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Before Athar Minallah, C J.,Aamer Farooq and Mohsin Akhtar Kayani, JJ

The MINISTRY OF INTERIOR, GOVERNMENT OF PAKISTAN through Secretary---Petitioner

Versus

The SPECIAL COURT through Registrar---Respondent

Writ Petition No.4075 of 2019, decided on 30th November, 2019.

(a) Criminal Law Amendment (Special Court) Act (XVII of 1976)---

----Ss. 5(3)(a), 5(3)(b), 6(f), 9 & 11(1)---High Treason (Punishment) Act (LXVIII of 1973), Ss. 2 & 3---Constitution of Pakistan, Arts. 6 & 10A---High treason---Fair trial---Scope---Proceedings before the Special Court---Pronouncement of judgment by Special Court in absence of prosecutor notified by the Federal Government---Legality---Allegations against the accused were that he in his capacity as the Chief of Army Staff and Chief Executive of the country issued Proclamation of Emergency Order, 2007 and illegally detained the Chief Justice of the Supreme Court and Judges of the superior judiciary and forced them to resign---Proceedings were initiated against the accused in a Special Court, constituted by the Federal Government, for the offence of high treason relating to actions targeting the judiciary---Subsequently the accused left the country and remained an absconder---When the Special Court set a date for announcement of judgment, the prosecution pleaded that the Court should not pronounce judgment as the main prosecutor had resigned and other members of the prosecution team were de-notified, and that the Federal Government required time to notify new prosecutor(s)---Special Court rejected such plea of prosecution and fixed the date for announcement of judgment---Held, that the accused was not the only party to the trial before the Special Court, as the Federal Government was an equally important stakeholder---Trial in question was unique and exceptional in nature, thus, it placed a heavy burden on the court to assure that each party was dealt with in a fair manner, having regard to the cardinal principles of due process and the right to a fair trial---In the peculiar facts and circumstances of the present trial, it was the onerous duty of the court to ensure that none of the interested parties to the trial complained that the proceedings were otherwise than fair---Right to a fair and proper trial was equally important for the prosecution---In a trial relating to the constitutional offence of high treason it was an even more onerous task to demonstrably assure an accused of fairness because at the end the latter could be exposed to the sentence of death---Preserving the integrity of the process that delivered a fair trial was equally important---Federal Government and the prosecution had a fundamental role under the scheme of the Criminal Law Amendment (Special Court) Act, 1976 ['the Act of 1976']---Trial proceedings under the Act of 1976, from initiation till conclusion, were dependent on the presence of the prosecutor appointed by the Federal Government---When cls.(a) and (b) of S.5(3) and cl. (f) of S. 6 of the Act of 1976 were read together it unambiguously brought out the legislative intent of ensuring that the person appointed under S.11(1) conducted the prosecution till the judgment was

pronounced---Special Court could not, therefore, pronounce the judgment without affording a reasonable opportunity of hearing to the appointed prosecutor---Also important to give to the Federal Government, through the prosecution, a reasonable opportunity before pronouncing the judgment, to exercise its options contemplated under cls. (a) and (b) of S. 5(3) of the Act of 1976---Said Act read as a whole unequivocally made it obvious that the trial proceedings were entirely dependent on the prosecution and that in its absence or without hearing it, judgment could not be announced (by the Special Court)---Federal Government had to be afforded a reasonable time to appoint a prosecutor---Pronouncement of judgment was subject to hearing the appointed prosecutor as contemplated under S.6(f) of the Act of 1976---High Court set aside impugned order of Special Court and directed that the Federal Government shall notify the prosecutor or a team of prosecutors, on or before 05-12-2019; that the Special Court shall fix a date for affording a reasonable opportunity of hearing to the notified prosecutor or the prosecution team, as the case may be, as well as the counsel appointed for the accused under S.11(2) of the Act of 1976, and that the Special Court was expected to conclude the proceedings expeditiously having regard to the cardinal principles of fair trial---Constitutional petition was allowed.

Lahore High Court Bar Association and others v. General (R) Pervez Musharraf and others 2019 SCMR 1029 ref.

(b) Constitution of Pakistan---

----Art. I0A---Right to fair trial---Scope---Right to a fair trial was the foundation of the rule of law---Said right was an integral part of and embedded in the constitutional right of due process guaranteed under Art.10A of the Constitution---Essence of fair trial was to assure to every party that he or she would be treated fairly and justly by the criminal justice system, which was impartial and independent; it essentially meant that the trial relating to an offence would be heard in public by an independent and impartial Tribunal, Court or Judge and within a reasonable time.

Altaf Ibrahim Qureshi and another v. Aam Log Ittehad and others PLD 2019 SC 745; Ishtiaq Ahmed v. Hon'ble Competent Authority through Registrar Supeme Court of Pakistan 2016 SCMR 943; Babar Hussain Shah and another v. Mujeeb Ahmed Khan and another 2012 SCMR 1235 and Suo Motu Action regarding allegation of business deal between Malik Riaz Hussain and Dr. Arsalan Iftikhar attempting to influence the Judicial process PLD 2012 SC 664 ref.

(c) Constitution of Pakistan---

----Art. 10A---Right to fair trial---Scope---Defence and prosecution---Equality of arms, principle of---In a criminal trial the two most important parties were the accused and the prosecution---Accused and prosecution both had to be assured of the fairness of a fair trial---Principles of fair trial must be seen as promoting the principles of 'equating arms on both sides'---Fair balance had to exist between the opportunities given to both the sides---Equally important was the fact that every party to a trial should have equal access to justice---Principle of 'equality of arms'

ensured that neither side ought to be procedurally disadvantaged---Right to a fair and proper trial was thus equally important for the prosecution as well.

(d) Constitution of Pakistan---

----Art. 10A---Right to fair trial---Scope---Impartiality and independence of the adjudicator/judge---Superstructure of the principle of fair trial was built on the premise that justice should not only be done but manifestly and undoubtedly appear to have been done---Every litigant, whether an accused or the prosecution, must have confidence regarding the impartiality and independence of the adjudicator; it was not the mind of the adjudicator that was relevant but the impression that one may even erroneously develop had to be dispelled.

Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon and others [{1968} 3 All E.R.304; Federation of Pakistan v. Muhammad Akram Sheikh PLD 1989 SC 689; Government of N.-WF.P. through Chief Secretry and another v. Dr. Hussain Ahmed Haroon and others 2003 SCMR 104; Suo Motu Case No.04 of 2010 PLD 2012 SC 553 and Asif Ali Zardari and another v. The State PLD 2001 SC 568 ref.

(e) Criminal Law Amendment (Special Court) Act (XVII of 1976)---

----S. 4(1)---Special Court constituted under S,4(1) of the Criminal Law Amendment (Special Court) Act, 1976 ['the Act of 1976]---Three judges of the High Court sitting as members of Special Court---Special Court was the creation of the Act of 1976 and its members did not sit as Judges of the High Court but as persona designata.

Mian Jamal Shah v. The Member Election Commission, Government of Pakistan, Lahore and others PLD 1966 SC 1; Brothers Sugar Mills Ltd. and others v. Punjab Co-operative Board for Liquidation and others 2012 CLC 1369; Sartaj v. The State through Deputy Attorney General and others 2012 PTD 1116 and Asghar Ali and another v. The State 1999 SCMR 654 ref.

(f) Criminal Law Amendment (Special Court) Act (XVII of 1976)---

----Ss. 6 & 12---Constitution of Pakistan, Art. 199---Judicial review---Scope---Orders of the Special Court---Amenable to judicial review by the High Court.

Abdul Hameed Dogar v. Federal Government through Secretary M/o Interior and 2 others PLD 2016 SC 454; Mian Jamal Shah v. The Member Election Commission, Government of Pakistan, Lahore and others PLD 1966 SC 1; Yousaf Ali v. Muhammad Aslam Zia PLD 1958 SC 104; Zafar Ul Ahsan v. The Republic of Pakistan (through Cabinet Secretary, Government of Pakistan) PLD 1960 SC 113; Kiramat Ali and another v. Muhammad Younis Haji and others PLD 1963 SC 191

and Abbasia Cooperative Bank (now Punjab Provincial Cooperative Bank Ltd.) v. Hakim Rafiz Muhammad Gaus and 5 others PLD 1997 SC 3 ref.

Sajid Ilyas Bhatti, Addl. Attorney General and Barrister Salman Safdar for Petitioner (in W.P. No.4076 of 2019).

Khashih-ur-Rehman, Secretay, Ministry of Law and Justice, Pir Muhammad Ishaq, Solicitor, Ministry of Law and Justie and Iftikhar Ul Hassan, Dy. Solicitor, Ministry of Law and Justice for Petitioner.

Date of hearing: 27th November, 2019.

JUDGMENT

ATHAR MINALLAH, C.J.---We shall decide the petitions in hand which have definitely given rise to a unique, extraordinary and unprecedented situation. In both the petitions, the petitioners have sought prayers which relate to the proceedings in the pending trial before the learned Special Court constituted under the Criminal Law Amendment (Special Court) Act 1976 (hereinafter referred to as the 'Act of 1976'). Through Writ Petition No.4075/2019, the Ministry of Interior, Government of Pakistan through its Secretary has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the 'Constitution') assailing the order, dated 19-11-2019, passed by the learned Special Court. In the other connected petition the petitioner, namely, Barrister Salman Safdar has sought prayers which essentially are regarding fair trial. The learned Special Court, vide order dated 19.11.2019, had denied the request made on behalf of the Federal Government to allow some time so that Prosecutor(s) could be appointed. Through the same order the request for adjournment by the defence counsel, appointed by the learned Special Court, was also not acceded to and thus the matter was reserved and November 28, 2019 was fixed as the date for announcement of the judgment. In a nutshell, both the petitions raise grievances regarding the right to a fair trial. They assert that judgment cannot be pronounced under the Act of 1976 without giving a reasonable opportunity of hearing and in the absence of a prosecutor appointed by the Federal Government. They also assert that the directions of the august Supreme Court have not been complied with.

2. In order to adjudicate these petitions and appreciate the extraordinary importance of ensuring that the trial is manifestly seen to be fair, it is inevitable to advert to the events which had led to the filing of the complaint, pursuant whereto the pending trial ensued regarding the charge relating to the alleged commission of high treason.

3. The accused in this case, General (R) Pervez Musharraf (hereinafter referred to as the 'Accused'), while holding the office of Chief of Army Staff had abrogated and subverted the Constitution on October 12, 1999 by taking over and declaring himself as the Chief Executive of the country. On March 3, 2007, the Accused forced the then Hon'ble Chief Justice of Pakistan to tender his resignation which the latter refused and thus he, along with his family members, remained detained in the official residence for a while. An acting Chief Justice of the Supreme Court was appointed. This unconstitutional suspension of the Chief Justice of Pakistan led to

an uprising, popularly known as the 'Lawyers' Movement'. A larger Bench of the august Supreme Court, consisting of 13 Hon'ble Judges, accepted a constitutional petition and consequently the Chief Justice of Pakistan was restored to his office and the actions of the Accused were declared as unconstitutional. However, on November 3, 2007 the Accused issued the Proclamation of Emergency Order, 2007 whereby the Chief Justice of Pakistan was yet again removed from his office. A Bench of the august Supreme Court, consisting of seven Hon'ble Judges, had earlier passed an order restraining the Accused or any other person from taking action contrary to the Constitution. Once again lawyers from across the country stood up against the despotic and tyrannical actions and demanded the restoration of the Constitution and the upholding of the rule of law. The lawyers were joined by the people of Pakistan who struggled together to make the State of Pakistan subject to the rule of law rather than the rule of a man. The world witnessed the idealism of young lawyers, students, members of civil society and the general public. Thousands of lawyers, members of the civil society and general public were incarcerated during this struggle. The burning of lawyers alive, the massacre in Karachi on May 12th and ninety innocent citizens losing their lives during this struggle against the actions of the Accused taken on November 3, 2007, are facts that have become part of our history. The members of the legal fraternity did not hesitate in risking their lives and limbs in order to uphold the Constitution and the rule of law. For the first time more than sixty Hon'ble Judges of the Supreme Court and the High Courts resisted the unconstitutional removal of the Chief Justice of Pakistan. This historic movement was ultimately successful in restoring the Constitution and upholding the rule of law and resultantly it led to the ouster of the Accused. The august Supreme Court in the judgment rendered by a Bench consisting of fourteen Hon'ble Judges declared the actions of the Accused, taken on November, 3, 2007, as unconstitutional and based on mala fide. It was further held that he alone had taken the said actions. This was later reiterated by the apex Court in the judgment titled 'Abdul Hameed Dogar v. Federal Government through Secretary M/o Interior and 2 others' [PLD 2016 SC 454]. It is important to note that the Majlis-e-Shoora (Parliament), through the 18th Amendment, inserted Article 270-AA in the Constitution explicitly declaring the Emergency of the fourteenth day of October, 1999 and the Proclamation of Emergency Order as having been made without lawful authority and of no legal effect. Despite this amendment, the then Federal Government chose to file a complaint on December 12, 2013 under the Act of 1976 regarding five offences of subversion of the Constitution under Article 6 read with section 2 of the High Treason (Punishment) Act 1973 (hereinafter referred to as the 'Act of 1973') relating to the actions taken by the Accused against the judiciary on November 03, 2007. The complaint was entertained by the learned Special Court on December 13, 2013 and the charge was framed on March 31, 2014. The prosecution evidence was closed on September 18, 2014. After completing the proceedings under section 87 of the Code of Criminal Procedure,1898 (hereinafter referred to as the 'Cr.P.C.'), the learned Special Court, vide order dated 19.07.2016, declared the accused as an absconder and issued a proclamation in this regard. A perpetual warrant of arrest was also issued and the name of the Accused was directed to be entered in the list of proclaimed offenders. Pursuant to the removal of the name of the Accused from the Exit Control List, the latter left the country without seeking permission from the learned Special Court.

The inordinate delay in the conclusion of the trial led the Lahore High Court Bar Association to file an application before the august Supreme Court in Civil Review Petition No.513/2014 in Constitutional Petition No.14/2013. The august Supreme Court vide the judgment reported as 'Lahore High Court Bar Association and others v. General (R) Pervez Musharraf and others' [2019 SCMR 1029] disposed of the application by observing that if the Accused voluntarily chooses not to appear or join the proceedings, then he would lose his right to record his statement under section 342 of the Cr.P.C. The apex Court further observed that, being a proclaimed offender, the accused would also lose the right of audience and that his right to defence would stand forfeited. The august Supreme Court thus directed the learned Special Court to proceed with the trial on the next date of hearing by extending to the Accused an opportunity of recording his statement under section 342 of the Cr.P.C. and pleading any other defence under the law. It was observed that in case the Accused failed to appear on the date of the hearing then, being a proclaimed offender, the learned Special Court would be empowered to proceed against the Accused even in his absence under section 9 of the Act of 1976. At the time when this direction was passed, the petitioner in W.P. No.4076/2019, namely Barrister Salman Safdar, was representing the Accused pursuant to his power of attorney having been accepted by the learned Special Court. An application under Section 265-K of the Cr.P.C. filed by and on behalf of the Accused was also pending. Another application filed on behalf of the Accused was for seeking an adjournment on the ground that the latter's medical condition did not allow him to travel to Pakistan in order to appear before the learned Special Court for recording his statement. The learned Special Court, vide order dated 12-06-2019, dismissed the application seeking adjournment. The learned Special Court declared that Barrister Salman Safdar could no longer represent the Accused and directed the Federal Government to submit a panel of lawyers so that a counsel could be appointed under section 9 of the Act of 1976 to represent the Accused. The learned Special Court, through the same order, further observed that in the light of the direction given by the august Supreme Court, the application filed under section 265-K of the Cr.P.C. could not be entertained. With the approval of the learned Special Court, Mr Raza Bashir, ASC, vide notification dated 26-08- 2019, was appointed to represent the Accused. It is relevant to note that initially Mr Muhammad Akram Sheikh, Sr ASC, was appointed as Prosecutor under the Act of 1976 vide notification dated 04-12-2013. Pursuant to nominations made by the latter, a team of lawyers was appointed vide notifications, dated 09-12-2013 and 27-01-2014 respectively. Mr Muhammad Akram Sheikh, Sr ASC, tendered his resignation on 03-07-2018. The other members of the prosecution team were de-notified by the Federal Government vide notification dated 23-10-2019. On 24-10-2019, the de-notified prosecution team appeared before the learned Special Court and submitted additional written arguments. A perusal of the order, dated 24.10.2019, shows that the learned Special Court directed the Secretary, Ministry of Interior to appear on the next date of hearing to explain under which provision of law had the notification, dated 23-10-2019, been issued and the prosecution team de-notified. The order further shows that the learned counsel appointed to represent the Accused had submitted an application for adjournment on medical grounds, which was accepted. It was noted that a last opportunity was being afforded to the learned defence counsel. On the next date of hearing the Secretary, Ministry of Interior

appeared before the learned Special Court and explained the reasons for de-notifying the prosecution team. It appears from the order, dated 19-11-2019, that the learned Special Court was not satisfied with the explanation. The Secretary, Ministry of Interior requested the granting of some time to enable the Federal Government to appoint and notify Prosecutor(s). This request was not acceded to and 28-11-2019 was fixed as the date for the announcement of the judgment.

4. Mr Sajid Ilyas Bhatti, learned Additional Attorney General, has argued that the prosecution has a pivotal role in the scheme of the Act of 1976. He has taken us through the various provisions of the Act of 1976 in support of his contention that judgment cannot be announced by the learned Special Court without giving a reasonable opportunity to the prosecution. In this regard he has specifically referred to clause (f) of section 6 of the Act of 1976. He has further argued that the prosecution also has a right to a fair trial and that the provisions of the Act of 1976 explicitly give various statutory rights for ensuring effective prosecution of an accused. It is the case of the Federal Government that in the absence of a notified Prosecutor or a prosecution team, as the case may be, proceedings initiated under the Act of 1976 cannot continue. After de-notification of the previous team of prosecutors on 23-10-2019, the Federal Government was in the process of appointing and notifying Prosecutor (s) but did not do so, having regard to the order, dated 24.10.2019 because the learned Special Court had summoned the Secretary, Interior to explain why the notification dated 23-10-2019 was issued. Surprisingly, it has been argued on behalf of the Federal Government that the constitution of the learned Special Court suffers from serious flaws and that the complaint was filed by an un-authorized person.

5. Barrister Salman Safdar has stated that he is aggrieved in his personal capacity because he could not have been removed after his power of attorney was entertained and accepted by the learned Special Court nor was such a direction given by the august Supreme Court. He has further argued that the august Supreme Court had not restrained the learned Special Court from deciding the application filed under section 265-K of the Cr.P.C. It is his contention that instead of deciding the application, the learned Special Court vide order, dated 12-06-2019, concluded that it could not be entertained in the light of the judgment of the august Supreme Court.

6. The learned Additional Attorney General and Barrister Salman Safdar have been heard and the record perused with their able assistance.

7. We are beseeched with an unprecedented, unique and extra ordinary situation, which is obvious from the facts highlighted above. The Federal Government and the prosecution have a pivotal role under the scheme of the Act of 1976, so much so that a Bench consisting of fourteen Hon'ble Judges of the august Supreme Court in the case titled 'Gen. (R) Pervez Musharraf v. Nadeem Ahmed (Advocate) and others' [PLD 2014 SC 585] has held that the discretion to direct a trial relating to the offence of high treason exclusively vests in the Executive. As will become obvious later, the Federal Government and the prosecution have a fundamental role under the scheme of the Act of 1976. One of the aggrieved petitioners seeking judicial review is the authority authorized to file a complaint and to prosecute an

accused through a notified prosecutor or team of prosecutors. The grievance essentially is in the context of statutory rights and procedural fairness or, in other words, the prosecution's right to a fair trial. Moreover, the trial for the constitutional offence of high treason pending before the learned Special Court is that of a person who is alleged to have subverted the Constitution on November 3, 2007. The Accused is not the only party to this trial and the Federal Government is an equally important stakeholder. These petitions, besides raising questions about the jurisdiction of the learned Special Court to proceed and announce a judgment in the absence of a prosecutor appointed by the Federal Government, is essentially regarding the assurance that the proceedings ought to be manifestly seen as fair. The Federal Government, instead of filing a complaint relating to subversion of the Constitution on October 12, 1999, chose in its wisdom to initiate proceedings for the offence of high treason relating to actions which were targeted against the Judiciary. Moreover, the actions of the Accused taken on November 3, 2007 have already been declared as mala fide and unconstitutional by the august Supreme Court. The foregoing reasons make the trial and the grievances in hand as unique and exceptional and thus placing a heavy burden to assure each party to the trial that they will be dealt with in a fair manner, having regard to the cardinal principles of due process and the right to a fair trial. It is noted that in the peculiar facts and circumstances of this case, it is our onerous duty to ensure that none of the interested parties to the trial complain that the proceedings were otherwise than fair.

8. It is unquestionable that the right to a fair trial is the foundation of the rule of law. This right is an integral part of and embedded in the constitutional right of due process guaranteed under Article 10A of the Constitution. The august Supreme Court in the case titled 'Altaf Ibrahim Qureshi and another v. Aam Log Ittehad and others' [PLD 2019 SC 745] has held that the right of hearing of a party to a lis is one of the fundamental principles of jurisprudence which has been guaranteed under Article 10A of the Constitution and that such a right is an assurance that everyone will have a fair trial and will be dealt with in accordance with the principles of due process of law. In the case titled 'Ishtiaq Ahmed v. Hon'ble Competent Authority through Registrar Supreme Court of Pakistan' [2016 SCMR 943] the august Supreme Court has elaborated the principles of right to a fair trial. The august Supreme Court has reiterated the importance of the principles of a fair trial in a plethora of precedent law. Reliance is placed on the cases of 'Babar Hussain Shah and another v. Mujeeb Ahmed Khan and another' [2012 SCMR 1235], 'Suo Motu Action regarding allegation of business deal between Malik Riaz Hussian and Dr. Arsalan Iftikhar attempting to influence the judicial process' [PLD 2012 SC 664].The essence of fair trial is to assure to every party that he or she would be treated fairly and justly by the criminal justice system, which is impartial and independent. It essentially means that the trial relating to an offence would be heard in public by an independent and impartial Tribunal, Court or Judge and within a reasonable time. In a criminal trial the two most important parties are the accused and the prosecution, although the general public is also an important stakeholder. It is not the accused alone who has to be assured the fairness of a fair trial but the prosecution must have the same confidence. The principles of fair trial must be seen as promoting the principles of 'equating arms on both sides'. There

must be a fair balance between the opportunities given to both the sides. It is equally important that every party to a trial has equal access to justice. The principle of equality of arms ensures that neither side ought to be procedurally disadvantaged. The right to a fair and proper trial is thus equally important for the prosecution as well. In a trial relating to the constitutional offence of high treason it is an even more onerous task to demonstrably assure an accused of fairness because at the end the latter could be exposed to the sentence of death. Preserving the integrity of the process that delivers a fair trial is equally important.

9. The superstructure of the principles of fair trial is built on the premise that justice should not only be done but manifestly and undoubtedly appear to have been done. Every litigant, whether an accused or the prosecution, must have confidence regarding the impartiality and independence of the adjudicator. It is not the mind of the adjudicator that is relevant but the impression that one may even erroneously develop has to be dispelled. The principles have been aptly described by Lord Denning, M.R., in the judgment titled 'Metropolitan Properties Co. (F. G. C.) Ltd. v. Lannon and others' [{1968} 3 All ER 304] and the relevant portion is reproduced as follows: -

> It brings home this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as he could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see R. v. Huggins (8); R. v. Sunderland Justice (9), per VAUGHAN WILLIAMS, L.J. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see R. v. Cambrone Justices, Ex p. Pearce (10); R. v. Nailsworth Justices, Ex p. Bird (11). There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "the judge was biased.""

10. The august Supreme Court, in the case titled 'Federation of Pakistan v. Muhammad Akram Sheikh' [PLD 1989 SC 689], has elucidated in detail the principle that justice should not only be done but manifestly and undoubtedly ought and seem to have been done. In the same judgment the exceptions have also been described in detail. Reference is also made to the cases of 'Government of N. W.F.P. through Chief Secretary and another v. Dr. Hussain Ahmed Haroon and others' [2003 SCMR 104], 'Suo Motu Case No.04 of 2010' [PLD 2012 SC 553] and 'Asif Ali Zardari and another v. The State' [PLD 2001 SC 568]. It is only because of the extra ordinary and peculiar facts and circumstances of this case that while

exercising jurisdiction of judicial review under Article 199 of the Constitution we feel that it is inevitable to go an extra mile so that every party to the lis has trust and confidence that we will lean in favour of the principle that justice ought to be manifestly and undoubtedly seen to be done. Whether or not these petitions should be allowed would require an examination of the provisions of the Act of 1976.

11. The august Supreme Court in the case titled 'Lahore High Court Bar Association and others v. General (R) Pervez Musharraf and others' [2019 SCMR 1029] has observed and held that there cannot be more grave an offence than high treason and more solemn a proceedings than a trial relating thereto before the learned Special Court. The Act of 1973 provides that the offence of high treason, as defined in Article 6 of the Constitution, is punishable with death or imprisonment for life. The Act of 1976 was enacted to provide for the trial by a special Court of certain offences affecting the security, integrity or sovereignty of Pakistan or any part thereof, including the offence of high treason and for matters connected therewith. The Special Court is defined under section 2(b) as meaning a court set up under section 4 ibid. The learned Special Court is, therefore, a creation of the Act of 1976 and has been explicitly established for the trial of the offences specified in section 3(1). The Federal Government, by notification in the official gazette, is empowered to set up one or more Special Courts composed of three persons each of whom is a Judge of a High Court and to nominate one of them to be the President of the Special Court. In case of a vacancy, the Federal Government, by notification in the official gazette, appoints another person to fill the vacancy. The discretion to initiate proceedings exclusively vests in the Federal Government as has been provided in section 5. It provides that the Federal Government shall forward to the Special Court, on behalf of the prosecution, a complaint in the form of a statement of the case to be tried by the Court. Section 5(3)(a) empowers the Federal Government to submit an amended or additional statement of the case or charge at any time before the judgment is pronounced. Likewise, section 5(3)(b) empowers the Federal Government or the prosecution to submit additional names of accused persons or witnesses at any subsequent stage of the prosecution evidence in the case. Section 6(f) explicitly provides that the learned Special Court shall, inter alia, hear the prosecution and on conclusion shall proceed to pronounce the judgment. The Federal Government, under section 7, is vested with power to appoint the place or places for the Special Court to hold its sittings. Sub section (1) of section 11 empowers the Federal Government to appoint one or more persons to conduct the prosecution in a trial before the learned Special Court. Moreover, subsection (2) of section 11 vests the power in the Special Court to appoint a counsel for an accused person who is not represented, after taking into consideration the views of such an accused person. The person is engaged at the expense of the Federal Government.

12. A plain reading of the Act of 1976 unambiguously shows that the Federal Government and the prosecution have a pivotal role. The trial proceedings under the Act of 1976, from initiation till conclusion, are dependent on the presence of the prosecution appointed by the Federal Government. When clauses (a) and (b) of section 5(3) and clause (f) of section 6 are read together it unambiguously brings out the legislative intent of ensuring that the person appointed under section 11(1)

conducts the prosecution till the judgment is pronounced. The Special Court cannot, therefore, pronounce the judgment without affording a reasonable opportunity of hearing to the appointed prosecutor. It is also important to give to the Federal Government, through the prosecution, a reasonable opportunity before pronouncing the judgment, to exercise its options contemplated under clauses (a) and (b) of section 5(3). It is obvious from the language of the said clauses that this statutory power can be exercised by the Federal Government at any time before pronouncement of the judgment. The Act of 1976 read as a whole unequivocally makes it obvious that the trial proceedings are entirely dependent on the prosecution and that in its absence or without hearing it, judgment cannot be announced.

13. We have carefully perused the record and the judgment of the august Supreme Court in the case titled 'Lahore High Court Bar Association and others v. General (R) Pervez Musharraf and others' [2019 SCMR 1029]. The learned Special Court, despite having issued a proclamation and declaring the Accused as an absconder, had not denied his right of audience. The power of attorney in favour of Barrister Salman Safdar was entertained and he was allowed to appear on behalf of the Accused till passing of the order, dated 12-06-2019 when he was informed that he could no longer represent his client. However, though, the Accused was represented but another counsel was appointed to represent him under section 9. The audience of the Accused was not denied till the passing of the impugned order, dated 19-11-2019 i.e when the pronouncement of the judgment was reserved. We also are of the opinion that the august Supreme Court had not restrained the learned Special Court from entertaining or deciding the application filed under section 265-K of the Cr.P.C. The august Supreme Court had observed that if the Accused fails to surrender and does not appear on the next date of hearing then the learned Special Court would be empowered to proceed in absentia under section 9 of the Act of 1976. It is important to note that in paragraph 6 of the aforementioned judgment, the august Supreme Court has explicitly used the expression 'if he voluntarily chooses not to appear or join the proceedings' then the latter would lose the right to record his statement under section 342 of the Cr.P.C. We feel that, pursuant to the directions and observations of the august Supreme Court, the learned Special Court was required to have given an opportunity to the Accused to surrender himself and appear for recording his statement under section 342 of the Cr. P.C. If the latter had failed to do so and the learned Special Court was satisfied that the absence was voluntary then forfeiting the right of defence should have proceeded under section 9 of the Act of 1976 and in such an eventuality appointment of an advocate was not required because the Accused has already been declared as an absconder and his right to defend stood forfeited. The learned Special Court in such an eventuality was, therefore, to consider whether to proceed under section 512 of the Cr.P.C or pronounce judgment. If the latter option was to be exercised then a reasonable opportunity of hearing was to be given to the prosecution as has been explicitly provided under section 6(f). As already noted, the scheme of the Act of 1976 and the procedure prescribed there under does not envisage pronouncing judgment without affording a hearing to the prosecution. In this case the main prosecutor had resigned on 30-07-2018 while the other members of the prosecution team were de notified vide notification dated 23-10- 2019. It is, therefore, obvious that on 23-10-

2019 the team of lawyers who had been de-notified were not authorized to submit skeleton arguments nor additional arguments the next day. The learned Special Court vide order dated 24-10-2019 summoned the Secretary, Ministry of Interior to appear on the next date of hearing and explain under what authority of law had the notification dated 23-10-2019 been issued. However, a direction was not given to appoint another prosecutor. The next date of hearing was fixed on 19-11-2019 and in compliance with the direction, the Secretary, Ministry of Interior appeared and his explanation was not found satisfactory. His request for allowing some time for appointing a prosecutor was also not acceded to and the next date fixed was November 28, 2019 for pronouncing the judgment. With great respect, the Federal Government should have been afforded a reasonable time to appoint a prosecutor. The pronouncement of judgment was subject to hearing the appointed prosecutor as contemplated under section 6(f) of the Act of 1976. It is implicit in the judgment of the august Supreme Court in the case of 'Lahore High Court Bar Association and others v. General (R) Pervez Musharraf and others' [2019 SCMR 1029] that the proceedings were to ensue in accordance with the procedure and the scheme of the Act of 1976. The requirements prescribed under the provisions of the Act of 1976 are obviously to ensure procedural fairness which do not appear to have been followed in this case. Moreover, the observations made in the aforementioned judgment of the august Supreme Court also do not appear to have been adhered to.

14. While entertaining these petitions which create an extraordinary situation, we were mindful of the fact that the learned Special Court established under the Act of 1976 comprises three Hon'ble Judges of the High Court. The petitioners have invoked the jurisdiction of this Court under Article 199 of the Constitution while, with great respect, the learned Special Court is the creation of the Act of 1976 and its Hon'ble members are not sitting as Judges of the High Court but as persona designata in view of the law laid down by the august Supreme Court in the case titled 'Mian Jamal Shah v. The Member Election Commission, Government of Pakistan, Lahore and others' [PLD 1966 SC 1]. Reliance is also placed on the cases of 'Brothers Sugar Mills Ltd and others v. Punjab Cooperative Board for Liquidation and others' [2012 CLC 1369], 'Sartaj v. The State through Deputy Attorney General and others' [2012 PTD 1116], 'Asghar Ali and another v. The State' [1999 SCMR 654]. Moreover, the amenability of the orders of the learned Special Court to the judicial review is implicit in the judgment of the august Supreme Court titled 'Abdul Hameed Dogar v. Federal Government through Secretary M/o Interior and 2 others' [PLD 2016 SC 454]. We have also considered the ouster clause under section 12 of the Act of 1976 and we have exercised jurisdiction under Article 199 of the Constitution because we were satisfied that the lis is covered within the scope of intervention by way of judicial review in the light of the principles and law enunciated the cases titled 'Mian Jamal Shah v. the Member Election Commission, Government of Pakistan, Lahore and others' [PLD 1966 SC 1], 'Yousaf Ali v. Muhammad Aslam Zia' [PLD 1958 SC 104], 'Zafar Ul Ahsan v. The Republic of Pakistan (through Cabinet Secretary, Government of Pakistan)' [PLD 1960 SC 113], 'Kiramat Ali and another v. Muhammad Younis Haji and others' [PLD 1963 SC 191] and 'Abbasia Cooperative Bank (now Punjab

Provincial Cooperative Bank Ltd.) v. Hakim Rafiz Muhammad Gaus and 5 others' [PLD 1997 SC 3].

15. The above are the reasons for our short order, dated 27.11.2019, which is reproduced as follows:-

"For reasons to be recorded later, we allow Writ Petition No.4075/2019 filed by the Ministry of Interior and consequently set aside the impugned order, dated 19- 11-2019. The instant petition and W.P. No.4076/2019 are thus disposed-of in the following terms:-

i. The Federal Government is directed to notify the Prosecutor or a team of prosecutors, as the case may be, on or before 05.12.2019.

ii. The learned Special Court will fix a date for affording a reasonable opportunity of hearing to the notified Prosecutor or the prosecution team, as the case may be, as well as the counsel appointed for the accused under section 11(2) of the Criminal Laws Amendment (Special Court) Act, 1976 (hereinafter referred to as to the 'Act of 1976').

iii. The learned Special Court is expected to take into consideration the grounds raised in the application filed under section 265-K of the Code of Criminal Procedure, 1898. The parties shall be at liberty to raise any other factual or legal ground.

iv. The learned Special Court is expected to conclude the proceedings expeditiously having regarding to the cardinal principles of fair trial.

v. The petitioner in W.P. No.4076/2019, namely, Barrister Salman Safdar may, if he so wishes, assist the learned counsel appointed for the accused under section 11 (2) of the Act of 1976. "

MWA/172/Isl. Petition allowed.

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