

2023 S C M R 1955

[Supreme Court of Pakistan]

Present: Syed Mansoor Ali Shah, Syed Hasan Azhar Rizvi and Shahid Waheed, JJ

SULTAN AHMED---Appellant

Versus

REGISTRAR, BALOCHISTAN HIGH COURT, QUETTA and others-- Respondents

Criminal Appeal No. 633 of 2019, decided on 7th June, 2023.

(Against the judgment of the High Court of Balochistan, Quetta, dated 06.11.2019 passed in C.P. No. 141 of 2016)

Per Syed Mansoor Ali Shah, J.; Syed Hasan Azhar Rizvi, J. agreeing; Shahid Waheed, J. also agreeing but with his separate note.

(a) Jurisdiction---

---Mentioning of a wrong or inapplicable provision of law or non-mentioning of the applicable provision of law while exercising the jurisdiction or power which is otherwise vested in a court, tribunal or authority, does not by itself have any fatal consequences.

Naseer Ahmed v. Returning Officer 2023 SCMR 179; Olan Khan v. NAB PLD 2018 SC 40; Saadat Khan v. State 2018 SCMR 387 and Commissioner of Income Tax v. Abdul Ghani PLD 2007 SC 308 ref.

(b) Contempt of Court Ordinance (V of 2003)---

---S. 3---Contempt of Court---Unqualified/unconditional apology---Effect---Unqualified apology tendered by the person accused of having committed the contempt of court necessarily means that he admits his guilt and submits the apology in the realization of the fact that he has done a wrong, for which he repents and seeks forgiveness---In cases where the accused tenders an unqualified apology, there remains no need of framing the charge and recording the evidence.

Abdul Hamid v. State PLD 1964 SC 186; Awal v. State PLD 1964 SC 562; Shahid Orakzai v. P.M.L.(N) 2000 SCMR 1969; Sarfraz Hussain v. State 2002 SCMR 1326 and Feroze Akbar v. Government of Pakistan 2002 SCMR 1623 ref.

(c) Contempt of Court Ordinance (V of 2003)---

---S. 3---Contempt of Court---Unqualified/unconditional apology---Discharge of accused---General rule---When the accused offers an unqualified apology at an early stage of the contempt proceeding as a sincere and profound remorse, the courts generally drop such proceeding and discharge the accused while warning him to be careful in the future---However, this is not an absolute rule to be followed invariably in all cases---Exceptional facts and circumstances of a case may justify

departure from this general rule---Courts may, despite the submission of an unqualified apology, convict the accused in the peculiar facts and circumstances of the case and may treat his apology only as a mitigating circumstance to impose a lesser punishment.

Abdul Hamid v. State PLD 1964 SC 186; Awal v. State PLD 1964 SC 562; Masroor Ahsan v. Ardeshir Cowasjee PLD 1998 SC 823; Feroze Akbar v. Government of Pakistan 2002 SCMR 1623; Contempt Proceedings against Islamabad Police Officials PLD 2007 SC 688; Contempt Proceedings against Nehal Hashmi 2018 SCMR 556 and Iftikhar Ahmed v. State 2018 SCMR 1385 ref.

(d) Contempt of Court Ordinance (V of 2003)---

---S. 3---Contempt of Court---Assistant Commissioner (appellant) raided official residence of a Qazi (judge) without registration of an FIR, assaulted and arrested him, then took the Qazi barefoot to the Levies Line, instead of the Police Station concerned, and kept him confined there for about 6 hours without registration of any criminal case---Subsequently unqualified/unconditional apology was tendered by the appellant---Held, that in the present case the act of assaulting and manhandling the Qazi, a judge, in the general public while arresting him was a flagrant attempt to undermine and lower the authority of district courts---Majority of the people have recourse to these courts for adjudication of their disputes---It is, therefore, in the public interest to protect the honour and authority of these courts--
-High Court has taken a lenient view in the matter of imposing punishment on the appellant because of his tendering an unqualified apology at the very early stage of the contempt proceeding and his young age---In the facts and circumstances of the case, the discretion exercised by the High Court in convicting the appellant for contempt and considering his unqualified apology only as a mitigating circumstance for imposing lesser punishment is proper and reasonable, which does not call for any interference---Appeal was dismissed.

(e) Constitution of Pakistan---

---Art. 203---Contempt of Court Ordinance (V of 2003), S. 4(2)---District judiciary---Duty of the High Courts to protect the judges of the district judiciary---Such duty is inherent in and concomitant with the power to supervise and control vested in them under Article 203 of the Constitution---It is imperative for the High Courts to protect the district judiciary from any executive onslaught or intrusion that may weaken its institutional independence or tends to lower its judicial fiat and brings it into disrespect---Observations recorded by the Supreme Court regarding importance of protecting the judicial independence and safeguarding the prestige and honour of the judges of the district judiciary.

District Judiciary is the backbone of our judicial system. It is imperative to protect and safeguard the district judiciary from any executive onslaught or intrusion that may weaken its institutional independence or tends to lower its judicial fiat and brings it into disrespect. The need to protect judicial independence and safeguard the prestige and honour of the judges is essential to protect the public confidence and public trust reposed in the judiciary. Public confidence and trust in

the courts rest on independence, impartiality, neutrality, openness and transparency of the judicial system; it lends the court its high moral authority and its decisions, unquestionable legitimacy. The courts being guardians of the rights of the people must be insulated and walled against any intrusion that weakens its fiat and prestige. This protection applies at all levels of the judiciary, from the constitutional courts to the frontline courts in the district. The Constitution protects the constitutional court judges through the power of contempt under Article 204 of the Constitution and through the Supreme Judicial Council established under Article 209 of the Constitution, while it is Article 203 of the Constitution that safeguards the judges of the district judiciary by placing them under the protective umbrella of the High Court of the respective Province.

Hasnain Raza v. Lahore High Court PLD 2022 SC 7 ref.

The primary duty to ensure the protection of district judiciary is of the High Courts under whose supervision and control it functions. This duty is inherent in and concomitant with the power to supervise and control vested in the High Courts under Article 203 of the Constitution. In line with this constitutional mandate, the Legislature has conferred upon the High Courts the power to punish a contempt committed in relation to any court of the district judiciary.

(f) Contempt of Court Ordinance (V of 2003)---

---S. 3--- Constitution of Pakistan, Art. 204---Contempt laws---Purpose---Real purpose of the law of contempt is the protection of the public interest and more importantly public confidence in the justice system.

State v. Khalid Masood PLD 1996 SC 42 ref.

(g) Constitution of Pakistan---

---Arts. 175(3) & 204---Contempt of Court Ordinance (V of 2003), S. 4(2)--- District judiciary---Security---Marshalls of the Court---Importance of district judiciary to have its own security personnel independent from the district administration and police highlighted.

It is axiomatic that the independence of the judiciary rests on judicial, financial and administrative autonomy. However, the administrative autonomy has been somewhat wanting over the years in the area of security of judges. The security and protection of judges is not an internal function of the judiciary but is dependent on and in control of the executive. The district judiciary protects the common people at the grassroots level against the misuse or abuse of executive power by the district administration and police. This check has an inherent potential to create tension between the district judiciary and the district administration and police. It is perhaps time for the district judiciary to have its own security personnel, somewhat parallel to the internationally recognized 'judicial marshals' or 'marshalls of the court'. The separation of the judiciary from the executive is a constitutional command and must be actualized in all its facets at the earliest. The district judiciary should be independent in all respects and in particular in the matter of its security from the district administration and police, and the High Courts should

take up this matter with the respective Provincial Governments and progressively proceed in establishing their own security agency, like their Process Serving Agency. However, until then the High Courts should take stern action against the district executive officers involved in illegal confrontational acts with the district judiciary under the Contempt of Court Ordinance, 2003.

Per Shahid Waheed, J.; agreeing with Syed Mansoor Ali Shah, J. with his separate note.

(h) Administration of justice---

---Criminal liability of a judge for non-judicial acts---Judicial title does not render its holder immune from responsibility even when the criminal act is committed behind the shield of judicial office---Immunity from criminal liability does not extend to non-judicial acts, and thus, a judge cannot in any way escape criminal liability and can be arrested.

Braatelen v. United States 147 F.2d 888 at 895 ref.

(i) Constitution of Pakistan---

---Art. 203---District judiciary---Precautionary measures to be observed by the executive while taking action under criminal law against the judges of District judiciary stated.

- (i) If a judicial officer of the District Judiciary is to be arrested for some offence, it should be done under intimation to the nominee of the concerned High Court;
- (ii) If facts and circumstances necessitate the immediate arrest of a judicial officer of the District Judiciary, a technical or formal arrest may be effected; and the facts of such arrest should be immediately communicated to the nominee of the concerned High Court;
- (iii) The Judicial Officer so arrested shall not be taken to a police station, without the prior order or directions of the nominee of the concerned High Court;
- (iv) Immediate facilities shall be provided to the Judicial Officer of communication with his family members, legal advisers and the District and Sessions Judge of his District;
- (v) No statement of a Judicial Officer who is under arrest be recorded, nor any medical tests be conducted except in the presence of the legal adviser of the Judicial Officer concerned or another Judicial Officer of equal or higher rank, if available; and
- (vi) There should be no handcuffing of a Judicial Officer. If, however, violent resistance to arrest is offered or there is imminent need to effect physical arrest to avert danger to life and limb, the person resisting arrest may be overpowered and handcuffed. In such case, immediate report shall be made to the District and Sessions Judge concerned and also to the nominee of the High Court. But the burden would be on the Police/ executive to establish

the necessity for effecting the physical arrest and handcuffing of the Judicial Officer, and if it is found that the physical arrest and handcuffing of the Judicial Officer was unjustified, the Police Officers causing or responsible for such arrest and handcuffing would be guilty of misconduct and would also be personally liable for compensation and damages as may be summarily determined by the High Court.

Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat and others AIR 1991 SC 2176 ref.

The above guidelines oblige each High Court to issue a notification, exercising its powers under Article 203 of the Constitution, for the nomination of a person, not less than the rank/grade of a District and Sessions Judge, who will attend to such criminal proceedings in which a judge of the District Judiciary is found involved, so as to ensure transparency and fair trial.

Amanullah Kanrani, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellant.

Malik Javed Iqbal Wains, Additional A.G.P., M. Ayaz Khan Swati, Additional A.G., Balochistan and Kamran Murtaza, Advocate Supreme Court for Respondents.

Date of hearing: 7th June, 2023.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---Through the present appeal, the appellant has challenged the order of the Balochistan High Court, dated 06.11.2019, passed in a suo motu contempt proceeding. The High Court has, by the said order, convicted the appellant under the Contempt of Court Ordinance 2003 and sentenced him to imprisonment till rising of the court with a fine of Rs.5000/-.

2. Briefly, the factual background of the case is that the appellant was posted as Assistant Commissioner at district Kalat, while respondent No.2, Muhammad Zahid, was serving there as Qazi (a judicial office equivalent to that of a Civil Judge), in the District Judiciary. On 16 February 2016, without the registration of an FIR, at about 03:15 p.m., the appellant raided the official residence of the Qazi, assaulted and arrested him, on the allegation of his having illicit relations with Bibi Zubaida, a police constable, whose civil suit for correction of the date of her birth was pending adjudication in the Court of the Qazi. Bibi Zubaida was also recovered from the house of the Qazi at that time. The appellant then took the Qazi barefoot to the Levies Line, Kalat instead of the Police Station concerned. The Qazi was kept confined there for about 6 hours without registration of any criminal case against him and was released on that night at 09:00 p.m. with the intervention of the Commissioner and the District and Sessions Judge.

3. This incident was reported by the District and Sessions Judge, Kalat, on 17 February, to the Registrar, Baluchistan High Court. On 18 February, the Registrar placed the report before the Hon'ble Vacation Judge, who observed that the report raised serious issues as to judicial independence in relation to the judicial service. The Hon'ble Judge formulated certain questions in this regard and directed the Registrar to place the matter before the Hon'ble Chief Justice. The Registrar put up

the matter before the Hon'ble Chief Justice, who ordered to treat the report as a Constitution Petition and fix it for hearing before a Division Bench. Accordingly, the report of the District and Sessions Judge was registered as constitution petition No. 41 of 2016, and the same was fixed for hearing before a Division Bench of the High Court. On 19 February, the Division Bench constituted a Commission consisting of an Hon'ble Judge of the High Court to probe into the matter and file his report. The Commission, after making a thorough inquiry into the facts, submitted its detailed report on 2 May 2016.

4. In its report, the Commission reported that the Qazi had issued warrants of arrest of the appellant in the execution proceedings of a decree and to avenge that, the appellant in connivance with Bibi Zubaida trapped the Qazi while the lust of the Qazi provided the opportunity for this trap. The Commission also reported that to satisfy his ego, the appellant mishandled the Qazi in arresting and taking him barefoot to Levies Line and did not proceed against the Qazi, a judicial officer, in accordance with law. On this report of the Commission, the Division Bench issued notices to the appellant and the Qazi. In response thereto, the Qazi tendered his resignation while the appellant submitted his "unqualified apology". The Division Bench of the High Court considered his "unqualified apology" but thought it fit not to exonerate the appellant of the charge and instead took a lenient view and awarded a lesser punishment. Hence, this appeal by the appellant.

5. The learned counsel for the appellant contended that the High Court has no power to suo motu exercise its constitutional jurisdiction under Article 199 of the Constitution on the report of the District and Sessions Judge and placed reliance in this regard on *Imran Khattak v. Sofia Khattak* (2014 SCMR 122). His next main contention was that while proceeding against the appellant under the Contempt of Court Ordinance, the High Court has not provided him with a fair trial and due process to which he was entitled under Article 10A of the Constitution. Alternatively, he made the submission that in case this Court maintains the conviction and sentence of the appellant, it may pronounce that the conviction and sentence of the appellant for contempt would not affect his service. On the other hand, the learned counsel for the respondents controverted these contentions, supported the impugned order and also opposed the alternate prayer.

6. We have considered the contentions of the learned counsel for the parties and examined the record of the case.

7. As for the first contention, the High Court has not passed any order in the present matter in the exercise of its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan ("Constitution"). Therefore, the said contention is only academic and does not arise in the facts of the case at hand. It is not disputed that the High Court had the jurisdiction to initiate suo motu the contempt proceeding against the appellant on the report of the District and Sessions Judge. Numbering the matter as a constitution petition instead of a contempt proceeding is only an error of procedure, which does not affect the jurisdiction of the High Court. Needless to reiterate the well-settled legal position that the mentioning of a wrong or inapplicable provision of law or non-mentioning of the applicable provision of law while exercising the jurisdiction or power which is

otherwise vested in a court, tribunal or authority, does not by itself have any fatal consequences.¹

8. While elaborating his second contention, the learned counsel for the appellant submitted that if the High Court was not to accept the apology of the appellant, it should have framed a proper charge against the appellant, examined the witnesses in his presence and allowed him to cross-examine them. This submission appears to have been made in the oblivion of the import of an unqualified apology. An unqualified apology tendered by the person accused of having committed the contempt of court necessarily means that he admits his guilt and submits the apology in the realization of the fact that he has done a wrong, for which he repents and seeks forgiveness.² In cases where the accused tenders an unqualified apology, there remains no need of framing the charge and recording the evidence. Therefore, the conviction of the appellant by the High Court on the basis of his admission made through submitting an unqualified apology does not in any way offend Article 10-A of the Constitution.

9. It is, however, true that when the accused offers an unqualified apology at an early stage of the contempt proceeding as a sincere and profound remorse, the courts generally drop such proceeding and discharge the accused while warning him to be careful in the future. However, this is not an absolute rule to be followed invariably in all cases. The exceptional facts and circumstances of a case may justify departure from this general rule. The courts may, despite the submission of an unqualified apology, convict the accused in the peculiar facts and circumstances of the case and may treat his apology only as a mitigating circumstance to impose a lesser punishment.³

10. In the present case, the High Court has observed that the act of assaulting and manhandling the Qazi, a judge, in the general public while arresting him was a flagrant attempt to undermine and lower the authority of district courts. The majority of the people have recourse to these courts for adjudication of their disputes. It is, therefore, in the public interest to protect the honour and authority of these courts. We fully endorse these observations of the High Court and find that they justify the exercise of its discretion by the High Court in not discharging the appellant on his unqualified apology and for considering his apology only as a mitigating circumstance to impose a lesser punishment.

11. It is important to reiterate that the 'District Judiciary is the backbone of our judicial system', as observed by this Court in *Hasnain Raza*,⁴ 'and the judges of the District Judiciary perform the onerous task of dispensing justice at the frontline by dealing with a large number of cases in a difficult and demanding environment'. As per the Judicial Statistics of Pakistan of the year 2021,⁵ the percentage of the cases handled by the district judiciary is 82% of the total pendency of cases in Pakistan.⁶ The district judiciary thus forms the foundational constituent of the justice system.

12. It is imperative to protect and safeguard the district judiciary from any executive onslaught or intrusion that may weaken its institutional independence or tends to lower its judicial fiat and brings it into disrespect. The need to protect

judicial independence and safeguard the prestige and honour of the judges is essential to protect the public confidence and public trust reposed in the judiciary. Public confidence and trust in the courts rests on independence, impartiality, neutrality, openness and transparency of the judicial system; it lends the court its high moral authority and its decisions, unquestionable legitimacy. The courts being guardians of the rights of the people must be insulated and walled against any intrusion that weakens its fiat and prestige. This protection applies at all levels of the judiciary, from the constitutional courts to the frontline courts in the district. The Constitution protects the constitutional court judges through the power of contempt under Article 204 of the Constitution and through the Supreme Judicial Council established under Article 209 of the Constitution, while it is Article 203 of the Constitution that safeguards the judges of the district judiciary by placing them under the protective umbrella of the High Court of the respective Province.

13. Although the Supreme Court of Pakistan as the apex court of the country is the custodian of justice as well as of the courts dispensing justice throughout the land, the primary duty to ensure the protection of district judiciary is of the High Courts under whose supervision and control it functions. This duty is inherent in and concomitant with the power to supervise and control vested in the High Courts under Article 203 of the Constitution.⁷ In line with this constitutional mandate, the Legislature has conferred upon the High Courts the power to punish a contempt committed in relation to any court of the district judiciary.⁸ The Balochistan High Court has, in the present case, exercised its power under the Contempt of Court Ordinance to protect the authority of the district courts and to safeguard the administration of justice by them from falling into disrespect and disrepute, and has performed its constitutional duty of protecting the independence of the judiciary by safeguarding the sanctity and prestige of the judges of district judiciary - our bastions of justice and an integral part of the judiciary envisaged under Article 175 of the Constitution.

14. Unlike the popular belief that the law of contempt protects the courts and judges, the real purpose of this law, as observed by this Court in Khalid Masood,⁹ is the protection of the public interest and more importantly public confidence in the justice system. Even though the courts are the creation of the Constitution or the law, their real strength and power base lie in the confidence reposed in them by the public. Therefore, anything which is intended to damage the public confidence in the authority of courts is remedied by an action under the law of contempt. Since the bulk of the judicial workload in the country is primarily dealt with by the district judiciary and most of the public approach them in pursuit of justice, it is of utmost importance that the public confidence in the authority of such courts is preserved and maintained.

15. The act of assaulting and insulting while arresting a judge of the district judiciary, in this case, in open public gaze without any prior information to the District and Sessions Judge or the High Court is unprecedented. The High Court has taken a lenient view in the matter of imposing punishment on the appellant because of his tendering an unqualified apology at the very early stage of the contempt proceeding and his young age. In the facts and circumstances of the case,

we find that the discretion exercised by the High Court in convicting the appellant for contempt and considering his unqualified apology only as a mitigating circumstance for imposing lesser punishment is proper and reasonable, which does not call for any interference by this Court in its appellate jurisdiction.

16. The incident involved in the present case, however, brings to light a much-neglected area that weighs heavily on the independence of the judiciary. It is axiomatic that the independence of the judiciary rests on judicial, financial and administrative autonomy. However, the administrative autonomy has been somewhat wanting over the years in the area of security of judges. The security and protection of judges is not an internal function of the judiciary but is dependent on and in control of the executive. The district judiciary protects the common people at the grassroots level against the misuse or abuse of executive power by the district administration and police. This check has an inherent potential to create tension between the district judiciary and the district administration and police. We are apprised that there have been some instances in the past when the district police officers, who were annoyed with some judicial orders of the district courts, had withdrawn the police officials performing security duties in the district judiciary or with the judges thereof. It is perhaps time for the district judiciary to have its own security personnel, somewhat parallel to the internationally recognized judicial marshals' or 'marshalls of the court'. The courts in some countries have their own security force.¹⁰ The separation of the judiciary from the executive is a constitutional command¹¹ and must be actualized in all its facets at the earliest. In our view, the district judiciary should be independent in all respects and in particular in the matter of its security from the district administration and police, and the High Courts should take up this matter with the respective Provincial Governments and progressively proceed in establishing their own security agency, like their Process Serving Agency. However, until then the High Courts should take stern action against the district executive officers involved in illegal confrontational acts with the district judiciary under the Contempt of Court Ordinance.

17. Lastly, we deal with the alternate prayer of the appellant as to pronouncing that his conviction and sentence for contempt would not affect his service. In this regard, we observe that the High Court has not made any direction to the departmental authority of the appellant to take any disciplinary action against him. It appears that the High Court has left it to the discretion of the departmental authority of the appellant to decide in its discretion whether or not to initiate any disciplinary action against him. We also would not pre-empt the exercise of its discretion by the departmental authority in either way.

18. For the above reasons, we find that the present appeal is devoid of any merit. It is, therefore, dismissed.

Sd/-

Syed Mansoor Ali Shah, J

Sd/-

Syed Hasan Azhar Rizvi, J

I have added my separate additional note.

Sd/-

Shahid Waheed, J

SHAHID WAHEED, J---In the prelude, I want to say that analysis of facts, application of law to that, observations, and the conclusion drawn from there by my learned brother Syed Mansoor Ali Shah, J., in his proposed judgment, while dismissing this appeal, are well sorted out, so I respectfully concur with them. However, as the facts of this case paint a picture of one of the despicable modus operandi of the executive to shackle the independence of the judiciary, I wish to record my additional note to supplement the main judgment and will confine myself to appraise whether the precautions as ordered by the High Court to the executive to be observed for the prevention of such attempts in future are valid.

2. In the beginning, it is to be noted that it is the will of the people of our country to establish a system that upholds the principles of democracy, freedom, equality, tolerance, social justice and fully preserve the independence of the judiciary.¹ Based on these aspirations, our Constitution promotes the rule of law while protecting the independence of the judiciary. It is important to note that judicial independence is usually defined in terms of freedom from outside influence. Judges who face pressure, harassment, intimidation, undue criticism, or consequences for the merits of their decisions encounter difficulty in deciding cases impartially. As such, the outside influence is deemed a factor that impinges upon their independence. Accordingly, great efforts are required to be made to neutralise those influences and to insulate judges from any potential retaliation of their decisions, so as to give them sufficient protection.² Such an effort will, in turn, serve threefold purposes. Firstly, it will protect judicial independence; secondly, it will avoid continual attacks upon judges who may be sincere in their conduct; and thirdly, it will protect the system of justice from falling into disrepute.³

3. It is a common fact that most people ordinarily approach the District Judiciary to resolve their disputes. As such, it serves as the primary interface between the justice system and the people. It will not be an overstatement if I say that a trial court judge, for an ordinary common citizen, is the human face of the law. It is, therefore, necessary that the District Judiciary should be honest, fearless and free from any pressure and should be able to achieve the preambular goal of justice by deciding cases only according to the law without being influenced by any external pressure.

4. The above prefatory observations bring me to examine the statutory provisions of the law to ascertain their intent and the extent to which they protect the independence of judges. It is also essential to do so because, after this analysis, I will be able to determine whether further safeguards are needed to protect the independence of judges. So, I proceed. The first law on the subject was enacted in

1850 and is called the Judicial Officers' Protection Act, and its solitary provision is as follows:

"No judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

This section unequivocally affords protection to two broad categories of acts done or ordered to be done by a judicial officer in his judicial capacity. In the first category falls those acts which are within the limits of his jurisdiction. The second category encompasses those acts which may not be within the jurisdiction of the judicial officer, but are, nevertheless, done or ordered to be done by him, believing in good faith that he had jurisdiction to do them or order them to be done.

5. That apart, Pakistan's criminal law also provides some immunity to judges. The Pakistan Penal Code, 1860 (P.P.C.), in its section 77, lays down that any activity done by a judge in the exercise of the power he has been granted, which he believes to have done in good faith, given to him by the law, is not liable for any offence. This particular section protects and gives the judicial officers immunity for any act done in good faith. Another section of the P.P.C. that deals with the issue is 228, and it states that if any insult or interruption is caused by a person towards another public servant who is part of an ongoing legal proceeding, then the person causing such trouble will be liable to simple imprisonment extendable up to six months along with a fine. This section, again, provides a form of immunity to the public servants who are judges in this case.

6. We find some more protection in the Code of Criminal Procedure, 1898 (Cr.P.C). Its section 480, provides a procedure in cases of contempt of court and grants powers to the judge to initiate relevant contempt proceedings against an offender as the judge may deem fit. This provision also grants power to a judge to take cognizance of an offence after allowing the offender an opportunity to show the cause of their acts before punishing them with a fine or imprisonment. Be it noted that section 197, Cr.P.C, too previously provided protection to judges but it was declared repugnant to the injunctions of Islam by the judgment of the Shariat Appellate Bench of this Court and as such, this provision has ceased to have effect.⁴

7. Exemption from arrest under civil process is also available. According to section 135 of the Code of Civil Procedure, 1908, no Judge, Magistrate or other Judicial Officer shall be liable to arrest under civil process while going to, presiding in, or returning from his Court.

8. The general proposition evident from the above mentioned statutory provisions is that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. They mandate that judges in all courts, appointed to administer the law be allowed to administer it under the protection of the law freely and independently, without favour and fear. In my opinion, these provisions of the law are also for the benefit of the public, apart from the protection of judges, whose interest is that judges should be at liberty to discharge their functions with independence and without fear of consequences. If I were to summarise the intent of these statutory provisions, I would do so by adapting the words of Lord Denning.⁵ Each judge should be protected from liability when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his book with trembling fingers, asking himself: "If I do this, shall I be liable to any action?"

9. The above position of law makes it pellucid that it does not attend to such an eventuality when the executive, being the largest litigant, misuses its powers to prosecute the judge and to force him to compromise his independence. This predicament, under the prevailing circumstances of our over-litigious society, has gained much importance, and the present case is an illustrative example. It will not be amiss if to explain this matter, I briefly state its facts here. The appellant before us was the Assistant Commissioner of the area at the relevant time and was involved in some litigation pending before the Qazi/Judge and bailable warrants were issued against him. He resented it, and it appears that at the end of the trial, he used some of the weak points of the Qazi/Judge's personal life to set a trap and apprehend him under the pretence that he had committed a criminal offence. However, on enquiry, this proved to be a sham and a malicious attempt to make the Qazi/Judge realise the consequences of taking a decision against the executive. It was clearly an abuse of power to discredit the Qazi/Judge. I must say that the High Court, in the given circumstances, meeting all the requirements of a fair trial, rightly convicted the appellant of contempt of Court. It is not necessary to go further into the facts and the application of law thereon, as it has already been elaborated in the main judgment. Lest I lose the thread, I return to the moot question.

10. The questions for me to consider is whether criminal proceedings can be instituted against a judge of the District Judiciary for acts unrelated to his judicial functions, whether an FIR can be recorded against him under section 154, Cr.P.C., and if yes, is it desirable to ask the executive to follow certain precautions while doing so? The sufficient answer to all facets of this question is yes. As to the first two parts of the question, there can be no doubt, and it is well settled that the judicial title does not render its holder immune from responsibility even when the criminal act is committed behind the shield of judicial office.⁶ Immunity from criminal liability does not extend to non-judicial acts, and thus, a judge cannot in any way escape criminal liability and can be arrested.

11. I now enter upon the last important aspect of the moot whether it will conduce to the independence of the judiciary if some precautionary measures are ordered to the executive to be observed while taking actions under the criminal law against the judges of District Judiciary, to ensure that the unfortunate incident we

experienced here does not happen again. This matter may be viewed from the standpoint of the Constitution. Our Constitution is an expression of the basic values of our system. Those values reflect ethical values of morality and justice; they include values relating to public order, judicial independence, separation of powers, and rule of law. This is why, on the one hand, our Constitution believes in the promotion of good and, on the other, at the same time, in the prevention of evil. As such, here we are faced with a situation of balancing these basic values. There is no settled legal principle which provides us with an answer to what weight is to be assigned to each value and how to balance them; nevertheless, the weighing and balancing of the conflicting values should be: (i) a rational process, manifesting reason, not fiat; (ii) objective, reflecting consensus and shared values of the society, not personal values; (iii) based on traditions or precedents; and (iv) in a manner that it may fit into the general structure of the institutional-government system; and while doing so, the approach should be holistic.

12. Keeping the above principle in mind, when an empirical study of the ground reality is conducted, it comes to light that not only is there an increase in frivolous and unwarranted criticism and complaints against the judges of the District Judiciary, but also the size of false criminal cases is getting bigger. External pressure in the form of unfounded criticism or by way of lodging false criminal case causes a significant injury to the dignity and independence of a judge. Although under the law, a person is presumed to be innocent until proven guilty but the society in which we live today, presumes a judge guilty once accused, irrespective of whether a false complaint has been made or later even when he gets discharged. An innocent, stigmatised by false implications, has to carry this irreparable stigma throughout his life span, and its shadow on his next generations also leaves a dark impression. Despite all these odds, the judges of the District Judiciary must be aware of the shared values of our society, and must also understand that judging is not merely a job. It is a way of life. So, as the saying goes, the robe magnifies the conduct; he ought to maintain the dignity of the office at all times and avoid both impropriety and the appearance of impropriety in his professional and personal life.

13. Indubitably, judiciary is the platform where a common man hopes for justice, even if the case is against the government. So, any offensive and outrageous conduct, either by a judge or the executive, breaks down the very fibre of what is necessary for a functional judiciary. Appraising the above-stated values of our society on a legal principle which states that no one is above the law, no one is below it, and all are equal, it is safe to conclude that it would be injurious to the health of the society if certain mandatory precautions are not suggested to the executive, while dealing with a criminal case in which a judge of the District Judiciary is found to be involved. I am therefore of the view that to maintain a balance between two constitutional values, to wit, preserving the independence of the judiciary and ensuring the prevention of crime while maintaining the rule of law, the guidelines suggested by the High Court⁷ fit into the institutional-government system, and it will be tider and safer to order them to be observed with the following modifications:

- (i) If a judicial officer of the District Judiciary is to be arrested for some offence, it should be done under intimation to the nominee of the concerned High Court;
- (ii) If facts and circumstances necessitate the immediate arrest of a judicial officer of the District Judiciary, a technical or formal arrest may be effected; and the facts of such arrest should be immediately communicated to the nominee of the concerned High Court.
- (iii) The Judicial Officer so arrested shall not be taken to a police station, without the prior order or directions of the nominee of the concerned High Court;
- (iv) Immediate facilities shall be provided to the Judicial Officer of communication with his family members, legal advisers and the District and Sessions Judge of his District;
- (v) No statement of a Judicial Officer who is under arrest be recorded, nor any medical tests be conducted except in the presence of the legal adviser of the Judicial Officer concerned or another Judicial Officer of equal or higher rank, if available; and
- (vi) There should be no handcuffing of a Judicial Officer. If, however, violent resistance to arrest is offered or there is imminent need to effect physical arrest to avert danger to life and limb, the person resisting arrest may be overpowered and handcuffed. In such case, immediate report shall be made to the District and Sessions Judge concerned and also to the nominee of the High Court. But the burden would be on the Police/ executive to establish the necessity for effecting the physical arrest and handcuffing of the Judicial Officer, and if it is found that the physical arrest and handcuffing of the Judicial Officer was unjustified, the Police Officers causing or responsible for such arrest and handcuffing would be guilty of misconduct and would also be personally liable for compensation and damages as may be summarily determined by the High Court.

The above guidelines oblige each High Court to issue a notification, exercising its powers under Article 203 of the Constitution, for the nomination of a person, not less than the rank/grade of a District and Sessions Judge, who will attend to such criminal proceedings in which a judge of the District Judiciary is found involved, so as to ensure transparency and fair trial. It is expected that this will be done expeditiously.

14. I, having expressed the above opinion while agreeing with the views and conclusions expressed in the main judgment, do not find any ground to interfere with the matter. The appellant must, therefore, fail in his appeal, and it is dismissed.

Sd/-

Shahid Waheed, J

MWA/S-29/SC Appeal dismissed.