

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, ACJ.

Ghulam Mustafa Mughal, J.

1. Cr. Appeal No. 18 of 2020

(PLA filed on 02.04.2020)

Asad Muneer Khan s/o Yaqoob Khan r/o Komi,
Tehsil and District Muzaffarabad.

.....APPELLANT

VERSUS

1. The State of AJ&K through Advocate-General having his office at Muzaffarabad.
2. Chief Secretary of the Azad Government of the State of Jammu and Kashmir having office at Muzaffarabad.
3. Inspector General Police of the State of Jammu and Kashmir having office at Muzaffarabad.
4. Deputy Inspector General Prisons of the State of Azad Jammu and Kashmir having office at Muzaffarabad.
5. Commissioner Muzaffarabad having office at Muzaffarabad.
6. Superintendent of Central Prison/Jail, Muzaffarabad.
7. All Prisoners Central Jail Muzaffarabad through Superintendent Central Jail, Muzaffarabad.
8. Imran s/o Muhammad Rasib, Mudasir Liaqat S/o Liaqat, Muhammad Rabnawaz s/o Sharif, Muhammad Sohail s/o Muhammad Atlas, Tanveer s/o Muhammad Yar, Muhammad Imran s/o Abdul Rehman on behalf of Prisoners of Central Jail Mirpur through Superintendent Central Jail, Mirpur.

9. Arshad Anwer s/o Muhammad Anwer Khan on behalf of All Prisoners of District Jail Rawalakot through Superintendent Jail, Rawalakot.
10. Rafique-ur-Rehman Prisoner on behalf of the Prisoners of District Jail Bagh through Superintendent of District Jail, Bagh.
11. Suhail Altaf s/o Muhammad Altaf on behalf of Prisoners of District Jail Pallandri through Superintendent of District Jail, Pallandri.
12. Faisal Mushtaq s/o Muhammad Mushtaq Bark No.1, Maroof s/o Yousif Bark No.2, Hamza Ilyas s/o Muhammad Ilyas Bark No.3, Akrum Subhani s/o Muhammad Sadiq Bark No.4, Iftikhar s/o Roshan Deen Bark No.5, Nazia Bibi w/o Azam, Nagina w/o Qasim and Tanzila Bibi w/o Yasir Shabeer on behalf of Prisoners of District Jail Bhimber through Superintendent District Jail, Bhimber.
13. Shabir Iqbal, Yasin Chaudhary, Shakeel Ahmed and Naeem Sherazi on behalf of Prisoners of District Jail, Kotli through Superintendent District Jail, Muzaffarabad.
14. Director General Health, having office at Muzaffarabad.
15. Department of Law, Justice, Parliamentary Affairs and Human Rights Department through its Secretary having office at Chatter, Muzaffarabad.
16. Raja Muhammad Nadeem Khan s/o Raja Siyab Khan r/o Komi Kot, Tehsil and District Muzaffarabad.

.....RESPONDENTS

[On appeal from the order of the High Court dated 27.03.2020 in Cr. Misc. No.50, 51, 53, 54, 55 and 56 of 2020]

FOR THE APPELLANT: Mr. Tahir Aziz Khan,
Advocate.

FOR THE STATE: Raja Inamullah Khan,
Advocate General.

2. Cr. Appeal No. 19 of 2020
(PLA filed on 02.04.2020)

1. Raja Haroon-ur-Rasheed s/o Raja Ashraf Khan,
2. Raja Ashraf Khan, Residents of Neelum Tehsil Authmuqam, District Neelum presently Central Plate, Muzaffarabad.

.....APPELLANTS

VERSUS

1. The State of AJ&K through Advocate-General having his office at Muzaffarabad.
2. Chief Secretary of the Azad Government of the State of Jammu and Kashmir having office at Muzaffarabad.
3. Inspector General Police of the State of Jammu and Kashmir having office at Muzaffarabad.
4. Deputy Inspector General Prisons of the State of Azad Jammu and Kashmir having office at Muzaffarabad.
5. Commissioner Muzaffarabad having office at Muzaffarabad.
6. Superintendent of Central Prison/Jail, Muzaffarabad.
7. All Prisoners Central Jail Muzaffarabad through Superintendent Central Jail, Muzaffarabad.
8. Imran s/o Muhammad Rasib, Mudasir Liaqat S/o Liaqat, Muhammad Rabnawaz s/o Sharif, Muhammad Sohail s/o Muhammad Atlas, Tanveer s/o Muhammad Yar, Muhammad Imran s/o Abdul Rehman on behalf of Prisoners

of Central Jail Mirpur through Superintendent Central Jail, Mirpur.

9. Arshad Anwer s/o Muhammad Anwer Khan on behalf of All Prisoners of District Jail Rawalakot through Superintendent Jail, Rawalakot.
10. Rafique-ur-Rehman Prisoner on behalf of the Prisoners of District Jail Bagh through Superintendent of District Jail, Bagh.
11. Suhail Altaf s/o Muhammad Altaf on behalf of Prisoners of District Jail Pallandri through Superintendent of District Jail, Pallandri.
12. Faisal Mushtaq s/o Muhammad Mushtaq Bark No.1, Maroof s/o Yousif Bark No.2, Hamza Ilyas s/o Muhammad Ilyas Bark No.3, Akrum Subhani s/o Muhammad Sadiq Bark No.4, Iftikhar s/o Roshan Deen Bark No.5, Nazia Bibi w/o Azam, Nagina w/o Qasim and Tanzila Bibi w/o Yasir Shabeer on behalf of Prisoners of District Jail Bhimber through Superintendent District Jail, Bhimber.
13. Shabir Iqbal, Yasin Chaudhary, Shakeel Ahmed and Naeem Sherazi on behalf of Prisoners of District Jail, Kotli through Superintendent District Jail, Muzaffarabad.
14. Director General Health, having office at Muzaffarabad.
15. Department of Law, Justice, Parliamentary Affairs and Human Rights Department through its Secretary having office at Chatter, Muzaffarabad.
16. Shadab Farooq s/o Muhammad Farooq, Caste Khakha r/o Mathai, Tehsil and District Muzaffarabad.
17. Mehran Rauf s/o Abdul RAuf Caste Khakha r/o Katkair, Tehsil and District Muzaffarabad.

18. Mehran Afaq s/o Muhammad Kahn Caste Khakha r/o Danna Haryala, Tehsil and District Muzaffarabad.
19. Hamad Naeem Abbasi s/o Muhammad Naeem Abbasi r/o Kotal Tar, Tehsil and District Muzaffarabad.
20. Umeer Arif s/o Muhammad Arif, Caste Khakha r/o Kachili, Tehsil and District Muzaffarabad.

.....RESPONDENTS

[On appeal from the order of the High Court dated 27.03.2020 in Cr. Misc. No.50, 51, 53, 54, 55 and 56 of 2020]

FOR THE APPELLANTS: Mr. Tahir Aziz Khan,
Advocate.

FOR THE STATE: Raja Inamullah Khan,
Advocate General.

3. Cr. Appeal No. 20 of 2020
(PLA filed on 04.04.2020)

1. The State of AJ&K through Advocate General, Azad Jammu and Kashmir, Muzaffarabad.
2. Chief Secretary of the Azad Government of the State of Jammu and Kashmir having office at Muzaffarabad.
3. Inspector General of Police of the State of Azad Jammu and Kashmir having office at Muzaffarabad.
4. Department of Law, Justice, Parliamentary Affairs and Human Rights Department through its Secretary having office at Chatter, Muzaffarabad.
5. Inspector General Prisons of the State of Azad Jammu and Kashmir having office at Muzaffarabad.

6. Deputy Inspector General Prisons of the State of Azad Jammu and Kashmir having office at Muzaffarabad.

.....APPELLANTS

VERSUS

1. All Prisoners Central Jail Muzaffarabad through Superintendent Central Jail, Muzaffarabad.
2. Imran s/o Muhammad Rasib, Mudasir Liaqat S/o Liaqat, Muhammad Rabnawaz s/o Sharif, Muhammad Sohail s/o Muhammad Atlas, Tanveer s/o Muhammad Yar, Muhammad Imran s/o Abdul Rehman on behalf of Prisoners of Central Jail Mirpur through Superintendent Central Jail, Mirpur.
3. Arshad Anwer s/o Muhammad Anwer Khan on behalf of All Prisoners of District Jail Rawalakot through Superintendent Jail, Rawalakot.
4. Rafique-ur-Rehman Prisoner on behalf of the Prisoners of District Jail Bagh through Superintendent of District Jail, Bagh.
5. Suhail Altaf s/o Muhammad Altaf on behalf of Prisoners of District Jail Pallandri through Superintendent of District Jail, Pallandri.
6. Faisal Mushtaq s/o Muhammad Mushtaq Bank No.1, Maroof s/o Yousif Bark No.2, Hamza Ilyas s/o Muhammad Ilyas Bark No.3, Akrum Subhani s/o Muhammad Sadiq Bark No.4, Iftikhar s/o Roshan Deen Bark No.5, Nazia Bibi w/o Azam, Nagina w/o Qasim and Tanzila Bibi w/o Yasir Shabeer on behalf of Prisoners of District Jail Bhimber through Superintendent District Jail, Bhimber.
7. Shabir Iqbal, Yasin Chaudhary, Shakeel Ahmed and Naeem Sherazi on behalf of Prisoners of District Jail, Kotli through Superintendent District Jail, Muzaffarabad.

.....RESPONDENTS

8. Commissioner Muzaffarabad having office at Muzaffarabad.
9. Superintendent of Central Prison/Jail, Muzaffarabad.
10. Director General Health, having office at Muzaffarabad.

[On appeal from the order of the High Court dated 27.03.2020 in Cr. Misc. No.50, 51, 53, 54, 55 and 56 of 2020]

FOR THE APPELLANT: Mr. Tahir Aziz Khan,
Advocate.

FOR THE STATE: Raja Inamullah Khan,
Advocate General.

4. Cr. Appeal No. 21 of 2020
(PLA filed on 31.03.2020)

1. Zahid Hussain s/o Pehlwan Khan, Caste Rajpoot r/o Kalri, Tehsil and District Bhimber.
2. Muhammad Asghar s/o Manzoor Ahmed r/o Tibba Barnala, District Bhimber.

.....APPELLANTS

VERSUS

1. Muhammad Fiaz s/o Allah Ditta, Caste Rajpoot r/o Kohhahra, Tehsil and District Bhimber, Present Address Lockup, District Jail, Mirpur.
2. Mohsin Shamim s/o Shamim Ahmed, Caste Rajpoot r/o Kalri, Tehsil and District Bhimber.

.....RESPONDENTS

3. State through Advocate General of Azad Jammu and Kashmir having his office at Supreme Court Building Muzaffarabad.

4. Jail Superintendent District Bhimber/Mirpur.

.... PROFORMA RESPONDENTS

[On appeal from the order of the High Court dated
27.03.2020 in Cr. Misc. No.50, 51, 53, 54, 55 and
56 of 2020]

FOR THE APPELLANTS: Ch. Shaukat Aziz,
Advocate.

FOR THE STATE: Raja Inamullah Khan,
Advocate General.

5. Cr. Appeal No. 22 of 2020
(PLA filed on 02.04.2020)

Rasheed s/o Mir Zaman, caste Awan r/o Awan Pati,
Tehsil and District Muzaffarabad.

.....APPELLANT

VERSUS

1. The State of AJ&K through Advocate-General having his office at Muzaffarabad.
2. Chief Secretary of the Azad Government of the State of Jammu and Kashmir having office at Muzaffarabad.
3. Inspector General Police of the State of Jammu and Kashmir having office at Muzaffarabad.
4. Deputy Inspector General Prisons of the State of Azad Jammu and Kashmir having office at Muzaffarabad.
5. Commissioner Muzaffarabad having office at Muzaffarabad.
6. Superintendent of Central Prison/Jail, Muzaffarabad.

7. All Prisoners Central Jail Muzaffarabad through Superintendent Central Jail, Muzaffarabad.
8. Imran s/o Muhammad Rasib, Mudasir Liaqat S/o Liaqat, Muhammad Rabnawaz s/o Sharif, Muhammad Sohail s/o Muhammad Atlas, Tanveer s/o Muhammad Yar, Muhammad Imran s/o Abdul Rehman on behalf of Prisoners of Central Jail Mirpur through Superintendent Central Jail, Mirpur.
9. Arshad Anwer s/o Muhammad Anwer Khan on behalf of All Prisoners of District Jail Rawalakot through Superintendent Jail, Rawalakot.
10. Rafique-ur-Rehman Prisoner on behalf of the Prisoners of District Jail Bagh through Superintendent of District Jail, Bagh.
11. Suhail Altaf s/o Muhammad Altaf on behalf of Prisoners of District Jail Pallandri through Superintendent of District Jail, Pallandri.
12. Faisal Mushtaq s/o Muhammad Mushtaq Bark No.1, Maroof s/o Yousif Bark No.2, Hamza Ilyas s/o Muhammad Ilyas Bark No.3, Akrum Subhani s/o Muhammad Sadiq Bark No.4, Iftikhar s/o Roshan Deen Bark No.5, Nazia Bibi w/o Azam, Nagina w/o Qasim and Tanzila Bibi w/o Yasir Shabeer on behalf of Prisoners of District Jail Bhimber through Superintendent District Jail, Bhimber.
13. Shabir Iqbal, Yasin Chaudhary, Shakeel Ahmed and Naeem Sherazi on behalf of Prisoners of District Jail, Kotli through Superintendent District Jail, Muzaffarabad.
14. Director General Health, having office at Muzaffarabad.
15. Department of Law, Justice, Parliamentary Affairs and Human Rights Department through its Secretary having office at Chatter, Muzaffarabad.

16. Muhammad Ilyas Awan s/o Muhammad Yousaf Awan r/o Awan Pati, Tehsil and District Muzaffarabad.

.....RESPONDENTS

[On appeal from the order of the High Court dated 27.03.2020 in Cr. Misc. No.50, 51, 53, 54, 55 and 56 of 2020]

FOR THE APPELLANT: Mr. Tahir Aziz Khan,
Advocate.

FOR THE STATE: Raja Inamullah Khan,
Advocate General.

6. Cr. Appeal No. 23 of 2020

Cr. Misc. No.19 of 2020

Cr. Misc. No.21 of 2020

Cr. Misc. No.23 of 2020

(PLA filed on 31.03.2020)

1. Kaleem Abbasi s/o Muhammad Yousaf,
2. Moeen Zareen s.o Muhammad Zareen Abbasi,
3. Basharat Abbasi s/o Muhammad Suleman r/o Gotha, Tehsil and District Muzaffarabad.

.....APPELLANTS

VERSUS

1. The State of AJ&K through Advocate-General having his office at Muzaffarabad.
2. Chief Secretary of the Azad Government of the State of Jammu and Kashmir having office at Muzaffarabad.
3. Inspector General Police of the State of Jammu and Kashmir having office at Muzaffarabad.
4. Deputy Inspector General Prisons of the State of Azad Jammu and Kashmir having office at Muzaffarabad.

5. Commissioner Muzaffarabad having office at Muzaffarabad.
6. Superintendent of Central Prison/Jail, Muzaffarabad.
7. All Prisoners Central Jail Muzaffarabad through Superintendent Central Jail, Muzaffarabad.
8. Imran s/o Muhammad Rasib, Mudasir Liaqat S/o Liaqat, Muhammad Rabnawaz s/o Sharif, Muhammad Sohail s/o Muhammad Atlas, Tanveer s/o Muhammad Yar, Muhammad Imran s/o Abdul Rehman on behalf of Prisoners of Central Jail Mirpur through Superintendent Central Jail, Mirpur.
9. Arshad Anwer s/o Muhammad Anwer Khan on behalf of All Prisoners of District Jail Rawalakot through Superintendent Jail, Rawalakot.
10. Rafique-ur-Rehman Prisoner on behalf of the Prisoners of District Jail Bagh through Superintendent of District Jail, Bagh.
11. Suhail Altaf s/o Muhammad Altaf on behalf of Prisoners of District Jail Pallandri through Superintendent of District Jail, Pallandri.
12. Faisal Mushtaq s/o Muhammad Mushtaq Bark No.1, Maroof s/o Yousif Bark No.2, Hamza Ilyas s/o Muhammad Ilyas Bark No.3, Akrum Subhani s/o Muhammad Sadiq Bark No.4, Iftikhar s/o Roshan Deen Bark No.5, Nazia Bibi w/o Azam, Nagina w/o Qasim and Tanzila Bibi w/o Yasir Shabeer on behalf of Prisoners of District Jail Bhimber through Superintendent District Jail, Bhimber.
13. Shabir Iqbal, Yasin Chaudhary, Shakeel Ahmed and Naeem Sherazi on behalf of Prisoners of District Jail, Kotli through Superintendent District Jail, Muzaffarabad.
14. Shaukat Abbasi s/o Muhammad Miskeen,

15. Nazeer Abbasi s/o Muhammad Miskeen residents of Gotha, Tehsil and District Muzaffarabad.
16. Director General Health, having office at Muzaffarabad.
17. Department of Law, Justice, Parliamentary Affairs and Human Rights Department through its Secretary having office at Chatter, Muzaffarabad.

.....RESPONDENTS

[On appeal from the order of the High Court dated 27.03.2020 in Cr. Misc. No.50, 51, 53, 54, 55 and 56 of 2020]

(Applications for interim relief)

FOR THE APPELLANTS: Mr. Tahir Aziz Khan,
Advocate.

FOR THE STATE: Raja Inamullah Khan,
Advocate General.

Date of hearing: 30.04.2020

JUDGMENT

Raja Saeed Akram Khan, ACJ.– An acute respiratory syndrome, *COVID-19*, caused by *Corona-virus* (a type of virus) has handicapped the whole world. The disease usually causes fever, tiredness, cough and breathing problems and in

severe cases leads to death. It has taken away the lives of more than two hundred thousand people and the number of infected persons has reached to three million, which is doubling day by day. The disease spreads from person to person.

2. Being afraid of this situation, the prisoners from all the Central and District Jails of Azad Kashmir filed separate applications before the High Court of Azad Jammu and Kashmir for releasing them on bail on the ground that their lives are in danger due to spread of COVID-19. The learned High Court issued notices to the Advocate General, Chief Secretary, Inspector General of Police, Director General Health and Deputy Inspector General Prisons and after having comments from them passed an order on 27.03.2020, wherein, following directions were issued:-

- “1. The under trial prisoners involving offences under Qisas and Diyat Act, Imprisonment for life and the offences involving imprisonment for 10 years and above (with or without fine) shall be released on conditional bail for a period of two months. The period of two months may be extended till the time of situation returns to normalcy.

2. The under trial prisoners detained in offences involved less than 10 years shall be released on bail provided they furnish surety and personal bail bonds.
3. Surety and personal bonds shall be furnished before the Sessions Judge of concerned District and the Judicial Magistrate on duty shall attest the bonds to his satisfaction.
4. This order shall not apply to the prisoners involved in offences under Antiterrorism Act. In the circumstances of the case, it is directed that a committee comprising Commissioner and Deputy Inspector General of Police of the Region shall scrutinize the cases under Antiterrorism Act on individual basis and submit its recommendations to the High Court keeping in view any threat to sovereignty of the State.
5. So far as the matters relating to convict prisoners, the concerned authorities may consider release of the said prisoners on parole in accordance with Prisons Rules, because a prisoner whose order of conviction has attained finality does not fall within the ambit of this order. A copy of this order shall be furnished to all the concerned authorities including Chief Secretary, I.G Police, DG Health Commissioners, DIGs of all the three regions, District and Sessions Judges for compliance and further proceedings.”

Pursuant to these directions, a number of prisoners were enlarged on bail. The appellants/complainants have challenged the aforesaid order passed by the learned High Court by filing captioned appeals by leave of the Court. Since all the appeals have arisen out of the same

order of the High Court, therefore, the disposal of the same through this single order is felt advised.

3. Mr. Tahir Aziz Khan, Advocate, the learned counsel representing the appellants in the respective appeals forcefully opposed the impugned order of the High Court. While referring to the applications filed by the prisoners before the High Court, he submitted that the so-called bail applications are incompetent. Nothing in detail has been incorporated that under what sort of offences, the applicants are being tried, thus, on such applications no further proceeding was justified. Before passing the impugned order, no notice was issued to the legal heirs of the victims, which is a glaring illegality. Even otherwise, the learned High Court was not vested with any jurisdiction to grant bail to the accused involved in murder cases. Such like jurisdiction lies with the Shariat Appellate Bench of the High Court constituted under the Azad Jammu and Kashmir Constitution of Shariat Appellate Bench of the High Court Act, 2017. Section 9 of this Act bars the jurisdiction of any

other Court or tribunal in any matter where the Shariat Appellate Bench has been vested with the power to adjudicate upon and determine the issue. He further added that under Article 44 of the Azad Jammu and Kashmir Interim Constitution, 1974 the High Court shall have such jurisdiction as is conferred on it by the Constitution or by any other law. In the matter in hand, the powers exercised by the High Court are not conferred by any law. He also referred to section 7 of the Prisoners Act, 1894 and submitted that the matter in hand could have been dealt with by the concerned Jail authorities. The learned Advocate also pointed out that the impugned order was based upon the order passed by the Islamabad High Court which order has been subsequently set-at-naught by the Supreme Court of Pakistan, hence, on this score too the impugned order of the High Court is liable to be quashed.

4. The learned Advocate-General while fully endorsing the arguments advanced by the learned counsel for the appellants submitted that the state is also not satisfied with the impugned order of the

High Court and in this regard a separate appeal has also been filed which is liable to be accepted.

5. Ch. Shaukat Aziz, Advocate, the learned counsel representing the appellants, Zahid Hussain and Muhammad Asghar, also forcefully opposed the impugned order of the High Court. He submitted that the appeals filed by the accused-respondents, involved in the offences under Qisas and Diyat Act, were pending adjudication before the Shariat Appellate Bench of the High Court but through a general bail granting order they have illegally been released without hearing the legal heirs of the victims. The impugned order of the High Court is bad in law and not sustainable.

6. During pendency of titled appeals, some miscellaneous applications have also been moved by the prisoners, enlarged on bail in the light of impugned order of the High Court, for grant of interim relief. It is the stance of Mr. Nasir Masood Mughal, Advocate, appearing on behalf of applicants/respondents No.14 and 15 in Criminal Appeal No.23/2020 that the case of their clients is

somehow different from other prisoners and according to the peculiar facts they are entitled for bail, hence, they be exempted from arrest. Mr. Mushtaq Hussain Janjua, Advocate, representing the applicants Umair Arif, Hamad Naeem and Mehran Rauf, stated that the case of the applicants for grant of bail was even otherwise pending before the District Criminal Court and in the meantime the prisoners were released on bail in the light of impugned order of the High Court, hence, the applicants are entitled to remain on bail. An application has also been moved by Sardar Abdul Hamid Khan, Advocate, on behalf of the applicant, Zaeem Hussain, for arraying him in the line of appellants in the titled appeals.

7. In the light of arguments of the learned counsel for the parties, we have minutely examined the record.

8. The deadly viral disease has brought the whole world down to knees. Millions are infected and the hundreds of thousands have lost their lives. The virus is being transmitted from person to

person. In order to combat with the pandemic disease, the precautionary measures are being taken by the State. It appears that on the ground emerged in the wake of spread of COVID-19 the prisoners from all the Central and District Jails of Azad Jammu and Kashmir moved some applications before the High Court for releasing them on bail, in consequence whereof, the prisoners in bulk have been ordered to be released.

9. First of all, we would like to have a bird eye view on the so-called bail applications. The applications have been filed by the prisoners themselves or through Jail Superintendents. Even some accused have moved for grant of bail to the other accused confined in the same prison. Nothing has been incorporated that in what sort of offences the applicants are being tried. It is also very amazing that the applications have been addressed directly to the Chief Justice of the High Court, whereas, the law provides appellate, revisional or extraordinary constitutional jurisdiction, as the case may be, before the High Court and not before the

Chief Justice of the High Court. Thus, the learned High Court was not justified in conducting the proceedings on said improperly instituted so-called bail applications.

10. The nucleus proposition involved in the matter in hand is the scope of jurisdiction of the High Court. Article 44 of the Azad Jammu and Kashmir Interim Constitution, 1974 postulates that: "*the High Court shall have such jurisdiction as is conferred on it by the Constitution or by any other law.*" The meanings of this statutory provision are clear, unequivocal and incapable of more than one interpretation. Although under section 561-A, Cr.P.C. the High Court has inherent powers to make such orders as may be necessary to give effect to any order or to prevent abuse of the process of any Court or otherwise to secure the ends of justice, however, we are afraid that such powers cannot be exercised as a substitute for remedies otherwise made available under law. By now, the law is quite settled that the jurisdiction of the High Court under section 561-A, Cr.P.C. can only be exercised in

respect of orders or proceedings of a Court and executive or administrative orders have nothing to do with such powers. In this regard, the Supreme Court of Pakistan in the case reported as *Muhammad Ali vs. Additional IG Faisalabad* [PLD 2014 SC 753], has held that:-

“The law is quite settled by now that the jurisdiction of a High Court under section 561-A, Cr.P.C. can be exercised only in respect of orders or proceedings of a Court and that the provisions of section 561-A, Cr.P.C. have no application vis-à-vis executive or administrative orders or proceedings of any non-judicial forum or authority”.

Thus, the powers vested under section 561-A, Cr.P.C. can only be exercised with relevance to judicial proceedings. It has also been held by the Supreme Court of Pakistan that the words used in section 561-A, Cr.P.C. i.e. “*otherwise to secure the ends of justice*”, have to be read along with the earlier objects mentioned in this section and must have some co-relation with them. These words cannot be interpreted to allow the High Court to pass any order in non-judicial proceedings. It has also been held that ‘ends of justice’ means justice administered by the Courts and not the justice in

abstract sense. Reliance can be placed on *Muhammad Ali's case* (supra) wherein it was held that:-

“3. While dilating upon the same subject this Court had made the following observations in the case of *Shahnaz Begum v. The Hon'ble Judges of the High Court of Sind and Balochistan* and another (PLD 1971 SC 677) leaving no room for any ambiguity that the provisions of section 561-A, Cr.P.C. have relevance only to judicial proceedings and actions and not to any executive or administrative action or function:

"If an investigation is launched mala fide or is clearly beyond the jurisdiction of the investigating agencies concerned then it may be possible for the action of the investigating agencies to be corrected by a proper proceeding either under Article 98 of the Constitution of 1962 or under the provisions of section 491 of the Criminal Procedure Code, if the applicant is in the latter case in detention, but not by invoking the inherent power under section 561-A of the Criminal Procedure Code.

If this be the position with regard to the quashing of an investigation we have no manner of doubt that section 561-A of the Cr.P.C. does not give any power to transfer an investigation as claimed by the learned Advocate-General of Sindh. Section 561-A of the Criminal Procedure Code runs as follows:--

"561-A. Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

It will be observed that the power given thereby can be invoked to give effect to any order under the Code to prevent an abuse of the process of any Court or otherwise to secure the ends of justice. The ends of justice necessarily means justice as administered by the Courts and not justice in the abstract sense or justice administered by agencies other than Courts. The words "otherwise to secure the ends of justice", have to be read along with the earlier objects mentioned in this section and must have some co-relation with them and it is in this sense that this Court in the case of M. S. Khawaja v. The State (PLD 1965 SC 287) opined that the ends of justice to secure which the inherent power may be invoked "have reference to the purposes which the judicial process is intended to secure, and it is difficult to include actions of investigating agencies within the scope of judicial process".

(underlining has been supplied for emphasis)

An identical view of the matter was subsequently taken by this Court in the case of Nazir Ahmed and others v. Muhammad Shafi and another (PLD 1980 SC 6).”

11. The apex Court of the Pakistan in the recent judgment titled *Raja Muhammad Nadeem vs. The State & another* [Criminal Petition No.299 of 2020 decided on 07.04.2020], almost in the identical circumstances, has expounded the inherent jurisdiction of the High Court in the following words:-

“8. There was no juridical basis for the High Court to undertake an extensive exercise in a criminal miscellaneous application to issue directions impinging upon the whole spectrum

of social life; 292 prisoners involved in different offences is quite a number; their abrupt release is far from being expedient for maintenance of law and order in their neighborhoods; impact could be graver in the Province of Sindh; the High Court certainly lacked jurisdiction to invoke provisions of section 561-A of the Code *ibid*, object and scope whereof was clearly laid down way back in the year 1945 by the Privy Council in the case of *Emperor Vs. Khawaja Nazeer Ahmed* (AIR (32) 1945 Privy Council 18); in the said case, High Court's interference with an investigative process, purportedly in exercise of powers under section 561-A *ibid* was held as *ultra vires*, a view subsequently followed by this Court in the cases of *Shahnaz Begum v. The Hon'ble Judges of the High Court of Sind and Balochistan and another* (PLD 1971 SC 677) and *Nazir Ahmed & others Vs. Muhammad Shafi & another* (PLD 1980 SC 6). The law is more vividly expounded in the case of *Muhammad Ali Vs. Additional I.G. Faisalabad* (PLD 2014 SC 753):-

“The law is quite settled by now that the jurisdiction of a High Court under section 561-A, Cr.P.C. can be exercised only in respect of orders or proceedings of a court and that the provisions of section 561-A, Cr.P.C. have no application vis-à-vis executive or administrative orders or proceedings of any non-judicial forum or authority.”

The plain language of section 561-A Cr.P.C. and the law declared by this Court unambiguously settles that provisions of the said section cannot be invoked to interfere, interrupt or divert procedural courses provided under the law nor it can be applied as a substitute for remedies otherwise available under the Statute.”

12. The High Court was not vested with the powers to bypass the special forum created under law.¹ A Shariat Appellate Bench in the High Court has been constituted through the Constitution of Shariat Appellate Bench of the High Court Act, 2017. The Bench is empowered to exercise the appellate/revisional jurisdiction against the judgments/orders passed by the District Criminal Court or Tehsil Criminal Court, as the case may be. The Act specifically bars the jurisdiction of any other Court or tribunal. Section 9 of the Act is very much relevant, which runs as under:-

“9. Bar of Jurisdiction:- Save as provided under this Act no Court or tribunal, including the Supreme Court and the High Court shall entertain any proceedings or exercise any power or jurisdiction in any matter when the Shariat Appellate Bench has the power to adjudicate and determine.”

It is unambiguously clear that in the matters falling within the domain of the Shariat Appellate Bench of the High Court, the jurisdiction of any other Court including the Supreme Court and the High Court is ousted. The stated prisoners while bypassing the provided legal forums approached

¹ 1986 SCMR 1035

the High Court, whereas, such direct access to the High Court has no place in the legal system.

13. The inherent jurisdiction of the High Court cannot be invoked where alternate remedy is available.² The powers are meant to meet the lacuna in extraordinary cases and not to vest the High Court with powers to make any order considering the same to be in the interest of justice. Such powers are to be invoked when gross injustice on the face of it seems to be caused to a party and no other efficacious or alternative remedy is provided to the aggrieved party under law.³ In exercise of the inherent powers the normal course provided under law should not be skipped over or diverted from, as has been done in the present case. Such powers cannot be extended to uncalled for and unwarranted interference with the procedure prescribed by law, which must be followed.

14. It appears that the High Court has exercised the powers *suo motu* while passing the

² 1995 PCrLJ 1912

³ 2000 YLR 239

impugned order, whereas, there was no occasion for the High Court to itself register the petitions. The framers of the Constitution have not conferred any such power to the High Court. Had the same been conferred upon, it would have been mentioned in the clear terms. The apex Court of Pakistan in the case reported as *Dr. Imran Khattak and another vs. Mst. Sofia Waqar Khattak and others* [2014 SCMR 122], has commented upon the jurisdiction of the High Court in the following terms:-

“.....It be noted that no Judge of a High Court or the supreme Court is robed, crowned and sceptered as a King to do whatever suits his whim and caprice. In all eventualities, he is bound to abide by and adhere to the law and the ConstitutionIt thus follows that the framers of the Constitution of 1962 and those of 1973, inasmuch as it can be gathered from the words used in Article 98 of the former and Article 199 of the latter, never intended to confer *Suo Motu* jurisdiction on a High Court. Had they intended, they would have conferred it in clear terms as the framers of the Code of Civil Procedure under its provision contained in section 115 have conferred it on the High Court and the District Judge and the frames of the code of Criminal Procedure under its provisions contained in section 439 and 439-A have conferred it on the High Court and the sessions Judge respectively. Article 175(2) of the Constitution leaves no ambiguity by providing that “no Court shall have jurisdiction, save as is or may be conferred on it by the Constitution or by or under any law”. We would be offending the very words used in the Article by reading exercise of *Suo Motu* jurisdiction in it which cannot be read even if

we stretch them to any extreme. It has been settled as far back as in 1916 in the case of *Tricomdas Cooverji Bhoja v. Sri Gopingath Jui Thakur*” (AIR 1916 Privy Council (sic)), that where the meanings of a provision are clear, unequivocal and incapable of more than one interpretation, even a long and uniform course of interpretation, if any, may be overruled, if it is contrary to its meanings. We have, therefore, no hesitation to hold that the High Court could not exercise *Suo Motu* jurisdiction under Article 199 of the Constitution of Pakistan. The more so when we have noticed that such jurisdiction has stridently been used even in the matters which are clearly and squarely outside the jurisdiction of a High Court.”

We are of the unanimous view that the action taken by the High Court is without jurisdiction and totally alien to law, hence, cannot be assented to. The learned High Court was equipped with no such powers. The law has provided a detailed mechanism for dealing with bail matters. Shortly stating, no person can be released on bail save as in accordance with law. This statutory mechanism cannot be neglected or bypassed in the garb of declaration of health emergency. We have no cavil with taking of precautionary measures to keep the prisoners safe from being vulnerable to the disease but the fact is also there that all these steps should have legal backing.

15. The impugned order of the High Court is also against the basic principle of administration of justice. Before passing the impugned order, the learned High Court has issued unconcerned notices to a number of parties, however, it forgot to hear the legal heirs of the victims. In the offences, punishable with Qisas or Diyat, the legal heirs of the victims are necessary parties to be heard but the learned High Court has passed the order adverse to them without issuance of any notice. It amounts to mockery of law and is very unhealthy practice.

16. Almost in the similar circumstances, the Islamabad High Court in the case titled *Kabir vs. The State*, released a large number of prisoners. The impugned order of the High Court has also been based upon this order of the Islamabad High Court. This wholesale release of the prisoners was strongly condemned by the apex Court of Pakistan in *Raja Muhammad Nadeem's case* (supra). In the referred judgment the Hon'ble apex Court of Pakistan after thorough deliberation on the

jurisdiction of the High Court reached the following conclusion:-

“11. In the peculiar facts and circumstances of the case, we consider it expedient to convert this petition into one under Article 184 (3) of the Constitution and in exercise of powers vesting in the Court under Article 187 thereof set aside the impugned directions issued by the Islamabad High Court as well as High Court of Sindh; bails granted to the accused/convicts, thereunder, are re-called; similarly, order dated 24.3.2020 passed by the Islamabad High Court in Crl. Misc. No.238/2020 granting bail to the accused charged under various provisions of the Control of Narcotic Substances Act, 1997 is also set aside and bails granted thereunder are re-called. Likewise, order dated 26.3.2020 passed in W.P. No.985 of 2020 by the said Court, granting bails to the accused involved in NAB cases is set aside and bails granted thereunder are re-called. Steps purportedly taken in exercise of powers under Section 401 of the Code ibid by the Government of Sindh as well as Khyber Pakhtunkhwa are also declared as without lawful authority, without jurisdiction and of no legal effects. Prisoners released in pursuance to the above mentioned orders are directed to be taken into custody except those falling within the categories suggested by the learned Attorney General for Pakistan with the concurrence of Advocate Generals of the Provinces. These categories we approve for conforming the considerations laid down by the law discussed above. Observations made hereinabove shall not cast their shadow on pending or future legal pursuits. Larger issue of combating the Pandemic shall remain pending.”

After this final judgment of the apex Court of Pakistan, the structure on which the impugned order of the High Court was built upon no more

exists. In this background too the impugned order of the High Court is not sustainable.

17. "Stay home, stay safe" is being considered as one of the basic precautionary measures for keeping the social distancing. An overcrowded place is more suitable for the virus to breed and grow, however, it can only be so if a contaminated visitor visits the prison. In our opinion, it was far easier for the concerned Jail authorities to arrange for screening of each and every visitor instead of releasing a large number of accused against law. The Jail authorities can combat with such an epidemic and contiguous disease under Jail Rules. Section 7 of the Prisoners Act, 1894 provides that:-

"7. Temporary accommodation for prisoners.— Whenever it appears to the (Director of Prisons) that the number of prisoners in any prison is greater than can conveniently or safely be kept therein, and it is not convenient to transfer the excess number to some other prison, Or whenever from the outbreak of epidemic disease within any prison, or for any other reason, it is desirable to provide for the temporary shelter and safe custody of any prisoners, provision shall be made, by such officer and in such manner as the (Provincial Government) may direct, for the shelter and safe custody in temporary prisons of so many of the prisoners as cannot be conveniently or safely kept in the prison."

In presence of these express guidelines to meet with the eventuality arisen, the High Court was not justified to step forward itself in a hasty manner and exercise the powers not vested under law.

18. For the foregoing reasons, we have reached to the conclusion that the impugned order passed by the High Court was without any jurisdiction or lawful authority, thus, the same is set-at-naught. As the operation of the impugned order was already suspended by this Court, in consequence whereof, the concerned were directed to re-arrest the released prisoners. A report has been submitted by the Assistant Inspector General of Police (legal) on 30.04.2020 according to which most of the prisoners have been re-arrested, whereas, 39 prisoners are yet to be arrested. The efforts of the concerned are appreciated, however, they are directed to ensure the arrest of the remaining prisoners.

19. So far as the case of intervenor applicants is concerned, as stated hereinabove, the

impugned order of the High Court was passed without any legal competence, therefore, there is no need to comment on the application filed by Sardar Abdul Hamid Khan, Advocate. Regarding the other applicants it is observed that they are at liberty to approach the concerned fora for bail if any legal ground is available to them and at this stage without any record we are unable to pass any specific order on the applications filed by them.

All the titled appeals are disposed of in the terms stated hereinabove.

ACTING CHIEF JUSTICE
Muzaffarabad,
05.05.2020

JUDGE