IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE KHAWAJA M. NASIM
MR. JUSTICE RAZA ALI KHAN

CRIM. APPEAL No. 51 OF 2024
CRIM. MISC. NO. 22 OF 2024
(Against the judgment dated 15.03.2024 passed by the high Court, in revision petition No. 278 of 2022).

Muhammad Shahban s/o Shah Muhammad r/o Rakh Baloch Nilah Singh Kulyam p/o Mandi Bahawaldeen at present r/o House No. 582, Sector F/1, Mirpur.

-Appellant

VERSUS

The State through Advocate-General and others.

…Respondents

Appearances:

For the Appellant:	Mr. Reaz Ahmed Alam, Advocate.
For the Respondents:	Sh. Masood Iqbal, Advocate-General and Mr. Asif Hussain, Advocate.
Date of hearing:	18.11.2024

JUDGMENT:

***Raza Ali Khan, J*:-** This appeal, by leave of the Court directed against the judgment of the High Court dated 15.03.2024, whereby the revision petition filed by the respondent, herein, stood accepted and the order dated 27.10.2022, passed by the Sessions Judge/ Anti-Corruption Court, Mirpur was set-aside.

2. The crux of the matter concerns a criminal case registered against the appellant under Sections 465, 466, 471, and 109 of the Azad Penal Code (APC), along with Section 5(2) of the Prevention of Corruption Act, 1950. These charges involve allegations of forgery, fraudulent documentation, and abetment, compounded by corruption-related misconduct under the statutory provisions. The appellant, apprehending arrest, approached the Sessions Judge/Anti-Corruption Court, Mirpur, by filing a pre-arrest bail application. After considering the circumstances, the learned trial Court granted interim pre-arrest bail to the appellant through its order dated 27.10.2022, subject to the satisfaction of certain conditions. Aggrieved by the grant of pre-arrest bail, the complainant, Respondent No. 4, filed a revision petition before the High Court, challenging the propriety of the trial Court's order. The complainant primarily contended that the appellant, being an absconder, was not entitled to the discretionary relief of pre-arrest bail, as his conduct exhibited a blatant disregard for the law. Upon hearing the arguments of the parties and perusing the record, the learned High Court, through its impugned judgment, allowed the revision petition. The High Court held that the trial Court erred in granting bail to the appellant, particularly in light of his abscondence, which disentitled him from such equitable relief. Consequently,

the High Court set aside the order of the trial Court dated 27.10.2022 and directed further proceedings in accordance with the law.

3. Mr. Reaz Ahmed Alam, the learned counsel for the appellant, argued that the impugned judgment of the High Court is contrary to the law, the facts, and the record of the case. He contended that the appellant had never absconded but had lawfully left the country after obtaining an exemption from personal appearance, which remains valied. Moreover, he highlighted that a revision petition challenging the exemption order is still pending before the High Court. The learned counsel emphasized that the procedure for declaring an accused as an absconder is explicitly laid down in law, and the High Court, in the absence of following such a procedure, erroneously declared the appellant an absconder on its own accord. He further submitted that the High Court's decision to set aside the trial Court's order granting pre-arrest bail was in clear violation of statutory provisions. In conclusion, the learned counsel earnestly prayed for the acceptance of the appeal. To fortify his arguments, the learned counsel placed reliance on the precedent set in the case reported as *2007 SCR 517*.

4. Conversely, Mr. Asif Hussain, the learned counsel for Respondent No. 4, argued vehemently that the appellant had misused the concession of bail and willfully absconded, justifying the High Court's decision to declare him an absconder. He maintained that the appellant's conduct disqualifies him from any equitable relief or leniency from this Court. The learned counsel further submitted that the High Court acted within its jurisdiction in recalling the bail order granted by the trial Court, as such relief was improperly extended to the

appellant in the first place. He asserted that the impugned judgment of the High Court is legally sound and does not warrant interference by this Court. In conclusion, the learned counsel prayed for the outright dismissal of the appeal, reiterating that the appellant is undeserving of the discretionary relief sought.

5. Sh. Masood Iqbal, the learned Advocate-General, fully endorsed the arguments advanced by the learned counsel for Respondent No. 4. He submitted that the High Court acted within the bounds of law and procedure in passing the impugned judgment. The learned Advocate-General contended that the appellant, by his conduct, forfeited any claim to relief and that the High Court's decision is well-reasoned and requires no interference by this Court.

6. After thoroughly considering the arguments presented by learned counsel for both parties and meticulously reviewing the case record, it transpires from the record that the appellant, during the pendency of litigation, returned from abroad, voluntarily surrendered, and was subsequently arrested. He has also been granted bail by a Court of competent jurisdiction. However, the critical issue raised by the learned counsel for the appellant warrants our attention. The learned counsel argued that the High Court, in recalling the bail granted to the appellant, declared him an absconder without following the statutory procedure prescribed by law; this, he contended, is a grave violation of the procedural requirements and the principles laid down by the superior Courts. This argument is indeed of vital importance, as any oversight in addressing it could establish a precedent rendering the relevant provisions of the law redundant. The High Court, in the penultimate

paragraph of its judgment, observed that the bail order needed to be recalled because the appellant had absconded, and an absconder forfeits certain rights, including the entitlement to bail. Specifically, the High Court stated that, as an absconder, the appellant did not deserve any leniency or concession for the grant of bail. In our view, this observation is fundamentally flawed and contrary to law. To declare an accused as a fugitive from justice or an absconder, the process prescribed under the Code of Criminal Procedure (Cr.PC) must be strictly adhered to. The relevant provisions in this regard are Sections 87 and 88 of the Cr.PC, which outline the detailed procedure for declaring an accused as an absconder. Under these provisions, a Magistrate, upon taking cognizance of a case triable by a Sessions Court, must conduct proceedings under Sections 87, 88, and 512 of the Cr.PC, before an accused can be lawfully declared as an absconder. Specifically, under Section 87(3) of the Cr.PC, a Court may issue a proclamation against an accused, provided the requisite formalities are met. This includes setting a specific date for the accused to appear, followed by the due publication of the proclamation. Only after compliance with these formalities can an accused be legally declared an absconder, and such abscondence may then be used as corroborative evidence against them. In the present case, it is evident that the procedural steps outlined in Sections 87 and 88 of the Cr.PC were not followed. No proclamation under Section 87 was issued, nor was any subsequent action under Section 88 taken. In the absence of such statutory compliance, the appellant cannot be deemed an absconder. The High Court’s decision to unilaterally declare the appellant as an absconder is, therefore, untenable and contrary to the

established principles of law. The learned counsel for the appellant rightly relied upon the judgment of this Court in the case reported as *M. Afzal vs. Abid Hanif and others*[1], wherein, it has been held as under: -

> "To declare an accused as a fugitive from law and absconder, a process provided by the Code of Criminal Procedure has to be followed and it is only after completion of that process that an accused is declared as absconder. The law and case law is settled on the point that mere absence from Court on one or more dates fixed for hearing is not itself sufficient to constitute absconsion or declare an accused as fugitive from law. Although there are umpteen reports recorded by the superior Courts of the subcontinent, it is sufficient to refer to Kareem Dad v. Zaheer and another [2004 SCR 36] wherein at page 41, it has been held as under:—
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> '..... Even otherwise in the circumstances of the case, the mere absence of 25 days cannot be viewed as a wilful absconsion at this stage. Even from the police record, it does not appear that the accused intentionally and with mala-fide purpose absconded from the scene of occurrence.'
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> 6. The learned Judge in the Shariat Court has not considered the application flied by the petitioner, herein, nor does it appear from the order of the Shariat Court or the record that absence of the petitioner was deliberate and wilful. The plea about his ailment has not clearly been refuted by the complainant party. Therefore, the absence of the petitioner on 26.2.2007 cannot at all be termed as wilful and deliberate"

7. Furthermore, the record unequivocally demonstrates that the appellant had previously filed an application for exemption from personal appearance before the trial Court, which was duly accepted. The exemption was granted on compassionate grounds,

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[1] [2007 SCR 517

specifically for the medical checkup of his daughter. This exemption order was subsequently challenged by way of a revision petition before the High Court, which remains pending. Consequently, the order of the trial Court granting exemption has neither been set aside nor invalidated and, therefore, continues to hold legal effect. In such circumstances, where the appellant lawfully left the country under a valid exemption granted by the trial Court, there was no justifiable basis for the High Court to recall his bail on the erroneous ground of abscondence. The appellant's actions were consistent with the exemption order, and his departure cannot, by any stretch, be deemed willful evasion or abscondence. The judgment of the High Court, being premised on this flawed reasoning, is a nullity in the eye of the law. Its sustenance would not only undermine the principles of justice but also set a dangerous precedent. Lower Courts, influenced by such a judgment, may begin to declare accused persons as absconders without adhering to the mandatory procedural safeguards enshrined in the Code of Criminal Procedure. To prevent such legal missteps and preserve the sanctity of due process, the impugned judgment of the High Court must be set aside.

In view of the above, this appeal is accepted, and the judgment of the High Court is set-aside.

JUDGE **JUDGE**

Mirpur,
18.11.2024