

1994 SCMR 2142

[Supreme Court of Pakistan]

**Present: Sajjad Ali Shah, C.J., Fazal Karim
and Muhammad Munir Khan, JJ**

Brig. (Retd.) IMTIAZ AHMAD---Petitioner

versus

**GOVERNMENT OF PAKISTAN through Secretary, Interior
Division, Islamabad and 2 others---Respondents**

Civil Petition for Leave to Appeal No. 161 of 1994, decided on 14th July, 1994.

(On appeal from the judgment dated 13-4-1994 of the Lahore High Court, Lahore passed in I.C.A: No. 163 of 1994).

(a) Constitution of Pakistan (1973)---

---Art. 199---Power of judicial review under Art. 199 of the Constitution--Scope---Judicial restraint essential to the continuance of rule of law.

The power under Article 199 of the Constitution is the power of judicial review. That power "is a great weapon in the hands of Judges, but the Judges must observe the Constitutional limits set by the parliamentary system on their exercise of this beneficial power, namely, the separation of powers between the Parliament, the Executive and the Court.

Judicial review, must, therefore, remain strictly judicial and in its exercise, Judges must take care not to intrude upon the domain of the other branches of Government.

Under a Constitutional system which provides for judicial review of executive actions, it is, a fallacy to think that such a judicial review must be in the nature of an appeal against the decision of the Executive Authority. It is not the purpose of Judicial Authority reviewing executive actions to sit on appeal over the executive or to substitute the discretion of the Court for that of the administrative agency.

Judicial restraint is so essential "to the continuance of rule of law", "for the continued public confidence in the political impartiality of the judiciary" and the voluntary respect for the law as laid down and applied by the Courts.

Nottinghamshire C.C. v. Secretary of State (1986) All ER 199 Mir Abdul Baqi Baluch v. The Government of Pakistan PLD 1968 SC 313 and Dupont Steels Ltd. v. Sirs (1980) 1 All ER 529 ref.

(b) Criminal Procedure Code (V of 1898)---

---S. 154---Criminal trial---Registration of case ---Effect---Investigation--Phases.

The effect of the registration of a case is to set in train an investigation by the police in accordance with law.

In every investigation there are by and large three different phases. First of all, the administrative phase; next, the judicial phase; and, finally, the executive phase when the orders of the Court or the Tribunal are, if necessary, executed or promulgated. Quite plainly fairness to the suspect demands that he should be given a chance of stating his case before the final period: the execution. Equally fairness demands that the suspect shall be given a chance of putting his side of the case before the judicial inquiry is over. But on the other side, and the other side is entitled to fairness just as the suspect is. Fairness to the inquirer demands that during the administrative period he should be able to investigate without having at every stage to inquire from the suspect

what his side of the matter may be. Of course it may be difficult to find out the particular point at which the administrative phase ends and the judicial phase begins.

Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party.

Norwest Holst Ltd. v. Department of Trade and others (1978) 3 All ER 280 and Wiseman v. Borneman (1971) AC 297 ref.

(c) Constitution of Pakistan (1973)---

---Art. 199 (1) (a) (ii)---Jurisdiction of High Court under Art. 199 (1) (a) (ii) of the Constitution---Nature---Continued control over the investigation exercised by the Court is prejudicial to the accused and detrimental to the fairness of the procedure apart from being without jurisdiction---High Court cannot assume the role of investigator.

The jurisdiction which the High Court exercises under clause (a) (ii) of clause (1) of Article 199 of the Constitution is the jurisdiction to declare that "any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect.

Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. There is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without acquiring any authority from the Judicial Authorities and it would, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course, subject to the right of the Court to intervene in an appropriate case.

Control over the investigation exercised by the Court was prejudicial to the accused and detrimental to the fairness of the procedure apart from being without jurisdiction.

High Court cannot- assume the role of investigator. This could obviously not be done, for the authority to register and investigate a criminal case in law vests in the police and not in Court.

Jamal Shah's case PLD 1966 SC 1; PLD 1966 SC 50; Imperial Tobacco Ltd. and another v. Attorney-General (1981) AC 718; Malik Shaukat Ali Dogar and 12 others v. Ghulam Qasim Khan Khakwani and others PLD 1994 SC 281 and Khawaja Nazir Ahmad's case AIR 1945 P C 18 ref.

(d) Qanun-e-Shahadat (10 of 1984)---

---Art. 129, illus. (e)---Official act---Performance of official act---Presumption.

There is a presumption that official acts have been regularly performed i.e. with due regard to the relevant formalities and within the relevant powers and that a conclusion of excess and irregularity is, therefore, not to be lightly reached.

Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan through Secretary, Ministry of Law and Parliamentary Affairs PLD 1992 SC 646; Mohtarma Benazir Bhutto v. The President of Pakistan PLD 1992 SC 492 and Muhammad Abdu Miah's case PLD 1959 SC (Pak.) 276 ref.

(e) Qanun-e-Shahadat (10 of 1984)---

---Art. 161---Privileged document---Concept---No immunity for accountability is available when the matter concerns the commission of a crime or fraud.

If the documents are relevant to establish the commission of crime or fraud by the accused and are not made for legitimate purposes such as for the preparation of the defence of the accused which the interest of justice may, require to be kept confidential, the documents would not be privileged.

There are no matters of fact, in the possession of officials, concerning solely the internal affairs of public business, civil or military, which ought to be privileged from disclosure when material is to be ascertained upon an issue in a Court of justice.

In any community under a system of representative Government and removable officials, there can be no facts which require to be kept secret with that solidity which defies even the inquiries of a Court of justice. "To cover with the veil of secrecy", the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country". Such a secrecy can seldom be legitimately desired. It is generally desired for the purpose of partisan politics or personal self-interest. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption. Whether it is the relations of the Treasury to the Stock Exchange, or the dealings of the Interior Department with Government lands, the facts must constitutionally be demandable, sooner or later, on the floor of House. To concede to them a sacrosanct secrecy in a Court of justice is to attribute to them a character which for other Purposes is never maintained, a character which appears to have been advanced only when it happens to have served the interests of some individual to obstruct investigation into facts which might fix him with a liability.

No immunity from accountability is available particularly when the matter concerns the commission of a crime or fraud.

The Anglo-American System of Evidence in Trials at Common Law by Jhon Henry Wigmores ref.

(f) Constitution of Pakistan (1973)---

---Art. 13---Public servant---Law does not confer any immunity against criminal prosecution upon a public servant---Question being of the misappropriation of public money and misuse of public power, no question of violation of Art. 13 of the Constitution could arise.

There is no law conferring immunity against criminal prosecution upon a public servant.

The law makes no difference between great and petty officers; they are all amenable to justice: The question being of the misappropriation of public money and misuse of public power, no question of violation of Article 13 of the Constitution can arise.

Wilkes v. Wood (1769) 19 St. Tr. 1406 ref.

Muhammad Akram Sheikh, Advocate Supreme Court instructed by -Imtiaz Muhammad Khan, Advocate-on-Record for Petitioner.

Shahzad Jehangir, Senior Advocate, - Iftikhar Hussain Chaudhry, Advocate instructed by Raja Abdul Ghafoor, Advocate-on-Record for Respondent No. 1.

Nemo for Respondents Nos., 2 and 3.

Date of hearing: 14th July, 1994.