

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Syed Mansoor Ali Shah

Criminal Petition No. 1667 of 2021

(Against the order dated 22.06.2021 of the Lahore High Court, Rawalpindi Bench passed in CrI. Revision No. 158/20)

Adeel Rasheed. ... Petitioner

Versus

The State and another. ... Respondents

For the Petitioner: Mr. Ansar Nawaz Mirza, ASC.

For the State: Mirza Abid Majeed,
Additional Prosecutor-General, Punjab.

Complainant: Fahad Bin Rauf, In-person.

Date of Hearing: 29.08.2022

ORDER

Qazi Faez Isa, J. The petitioner was convicted for the offence of dishonestly issuing a cheque under section 489-F of the Pakistan Penal Code, 1860 ('PPC') as the cheque of one million, five hundred and eighty thousand rupees issued by him was dishonoured. The prosecution established its case against the petitioner (beyond reasonable doubt), and he was sentenced to three years rigorous imprisonment and to pay a fine of forty-five thousand rupees; in default of payment of fine the petitioner would have to undergo one-month simple imprisonment. The petitioner appealed his conviction and sentence. The Appellate Court upheld the conviction but reduced his substantive sentence to one-year rigorous imprisonment while maintaining the fine and the punishment in default of payment of the fine. The High Court maintained the decision of the Appellate Court.

2. We have heard the submissions of the learned counsel representing the petitioner, the learned Additional Prosecutor-General, Punjab ('APG') on behalf of the State (respondent No. 1) and the complainant (respondent No. 2). The learned Mr. Ansar Nawaz Mirza, representing the petitioner, was not able to show any illegality or defect with regard to the petitioner's conviction. We have also independently satisfied ourselves that the prosecution had successfully established its case against the petitioner.

3. The learned Mr. Ansar Nawaz Mirza then contended that the petitioner may be released on probation under the Probation of Offenders

Ordinance, 1960 (**'the Ordinance'**). To support his contention, he submits that the petitioner: (a) has served out a major portion of his sentence, (b) will pay the fine and (c) is ready to do community service for a period of one year. He submits that section 5 of the Ordinance permits a convict to be released on probation. And, under section 3(2) of the Ordinance this power can also be exercised in appeal and revision, and, may also be exercised by this Court by virtue of Article 187 of the Constitution of the Islamic Republic of Pakistan read with Order XXXIII Rule 6 of the Supreme Court Rules, 1980 (respectively **'the Constitution'** and **'the Rules'**). In response to our query as to why the matter should not be remanded for consideration of the trial, appellate or revisional court, learned counsel submitted that by the time (after remand) it is listed for hearing, heard and decided the petitioner would have served out his remaining sentence. Reliance was placed on the decisions of the High Courts in the cases of *Ghulam Dastagir v State*,¹ *Saeed Ahmed Kalhoro v State*² and *Vikash v State*.³ In response to our query the learned counsel stated that there is no precedent of this Court with regard to his submissions.

4. The State through the learned APG, suggested that the petitioner should do community service with the Parks and Horticulture Authority, Rawalpindi and suggested this organization as the petitioner is a resident of Rawalpindi and there are parks close to where he resides. The complainant (respondent no. 2) primarily wanted his money back.

5. The Ordinance defines a *probation order*⁴ as *an order made under section 5*. Therefore, it would appropriate to reproduce section 5:

'5. Power of court to make a probation order in certain cases. –

(1) Where a *Court* by which-

- (a) Any male person is convicted of an offence not being an offence under Chapter VI or Chapter VII of the Pakistan Penal Code (Act XLV of 1860), or under Section 216A, 328, 382, 386, 387, 388, 389, 392, 393, 397, 398, 399, 401, 402, 455, or 458 of that Code, or an offence punishable with death or transportation for life, or
- (b) Any female person is convicted of any offence other than an offence punishable with death.

is of opinion that, having regard to the circumstances including the nature of the offence and the character of the offender, it is expedient to do so. The *Court* may, for reasons to be recorded

¹ PLD 2014 Balochistan 100.

² PLD 2017 Sindh 592.

³ 2018 YLR 461.

⁴ Section 2(e) of the Probation of Offenders Ordinance, 1960 (PLD 1961 Federal Statutes, 65).

in writing, instead of sentencing the person at once, make a probation order, that is to say, an order requiring him or her to be under the supervision of a *Probation Officer* for such period, not being less than one year or more than three years, as may be specified in the order.

Provided that the *Court* shall not pass a probation order unless the offender enters into a bond, with or without sureties, to commit no offence and to keep the peace and be of good behaviour during the period of the bond and to appear and receive sentence if called upon to do so during that period;

Provided further that the *Court* shall not pass a probation order under this Section unless it is satisfied that the offender or one of his sureties, if any, has a fixed place of abode or a regular occupation within the local limits of its jurisdiction and is likely to continue in such place of abode or such occupation, during the period of the bond.

(2) While making a probation order, the *Court* may also direct that the bond shall contain such conditions as in the opinion of the *Court* may be necessary for securing supervision of the offender by the *Probation Officer* and also such additional conditions with respect to residence, environment, abstention from intoxicants and any other matter which the *Court* may, having regard to the particular circumstances of the case consider necessary for preventing a repetition of the same offence or a commission of other offences by the offender and for rehabilitating him as an honest, industrious and law-abiding citizen.

(3) When an offender is sentenced for the offence in respect of which a probation order was made, that probation order shall cease to have effect.'

6. A convict may be placed under the supervision of a probation officer (for a period of one year to three years) provided he executes a bond stipulating that he shall not commit any offence, shall keep the peace and be of good behaviour, and must abide by any other condition of his probation, failing which he shall *appear and receive sentence if called upon to do so* during the period of his probation.

7. The preconditions permitting the making of a probation order with regard to the petitioner are met. The petitioner is a young man and, on our query, the learned APG informed us that he does not have a criminal record. We are in agreement with the observations made by a Division Bench decision of the Peshawar High Court,⁵ which held that:

'8. The object of punishing an offender is the prevention of offences or reformation of the offender. Punishment would be a greater evil, if instead of reforming an offender, it is likely to harm the offender to repetition of crime with the possibility of irreparable injury to him. The provisions of the Probation of Offenders Ordinance

⁵ *State v Mazdoor* (PLD 1969 Peshawar 226, p. 230, para 8).

are, thus, intended to enable the Court to carry out the object of reformation and give the accused person a chance of reformation which he would lose by being incarcerated in prison.'

The learned counsel representing the petitioner (in presence of the petitioner's father) states that the above conditions and the condition to do community service for a year are acceptable to the petitioner. We are of the considered view that to reform the petitioner he be released on probation by setting aside his sentence. However, it needs consideration whether a condition can be prescribed (in the probation order and in the bond to be executed by the petitioner) that he be made to do unpaid community service.

8. Section 5(2) of the Ordinance stipulates that any condition may be imposed '*for rehabilitating him [the convict] as an honest, industrious and law-abiding citizen.*' The Probation of Offenders Rules, 1961⁶ (**the Rules**) set out the duties of a probation officer, which include, to '*encourage every probationer placed under his supervision to make use of any recognized agency, statutory or voluntary, which might contribute towards his welfare and general well-being, and to take advantage of the social, recreational and educational facilities which such agencies might provide.*'⁷ Incidentally, the Province of Khyber Pakhtunkhwa has enacted a law⁸ which envisages unpaid community service which a convict may be ordered to do in a probation order.⁹ However, community service is not specifically provided for in the Ordinance, and it is the Ordinance which governs the province of Punjab.

9. In some countries a probation order is referred to as a *community service order*. An acclaimed academic noted the following positive aspects of a community service order:¹⁰

- (a) Restricts growth of prison numbers;
- (b) Reduces prison expenditure;
- (c) Enables offenders to 'pay back' for their wrongdoing;
- (d) Does not target the families of offenders;

⁶ The West Pakistan Probation of Offenders Rules, 1961, (PLD 1961 Federal Statutes 281), made pursuant to section 15 of the Probation of Offenders Ordinance, *ibid*.

⁷ Rule 10(d) of the West Pakistan Probation of Offenders Rules, 1961, *ibid*.

⁸ The Khyber Pakhtunkhwa Probation and Parole Act, 2021 (Gazette of Khyber Pakhtunkhwa, Extraordinary, dated 17 August 2021, p. 82).

⁹ Sections 2(b), 4(b) and 7 of the Khyber Pakhtunkhwa Probation and Parole Act, 2021, *ibid*.

¹⁰ Professor Shane Kilcommins, Faculty of Law, University College Cork, Ireland, *The Introduction of Community Service Orders: mapping its 'conditions of possibility'*.

- (e) Helps combat experience of alienation in offenders by providing them with an opportunity to perform constructive work in the community;
- (f) Promotes social integration by enabling offenders to associate with volunteers and the recipients of their assistance;
- (g) Reparation by offenders in an atmosphere of co-operation with the community and not in confrontation with authority;
- (h) Reparation has an intrinsic moral value of its own, and on another view, reparation finds its greatest justification in ensuring that the offender does not enjoy the fruits of his crime;
- (i) Provides offenders with the opportunity to participate in society and to develop a sense of social responsibility;
- (j) Undertake constructive work in the community; and
- (k) Provides a cheap humane way of rehabilitation, contains an element of 'bite', and is flexible.

A community service order (or a probation order, which includes unpaid community service) benefits the State, society and the convict. Another positive revealed by a study¹¹ was that there was a '*significant reduction in the rates of reoffending*' or recidivism.

10. The first recorded use of what may be akin to a community service order was by Prophet Muhammad (peace and blessings be upon him) when after the Battle of Badr¹² a prisoner could earn his freedom by teaching ten Muslims to read and write.¹³ A renowned Muslim jurist¹⁴ uses the phrase *fida' bil 'amal* with regard to the Battle of Badr prisoners who had secured their release on teaching, which would translate as, *securing release on account of your deeds*. This may also constitute *futuwwah*.

11. *Futuwwah* in Islam is the spiritual ethical concept of chivalry, mercy, altruism, and generosity.¹⁵ It is stated to be derived from the noted character of Prophet Muhammad (peace and blessings be upon him) as mentioned in the Holy Qur'an, that he *possessed a magnificent character-* وَإِنَّكَ لَعَلَىٰ خُلُقٍ عَظِيمٍ¹⁶ Therefore, emulating Prophet Muhammad (peace and

¹¹ Kiba Daniel Kurui, *A Study on Community Service Order in Uasin Gishu County in Kenya*, 2008, published by Grin Verlag, 2019.

¹² 13 March 624 AD (17 Ramazan 2 AH).

¹³ Muqatil ibn Sulayman (702-767), *Tafsir Muqatil*, published by Dar Ihya al-Turath al-Arabi, Beirut, 2003, vol. 2, p. 129; Abu Ubayd al-Qasim bin Sallam (774-838), *Kitab al-Amwal*, published by Dar al-Hady al-Nabawiyy, Egypt, 2007, vol. 1, pp. 308-309; Muhammad ibn Sa'd (784-845), *al-Tabaqat al-Kubra*, published by Dar al-Kutub al-'Ilmiyyah, Beirut, 1990, vol. 2, p. 16; Ahmad ibn Hanbal (780-855), *Musnad Ahmad*, Chapter; Musnad of 'Abdullah ibn Abbas, Hadith No. 2216.

¹⁴ Ibn Qayyim al-Jawziyyah (1292-1350) a disciple of Ibn Taymiyyah (1263-1328).

¹⁵ *Kitab al-Futuwwah*, translated by Sheikh Tosun Bayrak al-Jerrahi al-Halveti, New York, 1983.

¹⁶ Al-Qur'an, *surat Al-Qalam* (68) verse 4.

blessings be upon him) is praiseworthy, and he had said, '*I was sent only to perfect character/morality*' - إنما بُعِثْتُ لِأَتَمِّمَ مَكَارِمَ الْأَخْلَاقِ.¹⁷ *Futuwwah* are good deeds and Almighty Allah commands to *do justice and good deeds*- إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ¹⁸ Some exegetes¹⁹ are of the view that those who have a *sound heart* قَلْبٍ سَلِيمٍ²⁰ have the components of *futuwwah*. Reducing/setting aside the rigors and the alienation of imprisonment and substituting it with reformatory community service can be said to be the *futuwwah* of the victim (or that of the community, expressed through the State). A probation order which includes rendering of community service may also operate as *fida' bil 'amal*. Islamic *Shari'ah*, which includes analogous precedents from Islamic jurisprudence is a legally acceptable method of statutory interpretation.²¹

12. A probation order which mandates community service benefits the offender, the community and the State, as it saves the expense of keeping a convict imprisoned, and it also prevents the overcrowding of prisons. The convict's family unit is also not disrupted, and he may also retain his employment, and if he is studying continue to do so. It is less damaging to self-esteem and prevents exposure to undesirable elements in jail. In doing community service the convict pays back to society for his wrongdoing. Unpaid community service may also develop in the convict a sense of social responsibility and a sense of personal achievement. '*What attracts us is the opportunity which the community service order would give for constructive activity in the form of personal service to the community, and the possibility of a changed outlook on the part of the offender.*'²²

13. However, recourse to the Ordinance is rarely made by the prosecution, the defence, or the courts, despite it subsisting for sixty-two years. One reason could be that it was not envisaged that a convict could be made to do unpaid community service. But, (as noted by us above) the Ordinance does not exclude incorporating unpaid community service into a probation order. The stated object of the Ordinance is to rehabilitate a convict *as an honest, industrious, and law-abiding citizen* which objective may well be achieved by community service. Therefore, the prosecution,

¹⁷ 'Abdullah ibn al-Muqaffa (724-759), *al-Adab al-Saghir*, published by Dar Ibn al-Qayyim, Alexandria, p. 9; Abu Bakr al-Bayhaqi (994-1066), *al-Sunan al-Kubra*, Chapter 66, Hadith 20782.

¹⁸ Al-Qur'an, *surat An-Nahl* (16) verse 90.

¹⁹ Fakhr al-Din al-Razi (1150-1210), *Al-Tafsir al-Kabir*, Dar al-Fikr, Beirut, 1981, vol. 24, p. 151.

²⁰ Al-Qur'an, *surat Ash-Shu'ara* (26) verse 89.

²¹ See Article 227 of the Constitution of the Islamic Republic of Pakistan, and section 4 of the Enforcement of Shariat Act, 1991, PLD 1991 Central Statutes 373, reproduced below:

'4. Laws to be interpreted in the light of Shari'ah. -For the purpose of this Act-

(a) while interpreting the statute-law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court; and

(b) where two or more interpretations are equally possible the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution shall be adopted by the Court.'

²² *Report of the Advisory Council on the Penal System*, H.M.S.O. 1970, Chapter 3: 'Service to the Community'; 'Community Service', Baroness Wootton [1973] Crim.L.R. 1-72.

and the courts, keeping in view the nature of the offence and provided the Ordinance permits, should consider the request of a convict volunteering to do unpaid community service, and if appropriate, release the convict on probation by incorporating unpaid community service as part of the conditions of the probation order.

14. Therefore, since it has been stated on behalf of the petitioner that he has agreed not to commit any crime during the duration of his probation, has agreed to pay an amount of forty-five thousand rupees (equivalent to the amount of fine) to the complainant and has agreed to remain on probation for a period of one year doing unpaid community service of one hundred hours,²³ by the work assigned to him by the Parks and Horticulture Authority, Rawalpindi, under the supervision of the probation officer, Rawalpindi. The petitioner shall be released on probation subject to his furnishing a personal bond.

15. The learned Judge of the Trial Court shall order the release of the petitioner on probation upon the petitioner submitting the said bond, incorporating the noted terms, in the sum of fifty thousand rupees with one surety in the same amount, to the satisfaction of the Trial Court. However, if the petitioner fails to observe any of the conditions of his bond the Court may issue summons or warrant of his arrest, and, if after hearing the petitioner, the Court is satisfied that he has failed to observe any of the conditions of his bond, the Court may sentence him by restoring his original sentence and if the petitioner fails to pay the said compensation, he shall be dealt with in terms of section 6(3) of the Ordinance. Consequently, the sentence and fine, and sentence in default of fine, are set aside.

16. This petition is converted into an appeal and partly allowed in the aforesaid terms. Copy of this order be sent to the learned Judge of the Trial Court for information and **immediate implementation**. Copies for information and compliance be also sent to the Probation Officer, Rawalpindi and to the Parks and Horticulture Authority, Rawalpindi.

Judge

Judge

Islamabad:
29.08.2022
(M. Tauseef)

Approved for Reporting

²³ Which is the minimum stipulated period under section 5(1) of the Probation Offenders Ordinance, 1960.