

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

Mr. Justice Gulzar Ahmed, HCJ  
Mr. Justice Umar Ata Bandial  
Mr. Justice Mazhar Alam Khan Miankhel  
Mr. Justice Sajjad Ali Shah  
Mr. Justice Qazi Muhammad Amin Ahmed

**Criminal Petition No.299 of 2020**

*(Against the order dated 20.3.2020  
passed by the Islamabad High Court  
Islamabad in Cr. Misc. No.214/2020)*

***Raja Muhammad Nadeem***

*...Petitioner(s)*

**Versus**

***The State and another***

*...Respondent(s)*

**For the Petitioner:**

Syed Nayyab Hassan Gardezi, ASC  
Syed Rifaqat Hussain Shah, AOR along  
with petitioner

**For the Federation:**

Mr. Khalid Javed Khan,  
Attorney General for Pakistan  
Mr. Sohail Mehmood,  
Deputy Attorney General  
Ms. Shireen M. Mazari,  
Minister for Human Rights  
Dr. Safi Muhammad Mali, D.G. Health  
M/o N.H.S.  
Saeed Ullah Khan Niazi, Joint Secretary  
(Admn.)  
Asif Suhail, Director Legal  
Khalid Mehmood, Deputy Secretary,  
Ministry of Interior  
Nisar Ahmed, Section Officer

**For Islamabad Capital  
Territory**

Mr. Niaz Ullah Khan Niazi, Advocate  
General  
Mr. Amer Ali Ahmed,  
Chief Commissioner  
Mr. Hamza Shafqaat,  
Deputy Commissioner  
Waseem Ahmed Khan,  
Assistant Deputy Commissioner  
Waqar ud Din Syed, D.I.G. (Operations)  
Azhar Hussain Shah, DSP (Legal)

**For Government  
of Sindh (via video link):**

Mr. Salman Talibudin, Advocate General  
Mr. Sibtain Mehmood, Addl.A.G.  
Dr. Fayyaz Ul Hassan Shah, PG  
Mr. Muhammad Usman Chachar, ACS (Home)  
Mr. Nusrat Mengan, I.G (Prisons)  
Mr. Zahid Abbasi, Secretary Health

**For Government  
of Punjab:**

Mr. Shan Gul, Advocate General  
Ch. Faisal Fareed  
Additional Advocate General  
Mr. Ahmed Raza Gillani,  
Additional Prosecutor General  
Mirza Shahid Saleem Baig, I.G. (Prisons)  
Malik Shaukat Feroz, D.I.G. (Prisons),  
Rawalpindi Region  
Rana Zeeshan,  
Additional Secretary (Prisons)  
Muhammad Zaman, D.S.P. (Prisons)  
Saqib Nazir, Superintendent Adyala Jail  
Tahir Siddique,  
Assistant Superintendent Adyala Jail  
Amir Bashir,  
Assistant Superintendent Adyala Jail  
Majid Iqbal, Additional Secretary Punjab  
Iqbal Hussain,  
Special Secretary Home Punjab  
Adnan Yousaf, Sr. Law Officer  
Mr. Arif Kamal Noor,  
Prosecutor General Punjab  
*(via video link from Lahore Branch Registry)*

**For Government of  
K.P.K.**

Mr. Shumail Butt, Advocate General  
*(via video link from Peshawar Branch Registry)*  
Khuda Bakhsh, Special Secretary Health  
Dr. Shaheen Afridi,  
Additional Director General, Health  
Masood ur Rehman,  
Inspector General (Prisons)  
Ikram Ullah Khan, Home Secretary  
*(all appeared via video link from Peshawar  
Branch Registry)*

**For Government of  
Balochistan**

Mr. Arbab Muhammad Tahir,  
Advocate General  
*(via video link from Quetta Branch Registry)*  
Mr. Ayaz Khan Swati,  
Additional Advocate General Punjab  
Capt. (Retd.) Zafar Tahir Abbasi,  
Special Secretary Health  
Malik Yousaf, Inspector General (Prisons)  
Hameed Ullah Pechi, A.I.G. Prisons  
Niamat Ullah Khan Battazai,  
Prosecutor General  
Mushtaq Qazi,  
Additional Prosecutor General  
Abdul Lateef Kakar,  
Additional Prosecutor General  
*(all appeared via video link from Quetta Branch  
Registry)*  
Syed Baqar Shah, State Counsel.

**For Government  
of Gilgit-Baltistan**

Mr. Muhammad Iqbal, Advocate General  
Capt. (R) Ali Asghar,  
Inspector General (Prisons)

**For N.A.B.** Mr. Muhammad Hassan Akbar,  
Additional Prosecutor General

**For A.N.F.** Raja Inaam Amin Minhas,  
Special Prosecutor

**Amicus Curiae** Sh. Zameer Hussain, ASC

**From S.C.B.A.P.** Syed Qalb-e-Hassan, ASC/President  
**From P.B.C.** Mr. Zulfiqar Abbas Naqvi, ASC/Member  
Mr. Muhammad Akram Khaksar, V.C.  
**From P.H.C.B.A.** Mr. Abdul Latif Afridi, ASC/President  
**In C.M.A. 399/2020** Mr. Amjad Raza Bhatti, ASC  
**In C.M.A. 406/2020** In person  
**In C.M.A. 414/2020** Mr. Talat Mehmood Zaidi, ASC  
**In C.M.A. 415/2020** Mr. Hashmat Ali Habib, ASC  
**In C.M.A. 417/2020** Khawaja Haris Ahmed, Sr. ASC  
Mr. Munawar Iqbal Duggal, ASC

Date of hearing: 07.04.2020.

### **ORDER**

**Qazi Muhammad Amin Ahmed, J.-** A severe/acute respiratory syndrome is modern day reminder of past calamities, endured by the mankind; identified as *Corona Virus* disease 2019 (Covid-19), erupted in December 2019 in the Chinese City of Wohan, Metropolis of Hubai Province; it took humanity by surprise across the globe through human movement with no available treatment; the World Health Organization swiftly declared the disease as “*Pandemic*”; highly infectious, it attacks respiratory system with fallouts on vital organs; inbuilt immune system is the only defence against the disease with toll of the vulnerable, even in countries equipped with best health care system has been phenomenally high; no respite is within sight; isolation and dispersions of individuals are the suggested defences. It is in this backdrop that various High Courts in the country, Islamabad High Court being on the top, passed omnibus orders for the release of accused/convicts, lodged in different prisons, an issue taken up by the Court in the captioned petition filed by Raja Muhammad Nadeem, as “*Pro bono Publico*”.

2. Islamabad High Court Islamabad, assuming jurisdiction in Crl. Misc. No.214/2020 titled as *The State Vs. District Administration*, vide impugned order dated 20.3.2020 issued the following directions:-

- a) *The under trial prisoners alleged to have committed offences falling within the ambit of the non-prohibitory clause are admitted to bail, subject to furnishing such surety or security as may be deemed appropriate by an*

officer authorized in this regard by the Deputy Commissioner, Islamabad Capital Territory. The latter in consultation with the concerned incharge of Police Station shall ensure that the release on bail will not pose threat to public safety. They will endeavor to facilitate release of prisoners. It is clarified that this order is confined to those prisoners who's cases are pending before courts and related to police stations under jurisdiction of the Islamabad High Court. It is further clarified that this order shall also cover those cases in which bail has been refused because the declaration of emergency and the prevention of outbreak of corona virus is definitely a fresh ground.

- b) Before releasing a prisoner, proper screening shall be conducted by authorized officials nominated by the Ministry of National Health Services and Coordination, Government of Pakistan or the Director General (Health), Government of Pakistan, as the case may be. The officials shall also ensure screening of fresh admittance.
- c) The learned District and Sessions Judge (West), Islamabad shall nominate learned Judicial Officers to facilitate and guide the Deputy Commissioner in processing the cases pursuant to this order.
- d) Since time is of essence, therefore, this Court expects that the exercise pursuant to this order shall be completed at the earliest, preferably before 24-03-2020 and report submitted to the Registrar of this Court
- e) The Inspector General of Police and the Deputy Commissioner, Islamabad Capital Territory shall ensure that unnecessary arrests are not made by the Investigating Officers having regard to the law laid down by the august Supreme Court in the cases titled 'Muhammad Bashir v. Station House officer, Okara Cantt and others' (PLD 2007 SC 530) and 'Mst. Sughran Bibi v. The State' (PLD 2018 SC 595).
- f) The Deputy Commissioner, Islamabad Capital Territory shall identify such prisoners who are eligible to be considered for release under the Prison Rules, the Probation of Offenders Ordinance, 1960 and section 410(1) of the Cr.P.C. After identifying the eligible prisoners, their respective cases shall be processed under the relevant laws.

Pursuant to the above directions, 292 prisoners were released overnight.

3. Release of 519 prisoners in the Province of Sindh has been far more astounding; pursuant to some verbal direction, genesis whereof is a mystery, except the following press release dated 26.3.2020, issued by the Registrar of the High Court of Sindh:-

*"It is to inform that considering the present scenario of spreading of pandemic Coronavirus, on the direction of Hon'ble Chief Justice, Mr. Justice Ahmed Ali M. Shaikh, 829 UTPs have been released from the jails of Province of Sindh by the District Courts in the cases of lesser punishment."*

In pursuance whereof, Sessions Judges of the Province submitted reports regarding release of prisoners on the basis of lists tabulated by the Magistrates same day.

4. Lahore High Court Lahore followed the suit in W.P. No.1648/2020 titled as Bar Association Bahawalpur Vs. Federation of

Pakistan & others, albeit cautiously; it issued the following the direction:-

- g) *As regards, the prisoners confined because of non-payment of amounts of fine, diyat or daman, this court has been informed that all possible steps will be taken for fulfillment of their obligations by generating funds either from Bait-ul-Mall or inviting the financial sound persons to come in aid. So far as the persons undergoing civil prisons are concerned, the authorities shall move applications to the concerned courts, under whose orders they were put behind the bars, and those courts will decide whether their earlier order can be reviewed in prevalent unprecedented circumstances, or not;*

Injunctive order issued by this Court on 30.3.2020 closed the floodgates; none was released either in the Province of Punjab or Khyber Pakhtunkhwa Province.

5. It is argued that there was no occasion for the High Court to direct wholesale release of the prisoners; no petition seeking bail was posted before the Court; no notice was issued either to the State or to the complainant/victim of crimes and above all no jurisdiction vested in the Court to circumvent normal statutory procedures regulating release of accused/convicts on bail; the entire exercise was alien to law and cannot be countenanced on the fears of an impending calamity to the detriment of principle of trichotomy of power enshrined under the Constitution, concluded the learned counsel. Learned Advocate General, ICT, Islamabad though present before the Islamabad High Court during the hearings has, nonetheless, opted to abandon his support for the impugned order. Syed Qalb-e-Hassan, Sr.ASC, President, Supreme Court Bar Association of Pakistan while expressing concerns for the safety of prisoners has urged the Court to be benign upon the prisoners placed in vulnerable groups; he has requested for issuance of a direction for screening of prisoners, particularly the new entrants with a view to arrest spread of the disease. The learned Attorney General for Pakistan, after highlighting various steps taken by the Government to combat the menace, has suggested following recommendations for release of the prisoners:-

**U.T.P.'s**

*“Accused persons charged for offences under non-prohibitory clauses or under vagrancy law or offences carrying less than three years sentence may be considered for bail subject to the following:-*

- (a) *the benefit shall not extend in cases involving abuse/violent acts against children and women.*  
 (b) *benefit shall first be extended to persons otherwise suffering from ailments or physical or mental disability.*  
 (c) *benefit shall be extended to UTPs who are 55 years of age or older and then other male UTPs provided there is no history of past convictions.*

(d) benefit shall be extended to all women/juvenile UTPs.  
Bail in the above cases may be extended on personal bond.

**CONVICTED PERSONS**

The following categories of convicted persons may be considered for release by the Provincial Governments under Section 401 Cr.P.C.:

- (a) Convicts who have otherwise completed their sentences but remain in jail on account of non-payment of fine/monetary penalty;
- (b) Women/juvenile convicts who have completed 75% of their sentence and have no history of past convictions;
- (c) Convicts whose remaining term in jail is six months or less provided offence was not violence against women or children;
- (d) Women/juvenile who were sentenced to a term of one year or less.”

He surveyed the case law to argue that *suo motu* jurisdiction under the Constitution was not available to the High Court nor it could press into service the provisions of Section 561-A of the Code of Criminal Procedure 1898 to issue the impugned directions. Advocate Generals of all the Provinces joined the Attorney General for Pakistan to support recommendations laid by him before the Court.

6. Heard.

7. Being part of the global village, we are passing through difficult times, the pandemic is taking its toll on all spheres and walks of life; safe custody of prisoners is also facing challenges hitherto unknown, however, methods and means to manage the crises have to be essentially explored within a legal framework of statutory and judicial dispensation that amicably withstood the test of the times, therefore, the *vires* of the impugned actions is to be essentially examined and adjudged on legal touchstone. Article 175(2) of the Constitution of the Islamic Republic of Pakistan, 1973 provides as under:-

*“No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by under any law.”*

A High Court may possibly release an accused who is arrested or detained without warrant if he appears or brought before the Court, however, he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death, imprisonment for life or imprisonment for ten years, provided further that he shall not be released unless the prosecution has been given a notice to show cause as to why he should not be so released; what is unmistakably clear, that High Court would exercise

such power after notice to the prosecution, that too, on case to case basis having regard to the facts and circumstances of each. This provision of law has an inbuilt mechanism for release of a woman, underage accused or a sick or infirm person. Similarly, there is a mechanism for release of convicts through suspension of execution of their sentences; there is no concept of *en bloc* omnibus release of prisoners on the basis of declaration of health emergency issued by the World Health Organization in a context altogether different. Advisory by the international organizations to its member states is to be routed through Foreign Office; no such advisory calling upon the member states to empty their prisons has been issued; the impugned order is structured upon a misdirected premises.

Argument that our overcrowded prisons could be a breeding ground for the deadly virus is beside the mark. Barring few countries with low crime rates, most prisons in the world are overcrowded. An overcrowded prison, though an inconvenient abode, nonetheless, without a contaminated inmate is a safe place; instead of releasing them all, it is more expedient to screen the each after plugging the new entrants. Jail Rules laid down procedures to deal with epidemics and contagious diseases, in particular, section 7 of the Prisoners Act, 1900 provides complete mechanism to deal with a situation like one in hand:-

*“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.”*

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.

9. On the higher plane, High Court had no jurisdiction under the Constitution to take up the issue *suo motu*. Article 199 of the Constitution envisages *an aggrieved person*; there was none before the Court besides the bar of alternate remedy. It has been held by this Court in the case of Dr. Imran Khattak and another Vs. Mst. Sofia Waqar Khattak, PSO to the Chief Justice and others (2014 SCMR 122), as follows:-

*".....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 Constitution .....It 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.”*

With the exclusion of above powers, nothing is left in the field to sustain the impugned directions. Release of prisoners in the Province of Sindh, pursuant to a verbal direction, is even more disquieting.

10. Concomitant fears, aggravated by fast expanding contagion would susceptibly admit perceptual acceptance of the impugned arrangements but the law must not be a casualty even in most extreme or adversarial situations; it must reign supreme and the Government in the given legal framework must strive hard to combat the menace; the Court would not be swayed by popular themes. *“Judges rule on the basis of law, not public opinion, and they should be totally indifferent to the pressures of the times”* (Warren Earl Burger, 15<sup>th</sup> Chief Justice of the United States, 1969-1986). Sheikh Zameer Hussain, learned Sr.ASC, *amicus curiae*, has rendered us valuable assistance; he opined the impugned directions as *ultra vires*, referred to *Selected Writings of Justice HR Khanna*, edited by Dr. Lokendra Malik, a portion whereof is reproduced, hereunder:-

*“The need to foster a climate of discipline and adherence to democratic values cannot be overemphasized if we want to preserve and given long life to civil liberties and human rights. Freedoms guaranteed by Constitution cannot be absolute. They have to be subject to reasonable restrictions for the sake of their own survival.”*

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.

**Chief Justice**

**Judge**

**Judge**

**Judge**

**Judge**

Islamabad, the  
7<sup>th</sup> April, 2020  
Approved for reporting  
Azmat/-