

[Supreme Court of Pakistan]

Present: Asif Saeed Khan Khosa, C.J.,

Syed Mansoor Ali Shah and Munib Akhtar, JJ

LAHORE HIGH COURT BAR ASSOCIATION and others---Petitioners**Versus****GENERAL (RETD.) PERVEZ MUSHARRAF and others---Respondents**

Civil Review Petition No. 513 of 2014 in Constitutional Petition No. 14 of 2013, decided on 1st April, 2019.

Criminal Law Amendment (Special Court) Act (XVII of 1976)---

---S. 9---Constitution of Pakistan, Art. 10A---Criminal Procedure Code (V of 1898), S. 342---Trial for high treason---Constitution of Special Court---Accused delaying conclusion of trial by remaining a fugitive and absenting himself from court---Complaint against the accused was filed on 12-12-2013 before the Special Court, the charge was framed on 31-3-2014 and the prosecution evidence was closed on 18-9-2014 and since then the matter was dragging on due to absence of the accused---Significance, gravity and solemnity of the proceedings before the Special Court could not be undermined by delaying the trial due to non-appearance of the accused---Section 9 of the Criminal Law Amendment (Special Court) Act, 1976 ('the Act') envisaged that once the trial had begun, the trial shall not be adjourned by reason of absence of any accused person due to illness, or if the absence of the accused or his counsel had been brought about by the accused person himself, or if the behavior of the accused person prior to such absence had been, in the opinion of the Special Court, such as to impede the course of justice---Section 9, Criminal Law Amendment (Special Court) Act, 1976, mandated that the Special Court shall proceed with the trial after taking necessary steps to appoint an advocate to defend any such accused person---Section 9 was, therefore, an extension of the procedure for trial provided under S. 6 of the said Act and supported the purpose of the special law---Within the scope of the Act, if the accused voluntarily choose not to exercise his right to appear and to be present at trial, it did not infringe the fairness of the trial nor did it violate the right to fair trial under Art. 10A of the Constitution---To stop further proceedings of the trial, in such a situation, would amount to putting a premium on the fault of the absconder---Besides the control over the proceedings of the trial could not be allowed to vest in the accused---Accused, in the present case, was not merely absenting himself from attending the Special Court, he had also been declared a proclaimed offender---Being a fugitive from the law, the accused had lost the right to have an advocate appointed to defend him unless and until the accused surrendered before the court---In the context of the Act, if the accused voluntarily choose not to appear or join the proceedings, he lost his right to an explanation in terms of S. 342, Cr.P.C.---Supreme Court directed that the Special Court shall proceed with the trial on the next date of hearing; that in case the accused surrendered and appeared before the Court he would be entitled to record his statement under S. 342, Cr.P.C. and lead any other defence under the law, however, in case the accused failed to appear on the next date of hearing, being a proclaimed offender, the Special Court was empowered to proceed against the accused even in his absence under S. 9 of the Act---Case adjourned.

Abdul Hameed Dogar v. Federal Government through Secretary, Ministry of Interior and 2 others PLD 2016 SC 454; Ikramullah v. State 2015 SCMR 1002; Dr. Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265 and Hayat Bakhsh v. The State PLD 1981 SC 265 ref.

Hamid Khan, Senior Advocate Supreme Court, Taufiq Asif, Advocate Supreme Court and Sh. Ahsan-ud-Din, Advocate Supreme Court for Petitioners.

Sajid Ilyas Bhatti, Additional Attorney-General for Pakistan for the State.

Nasir-ud-Din, Special Prosecutor and Rao Abdul Jabbar Khan, Registrar, Special Court on Court's Call.

Salman Safdar, Advocate Supreme Court for Respondents.

Date of hearing: 1st April, 2019.

ORDER

SYED MANSOOR ALI SHAH, J.--On 07.3.2019, learned counsel for the petitioner informed this Court that trial of General (Retd.) Pervez Musharraf (accused/respondent No.1) before the Special Court, constituted under the Criminal Law (Special Court) Act, 1976 ("Act"), for the charge of high treason, stands stalled on account of absence of the accused from Pakistan. Report from the Registrar of Special Court was called for, to furnish reasons for the delay in the trial. More importantly, parties were put to notice to appear before the Court so as to determine as to how the Special Court may proceed further if the respondent deliberately and persistently fails to appear before it. Report of the Registrar, Special Court dated 20.3.2019, submitted before this Court, reveals that the complaint was filed against the accused on 12.12.2013, while formal charge was framed on 31.3.2014. The prosecution evidence stood recorded on 18.09.2014 and the accused was declared as a proclaimed offender on 12.7.2016. Since then the trial is at the stage of recording of statement of the accused under section 342, Cr.P.C. We took up the matter on 25.3.2019 and before determining the course of action regarding persistent absence of the accused from appearing before the Special Court, we thought it best to leave it to the Special Court to first decide on the future course of action. On 28.3.2019, learned counsel for the accused made a statement before the Special Court that the accused will appear before the Special Court for his examination under section 342, Cr.P.C. on 13.5.2019, but the Special Court directed the accused to appear on 02.5.2019 and the trial has been adjourned to the said date.

2. Learned counsel for the petitioner submitted that keeping in view the history of the case and the conduct of the accused, it is not likely that he will appear before the Special Court on the next date of hearing. They submitted that under section 9 of the Act, the Special Court can proceed against the accused if he fails to appear before the Court and prayed that directions be given to the Special Court to proceed and conclude the trial in the absence of the accused.

3. Learned counsel for the accused on the other hand referred to section 6 of the Act to submit that powers and procedure of the Special Court require presence of the accused, while section 9 deals with adjournments and cannot be interpreted to derail the procedure provided under section 6 of the Act. Order dated 19.07.2016 of the Special Court was also referred to where the Special Court was of the view that presence of the accused was required to proceed further in the matter.

4. We have heard the learned counsel of the parties at some length. This Court on 24.2.2016, in *Abdul Hameed Dogar v. Federal Government through Secretary, Ministry of Interior and 2 others* (PLD 2016 SC 454) directed the Special Court to proceed with the trial of the accused with all convenient dispatch and without any unnecessary delay. Looking at the progress of the trial, we note with concern that complaint against the accused was filed on 12.12.2013 before the Special Court, the charge was framed on 31.3.2014 and the prosecution evidence was closed on 18.9.2014 and since then the matter is dragging on due to absence of the accused. The report of the Registrar, Special Court cuts a sorry picture of the long delay in the trial. There cannot be a more grave an offence than high treason and more solemn a proceedings than the trial for high treason case before a Special Court. High treason is a constitutional offence. Article 6 provides that if a person abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means, is guilty of high treason. Constitution is the fundamental law of the land which people of Pakistan through their representatives in the National Assembly have adopted, enacted and have given to themselves. Obedience to the Constitution under Article 5 of the Constitution is the inviolable obligation of every citizen where ever he may be. The significance, gravity and solemnity of the proceedings before the

Special Court cannot be undermined by delaying the trial due to non-appearance of the accused. The parliamentary debate on the bill of this Act suggested that "the accused are charged with serious offences involving security and sovereignty of the State, therefore, it is in their interest that the cases, if they are proved innocent, if their innocence is proved should be decided as speedily and as quickly as possible¹? Section 9 of the Act prevents this and ensures that the trial must proceed without any adjournment. Section 9 of the Act provides as under:-

"9. Restriction of adjournments. No trial before the Special Court shall be adjourned for any purpose unless the Special Court is of opinion that the adjournment is necessary in the interests of justice and, in particular, no trial shall be adjourned by reason of the absence of any accused person due to illness, or if the absence of the accused or his counsel has been brought about by the accused person himself, or if the behavior of the accused person prior to such absence has been, in the opinion of the Special Court, such as to impede the course of justice but, in any such case, the Special Court shall proceed with the trial after taking necessary steps to appoint an advocate to defend any such accused person."

The above section envisages that once the trial has begun, the trial shall not be adjourned by reason of absence of any accused person due to illness, or if the absence of the accused or his counsel has been brought about by the accused person himself, or if the behavior of the accused person prior to such absence has been, in the opinion of the Special Court, such as to impede the course of justice. Section 9 mandates that the Special Court shall proceed with the trial after taking necessary steps to appoint an advocate to defend any such accused person. Section 9 is, therefore, an extension of the procedure for trial provided under section 6 of the Act and supports the purpose of the special law. Within the scope of this Act, if the accused voluntarily chooses not to exercise his right to appear and to be present at trial, it does not infringe the fairness of the trial nor does it violate the right to fair trial under Article 10A of the Constitution. To stop further proceedings of the trial, in this situation, would amount to putting a premium on the fault of the absconder. Besides the control over the proceedings of the trial cannot be allowed to vest in the accused.

5. In the present circumstances of the case, the accused is not merely absenting himself from attending the Special Court, he has also been declared a proclaimed offender on 12.7.2016. Being a fugitive from the law, the accused loses his right to audience [see *Ikramullah v. State* (2015 SCMR 1002); *Dr. Mobashir Hassan v. Federation of Pakistan* (PLD 2010 SC 265); *Hayat Bakhsh v. The State* (PLD 1981 SC 265)] as a consequence the accused has lost the right to have an advocate appointed to defend him unless and until the accused surrenders before the court.

6. We conclude that while section 342, Cr.P.C. enables the accused to explain any circumstances appearing against him in the evidence, however, in the context of this Act, if he voluntarily chooses not to appear or join the proceedings, he loses his right to such an explanation. Similarly, the accused being a proclaimed offender loses his right to audience and forfeits his right to put up a defence.

7. For the above reasons, the Special Court shall proceed with the trial on the next date of hearing. In case the accused surrenders and appears before the Court he would be entitled to record his statement under section 342, Cr.P.C. and lead any other defence under the law. However, in case the accused fails to appear on the next date of hearing, being a proclaimed offender, the Special Court is empowered to proceed against the accused even in his absence under section 9 of the Act.

8. Adjourned to a date to be fixed later on.

MWA/L-3/SC Order accordingly.