

Present: Umar Ata Bandial, Sajjad Ali Shah and Syed Mansoor Ali Shah, JJ

HASNAIN RAZA and another---Petitioners

Versus

LAHORE HIGH COURT, LAHORE and others (in both cases)---Respondents

C.P.L.As. Nos.1862-L and 1863-L of 2021, decided on 9th November, 2021.

(Against the strictures passed by the Lahore High Court, in its judgment dated 22.6.2021 delivered in F.A.O. No.28948 of 2019)

(a) Constitution of Pakistan---

---Arts. 202 & 203---Judicial strictures recorded against a judge of district/subordinate judiciary by the High Court/Appellate Court---Improper---Principles for warning or proceeding against a judge of the subordinate judiciary for grave inefficiency or misconduct stated.

Following are the principles for warning or proceeding against a judge of the subordinate judiciary for incompetence or misconduct:

i. An appellate court should not pass strictures in its judgment against the judge of the lower court whose judgment or order was impugned before it, relating to his efficiency or conduct;

ii. An appellate court should not summon in court the judge of the lower court whose judgment or order was impugned before it, to explain why and how he or she has made that judgment or order;

iii. An appellate court, if notices such procedural errors or irregularities in the proceedings conducted by the lower court which, it thinks, should not be repeated in other cases, may bring the same to the notice of the judge concerned through a confidential note separate from its judgment; and

iv. An appellate court, if is of the considered but tentative view supported by reasonable grounds that the judge of the lower court has exhibited grave inefficiency or has committed serious misconduct in discharge of his judicial duty that warrants disciplinary action, may inform the competent authority or the officer appointed by the competent authority to deal with such complaints, through a confidential report. The authority or the officer concerned was to deal with such confidential report and proceed with it further as per the relevant service laws, rules and instructions, notwithstanding the view of the appellate court, in the same manner as it or he dealt with other such complaints.

Nusrat Yasmin v. Registrar, PHC PLD 2019 SC 719 and Aijaz Ahmed v. State PLD 2021 SC 752 ref.

(b) Constitution of Pakistan---

---Arts. 202 & 203---Judicial strictures recorded by the High Court/Appellate Court against a judge of district/subordinate judiciary relating to his or her efficiency or conduct---Propriety---Public reprimand of a judge of the lower court regarding his judicial conduct by an appellate court while sitting in judgment over his or her judicial decision, either by recording a stricture or a censorious remark in its appellate judgment or by summoning the judge and reproaching him orally in open court, did not behove the judiciary of a constitutional democracy which boasted of the independence of judiciary as its salient pillar---Any such public condemnation of a judge lowered the public trust in the judicial institution, besides the harmful effect it had on the morale and confidence of the judge concerned as well as of his colleagues---While examining the decision of a court below, the higher court was to assess the reasoning and the legality of the decision challenged before it and not the ability or conduct of the author judge---Latter was the function of the disciplinary authority---Higher court, if so decided, could refer the matter to the disciplinary authority, in the manner elucidated in the judgment reported as Nusrat Yasmin v. Registrar, PHC (PLD 2019 SC 719), only on the administrative side.

Nusrat Yasmin v. Registrar, PHC PLD 2019 SC 719 ref.

(c) Constitution of Pakistan---

---Arts. 189 & 201---Vertical and horizontal precedents---Distinction and binding effect---Judicial effrontery---Effect---Judicial precedents may be classified into two categories: vertical and horizontal precedents---Vertical precedents meant the decisions of a higher court, and horizontal precedents meant the decisions of the same or coordinate court---All courts were absolutely bound by the vertical precedents

of a higher court---Such binding tie was often said to be a matter of owing obedience---Articles 189 & 201 of the Constitution also reinforced the binding effect of the vertical precedents---Judges were therefore obliged to follow a vertical precedent even when they disagreed with it; this ensured a degree of national uniformity in judicial decisions---Judges had little room to decide how much weight or value was to be given by them to that precedent---Precedent of the apex Court of the country must be followed by all other courts of the country who owed unflinching fealty to its decisions under the Constitution---Ignoring or refusing to follow the controlling precedent of the Supreme Court amounted to judicial effrontery, offended the constitutional mandate, and weakened the public confidence in the decisions of the apex Court of the country---Furthermore a higher court generally adhered to horizontal precedents - its own earlier decisions - but it may depart from or overrule any of its own decisions by sitting as a larger bench if there was a compelling justification to do so.

Garner et al., *The Law of Judicial Precedent*, p. 27 (2016); *Gately v. Massachusetts*, 2 F.3d 1221 (1st Cir. 1993); *Hutto v. Davis*, 454 U.S. 370 (1982); *Brown v. Allen*, 344 U.S. 443 (1953) and Garner et al., *The Law of Judicial Precedent*, p. 35 (2016). ref.

Shahid Shaukat Ch. Advocate Supreme Court for Petitioners along with Petitioner in person.

Nemo for Respondents.

Date of hearing: 9th November, 2021.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---"Every judge of the courts of this land - from the highest to the lowest - should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure that they may be free in thought and independent in judgment, it applies to every judge, whatever his rank."¹

2. Two judges of the District Judiciary of Punjab have approached this Court for redressal of their grievance against the stricture and direction passed against them by the Lahore High Court in para 23 of its judgment dated 22.06.2021 while deciding appeals against their judicial orders. They have prayed that the said stricture and direction, having been passed against them in derogation of the principles enunciated by this Court in *Nusrat Yasmin v. Registrar, PHC (PLD 2019 SC 719)* and *Aijaz Ahmed v. State (PLD 2021 SC 752)*, may be expunged. The impugned stricture and direction are as follows:

23. Before parting with this order, it is observed that the conduct of Messrs Hasnain Raza and Nazia Ali, the then Civil Judges, Sheikhpura, while holding proceedings in the suit for specific performance as well as application under section 12(2) C.P.C., filed by the first vendee, *prima facie*, seems to be dubious. In this backdrop, let the Office to put the matter before the Hon'ble Chief Justice for initiation of regular inquiry against the said Judicial Officers.

The facts of the appeals, relating to the dispute between the parties thereto, are not relevant for deciding the grievance agitated before us in the present petitions; they are, therefore, not being stated here.

3. We have considered the submissions of the petitioners and read the cases cited by them. The question involved in the present case is: whether a High Court, or any other appellate court, can record in its judgment a stricture against the judge of the lower court whose judgment or order is impugned before it, relating to his or her efficiency or conduct. This question has been considered in depth and answered authoritatively, in the light of relevant provisions of the Constitution and law, by a three member Bench of this Court in the *Nusrat Yasmin* case. The decision made in the *Nusrat Yasmin* case on the said question of law was later-on endorsed and followed by another Bench of this Court in the *Aijaz Ahmed* case, relied upon by the petitioners. We, therefore, think it unnecessary to re-consider the same question again, especially when we find ourselves in agreement with what was decided in the *Nusrat Yasmin* case. What we consider appropriate to do is to recapitulate the principles enunciated therein for clear understanding of, and strict compliance by, all the appellate courts including the High Courts:

- i. An appellate court should not pass strictures in its judgment against the judge of the lower court whose judgment or order is impugned before it, relating to his efficiency or conduct;

- ii. An appellate court should not summon in court the judge of the lower court whose judgment or order is impugned before it, to explain why and how he or she has made that judgment or order;
- iii. An appellate court, if notices such procedural errors or irregularities in the proceedings conducted by the lower court which, it thinks, should not be repeated in other cases, may bring the same to the notice of the judge concerned through a confidential note separate from its judgment;
- iv. An appellate court, if is of the considered but tentative view supported by reasonable grounds that the judge of the lower court has exhibited grave inefficiency or has committed serious misconduct in discharge of his judicial duty that warrants disciplinary action, may inform the competent authority or the officer appointed by the competent authority to deal with such complaints, through a confidential report. The authority or the officer concerned is to deal with such confidential report and proceed with it further as per the relevant service laws, rules and instructions, notwithstanding the view of the appellate court, in the same manner as it or he deals with other such complaints.

Public reprimand of a judge of the lower court regarding his judicial conduct by an appellate court while sitting in judgment over his or her judicial decision, either by recording a stricture or a censorious remark in its appellate judgment or by summoning the judge and reproaching him orally in open court, does not behove the judiciary of a constitutional democracy which boasts of the independence of judiciary as its salient pillar. Any such public condemnation of a judge lowers the public trust in the judicial institution, besides the harmful effect it has on the morale and confidence of the judge concerned as well as of his colleagues.

4. The District Judiciary is the backbone of our judicial system, and the judges of the District Judiciary perform the onerous task of dispensing justice at the frontline by dealing with a large number of cases in a difficult and demanding environment. The judges of the higher courts must appreciate the stressful and challenging conditions in which these judges perform. Our judicial system acknowledges the fallibility of judges, and hence provides for appeals and revisions. Higher courts everyday come across orders of the lower courts which are not justified either in law or in fact and modify or set them aside; that is the function of an appellate court. It is often said that a judge who has not committed an error is yet to be born. This applies to all judges, no matter how high or low in rank they may be. The intemperate or extravagant criticism on the ability of a person having a contrary view is often founded on one's sense of his own infallibility. This must be avoided, and the judicial approach should always be based on the consciousness that everyone may make a mistake. While examining the decision of a court below, the higher court is to assess the reasoning and the legality of the decision challenged before it and not the ability or conduct of the author judge. The latter is the function of the disciplinary authority. The higher court, if so decides, can refer the matter to the disciplinary authority, in the manner elucidated in Nurat Yasmin case, only on the administrative side.

5. The Nurat Yasmin case enunciated important principles of law for dealing with the matters like the present one, and it was therefore circulated amongst all the Hon'ble Judges of all the High Courts of the country for their information. And those principles were reiterated by this Court in the Aijaz Ahmed case. Needless to mention that a decision of this Court, to the extent it decides a question of law or enunciates a principle of law, is binding on all other courts of the country including the High Courts, under the mandate of Article 189 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"). Similar is the binding effect of such a decision of a High Court, under Article 201 of the Constitution, on all courts subordinate to that High Court. To appreciate the scope and extent of the binding force and authority of judicial precedents, they may be classified into two categories: vertical and horizontal precedents.² Vertical precedents mean the decisions of a higher court, and horizontal precedents mean the decisions of the same or coordinate court. All courts are absolutely bound by the vertical precedents of a higher court. This binding tie is often said to be a matter of "owing obedience".³ Articles 189 and 201 of our Constitution also reinforces the binding effect of the vertical precedents. Judges are therefore obliged to follow a vertical precedent even when they disagree with it; this ensures a degree of national uniformity in judicial decisions. The judges have little room to decide how much weight or value is to be given by

them to that precedent. Unless we wish anarchy to prevail within the judicial system, a precedent of the apex Court of the country must be followed by all other courts of the country who owe unflinching fealty to its decisions under the Constitution.⁴ Ignoring or refusing to follow the controlling precedent of this Court amounts to judicial effrontery, offends the constitutional mandate, and weakens the public confidence in the decisions of the apex Court of the country. As Jackson J. said, humbly but firmly, of the Supreme Court: "we are not final because we are infallible, but we are infallible only because we are final."⁵ A higher court generally adheres to horizontal precedents - its own earlier decisions - but it may depart from or overrule any of its own decisions by sitting as a larger bench if there is a compelling justification to do so.⁶

6. For the above reasons, these petitions are converted into appeals and allowed: the impugned stricture and direction are expunged. The learned Judge of the High Court may, if deems it proper and necessary, act in accordance with the principles settled in the cited precedents, and recapitulated above. Office shall dispatch a copy of this judgment to the Registrar, Lahore High Court to be placed before the learned Judge concerned.

MWA/H-14/SC Petitions allowed.

¹ Lord Denning, The Due Process of Law, p. 65 (1993) quoting from *Sirros v. Moore* 1974 3 All ER 776.

² Not until the early 1980s did scholarly commentators first use the antonyms *horizontal* and *vertical* in reference to precedents. Before that time, the phrase *stare decisis* was often ambiguous. It could refer to a court's standing by its own earlier decisions or to a court's following or distinguishing the precedent of a higher court. The vertical/horizontal terminology promotes clearer thinking by avoiding the ambiguity. See Garner et al., The Law of Judicial Precedent, p. 27 (2016).

³ *Gately v. Massachusetts*, 2 F.3d 1221 (1 st Cir. 1993).

⁴ *Hutto v. Davis*, 454 U.S. 370 (1982).

⁵ *Brown v. Allen*, 344 U.S. 443 (1953).

⁶ Garner et al., The Law of Judicial Precedent, p. 35 (2016).