

Form No: HCJD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT LAHORE.
JUDICIAL DEPARTMENT

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Writ Petition No.24302/2019.

██████████

VS. Province of Punjab, etc.

S.No. of order/ proceeding	Date of order/ proceeding.	Order with signatures of Judge, and that of parties or counsel, where necessary.
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06.02.2020

Barrister Sarah Belal, Orubah Sattar Ahmad, Zainab Mehboob, Sana Farrukh, Mahmood Iftikhar Ahmad Zufar, Ahmad Hassan Khan Niazi, Mehr Muhammad Iqbal, Imran Khan Kulair, Advocates for the petitioner.

Sardar Jamal Sukhera, Advocate General, Malik Abdul Aziz Awan, Additional Advocate General, Mr. Zafar Hussain Ahmad, Additional Prosecutor General with Dr. Qadeer Alam, AIG (Prisons), Iqbal Hussain, Special Secretary Home, Aamir Shehzad, Assistant Superintendent Jail, Hafiz Qamar Abbas Section Officer (Home Department).

Through instant Writ Petition the petitioner has challenged the order dated 04.05.2018 passed by Additional Chief Secretary (Home) with the following prayer: -

- i) *Declare that the impugned order dated 04.05.2018 is illegal, void and of no legal effect;*
- ii) *Order immediate release of the Petitioner from jail;*
- iii) *Order Respondents No.1 to 4 to pay compensation to the Petitioner for keeping him on death row and in illegal and unlawful confinement after completion of his life imprisonment, since issuance of Presidential Notification had commuted his punishment into life imprisonment;*
- iv) *Direct that the execution of Petitioner during pendency of this Petition may kindly be suspended;*
- v) *Grant any other relief that may be deemed just and equitable in the circumstances."*

2. Briefly the facts of the case are that ██████████ alias ██████████ (petitioner) was arrested in case FIR No.301 dated 11.07.1998 registered under sections 302, 324, 347/34 PPC police station

Qadirabad, District Mandi Bahau Din. On conclusion of trial vide judgment dated 05.07.1999, co-accused were sentenced to imprisonment for life, whereas, the petitioner was mainly convicted under section 396 PPC and sentenced to death. The petitioner challenged his conviction and sentence through Criminal Appeal No.732/99 (Murder Reference No.347-T/1999), which was dismissed vide judgment dated 26.02.2002 (announced on 20.03.2002), as such, conviction/sentence was upheld by this Court. Afterwards, the petitioner filed Criminal Petition No.301-L of 2002 for grant of leave before the august Supreme Court of Pakistan, which was declined vide order dated 11.09.2002, followed by a Criminal Review Petition No.54/2002 which was however withdrawn on the ground of compromise, the said order is reproduced here-under :-

"Learned counsel for the petitioner seeks permission to withdraw this Criminal Review Petition."

3. Subsequently, the petitioner moved an application before the learned trial court for his acquittal on the basis of compromise, but said application was dismissed vide judgment dated 16.07.2005. The said order was assailed through Writ Petition No.15161/2005 before this Court, which was dismissed on 13.11.2006 and the order dated 13.11.2006 was challenged before the august Supreme Court of Pakistan in Civil Petition No.2441-L/2006, which too was dismissed vide order dated 21.02.2007. Civil Review Petition No.603/2016 filed against the judgment dated 21.02.2007 passed in CP.No.2441-L/2004, was also dismissed on 28.04.2017. During this period the mercy petition of the petitioner was rejected by the President of Islamic Republic of Pakistan (*Government of Punjab Home Department, Lahore Letter No.72/2002/MP/DC dated 27th March, 2015, referred*).

4. Another round of litigation commenced after promulgation of Presidential Notification dated 13.12.2001, whereby, in exercise of his powers under Article 45 of the Constitution of Islamic Republic of Pakistan, 1973, the President of Pakistan granted special remissions in sentences to those condemned prisoners who were

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juveniles at the time of commission of offence. On the basis of said Presidential Notification the petitioner filed mercy petition before the President of Pakistan, which remains pending before him till date, as has been told to this court. In the meanwhile, a black warrants had been issued, the petitioner filed a petition before the National Commission for Human Rights, Islamabad (respondent No.5) and the respondent No.5 onwards directed Secretary Home Department, Government of Punjab (respondent No.1) to look into the matter on humanitarian grounds. Then petitioner filed another application dated 06.07.2017 before respondent No.6 (trial court/Anti-Terrorism Court-I, Gujranwala) requesting that black warrants may not be issued. After waiting for the outcome of departmental correspondences, the petitioner filed yet another Writ Petition No.163120/2018 prayed that special remissions be granted to the petitioner, said petition was disposed of vide order dated 06.03.2018 with a direction to respondent No.2 (Additional Chief Secretary (Home), Government of Punjab. The said direction was not being complied with, the petitioner filed Criminal Original No.6820-W/2009 and during those proceedings the court was informed that vide letter dated 04.05.2018 a mercy reference for commutation of death sentence of the petitioner into life imprisonment has been forwarded to the Chief Minister Punjab for its further transmission to the President of Pakistan for orders, consequently the contempt petition was disposed of vide order dated 21.02.2019. Relevant portion from the order dated 04.05.2018 passed by Additional Chief Secretary (Home), is reproduced hereunder:-

"5. The case was examined in this department at length and keeping in view the juvenility of the accused, a mercy reference for commutation of death sentence into life imprisonment in respect of subject cited condemned prisoner was forwarded to the Chief Minister Punjab for its further transmission to the Honourable President of Pakistan for orders.. The outcome of the reference is still awaited.

AND WHEREAS, in compliance with the order of Hon'ble Lahore High Court, Lahore passed in Writ Petition No.163120 of 2017, an opportunity of personal hearing was granted to the petitioner's brother

Muhammad Abbas alongwith his counsel on 09.04.2018 and Mian Mohsin Rasheed, Additional Secretary (Prisons) was appointed as hearing officer in this regard.

AND WHEREAS, Mian Mohsin Rasheed, Additional Secretary (Prisons) after hearing the petitioner's brother and his counsel submitted a report stating therein that a mercy reference for commutation of death sentence of the petitioner into life imprisonment has been forwarded to the Chief Minister Punjab for its further transmission to the Honourable President of Pakistan for orders and further proceedings will be carried out after the outcome of the reference. In the meantime execution proceedings will remain suspended."

This order dated 04.05.2018 has been challenged through the instant writ petition, with prayer reproduced above.

5. After hearing the arguments of learned counsel for the parties at full length and examining the entire record, some of the facts which remain admitted by the parties can be summarized as under:-

- a) The petitioner was booked in a criminal case (FIR No.301/1998 registered on 11.07.1998 regarding an occurrence of the same date i.e. 11.07.1998);
- b) It is a fact that vide judgment dated 05.07.1999 on his conviction the petitioner was sentenced to death, which conviction as well as sentence ultimately stands affirmed before the Hon'ble Supreme Court of Pakistan;
- b) There is no denying the fact that Presidential Notification dated 13.12.2001 was issued in exercise of powers under Article 45 of the Constitution of Islamic Republic of Pakistan, 1973, whereby the President of Pakistan granted special remissions in sentences to those condemned prisoners who were juveniles at the time of commission of offence;
- c) It is a fact that earlier mercy petition of the petitioner was rejected by the President of Islamic Republic of Pakistan, whereas, second mercy petition to seek benefit of above referred Presidential Notification has not yet been decided by the President;
- d) It is a fact admitted by respondent No.1 in reply to this writ petition that petitioner was a juvenile at the time of commission of the crime;
- e) Further the Home Department/respondent No.1 in reply to this writ petition in categorical terms admit

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that although the law barred the award of death sentence to a juvenile accused from the date of enforcement of Juvenile Justice System Ordinance, 2000, but at the same moment it has been admitted that benefit of said Ordinance was extended to the accused of those cases which were registered earlier to its promulgation but were not decided and were pending trial on the date of enforcement of this Ordinance;

- f) The respondent No.1 in written reply has come out with a clear stance that execution of death sentence in cases of juvenile accused decided some month prior to the enforcement of the Juvenile Justice System Ordinance would be unfair and such cases shall be brought at par with other cases;
- g) There is also no doubt, rather it also remains admitted position that legal heirs of the deceased have also forgiven/pardoned the accused/petitioner.

6. From the above summary of facts, it becomes almost obvious that as a matter of fact that legal heirs of the victim having forgiven the accused/petitioner have lost their interest in hanging the petitioner to gallows, whereas, departmental agencies by and large have agreed to the proposition that it will be unfair to deny the benefit of a legislation (Juvenile Justice System Ordinance or the Presidential Notification dated 13.12.2001) to the petitioner, when the same benefit has already been extended to other similarly placed accused persons.

7. In such a situation when it has been admitted by the government that petitioner was entitled to the benefit of above referred Ordinance as well as Presidential Notification, then we are afraid that irrespective of the fact that earlier mercy petition of the petitioner might have been rejected by the President of Pakistan, the respondent No.1 (Home Department) was not required at all to have still sent a reference to the President of Pakistan for considering the case of the petitioner for commutation of his death sentence. The plea taken by the Provincial Government is that under section 402-B Cr.P.C. a restriction existed for it to exercise its powers to commute the sentence of death in case where the President has already passed

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an order. But, we are of the view that here in this case the petitioner was not begging for anything over and above the legal or constitutional mandate, rather he was only seeking enforcement of a government policy executed in the light of Charter of United Nations Convention on the rights of Children, 1989 (UNCRC), International Convention on Civil and Political Rights, 1966 (ICCPR) and the Presidential Notification and that too on admitted factual and legal premises. It is admitted position that the policy has the force of law. There can be no second opinion that enforcement or implication of law, especially when it favours an accused, could not be restricted at any stage on any ground.

8. In addition to our above referred legislation and Presidential Notification, we are also cognizant of the fact that Pakistan is signatory to the United Nations Convention on the Rights of Children, 1989 (UNCRC) as well as International Convention on Civil and Political Rights, 1966 (ICCPR). Article 37(a) of the UNCRC and the Article 6 paragraph 5 of the ICCPR binds all members' states not to impose death penalty for crimes committed by persons of less than eighteen years of age. The promulgation of Juvenile Justice System Ordinance 2000 as well as the Presidential Notification dated 13.12.2001 was in fact carrying on the obligations set out by above referred two treaties.

9. Another aspect of the matter is that earlier vide letter No.8/41/2001-Ptns dated 13th December, 2001, the President of Pakistan in exercise of his prerogative under Article 45 of the Constitution of Islamic Republic of Pakistan, 1973 granted special remissions in sentences. The operative part of the text of the said letter is reproduced:-

"The death sentence of those condemned prisoners who were juveniles as defined in the Juvenile Justice System Ordinance, 2000 at the time of commission of offence stands commuted to life imprisonment provided that the death sentence has been awarded under Ta'zir and not Qisas or under other Haddood Laws.

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The Provincial Governments shall ensure that the age as recorded by the trial court entitles the condemned prisoner to such commutation."

As it appears on the basis of above letter, the executive authorities started to consider the cases of juvenility of offenders and this issue when came before the Hon'ble Supreme Court of Pakistan, the apex Court in the case "ZIAULLAH versus NAJEEBULLAH and others" (PLD 2003 SC 656), settled the proposition by holding that:-

"Essentially question relating to determination of the age of such claimant in terms of section 7 of the Juvenile Justice System Ordinance, 2000 can be settled judiciously for the purpose of treating the accused to be juvenile offender. As far as Executive Authorities or any Committee constituted by them is concerned, it enjoys no power to discharge the judicial function. If they allowed to do so, it would be negation of the concept of independence of judiciary. Similarly, it would give rise to number of related complications on account of which possibility would be that in the garb of exercise of such powers the judgments of the superior courts are nullified by reducing the sentence of death to life imprisonment by the Executive Authorities on the argument that the age of the accused was below 18 years at the time of commission of offence."

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In the light of above legal position, it remains a fact that here in this case the juvenility status of the petitioner was assessed by the learned trial court which was the proper and appropriate forum and no question has been put about his juvenility.

10. Therefore, after setting a proper law into motion and going through the entire exercise with regard to analysis of juvenility of the petitioner, it was totally unjust for departmental agencies to keep on restricting the uniform benefit of law as well as law to all similarly placed persons, on one excuse or the other. At the cost of repetition, we reiterate that juvenile status of the petitioner at the time of commission of the offence is not under question; the legal heirs of victim having pardoned the petitioner is beyond any doubt; giving benefit of same legislative intent to other similarly placed accused has not been denied; firstly the international legislation and secondly our domestic legislation impose a clear bar on the infliction of death

penalty on an accused under the age of eighteen years, thus, the claim of the petitioner to seek a benefit which otherwise, was fully available to him under the policy, having the force of law, could not have been denied by the departmental authorities at their level and no legislation could compel them to still refer the matter to the President of Pakistan for consideration merely on the ground that some earlier mercy petition had been dismissed by the President.

11. For what has been discussed above, we declare that the order dated 04.05.2018 passed by Additional Chief Secretary (Home) sending the reference to the President of Pakistan, is nullity in the eyes of law. Consequently, as otherwise, factual as well as legal position about the claim of the petitioner has not been denied by the respondents, his age of juvenility has already been undeniably assessed by the learned trial court as required by Section 7 of the Juvenile Justice System Ordinance, 2000, therefore, instead of sending the petitioner back to learned trial court for reexamination/reevaluation of his age, in exercise of our jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, we commute the death sentence of the petitioner to imprisonment for life, whereas, his other convictions/sentences if any under the same trial, shall remain intact.

- scd -
(Asjad Javaid Ghural) Judge.
- scd -
(Muhammad Qasim Khan) Judge.

Announced in open court on 13.03.2020.

APPROVED FOR REPORTING.

Javed*
(EXAMINER)
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Authorized under Article 87 of
the Qanun-e-Shahadat Order, 1984.
09/06/2020
- scd -
MUHAMMAD QASIM KHAN
JUDGE

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In Case No.
Examiner J.C.B (Copy Branch)
Lahore High Court, Lahore
9/6/2020