IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:
Mr. Justice Asif Saeed Khan Khosa, CJ
Mr. Justice Sh. Azmat Saeed
Mr. Justice Umar Ata Bandial

Constitution Petitions No. 10, 11 and 12 of 2019
(Regarding the allegations leveled through a media briefing against Muhammad Arshad Malik, Judge, Accountability Court-II, Islamabad)

Ishtiaq Ahmed Mirza *(in Const. P. No. 10 of 2019)*
Sohail Akhtar *(in Const. P. No. 11 of 2019)*
Tariq Asad *(in Const. P. No. 12 of 2019)*

…Petitioners

versus

Federation of Pakistan, etc. *(in all cases)*

…Respondents

For the petitioners: Ch. Munir Sadiq, ASC
Syed Ali Imran, ASC
Ch. Zubair Ahmed Farooq, ASC
Syed Rifaqat Hussain Shah, AOR
(in Const. P. No. 10 of 2019)
Mr. Muhammad Ikram Ch., ASC
(in Const. P. No. 11 of 2019)
In person *(in Const. P. No. 12 of 2019)*

For the respondents: Mr. Anwar Mansoor Khan, Attorney-General for Pakistan
Mr. Sajid Ilyas Bhatti, Additional Attorney-General for Pakistan
Mr. Sohail Mehmood, Deputy Attorney-General for Pakistan
(in all cases)

Dates of hearing: 16.07.2019, 23.07.2019 & 20.08.2019

ORDER

Asif Saeed Khan Khosa, CJ.: On 06.07.2019 a media briefing was held by Ms. Maryam Nawaz, Vice President of the Pakistan Muslim League (N) and a daughter of a former Prime Minister of Pakistan namely Mian Muhammad Nawaz Sharif who had been convicted and sentenced by Mr. Muhammad Arshad Malik, Judge, Accountability Court-II, Islamabad in connection with a Reference filed by the National Accountability Bureau and whose appeal is presently pending before the Islamabad High Court, Islamabad, and in that media briefing she, while flanked by some stalwarts of her political party, disclosed that the learned Judge mentioned above had contacted his old friend namely Nasir Butt, a worker of the political party of the former Prime Minister, and had asked for a meeting so as to express his remorse on having convicted Mian Muhammad Nawaz Sharif under pressure from "certain individuals". According to that media briefing a meeting then took place between the learned Judge and Nasir Butt at the Judge's residence and in that meeting a stenographer of the said Nasir Butt was also present. The said meeting was allegedly recorded through a video camera and some parts of the video so made were displayed in the media briefing showing the learned Judge dictating grounds of appeal which could be utilized for the benefit of Mian Muhammad Nawaz Sharif in his appeal filed against his conviction and sentence. In the said video the learned Judge was shown to be maintaining that Mian Muhammad Nawaz Sharif was convicted and sentenced by him without there being concrete evidence produced against him. The learned Judge was also shown in that video revealing that "certain individuals" confronted him with an embarrassing video from his past and required him to decide the case against Mian Muhammad Nawaz Sharif and, thus, the learned Judge succumbed to the pressure and convicted and sentenced him. The learned Judge was

also shown in that video to be admitting that the said conviction and sentence weighed heavily on his conscience and, therefore, he wanted to help Mian Muhammad Nawaz Sharif in order to rectify the wrong. On the very next day, i.e. 07.07.2019 the learned Judge namely Muhammad Arshad Malik issued a press release claiming that the conversation shown to be taking place in the above mentioned video had been distorted and twisted. In the said press release the learned Judge maintained that he knew Nasir Butt and his brother Afzal Butt for a long time and that during the course of the trial of Mian Muhammad Nawaz Sharif he was offered bribe and was also threatened with dire consequences in case he failed to cooperate and acquit Mian Muhammad Nawaz Sharif. It was further claimed by the learned Judge in that press release that he did not yield to those temptations, pressures or threats and that although he had acquitted Mian Muhammad Nawaz Sharif in one of the cases being tried by him yet he had convicted and sentenced him in the other case purely on merits and in accordance with the facts and evidence brought on the record. On 11.07.2019 the learned Judge swore an affidavit containing his detailed assertions in the above mentioned regard which affidavit was presented by him before the Honourable Acting Chief Justice of the Islamabad High Court, Islamabad who had then ordered the said affidavit to be placed on the record of the pending appeal filed by Mian Muhammad Nawaz Sharif against his conviction and sentence. The said affidavit contained some more details of the pressures applied and the temptations and bribe offered to the learned Judge for rendering a judgment acquitting Mian Muhammad Nawaz Sharif. It was also claimed by the learned Judge in the said affidavit that even after rendering the final verdict in the case against Mian Muhammad Nawaz Sharif he was approached by the above mentioned Nasir Butt and one Khurram Yousaf who referred to a video of the learned Judge which was followed by a visit to the learned Judge paid by one Mian

Tariq and his son who showed him "a secretly recorded manipulated immoral video in a compromising position." According to the learned Judge the purpose of showing that video to him was to blackmail and coerce him through one Nasir Janjua to record an audio message of the learned Judge for the satisfaction of Mian Muhammad Nawaz Sharif. The learned Judge had revealed in the said affidavit that thereafter while using the said video as a threat he was made to visit Jati Umrah where he met Mian Muhammad Nawaz Sharif who was on bail at the relevant time and in that meeting when the learned Judge tried to justify his verdict Mian Muhammad Nawaz Sharif was displeased. It was maintained by the learned Judge in the affidavit that in order to remove displeasure of Mian Muhammad Nawaz Sharif the above mentioned Nasir Butt had sought assistance of the learned Judge in the matter of preparing grounds of appeal for the benefit of Mian Muhammad Nawaz Sharif in his appeal against conviction and sentence pending before the Islamabad High Court, Islamabad. It was further revealed in the affidavit that the learned Judge had, during performance of *Umrah*, met a son of Mian Muhammad Nawaz Sharif namely Hussain Nawaz Sharif in Madina and on that occasion a hefty sum was offered to him as bribe besides requiring the learned Judge to resign from his office on the ground that he had to convict Mian Muhammad Nawaz Sharif under duress when there was no convincing evidence available against him on the record of the case. The learned Judge had statedly resisted all such temptations and threats not only in the said meeting in Madina but even subsequently when Nasir Butt and Khurram Yousaf had repeated the same threats and inducements.

2. After the above mentioned media briefing held by Ms. Maryam Nawaz there was an uproar in the country and different sections of the society started demanding immediate probe into the allegations leveled through the said

briefing. The subsequent press release issued by the learned Judge and the affidavit sworn by him had compounded the controversy and had deepened the anxiety felt by people belonging to all walks of life including politicians and the legal fraternity. It was in that backdrop that the present Constitution Petitions had been filed before this Court. The first hearing of these petitions took place on 16.07.2019 when we heard the learned counsel for two of the petitioners and one of the petitioners appearing in person whereafter it was found by us to be appropriate to seek assistance of the learned Attorney-General for Pakistan on diverse issues raised through these petitions and the options available in those regards. The learned Attorney-General for Pakistan was, thus, directed to appear before the Court on 23.07.2019 for the purpose of rendering such assistance.

3. On 23.07.2019 the learned counsel for the petitioner in Constitution Petition No. 10 of 2019 maintained that an Inquiry Commission comprising of an Honourable Judge of this Court should be constituted so as to find out the truth of the allegations and counter allegations leveled through the above mentioned media briefing held by Ms. Maryam Nawaz and the press release and the affidavit sworn by the learned Judge. The learned counsel for the petitioner in Constitution Petition No. 11 of 2019 submitted that contempt proceedings ought to be initiated against all the relevant persons who had tried to malign the judiciary of this country and a probe should also be ordered to be conducted by an Honourable Judge of this Court into the allegations leveled from the two sides. The petitioner appearing in person in Constitution Petition No. 12 of 2019 argued that different institutions were interfering in the working of the judiciary of this country and the allegations and the counter allegations leveled in the present matter required constitution of a Judicial Commission comprising of a retired Honourable Judge of this Court in order to inquire into the matter and to

dig out the truth so that dignity and grace as well as independence of the judiciary of this country remain unblemished. He further maintained that the Islamabad High Court, Islamabad ought to initiate an inquiry or investigation into the matter so that reality of the matter might be unearthed and the stain or slur on the name of the judiciary could be removed.

4. On the same date, i.e. 23.07.2019 the learned Attorney-General for Pakistan also appeared before the Court and straightaway informed us that on the basis of a complaint lodged by the learned Judge FIR No. 24 of 2019 had already been registered by the Federal Investigation Agency, Cyber Crime Reporting Centre, Islamabad in respect of commission of offences under sections 13, 20, 21 and 24 of the Prevention of Electronic Crimes Act, 2016 read with sections 34, 109 and 500, PPC. He further informed the Court that a person named Mian Tariq had already been arrested in connection with investigation of the said case and from the said accused person a land cruiser and a video had been recovered and he had claimed that he had been given the land cruiser and a sum of money through a cheque, which had been dishonoured by the concerned bank, as consideration for sale of the video which had been used to blackmail the learned Judge. The said accused person had further maintained before the investigating agency that he had sold the relevant video to one Mian Saleem Raza who had then handed the same over to Nasir Butt. We were informed that the said Mian Saleem Raza and Nasir Butt had already left the country surreptitiously. The learned Attorney-General for Pakistan had maintained that different laws in force in the country adequately took care of the allegations and the counter allegations leveled in the matter and, therefore, it might not be appropriate for this Court to probe into the matter itself or to get the matter probed into by somebody else through a Commission. In this respect the

learned Attorney-General for Pakistan had referred to section 16-B of the National Accountability Ordinance, 1999 read with section 34 of the Contempt of Court Ordinance, 2003 and had maintained that the National Accountability Bureau as well as the relevant Accountability Court were competent to take notice of the matter under the said laws. He had also referred to sections 177, 186, 189, 192 and 503, PPC to maintain that even the police could take notice of the matter and then to inquire into and investigate the offences mentioned in the said provisions of the Pakistan Penal Code. He had further pointed out that section 20 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 and particularly clauses 3, 4, 5, 17, 22 and 23 of the Electronic Media Code of Conduct, 2015 empowered the said Authority (PEMRA) to take cognizance of the issue and to hold appropriate proceedings. According to the learned Attorney-General for Pakistan an option available with this Court was to constitute a Commission to look into the matter and for constitution of such a Commission this Court was empowered under the Supreme Court Rules, 1980. He had further pointed out that under the Pakistan Commissions of Inquiry Act, 2017 even the Government of Pakistan could constitute a Judicial Commission to probe into the matter. He had, however, maintained that as the Federal Investigation Agency had already embarked upon an inquiry/investigation into the whole affair, therefore, this Court might not like to interfere in such a matter at such a premature stage. He had submitted that no commission of inquiry or any other authority could set at naught the judgment of conviction passed against Mian Muhammad Nawaz Sharif and his conviction and sentence could be interfered with only by the Islamabad High Court, Islamabad which was already seized of an appeal filed by him in that regard. He had maintained that the convicted person in that case could apply under section 428, Cr.P.C. for recording of additional evidence in the pending appeal either by the High

Court itself or by the trial court upon an order of the High Court in that regard and it was only when authenticity, relevance and admissibility of the relevant video were established before the High Court through such additional evidence then the effects of the facts disclosed through the said video on the conviction of Mian Muhammad Nawaz Sharif could be examined by the High Court. He had, however, hastened to add that the conduct of the learned Judge in the distasteful affair did call for a proper inquiry to be conducted by the Lahore High Court, Lahore which was the parent High Court of the learned Judge and no matter what the consequences of the relevant video were on the conviction of the relevant convicted person the conduct of the learned Judge ought to be attended to by the said High Court through appropriate departmental disciplinary proceedings. On the said date of hearing, i.e. 23.07.2019 we had adjourned the hearing of these maters for a period of three weeks so as to be apprised of the result of the inquiry/investigation being conducted into the matter by the Federal Investigation Agency.

5. On 20.08.2019 the learned Attorney-General for Pakistan submitted before us a report prepared by the Federal Investigation Agency and according to the said report the investigation into the matter is already underway, some arrests have been made, some recoveries have been affected and many persons have been quizzed. The said report reveals that there are two videos relevant to the present issues, i.e. the 'objectionable video' through which the learned Judge was blackmailed and which has already been recovered from the custody of the arrested accused person namely Mian Tariq and the 'subject video' which was displayed in the media briefing and which has not so far been recovered. The report shows that a forensic examination of the 'objectionable video' has already been conducted and the same has been found to be authentic and

genuine. The learned Attorney-General has informed that Ms. Maryam Nawaz and all those sitting on the stage when the 'subject video' had been displayed during the news briefing have maintained during the investigation that the said video is not with them and they do not even know where the same is at present. They had also expressed ignorance about who had made that video and when and where the same had been prepared. He has, however, undertaken that the relevant laboratory or expert shall be approached by the Federal Investigation Agency for forensic examination and audit of a copy of that video, if technically possible, as copies of the same can be found and made available.

6. After hearing the learned counsel for two of the petitioners, one of the petitioners appearing in person and the learned Attorney-General for Pakistan and after perusal of the report submitted by the Federal Investigation Agency we have found that the following issues need to be attended to by us in these matters:

(i) Which is the Court or forum that can presently attend to the relevant video for any meaningful consideration in the case of Mian Muhammad Nawaz Sharif?

(ii) How is the relevant video to be established as a genuine piece of evidence?

(iii) How is the relevant video, if established to be a genuine piece of evidence, to be proved before a court of law?

(iv) What is the effect of the relevant video, if established to be a genuine piece of evidence and if duly proved before the relevant court, upon the conviction of Mian Muhammad Nawaz Sharif?

(v) The conduct of the learned Judge namely Mr. Muhammad Arshad Malik in the episode.

We now proceed to discuss these issues one by one.

7. Issue No. (i):

Which is the Court or forum that can presently attend to the relevant video for any meaningful consideration in the case of Mian Muhammad Nawaz Sharif?

After having been convicted and sentenced by the trial court after a full-dressed trial an appeal filed by Mian Muhammad Nawaz Sharif against his conviction and sentence is presently pending before the Islamabad High Court, Islamabad and there cannot be two opinions about the legal position that it is that Court alone which can at present maintain, alter or set aside such conviction and sentence on the basis of the evidence brought on the record. Any Commission constituted by the Government or by this Court, any inquiry or investigation conducted by the police or by any other agency and any probe into the matter by any other institution or body can only render an opinion in the matter of the relevant video which opinion is treated by the law as irrelevant and it cannot *per se* be treated as evidence for the benefit of Mian Muhammad Nawaz Sharif in his appeal pending before the Islamabad High Court, Islamabad. The relevant video cannot be of any legal benefit to Mian Muhammad Nawaz Sharif unless it is properly produced before the Islamabad High Court, Islamabad in the pending appeal, its genuineness is established and then the same is proved in accordance with the law for it to be treated as evidence in the case. In the case of *Asif Ali Zardari and another v The State* (PLD 2001 SC 568) some audio tapes and their transcripts were produced before this Court when this Court was hearing an appeal against convictions and sentences and such material was produced to establish bias of the learned Judges of the High Court who had dismissed the appeal of the convicts. As the said audio tapes and their transcripts had never been duly proved in accordance with the law, therefore, the said material was neither allowed by

this Court to be brought on the record of the appeal nor was such material relied upon by the Court at the time of rendering its final judgment.

8. Issue No. (ii):

How is the relevant video to be established as a genuine piece of evidence?

With the advancement of science and technology it is now possible to get a forensic examination, audit or test conducted through an appropriate laboratory so as to get it ascertained as to whether an audio tape or a video is genuine or not and such examination, audit or test can also reasonably establish if such audio tape or video has been edited, doctored or tampered with or not. In the present case the learned Judge had asserted through his press release that the conversation shown to be taking place in the above mentioned video (the 'subject video') had been distorted and twisted. The advancement of science and technology has now made it very convenient and easy to edit, doctor, superimpose or photoshop a voice or picture in an audio tape or video and, therefore, without a forensic examination, audit or test of an audio tape or video it is becoming more and more unsafe to rely upon the same as a piece of evidence in a court of law. It must never be lost sight of that the standard of proof required in a criminal case is beyond reasonable doubt and any realistic doubt about an audio tape or video not being genuine may destroy its credibility and reliability.

9. Issue No. (iii):

How is the relevant video, if established to be a genuine piece of evidence, to be proved before a court of law?

Article 164 of the Qanun-e-Shahadat Order, 1984 provides as follows:

> **164. Production of evidence that has become available because of modern devices, etc.** In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques:
>
> Provided that conviction on the basis of modern devices or techniques may be lawful.

Admissibility of an audio tape or video in evidence before a court of law and the mode and manner of proving the same before the court are issues which have been discussed in many a case in this country and abroad and a summary of the case-law on the subject may advantageously be recorded here chronologically.

Islamic Republic of Pakistan through Secretary, Ministry of Interior and Kashmir Affairs, Islamabad – Applicant/Referring Authority v Abdul Wali Khan, M.N.A., former President of defunct National Awami Party
(PLD 1976 SC 57)

> "So far as tape records of speeches of some of the N.A.P. leaders are concerned, they stand on firmer ground. They are actual record of the speech as and when it was made. The officer recording the speech has been produced. He has produced the necessary tape and the tapes have been played in the Court. The officer concerned has identified the voice of the person speaking. Therefore, we see no reason not to accept these reports. They stand on the same footing as the transcripts of speeches personally recorded by officers attending the meetings at which the speeches complained of were delivered. The learned *amicus curiae* have also conceded that such tape records are admissible in evidence and that they have been so admitted by the Courts in this Country."

Hakim Ali Bhatti v Qazi Abdul Hakim and others
(1986 CLC 1784)

> "The evidence relating to first respondent and his supporter's speeches consisted of cassette or tape-record and transcripts of tape record speeches prepared after tape-recording and the statement of P.W. Haji Taj Din present at the meeting who had actually heard what was said by the first respondent and his supporters.
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> The learned counsel for the petitioner has relied on Yousaf Ali Ismail Nagrea v. State of Maharashtra AIR 1968 SC 147 at 149 and N. Shri Rama Reddy v. V.V. Giri AIR 1971 SC 1162, R.V. Maqsud Ali v. R.V. Ashiq Hussain 1965 (2) AER 464 PL.

The first respondent raised objection to the admissibility of this type of evidence.

In the case of S. Pralap Lenjh v. State of Punjab AIR 1964 SC 72. The Supreme Court of India accepted conversation or dialogue recorded on a tape-recording machine as admissible evidence.

In the case of Yousuf Ali Ismail Nagrea v. State of Maharashtra. The facts are that the appellant had walked into a pre-arranged trap. Mahajan and other police officer had hidden themselves in the inner rooms. Sh. Nagrea knew that the police officers were recording conversation and was naturally on the guard while talking to the appellants. The evidence of conversation was tendered at the trial of the offence. The contemporaneous dialogue between them formed part of the res gestae and is relevant and admissible under section 8 of the Evidence Act. The dialogue is proved by Sheikh. The tape-record of the dialogue corroborates his testimony.

In the case of N. Shri Rama Reddy v. Shri V.V. Giri AIR 1971 SC 1162. In this case the election petitioner had recorded on tape the conversation that had taken place between a witness Jagal Narain and petitioner. Objection was taken to admissibility of the recorded conversation. It was held by the Supreme Court of India that it was admissible.

In the case of R.M. Malkani v. State of Maharashtra AIR 1973 SC 157. It was held by the Supreme Court of India that the tape-recorded conversation was admissible in evidence.

In the case of R.V. Maqsud Ali 1965 (2) AER 464. In that case a conversation which took place in Punjab dialect between two persons and which had been recorded on the tape was played before the Jury and was admitted in evidence by the trial Judge. Objection was taken before the Court of Appeal regarding the admissibility in evidence of the tape-recorded conversation between the accused. Therefore, the point that specifically arose before the Court of appeal was "Is a tape-recording as such admissible in evidence, as a matter of law?" After referring to the observation in Mills Case 1962 (2) AER 298 the Appellate Court noted that the question regarding the admissibility of a tape-record was not actually decided in that case. The decision of High Court of Judiciary in Hopes Case 1960 Scots Law Times 264 was referred to and it was noted that the evidence of the police officer who listened to the tape-recorded was held to be admissible. The Court laid at p. 469:-

"We think that the time has come when this Court should state its views of the law on a matter which is likely to be increasingly raised as time passes. For many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The prints as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted, and now

there are devices for picking up, transmitting and recording, conversations. We can see no difference in principle between a tape-recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this Court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape-recording as admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged."

In consequence, the Court held that the tape-recorded conversation was admissible in evidence, subject to the limitation mentioned in the above extract.

In the case of Islamic Republic of Pakistan v. Adul Wali Khan PLD 1976 SC 57, the Hon'ble Supreme Court laid down the following dictum:

"So far as tape records of speeches of some of the N.A.P. leaders are concerned, they stand on firmer ground. They are actual record of the speech as and when it was made. The officer recording the speech has been produced. He has produced the necessary tape and the tapes have been played in the Court. The officer concerned has identified the voice of the person speaking. Therefore, we see no reason not to accept these reports. They stand on the same footing as the transcripts of speeches personally recorded by officers attending the meetings at which the speeches complained of were delivered. The learned *amicus curiae* have also conceded that such tape records are admissible in evidence and that they have been so admitted by the Courts in this Country."

I hold that the tape-record and its transcript are not admissible in evidence for the following reasons namely:-

(1) The tape-record had been prepared and preserved by the nephew of the petitioner. He is not an independent person and he does not belong to independent authority.

(2) The transcript from the tape-record was not prepared under independent supervision and control. The P.W. Haji Taj Din who prepared the tape-record stated in his affidavit that he handed over the cassette or tape-record to the petitioner. It was not annexed to the petition but it was produced before me by the witness himself.

(3) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.

(4) Accuracy of what was actually recorded had to be proved and satisfactory evidence, direct or circumstantial had to be there so as to rule out possibilities of tampering with the record.

(5) The witness who had made the tape-record was not part of his routine duties in relation to election speeches but it was actually made for the purpose of laying trap to procure evidence.

(6) The first respondent disputed that the tape-recorded voice was his and stated that there had been interpolation in the record.

The issue is decided in the negative and against the petitioner."

Muhammad Zahir Shah Khan and another v *Nasiruddin and others*
(1986 CLC 2463)

"3. One of the petitioners Zahir Shah has filed his affidavit of evidence in support of the petition on 20th April, 1985 while the other petitioner Malik Munsif did not file any affidavit of evidence. It may be mentioned here that although the petitioner mentioned names of as many as four private witnesses in the list of witnesses submitted alongwith his petition but affidavits of these witnesses were not filed alongwith the petition as required under the Rules. Therefore, in support of the petition, there was only one affidavit of Zahir Shah. The petitioner No. 1 was cross-examined by respondent No. 10 on 16th of October, 1985 and after close of his cross-examination the learned counsel for the petitioners made an oral request that he may be allowed to produce in evidence the four witnesses mentioned in the list of witnesses but this oral request of the learned counsel was disallowed by me on the ground that their affidavits of evidence were not submitted by the petitioners alongwith the petition as required under the Rules framed under section 62 of the Act published on 16th of March, 1985, vide notification No. F1(7)/85 Cord., dated 16th March, 1985. It may also be mentioned here that at the same time the learned counsel for the petitioners made a further oral request that he may be allowed to produce a video cassette alleged to have been prepared during the election campaign of respondent No. 10 but that prayer was also disallowed by me on the ground that neither this document is mentioned in the petition nor the date of acquiring the said cassette is disclosed anywhere by the petitioner. I also noted while declining the above request of the learned counsel in my order, dated 16th October, 1985, that no formal application was moved or filed by the petitioners in this behalf. The case was adjourned on 16th October, 1985 after closing the side of the petitioner to 19th October, 1985 for evidence of respondent No. 10. Respondent No. 10 was cross-examined by the learned counsel for the petitioner at length on 29th October, 1985 and respondent No. 10 closed his side on that date. On the same date, namely, 29th October, 1985 the learned counsel for the petitioner submitted an application under section 151, C.P.C. praying that the petitioner may be permitted to produce the video cassette in Court and that the petitioner is prepared to bear the expenses of playing that video cassette for consideration by the Tribunal. Notice of this application was given to the counsel for the respondent and the case was adjourned to 19th November, 1985 for

hearing of application as well as arguments on the main case. Before considering the two issues framed in the case I will first decide the application, dated 29th October, 1985 filed by the learned counsel for the petitioner under section 151, C.P.C. praying for permission to produce the video cassette as a document in the case. The application is vehemently opposed by the respondent No. 10 who in his counter-affidavit besides alleging that no ground has been made out for its production had denied that any video cassette was prepared during his election campaign. In the application filed on 29th October, 1985 the petitioner has sought permission to produce video cassette on the ground that this material was not within the knowledge of the petitioner prior to 14th October, 1985 when for the first time he was told about the existence of this video cassette by one Tamana Shah Warsi. It may be mentioned here that the petitioner appeared for cross-examination in Court on 16th October, 1985 i.e. after about two days of allegedly acquiring the knowledge about the existence of the video cassette. It is pertinent that the petitioner when produced in Court for cross examination made no attempt to make any further addition to his affidavit of evidence which was already filed in the Court alongwith the petition on 20th April, 1985. The learned counsel for the petitioner also made no request that he may be allowed to put further question in examination-in-chief as a result of discovery of some new material with regard to the controversy before the Tribunal. No doubt some questions were put to respondent No. 10 in cross-examination on 29th October, 1985 with regard to the video cassette which he denied but nothing was brought in evidence to establish that the denial made by respondent No. 10 in his cross-examination was incorrect. It may further be mentioned here that neither in the application under section 151, C.P.C. moved by the learned counsel for the petitioner on 29th October, 1985 nor in the supporting affidavit filed by petitioner Zahir Shah anything is disclosed to show that the contents of video cassette are relevant to the controversy in the petition. It is also not alleged either in the application or in the affidavit that the contents of the video cassette are relevant to prove any of the issues involved in the petition. The learned counsel for respondent No. 10 also rightly contended that the oral request of the petitioner having been declined by the Tribunal on 16th October, 1985 a written prayer in that regard was not maintainable. The learned counsel for the petitioner was unable to point out any provision of law under which the Tribunal after having once declined the oral request of the party could entertain a second request through a written application. Therefore, both on the legal plane as well as on merits no case is made out for allowing production of video cassette in evidence. I, therefore, reject the application of the petitioner filed on 29th October, 1985 seeking permission to produce the video cassette recorder in evidence in this petition."

Mst. Rukhsana Begum v *District Judge, Karachi (East), etc.*
(NLR 1987 Civil 799)

"This Constitutional Petition is directed against an order dated 26-11-1986 passed by the District Judge

Karachi East in Civil Revision Application No. 34/86 allowing the respondent's revision and rejecting the present petitioner's application under Section 151, CPC for permission to produce the cassette allegedly containing conversation between the parties as to the settlement talk after filing of the suit No. 221/85 which is pending in the Court of IVth Senior Civil Judge Karachi East.

2. I have enquired from the learned counsel for the petitioner as to the provision under which the above cassette was admissible as a piece of evidence. His reply was that Section 164 of the Qanun-e-Shahadat, 1984 (President's Order No. X of 1984) allows the production of cassette as a piece of evidence being a modern device. Section 164 of the Qanun-e-Shahadat 1984 (President's Order No. X of 1984) reads as follows:-

> *Sec. 164.* Production of evidence that has become available because of modern devices, etc. – In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques."

3. (a) A perusal of the above section indicates that it confers discretion on a Court to allow the production of any evidence that may have become available because of modern devices or techniques.

(b) In the instant case the learned Civil Judge has allowed the above application of the petitioner but the learned District Judge in revision took a contrary view on the basis of the two judgments of the two learned Single Judges of this Court in the cases of Hakim Ali Bhatti v. Qazi Abdul Hakim & others reported in 1986 CLC 1784 and Muhammad Zahir Shah Khan & another v. Nasiruddin and others, reported in 1986 CLC 2463.

4. Mr. Abdul Aleem K. Talib, learned counsel for the petitioner has vehemently submitted that since the learned trial Court has allowed the production of the cassette, the learned Revisional Court was not justifying in reversing the order. However, the fact remains that the petitioner has not been able to point out any infringement of any provision of law by the impugned order. In my view it is not a fit case for a Constitutional Petition. The petition is, therefore, dismissed *in limine*."

Asfandyar and another v Kamran and another
(2016 SCMR 2084)

"The record reveals that during investigation the petitioner tried to produce the footage of some C.C.T.V. which were produced by the petitioner/accused before the investigating officer. No doubt the trial Court, under section 164 of the Order, 1984, may allow to produce the said footage of C.C.T.V. but it is incumbent upon the defence to prove the same in accordance with the provisions of the Order, 1984. The defence had ample opportunity to produce in his defence, the concerned person who had prepared the said footage from the C.C.T.V. system in order to prove the same. In that eventuality, the adverse party would be given an

> opportunity to cross-examine the said witness regarding the genuineness or otherwise of the said document. Any document brought on record could not be treated as proved until the same is proved strictly in accordance with the provisions contained in the Order, 1984. While discussing these aspects of the case, the High Court restricted the admissibility only to the extent of Article 79 of the Order, 1984 whereas there are certain other provisions/Articles in the Order, 1984 for proving the documents which are procured through the modern devices and techniques. Mere producing any footage of C.C.T.V. as a piece of evidence in the Court is not sufficient to be relied upon unless and until the same is proved to be genuine. In order to prove the genuineness of such footage it is incumbent upon the defence or prosecution to examine the person who prepared such footage from the C.C.T.V. system. So we modify the impugned judgment to the extent that the accused is at liberty to produce evidence and prove the same strictly in accordance with the provisions of the Order, 1984 and it will not confine only to the Article 79 of the Order, 1984."

10. Apart from the precedent cases mentioned above a video recording or footage was held to be admissible in evidence upon fulfillment of some conditions in the following reported cases:

Ammar Yasir Ali v *The State*
(2013 P.Cr.L.J. 783)

> (Mere producing of CCTV video as piece of evidence and its watching in open court was not sufficient to be relied upon unless and until corroborated and proved to be genuine; as a proof of genuineness of such CCTV video, it was incumbent upon prosecution to examine the person who recorded the video to testify the same; prosecution even failed to point out the source of providing CCTV video; investigating officer who received CCTV video stated in his evidence that he received it from a person who did not want to disclose his name or identity being a man of some surveillance; investigating officer admitted that nothing was visible and identifiable in the video as such the CCTV was not reliable piece of evidence)

Akhtar Ali Ghowda v *The State*
(2015 MLD 1661)

Munas Parveen v *Additional Sessions Judge/Ex-Officio Justice of Peace, Shorkot and others*
(PLD 2015 Lahore 231)

> (Information conveyed over modern devices such as SMS validly accepted all over the world; however the witnesses in whose presence such information was conveyed or received are always important to prove a fact through its verification)

Shahid Zafar and others v *The State*
(2015 P.Cr.L.J. 628)

Sikandar Ali Lashari v *The State and another*
(2016 YLR 62)

Muhammad Sadiq @ Husnain and others v *The State and others*
(2016 P.Cr.L.J. 1390)

Zakir Hussain v *The State*
(2017 P.Cr.L.J. 757)

Babar Ahmad v *The State*
(2017 YLR 153)

Hasham Jamal v *The State and another*
(2018 YLR Note 105)

Muhammad Irfan v *The State and another*
(2018 P.Cr.L.J. 1319)

> (Forensic report prepared *qua* a video by an analyst could be looked into without reservation in view of S. 9(3) of the Punjab Forensic Science Agency Act, 2007; reliance placed upon forensic data, procured through technical system, which was not amenable to human interference)

Yasir Ayyaz and others v *The State*
(PLD 2019 Lahore 366)

> (Qualification is that of integrity of the procedure/process)

Muhammad Jawad Hamid and another v *Mian Muhammad Nawaz Sharif and others*
(2019 P.Cr.L.J. 665)

> (Newspaper cuttings or video recordings have to be proved by the author or creator)

11. The precedent cases mentioned above show that in the matter of proving an audio tape or video before a court of law the following requirements are insisted upon:

> * No audio tape or video can be relied upon by a court until the same is proved to be genuine and not tampered with or doctored.
>
> * A forensic report prepared by an analyst of the Punjab Forensic Science Agency in respect of an audio tape or video is

per se admissible in evidence in view of the provisions of section 9(3) of the Punjab Forensic Science Agency Act, 2007.

* Under Article 164 of the Qanun-e-Shahadat Order, 1984 it lies in the discretion of a court to allow any evidence becoming available through an audio tape or video to be produced.

* Even where a court allows an audio tape or video to be produced in evidence such audio tape or video has to be proved in accordance with the law of evidence.

* Accuracy of the recording must be proved and satisfactory evidence, direct or circumstantial, has to be produced so as to rule out any possibility of tampering with the record.

* An audio tape or video sought to be produced in evidence must be the actual record of the conversation as and when it was made or of the event as and when it took place.

* The person recording the conversation or event has to be produced.

* The person recording the conversation or event must produce the audio tape or video himself.

* The audio tape or video must be played in the court.

* An audio tape or video produced before a court as evidence ought to be clearly audible or viewable.

* The person recording the conversation or event must identify the voice of the person speaking or the person seen or the voice or person seen may be identified by any other person who recognizes such voice or person.

* Any other person present at the time of making of the conversation or taking place of the event may also testify in support of the conversation heard in the audio tape or the event shown in the video.

* The voices recorded or the persons shown must be properly identified.

* The evidence sought to be produced through an audio tape or video has to be relevant to the controversy and otherwise admissible.

* Safe custody of the audio tape or video after its preparation till production before the court must be proved.

* The transcript of the audio tape or video must have been prepared under independent supervision and control.

* The person recording an audio tape or video may be a person whose part of routine duties is recording of an audio tape or video and he should not be a person who has recorded the audio tape or video for the purpose of laying a trap to procure evidence.

* The source of an audio tape or video becoming available has to be disclosed.

> * The date of acquiring the audio tape or video by the person producing it before the court ought to be disclosed by such person.
>
> * An audio tape or video produced at a late stage of a judicial proceeding may be looked at with suspicion.
>
> * A formal application has to be filed before the court by the person desiring an audio tape or video to be brought on the record of the case as evidence.

12. As the trial court in the case of Mian Muhammad Nawaz Sharif has already become *functus officio* and as his appeal against his conviction and sentence recorded by the trial court is presently pending before the Islamabad High Court, Islamabad, therefore, the only Court which can take the relevant video in evidence of that case is the Islamabad High Court, Islamabad. An appellate Court can take additional evidence under section 428, Cr.P.C. which provides as follows:

> **428. Appellate Court may take further evidence or direct it to be taken.** (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.
>
> (2) Where the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.
>
> (3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken.
>
> (4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

Under this section an appellate court can take additional evidence on its own or upon an application of a party to the appeal, i.e. the appellant, the State or the complainant but in both such cases the appellate court has to record its reasons why it thinks that taking of additional evidence is necessary. The necessity of taking additional evidence at the appellate stage must be felt by the appellate court itself and the same is not to depend upon what a party to the appeal thinks of such necessity. After feeling the necessity of taking additional evidence and after recording reasons

for such necessity the appellate court may either take such evidence itself or direct it to be taken by a Magistrate or, when the appellate court is a High Court, by a Court of Session or a Magistrate. Where the additional evidence is taken by the Court of Session or the Magistrate it or he shall certify such evidence to the appellate court and the appellate court shall then proceed to decide the appeal on the basis of the pre-existing evidence as well as the additional evidence lawfully becoming a part of the record. It is, thus, obvious that in the context of the present matter if the Islamabad High Court, Islamabad, either on its own motion or on an application submitted by the appellant namely Mian Muhammad Nawaz Sharif, feels the necessity of taking additional evidence in the form of the relevant video then it may record its reasons for feeling such necessity and may then follow the steps mentioned in section 428, Cr.P.C. It goes without saying that in such a case the relevant video may be taken as (additional) evidence only after complying with the requirements detailed above for proving a video before a court of law.

13. Issue No. (iv):

> What is the effect of the relevant video, if established to be a genuine piece of evidence and if duly proved before the relevant court, upon the conviction of Mian Muhammad Nawaz Sharif?

If upon due fulfillment of the preconditions mentioned in the preceding paragraphs the relevant video is taken as additional evidence by the Islamabad High Court, Islamabad under section 428, Cr.P.C. either on its own motion or on an application submitted by the appellant namely Mian Muhammad Nawaz Sharif or any other party to the case then the High Court shall have to decide as to whether the conduct of the learned Judge of the trial court depicted through the said video, if found to be objectionable, had caused any prejudice or not. If the High Court comes to the conclusion that the process of trial and the evidence recorded during the trial were not affected by the conduct of the learned

Judge of the trial court then the Islamabad High Court shall have the option either to reappraise the evidence itself and decide the appeal on its merits after reaching its own conclusions on the basis of the evidence available on the record or to remand the case to the trial court for re-deciding the case after hearing of arguments of the parties on the basis of the evidence already recorded. We would not like to comment on these aspects any further as the choices available with the High Court in the above mentioned eventualities would lie within the jurisdiction and discretion of the High Court and such choices would be exercised by it on the basis of the facts found and the conclusions reached by it.

14. Issue No. (v):

The conduct of the learned Judge namely Mr. Muhammad Arshad Malik in the episode.

The pivot of the matter before us is the learned Judge of the trial court namely Mr. Muhammad Arshad Malik who had tried and decided the relevant criminal cases against Mian Muhammad Nawaz Sharif. He serves under the Lahore High Court, Lahore, was on deputation at the relevant time and was serving as a Judge, Accountability Court-II, Islamabad. We have been informed that he has already been relieved of that position and has been made an Officer on Special Duty (OSD) but he has not so far been repatriated to the Lahore High Court, Lahore and that is why no departmental disciplinary proceedings have been initiated against him so far. However, the press release issued by him on 07.07.2019 and the affidavit sworn by him on 11.07.2019 are themselves damning indictments against him. His admitted conduct emerging from that press release and the affidavit stinks and the stench of such stinking conduct has the tendency to bring bad name to the entire judiciary as an institution. He had unabashedly admitted in the press release and the affidavit that he had a shady past and had skeletons in his cupboard for which he was vulnerable to blackmail, during the trial being conducted by

him he had been holding private meetings with sympathizers of the accused person being tried by him, he was threatened and inducements were offered to him during the trial but he had not reported the same to any superior authority and had never considered recusing from the trial, after convicting the accused person in the trial he had met the convict at his residence in a different city, he had even met a son of the convict in a different country and finally he had tried to help the convict in his appeal filed against his own judgment by dictating some grounds of appeal and pointing out some stated weaknesses in the case against the convict convicted by him. Such admitted conduct of the Judge was shocking, to say the least, besides being abhorrent and offensive to the image of a Judge in the society. His sordid and disgusting conduct has made the thousands of honest, upright, fair and proper Judges in the country hang their heads in shame. The learned Attorney-General has assured the Court that the said Judge shall be repatriated to the Lahore High Court, Lahore immediately and we expect that after his repatriation appropriate departmental disciplinary proceedings shall be initiated against him by the Lahore High Court, Lahore forthwith.

15. In the end we find that it may not be an appropriate stage for this Court to interfere in the matter of the relevant video and its effects, particularly when the said video may have relevance to a criminal appeal presently *sub judice* before the Islamabad High Court, Islamabad. A criminal investigation is already being conducted into the matter by the Federal Investigation Agency, some other offences or illegalities under some other laws referred to by the learned Attorney-General might also entail inquiries or investigations by the competent agencies or fora and any probe into the matter by a Commission to be constituted by the Government or by this Court may end up only with an opinion which may have no relevance or admissibility in the relevant appeal pending before the Islamabad High Court, Islamabad. In

this view of the matter all these petitions are disposed of with the observations made above.

Chief Justice

Judge

Judge

Announced in open Court at Islamabad on 23.08.2019.

Chief Justice

Islamabad
23.08.2019
Approved for reporting.
Arif