IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT
MR. JUSTICE TASSADUQ HUSSAIN JILLANI
MR. JUSTICE NASIR-UL-MULK
MR. JUSTICE MOHAMMAD MOOSA K. LEGHARI
MR. JUSTICE SHEIKH HAKIM ALI
MR. JUSTICE GHULAM RABBANI

CRIMINAL PETITION NO.200 OF 2009
(On appeal from the judgment of the Sindh High Court, Karachi dated 30.10.2000 passed in Special A.T. Appeal No.43 of 2000)

Mian Muhammad Nawaz Sharif … …**Petitioner**

Versus

The State … …**Respondent**

For the Petitioner: Mr. Khawaja Haris Ahmad, ASC
Mr. Mehr Khan Malik, AOR

For the State: Mr. Shahadat Awan, P. G. Sindh
Mr. M. Yousaf Leghari, A. G. Sindh

Dates of Hearing: 08.06.2009 to 12.06.2009 &16.06.2009 to 18.06.2009

JUDGMENT

NASIR-UL-MULK, J.- The petitioner, Mian Muhammad Nawaz Sharif, was elected Prime Minister of Pakistan in the year 1996 for the second time and held the additional portfolio of Minister of Defence. He appointed General Pervaiz Musharraf as Chief of the Army Staff. On 12.10.1999, at around 4:30 p.m., the petitioner replaced him by General Zia-ud-Din. The news of this change was flashed on the electronic media at 5:00 p.m. Around that time General Pervaiz Musharraf was on board PIA Flight No. PK-805 returning to Pakistan from Sri Lanka. The flight was scheduled to land at Quaid-i-Azam International Airport, Karachi at 6:55 p.m. After the announcement of the change and while the aircraft was still in air, information was received at the Prime Minister House that the Pakistan Army had made

moves to takeover important installations and premises, including the Pakistan Television, Islamabad and the Prime Minister House, apparently as a reaction to the change in the leadership of the Army. It is alleged that in order to prevent General Pervaiz Musharraf's return to the country, the petitioner ordered that the flight PK-805 should not be permitted to land at Karachi or any other airport in the country and instead be diverted to another country. The activities that took place thereafter would be the subject of discussion latter and at this stage it is suffice to state that the aircraft carrying General Pervaiz Musharraf eventually landed at Karachi airport at about 7:50 p.m. By then the Army had seized power. General Pervaiz Musharraf later declared himself as Chief Executive and took control of the affairs of the country, whereas the petitioner along with his close relatives and political associates were taken into custody and detained.

2. On 10.11.1999, almost a month of the above incident, Lt. Col. Atiq-uz-Zaman Kiyani, Protocol Officer, who on the afternoon of 12.10.2999 was present at the Quaid-i-Azam International Airport to receive General Pervaiz Musharraf, lodged a five typed pages complaint at Police Station, Airport, District Maleer, Karachi. The contents whereof were incorporated as FIR No.201 of 1999, registered under sections 402-B, 365,120-B, 324/34, PPC read with section 7 of Anti Terrorism Act, 1997, wherein it was alleged that the petitioner and his co-accused had conspired and engineered the hijacking of aircraft of Flight PK-805 and put at risk the lives of the passengers on board the aircraft as there was imminent danger of its crash in view of the shortage of fuel, and thereby also attempted to commit Qatl-e-Amd. The co-accused nominated in the FIR were Syed Ghaus Ali Shah, the then Advisor to the Prime Minister on Sindh affairs, Rana Maqbool Ahmed, Inspector General of Police, Sindh, Aminullah Chaudhry, the Director General Civil Aviation Authority and Shahid Khaqan Abbasi, the Chairman Pakistan

International Airline. During the investigation, three other persons were added as accused namely, Mian Muhammad Shahbaz Sharif, brother of the petitioner and the then Chief Minister Punjab, Saif-ur-Rehman, Advisor to the Prime Minister and Saeed Mehdi, Principal Secretary to the Prime Minister. Later, Aminullah Chaudhry became an approver in the case and was accordingly granted conditional pardon. The remaining seven accused were tried by the Anti Terrorism Court No. I, Karachi on a charge framed in the following terms:-

> *"That you on or about 12.10.1999, in between 5.00 p.m. to 7.50 p.m. from the Air Space within the jurisdiction of Karachi Division (Flight Information Region) and in pursuance of conspiracy hatched in the Prime Minister's House, Islamabad, on 12.10.1999, in between 5.00 p.m. to 7.50 p.m. unlawfully seized/exercised the control of Air Craft No. PK-805 of P.I.A. along with its passengers and crew by taking control of Air Traffic Control by use of force viz. switching off run way lights and closing run way of Quad-e-Azam International Air Port, which did not allow the Air Craft to land at any Air Port in Pakistan and thereby committed an offence punishable under Section 402B R/W Sec. 109,114 PPC and within the cognizance of this Court.*
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> *I further charge you that on the above date, time and place in pursuance of the above mentioned conspiracy did not allow the Air Craft No.PK-805 to land anywhere in Pakistan but forced it to fly in the air with the result that its fuel became short and was likely to be crashed, with such intention and under such circumstances that if by that act you had caused the death of 198 passengers on board including crew and Chief of the Army Staff, you would have been guilty of Qatl-i-Amad and thereby committed offence punishable under Section 324 R/W Sec.109, 114 PPC and within the cognizance of this Court.*
>
> *I further charge you that on the above date, time and place in pursuance of above mentioned conspiracy, abducted 198 passengers of the above mentioned Air Craft including its crew and Chief of Army Staff with intent to cause the said passengers to be secretly and wrongfully confined and thereby committed an offence*

punishable under Section 365 R/W Section 109, 114 PPC and within the cognizance of this Court

I further charge you that on the above date, time and place after conspiracy to commit the offence of hijacking, abduction and attempt to murder, committed the said offences, the effect of which was likely to strike terror and create a sense of fear and insecurity in the people and passengers on board of Air Craft No.PK-805 of PIA and thereby committed an offence punishable under Section 7(ii) of A.T. Act and within the cognizance of this Court."

3. Upon conclusion of the trial, the Judge, Anti Terrorism Court, on 6th April, 2000, acquitted all the accused except the petitioner, who was convicted and sentenced:

(i) Under Section 402-B PPC, to undergo rigorous imprisonment for life with fine of Rs.500,000/-, in case of default of payment of fine, the petitioner to undergo for 5 years R.I. His entire property was ordered to be confiscated to the Government of Pakistan.

(ii) Under Section 7(ii) of the Anti Terrorism Act, 1997 and sentenced to suffer imprisonment for life with a fine of Rs.500,000/- in default whereof to suffer rigorous imprisonment for 5 years. The entire property of the petitioner was also ordered to be confiscated.

(iii) The sentences were ordered to run concurrently.

(iv) The Court further ordered the petitioner to pay compensation of Rs.2000,000/- to the passengers on board Flight No. PK 805 under Section 544-A Cr. P. C. and the same was ordered to be distributed equally among the passengers.

4. Against the judgment of the Trial Court, three appeals were filed; one by the petitioner against his conviction and sentences and the other two by the State, for enhancement of the sentence of the petitioner from life

imprisonment to death and against the acquittal of co-accused. The appeals were heard by a Full Bench of the Sindh High Court and were disposed of by a short order dated 30.10.2000. Two Honourable Members of the Bench maintained the conviction of the petitioner with modification in the sentences to the extent that the separate sentences under Section 402-B PPC and Section 7(ii) of the Anti Terrorism Act, were held not sustainable and the same were to be read as single sentence under Section 402-B PPC. The order of forfeiture of the entire property ordered by the Trial Court was also altered to forfeiture of moveable and immoveable property of the petitioner to the extent of the value of Rs.500 millions. The order of payment of compensation under Section 544-A Cr. P. C. to the passengers of the Flight was set aside. The appeals filed by the State were dismissed. The third Honourable Member of the Bench did not find the petitioner guilty of hijacking and, therefore, set aside his conviction under Section 402-B PPC but found him guilty of the offence of abduction and thus, sentenced him under Section 365 PPC to undergo 3 years rigorous imprisonment with a fine of Rs.500 millions in default whereof to under go rigorous imprisonment for 6 months. The Honourable Judge agreed with the majority to dismiss the appeals filed by the State. Detailed judgment in the case was released after more than a year on 01.11.2001. By then, the petitioner had left the country to live in exile after he was granted pardon by the President of Pakistan. The petitioner returned to the country on 25.11.2007 and filed the present petition for leave to appeal on 28.4.2009 against the judgment and order of the High Court of Sindh, assailing his conviction and sentence.

5. We heard Mr. Khawaja Haris Ahmad, learned ASC for the petitioner at the leave granting stage and notwithstanding that the petition was filed after a delay of more than eight years and there being concurrent findings of the two Courts against the petitioner, we issued notice to the State in view

of the submissions made by the learned counsel incorporated in our order dated 11.5.2009. Since we later proceeded to hear the petition on merits after notice to the State, without granting leave, it may be appropriate to reproduce material part of the order dated 11.5.2009:-

> *"4. Through this petition, the petitioner has challenged the afore-referred concurrent judgments and along with this petition he has filed (Crl. Misc. No. 168 of 2009) seeking condonation of delay in filing the petition.*
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> *5. The learned counsel submits that the delay in filing the appeal occasioned for circumstances beyond petitioner's control; that the judgment was announced vide short order dated 30.10.2000 and the detailed judgment was delivered on 01.11.2001 but petitioner was sent to exile on 2nd of December, 2000; that though terms of exile were not conveyed to the petitioner in writing but he was informed by the Federal Government that he had been pardoned; that the petitioner left the country on the afore-referred date but subsequently he wanted to come back and made abortive efforts twice; that despite the intervention of this Court, by an order reported in Pakistan Muslim League (N) through Khawaja Muhammad Asif M.N.A. and others v. Federation of Pakistan through Secretary Ministry of Interior and others (PLD 2007 SC 642), on his arrival in the country, he was not allowed to come out of the airport; that although petitioner has the perception that conviction and sentence were no longer in the field, yet he wanted to challenge the findings rendered as they carried a stigma and petitioner having remained twice the Prime Minister of this country wanted to have that stigma removed; that notwithstanding the afore-referred desire, certain events obliged the petitioner not to challenge the conviction as 63 Judges of the Superior Courts were laid off through an unconstitutional mode on 3rd of November, 2007; that petitioner took a principled stand for restoration of the superior judiciary; that in the meanwhile elections were announced but before joining the process of electioneering, he and all the candidates of the party that he heads, took a collective oath publically that they shall stand by the commitment made for restoration of the original judiciary and for independence of this institution; that it was only in the recent past that petitioner stood vindicated and the Hon'ble Chief Justice and other Judges were*

restored, where-after he decided to file the instant petition to challenge the conviction. He further submitted that the courts have always been liberal in condoning delay in criminal cases and what has weighed with them is the legality or otherwise of the convictions as also the canons of justice. Reliance was placed on Logan v. R. [1996]4 All ER, Muhammad Din and others v. The State (PLD 1977 SC 52) and Abdul Rehman v. The State (1978 SCMR 292).

6. Making his submissions on merits of the main petition, the learned counsel submitted that the impugned judgment is a split decision inasmuch as two of the learned Judges of the High Court upheld the conviction qua section 402(b) PPC whereas the third Judge found that only section 365 PPC was made out; that petitioner had taken a specific plea that he as Prime Minister of Pakistan had the additional portfolio of Defence Minister; that in the said capacity had the power in terms of section 6 of the Civil Aviation Ordinance, 1960 to regulate the flight of an aircraft in situations mentioned therein which, inter alia, include "state of emergency" and "public safety"; that the two learned Judges were of the view that circumstances did not exist for the exercise of afore-mentioned power where as the third learned Judge held that circumstances did exist; that having held that power was available with the petitioner and no offence under section 402(b) PPC was made out, it was not open for the learned third Judge to convict the petitioner under section 365 PPC; that even the finding of the learned two Judges is not sustainable as the question of existence of circumstances for exercise of the afore-mentioned power is more a matter of subjective satisfaction of the competent authority; that the evidence led was not sufficient to convict the petitioner inasmuch as the prosecution case basically hinged on the statement of approver/PW-1 Amin Chaudhry which could not be accredited with truth in absence of tenable corroboration which was absent.

7. Addressing the issue of mens rea which according to learned counsel, is a condition precedent to sustain conviction on a criminal charge, the circumstances and the evidence led failed to prove mens rea and therefore the conviction and sentence recorded cannot be sustained. He lastly submitted that the learned trial Court as also the learned High Court of Sindh disbelieved the prosecution evidence qua the six co-accused who stand acquitted and to the said extent, the learned High Court sustained the

finding; that having held so it was not open for both the courts to extend credence to the evidence led qua the petitioner.

8. We have given anxious consideration to the submissions made. Let notice be issued to the State for a date in the next week. This of course would be subject to the question of limitation."

6. Mr. Khawaja Haris Ahmad, ASC appeared for the petitioner whereas Mr. Shahadat Awan, Prosecutor General, Sindh, represented the State. Mr. Muhammad yousaf Leghari, Advocate General, Sindh, who also appeared for the State, later opted out, according to him, on the instructions of the Government of Sindh. Thus, for the State, the Prosecutor General, Sindh, addressed the Court at the final hearing of the petition.

7. Two preliminary objections were raised on behalf of the State. They need to be addressed first. The learned Advocate General, Sindh had, right in the beginning, submitted that in view of the pardon granted to the petitioner by the President of Pakistan regarding conviction and sentence, he was left with no cause and on that score the petition was not maintainable. The learned Prosecutor General, Sindh maintained that the petition is liable to be dismissed as barred by time under Order XXIII, Rule 2 of the Supreme Court Rules, 1980, which prescribes limit of 30 days for filing of the petition for leave to appeal in criminal matters, whereas the present petition has been preferred after 3072 days of the impugned judgment.

8. Before taking up the objection raised on the grant of pardon, we would like to mention that the documents pertaining to the pardon were not part of the record of the present case. However, after raising the above objection, Criminal Miscellaneous Application No. 257/2009 was moved on behalf of Advocate General, Sindh for placing on record the documents relating to the pardon, stating that they were being submitted in compliance to our directions. This was a blatant misstatement, as we had given no such direction and on that account dismissed the application on 12.6.2009,

however, leaving it open to the State to submit the said documents, if it so desired and also keeping open the question of their relevance to the present case. However, no further effort was made to submit the documents. In any case, we do not consider that the terms of pardon would be of any relevance for determining the maintainability of the present petition on account of such pardon.

9. Mr. Khawaja Haris Ahmed submitted that the pardon granted in the exercise of executive powers, cannot legally preclude the petitioner to assail his conviction before a judicial forum. The learned counsel contended that the stigma that the conviction carries with it stays notwithstanding the pardon and therefore the petitioner has a right under the law to have the stigma removed through judicial determination. In support of his contention the learned counsel cited **Muhammad Asghar v. Government Of Sindh** (PLD 1977 SC 212), **Kehar Singh v. Union of India** (AIR 1989 SC 653), **Logan v. R.** (996 4AER 190) and **R. v. Foster** (1984 2AER 679).

10. The principles of law laid down in the above referred judgments from different jurisdiction are of considerable relevance to the issue before us. In the case of **Muhammad Asghar** (ibid), the question was materially different than the one raised here. The Court was faced with the issue as to whether the petitioner before it could be restored to the public office, which was forfeited in consequence of a conviction, regarding which he was subsequently granted pardon. The Court answered the question in the negative, but while examining the effects of pardon, reproduced the following passage, with approval, from Halsbury's Law of England, 4th Edition 608:-

> *"The effect of a pardon under the Great Seal is to clear the person from all infamy, and from all consequences of the offence for which it is granted, and from all statutory or other disqualifications following upon conviction. It makes him, as it were, a new man, so as to enable him to maintain an action against any person*

afterwards defaming him in respect of the offence for which he was convicted.……..…"

11. The Supreme Court of India, in the case of **Kehar Singh** (ibid), examined the question in a different context. While determining as to whether or not the President, in exercise of his power to grant pardon was empowered to scrutinize the evidence on record, the Court held, *"It is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinize the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court in regard to the guilt of, and sentence imposed on the accused".* The Court went on to add *"……..….in doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it."* It went on to explain *"The legal effect of a pardon is wholly different from a judicial supersession of the original sentence."*

12. In the case of **Logan v. R**. (ibid) the petition for special leave was filed by Logan before the Privy Council against his conviction and sentence of death in a murder case after his mercy petition was dismissed by the Governor of Belize. While holding that the dismissal of mercy petition did not prevent the convict to appeal, it was held that the Privy Council, as the ultimate legal Court of appeal under the Constitution of Belize, had the power to set aside such conviction on legal grounds, whether or not prerogative of mercy had been or would be exercised. A more clearer pronouncement on the effect of the grant of pardon was made by the Court of Appeal, Criminal Division in the case of **R. v. Foster** (ibid) declaring *"Since the Crown no longer has a prerogative of justice but only a prerogative of mercy, it can only*

pardon the effects of a conviction and cannot remove the conviction itself. The only body which has power to quash a conviction is the Court of Appeal, Criminal Division. It follows that a free pardon in respect of a conviction does not eliminate the conviction, which continues to exist, and that the effect of the pardon is simply to remove from the subject of the pardon all the pains, penalties and punishments that ensue from the conviction."

13. The above case law demonstrates that the effects of the grant of pardon, even full, are not the same as an order of acquittal by a Court of law. The former is granted in the exercise of executive authority as a matter of grace, regardless of merits, and cannot be a true substitute for a finding of not guilty through judicial determination. Whereas the pardon wipes out the consequences of conviction, the conviction itself remains intact until annulled through a judicial process. Thus, notwithstanding the pardon granted to the petitioner, whether complete or limited, he remains invested with a cause to get the question of his guilt determined judicially. Till his acquittal by a Court of law, he will continue to carry the stigma of conviction for a crime. Every citizen is entitled to have his name cleared, if unjustifiably sullied, and it should be of particular importance to the petitioner, who remained Prime Minister of the Country twice and is presently leading a major political party, to remove the stigma of conviction for a crime and that too of hijacking, generally associated with terrorism. The first objection raised by the State is, therefore, overruled and we hold the petition maintainable.

14. Undoubtedly, the petition for leave to appeal is apparently barred by time as according to the petitioner's own showing in the application for condonation of delay (Cr. Misc. A. No.168/2009), the delay is of 8 years and 136 days. To overcome this hurdle, Mr. Khawaja Haris Ahmad, learned ASC submitted that the short order dismissing the petitioner's appeal was announced on 30.10.2000 and the detailed judgment was released more than a

year later on 22.11.2001 and in the meanwhile, the petitioner was forced to leave the country on 10.12.2000. That since the detailed judgment had not been written before the departure of the petitioner from the country, he was not in a position to instruct his counsel on further legal process. The learned counsel submitted that the petitioner was prevented from returning to the country for almost 7 years and in this context, he referred to the case of **Pakistan Muslim League (N)** v **Federation of Pakistan and others** (PLD 2007 SC 642) and **Mian Muhammad Shahbaz Sharif** v **Federation of Pakistan** (PLD 2004 SC 583). It was next submitted that though the petitioner returned to the country on 27.11.2007, he consciously refrained from assailing the impugned judgment till restoration of the Judiciary to its November 3rd 2007 position since the petitioner, as President of his political party, had taken a principled stand to desist from taking any legal matter to the Superior Courts till such restoration. The learned counsel maintained with the help of case law that the petitioner has inalienable right to have access to justice and the same could not be denied to him on account of hyper-technicalities in a matter calling for determination of question of criminal liability or otherwise of a person. He further referred to the consistent practice of this Court to refrain from dismissing petitions against conviction and sentences on account of time limitation, which is ignored when the Courts find grave miscarriage of justice.

15. The learned Prosecutor General, Sindh, however submitted that the petitioner left the country voluntarily after obtaining pardon from the President of Pakistan and therefore, could not take shelter from his absence from Pakistan to overcome the obstacle of limitation. Referring to Order XXIII Rule 2 of the Supreme Court Rules, 1980, he contended that the petitioner has to explain each and every day of delay in filing the petition. He, however, on Court query conceded that in a criminal case if the judgment of

conviction under challenge reflects miscarriage of justice, the Court ordinarily condones delay.

16. The period of delay of more then eight years in filing the present petition for leave to appeal can be broadly divided in two phases; the first is the petitioner's absence from the country for about seven years and the second is his abstinence from approaching this Court for almost a year and a half after his return. For the purpose of condonation of delay for the first phase, the circumstances under which the petitioner left the country are not as relevant as the resolution of the issue whether the petitioner was prevented from returning to the country. It has been the consistent stand of the petitioner that despite efforts he had not been allowed to return to Pakistan. This stand is substantiated by the judgment pronounced by this Court in the case of Pakistan Muslim League (N) v Federation of Pakistan and others (PLD 2007 SC 642) (ibid) and the ensuing events. It was declared that the petitioner was entitled to enter and remain in Pakistan and that no hurdle or obstruction was to be created by any authority to prevent the petitioner's return. Pursuant to the said direction, the petitioner embarked on a return journey to Pakistan and took a flight from London to Islamabad. However, after landing at Islamabad, he was not allowed to leave the airport and was sent out of the country. In view of violation of the order of this Court, an application for contempt of Court was filed before this Court. A similar abortive attempt was earlier made in the year 2004 by the petitioner's brother, Mian Muhammad Shahbaz Sharif, and he was not allowed to leave the airport and put on a flight destined for overseas. The above facts clearly demonstrate that the petitioner was prevented from returning to Pakistan.

17. The petitioner returned to the country on 27.11.2007 but did not file the petition for leave to appeal until 28.4.2009. The explanation for this

delay is mentioned in Para 'J, K and L' of the application of condonation of delay (Cr. Misc. A. No. 168 of 2009) which are reproduced as under:-

> "*J) That it is a matter of record that the petitioner had, on his return to Pakistan, publicly pledged, at the very outset, neither to accept nor to condone the aforesaid constitutional deviation whereby, inter alia,63 hon'ble Judges of the Superior Courts had been forcibly restrained from continuing to perform their judicial functions. It was because of this reason that all the candidates of the Pakistan Muslim League (N) contesting General Election 2008, pledged on oath to restore the judiciary to pre November 3, 2007 position, and this ceremony of collective oath of Pakistan Muslim League (N) candidate was widely publicized and covered by the media. Moreover, the petitioner had repeatedly declared that he will not appear before the judges of the Superior Courts till the entire set of judges who were illegally deposed on November 3, 2007, including the hon'ble Chief Justice Iftikhar Mohammad Chaudhry, were restored.*
>
> *k) , It was on account of the aforementioned principled stand of the Petitioner, solemnized on oath, that the Petitioner even after his return to Pakistan, did not file any appeal or sought any remedy against he sentence and conviction passed against him in the instant case. In fact, he did not even challenge his own order of disqualification to contest the General Elections, though this was so essential for him, only because of his solemn stand on the issue of restoration of the Judiciary to its pre-November, 2007 position as stated above.*
>
> *l) That it was only on March 17, 2009 that, pursuant to a long and arduous struggle of the lawyer's fraternity, as well as the indefatigable efforts made by, inter alia, the Pakistan Muslim League (N), that the illegally and unconstitutionally deposed judges have been restored to their original position with effect from pre November3, 2007. there being no longer any constraint upon the petitioner for appearance before the Hon'ble Judges, he has immediately initiated action for challenging the Judgment passed by the Full Bench of the Sindh High Court in the instant case."*

The stand taken by the petitioner in the above paragraphs was also taken before us in Review Petition Nos. 45 and 46 of 2009 in Civil Petition Nos. 778

and 779 of 2008 titled Federation of Pakistan v Mian Muhammad Nawaz Sharif and others. There the petitioner had not challenged before this Court his disqualification by the Lahore High Court to contest election for the National Assembly nor did he appear as respondent when the judgment of the High Court was assailed by the Federation of Pakistan. In the said review petitions, a specific issue (Issue No.1) regarding his stand was framed: "*Whether petitioner's non-appearance could be condoned for the reasons given by him and whether the findings given without hearing him have led to miscarriage of justice amounting to an error on the face of record to warrant exercise of review jurisdiction?.*" After detailed discussion on the observations made on the question in the judgment under review and extensively quoted there-from, we had accepted the petitioner's explanation for non-appearance in the following terms:

> "…….*However, on a deeper appreciation of the stance taken and after hearing their learned counsel, it has been found by us that petitioner's non-appearance was not attributable to a personal bias against the Court then constituted but on account of a public stand that they had taken before entering the process of elections i.e. the collective oath which they and all the party candidates had taken on the issues relating to the Imposition of "State of Emergency" on 3rd of November, 2007 and a resolve to launch a movement for the restoration of superior judiciary. The restoration of the Hon'ble Chief Justice of Pakistan and other judges who were deposed on the imposition of "State of Emergency" and the immediate appearance of the petitioners by way of filing these review petitions indicate that the stance taken was based on a certain moral grounds which stood vindicated. The same cannot be dubbed as either contumacious or reflective of acquiescence to warrant the impugned findings."*

Thus we have already accepted the petitioner's explanation for his non-appearance before the Superior Courts in a case of his disqualification to

contest election. There is all the more reason we accept the same as valid in a criminal matter to condone delay for not filing petition against his conviction and sentence soon upon returning home.

18. Additionally, this Court is always slow in dismissing petitions against conviction and sentence on the question of limitation and is more inclined to examine the case on merits in order to prevent grave miscarriage of justice notwithstanding delay. There is no dearth of case law in support of this proposition, reference, however, may be made to some authorities cited by the learned counsel for the petitioner. In the case of **Abdur Rehman v The State** (1978 SCMR 292) this Court reviewed its own judgment in a review petition filed by the convict after a delay of 1119 days. In another case **Ziaul Rehman** v **The State** (2001 SCMR 1405), the petition for leave to appeal filed by the convict with a delay of 266 days was condoned on the ground that dismissal of the appeal on such a technical ground would have caused grave injustice to the accused under the circumstances of the case. The petitioner's petition was heard on merits and his conviction and sentence was set aside. In **Muhammad Sadiq** v **Muhammad Sarwar** (PLD 1973 SC 469) where the Houourable Mr. Justice Dorab Patel, as he then was, after finding the convict not guilty condoned the delay for filing the petition, holding that the Supreme Court generally condones delay in criminal cases. The Lahore High Court in **Abdul Waheed** v **The State** gave convincing reasons for condonation of delay in criminal matters, as, unlike civil matters, no enforceable right accrues to the other party upon expiry of the time limitation.

19. Under Rule 4 of Order XXIII of the Supreme Court Rules, 1980, leave to appeal in criminal matters are to be filed within 30 days from the date of judgment or final order sought to be appealed from. However, the second proviso to the Rule empowers this Court to extend the time if the petitioner is able to show sufficient cause. Sufficiency of the cause depends upon the

circumstances of each case. In the light of what has been discussed above, the circumstances which prevented the petitioner from filing petition against his conviction and sentences were indeed extraordinary and we consider these to be sufficient cause for extension of time. The second objection raised is, therefore, not sustainable.

20. We now proceed to discuss the merit of the case. Ordinarily complaint is lodged by a person with personal knowledge of the incident. In the present case the informant, Lt. Col. Atiq-uz-Zaman, at the time of lodging FIR, was Protocol Officer at Headquarter No. 5 Corps, Karachi. On the afternoon of 12th October, 1999, he was present at the Karachi Airport to receive General Pervaiz Mushrraf. Though in the F.I.R. he has given the complete prosecution version of the incident; in his testimony at the trial, he was, however, restricted to the happenings at the Karachi Airport obviously for the reason that he had no personal knowledge of the other events.

21. Mr. Aminullah Choudhary was Director General of the Civil Aviation Authority at the relevant time. He became approver and was examined as star witness of prosecution. He claims to have ordered diversion of the aircraft on instructions of the petitioner. Since it is on his narration that the prosecution case against the petitioner is substantially founded, it will be appropriate to refer to the relevant parts of his testimony, which is reproduced as under:-

> *"On 12.10.1999, I was posted as Director General Civil Aviation authority with additional charge of Secretary Aviation. On the said date, little before 6.00 p.m., when I was finishing my work, my secretary Wing Commander Ahmed Farooq came into my office and in a voice of suppress inquired if I heard a rumour about the removal of Chief of the Army Staff General Pervez Mushraf. I was taken aback and told him that I was not so informed. I asked him to reach at the veracity of this news. He assured me that he had already done so and this was a confirmed matter. A little after 6.00*

p.m. my telephone operator, to the best of my memory, Sadiq, informed me that a call was coming in from the Prime Minister's house. I took the call and the operator at the other end informed me that the Prime Minister wished to speak to me. ***The Prime Minister Mian Muhammad Nawaz Sharif came on the line and after initial salutation inquired if I was aware of the flight details of the return to Pakistan of the Chief of the Army Staff. I submitted that I was not so aware. He instructed me to ascertain these details and ensure that this particular flight should not be allowed to land at any Air Port in Pakistan.*** *I immediately got in touch with Director Quad-e-Azam International Air Port Karachi, Brg. Tariq Fateh but found him unavailable. I then called my Secretary Wing Commander Ahmed Farooq and asked him to ascertain the flight details as required by the Prime Minister. I had also got in touch with the control tower for the said purpose. I further instructed my secretary to send for the relevant staff and in particular, since Prime Minister directive was involved. The Chief Operation Officer Yousif Abbas of Quad-e-Azam International Airport was instructed to go to the Air Traffic Control Tower to monitor the exercise. Since, the director Air Traffic Service Mr. N. A. Jafferi was on leave, I got in touch with his General Manager Mr. Akil Ahmed and instructed him to close down Quad-e-Azam International Air Port Karachi, to put on hold, all International Flights and divert domestic flights to Karachi designated alternative airport viz Nawab Shah. About 10/15 minutes of the first call of the Prime Minister,* ***I was again informed by the telephone operator that another call was coming in from the Prime Minister's office. The Prime Minister came on the line, he inquired as to whether I had ascertained details of the required flight. I submitted to him that it was PIA Flight No. PK 805 from Colombo with expected time of arrival as 1855 hours. The Prime Minister was pleased to observe that his earlier orders should stand that the flight should not be allowed to land in Pakistan. He further desired that flight should be diverted to any Air Port in the Middle East other than Dubai. He emphasized that his orders should be implemented without any delay.*** *I ordered the immediate closure of both Quad-e-Azam Air Port Karachi and Nawab Shah Airport. The matter having been delayed in the case of Karachi because of the inability of G. M. Air Traffic Service Aqil Ahmed to contact the tower. His orders, therefore, were*

conveyed by my secretary. I was faced with the situation that two telephone calls had been received from the Prime Minister himself which convened clear cut and un-ambiguous orders. I was also mindful of the fact that as I had learnt, a short while earlier that Prime Minister had removed the Chief of Army Staff, I was therefore, very clear in my mind that given this situation any defiance or deviation from these orders would result in grave implications for me professionally. I had asked the chief operating officer Yousif Abbas to reach the tower. I then instructed him to remain in the tower until I told him to leave him and until I left my office. ***I also asked him not to divulge the reason of the closure of Karachi and Nawab Shah Airports as the pilot of the Aircraft PK 805 may attempt to land else where thus defeating the sprit of Prime Minister's directive****. I further asked the Chief Operating Officer Yousid Abass to advice the pilot of the said aircraft to divert to Abu Dahbi or Maskat. It had further stressed that the pilot should be informed in clear terms that since the Air Ports in Pakistan would not allow the said aircraft to land he may take a decision on his destination after consulting his own orgnaizatior viz PIA. Finally I instructed Chief Operating Officer to make it clear to the pilot that whatever the decision be taken he would be doing so at his own risk. A little later I received a feed back through the control tower that the air craft was carrying fuel which would enable it to fly for approximately 70 minutes Since Maskat was 80 minutes flying time away from Karachi it became clear that the air craft could not land outside Pakistan and that it may had to land at Nawab Shah. At this stage, I tried to contact with Capt. Shah Nawaz Dara, Director Flight Operation PIA. My telephone operator informed me that Capt. Dara was sitting with Chairman PIA accused Shahid Khaqan Abbasi. I was put through Chairman PIA accused Khaqan Abbasi who informed me that he had received the instructions from the Prime Minister accused Mian Muhammad Nawaz Sharif as well. However, Chairman PIA accused Shahid Khaqan Abbasi did mention that the plane was carrying about 6 to 7 tons of fuel and would not be able to go to Maskat. Realizing this situation, I made an attempt to speak to the Prime Minister accused Mian Muhammad Nawaz Sharif. His staff put me through and I submitted to him that while his earlier orders were clearly understood* ***and were under implication, the Air Craft was running short of fuel and we had to make it land at***

Nawab Shah. The Prime Minister's response was firm. He reiterated his earlier orders and stated that these were categoric*. He also desired them to be implemented. As the fuel situation became more critical. One more attempt was made to inform the Prime Minister. However his staff informed me that for the moment he was not available on the telephone. Thereafter, an effort was made to reach the Principal Secretary to the Prime Minister accused Saeed Mehdi. His operator informed me that he was busy and could not take the call. I explained to him that a critical situation existed and it was important for me to speak to the Principle Secretary accused Saeed Mehdi. One more attempt was made and that time I spoke with his operator one Zia Rehman who informed me that the Principle Secretary accused Saeed Mehdi could not take the call as he was standing away from the telephone in the lawn. In sheer desperation I asked my secretary Wing Commander Ahmed Farooq, who put me with one of ADC of the Prime Minister accused Mian Muhammad Nawaz Sharif. I succeeded in talking to ADC Navy but I do not remember his name. I explained the above position in detail to the ADC Navy.* ***He promised to get back to me but he did not. A little while later, I got a telephone call from the Military Secretary to the Prime Minister, Brig. Javed. He informed me that now the orders were that the Air Craft should be brought back to Karachi Air Port. It should be isolated at the end of the runway at the Karachi airport viz Quad-i-Azam International Airport. Thereafter we should refuel the air craft and send it to Sharja.*** *The orders further were that no body should disembark from Air Craft and for this purpose I should get in touch with I.G. Police accused Rana Maqbool to request him to have the air craft surrounded by armed personnel carriers (APCs.). These orders were conveyed by Military Secretary Brig. Javed Malik. I, in pursuance of these fresh instructions spoke to Mr. Yusif Abass the Chief Operating Officer and told him to redirect the air craft PK805 to Karachi, isolated it at the end of the run way, Karachi Air port, have it refueled through a bouser and direct the air craft to proceed to Sharja as per instructions. I had directed Yousif Abass to land the air craft at Karachi for the above mentioned purpose. The Chief Operating Officer Yousif Abass informed, in response, that an Army Brigadier was now with him in the control tower and taken charge of the control. I told Yousif Abass that in such a case he should take the*

> *orders from Army authorities. As far as the other part of the instruction made by Military secretary Brig. Javed is concerned, I made no further efforts to contact IGP Sindh accused Rana Maqbool as this did not relate to my functions as D.G. Civil Aviation Authority.*
>
> ***During this entire episode, I did not go in the vicinity of the control tower nor did I speak with any of the cockpit crew of the air craft PK.805.*** *For this purpose Chief Operating Officer Yousif Abass had been assigned to tower to communicate the air craft on the one hand and with me and my secretary wing commander Farooq on the other hand. All orders emanating from the Prime Minister accused Mian Muhammad Nawaz Sharif and his staff were expressed clearly and unambiguously. It was the duty of Civil Aviation Authority and Aviation Division to implement them".*

22. In his statement recorded under Section 342 Cr. P. C. the petitioner completely denied giving instructions to PW1, Aminullah Chaudhry, or for that matter to any body else, to divert Flight No. PK 805. His statement was of total denial, however, in answer to the last question, he made a long statement spreading over 9 typed pages, mainly focusing on the friction and tension that had developed between him and General Pervaiz Musharraf and alleging that the entire case against him was fabricated at the behest of the latter, who nourished personal grudge against him.

23. However, at the hearing of the appeals by the Sindh High Court, the petitioner's counsel raised a plea, apparently new one, seeking protection under Section 6 of the Civil Aviation Ordinance, 1960, claiming that as Prime Minister and Minister for Defence, the petitioner was empowered to order diversion of the plane to another airport, within or outside the country and that the petitioner exercised this power in view of the emergent situation arising out of removal of General Pervaiz Musharraf as Chief of Army Staff. After a thorough discussion on the question as to whether such a plea could be taken

for the first time in appeal, the Court allowed it to be raised but eventually held that the petitioner had not been able to justify the exercise of the power.

24. The trial Court had found the petitioner guilty under Section 402-B PPC for attempting to hijack the plane as well as under Section 7(ii) of the Anti Terrorism Act 1997and sentenced the petitioner separately for each of the offence. The Appellate Court, by majority, agreed with this finding but imposed a single sentence under Section 402-B PPC read with Section 7(ii) of the Anti Terrorism Act. Since the petitioner substantially stands convicted and sentenced under Section 402-B PPC, we, therefore, have to examine whether the prosecution has been able to establish that the petitioner was guilty of committing offence of hijacking as defined in Section 402-A PPC, which reads: "*Whoever unlawfully, by the use or show of force or by threats of any kind, seizes, or exercise control of, an aircraft is said to commit hijacking.*" It is reflected from afore-quoted provision of law that three elements are required to be proved for conviction for hijacking, namely that the accused must have:

(i) acted unlawfully,
(ii) used or showed force or threats of any kind and
(iii) thereby seized or exercised control of the aircraft.

We would now proceed to examine whether the prosecution has been able to establish all the three ingredients of hijacking.

UNLAWFUL ACT

25. The learned counsel appearing for the petitioner had pressed into service Section 6 of the Civil Aviation Ordinance, 1960 to defend the instructions given by the petitioner for the diversion of Flight PK 805. He pointed out that the Appellate Court had accepted that the petitioner as the Prime Minister and Minster for Defence possessed the power to order diversion of an Aircraft but erred in holding that the circumstances mentioned

in Section 6 of the Ordinance for the exercise of such power did not exist. In order to appreciate the finding of the Appellate Court on the issue in the light of arguments of the learned counsel for the petitioner, Section 6 is reproduced as under:-

> *"……In the event of war or other emergency, or in the interests of public safety or tranquility, if the Federal Government is of opinion that the issue of all or any, of the following orders is expedient, it may, by notification in the official Gazette……*
>
> *(a)* *……*
>
> *(b)* *prohibit, either absolutely or subject to such conditions as it may think fit to specify in the order, or regulate in such manner as may be specified in the order, the flight of all or any aircraft or class of aircraft over the whole or any part of Pakistan;*
>
> *(c)* *……*
>
> *(d)* *……"*

26. The learned counsel for petitioner submitted that the statement of the petitioner made under Section 342 Cr. P.C. before the Trial Court, clearly demonstrated the existence of tension between the petitioner and General Pervaiz Musharraf. That the friction was further aggravated by the replacement of the latter as Chief of the Army Staff and that in order to avoid division in the Pakistan Army, on account of the change in its leadership, and to protect the Government established under the Constitution, the petitioner had considered it appropriate, in the interest of public safety and tranquility, to order diversion of the Aircraft carrying General Pervaiz Musharraf. The learned counsel pointed out that as a matter of fact, the instruction of diversion of Aircraft was given after the Army had moved to takeover important government installations. He argued that the decision to be taken by the Prime Minister was based upon his subjective assessment of the situation. Referring to the relevant portion of the judgment of the Appellate Court, the learned counsel argued that the Court's finding that no ground existed for the

petitioner to exercise power under Section 6 of the Ordinance is contrary to the evidence on record. He assailed the inference drawn against the petitioner by the Appellate Court on account of his failure to produce evidence in support of his plea and contended that an accused is entitled to establish his plea from the prosecution evidence, if it is so possible, and the plea cannot fail merely on account of non-production of defence evidence. In support of these contentions, the learned counsel cited **Khalid Javed** v **Ansar Khan** (1995 SCMR 1846), **Manzoor Hussain** v **Nadeem** (2003 SCMR 459), **Allah Wadhayo** v **The State** (2001 SCMR 25), **Mohtarma Benazir Bhutto** v **President of Pakistan** (PLD 1998 SC 388) and **Haji |Muhammad Hanif** v **The State** (PLD 1992 Lahore 314).

27. The learned Prosecutor General, Sindh, apposed the above contentions and submitted that the Appellate Court had, after evaluating the circumstances in the country on the 12th October, 1999, correctly concluded that there was no justification for exercise of powers under Section 6 of the Ordinance. He further pointed out that the Appellate Court had rightly referred to the case of **Syed Zaffar Ali Shah** v **General Pervaiz Musharraf, Chief Executive of Pakistan** (PLD 2000 SC 869) where this Court had justified the Military takeover after removal of the petitioner from the office of the Prime Minister.

28. The learned Appellate Court had proceeded on the premise that the petitioner was legally empowered to order diversion of the Aircraft. The learned Prosecutor General Sindh has also not disputed this position and we are also in no doubt that since the petitioner at the relevant time was the Prime Minister as well as the Minister for Defence, he was empowered to exercise the powers conferred on the Federal Government by Section 6 of the Ordinance. Although the said provision requires notification of the exercise of such powers, however under Rule 5(11-A) of the Rules of Business, the Prime

Minister was competent to pass verbal orders in case of emergency. The High Court, however, did not agree to the contentions of the defence that the circumstances justified the exercise of the power under Section 6 of the Ordinance. The reasons for disagreement with the defence plea are mentioned in Paragraphs 138 to 141 of the impugned judgment. The learned defence counsel had argued before the High Court that diversion of the aircraft was necessary as the replacement of General Pervaiz Musharraf as Chief of Army Staff with General Zia-ud-Din may not have gone well with a section of the Army and the presence of General Pervaiz Musharraf in the country might have led to infighting between different groups in the Army. That such diversion of the Aircraft was thus necessary to prevent bloodshed, which would have put the integrity of the country at risk. This argument on behalf of the petitioner was rejected by the High Court as "*figment of imagination of the appellant otherwise despite the fact that the flight could not be diverted and it landed in Pakistan no untoward incident did happen nor there was any casualty among the different Ranks of Army.……*" The presence of the soldiers at the Pakistan Television and later on at the Prime Minister House, a fact having come in evidence of prosecution, was not found by the High Court to be so serious a move to justify such a drastic response as to prevent General Pervaiz Musharraf from returning to the country. The Court then went on to examine the statement made by the petitioner under Section 342 Cr. P.C., and after reproducing the same, held that, "*the above versions pointedly relate to very crucial facts for which enormous material was required to substantiate each and every point of fact but admittedly such evidence is not forthcoming.*" Concluding its discussion on the issue, the Court declared "*On the whole for the purpose of this appeal it may be concluded that circumstances did not exist warranting an action to be taken by the appellant in exercise of the emergent and extraordinary powers within the compass of subsection (1) of*

section 6 of the Civil Aviation Ordinance, 1960 or otherwise, the plea, therefore, stands unsubstantiated. Consequently, it cannot be said that the diversion of plane was lawfully ordered."

29. The statement made by the petitioner under Section 342 Cr.P. C. was made in the context of his stand before the Trial Court that he had given no instructions at all to divert the aircraft. As the Appellate Court, permitted the petitioner to raise the new plea seeking protection under Section 6 of the Ordinance, it examined the statement on the touch stone as to whether the factual assertions made therein spelt out sufficient grounds for exercising powers under Section 6 of the Ordinance. After going through the said statement, the Appellate Court found that the allegations made therein had not been substantiated through evidence and on this account excluded the same from consideration. The learned counsel for the petitioner, however, questioned this finding and pointed to portions of the prosecution evidence which substantially established the allegations made by the petitioner in his statement under Section 342 Cr. P.C. To find out the worth of this contention, we first need to have a look at the statement made by the petitioner in response to question No. 37. There are two parts of the statement. The first is meant to demonstrate the existence of friction and tension between petitioner and General Pervaiz Musharraf and the second part narrates the events following the removal of General Pervaiz Musharraf as Chief of Army Staff. Each part will be examined separately. In statement relating to the first part, the petitioner stated as follows:-

> "*Your honour! This case has been framed against me at the behest of General (retired) Pervez Musharraf. He bore grudge against me on a number of counts, and had already prepared blue print for the overthrow of my Government. I had removed General Pervez Musharraf who was COAS on October 12, 1999, at 4.30 p.m. vide valid order which I produce as Exh.79. I also produce the copy of*

appointment of General Zia-u-din as Exh.80. In retaliation, he, instead of accepting a lawful decision, firstly went ahead to implement his already planed coup and thereafter framed me in this case so as to divert attention from his own crimes. The witnesses who have purportedly deposed against me have all been held in illegal custody and tortured, threatened with dire consequences and intimidated and thereby forced to make false accusations against me. I was constrained to do so as I had received credible information that General (Retd) Pervez Musharraf was planning to overthrow my legally established Government by unconstitutional means and to achieve that end he had been taking certain measures by keeping my movements under surveillance, by abruptly changing commander of 111 Brigade and replacing him by person of his confidence who was promoted to the rank of major General shortly after October, 1999 as a reward for showing his loyalty and acting as per instructions of General retired Pervez Musharraf and for disobeying the newly appointed COAS General Zia-ud-Din. He also got bugged various rooms of the Prime Minister House and the Prime Minister's office. I could not hold a meeting in the P.M. House or discuss any important or sensitive matter without raising the volume of the T.V. in order to avoid eaves-dropping. He also got General Tariq Corps Commander, Quetta retired prematurely on the suspicion that he had met me on some occasion, although, he never met me. This fact was also published in the press. Despite instructions issued by the Defence Secretary to the ISPR, no contradiction was issued. This gave me an impression, which was shared by the public and the press that an attempt had been made to undermine the authority of the elected Government and create misunderstanding between the government and the armed forces. The ISPR deliberately leaked out the news to convey impression in the public and in the army that merely meeting the prime minister could result in removal or retirement, even of the 3-star general. I also noticed that all of a sudden the army contingent posted at P.M. House was equipped with modern gadgetry such as head phones and other latest sensitive devices. This development was pointed out by my Military Secretary to the Commander 111 Brigade. The circumstances giving rise to these unfortunate developments date back to the Kargil issue.

Kargal was one of the most serious crises in Pakistan's history, which posed a grave danger to the integrity of the country. It necessitated resolution with utmost urgency to which I responded promptly. Why did I have to respond promptly; General retired Pervez Musharraf knows. He was playing hide and seek on this issue not only with me but also with the armed forces. My objection to this conduct became a source of resentment for him. What happened after Kargil, is known to the world. I saved my country from a very major crises, but unfortunately could not save myself and the system. I will not for reasons of national security elaborate any further on this issue although it is necessary that the people of Pakistan must be informed of the truth about Kargil.

Amongst other things, the then COAS General (Retd) Pervez Musharraf had a grudge against me after I replaced Lt. General retired Moinuddin Hyder with Justice (Retd) Syed Ghous Ali Shah on 17.6.1999. Lt. General (Retd) Moinuddin Hyder is a personal friend of the COAS. He was therefore, unhappy and annoyed on the above action of mine. The close relationship between the then COAS and General (Retd) Pervez Musharraf and Lt. General (Retd) Moinuddin Hyder is evident from the fact that the then COAS has appointed him as his Minister of Interior.

Your honour! I am innocent and have been falsely implicated in this case. I had reliable secret information that General (Retd) Pervez Musharraf had planned taking over the lawfully established Government. It was suspected that a plan could be carried through on his arrival from Colombo and for this very purpose forces had already been mobilized to take control of sensitive installations and the main airports of the country."

In the beginning of the statement, the petitioner explained that he had to bring about change in the leadership of the Army, as General Pervaiz Musharraf, the then Chief of Army Staff was planning a coup, and referred to incidents on the basis of which he had formed such opinion. Regarding change of Command of 111 Brigade few days before the incident, the learned counsel for the petitioner referred to the statement of Brig. Javed Iqbal Cheema (PW19), who at the relevant time was Military Secretary to the Prime Minister. This witness

had disclosed that a few months before the incident, the Commander of 111 Brigade, was changed. There is force in the contention of the learned counsel that this change was brought about with a purpose, as according to the said witness, he had made futile exercise to contact the Commander of 111 Brigade on the eve of 12th October, 1999 when the Prime Minister received information about takeover of the Pakistan Television Station by soldiers. Regarding the differences of opinion between the petitioner and General Pervaiz Musharraf on the mode of removal of General Tariq Pervez, the learned defence counsel again referred to the statement of PW19 relating to conversation between the Prime Minister and the Secretary Defence in which the petitioner had shown concern that the earlier retirement of General Tariq Pervez by General Pervaiz Musharraf on the allegation of the former's meeting with the Prime Minister would create a public perception of existence of a gap between Government and the Army. Again PW19 in his testimony made reference to the bugging of the Prime Minister House in that, suspecting the same, the Prime Minister had asked him to raise the television volume high in order to avoid eaves-dropping during discussion between the Secretary Defence and Saeed Mehdi, the Principal Secretary to the Prime Minister, when they were preparing notification for the replacement of the Chief of Army Staff. PW 19 has further lent support to the petitioner's accusation regarding surveillance of the Prime Minister House, when in cross-examination he stated "*It is correct that few days before 12th October, 1999, the Army guards posted at the Prime Minister House started wearing Headphones and carrying walkie-talkie on the directions of the Prime Minister, the Headphones and walkie-talkie were removed through me.*" Some support can also be found from the record of the petitioner's allegation that General Pervaiz Musharraf was annoyed by the removal of his personal friend, Lt. General (Retd) Moinuddin Hyder, from the office of Chief

Executive of the Province of Sindh. Syed Ghous Ali Shah, one of the accused tried along with the petitioner, in his statement under Section 342 Cr. P.C., gave narration of this incident and stated as to how he was appointed as Advisor to the Prime Minister with powers of the Chief Minister, replacing Lt. General (Retd) Moinuddin Hyder as Chief Executive of Sindh. It was pointed out that Lt. General (Retd) Moinuddin Hyder was appointed as Interior Minister in the Federal Cabinet after takeover by the General Pervaiz Musharraf. The extent of the friction developed between the two can be gathered from the very fact that the petitioner ultimately replaced General Pervaiz Musharraf as Chief of the Army Staff before expiry of his tenure.

30. None of the above pieces of prosecution evidence, already on record, were taken into consideration by the Appellate Court, which appears, was wrongly influenced by the non-production by the petitioner of evidence in support of his assertions. Undoubtedly, the burden is on the accused to establish a plea taken by him in defence. It is, however, well settled that the burden stands discharged if the defence is able to establish its plea from the prosecution evidence. It is equally settled that whereas the prosecution has to prove its case beyond reasonable doubt, the standard of proof required to establish a defence plea is lighter as the accused has only to show that the plea taken by him is reasonably possible. Reference may be made to the relevant case-law on the point. In **Shamir** v **The State** (PLD 1958 SC (Pak) 242) this Court held "*that despite the fact that no evidence had been led by the accused to prove the plea of self-defence, yet, if the plea received support to the extent of being reasonably possible, from the circumstances proved by the prosecution evidence, the accused was entitled to acquittal.*" A similar, but more elaborated pronouncement was made in **Khalid Javed** v **Ansar Khan** (1995 SCMR 1846) that the burden on accused of proving plea "i*s indeed a*

lighter one for he has only to show that there is a reasonable probability of his version being true; *to discharge his burden he need not lead any evidence of his own for he can rely entirely upon circumstances appearing from the evidence of the prosecution itself."*

31. In the light of the principles of law of evidence on the burden and standard of proof, we are of the opinion that the Appellate Court had misdirected itself by holding that the petitioner was unable to substantiate the plea taken by him in his statement under Section 342 Cr. P.C. From the statement reproduced above, the defence had only endeavored to establish the existence of tension between the petitioner and General Pervaiz Musharaf and the latter's manoeuvres to prepare for overthrow of the petitioner's government. In view of the light burden placed on the defence to establish its plea, the combined reading of the different pieces of prosecution evidence referred to above, was sufficient to establish the petitioner's stand.

32. We now come to the second part of the statement of the petitioner that relate to the events soon after the appointment of the new Chief of Army Staff at 4.30 p.m. on the 12th October, 1999. He stated as under:-

> "*The news of the change of the then COAS was flashed on the PTV at 5.00 p.m. and within minutes i.e. 5.20 p.m. the army took over control of the Islamabad PTV Centre. The Prime Minister House was also taken over by the army before 6.30 p.m. The Corps Commander 5 Corpse Lt. General Muzaffar Usmani, Brig. Tariq Ali Khan, Commander area had also reached the Karachi, Airport by 6 O clock on the pretext of receiving of General (Retd) Pervez Musharraf who was returning from Colombo, although he was no longer COAS as was known to the entire armed forces, and had also associated Brigadier Naveed Nasar, Commander ASF with them obviously to take over the control of the airport. This finds support from the fact that according to Lt. Colonel Atiquzaman Kiyani the armed troops of 5 Corps reserve not only arrived at the Jinnah Terminal but also took over control of the ATC at 6.45 p.m. Thus the order of the retirement of General Pervez Musharraf and*

appointment of General Zia-ud-Din was frustrated defied and made inoperative under a pre-conceived plan hatched by some senior commanders of the army, who owed personal loyalty and allegiance not to the institution, but to the retired COAS General Pervez Musharraf. The telephone exchange of the Prime Minister House was taken over at 6.40 p.m. i.e. before the expected arrival time of PK-805 which was about 7.00 p.m. No one from the Prime Minister House could be in control of or in contact with the CAA or PIA after this point of time.

Your honour! There is no evidence on the record against me or my co-accused that we had any intention to abduct or commit Qatl-i-Amd of any person travelling by PK-805 or of hijacking the same. Rather, it has been established on the record that both pilot Sarwat Hussain and his aircraft, were under the control of General retired Pervez Musharraf, under whose instructions the pilot was ignoring the direction of the ATC and was refusing to return and land at Karachi thus wasted valuable time and fuel. All said and done the aircraft landed safely with still fuel to spare without any harm caused to any one on board."

The announcement of the appointment of General Zia-ud-Din as the new Chief of Army Staff by the Pakistan Television at 5.00 p.m. has been confirmed by Muhammad Asif (PW15) Telephone Operator at the Prime Minister House as well as Zahid Mehmood (PW14) Director Protocol of the Prime Minister House. The takeover of the Pakistan Television Station and later on the Prime Minister's House by the Army is again affirmed by PW14, who stated in his testimony that at about 5.30 p.m. information was received at the Prime Minister's House that the Army had taken-over the Pakistan Television Station. This statement is further corroborated by Brig. Javed Iqbal Cheema (PW19), who had personally proceeded to the Pakistan Television Station, Islamabad on the instruction of the petitioner. He was dispatched at about 6.15 p.m. and when he reached the Pakistan Television Station, he found soldiers present at the Station and when he demanded of them to handover their weapons, they instead pointed their guns at him and responded

that they were acting on the orders of their Commanding Officer. The Army had, therefore, moved to takeover the PTV Station, Islamabad, considered to be crucial in military takeovers, for the purpose of making official announcements to the Nation. The presence of Army at the PTV Station was reported as earlier as 5.30 p.m., within half an hour of the announcement on the media of the appointment of General Zia-ud-Din as Chief of Army Staff. According to PW Aminullah Chaudhry, the petitioner had called him just after 6.00 p.m. to instruct him to divert Flight PK 805. Thus according to the prosecution's own case, the instructions by the petitioner for diversion of the aircraft were made after the Army had already made a move to dislodge the petitioner's government. The observation of the Appellate Court as well as the Trial Court that the presence of the soldiers at the PTV Station was an isolated act by a few soldiers and should not have been taken as a threat to the petitioner's government is indeed naïve. This could not have been brushed aside as misadventure by a few misguided disgruntled soldiers. Soldiers do not make any move on their own, much less a drastic one to takeover important installations like official television station. As a matter of fact PW19 confirms that "*I had asked the officer as to on whose orders he had taken over the PTV centre, he replied that* ***it was on the orders of his commanding officer***". The takeover of the Television Station was a loud alarm bell of a military takeover. It was wrong for both the Courts to down play the importance of this incident. This was sufficient signal for all concerned that the Army had decided to take control of the country.

33. From narration of the above facts, we are left in no doubt that serious differences had developed between the petitioner and General Pervaiz Musharraf, the then Chief of Army Staff. In view of certain moves on the part of the latter, as mentioned by the petitioner in his statement, he was led to

believe that General Pervaiz Musharraf was planning a military takeover. It was in this context that the petitioner brought about change in the military leadership and had reasons to believe that the change could create some restiveness in the Army Ranks which turned out to be true as soon after the flash of the news about the change, the Army made a move. It was under these circumstances that the petitioner had decided to divert the Aircraft carrying General Pervaiz Musharraf to another country, according to the defence, with two objectives: to prevent division in the Army with two claimants to the office of the Chief of Army Staff and secondly, to protect the constitutional government headed by the petitioner.

34. Interestingly, the Trial Court in a different context, while discussing motive had drawn inferences from the facts of the case substantially similar to the one claimed by the petitioner. These observations of the Trial Court are reproduced for ready reference:-

> "*From the above position it is manifest that after flashing of the news on the PTV about the retirement of General Pervez Musharraf and appointment of General Ziauddin as new Army Chief within half-an-hour of such news, few soldiers had taken over the PTV station, Islamabad who were disarmed by the Military Secretary to the then Prime Minister.*
>
> *The accused being faced with the situation, an inference can be drawn, that the accused Mian Muhammad Nawaz Sharif must have thought that the group of army had not liked the retirement of General Pervez Musharraf and replacement of General Ziauddin, particularly, in the absence of General Pervez Musharraf who was about to reach in Pakistan at About 7.00 p. m, therefore,* ***the accused Mian Muhammad Nawaz Sharif must have thought if General Pervez Musharraf is allowed to land at Karachi airport from the plane, then serious problems could have been created, as such, it must have come in his mind that his plane should not be allowed to land in Pakistan in order to avoid any difficult situation without realizing the fact that the aircraft was not only carrying general Pervez Musharraf but 198 passengers including***

50 American School students mixed Sri Lankan and Pakistanis, staff of General Pervez Musharraf and crew of the aircraft."

35. The question is whether the petitioner was justified in view of the foregoing circumstances to exercise his powers under Section 6 of the Ordinance. The opinion to be formed under the said provision is upon subjective assessment of the facts by the person forming the opinion. The correctness or accuracy of formation of such opinion cannot be questioned so long as grounds exist from which it is possible to draw such an inference. The opinion of the petitioner that prevention of General Pervaiz Musharraf from return to the country was necessary for public safety and tranquility was well founded in view of the events that had already taken place. The correctness of the formation of opinion is not to be adjudged on the touchstone of the subsequent development or events but on the basis of the material available at the time of forming the opinion. The learned Judges in the High Court had erred in holding that since no division took place in the Army on the appointment of the new Chief of Army Staff; the petitioner's opinion was unfounded. However, upon this reasoning of the High Court, the petitioner's apprehension that his government established under the Constitution was under threat from General Pervaiz Musharraf, had turned out to be true. Even upon applying the objective test a prudent man faced with the circumstances mentioned above would have drawn the same opinion as the petitioner did.

36. There is another aspect of the issue of unlawfulness or otherwise of the petitioner's instructions to Mr. Amin Ullah Chaudhry (PW1) regarding diversion of the aircraft. He being Director General of the Civil Aviation Authority, performed functions under the Civil Aviation Ordinance, 1960 and the Rules framed there under. He was the administrative head of the Authority and was expected to be aware of the provisions of the law under which he

functioned. Had the instructions to him by the petitioner been unlawful, he was under obligation not to follow the same, or at least to have brought it to the notice of the petitioner; he had done neither**.** Though ignorance of law is no defence, but according to the working of the Government Departments and Ministries, if Minister issues an unlawful order, it becomes the bounden duty of the concerned civil servant to bring it to the notice of the Minister that the order is not in accordance with law. Though PW1 in his testimony before the Court had claimed that the orders were implemented on account of his subordination, he never alleged during the investigation or the trial that the instructions received by him were unlawful. It can also mean that PW1 considered the instructions lawful and thus proceeded to carry them out without hesitation.

37. The above discussion leads us to conclude that at the relevant time the petitioner was not only possessed with the authority under Section 6 of the Ordinance to order diversion of the aircraft but the evidence on record shows that on the subjective assessment of the circumstances its exercise was not unjustified. The instructions by the petitioner to divert the flight were, therefore, not unlawful. The prosecution has thus failed to prove the first ingredient of the offence of hijacking. The finding of the Appellate Court on this point is reversed.

38. The learned counsel had advanced an alternative argument that even if the petitioner was not entitled to protection under Section 6 of the Ordinance, his action could still be defended under the exceptions provided under Sections 76, 79 and 81 of the Pakistan Penal Code. These provisions generally provide that an act by a person would not constitute an offence if done by mistake of fact or mistake of law, provided, the same is done in good faith. The learned counsel for the petitioner, therefore, argued that even if the

exercise of powers of the petitioner under Section 6 of the Ordinance was not in accordance with law, the instructions of diversion of the aircraft would not be an offence if the petitioner believed that he was so empowered to exercise such powers. The learned Prosecutor General, however, argued that the petitioner had not been able to prove good faith in order to claim protection under the said provisions and in this context he referred to the definition of good faith provided in Section 52 PPC, which reads "*Nothing is said to be done or believed in good faith which is done or believed without due care and attention.*" Since we have already held that the petitioner was not only empowered under Section 6 of the Ordinance to order diversion of the airplane but the power was validly exercised, the instructions were not unlawful, it will, therefore, be unnecessary to dilate upon the alternative argument advanced on behalf of the defence.

USE OR SHOW OF FORCE OR THREATS OF ANY KIND.

39. The learned Appellate Court as well as the Trial Court found this ingredient of the offence of hijacking against the petitioner proved by taking into consideration three factors; the closure of the airports at Karachi and Nawab Shah, secondly, blocking of the runway at Karachi Airport by fire engine brigades and switching off runway lights and thirdly, disallowing the aircraft to land in Pakistan, notwithstanding precarious shortage of fuel. In order to determine the petitioner's liability for these incidents, we need to examine the relevant prosecution evidence to find out the nature of the directions given by the petitioner for diversion of the aircraft. There is some controversy between the prosecution and the defence regarding the channel used by the petitioner for the issuance of the directions. The prosecution alleges that the instructions were given by the petitioner directly to Aminullah Chaudhry (PW-1), the Director General Civil Aviation, and in support of this contention, reference is made not only to the statement of Aminullah

Chaudhry but his Telephone Operator, Muhammad Sadiq (PW-16) and the Telephone Operator at the Prime Minister House, Muhammad Asif (PW-15). The learned counsel for petitioner disputed the prosecution's stand and maintained that the only instructions by the petitioner for the diversion of the plane was given to co-accused Shahid Khaqan Abbasi, Chairman PIA, and support for this argument is sought from the statement of the Director Protocol, Prime Minister House, Zahid Mehmood (PW-14). We find it difficult to agree with the stand taken by the defence, as no doubt PW-14 did mention in his statement that the petitioner had, through him, given instructions to Shahid Khaqan Abbasi, but this cannot be taken to exclude the possibility of the petitioner giving similar instructions to PW-1. On the other hand, the testimony of PW-1 regarding instructions to him by the petitioner is corroborated at least to the extent of telephone calls by the testimony of PW15 and PW-16. Muhammad Asif, (PW-15), further confirms that at about 6 p.m. he got connected the Prime Minister first to Shahid Khaqan Abbasi and a few minutes later to PW-1. It would thus appear that the petitioner had contacted both Aminullah Chaudhry as well as Shahid Khaqan Abbasi, regarding the status and diversion of Flight PK-805.

40. The prosecution star witness, Aminullah Chaudhry, who statedly implemented the instructions of the petitioner regarding diversion of the aircraft, claims to have received three telephonic calls from the petitioner regarding the Flight. In the first contact made soon after 6:00 pm the petitioner is alleged to have instructed the witness to ensure that the aircraft does not land at any airport in Pakistan. In the second call made about 10/15 minutes later, the witness alleges that after he had provided the petitioner detailed information of the Flight, the petitioner reiterated his earlier orders, with further direction to divert the aircraft to any country in the Middle East, other than Dubai. The witness claims to have received the third call from the

petitioner, when notwithstanding that the petitioner was informed about the shortage of fuel in the aircraft, his response was of strict compliance of his earlier orders. This third call has been seriously disputed by the defence and the learned counsel for the petitioner has referred to the evidence to demonstrate that the third call was never made. The contention has substance. The Telephone Operator at the Prime Minister House, Muhammad Asif (PW15) mentioned only one call from the Prime Minister to PW-1, whereas Muhammad Sadiq (PW-16), the Telephone Operator of PW-1 refers to only two calls from the Prime Minister House. Thus there is no confirmation of the third call by the petitioner to PW-1. Furthermore Zahid Mehmood (PW-14), who was present with the Prime Minister at the relevant time, had disclosed that it was Shahid Khaqan Abbasi, who had called him to inform about the insufficiency of fuel in the aircraft for journey to Masqat. The witness went on to add that after he had disclosed this information to the petitioner he directed that Shahid Khaqan Abbasi be informed that the aircraft be diverted to Nawab Shah and after its refueling, be dispatched to Masqat. This information was conveyed to Shahid Khaqan Abbasi at about 6:15 p.m. The above narration clearly negates the claim of PW-1 of his conversation with the petitioner regarding shortage of fuel. The evidence thus shows that the only information regarding shortage of fuel to the petitioner came from Shahid Khaqan Abbasi whereupon the petitioner ordered that the aircraft be allowed to land at Nawab Shah for refueling. This conclusion from the evidence takes the sting out of prosecution case as it was on strength of the third call claimed to have been received by PW-1 that the prosecution had endeavored, unsuccessfully, to demonstrate that notwithstanding the petitioner’s having gained knowledge of the shortage of fuel he nevertheless ordered that the plane should not be allowed to land anywhere in Pakistan, and thereby putting at risk the lives of the passengers on board the plane.

41. The prosecution's own case put forth through the testimony of PW-1 is that the only direction that the petitioner gave was that the aircraft should not be allowed to land in Pakistan and that it be diverted to another airport in a Middle Eastern country. It is not the prosecution case that the petitioner had either ordered the closure of the airports at Karachi or Nawab Shah or that he had given any specific instruction to switch off the lights and block the runway at Karachi Airport in order to prevent the aircraft from landing. PW-1 did not allege that the petitioner had instructed blocking of the runway and when questioned, he categorically stated that the petitioner had given no instructions to close the airports at Karachi or Nawab Shah. On the other hand Nadeem Akbar (PW-7), the Air Traffic Control Officer at the Airport, who received the instructions from PW-1 to close the airport, stated in cross-examination that blocking of the runway by placing fire-brigade vehicles was his idea. The witness admitted that for closure of the Airport, it was not necessary to block the runway. Even if we were to accept the instructions given by the petitioner to PW-1 in the two calls made to the later, the same were only to the extent of diversion of the aircraft. The petitioner had neither instructed closure of the airports nor blocking the runway, nor indeed was he informed of the same. It was a decision taken at lower level, without the knowledge of the petitioner. The decision to close the airports was taken by PW-1 and to block the runway by PW Nadeem Akhtar. It is not even the prosecution case that the petitioner had given any direction to use or show force to prevent the landing of the aircraft nor that the petitioner was at any time informed for his approval of the modes adopted to implement his instructions. The Appellate Court as well as the Trial Court had wrongly burdened the petitioner with the responsibility of acts done without his instructions and knowledge. For the purpose of fixing criminal liability for acts done pursuant to instructions, it must be shown that those very acts were

part of the instructions and cannot deduce by implication, be deduced there-from.

42. By the definition of hijacking given in section 402-A, PPC, the seizure or control of the aircraft by the hijacker must be the result of use or show of force or by threats of any kind. Whether the petitioner had taken control of the aircraft would be the subject of the discussion later but presently we propose to examine as to whether the Pilot of the aircraft was in anyway influenced by any use or show of force or any threat. This is to be seen in the light of the three factors, discussed above, from which the Appellate Court and the trial Court found the exercise of show or threat of force. In this context we would first refer to the statement of PW-1, who stated in his examination-in-chief that while instructing the Chief Operational Officer, Syed Yousuf Abbas (PW-2) to monitor the Flight from Air Traffic Control Tower, he had cautioned him not to divulge to the Pilot of the aircraft the reasons for closure of Karachi and Nawab Shah Airports. The Pilot was, therefore, unaware of the reasons for diversion of his aircraft. The Pilot, Capt. Syed Sarwat Hussain (PW-9), confirms this, as he only suspected that this exercise had something to do with General Pervaiz Musharraf, being on board in the Flight. The Captain was also completely unaware that the runway had been blocked and the lights were switched off. No such information was conveyed to him. Rather in his examination-in-chief he stated *"after some time we were allowed to park at the international gate and normal passengers disembarkation took place. We learnt at this point that the air area field was blocked by the vehicles and the lights were turned off"*.

43. The next question is whether the Pilot was under any threat on account of shortage of fuel in the aircraft. In this connection we would refer to our earlier conclusion that upon learning at about 6:15 p.m. that fuel in the aircraft was insufficient to take it to Masqat, the petitioner ordered its landing

and refueling at Nawab Shah. We may note here that the aircraft eventually landed at Karachi airport at 7:50 p.m. Capt. Syed Sarwat Hussain (PW-9), did state in his examination-in-chief that the fuel in the aircraft was enough to land at Nawab Shah airfield. He went on to add that *"after some time Karachi ATC gave us clearance to proceed to Nawab Shah and we started towards Nawab Shah in a climb."* It seems that this direction was in accordance with the instructions already issued by the petitioner and had the same been followed the plane would have very safely landed at Nawab Shah. While midway to Nawab Shah, the Pilot received another instruction from Karachi ATC at about *"7:10 or 7:15 p.m."* for landing at Karachi Airport. This second instruction to the Pilot given about more than half an hour before the actual landing at Karachi, was admittedly not given by the petitioner. According to the prosecution case, these instructions were given to PW-1 by Brig. Javed Iqbal (PW-19), Military Secretary to the petitioner, on his own initiative, after he was informed about the shortage of fuel in the aircraft by Zahid Mehmood (PW-14). This conversation, however, is not supported by PW-14. Interestingly, the reasons given by PW-19 for deciding to redirect the plane to Karachi, was the information he claims to have received from PW-1 that the plane did not even have enough fuel to reach Nawab Shah. PW-1 contradicts this version, who simply stated *"a little while later I got a telephonic call from the Military Secretary to the Prime Minister, Brig. Javed. He informed me that now the orders were that the Air Craft should be brought back to Karachi Air Port."* Syed Yousuf Abbas (PW-2), who was at the Control Tower, mentioned that he had received instructions from PW-1 for landing of the aircraft at Karachi but before he could pass on the instructions to the aircraft, he divulged *"at that moment a contingent of Pakistan Army entered the Control Tower and Brig. Jabbar ordered me for return of PK-805 to Karachi, I immediately told Mr. Asif to inform Mr. Manzoor in radar for return of PK-*

805. After about 3 to 4 minutes some higher officials of Pakistan Army also entered the Control Tower and strictly ordered diversion of PK-805 to Karachi. Major General Iftikhar spoke to Mr. Aqeel Ahmed in area Control Centre and gave him similar instructions." The instructions to the Pilot for redirection of the plane to land at Karachi was thus given on the orders of Army Officers, Brig. Jabbar and Major General Iftikhar, and not by the petitioner.

44. According to the prosecution own showing, the petitioner had directed that the plane be diverted to Nawab Shah for refueling for onward journey to Masqat. PW-14 says that the instructions for refueling at Nawab Shah were given by the petitioner at about 6:15 p.m., almost an hour and half before the plane eventually landed Karachi. It is, therefore, not difficult to conclude that in view of the petitioner's instructions regarding refueling at Nawab Shah, the Pilot was under no threat on account of shortage of fuel. Implementation of such instruction would have got the aircraft safely landed at Nawab Shah Airport.

45. There is another aspect of the issue of closure of Karachi and Nawab Shah Airports and shortage of fuel. According to the Pilot while midway to Nawab Shah, he received instruction from Air Traffic Control at about 7:10 or 7:15 p.m. to return to Karachi. He disregarded this instruction from Air Traffic Control in view of the confusion created in his mind by the different instructions he had received from Air Traffic Control. That he had decided to land at Karachi only after Major General Iftikhar had spoken to General Pervaiz Musharraf and in cross-examination, he categorically stated *"it is correct that without the said confirmation I would not have landed at Karachi."* He further admitted that General Pervaiz Musharrf spoke to the Air Traffic Control Tower and that he wanted to know as to who was in control of the Tower. It is, therefore, clear that when the Pilot received the instruction

from Air Traffic Control to return to Karachi, both the airfields, at Karachi and Nawab Shah, were open to the aircraft for landing. It appears that the reason for the Pilot to delay landing at Karachi for more than half an hour was not on account of any confusion that he claims, as he had received clear instructions from the Tower to land at Karachi but due to General Pervaiz Musharraf's anxiety that the landing should not be made until all was clear for him. The record shows that the troops had taken control of the Karachi Airport even before 7.00 p.m. This is evident from the statements of two witnesses, the complainant, Lt. Col. Atiq-uz-Zaman and PW Nadeem Akbar, Air Traffic Control Officer. At the trial the former stated that the troops of 5 Corps reached the airport at about 7.00 p.m., but when confronted with his written complaint(Exh.50), he admitted that he mentioned the time as 6.45 p.m. He further confirmed that Lt. Gen. Muzaffar H. Usmani, Commander 5 Corps arrived at the airport at 6.40 p.m. That Syed Ghous Ali Shah and Rana Maqbool Ahmed arrived at the Airport at 7.00 after the troops had already reached the airport. P.W. Nadeem Akbar stated that he received telephone call at 6.40 p.m. from General Iftikhar, directing him not to divert airplane anywhere.

46. It thus follows that since the Pilot was unaware of the blocking of the runway and he had sufficient fuel to land at Nawab Shah as well as at Karachi, he was not influenced by the circumstances alleged by the prosecution and was thus under no threat.

47. The above discussion leads us to conclude that since the petitioner had neither ordered closure of the airports nor blocking of the runways, rather he had issued instructions for the plane to land at Nawab Shah once he gained knowledge of insufficiency of fuel. Furthermore, the Pilot did not remain under any threat. The findings of the Courts, on this ingredient, are

contrary to the evidence on record and therefore warrants reversal, and it is accordingly so held.

SEIZURE OR EXERCISING CONTROL OF THE AIRCRAFT.

48. The third ingredient required to be proved by the prosecution is that as a result of his unlawful act and the use or show of force, the accused had seized or exercised control of the aircraft. For holding that the petitioner took control of the aircraft, the learned Appellate Court has heavily relied upon the judgment of this Court in the case of **Shahsawar** v. **The State** (2000 SCMR 1331) that the offence of hijacking stood completed no sooner the aircraft was diverted forcibly to a different destination. The learned Appellate Court thus found the petitioner to have exercised control of the aircraft the moment it was diverted on his instructions. The facts of the cited case are materially distinguishable from those of the present. There, the accused on board the flight from Turbat to Karachi entered the cockpit of the aircraft and at gunpoint ordered the pilot to take the plane to Jodhpur, India. However, upon some clever planning by the pilot, the aircraft landed at Hyderabad where the accused were overpowered and arrested. They were tried and convicted for hijacking. The distinguishing features are that the hijackers in the cited case were physically present in the aircraft and by show of force, had got the aircraft diverted from its scheduled destination, whereas the petitioner was neither physically present in the aircraft nor had he in any way ordered the use of force. In actual fact, the petitioner had only ordered the landing of the aircraft on another airport and had issued no direction that the aircraft be seized or its control be taken over. In any case, the Pilot remained in control of the aircraft throughout, so much so that he ignored the instructions of the ATC Tower to land at Karachi, notwithstanding that he was supposed to follow the directions from the ATC and the Radar Control. There is, therefore, no

evidence that the petitioner had either instructed or had personally seized or taken the control of the aircraft. Rather the control of the aircraft was never taken away from the Pilot.

49. In the light of foregoing discussion, we have no hesitation in concluding that the directions given by the petitioner regarding Flight PK-805 were neither unlawful, nor did he use or show force or gave threat of any kind for the implementation of his directions and that he had also not seized or taken control of aircraft directly or indirectly. The prosecution has, therefore, failed to prove any of the three ingredients that constitute the offence of hijacking as defined in section 402-A PPC.

50. The above findings based essentially on the petitioner's lawful exercise of powers under Section 6 of the Ordinance, and taking the prosecution evidence, to a great extent, on its face value, are sufficient to hold the petitioner not guilty. We however, propose to further address the infirmities in the prosecution case pointed out by the learned counsel for petitioner, as, notwithstanding the plea taken by the petitioner, the prosecution still had to prove its case beyond the reasonable doubt. It may be reiterated that the petitioner had taken the plea under Section 6 of the Ordinance for the first time at Appellate level with permission of Court whereas the Trial Court had proceeded to decide the case in the background of complete denial by the petitioner of having given any instruction regarding Flight No. PK-805.

51. The prosecution case is founded on the testimony of Aminullah Choudhary (PW1), the approver, to whom, the prosecution alleges, the petitioner had issued instructions regarding Flight No. PK-805. It is undoubtedly now settled that the testimony of an approver, in order to be accepted as worthy of credence, must pass the double test, namely, that he is a reliable witness and that his testimony receives sufficient corroboration on material particulars. The Appellate Court has also applied these tests and has

referred to the case law in support of the proposition in paras 30 to 49 of the impugned judgment and in para 50 thereof has deduced the principles from the case law. We need not refer to all the authorities cited by the learned Appellate Court as there is no controversy regarding this legal proposition. Reference, however, be made to the most important cases on the point, namely, **Srinivas Mall Bairoliya** v **Emperor** (PLD 1947 PC 141), **Ghulam Qadir** v **State** (PLD 1959 SC (Pak) 377), **Abdul Majeed** v **State** (PLD 1973 SC 595) and **State** v **Zulfiqar Ali Bhutto** (PLD 1978 Lahore 523). In the light of criteria laid down for the acceptance of approver's testimony, we proceed to examine whether the testimony of PW1 meets the requisite standard.

52. The approver, according to his own statement, was under house detention from 13.10.1999 till he was arrested formally by the police in the present case on 13.11.1999. However, the investigating officer, Abdul Waqar Malhan, (PW28), the then SHO, Police Station Airport, Karachi, stated that the approver along with Syed Ghous Ali Shah, Shahid Khaqan Abbasi and Rana Maqbool Ahmed, were taken into custody from Malir Cantt, Karachi. PW21 the then SIP, Police Station Airport, Karachi, stated that the "Army people" had handed over Aminullah Chaudhry along with said accused to the SHO. The approver thus remained in custody of the Army for a month before he was handed over to the police. While in police custody he made an application on 19.11.1999 to the Judge, Anti Terrorism Court, Karachi, through his counsel wherein it was stated "*It is submitted that from 15.11.1999 until today, the above-mentioned accused person has been subjected to acute duress with the result that the accused is undergoing acute mental torture and agonies which has adversely effected his health. It is, therefore, prayed that this Honourable Court be pleased to refer the above mentioned persons to Psychiatrist today or else the accused might die of shock."* After hearing arguments on the said application on the same day, the Court ordered *"As the*

accused is complaining of mental disturbances, therefore, there is no harm in getting him examined through psychiatrist in order to arrive at proper conclusion about the mental condition of the accused. Thus, the accused may also be examined through Psychiatrist and report be submitted to this Court."
The doctor's report was never produced, however, his police remand came to an end on 22.11.1999 and on the very next day he filed an application before the District Magistrate expressing his wish to make a statement under Section 337 Cr. P.C. on the condition that first he be given pardon and be declared an approver. The application was allowed on the same day and on that very day he also made his statement implicating the petitioner.

53. The circumstances, under which PW1 became an approver, were brought to the notice of the learned Appellate Court but were not given much importance in view of the explanation given by the witness at the trial. When confronted with the application (Exh.14) the witness accepted that the application was moved by his counsel, Mr. Muhammad Ashraf Qazi, Advocate, but tried to explain by denying having made verbal complaint to the Court or that he had heard his counsel making such complaint to the Court as he was sitting at the back of the Court Room. The learned Appellate Court did not give a very clear finding on whether or not the witness had made complaint to the Court but it appears that the said explanation had an influence on the Court. The Court however had overlooked the fact that the witness had never denied the contents of the application, rather he admitted that the same was moved by his counsel. His assertion that he had neither made verbal complaint to the Court or that he had not heard his counsel would not negate the factual assertions made in the application, which he never disowned. There is no reason not to hold that the witness was tortured and remained under duress during the police custody from 13.11.1999 and perhaps the same

continued till the such custody came to an end 3 days later on 22.11.1999, a day before he decided to become an approver.

54. It is understandable that an accused becomes an approver on motivation of self interest to save his own skin. The circumstances in the present case that led PW1 to become an approver indicate that he was not a free agent. He was taken into custody by the Army soon after the incident and remained there for about one month and was then in police custody for about 10 days, during which he was tortured to the extent that he feared that 'he would die of shock'. Notwithstanding such complaint made to the Trial Court, he was again sent to police remand for further 3 days which ended a day before he became an approver. He does not appear to be man of strong nerves as according to his own statement he implemented the instructions of the petitioner on account of concern for his own future, after he had heard that the petitioner had replaced the Chief of Army Staff. Additionally, he had tried to suppress truth in his testimony at the trial. While admitting that he remained under house detention from where he was taken into custody by the police on 13.11.1999, he denied categorically that he was handed over to the police by the 'Military People'. This is contradicted by Chaudhry Muhammad Zubair PW.21, who stated that the petitioner along with his co-accused Syed Ghaus Ali Shah and others were arrested by the SHO from Malir Cantt and that they were handed over to the SHO by 'Army People'. When asked during cross-examination he denied having made application to the Anti Terrorism Court regarding police torture but when confronted with the application he admitted that the same was moved by his counsel. Again in order to wriggle out of this situation, he gave an unbelievable explanation that since he was sitting right at the back of the Court Room he could not hear the arguments of his counsel. He denied having been interrogated or investigated before the registration of the case but then went on to concede that he had appeared before a Board of

Inquiry. Above all, he had falsely introduced into the prosecution evidence, as held above, the third call from the petitioner to him which was crucial for the prosecution, who wanted to show that the petitioner was adamant in not allowing the airplane to land in Pakistan, notwithstanding the fuel shortage in the aircraft. These circumstances erode the credibility of the witness.

55. To substantiate the approver's claim that all the instructions regarding Flight No. PK-805 were given to him for implementation, the prosecution had sought corroboration from the testimony of PW15 and PW16, the telephone operators respectively of the Prime Minister House and the Office of the Director General, Civil Aviation, and the implementation of instructions from the testimony of Wing Commander Ahmed Farooq, Secretary to PW1, Syed Yousif Abbas (PW2) Chief Operational Officer CAA and Syed Aqeel Abbas (PW6) General Manager, Air Traffic Control. So far as statements of the two telephone operators are concerned, their testimony can only substantiate that telephone contacts were made by the petitioner with PW1, but the same does not in any way go to prove the contents of the conversation. There is no evidence whatsoever to corroborate the contents of instructions the witnesses claimed to have received from the petitioner. The testimony of the three other witnesses who were involved in the implementation of the instructions is to the extent that PW1 had disclosed that the instructions had come from the petitioner. This of course would be hearsay and inadmissible. Furthermore, as pointed out by the learned counsel for the petitioner, the testimony of these three witnesses, PW2, PW6 and PW20 is tainted evidence. If PW1 can be labeled as accused for implementing the unlawful orders of the petitioner, the status of these three witnesses would be no better as they were equally involved in implementation of the same instructions. The testimony of PW-1 on the most material particular of the case, the nature of instructions by the petitioner, remains uncorroborated.

56. The testimony of the approver fails to satisfy both the tests in that he is neither reliable witness nor his testimony is corroborated in material particulars.

57. There is another serious infirmity in the prosecution case, namely, the delay in making the FIR for about a month after the incident. We may recall that the FIR was made on the written complaint of Lt. Col. Atiq-uz-Zaman Kiyani, the then Protocol Officer at Karachi, who was present at the airport to receive General Pervaiz Musharraf. He did not have much of personal information about the incident. He was a mere spectator and was not involved in any move made by the Army at the airport. After the Army had taken over on the 12th October, 1999, General Pervaiz Musharraf in the early hours of 13th October, 1999 addressed the nation on electronic media at 3.00 a.m. justifying the take over. In his speech he also mentioned the present incident referring to the fundamentals on which the present case is based, namely, diversion of aircraft to outside Pakistan, acute shortage of fuel and danger to the lives of the passengers. The speech has been reproduced at page 910 in the case of **Syed Zafar Ali Shah** v **General Pervaiz Musharraf, Chief Executive of Pakistan** (PLD 2000 SC 869). The point of delay in lodging the FIR was urged by the Defence before the Appellate Court but rejected on the ground that in the circumstances of the case, the delay was immaterial in view of the enormous trustworthy prosecution evidence. The Court accepted the explanation put forth by the special prosecutor that the delay had occurred on account of involvement of persons holding top slots and high offices and that in any case the prosecution did not gain any thing from the delay in lodging the FIR. The Court however did not venture to discuss the consequences of delay on the case.

58. Undoubtedly, the FIR could have been lodged soon after the incident as the basic facts were then available, which were even disclosed by

General Pervaiz Musharraf within hours of takeover. Like any other case, the evidence could have been collected during the investigation once the FIR was lodged. A unique mode was however, adopted in the present case. The Army had straightaway taken control of the matter and started its own probe. This is evident from the statement of as many as 10 witnesses and we may just refer to some of them. PW1 disclosed that *"there was a board of inquiry in this connection with regard to the present case during my house detention period. I was asked to appear before the board of inquiry. I appeared before the board of inquiry on 24th Oct. 1999 and 9th Nov. 1999. My statement was recorded by the board of inquiry on the 24.10.1999 on 9.11.1999 I was required to read it and sign it. The inquiry board was consisted of a Major General and Air Commandor and 3 gentlemen in civil dress. I am not aware of the names of the members of that board."* PW4 Muhammad Asif, disclosed that before the police contacted him on 13 and 14.11.1999, he had already been contacted by various agencies including those of the Army. Sayed Aqeel Ahmed, PW6 also referred to the interrogation by the Army personnel. To the same effects are of the statements of PW.7, Pw8, PW9, PW13, PW14, PW15 and PW20. Since facts of the case were known right from day one, no explanation has been put forth by the prosecution as to why FIR was not lodged immediately instead of the Army making a probe for a month before registration of the case.

59. We do not find ourselves in agreement with the Appellate Court that the delay in FIR was immaterial because the prosecution had not gained from it. Ordinarily, evidence in a case is collected or procured upon registration of the FIR. It appears that this exercise was undertaken by the Army personnel prior to the registration of the case as they had not only constituted a Board for the probe but as many as 10 witnesses were contacted by the agencies. Apart from its irregularity, the mode adopted may have had

significant repercussions on certain aspects of the case. Some factual material which could have thrown light on certain serious controversies, like the black box, the audio spools which recorded conversation between the Air Traffic Control and the aircraft were already taken into possession before registration of the case. The original contents of these recordings would have been helpful in finding out the exact conversation between the aircraft and the Air Traffic Control, particularly during the 30 minutes before the landing of the aircraft. Though the black box and the audio script were produced before the Court but the same were not played. They had been simply handed over to the investigating officer and there was nothing on the record to show as to who had secured them from the aircraft. Reference may be made to the statement of Nazir Ahmed (PW-22), who was working as Director Engineering, PIA. He stated that he had handed over to the police CVR (cockpit vice recorder), PMR (Performance Monitoring Recorder and DFDR (Digital Flight Data Recorder and disclosed that the articles had already been removed from the aircraft and were kept in some cabinet. Identity of the person who removed them was not disclosed. The investigating officer, Ilyas (PW8) who had taken the black box into possession, stated that he had not taken the article immediately after taking over the investigation and in cross examination admitted that he did not know who had secured the black box from the aircraft. He had not played the black box to hear the conversion recorded in it. In the circumstances, when already a probe was going on for more than one month before the FIR was lodged and evidence collected by persons, whose identity was not disclosed, the possibility of tampering with these articles could not be ruled out.

60. From the statement of the Investigating Officer, it appears that investigation and collection of evidence had substantially already been done before the FIR was lodged and the materials so collected were simply handed

over to the Investigating Officer to be produced in Court. There is force in the argument of the learned Counsel for the petitioner that such a high profile case was handed over for investigation to a junior police officer, who could not in the circumstances be expected to carry out investigation independently. The Appellate Court has, therefore, erred in saying that the probe before the FIR was merely an inquiry leading to the registration of the case. Had the FIR been lodged immediately after the incident, the investigation would have been taken over by the police and important evidence, not only beneficial to the prosecution but perhaps also helpful to the defence would have been taken into possession and preserved. The conversation recorded in the black box and the audio spools at the relevant time was crucial for the prosecution as well as for the defence. That evidence was lost as the material articles produced in the Court had come from undisclosed source. Similarly the log book which records the fuel endurance of the aircraft was also not produced. In the circumstances, it was wrong to hold that the prosecution has not gained from the delay in the FIR. Another major gain to the prosecution was that on account of the delay the prosecution in the meanwhile managed an approver who remained in the custody till the FIR was lodged. Furthermore, the probe carried out by the Army through a board of inquiry was not an enquiry under the Criminal Procedure Code as even the prosecution did not rely upon the same as it was not produced at the trial. As the FIR was lodged after extensive consultations and deliberations, its veracity stands eroded.

61. It thus follows that the FIR was lodged with inordinate delay for which no plausible explanation has been put forth by the prosecution. The investigation was not carried out independently and the testimony of the approver on which the prosecution is founded had not satisfied the conditions for acceptance of his testimony. Thus, regardless of the plea taken by the petitioner with regard to Section 6 of the Ordinance, the prosecution on its

own standing has not been able to prove its case against the petitioner beyond reasonable doubt.

62. We may note that the learned Single Judge who had not agreed with the majority to maintain conviction of the petitioner under Section 402-B PPC for hijacking, nevertheless found the petitioner guilty of abduction under Section 365 PPC. Though this is not the majority opinion, we do not subscribe to the view taken by the Hon'ble single Judge, in that, the offence of abduction, as defined in Section 362 PPC, is committed when a person is taken from one place to another either by 'force' or by 'deceitful means'. As already held, the petitioner had neither used force nor ordered its use and undisputedly no deceitful means were used. Even otherwise, the offence of hijacking itself contains an element of abduction and if the former offence is not proved, the latter cannot be established.

63. Looking at the case from any angle, the charge of hijacking, attempt to hijack or terrorism does not stand established against the petitioner. Consequently, the petition is converted into appeal and allowed. The conviction and sentence of the appellant are set aside and he is acquitted.

Judge

Judge

Judge

Judge

Judge

Announced at Islamabad in open Court
on 17th July, 2009

Judge

"APPROVED FOR REPORTING"

Shirazi/*