

P L D 2001 Supreme Court 568

Present: Muhammad Bashir Jehangiri, Sh. Riaz Ahmed, Munir A. Sheikh, Nazim Hussain Siddiqui, Iftikhar Muhammad Chaudhary, Qazi Muhammad Farooq and Abdul Hameed Dogar, JJ

ASIF ALI ZARDARI and another---Appellants

versus

THE STATE---Respondent

Criminal Appeal No. 102, of 1999 with Criminal Miscellaneous Applications Nos. 123, 124, 137 of 1999, Criminal Miscellaneous Applications Nos.58, 64, 70 of 2001 and Criminal Application No. 127 of 1999 with Cr1.M.A. Nil of 1999, Cr1. M.A Nil of 1999, Cr1.M.A. Nos.49, 50, 59, 68, 69 of 2001, Cr1. P. No.75 of 1999, C.P. No.619-K of 1998, C.P. No.623-K of 1998, decided on 6th April, 2001.

(On Appeal from the judgment dated 15-4-1999 of the Ehtesab Bench of Lahore High Court, Rawalpindi Bench, passed in Ehtesab Reference No.30 of 1998).

(a) Bias in a Judge--

---- Description, test and kinds of bias---Accused having right of a fair trial by a judicial minded person, not functioning under an influence which might paralyse his judicial faculties as to result in absence of a fair trial---Bias would vitiate judicial proceedings if such circumstances were created or brought about by the Judge as would rob him of the confidence that a litigant may have in the Judge---Principles.

"Bias" is synonymous with "partiality", and has strictly to be distinguished from "prejudice". Under particular circumstances, bias has been described as a condition of mind; and has been held to refer, not to views entertained regarding a particular subject-matter, but to the mental attitude or disposition toward a particular person and to cover all varieties of, personal hostility or prejudice against him.

Not only is a person affected by an administrative decision entitled to have his case heard by the agency seized with its determination, but he may also insist on his case being heard by a fair Judge, one free from bias. Bias in this context has usually meant that the adjudicator must have no financial interest in the matter under dispute, but it is not necessarily so limited and allegations of bias have been upheld in circumstances where there was no question of any financial interest.

A Judge must decline resolutely to act in a case involving his own interest, including those of persons whom he regards and treats as near relatives or close friends.

A Judge must refuse to deal with any case in which he has a connection with one party or its lawyer more than the other, or even with both parties and their lawyers.

To ensure that justice is not only done, but is also seen to be done, a Judge must avoid all possibility of his opinion or action in any case being swayed by any consideration of personal advantage, 'either direct or indirect.

There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and 'confidence is destroyed when right-minded people go .away thinking: "The judge was biased".

The accused has a right of a fair trial, by a judicial minded person, not functioning under an influence which might paralyse his judicial faculties as to result in absence of ,a fair trial. Bias may be caused by a judgment, order or observation of a superior Court or it may spring from personal, political, religious, communal, racial, commercial or economic considerations. Bias would vitiate judicial proceedings if such circumstances are created or brought about by the Judge as would rob him of the confidence that a litigant may have in the Judge.

No Judge can be a Judge in his own cause, or in a case in which .he is personally interested, not because his decision must invariably be in his own favour but on the principle that justice must not only be done but seen to be done and however right the Judge deciding a cause in his own favour may be, neither the public nor the aggrieved party will be satisfied with the adjudication and its result will be vacated by the Court of Appeal at the instance of the dissatisfied party.

The consideration of bias is a branch of the principles of natural justice. It is now agreed on all hands that there are certain broad principles of natural justice deducible from two Latin Maxims firstly, "Nemo debet esse judex in propria sua causa" which formed the foundation of the doctrine firstly, that no one .can be Judge in his own cause which, in a wide application, means that a judicial or quasi judicial authority not

only himself not be a party but must also not be interested as a party in the subject-matter of the dispute which he has to decide and; second principle is 'Audi alteram partem' (hear the other side)..

Bias is said to be of three different kinds:

(a) A Judge may have a bias in the subject-matter which means that he is himself a party or has direct connection with the litigation, so as to constitute a legal interest.

A 'legal interest' means that the Judge is 'in such a position that a bias must be assumed'.

(b) Pecuniary interest in the cause, however slight, will disqualify the Judge, even though it is not proved that the decision has in fact been affected by reason of such interest. For this reason, where a person having such interest sits as one of the Judges, the decision is vitiated.

(c) A Judge may have a personal bias towards a party owing to relationship and tire like or he may be personally hostile to a party as a result of events happening either before or during the trial. Whenever there is any allegation of personal bias, the question which should be satisfied is -- "Is there in the mind of the litigant a reasonable apprehension that he would not get a fair trial?" The test is whether there is a 'real likelihood of prejudicial, but it does not require certainty.' 'Real likelihood' is the apprehension of a reasonable man apprised of the facts and not the suspicion of fools or capricious persons.

No doubt, the Judges of the superior Courts are blessed with a judicial conscience but question nonetheless is whether a particular Judge of the Subordinate or the Superior Judiciary against whom the allegation of bias is alleged is possessed of judicial conscience. This litmus test is indeed very difficult but certainly not impossible. The circumstances of a particular case wherein bias of a Judge is alleged would themselves speak volumes for the same. In other words, the principle is well-settled that a Judge of the superior Court is a keeper of his own conscience and it is for him to decide to hear or not to hear a matter before him. However, in the present case Supreme Court declined to adhere to the said settled principle because bias is floating on the surface of the record.

A Judge having - pecuniary or proprietary interest or any other personal interest in the subject-matter of a case before him cannot hear the case.

Mohtarma Benazir Bhutto, Leader of the Opposition, Bilawal House, Clifton, Karachi and another v. The State through Chief Ehtesab Commissioner, Islamabad 1999 SCMR 759; Mohtarma Benazir Bhutto v. The State PLD 1999 SC 937; Benazir Bhutto v. The State Criminal Appeals -Nos.62 and 63 of 1999; Mohtarma Benazir Bhutto v. The State, Criminal Petition No.208 of 1998; Mohtarma Benazir Bhutto, M.N.A. and another v. The State PLD 2000 SC 795; Shahadat Khan and another v. Home Secretary to the Government of West Pakistan and others PLD 1969 SC 158 and Machia and 2 others v. The State PLD 1976 SC 695; Ms. Benazir Bhutto v. President of Pakistan and another 1992 SCMR 140; Corpus Juris Secundum, Vol. X; pp. 354, 355; Administrative Law by Garner, 4th Edn., p.122; Metropolitan Properties Co. (FGC) Ltd. v. Lannon and others (1968) 3 All ER 304; Code of Conduct framed by the Supreme Judicial Council under Article 128 (4) of the erstwhile Constitution of Pakistan, 1962 for the Judges of the Supreme Court and the High Courts in Pakistan; Anwar and another v. The Crown PLD 1955 PC 185 and Khairdi Khan v. Crown PLD 1953 FC 223 ref.

(b) Ehtesab Act (IX of 1997)---

---Ss. 3, 4(2), 15, 2(f), 9 & 10---Constitution of Pakistan (1973), Art. 185--?Appeal to Supreme Court---Conviction for corrupt and corrupt practices--?Allegation of bias in Judge by the convicts---Supreme Court by highlighting sufficient material on record which substantiated the allegation of bias found that trial of convicts was not fair on account of bias and accepted the appeals of convicts and set aside the sentences awarded to them and remitted the case to the Court of competent jurisdiction for trial afresh in accordance with law.

Mohtarma Benazir Bhutto, Leader of the Opposition, Bilawal House, Clifton, Karachi and another v. The State through Chief Ehtesab Commissioner, Islamabad 1999 SCMR 759; Mohtarma Benazir Bhutto v The State PLD 1999 SC 937; Benazir Bhutto v. The State Criminal Appeals Nos.62 and 63 of 1999; Mohtarma Benazir Bhutto v. The State Criminal Petition No.208 of 1:998; Mohtarma Benazir Bhutto, M.N.A. and another v. The State PLD 2000 SC 795; Shahadat Khan and another v. Home Secretary to the Government of West Pakistan and others PLD 1969 SC 158 and Machia and 2 others v.. The State PLD 1976 SC 695; Ms. Benazir Bhutto v. President of Pakistan and another 1992 SCMR 140; Corpus Juris Secundum, Vol. X, pp. 354, 355; Administrative Law by Garner, 4th Edn., p.122; Metropolitan Properties Co. -(FGC) Ltd. v. Lannon and others (1968) 3 All ER 304; Code of Conduct framed by the Supreme Judicial Council under Article 128 (4) of the erstwhile Constitution of Pakistan, 1962 for the Judges of the Supreme Court and the High Courts in Pakistan; Anwar and another v. The Crown PLD 1955 PC 185 and Khairdi Khan v. Crown PLD 1953 PC 223 ref.

(c) Criminal Procedure Code (V of 1898)---

---S. 342---Object of S.342, Cr.P.C.

Nemo debet esse iudex in propria sua causa"---Connotation.

----- Audi alteram partem"---Applicability.

Abdul Hafeez Pirzada, Senior Advocate Supreme Court, Farooq H. Naek, Senior Advocate Supreme Court instructed by Raja Abdul Ghafoor, Advocate-on-Record for Appellant (in CrI.A. No. 102 of 1999).

S.M. Zafar, Senior Advocate Supreme Court, Ali Sabtain Fazli, Advocate Supreme Court, Ali Zafar, Advocate Supreme Court and Ch. Fazal-i-Hussain, Advocate-on-Record for the State (in Cr1.A. No.102 of 1999).

Raja Muhammad Anwar, Senior Advocate Supreme Court, Sardar Muhammad Latif Khosa, Senior Advocate Supreme Court and Ch. Aitzaz Ahsan, Senior Advocate Supreme Court for Appellants (in CrI. A. No. 127 of 2000).

Barrister M. Zahoorul Haq, Advocate Supreme Court, Ali Sabtain Fazli, Advocate Supreme Court and Ch. Fazal-i-Hussain, Advocate-on-?Record for the State (in CrI.A. No. 127 of 1999).

Aziz A. Munshi, Attorney-General for Pakistan as Law Officer of the Court under Constitution assisted by Sher Zaman Khan, Deputy Attorney-General, Tanvir Bashir Ansari, Deputy Attorney-General instructed by Ch. Fazal-e-Hussain; Advocate-on-Record for the Federation of Pakistan (in both Criminal Appeals).

Dates of hearing: 26th, 27th, 28th February; 1st, 2nd, 12th to 16th, 19th to 22nd, 26th to 30th March; 2nd and 3rd April, 2001.

Full judgement of the Supreme Court of Pakistan in the SGS case

JUDGEMENT?
SUPPLEMENTARY REFERENCE
SHORT ORDER
CHARGES AGAINST MOHTARMA BENAZIR BHUTTO
CHARGES AGAINST ASIF ALI ZARDARI ACCUSED NO.2
EVIDENCE
CONTENTIONS ON THE QUESTION OF BIAS RAISED:
a. ON BEHALF OF THE APPELLANTS
b. ON BEHALF OF THE STATE
?SECRET? FOREIGN OFFICE SUMMARY FOR THE PM
??????????????

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IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)
HON'BLE JUDGES PRESENT:
MR. JUSTICE MUHAMMAD BASHIR JEHangIRI.
MR. JUSTICE SH. RIAZ AHMAD.
MR. JUSTICE MUNIR A. SHEIKH.
MR. JUSTICE NAZIM HUSSAIN SIDDIQUI.

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MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHARY.

MR. JUSTICE? QAZI MUHAMMAD FAROOQ

MR. JUSTICE ABDUL HAMEED? DOGAR.

CRL.A.102 OF 1999 WITH CRL.M.A. NOS. 123, 124, 137 OF 1999, CRL.M.A. NO.58, 64 , 70 OF 2001, AND CRL.A.127 OF 1999 WITH CRL.M.A. NIL OF 1999, CRL.M.A. NIL OF 1999, CRL.M.A. NOS.49, 50, 59, 68 , 69 OF 2001, CRL.P. 75 OF 1999, C.P.619-K OF 1998, CP 623-K OF 1998.

(On appeal from the judgment dated 15-4-1999 of the Ehtesab Bench of Lahore High Court, Rawalpindi Bench, passed in Ehtesab Reference 30 of 1998)??

CRL.A.102 OF 1999 WITH CRL.M.A. NOS. 123, 124, 137 OF 1999, CRL.M.A. NO.58, 64 , 70 OF 2001

(On appeal from the judgement dated 15-4-1999 of the Ehtesab Bench of the Lahore High Court, Rawalpindi Bench, passed in Ehtesab Reference 30 of 1998)

CRL.A.102 OF 1999 WITH CRL.M.A. NOS. 123, 124,, 70 OF 2001,

[illegible]

VERSUS

The State. ??? RESPONDENT

For the Appellant:

Mr. Abdul Hafeez Pirzada ?????????????? Sr. ASC (Crl. A 102/99)

Mr. Farooq H. Naek?? Sr. ASC. Instructed
by Raja Abdul Ghafoor AOR

For the State:

Mr. S. M. Zafar ?????? Sr.ASC (in CrI.A.102/99)?????

Mr. Ali Sabtain Fazli? ASC

??????? ????????? Mr. Ali Zafar ?? ASC

?????? ????????? Ch.Fazal-i-Hussain?? AOR.

CRL.A.127 OF 1999 WITH CRL.M.A. NIL OF 1999, CRL.M.A. NIL OF 1999, CRL.M.A. NOS.49, 50, 59, 68 , 69 OF 2001, CRL.P. 75 OF 1999, C.P.619-K OF 1998, CP 623-K OF 1998.

Mohtarma Benazir Bhutto ?????????????? APPELLANT

VERSUS

[illegible]

For the appellant: ???

Raja Muhammad Anwar?????? Sr. ASC. (In Crl.A.127 of 2000)

Sardar Muhammad Latif Khosa ?????? Sr. ASC.

??????? ????????? Mr.Aitzaz? Ahsan ??? Sr. ASC

For the respondent/State: ?

Mr. Barrister M. Zahoorul Haq????????? ASC (In CrI.A.127/99)?????????????????? ??

Mr. Ali Sabtain Fazli????????? ASC

??????? ????????? Ch.Fazal-i-Hussain ????????????????????????????????????? AOR.

For Federation of Pakistan:

Mr. Aziz A. Munshi? Attorney (In both CrI. Appeals)

General for Pakistan,

as Law Officer of the Court under the Constitution, assisted by:

Mr. Sher Zaman Khan ?????????????????? Deputy Attorney

General, Mr. Tanvir Bashir Ansari???? Deputy Attorney-General Instructed by:

Ch. Fazal-e-Hussain? AOR

Dates of hearing: 26,27,28-2-2001, 1,2-3-2001, 12? to 16-3-2001,19 to 22-3-2001, 26 to 30-3-2001.2 & 3-4-2001.

JUDGEMENT

MUHAMMAD BASHIR JEHangIRI J.- This judgment will dispose of Criminal Appeals bearing No.102 and 127 of 1999, both of which are directed against the judgment dated 15th April, 1999 of a

learned Division Bench of the Lahore High Court, Rawalpindi? Bench in? Ehtesab Reference No.30 of 1998. ISLAMABAD

2.????? The appeals were heard by a larger Bench of seven Judges with effect from 26th February to 3rd April, 2001. The two appellants were tried by the learned Ehtesab Bench of Lahore High Court, Rawalpindi Bench, on its original side on receipt of Ehtesab Reference No. 30 of 1998 from the then learned Chief Ehtesab Commissioner filed under Section 15(1) of the Ehtesab Act????? (IX of 1997) (hereinafter referred to as the? Act) against as many as 12 accused including the two convict-appellants before us.

3.????? Facts of the case, according to the prosecution, are that by his letter .F.2(37)/98-MP/EC dated 14th March, 1998 the Chief Ehtesab Commissioner made a Reference under Section 15 of the Act to the Lahore High Court, Lahore. This Reference was registered as ER No.30/98. The learned Chief Justice of Lahore High Court constituted a Bench comprising Malik Muhammad Qayyum and Syed Najam-ul-Hassan Kazmi JJ.? in terms of Section 2(f) read with Section 10 of the Act. The Reference comprised the letter referred to above and the interim report referred to in paragraph 13 thereof. The gist of the allegations as set out in the Reference? were that Ms. Benazir Bhutto, ex-Prime Minister of Pakistan, Asif Ali Zardari, ex-Federal Minister/ Ms. Benazir Bhutto's spouse, appellants and A.R.Siddiqui, ex-Chairman, CBR by abusing???? their authority as holders of public office? in collusion with each????? other and with M/s Societe General? De Surveillance SA???? ("SGS") as well as Jens Schlegelmilch, and Directors of M/s. SGS awarded a contract for pre-shipment inspection to M/s? SGS. This had allegedly been done for illegal gratification in the form of kickbacks and commissions resulting in loss to the public revenue. The Reference also set out the various dates on which various? alleged events took place. It was supported by an interim report in the form of a Reference spreading over pages 1-257 which had been submitted by the Ehtesab Bureau to the Chief Ehtesab Commissioner under Section? 15(6) of the Act. The reference made by the Chief Ehtesab Commissioner alleged commission of offences of corruption and corrupt practices within the meanings of Section 3 read with section 4(2) of the Act.

4.????????? Having taken cognizance of the offences under the Act alleged to have been committed, the Bench finding that there were sufficient grounds for proceeding with? the case, issued summonses to the persons named as the appellants in the Reference. It may be mentioned here that at a later stage, the Chief Ehtesab Commissioner? also forwarded a supplementary Reference on 20th? August, 1998, in which another person, Hans Fischer, was added as an accused.

SUPPLEMENTARY REFERENCE

5.????????? According to Mr. Abdul Hafeez Pirzada, learned Sr.ASC for Asif Ali Zardari appellant, a Supplementary Reference under Section? 15(1) of the Act was "purportedly filed by the Chief Ehtesab Commissioner before the learned Ehtesab Bench, Lahore High Court, against the appellant on 20th August, 1998". In the said Reference the name of Hans Fischer, Vice President of SGS, was added as an accused person and it was alleged that as a result of further? probe in the on-going investigation, additional cogent material and documentary evidence had been collected against the accused persons, mostly through the Swiss authorities and certain documents were annexed thereto in which it was stated that at the request of the Government of Pakistan under the Protocol for Mutual Assistance in criminal matters, Judge Michelle, Canton of Geneva, ordered the seizure of? the documents from the possession of SGS and Cotecna relating to the contract entered into with the Government of Pakistan and thereafter Judge Daniel Devaud vide order dated 24th June, 1998 ruled that the Islamic Republic of Pakistan be admitted as a damaged party. It was further alleged in the said Supplementary Reference that the judicial office of the Examining Magistrate in Switzerland after having inculpated the appellants, issued International "Letter Rogatory" which was handed over to Ehtesab Bureau, Government of Pakistan by the Swiss Embassy in Pakistan through Ministry of Foreign Affairs for service on the appellants who refused to accept the same. It was also stated in the Supplementary Reference that "the documents received from Swiss authorities further revealed that subsequent to the issuance of letter dated 29th June 1994 by Cotecna, whereby they had promised to pay 6% of the receipts from the Government of Pakistan to Mariston Securities Inc. name of Bomer Finance Inc. was substituted on 24th May, 1995, thereby indicating that the said 6% would be paid to Bomer Finance Inc". and not Mariston Securities Inc. It is further alleged that Jens Schlegelmilch, one of the accused, visited Pakistan and stayed as a guest of the then Prime Minister on various occasions which fact established his relationship with the then Prime Minister and Asif Ali Zardari.

SHORT ORDER

6.????? The short order dated 15th April, 1999 convicting the appellants is reproduced here under:-

? "The Chief Ehtesab Commissioner has referred to this Court under section 15(1) of the Ehtesab Act, 1997 the above Reference against Mohtarma Benazir Bhutto, former Prime Minister of Pakistan and a Member of the National Assembly and her husband Senator Asif Ali Zardari for trial under sections 3 & 4 of the Ehtesab Act,1997.? After summoning the accused, we framed the following charges against them:

CHARGES AGAINST MOHTARMA? BENAZIR? BHUTTO

"You as Prime Minister of Pakistan from 16.11.1993 to 5.11.1996 alongwith your spouse Asif Ali Zardari in exercise of your official functions and by abuse of your position as a holder of public office as defined in sub-para (ii) of Section 2 of the Act, with the abetment, assistance and aid of other co-accused dis-honestly and through corrupt and illegal means ordered the grant of "pre-shipment inspection contract" dated 29-9-1994 to M/s Societe Generale De Surveillance (SGS) in consideration of illegal gratification, pecuniary advantages, commission and kick-backs, earlier? agreed upon which were paid by SGS and contained and received in Bank accounts of off-shore companies operated by Jens Schlegelmilch namely Bomer Finance Inc., Mariston Securities Inc. and Nassam Overseas Inc. of which you and your spouse and others are beneficiaries.

?Your above acts constitute the offence of corruption and corrupt practices under section 3(1)(a), 3(1) (d) and 4(2) of the Act which is triable by this Court, we hereby direct that you be tried on the said charges."

CHARGES AGAINST ASIF ALI ZARDARI ACCUSED NO.2

"You as a holder of public office as defined in sub-para (ii) of section 2 of the Act along with your spouse? Ms.Benazir Bhutto in exercise of your official functions and by abuse of your position as a holder of public office, with the abetment, assistance and aid of others, dishonestly and through corrupt and illegal means secured the award of prh your spouse? Ms.Benazir Bhutto in exercise of your official functions and by abuse of your position as a holder of public ofoffice, with the abetment, assistance and aid of others, dishonestly and through corrupt and illegal means secured the award of prd received in bank accounts of off-shore companies operated by Jens Schlegelmilch, namely, Bomer Finance Inc., Mariaton Securities Inc. and Nassam Overseas Inc. of which you? and your spouse and other are beneficiaries.?

Your above acts constitute the offence of corruption and corrupt practices under section 3(1)(a), 3(1)(d) and 4(2) of the Act which is? triable by us.? We hereby direct that you be tried on the said charges".

In order to prove its case, the prosecution examined 16 witnesses and also produced 385 documents which were duly exhibited. In defence the only witness examined by Mr.Asif Ali Zardari was Mr.Nawaz Hussain, Superintendent Landhi Jail, Karachi as DW.1. We have heard the learned counsel for the parties at great length.? For detailed reasons to be recorded later, we have reached the following conclusion:-

?i)????? That the evidence comprising of Pakistani documents, documents sent? along with letter of rogatory, as also documents sent by the Swiss Judge, Daniel Devaud, duly stamped and signed by him, are admissible in evidence being certified copies of public documents and have been duly proved;

?ii)????? That the pre-shipment inspection contract in question was awarded to M/s SGS? by the former Prime Minister, Mohtarma .Benazir Bhutto alone and so-called presentation of the Committee? set up by her was merely an eyewash at the behest of and in abetment? with Mr. Asif Ali Zardari;

?iii)????? That the contract was awarded for the reason that M/s SGS had, on 11-3-1994, promised to pay 6% (six percent) of the fee received by it to Bomer Finance Inc. Bomer Finance was a Company wholly and beneficially owned by Mr. Asif Ali Zardari;

iv)????? That the payment of kickbacks was made in the account of? Bomer Finance Inc. which it was maintaining with Union Bank of Switzerland, Geneva, which? bear account No.552343. In addition to Mr.Asif Ali Zardari, Mohtarma? Benazir Bhutto? had also access to this account and she had? paid????? ? 92,000?? out of the aforesaid account as price payable in respect of the necklace purchased by her for ? 1,17,000/- .

v)????? That this Court had validly appointed Mr. Moazzam Hayat, Registrar of this Court as a Commission in order to compare the certified copies procured in evidence by the prosecution with the documents in the original r purchased by her for ? 1,17,000/- .

v)????? That this Court had validly appointed Mr. Moazzam Hayat, Registrar of this Court as a Commission in order to compare the certified copies procured in evidence by the prosecution with the documents in the original rhe above commission amounting to US \$ 4.3 Million was paid by SGS to Mr.Asif Ali Zardari of which Mohtarma? Benazir Bhutto was also beneficiary;

vii)????? That the trial of the respondents is not hit by Article 12 of the Constitution which has no applicability to the facts of the case.

It follows from the above that the prosecution has proved its case against Mohtarma Benazir Bhutto and Senator Asif Ali Zardari? beyond any reasonable shadow of? doubt.? They are, therefore, guilty of having committed corruption and corrupt practices within the meaning of section 3 (1)(a), section 3(1)(d) and section 4(2) of the Ehtesab Act, 1997.

Accordingly, Mohtarma? Benazir Bhutto and Senator Asif Ali Zardari are convicted and sentenced to undergo 5 years imprisonment each and to pay a fine of US \$ 8.6 Million or equivalent amount in the Pakistani currency.? They are further dis-qualified under section 9 of the Ehtesab Act, 1997 from holding any public office.? Their property shall also be confiscated".

EVIDENCE

7.????? In this case the prosecution in order to bring home charges to the appellants placed reliance on the following categories of evidence:

(1) Ocular testimony of PW-1 to PW-16, namely, Saqlain Shah(PW-1), Syed Waseem Ali (PW-2), Khalid Masood (PW-3), Mrs.Neelum S. Ali (PW-4), Ahmed Sadiq (PW-5), S.M.Abdullah (PW-6), Sohail Rehan (PW-7), Khalid Mehmood (PW-8), Mumtaz Ali (PW 9), M.Ramzan (PW-10), Riaz Hussain Naqvi (PW-11), Hafiz Muhammad Jamil Awaisi (PW-12), Iftikhar Qutub (PW-13), Hassan Waseem Afzal (PW-14), M.Tariq Pervez (PW-15), and M.Gulshan Khan (PW-16).

(2) Documentary evidence:-

Mark 'A' (Commission Rogatoire Internationale with a copy of Form 'A').

Mark 'B' (International Rogatory? Request).

Mark 'C' (Commission Rogatoire Internationale).

Mark 'D' Picture of the set of jewels).

Mark 'E' (Letter from Federal Office for Police Matters Berne with a copy of a Judgment of a Swiss Court).

Ex.PB & Ex.PC (Letters Rogatory)

Ex..PE, Ex.PF, Ex.PG (Letters Rogatory),
Ex.PH (Letter of Ehtesab Bureau)
Ex.PW-7/A (Copies of Minutes)
Ex..PW-7/B (Presentation of Pre-shipment Inspection (PSI),
Ex.PW-7/1-5 (Foreign documents) in E.R.No.26/98,
Ex.PW-14/1 to 152 (Foreign documents)
Ex.PW-14/153 to 338 (Foreign documents)

8.??????? Hassan Waseem Afzal (PW-14) was appointed as Joint Secretary in? Ehtesab Bureau on 9th April, 1997 and was a member of the Ehtesab Bureau, Islamabad. During the course of his duty,?? various matters relating to corruption and corrupt practices came to his notice including matters relating to Ms.Benazir Bhutto, Asif Ali Zardari appellants and some of the bureaucrats and tax-evaders. According to him titled Ehtesab Reference was sent to the Chief? Ehtesab Commissioner by? the Ehtesab Bureau in which the two appellants were involved. He also coordinated and assisted the prosecution in preparation of these cases particularly relating to overseas aspect. In September, 1997, according to Hassan Waseem Afzal, the Attorney General for Pakistan had requested? Mr.Beat Frey, the Chief of Swiss Police? under International Mutual Legal Assistance? seeking assistance relating to detection of corruption and corrupt practices and in that process he had obtained certified copies of the documents from the Swiss Police. According to Hassan Waseem Afzal, the original documents were produced before another Ehtesab Bench (ER 26 of 1998) comprising of Ehsanul Haq Chaudhary and Raja Muhammad Khurshid, JJ. In this process, the Attorney General for Pakistan, added Hassan Waseem Afzal PW, obtained attested copies of documents from his Office. Hassan Waseem Afzal also stated that he appeared before the Ehtesab Bench comprising of Ishan ul Haq Chaudhary and Raja Muhammad Khurshid JJ. and submitted the documents to the Bench and then obtained copies thereof from Lahore High Court and produced the same in this case as Ex.PW-14/1 to 152. He has also claimed to have visited Geneva as Coordinator of? affairs of Ehtesab Bureau and met his lawyers in Geneva; that Swiss Government had ordered the raids on the Offices of Jens Schlegelmilch and Didier Plantim. According to him? the same Judge had ordered the search of Offices of? SGS and Cotecna and had summoned various? Bank Managers, recorded their statements and took record into possession. According to him while carrying on these proceedings, the Swiss Judge blocked the accounts of Ms. Benazir Bhutto and Asif Ali Zardari appellants and Ms.Nusrat Bhutto. Thereafter the said Judge pronounced? indictment orders of President of SGS Hens Fischer, President of Cotecna and then Jens Schlegelmilch, Asif Ali Zardari and Ms.Benazir Bhutto appellants. He produced these documents as Ex.PW-14/153 and 154. Hassan Waseem Afzal further stated? that Letter? Rogatory?? was received through diplomatic channel alongwith the documents Ex.P-14/155 to 319. According to him, during the coordination proceedings, he had learnt that 19 offshore Companies had been established by the appellants. He further stated that he obtained the original documents whiomatic channel alongwith the documents Ex.P-14/155 to 319. According to him, during the coordination proceedings, he had learnt that 19 offshore Companies had been established by the appellants. He further stated that he obtained the original documents whi Ali Zardari, appellant, inter alia, contended that the learned Ehtesab Bench while recording the impugned judgment was completely biased, was victim of malice, misconduct and had failed to observe procedural propriety. The learned counsel also pleaded that? we should take judicial notice under Articles 111 and 112 of the Qanun-e-Shahadat Order, 1984 of the Press Clipping dated 16th August, 1991 of the Daily "News" under the caption "PPP paying way for Martial law" attributed to Mian Muhammad Nawaz Sharif, the then Prime Minister of Pakistan. The excerpt? from the Press clipping aforesaid reads as under:

"My blood boils when the name of PPP is mentioned to me and I feel like cutting it into pieces as this is the party responsible for the division of the country into two parts and now once again it is creating hurdles in the way of the country's progress and development."

10.??????? The learned counsel went on to say that "Saliva that dripped? from the mouth of the man was law".

CONTENTIONS ON THE QUESTION OF BIAS RAISED ON BEHALF OF THE APPELLANTS

11.???? The contentions of Mr.Abdul Hafeez Pirzada and Raja Muhammad Anwar, learned ASC for the appellants, primarily are as under:-

a) That in Reference No. 26/1998 the learned? Bench had ordered freezing of all the assets,? bank accounts and the properties of the two appellants situated inside and outside? Pakistan, vide order dated 27th April, 1997. In this context, it was pointed out that Reference No.? 26/98? appears to have been made over to the Bench headed by Malik Muhammad Qayyum J. temporarily for the sole purpose of securing? the order of freezing of assets etc. and in lieu thereof Diplomatic Passports were granted to Malik Muhammad Qayyum J. and his wife, notwithstanding the serious objection raised by the Ministry of Foreign Affairs that the Judges of the High Courts and the Supreme Court of Pakistan are not entitled to the grant of this category of Passport. It was thus urged that the grant of Diplomatic Passports to Mr.Justice Malik Muhammad Qayyum and his wife was a favour and? from that point of time onwards bias became evident on the? part of Malik Muhammad Qayyum J.

b) That on 28th September, 1998 trial of the appellants from that of ten other co-accused was separated in order to use against the appellants the statement purportedly made by one of the co-accused, namely, Jens Schlegelmilch? during the investigative process? carried out? in Geneva.

c) That Reference No.30/98 was pending at the principal seat of the Lahore High Court from where it was transferred by the order of this Court dated 14th December, 1998 in the case reported as Mohtarma Benazir Bhutto, Leader of the Opposition, Bilawal House, Clifton, Karachi, and another? v. The State through Chief Ehtesab Commissioner, Islamabad? (1999 SCMR 759), to Rawalpindi Bench where another Ehtesab Bench being seized of other Ehtesab References was available to gh the commission for the purpose of verifying the genuineness and authenticity of

the said documents, before finally disposing of" of the above Reference filed against the appellants to achieve the desired result.

d). That on 2nd April, 1999 this Court in the case of Mohtarma Benazir Bhutto v. The State? (PLD 1999 SC 937 at page 989) authored by Irshad Hasan Khan, J. as his Lordship then was, held that "the controversy raised in these appeals, in substance revolves around the admissibility of the documents in dispute.

Without expressing any opinion on the above controversial issues, we are of the view that for doing complete jurisdiction then was, held that "the controversy raised in these appeals, in substance revolves around the admissibility of the documents in dispute.

Without expressing any opinion on the above controversial issues, we are of the view that for doing complete jurisdiction against the report including the question of admissibility of the documents in dispute which were sent to Switzerland through the commission for the purpose of verifying the genuineness and authenticity of the said documents, before finally disposing of the report including the question of admissibility of the documents in dispute which were sent to Switzerland through the judgments rendered by this Court in Mohtarma Benazir Bhutto V. The State (Criminal Appeals Nos. 62 and 63 of 1999) and Mohtarma Benazir Bhutto V. The State (Criminal Petition No.208/1998)".

12. It was further emphasized in the case of Mohtarma Benazir Bhutto (supra)-

"On conclusion of the defence evidence as aforesaid, the arguments on the main case as well as on the applications filed under section 265-K, Cr.P.C. may be heard by the Hon'ble Ehtesab Bench simultaneously. However, consideration of objections raised to the admissibility of documents by the appellants at the time of their production in evidence before the Court, be attended to in precedence to other contentions in the case?"

In consequence of the non-compliance of the above direction the appellants were deprived of a substantial right of appeal recognized in law.

e) That the learned Ehtesab Bench directed Dr.Z.Babar Awan, learned ASC for Ms.Benazir Bhutto appellant to record his statement on behalf of Ms.Benazir Bhutto appellant on 22nd February, 1999 which he was reluctantly constrained to comply with. Ms.Benazir Bhutto, however, later submitted her statement in writing but it was spurned and not made part of the record.

f) That on the same day i.e. on 22nd April, 1998 the statement of Mr.Ali Sabtain Fazli, the learned Special Public Prosecutor, closing his side was dictated by the Bench giving up important witnesses including? V.A. Jafri, Talat Javed, Khalil Ahmad etc. and he was directed by the learned Bench? to sign it, as owned? by the learned Special Prosecutor himself in Court before us, with a view to conclude the trial at the earliest.?

g) That an application under Section 476 Cr.P.C./195 PPC read with Section 193 PPC was moved by Dr.Z.Babar Awan, learned counsel for Ms.Benazir Bhutto appellant for initiating action? regarding fabrication of documents, wherein instead of requiring? reply thereto? and disposing it of, the learned Ehtesab Bench appointed Mr.Mozzam Hayat, the then Registrar, Lahore High Court, as Commission, 1999. This Court suspended the operation of the aforesaid order till 8th March, 1999. It appears that on 8th March, 1999 order of participation in those proceedings at Geneva. The methodology was adopted? to strengthen the case of the prosecution.

h) That later, on 3rd September, 1998 Mr.Moazzam Hayat, the then Registrar, issued notice to Ms Benazir Bhutto and her counsel apprising them of his appointment as Commission to ascertain the authenticity of the aforesaid documents. It was further averred that on 5th March, 1999, the appellants were not issued any notice for execution of the Commission to be carried out in the Chambers of Judge Daniel Davoud at Geneva. It was next urged that in this behalf an appeal was filed by the appellants in this Court on 4th March, 1999. This Court suspended the operation of the aforesaid order till 8th March, 1999. It appears that on 8th March, 1999 order of Daniel Davoud at Geneva. It was next urged that in this behalf an appeal was filed by the appellants in this Court on 4th March? to the appellants and also? without associating them with? the process.

i) That the appellants felt aggrieved of the order of the learned Ehtesab Bench closing the defence evidence of the appellants, and challenged it before this Court. This Court in the precedent of Mohtarama Benazir Bhutto, M.N.A., and another v. The State? (PLD 2000 SC 795), inter alia, ordered that "the application dated 1-3-1999 filed by Ms.Benazir Bhutto? and? the application under Section 561-A, Cr.P.C. filed by Asif Ali Zardari for summoning of witnesses? or any other application for summoning of the witnesses filed by the two appellants which is pending on the record before? the Ehtesab Bench may be taken up by the Hon'ble Ehtesab Bench, after? completion of the statement read and/or pass such other order as it deem fit and proper in the circumstances of the case". In this context pointed reference was disposed of in accordance with the law" but this order of the apex Court was completely ignored.?

j) That Mr.Abdul Hafeez Pirzada, learned Sr.ASC? moved? CrI. M. A.? No. 64 of 2001 in Criminal Appeal No.102/98 under Order XXXIII rule 8 of the Supreme Court Rules, 1980 seeking a direction from this Court? that "the audio tapes and their? transcripts be made part of the Court record and/or pass such other order as it deem fit and proper in the circumstances of the case". In this context pointed reference was made to Rules, 1980 seeking a direction from this Court? that "the audio tapes and their? transcripts be made part of the Court record some short cut now to by pass things" "I am trying my best".

k) That the arguments of Mr.Ali Sabtain Fazli, learned Special Public Prosecutor? were partly heard on 8th April, 1999 with the direction to him to complete his arguments on the following day at 10.30 a.m. On 9th April, 1999 the learned Special Public Prosecutor concluded his arguments. The arguments of Dr.Z. Babar Awan were heard for one hour after 10.30 a.m. as it was Friday and, therefore, the case was adjourned to 12th April, 1999, on which date when Mr.Farooq H.Naek, learned ASC, who had replaced Dr.Z.Babar Awan as counsel for Ms.Benazir Bhutto, opened his arguments. He was, however, ordered by the learned Ehtesab Bench to complete his arguments by 10.30 a.m. on the same day. The grievance made by the learned counsel for the appellant was

peremptorily rejected. At this stage, according to Mr. Abdul Hafeez Pirzada, he got up to intervene "as a friend of the Court and not as a counsel for the parties and stated that he had never experienced such an oppressive atmosphere in Court proceedings". He urged the Court "for the sake of integrity of the Institution to give one more day to Mr. Farooq H. Naek, learned ASC to complete his submissions". Consequently, the learned Ehtesab Bench reluctantly directed Mr. Farooq H. Naek, learned ASC, to conclude his arguments by 12.00 noon the following day. It was next submitted that Ms. Benazir Bhutto's counsel concluded his arguments by 12.00 noon with the assurance by Malik Muhammad Qayyum J. that he was permitted to give full written submissions and that the learned Bench would hear him again if clarifications were needed.

l) That on 14th April, 1998, the appellants' counsel had partly argued on his Application under Section 265-K Cr.P.C. Malik Muhammad Qayyum J., however, 'made a personal request to Mr. Abdul Hafeez Pirzada, learned Sr. ASC, to finish his arguments "tomorrow" since he was not well and needed to go abroad for treatment'. The learned counsel for the appellant in support of his submissions, referred to the following conversations which had been tape-recorded and transcript whereof had been made available alongwith CrI.M.A.64 of 2001.

Taped conversation between CJ Rashid Aziz Khan and Qayyum J.

"He is going to issue warrants for both of us"- Rashid Aziz CJ.

"I have already written the short order"? Qayyum J.

Conversation between Saifur Rehman and Qayyum J.

"He (Nawaz) wants 101% confirmation"

"Give them full dose" Saifur Rehman

"After the interval at 11 a.m., even if they disagree we will not care". Qayyum J.

"So after half an hour we will come back and announce it"

"It will be 3 or 4 page judgment". Qayyum J.

Saifur Rehman "Today I have to fight with you".

Qayyum J "Why for what reason".

Saifur Rehman "You were supposed to do it today".

Qayyum J "It will be done in a day or so".

Saifur Rehman? "What can I tell you".

Qayyum J "For your sake I had to beg his lawyer.

I told him that I have to go abroad, I am not feeling well but I have to finish it first".

Saifur Rehman? "Hoo"

Qayyum J "I have asked Pirzada to finish it for my sake and he has acceded to my request. Now tell me about me.? Will he be happy with me. When it will be done this time. Mian Sahib will also be happy".

Saifur Rehman? "You should have done it today".

Qayyum J "What does it matter in one or two days. Now it will be done gracefully which is very good.? The people in Supreme Court are saying something others are saying something".

Saifur Rehman "I will try to control and handle him".

Qayyum J "Handle him as you are my lawyer there".

Saifur Rehman "Yes I am and you don't know it only God knows".

Qayyum J.? "No".

Saifur Rehman "I only fight for you".

Qayyum J. "Tell me one thing".

Saifur Rehman "Yes"

Qayyum J "By the grace of God this will be done and then both of us will go to him and seek forgiveness".

m) That on 17th March, 1999 Ms. Benazir Bhutto appellant moved Criminal Misc. Application No.40 of 1999 under Sections 556 and 561-A Cr.P.C. mentioning therein that the learned Bench headed by Malik Muhammad Qayyum J. should not hear the Reference as he was biased against her as is evident from his conduct noted above and further that his father late Malik Muhammad Akram J. was one of those Judges of this Court who had confirmed the death sentence awarded to her father? late Zulfiqar Ali Bhutto and that he would convict her also. The grievance made was that the learned Bench dismissed this application as well without hearing her counsel.

n) That the short order was announced on 15th April, 1999, before providing an opportunity to the appellants to pursue their objections on the report of the Commission and conclusion of the arguments. The short order had been prepared on 14th April, 1999 and announced on 15th April, 1999. The learned Ehtesab Bench being conscious of the imbroglia corrected the date of announcement of the short order describing it as a typographical mistake. The short order was at variance with the detailed judgment inasmuch as the issue regarding the confiscation of the Necklace did not figure in the former? while in the latter it was made part thereof.

o). That after the statement of Mr. Moazzam Hayat was recorded as Court witness the incriminating parts of his statement as also his report were not put to the appellants by recording? their further statements under Section 342 Cr.P.C. which was mandatory.

CONTENTIONS ON THE QUESTION OF BIAS RAISED ON BEHALF OF THE STATE

13.???? In response to the above contentions, the learned Sr.ASCs for the State submitted ?

i).???? That the assets of the appellants were ordered to be frozen in Ehtesab Reference No. 26 of 1998, which was temporarily entrusted to the Ehtesab Bench headed by Malik Muhammad Qayyum J., and not in? Reference No.30 of 1998. Besides, before framing of charge in the titled Ehtesab Reference No.30, the appellants' counsel had categorically? stated? that their application for? defreezing of assets had already become infructuous as their assets had been defrozen. It was,however, conceded by Mr.S.M. Zafar, Sr.ASC that the Diplomatic Passports were granted to Malik Muhammad Qayyum J. and his wife.

ii).???? That in? view of the law declared by this Court in Shahadat Khan and another. v.Home Secretary to the Government of West Pakistan and others (PLD 1969 SC 158) and? Machia and 2 others v. The State (PLD 1976 SC 695)? there was no compulsion on the Bench? to try all the accused persons together of the same offences. The trial was separated on 28th September, 1998 and at the time of the framing of the charge on? 5th October, 1998, there were only two accused persons facing trial. Hence the provisions of Section 239 Cr.P.C. were not attracted. The remaining accused were not available and the learned Ehtesab Bench was required under the Act to complete the proceedings within a period of 60 days as per Section 10 of the Act.

iii).??? That the learned Ehtesab Bench having been constituted for this particular case by the order of the Chief Justice of Lahore High Court dated 3rd July, 1998 was bound to conduct the case at Rawalpindi. The appellants never raised any objection in this regard till March, 1999. Moreover, the? learned Chief Justice of Lahore High Court vide notifications of different dates commencing from 10th December, 1998 to 8th April, 1999 ordered that two Judges i.e. Malik Muhammad Qayyum? and Najmul Hassan Kazmi JJ. shall work at Rawalpindi Bench from time to time, details whereof are mentioned in those notifications.

iv)???? That it was evident from Para 56 of the impugned judgment that in compliance with the order of this Court, the learned Ehtesab Bench had attended to the question of admissibility of documents first and given findings on the other questions involved thereafter.

v)???? That the statement of Ms.Benazir Bhutto under Section 342 Cr.P.C. was recorded through her? counsel Dr.Z. Babar Awan who was? authorised in this behalf on account of her? exemption from personal appearance in the Court on acceptance of CrI .Misc. Application No. 18 of 1998. By virtue of her application dated 23rd February, 1999 Ms. Benazir Bhutto had not only accepted her statement recorded through Dr.Z.Babar Awan but also supplemented the same by her own statement in writing.

vi)???? That Mr. Ali Sabtain Fazli, learned Special? Public Prosecutor had closed the prosecution side of his own free will and accord.

vii)??? That the Commission was appointed in order to set at rest the controversy raised by the learned counsel for Ms. Benazir Bhutto in an application moved under Section 476 Cr.P.C. challenging the authenticity of the documents which were presented before the Ehtesab Bench. The arguments on the application were heard in presence of the learned counsel for the parties but the order was announced later on. The Commission? was thus not appointed at the back of the appellants. In any case the appellants had brought the matter of appointment of Commission to this Court and were given ample opportunity to raise objections to the report of the Commission as well as to cross-examine? Mr. Moazzam Hayat.

viii) That the learned counsel? for the appellants had the knowledge of appointment of Commission throughout, therefore, non-issuance of notice of proceedings in the Chambers of Judge Daniel Devaud could not be blown out of proportion.

ix).??? That the evidence of the appellants was closed on 15th March, 1999 after passing a detailed order that they had failed to produce either? their witnesses or to get the summonses? issued in their names inspite of three opportunities granted to them. In any case this Court? had dealt with the matter in? Mohtarama Benazir Bhutto v. The State (PLD 2000 SC 795) and disposed it of in the terms? that Ms. Benazir Bhutto will be afforded an opportunity to examine herself under Section 340(2) Cr.P.C. as her own witness in the case on 22nd March, 1999, or on such other date ?convenient to the Court and allowed a fair opportunity to examine the witnesses in her defence within the bound of law.? The learned counsel for the appellants were provided ample opportunity? to put forth their point of view? and this fact was borne out by the findings recorded? in the short? as well as in the detailed orders.

x)???? That the ground of bias set up by the appellants that father of the learned Senior Judge was one of the Judges? who had confirmed death sentence? awarded to the father of Ms Benazir Bhutto? appellant was no ground at all for bias as in fact the appellant might have a bias against the learned senior member and his father.

xi).??? That the short order was no doubt silent about the Necklace but? in the detailed order the confiscation of the Necklace did figure? with the explanation? that the Necklace was ordered to be forfeited in lieu of non-payment? of fine of U.S \$ 8.6 million .

xii)??? That the short order was prepared and announced on 15th April, 1999, and the date initially mentioned therein was a typographical error pure? and simple which was duly rectified.?

(xiii) That mere fact that a Judge has dealt with another matter earlier in respect of a party to the legal proceedings before him or has given certain decisions against such a party upon interlocutory applications in the proceedings before him will not render him disqualified from hearing the case.

(xiv) That? bias in a Judge is to be shown as a matter of fact and not merely as a matter of opinion. A real likelihood of bias must be? established. Court does look into the same , if there was a real likelihood? that he would or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. (Emphasis provided).

(xv)?? That "mere suspicion of bias even if it is not unreasonable is not sufficient to render a decision void. A real likelihood of bias must be? established". A mere apprehension in the mind of a litigant that he may not get justice, such as based on influence from circumstances is not sufficient.

14.???? In support of the last three submissions , reliance was placed on Ms.Benazir Bhutto v. President? of Pakistan and another(1992 SCMR 140)

15.????????? Learned counsel for the State also referred to the distinction drawn between the case of bias of a Judge of a Subordinate Court and that of? a? Superior Court inasmuch as in the latter case, the Judges of the Superior Courts were held to have "judicial conscience".

16.????????? Mr.Aziz A.Munshi, learned Attorney General? for Pakistan defended the impugned order and also controverted the element of any bias of the learned senior member of the Bench on the grounds? pressed into service by? Mr.S.M.Zafar, learned Sr.ASC and additionally opposed Crl.Misc. Applications No.50 and 64 of 2001 by filing a detailed reply.

FINDINGS

17.????????? Since the main plank of the case of the learned counsel for both the appellants is the 'Bias' of Malik Muhammad Qayyum J. senior member of the Ehtesab Bench against the appellants, we have decided to examine it? at the outset.?????????

18.???? The foremost question is what is 'bias'. Bias has been? described in Corpus Juris Secundum, Volume X pp. 354 and 355 as under:

"BIAS. Primarily, a diagonal or slant, especially of a seam, cut, or line across a fabric; and so? derivatively, a leaning of the mind; a mental predilection or prejudice; anything which turns a? man to a particular course; a particular influential power which sways the judgment; a preconceived opinion; a sort of emotion constituting untrustworthy partiality;? bent, inclination, prepossession, propension, or tendency, which sways the? mind toward one opinion rather than another;? propensity toward an object, not leaving the mind? indifferent. "Bias" has been held synonymous? with "partiality," and strictly to be distinguished from "prejudice". Under particular circumstances, the word has been described as a condition of mind; and has been held to refer, not to views entertained regarding a particular subject matter, but to the mental attitude or disposition toward a particular person, and to cover all varieties of? personal hostility or prejudice against him."? (Emphasis provided).

Garner on Administrative Law, 4th? Edition at page 122 has also attempted to define bias as a disqualification and in such context observed as follows:

"Not only is a person affected by an administrative decision entitled to have his case heard by the agency seized with its determination, but he may also insist on his case being heard by a fair Judge, one free from bias. Bias in this context has usually meant that the adjudicator must have no financial interest in the matter under dispute, but it is not necessarily so limited, and allegations of bias have been upheld in circumstances where there was no question of any financial interest."

19.???? In this context, the following observations of Lord Denning M.R. in? Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon and others (1968) 3 All E.R. 304) would be relevant:-

"A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a "direct pecuniary interest" in the subject-matter.? Second, "bias" in favour of one side? against the other.

So far as "pecuniary interest" is concerned, I agree with the Divisional Court that there is no evidence that Mr.John Lannon had any direct pecuniary interest in the suit. He had no interest in any of the flats in Oakwood Court. The only possible interest was his father's interest in having the rent of 55, Regency Lodge reduced.? It was put in this way: if the committee reduced the rents of Oakwood Court, those rents would be used as "comparable" for Regency Lodge, and might influence their being put lower than they otherwise would be.? Even if we identify the son's interest with the father's, I think that this is too remote.? It is neither direct nor certain.? It is indirect and uncertain.

So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr.Lannon, and no want of good faith.? But it was said that there was, albeit unconscious, area of likelihood of bias.? This is a matter on which the law is not altogether clear; but I start with the oft-repeated saying of LORD HEWART, C.J., in R.V. Sussex Justices, Ex p. McCarthy:

"? it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done".

20.???? In our own context, the Code of Conduct framed by the Supreme Judicial Council under Article 128 (4) of the erstwhile Constitution of Pakistan, 1962? for the Judges of the Supreme Court and the High Courts in Pakistan provides in Article IV as under:-

"A Judge must decline resolutely to act in a case involving his own interest, including those of persons whom he regards and treats? as near relatives or close friends.

A Judge must refuse to deal with any case in which he has a connection with one party or its lawyer more than the other, or even with both parties and their lawyers.

To ensure that justice is not only done, but is also seen to be done, a Judge must avoid all possibility of his opinion or action in any case being swayed by any consideration of personal advantage, either direct or indirect"

21.???? In reaching the conclusion that Mr. John Lannon was biased Lord Denning? employed? the following terse phraseology :-?????????

"It brings home this point; in considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity.? It does not look to see if there was a real likelihood that he should, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people.? Even if he was as impartial as could be, nevertheless,? if right-minded persons would think that, in the circumstances, there was

a real likelihood of bias on his part, then he should not sit.? And if he does sit, his decision cannot stand.

There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other.? The Court will not enquire whether he did, in fact, favour one side unfairly.? Suffice it that reasonable people might think he did. The reason is plain enough.? Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased." (Emphasis provided).

Applying these principles, I ask myself: Ought Mr. John Lannon to have sat? I think not. If he was himself a tenant in difference with his landlord about the rent of his flat, he clearly ought not to sit on a case against the selfsame landlord, also about the rent of a flat, albeit another flat.? In this case he was not a tenant, but the son of a tenant; but that makes no difference.? No reasonable man would draw any distinction between him and his father, seeing that he was living with him and assisting him with his case.? Test it quite simply: if Mr. John Lannon were to have asked any of his friends: "I have been asked to preside in a case about the rents charged by the Freshwater Group of? Companies at Oakwood Court. But I am already assisting my father in his case against them, about the rent of his flat in Regency Lodge, where I am living with him.? Do you think I can properly sit?" The answer of any of his good friends would surely have been: "No, you should not sit. You are already acting, or as good as acting, against them.? You should not, at the same time, sit in judgment on them. No man can be an advocate for or against a party in one proceeding.? Everyone would agree that judge, or a barrister or solicitor (when he sits ad hoc as a member of a tribunal) should not sit on a case to which a near relative or a close friend is a party. So, also, a barrister or solicitor should not sit on a case to which one of his clients is a party; nor on a case where he is already acting against one of the parties.? Inevitably people would think he would be biased.

I hold, therefore, that Mr. John Lannon ought not to have sat on this rent assessment committee. The decision is violable on that account and should be avoided.? Although we are differing from the Divisional Court, I would like to say that we have had a good deal more information than that court had.? In particular, we have seen a letter of Jan. 13, 1967, and other things not before them when they gave their ruling.? Otherwise I would not have thought it right to interfere.? I would allow the appeal and remit the case to another rent assessment committee. Let it be heard again as soon as may be". (Emphasis provided).

22.???? The element of bias in a Judge was considered? by the Federal Court of Pakistan in the case of? Anwar and another v. The Crown? (PLD 1955 FC 185). In that case, the Federal Court had the occasion to reconsider an earlier case of Khairdi Khan? v. Crown? (PLD 1953 FC 223). In the former case latter case of Khairdi Khan (supra) was reconsidered by the Federal Court in which an appeal had been allowed? because the High Court in its revisional jurisdiction had arrived at a definite finding of fact while ordering the retrial after? setting aside? an acquittal. In the latter case of Khairdi Khan (supra) , late Abdul Rashid, CJ. inferred that the Sessions Judge who tried the case would not be? able to deliver an unbiased judgment for the reason of observations made by the High Court.? But late Muhammad Munir, CJ. disagreed? with the judgment?? in Khairdi Khan's case (supra)? and held as under:-

"We are, therefore, perfectly entitled to hold, as we do in this case after a full argument that the rule laid down in Khairdi Khan's case that bias vitiated all judgments and all orders made by? a Judge are void is incorrect and should no longer form part of the law of Pakistan."

23.???? Nonetheless late Muhammad Munir, Chief Justice, was constrained to hold that the accused has a right of a fair trial, by a judicial minded person, not functioning ?under an influence which might paralyse his judicial faculties as to result in? absence of a fair trial.? The learned Chief Justice also held? that bias may be caused by a judgment, order or observation of a superior Court or it may spring? from personal, political, religious, communal, racial, commercial or economic considerations. The other conclusion recorded by the Chief Justice is that bias would vitiate judicial proceedings if such circumstances are created or brought about by the Judge as would? rob him of the confidence that a litigant may? have in the Judge. We can do no better than? reproduce as under the observations of? late Munir. CJ:-

"Thus no Judge can be a Judge in his own cause, or in a case in which he is personally interested, not because his decision must invariably be in his own favour but on the principle that justice must not only be done but seem to be done, and however right the Judge deciding a cause in his own favour may be, neither the public nor the aggrieved party will be satisfied with the adjudication, and its result will be? vacated by the Court of Appeal at the instance of the dissatisfied party."

24.???? It may be added at this juncture that the consideration of bias is a? branch of the Principles of Natural Justice. It is now agreed on all hands that there are certain broad principles of natural justice deducible from two Latin Maxims firstly, "Nemo Debet Esse Judex in Propria Sua Causa" which formed the foundation of the doctrine firstly, that no one can be? Judge in his own cause which in a wide application means that a judicial or quasi-judicial authority not only himself not be a party but must also not? be interested as a party in the subject-matter of the dispute which he has to decide? and; second principle is 'Audi Alteram Partem'? (hear the other side). Bias is said? to be of three different kinds:

(a) A Judge may have a bias in the subject-matter which means that he is himself a party or has direct connection with the litigation, so as to constitute a legal interest.

A 'legal interest' means that the Judge is 'in such a position that a bias must be assumed'

"(b)? Pecuniary interest in the cause, however, slight, will disqualify the Judge, even though it is not proved that the decision has in fact been? affected by reason of such interest. For this reason, where a person having such interest sits as one of the Judges the decision is vitiated".

(c) A Judge may have a personal bias towards a party owing to relationship and the like or he may be personally hostile to a party as a result of events happening either before or during the trial. Whenever there is any allegation of personal bias, the question which should be satisfied is -? " Is there in the mind of the litigant a reasonable apprehension that he would not get a fair trial?" The test is whether there is a 'real likelihood of prejudice', but it does not require certainty.' 'Real likelihood' is the apprehension of a reasonable man apprised of the facts and not the suspicion of fools or 'capricious persons'. (Emphasis provided).

25.???? No doubt, the Judges of the Superior Courts are blessed with a judicial? conscience? but question nonetheless is whether a particular Judge of the Subordinate or the Superior Judiciary against whom the allegation of bias is alleged is possessed of judicial conscience. This litmus test? is indeed very difficult but certainly not impossible. The circumstances of a particular case wherein bias of a Judge is alleged? would themselves speak volumes for the same. In other words, the? principle is well settled that a Judge of the Superior Court is a keeper of his own conscious and it is for him to decide to hear or not to hear a matter before him.? However, in the present case we are not inclined to adhere to the said settled principle because bias is floating on the surface of the record.

26.???? Admittedly, the assets etc of the two appellants were frozen by the Bench headed by Malik Muhammad Qayyum, J. in Ehtesab Reference No. 26/1998 on 27th April, 1998.? This fact also stands admitted that Ehtesab Reference No. 26/1998 was temporarily entrusted to the Bench headed by Malik Muhammad Qayyum, J. The undisputed material made available on the record makes it manifest that Malik Muhammad Qayyum, J. had already moved an application for grant of Diplomatic Passport for himself and his wife? which had reached the Prime Minister Secretariat on? the 17th April, 1998, along with the following summary:-

?SECRET?

MINISTRY OF FOREIGN AFFAIRS SUMMARY FOR THE PRIME MINISTER

Subject: REQUEST FOR

ISSUANCE OF DIPLOMATIC PASSPORTS TO? JUSTICE MALIK MUHAMMAD QAYYUM, JUDGE LAHORE HIGH COURT AND? HIS WIFE"

The Ministry of Law? has requested for grant of diplomatic passports to Justice Malik Muhammad Qayyum Judge Lahore High Court and his wife.

2. According to the rules covering the Issuance of diplomatic passports, Justice Malik Muhammad Qayyum and his wife are not entitled to hold a diplomatic passport. It? may further be noted? that Judges of the High Court and the Supreme Court are not entitled to the grant of diplomatic passports. If an exception is made in one case, other members of the Judiciary? are likely to ask for similar privileges. This Ministry is, therefore, not in favour of making? an exception in the case.

3. The Prime Minister's kind orders are nevertheless solicited on Justice Malik Muhammad Qayyum's request.

4. The Foreign Minister has seen and approved the Summary.

Sd/-

(Anwar Kemal)

Acting Foreign Secretary

Prime Minister's Secretariat (Mr.Tauqir Hassain, Additional Secretary(FA), Islamabad.

Ministry of Foreign Affairs U.O.No.S/FS/AD 56/98 dated 17-3-1998.

Prime Minister has been pleased to approve Para 1 above: grant of diplomatic passports to Mr.Justice Malik M.Qayyum ,Judge, Lahore High Court and his wife.

Sd/-

30-04-1998

Secretary, Foreign Affairs."

27.????????????? It is noteworthy that on the same summary the following direction was given by Senator Saifur Rehman, who was then Incharge of Ehtesab Cell,? to one of his sub-ordinate Officers:-

"Mr.Sami Khilji please have it delivered to justice Qayyum"

Regards??

Sd/-

Saif

28.???? The order with regard to freezing of properties and assets etc. of the appellants was passed on 27th April, 1998 while on 30th April,? 1998, the Prime Minister approved the grant of Diplomatic Passports to the learned Judge and his wife ignoring the formidable objection raised by the Ministry of Foreign Affairs. It was candidly conceded by the learned Attorney General for Pakistan that no Judge of the Superior Courts is entitled to grant of a Diplomatic Passport except the Chief Justice of Pakistan.

29.???? The? unchallenged document in respect of the grant of Diplomatic Passports not only goes a long way to suggest that Malik Muhammad Qayyum, J. had acquired a personal interest in the case by deriving an out of the way favour of grant of Diplomatic Passport to him and his wife but also divulges a close liaison between the learned Judge, Senator Saifur Rehman and Mian Muhammad Nawaz Sharif, the then Prime Minister whose political rivalry with Ms. Benazir Bhutto appellant is a matter of common knowledge.

30.???? There is yet another undisputed circumstance, highlighted by Mr.Abdul Hafeez Pirzada, from which inference of partiality of the learned Judge and liasion ?with the then Prime Minister Mian Muhammad Nawaz Sharif can be safely drawn. It is that Malik Parvez , real brother of Malik

Muhammad Qayyum J. was a sitting Member National Assembly of PML (N) having been elected unopposed through a bye-election against a seat vacated by Mian Muhammad Nawaz Sharif.

31.???? The order of defreezing of the assets of the appellants passed by another Bench seized of Reference No.26 of 1998 was not produced before us. Be that as it may, the order appears to have aggravated and not diminished the personal interest of Malik Muhammad Qayyum J. in the case whose link with Mian Muhammad Nawaz Sharif, who was diametrically opposed to Ms.Benazir Bhutto appellant cannot be denied. This conclusion of ours gets complete support from the principle enunciated in para-22 of the judgment in the case of Ms.Benazir Bhutto v. President of Pakistan (1992 SCMR 140) that "there seems to be judicial consensus that a Judge having pecuniary or proprietary interest or any other personal interest in the subject matter of a case before him cannot hear the case.(emphasis provided).

?32.??? Initially Ehtesab Reference No. 30/1998 was pending at Lahore from where it was transferred by this Court on 14th Decembwer,1998 to Rawalpindi Bench of Lahore High Court vide judgment in the case of Mohtarma Benazir Bhutto supra (1999 SCMR 759). At that time an Ehtesab Bench comprising Muhammad Nawaz Abbasi and Sheikh Amjad Ali, JJ. was already functioning and was seized of inter alia another Ehtesab Reference No.31/1998 pending decision against Ms.Benazir Bhutto. Notwithstanding the ratio of the judgment of Mohtarma Benazir Bhutto supra being that the Reference aforesaid be heard at Rawalpindi by the Ehtesab Bench functioning there, Malik Muhammad Qayyum, J. somehow or other managed to have the Reference heard by the Bench headed by him even at Rawalpindi. It would , therefore, be worth while to reproduce hereunder para 51 of the Short Order in the case of Mohtarma Benazir Bhutto supra:-

"At present, two Ehtesab References are pending against the petitioners at Rawalpindi Bench of Lahore High Court (Ehtesab Reference 32 and 33/98) while five References against the petitioners are pending at principal seat of Lahore High Court (Reference Nos.26,27,29,30 and 31/98). As the petitioners, inter alia, have their residence in Islamabad, it is directed that References Nos.26,27,29,30 and 31 of 1998 which are being heard at principal seat of Lahore High Court, will henceforth be heard at the Rawalpindi Bench of Lahore High Court where two Ehtesab Reference are already pending against them."

33.???? The judgment of this Court was mis-interpreted as if Ehtesab Bench was ordered to be transferred to Rawalpindi Bench rather than the Reference itself.

34.???? It appears from the record that notifications were issued by the then learned Chief Justice Lahore High Court, from time to time to enable Malik Muhammad Qayyum, J. to visit Rawalpindi to hear Ehtesab Reference No.30/1998 and to be present on each and every date of hearing of the afore-noted Reference. It supports the contention of the learned counsel for the appellants that Reference No.30/1998 was virtually "chased" by Malik Muhammad Qayyum, J. and the exercise had caused substantial financial loss to the state exchequer. The "chase" thus given amply demonstrates the keen interest of Malik Muhammad Qayyum, J. to impose himself on the matter and take it to its end according to his pre-conceived notions.

35.???? In course of hearing of Reference by the learned Judges, the following circumstances stare into one's eyes from which inescapable deduction is an urge to proceed hastily to reach at the foregone conclusion. First and foremost circumstance is the separation of trial of appellants from their other ten co-accused. No doubt the said course of action is permissible in law but that can only be done after complying with the requirements of law. Under Section 512 Cr.P.C. the trial can be bifurcated but before that it has to be adjudged that the other co-accused are avoiding to face the trial or their presence can not be procured without any amount of delay . In the present case, the summonses were sent to Switzerland to the foreigner accused and the report received back revealed that a period of thirty days was required to effect the service. The learned Judges in haste did neither wait for the requisite period nor repeated the process and separated the trial. In this context there is nothing on the record to show the mode of service or issuance of the process against the co-accused of the appellants particularly when A.R.Siddiqui the then Chairman CBR and Khalil Ahmad, Chief Collector Customs were in Pakistan. Their attendance could, therefore, have been secured, but the learned Judges do not seem to have taken any step to procure their attendance. It seems that only target for the trial was the person of the appellants. In our view failure to procure attendance of the co-accused of the two appellants and the consequential orders were motivated.

36.???? The record reveals the glaring injustice meted out to Asif Ali Zardari appellant when the Court declined to grant him permission to recall certain witnesses for the purpose of cross-examination. The learned Judges proceeded to observe, vide order dated 22nd February, 1999, that since no prejudice had been caused as the defence of both the appellants was joint, therefore, there was no necessity to afford an opportunity to the appellant Asif Ali Zardari to cross-examine the said witnesses. It may be pointed out that because of freezing of assets and funds, the appellant Asif Ali Zardari had expressed his inability to engage a counsel of his choice to cross-examine those witnesses. Admittedly, Asif Ali Zardari appellant had not cross-examined PWs 1 to 5 and PW-11 and the learned Judges had observed that if at a subsequent stage it was felt that some prejudice had been caused due to non-availability of a counsel for Asif Ali Zardari appellant, the Court would consider recalling the aforesaid witnesses for further cross-examination. Having observed so, the learned Judges declined to allow to Asif Ali Zardari appellant an opportunity to recall and cross-examine those witnesses. In our view, it was an invaluable right of Asif Ali Zardari appellant to recall and cross-examine those witnesses for ensuring a fair trial. Denial of such right had caused failure of justice and had prejudiced the appellants in their defence besides reflecting bias.

37.???? The mode and manner in which the statement of Ms.Benazir Bhutto under Section 342 Cr.P.C. was recorded leaves no doubt in our mind that the provision of Section 342 Cr.P.C. was abused with a view to reach at a hasty conclusion. The underlying object of Section 342 Cr.P.C. is to enable an accused to explain the incriminating circumstances in the prosecution evidence appearing against him. In our view, this is the most valuable right being sacrosanct principle of natural justice. No doubt, the attendance of Ms.Benazir Bhutto appellant had been exempted but

as she was available in Pakistan, it was? incumbent upon the learned Judges to have summoned? her for recording her statement. The features of the prosecution case also necessitated her examination in person.? To our utter dismay the learned Judges opted not to do so and considering? the compliance of the provisions? of law sufficient by recording the statement of her counsel who according to the learned counsel for the appellants was not authorised to speak on her behalf. According to Ms.Benazir Bhutto appellant, when she came to know that her statement under Section 342 Cr.P.C had been got recorded through her counsel she at once made an application to supplement her statement under Section 342 Cr.P.C. and made a supplementary statement in writing? containing? answers to all the questions put to her counsel and requested the Court to treat the? statement in writing as her statement under Section 342 Cr.P.C. but queerly enough her said statement was ignored. The circumstance is also a link in the bias.

38.???? In the course of trial, while the statement of Hassan? Waseem Afzal (PW-14) was being recorded, an application under Section 476 Cr.P.C. was moved by the learned counsel of Ms.Benazir Bhutto appellant for taking action against the witness for producing allegedly? fabricated documents. The learned Judges directed the prosecution to file reply which was done by Hassan Waseem Afzal? in his personal capacity. The learned Judges, in post-haste appointed a Commission consisting of Mr. Moazzam Hayat, the then Registrar, Lahore High Court? for proceeding? to Switzerland to ascertain the genuineness? and authenticity of those documents. This order was passed on 1st March,1999, with the direction to the Commission to submit its report within ten days. The Commission issued notice to the learned counsel for Ms. Benazir Bhutto appellant? to appear before him in Switzerland on 5th March,1999. Imagine, how could? a counsel or an accused appear in Switzerland in four days particularly? when travel arrangements? had to be made? and a Visa to be obtained. This order was challenged in this Court which suspended? the order of appointment of Commission and proceedings before it. However, this order was vacated on 8th March, 1999 when Mr. Moazzam Hayat was already in Geneva. After vacation of the order without issuing a fresh notice to the appellant , the Commission proceeded to execute the Commission. In this context,? the exact grievance is reproduced hereunder:????????????????

"The matter came up for hearing on????? Ist March, 1999 and the learned Ehtesab Bench passed an order for production of defence evidence by the petitioner and adjourned the case for? 8th March, 1999 for the purpose.? During the proceedings of the case the Special Public Prosecutor pressed the plea taken in the written reply on behalf of Hassan Wasim Afzal, P.W.14, for issuance of commission to verify the genuineness and the authenticity of certified copies of documents tendered in evidence by the prosecution. It is alleged that no order was passed when the case was adjourned in presence of both the parties.? At about 4.00 p.m. it was communicated by the Additional Registrar of the Lahore High Court at Rawalpindi to Mr.Farooq H.Neak, Advocate, on telephone, that the impugned order has been passed by the learned Ehtesab Bench and despite request, copy of the order was not provided."

39.???? The manner of appointment of? Commission and the Commission having proceeded? to Geneva and the steps taken by it in Geneva shows a mysterious hidden? hand behind it.

40.? While challenging the appointment of Commission, the question of admissibility of? the documents produced by Hassan Waseem Afzal? PW-14 was agitated and leave was granted by this Court. At the time of disposal of the appeal, this Court? passed the order in the case of Mohtarama Benazir Bhutto v. The State? (PLD 1999 SC 937) reproduced in Para 11 (d) ante. We are sorry to observe that in flagrant disregard of the directions issued by this Court the learned Judges proceeded to decide the case in its entirety whereas learned Judges should have taken up the question of admissibility? of documents first as ordained by this Court. The learned Judges, after receipt of the report of Commission, treated it as an incriminating circumstance but we have noticed that this important piece of allegedly incriminating evidence was not put to the accused.

41. ??? Another intriguing circumstance? consists of? the statement of Mr.Ali Sabtain Fazali, learned? Special Public Prosecutor. It was pointed out by the appellants that? his statement was in fact recorded by the learned Ehtesab Bench itself giving up three very important prosecution witnesses including V.A.Jaferi , Javed Talat and Khalil Ahmad. Ostensibly it was done? by the learned Judges with a view to delivering?? the judgment hastily and this statement was merely read over by the Court to the? learned Special Public Prosecutor who admitted it to be correct. This was strange procedure prima facie adopted in order to hasten the proceedings and to reach the foregone conclusion.

42.???? We have considered all the above noted features of the case and? we have also noted the fate of application moved by the learned counsel for? Asif Ali Zardari appellant under Section??? 265-K of Cr.P.C. The atmosphere? must have been highly charged. It can also be imagined when on the intervention of the? Court the proceedings were drastically cut short by the learned Judges; the defence evidence was restricted to the recording? of the statement of a solitary defence witness, namely, Muhammad Nawaz, Superintendent? Landhi Jail as DW-1. Suddenly the Court rises; retires to the Chambers, re-appears after a while and the short order is handed down on 15th April,1999 which appears to have been pre-authored? bearing?? the date as 14th April, 1999, which was scored off and corrected.

43.???? At this stage, it will be pertinent to mention that the Ehtesab Bench? which tried and convicted the appellants consisted of two learned Judges. It appears from the record that Malik Muhammad Qayyum J. being the senior member of the Bench had exerted his influence on the second member S. Najamul Hassan Kazmi J. who being an unconfirmed Judge of the Lahore High Court was sweating for confirmation. We have taken judicial notice of the relevant Notifications issued by the Government of Pakistan in the Ministry of Law, Justice, Human Rights and Parliamentary Affairs dated 27th May, 1997, 26th May, 1998 and 13th May, 1999 that the said learned member of the Bench was appointed as Additional Judge of the Lahore High Court for a period of one year but the tenure was extended for a further period of one year with effect from 28th May, 1998 and he was ultimately appointed as a permanent Judge on 13th May, 1999.

44. ??? In support of this appeal an attempt was made at the bar that the learned Judges were not applying independent mind and had been pressurized and coaxed by the authorities in power to oust the appellants from the arena of politics by securing their disqualification to hold public office. On behalf of the appellants certain audio-tapes and their transcripts were attempted to be brought on the record. It was argued that Mr.Khalid Anwar, the then Law Minister, Mr.Rashid Aziz Khan J., the then? Chief Justice of Lahore High Court, Senator Saifur Rehman, Incharge Ehtesab Bureau and? Malik Muhammad Qayyum J. were clandestinely in league with each other to secure the conviction of the appellants at the behest of the then Prime Minister of Pakistan.

The other side took a categorical stance that the audio-tapes were fake and in any event were extraneous for the purpose of determination of the matter in controversy in appeal?

45.???? There is no need to advert to the audio-tapes and their transcripts as there is sufficient material on record which substantiates the allegation of bias. We are convinced that the trial in this case was not fair and on account of bias of the Ehtesab Bench, highlighted in preceding paragraphs, the trial of appellants stands vitiated.

46.???? Resultantly, the titled appeals are accepted, convictions recorded against and?? the sentences awarded to? the appellants are set aside and? the case is? remitted to the Court of competent jurisdiction for trial afresh in accordance with law. This disposes of the connected matters as well.?

47.???? Before parting with the judgment we are inclined to dispose of plea? of Mr. Abdul Hafeez Pirzada, learned Sr.ASC to the effect that Asif Ali Zardari, appellant had already served out the substantive sentence of imprisonment and, therefore, he is entitled to be released from Jail.? As we have already sent the case to a Court of? competent jurisdiction, it would be more appropriate if this matter is agitated before the Court aforesaid.

Judge.

Judge

Judge

Judge

Judge

Judge

Judge

ISLAMABAD.

DATED; 6th April, 2001.

APPROVED FOR REPORTING?

himself a party or has direct connection with the litigation, so as to constitute a legal interest.

A 'legal interest' means that the Judge is 'in such a position that a bias must be assumed'

"(b)? Pecuniary interest in the cause, however, slight, will disqualify the Judge, even though it is not proved that the decision has in fact been? affected by reason of such interest. For this reason, where a person having such interest sits as one of the Judges the decision is vitiated".

(c) A Judge may have a personal bias towards a party owing to relationship and the like or he may be personally hostile to a party as a result of events happening either before or during the trial. Whenever there is any allegation of personal bias, the question which should be satisfied is -? " Is there in the mind of the litigant a reasonable apprehension that he would not get a fair trial?" The test is whether there is a 'real likelihood of prejudice', but it does not require certainty. 'Real likelihood' is the apprehension of a reasonable man apprised of the facts and not the suspicion of fools or 'capricious persons'. (Emphasis provided).

25.???? No doubt, the Judges of the Superior Courts are blessed with a judicial? conscience? but question nonetheless is whether a particular Judge of the Subordinate or the Superior Judiciary against whom the allegation of bias is alleged is possessed of judicial conscience. This litmus test? is indeed very difficult but certainly not impossible. The circumstances of a particular case wherein bias of a Judge is alleged? would themselves speak volumes for the same. In other words, the? principle is well settled that a Judge of the Superior Court is a keeper of his own conscious and it is for him to decide to hear or not to hear a matter before him.? However, in the present case we are not inclined to adhere to the said settled principle because bias is floating on the surface of the record.

26.???? Admittedly, the assets etc of the two appellants were frozen by the Bench headed by Malik Muhammad Qayyum, J. in Ehtesab Reference No. 26/1998 on 27th April, 1998.? This fact also stands admitted that Ehtesab Reference No. 26/1998 was temporarily entrusted to the Bench headed by Malik Muhammad Qayyum, J. The undisputed material made available on the record makes it manifest that Malik Muhammad Qayyum, J. had already moved an application for grant of Diplomatic Passport for himself and his wife? which had reached the Prime Minister Secretariat on? the 17th April, 1998, along with the following summary:-

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Subject: REQUEST FOR

ISSUANCE OF DIPLOMATIC PASSPORTS TO? JUSTICE MALIK MUHAMMAD QAYYUM, JUDGE LAHORE HIGH COURT AND? HIS WIFE"

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38.???? In the course of trial, while the statement of Hassan? Waseem Afzal (PW-14) was being recorded, an application under Section 476 Cr.P.C. was moved by the learned counsel of Ms.Benazir Bhutto appellant for taking action against the witness for producing allegedly? fabricated documents. The learned Judges directed the prosecution to file reply which was done by Hassan Waseem Afzal? in his personal capacity. The learned Judges, in post-haste appointed a Commission consisting of Mr. Moazzam Hayat, the then Registrar, Lahore High Court? for proceeding? to Switzerland to ascertain the genuineness? and authenticity of those documents. This order was passed on 1st March,1999, with the direction to the Commission to submit its report within ten days. The Commission issued notice to the learned counsel for Ms. Benazir Bhutto appellant? to appear before him in Switzerland on

5th March,1999. Imagine, how could? a counsel or an accused appear in Switzerland in four days particularly? when travel arrangements? had to be made? and a Visa to be obtained. This order was challenged in this Court which suspended? the order of appointment of Commission and proceedings before it. However, this order was vacated on 8th March, 1999 when Mr. Moazzam Hayat was already in Geneva. After vacation of the order without issuing a fresh notice to the appellant , the Commission proceeded to execute the Commission. In this context,? the exact grievance is reproduced hereunder:?????????????????

"The matter came up for hearing on????? Ist March, 1999 and the learned Ehtesab Bench passed an order for production of defence evidence by the petitioner and adjourned the case for? 8th March, 1999 for the purpose.? During the proceedings of the case the Special Public Prosecutor pressed the plea taken in the written reply on behalf of Hassan Wasim Afzal, P.W.14, for issuance of commission to verify the genuineness and the authenticity of certified copies of documents tendered in evidence by the prosecution. It is alleged that no order was passed when the case was adjourned in presence of both the parties.? At about 4.00 p.m. it was communicated by the Additional Registrar of the Lahore High Court at Rawalpindi to Mr.Farooq H.Neak, Advocate, on telephone, that the impugned order has been passed by the learned Ehtesab Bench and despite request, copy of the order was not provided."

39.???? The manner of appointment of? Commission and the Commission having proceeded? to Geneva and the steps taken by it in Geneva shows a mysterious hidden? hand behind it.

40.? While challenging the appointment of Commission, the question of admissibility of? the documents produced by Hassan Waseem Afzal? PW-14 was agitated and leave was granted by this Court. At the time of disposal of the appeal, this Court? passed the order in the case of Mohtarama Benazir Bhutto v. The State? (PLD 1999 SC 937) reproduced in Para 11 (d) ante. We are sorry to observe that in flagrant disregard of the directions issued by this Court the learned Judges proceeded to decide the case in its entirety whereas learned Judges should have taken up the question of admissibility? of documents first as ordained by this Court. The learned Judges, after receipt of the report of Commission, treated it as an incriminating circumstance but we have noticed that this important piece of allegedly incriminating evidence was not put to the accused.

41. ??? Another intriguing circumstance? consists of? the statement of Mr.Ali Sabtain Fazali, learned? Special Public Prosecutor. It was pointed out by the appellants that? his statement was in fact recorded by the learned Ehtesab Bench itself giving up three very important prosecution witnesses including V.A.Jaferi , Javed Talat and Khalil Ahmad. Ostensibly it was done? by the learned Judges with a view to delivering?? the judgment hastily and this statement was merely read over by the Court to the? learned Special Public Prosecutor who admitted it to be correct. This was strange procedure prima facie adopted in order to hasten the proceedings and to reach the foregone conclusion.

42.???? We have considered all the above noted features of the case and? we have also noted the fate of application moved by the learned counsel for? Asif Ali Zardari appellant under Section??? 265-K of Cr.P.C. The atmosphere? must have been highly charged. It can also be imagined when on the intervention of the? Court the proceedings were drastically cut short by the learned Judges; the defence evidence was restricted to the recording? of the statement of a solitary defence witness, namely, Muhammad Nawaz, Superintendent? Landhi Jail as DW-1. Suddenly the Court rises; retires to the Chambers, re-appears after a while and the short order is handed down on 15th April,1999 which appears to have been pre-authored? bearing?? the date as 14th April, 1999, which was scored off and corrected.

43.???? At this stage, it will be pertinent to mention that the Ehtesab Bench? which tried and convicted the appellants consisted of two learned Judges. It appears from the record that Malik Muhammad Qayyum J. being the senior member of the Bench had exerted his influence on the second member S. Najamul Hassan Kazmi J. who being an unconfirmed Judge of the Lahore High Court was sweating for confirmation. We have taken judicial notice of the relevant Notifications issued by the Government of Pakistan in the Ministry of Law, Justice, Human Rights and Parliamentary Affairs dated 27th May, 1997, 26th May, 1998 and 13th May, 1999 that the said learned member of the Bench was appointed as Additional Judge of the Lahore High Court for a period of one year but the tenure was extended for a further period of one year with effect from 28th May, 1998 and he was ultimately appointed as a permanent Judge on 13th May, 1999.

44. ??? In support of this appeal an attempt was made at the bar that the learned Judges were not applying independent mind and had been pressurized and coaxed by the authorities in power to oust the appellants from the arena of politics by securing their disqualification to hold public office. On behalf of the appellants certain audio-tapes and their transcripts were attempted to be brought on the record. It was argued that Mr.Khalid Anwar, the then Law Minister, Mr.Rashid Aziz Khan J., the then? Chief Justice of Lahore High Court, Senator Saifur Rehman, Incharge Ehtesab Bureau and? Malik Muhammad Qayyum J. were clandestinely in league with each other to secure the conviction of the appellants at the behest of the then Prime Minister of Pakistan.

The other side took a categorical stance that the audio-tapes were fake and in any event were extraneous for the purpose of determination of the matter in controversy in appeal?

45.???? There is no need to advert to the audio-tapes and their transcripts as there is sufficient material on record which substantiates the allegation of bias. We are convinced that the trial in this case was not fair and on account of bias of the Ehtesab Bench, highlighted in preceding paragraphs, the trial of appellants stands vitiated.

46.???? Resultantly, the titled appeals are accepted, convictions recorded against and?? the sentences awarded to? the appellants are set aside and? the case is? remitted to the Court

of competent jurisdiction for trial afresh in accordance with law. This disposes of the connected matters as well.?

47.???? Before parting with the judgment we are inclined to dispose of plea? of Mr. Abdul Hafeez Pirzada, learned Sr.ASC to the effect that Asif Ali Zardari, appellant had already served out the substantive sentence of imprisonment and, therefore, he is entitled to be released from Jail.? As we have already sent the case to a Court of? competent jurisdiction, it would be more appropriate if this matter is agitated before the Court aforesaid.

Judge.

Judge

Judge

Judge

Judge

Judge

Judge

ISLAMABAD.

DATED; 6th April, 2001.

APPROVED FOR REPORTING?

