

IN THE SPECIAL COURT, ISLAMABAD
(Established under Act XVII of 1976)

Complaint No.1 of 2013

PRESENT:

Mr. Justice Faisal Arab
Mrs. Justice Syeda Tahira Safdar
Mr. Justice Muhammad Yawar Ali

The Federal Government of Pakistan.....**Complainant**

Versus.

General (R) Pervez Musharraf**Accused**

Dates of hearing: 14.10.2014, 15.10.2014, 29.10.2014 & 30.10.2014.

Date of Order: 21.11.2014.

M/s Muhammad Akram Sheikh and Naseer-ud-din Khan Nayyar advocates assisted by Dr. Tariq Hassan, Sardar Asmatullah, Ch: Muhammad Ikram, Tayyab Jafri, Ishtiaq Ibrahim, Barrister Sherjeel Adnan Sheikh, Barrister Natalya Kamal, Barrister Sajeel Sheryar, Ch:Hasan Murtaza Mann, Faraz Raza, Mian Moazzam Habib and Haider Imtiaz advocates for the Complainant.

Dr. Muhammad Farogh Naseem, advocate assisted by M/s Shaukat Hayat, Obaid-ur-Rehman Khan, Irfan-A-Memon and Ch:Faisal Hussain advocates for the accused.

Criminal Miscellaneous Application No.26/2014.

ORDER.

Faisal Arab, J: On 3rd November, 2007 all the organs of the State of Pakistan were fully functioning when at the close of the day it was announced that a state of emergency had been declared by

the present accused. The accused at that time was holding the office of the President of Pakistan as well as that of Chief of the Army Staff. The reasons which necessitated imposition of emergency were explained by him in his speech on the State Television. On that day the following instruments, were issued:

- (1) The Proclamation of Emergency of 3rd November, 2007
- (2) The Provisional Constitution Order No.1 of 2007
- (3) The Oath of Office (Judges) Order, 2007

2. The first two instruments were signed by the accused in his capacity as Chief of the Army Staff and the third as President of Pakistan. By virtue of the Proclamation of Emergency the Constitution of Pakistan was put in abeyance. The Provisional Constitution Order No.1 of 2007 was to the effect that the office of Judges of the Superior judiciary was made subject to the Oath of Office (Judges) Order, 2007 instead of the Constitution. The purpose of the Oath of Office (Judges) Order, 2007 was to declare that all the Judges of the Superior Judiciary had ceased to hold their offices, with a rider added to it that if any of the Judges is either given or does make an oath in the form set out in its Schedule, then he shall be deemed to continue to hold his office. Thus, the main purpose, as it appeared from the contents of these instruments, was to put the Constitution in abeyance and to facilitate removal of those Judges of the Superior Courts who did not take or were not given oath. Only those were to continue in office if oath was administered to them.

3. The removal of Judges under the Provisional Constitution Order No.1 of 2007 (PCO for short) gave rise to a massive lawyers' movement which finally resulted in the restoration of judiciary as it stood prior to 03.11.2007. The restored Supreme Court took up the matter and declared the 3rd November action unconstitutional. The present Federal Government came to the power as a result of the

general elections held in May, 2013. In June, 2013 it decided to initiate criminal proceedings under Article 6 of the Constitution. The investigation was carried out and finally the Government filed the present complaint against the accused, who was then summoned by this Court. One of the pleas the accused took before this Court was that the Proclamation of Emergency of 3rd November, 2007 was not an act of the accused alone, but was an outcome of a consultative process, mentioned in the Proclamation of Emergency itself; and that too was taken on the advice of the then Prime Minister, but the accused is being singled out in the present proceedings with malafide intent. It is the case of the accused that the motivating factor behind invoking the provisions of Article 6 of the Constitution was the animosity that existed between the accused on one hand and the present Prime Minister and the former Chief Justice of Pakistan on the other; and it is for this reason that the Prime Minister has resorted to prosecution only against him. On taking such plea, this Court passed an order on 07.03.2014 and on the same lines another order was also passed on 08.05.2014. The relevant parts of the said orders are reproduced below:

Excerpt from Order dated 07.03.2014.

(III). ACCUSED SINGLED OUT.

50. *The material that is before us at this stage is only limited to the extent that the accused consulted with certain functionaries of the State, both civil and military, before issuance of the Proclamation of Emergency, therefore, the involvement of any other person would depend on the evidence which would come on the record.*

Excerpt from Order dated 08.05.2014.

15. *We may mention here that we are not leaving the question of joinder of other persons as co-accused till the*

completion of the trial. The decision to implicate any other person would depend on what material comes on the record in the shape of documents, extrajudicial statements and oral evidence and the evidence so produced might then connect any other person with the commission of the crime. In such eventuality others, if any, can be implicated and tried alongwith the accused and this Court has ample power to do so.

4. When the evidence of the prosecution was nearing completion, the accused, placing reliance on the above orders of this Court, moved an application, numbered CrI.M.A.No.26 of 2014 wherein he sought (a) dismissal of the Complaint terming it to be based on selective prosecution meant only to target him and thus violative of Articles 9, 10-A and 25 of the Constitution of Pakistan, (b) implication of the persons or classes of persons highlighted in the application or, (c) return the Complaint to the Complainant with the direction to re-file the same after the inclusion of all persons or classes of persons, highlighted in the application as co-accused.

5. Dr. Muhammad Farogh Naseem advanced arguments on behalf of the accused. His submissions are summarized as follows:

a) Article 6 (2) of the Constitution brings within its ambit such persons as well who had conspired, aided or abetted in the commission of the offence covered under Clause (1) of Article 6 of the Constitution; the accused was not alone in his actions, rather there were several others who committed a series of acts, but they are not being prosecuted, even the Statement of Charges against the accused not only cover the events of 3rd November, 2007 but also includes the acts that were committed subsequently; all these acts committed by others are to be treated as one composite offence. Implicating only the accused in the present case would amount to denying him a fair trial and thus violative of Articles 3, 4 and 10-A of the Constitution.

Section 6(1) (g) of the Criminal Law Amendment (Special Court) Act, 1976 (Act 1976) mandates trial of co-offenders jointly, thus to single out the accused for trial is an exemplary case of selective prosecution.

b) Abetment has been defined in Section 107 of Pakistan Penal Code (PPC) which covers all those persons who aid and abet a crime or conspire in the commission of an offence. The last recital of the Proclamation of Emergency clearly states that prior to the 3rd November action the accused had consulted various functionaries of the State and acted on their advice, therefore, all those be made co-accused in the present case. As such the members of the Cabinet and the members of the National Assembly who endorsed the 3rd November action and passed a resolution, and all those who voted in favour, be also made co-accused. All holders of high public office, including Judges of the Superior Courts, who had earlier taken oath under the Constitution but accepted and complied with the 3rd November dispensation including the then Prime Minister, members of his Cabinet; the members of the bureaucracy who accepted the 3rd November action may also be added as co-accused.

c) The Investigation Report though recognized presence of aiders and abettors, but the Joint Investigation Team deliberately and with mala fide intent failed to identify them, and despite this deficiency in Investigation Report there was no direction by the Competent Authority for conducting further inquiry to ascertain who were the unidentified aiders and abettors.

d) The accused was implicated alone in violation of the judgment of the Supreme Court reported in 2013 SCMR 1683, whereby a window was left open for prosecuting aiders, abettors and collaborators. The investigators on the contrary have proceeded with the investigation in a manner as if incriminating material is to be collected only against the accused.

e) The prosecution witnesses have themselves admitted in the cross examination that no enquiry was conducted to identify aiders and abettors, thus admitted to its inconclusiveness; and a trial on such inconclusive report would be travesty of justice.

f) This court has ample power to include any person as co-accused as held in the cases reported in 2006 SCMR 373 whereas the judgment in the case reported in PLD 2007 SC 31 is *per incurim*.

g) In a case where trial is to proceed against the abettors then by virtue of Section 239 (a) & (b) Code of Criminal Procedure it has to be a joint trial with the principal accused.

h) The plea of the accused that he acted on the advice of the Prime Minister would be prejudiced if the then Prime Minister (Shaukat Aziz) does not stand trial in the present case.

i) The pleas taken by the accused that he consulted the functionaries mentioned in the last recital of the Proclamation of Emergency before taking 3rd November action and that he acted on the advice of the Prime Minister are not mutually destructive as both the situations can happen. Even otherwise, every accused has a right to take more than one plea in his defence.

j) It was the then Federal Law Minister and the then Prime Minister who prepared the summary for removal of Superior Court Judges under the provision of Provisional Constitution Order 2007 and Oath of Office (Judges) Order, 2007.

k) General Ashfaq Pervez Kiyani became Chief of the Army Staff on 27.11.2007 who could have lifted the emergency, but failed to do so and for this omission he be also made co-accused in this case.

1) In view of the inherent defect in filing the present complaint and on account of inconclusiveness of the Investigation, the complaint should be returned back to the competent authority for ordering de-novo investigation to be conducted by an impartial team of investigators.

6. Muhammad Akram Sheikh learned Special Public Prosecutor on the other hand made the following submissions:

a) Under Section 5(3) (b) of the Criminal Law Amendment (Special Court) Act, 1976 power to implead any other person as co-accused vests with the Federal Government or the prosecution and the Special Court is not empowered to do so.

b) Section 351 of the Code of Criminal Procedure is not attracted to the present case. The necessary ingredient for exercise of the power under Section 351 CrPC is that such person must be in attendance before the court, only then he can be joined as co-accused. Even otherwise, to order joint trial is not a rule nor a mandatory requirement but an exception. (Reliance was placed on PLD 1969 SC 158 and AIR 1988 SC 1531).

c) The accused seeks some 600 persons to be summoned and to face trial jointly with him, which amounts to causing injustice and unnecessary delay in completion of the trial. Even otherwise such a plea cannot be raised by an accused as of right. Reliance was placed on AIR 1988 SC 1531.

d) Plea of selective prosecution is attracted where prosecution is mounted only against one class of persons, leaving the others out from the trial. (Reliance was placed on 517 US 456 & 470 US 598).

e) The offence in the present case was completed upon signing of Proclamation of Emergency, Provisional Constitution Order No.1 of 2007 and Oath of the Office (Judges) Order, 2007 and was committed by the accused alone, which fact was admitted by the accused in his speech which he made to the nation on Television on 3rd November, 2007.

f) Issuance of the notifications regarding removal of Judges was only a ministerial act and cannot be treated as an offence in the present proceedings.

g) The reasons disclosed in the Investigation Report do not assign any role to any other person as aider or abettor of 3rd November action.

h) The Prime Minister, Law Minister, members of Cabinet and National Assembly at best can be regarded as accessory after the fact and cannot be made co-accused in this case.

i) The 3rd November action was a self motivated act taken by the accused for personal reasons and no one else could be made responsible for wrong doings of the accused.

7. The accused is charged for the offence of high treason as defined under Article 6 of the Constitution. It reads as under:-

(1) *Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.*

(2) *Any person aiding or abetting [or collaborating] the acts mentioned in clause (1) shall likewise be guilty of high treason*

2A. -----

3. -----

8. Clause (1) of Article 6 of the Constitution defines what constitutes offence of high treason, while its Clause (2) describes the liability of a person who aids and abets the offence described in Article 6(1). Thus Article 6 is attracted not only when the Constitution is abrogated or subverted or suspended or held in abeyance, but also when an attempt is made or conspiracy is hatched to abrogate, subvert or suspend it. Clause (2) goes further and provides that if a person with his action aids, abets or collaborates with the person in acts mentioned in Clause (1) then he shall likewise be guilty of high treason. The words aiding or abetting appearing in Clause (2) of Article 6 are not defined in the Constitution, therefore the Court can resort to the definition of these terms contained in Pakistan Penal Code (PPC). Section 107 of Pakistan Penal Code (PPC) defines what abetment is. For the sake of convenience it is reproduced as under:-

Section 107 PPC.

Abetment of a thing. A person abets the doing of a thing, who---

First.--Instigates any person to do that thing; or,

Secondly.--Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.--Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.--A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration

A, a public officer, is authorised by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2. Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

9. From the above quote of Section 107 of the Pakistan Penal Code, it is evident that three distinct acts fall within the definition of abetment. First is the act of instigation by one to another to do an illegal thing. Second is the act of engaging with one or more persons in any conspiracy which results in taking place an illegal omission or commission. Third is the act when a person either intentionally does anything or illegally omits to do that result in facilitating someone in doing an illegal act. Explanation 2 to Section 107 of the Pakistan Penal Code explains that where one does anything, either prior to or at the time of commission of an offence whereby he facilitates the other in the commission of an offence then the acts of

former would also amount to committing the offence. To fall in the third category of definition of abetment it is not necessary that the aider or abettor has committed such an act that is identical to the acts committed by the principal offender. It would be sufficient to describe a person aider or abettor if his act has facilitated the principal offender for committing any offence. Thus any kind of act of a person, intended to facilitate another to commit an offence, would fall within the third category of the definition of abetment.

10. We may point out here that the act of removal of Judges of the Superior judiciary is part of the third Charge contained in the Statement of Formal Charges filed by the Complainant in this case. For the sake of convenience the third Charge is reproduced as under:

c) Thirdly, on 3rd November, 2007 at Rawalpindi as President of Islamic Republic of Pakistan, he issued an unconstitutional and unlawful "Oath of Office (Judges) Order, 2007" whereby an oath was, unconstitutionally and unlawfully, introduced in the Schedule which required a judge to abide by the provisions of the Proclamation of Emergency dated 03.11.2007 and the Provisional Constitutional Order dated 03.11.2007 to perform acts and functions in accordance thereof and this order also resulted in removal of numerous Judges of the Superior courts including the Honourable Chief Justice of Pakistan and he thereby subverted the Constitution of Islamic Republic of Pakistan, 1973 and thus committed the offence of high treason punishable under section 2 of the High Treason (Punishment) Act, 1973 (Act LXVIII of 1973), which is within the jurisdiction of the Special Court established under section 4 of The Criminal Law Amendment (Special Courts) Act, 1976 (XVII of 1976).

11. To establish that the 3rd November, 2007 action was the outcome of a consultative process, Dr. Muhammad Farogh Naseem referred to the last recital of the Proclamation of Emergency, which states “*And whereas the situation has been reviewed in meetings with the Prime Minister, Governors of all four Provinces, and with the Chairman Joint Chief of Staff Committee, Chiefs of the Armed Forces, Vice-Chief of Army Staff Corps Commanders of the Pakistan Army;*” It was asserted that the said officials participated in the decision making process which culminated in taking 3rd November action therefore they all be joined as co-accused in this case.

12. To examine the above assertion we perused the material brought on the record. One of the consultees mentioned in the last recital of the Proclamation of Emergency is the Governor of Sindh, Dr. Isharat-ul-Ebaad. He was Governor then also. Before the investigation team he submitted a statement in the form of question and answer. The same was produced in evidence as Exhibit P-9/18 in which four questions were answered. The relevant answer is the third, which is reproduced below:

Question No.iii: *Did Gen. Pervaiz Musharaf consult me on this issue? When? And in which manner i.e. through a document, verbal, meeting or telephonic?*

Answer: *Nearly six years have elapsed since 3rd November, 2007; I recollected that perhaps in the last week of October, 2007, I alongwith the Governors of the other three provinces was summoned to attend a meeting chaired by the then President Gen. Pervaiz Musharaf. In such meeting the then President informed us, i.e. the Governors that in view of the difficult situation faced by the country, the Government was contemplating to take some measures, permissible under*

the Constitution. The then President informed us that he would only take such measures, upon the advice of the then Prime Minister, in accordance with legal advice. Except for the above, no other oral or written communication was made with me in this regard nor was any draft or document thereof shown to me.

13. We have given due consideration and weight to the statement of Dr. Ishrat-ul-Ebaad, as it comes from a person who holds the office of a Governor, especially when it was produced in evidence without being controverted in any manner by any of the parties. Evidently, the statement of the Governor Sindh can be said to be the reflection of what may have transpired in the consultative process between the accused and the officials mentioned in the last recital of the Proclamation of Emergency. The statement only spells out that in the consultative process a decision to take constitutional steps was agreed upon. Thus what has come out from the Governor's statement is that except for receiving a briefing from the accused there is nothing to show that any one advised the accused to take action similar to the one that was taken on 3rd November, 2007. We may also mention here that none of the officials mentioned in the referred recital had any constitutional role to play in the imposition of Emergency in any manner except the then Prime Minister. The then Governors of the four Provinces, the then Chairman Joint Chief of Staff Committee, the then Chiefs of the Armed Forces, the then Vice-Chief of Army Staff and the then Corps Commanders of the Army though at the relevant time held responsible positions and were serving this nation by playing their assigned roles, but except for engaging in a briefing, nothing else was attributed to them. Nonetheless active complicity i.e. participation in the commission of a crime is an essential ingredient of abetment as defined in Section 107 of the Pakistan Penal Code, which makes a person accessory to a crime. The legal maxim that says 'Cogitationis poenam nemo patitur.' [*The thoughts and intents of men*

are not punishable.] For the devil himself knoweth not the mind of man (per Brian C.J.)' would be relevant to quote in the circumstances.

14. It was argued that during subsistence of the Emergency, the accused relinquished the charge of Chief of the Army Staff and General Ashfaq Pervaiz Kiyani became his successor on 27.11.2007, but General Kiyani on taking charge of his office did not lift the Emergency, thus on account of such omission he too ought to have been made an accused in this case. No doubt General Kiyani took over the charge of his office in November, 2007 during subsistence of Emergency and he took no action to lift emergency but this was due to the fact that on 14.11.2007 certain amendments were brought about in the Provisional Constitution Order No.1 of 2007 which include insertion of Article 6. The amending law was produced in evidence as Ex.P-10/3. In the newly inserted Article 6 it is stated "*6. The President may revoke the Proclamation of Emergency of the 3rd day of November 2007, on such day as he may deem fit.*" By virtue of this amendment, the power to revoke Emergency came to vest in the President. The argument of implicating General Kiani in this case is therefore not sustainable.

15. The counsel for the accused next argued that on 6th November, 2007 the Cabinet endorsed the Proclamation of Emergency of 3rd November and the Provisional Constitutional Order No.1 of 2007, and a resolution in this regard was also passed by the National Assembly. Hence by virtue of such endorsements, the members of the Cabinet and the National Assembly, who voted in favour of the resolution, be arraigned as accused in the instant case. We have already expressed our view that under the law only active complicity in the commission of a crime is an essential ingredient which makes a person an accessory of the crime. As mere endorsement lacks this basic ingredient it cannot be treated as an act of abetment. At best those who endorsed the 3rd November action

without contributing towards the commission of the offence, can be regarded as 'accessory after the fact'.

16. It was contended that while recommending prosecution against the present accused, the Investigation Report in its concluding part mentions that others have also played role of the facilitators, but they were not identified and thus the Investigation Report was inconclusive suggesting half hearted attempt to identify other suspects of the offence.

17. The record reveals that the Joint Investigation Team, that was constituted to make investigations in the present case, finalized its report on 16.11.2013. This Investigation Report was produced in evidence as exhibit Ex.P-9/5. Its concluding paragraph states *"the Team further recommends that the Competent Authority may also take into account the role of various facilitators in the unconstitutional Proclamation of Emergency on 3rd November, 2007."* It appears from the Investigation Report that the investigators shifted their responsibility of identifying the persons, who allegedly facilitated the accused in taking the 3rd November action upon the Complainant. If the investigators had reasons to suspect someone who contributed towards the reported offence then it was their obligation to do so in order to be implicated as co-accused. We fail to understand why Investigators did not identify others when they found material during the investigation, which in their opinion, connected others as well with the 3rd November action. The Investigators ought to have taken their suspicion against unidentified persons to its logical conclusion, and in not doing so the investigators had left their assignment half finished. On receiving such deficient report, the prosecution ought to have thrown it back to the investigators to identify others who may have been also involved in the offence. The competent authority on its part also failed to react to such half-hearted and inconclusive investigative work. Thus the failure on the part of the

competent authority and the prosecution allowed an inconclusive investigation to be made basis of the trial and allowed an unfair investigative work to attain finality.

18. The choice as to which of the accused is to be tried, does not lie with the officers investigating a crime. It would be against the public interest if a selective investigation is allowed to be made the basis of a criminal trial. The ultimate decision of a Court, whichever way it might go, would lose its credibility in the public eye if a trial proceeds on the basis of selection of the accused by the investigator. Though the Courts are not to interfere with the manner in which investigation is carried out, but when selective or inconclusive investigation is pointed out to a Court, it becomes necessary to interfere to correct the wrong. A criminal investigation should not leave an impression that it was intended to find incriminating evidence only against a particular person or has deliberately excluded others who might be involved in the commission of the crime. Only such investigation would be looked upon as transparent which does not have any semblance of partiality and is conducted purely to identify involvement of all persons who may have been involved in the commission of the reported offence. The last paragraph of the Investigation Report does not reflect that. If we close our eyes to the contents of the last paragraph of the Investigation Report, then it may cast cloud on the credibility and transparency of the entire proceedings. It has come in evidence that after the submission of the inconclusive Investigation Report, nothing was done to get the investigation completed. We fail to understand why this sort of inertia was displayed. The entire approach adopted in the conduct of investigation process supports the argument advanced by the counsel for the accused that the investigation was deficient and unfair.

19. We may add that if criminal trial is to proceed on the premise that only the one who is brought before the court is to be tried

no matter material to connect someone else is also on the record, then it would amount to laying a very dangerous precedent. This would give the investigating authority an absolute power to determine who would be the accused in a case. However, we may state here that any deficiency in the investigation can be cured during the trial so that no one is prejudiced. Now should this court ignore the inconclusiveness of the Investigation Report and proceed with the case or in the alternative scrutinize the material itself, and identify the persons, if any, who could be termed as aiders and abettors. It would not be just to order reinvestigation at this stage. We shall therefore, proceed to scrutinize the material that has come on record in the light of the orders that we passed on 07.03.2014 and 08.05.2014 and identify the persons who may have aided, abetted or facilitated the alleged offence that is subject matter of this case.

20. Prime Minister is leader of the House in the National Assembly. He is empowered under the Constitution to advise the President to impose emergency. If he had not advised the accused to impose emergency prior to 3rd November action then certainly his powers were being usurped when Emergency was declared. The then Prime Minister however displayed no aversion to it. The record is absolutely silent on this aspect. On the contrary he facilitated the change intended to be brought about under the PCO alongwith the then Law Minister who surely knew the constitutional and legal requirements of an executive action. The Law Minister is supposed to be conscious of the legal consequences which flow from discharge of his responsibilities but the then Law Minister and the then Prime Minister instantly indulged themselves in the process of removal and appointment of Judges on 3rd November, 2007.

21. The PCO and the Oath of Office (Judges) Order, 2007 were instruments that were issued only to provide a vehicle for facilitating removal and appointment of Judges of the Superior

Judiciary. From the very first day and till the 3rd November dispensation lasted, all removal and appointment of the Superior Courts Judges were undertaken by the then Federal Law Minister. He used to initiate Summary containing proposal to the Prime Minister who then with his advice forwarded it to the President. Once the Summary was approved by the President only then the notifications were issued. The issuance of notification alone is definitely a ministerial function but the function which the Federal Law Minister and the Prime Minister performed cannot be termed as ministerial as they take their decisions after due deliberation, application of mind and with complete ownership of consequences.

22. The Record shows that steps for removal and appointment of the Judges were taken with undue haste on the very same day i.e. 3rd November, 2007 by the then Federal Law Minister and the then Prime Minister, instantly supplementing the purpose with which the Emergency of 3rd November was imposed and instruments like PCO and the Oath of Office (Judges) Order, 2007 were issued. The evidence shows that the investigation team recorded statements of the then Cabinet Secretary, Syed Masud Alam Rizvi and the then Principal Secretary, Cabinet Division, Justice (R) Mian Muhammad Ajmal. Mr. Rizvi stated that the Proclamation of Emergency of 3rd November, 2007 signed by General Parvez Musharaf was received by him from the Presidency in the evening and on receiving it he endorsed it so that its Gazette Notification could be issued by the Printing Corporation of Pakistan. Justice Ajmal stated that upon issuance of Proclamation of Emergency of 3rd November, 2007 the Prime Minister's Secretariat asked him to sign a notification of ceasure of the office of Judges of the Supreme Court and then he signed a prepared Summary in the Law Division that was presented to him by his Secretary. The Summary was also produced in evidence as Exhibit P-9/26 which narrates that the then serving Chief Justice of Pakistan, Justice Rana Bhagwandas and Justice Javed Iqbal ceased to

hold office; and Justice Abdul Hameed Dogar, who was fourth on the seniority list of the Supreme Court Judges was proposed to be appointed as new Chief Justice of Pakistan. Justice Abdul Hameed Dogar at no stage was removed from his office as was the case with the Judges who were senior to him. This is evident from the notification placed on the record. He was very swiftly nominated and within a span of only few hours of imposition of 2007 Emergency, was sworn in as Chief Justice of Pakistan and then he took over the control of the Supreme Court, the highest judicial forum of the Country. Keeping the sequence of events in mind, the only logical conclusion which could be drawn from this is that Justice Abdul Hameed Dogar would not have been made Chief Justice of Pakistan if he had not consented to become Chief Justice of Pakistan prior to the issuance of the PCO.

23. From the above referred Summary dated 3rd November, 2007 produced in evidence as Ex.P-9/26 it is evident that the then Prime Minister and the then Federal Law Minister immediately sat down on that very evening to process the removal of the then serving Chief Justice of Pakistan and appointment of his successor. The Proclamation of Emergency was received by the Cabinet Secretary in the evening and the process started in the Law Division on that very evening. The two instruments i.e. the Proclamation of Emergency and PCO were written on letterhead carrying title of "Government of Pakistan, Cabinet Secretariat, Cabinet Division" One can very well imagine why these two documents did not come as a surprise to the then Prime Minister and the then Federal Law Minister. Justice Abdul Hameed Dogar would not have been made Chief Justice of Pakistan had he not been taken on board prior to the 3rd November action. It is for this reason that on that very evening of 3rd November, 2007 the then Prime Minister and the then Federal Law Minister were geared-up to process the nomination of Justice Abdul Hameed Dogar with lightning speed.

24. In ones enthusiasm to seek punishment of the accused, the investigators should not have failed to identify the persons who according to their own findings acted as facilitators in the commission of the crime, atleast not when the material they gathered during investigation, which is now part of the evidence, was sufficient to identify them. From the above, it is evident that the role which the facilitators played falls within the ambit of the third Charge that is listed in the Statement of Charges filed in this case.

25. Even if we assume at this stage that the then Prime Minister and the then Federal Law Minister themselves did not decide to replace the then serving Chief Justice of Pakistan with Justice Abdul Hameed Dogar and were directed by the accused to do so, but whichever way one see it, their action fall within the definition of abetment as defined in Section 107 of the Pakistan Penal Code. How the then Prime Minister and the then Federal Law Minister could not be regarded as aiders and abettors and accessory in crime. No doubt mere issuance of notification alone is definitely regarded as a ministerial function but the then Prime Minister and the then Federal Law Minister perform their functions after due deliberations and take decisions on the strength of the responsibilities of the post which they hold. Their functions by no means can be regarded as ministerial.

26. Let us look at the matter from a different angle as well. Had the then Prime Minister and the then Federal Law Minister and Justice Abdul Hameed Dogar been made co-accused in this case then on the basis of the material that has come on the record could we have ordered their discharge from the case under the provisions of Section 265-K of the Code of Criminal Procedure. The answer would have been in the negative as on the basis of the material that has come on the record it is highly probable that they committed such acts which facilitated the accused in the realization of the object with which 3rd

November action was taken, cognizance whereof has already been taken by this Court.

27. We are of the firm view that the object and the purpose with which the Proclamation of Emergency of 3rd November, 2007, the Provisional Constitution Order No.1 of 2007 and Oath of Office (Judges) Order, 2007 were issued, was not realized merely by the issuance of three instruments but was realized with the replacement of the then serving Chief Justice of Pakistan. All steps taken by the then Prime Minister and the then Federal Law Minister in the process of removal and appointment of the Judges of the Superior Judiciary are to be regarded as an integrated whole constituting one offence. One can say without any hesitation that the then Prime Minister and the then Federal Law Minister within a span of few hours acted in concert with each other thereby demonstrating a pre-arranged plan to bring about the desired change in the Superior Judiciary during the subsistence of the Emergency of 3rd November, 2007, the Provisional Constitution Order No.1 of 2007 (PCO) and the Oath of Office (Judges) Order, 2007. One can see a clear division of performances in the entire chain of events.

28. We are conscious of the fact that an accused has no right to demand that there are other persons who should also be made accused in the case and tried along-with him but he can bring to the notice of the Court the identity of persons who according to him were involved in the commission of offence. Merely on the basis of his statement, an accused can neither protect his accomplices from facing the trial nor could he get someone implicated in a case. A Court, only after finding material to connect other persons with the commission of the crime, can summon them to stand trial alongwith the accused. Presence of sufficient material on the record is the only requirement to implicate a person as a co-accused.

29. Section 351 of the Code of the Criminal Procedure though empowers a court to get any person present in court arrested without issuance of warrants but it does not mean that there is bar on the courts to summon any person who is not before it. If the material before it is sufficient to connect him with the commission of the crime cognizance of which had already been taken, then even if he is not present in Court, he can be ordered to be arrested.

30. The court is regarded as an impartial arbiter of justice. Its decisions would not gain legitimacy in the eyes of the public if it appears that in deciding a case it acted with a certain tilt and allowed partners-in-crime to escape prosecution. Based on the material on record, the probability of their involvement as aiders and abettors cannot be ruled out. We are therefore of the view that joinder of the then Prime Minister and the then Federal Law Minister and Justice Abdul Hameed Dogar is necessary to secure the ends of justice. By joining them as co-accused, the conclusion of this trial might get delayed but where a charge of abetment is to be tried then the right thing to do is to order joint trial alongwith the accused, which is also a mandatory requirement of Section 239 (a) and (b) of the Code of Criminal Procedure.

31. The opinion expressed by us in this order depicts only the exercise that we undertook to examine whether anyone can be identified as co-accused in this case. Therefore, this order is to be regarded only as prima facie assessment with regard to the involvement of persons who could be joined as co-accused. Surely the newly added co-accused will get ample opportunity to defend themselves.

32. In the light of the above discussion we direct the Federal Government to submit amended or additional statement as well as Statement of Formal Charges in terms of Section 5(1) and 5(3) (a) of Criminal Law Amendment (Special Court) Act, 1976 against the then

Prime Minister, the then Federal Law Minister i.e. who held such office on 3rd November, 2007 and Justice Abdul Hameed Dogar as co-accused within a fortnight. The Criminal Miscellaneous Application No.26/2014 is partly allowed in the above terms.

Dated: 21.11.2014.

President

I agree.

Judge

I have added my note of dissent.

Judge

MUHAMMAD YAWAR ALI, J. I have read the order authored by the worthy President Mr. Justice Faisal Arab concurred by Mrs. Justice Syeda Tahira Safdar and am not in conformity with it hence am writing a note of dissent.

2. The applicant while invoking section 351 Cr.P.C read with section 561-A Cr.P.C. and Articles 9, 10-A and 25 of the Constitution of the Islamic Republic of Pakistan 1973 has prayed as follows:-

- (a) **dismiss the complaint as having been defectively framed and filed in violation of, inter alia, Articles 9, 10-A and 25 of the Constitution so also the principle of selective prosecution; or**
- (b) **implicate, array and/or implead the persons or classes of persons highlighted in paragraph No.8 above; or**
- (c) **return the Complaint back to the Complainant with the direction to only re-file the same after inclusion and addition of all the persons or classes of persons, highlighted in paragraph No.8 above, as co-accused, whether after re-investigation or otherwise; or**

(d) award any other relief that this Hon'ble Court may deem fit and appropriate in the facts and circumstances of the case.

3. According to the applicant, the following persons are guilty of aiding, abetting, facilitating, conspiring and collaborating:-

- (a) the then Prime Minister Mr. Shoukat Aziz who admittedly wrote the admitted letter of 03.11.2007 inviting General (Retd.) Pervez Musharraf to impose the emergency in question, such letter having been reproduced in extenso in the Iqbal Tikka Khan case;
- (b) the entire Federal Cabinet on 03.11.2007;
- (c) the members of the National Assembly as on 06.11.2007;
- (d) the entire Cabinet and Chief Ministers of all the four provinces as on 03.11.2007;
- (e) all the Governors of the four provinces as on 03.11.2007;
- (f) all service Chiefs as on 03.11.2007;
- (g) all Corps Commanders as on 03.11.2007;
- (h) all senior members of the Armed Forces of Pakistan as on 03.11.2007;
- (i) the worthy Chief of the Army Staff between 28.11.2007 to 15.12.2007;
- (j) all federal and provincial bureaucrats in BS-20 and above;
- (k) all members of the National and Provincial Assemblies as on 03.11.2007;
- (l) all Federal and Provincial Secretaries;
- (m) all learned Judges of the Supreme Judiciary who took oath under the PCO, in particular, those who passed the judgment in the Iqbal Tikka Khan's case and its review Petition;
- (n) all members of the Provincial and Federal Police, SSP and above.

4. The applicant is being tried for having committed the offence of high treason in terms of Article 6 of the Constitution of the Islamic Republic of Pakistan, 1973. This Article of the Constitution also provides that any person who is guilty of aiding or abetting (or collaborating) the principal accused shall likewise be guilty of high treason. The main thrust of the applicant's arguments addressed before this Court was to the effect that the applicant issued the Proclamation of Emergency on 03.11.2007 on the advice of the Prime Minister after consulting the Governors of all four Provinces, Chairman Joint Chiefs of Staff Committee, Chiefs of the Armed Forces, Vice-Chief of Army Staff and Corps Commanders of the Pakistan Army in his capacity as President of the Islamic Republic of Pakistan. Those persons who rendered advice to the effect that Emergency be proclaimed ought to be treated as aiders and abettors. All subsequent acts like issuance of oath of Office of Judges Order 2007 was on the advice of the then Prime Minister and the Cabinet. The present complaint has been filed on the basis of a high-powered report submitted by the Joint Investigation Team comprising of the then Additional Director General, F.I.A. and two Directors of the F.I.A. which concluded as follows:-

“The Team further recommends that the Competent Authority may also take into account the role of various facilitators in the unconstitutional Proclamation of Emergency on 3rd November, 2007.”

As per the learned counsel for the applicant it is not conceivable that the applicant could alone have committed the offence for which he has been charged. The letter dated 03.11.2007 written by the then Prime Minister Shoukat Aziz to the applicant to impose Emergency was infact an advice under Article 48 of the Constitution of the Islamic Republic of Pakistan 1973. The applicant who at that time was President of the Islamic Republic of Pakistan followed the mandate of the Constitution in letter and spirit by signing, ratifying and giving effect to the advice which was rendered for imposition of emergency.

The National Assembly in its 44 sessions endorsed and affirmed the Proclamation of Emergency and Provisional Constitutional Order of 3rd November 2007, hence, all those members of the Assembly would also be treated as aiders and abettors. That miscarriage of justice would be occasioned if the applicant is singled out as the only person tried for the offence of high treason in the given circumstances.

5. A bare reading of the Proclamation of Emergency dated 03.11.2007 would show that it has been signed by the applicant in his capacity as Chief of Army Staff and not as President of the Islamic Republic of Pakistan. The applicant filed **Civil Review Petition Nos. 328 & 329 of 2013 in Constitutional Petition Nos. 8 & 9 of 2009 titled General (R) Parvez Musharraf versus Nadeem Ahmed(Advocate) and another(PLD 2014 Supreme Court 585)** before the august Supreme Court of Pakistan and his counsel admitted before the Court that the order proclaiming Emergency was passed by the applicant in his capacity as Chief of Army Staff and not as President of the Islamic Republic of Pakistan. The counsel representing the applicant stated in clear terms that the Prime Minister never advised the applicant to act in violation of the Constitution and further stated that the applicant had imposed state of Emergency in his own discretion and not on the advice of the Prime Minister. The applicant after imposing Emergency addressed the Nation wherein he stated that after reviewing the situation and consulting with the members of the Army, Government, Politicians and friends both within the country and abroad himself took the decision to impose Emergency.

6. The complainant who appeared as PW-1 stated in his cross examination as follows:-

"I see the last paragraph of the Inquiry Report produced as Ex.P-9/5 wherein the Joint Investigation Team has recommended that the competent authority may also take into account the role of various facilitators in the unconstitutional Proclamation of Emergency on 3rd

November, 2007 and I state that action was not taken against any other person as there was no material against any other person in the Inquiry Report nor Joint Investigation Team specifically identified persons who were facilitators, aiders and abettors."

So far there is nothing on the record to show that the applicant acted on the constitutional advice which was rendered to him while imposing Emergency and taking other steps in pursuance of the same. Lt. Gen.(R) Khalid Maqbool who was Governor of the Punjab when the emergency was imposed in his communication dated 02.11.20013 Ex.P-15/27 took the stance that he was not consulted and that Emergency was imposed by the applicant on his own volition. Uptil now no defence witness has appeared in support of the applicant either to establish that the applicant is innocent or to make it manifest that there were other aiders and abettors. It is trite that no person can be summoned to face trial in a complaint unless requisite conditions under section 204 Cr.P.C. are fulfilled. It is only in the presence of sufficient grounds and satisfaction of the Court to be ascertained from the facts placed before it and the evidence which has come on the record that other persons can be summoned and arrayed as aiders and abettors. **IMTIAZ RUBBANI alias BILLU versus THE STATE and another(PLD 2008 Lahore 441), Mirza MUHAMMAD ABBAS versus The STATE(PLD 1964 Lahore 7) and PUNJAB NATIONAL BANK and others versus SURENDRA PRASAD SINHA(1994 P.S.C. (Crl.) 768)** can read with considerable advantage. Till date there is no evidence on the record to establish that any person rendered advice within the ambit of Article 48 of the Constitution of the Islamic Republic of Pakistan 1973 to the applicant for the imposition of Emergency on 03.11.2007. No doubt after the emergency was imposed it was accepted whole heartedly by the Prime Minister, Cabinet Members, Members of the Assembly, Senior Bureaucrats and those Judges of the Superior Courts who opted to take a fresh oath. At this stage, it cannot be concluded that this is an offence with a continuing cause of action meaning thereby that all

those persons who acted upon, accepted, ratified and subsequently took concrete steps for the implementation of the Proclamation of Emergency and other steps taken in pursuance of the same ought to be treated as aiders and abettors. The learned counsel for the applicant has failed to point out either from the documents which are on the record or from the evidence which has been adduced that specific, clear and unequivocal advice was given to the applicant in terms of Article 48 of the Constitution of the Islamic Republic of Pakistan and he acted upon the same in his capacity as President of the Islamic Republic of Pakistan 1973. The august Supreme Court of Pakistan while deciding the case titled **SINDH HIGH COURT BAR ASSOCIATION through its Secretary and another versus FEDERATION OF PAKISTAN through Secretary, Ministry of Law and Justice, Islamabad and others(PLD 2009 Supreme Court 879)** has held that the letter dated 03.11.2007 written by the then Prime Minister Shoukat Aziz to the applicant did not amount to advice rendered under Article 48 of the Constitution of the Islamic Republic of Pakistan, 1973. The learned counsel for the applicant has been unable to persuade me to direct the complainant to get the case re-investigated. In the ultimate analysis the outcome of the case would depend on the evidence which is brought on record and final arguments which are addressed by both the sides.

7. For what has been stated above Criminal Miscellaneous Application No.26 of 2014 is dismissed. It may be added that the findings arrived at and observations which have been made by me are strictly confined to the application in hand and would have no bearing on the outcome of the trial.

Dated: 21.11.2014.

Judge.

ORDER OF THE COURT.

In view of the majority decision, Criminal Miscellaneous Application No.26/2014 is disposed of with the direction to the Federal Government to submit amended or additional statement as well as Statement of Formal Charges in terms of Section 5(1) and 5(3) (a) of Criminal Law Amendment (Special Court) Act, 1976 against the then Prime Minister, the then Federal Law Minister i.e. who held office on 3rd November, 2007 and Justice Abdul Hameed Dogar, as co-accused within a fortnight.

Dated: 21.11.2014.**President****Judge****Judge**

afzaal