Form No: HCJD/C-121
ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

**W.P. No.2555-2022**

Capt (Retd.) Nadeem Khan Yousafzai
v.
The State, etc.

| S. No. of order/ proceedings | Date of order/ proceedings | Order with signature of Judge and that of parties or counsel where necessary. |
|---|---|---|
| | 22.08.2023 | Mr. Nabeel Javed Kahloon, Advocate for petitioner<br>Mr. Babar Mumtaz Advocate for respondent No. 3.<br>Ch. Muhammad Mohsin, State Counsel<br>Mr. Riaz Ahmed DSP (Legal) ICT Police along with Naveed S.I. |

**ARBAB MUHAMMAD TAHIR, J**:-Through the instant petition in terms of Article 199 of the Constitution, petitioner namely *Nadeem Khan Yousafzai* (former Director General Civil Aviation Authority **"CAA")** prayed for *quashing* of FIR No. 138 dated 07.04.2012 under section 302, 428, 286, 109, 287, 120-B Police Station Lohi Bher, Islamabad to his extent.

2. The case, set up by the petitioner in the memo of the petition is to the effect that Passenger Flight 213 (***Bhoja Air Flight***) scheduled for domestic flight operation from Karachi to Islamabad on 20.04.2012, crashed in bad weather wherein 121 passengers and six crew members, all lost their lives. The flight departed from Karachi at 17:00 PST (12:00 UTC) and had to land at Islamabad at 18:50 PST (13:50 UTC) but at about 18:40 PST, it had crashed 3 nautical miles (3.5MI 5.6 KM) short of its destination, near the village Hussain-abad, Rawalpindi.

3. According to the petitioner, the landing was attempted during heavy rain and a thunderstorm whereas initial report suggested that as the pilots attempted to land a midst rain and strong winds, the aircraft may have flown into an unexpected wind shear, which smashed it on to the ground below, however eye-witnesses stated that the aircraft may have been struck by lightening prior to the crash. The Federal Investigation Agency Karachi conducted an investigation and vide its report concluded that the aircraft was fit to fly and all procedural requirements were completed by the Civil Aviation Authority/respondent No. 3 before issuing the required AOC on 23.04.2012. The Board of inquiry ("**BOI"**) constituted by the Federal Government for investigation of the plane crash incident, in its report dated 21.01.2015 declared "*weather*" and "*pilot error*" as liable for the crash of Bhoja Air Plane".

4. The Civil Aviation Authority/Respondent No. 3 according to the petitioner also constituted a Second Board of Inquiry and its report concluded that there was no criminal intent on behalf of the Bhoja Air management and CAA officers in the plane crash incident. Writ Petition No. 2574-2012 filed before this Court was disposed of with the direction to the Federal Government and allied agencies to ensure implementation of the recommendations of the Judicial Commission in letter and spirit.

5. The petitioner availed pre-arrest bail and joined the investigation and final report under section 173 Cr PC he was declared innocent during the course of investigation, upon which he withdrew his pre arrest bail application.

6. The learned counsel argued that the implication of the petitioner in the subject FIR is tainted with *mala*

*fide* on the part of respondent No. 1 (the State); that petitioner retains outstanding educational credentials, resigned from the Pakistan Air Force, joined Pakistan Airlines as commercial pilot in 1974, remained Director General Services of the Pakistan Airline from 1995-1996, remained DG of CAA twice. According to the learned counsel, the involvement of the petitioner in the subject case had been due to the reason that at the time the incident took place, few days before he had assumed charge of DG CAA on 02-04-2012; that no role whatsoever in any preliminary inquiry, final inquiry, in the report of the commission or in police investigation, is attributed to him and that he had also been declared innocent in the report under section 173 Cr.P.C wherein his name has been placed in Column No. 2. Further asserted that the incident had been due to the pilot error and on account of bad weather; that the petitioner, was neither involved in the purchase, induction, fitness certification nor involved in the training of the *Bhoja Air Crew*, hence, further proceedings to his extent would be a futile exercise; that the SIB report also reflects that the petitioner had nothing to do with crash and that the CAA Ordinance 1992 provides immunity to the DG of the CAA against the criminal proceedings, therefore, subject FIR is liable to be quashed to the extent of the petitioner.

7. On the other hand, learned counsel for respondent No. 3 opted not to contest the petition while learned State Counsel assisted by DSP (Legal) ICT argued that the grounds urged warrant factual inquiry, not permissible under constitutional jurisdiction; that petitioner retains alternate efficacious remedy before the trial court and that under the circumstances, normal course cannot be allowed to be deflected, therefore, petitioner is liable to be dismissed.

8. Heard the learned counsel for the parties and perused the record with their able assistance.

9. The petitioner seeks *quashing* of the subject FIR to his extent mainly on the grounds that his involvement in the subject FIR is tainted *mala fide* on the part of respondent No. 1; that no role whatsoever in any preliminary inquiry, final inquiry, in the report of the Commission or in police investigation, is attributed to him and that he had also been declared innocent in the report under section 173 Cr.P.C wherein his name has been placed in Column No. 2; that the incident had been due to the pilot error and on account of bad weather; that he was neither involved in the purchase, induction, fitness certification nor involved in the training of the *Bhoja Air Crew*, that the SIB report also reflects that the petitioner had nothing to do with crash and that the CAA Ordinance 1992 provides immunity to the DG of the CAA against the criminal proceedings.

10. The grounds being pressed, in presence of findings of the Judicial Commission wherein the Civil Aviation Authority held responsible for not providing adequate monitoring and Supervision of Training need Assessment and Training Syllabi of the Airline,warrant factual inquiry, not permissible while exercising jurisdiction in terms of Article 199 of the Constitution as to hold an accused person innocent or otherwise is the exclusive prerogative of the trial court where challan has already been submitted and any indulgence at this stage would amount to regulate the proceedings of the trial by stepping into the shoes of the trial court.

11. For and to exercise the jurisdiction in terms of Section 561-A Cr.P.C. or under Article 199 of the Constitution for quashing of FIR, the Hon'ble Apex Court in the recent pronouncement in the case of *"FIA*

*through Director General, FIA and others v. Syed Hamid Ali Shah and others"* **(PLD 2023 SC 265**) has graciously held that :-

> 4. First of all, we want to make it clear that a High Court has no power under Section 561-A CrPC to quash an FIR or an investigation proceeding; therefore, the criminal miscellaneous applications filed under Section 561-A, Cr.P.C by some of the accused persons in the High Court for quashing the FIR and investigation proceeding in the present case were not maintainable. This is because jurisdiction of a High Court to make an appropriate order under Section 561-A Cr.P.C necessary to secure the ends of justice, can only be exercised with regard to the judicial or court proceedings and not relating to proceedings of any other authority or department, such as FIR registration or investigation proceedings of the police department. This has been authoritatively held by a five-member bench of this Court in Shahnaz Begum. A High Court, therefore, can quash a judicial proceeding pending before any subordinate court under Section 561-A CrPC, if it finds it necessary to make such order to prevent the abuse of the process of that court or otherwise to secure the ends of justice; however, it should not ordinarily exercise its power under Section 561-A Cr.P.C to make such order unless the accused person has first availed his remedy before the trial court under Section 249-A or 265-K Cr.P.C. Where before the submission of the police report under Section 173 CrPC to the court concerned, the accused person thinks that the FIR has been registered, and the investigation is being conducted, without lawful authority, he may have recourse to the constitutional jurisdiction of the High Court under Article 199 of the Constitution for judicial review of the said acts of the police officers.

12. As laid down by the Hon'ble Apex Court in the case of ***F.I.A through Director General supra***, the jurisdiction in terms of Article 199 of the Constitution for *quashing* of the FIR can only be exercised where before the submission of the police report under Section 173 Cr.P.C to the court concerned, the accused person thinks that the FIR has been registered and the investigation is being conducted,

without lawful authority, he may have recourse to the constitutional jurisdiction under Article 199 of the Constitution for judicial review of the said acts of the police officers.

13. The petitioner retains alternate efficacious remedy in terms of Section 249-A or 265-K Cr.P.C. and in view of the law laid down by the Hon'ble Apex Court in the case of ***FIA through Director General supra,*** this Court in normal course should not exercise its power under Section 561-A Cr.P.C to make an order of *quashing* of FIR unless the accused person had first availed remedy before the Trial Court under Section 249-A or Section 265-K Cr.P.C.

14. Lastly, reliance is placed upon recent pronouncement dated 22.07.2023 of the Supreme Court of Pakistan in the case of *Jameel Qadir & Another v. Government of Balochistan* (**CP No.2270 & 2272 of 2023**) wherein it was held that "the writ jurisdiction of the High Court cannot be worn out as a solitary way out or remedy for aerating all sufferings and deprivations. The doctrine of exhaustion of remedies stops a litigant from pursuing a remedy in a new court or jurisdiction until the remedy already provided under the law is exhausted. The underlying principle accentuated in this doctrine is that the litigant should not be encouraged to circumvent or bypass the provisions assimilated in the relevant statute. The extraordinary jurisdiction of the High Court under Article 199 of the Constitution cannot be reduced to an ordinary jurisdiction of the High Court. It is a well settled exposition of law that disputed questions of facts cannot be entertained and adjudicated in the writ jurisdiction. The expression "adequate remedy" signifies an effectual, accessible, advantageous and expeditious remedy.

15. In view of above legal position, the instant writ petition is **disposed of** with observation that proper course for the petitioner would be to avail remedy before appropriate forum available to him under the law, if so advised.

**(ARBAB MUHAMMAD TAHIR)**
**JUDGE**

Announced in the open court on ___.11.2023.

**JUDGE**

*A.R ANSARI*