Quarterly

Case Law Update

Online Edition

Volume 2, Issue-IV (October-December, 2021)

Published by:
Supreme Court Research Centre

Available online at:
https://www.supremecourt.gov.pk/downloads/?wpdmc=research-center-publications

Synopsis of Contents

Supreme Court of Pakistan

Foreign Superior Courts

Supreme Court of Pakistan

1. *Chief Executive, PESCO v. Afnan Khan*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._443_2021.pdf

Present: Mr. Justice Gulzar Ahmed, HCJ and Mr. Justice Mazhar Alam Khan Miankhel

The Supreme Court was hearing an appeal against an order of the Peshawar High Court whereby the civil revision petition filed by the appellant had been dismissed inter alia on the ground that the resolution of the Board of Directors of the Company, of which the appellant was Chief Executive, was not filed with the petition.

A party himself making a specific official of a company as party to the suit, not the company, cannot raise objection with regard to non-filing of the resolution by the company in the proceeding arising out of such suit, initiated by that official.

The Hon'ble Chief Justice Gulzar Ahmed, speaking for the Court, drew a distinction between a case filed by or against a company and a case filed by or against a specific official of a company, thus: " As regards the question of filing of resolution, we note that the very civil revision was not filed by the Company rather it was filed by the Chairman, WAPDA and Chief Executive, PESCO and these are the two authorities who were also impleaded by the respondent as defendants in the suit. Once the respondent himself has chosen to make a specific designation in the organization/company as party to the suit and not the organization/company, the objection with regard to filing of the resolution by the Company could not be justifiably raised or on that basis the civil revision filed by the appellant could not have been dismissed." (Para 6)

The Court also referred to its previous judgment given on this point, in the case of XEN PESCO v. Nawaz Zada (C.P. No.872 of 2019 decided on 17.09.2020), and set aside the decision of the High Court.

2. *In Re order dated 20.08.2021 in SMC No.4/2021*

https://www.supremecourt.gov.pk/downloads_judgements/s.m.c._4_2021_26aug2021.pdf

Present: Mr. Justice Umar Ata Bandial, HACJ, Mr. Justice Ijaz ul Ahsan, Mr. Justice Munib Akhtar, Mr. Justice Qazi Muhammad Amin Ahmed and Mr. Justice Muhammad Ali Mazhar

A two Member Bench of the Court had directly received and entertained in Court an application submitted by some journalists and passed an order taking Suo Moto notice of the grievance expressed in that application and issuing notice to and calling reports from certain Government authorities. In this backdrop, a five Member Bench was constituted to consider the questions: (i) How is the Suo Moto jurisdiction of the Court under Article 184(3) of the Constitution to be invoked? And (ii) Whether, and if so how, such action may be initiated at the instance or on the recommendation of a Bench of the Court?

The Chief Justice of Pakistan is the sole authority by and through whom the Suo Moto jurisdiction under Article 184(3) of the Constitution can be invoked/assumed.

After hearing the Attorney-General for Pakistan, the President of the Supreme Court Bar Association, the Vice Chairman of the Pakistan Bar Council and the counsel for some of the applicant journalists, the Court answered the above questions vide its short order, thus: (a) The Chief Justice of Pakistan is the sole authority by and through whom the said [Suo Moto] jurisdiction can be, and is to be, invoked/assumed; (b) The Chief Justice may invoke/assume the said jurisdiction in his discretion and shall do so if so requested or recommended by a Bench of the Court; (c) No Bench may take any step or make any order (whether in any pending proceedings or otherwise) as would or could constitute exercise of the suo motu jurisdiction (such as, but not limited to, the issuance of any notice, making any enquiry or summoning any

person or authority or any report) unless and until the Chief Justice has invoked/assumed the said jurisdiction.
The Court, in view of this declaration, held that the order passed by the two Member Bench stood recalled.

3. *Govt. of Khyber Pakhtunkhwa v. Sarbiland*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._71_p_2014.pdf

Present: Mr. Justice Qazi Faez Isa and Mr. Justice Yahya Afridi

The Court was hearing appeals filed by the Govt. of Khyber Pakhtunkhwa and the Sangota Public School against a judgment of the Peshawar High Court whereby accepting the civil revision petition of the respondents the High Court had decreed the suit of the respondents for declaration as to their ownership and possession of the suit land, which was with the School since 1965.

Islam's emphasis on education and learning, described.

Hon'ble Mr. Justice Qazi Faez Isa, speaking for the Court, accepted the appeals and dismissed the suit of the respondents for being time-barred, and also described the emphasis the Islam has put on education and learning, thus: "The first command from Almighty Allah to Prophet Muhammad (peace and blessings be upon him), and through him to humanity, was Iqra – Read. Iqra is a command, it is expressed in the command from of the Arabic verb. This first command proceeds to then mention the pen (qalam) and education or learning (ilm). Of the myriad of things that the Most Benevolent Creator could have conveyed in the first revelation in the Holy Qur'an He, in His Infinite Wisdom and Mercy, considered reading, writing and education to be of the primary importance. Prophet Muhammad (peace and blessing be upon him) also placed great emphasis on education; he enabled the non-Muslim prisoners taken after the Battle of Badr, to secure their freedom if they taught the illiterate amongst the Muslims to read and write. This was probably the first ever use of a community service order (used in some countries), which is the successor of a probation order. Prophet Muhammad (peace and blessings be upon him) had also said to the men and women of the Islamic community to go as far as China, a non-Muslim country, to seek knowledge. Islam's emphasis on education and learning distinguished it from the prevailing civilizations where education and learning was restricted either to a particular class or to a section of society. Islam was inclusive and non-discriminatory - 'The most honoured of you in the sight of Allah is the one who is the most righteous'. Race, colour, status, wealth and gender were submerged under the Islamic equality principle. Ironically, education has come under attack in the Islamic Republic of Pakistan despite the Constitution guaranteeing equality of sexes and which compels the State to provide free and compulsory education to all children of the age of five to sixteen." (Para 10)

4. *Muhammad Ajmal v. The State*

https://www.supremecourt.gov.pk/downloads_judgements/crl.a._506_2020.pdf

Present: Mr. Justice Sardar Tariq Masood, Mr. Justice Amin-ud-Din Khan and Mr. Justice Jamal Khan Mandokhail

The trial court had convicted the appellant on the charge of murder (Qatl-i-Amd) under Section 302(b) of the Pakistan Penal Code ("PPC") and sentenced him to death. On reference sent by the trial court for confirmation or otherwise of the death sentence, the Lahore High Court maintained the conviction of the appellant under Section 302(b), but converted the sentence of death into imprisonment for life. The Supreme Court was hearing the appellant's appeal against his conviction and sentence.

The punishment of qisas is not applicable to a murder (qatl-i-amd) committed without premeditation in a sudden fight in the heat

of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner; such offence is not punishable with death or imprisonment for life under Section 302(b), PPC rather is punishable under Section 302(c), PPC

Hon'ble Mr. Justice Sardar Tariq Masood, speaking for the Court, observed: "The new section 302 [of the PPC] itself divides qatl-i-amd for the purpose of punishment into three categories i.e. a) qatl-i-amd, punished with death as qisas; b) qatl-i-amd, punished with death or imprisonment for life as ta'zir; c) qatl-i-amd, punished with imprisonment of either description for a term which may extended to twenty-five years, where according to the injunctions of Islam the punishment of qisas is not applicable." (Para 4)

Explaining the scope of the punishment under Section 302(c) of the PPC, the Court held: "An offence under section 302 (c) PPC will be attracted only in those cases, where exceptions to old provision of section 300 PPC stand attracted….So bringing the case under the..exception [4 of old section 300 PPC]…[i]t is required to be established that the case was one of sudden fight, taken place without any premeditation in the heat of passion upon a sudden quarrel and offender had not taken any undue advantage and must had not acted in a cruel or unusual manner." (Para 3)

The Court found that "in the present case…, ingredient of Exception 4 of section 300 PPC (old) are born out from prosecution's case" and consequently, allowed the appeal partly. The Court converted the conviction of the appellant from Section 302(b) to Section 302(c) PPC and reduced his sentence from life imprisonment to seventeen-year imprisonment.

5. *Govt. of Khyber Pakhtunkhwa v. Sher Aman*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._232_2020.pdf

Present: Mr. Justice Gulzar Ahmed, HCJ, Mr. Justice Ijaz-Ul-Ahsan and Mr. Justice Munib Akhtar

The respondents had been appointed by the appellants on contract basis in different projects against different posts. Their services were extended from time to time, and ultimately terminated on completion of the respective projects. The respondents filed constitution petitions, in the Peshawar High Court, to challenge the decisions of the appellants to terminate their services, which were allowed, and the appellants were ordered to reinstate and regularize the respondents against their respective posts. The appellants impugned this order of the High Court in the Supreme Court.

Regularization of an employee is a policy matter, which necessarily requires the backing of law. In the absence of any law, policy or rules, an employee cannot claim regularization of his service.

The apex Court allowed the appeals and set aside the impugned judgment of the High Court. **Hon'ble Mr. Justice Ijaz-Ul-Ahsan**, speaking for the Court, held: "Regularization is a policy matter which necessarily requires backing of the law. In the absence of any law, policy or rules, an employee cannot knock on the door of the High Court for regularization of his/her services. The learned High Court, despite the fact that there is ample material on the record that establishes that the Respondents had agreed to the terms and conditions of their contracts, regularized the services of the Respondents. The Project Policy governing the projects in which the Respondents were working clearly and unequivocally states that after the said projects come to an end, employees working in the said projects would have no right to claim regularization. The same stipulation is made in the service contracts of the Respondents. That being the case, the order

of regularization lacked any legal basis or foundation… The High Court cannot in exercise of constitutional jurisdiction assume the role of the appointing authority and direct employers to amend/alter terms and conditions in favour of employees which have been agreed upon by the said employee." (Paras 14-15)

6. *Secretary M/o Finance, Islamabad v. Tayyaba Halim*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1546_2019.pdf

Present: Mr. Justice Gulzar Ahmed, HCJ
Mr. Justice Ijaz Ul Ahsan and Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

The apex Court was hearing appeal of the Government against a Judgment of the Federal Service Tribunal, whereby the Tribunal had accepted the service appeals of the respondents and ordered the appellant to provide pay protection to the respondents by counting the service they had rendered on daily-wage basis for pensionary benefits and pay.

The policy and action of the Government for employing teachers on daily-wages are detrimental to the education sector, and are not only contrary to constitutional dictates of Articles 3 and 25A but also contrary to the Principles of Policy enshrined in Article 38(a) of the Constitution.

The Court dismissed the appeal and upheld the impugned Judgment. **Hon'ble Mr. Justice Ijaz-Ul-Ahsan**, speaking for the Court, held: "Teachers strengthen the foundation of any state as well as play a pivotal role in nation building by imparting education which is necessary to uplift a society consisting of educated and aware citizens who believe in values and strengthen democracy and democratic values. Employing teachers on daily wages basis is not only detrimental to the education sector of Pakistan but is also a discouraging factor for future teachers who in turn are demotivated and discouraged a profession which is pivotal in the lives of our future generations. It is pertinent to mention that primary education is a fundamental right guaranteed under Article 25-A of the Constitution of the Islamic Republic of Pakistan, 1973. The Universal Declaration of Human Rights also recognizes education as one of the most important rights of children. Article 3 of the Constitution provides that all forms of exploitation shall be eliminated. One of the reasons for which this becomes relevant to the present controversy is that notwithstanding the importance of the services they render to society, which have consequences for generations, the Respondents were made to work under uncertain conditions on the pattern of unskilled and uneducated or semi-educated labour hired on a daily wage basis for seasonal projects expected to last for a limited period. We are appalled at this irresponsible, casual and utterly unprofessional approach of the policy makers towards a matter as important and as serious as education of our future generations. We have no hesitation whatsoever in strongly deprecating the same. These actions of the Appellants/ Petitioners are not only contrary to Constitutional dictates but also contrary to the Principles of Policy enshrined in [Article 38(a) of] the Constitution which state that there has to be an equal adjustment of rights between employers and employees." (Para 16)

7. *Hasnain Raza v. Lahore High Court*

https://www.supremecourt.gov.pk/downloads_judgements/c.p._1862_l_2021.pdf

Present: Mr. Justice Umar Ata Bandial, Mr. Justice Sajjad Ali Shah and Mr. Justice Syed Mansoor Ali Shah

The Court was hearing petitions for leave to appeal filed by two judges of the District Judiciary of Punjab, against the stricture and direction passed against them by the Lahore High Court in its judgment while deciding appeals against their judicial orders. They had prayed that the said stricture and direction, having been passed against them in derogation of the principles enunciated by this Court in Nusrat Yasmin v. Registrar,

PHC (PLD 2019 SC 719) and Aijaz Ahmed v. State (PLD 2021 SC 752), may be expunged.

The Court reiterated the principle that "an appellate court should not pass strictures in its judgment against the judge of the lower court whose judgment or order is impugned before it, relating to his efficiency or conduct" and, finding the High Court to have acted in derogation of this principle, converted the petitions into appeals and allowed them by expunging the impugned stricture and direction.

A decision of the Supreme Court of Pakistan, the apex Court of the country, deciding a question of law or enunciating a principle of law must be followed by all other courts of the country who owe unflinching fealty to its decisions under Article 189 of the Constitution; Ignoring or refusing to follow the controlling precedent of the apex Court amounts to judicial effrontery and offends the constitutional mandate.

Hon'ble Mr. Justice Syed Mansoor Ali Shah speaking for the Court held that "a decision of this Court, to the extent it decides a question of law or enunciates a principle of law, is binding on all other courts of the country including the High Courts, under the mandate of Article 189 of the Constitution of the Islamic Republic of Pakistan 1973. Similar is the binding effect of such a decision of a High Court, under Article 201 of the Constitution, on all courts subordinate to that High Court…Unless we wish anarchy to prevail within the judicial system, a precedent of the apex Court of the country must be followed by all other courts of the country who owe unflinching fealty to its decisions under the Constitution.4 Ignoring or refusing to follow the controlling precedent of this Court amounts to judicial effrontery, offends the constitutional mandate, and weakens the public confidence in the decisions of the apex Court of the country." (Para 5)

Vertical and horizontal precedents: All courts are absolutely bound by the vertical precedents of a higher court and are obliged to follow them even when they disagree with them.

His lordship further observed: "To appreciate the scope and extent of the binding force and authority of judicial precedents, they may be classified into two categories: vertical and horizontal precedents. Vertical precedents mean the decisions of a higher court, and horizontal precedents mean the decisions of the same or coordinate court. All courts are absolutely bound by the vertical precedents of a higher court. This binding tie is often said to be a matter of 'owing obedience'. Articles 189 and 201 of our Constitution also reinforces the binding effect of the vertical precedents. Judges are therefore obliged to follow a vertical precedent even when they disagree with it; this ensures a degree of national uniformity in judicial decisions. The judges have little room to decide how much weight or value is to be given by them to that precedent…A higher court generally adheres to horizontal precedents - its own earlier decisions - but it may depart from or overrule any of its own decisions by sitting as a larger bench if there is a compelling justification to do so." (Para 5)

8. Shakeel Shah v. The State

https://www.supremecourt.gov.pk/downloads_judgements/crl.p._1072_2021.pdf

Present: Mr. Justice Syed Mansoor Ali Shah and Mr. Justice Muhammad Ali Mazhar

The petitioner sought leave to appeal in the apex Court against the order passed by the Islamabad High Court, whereby the post-arrest bail prayed for on the statutory ground of delay in the conclusion of the trial, under the 3rd proviso to Section 497(1) of the Code of Criminal Procedure 1898 ("CrPC"), had been denied to him. The High Court had observed that the delay in the conclusion of the trial was caused by the petitioner and that the petitioner having been previously convicted for other offences was a hardened, desperate and dangerous criminal.

The act or omission on the part of the accused must be the result of a visible concerted effort orchestrated by the accused, to delay the timely conclusion of the trial, for disentitling him from the right to be released on bail on the statutory ground of delay.

Hon'ble Mr. Justice Syed Mansoor Ali Shah, speaking for the Court, observed: "The act or omission on the part of the accused to delay the timely conclusion of the trial must be the result of a visible concerted effort orchestrated by the accused. Merely some adjournments sought by the counsel of the accused cannot be counted as an act or omission on behalf of the accused to delay the conclusion of the trial, unless the adjournments are sought without any sufficient cause on crucial hearings, i.e., the hearings fixed for examination or cross-examination of the prosecution witnesses, or the adjournments are repetitive, reflecting a design or pattern to consciously delay the conclusion of the trial. Thus, mere mathematical counting of all the dates of adjournments sought for on behalf of the accused is not sufficient to deprive the accused of his right to bail under the third proviso." (Para 5)

Statutory right to be released on bail flows from the constitutional right to liberty and fair trial guaranteed under Articles 9 and 10A of the Constitution.

His lordship held: "The statutory right to be released on bail flows from the constitutional right to liberty and fair trial [guaranteed] under Articles 9 and 10A of the Constitution. Hence, the provisions of the third and fourth provisos to section 497(1) Cr.P.C must be examined through the constitutional lens and fashioned in a manner that is progressive and expansive of the rights of an accused, who is still under trial and has the presumption of innocence in his favour. To convince the court for denying bail to the accused, the prosecution must show, on the basis of the record, that there is a concerted effort on the part of the accused or his counsel to delay the conclusion of the trial by seeking adjournments without sufficient cause on crucial hearings and/or by making frivolous miscellaneous applications." (Para 5)

The words "hardened, desperate or dangerous" paint a picture of a person, who is likely to seriously injure and hurt others without caring for the consequences of his violent act: a person who will pose a serious threat to the society if set free on bail.

Hid lordship further held that "the words hardened, desperate or dangerous are to be understood collectively. The ejusdem generis principle is a principle of constriction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. For the said principle to apply, there must be sufficient indication of the category or word that can be properly described as the class or genus, which is to control the general words. The genus must be narrower than the general words it is to regulate. Applying this principle to the phrase a hardened, desperate or dangerous criminal, it is the word dangerous which…is…precise and narrow in order to regulate the meaning of the other two words. "Dangerous" means harmful, perilous, hazardous or unsafe – someone who can cause physical harm or injury or death. "Hardened" is someone who is pitiless, hardhearted, callous or unfeeling and set in his bad ways and no longer likely to change, having a tendency of repeating the offence and is, thus, dangerous to the society. "Desperate" is someone who is reckless, violent and ready to risk or do anything; such person is, therefore, also dangerous to society. All the three words paint a picture of a person, who is likely to seriously injure and hurt others without caring for the consequences of his violent act. Therefore, for this exception to apply, there has to be material to show that the accused is such a person who will pose a serious threat to the society if set free on bail." (Para 8)

The Court came to the conclusion that the delay in concluding the trial beyond the period of one year from the date of his detention had not been occasioned by an act or omission of the petitioner or any other person acting on his behalf, and that in the facts and circumstances of the case the petitioner does not appear to be a hardened, desperate or dangerous criminal. With this conclusion, the Court converted the petition into appeal and allowed the same.

9. Aam Loeg Itehad v. Election Commission of Pakistan

https://www.supremecourt.gov.pk/downloads_judgements/c.p._479_k_2020.pdf

Present: Mr. Justice Maqbool Baqar, Mr. Justice Sajjad Ali Shah and Mr. Justice Munib Akhtar

The petitioners filed a constitution petition in the Sindh High Court, under Article 199 of the Constitution, seeking writ in the nature of quo warranto against respondents No. 2 to 5, members of the Election Commission of Pakistan, on the ground that they being retired Judges of respective High Courts could not have been appointed as members of the Commission on account of the bar contained in Article 207(2) of the Constitution, before the expiration of two years after they had ceased to hold office of Judges. The High Court dismissed the petition holding that the office of a member of the Election Commission of Pakistan is quasi-judicial; therefore, the bar of Article 207(2) is not attracted. Hence, the petitioners filed the petition for leave to appeal against the judgment of the High Court, in the Supreme Court.

The apex Court, for deciding the legal questions involved, converted the petition into appeal, but dismissed the same in view of the answer of one of the legal questions. The Court reversed the findings of the High Court and held that the office of the members of the Election Commission of Pakistan is not quasi-judicial. It, however, held that the words "or member of the Election Commission" are to be read in into Article 207(2) after the term "Chief Election Commissioner", to avoid defeating the intent and object of the noted constitutional amendments.

Doctrines of reading out (severance), reading down and reading in, explained.

Hon'ble Mr. Justice Munib Akhtar, speaking for the majority, i.e., for himself and Hon'ble Mr. Justice Sajjad Ali Shah, observed: "It has to do with the constitutional remedies that are available to the Court to redress the situation when a constitutional defect or violation is shown to exist, especially in a statute or other legal instrument. As is well known, the Court has a whole array of remedies available. One is of course to strike down the provision involved, which may sometimes mean even the entire statute. But other tools, which can be more finely tuned and aimed with greater precision, are also there. Two well known examples are the doctrines of severance and reading down. In suitable cases it is only the offending part of the provision that need be excised, or the provision as a whole may be given a meaning that accords with the Constitution albeit one that is narrower and more restricted than what the actual language may otherwise indicate… Another doctrine, which is perhaps less well known (and is certainly less used) is of 'reading in', i.e., of adding such words to the statute as would remedy the constitutional defect." (Para 26)

"Reading in" and "casus omissus" are two different principles of interpretation of statute.

His lordship explained that the "constitutional principle of 'reading in' is different from the curing of a casus omissus...When a casus omissus is mooted, it is not a constitutional defect but rather a legislative deficiency that is contended. That is, it is not claimed that the omission in the statutory provision renders it liable to be struck down on the constitutional plane. Rather, the submission is that there exists an omission within the four corners of the

statute that, had the legislature put its mind to it, would have undoubtedly been included by the lawmaker and ought therefore to be inserted by the Court...On the other hand, the doctrine of "reading in" becomes available once a constitutional violation or defect is found to exist. It is a constitutional remedy to correct the defect without striking down the offending provision. The focus of attention is the Constitution and not just the statute in and of itself." (Para 27)

Doctrine of "reading in", applied for the interpretation of the provisions of Article 207(2) of the Constitution, to avoid defeating the intent and object of the noted constitutional amendments.

His lordship held that "the present case is an example of the clearest of cases where the intent behind the constitutional amendments is so obvious, and so patently requires appropriate action so as not to defeat the manifest objective thereof, that the constitutional rule of "reading in" can and ought to be invoked in the narrow and limited sense identified... Accordingly…from the 22nd Amendment (2016) onwards, the words 'or member of the Election Commission' are to be read in into clause (2) of Article 207 after the term 'Chief Election Commissioner'." (Para 31)

10. Haji Shah Behram v. The State

https://www.supremecourt.gov.pk/downloads_judgements/crl.p._893_2020.pdf

Present: Mr. Justice Mazhar Alam Khan Miankhel and Mr. Justice Qazi Muhammad Amin Ahmed

The Supreme Court was hearing a criminal petition for leave to appeal against an order of the Peshawar High Court, whereby the respondents/accused had been admitted to post-arrest bail in a case involving the commission of offence of murderous assault.

Expression further inquiry'used in Section 497(2), CrPC is a concept far from being confounded in subjectivity or to be founded upon denials or parallel stories by the defence; it requires a clear finding deducible from the record so as to be structured upon a visible/verifiable void, necessitating a future probe on the basis of material previously unavailable.

Hon'ble Mr. Justice Qazi Muhammad Amin Ahmed, speaking for the Court observed that" criminal cases, invariably resting upon vastly distinguishable facts, do not admit space for hard and fast rules, empirically applicable with any degree of unanimity in every situation; in each case culpability of an accused is to be assessed, having regard to its own peculiar facts and circumstances, therefore, determination of 'sufficient grounds' in contradistinction to 'further inquiry' has to be essentially assessed, with a fair degree of objectivity on the basis of evidence collected during the investigation; wording employed as "there are no reasonable grounds for believing that the accused has committed a non-bailable offence" is an expression of higher..import and, thus, cannot be readily construed in the face of material, prima facie, constituting the offence complained. Every hypothetical question which can be imagined would not make it a case of further inquiry simply for the reason that it can be answered by the trial subsequently after evaluation of evidence. Similarly, mere possibility of further inquiry which exists almost in every criminal case, is no ground for treating the matter as one under subsection (2) of section 497, Cr.P.C. It clearly manifests that expression 'further inquiry' is a concept far from being confounded in subjectivity or to be founded upon denials or parallel stories by the defence; it requires a clear finding deducible from the record so as to be structured upon a visible/verifiable void, necessitating a future probe on the basis of material hitherto unavailable." (Para 3)

The Court held: "With the available statement of the injured supported by the eye-witnesses, 'who cannot be stamped as false witnesses at bail stage', confirmed by medical evidence. The High Court has

clearly misdirected itself in holding that respondent's culpability warranted further inquiry." The Court converted the petition into appeal and allowed the same by cancelling the bail granted by the High Court to the respondents.

11. Umer Khan v. The State

https://www.supremecourt.gov.pk/downloads_judgements/crl.p._1154_2021.pdf

Present: Mr. Justice Maqbool Baqar and Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

The Supreme Court was hearing a criminal petition for leave to appeal against an order of the Peshawar High Court, whereby the post-arrest bail had been denied to the petitioner, in a case involving the comiision of offence punishable under Section 22(1) of Prevention of Electronic Crimes Act, 2016.

Nature of the offence and its impact on the society may make the case to fall within the exceptions to the rule of granting post-arrest bail in offences not falling within the prohibitory clause of Section 497(1) CrPC.

Hon'ble Mr. Justice Sayyed Mazahar Ali Akbar Naqvi, speaking for the Court, observed that "one of the most alarming social evil prevailing in the society is child pornography. It has created a havoc in society as it contains a great threat to morality and the future of children. One of the reason for the rise of child abuse/rape cases is squarely because of child pornographic content. The concerns regarding child sexual abuse and exploitation have been prevailing in the society in the past also. However, due to various factors, the gravity and impact of the offence of child pornography is increasing at an alarming rate and this menace needs to be curbed with iron hands. Although the offence with which the petitioner has been charged with, does not fall within the prohibitory clause of Section 497[(1)] Cr.P.C. and the maximum punishment for the same is seven years but keeping in view the nature of accusation, its impact on the society and the material collected so far merits the case to fall within the exception of granting bail when the offence falls within the non-prohibitory clause." (Para 5)

With these observations, the Court dismissed the petition and upheld the order of the High Court.

12. Zahid v. The State

https://www.supremecourt.gov.pk/downloads_judgements/crl.p._75_q_2021.pdf

Present: Mr. Justice Ijaz Ul Ahsan, Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

The Supreme Court was hearing a criminal petition for leave to appeal against a judgment of the Balochistan High Court, whereby the High Court had, in appeal, upheld the conviction and sentence of the petitioner recorded by the Trial Court for the offence of sexually abusing the minor daughter of the complainant.

When the victim of sexual abuse is a minor who does not know as to what is happening with her and does not resist, mere no sign of injury on her body does not help defend the accused.

Hon'ble Mr. Justice Sayyed Mazahar Ali Akbar Naqvi, speaking for the Court, held that so far as the argument of learned counsel that according to medical evidence no sign of injury was found on the person of the victim is concerned, the prosecution case is that the petitioner had sexually abused the minor girl by firstly undressing her and then by touching his genital organ on the chest of the victim and he also tried to put his organ in the mouth of the victim. In such eventuality when the victim was only of seven years old and did not know as to what is happening with her and keeping in view the fact that the petitioner was known to her previously, the victim may not have resisted in front of the petitioner, therefore, mere non-availability of any sign of injury is of no help to the petitioner." (Para 7)

Rape is a crime that is usually committed in private, and there is hardly any witness to provide direct evidence of having seen the commission of crime by the accused person.

The Court reiterated the principle enunciated in Atif Zareef v. State (PLD 2021 SC 550) that "rape is a crime that is usually committed in private, and there is hardly any witness to provide direct evidence of having seen the commission of crime by the accused person. The courts, therefore, do not insist upon producing direct evidence to corroborate the testimony of the victim if the same is found to be confidence inspiring in the overall particular facts and circumstances of a case, and considers such a testimony of the victim sufficient for conviction of the accused person. A rape victim stands on a higher pedestal than an injured witness, for an injured witness gets the injury on the physical form while the rape victim suffers psychologically and emotionally." (Para 7)
The Court observed that the victim had specifically named the petitioner in her testimony before the trial court and had fully identified him, and there was no previous enmity between the parties, which could lead to false implication of the petitioner in the case. With these observations, the Court dismissed the petition and upheld the judgment of the High Court.

13. Provincial Selection Board v. Hidayat Ullah Khan

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1486_2017.pdf

Present: Mr. Justice Gulzar Ahmed, HCJ, Mr. Justice Mazhar Alam Khan Miankhel and Mr. Justice Muhammad Ali Mazhar

The Supreme Court was hearing an appeal directed against a judgment passed by the Peshawar High Court, whereby the High Court had allowed the constitution petition of the respondent, who had entered into a plea bargain under the NAB Ordinance, and directed the appellant to issue pro-forma promotion order of the respondent in BS-20 with effect from 10.09.2001.

The High Court, while passing the impugned judgment, had relied upon a similar case of another person for granting the same relief to the respondent. The apex Court disapproved such reliance by the High Court, accepted the appeal and set aside the impugned judgment.

A wrong order or benefit cannot become a foundation for avowing equality or equal opportunity for enforcement of treatment alike, rather such right should be founded on a legitimate and legally implementable right. A wrong order cannot be allowed to carry on claiming parity or equality.

Hon'ble Mr. Justice Muhammad Ali Mazhar, speaking for the Court, held: "Any such benefit granted beyond the exactitudes or rigors of law cannot be treated as a good precedent in the case of respondent for implementation in the stricto sensu, rather it is an unlawful act of the authority which recommended the case of pro-forma promotion of a person who was booked by NAB in a corruption case and released after plea bargain…[T]he catchphrase and expression "two wrongs don't make a right" symbolizes a philosophical benchmark in which a wrongdoing is made level or countered with another wrongdoing. In fact this maxim is used to reprimand or repudiate an unlawful deed as a reaction to another's misdemeanor. A wrong order or benefit cannot become a foundation for avowing equality or equal opportunity for enforcement of treatment alike rather such right should be founded on a legitimate and legally implementable right. A wrong order cannot be allowed to carry on which hardly confers any right to claim parity or equality. The respondent could not claim that if something wrong has been done in the case of Zahid Arif, therefore, the same direction should be given in his case also for committing another wrong which would not be setting a wrong to right but would be moving ahead and perpetuating another wrong which is disapproved and highly deprecated. No case of any sort of discrimination is made out. The concept of equal treatment could not be pressed into service by the respondent which presupposes and deduces the existence of right and remedy structured on legal foothold and not on wrong notion or whims." (Para 9)

14. *Resham Khan v. The State*

https://www.supremecourt.gov.pk/downloads_judgements/crl.p._950_2021.pdf

Present: Mr. Justice Syed Mansoor Ali Shah and Mr. Justice Muhammad Ali Mazhar

This Criminal Petition for leave to appeal before the Supreme Court was directed against an order passed by the Lahore High Court, whereby the post-arrest bail prayed for by the petitioners had been denied to them. The High Court had discarded the opinion of the investigating officer regarding non-involvement of the petitioners in the occurrence, recorded by him on conclusion of the investigation, which was based on CCTV footage showing the presence of petitioners at a different spot at the time of occurrence. The apex court did not approve this approach of the High Court, converted the petition into appeal and allowed the same.

Court cannot get rid of or brush aside the opinion of the investigation officer unless some other cogent reasons or extenuating circumstances are available to discard and dislodge such opinion to come to another judicious and sagacious conclusion.

Hon'ble Mr. Justice Muhammad Ali Mazhar, speaking for the Court, held: "Albeit we are considering the question of bail, even at this stage, the court cannot lightly ignore the opinion of investigating officer but it needs to be considered in collocation and juxtaposition. In the State case, it is for the prosecution to prove the guilt of accused beyond reasonable doubts but at present no incriminating material has been produced by the prosecution against the petitioners. In tandem, we are also sanguine that the opinion expressed by Investigation agency is neither binding on court nor can be taken as gospel truth but it depends on the circumstances of each case to be considered. In the case in hand, the court cannot get rid of or brush aside it unless some other cogent reasons or extenuating circumstances are available to discard and dislodge such opinion to come to another judicious and sagacious conclusion." (Para 7)

15. *Usman Ghani v. Chief Post Master*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._1_k_2021.pdf

Present: Mr. Justice Sajjad Ali Shah and Mr. Justice Muhammad Ali Mazhar

While deciding an appeal against a judgment of the Federal Service Tribunal, the apex Court enunciated and explained the following two important principles:

Standard of proof applicable in departmental inquiry is that of "balance of probabilities or preponderance of evidence"

Hon'ble Mr. Justice Muhammad Ali Mazhar, speaking for the Court, observed: "The standard of proof looked-for in a departmental inquiry deviates from the standard of proof required in a criminal trial. In the departmental inquiry conducted on the charges of misconduct, the standard of proof is that of "balance of probabilities or preponderance of evidence" but not a "proof beyond reasonable doubt", which strict proof is required in criminal trial." (Para 9)

Distinction between a regular departmental inquiry and a preliminary/fact finding inquiry, explained.

His lordship further observed: "A distinction also needs to be drawn between a regular inquiry or preliminary/fact finding inquiry. A regular inquiry is triggered after issuing show cause notice with statement of allegations and if the reply is not found suitable then inquiry officer is appointed and regular inquiry is commenced… in which it is obligatory for the inquiry officer to allow evenhanded and fair opportunity to the accused to place his defense and if any witness is examined against him then a fair opportunity should also be afforded to cross examine the witnesses, whereas a discrete or fact finding inquiry is conducted at initial stage but internally to find out whether in the facts and circumstances reported, a proper case of misconduct is made out to initiate disciplinary proceedings."

Foreign Superior Courts

SUPREME COURT OF THE UNITED STATES

1. ***Darrell Hemphill, Petitioner v. New York***

https://www.supremecourt.gov/opinions/21pdf/20-637_new_6khn.pdf
595 U. S. ____ (2022)

Coram: J. Sotomayor, J. Alito, J. Kavanaugh, J. Thomas.

A defendant cannot be convicted of a crime based in part on the statement of a witness who is not present at trial and not made available for cross-examination.

The defendant has a right to cross-examine all witnesses who give testimony against him. In the instant case the New York court allowed the prosecution to introduce a testimonial statement from a witness who was not present at Petitioner's trial and therefore could not be confronted. The jury subsequently convicted Petitioner and he remained incarcerated on a 25-year sentence. On appeal, the New York Supreme Court affirmed the conviction. The Petitioner filed a petition for a writ of certiorari asking the Supreme Court to hear the case and consider the constitutionality of the matter.

The Supreme Court ruled that the reliability and veracity of the evidence against criminal defendants be tested by cross-examination, not determined by a trial court. Thus, the trial court's decision to admit un-confronted testimonial hearsay over Petitioner's objection on is a violation of fundamental guarantee. The defendant cannot be convicted of a crime based in part on the statement of a witness who is not present at trial and not made available for cross-examination.

2. ***State of Mississippi v. Tennessee, City of Memphis***

https://www.supremecourt.gov/opinions/21pdf/143orig_1qm1.pdf

Coram: Chief Justice Roberts

The underground water that flows across State lines is subject to equitable apportionment between the States, in similar fashion to interstate streams and rivers.

The City of Memphis's public utility pumps approximately 120 million gallons of groundwater from the Middle Claiborne Aquifer each day. Mississippi alleged that this created an area of low pressure in the aquifer that greatly accelerated the subterranean flow of water across the State line. Mississippi claims an absolute ownership right to all groundwater beneath its surface, and so it sued Tennessee and Memphis under the Supreme Court's original jurisdiction, seeking $615 million for a tortious taking of its groundwater.

The Supreme Court dismissed the claim in a unanimous opinion. The Court observed that, under the Court's long-settled precedents, interstate disputes over surface water rights are governed by the doctrine of equitable apportionment, which aims to produce a fair allocation of a shared water resource considering not only the physical properties and flow of a water resource, but also existing uses, the availability of alternatives, practical effects, and the costs and benefits to the States involved and guided by the overarching principle that States have an equal right to make a reasonable use of a shared water resource. Therefore, the Court held that Mississippi did not have absolute ownership of groundwater in the aquifer within its boundaries, but instead that the water is subject to equitable apportionment between the States that share the aquifer. Since Mississippi had not asserted a claim for equitable apportionment, the Court dismissed the case.

SUPREME COURT OF CANADA

3. ***Association de médiation familiale du Québec v. Bouvier***

https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19119/index.do

Coram: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

Communications during family mediation sessions may be used to prove the existence of a settlement agreement between the spouses.

This is a family law case from Quebec involving spouses who participated in family mediation to resolve the terms of their separation. In Quebec, family mediation by certified mediators is made available to married, civil union and common law spouses with or without children. This process is subsidized by the provincial government.

Ms. Isabelle Bisaillon and Mr. Michel Bouvier were common law spouses for more than three years. They had two children during that time. After their relationship ended, they participated in several family mediation sessions in 2012 with a certified mediator to resolve their disputes about the children's care, the family home and other matters. At the end of that process, the mediator prepared a document known as a "summary of mediated agreements" that explained how the parties had agreed to settle their disputes.

In 2014, Ms. Bisaillon filed a lawsuit in Quebec's Superior Court for more money than set out in the summary. Mr. Bouvier took the position they should stick to the terms of the contract agreed to in mediation, and set out in the summary. Ms. Bisaillon denied the existence of the contract and objected to the summary being admitted in evidence. She said the summary was protected by a rule of absolute confidentiality.

The Superior Court rejected Ms. Bisaillon's argument. In its reasons, the court relied on a commercial mediation case from 2014 called Union Carbide Canada Inc. v. Bombardier Inc. In that case, the Supreme Court acknowledged the confidentiality of the mediation process, but recognized the "settlement exception". This exception allows parties to a settlement to prove it exists. As such, the Superior Court found Ms. Bisaillon and Mr. Bouvier had a contract. Ms. Bisaillon appealed to Quebec's Court of Appeal, which also sided with Mr. Bouvier. While Ms. Bisaillon decided not to appeal that decision, Quebec's Association de médiation familiale was permitted to take Ms. Bisaillon's case to the Supreme Court.

The Supreme Court has sided with Mr. Bouvier.

The settlement exception also applies to family mediation cases.

Writing for the majority, Justice Nicholas Kasirer said the settlement exception outlined in Union Carbide may also apply to family mediation cases. He wrote, "It is certainly true that confidentiality is necessary in any mediation to allow for frank discussion between the parties in order to encourage settlements. It is also true that, unlike in the case of civil or commercial mediation, negotiations following the breakdown of a relationship often take place during a period of personal upheaval that may heighten the vulnerability of either spouse."

However, Justice Kasirer explained how the family mediation process includes other safeguards beyond confidentiality to assure the protection of vulnerable parties. These additional safeguards include a certified and impartial mediator chosen by the parties and a judge who confirms any agreement arising from the mediation. Due to these important safeguards, a rule of absolute confidentiality is not required. This means people may use the settlement exception to prove the existence and terms of what they agreed to during mediation.

4. R. v. Albashir,

2021 SCC 48
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19083/index.do

Coram: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

A retroactive declaration means the law is considered to have always been invalid. A prospective declaration, on the other hand, means the law is considered to be invalid only after the suspension period has ended and the declaration of constitutional invalidity has taken effect.

The question in this case is how courts should treat crimes that are committed after the Supreme Court of Canada declares a law unconstitutional but before that declaration takes effect. That is what happened when Mr. Tamim Albashir and Mr. Kasra Mohsenipour were convicted in 2019 for offences that occurred between 2013 and 2016. At that time, the men were operating a sexual escort service in Vancouver. Among the offences was a violation of section 212(1)(j) of the Criminal Code, which barred pimps from living off the money made by sex workers.

In 2013, in the case of Canada (Attorney General) v. Bedford, the Supreme Court found Canada's prostitution laws were unconstitutional, including section 212(1)(j). The judges found that it had criminalized all sex work, instead of focusing on controlling and abusive pimps. The Supreme Court gave Parliament a one year "suspension period" to change the law, which it did in 2014. Mr. Albashir and Mr. Mohsenipour committed the section 212(1)(j) offences during that suspension period, but were charged after it ended.

At their trial, the question was whether the old law had become unconstitutional, preventing the men from being convicted. The trial judge decided that the law had indeed been unconstitutional at the time the crimes were committed and quashed the charges against both men.

The Crown appealed to the British Columbia Court of Appeal, which convicted the men. The Court of Appeal held that the Supreme Court's declaration of unconstitutionality had never taken effect because Parliament had replaced section 212(1)(j) before the end of the suspension period. Mr. Albashir and Mr. Mohsenipour appealed their convictions to the Supreme Court of Canada.

The Supreme Court has dismissed the appeals.

The men could be charged and convicted under section 212(1)(j) of the Criminal Code after the suspension period had ended for conduct committed during it.

Writing for the majority, Justice Karakatsanis explained that a retroactive declaration means the law is considered to have always been invalid. A prospective declaration, on the other hand, means the law is considered to be invalid only after the suspension period has ended and the declaration of constitutional invalidity has taken effect.

In the Bedford case, the Court had not said whether that declaration would apply retroactively or prospectively. But the purpose for the suspension was to continue to protect vulnerable sex workers while Parliament replaced section 212(1)(j) with a new law. In light of this purpose, the majority in this case said section 212(1)(j) was unconstitutional only after the suspension period had ended. As a result, Mr. Albashir and Mr. Mohsenipour were liable under this provision for their conduct during the suspension period, and could be charged and convicted under it.

5. Northern Regional Health Authority v. Horrocks,

2021 SCC 42
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19043/index.do

Coram: Wagner C.J. and Abella, Karakatsanis, Côté, Brown, Rowe and Kasirer JJ.

An employment discrimination dispute involving a unionized worker should be settled by a labour arbitrator appointed under the collective agreement, not by a human rights adjudicator.

This case involves a dispute between an employee and her employer. The Supreme

Court was asked if the dispute should be heard by a labour arbitrator or a human rights adjudicator.
Ms. Linda Horrocks was employed by the Northern Regional Health Authority (NRHA) in Manitoba. As a unionized worker, the terms and conditions of her employment were set out in a "collective agreement". A collective agreement is a written contract between an employer and a union.

In 2011, Ms. Horrocks was suspended for being at work while under the influence of alcohol. She disclosed to her employer her alcohol addiction, which is a disability. The health authority asked Ms. Horrocks to formally agree to abstain from alcohol and get treatment for her addiction. When she refused to sign the agreement, she was fired. Her union filed a grievance on her behalf and, as a result, she returned to work on essentially the same terms as the agreement she had refused to sign. Soon after, the NHRA alleged that she had broken the terms of that agreement.

Ms. Horrocks filed a discrimination complaint with the Manitoba Human Rights Commission. She alleged the NHRA failed to sufficiently accommodate her disability. A human rights adjudicator was appointed to decide the complaint. The health authority opposed the adjudicator's jurisdiction. It argued that under the collective agreement, a labour arbitrator should settle the dispute. The adjudicator disagreed because she said the dispute was an alleged human rights violation. She went on to rule that the NRHA had in fact discriminated against Ms. Horrocks.

The NHRA appealed to a reviewing judge who agreed with it. Ms. Horrocks then appealed to the Court of Appeal. It said disputes concerning the termination of unionized workers do fall within the exclusive jurisdiction of a labour arbitrator, even when there are allegations of human rights violations. But in this case, the Court found the adjudicator had jurisdiction and sent the case back to the reviewing judge to decide if the adjudicator's decision on the complaint itself was reasonable.

The health authority appealed to the Supreme Court. It has ruled that the human rights adjudicator did not have jurisdiction over Ms. Horrocks' complaint.

A labour arbitrator should decide all disputes under a collective agreement, including human rights disputes, unless another law states otherwise.

Writing for the majority of the judges, Justice Brown said the human rights adjudicator did not have jurisdiction over Ms. Horrocks' complaint. Justice Brown explained that a labour arbitrator has exclusive jurisdiction when labour legislation provides for settling disputes under a collective agreement, unless another law states otherwise. In this case, Ms. Horrocks' complaint arose under the collective agreement and within the mandate of a labour arbitrator. Other legislation did not give concurrent jurisdiction to the human rights adjudicator. As a result, the adjudicator did not have jurisdiction over Ms. Horrocks' complaint.

6. Nelson (City) v. Marchi,

2021 SCC 41
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19036/index.do

Coram: Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe, Martin and Kasirer JJ.

The City of Nelson can be held responsible for injuries caused by its snow clearing decisions.

After a heavy snowfall in January 2015, snow clearing crews for the City of Nelson in British Columbia started plowing the streets. Not long after, Ms. Taryn Joy Marchi parked her car on Baker Street in the downtown area. City crews had already plowed the street, but they had created a snowbank along the curb of the sidewalk. Ms. Marchi decided to walk over the snowbank to get from her car to the

sidewalk and seriously injured her leg. She sued the city for negligence.

The City of Nelson argued that it should not have to pay any damages to Ms. Marchi, because snow clearing decisions are "core policy decisions" that are immune from negligence claims. Core policy decisions are based on public policy considerations, such as economic, social and political factors. They must be rational and not taken in bad faith.

At trial, the judge agreed with the city that its snow clearing decision was a core policy decision and the city did not have to pay any damages to Ms. Marchi. She appealed to the province's Court of Appeal, which disagreed with the trial judge and ordered a new trial. The City of Nelson appealed that decision to the Supreme Court of Canada.

The Supreme Court has agreed with the Court of Appeal. The city can be held responsible for injuries caused by its snow clearing decisions.

Operational decisions are not policy decisions.

Writing for a unanimous Court, Justices Karakatsanis and Martin agreed that core policy decisions are immune from negligence claims. However, they pointed out that operational decisions to carry out a policy are not policy decisions. They said, "the fact that the word 'policy' is found in a written document" does not settle the question.

In analyzing the city's snow clearing decision in this case, the Court concluded that the decision was not a core policy decision. Rather, the decision was operational and not immune from a negligence claim. The judges said the city owed Ms. Marchi a "duty of care" and that a new trial is required. The new trial would assess if the city breached that duty of care and, as a result, whether it should pay damages to Ms. Marchi.

Constituents of a negligence claim, stated.

A person making a negligence claim must prove four things in court: a duty of care, a breach of that duty, the cause and any damages. A duty of care means the other person or organization was required to do, or avoid doing, something that could likely cause harm.

HIGH COURT OF AUSTRALIA

7. *Deputy Commissioner of Taxation v Changran Huang*

https://eresources.hcourt.gov.au/showCase/2021/HCA/43
[2021] HCA 43

Coram: Gageler, Keane, Gordon, Edelman And Gleeson JJ

Power to make worldwide assets freezing order -- no realistic possibility of enforcement of any such judgment.

The respondent, Mr Huang, was a tax resident of Australia for a number of years. In December 2018, he left Australia for the People's Republic of China ("the PRC") while the Australian Taxation Office was conducting an audit into his income tax affairs. Subsequently, the Commissioner of Taxation issued to Mr Huang assessments for tax liabilities and a shortfall penalty totalling almost $141 million. On application by the Deputy Commissioner of Taxation the primary judge made a Worldwide Freezing Order against Mr Huang until further order.

Mr Huang sought leave to appeal against the freezing order to the extent it applied to his assets located outside Australia. The Full Court granted leave and set aside the Worldwide Freezing Order on the basis that there was presently no realistic possibility of enforcement of any judgment obtained by the Deputy Commissioner against Mr Huang's assets in the People's Republic of China or Hong Kong.

The High Court of Australia by majority held that the provisions granting powers to a court are not to be read down by making implications or imposing limitations which are not found in the express words. It is the

court's authority to make orders against a person who is subject to the court's jurisdiction that is relevant to the power to make a freezing order, rather than the location of the person's assets. Requiring proof of a realistic possibility of enforcement in each jurisdiction would render the power to make a freezing order largely impotent to protect the Federal Court's process from frustration by defendants who are able to secrete assets or move them almost instantaneously across international borders. Further, such a precondition is effectively inconsistent with the power to make a Worldwide Freezing Order as it would necessitate identification of the defendant's foreign assets as well as potential means of enforcement in a relevant foreign jurisdiction. However, the likely utility of a freezing order is undoubtedly relevant to the exercise of the court's discretion to grant a Worldwide Freezing Order.

SUPREME COURT OF UK

8. *Her Majesty's Attorney General v Crosland*

https://www.bailii.org/uk/cases/UKSC/2021/58.html
[2021] UKSC 58

Before
Lord Briggs, Lady Arden, Lord Kitchin, Lord Burrows, Lady Rose

Disclosure of the result of a pending appeal, in breach of an embargo on the Court's judgment, constituted a contempt of court

On 9 December 2020, a copy of the Supreme Court's draft judgment was circulated to the parties' representatives, to enable them to make suggestions for the correction of any errors, to prepare submissions on consequential matters, and to prepare themselves for the publication of the judgment. It was stated on the draft judgment, and in a covering email, that the draft was strictly confidential. Nonetheless, on 15 December 2020, the day before the judgment was due to be made public, Mr Crosland sent an email to the Press Association containing a statement in which he disclosed the outcome of the appeal. The statement was also published on Plan B Earth's Twitter account. These disclosures led to the publication of the outcome of the Heathrow appeal in the national media and on Twitter on 15-16 December, prior to the judgment being delivered at 9:45am on 16 December 2020.

Lord Reed, the President of the Supreme Court, referred this matter to the Attorney General on 17 December 2020. On 12 February 2021, the Attorney General applied to the Supreme Court to have Mr Crosland committed for contempt of court. The Attorney General's application was heard by three Justices of the Supreme Court, none of whom were involved in the Heathrow appeal. They found that Mr Crosland's conduct constituted a criminal contempt of court and imposed a fine of £5,000. They also ordered Mr Crosland to pay the Attorney General's costs in the sum of £15,000.

Mr Crossland filed an appeal against the finding of contempt, the imposition of the fine, and the award of costs. However, his appeal was unanimously dismissed on merits by Supreme Court and it was held that the ruling on costs was not oppressive or unjust. The award of costs is a matter for the discretion of this Court and it made no error of legal principle which would warrant setting aside their order. Nor did the court give reason to Mr Crosland to believe that costs would be decided in accordance with the rules for criminal proceedings.

9. *Crown Prosecution Service v Aquila Advisory Ltd*

[2021] UKSC 49
https://www.supremecourt.uk/cases/docs/uksc-2019-0105-judgment.pdf

Coram
Lord Lloyd-Jones, Lord Sales, Lord Burrows, **Lord Stephens**, Lady Rose

A proprietary claim can be brought by a company against its directors to recover

proceeds of crime received in breach of fiduciary duty.

Two directors of a company used the company to commit a criminal offence, from which they personally obtained a benefit in terms of money. They were prosecuted and convicted of the criminal offence and were made the subject of confiscation orders based on that benefit. However, in an action between Respondent (to which the company's rights had been assigned) and the directors, in which the Crown Prosecution Service intervened, the High Court determined that the company, and hence Respondent, could recover the money what remained from the directors because they had acted in breach of their fiduciary duty to the company and thus held the proceeds of the crime on constructive trust for the company. The Appellant seeks to prevent Respondent from recovering the money in priority to the confiscation orders.

The Supreme Court observed that the unlawful acts or dishonest state of mind of a director cannot be attributed to the company to establish an illegality defence defeating the company's claim under a constructive trust. In an action between Respondent and its former directors, in which the Appellant intervened, the Supreme Court held that the High Court had correctly determined that the company, and hence Respondent, could recover what remained of the relevant funds from the directors because they had acted in breach of their fiduciary duty to the company and thus held the proceeds of the crime on constructive trust for the company.

10. R v Secretary of State for the Home Department

[2021] UKSC 56
https://www.supremecourt.uk/cases/docs/uksc-2020-0081-judgment.pdf

Before

Lord Reed (President), Lord Lloyd-Jones, Lady Arden, Lord Sales, Lady Rose

There is no obligation to recognise a gender category other than male or female, and none which would require the Secretary of State to issue passports without any indication of gender. Appeal for gender-neutral passports, rejected.

The appellant was born female but identified as non–gendered. From 1995 onwards, the appellant had been in contact with Government Departments to seek to persuade the Government that a passport should be issued to the appellant without the necessity of making a declaration of being either "male" or "female". The Government refused to do so but conducted internal reviews to consider whether policy change was required. It noted that there had been very few requests for a non-gendered marking and that UK legislation, including discrimination and equality legislation, is based on the categorisation of all individuals as either male or female. It stated that recognising a third gender would put Passport Office in isolation from the rest of government and society and would result in administrative costs of about £2m. The appellant filed judicial review proceedings challenging the Government's passport policy. The judicial review was dismissed by the High Court and Court of Appeal.

The central question was whether passport policy breached the UK's obligations under the European Convention on Human Rights.

The Supreme Court observed that there is no judgment of the European Court of Human Rights which establishes an obligation to recognise a gender category other than male or female, and none which would require the Secretary of State to issue passports without any indication of gender. In fact, there does not appear to have been any case before the European Court concerned with the application of the Convention to individuals who identify as non–gendered. Applying the principles established in the case law of the European Court, there has been no violation of the appellant's Convention rights. The degree of prejudice to the appellant which is attributable to the unavailability of an 'X' (gender neutral) passport does not appear to

be as serious as that suffered by the applicants before the European Court in the cases on which counsel for the appellant relied. The appellant's interest in being issued with an 'X' passport is outweighed by considerations relating to the public interest put forward by the Secretary of State, including the importance of maintaining a coherent approach across government to the question of whether, and if so in what circumstances, any gender categories beyond male and female should be recognised. It is clear that this is a matter in which states would be afforded a high degree of latitude by the European Court, having regard to the absence of any consensus amongst the states which are parties to the Convention, the complexity and sensitivity of the issue, and the need for a balance to be struck between competing private and public interests.

The Court also did not entertain the argument that the Secretary of State was obliged under the Human Rights Act to issue the appellant with an 'X' passport, and that the failure to do so was a breach of the appellant's Convention rights. The question of whether an applicant's rights under the Convention have been violated is a question which the European Court answers for itself. States can of course create rights going beyond those protected by the Convention, but their power to do so exists independently of the Convention and is subject to their own established constitutional principles. Under those principles, law-making is generally the function of the legislature. If the Human Rights Act were to be interpreted as giving judges the right to find breaches of Convention rights even where the European Court would hold that United Kingdom law was in conformity with the Convention, there would be a substantial expansion of the constitutional powers of the judiciary at the expense of Parliament. Parliament is unlikely to have intended to effect such an encroachment upon parliamentary sovereignty when it enacted the Human Rights Act. The Supreme Court unanimously dismissed the appeal.

11. Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela

[2021] UKSC 57
https://www.supremecourt.uk/cases/docs/uksc-2020-0195-judgment.pdf

Before

Lord Reed (President), Lord Hodge (Deputy President), **Lord Lloyd-Jones**, Lord Hamblen, Lord Leggatt

The recognition of foreign states, governments and heads of states is a matter for the executive.

Nicolás Maduro was re-elected President of Venezuela in May 2018. Juan Guaidó is the President of the National Assembly of Venezuela. Guaidó claims that the May 2018 election was flawed and that he is Interim President of Venezuela. Both Maduro and Guaidó had set up Central Bank Committees and given those committees instructions on how the gold stored in the Bank of England was to be used. Maduro took the matter to court in the UK and lost in the first instance, but in July 2020 the Court of Appeal ruled in his favor.

The question before the Supreme Court was whether the UK Government has recognised Interim President Guaido as Head of State of Venezuela and, if so, whether any challenge to the validity of Mr. Guaido's appointments to the Board of the Central Bank of Venezuela is justiciable in an English court.

The Court observed that under the United Kingdom's constitutional arrangements, the recognition of foreign states, governments and heads of states is a matter for the executive. UK Courts thus accept statements made by the executive as conclusive as to whether an individual is to be regarded as a head of state. The Government's statement was a clear and unequivocal recognition of Guaidó as President of Venezuela, which necessarily entailed that Maduro was not recognised as the President of Venezuela. The courts in UK are bound to accept the Government's statements which establish

that Guaidó is recognised as the constitutional interim President of Venezuela and that Maduro is not recognised as President of Venezuela for any purpose.

Two aspects of the act of state doctrine, described.

The Court noted that there are two aspects of the act of state doctrine with which the appeal is concerned. The first is that the courts of UK will recognise and will not question the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state. The second is that the UK courts will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state. Rule 2 thus applies to an exercise of executive power such as Guaidó's appointments to the Central Bank's board. However, there are several exceptions to the act of state doctrine, including for acts which take place outside a state's territory, for challenges to acts which arise incidentally, and for judicial acts. The Court said it remained necessary to consider whether to recognise judgments by Venezuela's Supreme Tribunal of Justice ruling that Guaido's transition statute was null and void, and it asked the Commercial Court to do so. The Supreme Court unanimously allowed the appeal in part.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

12. Samancor Chrome Limited v. North West Chrome Mining

https://www.supremecourtofappeal.org.za/index.php/component/jdownloads/send/35-judgments-2021/3723-samancor-chrome-ltd-v-north-west-chrome-mining-pty-ltd-and-others-case-no-30-20-2021-zasca-183-23-december-2021?Itemid=0
[2021] ZASCA 183

Coram:
Petse Ap and Dambuza, Van Der Merwe, Makgoka And Mabindla-Boqwana JJA

High court cannot sit as a court reviewing the decision of Minister to award the prospecting rights of Mining

The applicant, Samancor brought an urgent application in the high court for an order interdicting and restraining the respondents from conducting unlawful mining activities in an area where he held a prospecting right. The high court dismissed the application with costs while holding that the respondents held valid mining permits in respect of the area concerned; that Samancor's prospecting permit was issued on the basis of insufficient or incorrect information and that the Minister ought to have been joined in the application as he had started a process in terms of s 47 of the MPRDA which entitled him to cancel or suspend a prospecting right under certain circumstances.

The SCA held that the high court erred by approaching the matter on the basis that the validity of Samancor's prospecting right was an issue before it. It found that although there was an error in the text of the prospecting right, it was lawfully issued and remained in place until cancelled or set aside. The high court was not sitting as a court reviewing the decision to award the prospecting right, nor was it asked to make a declaratory order as to the sub-division of portion 3. The SCA further found that the respondents did not dispute that they were conducting mining activities in the prospecting area. There was evidence that the area in respect of which Monageng held mining permits was situated on a separate portion of portion 3 which did not in any way overlap with the prospecting right area. These permits were also limited to 1.5 hectares and had in any event expired. There was no evidence of their renewal. The SCA further found that the Minister had no legal interest in the matter and that s 47 did not stand in Samancor's way as it was not an internal remedy available to private parties seeking to enforce their rights by way of an interdict. The Court however declined to receive further evidence sought to be introduced by Samancor on appeal (which

was that the error in the prospecting right had been rectified) on the basis that exceptional circumstances had not been shown. Considering that Samancor had satisfied the requirements for an interdict against the respondents, the SCA granted leave to appeal and upheld the appeal.

13. The City of Cape Town v. The South African Human Rights Commission

https://www.supremecourtofappeal.org.za/index.php/component/jdownloads/send/35-judgments-2021/3722-city-of-cape-town-v-the-south-african-human-rights-commission-case-no-144-2021-2021-zasca-182-22-december-2021?Itemid=0
[2021] ZASCA 182

Coram:
Mathopo, Schippers, Nicholls, Mbatha And Mabindla-Boqwana JJA

An order is appealable if the decision is final in effect and not susceptible to alteration by a court of first instance

The South African Human Rights Commission (the SAHRC), Mr Qolani and the Housing Assembly (a social justice movement) launched an urgent application in the High Court to prevent the City of Cape Town (the City) from evicting persons and demolishing structures, whether occupied or unoccupied, during the national state of disaster, without a court order. The application was for interim relief (Part A), pending a decision on Part B, which primarily dealt with the constitutionality of the City's conduct and its Anti-Land Invasion Unit (ALIU), which carried out the evictions and demolitions, and whether the defence of counterspoliation permitting the eviction and demolition of a structure, occupied or unoccupied was constitutional. The High Court granted the interim relief sought, pending the determination of Part B. The City as such challenged the said order before the SCA.

The SCA held that an order is appealable if the decision is final in effect and not susceptible to alteration by a court of first instance; if it is definitive of the rights of the parties; and if it has the effect of disposing of a substantial part of the case. The SCA held that on comparing the interim orders sought to be appealed with those sought in Part B, it was clear that the decision was not final in effect as these orders would be reconsidered by the full court in Part B. Next the SCA considered whether there would be irreparable harm or a grave injustice to the City if any interim orders were not set aside. The SCA found that it was difficult to conceive of a situation where judicial oversight of evictions and demolitions could ever amount to irreparable harm. The City was not precluded from evicting persons but merely prohibited from doing so without judicial supervision. The orders were not final in effect and there would be no irreparable harm if the interim orders were not set aside. The appeal in respect of those interim orders had to be dismissed.

CONSTITUIONAL COURT OF SOUTH AFRICA

14. Thubakgale v Ekurhuleni Metropolitan Municipality

[2021] ZACC 45
https://collections.concourt.org.za/bitstream/handle/20.500.12144/36721/%5bJudgment%5d%20CCT%20157-20%20Thubakgale%20v%20Ekurhuleni%20Metropolitan%20Municipality.pdf?sequence=18&isAllowed=y

Coram
Mogoeng CJ, **Jafta J**, Khampepe J, **Madlanga J**, **Majiedt J**, Mhlantla J, Theron J, Tlaletsi AJ and Tshiqi J

Damages cannot be awarded to enforce socio-economic rights

The residents of the Winnie Mandela informal settlement were allocated sites and Reconstruction and Development Programme houses (RDP houses) in 1998, which they say were then given to others in a corrupt process. They secured a court order, compelling the municipality to provide them with housing within a certain time-frame, but

the municipality did not comply. They sought an order for constitutional damages, totalling about R15 million, from the Pretoria High Court, but were unsuccessful. They then appealed to the Constitutional Court.

The Constitutional Court ruled - five judges to four - against awarding constitutional damages to the residents of informal settlement. In the main judgment, Jafta J said, as a matter of principle, constitutional damages could not be awarded to enforce socio-economic rights. He conceded that the matter had a long and sad history, permeated by deplorable conduct on the part of the municipality which had failed to honour undertakings and obey court. But, he said, the mere existence of a right under the Constitution did not give rise to a positive obligation on the state to provide housing on demand. "[T]he failure to provide a house cannot cause an injury or damage to the individual in need of a house. And without injury, there can be no claim for constitutional damages." Jafta J said the state had to take reasonable measures to achieve progressive realisation of the right to access adequate housing, but this also depended on available resources. He said the applicants should have applied for a contempt of court order when the municipality did not comply with the order of the lower court. Or they should have sought eviction proceedings against the illegal occupants of their houses. "They have various remedies at their disposal, but they chose the wrong one." "They are seeking damages as punishment for non-compliance. This is a novel means of enforcing a court order and we were not told its source in law," he said, noting that, if it were recognised in law, there would be "no end to litigation". He also noted that there were thousands of people waiting for housing "since the dawn of democracy" and awarding damages in this matter would, in effect, be treating the applicants differently to them.

Madlanga J agreed that the application could not succeed. In a separate judgment, he reiterated a previous ruling in the Constitutional Court that constitutional damages could only be awarded "if they were the most appropriate remedy available to vindicate constitutional rights". But Majiedt J (with Khampepe, Theron and Tlaletsi JJ concurring) took the opposite stance. "And there is no end in sight. 20 years and three court decisions later, it would provide cold comfort to suggest that a contempt of court application is the answer. In fact, it is no answer at all", he said. Majiedt J said it was also unlikely that eviction proceedings would be successful because the current residents would have nowhere to go. He said it was unquestionable that constitutional damages were the appropriate remedy in this case and he would have awarded a once-off amount of R10 000 per applicant 'as a token' to acknowledge the harm suffered, and to avoid a situation where the public purse was not drained entirely.

CONSTITUIONAL COURT OF SOUTH AFRICA

15. Jane Bwanya v The Master of the High Court, Cape Town

[2021] ZACC 51
https://collections.concourt.org.za/bitstream/handle/20.500.12144/36725/%5bJudgment%5d%20CCT%20241-20%20Bwanya%20v%20Master%20of%20the%20High%20Court%20Cape%20Town%20and%20Others.pdf?sequence=24&isAllowed=y

Coram
Mogoeng CJ, **Jafta J**, Khampepe J, **Madlanga J**, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Permanent life partnerships are a legitimate family structure deserving respect and entitlement to legal protection

The applicant and the deceased lived together in a committed romantic relationship. The latter died testate having nominated his mother as the only heir to his estate. His mother, however, had predeceased him. The applicant lodged two claims against the deceased's estate. One was for inheritance

while the other was for maintenance. The basis of the claims was that the deceased was her life partner; they had been living together in a permanent, stable and intimate relationship; they were engaged to be married; their partnership was analogous to, or had most of the characteristics of a marriage; the deceased supported her financially, emotionally and introduced her to friends as his wife; they had undertaken reciprocal duties of support; and were to start a family together. The executor of the deceased's estate rejected both claims on the basis that the Intestate Succession Act and Maintenance of Surviving Spouses Act conferred benefits only on married couples, not partners in permanent life partnerships. The applicant challenged the constitutionality of both Acts. The High Court declared section 1(1) of the Intestate Succession Act unconstitutional, but rejected the challenge to the constitutionality of section 1 of the Maintenance of Surviving Spouses Act.

The majority of the Constitutional Court stressed that permanent life partnerships are a legitimate family structure and are deserving of respect and, given recent developments of the common law, entitled to legal protection. The judgment held that the definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act is unconstitutional and invalid insofar as it omits the words "and includes the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate". The judgment ordered that these words be read into the definition. "Spouse" and "marriage" are also declared to include a person in a permanent life partnership. Additionally, the majority judgment confirmed the declaration of invalidity of section 1(1) of the Intestate Succession Act to the extent that it excludes partners from inheriting where partners were unmarried but undertook reciprocal duties of support.

Mogoeng CJ dissented with the majority and argued that it "would be unconscionable, unjust and most insensitive to the plight of unmarried heterosexual couples to adopt a legal posture that seeks to preclude them from ever being entitled to be beneficiaries of maintenance and inheritance from their permanent life partners, regardless of the explicit or implicit terms of their partnership". He said the fundamental differences between marriage and permanent life partnerships necessitate the existence of different regimes for each with regard to maintenance and inheritance. The third judgment penned by Jafta J agreed with the first judgment that the declaration of invalidity of section 1(1) of the Intestate Succession Act be confirmed, however, it was unable to conclude that the decision that section 2(1) of the Maintenance of Surviving Spouses Act does not constitute unfair discrimination is clearly wrong. In the result, the third judgment held that it was appropriate to refer the matter to Parliament to consider passing legislation to address the affairs of permanent life partnerships.

*****

Contact Info:
Email: scrc@scp.gov.pk
Phone: +92 51 9201574
Research Centre
Supreme Court of Pakistan