

HIGH COURT OF AZAD JAMMU AND KASHMIR

*Writ Petition No.2540/2023;
Date of Institution 23.08.2023.
Date of Decision 01.09.2023.*

Abbas Khan S/o Sardar Khan Caste Mangral R/o Sainla Tehsil
Sehensa District Kotli Azad Kashmir.

...Petitioner.

VERSUS

1. Azad Govt. of the State of Jammu and Kashmir through Secretary Home Department (Chief Secretary) of Azad Govt. having office at Civil Secretariat Chatter Muzaffarabad Azad Kashmir.
2. Secretary Home Department (Chief Secretary) of Azad Government having office at Civil Secretariat Chatter Muzaffarabad Azad Kashmir.
3. Inspector General of Prisons (Additional Secretary Home Department) Azad Government having office at Civil Secretariat Chatter Muzaffarabad Azad Jammu and Kashmir.
4. Superintendent District Jail Mirpur Azad Jammu and Kashmir.
5. District Magistrate Mirpur Azad Jammu and Kashmir.
6. Additional District Court of Criminal Jurisdiction Sehensa District Kotli Azad Kashmir.
7. State through Advocate General AJ&K at Muzaffarabad.

....Respondents

8. Iftikhar alias Khari S/o Sardar Khan Caste Mangral R/o Sainla Tehsil Sehensa District Kotli Azad Kashmir presently confined in District Jail Mirpur Azad Jammu and Kashmir.

Proforma-respondent.

WRIT PETITION

Before: Justice Sadaqat Hussain Raja, C.J

PRESENT;

Hamid Raza, Advocate for the petitioner.

*Muhammad Rafique Minhas, Legal Advisor for official respondents
AAG, for State.*

JUDGMENT:

The captioned writ petition has been filed under Article 44 of Azad Jammu and Kashmir Interim Constitution, 1974, whereby, petitioner has implored the following relief;-

“It is, therefore, most humbly prayed that by accepting the instant petition, while summoning the record, the death/black warrant issued for execution of death sentence of the prisoner, Iftikhar S/o Sardar Khan Caste Mangral R/o Saila Tehsil Sehensa District Kotli Azad Kashmir presently confined in District Jail Mirpur Azad Jammu and Kashmir, may kindly be set aside. The respondents may kindly be directed to provide the medical facilities to the convicted prisoner & his thorough checkup & treatment may kindly be directed/ordered.”

Facts forming background of the captioned petition are that the proforma-respondent/convict is real brother of the petitioner who is behind the bars (presently in District Jail Mirpur) for more than two decades. It is stated that the proforma respondent was convicted for murder of one late Raja Sharif and sentenced to death by the learned Additional District Court of Criminal Jurisdiction in the year, 2006 and the conviction & sentence were maintained up to the Apex

Court. Finally, a death warrant/black warrant has been issued for execution of the sentence. It is further stated that the petitioner and other family members of the proforma-respondent/convict have been visited the District Jail Mirpur to meet proforma respondent, but he has not recognized them due to serious ailment. It is submitted that the petitioner while realizing the situation, moved applications to the Superintendent District Jail Mirpur but all in vain, hence, the instant writ petition.

Respondents were directed to file para-wise comments. The needful has been done on behalf of respondents No. 1 & 2, wherein it is stated that Additional Court of Criminal Jurisdiction, Sehnsa District Kotli has awarded sentence to the convict/proforma respondent in the offence under Section 302-B/APC vide order dated 29.12.2006. Feeling aggrieved from the aforesaid order, the convict/proforma respondent filed an appeal before Shariat Appellate Bench of High Court Circuit Kotli, which also met the same fate vide judgment dated 05.06.2018. Feeling dissatisfied, the convict/proforma respondent filed appeal before Apex Court, Circuit Bench Mirpur. The Apex Court

maintained the order of this Court vide judgment dated 26.02.2020. Against the aforesaid judgment, the convict/proforma respondent filed review petition before the Apex Court. The Apex Court dismissed the review petition vide judgment dated 22.12.2021 but later on, the convict/proforma respondent filed appeal before President of Azad Jammu and Kashmir, which was also dismissed. After finalizing the matter, the Government issued notification dated 28.10.2022 for implementation of the aforesaid matter. The learned District and Sessions Judge, Mirpur issued black warrant to the convict/ proforma respondent and fixed the date as 24.08.2023. Lastly, it is prayed for dismissal of the writ petition in limine. Comments have also been filed by respondents No.3 & 4 wherein the claim of the petitioner has been refuted.

The legal heirs of the deceased (Hamida Sharif (wife) Dr. Saima Sharif (daughter) and Barrister, Raja Sajid Sharif approached the Court through Mail. Transcripts of their Mails are made part of the file.

I have gone through the record, heard the learned counsel for the parties and also considered the submission made by the legal heirs of the deceased through Mail.

It transpires from the record that one named Iftikhar alias Khari S/o Sardar Khan has been sentenced to death by the trial Court vide judgment dated 29.12.2006 in the offences under sections 302/341,APC and 13/20/65,AA. The sentence was confirmed by the Shariat Appellate Bench of this Court on 05.06.2018 and the appeal filed by the convict-proforma-respondent was also dismissed. The judgment of this Court was also maintained by the Hon'ble Apex Court of AJ&K vide judgment dated 26.02.2020. The Convict also approached the worthy President for granting of pardon, however, the same was also dismissed on 18.10.2022. The convict was in central Jail Mirpur for execution of the sentence. The trial Court issued Black warrant to the convict/proforma-respondent for execution of the sentence on 24.08.2023. The legal heirs of the convict were informed by the concerned authorities. The petitioner visited central jail Mirpur and submitted an application for treatment of convict/proforma respondent before Jail Superintendent on 21.08.2023. The petitioner was informed by the Jail Superintendent that death warrant will be executed on 24.08.2023. Hence in this short period it is impossible to

proceed on the application of the petitioner, as such the petitioner withdrew this application.

The petitioner in the instant writ petition sought the following relief;-

- i. Summoning the record, the death warrant issued for execution of death sentence.*
- ii. To set aside the death warrant.*
- iii. To issue direction for medical checkup of the proforma-respondent/convict.*

The record has been summoned and copy of the death warrant is made part of this file.

It has been categorically mentioned in the comments that during the pendency of this writ petition the convict/proforma-respondent, Iftikhar has been medically examined by the Medical Specialist and psychiatrist. He has been observed as not mentally sick. The last relief claimed by the petitioner is to set aside the death warrant on the following grounds mentioned in the writ petition;-

- i. Mental health of the convict.*
- ii. To decide the application of the petitioner.*
- iii. Rules 443, 444 & 445 of the Prison Rules have been violated.*

As mentioned above that the petitioner has withdrawn his application, hence the Jail Superintendent was not in position to decide the matter.

The petitioner also claimed that the proforma-respondent/convict is mentally ill. The proforma-respondent was admitted in DHQ Hospital Mirpur on 23.08.2023 and was discharged on 24.08.2023. The convict remained under supervision of concerned Doctors **Medial Specialist** and **Psychiatrist**. According to discharge report, the convict-proforma-respondent suffered **Hyperventilation (ABP)** and this happened after he came to know of his death sentence.

In the light of observation made by the Medical Specialist and **Psychiatrist** this argument of the counsel for the petitioner is also repelled.

The counsel for the petitioner also challenged the death warrant as being in violation of Rules 443, 444 & 445 of the Prison Rules 1978. For having true perception, these Rules are reproduce are as under;-

***“Rule, 443,** When a convicted prisoner is acting as if he was insane, the Superintendent shall put him under observation. The Medical Officer shall scrutinise his symptoms closely so as to preclude the possibility of*

criminal feigning insanity. Procedure in case of a convicted prisoner of unsound mind.

Rule, 444, whenever it appears to the Superintendent that any convicted prisoner is of unsound mind, he shall, in the first instance, place the patient under the observation of Medical Officer for a period of ten days. After the expiry of this period, the Medical officer shall report the result to the Superintendent. If the patient is found to be of unsound mind, a report regarding his case shall be submitted to the Inspector General for obtaining the orders of the Government for his removal to a mental hospital. The following documents shall be forwarded with case.

- (a) A descriptive roll of the prisoner.
- (b) His descriptive roll in form No.9 of the Medical Manual.
- (c) Medical certificate in Form No.3 of Schedule I of Act IV of 1912.

Rule,444 shall be re-numbered as sub-rule (1) and after sub-rule (1) as so renumbered the following new sub-rule shall be added namely (2) for the proper and effective treatment of patients, arrangements shall be made for periodic visits by psychologist, psychiatrists, medical specialists, sociologists besides the prison doctor.

Rule, 445. On receipt of an order from Government for the removal of mental patient, the Superintendent shall transfer him to the mental Hospital specified, with the following documents;-

- (a) The Government order directing his transfer.
- (b) His descriptive roll in form No.9 of the Mental Hospital Manual.
- (c) The medical certificate in form No.3 of Schedule I of Act IV 1912.

If the mental patient is a convicted prisoner the following documents shall be sent in addition;-

(a) Warrant of imprisonment.

(b) Remission sheet.

(c) History ticket and private property (if any).

(d) A copy of the Court's judgment in his case. "

So, after perusal of above mentioned rules, it transpires that these Rules deal with mentally ill convict. As mentioned above that according to the observations made in the discharge report by **Dr. Shakil Asif (Psychiatrist)**, the proforma-respondent/convict is not mentally ill, rather he is suffering from Hyperventilation (ABP) on the information of execution of the death sentence.

Hence, this point raised by the learned counsel for the petitioner is of no value.

Furthermore, it is more appropriate to mention here that an extraordinary jurisdiction can only be exercised where any violation or departure of law has been made. In the instant case, the petitioner could not prove any violation of law. The same principle has been laid down in case titled "Tayyab Abbasi Vs. Azad Jammu and Kashmir Election Commission & others" [PLD 2021 High Court (AJK)19].

Admittedly, in the instant case, no violation of law or infringement of law has been pointed out by the petitioner, therefore, the stance taken by the petitioner is baseless, which is hereby repelled.

The crux of the above discussion is that, finding no force in this writ petition is hereby dismissed in limine.

Announced.

Muzaffarabad:
01.09.2023.

Chief Justice
(Vacation Judge)