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SUPREME COURT OF PAKISTAN

2021 S C M R 2094

General Manager SNGPL, Peshawar Vs Qamar Zaman and others

Civil suit under OGRA Ordinance 2002 is not maintainable before a Civil Court of plenary jurisdiction.

MAZHAR ALAM KHAN MIANKHEL, J.

Section 11 of the Ordinance (Oil and Gas Regulatory Authority Ordinance, 2002) prescribes the procedure for redressal of disputes by filing complaints which reads as under: -

> "11. Complaints. (1) Any interested person may file a written complaint with the Authority against the licensee for contravention of any provision of this Ordinance or of any rule or regulation.
>
> (2) The Authority shall, on receipt of a complaint, provide an opportunity to the complainant as well as to the licensee, or any other person against whom such complaint has been made to state its case before taking action thereon."

Similarly, section 12 of the Ordinance, provides the right of appeal.

7. The Ordinance being a special law explaining the powers and jurisdiction of the Authority and redressal of the disputes with overriding effect, then no other forum, Tribunal shall have the jurisdiction to step in for resolving the disputes. An overall look of the Ordinance would reflect that except the provisions of section 43, which gives the overriding effect to the Ordinance, and the provisions of sections 11 and 12 of the Ordinance, providing the procedure for resolving the disputes and appeal against the order/decision of the Authority, no other specific provision barring the jurisdiction of the Civil Court is there in the Ordinance. In the given circumstances, question would arise, as to whether a Civil Court, being a Court of plenary and ultimate jurisdiction, will have no jurisdiction to entertain the disputes referred to in the Ordinance despite the fact that there is no specific bar in the statute over the jurisdiction of the Civil Court? Answer to the above question would be a simple yes! No doubt, there is no specific bar provided in the statute over the jurisdiction of Civil Court but the above noted provisions of the Ordinance would reflect that an exclusive jurisdiction has been conferred on the Authority for determining the disputes referred to in the Ordinance which reflect the intent of the legislature. In such like situation, the jurisdiction of Authority is exclusive and the jurisdiction of Civil Court is barred but this would be an implied bar, very much permissible under the settled law and it will be equivalent to the specific bar provided in any statute.

2021 S C M R 1986

Khalid Hussain and others Vs Nazir Ahmad and others

Shifting of onus of proof in civil cases

YAHYA AFRIDI, J.

Onus of proof

6. There is no cavil to the proposition that the onus to prove the claim is ordinarily on the person moving the court to seek his relief, as he is the one who is to

fail if no evidence at all is given on either side. However, when the contesting party takes up a defence and desires the court to pronounce judgment as to his legal right dependent on the existence of facts which he asserts, then the onus to prove those facts lies on him. It is after the parties have produced their respective evidence that, the court is to consider and evaluate the evidence, in civil cases, on the touchstone of preponderance of evidence. It is on whose side the scale of evidence tilts would emerge as the victor, and be awarded the positive verdict.

2021 S C M R 1771

Naseem Khan Vs The State

A single consolidated sample instead of dispatching three separate samples from each bag brings petitioner's case within the purview of clause (b) of S.9 of CNSA.

QAZI MUHAMMAD AMIN AHMED, J.

3. Though not specifically pleaded, the petitioner figures somewhat in the adolescent interregnum with no past history to his discredit; prosecution's claim of possession of 3 kgs. of cannabis notwithstanding, the forensic report unambiguously refers to receipt of single sample of 5 grams.

Purpose of administration of criminal justice is to ensure that majesty of law reigns supreme with peace and equilibrium in the society, it is not designed to wreak vengeance; it must provide opportunity to the errant to possibly reform himself so as to rejoin mainstream life as a useful member thereof. Prosecution's reliance upon a single consolidated sample instead of dispatching three separate samples from each bag brings petitioner's case within the purview of clause (b) of the section ibid and, thus, a corresponding reduction in his sentence is an option most conscionable in circumstances. Consequently, petitioner's sentence is reduced to already undergone by him with reduction in fine to Rs.5000/- or to undergo two months SI in the event of default. Petition is converted into appeal and partly allowed.

2021 S C M R 1983

Haji Shah Behram Versus The State and others

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, CrPc.

QAZI MUHAMMAD AMIN AHMED, J.

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 defense; 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. With the available statement of the injured supported by the eye-witnesses, "who cannot be stamped as false witnesses at bail stage"[3], confirmed by medical evidence. The High Court has clearly misdirected itself in holding that respondent's culpability warranted further inquiry. It cast away the very basis of the impugned order. Argument that exceptionally strong grounds are required

to cancel bail even if granted erroneously; nonetheless, by a tribunal competent to extend such relief, does not hold much water inasmuch as erroneous application of law by itself presents a strong ground for its annulment. Strict adherence to law is a sine qua non to ensure predictability of consequences of a criminal act in any civilized legal system; it is imperative to ensure peace in the society through means and methods prescribed by law. It discourages criminal behaviors and at the same time strengthens people's faith in the rule of law.

Observation by the High Court that nature of injury as "Jurh Ghayr Jaifah Badiah" being punishable under section 337 F(ii) brought respondents' case outside the remit of prohibitory clause of section 497 of the Code is also unsustainable, inasmuch as, the language employed in section 324 of the Code unambiguously provides a punishment that may extend to ten years imprisonment with a fine; it is in the event of hurt caused that in addition to the aforesaid an offender shall be liable to the punishment provided therefore, an amendment, contemplated to provide monetary compensation to the victim, in accord with the injunctions of Islam; nature of the injury suffered by the victim and punishment provided therefore, by itself, do not substitute or override primary punishment prescribed for murderous assault. Criminal petition is converted into appeal and allowed; impugned order dated 07.07.2020 is set aside and bail granted to the respondents is cancelled.

2021 S C M R 1797

Ahmed Din (deceased) through LRs and another Vs Muhammad Iqbal (deceased) through legal heirs and others

The subsequent purchaser must probe into the matter with regard to possession over the suit land and non-production of any evidence and independent witness will not absolve him from the onus to discharge that he was having no knowledge of prior agreement to sell in favour of the appellant.

AMIN-UD-DIN KHAN, J.

5. …….. The subsequent purchaser was required to probe into the matter with regard to possession of the appellant over the suit land and non-production of any evidence and independent witness will not absolve the subsequent purchaser from the onus to discharge that he was having no knowledge of prior agreement to sell in favour of the appellant when appellant was in possession of the suit land. This aspect escaped from the view of the learned High Court.

7. So far as the statement of subsequent purchaser that he had strained relations with his brother-in--law who admittedly appeared in the previous litigation in a suit filed by the original owner against the appellant was clear knowledge of agreement to sell in favour of the appellant. That portion of statement of the subsequent purchaser/ respondent is beyond the pleadings; therefore, it was to be ignored but the learned High Court has mainly based his statement while recording findings in his favour.

8. In these circumstances, the respondent/ subsequent purchaser badly

failed to prove that he was having no knowledge of the agreement and he purchased the suit property in good faith. This clearly establishes that Muhammad Iqbal subsequent purchaser was not a bona fide purchaser. There is further an important factor which was ignored by the learned High Court that Muhammad Iqbal opted not to produce the sale deed in his favour on the basis of which he is claiming the suit property transferred in his favour.

2021 S C M R 1909

Zafar Iqbal, Mazhar Hussian and Muhammad Saleh Versus The State and others

The concept of "benefit of reasonable doubt" for the sake of safe administration of criminal justice which cannot only be extended at the time of adjudication before the trial court or court of appeal rather if it is satisfying all legal contours, then it must be extended even at bail stage.

SAYYED MAZAHAR ALI AKBAR NAQVI, J.

6. Our judicial system has evolved beside others the concept of "benefit of reasonable doubt" for the sake of safe administration of criminal justice which cannot only be extended at the time of adjudication before the trial court or court of appeal rather if it is satisfying all legal contours, then it must be extended even at bail stage which is a sine qua non of a judicial pronouncement, hence, any unjustified action by the court of law intruding into the affairs would certainly frustrate the free life of an accused person after availing the concession of bail. It is not beyond the legitimate expectations that in our society mere leveling of accusation basing upon trumped-up charges is not something beyond imagination. Therefore, false implication/ exploitation which has become epidemic in our society has to be safeguarded by the majesty of the courts." There is no denial to this fact that the petitioners have been nominated in the cross-version and FIR No. 375/2020 dated 09.07.2020 was registered against the complainant, who is one of the alleged injured of the cross-version. The learned Additional Sessions Judge while granting bail to the petitioners mainly took note of the fact that the occurrence took place on 04.07.2020 whereas the cross-version was recorded on 12.07.2020 after a delay of about 8 days, which has not been satisfactorily explained. He also took note of the fact that in the first medical examination of the injured, no bone fracture was observed but in the second report it came on record, which puts the story of the cross-version in mystery calling for further probe into the guilt of the petitioners, and that during the investigation the narration of the injuries by the complainant was found to be false. The learned High Court in the impugned order did not discuss these aspects of the matter at all. In view of the law laid down by this Court, we are constrained to observe that the learned High Court while recalling the bail granted to the petitioners has fell into error.

2021 S C M R 2011

Resham Khan and other Vs the State through Prosecutor General Punjab, Lahore and another

Benefit of doubt can be extended to the accused even at bail stage if the facts of the case so warrant.

MUHAMMAD ALI MAZHAR, J.

8. The insight and astuteness of further inquiry is a question which must have some nexus with the result of the case for which a tentative assessment of the material on record is to be considered for reaching just conclusion. The case of further inquiry pre-supposes the tentative assessment which may create doubt with respect to the involvement of accused in the crime. It is well settled that object of trial is to make an accused to face the trial and not to punish an under-trial prisoner. The basic idea is to enable the accused to answer criminal prosecution against him rather than to rot him behind the bar. Every accused is innocent until his guilt is proved and benefit of doubt can be extended to the accused even at bail stage if the facts of the case so warrant. The basic philosophy of criminal jurisprudence is that the prosecution has to prove its case beyond reasonable doubt and this principle applies at all stages including pre-trial and even at the time of deciding whether accused is entitled to bail or not.

https://www.supremecourt.gov.pk/downloads_judgements/c.p._2913_2021.pdf

Uzma Manzoor, Hameed-ur-Rehman Vice Chancellor Khushal Khan Khattak University, Karak and another Vs Vice Chancellor Khushal Khan Khattak University, Karak .

Mere submitting an application for joining recruitment process in response to an advertisement does not create any vested right to claim the job come what may. Obviously before finalizing a fit candidate by the competent authority or Selection Board, the testimonials and antecedents of each candidate shall be considered in accordance with the prescribed benchmarks but in order to maintain level playing field and evenhanded competition amongst all candidates, the qualification and competency in all fairness should have been considered and adjudged in accordance with the qualification notified to apply in the advertisement and to extend any preference or favorable treatment, the settled terms and conditions cannot be disregarded.

MUHAMMAD ALI MAZHAR, J.-

11. We are sanguine that mere submitting an application for joining recruitment process in response to an advertisement does not create any vested right to claim the job come what may. Obviously before finalizing a fit candidate by the competent authority or Selection Board, the testimonials and antecedents of each candidate shall be considered in accordance with the prescribed benchmarks but in order to maintain level playing field and evenhanded competition amongst all candidates, the qualification and competency in all fairness should have been considered and adjudged in accordance with the qualification notified to apply in the advertisement and to extend any preference or favorable treatment, the settled terms and conditions cannot be disregarded. On the contrary, the selection process should be within the specified spectrum and attributes and due to breach of this protocol, the doctrine of legitimate expectation will come into sight for rescuing and ventilating the sufferings of the candidates who were under the bona fide belief that their applications for appointment will be considered without experience marks being not the precondition and if any additional marks are added or considered beyond the conditions to apply or contrary to the aforesaid Schedule that would be highly discriminatory to those candidates who applied as fresh candidates after completing their required education with the hope of securing jobs.

12. The doctrine of legitimate expectation connotes that a person may have a

reasonable expectation of being treated in a certain way by administrative authorities owing to some uniform practice or an explicit promise made by the concerned authority. In fact, a legitimate expectation ascends in consequence of a promise, assurance, practice or policy made, adopted or announced by or on behalf of government or a public authority. When such a legitimate expectation is obliterated, it affords locus standi to challenge the administrative action and even in the absenteeism of a substantive right, a legitimate expectation may allow an individual to seek judicial review of a wrongdoing and in deciding whether the expectation was legitimate or not, the courts may consider that the decision of public authority has breached a legitimate expectation and if its proved then the court may annul the decision and direct the concerned authority/person to live up to the legitimate expectation. This doctrine is basically applied as a tool to watch over the actions of administrative authorities and in essence imposes obligations on all public authorities to act fair and square in all matters encompassing legitimate expectation. This Court expatiated the doctrine of legitimate expectation in the “Judges Pension case” reported in PLD 2013 SC 829 with the observation that the rule of legitimate expectation is not a part of any codified law, rather the doctrine has been coined and designed by the Courts primarily for the exercise of their power of judicial review of the administrative actions. As per Halsbury's Laws of England, Volume 1(1), 4th Edition, paragraph 81, at pages 151-152, it is prescribed that "A person may have a legitimate expectation of being treated in certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise from a representation or promise made by the authority including an implied representation or from consistent past practice." In the case of R. v. Secretary of State of Transport Exporte Greater London Council (1985) 3 ALL.ER 300, it is propounded that "Legitimate, or reasonable, expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. The expectation may be based on some statement or undertaking by or on behalf of the public authority which has the duty of taking decision." Whereas in the judgment reported as Union of India v. Hindustan Development Corporation (1993) 3 SCC 499, it was held that "The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or established procedure followed in regular and natural sequence. It is also distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."

PESHAWAR HIGH COURT
PESHAWAR

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/CrMBA-No-4183-P-of-2021.pdf

Faisal Amin etc Vs the State

Compromise in non-compoundable offences cannot be taken into consideration at bail stage.

QAISER RASHID KHAN, CJ: -

Accused-petitioners seek their release on bail in case FIR No.2086, dated 19.10.2021, under Sections 365/377/506/392/148/149 PPC of Police Station City, District Mardan with the allegations that they had abducted

transgender Zakir alias Anmol, severely beat her and thereafter committed unnatural offence with her.

The argument of the learned counsel for the accused-petitioners is that the latter have been falsely implicated in the case FIR and also that they have effected a compromise with the complainant party, who have expressed their no objection over the release of the accused-petitioners on bail.

The victim namely Anmol has directly nominated the accused-petitioners for the cruel treatment meted out to her and that too, because of her gender. Such class of citizens mostly belong to the poor and vulnerable segment of the society. Of late, it has been noticed that they are subjected to such cruel and unhuman treatment in the routine and the case of the accused-petitioners is no different. The medical report of the victim is also in line with the prosecution version.

So far as the compromise effected between the parties is concerned, it needs no reiteration that the offence for which the accused-petitioners are charged with is not compoundable. Such plea in like manner cases cannot be taken into consideration at the bail stage.

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/Johar-Ali-vs-State.pdf

Johar Ali Vs The State etc

For conviction of an accused person it would be highly unsafe to rely upon testimony of a chance witness when remained uncorroborated and for conviction of a accused on capital charge on the basis of testimony of chance witness, the court has to be at guard and corroboration has to be sought for relying upon such evidence.

ROOH-UL-AMIN KHAN, J

7. It appears from record that occurrence in this case has taken place on 29.04.2014 at 1845 hours, which has been reported by complainant Asad Khan (PW.3) vide Exh.PA/1 at 2010 hours wherein he has charged the appellant along with 5 Cr.A. No.163-P/2018 absconding co-accused Khan Zaman and Lazmin for committing murder of Robaid deceased with firearms. Complainant Asad, the alleged eyewitness, is real cousin of the deceased. Though his evidence is not to be discarded on the sole ground that he is close relative and interested witness, but necessary caution has to be observed in accepting his evidence because it is generally approved proposition that in case of rivalries and enmities, there is general tendency that a person from victim side will pose himself as eye witness of the occurrence and shall rope in the influential members of rival side for participating in the assault, with a particular designed role, therefore, the veracity of this witness has to be examined with utmost care and caution, particularly, with regard to his presence at the spot at the time of occurrence when he has not disclosed the purpose of his visit to the spot. In his initial report Exh.PA/1, the complainant has not stated a single word as to when and how he met the deceased and they both reached the spot. Similarly, he has also not disclosed the purpose of his visit to the spot. In this view of the matter, complainant is also a chance witness. It has now been well settled that for conviction of an accused person it would be highly unsafe to rely upon testimony of a chance witness when remained uncorroborated and for conviction of a accused on capital charge on the basis of testimony of chance witness, the court has to be at guard and corroboration has to be sought for relying upon such

evidence. Reliance may be placed on 2017 SCMR 1710 Anwar Begum vs. Akhter Hussain. In case titled, "Mst. Rukhsana Begum and others Vs 6 Cr.A. No.163-P/2018 Sajjad and others" (2017 SCMR 596), it has been held by the Hon'ble Supreme Court that single doubt reasonably shown that a witness's presence on the crime spot was doubtful during the occurrence, it would be sufficient to discard his testimony as a whole and that said principle may be pressed into service in case where such witness was seriously inimical or appeared to be chance witness. Keeping in view the above settled principles in mind, we will reappraise the evidence furnished by the complainant, the alleged eyewitness.

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/BA-3281--of-2021-Mst--Husna-Bibi-vs-The-State.pdf

Husna Bibil Vs The State

Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman with strict regard to decency.

MUSARRAT HILALI, J :-

Petitioner (Mst. Husna Bibi), through the instant petition, seeks her release on bail in case FIR No.1807 dated 06.092021 u/s 9-1) KP CNSA, registered against her at police station Pishtakhara District Peshawar, wherein she was found in possession of four packets heroin weighing 3280 grams.

Under the provision of Criminal Procedure Code, a woman is entitled to special treatment in matters of body search. Section 52 of the Cr.P.C provides that whenever it is necessary to cause a woman to be searched, the search shall be made by another woman with strict regard to decency. Under no circumstances male police personnel shall actually touch the person of a woman for making search or arrest.

In the instant case, as per the contents of FIR, the complainant found the petitioner standing on road side with a shopping bag in her hand. The shopping bag was searched on suspicion wherefrom allegedly narcotics were recovered. Admittedly, when the petitioner was searched by police on public road in presence of all male police personnel, the norms of decency could not have been observed. The question is that how the petitioner, who is pregnant of six weeks, was searched on road side where there was no prior information of her being involved in trafficking narcotics. It has also been noticed with great concern that though the FIR was registered against the petitioner at 1650 hours but she was sent to Women Police Station at 1950 hours i.e. after a delay of three hours during which she remained in exclusive male police custody as no female constable is shown to have been associated with the proceedings. The situation is extremely intolerable, undesirable and against the statutory and executive directions. That apart, despite lapse of 65 days, the prosecution has failed to produce the FSL report of the contraband allegedly recovered from the petitioner.

In view of the above, this bail petition is allowed.

Above are the reasons of short order of even date.

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/Cr-A-No-852-P-of-2020.pdf

Mukhtaj etc Vs The State etc

Requirements for recording of dying declaration. It is to be proved that the

declaration must be made without the interference of any close relative of deceased.

LAL JAN KHATTAK J.-

10. No doubt, as stated earlier, on extreme right corner of the FIR, there is endorsement of the doctor showing that the patient at the time of lodging of the FIR was alive and conscious but such endorsement alone would not be enough to hold that the contents of the FIR were correct qua the assailants. Of course, declaration given by a person at the time of his death carries great importance as to its truthfulness but there are certain pre-.requisites which must be there in order to believe such declaration as true and one of them is that the declaration must be made without the interference of any close relative of the dying man who is found present around the dier at the time of making the statement and second the declaration must be corroborated by the circumstances prevailing on the spot at the time of occurrence. Furthermore, it is also necessary to see, in order to believe a dying declaration, whether at the time of his death the dying person was capable to narrate the event occurred before his death.

11. On the touchstone of the above, if we look at the dying declaration of deceased Ibn-e-Ameen, it would appear that same was not free from foreign interference as his step brother, namely, Muhammad Abbas Khan (PW-11) was present around him at the time when such statement was being made. It is worth mentioning that in the preceding paragraph we have already disbelieved the testimony of Muhammad Abbas Khan and in such like situation interference on behalf of said witness in the statement of his brother, who was returning to his Creator to make an exaggerated account of the occurrence, cannot be ruled out.

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/Cr.A.-No.713-P-of-2020-judgement-dated-14.09.2021.pdf

Riaz Vs The State and one other

Recovery of incriminating articles on joint pointation of two accused is inadmissible.

ISHTIAQ IBRAHIM, J.

2. Brief facts of the case are that during investigation of the case against the present appellants with regard to murder of deceased Ibne Ameen, they disclosed that they had fired at the deceased through their respective Kalashnikovs and the said weapons have been concealed by them in their house after the occurrence. Thus, they led the police to their house and a Kalashnikov having no number with five rounds of 7.62 bore was recovered on pointation of appellant Riaz Ali from an iron box inside his residential room. Thereafter another Kalashnikov bearing No.5617327729 with ten rounds was recovered on pointation of appellant Rehman Ali which he had concealed in an iron box in his room. Both the weapons were taken into possession vide recovery memo Ex.PW- 1/1 attested by Afsar Khan ASI (abandoned) and Mushtaq Hussain ASI (PW-I).

6. Admittedly, the alleged recovery has been made on joint pointation of the appellants and ajoint recovery memo was prepared regarding both the weapons. Recovery of incriminating articles on joint pointation of two or more accused is inadmissible in evidence under Article 40 of the Qanun-e-Shahadat Order, 1984. In this regard we would refer the judgment in the case titled Ghulam Mustafa Vs. Ali Nawaz and 2 others 2020 M L D 1260 [Sindh

(Hyderabad Bench) , wherein it was held that:

Moreover, it is alleged that the recovery was made on the joint pointation of both the accused and there is plethora of case laws that recovery which is made on the pointation of more than one accused on their joint pointation is inadmissible in evidence and cannot be relied upon. In this respect, we are supported by the dictum laid down by the honorable Supreme Court in the case of Gul Jamal and another v. The State (1980 SCMR 654).

8. The record further transpires that the1.0 has not complied with the provision of section 103, Cr.P.C. Although non-compliance of the said provision by police alone would not damage the entire case of prosecution, however, the 1.0 in the present case has failed to offer any plausible explanation to justify non-association of private witnesses with the recovery of unlicensed weapons from the house of appellant. Moreso, the prosecution has also failed to prove the charge of murder against the present appellants and they have been acquitted by this Court through a separate judgment in the connected Cr.A No. 712-M/2020.

9. In view of the above, prosecution has not proved its case against the appellants beyond reasonable doubt, therefore, the impugned judgment needs reversal in circumstances of the case. Resultantly, this appeal is allowed, the impugned

https://peshawarhighcourt.gov.pk/PHCCMS/judgments/Service-Appeal-No.06-P-of-2021-Kalim-Arshad-Khan-Vs.-PHC,-seeking-seniority,-allowed.pdf

Kalim Arshad Khan Vs Registrar PHC

Whether the appellant can claim seniority with his batch mates when there was no direction of the Hon'ble Peshawar High Court for allowing him seniority and that seniority to be given effect from regular appointment?

IJAZ ANWAR, J.

22. Section 8 of "the Act" read with Rule 10 of "the Rules" deals with the matter of seniority. Section 8(2) of "the Act" provides that "seniority of a civil servant shall be reckoned in relation to other civil servants belonging to the same service or cadre in the same department or office or not, as may be prescribed". Similarly, sub-section (3) of Section 8 provides that "seniority on initial appointment to a service, cadre or post shall be determined as may be prescribed", while Rule 10(a) of "the Rules" prescribes that "in case of members appointed by initial recruitment, in accordance with the order of merit assigned by the Selection Authority as mentioned in Rule-5; provided that persons selected for the service in an earlier selection shall rank senior to the persons selected in a later selection".

23. Admittedly, the appellant has applied for appointment against the post of Additional District & Sessions Judge and appeared in the same selection process whereby, four Judicial Officers were appointed vide Notification dated 28.08.2001, depriving him of his appointment, while this process/selection was held by the Division Bench of the Hon'ble Peshawar High Court as violative of his rights and specific direction for his appointment was issued. Meaning thereby that when he was appointed pursuant to the same selection process, as such, for the determination of his seniority in terms of Rule 10(a) of "the Rules", his seniority shall be determined in accordance with the order of merit assigned by the Selection Committee. The mere fact that the appointment orders were issued belatedly will not deprive the appellant of

his seniority particularly when the Division Bench of the Hon'ble Peshawar High Court has raised eyebrow on the selection process. Moreover, the respondents appointed/promoted in the later selection, prior to the appointment of the appellant, have no right whatsoever to claim seniority over the appellant.

24. The Hon'ble Supreme Court of Pakistan in the case titled "Wazir Khan Vs. Government of NWFP through Secretary Irrigation, Peshawar and others (2002 SCMR 889), while dealing with somewhat similar situation, held that "it is well-settled proposition of law that the appointments made as a result of the selection in one combined competitive examination would be deemed to be belonging to the same batch and notwithstanding recommendation made by the Public Service Commission in parts, the seniority intense, the appointees of the same batch, would be determined in the light of merit assigned to them by the Public Service Commission". Similar view was earlier given by the Provincial Service Tribunal in the case titled **"**Musa Wazir Vs. NWFP Public Service Commission (1993 PLC (C.S) 1188)", wherein, it is held that "when the selection is made out of one competitive examination, it cannot be bifurcated into two or more. The competitive examination being one, the selection has to be one and it cannot be said that any number of selections can be made out of the same competitive examination. Such a practice cannot stand scrutiny or the test of law applicable to the case".

25. The above propositions of law propounded by the Hon'ble Supreme Court of Pakistan in the light of Section 8 of "the Act" read with Rule 17 of the Khyber Pakhtunkhwa (Appointment, Promotion and Transfer) Rules, 1989 (parimateria with Rule 10 of "the Rules") clearly demonstrate that seniority of the civil servants appointed pursuant to a same selection process, is to be determined in the light of the merit assigned by the Selection Committee. In the instant case, the appointment of the appellant was though made on 22.02.2005; albeit, his seniority will be determined along with his batch-mates appointed on 19.09.2001. Reference can be made to the cases titled **"**Fazal Muhammad Vs. Government of NWFP and others (2009 SCMR 82) and Nadir Shah, S.D.O., Minor Canal Cell, Irrigation Sub-Division, Dera Murad Jamali and 2 others Vs. Secretary, Irrigation and Power Department, Balochistan, Quetta and 7 others (2003 PLC(CS) 961)".

27. For the reasons stated above, this Tribunal finds that the appellant has not been assigned his correct seniority along with his batch-mates, thus, the mere fact that he was appointed vide order dated 22.02.2005 would not deprive him of his seniority in terms of Rule 5(c)(ii) read with Rule 10 of "the Rules". As such, this Tribunal holds that the appellant be assigned seniority with effect from the date, his batch-mates of the same selection process were appointed.

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/Cr.A-260-A-2018.pdf

Shahkeel Ahmad Vs The State

Where an accused person wanted the court to believe that some words or actions of the victim had provoked him and on the basis of such provocation he had killed the victim then in all such cases the court was to presume the absence of the circumstances being asserted by the accused person in support of his plea and it was for the accused person to prove through positive and legally admissible evidence

that some provocation was actually offered to him by the victim and such provocation was grave and sudden.

Shahkeel Ahmad, J: -

18. So far as the provocation is concerned, it consists of mainly on three elements, the act of provocation, the loss of self-control both actual and reasonable and the retaliation proportionate to the provocation. It is further observed that there are five conditions for bringing the case of an accused within the ambit of provocation, which are:

(i). The deceased must have given provocation to the accused,

(ii) The provocation must be grave,

(iii) The provocation must be sudden,

(iv) The offender by reasons of the said provocation should have been deprived of his power of self-control and killed the deceased during the continuance of the deprivation of power of control,

(v) The offender must have caused the death of a person, who gave provocation.

19. In the present case, we have minutely examined the evidence produced before the learned trial Court and found that there is nothing on the record to show that the appellant was provoked. The 13 appellants did not take any such plea in the cross examination to the witnesses nor in his statement recorded under section 342, CrPc. If such plea is taken, the accused is required under Article 121 of the Qanoon-e-Shahadat Order, 1984, to have proved the said plea. If no such proof is led by the accused then the Court has to presume the absence of such circumstances. However, if from the facts of the case, a case of provocation appears to have been made out then the above conditions are required to be satisfied before applying the said principle.

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/789-P-2021-Junaid-Khan-Babar..vs..Mst.-Farhad-Begum-etc,-Pltff-give-state-in-favour-of-defdt,-wants-tranposition,-allow,-Or-1-R-1-&-10,-authority,-on-1.10.21.pdf

Junaid Khan Babar and others Vs Mst. Farhad Begum and others

Under O.1, R.10 CPC, the Court has power to order the transposition from the panel of plaintiffs to the panel of defendants and this power can be exercised irrespective of the consent of the party.

SYED ARSHAD ALI, J.

4. The suit is being contested by the defendants. On 27.07.2021, Kamran Babar the special attorney on behalf of the legal heirs of plaintiff No.4 recorded his statement wherein he has confirmed in his examination-in-chief that defendants No.1 and 2 are the legal heirs of Jehangir Khan Babar and thus has supported the claim of defendants No.1 and 2. When the said Kamran Babar recorded his statement as PW-5 which was also adopted by plaintiffs No.5 and 6, the present petitioners moved an application to the trial Court for their transposition to the array of the defendants. The defendants as well as plaintiffs No.4 to 6 contested the said application. The learned trial Court as well as the learned Appeal Court dismissed the said application.

5. Granted that a party cannot be transposed from a panel to another panel without his/their counsel, however, keeping in view the scheme of Order 1 of the Civil Procedure Code, 1908, it appears that the plaintiffs can remain joint only when they are commonly pursuing their relief and once there is conflict/hostility between the

plaintiffs regarding the nature of the relief then obviously the conflicting/hostile plaintiffs should be transposed in the array of defendants.

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/CR-No-173-B-2016.pdf

Faizullah Khan & others vs Gul Daraz Khan & others

Estoppel by acquiescence/Estoppel by record.

MUHAMMAD NAEEM ANWAR, J: -

06. Intrinsically, grievance of the petitioners was that the name of their predecessor Mst. Gul Adama was incorporated in Jamabandi for the year 2001-02 but was cancelled later on and the substitution thereof was categorically mentioned in the first column of Jamabandi where except Mst Gul Adama all others were properly named. It is reflected from the decision of earlier suit that Mst. Gul Adama alias Gul Andama was not alive even at the time of decision of those suits, i.e., 16.05.1990 and in fact Mst. Gul Adama died in the year 1962, therefore, he was rightly not named/incorporated in the Jamabandi for the year 2001-02. Last column of Jamabandt appended with the application by the petitioners reflects that the reference of mutation No. 322, which was confirmed from ADK present in the Court during hearing from record, and this has already been incorporated with L determination of correct shares. Contents of the plaint -7 - v N demonstrate that the petitioners are legal heirs of Sardar Ali Shah who was the son of Mehrab Shah to whom l/3'd share from the inheritance of Mst. Gul Adama as residuary was given. Apart from that, the judgment in civil suit No. 153 and 142 are self-explanatory that predecessor-in-interest of the petitioners Sardar Ali Shah has filed the suit No. l42ll for declaration which was dismissed by the civil court on 16.05.1990 and the judgement and decree was maintained by this Court through the judgment in Civil Revision No. 31 of 1997 decided on 13.03.1998. The petitioners by their own conduct are stopped under the principle of estoppel by acquiescence in accordance with Article I 14 of Qanun-e-Shahadat Order, 1984 which as per Osborn's dictionary "Acquiescence is a species of estoppel. An estoppel arises where the party aware of his rights sees other parties acting upon the mistaken notion of his rights. Injury accruing fro* one's acquiesces in another's action to his prejudice creates estoppel" The judgment in civil suit No. 14211 is an estoppel by record, to the effect that "where a judgment has been given by a competent court, and the effect of it is that the matters decided cannot be reopened by a person who is a party to the judgment or his representative. In India, principle of res judicata is applied to get the same effecf'. It is worth to mention that in the contents of plaint relationship of the petitioners with Mst. Gul Adama was nowhere mentioned nevertheless, after rejection of plaint when they have filed -8- appeal, they have mentioned that Mst. Gul Adama was the widow of Mehrab Shah which fact is repelling to the judgment in C.RNo. 3l of 1997 dated 13.03.1998 where Mst. Gul Adama was shown to be the daughter of Azim Shah from his first wife and Mehrab Shah was the son of Nizam Shah and the findings of this Court in C.R No. 3l of 1997 were not challenged before apex Court as such attained finality. It is by now well settled that judgment/order passed by the Court of competent jurisdiction, if not assailed in the higher forum shall attain finality, Reliance in this regard is placed on the cases reported as "Muhammad Aslam and Shah" (1996 SCMR 1862) and "Kanwal Nain v. Fateh K ' (PLD 1983 SC 53). 07. Though ordinarily, intricate questions of law

and facts cannot be resolved without recording of evidence but when a fact has already been established and resolved cannot be reagitated then of course on the basis of same cause of action which has earlier been alleged and decided by the Court to its logical conclusion, the institution of the fresh suit on the basis of same cause of action and trial of suit filed later on would be nothing but a futile exercise. The Supreme Court in Case titled "Raia Ali Shan versus Messrs. Essem hotel limited and others" 2007 SCMR 741) has held that in view of the Order VII, rule 11, C.P.C. it is the duty of the Court to reject the plaint \ -9 - if, on a perusal thereto, it appears that the suit is incompetent, the parties to the suit are at liberty to draw Courts' attention to the same by way of an application. The Court can, and, in most cases hear counsel on the point involved in the application meaning thereby that the Court is not only empowered but under obligation to reject the plaint, even without any application from apafi, if the same is hit by any of the clauses mentioned under rule 1l of Order VII, C.P.C. Accordingly, when only one legal issue was involved which could have been resolved at the very initial stage of the suit, if the court ceased of the suit had attended to the plaint that would save the precious time of the court, the parties and their hard earned money on one hand and could achieve Goals of National Judicial Policy easily on the other, if the Trial Court would attend to the said observations. It is by now well-settled that incompetent, illegal, vexatious and frivolous suits must be buried at their inception, as the birth of those suits would not only prolong the agony of the parties but the wastage of precious time of the Courts as well. Fruitless and useless litigation must not be encouraged.

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/Cr.A-296-B-2019-judgment-17.11.2021.pdf

Muhammad Gulfam and another Vs. The State and another

The Court of appeal is under obligation to assess and re-assess the already assessed evidence, so that miscarriage of justice could be avoided.

SAHIBZADA ASADULLAH, J.-

“This Court is to strike a balance between the two and to assess as to which of the versions is nearer to the truth and which not. Though in the like matters, when the incident occurs, that too, in the house of a husband, the responsibility shifts to a husband to a greater extent where on one hand the prosecution is to prove its case, on the other, the husband is equally burdened to prove his innocence. We are to walk with a little bit different approach in the instant case as the complainant and her sons claimed to have seen the incident andin such eventuality, the primary duty rests upon the prosecution to establish on record that the incident occurred in the mode, manner and at the stated time. We are conscious of the fact that in the instant episode, the accused/appellant has been singularly charged for the death of the deceased, whereas rest of the two, either for abetment or facilitation. If on one hand in case of single accused substitution is held to be the rarest phenomenon then on the other the Court deciding the fate of the accused is under obligation to search for independent corroboration and be vigilant while assessing the inherent worth of the evidence produced. It is advisable that the learned trial Court in case of a single accused must not beswayed with the impulse that substitution is a rear phenomenon and that it must not take it for granted that in case of single accused, the prosecution is not under obligation to prove its case and that once an accused is charged, he is outrightly be

declared guilty, if the trial Court travels with the impulse then the criminal justice system will always and always be in periland in that eventuality one cannot think otherwise, but miscarriage of justice will always occasion which approach is neither permissible nor finds a room in the system, as Courts are the custodian of the rights of the parties and in all eventualities they will follow the guidelines provided and the principles evolved. In the like situation, it is incumbent upon both the trial as well as the appellate Court to appreciate the evidence collected and thereafter after assessing the collected material the lis is to be answered so that to avoid miscarriage of Justice."

"After evaluating the available record from all angles, this Court reaches to an inescapable conclusion that the incident did not occur in the mode, manner and at the stated time. This Court is to determine that despite the fact that the deceased lost her life in the house of her husband and that the incident was reported by mother of the appellant charging none, whether in that eventuality, the responsibility of the appellant increases and the burden would shift from the prosecution to the accused charged. Had the complainant charged the appellant for the murder of the deceased, even in absence of eyewitness account it would have been the responsibility of the appellant to discharge the burden being husband of the deceased, as it was he who was to convince otherwise, but when the complainant along with witnesses took the burden by posing themselves to be the eyewitnesses of the incident, then in that eventuality, the husband was to do less to establish his innocence and the witnesses to do more to prove him guilty. Though the learned counsel for the complainant placed reliance on a celebrated judgment of the apex Court **titled 'Nazir Ahmad Vs, The State' (2018 S C M R 787)** where the husband was burdened with the responsibility in the like situation, and that the conduct of the accused charged therein, was taken an additional factor, but there too, the liability was never shifted, as the prosecution was held responsible to discharge the burden. True, that in the cited judgment, the apex Court was pleased to put some of the responsibilities on the shoulders of the husband, but never ever the prosecution was absolved of the liabilities to prove its case, in the circumstances, we can quote with convenience case titled **Asad Khan Vs. The State (PLD 2017 Supreme Court 681).** where in the like situation, the prosecution was burdened with the liability to establish the guilt of the accused/appellant and to prove its case to the hilt, by holding that under all circumstances, it is the prosecution to prove its case and even if an accused takes a specific plea and fails to establish the same, he cannot be burdened with the liability to establish his innocence, rather the prosecution was held responsible under all circumstances to bring home charges against the accused charged."

Cite as: 595 U. S. ____ (2022)

SUPREME COURT OF THE UNITED STATES

David Bryon Babcock Vs Kilolo Kijakazi, Acting Commissioner of Social Security

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Civil-service pension payments based on employment as a dual status military technician are not payments based on "service as a member of a uniformed service"

JUSTICE BARRETT delivered the opinion of the Court.

The Social Security Act generally reduces the benefits of retirees who receive payments from separate pensions based on employment not subject to Social Security taxes. The reduction is not triggered, though, by payments "based wholly on service as a member of a uniformed service." We must decide whether this exception applies to civil-service pension payments based on employment as a "dual-status military technician"—a federal civilian employee who provides technical or administrative assistance to the National Guard. We hold that it does not.

Babcock argues that the agency and courts below erred in reducing his Social Security benefits based on his pension for technician employment. The dispute is narrow: All agree that Babcock's separate military pension for his National Guard service does not trigger the windfall elimination provision. And all agree that Civil Service Retirement System pensions generally do trigger that provision. The only question is whether Babcock's civil-service pension for technician work avoids triggering the provision's reduction in benefits because it falls within the exception for "a payment based wholly on service as a member of a uniformed service." 42 U. S. C. §415(a)(7)(A)(III). The answer depends on whether Babcock's technician work was service "as" a member of the National Guard. See §410(m) (defining "member of a uniformed service" to include a member of a "reserve component" as defined in 38 U. S. C. §101(27), which includes the Army National Guard of the United States). It was not. In context, "as" is most naturally read to mean "[i]n the role, capacity, or function of." American Heritage Dictionary 106 (3d ed. 1992); see also 1 Oxford English Dictionary 674 (2d ed. 1989) ("[i]n the character, capacity, or rôle of"). And the role, capacity, or function in which a technician serves is that of a civilian, not a member of the National Guard. The statute defining the technician job makes that point broadly and repeatedly: "For purposes of this section and any other provision of law," a technician "is" a "civilian employee," "assigned to a civilian position" and "authorized and accounted for as" a "civilian." 10 U. S. C. §§10216(a)(1), (a)(1)(C), (a)(2). This statute's plain meaning "becomes even more apparent when viewed in" the broader statutory context. FCC v. AT&T Inc., 562 U. S. 397, 407 (2011). While working in a civilian capacity, technicians are not subject to the Uniform Code of Military Justice. See 10 U. S. C. §§802(a)(3)(A)(ii), 12403, 12405. They possess characteristically civilian rights to seek redress for employment discrimination and to earn workers' compensation, disability benefits, and compensatory time off for overtime work. See 32 U. S. C. §709(f)(5); 42 U. S. C. §2000e–16; 5 U. S. C. §§8101 et seq., 8337(h), 8451; 32 U. S. C. §709(h). And, as particularly significant in the context of retirement benefits, technicians hired before 1984 are members of the "civil service" entitled to pensions under Title 5 of the U. S. Code, which governs the pay and benefits of civil servants. See 5 U. S. C. §2101. These provisions demonstrate that Congress consistently distinguished technician employment from National Guard

We are unpersuaded. To begin with, the only reason Babcock advances for choosing his functional interpretation of "as" is that Congress used the word "capacity" (or the arguably analogous "status") in other provisions and did not do so in the uniformed-services exception. See, e.g., 32 U. S. C. §101(19) ("status as a member"); 10 U. S. C. §723(a) ("employ[ment] in" a "capacity"). But these scattered provisions do not create the kind of "stark contrast" that might counsel adoption of a meaning other than the most natural one. Cf. Astrue v.

Ratliff, 560 U. S. 586, 595 (2010). At most, they illustrate that Congress has employed several variations on the same theme to distinguish between service in different capacities. More importantly, though, Babcock's functional test is inconsistent with the choices that Congress made in the statutory scheme. Determining whether Babcock's technician employment was service "as" a member of the National Guard does not turn on factors like whether he wore his uniform to work. It turns on how Congress classified the job—and as already discussed, Congress classified dual-status technicians as "civilian." Babcock dismisses that distinction as one drawn for purposes of "administrative bookkeeping," but bookkeeping matters when it comes to pay and benefits. * * * Babcock's civil-service pension payments fall outside the Social Security Act's uniformed-services exception because they are based on service in his civilian capacity. We therefore affirm the judgment of the Court of Appeals. It is so ordered.

SUPREME COURT OF INDIA

https://indiankanoon.org/doc/184463694/

Ravinder Kumar Dhariwal vs The Union of India

Bench: Hon'ble Dr. Chandrachud, A.S. Bopanna

No employee working in a Government establishment, who acquires a disability during the course of service shall be (i) terminated from employment; (ii) reduced in rank; or (iii) denied promotion.

JUDGEMENT:

90. The question that comes up before this Court is whether it is sufficient for the appellant to show that his mental health disorder was one of the factors that led to the initiation of disciplinary proceedings against him for misconduct or is he required to prove that his disability was the sole cause of disciplinary proceedings being instituted against him. Section 3 of the RPWD Act provides a PART C general guarantee against non-discrimination and equality to persons with a disability. Section 20 specifically provides that no government establishment shall discriminate against any person who has acquired a disability in any matter relating to employment. Discrimination has been given an expansive definition under Section 2(h) of the RPwD Act, which states thus:

"(h) "discrimination" in relation to disability, means any distinction, exclusion, restriction on the basis of disability which is the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination and denial of reasonable accommodation"

91. Section 2(h) prohibits discrimination on the basis of disability. It is pertinent to note that the provision does not use the phrase 'only' on the basis of disability. This Court in its decisions has observed that while a causal connection may need to be established between the ground for discrimination and the discriminatory act, it is not required to be shown that the discrimination occurred solely on the basis of the forbidden ground. As long as it can be shown that the forbidden ground played a role in the discriminatory action, the action will violate the guarantee against non-discrimination.

104. Sub-Section (3) of Section 3 of the RPwD Act itself contemplates undertaking a proportionality analysis for a rights-limiting measure. Section 3 of the RPwD Act provides thus:

> "**3. Equality and non-discrimination**. — (1) The appropriate Government shall ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.
>
> (2) The appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment.
>
> (2008) 3 SCC 1.

Puttaswamy v Union of India (2017) 10 SCC 1; Puttaswamy (II) v Union of India (2019) 1 SCC 1; AnuradhaBhasin v Union of India (2020) 3 SCC 637; and Internet and Mobile Association of India v. Reserve Bank of India (2020) 10 SCC 274; Akshay N Patel v. Reserve Bank of India Civil No. 6522 of 2021.

(3) No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.

(4) No person shall be deprived of his or her personal liberty only on the ground of disability.

(5) The appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities." (emphasis supplied)

(a) A person with a disability is entitled to protection under the RPwD Act as long as the disability was one of the factors for the discriminatory act; and

(b) The mental disability of a person need not be the sole cause of the misconduct that led to the initiation of the disciplinary proceeding. Any residual control that persons with mental disabilities have over their conduct merely diminishes the extent to which the disability contributed to the conduct. The mental disability impairs the ability of persons to comply with workplace standards in comparison to their able-bodied counterparts. Such persons suffer a disproportionate disadvantage due to the impairment and are more likely to be subjected to disciplinary proceedings. Thus, the initiation of disciplinary proceedings against persons with mental disabilities is a facet of indirect discrimination.

107. The disciplinary proceedings against the appellant relating to the first enquiry are set aside. The appellant is also entitled to the protection of Section 20(4) of the RPwD Act in the event he is found unsuitable for his current employment duty. While re-assigning the appellant to an alternate post, should it become necessary, his pay, emoluments and conditions of service must be protected. The authorities will be at liberty to ensure that the assignment to an alternate post does not involve the use of or control over fire-arms or equipment which may pose a danger to the appellant or others in or around the work-place.

108. The Civil Appeal is accordingly allowed in the above terms.

109. Pending application(s), if any, stand disposed of.

https://www.bailii.org/ew/cases/EWHC/Fam/2021/3527.html

HIGH COURT OF JUSTICE FAMILY DIVISION (Wales)

2021 EWHC 3527 (Fam)

A LOCAL AUTHORITY Vs (1) A MOTHER (2) A FATHER (3) F (A child) (4) A GUARDIAN

MR L. SAMUELS QC (sitting as a Deputy High Court Judge)

38. Where a local authority has care of a child, they cannot deprive that child of her liberty without the agreement of a judge. Case law has established that a child is deprived of her liberty when she is subject to continuous control or supervision and is not free to leave.

39. I do not think this situation is comparable to that in the Hertfordshire CC case. In that case the young person was living in semi-independent accommodation and was able to leave the property which was not locked. He could leave to be with his mother whenever he wished and could spend as long as he wanted to with her. He had unlimited access to his mobile phone and neither he nor his room were ever searched. I see no reference in that case to any history of physical restraint.

40. I do consider that the restrictions imposed upon Fiona amount to a deprivation of her liberty. She is not free to leave the perimeter of the property and her access to the outside areas has to be earned and can be withdrawn at any time. She is not free to be outside the placement unsupervised by an adult. The proposed restrictions would enable staff to enter the bathroom when she is in there to make sure she is safe. It would enable them to be able to search her and remove her possessions if they were concerned about her safety. I appreciate these may not happen very often at the moment, but they are a necessary safeguard. Fiona is monitored every 15 minutes and there is CCTV in the communal areas. I do consider that these proposed measures, when viewed as a whole, would amount to a deprivation of her liberty. When I compare Fiona's situation to that of another child of her age, she is under a great deal more control and supervision than that other child would be. At 14 the doors to that child's home would not be locked to prevent her leaving. She would be able to be outside the property unsupervised to go to school and to see her friends or go to the shops. She would be able to lock the bathroom door and to have privacy when she needs it. She would not be subject to monitoring every 15 minutes.

41. I have considered the argument that Fiona's situation is no different from the other residents at A Children's Home. The difficulty with that is that I do not have much information about their individual circumstances. There can be a number of reasons why the distinction has been made. On close analysis their situation may not amount to a deprivation of liberty. Alternatively, it may do so but for some reason no order may yet have been sought. To my mind what is important is to concentrate on Fiona's situation and not worry too much about the other residents at A Children's Home.

42. The next question for me is whether I am satisfied that such a deprivation of liberty is in Fiona's best interests, whether it is proportionate and whether it is necessary to keep her safe. I have listened to, heard and reflected upon what Fiona and her mother have said, but I have no doubt that these restrictions are necessary and proportionate, for the time being. As I have said, I can see why her family and the professionals trying to help her have been very frightened by her behavior. She has hurt herself in a significant way, most recently in the summer of 2021. She has also tried to take her own life. I know that was in the more distant past but no-one would want to take a risk of that happening again. We all need to be sure that Fiona's behavior has changed and changed for good. She needs to be patient with us and understand our worries. Her positive progress needs to continue for a little longer and to be stress tested. As Fiona herself told me all teenagers are impulsive. But not all teenagers hurt themselves or attempt to do so. I have considered and further amended the proposed regime of control and supervision to be annexed to the order. I have carefully reviewed these proposed deprivations and consider them to be proportionate and necessary given the history of this case.

43. However, as I have already said during the hearing, I would not agree an order authorizing this for a further 12 months. This would be too long. Everyone expects Fiona to be home by September 2022. If that has not happened the court will want to know why and to review, in any event, the ongoing necessity for a DOLS order. I will therefore make the order to last until 26 August 2022 in line with the revised position of the local authority and guardian. I have considered the alternative date in May as proposed by the mother, but I think that is a little too soon. I would emphasize the restrictions authorized are permissive only and are not a requirement. I know the local authority understands that but there should be further communication with A Children's Home to underline that point. It would not be right for Fiona to be subject to a greater degree of control of supervision than is strictly necessary to protect her from harm, simply because of the terms of the DOLS order that is in place.

44. That is my judgment.

9 December 2021
L. Samuels QC

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