

# THE HIGH COURT OF SINDH, KARACHI

## Spl. Cr. Misc. Application No. 612 of 2023

[Usman Bajwa versus The State & others]

Applicant : Usman Bajwa son of Javed A. Bajwa through M/s. Sarfaraz Ali Metlo and Fayaz Ali Metlo Advocates assisted by M/s. Athar Hussain, Faiz Ali Sheeraz Metlo, Farooq Ali, Saleem Nawaz Metlo and Atiya Manzoor Advocates.

Respondents 1&2 : Through Mr. Ashiq Ali Anwar Rana, Special Prosecutor Customs.  
M/s. Alizeh Bashir and Gul Faraz Khattak, Assistant Attorney General(s) for Pakistan.

Respondents 3&4 : Nemo.

Dates of hearing : 30-01-2024, 13-02-2024 & 02-09-2024.

Date of decision : 31-10-2024

## ORDER

**Adnan Iqbal Chaudhry J.** - The Applicant seeks intervention of this Court under section 561-A CrPC in proceedings pending before two special courts below pursuant to FIR No. 19/2023.

2. The FIR lodged by Sub-Inspector of the FIA, Anti-Corruption Circle, Karachi alleged that two Customs officers were intercepted at the domestic departure lounge of Jinnah International Airport Karachi; a search of their official vehicle at the parking lot revealed a substantial amount of local and foreign currency; that on interrogation they confessed it was speed money collected from the customs check-post at Mochko, Kemari for onward distribution amongst various customs officers as part of a network involved in facilitating smugglers in the transport of smuggled goods. The FIR was thus lodged against Customs officers for the offence of criminal misconduct punishable under section 5(2) of the Prevention of

Corruption Act, 1947 [PCA], and for offences of smuggling punishable under clauses (8) and (89) of section 156(1) of the Customs Act, 1969. The Applicant herein, also a Customs officer, was implicated by the arrested officers.

3. Since the offences alleged were punishable under different enactments and triable by separate courts, separate challans were submitted by the FIA, one before the Special Judge (Customs, Taxation & Anti-Smuggling) Karachi for offences of smuggling under the Customs Act, and the other before the Special Judge (Central-I) Karachi for the offence of criminal misconduct under the PCA.

4. On 30-08-2023, when this application first came up before this Court, the prayer for quashing the FIR was declined in view of *Muhammad Farooq v. Ahmed Nawaz Jagirani* (PLD 2016 SC 55) as the Applicant had a remedy before the trial court in section 265-K CrPC. This application under section 561-A CrPC was retained only to examine the following questions of jurisdiction raised by learned counsel for the Applicant:

- (a) whether the FIA had no jurisdiction to investigate the offence of smuggling under the Customs Act ?
- (b) whether separate trials by the two special courts would amount to double jeopardy, prohibited by Article 13(a) of the Constitution of Pakistan ?
- (c) whether a joint trial can be held of both offences by the Special Judge (Central-I) which is seized of the offence under the PCA?

5. Heard learned counsel.

6. The first point raised by learned counsel for the Applicant was that by virtue of section 185-A(1)(a) read with section 185-B(b) of the Customs Act, 1969, only “an officer of customs” can investigate an offence under the Customs Act, and thus the FIA had no jurisdiction to submit a challan to the Special Judge (Customs, Taxation and Anti-

Smuggling). However, section 185-A(1)(a) of the Customs Act also goes on to envisage investigation “by any other officer especially authorized in this behalf by the Federal Government”. By SRO 826(I)/97 dated 20-09-1997 the Federal Government inserted entry No. 10 in the Schedule to the FIA Act, 1974 to bring within the domain of the FIA offences punishable under section 156 of the Customs Act, 1969. Therefore, the FIA was competent to submit a challan to the Special Judge (Customs, Taxation and Anti-Smuggling).

7. Adverting to the argument of double jeopardy, the prohibition in Article 13(a) of the Constitution of Pakistan is that: “No person shall be prosecuted or punished for the same offence more than once”. A similar protection is provided by section 403 of the CrPC. In the same vein, section 26 of the General Clauses Act, 1897 stipulates that: “Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.”

8. It was held by the Supreme Court of Pakistan in *Muhammad Nadeem Anwar v. Securities & Exchange Commission of Pakistan* (2014 SCMR 1376) that the bar in Article 13(a) of the Constitution of Pakistan and section 26 of the General Clauses Act, 1897 was attracted to the ‘same offence’; and the fact that offences under different enactments are committed in one go, does not necessarily make them the ‘same offence’. The test that was approved by the Supreme Court was as under:

“To operate as a bar the second prosecution and the consequential punishment thereunder, must be for 'the same offence'. The crucial requirement therefore for attracting the Article is that the offences are the same, i.e., they should be identical. If however, the two offences are distinct, then notwithstanding that the allegations of fact in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out. That the test to ascertain is whether two offences are the same and not the identity of the allegations but the identity of the ingredients of the offences.”

9. The offences punishable under clauses (8) and (89) of section 156(1) of the Customs Act are facets of 'smuggling', which is defined in section 2(s) of said Act in relation to certain goods is:

“to bring into or take out of Pakistan, in breach of any prohibition or restriction for the time being in force, or in any way being concerned in carrying, transporting, removing, depositing, harbouring, keeping, concealing, retailing or en route pilferage of transit goods or evading payment of customs-duties or taxes leviable thereon.”

On the other hand, the offence of “criminal misconduct” by a public servant under section 5 of the PCA is:

“(a) if he accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the Pakistan Penal Code; or  
.....  
(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.”

Sub-section (4) of section 5 of the PCA goes on to stipulates that:

“(4) The provisions of this section shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this section, be instituted against him.”

10. Clearly, the act of 'smuggling' under the Customs Act, 1969 and that of 'criminal misconduct' under the PCA are separate and distinct acts/offences. The fact that those may have been committed by an accused person in one go does not make them the same offence. Consequently, as held in the case of *Muhammad Nadeem Anwar*, the separate trial of said offences would not attract the bar in Article 13(a) of the Constitution of Pakistan and section 26 of the General Clauses Act, 1897.

11. The fall-back argument of learned counsel for the Applicant was that a joint trial can be had of both offences by the Special Judge (Central-I) which is seized of the offence under the PCA.

12. The offence of 'smuggling' is triable by the Special Judge appointed under the Customs Act, 1969, who is vested with exclusive jurisdiction by section 185-B to try such offence except where it relates to narcotics and narcotic substances. On the other hand, the offence of 'criminal conduct' under the PCA is triable by the Special Judge appointed under the Criminal Law Amendment Act, 1958, who is vested with exclusive jurisdiction by section 5 thereof to try offences specified in the Schedule thereto, which includes offences under the PCA. Though sub-section (7) of section 5 of the Act of 1958 envisages a joinder of charges to also try an offence not in the Schedule, but that could follow only if that other offence was not triable exclusively by another forum. Since jurisdiction of the Special Judge under the Customs Act (to try the offence of smuggling) is 'notwithstanding anything contained in any other law for the time being in force', such jurisdiction cannot be exercised by the Special Judge appointed under the Act of 1958. Therefore, the offences with which the Applicant is charged cannot be tried jointly.

13. Having answered in the negative all questions raised in para 4 above to the jurisdiction of the proceedings before the respective special courts, there is no cause to interfere with those proceedings. The application is dismissed.

**JUDGE**

Karachi  
Dated: 31-10-2024