

Stereo HCJDA-38
Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT

Criminal Appeal No.70907 of 2017
(Jahanzeb Khan Vs. Special Judge, CNS Court, Lahore, etc)

JUDGMENT

Date of hearing	18.09.2017
Appellant by:	Mr. Nasir Khan Afridi, Advocate.
State by:	Mr. Zafar Iqbal Chohan, Special Prosecutor, ANF.

TARIO SALEEM SHEIKH, J:-This appeal under Section 48 of the Control of Narcotic Substances Act, 1997 (the “CNSA”), is directed against Order dated 6-9-2017 passed by the learned Special Court, CNS, Lahore, whereby the application under Section 539-B Cr.P.C. moved by the Appellant was dismissed (the “Impugned Order”).

2. Brief facts of the case are that on 8-4-2015 the Anti-Narcotics Force received a spy information that Appellant Jahanzeb and co-accused Ismail, who was his real brother, were engaged in drug trafficking and they would transport huge quantity of narcotics from Peshawar to Sheikhpura via motorway during the day in Honda Civic Car No. LXM-6252. On this information a raiding party was constituted under the supervision of Kashif Mushtaq, Assistant Director, ANF, which *inter alia* included Inspector Amjad Ali and Constable Naveed. The raiding party reached near the Sheikhpura Motorway Interchange Toll Plaza along with the informer at about 03:00 p.m. and started surveillance of the vehicles exiting that Interchange. At about 03:30 p.m. the wanted car came that way. It was intercepted and the Appellant and his co-accused Ismail were arrested with 14.400 Kgs *charas* and 9.600 Kgs opium. They had concealed some of these narcotics in the secret cavities of the rear bumper of the car. Inspector Amjad Ali drew samples from every packet of the recovered *charas* and opium and prepared sealed parcels for chemical analysis. He also took into his possession the remaining contraband and Car No.LXM-6252 through separate Recovery Memos which were attested by Constables Naveed and Sohail.

Inspector Amjad Ali then sent a complaint to Police Station RD-ANF, Lahore, pursuant to which FIR No.13/2015 dated 8-4-2015 was registered against the Appellant and his co-accused under Sections 9(c) & 15 of the CNSA.

3. Complainant Amjad Ali, Inspector, also conducted the investigation of this case. On the receipt of the report of the NIH Laboratory, Islamabad, confirming that the recovered substances were narcotics (*charas* and opium), an incomplete challan was submitted in the Special Court, CNS, Lahore. The learned Special Court summoned the Appellant and Co-accused Ismail for trial and indicted them on 16-2-2016. Both of them denied the charge and claimed trial. Thereupon, the prosecution was called upon to produce evidence.

4. The prosecution has so far brought four witnesses to the witness-box, including Constable Naveed and Inspector Amjad Ali who recorded their testimony as PW-3 and PW-4 respectively. Car No. LXM-6252 which was allegedly used for drug trafficking was produced as P-15. The Appellant took the plea that the prosecution case was false and no narcotics were recovered from the car P-15. His particular emphasis was on the fact that there were no secret cavities in the car in which the narcotics could be hidden, more particularly its rear bumper. Accordingly, the learned counsel for the Appellant extensively cross-examined Naveed/C (PW-3) and Amjad Ali/Inspector (PW-4) on this point. While the cross-examination of Amjad Ali/Inspector (PW-4) was still in progress, the Appellant filed an application under Section 539-B Cr.P.C. before the Special Court requesting the learned Judge to inspect the rear bumper of the car P-15 to verify whether it had any secret cavities. The learned Special Court dismissed the said application vide Impugned Order dated 6-9-2017 holding that there was no need for any such inspection and the learned defence counsel was at liberty to examine the same if he so desired as it was available in the car park outside the court-room. Hence, this appeal.

5. Learned counsel for the Appellant contended that the Impugned Order was contrary to law. It was arbitrary and had occasioned serious miscarriage of justice. He argued that the charge

against the Appellant and his co-accused was that they were transporting narcotics and had concealed some of them in the secret cavities of the car's bumper. The entire prosecution case would fall to ground if it was proved that there were no such secret cavities therein. It was, therefore, incumbent on the learned Judge to inspect the vehicle and his refusal to do so had caused prejudice to the Appellant who was facing trial on capital charge. Lastly, he contended that the Impugned Order was bad in law inasmuch as it denied the right of a fair trial to the Appellant which was his fundamental right guaranteed under Article 10A of the Constitution of Pakistan, 1973. He placed reliance on "Tameshwar and another v. The Queen" (PLD 1957 Privy Council 227), "Bazal Ahmed Sowdagar v. Nur Muhammad" (PLD 1963 Dacca 852) and the recent judgment of the Hon'ble Supreme Court of Pakistan reported as "Asfandyar and another v. Kamran and another" (2016 SCMR 2084) to buttress his submissions.

6. On the other hand, the learned Special Prosecutor for ANF vehemently opposed the aforementioned contentions. He contended that the Impugned Order was based on cogent reasons. The learned Judge had rightly exercised the discretion vested in him while declining the request of the Appellant to personally inspect the vehicle. According to him, reference of the learned counsel for the Appellant to Article 10A of the Constitution was misplaced as no fundamental right of the Appellant had been infringed.

7. We have heard the learned counsel for the parties and have also perused the documents appended with this appeal.

8. The right to a fair trial is considered to be the bedrock of rule of law and is closely linked with human rights protection, more particularly the right to life, liberty and property. According to some scholars, the aforesaid right is rooted in the twin canons of natural justice, namely, "nemo debet esse judex in propria causa" (no one should be a judge in his own cause) and "audi alteram partem" (no one should be condemned unheard). However, some researches have traced the origin of the basic principles of the said right to *Lex Duodecim Tabularum*—the Law of Twelve Tables—which was the first written code of laws in the Roman Republic

around 455 B.C. These laws ordained that all the parties should be present at a hearing, stressed the principle of equality amongst citizens and prohibited bribery to judicial officers. Nevertheless, it was the Magna Carta in 1215 that laid a solid foundation for articulating this right. Magna Carta proclaimed:

No freeman shall be taken, or imprisoned or disseized or outlawed or exiled or in any way destroyed; nor shall we go upon or send up him save by the lawful judgment of his peers or by the law of the land.

9. Patrick Robinson J.^[1] has observed that “the Magna Carta— like the Twelve Tables— recorded in writing a set of clearly formulated rights ... Subsequently, Courts have looked to the Magna Carta in articulating rights such as trial by jury, habeas corpus, abolition of arbitrary imprisonment, and equality before law”. The phrase “due process of law” originated in a 1354 restatement^[2] of the 1215 Magna Carta. It is important to note that neither the phrase “law of the land” nor “due process of law” were explained in any of the documents but on the authority of Sir Edward Coke it is generally accepted that both the expressions were intended to be synonymous and have the same meaning.

10. After the Magna Carta other important historical references to the right of fair trial are contained in the Treaty of Arbroath of 1320^[3] , Virginia Declaration of Rights (1776) and the French Declaration of the Rights of Man (1789). The United States adopted the Fifth Amendment in 1791 which contained the first use of the phrase “due process of law” in its Constitution. It reads:

‘No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

1. Patrick Robinson, The Right to a Fair Trial in International Law.
 2. Magna Carta was not a statute but was merely a personal treaty between King John and the barons. Consequently, when Henry-III ascended the throne in 1216, the regents of the Kingdom re-issued the Charter in his name. Thereafter it became customary for each successive King to reaffirm the Charter during his reign. This practice continued for about two centuries. [See: Hamid Khan, Comparative Constitutional Law].
 3. This was a declaration of Scottish Independence sent by 51 Scottish nobles and magistrates as evidence of a contract between Robert the Bruce and his subjects. This declaration paved way for development of the notion of equality for all.

law; nor shall private property be taken for public use, without just compensation’.

The Fifth Amendment did not apply to the states. Therefore, the Fourteenth Amendment was proposed by the Congress which was ratified by three-fourths of the states by July 1868. It is couched in almost the same language as the Fifth Amendment.

11. The expression ‘due process of law’ has neither been defined in the Constitution of the United States nor by any Act of the Congress. In “*Twining V. New Jersey*” (211 US 79), the Court observed:

“Few phrases in the law are so elusive of exact apprehension as this one. This Court has always declined to give a comprehensive definition of it and preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decision of cases as they arise.”

12. Be that as it may, the Due Process Clause in the U.S. Constitution, as it is generally called, has been construed as imposing two separate limits on the government (which is taken in a broader sense to include all legislative, executive and judicial officers and institutions) which are usually described as “procedural due process” and “substantive due process”. In his book “Judicial Review of Public Actions,” Justice (Retd) Fazal Karim elucidates that “‘procedural due process’ guarantees ‘only that there is a fair decision-making process before the government takes some action directly impairing a person’s life, liberty, or property. This aspect of the due process clauses does not protect against the use of arbitrary rules or law which are the basis of those proceedings. It is only necessary that a fair decision-making process be used; the ultimate rule to be enforced need not be a fair and just one’”. He further explains that “‘substantive due process’ is concerned with the ability of the judiciary to review the substance of legislation. ‘By substantive review we mean the judicial determination of the compatibility of the substance of law or government action with the Constitution. The Court is concerned with the constitutionality of the underlying rule rather than the

fairness of the process of which the government applies the rule to an individual. Every form of review other than that involving procedural process is a form of substantive review”.

13. In “*A.K. Gopalan v. State of Madras*” (AIR 1950 SC 27), the Constitutional Bench of the Supreme Court of India succinctly described the distinction between application of the concept in the United Kingdom and the United States as follows:

“It is clear, however, that the requirement of ‘due process of law’ in the United States’ Constitution imposes a limitation upon all the powers of government, legislative as well as executive and judicial. Applied in England only as protection against executive usurpation and royal tyranny, in America it became a bulwark against arbitrary legislation : vide *Hurtado v. People of California*, (110 US 512 at p. 532). As it is a restraint upon the legislative power and the object is to protect citizens against arbitrary and capricious legislation, it is not within the competence of the Congress to make any process a ‘due process of law’ by its mere will; for that would make the limitation quite nugatory. As laid down in the case cited above, ‘it is not any act legislative in form that is law; law is something more than mere will exerted as an act of power’. “It means and signifies the general law of the land the settled and abiding principles which inhere in the Constitution and lie at the root of the entire legal system. To quote the words of Daniel Webster in a famous argument before the Supreme Court : vide *Dartmouth College case*, 4 Wheaton p.518: ‘By the law of the land is most clearly intended the general law – a law which hears before it condemns, which proceeds upon enquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society”.

14. The right to fair trial is now universally recognized as a norm of international human rights law. Universal Declaration of Human Rights, 1948, is of paramount importance as it is considered to be declaratory of the customary international law. However, there are other multilateral treaties like the International Covenant on Civil and Political Rights, 1966, and regional human rights instruments, including the European Convention for Protection of Human Rights and Fundamental Freedoms (European Convention), American Convention on Human Rights (American Convention) and African Charter on Human and Peoples’ Rights (African Charter), which impose a binding obligation on the States who have ratified them to guarantee the aforesaid right to their people.

15. Pakistan is a constitutional democracy which rests on rule of law which in turn is pillared on fairness and due process^[4]. This is manifested by various provisions of the Constitution of Pakistan, more particularly Article 4 which reads as under:

4. Right of individuals to be dealt with in accordance with law, etc.—(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

(2) In particular---

- (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;
- (b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and
- (c) no person shall be compelled to do that which the law does not require him to do.

16. The above-mentioned Article guarantees that every citizen of Pakistan and every person for the time being in the country shall be treated in accordance with law and ensures constitutional protection of life, liberty, body, reputation and property. It bars the government from taking any action in this country for which there is no legal sanction. In “*Ch. Manzoor Elahi v. Federation of Pakistan etc*” (PLD 1975 SC 66), it was held that Article 4 embodies the rule of law. It is pertinent to note that this provision is inviolable and cannot be suspended even when an emergency is proclaimed in the country under Part-X. In his book “Commentary on the Constitution of Pakistan, 1973, Muhammad Munir wrote: “...[it] confers a right which is more basic than fundamental rights because while the fundamental rights can be suspended, the right given by Article 4 cannot.” In “*Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri*” (PLD 1969 SC 14), while dilating on Article 2 of the Constitution of 1962, which was *pari materia* with Article 4 of the Constitution of 1973, the Hon’ble Supreme Court of Pakistan observed that it was comparable to the American “due process clause”. Hamoodur Rehman J. wrote: “The words ‘in an unlawful manner’ in sub-clause (b) of Article 98(2)

4. Liaqat Ali Chughtai v. Federation of Pakistan, through Secretary Railways, and 6 others (PLD 2013 Lah. 413).

have been used deliberately to give meaning and content to the solemn declaration under Article 2 of the Constitution itself that it is the inalienable right of every citizen to be treated in accordance with law and only in accordance with law. Therefore, in determining as to how and in what circumstances a detention would be detention in an unlawful manner one would inevitably have first to see whether the action is in accordance with law, if not, then it is action in an unlawful manner. Law is here not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country, including even the judicial principles laid down from time to time by the superior Courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may well be, as has been suggested in some quarters, that in this sense it is as comprehensive as the American ‘due process’ clause in a new garb”.

17. However, in the subsequent case of “*Fauji Foundation and another v. Shamimur Rehman*” (PLD 1983 SC 457) the Hon’ble Supreme Court clarified that by the word “comprehensive” used in *Begum Agha Abdul Karim Shorish Kashmiri* case (supra) Hamoodur Rehman J. “only meant to emphasize the principles of natural justice as obtaining in the judicial principles of ‘due process clause’ for judging actions against persons in regard to their life, liberty or property[he] could not have meant the natural law-cum-due process clause limitation on the legislative powers... for that concept is not obtainable under our constitutional system”.^[5]

18. The right to a fair trial has always been reckoned as the cornerstone of our judicial system. In “*New Jubilee Insurance Company Ltd., Karachi v. National Bank of Pakistan, Karachi*” (PLD 1999 SC 1126), the Hon’ble Supreme Court of Pakistan went to the extent of holding that the said right was associated with the fundamental right of access of justice. However, in the year 2010, the Parliament enacted the Constitution (Eighteenth Amendment)

5. After the insertion of Article 10-A in the Constitution of Pakistan a controversy has arisen as to whether the American concept of ‘substantive due process’ has been made applicable to our constitutional system. Reference in this regard is made to *Shabbir Ahmad v. Kiran Khursheed and 8 others* (2012 CLC 1236).

Act, 2010, *inter alia* to insert Article 10A in the Constitution of Pakistan to elevate the “Right to fair trial” to the status of an independent fundamental right guaranteed thereunder. Article 10A reads as under:

10A. Right to fair trial. — For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

19. Courts have dilated on the significance of Article 10A in a number of cases. In “Babar Hussain Shah and another v. Mujeeb Ahmed Khan and another” (2012 SCMR 1235), the Hon’ble Supreme Court said:

“Although from the very inception the concept of fair trial and due process has always been the golden principle of administration of justice but after incorporation of Article 10A in the Constitution of the Islamic Republic of Pakistan, 1973 vide 18th Amendment, it has become important that due process should be adopted for conducting a fair trial and an order passed in violation of due process may be considered to be void”.

20. In Suo Moto Case No.4 of 2010 (Contempt proceedings against Syed Yousaf Raza Gillani, Prime Minister of Pakistan, regarding non-compliance of Supreme Court’s Order dated 16-12-2009) reported as **PLD 2012 SC 553**, the Hon’ble Supreme Court made the following observations:

“We agree with the learned counsel for the Respondent that the inclusion of the principle of right to a ‘fair trial’ is now a constitutionally guaranteed fundamental right and has been raised to a higher pedestal; consequently a law, or custom or usage having the force of law, which is inconsistent with the right to a fair trial’ would be void by virtue of Article 8 of the Constitution.”

21. In “Warid Telecom (Pvt.) Limited and 4 others v. Pakistan Telecommunication Authority through Chairman” (2015 SCMR 338), the Apex Court ruled:

“...It is a principle of longstanding that whenever adverse action is being contemplated against a person a notice and/or opportunity of having is to be given to such person. This principle has now been elevated to the status of a fundamental right with the incorporation of Article 10A in the Constitution of the Islamic Republic of Pakistan pursuant to the Constitution (Eighteenth Amendment) Act, 2010”.

22. Reference may also be made to the case of “Shabbir Ahmed v. Kiran Khursheed and 8 others” (2012 CLC 1236) in which a learned Single Judge of this Court held:

“Article 10A morphs Article 4 into a more robust fundamental right....Due process is now available to every person as a fundamental right and underscores procedural fairness and propriety in determining his civil or criminal rights. The procedure adopted in determining the rights of the parties must at every step pass the test of fairness and procedural propriety and at all times must honour the law and the settled legal principles”.

23. The above discussion leaves little room to doubt that the right to a fair trial is an inalienable right of a citizen. This is because it protects individuals from the unlawful and arbitrary curtailment or deprivation of other human rights, more particularly the rights to life, liberty and property. But what are the requisites of a fair trial and what does it actually connote? We have already mentioned some important international instruments in the earlier part of this judgment which describe the content of the right to a fair trial. In addition, there are various other instruments that develop and explain the minimum standards for a fair trial. All of them are not binding under the international law but as they have adopted by the political bodies of the United Nations, usually by consensus, they do have a normative value. However, it is a settled principle that an international instrument, even if it constitutes a binding treaty, does not apply to a country unless it is enforced by domestic/municipal legislation. Resultantly, the content of the right to a fair trial varies from nation to nation. For example, in some countries jury trial is considered to be a fundamental requirement for a fair trial while in others it is not.

24. Historically, the right to a fair trial is regarded more important in criminal proceedings. The standards or the criteria by which a trial is assessed in terms of fairness are numerous, complex and are constantly evolving. According to the guide published in March 2000 by the Lawyers Committee for Human Rights, USA, the rights associated with the right to a fair trial may be classified as (a) Pre-trial Rights, (b) Rights During the Hearing, and (c) Post-trial

Rights. Every category consists of a basketful of rights which may be enumerated as under:

Pre-trial Rights:

They include: (i) The prohibition on arbitrary arrest and detention; (ii) The right to know the reasons for arrest; (iii) The right to legal counsel; (iv) The right to a prompt appearance before a judge to challenge the lawfulness of arrest and detention; (v) The prohibition of torture and the right to humane conditions during pre-trial detention; and (vi) The prohibition on incommunicado detention.

Rights During the Hearing:

These rights entail: (i) Equal access to, and equality before the courts; (ii) The right to a fair hearing; (iii) The right to a public hearing; (iv) The right to a competent, independent and impartial court/tribunal established by law; (v) The right to a presumption of innocence; (vi) The right to prompt notice of the nature and cause of criminal charge; (vii) The right to adequate time and facilities for the preparation of a defence; (viii) The right to a trial without undue delay; (ix) The right to defend oneself in person or through legal counsel; (x) The right to examine witnesses; (xi) The right to an interpreter; (xii) The prohibition on self-incrimination; (xiii) The prohibition on retroactive application of criminal laws; and (xiv) The prohibition on double jeopardy.

Post-trial Rights:

They constitute: (i) The right to a judgment which is supported by reasons and is duly published; (ii) The right to appeal; and (iii) The right to compensation for miscarriage of justice.

25. On the other hand, albeit they are equally applicable to criminal trials, the following are emphasized as the minimum requirements for the determination of one's civil rights and obligations^[6], namely: (i) the court/tribunal should be independent and there should be reasonable assurance of its honesty and impartiality; (ii) the court/tribunal should be established under the

6. See “*Aftab Shahban Mirani v. President of Pakistan and others*” (1998 SCMR 1863), “*Babar Hussain Shah and another v. Mujeeb Ahmed Khan and another*” (2012 SCMR 1235), “*Bilal Akbar Bhatti v. Election Tribunal, Multan and 15 others*” (PLD 2015 Lah. 272) and Article 6 of the (British) Human Rights Act, 1998.

law; (iii) all persons should be equal before the court/tribunal; (iv) regular procedure prescribed by law should be followed; (v) the person to be affected should have notice of the proceedings that are initiated against him and must be made aware of the nature of allegations against him (the requirement of “adequate disclosure”); (vi) the person to be affected must be given a reasonable opportunity to defend himself; (vii) the parties should have the right to engage a counsel; (viii) right of public hearing within a reasonable time; (ix) judgment should be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society; and (x) the relevant statute must provide a remedy of appeal.

26. The right to a fair trial applies not only to judicial proceedings but also to administrative proceedings. Some scholars argue that the requirement of fairness should be separately identified and emphasized as an essential component of this concept. The Supreme Court of India adumbrated to this issue in “Zahira Habibulla H. Sheikh and another v. State of Gujarat and others” (AIR 2004 SC 3114). Following extract may be reproduced therefrom with advantage:

“As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the laws of evidence. There is, however, an overriding and, perhaps, unifying principle. As Deane, J. put it: It is desirable that the requirement of fairness be separately identified since it transcends the content of more particularized legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed...”.

27. Lord Mustill has enumerated the following general principles in “Doody v. Secretary of State for Home Department” [(1993) 3 All ER 92, (at p. 106)] to explain what fairness requires:

“(1) Where an Act of Parliament confers an administrative (Read: or judicial) power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its

aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

28. So far as the criminal trials are concerned, while emphasizing that a fair trial should be ensured in all circumstances, in *Zahira Habibulla H. Sheikh* case (supra) the Supreme Court of India adverted to an important aspect of the matter which the criminal courts must always bear in mind while conducting trials. It said:

“...crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata....It will be not correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson’s eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society.”

29. In Pakistan, as already noted, Courts are bound by a constitutional command to ensure fair trial and due process in all proceedings. Neither the Constitution nor any statutory law specifically define these terms. However, the broad principles highlighted hereinabove have consistently been followed and rich jurisprudence has developed over the years. For illustrative purpose we may refer to some of the important judgments. In “*University of Dacca v. Zakir Ahmed*” (PLD 1965 SC 90), the Hon’ble Supreme Court of Pakistan held that in all proceedings, whether judicial or administrative, the principles of natural justice should invariably be observed even though there may be no positive words in the statute whereby the power is vested to take such proceedings, for in such

cases this requirement is to be implied into it. In *Begum Agha Abdul Karim Shorish Kashmiri* case (supra), the Apex Court held that where the matter relates to the deprivation of liberty of a citizen, the Court could satisfy itself that the action taken is not a mere colourable exercise of power or fraud upon the statute. In “*Samiuddin Qureshi v. Collector of Customs*” (PLD 1989 SC 335), it was ruled that conjectures or suspicions can never take the place of proof of fact. “*Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others*” (PLD 1993 SC 341) ordained that the tribunal or the Court which has to adjudicate a lis should be free from bias. “*Mehram Ali and others v. Federation of Pakistan and others*” (PLD 1998 SC 1445) struck down Section 19(10)(b) of the Anti-Terrorism Act, 1997, which provided for trial of an accused in absentia on account of his misbehaviour in the Court. In “*Tanvir Ashraf v. Ch. Riasat Ali and 5 others*” (2004 YLR 659), a Full Bench of this Court held that in order “to arrive at a finding adverse to some person not only cogent evidence is required but also that affected person has to be confronted with the material sought to be used against him ... and the said person is also entitled to an opportunity of defence to rebut the material”. More recently, in “*National Bank of Pakistan and 117 others v. SAF Textile Mills Ltd. and another*” (PLD 2014 SC 283) Section 15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, was assailed which authorized a financial institution to sell a mortgaged property without intervention of the Court if the borrower committed a default. The august Supreme Court declared the said provision void on the ground that it neither provided a remedy to the mortgagor to object to the sale by the financial institution nor ensured a transparent sale and even otherwise it militated against the principle of fair trial and due process. Again, in “*Shabbir Ahmed v. Kiran Khursheed and 8 others*” (2012 CLC 1236) this Court declared the action of the Town Municipal Administration against the petitioners unconstitutional as it failed to issue them a “reasonable notice” to alter the terms and conditions of their lease. Then, in “*Liaqat Ali Chughtai v. Federation of Pakistan through Secretary Railways and*

6 others” (PLD 2013 Lahore 413), this Court held that adequate disclosure is an essential ingredient of due process.

30. Legislature’s wisdom is not prescribing a constitutional/statutory definition for “fair trial” could be that it is a constantly developing concept. The Hon’ble Supreme Court of Pakistan took cognizance of this issue in *Suo Moto case No.4 of 2010* (PLD 2012 SC 553), supra, and ruled that:

“While incorporating Article 10A in the Constitution and making the right to a ‘fair trial’ a fundamental right the Legislature did not define, or describe the requisites of a ‘fair trial’. By not defining the term the Legislature perhaps intended to give it the same meaning as is broadly universally recognized and embedded in our own jurisprudence”.

31. Coming to the instant appeal, we agree with the first submission of the learned counsel for the Appellant that the Appellant is entitled to a fair trial under Article 10A of the Constitution and that it is his fundamental right. In order to appreciate his contention that the Impugned Order is arbitrary and has caused miscarriage of justice, we have read the same minutely. We have noted that it is bereft of all reasoning. The learned trial Judge has simply stated that Car No.LXM-6252 from which the narcotics were allegedly recovered was parked outside the court-room and the learned Defence Counsel was at liberty to inspect the same. In his opinion, it was not necessary for him to inspect it. He wrote: “It is discretionary with the Court to make physical inspection which is not necessary for just conclusion in this case”. Albeit the learned Special Prosecutor for ANF has strenuously tried to defend the Impugned Order, he could not persuade us about its legality.

32. According to Vice-Chancellor Knight Bruce (1846)^[7], right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. Perusal of the record shows that the precise defence plea is that the prosecution story is concocted and that narcotics were foisted on the Appellant and his co-accused. Since the prosecution alleges that some packets

7. See AIR 2004 SC 3114.

of the contraband substance were also recovered from the secret cavities of the car's bumper, the Appellant seeks to demonstrate that no such cavities exist. Indeed, the inspection of the car in general and its bumper in particular is imperative for a just decision of the case. Denial of an opportunity to the Appellant to make the aforesaid demonstration would be a denial of his fundamental right to a fair trial.

33. Learned Special Prosecutor contended that the Appellant had wrongly invoked Section 539-B Cr.P.C. as the same was not applicable to the facts of the instant case. He read out the statutory provision before us to argue that it pertains to local inspections only. According to him, it empowers the trial Judge or a Magistrate to visit and inspect only the place of incident if it is necessary for proper appreciation of the evidence adduced at the trial. It cannot be stretched to require him to inspect the car parked outside the court-room. In order to appreciate this contention it is necessary to have a look at Section 539-B Cr.P.C. which is reproduced hereunder in extenso:

539-B.Local inspection.-- (1) Any Judge or Magistrate may at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry of trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection. (2) Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost.

(emphasis added)

34. In our opinion, the aforementioned argument is based on misconstruction of law inasmuch as it fails to take into consideration the words "any other place" used in the Section. Obviously the car cannot be brought into the court-room. Therefore, "any other place" would include the place where it is parked. In "Ch. Sajid Mehmood v. Inspector General of Police, I.C.T. Islamabad and 3 others" (2015 YLR 81), a learned Single Judge of the Islamabad High Court ruled that the Magistrate could invoke Section 539-B Cr.P.C. to visit the place where the vehicle was parked and inspect the same to find out whether its engine and chasis numbers were tampered and, if

necessary, he could also issue directions for its examination by forensic experts. Legislature has purposely employed the above-said words in Section 539-B Cr.P.C. to meet the situations like the present one because otherwise the trial would be strangled.

35. There is no more issue in the Impugned Order that needs a comment. The tenor of the Impugned Order shows that while holding that it was not necessary to inspect the car’s bumper, the learned Special Judge expressed his inclination to accept the statement /observations of the learned Defence Counsel if he made any inspection. We wish to point out that even such a course, if adopted, would be contrary to law. The trial Court is obligated to make inspections under Section 539-B Cr.P.C. personally and cannot delegate his powers to anybody by appointing a commission or otherwise. Furthermore, he should record a memorandum of any relevant fact observed at such inspection which shall form part of the file. The case-law cited by the learned counsel for the Appellant^[8] fully supports our view.

36. In view of the foregoing, we **allow** this appeal and set aside the Impugned Order. The Appellant’s application under Section 539-A Cr.P.C. stands accepted.

(Muhammad Yawar Ali)
Acting Chief Justice

(Tariq Saleem Sheikh)
Judge

Approved for reporting

Acting Chief Justice

Judge

Yasir*

8. See Paragraph-5 of this judgment