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JUDGMENT SHEET

LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Writ Petition No. 58123/2022

Salman Mushtaq

Vs.

Ex-officio Justice of Peace etc.

<u>JUDGMENT</u>

Date of hearing:	**7.4.2023**
For the Petitioner:	Mr Nasir Mehmood Ch., Advocate.
For Respondents No.1 & 2:	Mr Sittar Sahil, Assistant Advocate General.
For Respondent No.3:	Ch. Umar Hayat Kamran Rajoka, Advocate.
Research assistance:	Mr Kashif Iftikhar, Research Officer, Lahore High Court Research Centre.

"God made man, man made money, and money made man mad."

– Anonymous

<u>Tariq Saleem Sheikh, J.</u> – Respondent No.3 filed an application under section 22-A of the Code of Criminal Procedure, 1898, before the Ex-officio Justice of Peace, Jhang, stating that he had close relations with Salman Mushtaq (the Petitioner). About three years ago, the Petitioner told him he knew a public servant in the Civil Secretariat who could get him appointed as a Senior Clerk in the Civil Secretariat, Lahore. Respondent No.3 stated that he settled the deal at Rs.150,000/- and paid Rs.100,000/- to the Petitioner upfront while the remaining sum was payable on completing the job. In January 2019, the Petitioner handed him Office Order No. NAC/PF-831/2010/24360 dated 18.01.2019 in the District Courts at Jhang, after which he paid him the remaining Rs.50,000/-. Muhammad Atif Iqbal and Muhammad Amir Khan were present during both transactions. The said Office Order was later found fake. Respondent No.3 contended that the Petitioner had committed a cognizable offence and prayed for a directive to the Respondent Station House Officer to register an FIR against him. The Ex-officio Justice of Peace accepted his application vide order dated

23.09.2022. The Petitioner has challenged that order through this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution).

2. The Petitioner denies the allegation levelled by Respondent No.3 and terms it *mala fide* and baseless. However, in his report dated 16.09.2022, the S.P. (Investigation)/District Complaint Officer, Jhang, has supported the version of Respondent No.3, except that he had exaggerated the amount. According to him, he paid Rs.50,000/- for the task, not Rs.150,000/- as alleged.

Discussion

3. There is no universal definition of bribery. However, all the definitions agree that it involves someone in a position voluntarily breaching the trust in exchange for a benefit. That benefit may not necessarily involve cash. It can take various forms, such as extravagant gifts, hospitality, expenses, access to riches, or a favour for a relative, friend, or favoured cause.[1] Transparency International defines bribery as "the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust."[2] Bribery may be active or passive. "When a person offers, promises or gives a bribe, it is called 'active bribery'; and when a person requests, receives or accepts a bribe, it is called 'passive bribery'."[3]

4. "Bribery" is sometimes used interchangeably with "corruption". Corruption includes any illegitimate use of office and may include various types of crime. In contrast, bribery is limited to giving or accepting payment or other unlawful advantages. The World Bank defines "corruption" as the "abuse of public power for private benefit."[4]

5. Bribery and corruption can have devastating socio-economic impacts. It affects the availability, quality, and accessibility of human rights-related goods and services. Moreover, it undermines the

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[1] What is bribery? *Global Anti-Bribery Guidance, Transparency International UK.*
Available at: https://www.antibriberyguidance.org/guidance/5-what-bribery/guidance

[2] *ibid*

[3] *ibid*

[4] Working Paper of the International Monetary Fund, WP/98/63 (May 1998). *"Corruption Around the World: Causes, Consequences, Scope, and Cures."*
Available at: https://www.imf.org/external/pubs/ft/wp/wp9863.pdf

functioning and legitimacy of institutions and processes, the rule of law, and ultimately, the State itself.[5] According to the International Monetary Fund, corruption increases public spending while decreasing government revenue. As a result, it makes it more difficult for the government to adopt sound budgetary policies and leads to bigger fiscal deficits. As corruption permits powerful people to profit from government actions at the expense of the rest of society, it fosters economic disparity. It also inhibits economic growth by distorting markets and resource allocation.[6]

6. Islam condemns bribery and corruption. In Surah Baqara, Verse 188, the Quran commands:

> وَلَا تَأْكُلُوْٓا اَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُدْلُوْا بِهَآ اِلَى الْحُكَّامِ لِتَاْكُلُوْا
> فَرِيْقًا مِّنْ اَمْوَالِ النَّاسِ بِالْاِثْمِ وَاَنْتُمْ تَعْلَمُوْنَ

> And do not consume one another's wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].

In a Hadith narrated by Abdullah ibn Amr, the Holy Prophet (peace be upon him) said:

> لَعَنَ رَسُوْلُ اللّٰهِ صَلَّى اللّٰهُ عَلَيْهِ وَسَلَّمَ الرَّاشِيَ وَالْمُرْتَشِيَ

> Allah's Messenger cursed the one who bribes and the one who takes bribes. [Abu Dawud – 3580].

7. Corruption is found in all countries – big and small, rich and poor. Lately, the international community has started focusing on it. OECD Anti-Bribery Convention (1997)[7] makes it a crime for companies and individuals to pay bribes to foreign public officials. UN Convention Against Corruption (2003) covers five main areas: preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange. The Convention addresses many forms of corruption, including bribery, trading in influence, abuse of functions, and various acts of corruption in the private sector. It has a dedicated chapter on asset recovery which

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[5] Corruption and human rights, OHCHR and good governance. Available at: https://www.ohchr.org/en/good-governance/corruption-and-human-rights

[6] See note 4.

[7] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

aims to return assets to their rightful owners, including countries from which they had been illegally taken.[8] This Convention supplements the United Nations Convention against Transnational Organized Crime, another landmark instrument.

8. It is difficult to detect bribery offences because they are secretive, and there is no immediate victim in the traditional common law sense. Therefore, the fight against bribery must begin with an efficient legal framework and adequately trained investigators. The links to other economic and financial crimes, and the corresponding capacity and skills required by investigators and prosecutors, such as forensic accounting, electronic evidence analysis, and cross-border information sharing, present additional challenges in investigating bribery.[9] Pakistan ratified the UNCAC on 31 August 2007. Although we have enacted several laws to curb corruption, according to the 2021 Corruption Perceptions Index reported by Transparency International, Pakistan is the 140 least corrupt nation out of 180 countries.[10] Pakistan must take quick corrective action.

9. At common law, the term “accomplice” was understood broadly to include principals in every degree and accessories to the crime. Anyone who “receives, relieves, comforts or assists” an offender was regarded as having participated in his offence and deserved virtually the same penalty as he did. Michael Allen states that while the consequence of conviction as a principal or as an accessory is the same, it is important to distinguish them in some circumstances. The *mens rea* required of the accessory differs from that of the principal, and *mens rea* must always be proven, even when the principal’s offence is one of strict liability.[11]

10. There are several crimes which cannot be committed without the concurrent act or cooperation of two or more people. A person is an accomplice if his participation is corrupt and criminal. In

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[8] United Nations Convention against Corruption. https:www.unodc.org/unodc/en/treaties/CAC/

[9] Effective action against bribery: criminalization and enforcement of national and transnational bribery offence under the United Nations Convention against Corruption CAC/COSP/IRG/2020/CRP.16/

[10] https://www.transparency.org/en/countries/pakistan

[11] Michael Allen, *Textbook on Criminal Law,* 7th Edn., p.207.

People v. Coffey, (1911) 161 Cal. 433 [119 p.901, 39 L.R.A.N.S. 704], the California Supreme Court explained:

> "To the crime of seduction, two parties are necessary, but the cooperation of the seduced is not criminal. She is a victim and is not, therefore, an accomplice of the seducer … In cases of abortion, where the law denounces the commission of abortion, some cases hold that the consenting pregnant woman is not an accomplice. These decisions doubtless arise in part out of a tenderness for the sex and a consideration of the extreme temptations by which a woman so situated may be beset. Under our law, a woman may or may not be an accomplice, depending upon her part in the transaction. Thus, she may consent to taking the drugs or the performance of the operation in ignorance of the intended purpose. She may, indeed, be coerced into submission, in neither of which cases would she be an accomplice. But if a woman voluntarily solicits the performance of such an operation upon herself and to that extent induces it, it is impossible to see how she can fail to have been an instigator and encourager of the crime and so an accomplice … In adultery and fornication, where the willing consent of the woman is proven or assumed, the courts have found no difficulty in declaring her to be an accomplice of the man. For there, differing from abortion, no considerations of the temptation of the woman's hard lot operate to soften the courts' views. They are accomplices the one with the other because their conduct is corrupt, and each has mutually aided the other in committing a crime to which the corrupt participation of the two is necessary."

11. Here, for completeness, it may be pertinent to look at the effect of withdrawal from the joint enterprise. Allen states that if A has encouraged D to commit an offence, or is present assisting D to commit an offence, A's withdrawal from the enterprise before the offence is committed will not affect his liability for incitement or conspiracy or attempt where the principal has reached the stage of a "more than merely preparatory act" before A withdraws. Actual withdrawal from the enterprise must be effective if A is to escape liability for the completed offence. A mere change of heart without more is not sufficient. Moreover, where practicable and reasonable, the communication must be timely and serve unequivocal notice upon the other party to the common unlawful cause. If he proceeds upon it, he does so without the further aid and assistance of those who withdraw. However, such communication may not be necessary where violence is spontaneous rather than pre-planned. The intention to withdraw may be ascertained from the party's/accessory's conduct or the words spoken at the relevant time.[12]

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[12] *ibid.*, p.227

12. In view of the law discussed above, the parties to any criminal agreement are accomplices if the deal constitutes a crime. Conspiracies are typical examples of arrangements that constitute crimes themselves. All the conspirators are principals as well as accomplices.

13. At common law, the giver and receiver of the bribe are principals in the crime and thus accomplices of each other. The giving and the receiving are reciprocal.[13] In ***People v. Coffery***, the defendant (Coffey) was convicted for receiving a bribe in granting a franchise for an overhead trolley system to the United Railroads of San Francisco. The principal witness for the prosecution was Gallagher, himself a supervisor, who testified under a promise of immunity, i.e., as an approver. He swore that he acted as the intermediary of Ruef and influenced the board members in relation to the corrupt bargain. The question of law raised before the California Supreme Court was whether Gallagher was an accomplice of Coffey in the corrupt agreement and whether his testimony could be relied upon without corroboration. The Court ruled that he was indeed an accomplice. It reasoned:

> "The charge against this defendant, as we have seen, is under section 165 of the Penal Code. It is not for asking or soliciting a bribe. It is for "agreeing" to receive and "receiving" a bribe. The agreement necessarily carries with it the essential concept of a criminal and corrupt bargain. There can be no agreement without a meeting of minds, and a meeting of minds for this base bargain is declared to be a crime. There is nothing in the law to suggest even that in such a crime, the two parties stand in any different position from that occupied by two who agree to fight a duel. In such an agreement, the act of the person who contracts to pay the consideration is admittedly base, corrupt, and criminal. Moreover, his conduct is essential to the very existence of the crime of agreeing. How, then, shall it be said that he is not, within the narrowest or the fullest meaning of the law, an accomplice of the man agreeing to take the bribe? He is an actual participant in the crime, as well as an aider, abettor, adviser, and encourager in its commission, for it is to be remembered that in the case at bar the crime itself is the agreement. An officer may solicit bribes, may ask for bribes, and may advertise his willingness to accept bribes. Each of these acts is a separate, distinct, and recognized crime, but no one of them is the crime of agreeing to take a bribe, which *ex vitermini* requires the guilty cooperation of another. (*United States v. Deitrich*, page 451 126 Fed. 664.) Moreover, since, as we have seen, by all of the authorities, saving one, when the bribery is completed, the payer of the bribe and the recipient of the bribe are reciprocally accomplices in the bribing, it cannot successfully be argued that in the perfected agreement for the accomplishment of this crime the same two persons are not accomplices."

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[13] *People v. Coffey*, (1911) 161 Cal. 433 [119 p.901, 39 L.R.A.N.S. 704].

14. As adumbrated, our country has several laws to curb corruption and corrupt practices. Since the general law, Pakistan Penal Code, 1860 ("PPC"), applies to the present case, I would confine my discussion to it. Section 161 PPC makes it an offence for a public servant to take gratification other than legal remuneration in respect of an official act. Section 162 seeks to punish anyone who accepts or obtains, or attempts to take illegal gratification to influence any public servant in performing his functions. Section 163 criminalizes obtaining and attempting to obtain gratification for exercising personal influence with a public servant. Section 165 prohibits and punishes a public servant who accepts, or attempts to get a valuable thing, without consideration, from a person concerned in a proceeding or business transacted by such public servant. Sections 164 and 165-A criminalize abetment of the offences under sections 162, 163, and 165. Section 165-B PPC excludes certain abettors. It states that a person shall be deemed not to have committed an offence under section 161 or 165 PPC if he is induced, compelled, coerced or intimidated to offer or give graft, or any valuable thing without consideration, or for inadequate consideration, to a public servant.

15. In law, an *abettor* is a person, who knowingly and voluntarily, aids another in committing a crime and thus becomes equally liable for it. An abettor is one type of accomplice, the other being an accessory who helps the criminal before or after the crime.[14] "The terms *accessory* and *abettor* derive from the English common law, which distinguished between accomplices and principals in assessing guilt for a crime. (An abettor was also known in the common law as a *principal in the second degree*.) Modern statutes abolish these differences and consider all accomplices as principals. It is no longer necessary to prove which kind of accomplice a person is or to find the principal guilty before the accomplice can be convicted."[15] A person may be punished as a principal when a crime has been committed, and he is proven to have assisted in its conduct.

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[14] Encyclopedia Britannica, https://www.britannica.com/topic/abettor

[15] *ibid.*

16. In Pakistan Penal Code, Chapter V deals with abetment. It expressly recognizes that the bribe-giver is an abettor in the bribery offence. The Explanation to section 109 PPC states that "an act or offence is said to be committed in consequence of the abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment." Illustration (a) to section 109 reads as follows:

> "(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in section 161."

17. One may also refer to Chapter IX-A of PPC. Section 171-B PPC read with section 171-E sanctions bribery in elections. Sub-section (2) of section 171-B states that any person who offers, agrees to give, offers, or attempts to procure gratification shall be deemed to give gratification. Interestingly, where *mens rea* can be established, even treating is considered bribery. The Explanation to section 171-E elucidates that "treating" means the type of bribery where the gratification consists of food, drink, entertainment, or provision.

18. According to the Explanation to section 109 PPC reproduced above, an act or offence is also considered to be a result of abetment when it is committed in pursuance of a conspiracy. The following excerpt from *Corpus Juris Secundum* (Volume 15) elucidates the concept of "conspiracy":

> "[Conspiracy means] a combination of two or more persons intentionally participating in the furtherance of a preconceived common design and purpose is essential to constitute a conspiracy … one person cannot conspire with himself. Furthermore, there must be a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy. The mere fact that each of several defendants acted illegally or maliciously with the sumo end in view does not constitute a conspiracy, unless such acts were done pursuant to a mutual agreement … the mere knowledge, acquiescence, or approval of the act, without cooperation or agreement to co-operate, is not enough to constitute one a party to a conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose … no formal agreement is necessary; it is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offence charged, although such agreement is not manifested by any formal voids or by a written instrument."[16]

[16] The Supreme Court of Pakistan cited this excerpt with approval in *Zulfikar Ali Bhutto v. The State* (PLD 1979 SC 53).

19. Pakistan Penal Code defines "criminal conspiracy" as under in section 120-A:

> **120-A. Definition of criminal conspiracy**.– When two or more persons agree to do, or cause to be done,
>
> (1) an illegal act, or
>
> (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Section 120-B PPC prescribes punishment for the offence of criminal conspiracy.

20. In ***Zulfikar Ali Bhutto v. The State*** (PLD 1979 SC 53), the Supreme Court of Pakistan held that the offence under section 120-A PPC is committed when two or more persons agree to do or cause to be done an illegal act or a legal act by unlawful means. It further explained:

> "The essence of the offence of conspiracy is the combination of agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises, and the offence is committed as soon as the agreement is made, and the offence continues to be committed so long as that combination persists, that is, until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The *actus reus* in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other."

21. In ***Suresh Chandra Bahri v. State of Bihar*** (AIR 1994 SC 2420), while dilating on the analogous provisions of the Indian Penal Code, the Supreme Court of India stated that where the agreement is for the accomplishment of an act which by itself constitutes an offence, the prosecution need not prove any overt act. Criminal conspiracy is established by proving such an agreement. In ***State through S.P. (CBI/SIT) v. Nalini and others*** (1999 Crl. LJ. 3124), the Supreme Court of India held that a criminal conspiracy is a partnership in crime, and each conspirator has a joint or mutual agency for the prosecution of a common plan. Thus, if two or more people form a conspiracy, any act done by any of them in pursuance of the agreement is, in legal terms, the act of each of them, and they are jointly liable for it. It means that

everything said, written, or done by any conspirator in execution or furtherance of the common purpose is deemed to have been spoken, done, or written by all of them. This joint responsibility extends not only to what any of the conspirators do under the initial agreement but also to collateral acts incidental to and arising from the original purpose. Once the conspiracy's goal is achieved, any further unlawful act, such as providing asylum to an absconder, does not make the accused a part of the conspiracy.

22. The upshot of the above discussion is that, subject to section 165-B PPC, both the bribe-giver and the bribe-taker can be prosecuted. But can the bribe-giver reclaim the bribe money from the bribe-taker?

23. English law has a longstanding aversion to claims based on the claimant's own illegal or immoral conduct. In ***Holman v. Johnson***, (1755) 1 Cowp 342 at 343, Lord Mansfield CJ laid down, as a principle of public policy, that no court will assist a man whose cause of action is based on an immoral or an illegal act. He stated:

> "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*."[17]

24. Even after more than 240 years, Lord Mansfield's above dictum remains one of the most authoritative pronouncements of the law

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[17] The complete Latin maxim is: "*in pari delicto potior est conditio defendentis*", which literally means "where both parties are equally in the wrong the position of the defendant is the stronger." In Herbert Broom's *"A selection of Legal Maxims"* (10th Edition), the maxim is explained as follows:

> The maxim, *in pari delicto portior est conditio defendentis*, is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who has paid over money, or handed over property, in pursuance of an illegal or immoral contract, to recover it back; 'for the courts will not assist an illegal transaction in any respect'. The maxim is therefore, intimately connected with the more comprehensive rule of our law, *ex turpi causa non oritur actio*, on account of which no court will 'allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal'; and the maxim may be said to be a branch of that comprehensive rule: for the well-established test, for determining whether the money or property which has been parted with in connection with an illegal transaction can be recovered in a court of justice, is to ascertain whether the plaintiff, in support of his case, or as part of his cause of action, necessarily relies upon the illegal transaction: if he 'requires aid from the illegal transaction to establish his case,' the court will not entertain his claim.

of illegality.[18] Yet, because he did not elucidate what constituted an "immoral" or an "illegal" act, an "incoherent mass of inconsistent authorities"[19] resulted, and sometimes the decisions appeared "arbitrary, unjust, and disproportionately harsh."[20] Finally, in ***Patel v. Mirza***, [2016] UKSC 42, [2016] 1 W.L.R. 399], a case heard by a panel of nine Justices, the U.K. Supreme Court abandoned the conventional rules and adopted "a policy-based" or "range of factors approach."[21] It would be useful to look at the facts of the case, which were as follows: Patel, the claimant, paid Mirza (the defendant) sums totalling £620,000 under an arrangement in which Mirza agreed to use the money to wager on the movement of shares using inside information. Section 52 of the Criminal Justice Act of 1993 makes it an offence to utilize inside knowledge to trade in stocks (for example, by betting on their movement). Therefore, this was an agreement to commit a crime. The anticipated inside information was not forthcoming, so the agreement could not be carried out. Patel sought payback of the £620,000 relying on the principle of unjust enrichment. Under the conventional rules, he would be entitled to restitution of the £620,000 because the money was paid for a completely failed consideration. Patel received nothing in return for his £620,000, while Mirza got £620,000 for doing nothing. Mirza pleaded the defence of illegality and argued that the claim should be dismissed and that he should not be required to repay the money. He succeeded before the trial judge, who applied the reliance rule, which states that illegality is a defence if the claimant relies on the illegality to make out a claim. However, his plea failed before the Court of Appeal which applied the *locus poenitentiae* doctrine.[22] Mirza filed an appeal before the Supreme Court which unanimously dismissed it. The defence of illegality failed –

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[18] Calab O'fee, *Patel v. Mirza and the Future of the Illegality Doctrine in New Zealand* (2018). Available at: file:///C:/Users/IST/Downloads/paper_access%20(2).pdf

[19] *Bilta (UK) Ltd. (in liquidation) and others v. Nazir and others (No.2)*, [2015] UKSC 23, per Lord Sumption.

[20] See note 18.

[21] Lord Burrows on *The Illegality Defence after Patel v. Mirza.* The Professor Jill Poole Memorial Lecture 2022, Aston University, 24 October 2022. Available at: file://C:/Users/IST/Downloads/illegality-defence-after-patel-v-mirza-lord-burrows%20(2).pdf

[22] *Locus poenitentiae* literally means "place of repentance." It is also used for "an opportunity to repent." According to Black's Law Dictionary (Ninth Edition), it means: "(1) A point at which it is not too late for one to change one's legal position; the possibility of withdrawing from a contemplated course of action, esp. a wrong, before being committed to it; (2) The opportunity to withdraw from a negotiation before finally concluding the contract."

but for different reasoning than that of the Court of Appeal. By a majority of 6-3, the Supreme Court favoured a new policy-based approach to the defence of illegality. Lord Toulson gave the leading judgment with whom Lady Hale, Lord Kerr, Lord Wilson, and Lord Hodge agreed (as did Lord Neuberger albeit with some differences). Lord Toulson wrote:

> "[O]ne cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality … That trio of necessary considerations can be found in the case law."

25. Lord Toulson considered Patel's claim regarding unjust enrichment in light of the philosophy guiding the statutory prohibitions on insider trading that made his agreement with Mirza unlawful. He stated there was no logical reason why public policy considerations should require Patel to forfeit the money he deposited into Mirza's account, which was never used for the purpose for which it was paid. This would be an unjust and disproportionate response to the illegality. Patel is seeking to unwind the arrangement, not to profit from it.

26. Conversely, Lords Sumption, Mance, and Clarke favoured preserving the existing norms. They apprehended that the new approach would create unacceptable uncertainty. However, in his opinion on the merits of the case, Lord Sumption wrote:

> "267. … the parties were on the same legal footing. Both would be liable to conviction for conspiracy in a criminal court, and any difference in the degree of their fault would be relevant only to the sentence. Section 52 of the Criminal Justice Act, 1993 is not a statute designed to protect the interests of persons entering into an agreement to commit the offence of insider dealing, and there is no other overriding statutory policy which requires their participation in the offence to be overlooked when it comes to determining its civil consequences."
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> "268. However, restitution still being possible, none of this is a bar to Mr Patel's recovery of the £620,000 which he paid to Mr Mirza. The reason is simply that although Mr Patel would have to rely on the illegal character of the transaction in order to demonstrate that there was no legal basis for the payment, an order for restitution would not give effect to the illegal act or any right derived from it. It would simply return the parties to the status quo ante where they should always have been. The only ground on which that could be objectionable is that the court should not sully itself by attending to illegal acts at all, and that has not for many years been regarded as a

> reputable foundation for the law of illegality. This was Gloster LJ's main reason for upholding Mr Patel's right to recover the money. Although my analysis differs in a number of respects from hers, I think that the distinction which she drew between a claim to give effect to the right derived from an illegal act, and a claim up unpick the transaction by an award of restitution was sound."

27. The new policy-based approach is helping the English courts to apply the law in a way that is considerably clearer, more certain, and less arbitrary and provide a fair result. The subsequent cases, such as ***Stoffel & Co. v. Grondona***, [2020] UKSC 42, and ***Ecila Henderson v. Dorset Healthcare University NHS Foundation Trust***, [2020] UKSC 43, have provided further clarity to the practical application of Lord Toulson's formulations.[23]

28. The illegality doctrine is not aimed at achieving a just result between the parties. If the defence is successful, the defendant may end up with a windfall gain at the claimant's expense.[24] Therefore, Parliament has passed legislation allowing the State to confiscate benefits earned by criminal misconduct in some circumstances. It has made special provisions for some offences, such as terrorism, but the two main schemes are found in the Proceeds of Crime Act of 2002.

29. The principle that no wrongdoer should profit from the commission of a wrong is rooted in antiquity. In the 18th century, courts in England frequently allowed the victim to reclaim the bribe money. Even Lord Mansfield, widely recognized as the father of the doctrine of illegality, did it in some instances. ***Smith v Bromley***, (1760) 2 Doug KB 696n, permitted a plaintiff to recover the money she had paid to a person to help her brother's discharge from bankruptcy in exchange for an illegal consideration. Lord Mansfield CJ wrote on page 268 of his opinion that, even though the payment was made for an illegal purpose, "on the whole, I am persuaded it is necessary, for the better support and maintenance of the law, to allow this action; for no man will venture to take, if he knows he is liable to refund." Lord Mansfield followed this approach again in ***Walker v Chapman***, (1773) Lofft 342, where the defendant, who was a page to the King, took a bribe to arrange a job for the plaintiff in Government service but failed. In the suit for the return of

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[23] See note 21.

[24] The Law Commission Consultation Paper No.189, *The Illegality Defence*, para 2.34

the money, he maintained that the action would not lie because the plaintiff was a party to an iniquitous transaction, "and that the law would not suffer a party to "draw justice from a foul fountain". Lord Mansfield rejected the defence, holding that there was a distinction between a claim to overturn an illegal contract and a claim to obtain benefit from it. In ***Neville v Wilkinson***, (1782) 1 Bro CC 543, 547, Lord Thurlow LC approved this approach, holding as follows:

> "[I]n all cases where money was paid for an unlawful purpose, the party, though *particeps criminis*, might recover at law; and that the reason was, that if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before."

30. Subsequent judges took a different and stricter approach. However, in ***Patel v. Mirza***, [2016] UKSC 42, [2016] 1 W.L.R. 399, after thoroughly surveying the entire case-law, Lord Toulson concluded that "bribes of all kinds are odious and corrupting, but it does not follow that it is in the public interest to prevent their repayment. There are two sides to the equation. If today it transpired that a bribe had been paid to a political party, a charity or a holder of public office, it might be regarded as more repugnant to the public interest that the recipient should keep it than that it should be returned."

31. The British rulers provided a general Penal Code for the Indian sub-continent. Both India and Pakistan adopted it after the Partition, and it is still in effect with some amendments they have made to address their domestic requirements. The Penal Code does not contain any provision for restitution of the bribe money to the victim. Nonetheless, both nations have passed laws with special provisions allowing the State to confiscate such money. Even under the general law, the criminal courts may, in appropriate cases, impose a fine equivalent to bribe money on the bribe-taker while convicting him to prevent him from unjust enrichment, a concept at the heart of modern law.

32. Insofar as the restitution claims are concerned, the courts in India and Pakistan decide them on the basis of the Contract Act of 1872, another law they have commonly inherited from the British. The statutory provisions in both countries are the same except for a few amendments. Section 23 of the Act describes what considerations and

objects are lawful. Section 24 provides that the agreement is void if any part of a single one or any part of several considerations for a single object is unlawful. Section 65 states, "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

33. Section 84 of the Trust Act 1882 is also relevant to the discourse. It provides that if the owner of a property transfers it to another for an illegal purpose, but that purpose is not carried out, the transferee must hold the property for the benefit of the transferor. It further states that the same rule will apply where the transferor is not as guilty as the transferee or allowing the transferee to retain the property would defeat the provisions of any law.

34. In ***Kuju Collieries Ltd. v. Jharkhand Mines Ltd. and others*** (AIR 1974 SC 1892), the appellant paid a large sum of money, including a premium called *salami*, to the respondent for a mining lease in 1950. The Mineral Concession Rules, which came into force on 25.10.1949, prohibited *salami*. Subsequently, the appellant instituted a suit seeking possession of the leased property or, in the alternative, for a return of the money paid to the respondent. Meanwhile, the Bihar Land Reforms Act was passed, which rendered the appellant's claim regarding possession of the mines unenforceable. The appellant, therefore, limited its claim to the recovery of the sum paid. The High Court ruled that it was not entitled to the refund of the *salami* because the agreement was void *ab initio* being contrary to the Mineral Concession Rules. The lease was also illegal on that basis. The learned Judge held that the appellant could not invoke section 65 since it applied only where an agreement was "discovered to be void." In this case, the parties knew the deal was unlawful, yet they transacted. The Supreme Court of India dismissed the appeal, approving the High Court's reasoning that the Contract Act differentiates between an agreement and a contract. Section 2 thereof stipulates that a legally enforceable agreement is a contract, but an agreement that is not legally enforceable is not a contract and is, therefore, void. Section 65 is to be interpreted in light of these

definitions. It has two parts. The first speaks of an agreement that is discovered to be void, while the second refers to a contract that becomes void. The parties (or one of them) may engage in an agreement without realizing that it is not legally enforceable and come to know about it afterwards. In that scenario, the issue would fall within the first part of section 65. In contrast, the second part of section 65 relates to a situation where an agreement, which was originally enforceable and thus a contract, becomes void due to subsequent events. In both these instances, the individual who received any advantage is obliged to restore or compensate the person from whom he obtained it. However, where both parties knew that the agreement was unlawful (and, therefore, void) when they entered it, there was no contract but merely an agreement. It is not a situation where it is discovered to be void subsequently or where the contract becomes void due to future events. Hence, section 65 of the Contract Act would be inapplicable. The Supreme Court further stated:

> "The further question is whether it could be said that this contract was either discovered to be void or became void. The facts enumerated above would show that the contract was void at its inception, and this is not a case where it subsequently became void. Nor could it be said that the agreement was discovered to be void after it was entered into. As pointed out by the trial court the plaintiff was already in the business of mining and had the advantage of consulting its lawyers and solicitors. So, there was no occasion for the plaintiff to have been under any kind of ignorance of the law under the Act and the Rules. Clearly, therefore, this is not a case to which Section 65 of the Contract Act applies. Nor is it a case to which Section 70 or Section 72 of the Contract Act applies. The payment of the money was not made lawfully, nor was it done under a mistake or under coercion."

35. In *Kuju Collieries Ltd.,* supra, the Supreme Court of India also approved the following observations from the opinion of Jaganmohan Reddy J. in ***Budhulal v. Deccan Banking Company Ltd.*** (AIR 1955 Hyderabad 69), a case decided by a 5-member Bench of the Hyderabad High Court:

> "A person who, however, gives money for an unlawful purpose knowing it to be so, or in such circumstances that knowledge of illegality or unlawfulness can as a finding of fact be imputed to him, the agreement under which the payment is made cannot on his part be said to be discovered to be void. The criticism that if the aforesaid view is right, then a person who has paid money or transferred the property to another for an illegal purpose can recover it back from the transferee under [section 65 of the Contract Act] even if the illegal purpose is carried into execution, notwithstanding the fact that both the transferor and transferee are *in pari delicto*, in our view, overlooks the fact that the courts do not assist a person who comes with unclean hands. In such cases, the defendant possesses an advantage over the

> plaintiff – *in pari delicto potior est conditio defendentis*. Section 84 of the Indian Trust Act, however, has made an exception in a case 'where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution, or the transferor is not as guilty as the transferee or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law the transferee must hold the property for the benefit of the transferor.' This specific provision made by the legislature cannot be taken advantage of in derogation of the principle that section 65 of the Contract Act is inapplicable where the object of the agreement was illegal to the knowledge of both the parties at the time it was made, in such a case the agreement would be void *ab initio*. There would be no room for the subsequent discovery of that fact …"

36. In ***Tarsem Singh v. Sukhminder Singh*** (AIR 1998 SC 1400), the parties to the sale agreement were not *ad idem* with regard to the unit of land measurement. The vendor meant to sell the land in *kanals* while the vendee intended to buy it in *bighas*. Thus, they were under a mistake about a fact critical to the agreement. The area of land was as much essential to the agreement as the price, which had to be computed on the basis of the area. In the circumstances, the agreement was void from the inception under section 20 of the Contract Act. The issue arose as to whether the vendor could forfeit the earnest money or seek the enforcement of the forfeiture clause by way of defence in a suit brought by the vendee for specific performance of the agreement. The Supreme Court of India ruled that section 65 of the Contract Act is based on equitable doctrine and nixed the argument that it would apply only when the agreement is "discovered to be void" or where the contract "becomes void" and not to an agreement that is void from the inception. However, in the penultimate paragraph of the judgment, it stated:

> "We may point out that there are many facets of this question, as for example (and there are many more examples), the agreement being void for any of the reasons set out in sections 23 and 24, in which case even the refund of the amount already paid under that agreement may not be ordered. But, as pointed out above, we are dealing only with a matter in which one party has received advantage under an agreement which was 'discovered to be void' on account of section 20 of the [Contract] Act. It is to this limited extent that we say, on the principle contained in section 65 of the Act, the petitioner having received Rs. 77,000/- as earnest money from the respondent in pursuance of that agreement, is bound to refund the said amount to the respondent."

37. In ***Mohd. Salimuddin v. Misri Lal and others*** (AIR 1986 SC 1019). The appellant-tenant advanced a loan to the landlord to secure the tenancy under an agreement that provided the loan was to be adjusted against the rent accrued subsequently. This agreement was

unlawful because it violated section 3 of the Bihar Buildings (Lease, Rent & Eviction) Contract Act. The landlord filed a suit against the tenant for eviction on the ground of non-payment of rent. The High Court held that the tenant was not entitled to claim adjustment of the loan as the agreement was unlawful. Hence, he was in arrears of rent and liable to be evicted. The Supreme Court set aside that decision. It held that the parties to the contract were unequal. The landlord was in a dominant position, and the tenant could not afford to refuse him the loan even if that violated the law. The doctrine of *pari delicto* is not designed to reward the "wrongdoer" or penalize the "wronged". The relevant excerpt is reproduced below:

> "To deny access to justice to a tenant who is obliged to yield to the unlawful demands of the landlord in this scenario by invoking the doctrine of *pari delicto* is to add insult to injury, and to negate the very purpose of the provision designed for his protection. The doctrine of *pari delicto* is not designed to reward the 'wrongdoer', or to penalize the 'wronged', by denying the victim of exploitation access to justice. The doctrine is attracted only when none of the parties is a victim of such exploitation, and both parties have voluntarily and by their free will joined hands to flout the law for their mutual gain. Such being the position the said doctrine embodying the rule that a party to a transaction prohibited by law cannot enforce his claim in a court of law is not attracted in a situation like the present."

38. In ***Sita Ram v. Radha Bai and others*** (AIR 1968 SC 534), the Supreme Court of India approved the following passage from *Anson's* Principles of the English Law of Contracts, 22nd Ed. p. 343, which spells out the exceptions to the *pari delicto* rule:

> "There are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered – cases to which the maxim does not apply. They fall into three classes: (a) where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; (b) where the plaintiff is not *in pari delicto* with the defendant; (c) where the plaintiff does not have to rely on the illegality to make out his claim."

In paragraph 13 of the judgment, the Supreme Court further said:

> "It is settled law that where the parties are not *in pari delicto*, the less guilty party may be able to recover money paid, or property transferred, under the contract. This possibility may arise in three situations: First, the contract may be made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one. Secondly, the plaintiff must have been induced to enter into the contract by fraud or strong pressure. Thirdly, there is some authority for the view that a person who is under a fiduciary duty to the plaintiff will not be allowed to retain the property, or to refuse to account for

> moneys received, on the ground that the property or the moneys have come into his hands as the proceeds of an illegal transaction (See *Anson's Principles of the English Law of Contract*, p. 346)."

39. The courts in India have dealt with the issue of bribery most commonly in the cases under section 138 of the Indian Negotiable Instruments Act 1881 (the "NIA"), which criminalizes dishonour of cheques for insufficient funds in the account. There are, however, two streams of cases in this regard. Some courts have accepted the defence of illegality while others have not. In ***Virender Singh v. Laxmi Narain and another*** [1 (2007) BC 530, 2007 Cri LJ 2262],[25] the petitioner received illegal gratification from the respondent-complainant for arranging a job for his nephew in Haryana Police through high-profile political leaders. He failed to fulfil his promise and issued a cheque to return the money which was dishonoured for want of sufficient funds. The complainant filed a complaint under section 138 of the NIA in which the petitioner was convicted. The Delhi High Court acquitted him holding as under:

> "[T]he explanation in section 138 of the said Act makes it clear that the expression 'debt or other liability' has reference only to a legally enforceable debt or liability. Conversely, if a cheque is issued in respect of a debt or liability which is not legally enforceable, then, section 138 of the said Act would not apply. Section 23 of the Indian Contract Act, 1872, *inter alia*, stipulates that every agreement of which the object or consideration is unlawful is void."[26]

40. For the second set of cases, ***R.L. Sahu v. Moh Tahir Shekh*** [2012 (3) MPHT (C.G.) 69; 2012 ACD 981; 2012 (118) AIC 882], is illustrative. The petitioner paid the respondent money to get him a job. When he failed, he demanded his money back upon which the respondent gave him two cheques which were dishonoured. The petitioner filed a complaint under section 138 of the NIA. The trial court dismissed it because the cheques were not for paying a legally enforceable debt or liability. The Chattisgarh High Court set aside that order stating:

> "In the present case, first part of the agreement was not illegal, but when the respondent, with a view to correct himself, has agreed to return the money which he had received from the petitioner for an illegal purpose and issued cheques in favour of the petitioner, who is the victim of the first agreement, then it cannot be said that second part of the agreement is illegal, and the petitioner is not entitled to

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[25] https://indiankanoon.org/doc/300293/

[26] Also see: *R. Parimala Bai v. Bhaskar Narasimhaiah* (https://indiankanoon.org/doc/126365146/); *Nagaraj alias Nagappa Karennavar v. Basalingayya Hiremath* (2022 Latest Case Law 2529 Kant) (https://indiankanoon.org/doc/179605958/).

> take recourse available under the law for the wrong committed by the respondent. Therefore, petitioner cannot be denied access to justice. His position was not of *pari delicto*."[27]

41. Pakistan, as adumbrated, adopted the Contract Act of 1872 enacted during British rule, and it is still in force with some amendments made over time. As a result, sections 23, 24, and 65 of our Contract Act are analogous to their Indian counterpart. A Division Bench of the Dacca High Court considered section 65 of the Contract Act in ***Messrs P.K. Basak & Co. Ltd. v. Messrs Gossen & Co. Ltd.*** (PLD 1957 Dacca 233). The plaintiff and the defendant were both private limited companies. The defendant took a loan from the plaintiff but repaid only a part of it which constrained it to file a civil suit. The defendant denied liability. It *inter alia* pleaded that the plaintiff and it had a secret arrangement under which they agreed to split the proceeds evenly, whichever of them secured a contract. The amount of loan alleged by the plaintiff was paid by it to the defendant as its share of the profits of one of the contracts which they performed jointly. The defendant established its plea at the trial. The plaintiff argued that if the agreement was hit by section 23 of the Contract Act, it was entitled to recover the money paid in pursuance thereof. The Court nixed the contention holding as under:

> "[The learned Advocate], of course, did not specify under which particular statutory provision he sought to claim the recovery of the money, but, presumably, this contention is based on the provisions of section 65 of the Contract Act whereunder, when an agreement is discovered to be void, any person who has received advantage under such an agreement is bound to restore it or to make compensation for it to the person from whom he received it. We must point out that section 65 of the Contract Act does not apply to contracts void under the provisions of sections 23 and 24 of the said Act, for the latter are *void ab initio* and cannot be said to have become void or to have been discovered to be void. But even assuming that the provisions of section 65 did apply to such a case, the rule is not quite as wide as the learned Advocate sought to make it out to be. It is true that if the contract is not yet performed or is merely an executory contract, then one of the parties may resile from his agreement subsequently, and may, in such circumstances, recover money paid in consideration thereof upon the repudiation of the contract as upon a failure of consideration. But if the illegal purpose or any material part of it has been performed, then the money paid cannot be recovered; for the parties in such cases must be held to be equally at fault, and the rule is that, in cases where the parties are *in pari delicto*, the position of the defendant is always better."[28]

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[27] Also see: *E.K. Saseendra Varma Raj v. State of Kerala and another* [2009 (5) R.C.R (criminal) 267] (https://indiankanoon.org/doc/1204314/); and *Awadesh Tahkur and others v. State of Bihar and another* (https://indiankanoon.org/doc/175687127/).

[28] The above dictum was followed in *Hossain Ali Khan v. Firoza Begum* (PLD 1971 Dacca 112).

42. After an in-depth analysis of the court decisions in India and Pakistan, I conclude that any agreement falling within the scope of sections 23 and 24 of the Contract Act is illegal and consequently void. If the agreement is indivisible, illegality impacts the whole of it. On the other hand, if it is divisible, it affects only the illegal part. If the object of the agreement is unlawful, it is void regardless of whether the parties are aware of the illegality. As a rule, which the maxim *in pari delicto potior est conditio defendentis* expresses, no action can be brought on an illegal agreement. The doctrine of *restitutio in integrum*, an equitable principle embodied in Section 84 of the Trusts Act, is an exception to this maxim. One must not construe section 84 of the Trust Act to override section 65 of the Contract Act.

43. The question as to whether the bribe-giver should be able to recover his money from the bribe-taker is quite treacherous. In my opinion, the agreement to give the bribe and the one to return the benefit must be treated as separate and distinguishable, as held in the English[29] and some Indian[30] cases cited above. A bribe-giver's claim should be entertained only where the bribe-taker agrees to pay back, but not when no such agreement exists.

The case at hand

44. Having outlined the law and jurisprudence, I turn to the case at hand. Respondent No.3 alleges that he paid Rs.150,000/- to the Petitioner to arrange for his appointment as a Senior Clerk at the Civil Secretariat through a source who was a public servant. This accusation is sufficient to bring the matter within the purview of section 163 PPC because it amounts to accepting a gratification "as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or forbear to do an official act." It is irrelevant whether the accused was, in fact, capable of doing the favour or not. The offence is committed if the bribe-giver believes he can do the favour and gives the bribe.[31]

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[29] *Smith v Bromley* (1760) 2 Doug KB 696n; *Walker v Chapman* (1773) Lofft 342; *Neville v Wilkinson* (1782) 1 Bro CC 543; *Patel v. Mirza* [2016] UKSC 42, [2016] 1 W.L.R. 399].

[30] *R.L. Sahu v. Moh Tahir Shekh* [2012 (3) MPHT (C.G.) 69; 2012 ACD 981; 2012 (118) AIC 882]

[31] See: *Lutfur Rahman and others v. The Crown* (1969 SCMR 766); *Akhtar Hassan Khan v. The State* (1974 SCMR 457); *Muhammad Asghar v. The State* (1975 P Crl. LJ 1132).

45. Respondent No.3 has also accused the Petitioner of fabrication of Office Order dated 18.01.2019, which attracts sections 420, 468 & 471 PPC. The offence under section 420 PPC is cognizable.

46. In his report dated 16.09.2022, the S.P. (Investigation)/ District Complaint Officer has supported the version of Respondent No.3, except that he has exaggerated the amount of the money he paid to the Petitioner. According to him, Respondent No.3 paid Rs.50,000/- and not Rs.150,000/- for the job. In this view of the matter, the Respondent SHO should be directed to register the FIR. Order accordingly.

47. The Investigating Officer shall investigate the case strictly on merits and, in light of the law discussed above, also determine the criminal liability of Respondent No.3. If he concludes that he has committed an offence, the State may consider prosecuting him as well.

48. This petition is decided in the above terms. However, before concluding this judgment, I may add that the observations on facts are tentative and shall not prejudice the parties' rights in future proceedings.

(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

Judge