

IN THE SUPREME COURT OF PAKISTAN
(REVIEW JURISDICTION)

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, HCJ.
MR. JUSTICE EJAZ AFZAL KHAN.
MR. JUSTICE SH. AZMAT SAEED.

CIVIL REVIEW PETITION NO. 229 OF 2006

IN

CIVIL APPEAL NO. 802 OF 2006.

(On review against the judgment dt. 25.09.2006 passed by this Court in Civil Appeals No. 613, 614, 782, 802 and 825 of 2006).

Rana Muhammad Naveed and another. ...Petitioners

Versus

Federation of Pakistan thr. Secy. M/o Defence. ...Respondent

For the petitioners: Mr. Hashmat A. Habib, ASC.
Mr. M. S. Khattak, AOR.

For M/o Defence: Mr. Mujeeb-ur-Rehman, ASC.
Col. Tahir.
Maj. Shahjehan, JAG Branch.

Date of hearing: 28.02.2013. (Judgment Reserved).

J U D G M E N T

EJAZ AFZAL KHAN, J.-- This civil review petition has arisen out of the judgment dated 25.09.2006 of this Court, whereby Civil Appeal Nos. 782 and 825 were dismissed.

2. Brief facts of the case relevant for the purpose of this case are described in para 3 of the judgment under review which read as under :-

"3. Civil Appeals No. 782, 802 and 825 of 2006. – Appellants Zubair Ahmed @ Tauseef, Rashid Qureshi @ Tipu @ Ibrahim, Ghulam Sarwar Bhatti @ Salahuddin, Ikhlas Ahmed @ Rusi, Naik Arshad Memood (Ex-Number 7351783), Rana Muhammad Naveed, and Ameer Sohail @ Sajjad were found involved in the commission of offence falling within the mischief of Section 31(d) read with Section 59 of the Pakistan Army Act [herein after referred to as "PA Act"], for seducing and attempting to seduce persons in the Military Force of Pakistan from their

allegiance to the Government of Pakistan, as such, they were arrested and tried by the Field General Court Martial. They were adjudged guilty for the offences for which they were charged with, as such sentences of imprisonment for life were awarded to them. Which were confirmed by the confirming authority. In the appeals filed by them, the Appellate Court while dismissing their appeals enhanced their sentences from life imprisonment to death. Ultimately, they approached the High Court by filing Writ Petitions, but the same have been dismissed by means of impugned judgments being not entertainable under Article 199 (3) of the Constitution of Islamic Republic of Pakistan [herein after referred to as 'the Constitution']".

3. Learned counsel appearing on behalf of the petitioners contended that he may not have any cause against the conviction and sentence awarded by the Field General Court Martial but he would certainly have one against the Court of appeals exercising powers under Section 133-B of The Pakistan Army Act, 1952. Such Court, the learned counsel added, has the power to accept or reject the appeal in whole or in part; substitute a valid finding or sentence for an invalid finding or sentence; annul the proceedings of the Court Martial on the ground that they are illegal or unjust; remit the whole or any part of sentence or reduce or enhance the same when there is an appeal before it in terms of Section 133-B. But it has no power, argued the learned counsel, to enhance a sentence when there is no appeal before it in terms of the section mentioned above. He next contended that such Court, even if there is an appeal before it, cannot enhance a sentence, without giving the convict an opportunity to show cause as to why his sentence should not be enhanced. Any enhancement made without giving such opportunity to the convict, argued the learned counsel, would amount to condemnation without hearing which is violative of the principle of natural justice enshrined in the maxim audi alteram partem and the provisions of the Constitution of

Islamic Republic of Pakistan ensuring due process of law, and that the judgment omitting to take notice of this essential aspect of Criminal Jurisprudence, is liable to be reviewed.

4. Learned counsel appearing on behalf of the respondent contended that when it has been observed by this Court in para 27 of the judgment under review that the Court of appeal has power to enhance sentence, enhancement of sentence being covered by the words used in Section 133-B (2)(f) of the Act cannot be termed as an act without jurisdiction or coram non judice. When we asked the learned counsel for the respondent as to what is the time for filing an appeal before the Court of appeal, he by reading out the words from Section 133-B (1) submitted 40 days from the date of announcement of finding or sentence or promulgation thereof which ever is earlier. When we asked as to what is the date of announcement of finding, he without a moment's hesitation mentioned 21st July, 2005. When we asked what is the date of filing appeal before the Court of appeals, the learned counsel after seeing the relevant record submitted that Ameer Sohail filed an appeal on 2nd September, 2005 while Rana Muhammad Naveed filed an appeal in the form of a letter on 26.11.2005. When asked whether these appeals could be said to have been filed within time as prescribed in Section 133-B of the Act, the reply of the learned counsel was in no, in case the time is reckoned from the date of announcement of finding or sentence. He, however, added, that in case it is reckoned from the date of confirmation of finding or sentence, the appeal of Ameer Sohail was within time. He, however, conceded that the appeal filed by Rana Muhammad Naveed was not within time, whether it is

reckoned from the date of announcement of finding or sentence or confirmation thereof. When asked what nexus confirmation has with the time prescribed for filing an appeal when it according to the section mentioned above would run either from announcement of finding, sentence or promulgation thereof whichever is earlier, he could not give any satisfactory reply except asking us to read Rules 54 to 58 of The Pakistan Army Act Rules, 1954. We carefully and even critically read the rules mentioned above but did not find anything therein which could either substantiate the stance of the learned counsel or suggest any other mode of reckoning time. The mode spelt out by the section for reckoning time gets added strength when it is read together with Sections 124 and 131 of the Act. When we asked, whether an opportunity to the convicts to show cause as to why their sentence should not be enhanced was ever given even if it is assumed that they filed appeals in terms of Section 133-B of the Act, the reply of the learned counsel was again in no.

5. We have gone through the entire record carefully and considered the submissions of the learned counsel for the parties.

6. Before we proceed to discuss the arguments addressed by the learned counsel for the parties, we would like to refer to Section 133-B which reads as under :-

"[133-B. – Court of Appeals for other cases.-- (1) Any person to whom a court martial has awarded a sentence of death, imprisonment for life, imprisonment exceeding three months, or dismissal from the service after the commencement of the Pakistan Army (Amendment) Act, 1992, may, within forty days from the date of announcement of finding or sentence or promulgation thereof, whichever is

earlier, prefer an appeal against the finding or sentence to a Court of appeals consisting of the Chief of the Army Staff or one or more officers designated by him in this behalf, presided by an officer not below the rank of Brigadier in the case of General Court Martial or field General Court Martial or District Court Martial or Summary Court Martial convened or confirmed or counter signed by an officer of the rank of Brigadier or below as the case may be, and one or more officers, presided by an officer not below the rank of Major General in other cases, hereinafter referred to as the Court of Appeals:

Provided that where the sentence is awarded by the court martial under an Islamic law, the officer or officers so designated shall be Muslims:

Provided further that every Court of Appeal's may be attended by a judge advocate who shall be an officer belonging to the Judge Advocate General's Department, Pakistan Army, or if no such officer is available, a person appointed by the Chief of the Army Staff.

- 2) A Court of appeals shall have power to –
- a) accept or reject the appeal in whole or in part; or
 - b) substitute a valid finding or sentence for an invalid finding or sentence; or
 - c) call any witness, in its discretion for the purpose of recording additional evidence in the presence of the parties, who shall be afforded an opportunity to put any question to the witness; or
 - d) annul the proceedings of the court martial on the ground that they are illegal or unjust; or

e) order retrial of the accused by a fresh court; or

f) remit the whole or any part of the punishment or reduce or enhance the punishment or commute the punishment for any less punishment or punishments mentioned in this Act.

3) The decision of Court of Appeals shall be final and shall not be called in question before any court or other authority whatsoever.]”

7. A look at the provision reproduced above would reveal that the Court of appeal has the power to reduce or enhance the punishment but this could only be done when there is an appeal before it in terms of the section reproduced above. An appeal against conviction and sentence could be filed before the Court of appeal within 40 days from the date of announcement of finding, sentence or promulgation thereof. The period of limitation would run from any of them which ever is earlier. Announcement of finding and award of sentence according to the averments made in the concise statement submitted by the learned counsel for respondent is 21st July, 2005. This date was also confirmed by the learned counsel in his statement made at the bar after seeing the relevant record. Dates of filing appeals, according to the aforesaid statements in the case of Ameer Sohail is 2nd September, 2005 while in the case of Rana Muhammad Naveed is 26.11.2005. These appeals, quite obviously, were barred by time. There were thus no appeals before the Court of Appeal in terms of Section 133-B of the Act. Enhancement of sentence could not have been made in a vacuum. Such enhancement is essentially against the principle of

natural justice enshrined in the maxim audi alteram partem and Articles 4 and 9 of the Constitution.

8. Assuming for the sake of arguments, that there were appeals before the Court of Appeal, yet sentence of imprisonment could not have been converted into that of death without giving an opportunity to the petitioners to show cause why their sentence should not be enhanced. Admittedly no opportunity was given to the petitioners to show cause, why their sentence should not be enhanced. In any case, they were to be informed whether they were being heard against conviction or enhancement of sentence. The sentence thus enhanced would be without jurisdiction and coram non judice. Therefore, it cannot be sustained under any canons of law and propriety.

9. Yes, Article 199(3) of the Constitution prohibits the High Court from making an order in relation to a person who is a member of Armed Forces of Pakistan or who is for the time being subject to any law relating to any of those forces or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law but not when acts, actions or proceedings which suffer from defect of jurisdiction and are thus coram non judice. The cases of **"Federation of Pakistan and another. Vs. Malik Ghulam Mustafa Khar"** (PLD 1989 S.C. 26), **"Secretary, Ministry of Religious Affairs and Minorities and two others. Vs. Syed Abdul Majid"** (1993 SCMR 1171) and **"Ghulam Abbas Niazi. Vs. Federation of Pakistan and others"** (PLD 2009 S.C. 866) may well be referred to in this behalf. Once we are convinced that the order enhancing sentence is without jurisdiction and coram non judice, it cannot be allowed to hold the field notwithstanding it

surfaced during the course of hearing a review petition. The error being patent on the face of the judgment requires correction for the ends of justice.

10. For the reasons discussed above, this Civil Review Petition is allowed and the sentence thus enhanced is declared without jurisdiction and coram non judice.

Chief Justice

Judge

Judge

Announced in open Court at Islamabad on _____.

Judge