

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE AMIR HANI MUSLIM

MR. JUSTICE IJAZ AHMED CHAUDHRY

CIVIL APPEAL NOS. 718 & 1366 OF 2007

(On appeal against the judgments dated 24.6.2005 & 19.4.2006 passed by the Lahore High Court, Rawalpindi Bench in Writ Petition No. 1762/2005 & 919/2006)

Ex.-Gunner Muhammad Mushtaq
Ex-Lance Naik Mukarram Hussain

(In CA 718/2007)

(In CA 1366/2007)

... Appellants

VERSUS

Secretary Ministry of Defence through
Chief of Army Staff and others

(In both cases)

... Respondents

For the Appellants:

Col (R) Muhammad Akram, ASC
Ch. Akhtar Ali, AOR
(In CA 718/2007)

Rao Naeem Hashim Khan, ASC
(In CA 1366/2007)

For the State:

Mr. Sohail Mehmood, DAG

Date of Hearing:

01.04.2015

JUDGMENT

IJAZ AHMED CHAUDHRY, J.- Through these appeals

by leave of the Court, the appellants / ex Army Officials have challenged the judgments of the Lahore High Court, Rawalpindi Bench whereby the Writ Petitions filed by them against their death sentences awarded by the Field General Court Marshal were dismissed and the orders of the said Field General Court Marshal were affirmed.

2. Facts briefly stated are that appellant Muhammad Mushtaq in Civil Appeal No. 718/2007 was Gunner of Pakistan Army and was posted at Siachin Glacier in Chullung Sub Sector. He was charged under Section 59 of the Pakistan Army Act, 1952, to have committed murder of another Gunner Israr Ahmed on

28.2.2004 at 5.30 AM. On 5.7.2004 he was convicted and sentenced to death by the Field General Court Martial. The sentence of death was confirmed on 26.10.2004 by the Chief of Army Staff. The appellant then filed Writ Petition No. 1762/2005 before the learned Lahore High Court, Rawalpindi Bench which stood dismissed vide order dated 24.6.2005. The appellant challenged the said order of the learned High Court by filing Civil Petition No. 2149/2005 before this Court in which leave was granted on 6.2.2007 and out of which this appeal has arisen.

3. Appellant Mukarram Hussain in Civil Appeal No. 1366/2007 was working as Lance Naik in Pakistan Army and was posted at Chumb Sector, Azad Kashmir. He was charged for the double murder of Hawaldar Noor Muhammad and Lance Hawaldar Bashir Ahmed vide FIR No. 39/2001 dated 29.5.2001 under Section 302 PPC at Police Station Barnala, District Bhambar Azad Kashmir. As the place of occurrence fell within the Cantonment Area, the investigation was undertaken by Military Police. He was convicted and sentenced to death by the Field General Court Martial and appeal against the said conviction also failed. The appellant then filed Writ Petition No. 919/2006 before the learned Lahore High Court, Rawalpindi Bench which stood dismissed on 19.4.2006. Thereafter the appellant challenged the said order of learned High Court before this Court by filing Civil Petition No. 336/2006 out of which Civil Appeal No. 1366/2007 has arisen.

4. Learned counsel for the appellant in Civil Appeal No. 718/2007 has *inter alia* contended that the appellant was not given the opportunity to consult a legal practitioner as guaranteed by the Constitution in terms of Article 10(1) of the Constitution; that the appellant has been deprived of his rights; that the appellant was

forced to take a different stance as it was the case of the appellant that the deceased had tried to commit an unnatural act with him and due to sudden provocation he committed his murder. Learned counsel lastly contended that the learned High Court and this Court are empowered to set aside the conviction and sentences awarded to the appellant by the Field General Court Martial. In support of the contention learned counsel relied on Ghulam Abbas Niazi vs. Federation of Pakistan (PLD 2009 SC 866), & Shabbir Shah Vs. Federation of Pakistan (PLD 1994 SC 738 at 765).

5. Learned counsel for the appellant in Civil Appeal No. 1366/2007 submitted that it was an un-witnessed occurrence; that the learned High Court dismissed the writ petition filed by the appellant without considering the powers vested in it; that FIR was registered with a delay of 31 hours and that the case was registered at the ordinary Police Station and the same was to be tried by the ordinary Courts.

6. Learned Deputy Attorney General, on the other hand, has submitted that writ petitions were not maintainable in view Article 199(3) of the Constitution; that Field General Court Martial was competent under the Army Act to try the appellants and the proceedings were not *mala fide*; that under Section 133 of the Pakistan Army Act the matter has come to an end after rejection of appeals of the appellants by the Court of Appeal. In support of the contention, learned counsel relied on Rana Muhammad Naveed Vs. Federation of Pakistan (2013 SCMR 596).

7. We have heard learned counsel for the appellants as also learned Deputy Attorney General at some length and have gone through the record.

8. Admittedly both the appellants were serving in Pakistan Army at the time of commission of offence. A complete procedure has been provided in the Pakistan Army Act, 1952, to try such accused. Both the appellants exhausted the remedies available to them under the Pakistan Army Act up to the level of Chief of Army Staff and it was after that, that they invoked the Constitutional jurisdiction of the learned High Court by filing writ petitions. Article 199 (3) of the Constitution of Islamic Republic of Pakistan clearly prohibits the High Courts from making an order in relation to a person who is member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of such forces, or in respect of any action taken in relation to such person as a member of the Armed Forces, or a person subject to such law. Under this clause of Article 199 the jurisdiction of the High Court is barred with regard to the conviction recorded and sentences awarded by the Field General Court Martial. As the appellants were admittedly members of Armed Forces, therefore, writ could not have been issued by the High Court against the General Field Court Martial or against the Appellate Authority which confirmed the conviction and sentences in view of Article 199(5) of the Constitution as the General Field Court Martial is excluded from the definition of 'person' in Article 199(1)(i) of the Constitution. The learned High Court in the peculiar facts and circumstances of this case has rightly declined to press into service its Constitutional jurisdiction in respect of the appellants, who have been found guilty by the competent forum. This Court in Shahida Zahir Abbas Vs. President of Pakistan (1996 PLD 632) has observed that "*rules of procedure applicable for trial of a person in a criminal case before a Military Court do not violate any accepted judicial principle governing trial of*

an accused person. Procedure prescribed for trial before Military Courts is in no way contrary to the concept of a fair trial in a criminal case." In Anwar Aziz Vs. Federation of Pakistan (2001 PLD 549) this Court has held that where matter is related to terms and conditions of service or in respect of any action taken in relation to members of Armed Forces or a person subject to Pakistan Army Act, 1952, then jurisdiction of a High Court in such a case is barred by Article 199(3) of the Constitution and that Article 8(3) of the Constitution envisages that provisions of Article 199(3) of the Constitution shall not apply to any law relating to members of Armed Forces, or of the Police or of such other forces as are charged with maintenance of public order, with a view to keep maintenance of discipline among them and also for the purpose of ensuring proper discharge of their duties. In Muhammad Musthaq Vs. Federation of Pakistan (1994 SCMR 2286) this Court has candidly held that grant of relief in relation to a person who is member of the Armed Forces of Pakistan even though based on fundamental rights which are included in Clause 1 of Article 199, is barred under Article 199(3) of the Constitution as the High Court has no jurisdiction in the matter. The learned Lahore High Court in Captain (R) Waseem Pasha Tajammal Vs. Federal Government, Ministry of Defence through Chief of Army Staff has also held that Article 199(3) of the Constitution has imposed restriction on the High Court that no order could be made under Article 199(1) on an application made by or in relation to a person who is member of the Armed Forces of Pakistan. Same is the case in Ex.PA 33756 Lieut Muhammad Asjid Iqbal Vs. Federal Government Secretary General Ministry of Defence, Rawalpindi (2005 PCrLJ 632).

9. However, it is also a settled law that the superior Courts can interfere in the orders of the authorities relating to the Armed Forces if the same are found to be either result of *mala fide* or the same are *corum non judice*. This Court in Ghulam Abbas Vs. Federation of Pakistan through Secretary Ministry of Defence (2014 SCMR 849) has held that "*any action or order of any authority relating to Armed Forces of Pakistan, which is either corum non judice, mala fide or without jurisdiction, the same could be challenged before the High Court and bar contained under Article 199(3) of the Constitution would cease to operate.*" The same view has been taken in Rana Muhammad Naveed Vs. Federation of Pakistan through Secretary M/o Defence (2013 SCMR 596) that the High Court is not prohibited from making an order under Article 199(3) of the Constitution when acts, actions or proceedings suffered from defect of jurisdiction and are thus *coram non judice*. In Federal Government through M/o Defence, Rawalpindi Vs. Munir Ahmed Gill (2014 SCMR 1530) this Court has reiterated that "*when any action of the Army Authorities regarding a serving officer of the Armed Forces or any other person subject to the Pakistan Army Act, 1952, is established to be either mala fide, quorum non judice or without jurisdiction then the same could be assailed through a Constitution petition by the aggrieved person, and the bar of jurisdiction under Article 199(3) of the Constitution would have no applicability.*" Same was the view of this Court in Federation of Pakistan through Secretary Defence Vs. Abdul Basit (2012 SCMR 1229). However, we have not been able to find out any *mala fide* on the part of the prosecution or authority. Neither the order passed by the Field General Court Martial is a case of no evidence nor the evidence led by the prosecution is insufficient. There is sufficient material

available to prove the guilt of the appellants. In absence of any *mala fide* on the part of the prosecution, the conviction and sentences awarded to the appellants by the Field General Court Martial cannot be stamped to be *coram non judice*. The case law relied upon by the learned counsel for the appellants is also to this effect that if an order of the authority relating to Armed Forces is found to be result of *mala fide* or the same is *coram non judice*, the Courts can interfere. However, as discussed above, the same is misconceived.

10. So far as the argument of learned counsel for the appellants that the appellant in Civil Appeal No. 718/2007 that the appellant was not given an opportunity to consult legal practitioner of his own choice in terms of Article 10(1) of the Constitution is concerned, it is on record that the appellant was defended by a Defending Officer and in the writ petition before the High Court in para 5 it has been specifically mentioned that the appellant could not afford engaging a counsel due to his sheer poverty. In such a situation the apprehension of the learned counsel is misconceived. In Civil Appeal No. 1366/2007 it is on record that the appellant was represented through a counsel.

11. For what has been discussed above, we do not find any merit in these appeals, which are dismissed.

JUDGE

JUDGE

Islamabad, the
1st of April, 2015
Approved For Reporting
Khurram