JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD, JUDICIAL DEPARTMENT

W.P. No.4739/2018

Major Raja Zahid Mahmood
versus
Secretary, Ministry of Defence, Government of Pakistan, etc.

Petitioner:	Raja Rizwan Abbasi and Mr. Sohail Akhtar, Advocates
Respondents By:	Raja Muhammad Aftab Ahmed, AAG. Barrister Ayesha Siddique Khan, State Counsel. Major Muhammad Ali, JAG Department, GHQ. Muhammad Ashfaq, ASI, P.S. Sihala, Islamabad.
Date of Hearing:	01.10.2019.

MOHSIN AKHTAR KAYANI, J: Through this writ petition, the petitioner prays for his acquittal in case FIR No.340, dated 30.12.2015, under Section 302/201/34 PPC, P.S. Sihala, Islamabad on the basis of compounding of offence duly recorded by the learned Sessions Judge (East), Islamabad vide judgment dated 30.10.2017 to the extent of Minhaj Munir/co-accused.

2. Brief facts referred in the instant petition are that the aforesaid FIR was lodged on the complaint filed by Mst. Zubaida Bibi i.e. mother of Mahmood Ahmad (deceased), in which Mst. Zubaida Bibi/complainant alleged that on 30.12.2015, at about 11:30 p.m., Zafar Mahmood and Ejaz Chaudhary/Linemen informed her that her son, who was working as Lineman in IESCO, went to recover arrears to the tune of Rs.140,414/- from the petitioner (who was serving Major of Pakistan Army) at his residence i.e. House No.8/9, Lane 12-B, Sector B, DHA Phase-II, Islamabad, where he has been murdered by the petitioner. The petitioner and Minhaj Munir/co-accused were arrested on the same day, whereas the petitioner was taken into custody by the Military Police, who faced Field General Court Martial (*hereinafter referred to as "**FGCM**"*) and was sentenced

to 23 years R.I. by the FGCM, which was progressively reduced to 14 years R.I., then to 07 years R.I. and finally to 03 years R.I. on appeal as well as by considering the mercy petition by the Chief of Army Staff. On the other hand, Minhaj Munir/co-accused faced his trial before learned Sessions Judge, Islamabad being a civilian. However, Minhaj Munir/co-accused on executing compromise with complainant party was acquitted by the trial court, whereas the offer of compounding has not been recognized by the Army authorities. Hence, the instant writ petition.

3. Learned counsel for petitioner contended that offence under Section 302 PPC is compoundable and concerned authority cannot impose conviction once compromise is effected between the parties; that FGCM neither gave effect to the compromise executed between the complainant party and Minhaj Munir/co-accused, nor recorded statements of legal heirs to that extent; that legal heirs of deceased in their statements categorically mentioned the name of petitioner and materialized their waiver of offence to the extent of petitioner; that the cases of petitioner and co-accused are on same footing, but the outcome is divergent; that even otherwise the material available on record is deficient to rely upon for conviction of the petitioner.

4. Conversely, learned AAG initially opposed the instant writ petition for having been not maintainable in terms of Article 199(3) read with Article 8(3) of the Constitution of the Islamic Republic of Pakistan, 1973; that the cases of petitioner and Minhaj Munir/co-accused are not on same footings as the petitioner was the main accused while the later was his accomplice; that acquitting an accused person pursuant to execution of a compromise is the discretionary power of the trial Court, which in the case of petitioner is the FGCM; that the trial conducted by FGCM is neither malafide, nor without jurisdiction or *coram non*

judice, hence no fundamental rights of the petitioner have been infringed, therefore, the instant writ petition may be dismissed having been not legally maintainable.

5. Arguments heard, record perused.

6. Perusal of record reveals that the petitioner was convicted by the Field General Court Martial in criminal case FIR No.340, dated 30.12.2015, under Section 302/201/34 PPC, P.S. Sihala, Islamabad for the murder of one Mehmood Ahmad, who for being stated to be a serving Lineman in IESCO visited the residence of petitioner i.e. House No.8/9, Lane 12-B, Sector B, DHA Phase-II, Islamabad on 30.12.2015 with regard to recovery of arrears of IESCO, however the petitioner in retaliation has committed murder of the said Lineman and removed his dead body from the place of occurrence with the help of Minhaj Munir/co-accused.

7. Minhaj Munir/co-accused being a civilian was tried by the learned Sessions Judge (East), Islamabad and was acquitted from said charge vide order dated 30.10.2017 due to compounding of offence by legal heirs of the deceased, whereas the petitioner, who faced his trial before the FGCM, was awarded sentence of 23 years R.I., which was reduced to 14 years R.I., 07 years R.I. and finally to 03 years R.I. on the basis of decision made by the court of appeal and by the COAS on mercy petition.

8. The petitioner through the instant petition claims acquittal from the above referred offence on the strength that the matter was compounded by legal heirs of deceased to the extent of Minhaj Munir/co-accused in terms of Section 345 Cr.P.C., in which *Badle-Sulha* was paid in shape of *Diyat* amount. The perusal of judgment dated 30.10.2017 of the learned Sessions Judge (East), Islamabad reveals that Minhaj Munir/co-accused has paid the share of *Diyat* to major legal heirs in

the Court, while the share of *Diyat* in favour of the minor legal heirs of the deceased has been deposited in Defense Saving Certificate.

9. The petitioner has been confronted as to whether Criminal Procedure Code, 1898 is applicable in the FGCM, whereby he candidly conceded that Cr.P.C., 1898 is not applicable in the FGCM, rather the trial was conducted under the Pakistan Army Act, 1952.

10. In view of above, I have gone through the wisdom laid down in ***2017 SCMR 580 (Ex-Lance Naik Mukarram Hussain, etc. vs. Federal Government, Ministry of Defence, etc.)*** and observed therein that provisions of Cr.P.C. are not applicable to the matters governed by any Special or Local Law unless specifically provided in the said laws wholly or to any extent. If a person, who was proceeded against under a special law, he would be dealt with according to the procedure of inquiry/investigation and trial as laid down in the said special law.

11. Similarly, the question of compounding of any offence has to be seen with reference to provisions provided in applicable law i.e. the **Pakistan Army Act, 1952**, wherein the relevant provision is Section 143, which is as under:

> *"**143. Pardons and remissions.** (1) When any person subject to this Act has been convicted by a Court martial of any offence, the Federal Government or the Chief of the Army Staff or any officer not below the rank of brigadier empowered in this behalf by the Chief of the Army Staff may;*
>
> *(i) either without conditions or upon any conditions which the person sentenced accepts, pardon the person or remit the whole or any part of the punishment awarded; or*
>
> *(ii) mitigate the punishment awarded or commute such punishment for any less punishment or punishments mentioned in this Act ;*
>
> *Provided that a sentence of rigorous imprisonment shall not be commuted for a sentence of detention for a term exceeding the term of rigorous imprisonment awarded by the court.*
>
> *Provided further that a person to whom a sentence has been awarded as hadd under in Islamic law shall not be pardoned, and no such*

sentence shall be mitigated remitted or commuted to any less punishment or punishments, otherwise than in accordance with such law.

(2) If any condition on which a person has been pardoned or a punishment has been remitted is, in the opinion of the authority which granted the pardon or remitted the punishment, not fulfilled, such authority may cancel the pardon or remission, and thereupon the sentence of the Court shall be carried into effect as if such pardon had not been granted or such punishment had not been remitted:

Provided that, in the case of a person sentenced to Imprisonment for life, imprisonment, or detention, such person shall undergo only the unexpired portion of his sentence.

(3) When under the provisions of sub-section (5) of section 62 a non-commissioned officer is deemed to be reduced to the ranks, such reduction shall, for the purposes of this section, be treated as a punishment awarded by sentence of a Court martial."

12. Keeping in view the above concept and non-application of Cr.P.C., 1898, the other statute applicable under the manual of Pakistan military law is the Pakistan Penal Code, 1860, which in terms of Section 307 PPC provides the concept of cases where *Qisas* for *Qatl-e-Amd* is not enforced. The punishment in *Qatl-e-Amd* is not liable to *Qisas* in terms of Section 308 PPC. Similarly, Section 309 PPC explains the concept of waiver (*Afw*) of *Qisas* in *Qatl-e-Amd,* while the concept of compounding of *Qisas* (*Sulh*) in *Qatl-e-Amd* has been explained in terms of Section 310 PPC read with Section 311 PPC, where *Ta'zir* after waiver of compounding of *Qisas* in *Qatl-e-Amd* has been explained. All these provisions of PPC are applicable on military officials in Court Martial in terms of the Pakistan Army Act, 1952 as these provisions are based upon the Quranic injunctions, hence, the same could not be excluded by any stretch of imagination.

13. The concept of compounding by way of waiver/*Diyat* (payment of compensation) is fully explained in these provisions and the concept of *Badal-i-Sulh* is available to all military officials in any offence, which is compoundable. The petitioner claimed his acquittal on the basis of these provisions, however he has

not been extended with the benefit guaranteed in these provisions, especially the benefits provided in Section 310 PPC, which is reproduced as under:

> ***310. Compounding of Qisas (Sulh) in qatl-i-amd:***
> *(1) In the case of qatl-i-amd, an adult sane wali may, at any time on accepting badl-i-sulh, compound his right of qisas:*
>
> *Provided that a female shall not be given in marriage or otherwise in badal-i-sulh.*
>
> *(2) Where a wali is a minor or an insane, the wali of such minor or insane wali may compound the right of qisas on behalf of such minor or insane wali:*
>
> *Provided that the value of badal-i-sulh shall not be less than the value of diyat.*
>
> *(3) Where the Government is the wali, it may compound the right of qisas:*
>
> *Provided that fee value of badal-i-sulh shall not be less than the value of diyat.*
>
> *(4) Where the badal-i-sulh is not determined or is a property or a right the value of which cannot be determined in terms of money under Shari'ah, the right of qisas shall be deemed to have been compounded and the offender shall be liable to diyat.*
>
> *(5) Badl-i-sulh may be paid or given on demand or on a deferred date as may be agreed upon between the offender and the wali."*

14. The respondent authorities i.e. the Ministry of Defence and the JAG Department of Pakistan Army have resisted the instant writ petition mainly on the ground that the compromise executed between the petitioner and the legal heirs of deceased took place at the appellate stage in the criminal trial of co-accused before the Sessions Court (West), Islamabad, which was considered and resultantly due remission was extended in favour of the petitioner. The respondent authorities further argued before this Court that Section 338-E of the PPC does not compel the Court to acquit the offender pursuant to compromise; rather it gives the trial court a discretionary power, which in the instant case was FGCM. The concept of

Section 338-E(2) PPC is also part of the applicable law in the Court Martial proceedings of a military official, which is reproduced as under:

> ***"338-E. Waiver or compounding of offences:***
> *(1)……*
> *(2) All questions relating to waiver or compounding of an offence or awarding of punishment under Section 310, whether before or after the passing of any sentence, shall be determined by trial Court:*
> *Provided that where the sentence of qisas or any other sentence is waived or compounded during the pendency of an appeal, such questions may be determined by the trial Court."*

Undeniably the discretion is available to the Court i.e. the FGCM or the Court of Appeals, who despite compounding of *Ta'zir* and waiver of *Qisas*, can punish the accused person on the grounds that when he is a previous convict, habitual or professional criminal or the offence has been committed with brutality. Reliance is placed upon ***PLD 1997 Quetta 17 (Niaz Muhammad vs. The State)***. Similarly, the offence of murder affects the society at large and the accused person, who takes the law in his own hands, creates some sensation and panic in society, even otherwise, the offence so committed also relates to the rights of Allah. In such situation, the State is fully competent to award the punishment as may be deemed fit and proper notwithstanding pardon by the legal heirs of deceased. Reliance is placed upon ***PLD 1996 Quetta 56 (Muhammad Akbar, etc. vs. The State)***.

15. The above referred provisions are applicable and available to be applied in the instant matter despite the fact that the petitioner has also been sentenced by the FGCM, his appeal has already been dealt by court of appeal and even his sentence has been reduced manifolds up to the level of COAS. The compounding by the legal heirs results into plain acquittal, even at the highest court of appeal, the effect of compounding (*badal-i-sulh*) has to be extended as held in ***PLD 2018 SC 703 (Suo Moto Case No.3/2017)***, whereby it was held as under:

> *"5. The law permits the legal heirs of a murdered person to compound the offence with the convict, with or without receiving badal-i-sulh/diyat (sections 310 and 323 P.P.C.). When the legal heirs compounded the*

offence they elected not to seek retribution or the enforcement of the sentence. The very premise of compounding the offence is the acknowledgment of guilt by the accused who is then forgiven by the legal heirs; the affidavits filed by the legal heirs clearly also state this.

6. Section 338-F of the P.P.C. stipulates that in the interpretation and application of Chapter XVI ("Offences Affecting the Human Body") "and in respect of matters ancillary or akin thereto, the Court shall be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah". The aforesaid interpretation of subsection (6) of section 345 is in conformity with a number of verses of the Holy Qur'an: surah Al-Baqarah (2) verses 178-9, surah Al-Maidah (5) verse 45, surah Al-Isra (17) verse 33 and surah Ash-Shura (42) verse 40. In these verses our Merciful Creator suggests that forgiveness and reconciliation is preferable to revenge or retaliation. A person can only be forgiven if he is guilty. The cited verses neither state nor imply that the finding of guilt is effaced."

16. In addition to above referred view, one of the senior members of the Bench has given his separate view in the same judgment and explained the concept of compounding in the following manner:

5. Before we dig deep into the controversy at hand it may be advantageous to mention that there are shorter answers available to the questions involved in this matter and they may be recorded straightaway. Chapter XVI of the Pakistan Penal Code, 1860 deals with offences affecting human body including murder and causing of hurt and all such offences are compoundable by virtue of the provisions of section 309, P.P.C. (Waiver-Afw), section 310, P.P.C. (Compounding-Sulh) and section 345, Cr.P.C. Section 338-E(1), P.P.C. and the first proviso to the same (falling in Chapter XVI of the Pakistan Penal Code, 1860) provide as follows:

> *338-E. Waiver or compounding of offences. (1) Subject to the provisions of this Chapter and section 345 of the Code of Criminal Procedure, 1898 (V of 1898), all offences under this Chapter may be waived or compounded and the provisions of sections 309 and 310 shall, mutatis mutandis, apply to the waiver or compounding of such offences:*
>
> *Provided that, where an offence has been waived or compounded, the Court may, in its discretion having regard to the facts and circumstances of the case, acquit or award ta'zir to the offender according to the nature of the offence. -------*
>
> *(bold letters have been supplied for emphasis)*

These provisions show, and show quite clearly, that all the offences affecting human body including murder and causing of hurt falling in Chapter XVI of the Pakistan Penal Code, 1860 are capable of being waived or compounded and that in case of waiver or compounding of such offences the court concerned, after granting the discretionary permission or leave to

> *compound where necessary, is to acquit the person accused or convicted if it is a case of Ta'zir but in a case of Qisas it has a discretion either to acquit or to pass a sentence of Ta'zir against the accused person or convict in view of the peculiar facts and circumstances of the case. It has already been clarified by this Court in the case of Zahid Rehman v. The State (PLD 2015 SC 77) that the discretion to punish by way of Ta'zir under section 311, P.P.C. and other similar provisions after waiver or compounding of the right of Qisas is relevant only to cases of Qisas and not to cases of Ta'zir. It is true that section 345(6), Cr.P.C. does not speak of "acquittal" as a consequence of compounding of an offence and it only speaks of the "effect of an acquittal" but it is now clear through the subsequently introduced section 338-E, P.P.C. that a compounding of a compoundable offence in a case of Ta'zir is to lead to acquittal of the accused person or convict. When the law itself, as it stands today, speaks of acquittal as a consequence of compounding of an offence then any ambiguity in that regard created by the previous state of the law may not confound us anymore.*

17. The only hurdle in petitioner's case is as to whether the concept of waiver or compounding of offences in terms of Sections 309, 310 & 338(E) PPC could be enforced directly or through a procedure provided in Section 345 Cr.P.C., which deals with compounding of offence. Evidently, Cr.P.C. is not applicable, but the solution has to be seen by application of Section 338(E) PPC, which is qualified with proviso that where offence is waived, the Court may, in its discretion having regard to facts and circumstances of the case, acquit or award *Ta'zir* to the offender according to the nature of offence. However, the only legal impediment in the way to compound the offence is the application of Section 345 Cr.P.C., which is not meant to be applied under the Pakistan Army Act, 1952, therefore, the question arises as to whether this Court can draw a line where waiver or compounding of offence can be made without application of provisions of Section 345 Cr.P.C. as it relates to the rights of an individual provided in Holy Quran i.e. specifically in *Surah Al-Baqarah* (2, Verse 178), *Surah Al-Maida* (5, Verse 45), *Sural Bani-Israel* (17, Verse 33) and *Surah Ash-Shura* (42, Verse 40). All these Quranic injunctions describe complete settlement of offences affecting human body, whereas the

concept provided in *Badal-i-Sulh/Diyat* with reference to Sections 309 and 310 PPC is based upon these principles.

18. The continuing position persuaded this Court to hold that Section 143 of the Pakistan Army Act, 1952 provides the concept of ***pardon and remission*** subject to the Act under which a person has been convicted by the Court Martial, the Federal Government or the COAS or any officer not below the rank of Brigadier empowered in this behalf by the COAS, who may accepts the pardon or remit the whole or any part of punishment awarded to the convict, with or without conditions, as the legislature has used the words, "***may***" and "***either***". Both these terms connote the discretion of the authority, which could be applied in the given circumstances while considering facts of each case. In order to explain the word "***may***", reliance is placed upon ***2004 PTD 2187 SC (Abu Bakr Siddique vs. Collector of Customs, Lahore)***, wherein it has been held that:

> *"Word 'may' is discretionary and an enabling word and unless the subject matter shows that the exercise of power given by the provision using the word 'may' was intended to be imperative for the person to whom the power was given, it might not put him under obligation to necessarily exercise such power but if it is capable of being construed as referring to a statutory duty, it is not entirely for such person to exercise or not to exercise the power given to him under the law Use of word 'may' in statute in plain meanings is to give discretion to public authorities to act in their option in the manner in which such authorities deem proper but if the public authorities are authorized to discharge their functions in their option in a positive sense, the word `may' used in the provision can be suggestive of conveying the intention of Legislature of imposing an obligation on them Word `may' usually and generally does not mean 'must' or 'shall' but it is always capable of meaning 'must' if the discretionary power is conferred upon a public authority with an obligation under law Word 'may' is not always used in statute with the intention and purpose to give uncontrolled powers to an authority rather oftenly it is used to maintain the status of authority on whom the discretionary power is conferred as an obligation and thus the legislative expression in the permissive form sometimes is construed mandatory Such however, is only in exceptional circumstances that a power is conferred on a person by saying that he may do a certain thing in his discretion but from the indication of the relevant provisions and the nature of the duty to be done, it appears that exercise of power is obligatory."*

19. It is trite law that when meaning of any statute is clear and plain language of the statute requires no other interpretation then the intention of legislature conveyed through such language has to be given full effect. Plain and unambiguous words must be expounded in their nature and ordinary sense. Reliance is placed upon ***2018 CLD 1470 (M/s Hani Trading Company vs. Ministry of Commerce)***. Similarly, the Court is under legal obligation to discover the true intent of legislature while interpreting the statute. The intention of legislature is primarily to be gathered from the language used, meaning thereby attention has to be paid to what has been said and also what has not been said.

20. The other important aspect to be considered in this context is the status of the Pakistan Army Act, 1952, which is a special law and has precedence over the general law, even the special law has to be applied in case of two similar subjects in field. Similarly, special law is to be prevailed in case of any inconsistency, or if there is any gap, then provisions of general law have to be applied for understanding of reference as held in cases reported as ***PLD 2019 Islamabad 1 (FGEHF vs. Malik Ghulam Mustafa, etc.), 2018 CLC 1910 Islamabad (Senator Taj Haider vs. GOP)*** and ***PLD 2018 Islamabad 51 (SNGPL vs. Director (Legal), President Secretariat (Public), Islamabad)***. The principles settled therein persuaded this Court to hold that the Pakistan Army Act, 1952 can be applied in these particular situations and to be specific Section 143 of the Act includes principles adhering to the concept of Section 345 Cr.P.C., the areas referred in Cr.P.C. have been justified by using word "***may***", "***either without conditions or upon conditions***" in Section 143 of the Pakistan Army Act, 1952, hence the discretion to the army authorities i.e. the FGCM, Court of Appeal, COAS or any other officer is absolute, who can consider each criminal case of a military official under their special law. Similarly, by considering the concept of compounding as referred in Section 310 PPC read with Section 338(E) PPC, the army authorities are

the best judge to settle the question of pardon and remission. Such kind of discretion, if exercised by the army authorities, cannot be considered under the concept of judicial review in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 unless there is patent illegality or order regarding conviction or acquittal has been passed beyond legal jurisdiction of the authority.

21. Article 2 of the Constitution of the Islamic Republic of Pakistan, 1973 describes the Islam as State religion and Quran as primary source of law. Similarly, it has also been explained in the Constitution that any law which is repugnant to injunctions to Quran and Sunnah is void, even otherwise, the State is under legal obligation to provide due protection of law and no discrimination could be made, therefore, the concept of compounding is provided in Section 345 Cr.P.C., which is not available in the Pakistan Army Act, 1952. However, the relevant provision in terms of Section 143 of the Pakistan Army Act, 1952 has to be equalized in a similar manner and could be applied in favour of the proposition raised in the instant case, subject to law by the army authorities.

22. At last, I have no hesitation to hold that petitioner, who was convicted in case FIR No.340, dated 30.12.2015, under Section 302/201/34 PPC, P.S. Sihala, Islamabad by the FGCM for the murder of Mehmood Ahmad (deceased), was given due benefits of pardon and remission by application of Section 143 of the Pakistan Army Act, 1952 as reflected in para-wise comments submitted by respondent authorities with reference to Paras 1 to 7, in which it was specially referred that a compromise between the parties took place at appellate stage and the same was considered by the then army authority, as a result whereof the due remission in sentence was given and sentence of 23 years rigorous imprisonment was reduced to 03 years rigorous imprisonment by different army authorities up to the level of COAS, which itself reflects that the sentence awarded to the petitioner is reduced while considering each and every aspect of compromise in

the offence of murder, therefore, at this stage, the claim of petitioner for complete compounding and declaring him entitle to acquittal in the above said charge is not justified, which itself falls within the exclusive domain of the Pakistan army authorities under the Pakistan Army Act, 1952.

23. In view of settled position discussed above, the concept of discretion provided by legislature in Section 143 of the Pakistan Army Act, 1952 is absolute and as such no specific order was placed for perusal of this Court where army authorities have considered the question of compounding independently under the Pakistan Army Act, 1952 in terms of Section 143, although the concept of pardon or remission is qualified with or without conditions, therefore, the entire background of this case does not permit this Court to enter into the arena of judicial review in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 against the conviction and sentence awarded by the FGCM, unless the ground of *coram non judice*, without jurisdiction or suffering from malafide including malice are apparent as held in ***2017 SCMR 1249 (Said Zaman Khan vs. Federation of Pakistan, etc.)***.

24. However, keeping in view the facts and circumstances discussed above as well as the plea raised by the petitioner through instant writ petition that he entered into compromise with legal heirs of deceased, which as per his own version was recorded at the time of trial of his co-accused by the Sessions Judge (East), Islamabad vide judgment dated 30.10.2017, passed in case titled as "*The State vs. Minhaj Munir*", but this aspect could not absolve the petitioner completely as the matter was compounded in the criminal trial of co-accused under Section 345 Cr.P.C., in which the petitioner was not the accused before that Court.

25. The petitioner's case has to be dealt by the army authorities only if a compromise has been effected between the petitioner and legal heirs of the

deceased, which requires acknowledgment only by the army authorities and the petitioner could only be allowed to take relief in terms of Section 143 of the Pakistan Army Act, 1952. Although, the army authorities have already considered all these aspects and extended due benefit to the petitioner, but a clean acquittal in this matter could not be applied as the petitioner was a serving Major of Pakistan Army when he committed murder of Mehmood Ahmad i.e. serving Lineman of IESCO, who was on duty and as such, this conduct of the petitioner falls within the purview of *Fasad-Fil-Arz*. The FGCM convicted the petitioner pursuant to observing each and every aspect of the case i.e. position of the petitioner together with the nature and style in which the crime was committed, even otherwise, if at all, the petitioner deserves any leniency, the same has already been extended to the petitioner on the basis of decision passed by the Sessions Judge (East), Islamabad, in which compounding in terms of Section 345 Cr.P.C. was recorded to the extent of co-accused and petitioner, although the same is not permissible under the Pakistan Army Act, 1952.

26. The petitioner could agitate all these grounds at the relevant stage before the Court of appeal or the army authorities to take into consideration the compromise independently, but the petitioner neither carried out such exercise, nor the same was requested by the petitioner, rather he intends to get benefit of the judgment passed in favour of the co-accused, which has nothing to do with the trial of petitioner as the petitioner had been tried by the FGCM.

27. The requirements of judicial review in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 have already been settled with reference to Section 143 of the Pakistan Army Act, 1952 in case reported as ***PLJ 2017 SC 293 (Ex-Lance Naik Mukarram Hussain, etc. vs. Federal Government M/o Defence, etc.)***, wherein it has been held as under:

"……A bare perusal of both the above provisions would make it clear that the provisions of Code of Criminal Procedure are not applicable to the matters governed by any Special or Local Law unless specifically provided in the said laws wholly or to any extent. If a person, who was proceeded against under a Special La, he would be dealt with according to the procedure of enquiry/investigation and trial as laid down in the said Special Law. While reverting back to the case in hand, all the petitioners/applicant were dealt with in accordance with the provisions of the Army Act. The provisions of Section 143 of the Army Staff or any officer not below the rank of Brigadier empowered in this behalf by the Chief of Army Staff who is empowered to grant such pardons, remissions and suspensions. In view of this very specific provision of the Army Act and being a Special Law, in our view, this Court cannot assume such jurisdiction and that too in its Review jurisdiction. The scope of Review provided under Article 188 of the Constitution of Islamic Republic of Pakistan, 1973 is very limited as such jurisdiction can only be exercised by this Court when there is an apparent error on the face of the record having bearing on the fate of the case. The question of jurisdiction to entertain C.P.L.A. or C.A. has already been dealt with by this Court while deciding the appeals of the present petitioners vide judgment dated 1.04.2015 and this issue has also been addressed in an un-reported judgment dated 22.04.2015 delivered in Civil Petition No.276/2015 titled Ex. Havildar Iftikhar Hussain vs. Federation of Pakistan through Secretary M/o Defence, Rawalpindi Cantt. This Court has time and again faced the question of jurisdiction relating to the orders or actions of the Armed Forces and it has been the firm view of this Court that there is no bar of jurisdiction if the same suffer from mala fide, jurisdictional error or corum non judice. This Court in case of Ghulam Abbas vs. Federation of Pakistan through Secretary Ministry of Defence (2014 SCMR 1530) has held that "any action or order of any authority relating to Armed Forces of Pakistan, which is either corum non judice, malafide 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. In the case of Rana Muhammad Naveed vs. Federation of Pakistan through Secretary M/o Defence (2013 SCMR 596) this Court was of the view that there is no prohibition on the High Court to make an order under Article 199(3) of the Constitution if acts, actions or proceedings suffered from defect of jurisdiction or corum non judice. Further in the case of Federal Government through M/o Defence, Rawalpindi vs. Munir Ahmad Gill (2014 SCMR 1530) this Court has observed that if an action of the Army Authorities with regard to a serving officer of the Armed Forces or any other person subject to the Army Act is established to be either malafide, corum non judice or without jurisdiction then the same

could be assailed through a Constitution Petition by such aggrieved person and the bar of jurisdiction under Article 199(3) of the Constitution would have no applicability. Thus, we are very much clear that jurisdiction of this Court can only be justified against orders or actions of the Army Authorities if same are suffering from malafide, jurisdictional error or thus corum non judice but in the case in hand all the elements lack their existence. Moreover, it has been the firm view of the Courts that provisions of the, Cr.P.C. would not attract to a case involving an offence dealt with by the Field General Court Martial under the Army Act."
(Underlining is mine provided for emphasis)

28. In view of above settled position, the instant writ petition is not maintainable and the same is hereby ***DISMISSED***.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: _____.

JUDGE

APPROVED FOR REPORTING

Khalid Z.