Judgment Sheet

PESHAWAR HIGH COURT, PESHAWAR

JUDICIAL DEPARTMENT

Writ Petition No.1706-P of 2016

JUDGMENT

Date of hearing 02.03.2017 (Announced on 25.05.2017)

Petitioner: (Muhammad Ayaz) by M/s Abdul Latif Afridi and Khalid Anwar, Advocates.

Respondents: (The Superintendent District Jail, Timergara and others) M/s Manzoor Khan Khalil, DAG and Waqar Ahmad Khan,AAG alongwith Major Muhammad Tahir and Lt.Col. Kashif, 11 Corps.

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YAHYA AFRIDI, C.J.- Muhammad Ayaz, petitioner, seeks the Constitutional jurisdiction of this Court in challenging the conviction awarded to convict Muhammad Imran, by the Court Martial, whereby, he was sentenced to death vide order dated 28.6.2015.

2. The brief and essential facts leading to the present petition are that convict Muhammad Imran, being involved in terrorist activities, was charged and tried by a Court Martial **("Military Court")** under The Pakistan Army Act, 1952 as amended vide Pakistan Army (Amendment) Act,

2015 **("The Army Act")**, for the following charges;

"First Charge.
PAA Section 59
Committing a civil offence, that is to say, designing vehicle for terrorists act, in that he, at Nahaqi (Mohmand Agency) during 2008, alongwith Civilians Musafir and Farhan designed a Shahzore vehicle by fixing improvised explosive device for terrorist attack on Nahaqi Check Post, Mohmand Rifles, Frontier Corps ; and thereby committed an offence punishable under Pakistan Army (Amendment)Act, 2015.

Second Charge
PAA Section 59
Committing a civil offence, that is to say, attacking the law enforcement agency, in that he, at DG-II Check Post (Mohmand Agency), on 29 October 2008, alongwith Civilian Sheraz attacked on the troops of 3 Wing Mohmand Rifles, Frontier Corps, deployed at DG-II Check Post, by firing with Sub Machine Gun; and thereby committed an offence punishable under the Pakistan Army (Amendment) Act, 2015.

Third Charge
PAA Section 59
Committing a civil offence, that is to say, possessing firearm, in that he, at DG-II Check Post (Mohmand Agency), on 29 October 2008, was found in possession of 1x Sub Machine Gun alongwith 4x Magazines; and thereby committed an offence punishable under the Pakistan Army (Amendment) Act, 2015;

Fourth Charge
PAA Section 59
Committing a civil offence, that is to say, possessing explosives, in that he, at DG-II Check Post (Mohmand Agency), on 29 October 2008, was found in possession of 2x grenades; and thereby committed an offence punishable under the Pakistan Army (Amendment) Act, 2015;

3. To the above charges, the accused pleaded *guilty*. However, Military Court did not convict the accused on his said plea of guilt, and directed the prosecution to lead its evidence, as provided under Sub-Rule (4) of Rule 42 of The Pakistan Army Act Rules, 1954 **("The Rules")**, which reads;-

> ***"A plea of "Guilty" shall not be accepted in cases where the accused is liable, if convicted, to be sentenced to death, and where such plea is made, the trial shall proceed and the charge shall be dealt with as if the plea made was "Not guilty".***

4. Accordingly, the prosecution in support of its case produced as many as seven witnesses, which included Interrogation Officer (**PW-1**); Internment Officer (**PW-2**) who produced internment report; Judicial Magistrate (**PW-5**) who recorded the confessional statement of the convict; an officer (**PW-7**) before whom the accused recorded his inculpatory voluntary statement at the time of recording summary of evidence; and (**PW-3, 4 & 6**) supported the prosecution's case in their testimony before the Military Court.

5. The Military Court also examined the convict, Muhammad Imran, who once again confessed his guilt, by narrating the entire events and his involvement in the terrorist activities, in terms that:

> ***"I Mohammad Imran son of Abdul Manan joined Harkat-ul-Mujahideen in year 2004. I went to Karachi in year 2005 where I got affiliated with Haqqani Network and got training from its commander Khalifa at Miran Shah in year 2006. In year 2007, I moved to Kurram agency and established a camp at Ghauz Ghari Makbal near Afghanistan border in Upper Kurram. I took part in various attacks across the border in Afghanistan on NATO/Allied troop convoys. In year 2008, I got appointed as commander of Khalifa group in Mohmand Agency. I established my markaz at Lakaro Walikore Qandharo and made a pact with Commander Abdul Wali of Tehreek-e-Taliban Mohammad. I got training of preparation of improvised explosive devices/ suicide jackets at markaz of Taliban commander Abdul Wali. I confess to having prepared a Shahzore vehicle borne improvised explosive that was used on 26 October 2008 at Nahaqi check post suicide attack. I used to roam around in Mohmand agency alongwith my companions brandishing weapons and regularly coordinated my activities alongwith Taliban commander Abdul wali at Mohmand agency. On 29 October 2008, upon reaching DG-II check post, one of the sentries deployed on duty gave signal to our car for stopping. As I and my driver companion were armed with SMG and grenades so I told my companion to speed up the car, while I started firing upon the troops deployed at check post. Upon retaliatory firing by the troops, I got injured at my shoulder while other person alongside me died on spot. During the fire fight, I abandoned the car and ran towards nearby built up area. I tried to avoid capture by taking shelter behind hostage children, but after a prolonged fight my***

ammunition ran out and I surrendered to the troops."

(emphasis provided)

6. Valuable arguments of the worthy counsel for the parties heard and the available record of the case thoroughly considered.

7. The worthy counsel for the petitioner raised a *preliminary objection* that with the flux of time, the impugned conviction by the Military Court had lost its legal force, and thus was a nullity in the *eyes* of law. The legal contention of the worthy counsel for the petitioner was that the Military Court had sentenced the convict to death under the provisions introduced in the Army Act through the *Sun Set legislation*, which expired on 7th January, 2017, and thereafter, the sentence of death could not be executed. The worthy counsel placed reliance on ***Air League's case*** **(2011 SCMR 1254)**. It was further contended that as the matter was still before this Court and the death sentence had not been executed, it was not a *closed* and *past transaction*, so as to rescue the prosecution under section 6 of the General Clauses Act, 1897. In this regard, reliance was placed on ***Sheikh Liaqat Hussain's case*** **(PLD 1999 SC**

504), *Imran's case* (PLD 1996 Lahore 542), *Mehram Ali's case* (PLD 1998 SC 1445).

8. In response, the worthy Deputy Attorney General vehemently opposed the contention of the worthy counsel for the petitioner by stating that all actions taken, decision passed by the Military Court under the Army Act were protected under section 6 of the General Clauses Act, 1897. In this regard, reliance was placed on ***Asad Ali's case*** **(PLD 1998 SC 161), *Mehram Ali's case*** and ***Air League's case*** *supra*.

9. This contested legal issue does not require a definite finding of this Court in the instant petition, as during the present proceedings, the Parliament introduced the **Constitutional (Twenty Third Amendment) Act, 2017 ("Act of 2017")** and the **Pakistan Army (Amendment) Act, 2017,** whereby the *life* of the Military Courts was extended for a further period of two years from 07.01.2017. The relevant provision of the Act of 2017 so introduced, reads;

> *"**1. Short title and commence.—***
> *(1) This Act may be called the Pakistan Army (Amendment) Act, 2017.*
> *(2) It shall come into force at once and shall be deemed to have taken effect on and from 7th January, 2017.*

> *(3) The provisions of this Act shall remain in force for a period of two years from the date of its commencement and shall cease to form part of the Constitution and shall stand repealed on the expiry of the said period."*

10. Accordingly, the *preliminary objection* of the worthy counsel for the petitioner regarding the conviction being without any lawful authority based on the legal premise that the *Sun Set Legislation* had lapsed would be of no legal avail to the convict.

11. During the proceeding of the instant case, the worthy counsel for the petitioner moved an application (C.M.No.1752-P/2016), raising a specific plea that Major Faisal Riaz Kiyani purporting to be a member of the Military Court had raised serious objections to the death sentence awarded to the three specific cases mentioned therein. In response to the said application, the Assistant Judge Advocate General expressly denied the veracity of the said letter and in support thereof filed a personal affidavit.

12. There being contesting assertions of the parties duly supported by affidavits, this Constitutional Court would not enter into resolving

the said issue in the instant constitutional petition. In this regard, we seek guidance from the judgment of the august Supreme Court of Pakistan in ***Ghulam Nabi's case*** **(PLD 2001 SC 415)**, wherein it was held that;

> *"It hardly needs any elaboration that the superior Courts should not involve themselves into evidence. This can more appropriately be done in the ordinary Civil Procedure for litigation by a suit. This extraordinary jurisdiction is intended primarily, for providing an expeditious remedy in a case where the illegality of the impugned action of an executive or other authority can be established without any elaborate enquiry into complicated or disputed facts."*

Similarly, in ***Shamim Khan's case*** **(PLD 2005 SC 792)**, the Full Bench of the Apex Court has observed that;

> ***"Controversial question of facts requiring adjudication on the basis of evidence could not be undertaken by the High Court under its Constitutional jurisdiction where the material facts were admitted by the respondent, High Court could interfere."***

This was followed by the Apex Court in ***Muhammad Sadiq Vs. Ilahi Bukhsh*** **(2006 SCMR 12)** and has held that;

> *"High Court in exercise of its constitutional jurisdiction is not suppose to dilate upon the controversial questions of facts and interfere in the concurrent findings on such question in the writ jurisdiction but it is settled law that if findings of facts are based on misreading or non-reading of evidence or not supported by any evidence, the High Court without any hesitation can interfere in the matter in its constitutional jurisdiction."*

And finally, the Supreme Court has reiterated the above principles in ***Watan Party's case*** (PLD 2012 SC 292).

13. In view of the *'ratio decidendi'* laid down in the above judgments of the apex Court, it is clear that controversies, which are based on contentious disputed fact, should not be entertained and adjudicated in constitutional jurisdiction. Accordingly, the contention of the worthy counsel for the petitioner will not be considered while deciding the instant petition.

14. Now, moving on to the next contention of the worthy counsel for the petitioner

qua the access to the record of the Military Court leading to the impugned conviction. When confronted, the worthy Deputy Attorney General vehemently contested the same and submitted that by allowing free access of the record and that too in an open Court would be against the law and put the *life* of the Presiding Officer, witnesses and counsel representing the parties at peril.

15. In this regard, the attention of this Court was drawn to the procedure endorsed, and adopted by the Apex Court, in case titled, ***"Said Zaman Khan Vs Federation of Pakistan & others" (C.P.No.842 of 2016)*** wherein, it was held that;-

> *97.The learned counsels for the petitioners complained of limited access to the record of the proceedings conducted by the FGCM. We cannot ignore the fact that in view of the peculiar nature of the offences for the commission whereof the Convicts have been accused, it was imperative that efforts should be made to ensure the security and safety of the Members of the FGCM, witnesses produced, the Prosecuting and the Defending Officers and the interpreters. Such sensitivity necessitated by the existing extra-ordinary circumstances has been reflected in Section 2-C of the Pakistan Army Act, incorporated through a subsequent Amending Act dated 19.11.2015. In the instant cases through specific Order passed by this Court, all the learned counsels were permitted to examine the record of the proceedings of the FGCM, which has been made available to this Court. It has also been noticed that at no point of time after the confirmation of*

> *the sentence by the FGCM, any application was filed to the Competent Authority for the supply of the copies of the proceedings, if so required, in terms of Rule 130 of the Pakistan Army Act Rules, 1954. Such applications were not even moved during the pendency of the proceedings before the High Courts or even before this Court.*
> *In the circumstances, we are not persuaded that any prejudice has been caused to the petitioners, in this behalf.*
> *(emphasis provided)*

16. In view of the definite direction rendered by the Apex Court, this Court decided that the record and the proceedings should not be made open to *public*, and that the recorded proceedings leading to the impugned conviction should only be provided to the worthy counsel for the petitioner, and that too after due precautions are taken to ensure that the identity of the witnesses, Presiding Officers and the worthy counsel for the parties in the proceedings challenged before this Court, are not divulged or revealed. As a further precautionary measure, the worthy Deputy Attorney General insisted that the copies of the written notes taken by the worthy counsel for the petitioner during the inspection of the record allowed by this Court be also provided to the prosecuting team. The same being not

prejudicial to the defense of the convict was allowed.

17. Accordingly, the worthy Deputy Attorney General alongwith the official custodian of the record were directed to provide to the worthy counsel for petitioner, the recorded trial proceedings at the Judges' Library, Peshawar High Court, Peshawar. And this Court, ensured that the entire record of the Military Court leading to the impugned conviction had been inspected and examined by the worthy counsel for the convict prior to his addressing legal submissions before this Court.

18. Before this Court considers the merits of the valuable submissions of the worthy counsel for the parties, it would be crucial to first determine the scope of judicial review mandated to this constitutional Court in adjudicating the challenge made to the conviction and sentence awarded to a civilian by a Military Court under the Army Act. This jurisdictional issue has been a matter of great deliberation by the superior Courts of our jurisdiction, which culminated in the decision of the apex Court in ***Said Zaman Khan's***

case *supra*, wherein the worthy Supreme Court held that;

> ***"93. It may be noted that the actions complained of can even otherwise be without jurisdiction, a separate and independent ground available to challenge the sentences and convictions of the FGCM, therefore, it must necessarily be examined whether the FGCM had the jurisdiction over the person tried and the offence for which such trial has taken place and to ascertain existence or otherwise of any other defect or a gross illegality in the exercise of jurisdiction denuding the same of validity.***
>
> ***However, we cannot lose sight of the non-obstantive provision {in the Constitution i.e. Article 199(3)} impeding the exercise the powers of Judicial Review by the High Court under Article 199 of the Constitution. Consequently, the boundaries of the available jurisdiction cannot be pushed so as to negate and frustrate the said provision of the Constitution. An exception to the rule barring exercise of jurisdiction cannot be extended so s to defeat and destroy the rule itself. It is by now a well settled proposition of law, as is obvious from the judgments of this Court, referred to and reproduced hereinabove, that the powers of Judicial Review under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, against the sentences and convictions of the FGCM is not legally identical to the powers of an Appellate Court. The evidence produced cannot be analyzed in detail to displace any reasonable or probable conclusion drawn by the FGCM nor can the High Court venture into the realm of the "merits" of the case. However, the learned High Court can always satisfy itself that it is not a case of no evidence or insufficient evidence or the absence of jurisdiction."***
>
> ***(emphasis provided)***

19. Keeping the *ratio decidendi* of the aforementioned judgment as our guiding principle,

it would be safe to state that this Court in its constitutional jurisdiction has the legal mandate to positively interfere with the decision of the Military Courts on three fundamental grounds; if the case of the prosecution is based, **Firstly**, on no evidence, **Secondly,** insufficient evidence and **Thirdly**, absence of jurisdiction.

20. Thus, the evidentiary value of the prosecution *evidence* cannot be adjudged by this Court as a *Court of Appeal* and that too on the legal threshold required for conviction of a person on a capital charge under the ordinary criminal law. What this Court has to see is whether the conviction recorded by the Military Court is based on *no* or *insufficient evidence* or *absence of jurisdiction*.

21. Even if this Court discards the entire evidence of the prosecution witnesses, the statement of the accused before the Judicial Magistrate and Military Court, duly narrated hereinabove, clearly speaks of his admission of guilt of the charges framed against him. Needless to mention, that prior to making his admission of guilt before the Military Court, the convict had on

three previous occasions admitted his guilt; **Firstly**, before the Judicial Magistrate, while recording his statement under section 164 of Criminal Procedure Code, 1898 **("Cr.P.C.")**, **Secondly**, during his period of Internment under section 13 of the Actions (In Aid of Civil Power) Regulation, 2011 and **Thirdly**, during the proceedings of taking summary of evidence under Rule 13 of the Rules.

22. No doubt, the challenge made to the mode, manner and the time of the confessions made by the accused, under the ordinary criminal jurisprudence would seriously diminish the evidentiary value thereof. But in view of the limited scope available to this constitutional Court in evaluating the evidence and the repeated admission of guilt by the accused convict does not warrant interference in the impugned conviction and sentence awarded by the Military Court.

23. As far as the contention of the worthy counsel for the petitioner that the convict was not provided legal representation of his free choice, as was his *Fundamental Right* under Article 10-A of the Constitution of Islamic Republic of Pakistan,

1973 **("Constitution")** and Rules 23, 82, 83 and 87 of the Rules, it is noted that this issue was resolved in ***Said Zaman Khan's case*** *supra,* by Mr.Justice Faisal Arab in his separate note. It was opined;-

> ***"The Court in its anxiety to ensure that a crime may not go unpunished must not lose sight of the fact that the family members of the accused must be given information of his arrest or detention. If in the present case had there been no categorical admission of guilt by the convicted persons before the Magistrate, retrial would have been the right course to adopt."*** ***(emphasis provided)***

24. Thus, in the face of the bold repeated admission of guilt made by the accused, the impugned conviction and sentence does not warrant to be set aside on this ground alone. Moreover, in this regard, it is on record that when confronted, the convict did not oppose or protest the defending officer appointed to represent him before the Military Court under Rule 23 of the Rules.

25. Similarly, it was also argued by the worthy counsel for the petitioner that the prosecution had not obtained the requisite sanction of the Federal Government and that the appeal of the convict has not been considered and decided by the competent authority. In response, the worthy Attorney General produced copies of sanction of the Federal

Government for trial of accused by Military Court, order of Court of Appeal whereby appeal filed by the convict was rejected and orders of confirmation of sentence and rejection of Mercy Petition by the Chief of Army Staff.

26. The worthy counsel for the petitioner further urged the Court that the charges for which the convict was sentenced to death by the Military Court is not an offence punishable to death under the ordinary penal laws of Pakistan. Hence, it was vehemently argued that the sentence of death could not be maintained in the instant case.

27. It is an admitted position that Muhammad Imran *alias* Mansoor son of Abdul Manan is a civilian, who has been charged for four distinct *civil offences;* **firstly** for designing a vehicle for terrorist act and affixing thereon improvised explosive for a terrorist attack, **secondly** for attacking the law enforcing personnel by firing with sub-machine gun, **thirdly** for possessing fire arm and ammunition, and **finally** for possessing grenades (explosive).

28. The two striking features in the above charges are that **firstly** Muhammad Imran is not charged for the death of any person, **secondly** he

was not charged for actually causing an explosion. Keeping in view these two striking features of the charges against Muhammad Imran, let us review the jurisdictional mandate of a Military Court to try a civilian for a *civil offence*, as provided under section 59 of the Army Act. The said provision reads:-

> "***59.Civil Offences.-*** *(1) Subject to the provisions of sub-section (2), any person subject to this Act who at any place in or beyond Pakistan commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be dealt with under this Act, and on conviction, to be punished as follows, that is to say,-*
>
> *(a) if the offence is one which would be punishable under any law in force in Pakistan with death or with imprisonment for life, he shall be liable to suffer any punishment assigned for the offence by the aforesaid law or such less punishment as is in this Act mentioned; and*
>
> *(b) in any other case, he shall be liable to suffer any punishment assigned for the offence by the law in force in Pakistan, or rigorous imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned.*
>
> *Provided that, where the offence of which any such person is found guilty is an offence liable to Hadd under any Islamic law, the sentence awarded to him shall be that provided for the offence in that law.*
>
> *(3) The powers of a Court martial or an officer exercising authority under section 23 to charge and punish any person under this section shall not be affected by reason of the fact that the civil offence with which such person is charged is also an offence against this Act.*
>
> *(4) Notwithstanding anything contained in this Act or in any other law for the time being in force a person who becomes subject*

> *to this Act by reason of his being accused of an offence mentioned in clause (d) of sub-section (1) of section 2 shall be liable to be tried or otherwise dealt with under this Act for such offence as if the offence were an offence against this Act and were committed at a time when such person was subject to this Act; and the provisions of this section shall have effect accordingly."*
>
> *(emphasis provided)*

29. The bare reading of clause (a) of sub-section (1) of section 59 *ibid* clearly reveals that the quantum of sentence that can be awarded by a Military Court cannot go beyond that prescribed for the said offence under the ordinary penal laws enforced in Pakistan. This crucial issue came up before the Apex Court in ***Brig (Retd) F.B.Ali's case*** **(PLD 1975 SC 506),** wherein the Hon`ble Court explained the limited scope of awarding punishments being restricted to clause (a) and (b) of section 59 of the Army Act. The apex Court opined that;

> *"It is limited to an offence mentioned in clause (d) of sub-section (1) of section 2 of the said Act and its purpose is to make that offence triable under the Army Act as if it was an offence under the said Act and was committed at the time when such person was subject to the said Act. In the case of other civil offences, the provisions of sub-section (1) of section 59 are attracted. This sub-section reads as follows;-*
>
> *(1) Subject to the provisions of sub-section (2), any person subject to this Act who at any place in or beyond Pakistan commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this*

section, shall be liable to be dealt with under this Act, and on conviction, to be punished as follows, that is to say,-

(a) if the offence is one which would be punishable under any law in force in Pakistan with death or with imprisonment for life, he shall be liable to suffer any punishment assigned for the offence by the aforesaid law or such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment assigned for the offence by the law in force in Pakistan, or rigorous imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned.

This section seems to provide that if any person who is or has become subject to the Army Act, commits any civil offence, he shall be seemed to be guilty of an offence against the said Act and, if charged therewith, shall be liable to be tried by a Court Martial subject to the limitations mentioned in sub-section (2) and will be punishable as prescribed in clauses (a) and (b).”

30. This Court has to now consider whether under the ordinary penal laws of Pakistan the offences for which Muhammad Imran has been convicted and sentenced to death carry the capital punishment of death or otherwise.

31. There was no contest except the first charge, which the worthy Deputy Attorney General insisted was punishable with death under the ordinary penal laws. For ease of reference, the said charge is reiterated and it reads;-

***“First Charge**.*
PAA Section 59

> ***Committing a civil offence, that is to say, designing vehicle for terrorists act, in that he, at Nahaqi (Mohmand Agency) during 2008, alongwith Civilians Musafir and Farhan designed a Shahzore vehicle by fixing improvised explosive device for terrorist attack on Nahaqi Check Post, Mohmand Rifles, Frontier Corps ; and thereby committed an offence punishable under Pakistan Army (Amendment)Act, 2015."***

32. Now, when we canvas through the ordinary penal laws relating to explosive and in particular the offence for which the convict was charged in the instant case, our attention is drawn to the provisions of the ***Explosive Substances Act, 1908*** **("Act of 1908")**, and the more recent legislation relating to terrorism, ***The Anti Terrorism Act, 1997*** **("Act of 1997").** In this regard, let us first review section 3 of the Act of 1908, which was so rigorously relied upon by the worthy Deputy Attorney General, contending that the same to carry the death sentence. The said provision provides;-

> ***"3.Punishment for causing explosion likely to endanger life or property****. Any person who unlawfully and maliciously causes by any explosive substance and explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not be punished with death or imprisonment for life."*
>
> ***(****emphasis provided****)***

33. When we read the above provision of law, it is but clear that the condition precedent for saddling the said charge on any person is the very act of explosion, which in the present case is wanting. The charge against Muhammad Imran was not for the act of causing an explosion. In fact, he was charged for planting an explosive device. This act could fall under the offences provided under sections 4 and 5 of the Act of 1908, which at best carry the maximum punishment for life and not death.

34. More importantly, the Act of 1997, a more recent legislation aimed to curb terrorism, specifically provided in section 6 for offences relating to explosives. The said provision reads;-

> *"**Section 6 Terrorism.-***
> *(1) In this Act, terrorism means the use or threat of action where;*
> *(a) the action falls with the meaning of sub-section (2), and*
> *(b)……..*
> *(c)……..*
> *(2) An action shall fall within the meaning of sub-section (1), if it;*
> *(a)……..*
> *(b)……..*
> *(c)……..*
> *(d)……..*
> *(e)……..*
> *(ee) Involves use of explosives by any device including bomb blast or having any explosive substance without any lawful justification or having been unlawfully concerned with such explosive.*

35. The punishment prescribed for the above act of *terrorism* relating to explosives under section 6(2)(ee) is provided in section 7 (1) (ff) in terms that;-

> *"the act of terrorism committed falls under section 6(2)(ee), shall be punishable with imprisonment which shall not be less than fourteen years but may extend to imprisonment for life."*
>
> *(Emphasis provided)*

36. Thus, what we have are two penal provisions prescribing two distinct punishments for the same offence. Faced with such circumstances, it is by now settled principle of safe administration of criminal justice that the accused is to be charged for an offence carrying a lesser punishment. Moreover, this Court cannot lose sight of the wisdom of the legislature, whereby it, while enacting a law to curb terrorism has expressly provided a lesser punishment for the offence relating to explosive. When faced with these two penal legislations regarding the same offence, the one more recent has to be given precedent and applied.

37. When confronted with the above legal position, the worthy Deputy Attorney General vehemently contended that Muhammad Imran

though not charged for the actual act of explosion, had admitted in his statement that the *Shahzore* he had laden with explosives was used in a terrorist attack causing death to security personnel and hence is criminally liable for the same. This Court is not in consonance with the above contention of the worthy Deputy Attorney General for the simple reason that Muhammad Imran was not charged for causing death to the security personnel, as a result of the explosion. To saddle him with the punishment of death would surely prejudice his defence; an accused cannot be punished for an offence he was not charged for. This cardinal principle of safe administration of justice cannot be lost sight of even in cases tried by the Military Court under the Army Act.

38. In conclusion, keeping in view the limited scope of judicial review mandated to this Court and in the face of the repeated admission of guilt made by the convict, culminating in punishment awarded by the Court Martial, it would not be appropriate for this Court to interfere in the impugned conviction. However, as far as the quantum of sentence is concerned, this Court has

serious reservations for awarding death sentence to the convict for the charges he faced before the Military Court.

38. In view of the above deliberation, this Constitutional Court finds that:-

(1) The awarded of conviction by the Military Court to Muhammad Imran does not warrant interference by this Constitutional Court, as it is not a case of no or insufficient evidence.

(2) The sentence awarded to Muhammad Imran *alias* Mansoor son of Abdul Manan, however, warrants interference by this Constitutional Court, as the Military Court lacked legal jurisdiction to award death penalty for the charges like the ones framed upon him.

(3) The sentence of death awarded to Muhammad Imran *alias* Mansoor son of Abdul Manan and the confirmation thereof passed by the Chief of Army Staff is set aside and the case is remanded back to the Military Court either to revisit the quantum of punishment awarded or to alter the charge

framed against Muhammad Imran and thereafter proceed against him under the law.

Accordingly, for the reasons stated hereinabove, this writ petition is disposed of, in the above terms.

Announced
Dt.

-SD-
CHIEF JUSTICE

-SD-
J U D G E

F.Jan/*