

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

Present:

Mr. Justice Sardar Tariq Masood
Mr. Justice Amin-ud-Din Khan
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Syed Hasan Azhar Rizvi
Ms. Justice Musarrat Hilali
Mr. Justice Irfan Saadat Khan

1. I.C.A.5/2023 IN Const.P.24/2023
2. I.C.A.6/2023 IN Const.P.24/2023
3. I.C.A.7/2023 IN Const.P.25/2023
4. I.C.A.8/2023 IN Const.P.24/2023
5. I.C.A.9/2023 IN Const.P.26/2023
6. I.C.A.10/2023 IN Const.P.26/2023
7. I.C.A.11/2023 IN Const.P.30/2023
8. I.C.A.12/2023 IN Const.P.35/2023
9. I.C.A.13/2023 IN Const.P.27/2023
10. I.C.A.14/2023 IN Const.P.24/2023
11. I.C.A.15/2023 IN Const.P.35/2023
12. I.C.A.16/2023 IN Const.P.26/2023
13. I.C.A.17/2023 IN Const.P.24/2023
14. I.C.A.18/2023 IN Const.P.30/2023
15. I.C.A.19/2023 IN Const.P.25/2023
16. I.C.A.20/2023 IN Const.P.25/2023
17. I.C.A.21/2023 IN Const.P.28/2023
18. I.C.A.22/2023 IN Const.P.25/2023
19. I.C.A.23/2023 IN Const.P.30/2023
20. I.C.A.24/2023 IN Const.P.26/2023
21. I.C.A.25/2023 IN Const.P.28/2023

Shuhada Forum, Balochistan through its Patron in
Chief, Nawabzada Jamal Raisani, Quetta Cantt. and
others

...Appellants

Versus

Justice (R) Jawwad S. Khawaja and others

...Respondents

For the Appellants:

Mr. Mansoor Usman Awan, AGP
Ch. Aamir Rehman, Addl. AGP
Malik Javed Iqbal Wains, Addl. AGP
Raja Muhammad Shafqat Abbasi, DAG
Mr. Khalid Ishaq, AG, Pb
Mr. Baleegh-uz-Zaman Chaudhry, Addl. AG, Pb
Malik Waseem Mumtaz, Addl. AG, Pb
Mr. Khurram Shahzad, Addl. AG, Pb
Mr. Ayaz Khan Swati, Addl. AG, Balochistan
Khawaja Haris Ahmad, Sr. ASC
Mr. Yaser Aman Khan, ASC
Mr. Shumail Butt, ASC
Mr. Sikandar Bashir Mohmand, ASC
Mr. Tariq Aziz, AOR

Mr. Jawaid Masood Tahir Bhatti, AOR
Syed Rifaqat Hussain Shah, AOR
Ms. Imrana Parveen Baluch, AOR
Mr. Zahid Yousaf, AOR
Mr. Anis Muhammad Shahzad, AOR

For the Respondents:

Sardar M. Latif Khan Khosa, Sr. ASC
Ch. Aitzaz Ahsan, Sr. ASC
Mr. Abid S. Zuberi, ASC
Mr. Faisal Siddiqui, ASC
Mr. Salman Akram Raja, ASC
Mr. Salahuddin, ASC
Ms. Bushra Qamar, ASC
Mr. M. Arif Ansari, ASC
Syed Ali Imran, ASC
Ms. Samia Faiz Durrani, ASC
Mr. Rifaqat Islam, ASC
Sardar Shahbaz Ali Khosa, ASC

Mr. Muqtadar Akhtar Shabbir, ASC
Mr. Uzair Karamat Bhandari, ASC
(via video link from Lahore)

Date of Hearing:

13.12.2023

ORDER

These Intra Court Appeals filed under Section 5 of the Supreme Court (Practice and Procedure) Act, 2023 are directed against the impugned Order dated 23.10.2023 passed by the learned bench of this Court in Constitution Petition Nos.24, 25, 26, 27, 28, 30 & 35 of 2023, whereby, for detailed reasons to be recorded later, the aforesaid Constitution Petitions were decided in the following terms:

“ORDER OF THE COURT

For detailed reasons to be recorded later, and subject to such amplification and/or explanation therein as is considered appropriate, these petitions are decided in the following terms:

i. It is hereby declared by Mr. Justice Ijaz ul Ahsan, Mr. Justice Munib Akhtar, Mr. Justice Sayyed Mazahar Ali Akbar Naqvi and Mrs. Justice Ayesha A. Malik that clause (d) of subsection (1) of Section 2 of the Pakistan Army Act, 1952 (in both of its sub clauses (i) & (ii)) and subsection (4) of Section 59 of the said Act are ultra vires the Constitution and of no legal effect.

ii. Without prejudice to the generality of the foregoing the trials of civilians and accused persons, being around 103 persons who were identified in the list provided to the Court by the learned

Attorney General for Pakistan by way of CMA No.5327 of 2023 in Constitution Petition No.24 of 2023 and all other persons who are now or may at any time be similarly placed in relation to the events arising from and out of 9th and 10th May, 2023 shall be tried by Criminal Courts of competent jurisdiction established under the ordinary and / or special law of the land in relation to such offences of which they may stand accused.

iii. It is further declared that any action or proceedings under the Army Act in respect of the aforesaid persons or any other persons so similarly placed (including but not limited to trial by Court Martial) are and would be of no legal effect.

iv. Mr. Justice Yahya Afridi reserves judgment as to para (i) above, but joins the other members of the Bench as regards paras (ii) and (iii)"

2. The learned counsel for the appellants argued, *inter alia*, that on 09.05.2023, numerous military installations and establishments throughout the country faced targeted attacks for which several First Information Reports (FIRs) were lodged at different Police Stations. Initially, in some FIRs, the offences covered under the Pakistan Army Act, 1952 ("**Army Act**") were not mentioned, but subsequently the said offences were also added for the trial of the accused persons. According to the learned counsel, 103 persons have been found to be involved in the offences under the Army Act, and were taken into custody in accordance with law and procedure. It was further contended that the detailed reasons in support of the short order have not been released by the learned bench so far, but keeping in mind the urgency, and to avoid the rigors of limitation, the present Intra Court Appeals have been filed without prejudice to the right of filing amended memo of appeals upon the detailed reasons being released. It was further averred that, in the light of sub-clause (a) to clause (3) of Article 8 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**"), the laws relating to members of the Armed Forces for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them are not susceptible to be adjudged on the touchstone of the Fundamental Rights as contained in the Constitution. It was further contended that while declaring clause (d) of sub-section (1) of Section 2 of the Army Act (in both of its sub-clauses (i) and (ii)), and sub-section (4) of Section 59 of the said Act as *ultra vires* the Constitution, the learned bench has deviated from the ratio of the judgment rendered by this Court in Brig. (Retd.) F. B. Ali's case (*infra*) whereby the provisions of the Army Act were declared *intra vires* the Constitution, hence there was no justification for holding clause (d) of sub-section (1) of Section 2 of the Army Act (in both its sub-clauses (i) and (ii)), and sub-section (4) of Section 59 of the said Act *ultra vires* the

Constitution. It was further argued that the courts under the Army Act do not form part of the judicial hierarchy contemplated by Articles 175 and 203 of the Constitution and, as such, neither the provisions of clause (3) of Article 175 of the Constitution, nor those of Article 203 are applicable to, or have any relevance to the said Courts. It was further contended that the process of trial under the Army Act is consistent with the recognized principles of criminal justice as held in Brig. (Retd.) F. B. Ali's case (PLD 1975 SC 506), Shahida Zahir Abbasi's case (PLD 1996 SC 632), and the majority judgment of this Court rendered in the case of District Bar Rawalpindi case (PLD 2015 SC 401). It was further contended that clause 2 (d) was inserted into the Army Act *vide* Section 2 of the Defence Services Laws Amendment Ordinance, 1967 which is protected under Article 268 of the Constitution. It was further argued that due to the striking down of the law in question by dint of the impugned order, no action can be taken against the hardcore criminals and terrorists involved in the attacks on army installations and/or against the martyrdom of innocent civilians and personnel of the armed forces who are devoting and sacrificing their precious lives to combating the menace of terrorism. He further argued that even in the present situation, no action can be taken against the persons accused of espionage. In the end, all the counsel for the appellants collectively requested that the impugned Order may be suspended till further orders, because the detailed reasons have not been released.

3. Although it is the first date of hearing and no notice has been issued to the respondents, some of the respondents are represented by their counsel who addressed their preliminary arguments. They have insisted that the detailed reasons be allowed to be released by the learned bench of this Court before the passing of any interim order(s) in these Intra Court Appeals, but it is an admitted position that the detailed reasons have not been released hitherto to expound and amplify the reasons for striking down the law in question.

4. Issue notice to the respondents for a date that may be fixed by the office in the third week of January 2024. Office is further directed to append the detailed reasons, if released by the learned bench initially seized of the matter, on the next date of hearing.

CMA's No.10534 to 10551 of 2023

Notice. Since the appellants have raised various questions of law which require consideration, therefore till the next date of hearing, with the majority of five to

one (the latter being Musarrat Hilali-J, who only issued notice on the stay applications and main appeals), the operation of the impugned Order striking down clause (d) of subsection (1) of Section 2 of the Army Act (in both of its sub clauses (i) & (ii)), and subsection (4) of Section 59 of the said Act as being *ultra vires* the Constitution, is suspended subject to the condition that no final judgment shall be passed against the 103 accused persons by the Military Courts.

The Civil Misc. Application No.10514/2023 filed by respondent No.1 in ICA.No.5/2023 for reconstitution of bench and Civil Misc. Application No.10522/2023 filed by respondent Nos.1 to 5 in ICA No.10/2023 for broadcasting/live streaming of the Court proceedings of the instant Intra Court Appeals will be heard on the next date of hearing.

Sardar Tariq Masood, J.

Amin-ud-Din Khan, J.

Muhammad Ali Mazhar, J.

Syed Hasan Azhar Rizvi, J.

Musarrat Hilali, J.

Irfan Saadat Khan, J.

ISLAMABAD

13th December, 2023

"Approved for reporting"