

P L D 2007 Supreme Court 405

[Appellate Jurisdiction]

Present: Iftikhar Muhammad Chaudhry, C.J. Abdul Hameed Dogar and Saiyed Saeed Ashhad, JJ

MUSHTAQ AHMED and others---Appellants

Versus

SECRETARY, MINISTRY OF DEFENCE through Chief of Air and Army Staff and others---Respondents

Civil Appeals Nos. 613, 614, 782, 802 and 825 of 2006, decided on 25th September, 2006.

(On appeal against the judgments dated 14-3-2006, 28-3-2006, 13-4-2006 and 17-4-2006 passed by the Lahore High Court, Rawalpindi Bench in W.Ps. Nos. 585 of 2006, 2876/06, 897/06, D.Nos.3086/06 and 906/06).

Co. (R) Muhammad Akram, Advocate Supreme Court for Appellants (in C.As.Nos.613, 614, 782 and 825/2006).

Hashmat Ali Habeeb, Advocate Supreme Court and M.S. Khattak, Advocate on Record for Appellant (in C.A.No.802 of 2006).

Mujeeb-ur-Rehman, Advocate Supreme Court and Col. Jehangiri, JAG Dept. Army Group Capt. Aziz for Respondents.

Nasir Saeed Sheikh, D.A.G. (on behalf of Attorney-General) (On Court Notice).

Date of hearing: 25th September, 2006.

JUDGMENT

IFTIKHAR MUHAMMAD CHAUDHARY, C J.---These appeals by leave to the Court are directed against the judgments dated 14th March 2006, 28th March, 2006, 13th April, 2006 and 17th April, 2006, of the Lahore High Court, Rawalpindi Bench whereby Writ Petitions Nos. 585/2006, 897/2006, 906/2006, 2896/2006 and D.No.3086 of 2006 filed by the appellants have been dismissed. As common questions of law and facts are involved in these appeals, therefore, we intend to decide them by means of instant judgment. However, the facts of the each set of appeal are being noted hereinbelow, separately.

2. Civil Appeals Nos. 613-614 of 2006.-The appellant Mushtaq Ahmed son of Imran Ahmed, Khalid Mehmood -Ex. Chf-Tech (Pak-851866), Nawazish Ali Ex. Cpl. Tech (Pak-489006), Niaz Muhammad-Ex. Jnr. Tech (Pak-860186), Adnan Rashid-Ex. Jnr. Tech (Pak-862476) were apprehended on 7th January 2004, and 9th January, 2004 respectively, in a criminal case, pertaining to causing explosion at Jhanda Chechi bridge (Chaklala) on 14th December, 2003, as they were charged with making an attempt on the life of Gen. Pervaiz Musharraf, Chief of the Army Staff and the President of the Islamic Republic of Pakistan. They were tried by the Field General Court Martial under the Pakistan Air Force Act [hereinafter referred to as "the PAF Act"]. On conclusion of the trial they were found guilty, as such, sentenced to death which has been confirmed by the confirming authority. Their appeals before the Court of Appeal were rejected. Thereafter they challenged their conviction/sentences by filing Writ Petitions before Lahore High Court, Rawalpindi Bench referred to hereinabove, which have been dismissed vide judgments dated 14th March 2006 and 28th March, 2006.

3. Civil Appeals Nos.782, 802 and 825 of 2006.---Appellants Zubair Ahmed alias Tauseef, Rashid Qureshi alias Tipu alias Ibrahim, Ghulam Sarwar Bhatti alias Salahuddin, Ikhlas Ahmed alias Rusi, Naik Arshad Memood (Ex-Number 7351783), Rana Muhammad Naveed, and Ameer Sohail alias 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 [hereinafter 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 [hereinafter referred to as "the Constitution"].

4. Leave to appeal was granted, initially, in Civil Appeals Nos.613 and 614 of 2006 and this order was followed in other cases as well.

5. Learned counsel appearing for appellants contended that:---

(a) Death sentences to civilian accused, under section 2(dd) of the PAF Act and section 2(1)(d) of the PA Act, have wrongly been awarded, as they have been made subject to the Acts, only for the offence of seducing and attempting to seduce persons in the Military Force of Pakistan from their allegiance to the Government of Pakistan, therefore, on establishment of charge against them, they would be liable to be convicted under section 131, P.P.C. and not under section 37(e) of the PAF Act and 31(d) of the PA Act, thus rendering their convictions mala fide and proceedings before General Court Martial as well as the Appellate

Authority as without jurisdiction being coram non judice and learned High Court committed grave illegality in not exercising jurisdiction.

(b) The General Court Martial members of Pakistan Air Force as well as of Pakistan Army is also bad in the eye of law because the procedure adopted by them was contrary to the provisions of Qanoon-e-Shahadat Order (formerly Evidence Act) and the principles of natural justice.

(c) The Appellate Authority enhanced the sentence of Zubair Ahmed and others from life imprisonment to death without providing them opportunity of hearing, although they had not filed any appeal challenging their conviction.

6. Mr. Hashmat Ali Habib, learned Advocate Supreme Court for appellants (in CA. No.802/2006) adopted the above arguments, and further submitted that:

(i) Copies of the proceedings were not provided to the appellant; and

(ii) Placing reliance on the confessional statement of one of the accused against the co-accused in different trial is unwarranted as such the proceedings suffered from illegality and material irregularity rendering them as unlawful and void entitling the appellants to acquittal.

7. Learned counsel appearing for respondent No.1 vehemently opposed the contentions of the petitioner's counsel by arguing that:--

(a) The Civilians have been subjected to the PAF Act and the PA Act, under sections 71(3) and 58(4), respectively, as such, they have been convicted in exercise of jurisdiction under section 37(e) of the PAF Act and 31(d) of the PA Act, therefore, in view of the bar under Article 199(3) of the Constitution, High Court had no jurisdiction to entertain the petitions filed by appellants.

8. Arguments advanced by both the sides have been considered carefully. It may be noted that vide Defence Services Laws (Amendment) Ordinance, 1967 [III of 1967, PAF Act and PA Act were amended by adding sections 2(dd) and 2(1)(d), respectively. It would be appropriate to reproduce hereinbelow section 2(dd) of the PAF Act, in extenso, for convenience:--

"2. Persons subject to this Act.---The following persons shall be subject to this Act wherever they may be, namely:--

(a) officers and warrant officers of the Air Force;

(b) persons enrolled under the Indian Air Force Act, 1932, before the date notified in pursuance of subsection (2) of section 1 and serving in the Air Force on that date, and persons enrolled under this Act;

(c) persons belonging to the Pakistan Air Force Reserves in the circumstances prescribed by rules made under section 6 of the Pakistan (Army and Air Force) Reserves Act, 1950 (XLVII of 1950);

(d) persons not otherwise subject to Air Force law who on active service, in camp, on the march, or at any frontier post specified by the Federal Government, by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of, the Air Force;

(dd) persons not otherwise subject to Air Force Law, who are accused of.---

(i) seducing or attempting to seduce any person subject to this Act from his duty or allegiance to Government, or

(ii) having committed, in relation to any work of defence, arsenal, naval, military or air force establishment or base, ship or aircraft, or otherwise in relation to the naval, military or air force affairs of Pakistan, an offence under the Official Secrets Act, 1923;

(e) to such extent and subject to such conditions as the Federal Government may direct, persons subject to the Pakistan Army Act, 1952 (XXXIX of 1952) or the Pakistan Navy Ordinance, 1961 (XXXV of 1961), when seconded for service with the Air Force.

It may be noted that section 1(2)(d)(i)(ii) of the PA Act is verbatim replica of the above provision of section 2(dd) of the PAF Act, therefore, it need not be reproduced.

9. A perusal of section 2(a), (b), (c), (d), (dd) and (e) demonstrates that all the personnel in uniform have been made subject to the PAF Act, and with a view to include all those persons, who were not otherwise subject to the Pakistan Air Force Act, above provision was added. It may be noted that under section 2(d), the person, not otherwise subject to Pakistan Air Force Act, who on active service, in camp on the march, or at any frontier post specified by the Federal Government, by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of, the Air Force, has been made subject to this Act, but under clause (dd) of section 2, those persons have been included who are neither in uniform nor they are acting in any manner with the force but have been found involved being an accused of seducing or attempting to seduce any person subject to PAF Act from his duty or allegiance to Government, etc. It seems that to establish connection between two type of the accused, firstly those who are in uniform or otherwise connected with the force or secondly those who are non-uniformed persons but also connected with the force and have been found involved in the commission of offence of seducing the person who is subject to this Act, have been declared to be such person, who can be tried under the PAF Act or PA Act.

10. At this stage, it is also important to note that subsection (3) to section 71 of the PAF Act and subsection (4) to section 59(4) of the PA Act, were incorporated in the above two

Acts by Defence Services Laws (Amendment) Ordinance IV of 1967. According to the language, employed in both these subsections, which contains non-obstante clause, a person who becomes subject to PAF Act and PA Act by reason of his being accused of an offence mentioned in clause (d) of subsection (1) of section 2 of the PA Act and clause (dd) of section 2 of the PAF Act, shall be liable to be tried or otherwise dealt with under the aforestated two Acts for such offences as if the offence were an offence against the PAF Act or the PA Act committed at a time when such person was subject to these Acts and the provisions of these sections shall have effect accordingly.

11. It is a cardinal principle of interpretation of statute that the words employed in a statute are to be read and interpreted in its ordinary meanings. Comparative study of these provisions of law clearly demonstrates that any person who has been subjected to the above Acts, shall be deemed to be an accused if he committed an offence of seducing or attempting to seduce any person from his duty or allegiance to Government and shall be dealt with under the provisions of PAF Act and PA Act.

12. Arguments raised by the learned counsel for the appellants that a civilian person is not to be convicted under section 37(c) and section 31(d) of the PAF Act and the PA Act, respectively, seems to be misplaced because once a civilian accused has been found involved in the commission of offence, which falls within the purview of PAF Act or PA Act, shall be punished accordingly under the said Acts. If the argument of the learned counsel that the accused would be tried by General Court Martial under any of the above Acts, but shall be convicted under P.P.C., are allowed to prevail, it would create an anomalous situation. In our considered opinion, such departure could have been possible only if the punishment for the offence of seducing or attempting to seduce any person from his allegiance to the Government, had not been provided by the above Acts or if they would have not been charged for an offence which is not covered under the above Act, then for the purpose of punishment, reference to the provisions outside the Acts could have been made, that too subject to framing of the charge against the accused under the provisions other than the PAF Act and the PA Act. Otherwise, as per the normal course, on the culmination of the trial, a civilian accused shall be convicted/sentenced in similar manner as an accused, who is in uniform because the former has been brought within the folds of the above Acts, by subjecting him to the same.

13. With reference to the above proposition, it may also be noted that if the intention of the legislature would have been to record sentence against a 'person who has been made subject to PAF Act or PA Act, under section 131, P.P.C. and not under section 37(e) of the PAF Act or section 31(d) of the PA Act, then the legislature quite conveniently would have added the same in section 2(dd) (i) to the PA Act as the addition of some of the laws in section 2(d) (ii) of the Pakistan Air Force Act has been made; namely an offence under the Official Secrets Act, 1923 having been committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Pakistan, etc. So the intention of the legislature can safely be gathered by making reference to clause (ii) of section 2(dd) of the PAF Act that non-uniformed personnel were not to be convicted under section 131, P.P.C. by the General Court Martial on the completion of the trial and

they would be convicted in the same manner as uniformed personnel, on having been found guilty for the offences they are charged with.

14. It is important to note that there are two types of offences namely civil offences and military offences. Uniformed persons under the above Acts are amenable to both type of the offences, but when a person who has been subjected to the PAF Act or the PA Act, under section 71(3) or section 59(4), respectively, he would be liable to be punished for the military offences, punishment for which has been provided in both the Acts, independently, otherwise, if a non-uniformed person or civilian accused had to be tried by the Civil Court then there was no necessity at all to introduce amendment in section 71(3) of the PAF Act and section 59(4) of the PA Act.

15. Both the learned counsel had relied upon the case of F.B. Ali v. State (PLD 1975 SC 506) to canvass their viewpoint, therefore, it would be appropriate to examine this report thoroughly to ascertain as to whether sentence can be awarded to a person who has been made subject to the PAF Act or the PA Act, under the respective provision, contained therein. According to the facts of the case Brig. (Retd.) F.B. Ali and Col. (Retd.) Abdul Aleem Afraidi, being persons subject to PA Act under the provisions of section 2(1)(d), were charged with for committing a civil offence, that is to say, conspiring to wage war against Pakistan and thereby committed an offence punishable under section 121-A of the P.P.C. Similarly, both of them were charged under section 31(d) of the PA Act for attempting to seduce any person in the military Forces of Pakistan from his allegiance to the Government of Pakistan, as it was alleged against them that during the period from August 1972 to 30th March 1973, they hatched a plan to overthrow the Government established by law in Pakistan by putting under arrest with the help of troops at their disposal, the President, the Governor of Punjab, the Ministers, all the Generals assembled in a conference and other officials holding key position in the Administration, and thereby to assume power in the country for themselves by use of criminal force. As a sequel, they attempted to seduce some of the Military Officers and other persons they attempted to seduce some of the Military Officers and other persons in the Military Force from their allegiance to the Government, in order to enlist their support in furtherance of their plan to overthrow the Government. The case of both the officers was that since they had been retired from the Army and were no longer subject to the PA Act, as such they could not be tried by a General Court Martial. The objection so raised on the question of jurisdiction was overruled by the General Court Martial, therefore, they challenged the jurisdiction of the General Court Martial to try them along with a number of other Army Officers by preferring writ petition, which remained pending. In the meantime, trial continued. It may be noted that during the trial, once again the question of jurisdiction of the Court Martial was raised but the same was again overruled and the trial proceeded, resulting in the conviction of the appellants on both the charges.

After their conviction, amendment was sought in the writ petition, reiterating that PA Act applied only to those persons who are subject to the discipline of the Army and that the inclusion of the categories of persons to whom the PA Act was sought to be made applicable by the Defence Services Laws (Amendment) Ordinances III and IV of 1967 was of no effect as the Ordinances were; firstly, ultra vires the powers of the President

under the Constitution of 1962 and; secondly, in any event, were discriminatory and violative of the Fundamental Right No.15 of the Constitution of 1962 relating to the equality of citizens before law. Hence, they were ab initio void and of no legal effect by reason of the provisions of Article 6 of the said Constitution. Learned High Court dismissed the writ petition in limine while holding that the Ordinances of 1967 were competently made by the President as the subject was expressly covered by items Nos.1, 48 and 49 of the Third Schedule to the Constitution of 1962. The contention that the Ordinances of 1967 were violative of Fundamental Right No.15 of the 1962 Constitution, pertaining to the equality of citizens before the law was also repelled on the ground that a challenge to a law on account of its being in conflict with a fundamental right was in reality an attempt to enforce a Fundamental Right, which could not be done during the subsistence of proclamation of emergency. It is to be noted that after having discussed different aspects of the case, including the provisions of Article 199 of the Constitution of 1973, it has been held by the Lahore High Court that it had no jurisdiction in relation to any order made in respect of 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 those forces, in respect of his terms and condition of service or in respect of any action taken in relation to him as a member of the armed forces or as a person subject to such law. Similarly, the High Court repelled the contention that the offence under section 121-A, P.P.C. was not, in any event, covered by the Ordinances. Learned High Court also held that subsection (1) of section 59 of the PA Act was wide enough to give jurisdiction to the General Court Martial to try any person to whom the PA Act had been applied by clause (d) of section 2 even in respect of civil offences.

This Court after granting leave to appeal, examined the vires of the Ordinance No.III of 1967 and found it to be intra vires of the Constitution, therefore, concluded that the words used in clause (d) added to section 2 of the PA Act by Ordinance No.II of 1967 are clear enough. The words "person not otherwise subject to this Act" clearly embrace all others who are not subject to the said Act by reason of the provisions of clauses (a), (b), (bb) and (c). The intention of the framers of clauses (d) and (dd) clearly is that even civilians or persons who have never been, in any way, connected with the Army should be made subject to it in certain circumstances gravely affecting the maintenance of discipline in the Army. The nexus required is that they should be persons who are accused of seducing or attempting to seduce any person subject to the PA Act and the PAF Act from his duty or allegiance to Government. In the case in hand, non-uniformed appellants (civilians) have been charged for the offence of seducing or attempting to seduce any person subject to the PA Act from his duty or allegiance to Government, therefore, their trial by General Court Martial has rightly been held.

In this reported judgment, the argument that for the offence of seducing or attempting to seduce any person subject to the PA Act from his duty or allegiance to Government, shall be punished under section 131, P.P.C. and not under section 31(d) or for the purpose of present case to the extent of personnel of PAF section 37(e) of the PAF Act, was raised but repelled. Relevant para therefrom is reproduced herein below, instead of discussing the proposition in our own words, as this question has already been disposed of in the reported judgment:--

"This may well be incidentally the consequence of the amendment introduced, insofar as the persons falling within the new category are concerned, but it cannot be said that this is in pith and substance the object of the amending legislation. The Pakistan Army Act was a Central Act which could only be amended by the Central Legislature and the Central Legislature had power to enlarge or restrict its operation by amendment, and if it was intended to extend the operation of the Act to another specific category of persons who are accused of certain offences in relation to defence personnel or defence installations, how can it be said that the object of the Act was not in pith and substance to prevent the loyalty of the defence personnel from being subverted by outside influence. The legislation, therefore, in my opinion, came directly within item 1 of the Third Schedule of the 1962 Constitution. It did not amend either section 131 or section 139 of the Penal Code."

16. In F.B. Ali's case, this Court has also proceeded to examine section 59(4) of the PA Act, which has already been reproduced hereinabove and concluded that the main purpose of this addition was to effectuate the purpose sought to be achieved by addition of clause (d) to subsection (1) of section 2 of the PA Act and to make the offence itself triable under the said Act when committed by persons accused of such offence. This became necessary because otherwise such persons would have been liable for trial under the PA Act only in respect of an offence of the said type committed after they became subject to the Act as a result of the accusation, which would necessarily be made after the commission of the offence.

17. Therefore, in view of above discussion in F.B. Ali's case, the arguments put forward by the learned counsel for appellants becomes redundant and it is held that if a civilian person is tried on the charge of seducing or attempting to seduce any person in the Military Force of Pakistan from his allegiance to the Government, he shall not be punished under section 131, P.P.C. but would be punished under the provisions of PA Act or the PAF Act i.e. section 31(d) or 37(e) respectively, in view of the provisions of section 59(4) of the PA Act and 71(3) of the PAF Act.

18. Learned counsel next contended that the High Court under Article 199(3) of the Constitution is not absolutely debarred from entertaining a writ petition because if the trial is based on mala fide, without jurisdiction and coram non judice, then the Court has jurisdiction to examine the merits of the case, as according to him in the instant case, instead of awarding punishment to appellants under section 131, P.P.C., they have been punished under section 37(e) of PAF Act, therefore, it is mala fide on the part of the prosecution. In this behalf, he relied upon the judgment in the case of Shahida Zahir Abbasi v. President of Pakistan (PLD 1996 SC 632) and Farooq Ahmed Khan Leghari v. Federation of Pakistan (PLD 1999 SC 57).

19. We are not in agreement with the learned counsel because mala fide has not been pleaded either against the prosecution or the victims/complainant but against applying wrong provisions of the law. In this behalf, as we have already held that conviction of the

appellants in the trial on the charge of seducing or attempting to seduce any person in the Military Force of Pakistan from his allegiance to the Government, is not to be made under section 131, P.P.C. but under section 37(e), therefore, the argument, being without substance, is accordingly overruled and it is held that there was no mala fide on the part of the prosecution and the trial of the appellant and then conviction by General Court Martial was in exercise of the jurisdiction vesting in it and the proceedings cannot be stamped to be coram non judice.

20. Learned counsel has also relied upon *Gul Akbar v. Deputy Chief of Air Staff* (PLD 1968 Peshawar 114). In this case petitioner Gul Akbar being a former employee of Pakistan Air Headquarter Peshawar was tried along with an Afghan subject by the General Court Martial under section 71 of the PAF Act, 1953 read with section 4 of the Official Secrets Act, 1923. They raised number of objections in respect of their trial including the one that the Defence Services Laws (Amendment) Ordinances, III and IV of 1967 are contrary to the Constitution and hence are ultra vires and amount to and are in effect ex post facto laws. Such objections of the petitioners have been replied as follows:-

"11. Dr. Abdur Rahim, learned counsel for the petitioners, tried to argue that section 71 of the Air Force Act was listed in Chapter VI under the heading "offences", and therefore section 71 itself was substantive offence. The argument, in our view, is clearly misconceived for the short and sensible reason that the reading of section 71 as amended by Ordinance No.IV does not create an offence much less provides any punishment for any such offence. That section is an enabling section under which any person subject to that Act having committed any civil offence shall be deemed to be guilty of an offence against that Act. The scope of section 2 of the Air Force Act has been enlarged by Ordinance No.III of 1967 by addition of clause (dd) by subjecting to an offence under the Secrets Act, any person who are not subject to the Air Force Act who are accused of "having committed in relation to any work of defence, or air force affairs of Pakistan. To put it differently, Ordinances Nos.III and IV of 1967 have the cumulative effect of providing a new forum of trial, namely, "Court Martial" for the alleged offences committed by the petitioners under section 3(1) (c) of the Secrets Act. The punishment under the Air Force Act for an offence is neither greater than, nor of a kind different from the penalty prescribed under the Secrets Act, and therefore, the petitioners can have no valid grievance that Ordinances Nos. III and IV are violative of Fundamental Right No.4 which guarantees "protection against retrospective punishment."

In view of above conclusion, we are of the opinion that this judgment has not advanced the case of appellants in any manner.

21. Learned counsel actually wanted to argue that the question of bar of jurisdiction of the High Court or the Supreme Court was not raised in this judgment, therefore, according to him the case has to be heard on merits. We are not inclined to agree with him because we feel that if there is a constitutional bar upon the jurisdiction of a Court,

then it becomes its duty to first of all determine this jurisdiction then to proceed ahead. Besides, in this very judgment the provisions of both the Ordinances of 1967 referred to herein above have been declared valid as a result whereof the petition was dismissed.

22. Learned counsel next relied upon the case of Begum Shamim Afridi v. Province of Punjab (PLD 1974 Lahore 120). In this case detention of the Army personnel was brought under challenge and at the end of the proceedings, Advocate-General took a sudden change in respect of the ouster of the jurisdiction of the High Court, basing his submission on an English case (R. v. Army Council). In this context the Court observed that the general ouster of jurisdiction cannot be canvassed on the basis of an English case which has no binding authority on the High Court and also because in the development of the law of habeas corpus much water has flown by now. It is to be noted that in this judgment the bar contained in Article 199(3) of the Constitution upon jurisdiction of this Court to issue a writ was in the specific subject, therefore, this judgment has no bearing on the instant case as well.

23. Learned counsel also relied upon the judgments in State v. Zia-ur-Rehman (PLD 1973. SC 49), Saifuddin Saif v. Federation of Pakistan (PLD 1977 Lahore 1174) and Federation of Pakistan v. Ghulam Mustafa Khar (PLD 1989 SC 26). In these judgments it has been declared that the bar to exercise constitutional jurisdiction shall not be applicable where proceedings suffered from defect of jurisdiction or were coram non iudice or were made mala fide and the Court despite of such bar will exercise jurisdiction. In, our considered opinion, these judgments are not applicable to the case in hand in view of the discussion made herein above, wherein it has been held that as there is no mala fide on the part of the prosecution, complainant/victim in the trial of the appellant by the General Court Martial, therefore the absolute power to exercise the jurisdiction will operate against both the categories of the accused namely civilians and uniformed officers. Similar view has been formed in the case of Saifuddin Saif (ibid), relied upon by the learned counsel for appellants, wherein it has been held that if an action suffers from certain infirmities including absence of jurisdiction then the bar of clause (3) of Article 199 of the Constitution would not operate. Since in the instant case we have already held herein above that the trial of appellants does not suffer from jurisdictional defect, therefore, the constitutional bar would be an impediment for the High Court to exercise its jurisdiction.

24. Learned counsel for appellants next contended that the joint trial of uniformed personnel with the civilians cannot take place. This argument needs- not to be examined at length because the appellants through their counsel conceded that objection on the joint trial was not raised before the General Court Martial, thus in such view of the matter the arguments so advanced loses its significance. In addition to it, in view of the bar of jurisdiction of the High Court, in terms of Article 199(3) of the Constitution, it is not obligatory upon this Court to enter upon such controversy.

25. Learned counsel for appellants vehemently argued that some of the appellants i.e. Zubair Ahmed and others were awarded sentence of life imprisonment by the General Court Martial but the Appellate Authority unauthorizedly enhanced their sentences in

absence of any appeal filed by the prosecution and affording them opportunity of the right of hearing, therefore, the sentences of death awarded to them deserve to be reversed.

26. On the other hand learned counsel appearing for respondent contended that section 133-B of the PA Act empowers the Appellate Authority to enhance the sentence while disposing of the appeal filed by the convict.

27. In this behalf it may be noted that the question for consideration before us is as to whether in exercise of inherent powers, sentences of life imprisonment of some of the accused have been enhanced or the statute has conferred powers upon the Appellate Authority to enhance the sentence. It may be noted that section 423, Cr.P.C. does not confer powers of enhancement of sentence of an accused upon the Court functioning under the Cr.P.C. as according to its subsection (1) clause (b), in an appeal from a conviction, (1) Court can reverse the findings and sentences, and acquit or discharge the accused, or order him to be revived by a Court of competent jurisdiction, subordinate to such Appellate Court or sent for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but subject to the provision of the section 106, subsection (3) so as not to enhance the same. The Appellate Court under Cr.P.C. is not authorized even to convert acquittal into conviction or enhance the sentence whereas section 439 Cr.P.C. confers such powers upon the Revisional Court i.e. the High Court to enhance the sentence. Contrary to the power, available to Appellate Court under Cr.P.C. section 133(b) of PA Act, while defining the powers of the Appellate Authority in subsection (2) clause (f), specifically confers powers to remit the whole or any part of the punishment or reduce or enhance the punishment or commute the punishment for any less punishment or punishment mentioned in this Act. (Emphases supplied)

28. Learned counsel appearing for respondent under instruction stated that the sentence of the accused i.e. Zaheer Ahmed and others were enhanced after providing them and their counsel opportunity of hearing as well as considering the Jail appeals filed by some of them, therefore, there is nothing wrong with the enhancement in the punishment.

29. On having gone through the relevant provisions of section 133(b) of the PA Act, we are of the considered opinion that the Appellate Authority is empowered to enhance the sentence. Even otherwise, presence of the learned counsel in support of appeal as well as the Jail Appeals, by way of which the convicts had represented against their conviction awarded to them by the General Court Martial, it would be deemed that opportunity of hearing was given to him.

30. It may also be noted that under the general law of Cr.P.C. as well as the precedent law, there is no specific mode of issuing notice to an accused for the enhancement of the sentence. The requirement is only to the extent of providing him opportunity of being heard before the enhancement of his sentence and no sooner the appeal is filed, it would be presumed that while disposing of the same, opportunity of hearing has been given through his counsel. Reference in this behalf may be made to Khoda Bux v. Emperor

AIR 1934 Calcutta 105 and Javed Ahmad v. State 1978 SCMR 114. Relevant para from the case of Khoda Bux (ibid) is reproduced hereinbelow for convenience:--

"I observed at the outset of this judgment that as a measure of precaution we directed rule to be issued upon all the appellants calling upon them to show cause why the sentences passed upon them should not be enhanced by this Court. I desire to say that in my opinion it is by no means clear that any such procedure was really necessary. These five convicted persons had themselves appealed to this Court against their conviction and thus submitted themselves to the judgment of this Court. They had appeared before the Court by their Advocate Mr. Dinesh Chandra Roy who, at the previous hearing was prepared to argue and had indeed commenced to argue that the conviction ought to be set aside for the reasons I have already discussed. That being the position the accused persons themselves were then before the Court and therefore, in my view it was open to the Court, should it after hearing the appeal decide against the appellants, straightway, to give to the accused persons the opportunity referred to in subsection (2) of section 439, Cr.P.C. of being heard upon the question whether the sentence ought to be enhanced or not by calling upon the appellants in the person or their advocate to show cause there and then, why their sentences should not be enhanced."

31. Thus we are of the opinion that the arguments so advanced on behalf of the appellants have no substance and relying upon another judgment of this Court in the case of Anwar Aziz v. Federation of Pakistan PLD 2001 SC 549, wherein it has been concluded that as the appellant had accepted the jurisdiction of the General Court Martial and the conviction awarded to them is not based on mala fide nor coram non judice or without jurisdiction, therefore, the High Court had rightly declined to exercise jurisdiction under Article 199(3) of the Constitution.

32. Mr. Hashmat Ali Habeeb, appearing for some of the appellants attempted to argue that copies of some of the documents were not supplied to them and on account of joint trial the confession made by one of the accused has been used against the other, therefore, interference is called for.

33. In this behalf it may be noted that these are the questions which relate to the merits of the case. Further more, during the trial no such objection was raised on behalf of the appellants, therefore, the same is not entertainable for want of jurisdiction of the High Court, as concluded herein above.

Thus for the, foregoing reasons, impugned judgments of the Lahore High Court are maintained. Consequently, appeals are dismissed.

S.A.K./M-2/S

Appeals dismissed

