

IN THE FEDERAL SHARIAT COURT OF PAKISTAN

(Appellate/Revisional Jurisdiction)

Present

Mr. Justice Haziqul Khairi Chief Justice

Mr. Justice Dr. Fida Muhammad Khan.

Mr. Justice Salahuddin Mirza.

Criminal Revision No.43/I/1993

Ex.No.2325998 Sepoy Mukhtar Ahmed

Son of Muhammad Abdullah

Petitioner.

Versus

1. Federation of Pakistan
through Secretary
Ministry of Defence .

2. Judge Advocate General,
General Headquarters,
Rawalpindi

Respondents.

Criminal Revision No.4/I of 1997

Ex.Sepoy Imtiaz Ahmed No.2379058

Son of Mutalli Khan.

Petitioner

Versus

1. Federation of Pakistan
through Secretary Ministry of Defence
Islamabad

2. Judge Advocate General, Pakistan Army,
General, Headquarters,
Rawalpindi.

3. The State through
Advocate General,
Baluchistan

Respondents.

Cr.Rev.No.437 of 1997, 471 of 1997,
77 of 1997, 273 of 2001, 247 of 2004
Cr.Appeal No.497 of 2004

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Criminal Revision No.771 of 1997

Ex.Hawaladar Atlas Khan No.2731430
Son of Hayat Khan -----

Petitioner.

Versus

1. Federation of Pakistan
through Secretary Ministry of Defence
Islamabad
2. Judge Advocate General, Pakistan Army,
General, Headquarters,
Rawalpindi.
3. The State through
Advocate General,
Baluchistan -----

Respondents.

Criminal Revision No.2771 of 2001

Rab Hawaz son of Gulab
Corporal Technician Pak.483189
Supply Assistant -----

Petitioner

Versus

1. Court of Appeal
Rear Air Headquarter
Peshawar.
2. Air Commander
Maqbool Ali Shah.
3. Muhammad Ayub
Cpl.Tech.
4. Noshella Ayub wife of
Muhammad Ayub -----

Respondents.

12/11/01

Cr Revn Nos 431 of 1993, 43 of 1997,
41 of 1997, 271 of 2001, 247 of 2004
Cr Appeal No. 491 of 2004

Criminal Revision Petition No. 24/1 of 2004

Ex.No.2545639 Hawaldar Muhammad Ashraf
Son of Siaz Din Petitioner

Versus

1. Federal Government
Ministry of Defence
Through Chief of the Army Staff,
General Headquarters
Rawalpindi Cantt. Respondent.

Jail Criminal Appeal No. 49/1 of 2004

Ex.No.2650813 Signalman Muhammad Latif
son of Said Muhammad Petitioner

Versus

The State Respondent.

For Petitioners M/S Col. Muhammad Akram,
Muhammad Salheen Mughal and
Muhammad Akram Gondal,
Advocates.

For the State M/S Sardar Abdul Majeed Khan, Standing
Counsel for Federal Government;
Shafiqat Munir Malik, AAG Punjab;
Col. Jahangiri Judge Advocate General,
GHQ and Sanaulah Squadron Leader
Pakistan Air Force.

Dates of Orders of trial Courts. 28.10.1989, 27.11.1996, 19.3.1997,
8.1.2001, 15.1.2004, 24.04.2003.

Dates of institution 14.10.1993, 17.2.1997, 28.6.1997,
1.12.2001, 14.9.2004, 29.10.2003.

Date of hearing 30.5.2007.

Date of decision 6.9.2007

JUDGMENT.

HAZIQUL KHAIRI, CHIEF JUSTICE: By this common judgment we propose to dispose of Criminal Revision No.43/1 of 1993 filed by Ex-Sepoy Mukhtar Ahmed, Criminal Revision No.4/1 of 1997 filed by Ex-Sepoy Imtiaz Ahmed; Criminal Revision No.7/1 of 1997 filed by Ex-Hawaldar Attlas Khan, Jail Criminal Revision No.27/1/2001 filed by Ex-C.T.P. Rab Nawaz, Criminal Revision No.24/1 of 2004 filed by Ex-Hawaldar Muhammad Ashraf, and Jail Criminal Appeal No.49/1 of 2004 filed by Muhammad Latif converted into a Revision.

2. In Criminal Revision No.43/1 of 1993 the Petitioner Mukhtar Ahmed a sepoy was convicted on 28.10.1989 U/S 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 by Commander 11 Corps to suffer imprisonment for life with whipping numbering 20 stripes and to suffer dismissal from service. The sentence was confirmed by the concerned Army Officer.

3. In Criminal Constitutional Revision No.4/1 of 1997, Imtiaz Ahmed also a sepoy was tried and convicted by Field General Court Martial convened by the Commander 33 Division for having committed Zina-bil-jabr and sentenced under Section 10(3) of the Ordinance to suffer R.I. for 20 years and whipping numbering 30 stripes

and was also dismissed from service. His conviction/sentence was confirmed in an appeal by the 12 Corps under PAA Section 133.B. However, his sentence was reduced to 14 years R.I. vide order dated 7th November 1996.

4. In Criminal Constitutional Revision No.7/1/1997 Atlas Khan No.2731430 an Ex-Hawaladar was convicted/sentenced for abatement for zina-bil-jabr liable to Tazir by Field General Court Martial the Commander log area Quetta under section 10(3) of the offence of Zina (Enforcement of Hudood ordinance), 1979 R/W Section 109, PPC to 25 years R.I. His conviction and sentence was confirmed and appeal was rejected vide order dated 24.3.1997.

5. In Jail Criminal Revision No.27/1/2001 the petitioner Rab Nawaz, Ex.No.Pak/483189/ Corporal Technician, was convicted and sentenced under Section 10(3) Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to suffer R.I. for 20 years. His appeal was also dismissed vide order dated 15.11.2000 by the Court of Appeal Rear Air Headquarter, Peshawar.

6. In Criminal Revision Petition No.24/1 of 2004 the petitioner Muhammad Ashraf Ex.Hawaladar was charged for attempting to commit

Zina-bil-Jabr under section 10(3) read with Section 18 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and was convicted U/S 354, PPC and sentenced to suffer S.I. for two years and also dismissal from service besides reduction in Rank. The Commander SSG also confirmed the verdict of the trial court and the court of appeal also rejected the petitioner's appeal on 15.1.2004.

7. In Jail Criminal Appeal No.49/1 of 2004 the appellant Muhammad Latif No.3650613 Signalmian was convicted and sentenced under section 10(2) Offence of Zina (Enforcement of Hudood) Ordinance, 1979 for 9 years R.I. and under section 59 SAA Army Act dismissed from service and was reduced to rank on 14.11.2001. The Military Court also dismissed the appeal of the appellant vide judgment dated 24.4.2003. His application for condonation of delay in filing the appeal was granted.

8. These Revisions were filed *inter alia* against Federation of Pakistan, Provincial Governments, Judge Advocate General Headquarters, Court of Appeal, Rear Air Headquarter etc under Article 203-DD of the Constitution of Islamic Republic of Pakistan. The contention of the Petitioners firstly is that a Military Court has no jurisdiction over Hudood cases and assuming that it has, the Federal Shariat Court is empowered in its revisional jurisdiction under Article

203-DD of the Constitution of Islamic Republic of Pakistan to call for its record and see among others the correctness, legality or propriety of any finding thereunder. As against this the respondents have raised a preliminary objection that the Federal Shariat Court is neither an appellate nor Revisional Court nor invested with any administrative authority over the Military Courts.

9. It will be advantageous to reproduce Article 203-DD and other related Articles of the Constitution to which reference was made by the learned counsel for the parties as under:

203-DD. Revisional and other jurisdiction of the Court: (1) The Court may call for and examine the record of any case decided by any Criminal Court under any law relating to the enforcement of Hudood for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceedings of, such court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

(2) In any case the record of which has been called for by the Court, the Court may pass such order as it may deem fit and may enhance the sentence:

Provided that nothing in this Article shall be deemed to authorize the Court to convert a finding of acquittal into one of

conviction and no order under this Article shall be made to the prejudice of the accused unless he has had an opportunity of being heard in his own defence.

(3) The Court shall have such other jurisdiction as may be conferred on it by or under any law."

"203-G. Bar of jurisdiction: Save as provided in Article 203-F, no Court or Tribunal, including the Supreme Court and a High Court, shall entertain any proceedings or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Court."

"203-GG. Decision of Court binding on High Court and Courts subordinate to it: Subject to Articles 203-D and 203-F, any decision of the Court in the exercise of its jurisdiction under this Chapter shall be binding on a High Court and on all Courts subordinate to a High Court."

10. The line of arguments advanced on behalf of the petitioners was that Federal Shariat Court was established under the Constitution for no other purpose but to decide or deal with Shariat and Hudood cases in accordance with dictates of Quran and Sunnah over which it has over all, exclusive and special jurisdiction. The expression "any criminal Court" used in Article 203-DD of the Constitution connotes any Criminal Court whatsoever deciding a case relating to the enforcement of Hudood

which includes a Military Court as well. Learned counsel for the petitioners relied on **BENZIR BHUTTO vs. THE FEDERATION OF PAKISTAN (PLD 1988 SC 416)** in which it was held that "assumption of jurisdiction is always preferred to abdication of jurisdiction and no superior Court would easily concede to the ouster of its jurisdiction" and that "The ouster of jurisdiction of the Courts must be couched in express terms or must arise by necessary implication."

11. Learned counsel for respondents called in question the very revisional jurisdiction of Federal Shariat Court under Article 203-DD of the Constitution against decisions of Military Courts. According to them the expression 'a Criminal Court' used in Article 203-DD of the Constitution has not been defined in the Constitution, nevertheless, Section 5 Cr.P.C. specifically defines Criminal Courts as under:

"6. Classes of Criminal courts and Magistrates:

(1) Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be two classes of Criminal Courts in Pakistan, namely:

- (i) Courts of Session;
- (ii) Courts of Magistrates;

(2) There shall be the following classes of Magistrate, namely:

- (i) Magistrates of the First Class.

(ii) Magistrates of the Second Class; and

(iii) Magistrates of the third class."

It was thus urged that nowhere in the said definition, a Military Court has been mentioned and the legislature purposely excluded it from its purview by the Federal Shariat Court.

12. Next it was urged by the respondents that a bare reading of clause (3) of Article 203-DD of Constitution will reveal that the Federal Shariat Court shall not have unqualified revisional jurisdiction over other Criminal Courts in matters relating to enforcement of Hudood by stating that "The Court shall have such other jurisdiction as may be conferred on it by or under any law." Such revisional jurisdiction is not found in any of the Military laws.

13. Further there is express ouster of jurisdiction of Federal Shariat Court in Section 133 of Pakistan Army Act (and laws of Air Force and Navy) as under:

"No remedy shall lie against any decision of a court martial save as provided in this Act, and for the removal of doubt hereby declared that no appeal or application shall lie in respect of any proceeding or decision of a court martial to any court exercising any jurisdiction whatever."

M. Lastly it was contended that Chapter-1 of the Constitution of Islamic Republic of Pakistan 1973 deals with fundamental rights under its Article 8(3)(a) which specifically states that "the provisions of this Article shall not apply to any law relating to members of the armed forces or of the police or of such other forces as are charged with the maintenance of public order for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them." Similarly, under proviso contained in clause (3) to Article 199 of the Constitution an order made under clause (1) of the said Article shall be inapplicable to "an application made by or in relation to a person who is a member of 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 conditions of services, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law." It follows that the intention of the makers of the Constitution was that even in matters relating to fundamental rights the High Court shall not interfere with matters falling within the jurisdiction of Military Court.

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15. Learned Counsel for the petitioners refuted this position and referred to the case of **MRS. SHAHIDA ZAHIR ABBASI AND 4 OTHERS vs. PRESIDENT OF PAKISTAN AND OTHERS** PLD 1996 SC 632 in which it was held:

"Pakistan Army Act 1952 is one of those pieces of legislation which is protected under Art.8(3)(a), Constitution of Pakistan (1973) from being challenged on the grounds of its inconsistency with the provisions contained in Chap.1 of Part.II of the Constitution. Such protection, however, has not enhanced the status of Pakistan Army Act, 1952 from a sub-Constitutional provision of law to a constitutional provision of law."

16. However in final analysis the view of the Supreme Court was as under:

"A provision barring jurisdiction of Courts contained in sub-Constitutional enactment, however expressly and widely worded, cannot affect or take away the jurisdiction of superior Courts conferred on them under the Constitution. It is, therefore, quite clear that the bar of jurisdiction contemplated under Section 133 of the Act can neither affect nor takes away the powers and

jurisdiction exercised by Supreme Court under Article 184(3) of the Constitution."

17. The contention of the learned counsel for the petitioners' is not tenable as the Supreme Court has wide powers in relation to Public interest matters under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan which cannot be equated with the revisionary powers vested in Federal Shariat Court under Article 203.DD of the Constitution. Similarly the powers conferred on Federal Shariat Court under Article 203.DD of the Constitution are not the same as are available to the High Court under section 439, Cr.P.C., the former being restricted to 'Enforcement of Hudood' for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceeding of a Court, whereas, the High Court in its revisionary jurisdiction under section 439, Cr.P.C. has wide powers as conferred on a Court of Appeal namely power of appellate Court in disposing of appeal (Sections 429), Suspension of sentence pending appeals, Release of appellant on bail (426), Arrest of accused in appeal from acquittal (427) and Power to take or direct further evidence (Section 426). Having said so, the Federal Shariat Court is empowered to take suo moto action in a fit case under Article 203.DD, while hearing a revision petition to examine and decide

the question, whether or not any law or provision of law is repugnant to the injunctions of Islam as laid down in the Holy Quran and the Sunnah.

18. As a result of foregoing discussion, we are of the view that the decision of Military court is not amenable to Federal Shariat Court in revision under Article 203.DD of the Constitution of the Islamic Republic of Pakistan. Firstly, Military Courts do not come within the ambit of Section 6, Cr.P.C.; secondly, there is ouster of jurisdiction under Military laws and finally and more importantly as there is no conferment of jurisdiction of Federal Shariat Court and non-mention of Military laws under clause (3) of Article 203.DD of the constitution.

19. It may be recalled that the Pakistan Army Act, 1952, The Pakistan Air Force Act 1953 and the Pakistan Navy Ordinance, 1961 were examined under Article 203.D of the Constitution by a Full Bench of four Judges of Federal Shariat Court in the case of PAKISTAN ARMED FORCES NURSING SERVICES ACT 1952 etc (PLD 1985 FSC 365) in which inter alia directives were given to the Federal Government to set up appellate Courts to hear appeals of the convicts under the Hudood Laws as well as against their conviction under these three laws though petty punishment may be made subject of revision only. These directions were duly complied with and provisions were inserted by way of amendments

Cr Revn.Nos 42/I of 1993, 4/I of 1997,
7/I of 1997, 27/I of 2001, 24/I of 2004
Cr Appeal No.49/I of 2004.

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therein. Consequently, we find no substance in the said appeals and
revisions before us, which are hereby dismissed.

Justice Haziqul Khairi 6/9/07

JUSTICE HAZIQUL KHAIRI
CHIEF JUSTICE

Justice Dr. Fida Muhammad Khan

JUSTICE DR. FIDA MUHAMMAD KHAN

Justice Salahuddin Mirza

JUSTICE SALAHUDDIN MIRZA.

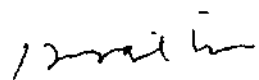
Approved for reporting.

Justice Haziqul Khairi


Justice Haziqul Khairi
Chief Justice.

Our attention has been drawn to a typing mistake which has crept in the eighth line of para 14 at page 11 of this judgment wherein instead of Article 199 Article 109 has been typed.

2. We order that the same may be corrected to read as Article 199.


JUSTICE HAZIQUL KHAIRI
Chief Justice


JUSTICE DR. FIDA MUHAMMAD KHAN


JUSTICE SALAHUDDIN MIRZA