

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

MR. JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE
MR. JUSTICE DR. ALLAMA FIDA MUHAMMAD KHAN
MR. JUSTICE SHEIKH NAJAM UL HASAN
MR. JUSTICE ZAHOOR AHMED SHAHWANI
JUSTICE MRS. ASHRAF JAHAN

SHARIAT PETITION NO.3/I OF 2008

Col. (Retd) Muhammad Akram son of Malik Fateh Khan,
R/o 105 Race Course Road, Street 1, Rawalpindi Cantt.

..... Petitioner

Versus

Federation of Pakistan through Secretary M/o Defence, Rawalpindi Cantt.

.... Respondent

Counsel for the Petitioner In person

Counsel for Federal Govt. Mr. M. Parvez Khan Tanoli,
Standing Counsel

For Pakistan Army Major Shah Jehan Khan,
JAG, GHQ, Rawalpindi

For Pakistan Navy Capt. M. Nawaz Mirza and
Commander Sami Waheed

For Pakistan Air Force Group Captain Rana Nazir
JAG, Headquarter Peshawar

Date of Institution 21.07.2008

Date of hearing 27.09.2016

Date of decision 31.10.2016

JUDGMENT

ALLAMA DR. FIDA MUHAMMAD KHAN, Judge.- The petitioner Col. (Retd) Muhammad Akram has challenged sub rule (c) to Rule 269-A of the Pakistan Army Regulations, on the ground that it is repugnant to the Injunctions of Islam. Accordingly, he has prayed that the same as well as the parallel provision, if any, of the Pakistan Navy and the Pakistan Air Force may be declared against the Injunctions of Islam.

2. Before proceeding to discuss the impugned sub-rule, we deem it necessary to mention that this Court had examined the Pakistan Army Act, 1952, The Pakistan Air Force Act, 1953 and the Pakistan Navy Ordinance, 1961 and, after finding some of the provisions repugnant to the Injunctions of Islam, had directed that necessary amendments be made, as directed by the Court vide its judgment reported as PLD 1985 FSC 365. Aggrieved by the said order of this Court, the Federation of Pakistan had preferred appeal before the Honourable Supreme Court of Pakistan (Shariat Appellate Bench) which, after hearing the parties, upheld the judgment of this Court in “Pakistan Versus the General Public” reported as PLD 1989 SC (Shariat

Appellate Bench) page 6. Accordingly, in compliance with the order of the Court, sections 133-A and 133-B of Army Act, 1952, section 162-A of Pakistan Air Force Act, 1953 and section 138 of Pakistan Navy Ordinance, 1961 were enacted whereby the Appellate Courts were established.

3. The Instant petition was admitted for regular hearing but somehow on account of various reasons, it could not be decided. It came up for final hearing on 27.09.2016 and after hearing the parties the Judgment was reserved.

4. The impugned sub-rule reads as under:-

“269-A. Dismissal, Removal, Premature or Voluntary Retirement/Resignation of Officers for misconduct etc. Procedure. The following procedure will be observed to deal with cases in which it is not practicable or desirable to convene a court martial for the trial of an officer against whom misconduct or inefficiency etc; is imputed and his retention in service is not considered to be in the interests of the Army:-

- (a)
- (b)

(c) When it is not expedient either to hold a court of Inquiry or call for the officer’s explanation, the Chief of Army Staff may submit a report giving all the circumstances of the case and evidence, if any available, together with his recommendations for the decision of the Government.”

5. Notices were issued to Federation of Pakistan through Secretary of Defence, Rawalpindi. Accordingly comments were filed by Standing Counsel for Federal Government on behalf of the respondents. In addition, the Pakistan Air Force and the Pakistan Navy submitted separate comments also wherein all of them have opposed the petition.

6. The Federation on its behalf and on behalf of the Pakistan Army expressed serious reservations about the pleas raised by the petitioner and filed detailed comments. For the sake of brevity, the objections raised by them are summarized as under:-

- a). In spite of notification to the general public, no citizen of Pakistan or any member of general public had ever appeared nor raised any objection before the Court;
- b). The Federal Shariat Court and Shariat Appellate Bench of the Honourable Supreme Court have delivered judgments in 1985 and 1989, respectively, and the relevant Sections of law have been amended by the three Armed Forces, in accordance with the direction of the Courts. Thus none of the provisions can be termed to be against the principles of equity and justice;

- c). The defence services have their own judicial system as a special law by virtue of sub section 2 to section 5 of Code of Criminal Procedure 1898;
- d). Joining employment in the Armed Forces is voluntary and nobody is forced. Thus whoever joins the Armed Forces, willingly accepts the compliance of all Rules and Regulations enforced therein;
- e). A crime committed by a common person may not be a big crime but the same crime amounts to a heinous crime when committed by an official of the Armed Forces because it is an urgent national defence requirement in peace and war.

7. We have heard learned counsel/petitioner for the parties and have given our anxious consideration to their contentions. We have also gone through the judgments referred to above.

8. The learned petitioner vehemently contended that the impugned sub-rule is against the principles of 'Adl' and thus repugnant to the Injunctions of Islam. However, in support of his contention, the learned petitioner could not cite any specific Injunction of Islam as contained in the

Holy Quran and Sunnah of the Holy Prophet ﷺ .

9. We may mention that equality before law and equal protection of law is one of the fundamental principles of Islam which cannot be ignored. Keeping in view the same, as mentioned above, the Pakistan Army Act, 1952 the Pakistan Air Force Act 1953 and the Pakistan Navy Ordinance 1961 have been duly amended to provide the right of appeal in the interest of justice.

10. We have thoroughly examined the impugned sub-rule and have duly considered the same in the context it has been placed. In this connection, it seems pertinent to reproduce sub-rules (a) and (b) also which read as under:

- “(a) The Chief of the Army Staff may order a Court of Inquiry to investigate the matter and submit its findings together with his recommendations to the Government, for decision, or
- (b) The Chief of the Army Staff may call upon an officer to show cause why action should not be taken against him for his dismissal, removal or premature retirement from the service under the PAA Rules and submit the officer’s explanation together with his recommendations to the Government for decision.

A bare reading of the above sub rules to Rule 269-A reveals that the Chief of Army Staff has the option to order a Court of inquiry to investigate the matter and submit its findings together with his recommendations to the Government for decision, or may call upon an officer to show cause why action should not be taken against him for his dismissal, removal or premature retirement from the service under the PAA Rules and submit the officer's explanation together with his recommendations to the Government for decision. However, according to the impugned section when it is not expedient either to hold a Court of inquiry or call for the officer's explanation, the Chief of Army Staff may submit a report giving all the circumstances of the case and evidence, if any available, together with his recommendations for the decision of the Government.

11. The phrases "when it is not expedient" and "all the circumstances of the case and evidence" used in the impugned sub-rule carry great significance. The word "expedient" means suitable, advisable, apt or appropriate (Legal Terms & Phrases Judicially defined from 1947 – 2006). Thus it refers to the ground realities and attending circumstances as well as

evidence of the case which is under consideration of the Chief of Army Staff. The question is who else other than the Chiefs of Armed Forces could be considered competent enough to properly decide whether the matter brought to their notice is expedient or not keeping in view all the existing circumstances and nature of offence as well as its repercussions.

12. In all the above mentioned three sub-rules, it is the Government to consider the recommendations of the Chief of Army Staff and decide the cases as deemed appropriate. Actually the Armed Forces have their own separate judicial system and have their own particular appropriate procedure which has its unique features to administer justice and expeditiously decide all cases, according to the existing circumstances and available evidence. In view of this position, a special provision has been incorporated in the Constitution of Islamic Republic of Pakistan. Article 8(3)(a) of the Constitution provides 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”.

13. Needless to say that maintenance of high order and discipline in the Armed Forces has utmost importance. Without enforcing proper order and discipline, the troops may turn into an unruly mob and become a mere irresponsible mobilization of a crowd. So many occasions arise in the Armed Forces, from time to time, that recourse to the normal legal system may create irreparable loss to their unity, cohesion, morale, good order, military discipline and professional performance, especially in war or emergency. The Armed Forces are entrusted with a very heavy responsibility of defending the solidarity of the country and ensuring perfect law and order among its ranks and files. The Chiefs of Armed Forces hold very high responsible positions and have to keep a vigilant eye on anything that may disturb the morale, good order and discipline of the personnel under their command and have to immediately use their discretion in deciding various issues/cases. They are duty bound to take notice, repress any negligence or impropriety of the conduct on the part of all ranks under their command and sternly curb any infringement of orders by adopting appropriate remedial measures as soon as possible. The impugned sub-rule has taken care of all

circumstances and duly made enactment for them in sub rules (a), (b) and (c). Any outsider cannot appreciate the ground reality prevailing in the Armed Forces at some particular time. Since the Chief of Army Staff and other Chiefs of the Armed Forces have to decide various cases then and there on the spur of the moment, they are the best judges to take cognizance, decide and take any appropriate action based on the attending circumstances and available evidence. In any case all the three sub-rules provide, firstly, for a court of inquiry to investigate and submit its findings or, secondly, call upon an officer to show cause and explain his position regarding the reasons necessitating his dismissal, removal and premature retirement from service under PAA rules or, lastly, in case it is not expedient, he may submit a report giving all the circumstances of the case and evidence, if any available, and send the case alongwith his recommendations for the decision of the Government.

14. We may refer here to Black's Law Dictionary Eighth Edition P.1013. Explaining Military Justice it defines: "A structure of punitive measures designed to foster order, morale and discipline within the military.

Military Law is the branch of Public Law governing military discipline and other rules regarding service in the armed forces. It is exercised both in peace time and in war, is recognized by civil courts, and includes rules far broader than for the punishment of offenders.” Discipline of the Armed Forces has to be maintained at all costs. Hence the Pakistan Army Act, the Pakistan Air Force Act and the Pakistan Navy Ordinance in any manner cannot be equated with the other laws of the country, enacted for civilians. As mentioned above, the said Laws have already provided full protection to the accused to ensure justice.

15. The laws relating to the Pakistan Army, Pakistan Air Force and Pakistan Navy provide for the organization and Governance of the said three Forces and establish judicial hierarchy different from that of the Courts established for civilians. In this separate judicial system the offences are triable through the Court Martial etc. which try various offences, mentioned separately in the Schedule, according to the procedure laid down in their special laws and have been properly spelled out in great details. Previously as stated above, appeals were completely barred against the findings of the

Courts (S.133, Army Act, S.162, Air Force Act and S.140, Navy Ordinance), but this deficiency has now been removed, in compliance with the above mentioned judgments of this Court as well as of the Shariat Appellate Bench of the Supreme Court.

16. We are cognizant of the fact that the Armed Forces can function only if strict discipline is maintained in their organizations and it is ensured that orders of the superior Officers are obeyed, in letter and spirit, without any question or hesitation. Any inclination to violate the Orders given by the competent command or disobedience of that, whatsoever, must, therefore, be curbed with strict disciplinary action by subjecting the offender to punishment according to the gravity of the offence. To meet this end the Senior Officers, in the chain of command, irrespective of the rank they hold, urgently need to be vested with the requisite authority. In some cases this objective can be achieved by summary punishment of simple nature, which has to be administered without any unreasonable delay. The Chiefs of Armed Forces are entrusted with very authoritative and important positions and required to pass fair, appropriate and prompt Orders in all situations, especially those of sensitive nature. Sometimes, apparently minor loopholes can cause huge damage if not taken care of

immediately. It has been rightly said that “for the want of a nail, the shoe was lost, for want of a shoe, the horse was lost; for want of a horse, the rider was lost; for want of a rider the castle was lost”. According to an old adage, a stitch in time saves nine. A little hole if left unattended will sink a big ship.

17. According to Islamic Injunctions also, strict discipline is to be maintained amongst the Mujahideen. In the judgments referred to above, all such injunctions have been mentioned in detail and we need not reproduce them here.

We may, however, add that the best illustration of this kind of discipline is furnished by the withdrawal of Command from Hazrat Khalid Bin Waleed by order of Hazrat Umar and appointment of Hazrat Abu Obaida in his place as Commander of the Muslim Army. The Muslim Army was engaged in active battle at that time. Hazrat Khalid Bin Waleed who was commanding, was removed from Command at a very very sensitive stage when the actual fight was in full swing. He was not given any notice nor charged nor even asked for explanation. He himself also did not raise any objection to his removal. It is pertinent to mention that thereafter he served in the actual fight as best as he could, just as an ordinary soldier, under the command of Abu Ubaida in the same Army which he had been commanding a few minutes before; (For detail see Tarikh-e-Tabri, Vol. II, page 282).

18. The learned petitioner could not specifically point out any Verse of the Holy Quran or Hadith of the Holy Prophet ﷺ to support his contentions whereas according to Article 203D of the Constitution of Islamic Republic of Pakistan it is the first and foremost Constitutional requirement that this Court may, [either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, 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 of the Holy Prophet ﷺ .

19. In view of the above, we have found nothing in the impugned sub-rule, repugnant to the Injunctions of Islam and, therefore, dismissed this Petition accordingly.

MR. JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN

MR. JUSTICE RIAZ AHMAD KHAN
CHIEF JUSTICE

MR. JUSTICE SHEIKH NAJAM-UL-HASAN

MR. JUSTICE ZAHOOR AHMED SHAHWANI

MRS. JUSTICE ASHRAF JAHAN

Announced in open Court
on at Islamabad
*Umar Draz/**