

**SUPREME COURT OF AZAD JAMMU AND KASHMIR**

[Appellate Jurisdiction]

**PRESENT:**

*Raja Saeed Akram Khan, J.*  
*Ghulam Mustafa Mughal, J.*

Civil Appeal No.273 of 2018  
(PLA filed on 10.07.2018)

1. The Field General Court Martial, through its President, Station Border Defence Area, Kail Brigade, District Neelum Azad Jammu and Kashmir.
2. Pakistan Armed Forces, through 32-Brigade, Kail Sector, District Neelum, Azad Jammu and Kashmir.

....APPELLANTS

**VERSUS**

1. Khani Zaman [Ex-Hawaldar (M-4111209) of 647 Mujahid Battalion], son of Sher Ali Awan, r/o village Falkan, r/o Barian Tehsil and District Neelum, presently confined in Central Jail Rara, Muzaffarabad.
2. Muhammad Irshad son of Muhammad Yaqoob, r/o village Falkan, p/o Barian, Tehsil and District Neelum, presently

confined in Central Jail Rara, Muzaffarabad.

3. Rafique Ahmed son of Raj Muhammad, r/o Mohajir Camp Manakpayan, Gari Pan, Tehsil and District Muzaffarabad.
4. Muhammad Naeem, son of Muhammad Haider Awan, r/o village Falkan, p/o Barian, Tehsil and District Neelum, presently confined in Central Jail Rara, Muzaffarabad.

....RESPONDENTS

5. Azad Government of the State of Jammu and Kashmir through the Secretary Home Department having his office at New Secretariat, Lower Chatter, Muzaffarabad.
6. Home Department Azad Government of the State of Jammu and Kashmir through Secretary Interior (Home), having his office at New Secretariat, Muzaffarabad.
7. The In-charge, Prisoners' Cell, Azad Kashmir Brigade, Shaukat Lines, Muzaffarabad.
8. The Superintendent, Central Jail Rara, Muzaffarabad.

....PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court dated 22.05.2018 in writ petition No.1603 of 2017)

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FOR THE APPELLANTS: Syed Mushtaq Hussain Gillani, Advocate and Raja Ikhlaq Hussain Kiani, Addl. Advocate-General.

FOR THE CONVICT-RESPONDENTS: Mir Abdul Latif and Mr.Fazal Mehmood Baig, Advocates.

*Date of hearing:* 12.10.2018

**JUDGMENT:**

**Raja Saeed Akram Khan, J.**— The tiled appeal by leave of the Court has been filed against the judgment of the High Court dated 22.05.2018, whereby the writ petition filed by the respondents, herein, has been accepted.

2. The facts necessary for disposal of this appeal are that the allegation levelled against the respondents is that they have communicated such documents, informations and sketches to the enemy which can directly or indirectly useful for him. The case was

registered against the respondents, in the offence under section 3 of the Official Secrets Act, 1923, and after due course of trial, the Field General Court Martial punished and sentenced 3 years' rigorous imprisonment and dismissal from service to respondent No.1, 9 years' rigorous imprisonment to respondent No.2, 3 years' rigorous imprisonment to respondents No.3 and 5 years' rigorous imprisonment to respondent No.4. The convicts filed appeal before the Army Court of Appeals. The appeals were dismissed, however, the term of imprisonment of respondent No.2 was reduced from 9 years to 5 years. The respondents filed writ petition before the High Court on the sole ground that the benefit of section 53(d) of Pakistan Army Act Rules, 1954 has not been extended to them which is mandatory in nature. The learned High Court after necessary

proceedings through the impugned judgment dated 22.05.2018, while accepting the writ petition held that:-

“In view of above, the writ petition stands accepted and the benefit of section 53(d) of Pakistan Army Act Rules, 1954, is extended in favour of the petitioners and their under trial period shall be commuted towards the period of their sentence and after commuting the said period, if the petitioners have served awarded punishment they shall be released forthwith.”

The judgment of the High Court is the subject matter of this appeal by leave of the Court.

3. Both the parties filed written arguments. The learned counsel for the appellants in the written arguments has taken the stance that the impugned judgment is based on misinterpretation of law which is not sustainable in the eye of law. He added that

benefit under section 382-B, Cr.P.C. or section 53 (d) of the Pakistan Army Act Rules, cannot be claimed as a matter of right but the learned High Court failed to appreciate the relevant provisions of law in a legal manner. He added that the learned High Court in the impugned judgment has held that the provisions of section 382-B, Cr.P.C. and section 53 (d) of Pakistan Army Act Rules are at par, but failed to adhere to the fact that it is not mandatory for the Court to extend the benefit of section 382-B, Cr.P.C. to every culprit rather it is subject to the judicial review which depends upon case to case. He further added that the convicts are involved in the heinous offence and the trial Court at the time of handing down its judgment has taken into consideration all the relevant aspects carefully. He submitted that against the judgment of the Field General Court Martial, the respondents

had already availed the remedy of appeal, thus, the writ petition before the High Court was barred by law. He lastly submitted that the benefit of section 53 (d) had already been extended to the convicts by the Field General Court Martial but this aspect also escaped the notice of the High Court.

4. The learned Additional Advocate-General also supported the written arguments submitted by the counsel for the appellants.

5. Conversely, the learned counsel for the respondents while filing written arguments supported the judgment of the High Court and submitted that the impugned judgment is in accordance with law which is not open for interference by this Court. They contended that the provisions of section 53(d) of Pakistan Army Act Rules, 1954, are mandatory in nature but the Field General Court Martial has

not considered the same and the High Court has got the jurisdiction to look into such an illegality. Respondent No.4, was arrested on 21.05.2014 and he was convicted by the Field General Court Martial on 15.06.2015 and in the conviction order, no clarification regarding one year and twenty four days' period which he spent in jail during the trial of the case, has been given. They forcefully submitted that it is now settled by the superior Courts that the benefit of section 382-B, Cr.P.C., shall be available to all such persons serving their sentence passed by any Court of law, therefore, the learned High Court has rightly corrected the illegality committed by the trial Court.

6. In the light of the arguments, we have examined the record minutely. After going through the record as well as the impugned judgment, it reveals that the main



proposition before the High Court was; whether the convicts are entitled to get the benefit of section 53(d), Pakistan Army Act Rules, 1954, or not, which is pari materia to section 382-B, Cr.P.C. The allegation levelled against the respondents is that they remained involved in the heinous offence of communicating suchlike documents, information and sketches to the other country, which may damage to their own Country/State. The Field General Court Martial after due course of trial, awarded rigorous imprisonment of 3, 9, 3 and 5 years to respondents No.1 to 4, respectively, and on appeal the appellate authority altered the sentence of 9 years' imprisonment awarded to respondent No.2, into 5 years' imprisonment. From the juxtapose examination of the gravity of offence committed by the respondents and the punishments awarded to them it is obvious

that lenient view has been taken while awarding the sentences. The learned counsel for the respondents stressed that it was mandatory for the trial Court to extend the benefit of section 53(d) of Pakistan Army Act Rules, which is at par with section 382-B, Cr.P.C. It may be observed here that bare reading of both the statutory provisions shows that consideration of section 53 (d) of Pakistan Army Act Rules and 382-B, Cr.P.C., is although necessary while awarding the sentence but extension of its benefit is not mandatory. It does not mean by the consideration that the Court has no choice and its hands are fettered and it must exclude such period from the substantive sentence which the convict has spent in the custody as an under trial prisoner. In a case reported as *Sain Muhammad v. The State and others* [2015 SCR 339] this Court

after survey of the statutory provision as well as the case law on the subject has held that:-

“12. According to the statutory developments, initially consideration of benefit of section 382-B, Cr.P.C., was discretion of the Court. Subsequently, through an amendment substitution of the word “may” with the word “shall”, the consideration of this benefit has become mandatory. However, despite this according to the principle of law enunciated by Courts it has been unanimously opined that consideration is mandatory but extension of benefit is not mandatory.”

It may be observed here that the object of section 382-B, Cr.P.C. or 53 (d) of Pakistan Army Act Rules, 1954, is to compensate the convict for the delay caused in the conclusion of the trial and the Court in appropriate cases, while exercising discretion may refuse to grant

the protection concerning the period spent by the convict as under trial prisoner, however, discretion must be exercised judiciously on sound judicial principles. In this regard, reference may be made to a case reported as *Javed Iqal v. The State* [1998 SCMR 1539], wherein, while dealing with the proposition it has been held that:-

“4. The object of the above provision seems to be to compensate a convict for the delay in the conclusion of his trial because of the various factors generally not attributable to him as a State is supposed to provide speedy justice.....

5. ...No doubt, the Court in appropriate cases while exercising discretion judiciously may refuse to grant protection concerning period spend by the convict as under trial prisoner. Nevertheless, it would be most essential that the Court while

examining the question with regard to allowing or refusing facility contemplated under section 382-B, Cr.P.C., should consciously apply mind.”

In the impugned judgment, the learned High Court has after reproducing only section 53(d) of Pakistan Army Act Rules and observing that the Lahore High Court Lahore in writ petition No.1653 of 2015 and the Supreme Court of Azad Jammu and Kashmir in a case titled *Syed Tasawar Hussain Shah v. Azad Government & others* (civil appeal No.194 of 2017, decided on 18.09.2017), extended the benefit of section 53(d) of Pakistan Army Act Rules 1954, to the convicts therein; has extended the benefit to the present convict-respondents, and has not even assigned a single reason in this regard. We deem it proper to observe here that in the case in hand, the convicts have committed heinous crime and the trial Court

has not awarded them the maximum punishment rather has taken very lenient view and the Appellate Authority further reduced the sentence awarded to one of the convicts, meaning thereby that the convicts have already been compensated adequately by the Military Courts. In a case reported as *Shahbaz Afghan v. The State* [1993 SCMR 224] same situation arose, wherein, the apex Court of Pakistan held as under:-

“Coming to the merits of this case it cannot be ignored that the petitioner had committed a heinous crime. He was also awarded comparatively very heavy punishment by the trial Court but the Federal Shariat Court reduced it considerably. Therefore, the benefits sought by the learned counsel in pursuance of all the submissions made by him, in our view, have adequately been granted to him by the Federal Shariat Court

as well as by the trial Court in not awarding him the maximum punishment regarding which there was nothing else as a hurdle.”

7. As in the preceding paragraphs we have observed that; (i) in view the heinousness of the offence committed by the convicts in the present case, the convicts have already been compensated by the Military Courts while awarding the trivial punishments, (ii) consideration of section 53(d) of Pakistan Army Act Rules and 382-B, Cr.P.C., was necessary for the trial Court at the time of awarding the sentence but extension of benefit is not mandatory, and (iii) the learned High Court has passed the impugned judgment in a telegraphic manner and without assigning any reason has extended the benefit to the convicts; thus, in such scenario, the impugned judgment is not maintainable.

8. So far as, the other questions raised by the counsel for the appellants regarding the competence of writ petition etc., are concerned, as we have reached the conclusion that if the benefit of section 53(d) of the Pakistan Army Act Rules was not given to the convicts, even then, in view of the circumstances of the case and the punishment awarded to the convicts it can safely be said that the trial Court has exercised the discretion judiciously, therefore, there is no need to dilate upon the other points involved in the matter and the same are left open to be resolved in any other appropriate case. The learned counsel for the respondents heavily relied upon a judgment of this Court delivered in *Syed Tasawar Hussain Shah's case*, however, this judgment is not applicable in the instant case as in the referred judgment, the benefit of section 53(d) was granted to the



convict, therein, by the trial Court but there was some dispute regarding the computation of period, the convict remained under custody of the Military, whereas, in the case in hand the proposition is quite different.

Resultantly, this appeal is accepted and while setting aside the impugned judgment the writ petition before this Court is hereby dismissed. No order as to costs.

Mirpur,

**JUDGE**

**JUDGE**

\_.10.2018