SUPREME COURT OF AZAD JAMMU & KASHMIR

[Appellate Jurisdiction]

PRESENT:
Ch. Muhammad Ibrahim Zia, CJ.
Raja Saeed Akram Khan, J.

Civil Appeal No.194 of 2017
(PLA filed 10.5.2017)

Syed Tasawar Hussain Shah s/o Syed Sakhawat Hussain Shah r/o Mirpura, Takka Sadaat, Tehsil Athmuqam, district Neelum, Azad Jammu & Kashmir, presently detenue/illegally confined in Central Jail Rara, Muzaffarabad.

.... APPELLANT

v e r s u s

1. Azad Government of the State of Jammu & Kashmir through Secretary Home Department (Chief Secretary), New Secretariat Complex, Chattar, Muzaffarabad.
2. Home Department of Azad Jammu & Kashmir Government through Secretary Home, New Secretariat Complex, Chattar, Muzaffarabad.
3. The Field General Court Martial through its President, 658 Mujahid Battalion c/o Pak A Code No.32, 32 Brigade, Kail Sector, District Neelum.
4. Pakistan Armed Forces through 32 Brigade Kail Sector, District Neelum.
5. The In-charge Prisoner Cell ex5 A.K. Brigade, Shaukat Lines, Muzaffarabad.
6. The Superintendent, Central Jail Rara, Muzaffarabad, A.K.

..... RESPONDENTS

[On appeal from the order of the High Court, dated 15.3.2017 in writ petition No.270/2017]

FOR THE APPELLANT: Syed Nazir Hussain Shah Kazmi, advocate.

FOR THE RESPONDENTS: Mr. Raza Ali Khan, Advocate-General.

Date of hearing: 10.8.2017

JUDGMENT:

***Raja Saeed Akram Khan, J.*—**Originally the titled petition for leave to appeal was filed through Mr. Mujahid Hussain Naqvi, on the strength of the power of attorney. After coming this fact on the surface, an order was passed on 10.7.2017 that in derogation of section 55 (Chapter VIII) of the AJ&K Legal Practitioners and Bar Council Act, 1995, Mr. Mujahid Hussain Naqvi, after suspension of his license of advocacy and removal of his name from the roll of the advocates, tried to appear as special attorney, whereas he was not competent to file any sort of petition for leave to appeal/appeal. The Court directed the concerned authorities to proceed against him, however, the petitioner was summoned in person, who stated that he is not in a position to engage a counsel, therefore, Syed Nazir Hussain Shah Kazmi, advocate, was appointed as *amicus curie* to apprise the Court on behalf of the appellant.

2. The facts of the case in short are that vide order dated 18.12.2013, the appellant, herein, was

convicted and sentenced under section 59 of the Pakistan Army Act, 1952, read with Section 3 of the Official Secrets Act, 1923, by the Field General Court Martial for a period of 5 years' rigorous imprisonment and through warrant of commitment sent to civil prison, Muzaffarabad, by the aforesaid Court Martial. On 16.2.2017, the appellant filed a writ petition with the prayer to grant him the due benefit of rule 53 of the Pakistan Army Act Rules, 1954, as well section 382-B of the Criminal Procedure Code, 1898 and that the period of confinement served under trial as well as awaiting trial since 24.12.2011 be also computed and counted towards the period of sentence of 5 years. After necessary proceedings, a learned single judge in the High Court, through the impugned judgment dated 15.3.2017, dismissed the writ petition, hence this appeal by leave of the Court.

3. Syed Nazir Hussain Shah Kazmi, advocate, who appeared as *amicus curie,* submitted that provisions of rule 53 of the Pakistan Army Act Rules, 1954, are similar to section 382-B, Cr.P.C. In the warrant of commitment, it has clearly been mentioned that the benefit in rigorous imprisonment as required

by the Pakistan Army Act, Rule 53, has been granted to the convict by the trial Court but jail authorities are not determined to extend him the benefit of said rule. He added that the appellant was awarded five years' imprisonment and after availing the benefit of rule 53, his period of conviction has expired and the sentence has been served out by him. The claim of the appellant that he remained in the custody of the military authorities since 2011, has not specifically been rebutted by the respondents. He submitted that the appellant was arrested by the military authorities in the year 2011 and till award of the sentence of five years rigorous' imprisonment by the Court Martial, he remained in custody. No rebuttal from the respondents' side has come on the record by filing any document or counter affidavit. He added that a number of opportunities were provided to the respondents in this regard for producing any sort of document, but nothing has been brought on the record in support of the claim of the appellant.

4. On the other hand, Mr. Raza Ali Khan, the learned Advocate-General, while appearing on behalf of the official respondents, has not seriously contested the

relief claimed by the appellant; however, he submitted that according to the record, he was arrested in the year 2012. The learned Advocate-General conceded the legal position that the military court has extended the benefit of rule 53, supra, to the appellant.

5. We have heard Syed Nazir Hussein Shah Kazmi, the learned *amicus curie*, and the learned Advocate-General and perused the record with utmost care.

6. The only grievance of the appellant is that he remained in the custody of the military authorities and thereafter, finally, through the Court Martial, he was convicted for five years. While recording the conviction, he was extended the benefit of rule 53 of the Pakistan Army Act, Rules, 1954 and his period of confinement has been completed but the jail have not released him. It has been incorporated in the warrant of commitment dated 20.12.2013 as under:-

> "Note: The benefit in rigorous imprisonment as required vide PAA Rule 53 has been granted to the convict by the trial Court."

Rule 53(d) of the Pakistan Army Act Rules, 1954, reads as under:-

> "53(d). The Court will also consider the length of time during which the accused has been in confinement awaiting trial upon the present charge or charges. The imprisonment reckons to commence on the day on which the original proceedings were signed by the president."

7. It may be observed here that the provisions of rule 53 (supra) are similar in nature to the provisions of section 382-B of the Criminal Procedure Code, 1898. The rule carefully suggests that the length of time, during which the accused has remained arrested, shall be considered by the court martial.

8. The jurisprudence on the law relating to the matters of giving benefit of section 382-B, Cr.P.C., to the convicts sentenced by the military courts of Pakistan and computing the period of detention and confinement period before formal commencement of the trial has substantially developed in the recent years. The apex Courts have extended benefit of computing the period of pre-trial confinement in the cases where the trial Court has omitted or refused to grant the same. Reference may be had to the case reported as *Nizamuddin vs. The State* [PLD 2014 Sindh 248], wherein it was observed as under:-

"15. It will be noted from para 39 of *Shah Hussain* (reproduced in para 10 herein above) that the benefit of section 392-B (or the principles encapsulated in that section) may not be available if expressly debarred by any law. Learned A.P.-G. submitted that section 135 of the Army act is a provision of precisely this nature. This provides as follows:-

> **'135. Commencement of sentence of imprisonment for life, or rigorous imprisonment or detention.--**Whenever any person is sentenced under this Act to imprisonment for life, rigorous imprisonment or detention, the term of sentence shall, whether it has been revised or not, be reckoned to commence on the day on which the original proceedings were signed by the president or, in the case of summary Court-martial, by the Court.'

Learned A.P.-G. submitted that since section 135 expressly provides that the tem of sentence is to be reckoned from the date the original proceedings were signed by the president of the court martial, the application of section 382-B (or the principles encapsulated in the section) necessarily stood excluded. In this context, he also referred to the following passage from para 38 of *Shah Hussain*:--

> 'The practical effect of reducing the sentence to the extent of pre-sentence custody period, *particularly the way it is done in Pakistan,* is that the sentence takes effect from the date of arrest of the convict in connection with the offence." (Emphasis supplied)

In our view, the interpretation placed by learned A.P.-G. on section 35 is misconceived. It stems in fact from a peculiarity of the military justice system. Under the Code of Criminal Procedure, a judgment of a criminal Court must be signed by the presiding officer in open court (section 367, Cr.P.C., which also prescribed the contents of the judgment). Such a judgment is effective immediately, i.e., upon being signed. This is not the case with a court martial. Section 119 of the Army Act expressly provides that no finding or sentence of a field general court martial shall be valid unless confirmed in accordance with the provisions of the Act. The confirming authority may approve what the court martial; has done or revise either the finding or sentence or both. Thus, since the finding and sentence of a court martial are not effective immediately, it was necessary to specify in the Army Act when the term of the sentence would commence. This, in our view, is the true (and limited) scope of, and intent behind, section 135. Thus, it does not in any manner exclude the application of the principles enunciated by the Supreme Court in *Shah Hussain*. Insofar as the passage from para 38 of that judgment, relied upon by the leaned A.P.-G., is concerned, that is simply reflective of the actual statutory language employed in section 382-B. The Supreme Court in that para was explaining the "practical" (as opposed to the legal) effect of the manner in which section 382-B is drafted. It does not affect the broader principle which in our respectful view, emerges clearly from that judgment namely, that the period of pre-conviction custody must be taken into consideration in determining the

> length of time a convict is to be undergo imprisonment post-conviction. This is a principle of general application and is not in any manner excluded by section 135 of the Army Act."

In the same report, it has also been observed in para 20, as under:-

> "20. In view of what has been stated above, this application is converted into a petition under Article 199 of the Constitution and is hereby allowed. The Jail superintendent, Central Prison-I, Sukkur is hereby directed to prepare a fresh jail roll for the applicant within 7 days of the receipt of this judgment, in which the pre-conviction period of custody (i.e., from 1-9-2006 to 12-11-2008) is taken into consideration (along with any other applicable remissions). Once the applicant has served out his period of detention as so computed, he shall be forthwith set at liberty unless required in some other case…"

In the case reported as *Dr. Muhammad Aslam Khakhi vs. the State & others* [PLD 2010 Federal Shariat Court 1], wherein it has been observed as under:-

> "The objection of the petitioner is that the period of detention in custody for the offence should be deducted from the quantum of sentence of imprisonment awarded at the end of the trial for the same offence. Let us examine it in the light of relevant verses of Holy Qur'an. The following principles can be inferred from the injunctions of Islam relating to the realm of administration of justice.

a. All human beings are equal before law and even handed justice has to be administered to the effective parties and no one should be punished beyond the period stipulated in law.

(i) Ayat 48, 123, 286 Sura 2:
(ii) Ayat 135, Sura 4
(iii) Ayat 8, Sura 5
(iv) Ayat 15, Sura 10

b. Tamper justice with equity (Soften Adl. with Ehsan). Ayat 90 of Sura 16 of Holy Qur'an

c. The recompense of an injury is an equal injury but forgiveness in divine. Allah loves that compassionate. Ayat 41 of Sura 42.

110. In this view of the matter it appears to be just and reasonable that the period spend by a prisoner in detention/custody for an offence before and during the trial ought to be deducted from the sentence awarded by the trial Court for the reason that the prisoner has already suffered incarceration on account of the crime report which becomes the basis of his conviction and the consequent sentence of imprisonment. The omission to deduct such a period of detention in the same cause would fall in the category of *zulm* which the Holy Qur'an does not countenance under any situation: Refer Ayat 85 Sura 3. The existing provision i.e. section 382-B of the Code of Criminal Procedure in so far as it speaks of *taking into consideration the period spent in detention for the same offence,* before pronouncement of judgment is declared derogatory to the injunctions of Islam. Necessary correction may be made by 1.12.2009 whereafter the order of this Court will take effect and the provision of section 382-B of the

Code of Criminal Procedure would read as follows:---

> 'Where a Court decides to pass a sentence of imprisonment of an accused for an offence, the period, if any, during which such accused was detained in custody for such offence, whether before or after submission of report under section 173 of the Code of Criminal Procedure or initiation of trial in a case instituted upon a complaint, shall be deducted from the quantum of sentence of imprisonment awarded by the trial Court or it may be adjusted against imposition of fine if the Court so directs.'

111. Consequently Shariat Miscella-neous Application No.21/I of 1995 succeeds partly. We took notice of this provision also because this point invariably crops up whenever the question of benefit of section 382-B of the Code of Criminal Procedure comes under consideration at the time of award of sentence to the accused both at the conclusion of the trial and at the time of hearing the appeal. It is hoped that this declaration will put an end to the controversy."

In the case reported as *Shahid Mehmood vs. The State & others* [PLD 2001 Lahore 502], it was observed as under:-

> "5. Record shows that the petitioner was arrested on 24-8-2006 under section 59 of Pakistan Army Act read with section 3(a) of the Official Secrets Act, 1923 and he was convicted and sentenced to 4 years' R.I. on 27-2-2008

> but benefit of section 382-B, Cr.P.C., has not been allowed perhaps due to inadvertent. Perusal of judgment passed by Field Court Martial highlights that there is no mentioned of section 382-B, Cr.P.C in the judgment and as such it cannot be said that benefit of said section has been denied. Any person convicted and sentenced by the Military Authorities is sent to civil prison to serve the sentence. Section 136 of the Pakistan Army Act, 1952 provides that convicts under Army act will serve their sentences along with civil prisoners in the civil jail and will be governed according to the provisions of Jail Manual. In the circumstances, not extending the benefit of section 382-B, Cr.P.C., is a glaring discrimination. The Hon'ble Federal Shariat Court has also defined it as "Zulm". Reliance is placed on PLD 2010 FSC 1, 2001 SCMR 1987. Therefore, benefit of section 382-B, Cr.P.C., could not be withheld and shall also be allowed to the petitioner convicted under the Army act. Therefore, this petition is accepted. Benefit of section 382-B, Cr.P.C. is granted to the petitioner."

Although in the case in hand, the military court has extended the benefit of rule 53(d) of the Pakistan Army Act Rules, 1954, but there is dispute regarding the exact date of arrest of the appellant, as he is claiming that he was arrested in the year 2011 and he has also filed an affidavit in this regard, whereas the learned Advocate-General has taken the stance that the appellant was arrested by the Military

authorities in the year 2012. During the course of hearing, we summoned the report from Jail Superintendent, who has reported that the convict was awarded 5 years rigorous imprisonment vide order dated 20.12.2013 and was entered in the jail on the same date, whereas his conviction started w.e.f. 28.8.2013, however, there is no mention about the date on which the convict-appellant was arrested. If the argument of the learned Advocate-General is assumed that the appellant was arrested in the year 2012, even then while computing the period of detention passed before the commencement of the trial, he has served his legal sentence, therefore, he cannot be allowed to be relinquished in jail for further time. Resultantly this appeal is accepted. These are the detailed reasons for the short order announced on 10.8.2017.

JUDGE **CHIEF JUSTICE**

Muzaffarabad