Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 4047 OF 2022

Javad Khan
Vs

The State and others.

PETITIONER BY: Mr. Sher Afzal Khan Marwat, Advocate.

RESPONDENTS BY: Mr. Muhammad Usman Warraich, Assistant Attorney General.

Mr. Fazal Mehmood, S.I, FIA.

DATE OF HEARING: 19.12.2022.

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BABAR SATTAR, J.- The petitioner is seeking quashment of FIR No.154 dated 06.10.2022 for offence under Section 14 of the Prevention of Electronic Crimes Act, 2016 ***("PECA")***, read together with Sections 419 and 420 of the Pakistan Penal Code, 1860 ***("PPC")***, registered at Police Station Federal Investigation Agency Cyber Crime Reporting Centre, Islamabad.

2. The learned counsel for the petitioner stated that two sets of offences are identified in the FIR, an offence under Section 14 of the PECA; and offences under Sections 419 and 420 of PPC. He stated that the alleged act does not fall within Sections 13 and 14 of the PECA given that the act was committed within Pakistan. He further stated that an offence under Section 14 of the PECA is not a cognizable offence and consequently, an FIR in relation to the said charge could not be registered without seeking prior permission from a Court. He further submitted that offences under PPC cannot be tried

alongside offences under the PECA by a Court that has jurisdiction to try offences under the PECA in view of Section 237 of the Code of Criminal Procedure, 1898, read together with Section 26 of the General Clauses Act, 1897. For this proposition, he relied on the judgment of the learned Lahore High Court in ***Sheraz Khan vs. The State and others*** **(2022 Pcr.LJ 203)**. He submitted that PECA was a special law and the legislative intent was manifest in its preamble. The purpose of the law was not to enable a notified investigation agency to investigate PECA offences only and not to combine them with other offences under PPC as such offences fall within the investigative domain of police authorities under the control of provincial government. He submitted that the primary allegation in the instant case fall within the scope of Sections 419 and 420 of PPC. And merely because there was an allegation that such offences had been committed through use of mobile phone did not make such offences PECA offences to be tried by an investigation agency notified under Section 29 of PECA. He submitted that as an FIR pursuant to the Section 14 of the PECA could not be registered without seeking prior permission from the competent Court, the offence being not cognizable. The FIR was liable to be quashed on such basis. And to the extent that the FIR mentioned Sections 419 and 420 of PPC, it was liable to be quashed as an investigation agency constituted under Section 29 of the PECA had no authority to register a complaint and investigate offences under PPC.

3. The learned Assistant Attorney General submitted that Section 28 of the PECA incorporated provisions of PPC to the

extent not inconsistent with PECA. He further submitted that Section 28 read together with Section 44(4) and 50 contemplated that while investigating a PECA offence any related offences created under PPC could also be investigated by an investigation agency notified for purposes of the PECA. He submitted that Sections 419 and 420 of PPC were mentioned in the schedule to the Federal Investigation Agency Act, 1974, **("FIA Act")** and therefore the Federal Investigation Agency **("FIA")** had the jurisdiction to investigate the same. He contended that Section 26 of the General Clauses Act, 1897, and Section 113 of the Cr.P.C provided protection to a citizen being punished twice for the same offence. But such principle was not attracted in the instant case, as the petitioner was not being punished twice but was being investigated by FIA for offences under Section 14 of the PECA read together with Sections 419 and 420 of PPC. He submitted that the absence of special provision for a joint trial was not a basis for quashment of an FIR. And an FIR could only be quashed where no tangible material existed on record establishing a basis for the charge against the citizen. He submitted that there was clear evidence of fraud having been committed by the petitioner against an unsuspected female citizen residing in Saudi Arabia. The offence had been committed through Whatsapp calls and consequently there was utilization of information system as defined under Section 2(xx) of PECA and FIA had correctly taken cognizance of the complaint.

4. At the heart of the controversy are three questions: (i) does the FIA as an investigation agency notified for purpose of

Section 29 of the PECA have jurisdiction to investigate the offences defined under PPC; (ii) in the event that FIA has jurisdiction to investigate offences under PPC where such offences are made out from actions that constitute an offence under PECA, would inclusion of cognizable offences under PPC authorized the investigation agency to register an FIR in relation to a non-cognizable offence under PECA without seeking prior permission from a Court of competent jurisdiction; and, (iii) can a special Court designated under Section 44 of PECA conduct a joint trial of offences under PECA as well as offences under PPC.

5. The question of joinder of offences under PECA with offences created under PPC came before the learned Lahore High Court in ***Sheraz Khan*** and it was held that PECA was a special law and the legislative intent manifest from the provisions of PECA was that offences created under it were to be investigated and tried on a standalone basis. The learned Lahore High Court noted that unlike Section 17 read together with Section 21-M of the Anti-Terrorism Act, 1997, there was no provision for holding a joint trial under PECA. The learned Lahore High Court observed that Section 27 of the PECA envisaged separate trials and there was no provision within PECA that gave overriding effect the provisions of PECA over other laws. The learned Lahore High Court, therefore, concluded that, "offences under P.P.C., if are committed through use of an information system shall be tried by the ordinary court and not by Court constituted under PECA; if such acts are committed through unauthorized access to information system, then main offence shall be tried by the ordinary court and offence of

unauthorized access shall be tried by court under PECA". The matter before the learned Lahore High Court was the grant of bail and a case where the accused had been charged under Sections 13, 14, 16 of the PECA read together with Sections 109, 419, 420, 468 and 471 of PPC.

6. In the instant matter, the question is whether the FIR registered against the petitioner is backed by the authority of law or whether it is liable to be quashed for not being legally authorized. To answer the questions framed in para 4 above it is essential to appreciate the scheme of PECA and the import of its various provisions.

7. It is well understood that a preamble is not a substantive part of a statute, but it nevertheless is a useful tool to understand the legislative intent underlying the enactment of a statute. The preamble to PECA speaks of preventing "unauthorized acts with respect to information systems and provide for related offences as well as mechanisms for their investigation, prosecution, and trial and for the matters connected there with". The statement of objects and reasons that accompanied the introduction of PECA argued that the existing criminal justice framework was inadequate and ill-equipped to deal with the information age and the new types of cyber crimes that it had brought along. And it was for the purpose of dealing with unauthorized and illegal actions within the virtual word using information systems that PECA was enacted. It identified a new set of offences and provided for the investigation and prosecution of such offences. This suggests

that PECA was conceived as a special law to deal with a different category of crimes involving the cyber world and use of information systems and not an additional means to investigate and prosecute traditional crime that may involve, as an ancillary matter, the use of an electronic device. Section 2(xxiii) defined investigation agency to mean "the law enforcement agency established by or designated under this Act". And Section 29 vested authority in the Federal Government to establish or designate a law enforcement agency as "the investigation agency for the purposes of investigation of offences under this Act". Section 30 then provided the following:

> **30. Power to investigate.-** Only an authorized officer of the investigation agency shall have the powers to investigate an offence under this Act:
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> Provided that the Federal Government or the Provincial Government may, as the case may be, constitute one or more joint investigation teams comprising of an authorized officer of the investigation agency and any other law enforcement agency for investigation of an offence under this Act and any other law for the time being in force.

8. In exercise of authority under Section 51 of PECA read together with Section 29 of the PECA, the Federal Government has promulgated the Prevention of Electronic Crimes Investigation Rules, 2018 **("Rules").** A complete framework for the manner in which the investigation agency is to be set up and is to exercise authority for purposes of PECA is provided under such Rules. Rule 3 of the Rules states that the FIA is designated as the investigation agency for investigation of offences under the Act and shall discharge its functions under the Act and the

Rules through the cyber crime wing under the supervision of the Director General.

9. The FIA is an agency established under the FIA Act. The schedule to the FIA Act lists of the matters and offences in relation to which FIA is authorized to exercise its investigation powers and includes many provisions of PPC. In exercise of authority under Section 9 of the FIA Act, the Federal Government has promulgated Federal Investigation Agency (Inquiries and Investigations Rules, 2002). It is in view of the provisions of the Rules and the FIA Act that the scope of authority of FIA pursuant to the FIA Act has been enumerated by the august Supreme Court in ***Director General, FIA Vs. Kamran Iqbal*** **(2016 SCMR 447)**. The fact that FIA has been designated as the investigation agency for purposes of Section 29 of the PECA does not mean that the test for exercise of authority by FIA under provisions of PECA is the same as that for exercise of authority under the FIA Act. Or that by virtue of FIA being designated as the investigation agency under Section 29 of PECA, there is a merger of the powers vested in FIA for purposes of the FIA Act and the authority vested in FIA by virtue of it being designated as the investigation agency for purposes of PECA.

10. Rule 3 of the Rules reflects the understanding on part of the Federal Government of the legislative intent behind PECA and explicitly provides that the investigation powers as enumerated in the Rules are for purposes of discharge of functions under PECA (and not any other statute including the

FIA Act). The authority vested in the investigation agency to be designated under Section 29 has been appropriately circumscribed by the legislature by stating that such designation would be for purposes of investigating offences under PECA. Likewise, Section 30 reiterates that only an officer of the investigation agency authorized for purposes of PECA would have the power to investigate an offence under PECA, (which is why a very detailed framework of how the investigation is to be undertaken has been provided under the Rules). This also explains why a proviso has been added to Section 30 of PECA to provide for the constitution of Joint Investigation Team **("JIT")**. It was obviously within the contemplation of the legislature that there might be actions that fall within the scope of offences as defined under PECA and simultaneously fall within the scope of offences defined under other statutes, including the PPC. It is for such purpose that the legislature has provided for constitution of JIT's. And Rule 17(3) of the Rules identifies a police officer not below the rank of BPS-18 as one of the members of the JIT.

11. In the event that the legislature had wished for the FIA to investigate allegations that simultaneously constitute offences under PECA as well as PPC there would be no need to provide for a JIT and include a police officer under the hierarchy of the Provincial Government to be part of such team. As in such case FIA as the designated investigation agency could investigate any actions that attracted the offences defined under PECA as well as offences defined under PPC. And the legislature could easily have appended a schedule to PECA listing provisions of PPC the cognizance of which could be taken by the designated

investigation agency under Section 29 of PECA together with PECA offences. This was done by the legislature under the FIA Act where a schedule is appended that lists of various provisions of PPC that fall within the domain of FIA subject to qualification of the subject-matter test in view of the provisions of FIA Act). But this scheme was not adopted by the legislature and consequently no schedule is appended to PECA listing Sections of PPC that fall within the investigative domain of the investigation agency designated under Section 29 of PECA.

12. In ***Sheraz Khan*** the learned Lahore High Court has also noted that Section 36(3)(b) and (c) provide for an authorized officer investigating a PECA crime to seek permission from the Court not to provide seized data or information system to the owner of data or system where such provision may prejudice "another ongoing investigation" or "any criminal proceedings" that are pending or that may be brought in relation to any of those investigations. The provisions of Section 36(3) thus bolster the opinion of this Court that the manner in which the investigative powers are set up under provisions of PECA contemplates the possibility of parallel investigations under PECA and another statute and provisions have been made for cooperation in relation to such investigations through constitution of JITs. And, therefore, precautionary provisions such as Section 36(3) to prevent causing prejudice to a parallel criminal proceeding or investigation, have been provided.

13. In view of the aforementioned scheme and provisions of PECA as well as the Rules, it emerges that the legislative intent

manifest in such provisions is that the investigation agency designated under Section 29 would exclusively investigate PECA offences and not offences under PPC. The proviso of Section 30 provides that for the mechanism for joint investigations i.e. the constitution of an appropriate JIT.

14. Independent of the scope of investigative powers under PECA, let us now consider whether a joint trial can be convened in relation to an offence under PECA and an offence under PPC. For purposes of convenience let us reproduced below the relevant provisions of PECA to address this question:-

> **27. Legal recognition of offences committed in relation to information system.-** (1) Notwithstanding anything contained in any other law for the time being in force, an offence under this Act or any other law shall not be denied legal recognition and enforcement for the sole reason of such offence being committed in relation to or through the use of an information system.
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> **28. Pakistan Penal Code, 1860 (Act XLV of 1860) to apply.-** The provisions of the Pakistan Penal Code, 1860 (Act XLV of 1860), to the extent not inconsistent with anything provided in this Act, shall apply to the offences provided in this Act.
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> **44. Cognizance and trail of offences.-** (1) The Federal Government, in consultation with the Chief Justice of respective High Court, shall designate presiding officers of the Courts to try offences under this Act at such places as deemed necessary.
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> **50. Relation of the Act with other laws.-** (1) The provisions of this Act shall have effect not in derogation of the Pakistan Penal Code, 1860 (Act XLV of 1860), the Code of Criminal Procedure, 1898 (Act V of 1898), the Qanoon-e-Shahadat, 1984 (P.O. No. X of 1984), the Protection of Pakistan Act, 2014 (X of 2014) and the

Investigation for Fair Trial Act, 2013 (I of 2013).

15. A perusal of the aforementioned provisions reflects that there is no non-obstante provision within PECA. Section 27 recognizes the possibility of overlapping domains whereby an action can constitute an offence under PECA while also constituting an offence under any other statute. There are also two principles applicable to the criminal justice system, which are relevant here. One, is that a citizen is not be punished twice for the same offence. And two, where an action attracts offences under different statutes a citizen is to be punished for an offence that entails the lesser punishment. It is thus that Section 27 clarifies the possibility of overlapping domains between PECA and offences as defined under other statutes, and depicts the legislative intent that such offences are to be considered and treated separately and one is not to be treated as a predicate offence of the other merely because it involves the use of an information system. Similarly Section 28 and Section 50(1) provide that the provisions of PECA would have effect not in derogation of provisions of PPC and provisions of PPC would only be applicable to the extent not inconsistent with anything provided in PECA.

16. This brings us to the manner in which cognizance can be taken of an alleged offence under PECA. Section 43 provides that all offences under PECA (with the exception of offences under Sections 10, 17, 21 and 22) are non-cognizable. When Section 43 is read together with Section 28 and 50(1) of PECA it becomes evident that an investigation agency designated under Section 29, even if it were to be deemed competent to

investigate offences under PPC, could not assume authority to investigate a non-cognizable PECA offence in combination with a cognizable offence under PPC without seeking prior permission as contemplated by Section 157 of Cr.P.C. To find otherwise would be to rule that what cannot be done directly under provisions of PECA can be done indirectly by incorporating a provision of PPC within the complaint, thereby rendering a non-cognizable offence cognizable. Doing so would be tantamount to a fraud on the statute.

17. As evident from the statement of objects and reasons accompanied with the introduction of PECA to the legislature, one of the objects of creating special law for purposes of crimes related to the cyber and virtual world involving information systems was to designate a special Court in order to try PECA offences. This has been done by Section 44 pursuant to which the Federal Government, in consultation with the Chief Justice of respective High Court, designates presiding officers of Courts to try PECA offences. As it is a special law, Section 44(2) provides for special training to be provided to presiding officers of PECA Courts. In other words, Section 44 read together with Section 2(9) of the PECA provides for creation of special Courts for trial of PECA offences. It could very well be, as is often the case with regard to special tribunals, that the special Court is presided over by a Sessions Judge or Additional Sessions Judge who is otherwise also vested with jurisdiction to try offences under PPC. But such outcome is incidental and not part of the design of the special Court. Where a Court sits as a Court designated for purposes of Section 44 of PECA, it is only vested with authority

to try PECA offences and not an ordinary offence under PPC. Article 175 of the Constitution provides that a Court only has such jurisdiction as vested in it by law. A PECA Court established under Section 44 of the PECA can therefore not assume the authority and jurisdiction to try offences under PPC. Where the legislature intends to provide for joint investigations or joint trials, it can make appropriate provisions to do so as has been done under Section 17 and 21-M of the Anti-Terrorism Act, 1997, which state the following:

> **17. Powers of Anti-terrorism Courts with respect to other offences.-** When trying any scheduled offence, an Anti-terrorism Court may also try any offence other than the scheduled offence with which the accused may, under the Code, be charged at the same trial.
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> **21M. Joint Trials.-** (1) While trying any offence under this Act, a Court may also try any other offence with which an accused may, under the Code of Criminal Procedure, 1898, be charged, at the same trial if the office is connected with such other offence. (2) lf, in the course of any trial under this Act of any offence it is found that the accused person has committed any other offence under this Act or any other law for the time being in force, the Court may convict an accused for such other offence and pass any sentence authorized by this Act or, as the case may be, such other law, for the punishment therof.

18. Likewise, where the legislature contemplates that one investigation agency can assume control over prosecution being undertaken by another agency in view of the fact that the offence falls within the domain of a special law, the legislature provides for such possibility, as has been done in Section 16 A of the National Accountability Ordinance, 1999, to allow for transfer

of a case from any other court to an accountability court. As we have already discussed above PECA neither provides for exclusive investigation of primary offences and predicate offences nor provides for joint trials of PECA offences together with offences under other statutes. Section 235(2) of Cr.P.C provides for an offence falling within two or more separate definitions of any law to be tried at a single trial for each of such offences. However, a fundamental requirement for such joint trial of separate offences is that the Court trying such offences has the jurisdiction to do so. We have noted above that in view of the Section 44 of PECA, PECA offences are to be tried by a special Court that has jurisdiction to only try PECA offences and none other. Consequently even if the provisions of PECA read such that a joint investigation was possible to be undertaken by an investigation agency designated under Section 29 of PECA, at the end of such investigation if the investigation agency formed a view that offences under PECA as well as offences under PPC were both made out, there would arise the need to submit separate challans in relation to PECA offences before a special Court designated under Section 44 of PECA and an ordinary Court in relation to offences under PPC.

19. In view of the above, this Court is of the view that FIA as the designated agency under Section 29 of PECA is not vested with jurisdiction to investigate allegations that attract offences under PPC, merely because they relate to the actions that attract an offence under PECA. In such case, the proviso of Section 30 provides for creation of a JIT to facilitate related investigations and at the culmination of such investigation it would be for FIA

to file a challan before the special Court designated under Section 44 for trial of PECA offence and for the police authorities to undertake criminal proceedings and file a challan before a trial Court competent to take cognizance of an offence under PPC. This Court is also of the opinion that even if it was possible to read FIA's investigative powers under the FIA Act into PECA, where the foundational basis for assumption of jurisdiction by FIA is a PECA offence that is non-cognizable, FIA as the designated investigation agency for purposes of Section 29 cannot take cognizance of such offence without seeking prior permission from the competent Court by merely lapping on charges under PPC that are cognizable.

20. In the facts of the present case, the charge against the petitioner is that he is liable for an offence under Section 14 of PECA. In view of the Section 43 of PECA the offence is non-cognizable and consequently FIA could not have taken cognizance of it without seeking prior permission from a Court of competent jurisdiction. That has admittedly not been done in the instant case and the cognizance of the offence under Section 14 of the PECA and steps taken subsequent to such cognizance by FIA are devoid of legal authority. Further, as has been held above, FIA as the investigation agency designated under Section 29 of PECA is devoid of authority to investigate offences under PPC through a joinder of such offences with offences under PECA. FIA could therefore not have registered a complaint under Section 419 and 420 of PPC and investigate the same. As these are the sum total of charges brought against the petitioner, this Court finds that the First Information Report registered, which

has been impugned in the instant petition, is devoid of legal authority and is liable to be ***quashed***. The quashment however would not prevent FIA from seeking appropriate permission from the Court of competent jurisdiction to take cognizance of the alleged offence committed by the petitioner under Section 14 of PECA. Further to the extent that the actions attributed to the petitioner constitute offences under PPC complainant would be within his right to file a complaint with police authorities so that an FIR can be registered in exercise of authority under Cr.P.C.

21. The petition is ***allowed*** in the above terms.

(BABAR SATTAR)
JUDGE

Announced in open Court on 17.02.2023.

JUDGE

Shakeel Afzal/-

Approved for reporting.