Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

PRESENT:

Mr Justice Aamer Farooq, HCJ
Mr Justice Babar Sattar, J.
Mr Justice Arbab Muhammad Tahir, J.

(To decide the legal question relating to the combined trial of offences under Prevention of Electronic Crimes Act, 2016 and Pakistan Penal Code, 1860 by the Court designated under section 44(1) of the Prevention of Electronic Crimes Act, 2016)

Crl. Misc. No.1184-B-2023

Muhammad Ayyaz Bin Tariq
Versus
The State & another

Petitioners by	:	Abdul Hameed Khan, Advocate. Ch. Muhammad Ishaq, Advocate. Ch. Muhammad Nisar, Advocate. Amad Ashraf, Advocate. Qamar Shahzad Abbasi, Advocate. Barrister S.M. Yawar, Advocate. Syed Nayab Hassan Gardezi, Advocate. Syed Shah Miran, Advocate. Malik Qatada Jamal, Advocate. Ch. Muhammad Junaid Akhtar, Advocate. Manzoor Ahmed Rehmani, Advocate. Qaiser Imam Ch., Advocate. Shujaullah Gondal, Advocate. Hafiz Asif Ali Tamboli, Advocate. Asad Jamal, Advocate.
Respondents by	:	Barrister Munawar Iqbal Duggal, Addl. Attorney General. Azmat Bashir Tarar, Assistant Attorney General. Zahid Asif Chaudhry, Advocate. Muhammad Bilal, Advocate. Qamar Abbas, Advocate. Muhammad Azhar Malik, Advocate. Muhammad Fahim Akhtar Gill, Advocate.

Khurram Mehmood Qureshi, Advocate.
Dr Yasser Aman Khan, Advocate.
Hafiz Liaquat Ali Manzoor, Advocate.
Laraib Kanwal, Advocate.
Malik Saqib, Advocate.
Shaista Chaudhry, Advocate.

Azam Nazir Tarar, Amicus curiae.

Sarfraz Khatana, Dy. Director (Law), FIA.
Mudassar Shah, Asstt. Director (Law), FIA.

Assisted by : Mr Sajjad Ali, Law Clerk.
Ms Aneesa Noureen, Law Clerk.

Date(s) of Hearing : **09.01.2024.**

Arbab Muhammad Tahir, J.- The questions of law referred to us relate to the joint trial of the offences provided under the Prevention of Electronic Crimes Act, 2016 (hereinafter **"PECA"**) and Pakistan Penal Code, 1860 (hereinafter **"PPC"**).

2. We have heard the learned Additional Attorney General, learned amicus curiae and the learned counsels for the parties and perused the available record.

3. Firstly, we will examine the jurisdiction of the Special Judge appointed under section 3 of the Pakistan Criminal Law (Amendment) Act, 1958 (hereinafter **"Act of 1958"**) to try offences under PECA. Section 3 of the Act of 1958 provides that the appropriate Government shall, by notification in the Official Gazette, appoint as many Special Judges as may be necessary to try and punish offences specified in the *"Schedule".* Sub-section (2) of section 3 provides that no person shall be appointed a Special Judge unless he is qualified to be a Judge of a High Court; or is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge or a District Magistrate or an Additional District Magistrate and has not retired from Government service or at any

time been removed or dismissed from such service. Section 5 deals with *"jurisdiction"* and provides that the Special Judge so appointed under section 3 may take cognizance of any offence committed or deemed to have been committed within such limits and triable under the Act of 1958 upon receiving a complaint of facts which constitute such offence or upon a report in writing or such facts made by any police officer. Sub section (1) of section 5 provides that the offences specified in the *"Schedule"* shall be exclusively triable by a Special Judge, whereas, sub-section (2) provides that the appropriate Government may, from time to time, by notification in the official gazette, include in the Schedule such other offences as it deems necessary or expedient. Sub section (4) of section 5 provides that whenever an offence is included in the Schedule by a notification of the appropriate Government made under subsection (1), all cases relating to that offence pending in any Court other than the Court of a Special Judge immediately before such notification shall stand transferred to the Court of the Special Judge having jurisdiction over such cases. The Schedule to the Act of 1958 shows that the following offences are triable by the Special Judge.-

(a) offences punishable under sections *161 to 166, 168, 217 and 218* of the Pakistan Penal Code(XLV of 1860), and as attempts, abetments and conspiracies in relation thereto or connected therewith,

(b) offences punishable under sections *403 to 409, 417 to 420, 465 to 468, 471 and 477A* of the Pakistan Penal Code(XLV of 1860), and as attempts, abetments and conspiracies in relation thereto or connected therewith, when committed by any public servant as such or by any person acting jointly with or abetting or attempting to abet or acting in conspiracy with any public servant as such.

(c) Offences punishable under the *Prevention of Corruption Act, 1947(II of 1947)*, and as attempts, abetments and conspiracies in relation thereto or connected therewith.

4. Section 44 of PECA deals with cognizance of offences and trial under PECA. Sub-section (1) of section 44 of PECA provides that the Federal Government, in consultation with the Chief Justice of the High Court, shall *"designate"* presiding officers of the Courts to try offences under PECA. Section 47 provides a right of appeal against the final judgment of the Court to the High Court if the order is passed by a *"Court of Session"* and to the Court of Session if the order is passed by the *"Magistrate"*. The law does not envisage appointment of a new judge or establishment of a new court for trial of offences under PECA. Rather, it envisages designating presiding officers of the Courts. It is worth-mentioning here that the legislature in its wisdom has mentioned two forums i.e. *Magistrate* and *Court of Session* whose decisions are appealable in section 47 of PECA.

5. The Federal Government, in terms of section 44(1) of PECA, has designated the Judge, Special Court (Central), Islamabad for trial of offences in the Islamabad Capital Territory. It may be noted that the Judge, Special Court (Central), Islamabad has been appointed as by the Federal Government in exercise of the powers conferred under section 3 of the Act of 1958. The jurisdiction of the Special Judge appointed under the Act of 1958 is governed under sub section (1) of section 5 thereof. Sub-section (2) of section 5 of the Act of 1958 provides that the Federal Government is empowered to include in the Schedule such other offences as it deems necessary or expedient through notification in the official gazette. Nothing has been placed on record of this Court that the Federal Government has amended the Schedule to the Act of 1958 and included the provisions of PECA so as to enable the Special Judge to try such offences. Competence of a court to try offences and award conviction in its ordinary criminal jurisdiction is the condition precedent to designate such court under section 44(1) of PECA. The designation of a presiding officer under section 44(1) of PECA does not remove any inherent defect in the jurisdiction of such Court. Rather, it refers to identifying "presiding officers vested with ordinary criminal jurisdiction to try the

offences" under PECA and to enable the Federal Government to arrange special training of such presiding officers by a notified entity in computer sciences, cyber forensics, electronic transactions and data protection.

6. Article 175(2) of the Constitution provides that "*No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law".* As discussed above, the jurisdiction of the Special Judge (Central), Islamabad is controlled by section 5 of the Act of 1958 and restricted to the Schedule or any other predicate offence relating to the offences mentioned therein. Furthermore, he is not vested with ordinary criminal jurisdiction to try other offences. The defect in jurisdiction of the Special Judge (Central) to try offences, not included in the Schedule to the Act of 1958, is inherent and cannot be removed by "designating" him under section 44(1) of PECA. It is, therefore, held that the Special Judge (Central) is not competent to try offences under PECA and as such he cannot be designated under section 44(1) of PECA.

7. Section 6 of the Code of Criminal Procedure, 1898 (hereinafter **"Cr.P.C."**) provides that besides the High Courts and the Courts constituted under any law other than Cr.P.C. for the time being in force, there shall be two classes of Criminal Courts in Pakistan i.e. Courts of Session and Courts of Magistrate. Section 28 provides that subject to the provisions of Cr.P.C., offences under the Pakistan Penal Code may be tried, (a) by the High Court, or (b) by the Court of Session, or (c) by any other Court by which such offence is shown in the eighth column of the Second Schedule to Cr.P.C. to be triable. Section 29 provides that an offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court, however, if no Court is so mentioned, then it may be tried by the High Court or the Court shown to be triable in the eighth column of the Second Schedule to Cr.P.C. Section 30 provides that

notwithstanding anything contained in sections 28 and 29, the Provincial Government may invest any Magistrate of the First Class with power to try as a Magistrate all offences not punishable with death. Sub section (2) of section 31 provides that a Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law, however, any sentence of death shall be subject to confirmation by the High Court. Section 32(1) provides that a Magistrate of the First Class may pass a sentence of imprisonment for a term not exceeding three years including such solitary confinement as is authorized by law.

8. The Federal Government can designate more than one presiding officers of the ordinary Criminal Courts (Magistrates appointed under section 30 of Cr.P.C., Additional Sessions Judges and Sessions Judges) for trial of offences under PECA, in terms of section 44(1) thereof. Although the Court of Special Judge is deemed as Court of Session, but such power is restricted for trial of offences mentioned in the Schedule and any other predicate offence. Allowing trials of all the offences under PECA by the Court of Session would amount to taking away the right of appeal provided under clause (b) of section 47, resultantly rendering this provision of law as redundant. It is settled law that redundancy cannot be attributed to the legislature. The Supreme Court in the case titled *"Haji Tooti and another v. Federal Board of Revenue, Islamabad and others"* [2023 PTD 1617] has held as follows.-

> "We have heard learned counsel as above and considered the provisions involved. In our view, the appeals must fail for the following reasons. Firstly, and with respect to the learned High Court, the order made by the concerned officer under section 181 is not in exercise of quasi-judicial functions. It is in exercise of a statutory power, and is in the nature of an administrative or executive order. Secondly, if the submissions made by learned counsel are accepted that would in effect reduce the second proviso of section 181 to redundancy. This would be so because any exercise of the statutory power

> thereby conferred would "interfere" with the power conferred on the officer of customs under the main part. The result would be that the power under the second proviso could never be exercised, i.e., would be made redundant. It is well settled that redundancy is not to be lightly imputed, and an interpretation that yields such a result is to be avoided if at all possible."

9. The provisions of Cr.P.C. are unambiguous. Most of the offences provided under PECA carry sentences, which can be tried by a Magistrate appointed under Section 30 Cr.P.C., except those cases where predicate offences may be triable by the Court of Session. The spirit of the provisions of PECA is that more than one presiding officers of the ordinary criminal courts should be designated under section 44(1) thereof for trial of offences under PECA. This would save clause (b) of section 47 from being rendered redundant. It may be noted that the court of Magistrate appointed under section 30 is subordinate to the Court of Sessions under section 17 Cr.P.C. The orders passed by the Magistrate appointed under Section-30 are appealable under section 408 Cr.P.C. before the Court of Sessions.

10. *"Every son of Adam commits error; among those who commit error those who repent are the best"* (Sunan al-Tirmidhi, Abwab Sifat al-Qiyamah, Hadith No.2499). Human beings can commit errors and that whenever an error in a judgment becomes apparent, it needs to be corrected. That is why the right of appeal has been recognized as the integral part of criminal justice system. The Shariat Appellate Bench of the Supreme Court in the cases titled *"Federation of Pakistan v. General Public* [PLD 1988 SC 202] and *Pakistan v. General Public* [PLD 1989 SC 6] has declared that the injunctions of Islam mandate atleast one appeal as a matter of right. Chapter XXXI Cr.P.C. deals with appeal, reference and revision. It provides that an appeal from the order/judgment of the Magistrate shall lie to the Court of Sessions, and to the High Court from the order/judgment of the Court of Sessions, with few exceptions. Similarly, sections 435 to

439 of Cr.P.C. empowers the Court of Sessions and the High Court to call for and examine the record of any proceedings before any subordinate Criminal Court situated within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as the to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such subordinate Criminal Court. The High Court and Court of Session are empowered under section 439 and 439-A Cr.P.C. to exercise discretion any the powers conferred on a Court by section 423, 426, 427 and 428 or on a Court by section 338 and may enhance the sentence, subject to sub section (4) of section 439 Cr.P.C. There is no cavil with the proposition that if the trials of offences under PECA are allowed to be conducted by the Court of Session, even then one right of appeal would be protected. However, in the case at hand, the legislature has provided two different forums of appeals against decisions of two different Criminal Courts. It is settled law that where a law requires an act to be done in a particular manner it ought to be done in that manner alone and such dictate of law cannot be termed as technicality. Reliance is placed on the case *"Muhammad Anwar etc versus Mst. Ilyas Begum, etc"* [PLD 2013 S.C. 255]. Allowing trials of the offences under PECA by one Court i.e. Court of Session will not only render the statutory provision redundant, but simultaneously defeat intention of the legislature in enacting the provisions of section 47 of PECA. The provisions of PECA, therefore, make it mandatory for the Federal Government to designate presiding officers of the ordinary criminal courts for trial of offences mentioned therein.

11. Before responding to the question whether the offences under PPC and PECA can be combined and tried in one trial, it would be relevant to discuss the Judgment of the Supreme Court rendered in the case titled *"Sughran Bibi v. The State"* [PLD 2018 SC 595].

12. In 2018, a Larger Bench of the Supreme Court comprising of seven Hon'ble Judges considered its own earlier judgments as well as judgments rendered by the High Courts on the question of registration of second FIR in respect of one occurrence i.e. "offences committed in one transaction". The Supreme Court mainly considered the following different views.-

(i). Precedent cases wherein it has been declared quite categorically that there is to be only one FIR in respect of an occurrence wherein a cognizable offence has been committed and any other version of the same incident advanced by any person during the investigation of the case is to be recorded under section 161, Cr.P.C.

(ii). Precedent cases decided by different High Courts wherein it has been held that after registration of an FIR a new version of the same incident depicting a different story and a different set of accused persons can be recorded through a separate FIR.

(iii). Precedent cases wherein different High Courts have clarified that a separate FIR is to be registered if the new version being advanced pertains to a different occurrence or discloses commission of a different cognizable offence.

(iv). Earlier judgments wherein the Supreme Court took different views relating to registration of second FIR.

In the referred case, the Supreme Court after examining the provisions of relevant laws observed that the power to investigate is relatable to the offence and is not confined to the circumstances reported to the police through the first information reduced to writing as an FIR. The first information only sets the ball rolling and the investigations are conducted about *"the facts and circumstances of the case"*, not just those reported by the first informant but including any other information received through any other informant or source. Furthermore, the investigation of a case is not restricted to the version of the incident narrated in the FIR or the allegations leveled

therein. Once an FIR is registered then the investigating officer embarking upon investigation may not restrict himself to the story narrated or the allegations leveled in the FIR and he may entertain any fresh information becoming available from any other source regarding how the offence was committed and by whom it was committed and he may arrive at his own conclusions in that regard. The final report to be submitted under section 173, Cr.P.C. is to be based upon his final opinion and such opinion is not to be guided by what the first informant had stated or alleged in the FIR. The Supreme Court after discussing in detail its earlier judgments as well as judgments rendered by High Courts, passed the following declarations.-

(i). According to section 154, Cr.P.C. an FIR is only the first information to the local police about commission of a cognizable offence. For instance, an information received from any source that a murder has been committed in such and such village is to be a valid and sufficient basis for registration of an FIR in that regard.

(ii). If the information received by the local police about commission of a cognizable offence also contains a version as to how the relevant offence was committed, by whom it was committed and in which background it was committed then that version of the incident is only the version of the informant and nothing more and such version is not to be unreservedly accepted by the investigating officer as the truth or the whole truth.

(iii). Upon registration of an FIR a criminal "case" comes into existence and that case is to be assigned a number and such case carries the same number till the final decision of the matter.

(iv). During the investigation conducted after registration of an FIR the investigating officer may record any number of versions of the same incident brought to his notice by different persons which versions are to be recorded by him under section 161, Cr.P.C. in the same case. No separate FIR is to be recorded for any new version of the same incident brought to the

notice of the investigating officer during the investigation of the case.

(v). During the investigation the investigating officer is obliged to investigate the matter from all possible angles while keeping in view all the versions of the incident brought to his notice and, as required by Rule 25.2(3) of the Police Rules, 1934 "It is the duty of an investigating officer to find out the truth of the matter under investigation. His object shall be to discover the actual facts of the case and to arrest the real offender or offenders. He shall not commit himself prematurely to any view of the facts for or against any person."

(vi). Ordinarily no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer feels satisfied that sufficient justification exists for his arrest and for such justification he is to be guided by the relevant provisions of the Code of Criminal Procedure, 1898 and the Police Rules, 1934. According to the relevant provisions of the said Code and the Rules a suspect is not to be arrested straightaway or as a matter of course and, unless the situation on the ground so warrants, the arrest is to be deferred till such time that sufficient material or evidence becomes available on the record of investigation *prima facie* satisfying the investigating officer regarding correctness of the allegations levelled against such suspect or regarding his involvement in the crime in issue.

(vii). Upon conclusion of the investigation the report to be submitted under section 173, Cr.P.C is to be based upon the actual facts discovered during the investigation irrespective of the version of the incident advanced by the first informant or any other version brought to the notice of the investigating officer by any other person.

(viii). As an FIR had been registered in the present case regarding the same occurrence and the offences allegedly committed therein and upon completion of the investigation of the case a Challan had been submitted before the trial court and as the present petitioner had instituted a private complaint depicting her version of the same incident and after

> summoning of the accused persons nominated therein a trial is already in progress in connection with that private complaint, therefore, ordering registration of another FIR based upon the petitioner's version of that very incident is not legally warranted. This petition is, thus, dismissed.

The Supreme Court in *Sughran Bibi's* case supra has conclusively settled the law that only one criminal case shall be registered in respect of one occurrences/offences committed in one transaction.

13. The term *"offences committed in the course of the same transaction"* was considered by the Supreme Court of India in the case titled *"Anju Chaudhary v. State of U.P. & Anr"* [AIR 2013 SC (Criminal) 315] wherein it was held that it is true that law recognizes common trial or a common FIR being registered for one series of acts so connected together as to form the same transaction as contemplated under Section 220 of the Code (*India CrPC)*. There cannot be any straight jacket formula, but this question has to be answered on the facts of each case. Reference was made to its earlier judgment rendered in the case of *Mohan Baitha v. State of Bihar* [(2001) 4 SCC 350], wherein it was held that the expression 'same transaction' from its very nature is incapable of exact definition. It is not intended to be interpreted in any artificial or technical sense. Common sense in the ordinary use of language must decide whether or not in the very facts of a case, it can be held to be one transaction. It was further held that in order to determine the whether two or more acts constitute the same transaction; things are to be gathered from the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action, commonality of purpose or design. Where two incidents are of different times with involvement of different persons, there is no commonality and the purpose thereof different and they emerge from different circumstances, it will not be possible for the Court to take a view that

they form part of the same transaction and therefore, there could be a common FIR or subsequent FIR could not be permitted to be registered or there could be common trial. The test to be applied to determine whether several offences have been committed in the same transactions is, they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action.

14. Similarly the Supreme Court of Pakistan in the case titled *"MD. Mosaddar Haque & another v. The State"* [PLD 1958 SC (Pak.) 131] has considered the term "the same transaction" and held that the expression "transaction" is not defined in Cr.P.C. which leaves it to the Court to determine whether a given set of facts do or do not constitute "the same transaction" within the meaning of sections 235 and 239. It was held that in dealing with the question as to what constitutes "the same transaction" Courts, while indicating that the tests to be employed are proximity of time and place, community of purpose or design and, continuity of action, have also pointed out that the two latter are the essential elements which are necessary in order to link together different acts into the same transaction. Proximity of time and place by themselves are insufficient. The Supreme Court observed that community of purpose or design and continuity of action are *sine qua non* to link together separate acts so as to constitute one transaction. In this case, reference was made to "Emperor v. Datto Hanmant Shahapurkar" [I L R 30 Born. 49] which was referred to by their Lordships of the Privy Council with approval in *"Babulal Chaukhani v. King Emperor"* (65 I A 158) wherein it was held that according to its etymological and dictionary meaning the word `transaction' means `carrying through' and suggests, we think, not necessarily proximity in time-so much as continuity of action and purpose. The same metaphor implied by that word is continued in the illustrations where the phrase used is in the course of the `same transaction'. In section 239, therefore, a series of acts separated by

intervals of time are not, we think, excluded, provided that those jointly tried have throughout been directed to one and the same objective. Reliance is also placed on the cases titled "*Noor Ahmad v. The State"* [PLD 1964 SC 120], *"Azam Shah v. The State"* [1990 SCMR 1360], *"The State v. Barajuddin Mondal and others"* [PLD 1962 Dacca 424], *"Kameshwar and another v. State"* [AIR 1958 Allahabad 318], *"Umar Bin v. The State"* [AIR 1954 SAU 15], and *"Mehr Khan v. The State"* [1992 PCr.LJ 899 Lahore].

15. Now we shall advert to the questions whether the offences under PECA and PPC can be combined in one trial and whether these offenses can be investigated together? The judgment of this Court in "*Javed Khan and other v. The State and others"* [2023 PCrLJ 1092 Islamabad], has answered the referred question in *negative.* Such opinion rests on the premise that neither the provisions of PECA mentions that the offences under PPC are to be investigated with offences under PECA nor it envisages a joint trial of such offences. This Court in the referred judgment held that since joint investigation and trial of the offences under PECA and PPC is not permitted by law and that most of the offences under PECA are non-cognizable, therefore, FIA shall proceed with the matter only to the extent of offences under PECA after obtaining sanction from the magistrate to investigate the offence, whereas, the offences under PPC were left to be investigated by the police and tried by ordinary criminal courts. With due deference, in light of the principles and law laid down by the Supreme Court in *Sughran Bibi's* case, supra, registration of second criminal case relating to the same occurrence is not permissible. The judgment in *Sughran Bibi's* case, supra, is relevant in the instant case for the reason, that when complaint is lodged with the authorized agency, it amounts to receipt of the "first information" in relation to the commission of offence and a case is registered, then all subsequent events unfolded during investigations or information received through other sources by the investigating officer are to be

incorporated in the said criminal case. If the first information report received by the FIA discloses commission of offences under different statutes in one transaction, then all of them are to be investigated by the authorized agency. If a different view is taken and authorized agency under the PECA is restricted to the provisions of PECA and the offences under other laws (committed in the same transaction) are segregated before investigation and sent to police, then police shall also register separate criminal cases so as to initiate investigation in respect of the crime, commission whereof is reported to police. This interpretation would allow registration of two criminal cases in respect of one occurrence. The outcome of such conclusion/interpretation would be that, (i) there will be two different investigations and trials before two different forums in respect of one occurrence/offences committed in one transaction, (ii) there will be likelihood that both the forums would reach at different conclusions in matters of bail, conviction or acquittal on the same set of evidence in respect of offences committed in one transaction, (iii) the parties would conveniently frustrate the process of law, and (iv) it would cause inconvenience to the parties, besides violating the principles and law laid down in *Sughran Bibi's* case.

16. PECA was enacted with the aim to prevent unauthorized acts with respect to information systems and provide for related offences as well as mechanisms for their investigation, prosecution, trial and international cooperation with respect thereof and for matters connected therewith or ancillary thereto. Section 2(ix) defines the expression "Court" as meaning the Court of competent jurisdiction designated under PECA. Section 2(xxiii) defines "investigation agency" as meaning the law enforcement agency established by or designated under PECA. The distinct character of the offences under PECA enjoys special recognition under section 27 thereof. Furthermore, the provisions of PPC, as much as, they are not inconsistent, are applicable to the offences under PECA. Section 29(1) provides that the

Federal Government may establish or designate a law enforcement agency as the investigation agency for the purpose of investigation of offences under PECA. Section 30 has been substituted through the Criminal Laws (Amendment) Act, 2023. Sub section (1) of section 30 provides that in addition to the Federal Investigation Agency, the Police shall be authorized to take cognizance of the offences under PECA. However, the Police shall be bound to refer the matter relating offence under this PECA immediately to the Federal Investigation Agency, for technical opinion and investigation as per its mandate and rules. The proviso to sub section (1) of section 30 provides that the Federal or Provincial Government, as the case may be, may 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. Section 30 provides that the Federal Investigation Agency (hereinafter the **"FIA"**) and the Police are two agencies which are authorized to take cognizance of the offences under PECA. For the purposes of investigations under PECA they are bound to proceed as per the procedure prescribed under the provisions of Cr.P.C., PECA and the rules made thereunder. Section 43(1) provides that the offences under PECA, except under sections 10, 21 and 22 (abetment thereof), shall be non-cognizable, bailable and compoundable. Section 50 provides that the provisions of PECA shall have effect not in derogation of PPC.

17. It is imperative to highlight that it is the unlawful use of the information system for a criminal act, which is punishable under PECA. However, if the offences under the two statutes i.e. PECA and PPC are committed in one transaction i.e. in terms of proximity of time and place, community of purpose or design and, continuity of action, then all such offences shall be tried in one common trial. Furthermore, it is a matter of trial and the facts and circumstances of a particular case, which enables the Court to frame charge and award

conviction under appropriate provision of law. The argument with regard to applicability of section 26 of the General Clauses Act, 1897 is misconceived as the subject matters of the provisions of PECA and PPC are altogether different. PECA has been enacted later in time, therefore, it shall be deemed that the legislature was cognizant and aware of the provisions of PPC, consequently it should have repealed inconsistent parts of PPC by inserting express provision in PECA. It is, therefore, held that there is no inconsistency between the provisions of PECA and PPC thus the provisions of section 26 of the General Clauses Act, 1897 are not applicable.

18. The learned counsels, during arguments, have laid great stress on the question that no schedule has been appended with PECA to include the offences under PPC so that such offences may be investigated or tried under PECA. Sub-section (4) of section 44 of PECA provides that the Court designated under PECA shall follow the procedure under the Code of Criminal Procedure. Section 221 provides that every charge under the Cr.P.C. shall state the offence with which the accused is charged. Section 227 provides that the Court may alter or add to any charge at any time before judgment is pronounced. Section 233 provides that for every distinct offence of which any person is accused, there shall be separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239. This provision is accompanied by an illustration which provides that *"A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt."* Section 235 provides that if in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence. Sub-section (2) of section 235 provides that if the acts alleged constitute an offence falling within two or more separate definitions of any law in force for

the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences. Sub section (3) of section 235 provides that if several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

19. As highlighted above, the a second criminal case in respect of one occurrence is not permissible in light of *Sughran Bibi's* case, supra, therefore, when first information in relation to the commission of offence is received by any authorized agency, it shall investigate the whole occurrence before submitting the final report under Section 173 Cr.P.C. The Investigating Officer shall not split one occurrence/story in two parts and ask the complainant / victim or informant to approach any other agency for redressal of his grievances in respect of the remaining portion of the same occurrence. The second limb of argument of the learned counsel for petitioners relate to joint trial of the offences under PECA and PPC. The Court designated under PECA is bound to follow the procedure provided under Cr.P.C. to the extent it is not inconsistent with PECA, which means that the "*doctrine of express repeal"* is applicable to those provisions of Cr.P.C. which are inconsistent with the provisions of PECA. There is no provision in PECA which may be deemed to have expressly repealed section 235 Cr.P.C. being inconsistent. Section 235 Cr.P.C. provides that if in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence. Sub-section (2) of section 235 provides that if the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which

offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences. Sub section (3) of section 235 provides that if several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts. Unless there is explicit bar under any law for the time being in force, joint trial of offences under PECA and PPC, if committed in one and the same transaction, is permissible. This shall, however, be subject to the competence of the Court so designated under PECA to try offences under PPC committed in one and the same transaction. It may also be noted that the allegation of the commission of offences under PECA is *sine qua non* for taking cognizance of any offence under PPC by the agency authorized to investigate offences under PECA. The learned counsels for petitioners have made reference to section 21M of the Anti-Terrorism Act, 1997 and argued that if the legislature had intended joint trials of the offences under PECA and PPC, it would have incorporated express provision in PECA. This argument is repelled on two grounds, firstly the referred provision is only clarificatory and does not mean that absence of such words in other laws would amount to prohibition; and secondly section 235 Cr.P.C. has not been expressly repealed by the provisions of PECA being inconsistent.

20. The general rule of construction is that there is a presumption against a repeal by implication because the legislature has full knowledge of the existing law on the subject matter while enacting a law. When a repealing provision is not specifically mentioned in the subsequent statute, there is a presumption that the intention of the legislature was not to repeal the provision. The burden to prove that the subsequent enactment has impliedly repealed the provision of an earlier enactment is on the party asserting the

argument. This presumption against implied repeal is rebutted if the provision(s) of the subsequent Act are so inconsistent and repugnant with the provision(s) of the earlier statute that the two provisions cannot stand together. Therefore, the test to be applied for the construction of implied repeal is; whether the subsequent statute (or provision in the subsequent statute) is inconsistent and repugnant with the earlier statute (or provision in the earlier statute) such that both the statutes (or provisions) cannot stand together, whether the legislature intended to lay down an exhaustive code in respect of the subject-matter replacing the earlier law and whether the two laws occupy the same field. (*Pradeep S. Wodeyar v. The State of Karnataka, LL 2021 SC 691, Supreme Court of India*). In the case in hand, there is no express provision in PECA which may exclude applicability of Chapter XIX (of the Charge/form of charges) of Cr.P.C., particularly section 235 thereof.

21. It is also pertinent to put forth a hypothetical proposition combining the offence under PECA & PPC. What if a hacker hacks the social media account of a citizen/victim and posts/shares blasphemous material through the hacked account. If the investigating and trial of the offences under PECA and PPC are allowed to combine, then the culprit can be conveniently brought to justice and dealt with in accordance with law without facing hurdles, as the investigation officer and trial court shall have wide space to deal with the incident from all aspects. But if the investigation and trial of offences under PECA and PPC are separated, the outcome would of course be catastrophic. The power of the authorized agencies (especially FIA) under PECA would be limited to investigate the offences under PECA. They would be unable to cross barriers. One occurrence would be divided into two parts. The victim (*whose account is hacked*) will be accused of the offence of blasphemy before police facing investigation and trial for sharing blasphemous material on his social media account, whereas, he will be a complainant before the FIA against the hacker for

commission of offences under PECA. What if the investigation and trial of the blasphemy case proceeds expeditiously and the victim is convicted? On the other hand, subsequently during investigation and trial under PECA, it is proved that social media account of the victim was hacked by someone for commission of the offence of blasphemy, for which the victim/complainant had already been convicted by criminal court under the ordinary jurisdiction. Police has the authority to simultaneously investigate offences under PECA and PPC, even then it will be impossible to submit final report under section 173 Cr.P.C. (*combining the offences under PECA & PPC)* before the Special Court (Central) under PECA, as the said court lacks jurisdiction to try offences not included in the Schedule to the Act of 1958 (*be that the offences under PECA or PPC*). There is yet another situation, if separate trials are conducted in respect of offences under PECA and PPC committed in one transaction, then the two courts would wait for one another and rely on each other's evidence. For example if the trial before the special court is in respect of commission of offences punishable in PECA, which may include impersonation and cheating punishable in PPC, the evidence to be adduced by prosecution would be the report of forensic expert and other material collected by the authorized investigating agency under PECA, leaving no evidence to be produced before the ordinary criminal court to prove commission of offences punishable under PPC. Will the ordinary criminal court rely on secondary evidence i.e. attested copies of exhibits produced before special court, and award convictions? Furthermore, report under section 173 Cr.P.C. of the two investigating agencies (*i.e. (i) in respect of case registered with FIA/police under PECA and, (ii) the report prepared in respect of offences punishable under ordinary criminal jurisdiction*) would be inconclusive. Both the reports under section 173 Cr.P.C. would be referring to the case of one another to draw a conclusion. The trial courts under two different jurisdictions would be acting independently, which they should, and as a result may arrive at different conclusions resulting into anomalous situation

in respect of the offences committed in the same transaction. This scheme would render the framework under PECA unworkable as the results would be absurd.

22. Offences in section 10 of PECA provides that whoever commits or threatens to commit any of the offences under section any of the offences under sections 6 (unauthorized access to critical infrastructure information system or data), 7 (unauthorized copying or transmission of critical infrastructure data), 8 (interference with critical infrastructure information system or data) or (glorification of an offence), where the commission or threat is with the intent to (clause b) advance interfaith, sectarian or ethnic hatred, shall be punished with imprisonment of either description for a term which may extend to fourteen years or with fine which may extend to fifty million or with both. Section 11 provides that whoever prepares or disseminates information, through any information system or device, that advances or is likely to advance interfaith, sectarian or racial hatred, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both. The language of these two provisions is unambiguous and leaves no confusion as to their meaning. Both these provisions provide punishments for distinct acts and are not co-related. Section 10 deals with four different offences if committed with the intent to advance interfaith, sectarian or ethnic hatred. Whereas, section 11 deals with *"preparation or dissemination of information through information system or device".* Furthermore, section 295-C PPC provides punishment for defiling the sacred name of the Holy Prophet Muhammad (peace be upon him). Therefore, sections 10 and 11 of PECA are not co-related and can be tried as predicate offences with section 295-C PPC before a competent court in appropriate cases.

23. Lastly, the applicability of the *de facto* doctrine. The *de facto* doctrine ensures smooth running of the system and gives

validity to the acts performed in the interests of a third party by an officer/authority. Application of the *de facto* doctrine means that although an office was held illegally, the decisions rendered by it before the orders of court would hold ground and must be accepted for all practical purposes. The applicability of the *de facto* doctrine is controlled by conditions precedent i.e. holding office and performance of duties attached to it, such performance of duties must be on the basis of some apparent right, the orders passed or decisions given must not be in the interest of the holder of such office. This doctrine was applied by the Supreme Court to protect orders/judgments passed by Judges whose appointments were declared *void ab initio* in the case titled *"Sindh High Court Bar Association through Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others"* [PLD 2009 SC 789]. In the case titled *Baldock v. Webster* (2007) [EWCA Civ 1869], [2006] QB 315, it was held that *"No doubt the general reputation of the law and the public's confidence in it must be protected as surely as the interests of individual parties who have proceeded on the assumption that a judgment in their case is perfectly valid, where that is exactly how it seems to all the world. Public confidence as well as individual parties are… protected by the requirement that there be a court of competent jurisdiction convened to hear the case, that the judicial officer be not a usurper and that he have a colourable title to sit where he does sit."* In the case in hand, the Judge Special Court (Central) assumed jurisdiction and passed orders pursuant to the notification issued by the Federal Government whereby he was designated under section 44(1) for trial of offences under PECA, therefore, the assumption of office and passing of orders/judgments pursuant to such authority, were in the public interest. Therefore, it would be appropriate to grant protection to those orders passed by the Special Court (Central), which have attained the status of past and closed transaction, under the *de facto* doctrine.

24. For what has been discussed above, we hold and declare that:-

(a) The authorized agencies under PECA can investigate the offences mentioned under PECA and PPC or any other law, committed in one transaction. Similarly, offences under both the statutes can be jointly tried by the designated ordinary criminal courts. However, the allegation of the commission of offences under PECA is *sine qua non* for taking cognizance of offences mentioned in any other law.

(b) The Special Judge appointed under the Act of 1958 lacks jurisdiction to try the offences under PECA, if not related to any offence included in the Schedule to the Act of 1958.

(c) PECA envisages trial of offences by ordinary criminal courts. The Federal Government shall, in terms of section 44(1) of PECA, designate presiding officers of the ordinary criminal courts keeping in view their competence to pass sentences and/or punishments as provided under sections 30, 31 and 32 of Cr.P.C. i.e. Magistrates appointed under section 30, Court of Sessions Judges and Additional Sessions Judges. Since the question of liberty and right to fair trial of citizens is involved and the fact that trials in criminal cases cannot be delayed for indefinite period, the Federal Government shall conclude the process under section 44(1) of PECA within a period of two weeks.

(d) The orders passed and the proceedings conducted by the Judge Special Court (Central), which have attained the status of past and closed transaction, are protected under the *de facto* doctrine, without prejudice to rights of parties on other legal grounds.

(e) We have declared in paragraph 24(b) above that the Special Court (Central) lacks jurisdiction to try offences under the PECA, therefore, the orders passed by the Special Court (Central) dismissing the bail petitions are hereby declared to be devoid of jurisdiction and consequently set-aside. The bail petitions shall be deemed to be pending before the Court(s) to be designated by the Federal Government in consultation with the Chief Justice of this Court. The Court hearing the bail petitions shall be at liberty to pass any order in accordance with law. However, as held above, the findings in this judgment will not affect judgments passed in relation to PECA offences that have attained finality and have become past and closed transaction.

25. The post arrest bail petitions are disposed-of in the above terms. However, the writ petitions/criminal revision seeking quashment of FIRs/proceedings are to be heard by Single Benches keeping in view the peculiar facts and circumstances involved in each case. Office shall place the files before the learned Single Benches already hearing the petitions for further proceedings.

(BABAR SATTAR) JUDGE

CHIEF JUSTICE

(ARBAB MUHAMMAD TAHIR) JUDGE

(I agree for reasons stated in my separate opinion attached here.)

Announced in the open Court on 03.06.2024

JUDGE CHIEF JUSTICE JUDGE

Approved for reporting.

Luqman Khan/*

BABAR SATTAR, J.- The two questions that arise out of the afore-titled petition were **(i)** whether Federal Investigation Agency **("FIA")** as the designated agency under section 29 of the Prevention of Electronic Crimes Act, 2016 **("PECA")** has jurisdiction to register an FIR and carry out an investigation in relation to offences under PECA together with offences under Pakistan Penal Code, 1860 **("PPC"),** where the PPC offences are listed in the schedule to the Federal Investigation Agency Act, 1974 **(FIA Act")**, and **(ii)** whether the Special Court designated for purposes of section 44(1) of PECA is vested with jurisdiction to conduct joint trials of PECA offences as well as offences under PPC.

2. During the arguments in the afore-titled petition, the learned counsel for the petitioner relied on the judgment of this Court in ***Javad Khan vs. State (2023 PCr.LJ 1092)***, wherein it had been held that FIA was not vested with authority to jointly investigate charges brought in relation to PECA offences as well as PPC offences. And that the Special Court designated under section 44(1) of PECA could only conduct a joint trial of PECA offences together with PPC offences, if it was vested with jurisdiction to do so. While rendering the judgment in ***Javad Khan***, this Court had relied on the judgment of the

Lahore High Court in ***Sheraz Khan vs. the State*** ***(2022 PCr.LJ 203)***.

3. The learned State Counsel submitted that the Lahore High Court in the matter of ***Sheraz Ahmed Vs. The State*** ***(Criminal Revision No. 69407 of 2022)*** by judgment dated 09.12.2022, had taken a different view of the matter and had concluded that offences under section 11 of PECA and offences under sections 295-A, 295-B, 295-C and 298-C of PPC cannot be tried separately as they are interlinked. In this judgment, Lahore High Court held that such offences ought to be tried together in view of section 235(2) of the Code of Criminal Procedure, 1898 **("CrPC")**. He submitted that the Lahore High Court was hearing a criminal revision petition against dismissal of an application challenging the act of being charge-sheeted for PPC offences along with PECA offences. The revision petition was dismissed and the judgment of Lahore High Court was upheld by the Supreme Court in ***Waqar Ahmed vs. The State*** ***(C.P No. 163-L of 2023)*** by order dated 20.04.2023. It was submitted that the later view of Lahore High Court has prevailed and was followed by the Lahore High Court in ***Muhammad Ahmed Fraz Satti vs. The State*** in its judgment dated 19.06.2023.

4. In view of the conflicting case law cited by the learned State Counsel, by order dated 05.09.2023 it had been proposed that a larger bench be constituted to consider the questions framed in Para-1 above. The three-member bench had the benefit of hearing detailed arguments presented by the learned counsels for the parties, as well as Mr. Azam Nazir Tarar, ASC, appointed as amicus curiae. The arguments need not be reproduced in detail in order to economize the length of this opinion. The instant petition and the clubbed matters have challenged the jurisdiction of FIA as the investigation agency to register criminal cases, combining offences under PECA and PPC and investigating the same, and the jurisdiction of the Special Court to take cognizance of such criminal cases and decide bail applications in relation thereto.

5. Let us start with the relevant provisions of PECA. Section 2(ix) defines "Court" as *"the Court of competent jurisdiction designated under this Act".* Section 44 of PECA deals with cognizance and trial of offences. Section 44(1) provides that, "*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."* The presiding officer designated for purposes of trying offences

under PECA in Islamabad Capital Territory is the Special Judge appointed under Section 3(1) of the Pakistan Criminal Law (Amendment Act), 1958 **("Act of 1958").** We will consider the jurisdiction of the Special Judge when we address the second question, framed in para-1 above.

6. Section 2(xxv) of PECA defines "offence" as *"an offence punishable under this Act except when committed by a person under ten years of age or by a person above ten years of age and under fourteen years of age, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion."* Sections 3 to 26 then define and create offences punishable under PECA and constitute PECA offence for purposes of section 2(xxv) of PECA. Section 27(1) provides that, *"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."* Section 27, as is evident from its language, provides that an offence under any law for the time being in force shall not stop being an offence merely because it has been committed through use of an information system. And "information system" has been defined under section 2(xx) as *"an electronic system for*

creating, generating, sending, receiving, storing, *reproducing, displaying, recording or processing any information*." In other words, any offence under PECA or any other law is not to be denied legal recognition due to the use or involvement of any information system in carrying such offence or due to such offence being carried out in relation to an information system. What it also means is that an offence, for example, which is defined as such under PPC, does not transform itself into a PECA offence merely because it has been committed through the use of an information system. In this context PECA offences are the offences that are defined as such under sections 3 to 26 of PECA. Offences created by provisions of PPC remain PPC offences and are to be recognized and enforced as such notwithstanding the fact that such offences have been carried out through the use of an information system.

7. Section 28 of PECA explains the relationship between PPC and PECA and provides that, "*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.*" As has been discussed above, PECA offences and PPC offences are distinguishable and are independently identifiable. The provisions of PPC, however, do not all relate to the

creation of offences. A perusal of the provisions of PPC reflects that sections 1 to 106 are general legal provisions that relate to the scope of application of PPC, general explanations with regard to various offences, punishments and general exceptions. Chapter-V, under which fall sections 107 to 120 of PPC, relates to abetment, which is also identified as an offence in conjunction with other PPC offences. Sections 120-A to 511 then define the various PPC offences. Given that PECA offences and PPC offences are separately identifiable, as discussed above, section 28 appears to make the general provisions within the PPC (which do not create PPC offences) applicable to PECA offences. Section 28 does not incorporate or re-characterize PPC offences as PECA offences or vice versa. It merely provides that the general provisions within the PPC (that have been provided therein and are applicable to PPC offences for purposes of understanding the definitions, punishments and exceptions etc.) would apply to PECA offences as well to the extent not inconsistent with provisions of PECA.

8. Section 50 explains the relationship between PECA and other laws provides that, *"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*

Order, 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).” The non-derogation clause is a legislative statement prescribing that by promulgating PECA, the legislature did not intend to repeal provisions of PPC, CrPC, Qanun-e-Shahadat Order, 1984, the Protection of Pakistan Act, 2014, or the Investigation for Fair Trial Act, 2013. PECA does not include a non-obstante clause. The non-derogation clause in the absence of a non-obstante clause is a clear legislative statement that the provisions of PECA as a criminal law statute are meant to stand alongside other criminal law statutes mentioned in section 50 of PECA. The principle that in case of a conflict, the statute that is later in time is to be given overriding effect will still apply. However, the legislature has clarified that it doesn't intend the repeal of other criminal law statutes. And consequently, while considering the provisions of PECA in conjunction with provisions of other criminal law statutes mentioned in section 50 of PECA, the doctrine of implied repeal is not to be readily applied. This is also evident from section 28 of PECA, already reproduced above, which provides that provisions of PPC would apply to offences under PECA to the extent not inconsistent with anything provided in PECA. A logical interpretation of section 28 read together

with section 50 of PECA is that the provisions of PPC that do not create PPC offences, would apply to the offences under PECA. This is obvious from the language used in section 28, which does not state that provisions of PPC shall apply to provisions of PECA. It states that provisions of PPC shall apply to *"offences provided"* in PECA. Consequently, the provisions of PPC that provide the overall framework within which PPC offences are considered and tried have been incorporated by virtue of section 28 of PECA to apply to PECA offences as well.

9. Provisions of Section 50 of PECA are to be read together with Section 5 of CrPC, which states the following:

> ***Trial of offences under Penal Code****. (1) All offences under the Pakistan Penal Code (XLV of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.*
>
> ***Trial of offences against other laws****. (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.*

Section 5(2) clearly provides that offences under any criminal law statutes other than PPC are to be investigated, inquired into, tried and dealt with in accordance with provisions of CrPC, except where the contrary is provided in the relevant criminal law statute regulating the investigation of such other offences.

10. In the context of CrPC here, PECA is the criminal law statute creating offences to which section 5(2) of CrPC becomes applicable. Section 2(vii) of PECA defines "Code" as the Code of Criminal Procedure, 1898. Section 29(2) of PECA provides that, *"unless otherwise provided for under this Act, the investigation agency and the authorized officer shall in all matters follow the procedure laid down in the Code to the extent that it is not inconsistent with any provision of this Act."* Section 51 of PECA vests in the Federal Government broad powers to make rules for purposes of carrying out investigations. The statutory scheme that emerges from the above provisions is that Federal Government may prescribe rules for purposes of investigation of PECA offences, which it has done by enacting the Prevention of Electronic Crimes Investigation Rules, 2018. The investigation agency empowered to investigate PECA offences is to act in accordance with the Prevention of Electronic Crimes Investigation Rules, 2018, as well as provisions of CrPC to the extent not inconsistent

with such rules. The relationship of provisions of CrPC and PECA will become relevant when we discuss the jurisdiction of courts to jointly try offences under PECA and PPC, as will be discussed later in this opinion.

11. Section 29(1) of PECA provides that the Federal Government may establish or designate a law enforcement agency as the investigation agency for the purpose of investigation of offences under PECA. The language used in section 29 speaks of establishment or designation of a law enforcement agency. This language stands in contrast with the language used in section 44 of PECA in relation to the court competent to take cognizance of and try PECA offences, as section 44 only vests power in the Federal Government to *"designate"* a court. The power to establish a court for purposes of trying PECA offences is conspicuously missing from section 44 of PECA. This will also become relevant when we discuss the jurisdiction of the court to try PECA offences.

12. For purposes of section 29 of PECA, the Federal Government by S.R.O 897/(I)/2016 dated 22.09.2016, designated the FIA as the competent agency to investigate PECA offences. Section 30 of PECA provides that an authorized officer of FIA would have power to investigate a PECA offence and that the Federal Government or the

Provincial Government may constitute joint investigation teams for purposes of investigation of an offence under PECA and that under any other law for the time being in force. It was in view of the language used in section 30 and its proviso that the Court in ***Javad Khan*** had come to the conclusion that the investigation agency designated under section 29 was only meant to investigate PECA offences and it was thus that a provision had been created to establish joint investigation teams where there was a need to investigate PECA offences together with offences under any other law for the time being in force.

13. The Parliament has had an opportunity to consider provisions of PECA and has amended various provisions of PECA through Criminal Laws (Amendment) Act, 2023 (Act No. XXXVII of 2023). Section 30(1) & (2), as amended, which are relevant to our present discussion, now read as follows:

> ***30. Power and procedure to investigate****. (1) In addition to the Federal Investigation Agency, the Police shall be authorized to take cognizance of the offences under this Act. In that case the Police shall be bound to refer the matter relating offence under this Act immediately to the Federal Investigation Agency, for technical opinion and investigation as per its mandate and rules:*

> *Provided that the Federal or Provincial Government, as the case may be, may 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.*
>
> *(2) An investigating officer under this Act shall be an officer or Police not below the rank of Inspector of Police or equivalent or, if the Federal Government or the Provincial Government, as the case may, deems necessary to constitute a Joint Investigation Team it shall be headed by an Investigating Officer not below the rank of BS- l8 and other officers of Joint Investigation Team may include equivalent rank from other agencies, as the case may be. The Joint Investigation Team shall comprise five members and for the meeting purposes the quorum shall consists of three members.*

The legislative scheme after the promulgation of Criminal Laws (Amendment) Act, 2023, amending and restating section 30 of PECA has clarified matters. It is now unambiguous that both the FIA (as the designated agency under section 29 of PECA) and the police are vested with authority to take cognizance of PECA offences. At the time when the Criminal Laws (Amendment) Act, 2023, was enacted, the judgment of the Lahore High Court in ***Sheraz Ahmed*** and the judgment of this Court in ***Javad Khan***

were already in the field. Had the legislative intent been that FIA as the designated investigation agency under section 29 of PECA was only competent to register criminal cases in relation to PECA offences and not PPC, the amended section 30(1) & (2) could have reflected the same. But it hasn't. The amended section 30(1) now provides that the police may take cognizance of PECA offences in addition to the FIA and where it does take cognizance of a PECA offence it, *"shall be bound to refer to the matter relating offence under this Act immediately to the Federal Investigation Agency, for technical opinion and investigation as per its mandate and rules*." The proviso to section 30(1) still provides for the creation of joint investigation teams when deemed appropriate by the Federal or Provincial Governments. The amended section 30(1) of PECA clarifies that the police while taking cognizance of PECA offence is under an obligation to refer the same to FIA for its technical opinion and investigation. The amended section 30(1) does not, however, provide that FIA may not take cognizance of a PPC offence or that to the extent that a complaint alleges that a PECA offence and PPC offence have been undertaken in view of the actions of accused, FIA is to refer the PPC offence to the police for investigation. In view of amended section 30, the legislative intent is now clear that the legislature has

placed no restriction on the ability of FIA to investigate a PPC offence alongside a PECA offence, to the extent that they emanate from the same transaction, as is understood for purposes of section 235 of CrPC, and to the extent that FIA is otherwise vested with jurisdiction to investigate such PPC offence as a scheduled offence under the FIA Act. The contrary view expressed by this court in ***Javad Khan***, therefore, cannot be considered good law and is declared to be *per in curium*.

14. Section 3 of the FIA Act vests in FIA the authority to investigate offences specified in the Schedule to the FIA Act. The Schedule to the FIA Act at Serial No.1 lists the various offences punishable under identified sections of PPC as offences in relation to which FIA is vested with authority under Section 3(1) of the FIA Act. Pursuant to Serial No. 32 of the Schedule, FIA is vested with authority to inquire into and investigate offences punishable under PECA. In view of section 30(1) of PECA, as amended, read together with section 3 of the FIA Act to the extent that complaint alleges that an accused has committed a PPC offence, which constitutes a scheduled offence under the FIA Act together with an offence under PECA, FIA is vested with authority to register an FIR for purposes of inquiring into and investigating the allegations.

15. In the matters before us, it is nobody's case that FIA has registered an FIR in relation to a PPC offence (together with a PECA offence) that is not a scheduled offence for purposes of the FIA Act. It can, therefore, not be argued that FIA was devoid of authority to register the complaints related to charges under either PPC or PECA. In some of the matters before us, it is the petitioners' argument that the FIA has invoked section 11 of PECA, which is a non-cognizable offence in view of section 43(1) of PECA, along with section 295-A of PPC, which is also a non-cognizable offence. A non-cognizable offence as defined under section 4(n) of CrPC is one in which a police officer may not arrest an accused without warrant. Likewise, it is the case of the petitioners in some of the clubbed matters that the petitioners have been charged with an offence under section 295-A of PPC without any complaint having been filed by the Federal Government or the Provincial Government or an officer empowered by such governments in breach of requirements of section 196 of CrPC, which prohibits a court from taking cognizance of an offence under*, inter alia*, section 295-A of PPC without such complaint. Such objections remain and carry weight. It was held by this Court in ***Javad Khan*** that where in view of a complaint the police officer has a reason to suspect that a non-cognizable offence may be

made out, the police officer must comply with the procedure laid out in section 155 of CrPC. What the authorized officer of FIA or a police officer cannot do is to introduce cognizable offence along with non-cognizable offence where the basic offence made out is non-cognizable, merely to circumvent the requirement of sections 155, 157 and 159 of CrPC. Where a person has been detained for investigation in relation to a PECA offence, he/she is required to be produced before a court within twenty-four hours of such arrest pursuant to section 30A(1) of PECA. Section 30A(3) provides that the court designated under section 44(1) of PECA will be deemed to be a Magistrate for purposes of seeking remand under PECA. It is the obligation of such court at remand stage to consider whether or not the charges in relation to which the suspect is to be detained for purposes of investigation constitute a cognizable or non-cognizable offence and whether the requirements of law under, *inter alia*, sections 155, 156, 156A, 157, 159 and 196 of CrPC read together with section 44 of PECA have been complied with. It is for the court at the stage of supervising the arrest and granting remand that it must ensure that a suspect is not detained or remanded in police custody in breach of provisions of law, including the aforementioned provisions of CrPC. In the event that the

court at remand stage does not take into account such irregularities in a manner in which the investigation agency or police exercises their authority, the court considering grant of bail can consider the relevant provisions of law and determine whether the accused is being detained in relation to offences that the investigation agency or police could not take cognizance of without permission from the Magistrate or without a formal complaint having been filed by the Federal or Provincial Government. Also, the unauthorized initiation of investigation by FIA/Police without permission of the magistrate for a non-cognizable offence may constitute a ground for considering grant of bail if such procedural irregularity undermines the interests of justice. Courts overlook such irregularity if it does not prejudice the rights of the accused. The law in this regard was enumerated by the Supreme Court in **Altaf Hussain vs. Abdul Samad** (2000 SCMR 1945). As it has been held that above that FIA is vested with jurisdiction to register a complaint and investigate the same where there is reason to suspect that offences under PECA as well as PPC are made out, FIA is equally obliged to comply with requirements of CrPC, such as those in relation to non-cognizable offences.

16. The conclusion that FIA is vested with jurisdiction to register a criminal case, including charges under PECA

as well as PPC, is not based on any reading of Section 28 or Section 50 of the PECA. Provisions of PECA do not authorize any law enforcement agency designated for purposes of investigation of offences under PECA pursuant to Section 29(1) of PECA to investigate PPC offences. So for example, if the Customs Intelligence or the National Accountability Bureau or any other such agency were designated as the investigation agency for purposes of PECA offences under Section 29, such agency would not automatically be vested with authority to investigate PPC offences on the basis that they could be treated as offences predicate to or connected with PECA offences. A predicate offence is a minor offence that is the component of a larger offence or crime. There is nothing within the provisions of PECA that automatically authorizes an investigation agency designated under Section 29(1) to investigate PPC offences. The situation in relation to FIA is somewhat different. FIA as the designated agency, for purposes of Section 29(1) of PECA, has the authority to register complaints and investigate PECA offences. Such authority flows from SRO 897(I)/2016 dated 22.09.2016 designating FIA for purposes of Section 29(1) of PECA. But FIA also has jurisdiction to investigate offences included in the schedule of the FIA Act. The schedule includes a whole list of PPC offences as well. FIA's jurisdiction to investigate

the PPC offences therefore flows from the schedule to the FIA Act. Consequently, the authority and power of FIA to investigate PECA offences as well as PPC offences mentioned in the schedule to the FIA Act flows from two independent legal instruments. As there is nothing in PECA or CrPC that prevents a law enforcement agency to investigate offences that are created under different criminal law statutes, it cannot be argued that FIA is not vested with the jurisdiction to investigate PECA offences and PPC offences together. It must be clarified that FIA's jurisdiction to investigate PPC offence is not rooted in the fact that the offence in question involves the use of an information system. The use of an information system alone to carry out a PPC offence will not transform such offence into a PECA offence. It is only where the *actus reus* and *mens rea*, as defined under the relevant PECA offences, coexist can it be argued that a PECA offence has taken place. Consequently, had FIA not been vested with jurisdiction to investigate PPC offences by virtue of them being included in the Schedule of FIA Act, FIA would have lacked the jurisdiction to register FIRs and investigate PPC offences alongside PECA offences.

17. Let us now consider whether a presiding officer designated to take cognizance and try offences under section 44(1) of PECA is vested with jurisdiction to jointly

try offences under PECA and PPC. It has already been discussed in the initial part of this opinion that section 44 of PECA vests in the Federal Government the power to designate presiding officers of the courts empowered to try offence under PECA. "Court" as used in PECA is also a defined term, which means *"the court of competent of jurisdiction designated under this Act."* Section 2(ix) defining court read together with section 41 clearly provides that the legislature did not intend the creation or establishment of new courts for purposes of trying PECA offences, but envisaged that a court "of competent jurisdiction" would be designated as such under section 44(1) of PECA in consultation with the Chief Justice of respective High Courts to take cognizance of and try PECA offences. In other words, the very definition of court as provided under PECA makes jurisdictional competence of the court that is to try PECA offences a pre-requisite to it being designated as such for purposes of section 44(1) of PECA.

18. Section 6 of CrPC identifies the various classes of criminal courts. Section 28 read together with the second schedule of CrPC determine the court that is competent to try a certain offence. Such competence is determined by virtue of the sentence that the Magistrate or the Sessions Court may pass as provided in sections 31 and 32 of CrPC.

Section 31 authorizes the High Court to pass any sentence authorized by law and the Sessions Judge or the Additional Sessions Judge to pass any sentence authorized by law, including the death sentence but subject to confirmation by the High Court. Section 32 of CrPC prescribes that a Magistrate of First Class may award a sentence of up to three years and a fine not exceeding forty-five thousand Rupees. Section 29(1) of CrPC provides that, *"subject to the other provisions of this Code, any offence under any other law shall, when any court is mentioned in this behalf in such law, be tried by such Court".* Section 5(2) read together with Section 29 of CrPC, therefore, envisages that special procedure and special courts may be established for purposes of investigating and trying offences under special laws. Where no court is mentioned in special law, offences under special laws may be tried by the High Court or by a court that is identified for such purpose pursuant to the second schedule of CrPC as provided under Section 29(2) of CrPC. The second Schedule of CrPC deals with PPC offences and does not mention PECA offences. The aforementioned provisions of CrPC would, therefore, have to be read with Section 44 of PECA to determine the Judge who could be designated for purposes of trying offences under PECA. Also relevant is Section 47 of PECA which

conceives that an appeal against the judgment and order by the Magistrate would be heard by the Court of Sessions and that against an order of the Court of Sessions would be heard by the High Court.

19. The subject-matter jurisdiction of a criminal court under CrPC is determined by virtue of the power of the judge or presiding officer to award certain punishment as prescribed in sections 31 and 32 of CrPC. Jurisdiction and competence could be based on the nature of the offence, where under a special law a Special Court has been created or established, as envisaged in section 29(1) of CrPC. In such cases, there is often included a schedule of offences within the special law, which the established or designated court is competent to hear. Jurisdiction and competence of a criminal court could also be based on the identity of the accused, as special laws have been created for trying those in the service of the state and/or the Armed Forces etc.

20. What emerges from the perusal of sections 44 and 46 of PECA is that this law conceives trial of PECA offences by Magistrates and Sessions Judges/Additional Sessions Judges, while identifying the High Court as the forum for appeal against a decision of the Additional/Sessions Judge. Section 44 authorizes the

Federal Government in consultation with the Chief Justice of the High Court to designate presiding judge of the court to try a PECA offence. And "Court" has been defined under section 2(ix) as the court of competent jurisdiction. The competence of the presiding officer would therefore need to be determined in view of sections 31 and 32 of CrPC, as its provisions have been made applicable by sections 44(4) and 50(1) of PECA. A Magistrate would, therefore, possess jurisdiction to try a PECA offence if so designated pursuant to section 44(1) where the offence attracts a punishment of up to three years and fine not in excess of Rupees forty-five thousand. Some of the offences of PECA attract punishment of three years or less. But the prescribed fine that may be imposed in relation to PECA offences ranges from Rupees 50,000 upward to a million and imposing such fine would fall beyond the jurisdiction of the Magistrate, as prescribed in section 32 of CrPC. In view of the punishments prescribed for PECA offences read together with sections 31 and 32 of CrPC, it would have to be a duly empowered Section 30 Magistrate or a Sessions Judge or an Additional Sessions Judge who would have jurisdiction to try the offences would be designated as such in exercise of authority under section 44(1) of PECA. A High Court Judge could also be designated as a presiding officer of the Court that has jurisdiction to try

PECA offence, but that would render the remedy of appeal provided under section 47 of PECA redundant.

21. There is no standard model for the manner in which jurisdiction is conferred on a court to try offences created under special laws, as required by Article 175(2) of the Constitution. The Act of 1958 confers powers on special Judges to try and punish offences specified in the schedule to such Act. Section 4 of the Act of 1958 prescribes the jurisdiction of Special Judges in territorial terms. Section 5(1) of the Act of 1958 mandates that the scheduled offences are to be tried exclusively by a Special Judge. Section 5(4) provided a mechanism transferring a case involving the scheduled offence for an ordinary criminal court to the court of the Special Judge. Section 5(7) of the Act of 1958 states the following:

> *(7) When trying an offence under this Act a Special Judge may also charge with and try other offences not so triable with which the accused may, under the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), relating to the joinder of charges, be charged at the same trial.*

The schedule then lists certain PPC offences as well as offences punishable under the Prevention of Corruption Act, 1947, as scheduled offences to be tried exclusively by the court of Special Judge. Section 5(2) vests in the Government authority to include other offences in the

Schedule of the Act of 1958. The Federal Government has not exercised its authority to amend the Schedule of the Act of 1958 to include PECA offences within the scheduled offences in relation to which the court of Special Judge appointed under the Act of 1958 enjoys exclusive jurisdiction. The provisions of the Act of 1958 are relevant in the present context as the court notified for purposes of section 44(1) of PECA to try a PECA offence in Islamabad Capital Territory is the Court of Special Judge appointed under the Act of 1958. Such court is not vested with jurisdiction to try PECA offences as such offenses are not scheduled offences in relation to which jurisdiction has been conferred on the Court of Special Judge. Under the Offences in Respect of Banks (Special Courts) Ordinance, 1984 **("1984 Act")**, the Federal Government is vested with authority under Section 3 of such Act to establish as many Special Courts as it considers necessary to try offences listed in the First Schedule of such Act. Section 4(1) of the 1984 Act provides that scheduled offences are to be tried exclusively by a Special Court established in exercise of power under Section 3. Section 4(3) provides for transfer of cases pending from other courts to the Special Courts. Section 4(6) clarifies that where a Special Court *"is of the opinion that any of the offences which the accused is alleged to have committed is not a scheduled*

offence, the court shall record such opinion and try the accused only for such offence, if any, as is a scheduled offence." The scheme of the 1984 Act is in contrast to the scheme of the Act of 1958, as discussed above. While the former provides for joint trials of scheduled offences along with offences that are not scheduled offences, the 1984 Act while vesting in the Special Court the exclusive authority to try offences listed in the First Schedule of such an Act, also provides that the Special Court will not try offences that are not scheduled offences, and therefore prohibits joint trials of scheduled and unscheduled offences. Section 5A of the National Accountability Ordinance, 1999 **("NAO")**, vests in the Federal Government the power to establish courts to try offences under the NAO. Section 16A of the NAO provides a mechanism for transfer of a case from any other court in which it is pending to an Accountability Court established under the NAO.

22. The purpose of discussing the aforementioned special laws is to highlight that the scheme for conferring jurisdiction on courts under special laws varies. Some laws provide for the creation of new courts and vest in such courts the exclusive jurisdiction to try the offences listed in the schedule of the special law. Some statutes provide for joint trials, while others prohibit joint trials and clarify

that only scheduled offences can be tried by the special court created under the special law. PECA does not provide for creation or establishment of a special court. It envisages the designation of a presiding officer of the court competent to try a PECA offence. The competence and jurisdiction of the court to try a PECA offence thus needs to be determined in view of the competence of the Judge or Magistrate to award the punishment prescribed for the PECA offences, as has already been discussed above. As the judge competent to award maximum punishment prescribed under PECA offences would be a duly empowered Section 30 Magistrate, a Sessions Judge or Additional Sessions Judge, in view of sections 30, 31 and 32 of CrPC, it is only such judge who can be designated as the presiding officer in exercise of authority under section 44(1) of PECA. The Federal Government has, however, designated the court of Special Judge created under the Act of 1958 as the designated court to try PECA offences. This could not have been done unless the schedule to the Act of 1958 was also amended to vest jurisdiction in the court of special judge to try PECA offences. The Special Judge appointed under section 3 of the Act of 1958 is not a criminal court established under CrPC that has the authority to try all PPC offences. Consequently, even by virtue of section 5(7) of the Act of

1958, a Special Judge cannot try PECA offences along with PPC offences in view of section 235 of CrPC. The court of Special Judge under the Act of 1958 is thus devoid of jurisdiction to try PECA offences along with PPC offences not listed in the Schedule of the Act of 1958. The court of Special Judge could, therefore, neither take cognizance of PECA offences nor could be treated as a court competent to remand the petitioners in the custody of FIA pending trial under section 30A of PECA.

23. The word "designate" has been defined in Black's Law Dictionary to mean "*to choose (someone or something) for a particular job*…". "Establish" has been defined as *"to make or form; to bring about or into existence*". Confer means *"to bestow"*. Under Article 175(2) of the Constitution only a court that has been conferred jurisdiction by law can exercise the authority so vested. PECA does not vest any authority in the Federal Government to establish new courts to try PECA offences. Thus, unless the schedule of the Act of 1958 was appropriately amended, the only presiding officers who could have been designated to try PECA offences under section 44(1) of PECA could be duly empowered Section 30 Magistrates, Session Judges or Additional Session Judges competent, in view of provisions of CrPC, to award sentences in relation to PECA offences.

24. It was held by the Supreme Court in ***Brother Steel Mills Ltd. Vs. Mian Ilyas Mairaj (PLD 1996 SC 543)*** that, *"the jurisdiction of the courts is never established by themselves, it is established by an authority external to them, either in the Constitution or in law"* and *"it is for the Constitution, and subject to the Constitution, for the law to determine the nature and extent of the jurisdiction and the forum upon which it will be conferred."*

25. In ***Khyber Tractors Private Ltd. Vs. Pakistan (PLD 2005 Supreme Court 842)***, it was held that, *"the jurisdiction of a court lays down a foundation stone for a judicial or quasi-judicial functionary to exercise its power/authority and no sooner the question of jurisdiction is determined in negative, the whole edifice, built on such defective proceedings, is bound to crumble down. As held in the case of Parey Lal vs. Nanak Chand (AIR 1948 PC 108), Parvez Iqbal Vs. Mohammed Hanif (1979 SCMR 367), Chief Settlement Commissioner Vs. Mohammed Fazil (PLD 1975, Supreme Court 331)."* The principle was reiterated by the Supreme Court in ***Izhar Alam Farooqi, Advocate Vs. Sheikh Abdul Sattar Lasi (2008 SCMR 240),*** wherein the following was held:

> *"This is an established law that jurisdiction cannot be assumed with the consent of the*

parties and notwithstanding the raising of such an objection by the parties, the forum taking cognizance of the matter must at the first instance decide the question of its jurisdiction. There can be no exception to the principle that an order passed or an act done by a Court or a tribunal not competent to entertain the proceedings is without jurisdiction and that it is mandatory for the Court or tribunal as the case may be to attend the question of jurisdiction at the commencement of the proceedings because the jurisdictional defect is not removed by mere conclusion of trial or inquiry and objection to the jurisdiction can be raised at any subsequent stage. This Court in Rashid Ahmed v. State (PLD 1972 SC 271) held as under:

> *"If a mandatory condition for the exercise of a jurisdiction before a Court, tribunal or authority is not fulfilled, then the entire proceedings which follow become illegal and suffer from want of jurisdiction. Any orders passed in continuation of these proceedings in appeal or revision equally suffer from illegality and are without jurisdiction."*

26. It was held by the Supreme Court in ***S.M. Waseem Ashraf vs. Federation of Pakistan through Secretary, M/o Housing and Works, Islamabad (2013 SCMR 338)*** that in view of Article 175(2) of the Constitution, *"it is unambiguously clear that a bar and a prohibition has been placed that no court in Pakistan shall*

exercise any jurisdiction in any matter or situation until and unless such jurisdiction has been conferred upon it by the Constitution itself or under any law… It is a settled law that any forum or court, which, if lacks jurisdiction, adjudicates and decides a matter, such decision etc. shall be void and of no legal effect."

27. There are instances where the doctrine of de facto has been invoked to afford a shroud of legality to otherwise illegal conduct. The doctrine was enumerated by the Supreme Court in ***Mehmood Khan Achakzai Vs. Federation of Pakistan (PLD 1997 SC 426)***, wherein it was explained that, *"the doctrine of de facto is based on considerations of policy and public interest"* and is invoked to *"preserve continuity, prevent disorder and protect private rights"* in extraordinary situations, such as the one before the Supreme Court, where the Parliament was declared to be illegally constituted and the eighth amendment was declared to be unconstitutional. The purpose of the doctrine was to secure private rights and public convenience so that declarations of illegality do not interfere with vested rights that become part of past and closed transactions.

28. In the instant matter, the question before the Court is whether the court of the Special Judge is vested

with jurisdiction to try PECA offences and other PPC offences. Once this Court finds that the court of the Special Judge is not vested with jurisdiction, the orders and judgments of such court cannot be protected on the basis of the de facto doctrine. Any judicial orders passed by a court devoid of jurisdiction to pass them will have no sanctity.

29. The only remaining question is whether a criminal court of competent jurisdiction designated as the court for purposes of PECA offences would have the authority and jurisdiction to try PECA offences along with PPC offences. The answer to such question is the affirmative. Section 44(4) of PECA provides that the procedure laid down in CrPC would apply to PECA offences being tried by a court designated under Section 44(1) of PECA. Section 50 of PECA also provides that provisions of PECA are not in derogation with provisions of CrPC. Section 233 of CrPC provides that, *"for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239."* Section 235 is relevant for our present purposes and provides the following:

> ***235. Trial for more than one offence****. **(1)** If, in one series of acts so connected together as to*

> *form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.*
>
> ***(2) Offence falling within two definitions**. If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.*
>
> ***(3) Acts constituting one offence, but constituting when combined a different offence.** If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.*
>
> ***(4)** Nothing contained in this section shall affect the Pakistan Penal Code (XLV of 1860), section 71.*

Sections 235(1) and (2), reproduced above, are relevant for our present purposes as they provide for joint trial where series of acts constitute the same transaction or the acts alleged constitute offences falling within two or more separate definitions of any law.

30. The test for what constitutes same transaction was provided in ***Raj Bahadur vs. The Emperor*** **(1935, PCr.LJ 1496)** as follows:

> *"The real and substantial test for determination whether several offences are so connected together as to form one transaction, depends upon whether they are related together in point of purpose, or as cause and effect, or as principle and subsidiary acts, so as to constitute one continuous action."*

This test remains good law and was reiterated by the Supreme Court in ***Abdul Rashid vs. the State (2003 SCMR 799).*** The rationale for convening joint trial was explained by Supreme Court in ***Noor Muhammad vs. The State*** **(PLD 1964 SC 120)**, wherein the following was held:

> *"…Even though sections 235 and 239 of the Criminal Procedure Code give a discretion to the Court to try certain persons and/or offences jointly yet there are certain considerations which are more fundamental than merely the convenience of the proceeding or trial which must be kept in view when deciding as to whether the discretion should in given in case be exercised or not. In a criminal trial, as we have already observed, it is a fundamental principle that the trial of an accused person should be conducted with the utmost fairness and anything which is*

likely to cause any serous embarrassment to him in the conduct of his defence should be abided."

31. Learned State Counsel relied on a judgment of Divisional Bench of Lahore High Court in ***ANF vs. Muhammad Faizan (PLD 2022 Lahore 700)*** to argue that in view of section 135 of CrPC, PECA and PPC offences that arise from the same transaction are to tried together. In the said judgment the test for same transaction was explained as follows:

"*The language of section 235, Cr.P.C is explicit in sense and enables a Court to charge an accused in one trial for multiple offences comprising upon different acts but committed during same transaction. The term "same transaction" used in section 235, Cr.P.C is of dominant importance and calls for our indulgence. In our view the offences, though committed not at same place and time but if are stemming from common motivation, intent, design or in continuity with each other, still can be described as forming same transaction. For the determination of question about the offences having been committed during same transaction, the root cause of the crime or the motive is to be considered along with the proximity of time and distance between the different events. To be precise, if the different events forming basis of a crime cannot be bisected in reference to the motive, design, concert and reasons rather are strongly interwoven with each other by common*

thread of background, it can inexorably be held that offences are committed during same transaction within the meaning of section 235, Cr.P.C. The foregoing provision, from simple recital, is found to be person specific as it deals with multiple offences committed by a single accused in a series of acts tied with common knot so as to form same transaction."

32. A cogent test for determining whether separate offences form part of the same transaction was articulated in ***The State vs. Darajuddin Mondal* (PLD 1962 Dacca 424)**, wherein the following was held:

"…the tests employed by the Courts for determining whether separate offences committed in course of the same transaction are whether they are connected together by (i) proximity of time and place (ii) community of purpose and design, and (iii) continuity of action. The two last are essential elements while the first is alone insufficient for a joint trial."

33. What emerges from the above discussion is that a court of competent jurisdiction can try PPC offences and PECA offences in a joint trial if they qualify the test prescribed in section 235 of CrPC. Whether the test is satisfied would need to be determined in view of the facts of each case. It has already been clarified earlier in this judgment that the mere use of an information system to carry out a PPC offence would not transform the offence

into a PECA offence. The *actus reus* and *mens rea* of each PECA offence has been specified therein and the mere use of an information system for an illegal purpose does not constitute an offence under PECA. Such offence would remain a PPC offence and would be recognized as such in view of the clarification provided in section 27 of PECA. For example, section 10 of PECA defines the *actus reus* for cyber terrorism as committing any of the offences under sections 6, 7, 8 or 9 of PECA, and sub-clauses (a), (b) and (c) of section 10 then define the *mens rea* that must be associated with the proscribed actions to constitute the offence of cyber terrorism. Thus, the mere use of an information system to advance interfaith sectarian or ethnic hatred does not constitute the offence of cyber terrorism. Likewise, the preparation or dissemination of information through an information system or device that has the effect of advancing interfaith sectarian or racial hatred constitutes hate speech under section 11 of PECA. It is possible that an act that qualifies as hate speech under section 11 of PECA may also constitute an offence under section 295 or 295-A or 298 or 298-A of PPC. But the *actus reus* and *mens rea* for offences defined under section 295-B and 295-C are quite different. The *mens rea* for purposes of sections 295-B or 295-C has no correlation with the effect or motive of advancing interfaith sectarian

or religious hatred, which constitutes a component of the offence of hate speech under section 11 of PECA. Thus, where the acts of a person constitute an offence under section 295-B or 295-C, the mere use of an information system or device to carry out such offence would not make such action an offence under section 11 of PECA. As already emphasized, where offences under PECA and offences under PPC are combined, it is for the court that takes cognizance of the case to determine whether such offences are attracted.

34. In view of the aforementioned opinion, the findings in this opinion can be summarized as follows:

1. FIA as the designated agency under section 29(1) of PECA read together with the Schedule of FIA Act has the jurisdiction to investigate PECA offences and offences listed in the Schedule of the FIA Act and there is nothing in law that prohibits joint investigation of PECA offences and scheduled PPC offences (listed in the schedule to the FIA Act) by FIA.

2. The Court of Special Judge established under section 3 of the Act of 1958 is not a Court that has been conferred jurisdiction under any law to take cognizance of and try PECA offences.

In order to designate the Court of Special Judge for purposes of section 44(1) of PECA, the Federal Government would first need to amend the Schedule to the Act of 1958 to include therein PECA offences in relation to which the Court of Special Judge could then be conferred with jurisdiction.

3. A criminal court that can be designated for purposes of section 44(1) of PECA to take cognizance of and try PECA offences, in view of the competence of criminal courts to pass sentences and/or punishments as provided under sections 30, 31 and 32 of CrPC, is the court of a duly-empowered Section 30 Magistrate, Sessions Judge and Additional Sessions Judge. Such court when designated for purposes of section 44(1) of PECA to try PECA offences would have the power to conduct joint trials of PECA and PPC offences in the event that the requirements prescribed under section 235 of CrPC are met.

4. The mere use of an information system to carry out an offence defined by PPC would not transform such offence into a PECA offence. In

order for an act to qualify as an offence under PPC as well as PECA, the requirements of *actus reus* and *mens rea* as provided in the relevant provisions of law creating such offence must be satisfied.

35. For the reasons mentioned in this opinion, I would direct the Federal Government to designate presiding judges of criminal courts established under CrPC of appropriate jurisdiction in view of sections 30, 31 and 32 of CrPC for purpose of section 44(1) of PECA within a period of two weeks. The cases pending before the Court of Special Judge in relation to PECA offences will be transferred to the court designated under section 44(1) of PECA. The orders dismissing the bail applications of the petitioners passed by court of Special Judge are declared to be devoid of jurisdiction and of no legal effect and set aside. The bail applications will be deemed pending before the court to be designated by the Federal Government in exercise of authority under section 44(1) of PECA, which will hear the petitions and decide them in accordance with law. The findings in this judgment will not affect any judgments passed in relation to PECA offences that have attained finality and have become past and closed transaction.

36. It is for reasons stated hereinabove that I agree with the decision rendered in the judgment authored by my learned brother, Hon'ble Mr. Justice Arbab Muhammad Tahir, and the directions issued in para 24 of the judgment.

(BABAR SATTAR)
JUDGE

Saeed