JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD, JUDICIAL DEPARTMENT

W.P. No. 4091 – 2024

Atif Hussain
Vs.
Federation of Pakistan through Secretary Ministry of Defense and others.

Petitioner by:	Mr. Muhammad Attique, Advocate.
Respondents by:	Mr. Usman Rasool Ghumman, AAG. Mr. Sajid Hussain, FCPO, Pakistan Navy.
Dates of Decision:	17.07.2025.

MOHSIN AKHTAR KAYANI, J: Through this writ petition, the petitioner Atif Hussain ex-Chief-I of Pakistan Navy has assailed order of conviction dated 18.10.2024 passed against the petitioner by Court of Appeals at PNS Zafar Islamabad, on the following charges:

> *"Charge-I:*
>
> *Did commit a civil offence under section 78 of Pakistan Navy Ordinance, 1961 read with Section 496 (B) of the Pakistan Penal Code, 1860 in that he involved himself in immoral activity by committing fornication with a call girl namely Mst. Aliya at her home (kachi Abadi) G-11, Islamabad in the month of January, 2022.*
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> *Charge-II:*
>
> *Did contravene NHQ Policy vide NHQ letter No.IN/8833/(CI/CT) Policy/261 dated 20 June 2016, in that he involved himself in social media activities namly shared confidential / restricted documents through his*

whatsapp account Number 0300273539 during the month of February 2022 to April 2022."

2. Learned counsel for the petitioner contends that the petitioner has been convicted for the offence of fornication and sharing some restricted confidential information through his WhatsApp account number, whereby he has been made liable under the Pakistan Navy Ordinance 1961 and the rules made thereunder. He further contends that three witnesses have been produced namely, L.t. Mian Harris Miraj, Sohail Aslam PO (R), and Ramzan Tandorchi, however despite production of witnesses, the charge of fornication has not been made out. Even the digital forensic evidence was not collected to prove the sharing of any confidential document on any number. Learned counsel for the petitioner further contends that the identity of the petitioner's mobile number has not been confirmed or verified from any mobile telephone operator. It is lastly contended that the defence officer provided to the petitioner in terms of Pakistan Navy laws has not cross-examined any of the witnesses, as apparent from the evidence. At last, the charge of fornication has only been made on a self-incrimination basis without verification of the alleged co-accused girl.

3. Conversely, learned AAG along with the officer of the Pakistan Navy in attendance contends that the petitioner is not allowed to challenge the procedure adopted by the Pakistan Navy during the trial of the charges against the petitioner. Even this court is not permitted to appreciate the evidence in a constitutional jurisdiction in a manner of an appellate court under the law. He further

contended that the petitioner has been given due rights under the law, including but not limited to the appointment of a defence counsel. Even he was warned against self-incrimination before recording any statement under the rules. And as such, the petitioner has committed the offence of fornication and shared information that was confidential, which has been proved on record. Therefore, the confession was treated against the petitioner, he was awarded imprisonment, while taking a lenient view, he has also been dismissed from service.

4. Arguments heard, record perused.

5. Perusal of record reflects that the petitioner has been charged on two counts by the Pakistan Naval Authorities for committing the offence of fornication in terms of section 496-B PPC with Mst. Alia, (call girl) and for sharing confidential information via whatsapp in a whatsapp group. I have attended the proposition of fornication with the able assistance of both sides, which reflects that in this case Mst. Alia was never called as a witness, neither she was inquired by the investigation authorities of the Pakistan Navy, and her identity has also not been verified and confirmed, as is required in cases of fornication/adultery/zina.

6. The other important factor is the confessional statement alleged by the respondent side, whereas, the statement available on record is silent with respect to any protection given to the petitioner being an accused in terms of Article 10-A of the Constitution of Pakistan 1973. Due process requires certain important factors to be observed,

including but not limited to the right of the accused of protection against self-incrimination under Article 13 (b) of the Constitution as well as a fair opportunity to defend and represent before any tribunal or court of law. The principle of "protection of self-incrimination" is dilated upon in detail in judgment reported as **PLD 1988 [Karachi] 539 (*Muhammad Yusuf Vs. The State*)** in terms of Article 13 (b) of the Constitution of Islamic Republic of Pakistan, 1973.

7. In this case, the primary witness was Ramzan Tandorchi, who allegedly gave the mobile number of one Mst. Alia, to the present petitioner, and as such nothing has been suggested at the time of cross-examination, where only a single line sentence is recorded: "*I declined to cross-examine*." Same is the case with the second witness and the third witness, who are confronting their second charge, that the petitioner shared confidential/restricted documents (*Nominal roll of acquisition crews, draft incoming routine, uniform pictures of officers and CPO and confidential / restricted letter)* through his WhatsApp account in the group named "*Best of Luck*" during the month of April 2022.

8. I have attended those exhibits referred on record, and I have asked the respondent side, the representatives of Pakistan Naval Authority and Judge Advocate General, Naval Headquarters, Islamabad, about the digital forensic of petitioner mobile phone upon which they candidly conceded that there is no forensic evidence or digital forensic evidence available on record to prove the authentication of the WhatsApp messages in this case, especially

when the WhatsApp messages reflect a group of naval officials in which the petitioner is not even the admin or controller of the group, instead he was just one of the members. Even it is not verifiable from any source that such information is confidential/secret under any law, especially when those documents were not covered with any such label of confidential/secret. Nonetheless, this charge requires forensic evidence to sustain, otherwise it cannot stand as held in **2020 SCMR 830** ***(Dr. Atif Muhammad Khan Vs. The State),***

9. Moreover, on the second charge, this Court attended the proposition of fornication by going through the requirements to establish this offence by considering the latest judgment of the Supreme Court of Pakistan reported as **2025 SCMR 699** ***(Asif Masih Versus State)***, whereby it is a settled that without identifying the co-accused, recording her statement and cross-examining her no case of fornication could be made out. I have also attended the judgment reported as **2017 P.Cr.L.J [Peshawar] 1241** ***(Mst. Zainab versus The State)***, in which complaints in cases of fornication are required to be filed in terms of Section 203-C of the Criminal Procedure Code, which is a proper mechanism for such offences to be dealt under the law. Also, the ingredients to constitute an offence under Section 496-B PPC should have been demonstrated through the record, and in absence of any direct evidence, the charge is not made out. It is also an admitted position on record that the procedure contemplated in Section 203-C Cr.P.C. has not been adopted in the instant case from the very inception. Therefore, in the absence of the mandatory

procedure envisaged under the law, the entire superstructure raised upon is crumbled down.

10. This Court has also been guided by the law settled in **2019 P.Cr.L.J [Lahore] 773** ***(Aamir Razaq versus The State)***, a case of fornication wherein the protection against self-incrimination is a key point in the said judgment, and a single accused could not be convicted in any case wherein the statement of the victim or the co-accused (the girl) has not been recorded. In the present case against the petitioner, no complaint of any nature has been filed by any third person or by the said girl in this case, who has not been identified during the entire trial or investigation. Therefore, the entire episode as being consensual could not be demonstrated from any record when there is no medical evidence available on record to corroborate the offence through the allegation leveled in this case by the Naval Intelligence Report.

11. In such types of cases, it is an admitted position that the digital forensic examination report plays a significant role, and in the absence of such an important piece of evidence, no corroboration could be made out. Similarly, the mobile phone, which is the most important piece of evidence, was not produced before the naval tribunal during the course of the trial to demonstrate that this is the very mobile that had been used by the petitioner/accused for dissemination of some document in the WhatsApp group with the same mobile number and WhatsApp data. The picture of the alleged victim, Mst. Alia is also not available, neither any third individual

has identified the girl through direct evidence. Resultantly, when the digital forensic examination report is not available, no case for interference regarding the allegation is to be considered important to prosecute the petitioner in any manner. The case of fornication in the ordinary sense gives the same meaning as explained in the Islamic jurisprudence, wherein to prove the case of fornication, the court or the tribunal, as the case may be, has authority to investigate any report or statement given by a person whose veracity is not doubtful and who is not involved in any major sin as a key factor to become a witness in such type of cases in terms of the Islamic jurisprudence. Therefore, the standard of proof is on the higher side, and presumption of innocence exists until the contrary is established by reasonable, cogent evidence as required by law. Where required evidence fails to satisfy the court affirmatively and bring home the guilt of the accused beyond reasonable doubt, the accused stands entitled to acquittal as held in **PLD 2017 [Federal Shariat Court] 63 *(Shahid Orakzai versus Pakistan through Secretary Law, Ministry of Law, Islamabad)***.

12. While dealing with this case, the respondent side has mainly argued that the petitioner has made a confession under the law before the tribunal. No doubt, the only procedure and process available under the law is provided in Section 164 Cr.P.C. read with Section 364 Cr.P.C., and such statement should be recorded. Though in this case the statement has been recorded, but surprisingly, when the confessional statement was retracted, no corroboration is

available, therefore, the confessional statement loses its value and could not be made the sole basis of conviction as held in **2020 YLR Note [Islamabad] 93 (*Muhammad Khalid Vs. Sajid Mehmood)***. Hence, a single statement of a petitioner, if at all considered to be self-incriminating that he committed fornication with a lady Mst. Alia as alleged by the prosecution, it would be presumed that no such women exists unless her identity is confirmed and physical presence before court is demonstrated. Therefore, in the absence of such glaring proof, the prosecution case crumbles down. Similar aspect of corroborating retracted confession has also been considered in the judgments reported as of **2023 P.Cr.L.J [Quetta] 964 *(Sardar Muhammad Vs. State)*** and **2024 MLD [Peshawar] 348 *(State Vs. Khalid Khan)***.

13. After going through the above discussion, this court must consider the principal mandate applicable in such cases while considering the scope of Article 199 of the Constitution of Pakistan, 1973. Where a person is subject to the Pakistan Navy Ordinance or military law, the jurisdiction of the High Court to exercise powers of judicial review over trial conducted by a court-Martial or FGCM under military, has to be seen in the light of the judgment reported a **PLD 1973 [SC] 49 (*The State Vs. Zia-ur-Rehman)*, PLD 1989 [SC] 26 (*Federation of Pakistan and another Vs. Malik Ghulam Mustafa Khar)*, PLD 1996 [SC] 632 (*Mrs. Shahida Zahir Abbas and 4 others Vs. President of Pakistan and others)***, and **2014 SCMR 849 (*Risaldar Ghulam Abbas Vs. Federation of Pakistan through Secretary, M/o***

Defence, Government of Pakistan). It is a settled proposition of law that High Court has the power of judicial review and can interfere on limited grounds, such as *corum non-judice*, without jurisdiction, or proceedings suffering from mala fides including malice in law. It is also well established that the High Court cannot act as an appellate court in cases of conviction rendered by FGCM or military tribunal and cannot reappraise the evidence if sitting in appeal, as in the present case. However, if the court is satisfied that the case does not fall within the four corners of law, such as the absence of evidence, insufficient evidence, or suffering from jurisdictional defect, the interference is justified and High Court is competent to exercise the powers of judicial review in terms of **2017 SCMR 1249 *(Sayyed Zaman Khan versus Federation of Pakistan and others)***.

14. In view of the above background, this court is convinced that the entire trial conducted by the Pakistan Naval Authorities stands vitiated being in violation of basic principles of law. The charge of fornication in terms of Section 496-B PPC could not be made out inasmuch as the alleged co-accused has neither been identified nor arrayed as an accused throughout proceedings. Similarly, the charge of sharing confidential information also remained unproved due to the absence of digital forensic evidence of the mobile number allegedly used by the petitioner to share content in a WhatsApp group of 148 naval officials. The allegation substantiated is also not independently corroborated through any forensic report, which is a key evidentiary requirement in such type of cases. Therefore, this

entire superstructure crumbles down and no case of conviction is made out. The absence of such evidence makes it a case of "no evidence" thereby, High Court can interfere in its constitutional jurisdiction as held in **2014 SCMR 84** ***(Ghulam Abbas Vs. Federation of Pakistan through M/o Defence and others)***. Resultantly, this court, while exercising constitutional jurisdiction under Article 199 of the Constitution of Pakistan, 1973, **SETS ASIDE** the entire trial as well as the prosecution conducted by the Pakistan Naval Authorities. Hence, the orders as well as the prosecution are declared to be illegal.

15. Instant writ petition stands **ALLOWED** in above terms.

(MOHSIN AKHTAR KAYANI)
JUDGE

APPROVED FOR REPORTING.

A.Waheed/-