

P L D 1998 Supreme Court 1445

Present: Ajmal Mian, C.J., Saiduzzaman Siddiqui
Irshad Hasan Khan, Raja Afrasiab Khan
and Muhammad Bashir Jehangiri, JJ

MEHRAM ALI and others---Petitioners

versus

FEDERATION OF PAKISTAN and others---Respondent

Civil Petition No.251 of 1998, Constitutional Petitions Nos. 15, 20, 21, 26, 36, 61 of 1997;
Civil Petitions Nos. 1129 of 1997 and 423 to 431 of 1998, decided on 15th June, 1998.

Ajmal Mian, C.J.; Saiduzzaman Siddiqui; Irshad Hasan Khan. Raja Afrasiab Khan and
Muhammad Bashir Jehangiri, JJ. agreeing-

(a) Anti-Terrorism Act (XXVII of 1997)---

---S. 5(2)(i)---Use of Armed Forces and Civil Armed Forces to prevent terrorism---
Provision of S.5(2)(i), Anti-Terrorism Act, 1997 is invalid to the extent it authorises the
Officer of Police, Armed Forces and Civil Armed Forces charged with the duty of preventing
terrorism, to open fire or order for opening of fire against person who, in his opinion, in all
probability, is likely to commit a terrorist act or any scheduled offence, without being fired
upon---Such declaration by Supreme Court, however, will not affect the trials already
conducted and convictions recorded under the Act and the pending trials may continue
subject to this order.

(b) Anti-Terrorism Act (XXVII of 1997)---

---S. 10---Constitution of Pakistan (1973), Art.14---Power to enter or search--Inviolability
of dignity of man---Provision of S.10 of Anti-Terrorism Act, 1997, in its present form being
direct in conflict with Art. 14 of the Constitution, is not valid; the same requires to be
suitably amended as to provide that before entering upon a premises which is suspected to
have material or a recording in contravention of S.8 of the said Act, the concerned Officer of
Police, Armed Forces or Civil Armed Forces shall record in writing his reasons for such
belief and serve on the person of premises concerned a copy of such reasons before
conducting such search---Such declaration by Supreme Court, however, will not affect the
trials already conducted and convictions recorded under the Act and the pending trials may
continue subject to this order.

Section 10 of the Anti-Terrorism Act, 1997, in its present form is not valid; the same requires
to be suitably amended as to provide that before entering upon a premises which is suspected
to have material or a recording in contravention of section 8 of the Act, the concerned officer
of Police, armed forces or civil armed forces, shall record in writing his reasons for such
belief and serve on the person or premises concerned a copy of such reasons, before
conducting such search.

Section 10 of the Anti-Terrorism Act, 1997 empowers an officer of the police, armed forces
or civil armed forces on his being satisfied that there are reasonable grounds for suspecting
that a person has in his possession some written material or recording in contravention of
section 8, he may enter and search the premises where it is suspected that the material or
recording is situated and may take possession of the same. This is directly in conflict with
Article 14 of the Constitution, which confers a fundamental right as to the dignity of man by,
inter alia, laying down that the dignity of man and, subject to law, the privacy of home shall
be inviolable. No doubt, that the above right of privacy is subject to law but such law is
supposed to be reasonable and in conformity with the constitutional mandate. In this regard,
reference may be made to section 165, Cr.P.C., which authorises an officer in charge of a
police station or a . police officer making an investigation, if he is satisfied that reasonable

grounds for believing that anything necessary for the purposes of an investigation into any offence, which he is authorised to investigate, may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot, in his opinion, be otherwise obtained without undue delay, he may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search or cause search to be made, for such thing in any place within the limits of such station. The above provision is in consonance with Article 14 of the Constitution and, therefore, section 10 of the Act, in its present form, is not in accordance with law. The same should be suitably amended in order to provide that the concerned officer of police, armed forces or civil armed forces shall record and serve on the person of the premises concerned a copy of such reasons, before conducting such search.

Such declaration by the Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to as above.

(c) Anti-Terrorism Act (XXVII of 1997)---

---S. 19(10)(b)---Constitution of Pakistan (1973), Art.10---Procedure and powers of Special Court---Security of person---Safeguard as to arrest and detention---Provision of S.19(10)(b), Anti-Terrorism Act, 1997, which provides for trial of an accused in absentia on account of his misbehaviour in the Court, is violative of Art. 10 of the Constitution of Pakistan (1973) and thus invalid--Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

Section 19(10)(b) of the Anti-Terrorism Act, 1997, which provides for trial of an accused in absentia on account of his misbehaviour in the Court, is violative of Article 10 of the Constitution and, therefore, is declared as invalid.

Only clause (b) of subsection (10) of section 19 of the Anti-Terrorism Act, 1997 is violative of the fundamental right of access to justice. The above clause (b) of subsection (10) of section 19 authorises a Special Court to order the removal of an accused person from the Court if his behaviour is such as to impede the course of justice and then to proceed with the case in absentia. An accused person for his misbehaviour in Court can be convicted for contempt of Court and punished, but on no principle of law, he can be denied the right to be present and to defend himself in a criminal matter. The right of access to justice is a well recognised and inviolable right enshrined in Article 9 of the Constitution, which lays down that no person shall be deprived of life or liberty save in accordance with law. If an accused person is removed from the Court on account of his misbehaviour and in his absence the trial is concluded and he is sentenced to death, he will be deprived of his life without due course of law. Secondly, under clause (1) of Article 10 of the Constitution an accused person has the right to consult and be defended by a legal practitioner of his choice, in case he is arrested and detained.

The above provision is violative of the above Constitutional provision having no legal effect.

Such declaration by the Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to as above.

Government of Balochistan v. Azizullah Memon PLD 1993 SC 341 and AI-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 ref.

(d) Anti-Terrorism Act (XXVII of 1997)---

---S. 24---Constitution of Pakistan (1973), Arts.175 & 203---Appellate Tribunal---Provision of S.24 of the Anti-Terrorism Act, 1997 is not valid in its present form as the same militates against the concept of independence of Judiciary and Arts. 175 & 203 of the Constitution---Section 24 of the Act needs to be suitably amended so as to vest the Appellate power in a High Court instead of Appellate Tribunal and to use the words "High Court" in place of

"Appellate Tribunal" ---Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

(e) Anti-Terrorism Act (XXVII of 1997)---

---S. 25---Constitution of Pakistan (1973), Arts.175 & 203---Appeal--Provision of S.25 of the Anti-Terrorism Act, 1997 is not valid in its present form as the same militates against the concept of independence of Judiciary and Arts. 175 & 203 of the Constitution---Section 25 of the Act needs to be suitably amended so as to vest the Appellate power in a High Court instead of Appellate Tribunal and to use the words "High Court" in place of "Appellate Tribunal"--Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

(f) Anti-Terrorism Act (XXVII of 1997)---

---S. 27---Constitution of Pakistan (1973), Arts.175 & 203---Punishment for defective investigation---Provision of S.27 of the Anti-Terrorism Act, 1997 is not valid in its present form as the same militates against the concept of independence of Judiciary and needs to be suitably amended so as to vest power in a "High Court" instead of "Appellate Tribunal "---Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

(g) Anti-Terrorism Act (XXVII of 1997)---

---S. 28---Constitution of Pakistan (1973), Arts.175 & 203---Transfer of cases---Provision of S.28 of the Anti-Terrorism Act, 1997 is not valid in its present form as the same militates against the concept of independence of Judiciary and Arts. 175 & 203 of the Constitution---Section 28 of the Act needs to be amended as to vest power of transfer of cases in a High Court instead of Appellate Tribunal and to use the words "High Court" in place of "Appellate Tribunal "---Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

e(h) Anti-Terrorism Act (XXVII of 1997)---

---S. 30---Constitution of Pakistan (1973), Arts.175 . & 203---Modified application of certain provisions of the Criminal Procedure Code, 1898--Provision of S.30 of the Anti-Terrorism Act, 1997 is not valid in its present form as the same militates against the concept of independence of Judiciary and Arts. 175 & 203 of the Constitution---Section 30 of the Act needs to be suitably amended so as to vest the appellate power in a High Court instead of Appellate Tribunal and word "High Court" be substituted for "Appellate Tribunal "---Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

(i) Anti-Terrorism Act (XXVII of 1997)---

---S. 37---Constitution of Pakistan (1973), Arts.175 & 203---Contempt of Court---Provision of S.37 of the Anti-Terrorism Act, 1997 is not valid in its present form as the same militates against the concept of independence of Judiciary and Arts.175 & 203 of the Constitution---Section 37 of the Act needs to be amended suitably so as to vest. power to punish for contempt in a High Court instead of Appellate Tribunal and to use the words "High Court" in place of "Appellate Tribunal" ---Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

(j) Anti-Terrorism Act (XXVII of 1997)---

---S. 26---Constitution of Pakistan (1973), Arts. 13(b) & 25---Admissibility of confession made before Police---Provision of S.26 of the Anti-Terrorism Act, 1997 is not valid in its present form as it makes admissible the confession recorded by a Police Officer not below the rank of a Deputy Superintendent of Police and is violative of Arts. 13(b) & 25 of the Constitution---Section 26 of the said Act, thus, requires to be suitably amended by substituting the words "by a Police Officer not below the rank of a Deputy Superintendent of Police" with the words "by Judicial Magistrate" ---Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

Section 26 of the Anti-Terrorism Act, 1997 is not valid in its present form as it makes admissible the confession recorded by a police officer not below the rank of a Deputy Superintendent of Police as it is violative of Articles 13(b) and 25 of the Constitution and that the same requires to be suitably amended by substituting the words 'by a police officer not below the rank of a Deputy Superintendent of Police' by the words "by Judicial Magistrate".

Section 26 of the Anti-Terrorism Act provides that notwithstanding anything contained in Qanun-e-Shahadat Order, 1984 (President's Order 10 of 1984), a confession made by a person accused of any offence punishable under section 7 or section 8 of the Act or an offence covered by sub-paragraph (a) of paragraph 2, or paragraph 3 of the Schedule to the Act, or robbery or dacoity with murder or rape, before a police officer not below the rank of a Deputy Superintendent, may be proved against such person. The above provision seems to be violative of Articles 13(b) and 25 of the Constitution. Clause (b) of Article 13 of the Constitution confers a fundamental right by providing, inter alia; that no person shall, when accused of an offence, be compelled to be a witness against himself. Indeed a judicial confession is recorded by a Magistrate which is admissible as a piece of evidence, but keeping in view the state of affairs obtaining in the police force, Court cannot equate a police officer with a Magistrate. Additionally, there are very strict requirements which a Magistrate is required to comply before recording a judicial confession of an accused person. These requirements do not find place in section 26 of the Act. It is true that it will be for the Special Court concerned or for the Appellate Tribunal to

accept or not to accept a confession recorded by a police officer specified in the above section, but the fact remains that such a confession is not in consonance with the law and the Constitution. Under Islamic Jurisprudence a confession cannot be accepted lightly and it has certain mandatory requirements.

Under Hanfi school of thought a confession is admissible if an accused person admits his guilt/crime four times at four different places.

Section 26 cannot be sustained, the same requires to be suitably amended by substituting the words "police-officer not below the rank of a Deputy Superintendent of Police" by the words "Judicial Magistrate".

Declarations in respect of the provisions of the Act referred to hereinabove will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to the above as ordered by the Court in the short order.

Kitab-ul-Fiqah, Vol. 5 by Abdur Rehman Al-Jaziri ref.

(k) Anti-Terrorism Act (XXVII of 1997)---

---Sched., Ss.6, 7 & 8---Terrorist act- --Punishment for terrorist act--Prohibition of acts intended or likely to stir up sectarian hatred---Offences mentioned in the Sched. to the Anti-Terrorism Act, 1997 should have nexus with the objects mentioned in Ss.6, 7 & 8 of the Act---If an offence included in the Schedule has no nexus with Ss.6, 7 & 8 of the Act, in that event, notification including such an offence, to that extent will be ultra vires---Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

The offences mentioned in the Schedule should have nexus with the objects mentioned in sections 6, 7 and 8 of the Anti-Terrorism Act.

Offences mentioned in the Schedule should have nexus with the object of the Act and the offences covered by sections 6, 7 and 8 thereof. Section 6 defines terrorist acts, section 7 provides punishment for such acts, and section 8 prohibits acts intended or likely to stir up sectarian hatred mentioned in clauses (a) to (d) thereof. If an offence included in the Schedule has no nexus with the above sections, in that event notification including such an offence to that extent will be ultra vires.

Declarations in respect of the provisions of the Act referred to hereinabove will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to the above as ordered by the Court in the short order.

Government of Balochistan through Additional Chief Secretary v. Azizullah Memon PLD 1993 SC 341 and Darvesh M. Arbey v. Federation of Pakistan PLD 1977 Lah. 846 ref.

(1) Anti-Terrorism Act (XXVII of 1997)---

---S. 35---Constitution of Pakistan (1973), Arts.175 & 203---Power to make rules---Provision of S.35 of the Anti-Terrorism Act, 1997 in its present form is not valid as the same militates against the concept of independence of Judiciary and is also violative of Arts. 175 & 203 of the Constitution---Section 35 of the said Act needs to be suitably amended inasmuch as the power to frame rules is to be vested in the High Court to be notified by the Government---Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

Section 35 of the Anti-Terrorism Act in its present form is not valid as it militates against the concept of the independence of judiciary and is also violative of Articles 175 and 203 of the Constitution and, therefore, it needs to be suitably amended inasmuch as the power to frame rules is to be vested in the High Court to be notified by the Government.

Section 35 of the Act empowers the Government to frame rules through a notification, which it may deem necessary for carrying out the purposes of the Act. Under sections 24, 25, 27, 28, 30 and 37 of the Act 'High Court' should be substituted in place of 'Appellate Tribunal' and as the Special Courts are to operate/function under the control and supervision of the High Court concerned in terms of Article 203 of the Constitution, the power to frame rules should vest in the High Court and not in the Government. We, therefore, hold that section 35 of the Act in its present form is not valid as it militates against the concept of independence of judiciary and is also violative of Articles 175 and 203 of the Constitution and, therefore, it needs to be suitably amended.

Declarations in respect of the provisions of the Act referred to hereinabove will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to the above as ordered by the Court in the short order.

(m) Anti-Terrorism Act (XXVII of 1997)---

---S. 14---Constitution of Pakistan (1973), Arts.212-B(4), 175 & 203--Establishment of Special Courts for trial of heinous offences---Composition and appointment of Presiding Officers of Special Courts---Provision of S.14 of the Anti-Terrorism Act, 1997 requires to be amended so as to provide security of the tenure of the Judges of the Special Courts in consonance with the concept of independence of Judiciary---Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

Section 14 of the Anti-Terrorism Act, 1997 requires to be amended as to provide security of the tenure of the Judges of the Special Courts in consonance with the concept of independence of Judiciary.

Section 14 of the Act which provides for composition and appointment of Presiding Officers of Special Courts does not provide for the security of the tenure of the Judges appointed thereunder. The security of tenure of Judges is a sine qua non for independence of Judiciary.

The framers of Article 212-B of the Constitution were mindful of the fact that in the absence of security of tenure, no Judge can function impartially and independently. Therefore, section 14 is required to be suitably amended preferably. in line with clause (4) of Article 212-B of the Constitution.

Declarations in respect of the provisions of the Act referred to hereinabove will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to the above as ordered by the Court in the short order.

Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 ref.

(n) Constitution of Pakistan (1973)---

---Arts. 175, 202 & 203---Establishment and jurisdiction of Courts--Framework---Words "Such other Courts as may be established by law" employed in Art.175(1) of the Constitution are relatable to the subordinate Courts referred to in Art.203 of the Constitution---Any Court or Tribunal which is not founded on any of the Articles of the Constitution, cannot lawfully share judicial power with the Courts referred to in Arts.175 & 203 of the Constitution ---Supervision and control' over the subordinate judiciary vests in High Courts, which is exclusive in nature, comprehensive in extent and effective in operation---Any Court or Tribunal which is not subject to judicial review and administrative control of the High Court/or the Supreme Court does not fit in within the judicial framework of the Constitution---Different laws though can validly be enacted for different sexes, persons in different age groups, persons having different financial standing and persons accused of heinous crimes, but that does not mean that a parallel Judicial system can be created in violation of Arts. 175, 202 & 203 of the Constitution---Special Courts can be constituted for trying heinous crimes expeditiously but the same should be within the framework of the Constitution---Courts/Tribunals which are manned and run by executive authorities without being under the control and supervision of the High Court in terms of Art.203 of the Constitution, cannot meet the mandatory requirement of the Constitution.

Articles 175, 202 and 203 of the Constitution provide a framework of Judiciary i.e. the Supreme Court, a High Court for each Province and such other Courts as may be established by law.

The words "such other Courts as may be established by law" employed in clause (1) of Article 175 of the Constitution are relatable to the subordinate Courts referred to in Article 203 thereof.

Constitution recognises only such specific Tribunal to share judicial powers with the above Courts, which have been specifically provided by the Constitution itself: Federal Shariat Court (Chapter 3-A of the Constitution), Tribunals under Article 212, Election Tribunals (Article 225). It must follow as a corollary that any Court or Tribunal which is not founded on any of the Articles of the Constitution cannot lawfully share judicial power with the Courts referred to in Articles 175 and 203 of the Constitution.

In view of Article 203 of the Constitution read with Article 175 thereof the supervision and control over the subordinate judiciary vests in High Courts, which is exclusive in nature, comprehensive in extent and effective in operation.

The hallmark of our Constitution is that it envisages separation of the Judiciary from the Executive (which is founded on the Islamic Judicial System) in order to ensure independence of Judiciary and, therefore, any Court or Tribunal which is not subject to judicial review and administrative control of the High Court and/or the Supreme Court does not fit in within the judicial framework of the Constitution.

The right of "access to justice to all" is a fundamental right, which right cannot be exercised in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy. The Courts/Tribunals which are manned and run by executive authorities without being under the control and supervision of the High Court in terms of Article 203 of the Constitution, can hardly meet the mandatory requirement of the Constitution.

Indeed different laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standing and persons accused of heinous crimes. However, this does not mean that a parallel judicial system can be created in violation of Articles 175, 202 and 203 of the Constitution. There can be Special Courts trying heinous crimes expeditiously, but the same should be within the framework of the Constitution.

Declarations in respect of the provisions of the Act referred to hereinabove will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to the above as ordered by the Court in the short order. [p. 14951 GG

Kartar Singh v. State of Punjab (1994) 3 SCC 569; Black's Law Dictionary, 5th Edn.; Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through the Prime Minister and another PLD 1989 Kar. 404; Government of Sindh through Chief Secretary to the Government of Sindh, Karachi and others v. Sharaf Faridi` and others PLD 1994 SC 105; Iftikhar Ahmad v. The Muslim Commercial Bank Ltd. PLD 1984 Lah. 69; Altaf Hussain v. The State PLD 1985 Lah. 10; Imran v. Presiding Officer, Punjab Special Court No. VI, Multan and 2 others PLD 1996 Lah. 542; Chenab Cement Product (Pvt.) Ltd. and others v. Banking Tribunal, Lahore and others PLD 1996 Lah. 672; Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others PLD 1993 Sit 341; Syed Abul A'la Maudoodi's case PLD 1964 SC 673; Ms. Benazir Bhutto's case PLD 1989 SC 416; Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahab-ul-Khairi and others v. Federation of Pakistan and others PLD 1996 SC 324 and by Shamsul Ulema Allama ()Shibli Nomani, 1997 Edn. ref.

(o) Constitution of Pakistan (1973)---

---Art. 2A---Independence of Judiciary---Separation of Judiciary from Executive---Hallmark of Constitution is that same envisages separation of the Judiciary from the Executive---Independence of Judiciary is inextricably linked and connected with the process of appointment of Judges and the security of their tenure and other terms and conditions.

(p) Constitution of Pakistan (1973)---

---Art. 25---Equality of citizens---Classification---Principles

Following are the principles on the question of classification with regard to equality of citizens:

(i) That equal protection of law does not envisage that every citizen is treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;

(ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;

(iii) that different laws can validly be enacted for different sexes, persons of different age groups, persons having different financial standard and persons accused of heinous crimes;

(iv) that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable classification in the other set of circumstances;

(v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;

(vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;

(vii) that in order to make a classification reasonable, it should be based-

(a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;

(b) that the differentia must have rational nexus to the object sought to be achieved by such classification.

I.A. Sharwani and others v. Government of Pakistan 1991 SCMR 1041 and Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others PLD 1993 SC 341 ref.

(q) Constitution of Pakistan (1973)---

---Arts. 175, 202 & 203---Establishment and jurisdiction of Courts---Creation of Special Courts--Validity---Framework---Different laws though can validly be enacted for different sexes, persons in different age groups, persons having different financial standing and persons accused of heinous crimes but that does not mean that a parallel judicial system can be created in violation of Arts. 175, 202 & 203 of the Constitution---Special Courts for trying heinous crimes expeditiously can be constituted but within the framework of the Constitution.

(r) Terrorism---

--- Preventive enactment ---Simpliciter the fact that other foreign countries have also enacted certain Acts to cope with the menace of terrorism, will not warrant enactment of an Act in Pakistan,, which may be violative of the Constitution.

Usmanbhai Dawoodbhai Memon and others v. State of Gujarat AIR 1988 SC 922; Niranjan Singh Karam Singh Punjabi, Advocate v. Jitendra Bhimraj Bijja and others (unreported) decided on 7-8-1990; Kartar Singh v. State of Punjab (1994) 3 SCC 569; Supreme Court Advocates-on-Record Association and another v. Union of India AIR 1994 SC 268; Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others v. Federation of Pakistan and others PLD 1996 SC 324; S.P.Sampath Kumar v. Union of India AIR 1987 SC 386 and Constitutional and Administrative Law, 9th Edn. by E.C.S. Wada and G.Godfrey Phillips ref.

(s) Criminal trial---

---Terrorism---Conviction---Approach of the Court while considering criminal matters should be dynamic and Court should take into consideration the surrounding situation obtaining in the country and should not lightly set aside a conviction on technical grounds if the Court's conscience is satisfied that factually the convict was guilty of the offence.

The law and order situation has been considerably deteriorated and new types of terrorism have emerged due to tremendous progress made in the field of technology. The approach of the Court while considering criminal matters should be dynamic and it should take into consideration the surrounding situation obtaining in the country and should not lightly set aside a conviction on technical grounds if the Court's conscience is satisfied that factually the convict was guilty of the offence.

State through Advocate-General Sindh, Karachi v. Farman Hussain and others PLD 1995 SC 1 and Zeeshan Kazmi v. The State PLD 1997 SC 267 ref.

(t) Anti-Terrorism Act (XXV11I of 1997)---

---S. 5(1) & (2)(i)---Const-itution of Pakistan (1973), Art.9---Use of armed forces and civil armed forces to prevent terrorism---Security of person--Provision of S.5(2)(i), Anti-Terrorism Act, 1997 is violative of Art.9 of the Constitution of Pakistan---Such declaration by Supreme' Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

Subsection (1) of section 5 of the Anti-Terrorism Act, 1997 provides that any police officer, or member of the armed forces, or civil armed forces, who is present or deployed in any area may, after giving sufficient warning, use the necessary force to prevent the commission of terrorist acts or scheduled offences, and, in so doing shall, in the case of an officer of the armed forces or

civil armed forces, exercise all the powers of a police officer under the Code. There is nothing wrong with the above provision. However, clause (i) of subsection (2) thereof empowers a police officer or member of the above forces, after giving prior warning, to use such force as may be deemed necessary or appropriate, bearing in mind all the facts and circumstances of the situation, against any person, who is committing, or in all probability is likely to commit a terrorist act or a scheduled offence. It also provides that it shall be lawful for any such officer, or any superior officer to use force, or to order the firing upon any person or persons against whom he is authorised to use force in terms thereof. The above provision is violative of Article 9 of the Constitution which guarantees that no person shall be deprived of life or liberty save in accordance with law.

Declarations in respect of the provisions of the Act referred to hereinabove will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to the above as ordered by the Court in the short order.

(u) Anti-Terrorism Act (XXVII of 1997)---

---S. 5(2)(i)---Constitution of Pakistan (1973), Art.9---Use of armed forces and civil armed forces to prevent terrorism---Security of person---Conferment of power on the officers referred to in S.5(2)(i), Anti-Terrorism Act, 1997 without being fired upon by the accused is not justifiable---Provision of S.5(2)(i), AntiTerrorism Act, 1997 being not sustainable in its present form, Supreme Court directed that said provisions may be amended providing that the officer can fire upon an accused person if he has been himself fired upon by him---Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

The conferment of power on the officers referred to in clause (i) of subsection (2) of section 5 without being fired upon by the accused, is not justifiable. An officer of any of the above forces under the present provision can kill any person, if he considers that in all probability the former is likely to commit a terrorist act or scheduled offence. The formation of opinion as to the probability or likelihood of commission of offence will vary from person to person as it depends on subjective satisfaction. There is no check or guideline provided for the exercise of the above power conferred by the above provision. The aforesaid provision in its present form is not sustainable. The same may be amended and it may be provided that the officer can fire upon an accused person if he has been himself fired upon by him.

Declarations in respect of the provisions of the Act referred to hereinabove will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to the above as ordered by the Court in the short order.

(v) Anti-Terrorism Act (XXVII of 1997)---

---Preamble---Constitution of Pakistan (1973), Arts. 175, 202 & 203--Establishment and jurisdiction of Courts--Framework--Establishment of Special Courts under Anti-Terrorism Act, 1997 is under an Act of the Parliament and is not founded on a Constitutional provision, and therefore, if any of the provisions of the Anti-Terrorism Act, 1997 is in conflict with the Constitutional provisions, the same cannot be sustained---Such declaration by Supreme Court, however, will not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this order.

(w) Constitution of Pakistan (1973)---

---Arts. 175, 202 & 203---Establishment and jurisdiction of Courts--Framework---Constitutional framework relating to judiciary does not admit/permit the establishment of a parallel system of the Courts or Tribunals, which are not under the judicial review and administrative control and supervision of the High Court---Where the Constitution makers wanted to provide judicial forums other than what is envisaged by Arts. 175, 202 & 203 of the Constitution, same has expressly been provided in the Constitution.

(x) Anti-Terrorism Act (XXVII of 1997)---

---S. 34---Power of Government to amend the Schedule to the Act ---Validity--Held, delegation of such power to the Government by the Legislature is not an unusual phenomenon---Such

power is normally delegated to Government in order to implement the object of a statute or to work out certain detail but the offences mentioned in the Schedule should have nexus with the object of the Act---Provision of S.34, Anti-Terrorism Act, 1997 is not ultra vires.

Zaibtun Textile Mills Ltd. v. Central Board of Revenue and others PLD 1983 SC 358; Muhammad Hussain Ghulam Muhammad and another v. The State of Bombay and AIR 1962 SC 97; Government of Balochistan through Additional Chief Secretary v. Azizullah Memon PLD 1993 SC 341 and Darvesh M. Arbey v. Federation of Pakistan PLD 1977 Lah. 846 ref.

(y) Anti-Terrorism Act (XXVII of 1997)---

---S. 16---Oath by Judges of Special Courts---Suitable amendment in S.16 for the non-Muslim Judges was directed to be made---Such declaration in respect of the provision of the Act will, however, not affect the trials already conducted and convictions recorded under the Act and the pending trials may continue subject to this judgment.

(z) De facto, doctrine of--

--- Principle of de facto exercise of power by a holder of the public office is based on sound principles of public policy to maintain regularity in the conduct of public business to save the public from confusion and to protect private right which a person may acquire as a result of exercise of power by the de facto holder of the office.

Imran v. Presiding Officer, Punjab Special Court No.VI, Multan and 2 others PLD 1996 Lah. 542; Chenab Cement Product (Pvt.) Ltd. and others v. Banking Tribunal, Lahore and others PLD 1996 Lah. 672; Malik Asad Ali and others v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs, Islamabad and others PLD 1998 SC 161 and S.P. Sampath Kumar v. Union of India and others AIR 1987 SC 386 ref.

(aa) Anti-Terrorism Act (XXVII of 1997)---

---S. 19---Penal Code (XLV of 1860), Ss.302, 324 & 304---Constitution of Pakistan (1973), Art.185(3)---Petition for leave to appeal---Contention was that Special Court committed serious irregularities in the trial of the case inasmuch as the charge was wrongly framed and evidence was not recorded in terms of S.304, P.P.C. and therefore conviction and sentence could not be sustained--Held, such alleged irregularities could not be urged in the petition for leave to appeal before Supreme Court as same had arisen out of the dismissal of the petitioner's Constitutional petition in the High Court---Such irregularities could have been urged before the Trial Court and/or before the Appellate Tribunal--Supreme Court would not interfere with impugned judgments on such technical grounds--If a Court was satisfied about the guilt of the accused person concerned, the technicalities should be overlooked without causing any miscarriage of justice---Special Court having found the accused guilty and Appellate Tribunal having affirmed such finding, petition for leave to appeal was disposed of by Supreme Court accordingly.

State through Advocate-General Sindh, Karachi v. Farman Hussain and others PLD 1995 SC 1 ref.

Per Irs:iad Hassan Khan. J.-

(bb) Anti-Terrorism Act (XXVH of 1997)---

---Preamble---Constitution of Pakistan (1973), Art.37(d)---Promotion of social justice and eradication of social evils---No objection can be taken to the establishment of Special Courts for Speedy Trials and prevention of terrorist acts/heinous offences under the Anti-Terrorism Act, 1997---Such Courts being validly constituted Courts are subordinate to the High Court and have to perform judicial functions under the Constitution and provisions contained in the Act (except which have been declared ultra vires).

'Efficiency in the Courts' is serious national problem, an expression of greater public concern than even the threat of war. Article 37(d) of the Constitution of Islamic Republic of Pakistan, 1973, enjoins upon the State to ensure 'inexpensive' and 'expeditious justice'. Thus visualized, speedy resolution of civil and criminal cases, is an important Constitutional goal, as envisaged by

the principles of policy enshrined in the Constitution. It is, therefore, not undesirable to create Special Courts for operation with speed but expeditious disposition of cases of terrorist activities/heinous offences have to be subject to Constitution and law. Viewed in this perspective, no objection can be taken to the establishment of Special Courts for speedy trials and prevention of terrorist acts/heinous offences under the Anti-Terrorism Act, 1997.

The Special Courts are, therefore, validly constituted Courts but they have to perform judicial functions under the Constitution and the provisions contained in the Act except those which have been declared ultra vires.

A Special Court is a Court subordinate to the High Court. It has to act under its supervision and control.

Iftikhar Ahmed v. The Muslim Commercial Bank Ltd. PLD 1984 Lah. 69 ref.

(cc) Administration of justice---

---Court-delay in disposal of cases---Remedy

The solution of the problem of Court-delay does not necessarily lie in a large scale addition of new Judges or creation of Special Courts but delay in the disposal of cases can be reduced only by Judges who are willing to insist that the lawyers/prosecutors/parties meet reasonable deadlines for the conclusion of the trial. This effort will require concern and commitment on the part of the Judges. Judges will probably receive considerable "heat" from lawyers/prosecutors understandably upset by changes in their scheduling prerogatives. Delay in disposition of cases can be eliminated to a larger extent through good Court management and not necessarily by creation of new Courts and increase in the strength of Judges. It is for the Presiding Officer of the Court to evolve strategies within the parameters of the law/procedure for accelerating the pace of disposition of civil and criminal cases, resulting in reduction of delay and clearance of backlog. However, sacrifice of justice to obtain speedy disposition of cases could hardly be termed as justice. A balance ought to be maintained between the two commonly known maxims, "justice delayed is justice denied" and "justice rushed is justice crushed". Speed and efficiency should not be at the expense of justice.

Justice Delayed (a publication of the National Center for State Courts in Cooperation with the National Conference of Metropolitan Courts) by Thomas Church Jr. quoted.

(dd) Anti-Terrorism Act (XXVII of 1997)---

---S. 32---Criminal Procedure Code (V of 1898),. Preamble ---Qanun-e-Shahadat (10 of 1984), Art.1(2)---Special Court shall be deemed to be a Court of Session by virtue of S.32, Anti-Terrorism Act, 1997---Provisions of Criminal Procedure Code, 1898 and Qanun-e-Shahadat, 1984 are applicable to the proceedings before a Special Court.

The provisions of the Code of Criminal Procedure, 1898 which is a self-contained Code for the holding of criminal trials, has been made applicable to the proceedings before a Special Court and for the purpose of the said provisions of the Code, a Special Court shall be deemed to be a Court of Session by virtue of section 32 of the Anti-Terrorism Act. By virtue of Article 1(2) of the Qanun-e-Shahadat, 1984, its operation extends to the whole of Pakistan and applies to all judicial proceedings in or before any Court, including a Court martial, a tribunal or other authority exercising judicial or quasi judicial powers of jurisdiction, but does not apply to proceedings before an arbitrator.

M. Asghar Khan Rokari, Advocate Supreme Court for Petitioner (in C.P. No.251 of 1998).

M. Ikram Ch., Advocate Supreme Court and M.A. Zaidi, Advocate-on Record for Petitioner (in C. P.No.15 of 1997). ,

K.M.A. Samdani, Senior Advocate Supreme Court and Mehr Khan Malik, Advocate-on-Record for Petitioner (in C.P. No.20 of 1997).

Syed Iftikhar Hussain Gilani, Advocate Supreme Court alongwith Mehr Khan Malik, Advocate-on-Record for Petitioners (in C.Ps. Nos.21 and 26 of 1997).

Sh. Khizar Hayat, Advocate Supreme Court for Petitioners (in C.P. No.36 of 1997).

Baseer Naveed (in person) and Ijaz Muhammad Khan, Advocate-onRecord for Petitioner (in C.P.No.61 of 1997).

Mehr Khan Malik, Advocate-on-Record for Petitioner (in C.P. No. 1129 of 1997).

Ch. Muhammad Farooq, Attorney-General for Pakistan alongwith Ch.Akhtar Ali, Advocate-on-Record, Yasmin Saigol, Assistant Advocate General, Punjab and M. Iqbal Radd, Additional Advocate-General, Sindh for Respondents (in above Petitions) and for Petitioners (in C.Ps. Nos. 423 to 431 of 1998).

M. Ismail Qureshi, Advocate Supreme Court for the Complainant (in C. P. No. 1129 of 1997).

Dates of hearing: 11th May to 15th May, 1998.