

**IN THE PESHAWAR HIGH COURT,**  
**D.I.KHAN BENCH.**  
*(Judicial Department)*

**Criminal Appeal No.35-D of 2019**  
**Criminal Misc. No. 19-D/2019**

**Riaz Muhammad**  
**Versus**  
**The State etc**

**JUDGMENT**

For Appellants: **Mr. Saif-ur-Rehman Khan Gandapur,**  
**Advocate:**

For the State: **Mr. Adnan Ali, Assistant Advocate**  
**General.**

For the complainant: **Mr. Asad Aziz Mehsud Advocate**

Date of hearing: **17.05.2022**

\*\*\*\*\*

**MUHAMMAD FAHEEM WALI, J.—** The appellant has assailed the judgment dated 17.09.2018, passed by the Assistant Commissioner/ADM, Wana, South Waziristan Tribal District, whereby convict/ appellant Riaz Muhammad son of Din Muhammad alias Din Bobrai, nominated for the murder of Abdullah son of Hazrat Khan, was convicted under Section 302 PPC read with Section 16 of FIGR-2018 by the Assistant Commissioner/ADM Wana invoking powers under



Section 7 of the FATA Interim Governance Regulations, 2018, and sentenced to twenty-five (25) years rigorous imprisonment.

2. Summarized facts of the case are that the complainant Hafiz Hazrat Umar son of Hazratullah Yar Gul Khel, made a report to the political administration of Wana, District South Waziristan, to the effect that the accused Riaz Gul on 23.05.2018 at about 06:00 PM murdered his brother Abdullah by making firing at him. The motive of occurrence was on the sale/exchange of motorcycle and cell phone. After the occurrence, the accused was arrested and he recorded his statement under Section 164 Cr.P.C. wherein he confessed his guilt. Finally, the Assistant Commissioner/ADM Wana, vide impugned Order dated 17.09.2018, in view of the confessional statement of accused/appellant, convicted him under Section 302 PPC read with section 16 of FIGR-2018, and sentenced him to undergo rigorous imprisonment of twenty-five years. Aggrieved of his conviction & sentence, the petitioner filed present jail appeal with an application to condone the delay in filing the appeal.

3. Arguments of learned counsel for the parties assisted by learned Addl: A.G representing the State heard and record gone through with their valuable assistance.

4. It is the case of prosecution that the accused executed the brother of complainant by making firing with the Kalashnikov; and after his arrest, the accused recorded his confessional statement under Section 164 Cr.P.C. therefore, he was sentenced to rigorous imprisonment for twenty-five years. Learned counsel for the appellant mainly argued that the conviction & sentence so awarded to the accused is illegal as, after the merger of FATA into province Khyber Pakhtunkhwa, the Assistant Commissioner/ADM was having no jurisdiction to try criminal cases thus, the impugned order being void, limitation is condonable. The learned AAG assisted by learned counsel for complainant unanimously argued that the impugned order was passed under the FATA Interim Governance Regulations, 2018, and therefore, the impugned conviction is liable to be maintained particularly when the appeal has been filed beyond the scope of limitation provided for filing appeals under Section 410 Cr.P.C.



5. Before dilating upon the merits of the appeal, we would like to discuss the application for the condonation of delay. Although the law of limitation is the foremost element for the decision of a case, and in case of failure in complying with the law of limitation, other merits cannot help the party

who travelled beyond the period of prescribed limitation. But in criminal cases, particularly, involving conviction of an accused person, the situation is different and the delay always remains subservient to the merits of case because, the right to appeal provided under Sections 410 of the Criminal Procedure Code against an order of conviction is also the fundamental right of an accused as enshrined in Article 9 of the Constitution of Islamic Republic of Pakistan, 1973. The said Article 9 of the Constitution provides a citizen for protection of his life and liberty which reads that "no person shall be deprived of life or liberty save in accordance with law".

6. The term '*save in accordance with law*' means the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 9 of the Constitution of Islamic Republic of Pakistan, 1973, have to be fair, carefully designed to effectuate, not to subvert, the substantive right itself. In this regard, a fair trial is the first imperative of the dispensation of justice. Further Article 10 of the Constitution gives safeguard as to arrest and detention in certain cases. Clauses (1) and (2) of the Article 10 apply to a person arrested or detained under law otherwise than preventive detention. Article 9 of Constitution supplements



the various requirements laid down under Article 10 of the Constitution. Personal liberty cannot be cut out or cut down without fair legal procedure. Enough has been set out to establish that a convict, deprived of his freedom, by the Court's sentence but entitles to an appeal against such verdict as part of his protection under Article 9 of the Constitution and as implied in his statutory right of appeal. It is a fact that the convict irrespective of any means, are particularly handicapped class. The morbid cell which confines them to walls also cut them off from the world outside. Legal remedies are obtained beyond their physical and even financial reach. Under the said circumstances denying the condonation of delay in filing the appeal outrightly will cause further hardship, inconvenience and the same will be prejudicial to their interest. A fundamental right by no stretch of imagination can be taken away by way of technicalities. Thus, keeping these fundamental and statutory rights of a convict in mind, we deem it apposite to first discuss the merits of appeal and then to take-up the application for the condonation of delay for decision, in the peculiar background of present appeal.

7. Now advertng to the merits of the case and in this regard the primary contention of the learned counsel for


appellant was that the impugned order was passed after the 25<sup>th</sup> Constitutional Amendment, therefore, the same is ab-initio void being unconstitutional. Suffice it to say that Constitution (Twenty-fifth Amendment) Act, 2018 was passed from the National Assembly Pakistan on 24<sup>th</sup> May, 2018 and thereafter to provide an interim system of administration of justice, maintenance of peace and good governance in the FATA, due to repeal of Frontier Crime Regulation, 1901, the President of Pakistan promulgated "FATA Interim Governance Regulation, 2018" (FIGR-2018) which was notified in the official gazette on 29.05.2018. Be that as it may, this Court in a division bench judgment in W.P. No.3098-P/2018 vide Judgment dated 30.10.2018 declared the said regulation as ultra vires of the Constitution to the extent of allowing the Commissioners to act as Judges; Council of Elders deciding Civil and Criminal matter; Constitution of Qaumi Jirga; modified applications of Chapters VIII and XLII of the Code for Security; Third Schedule; administered area etc and it was held that after one month from the date of judgment, any decision of civil or criminal nature would be void ab-initio; and thereby the target date was set as 30.11.2018. The referred judgment dated 30.10.2018 was though challenged in Civil Petition



No.773-P/2018 but the same was dismissed as having been withdrawn, with certain observations by the worthy Apex Court, vide Judgment dated 31.12.2018 in the case of *“National Commission on Status of Women through Chairperson and others Vs. Government of Pakistan through Secretary Law and Justice and others” (PLD 2019 Supreme Court 218)* and thereby six months’ time was given for the development of infrastructure to take steps to spread a uniform system of Courts of ordinary jurisdiction in Khyber Pakhtunkhwa, mandating the local law enforcing agencies to ensure that the rule of law is observed by reducing jirgas/panchayats etc to arbitration forums.

8. In this view of the matter, as aforesaid, after the judgment dated 30.10.2018 in WP No.3098-P/2018, FIGR-2018 were effective for all practical purposes from the date of its promulgation till 30.11.2018. The order impugned in this appeal was passed on 17.09.2018 even prior to the ibid judgment of this Court, therefore, completely fall within the reign of FIGR-2018, and its legality on this score cannot be questioned.

9. Now the final question for ascertainment before us is, ‘whether the impugned order was passed fully in accordance with the provisions of FIGR-2018?’ and in this regard we




have noted that the impugned order was passed by the Assistant Commissioner by exercising powers as Additional District Magistrate. Regulation 2(f) of the FIGR-2018 recognized an Assistant Commissioner to be a Judge to adjudicate criminal matters in each tribal district and vested with the requisite powers under the Code of Criminal Procedure, 1898, to try offences. Clauses 3 & 4 of the Regulation-7 further conferred all the ordinary powers of a Magistrate of the First Class as specified in Schedule II and additional powers as specified in Part I of Schedule IV of the Cr.P.C. upon the Assistant Commissioner to pass any sentence of imprisonment or fine, or both, as provided by the Regulation. Further that when exercising powers of a Deputy Commissioner under the FIGR-2018, an Assistant Commissioner shall be deemed, for the purpose of regulation, to be the District Magistrate and shall exercise all or any of the powers specified in the First Schedule of the Regulation. Procedure of the trial in criminal case, conviction and manner of enforcing sentences, have been provided in Regulations 13, 16 & 17 respectively, which read as under:

### **13. Criminal Reference to Council of**

**Elders.-** (1) Whenever an offence, of which the Deputy Commissioner is






competent to take cognizance under this Regulation, is committed, the case shall be registered and the accused shall be produced before the Judge concerned within twenty four hours of the arrest of the accused excluding the time necessary for the journey from the place of arrest to the Judge having jurisdiction. The Judge shall make an order in writing referring the matter to the Council of Elders for its finding on facts, who after holding necessary inquiry and hearing the parties and witnesses, submit its findings to the Judge. The Judge shall appoint the members of the Council of Elders within ten days from the date of arrest of the accused and shall require the Council of Elders to submit its findings on the question referred to within ninety days.

(2) Where reference to the Council of Elders is made under subsection (1) and the members of the Council have been nominated by the Judge, the

names of the members so nominated be communicated to the accused and the complainant, and any objection taken thereto by any of the parties, shall be recorded. The Judge shall dispose of the objection after hearing the parties and the reasons thereof be recoded and appoint the members of the Council accordingly.

(3) On receipt of finding of the Council of Elders, the Judge shall decide the legal issues, if any, and pass an order in accordance with the findings of the majority of the Council of Elders and applicable law.



**16. Punishment on conviction.-** Where the Judge convicts a person under sub-section (3) of Section 13, he may pass sentence of imprisonment or fine or both for the offence, provided that the sentence shall not exceed twenty five years.

**17. Manner of enforcing sentences.** Any sentence passed under section 16 shall be

executed in the manner provided for the execution of sentence in Chapter XXVIII of the Code and:

- (a) an offence punishable with imprisonment for life shall be punishable with rigorous imprisonment for a term which may extend to twenty five years.
- (b) the imprisonment in default of payment of fine shall be simple and the provisions of section 63 to 70 of the Pakistan Penal Code, 1860 (Act XLV of 1860) shall, subject to aforesaid provisions, apply to sentences passed under this Regulation; and
- (c) the sentence of imprisonment and fine provided by the Pakistan Penal Code, 1860



(Act XLV of 1860) or any other law specified in the Second Schedule to this Regulation for the offence shall be applicable to such offence committed in FATA.

10. It is clear from the above extracted provisions of Regulation 13 that upon commission of any cognizable offence, falling within the competence of Deputy Commissioner, the same shall be registered and after arrest of accused, he shall be produced before the Judge within 24 hours of his arrest, who shall refer the matter to the Council of Elders for its finding on facts but after holding necessary inquiry, hearing parties and witnesses; and then the council of elders shall submit its findings on the fact to the judge and latter shall record its findings on the legal issues, if any, and pass order accordingly. This specific provision for hearing parties and their witnesses by the council of elders before recording its finding on facts, become more nuanced when viewed in the constitutional context. Right to life and liberty, right to fair trial and right to dignity are fundamental rights guaranteed under Articles 9, 10-A and 14 of the Constitution. The importance of human life goes to the heart of these



fundamental rights, the rigorous two-tiered process of appraisal, assessment and examination under the appellate jurisdiction of this Court also meets the test of these fundamental rights. The duty cast on the Court, or Council of Elders in the case of FIGR-2018, in deciding a criminal case entailing punishment of life imprisonment is a heavy one and can only be discharged once the entire evidence is recorded and reappraised by the Judge on the legal issues to fully exhaust all the points, having a bearing upon the guilt or innocence of an accused person.

11. Admittedly, and undeniably, after the arrest of appellant/accused, the matter was not referred by the Assistant Commissioner/Judge to the Council of Elders for recording its finding on facts after inquiry and hearing parties and their witnesses. A Judge could pass sentence under Regulation 16 only after satisfying the mandate of Regulation 13(3) and that can be done subject to submission of findings on facts by the Council of Elders. Hence, provisions of Section 16 are supplemental to Section 13(3) and cannot be applied in isolation thereto. The sentence can be enforced under Regulation 17 in the cases where provisions of Regulation 16 are fulfilled. As discussed hereinabove, the matter was not referred to the council of



elders for recoding its findings on facts and noncompliance of mandatory provisions of Regulation 13 invalidates the impugned conviction & sentence by the Assistant Commissioner/ADM vide order dated 17.09.2018. For this reason, the impugned conviction and sentence are legally unwarranted, and this fact brings the appeal of appellant within the scope of Articles 9, 10-A and 14 of the Constitution. Accordingly, the delay in filing the appeal is condoned and we while treating the appeal within time allow this appeal, set aside the impugned conviction and sentence awarded to the appellant Riaz Muhammad, vide order dated 17.09.2018, passed by Assistant Commissioner/ADM Wana, South Waziristan Tribal District and remand his case back for *denovo* trial. Here, we deem it in the fitness of things to clarify that the criminal proceedings against appellant were initiated within the purview of provisions of FATA Interim Governance Regulation, 2018, which are deemed to have been repealed in view of the above referred Judgments of this Court as well as worthy Apex Court, therefore, this judgment cannot review the provisions of repealed act as contemplated under Article 264 of the Constitution of Pakistan, particularly when a judicial system has been set-up in the erstwhile FATA and this Court in the Reference/Suo Moto No.01-P of



2019 titled "Secretariat, District Judiciary, Peshawar High Court, Peshawar VS. Provincial Government & others" decided vide Judgment dated 20.03.2019, has already resolved the ambiguity of transfer of pending Civil & Criminal matters from erstwhile political administration to the newly established Civil, Session and District Courts in the Tribal Districts in the manner:

*"11. in view of the above quoted sections of law it became very clear that under section 24 of the CPC & 526 Cr.PC, this Court has got ample powers to transfer cases from one Court of law to another, therefore, summarizing the process of subject matter pending before the previous hierarchy, it is held that under trial cases be transferred to the Court of Civil Judge/Judicial Magistrate, having jurisdiction under the law, appeals to the Court of District & Sessions Judges and thereafter proceedings excluding past and closed chapters would be filed before this Court, as revisional matter. On criminal side, all pending cases in trial Court*



*irrespective of the same pending before Additional Commissioner or Commissioner, but in trial stands transferred to the respective Court i.e. Judicial Magistrate or Sessions Judge, as defined earlier, where the punishment proposed is more than seven years will be tried by Session Judge and below would be Magistrate. Whether the appeals are pending against conviction of four years and above, the same would be filed before this Court.*

12. Resultantly, the case is sent back to the prosecution to submit challan before the learned Sessions Judge South Waziristan, who shall conduct trial *denovo* strictly in accordance with law. As the appellant was arrested on 24.05.2018 and since then he is under the custody, and as, submission of challan by prosecution and *denovo* trial by the learned trial Court would certainly take further time; therefore, in view of the clause (B) of 3<sup>rd</sup> Proviso of Section 497(1) Cr.P.C. the appellant is directed to be released on bail subject to furnishing bail bond in the sum of Rs.10,00,000/- (ten lac) with two sureties each in the like amount to the



satisfaction of learned Sessions Judge South Waziristan  
Tribal District.

13. These are the reasons of our short order of even date.

**Announced.**

**17.05.2022**

(\*M/Subhan)

**JUDGE**

**JUDGE**

Office  
File  
30/5

**(D.B)**

**Hon'ble Mr. Justice Ishtiaq Ibrahim and**  
**Hon'ble Mr. Justice Muhammad Faheem Wali**