

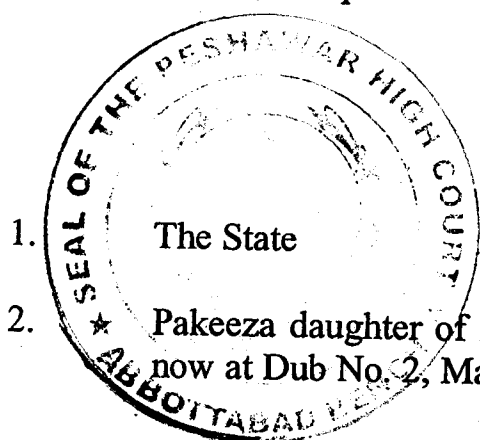
BEFORE THE PESHAWAR HIGH COURT,  
ABBOTTABAD BENCH

Criminal Appeal 251-A /2015

1. Muhammad Faizan, alias, Faizi son of Mohammad Irshad, resident of Dhani Battal, presently Mohallah Dharmian Mansehra, now at Central Prison, Haripur.
2. Qari Mohammad Naseer son of Mohammad Maskeen, resident of Khail Phulra, presently Dab No. 2 Mansehra, now at Central Prison, Haripur.

....CONVICTS/APPELLANTS

VERSUS



.....RESPONDENTS

CHARGE VIDE FIR NO. 540 DATED 12/05/2014  
UNDER SECTIONS 376(2)/114/120-B PPC READ  
WITH SECTION 6/7 ATA, POLICE STATION  
CITY, DISTRICT MANSEHRA.

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Peshawar High Court  
Abbottabad Bench  
Authorized Under Section 76 of the Ordinance

CRIMINAL APPEAL UNDER SECTION 25 OF THE  
ANTI TERRORISM ACT, 1997 READ WITH SECTION  
410 Cr.PC AGAINST THE JUDGMENT DATED  
05/03/2015 PASSED BY LEARNED JUDGE, ANTI  
TERRORISM COURT, HAZARA DIVISION,  
ABBOTTABAD, WHEREBY, THE APPELLANTS WERE  
CONVICTED UNDER SECTION 376(1) PPC AND WERE  
SENTENCED TO RIGOROUS IMPRISONMENT FOR

969  
No 11.3.15

FILED

11/3/15

## JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,  
ABBOTTABAD BENCH.

JUDICIAL DEPARTMENT

**Cr.A No. 25-A of 2015**

## JUDGMENT

Date of hearing 05-11-2015

Appellant(s)/Petitioner (s) Muhammad Faizan & other by

Respondent (s) Siddh. H. In Patel and Gulam

Mr. Tufan Swati & M. Arshad Anwar, Adv. for complainant

**QALANDAR ALI KHAN, J:-** Criminal appeals by

Hussain Vs State and another (24-A/2015), Mst.

Pakeeza vs. Mst Anam Saleem & State (31-A/2015),

State through Additional Advocate General Vs. Mst.

Anam Saleem (50-A/2015) and Criminal Revision by

Mst Pakeeza Vs Qari Muhammad Nasir etc (06-

A/2015) arise out of the same case vide FIR No.540

dated 12.05.2014 under Sections 376 (2)/114/120-B

PPC and Section 6/7 ATA Police Station City,

Mansehra, therefore, this single judgment/order shall

~~also dispose of the aforementioned appeals/revision.~~

2. The case was registered on the report of

Mst. Pakeeza, complainant, who reported to the

police in Police Station City Mansehra that after

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*06/15*  
Peshawar Court  
Abdusamad Khan  
Authorized under Section 20 of the Ordinance

appearing in the paper of chemistry in Sky International College from 0900 hours to 1200 hours, she along with her friend Mst Anam Saleem, daughter of Muhammad Saleem, resident of Dab No.2, started for her home and when reached near Abasin College at 12:30 hours a black colour corolla car was found there. According to the complainant, she was made to sit in the car by the said Anam Saleem. In the car, two young boys namely Qari Naseer and Hussain were already present, who locked the car and Qari Naseer drove the car towards Balakot road, wherefrom the car was reversed by them when they saw the traffic police and in the meantime a third young boy namely Muhammad Faizan alias Faizi emerged from the boot of the car and took the rear seat close to Anam Saleem, and when the car reached near GhaziKot on return, Qari Naseer handed over steering of the car to Hussain and himself occupied the rear seat while Faizan alias Faizi took the front seat and Qari Naseer committed rape on her. The car was then driven to APS Abbottabad and on return there-from Qari Naseer took the driving seat while Faizan alias Faizi committed *rape*, and then returned to Mansehra

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 Abbottabad Bench  
 Authorized Under Sec 75 A & 16 Q Ord 113

Township, where she and Anam Saleem were dropped and after taking mobile phone of Mst Anam Saleem, they went away. On reaching home, she narrated the occurrence to her uncle Mirza Arshad Zaman who brought her to the Police Station for lodging the report, wherein, she charged Qari Naseer, Faizan alias Faizi, Hussain and Mst Anam Saleem for commission of the offences.

3. After registration of the case, investigation was conducted and on completion of investigation, challan was submitted in the Anti Terrorism Court Hazara Division, Abbottabad, leading to trial of the accused named in the FIR. On conclusion of trial, the learned Judge, ATC, Abbottabad, found accused Qari Naseer and Faizan alias Faizi guilty of offence under Section 376 (1) PPC and convicted and sentenced them to undergo R.I for 14 years. Accused Hussain son of Mushtaq Ahmed was also found guilty of offence under Section 376 (1) PPC but was convicted and sentenced to R.I for ten years. Co-accused Mst Anam Saleem was acquitted of the charges, vide

impugned judgment dated 05.03.2015. The judgment of conviction and sentences was, however, recorded by the learned Judge, ATC, after holding

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 O. G. Khan  
 Peshawar High Court  
 Abbottabad Bench  
 Authorized Under Section 206 of Cr.P.C.

that there was nothing on file to show that the offence was designed to create panic, fear or insecurity in the General Public, hence, the attraction of ATA was ruled out; but at the same time, it was held that despite this, the Court was free to decide the case under ordinary law as the superior Courts in a 'host of cases' had done so without *de novo* trials. It may be added here that the 'host of case' were not referred to, but a long list of reported cases, referred to by counsel for the parties, was furnished separately at the tail end of the judgment, without specifying as to what were those 'host of cases' wherein the superior Courts had decided the cases under ordinary law without *de novo* trials.

4. After marathon arguments, stretching over several days, the learned counsel for the parties converged on the point that a judgment without jurisdiction was not sustainable. It may be pointed out here that in the impugned judgment, the learned Judge, ATC, had vividly concluded that there was nothing on the file to show that the offence was designed to create panic, fear or insecurity in the general public, hence, the attraction of ATA was ruled out. Needless to say that an Anti Terrorism

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Examiner  
Peshawar High Court  
Abbottabad Bench  
Attested Under Section 75 of the Ordinance

Court is vested with jurisdiction under Section 12 of the Anti Terrorisms Act, 1997, only to try cases under the Anti Terrorism Act, as there is a special provision under Section 23 of the Act to transfer cases of offences, which were not scheduled offences, to ordinary Courts. It is worthwhile to reproduce the provision of Section 23 ATA as under;

"Power to transfer cases to regular Courts.- Where, after taking cognizance of an offence, (Anti Terrorism Court) is of opinion that the offence is not a scheduled offence, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any Court having jurisdiction under the Code, and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence."



5. The word 'shall' used in the section leaves no discretion with the Anti Terrorisms Court once it forms opinion that the offence is not a scheduled offence. In this case, there is no doubt that the learned Anti Terrorism Court formed the opinion that the offences were not scheduled offences, therefore, it was incumbent upon the learned Judge Anti Terrorisms Court to transfer the case for trial to the Court of ordinary jurisdiction. The language of the section is also clear with regard to the stage when

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Peshawar High Court  
Abbottabad Bench  
Authorized Under Section 23 of the Ordinance

the case can be transferred under the provision, which is after taking cognizance of the offence by the Anti Terrorism Court. Obviously, not only cognizance was taken by the Anti Terrorism Court, but trial was also conducted and judgment was rendered on the conclusion of trial.

6. Having said that, we found no second opinion about remand of the case to the Court of ordinary jurisdiction under the Cr.PC for proceeding with trial of the offences as if it had taken cognizance of the case. It may not be out of place to point out here that the learned Judge, ATC, proceeded on wrong premise while holding that superior Courts had decided cases under ordinary law without *de novo* trials, as there was difference in decision of cases in appeal and decision at the trial stage. Anyhow, it is an established principle of law that a judgment passed without jurisdiction is nullity in the eye of law. There was also consensus that the learned Judge, ATC, arrived at the conclusion that the offences with which the accused were charged were not scheduled offences while recording judgment, therefore, there was no need of *de novo*

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 Examiner  
 Peshawar High Court  
 Abbottabad Bench  
 Approved Under Sec 75 Arts Ord 115

trial, and the ordinary Court was to proceed with the case from the stage of final decision.

7. There were, however, heated arguments whether the accused would enjoy the pre-judgment status i.e to remain on bail or confine in jail; or their conviction in the case and sentence awarded to them would have any bearing on their erstwhile status; but the arguments ended on the agreed note that with setting aside the judgment, conviction and sentence, the accused would revert back to their pre-judgment position.

8. In view of the forgoing discussion, the impugned judgment dated 05.03.2015 of the learned Judge, ATC, Abbottabad is set aside, together with the conviction and sentences there-under; and the case stands transferred to the Court of learned Sessions Judge, Mansehra, for decision afresh after providing opportunity of hearing to the parties. Accused Qari Muhammad Naseer and Muhammad Faizan alias Faizi were in custody at the time of decision of the case, therefore, they shall remain in custody, as before. Accused Husain Mushtaq was on bail, but was sent behind the bars after his conviction and sentence in the case. Therefore, he

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Ex. 101  
Chawar High Court  
Abbottabad Bench  
Under Sec 25-A of Ord.



be released on bail subject to his furnishing bail bonds in the sum of Rs.400000/- with two sureties each in the like amount to the satisfaction of Illaqa/Duty Judicial Magistrate, Mansehra. Accused Anam Saleem was also on bail at the relevant time but since she was acquitted in the case and not taken into custody, she need not furnish fresh bail bonds and shall remain on bail, as before.

9. The appeals and revision petition are disposed of accordingly.

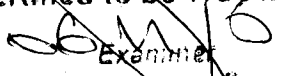
**Announced:**  
**05.11.2015**

  
JUDGE

  
JUDGE

Justice Lal Jan Khattak.  
Justice Qalandar Ali Khan

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Examiner  
Peshawar High Court  
Abbottabad Bench  
Authorized Under Section 76 A of Ordinance