

JUDGMENT SHEET

PESHAWAR HIGH COURT, PESHAWAR
(Judicial Department)

J.Cr.A No. 1184-P/2019 with
Cr.M No. 682-P/2019.

JUDGMENT

Date of hearing: **23.12.2019**


Appellant:- (Shah Zal) by Mr. Abdul Hashim
Khan, Advocate.

Respondent: (The State) by Syed Sikandar
Hayat Shah, AAG.

WIQAR AHMAD, J. – This order is directed

to dispose of Jail Criminal Appeal No. 1184-P
of 2019 filed by the appellant namely Shah Zal
son of Haider Khan prisoner at Central Prison
Bannu against judgment dated 21.02.2017 of
the erstwhile FATA Tribunal Peshawar. Appeal
dated 28.09.2019 was sent to this Court vide
letter 4635 dated 20.09.2019 of the
Superintendent Central Prison Bannu.

2. Brief facts of the case, relevant for
disposal of the instant appeal, are that the
accused/appellant namely Shah Zal Khan son



of Haider Khan resident of Khapyanga faced trial along with other co-accused before the Court of Political Agent Kurram Agency on the charges of committing triple murder of the victims namely Mir Bat Khan (deceased), Fazle-e-Amin (deceased) and Nasir Khan (deceased) and making an attempt at the lives of Rafiq Shah and Irfanullah by firing at them effectively on 05.03.2001 at 08:00 p.m. on the place of occurrence. A council of elders had been nominated by the Political Agent Kurram after necessary investigation of the case. The council of elders had returned their award/verdict unanimously on the terms of reference given to them, wherein the accused/appellant had been found guilty of the offence along with other co-accused namely Muhammad Umar, Tariq Shah, Hakeem Khan and Faraz Khan. The Political Agent Kurram

Agency vide his order dated 09.01.2002 had convicted all the accused to 14 years rigorous imprisonment under section 302 of the Pakistan Penal Code, 1860 (hereinafter referred to as "**PPC**") read with section 11 of the Frontier Crimes Regulation, 1901 (hereinafter referred to as "**FCR**") (repealed) on each account and also to pay a fine of Rs. 500,000/- each, or in default to suffer rigorous imprisonment for a term of 5 years each. A sentence of 10 years under section 307 PPC had also been awarded to the appellant and other co-accused on two counts. The sentences were ordered to run consecutively. On realization of fine, Rs. one lac was ordered to be paid to legal heirs of deceased and Rs. 50,000/- to each injured. Appeal was filed against the judgment of conviction before the Court of Commissioner FCR Kohat. On acceptance of which the

judgment of conviction dated 09.01.2002 was set aside and the case was remanded to the Political Agent Kurram Agency for *denovo* trial in line with local *Rewaj* of TORIZONA.

3. Feeling aggrieved from the said judgment, the prosecutor concerned filed a revision petition before the Tribunal FCR (former) which was accepted vide judgment dated 26.04.2003 to the effect that the judgment of Commissioner FCR dated 02.04.2002 was set aside and that the Political Agent Kurram Agency dated 09.01.2002 was restored. The convict then filed a writ petition No. 1154 of 2007 before this Court, which was heard along with other connected petitions and it was finally decided that the sentences were ordered to run concurrently. The petitions for leave to appeal were filed before the Hon'ble Supreme Court of Pakistan. The Hon'ble Apex Court was pleased to convert the petitions into

appeals and allowed the same by setting aside the judgment of this Court dated 04.12.2008.

4. The appellant was undergoing his sentence when he had filed another jail criminal appeal dated 16.11.2015, forwarded by the Superintendent Central Prison Bannu vide his letter No. 4670 dated 18.11.2015 to the Registrar of FATA Tribunal Peshawar. The said appeal was dismissed vide order dated 21.02.2017 of the FATA Tribunal (former). The appellant had filed the instant appeal against the last mentioned order.

5. Learned counsel for the appellant submitted during the course of his arguments that the consecutive running of the sentences awarded to the appellant had been against the basic principle of law, particularly section 71 of the PPC and sections 12 & 13 of the FCR. He further added that since FCR had been repealed


by way of 25th Constitutional Amendment to the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as "*the Constitution*"), therefore the consecutive running of the sentences should be reviewed according to law and principles of criminal dispensation of justice prevalent in the country.

6. The learned Astt: A.G, however opposed the arguments of learned counsel for the appellant and stated that the issue had been a past and closed transaction, which could not be re-agitated.

7. I have heard arguments of learned counsel for the appellant as well as learned Astt:A.G. for the State and perused the record.

8. Perusal of record reveals that this Court had earlier allowed the writ petition of the petitioner/appellant after finding the order of consecutive running of the sentences to be

against law, particularly sections 12 & 13 of the FCR as well as section 71 of the PPC. The Hon'ble Supreme Court of Pakistan while hearing petitions for leave to appeal in the case in hand against the judgment of this Court, had held as follows;



"Clause of Article 247 of the Constitution unambiguously excludes the jurisdiction of the Supreme Court and the High Court in the matters relating to the Federal Administered Tribal Area. The controversy regarding the extent, to which this jurisdiction is ousted, has been settled by this Court in case of 'Qaum Bangash' (Supra). In criminal matters, it has been held, that the determining factor ousting jurisdiction of the High Court and the Supreme Court under clause 7 of Article 247 of the Constitution is the location of the commission of crime. If committed in the tribal area, the jurisdiction of the Superior Courts would stand excluded. This principle has been consistently followed since then. The legality or otherwise of an order passed by any forum exercising powers under the F.C.R. could have been examined by the High Court only if it possess jurisdiction under Article 199 of the Constitution. As held the High Court did not possess jurisdiction over trial under the F.C.R of crimes committed in the Tribal Area. If on the one hand the sentences on three counts of imprisonment of 14 years have been ordered to run consecutively and the respondents feel aggrieved of the same, on the other hand, they have benefited from the trial under the F.C.R for being sentenced to only imprisonment after having been found guilty of murdering three young men. The impugned judgment of the High Court could not be sustained in law on another

ground. The writ petitions were not maintainable when the respondents' earlier writ petitions arising out of the same trial were dismissed on account of the bar contained under Article 247 (7) of the Constitution."

The judgment of this Court was accordingly set aside by converting the petitions into appeals and allowing the same.

The judgment of the FATA Tribunal dated 02.04.2002 which had upheld the conviction and sentence dated 09.01.2002 of the Political Agent Kurram Agency, was restored.

9. When the appellant filed the second jail criminal appeal dated 16.11.2015 before FATA Tribunal, the matter had attained finality and was a past and closed transaction.

The arguments of the learned counsel for appellant that with the repeal of the FCR the conviction and sentences of the appellant should be reviewed, I am afraid, is not well placed. FCR along with other regulations were repealed as a result of the 25th Constitutional

Amendment to the Constitution. The controversy in hand would therefore be governed by Article 264 of the Constitution. The said article being relevant is reproduced hereunder for ready reference;

264. Effect or repeal of laws.

Where a law is repealed or is deemed to have been repealed, by, under, or by virtue of the Constitution, the repeal shall not except as otherwise provided in the constitution,

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of the law or anything duly done or suffered under the law;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the law;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the law; or

(e) affect any investigation legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the law had not been repealed.

The criminal liability incurred by the appellant has been expressly saved by the wordings of Article 264 of the Constitution.

The repeal of the FCR cannot be deemed to

have been affecting the punishment imposed on the appellant and upheld upto the august Supreme Court of Pakistan. In the case of "Muhammad Arif and another v/s The State and another" reported as "1993 SCMR 1589", the Hon'ble Apex Court had cited with approval the judgment of the House of Lords of England given in the case of "Wicks v/s Director of Public Prosecutions (1947)", whereby the conviction of the appellant had been upheld under the Emergency Powers (Defence), Act 1939, because of existence of section 11 (3) in the said Act. The ibid section of law provided that the expiry of the Act should not affect its past operation, as respects things previously done or omitted to be done. The Hon'ble Court further held in the said judgment as follows;

16. From the above cited cases, it is evident that there is judicial consensus that where a law is repealed, it will not inter alia affect any

investigations, legal proceedings or remedy in respect of any right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the law had not been repealed.

In the case of "Province of East

Pakistan v/s Sharafatullah" reported as "PLD

1970 S.C. 514", the Hon'ble Apex Court

observed as follows;

"In other words liabilities that are fixed or rights that have been obtained by the operation of law upon facts or events for or perhaps it should be said against which the existing law provided are not to be disturbed by a general law governing future rights and liabilities unless the law so intends."

This Court in the case of

"Mubarak Shah v/s The State" reported as

"1990 P Cr. LJ 1796" had passed the

following order by majority of the Hon'ble

members of the bench;

By a majority, it is held that notwithstanding the lapse/repeal of the Suppression of Terrorist Activities (Special Courts) (Amendment) Ordinance J (XVII of 1988) the learned Special Court had the jurisdiction to try Syed Mubarak Shah the appellant and his trial does not stand vitiated.

The Hon'ble Karachi High Court

in the case of "Sher Muhammad alias Shera

v/s The State" reported as "PLD 1990 Karachi

271" had also taken a similar view in the

following words;

The petitioner was arrested on 27-10-1988, the first judgment was pronounced on 17-1-1989 but it was set aside by the judgment of the High Court, dated 17-6-1989 and case was remanded for rehearing. In pursuance thereof the case was reheard and decided on 31-7-1987. The learned counsel's main contention is that as the Ordinance expired on 12-2-1989 the Court did not have the jurisdiction to proceed and decide the case. The judgment was first pronounced on 17-1-1989 during the currency of the Ordinance but the proceedings from remand to re-hearing and passing of the impugned judgment were held after the repeal of the Ordinance. Therefore, it has to be considered whether the proceedings had terminated at the time when Ordinance was repealed by efflux of time. As the case was pending in appeal the proceedings had not terminated. By appellate order the case was remanded and therefore, the proceedings continued and shall be deemed to have remained pending. Therefore, the proceedings taken by the learned trial Court after the remand shall be saved by the provisions of Article 264 of the Constitution."

Further reliance in respect of the said ratio may be placed on the judgments in

the case of "Hakim Ali Zardari v/s The State

and another" reported as "PLD 1998 Supreme

Court 1, as well as the judgments reported as

PLD 1967 S.C. 187, 1992 SCMR 602 and

1996 SCMR 237.

Thus there remains no doubt that the punishment awarded to the appellant had attained finality before the promulgation of 25th Constitutional Amendment on 31.05.2018 and same shall be deemed to be protected under Article 264 of the Constitution, despite repeal of the FCR.

10. The appeal in hand was also not maintainable as the sentence in the case had earlier been finalized till the august Supreme Court of Pakistan and was therefore a past and closed transaction, which could not have been reopened by way of the instant appeal, or the earlier second jail criminal appeal filed before the Tribunal and disposed of vide the impugned judgment dated 21.02.2017 of the FATA Tribunal Peshawar. In the case of *"Syed Masroor Shah and others v/s The State"* reported as *"PLD 2005 Supreme Court"*

173", the Hon'ble Apex Court has held that an order passed by any Court irrespective of the fact whether it was ordinary criminal Court or Accountability Court, no appeal would lie there-against, unless it is provided for by the Statute. It had further been laid down that right of appeal was a substantive right it could not be assumed unless expressly given by the Statute. Further reliance in this respect is also placed on the judgments given by the Hon'ble Supreme Court in the case "Manzoor Ali and 39 others v/s United Bank Limited" reported as "2005 SCMR 1785", in the case of "Muhammad Azhar Siddique and others v/s Federation of Pakistan and others" reported as "PLD 2012 Supreme Court 774" and in the case of "State Life Insurance Corporation of Pakistan through Chairman and others v/s Mst. Sardar

Begum and others” reported as **“2017 SCMR 999”**.

Right of filing second appeal before the High Court was neither available in the erstwhile regime nor in the dispensation put in place in the merged area after its merger with the province of Khyber Pakhtunkhwa. The 2nd appeal in the case in hand was therefore not maintainable as well.

11. In light of what has been discussed above, the appeal in hand was found to be meritless, as well as non-maintainable and same is accordingly ordered to be dismissed.

Announced.
Dt: 23.12.2019


JUDGE