

33

**IN THE PESHAWAR HIGH COURT, BENCH MINGORA/  
DAR-UL-QAZA, SWAT  
OBJECTION SLIP**

Fazal Haadi

VERSUS

Amir Zaman Khan

1. This petition has been presented by Mikayat AG- Ken Deel
2. Signature of council/petitioner requires on \_\_\_\_\_
3. Enactment under which the petition was file is not mentioned correct.
4. Approved file cover is not used.
5. Affidavit is not duly attested/ appended.
6. Checklist has not been filed/ duly filled in/ signed
7. Petition/ annexures are not properly paged according to index. 28 page is missing
8. Certified copies of annexures/ page # \_\_\_\_\_ have not been filed.
9. Copies of annexure/ pages # \_\_\_\_\_ are not legible.
10. Certificate be furnished that whether nay petition on the subject matter has earlier been filed in this court.
11. There should be separate application for each prayer/ case.
12. Copy of application is not delivered to A.G.
13. The appeal, revision, application is time barred.
14. Value for the purpose of court fee and jurisdiction has not been mentioned in the relevant column of the opening sheet.
15. Opening sheet has not been filled in properly.
16. The P/A of the council engaged is not attested/ signed by all petitioners/ appellants.
17. Chamber address and phone number of council has not been mentioned on index/ wakalatnama.
18. Memo of parties name & address not filed.
19. Petitioner's/ Attorney of Petitioners' CNiC #/ present address/ permanent address/ phone #/ Cell #/ Fax #/ E-mail address has not been mentioned in memo of addresses of the parties.
20. No. of referred cases is not given/ correct. 39 Branch report is required
21. Petition received by post is not entertain-able except through jail.
22. Petition containing overwriting is not entertain-able. Fair petition be filed.
23. Appeal/ Revision is not competent.
24. List of books have not been mentioned at the end of the petition.
25. Case does not relate to \_\_\_\_\_
26. Petition should be drafted by a person competent to do so.
27. one more spare copies be filed.
28. In what jail the petitioner is confined.
29. Revision/ appeal may be filed on the prescribed form.
30. Copies of annexure \_\_\_\_\_ are not translated.
31. Court fee stamps are not been affixed.
32. Power of Attorney is not attested by the jail authority.
33. Certified copies of impugned orders/ decree sheets/ pleadings/ evidence/ ground of revision/ appeal before District Judge have not been filed.
34. District Judge or any other Judicial Officer cannot be made as respondent on top of the petition.
35. Index has not been filed/ signed/ duly completed/ or it carries overwriting.
36. The Petition has not been flagged/ marked with annexures' marks.
37. Power of attorney for petitioner/ petitioners has not been filed.
38. Every miscellaneous application should be followed by an affidavit.

Reader  
**READER**

Returned with objections at Sr. Nos. 7, 20, 27 for removal to be  
re-submitted on or before 17-2-18

Additional Registrar  
**PHC, Bench Mingora/Dar-ul-Qaza, Swat.**

Si,

objection removed, Re Submitted

Before Your Honor.

  
13/2/2018

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**URGENT FORM**  
**BEFORE PESHAWAR HIGH COURT,**  
**MINGORA BENCH** (Dar-ul-Qaza), SWAT

Cr. M # 337 of 2018  
in

Misc No 41 OF 2017 in Criminal Appeal No. 223/12

**Fazal Hadi son of Chamanuddin Chamnay resident of Chuprial,  
Tehsil Matta, District Swat.**

(Petitioner)

**V E R S U S**

**Amir Zaman Khan, the then SHO, P. S Matta, Swat etc**

(Respondents)

1. Will you kindly treat the accompanying petition as urgent and in accordance with the Provisions of Rules 9, Chapter 3-A, Rules orders of the High Court Lahore Volume V.
2. The grounds of urgency are:
  - a. That the property of the petitioner has been attached.
  - b. That due to dismissal of Criminal Appeal, the acquittal order of the father of the petitioner has been maintained by this august court.
  - c. That due to above reasons the instant petition if could not be treated as urgent then the petition will become aimless and the petitioner will suffer irreparable loss.

Petitioner Through

**WILAYAT ALI KHAN**  
**Advocate**

**FILED TODAY**

**09 FEB 2018**

  
Additional Registrar

(35)

**BEFORE THE PESHAWAR HIGH COURT, BENCH**  
**AT MINGORA, SWAT**

Cr.M No. 337 of 2018

In Misc:No 41 of 2017 in criminal appeal NO. 223/12

Fazal Hadi S/O Chamanuddin Chamnay Resident of Chuprial Tehsil Matta  
District Swat. (Petitioner)

VERSUS

1. Amir Zaman Khan, The then SHO, PS Matta Swat
2. The State through AAG

(Respondents)

**INDEX**

S.No	Description of Documents	Pages	Annexure
1	Application.	1. 3	.....
2	Memo of Addresses of Parties	4	.....
3	Copy of FIR	5	"A"
4	Copy of Objection Petition	6. 10	"B"
5	Copy of orders Dated 24/01/2018	11. 35	"C & D"
6	Wakalat Nama.	36	.....

Petitioner through



Wilayat Ali Khan

Advocate High Court

At Park Hotel, Saidu Road Mingora swat

Cell:0300 907 5335

FILED TODAY

09 FEB 2018



Additional Registrar

FILED TODAY

13 FEB 2018



Additional Registrar



(36)

**BEFORE PESHAWAR HIGH COURT, MINGORA**  
**BENCH (Dar-ul-Qaza), Swat**

Cr. M # 337 of 2018  
in

Misc # 41 OF 2017 in criminal appeal No. 223/12

**Fazal Hadi son of Chamanuddin Chamnay resident of Chuprial,  
Tehsil Matta, District Swat.**

(Petitioner)

**V E R S U S**

1. Amir Zaman Khan, the then SHO, P. S Matta, Swat.
2. State through Additional Advocate General.

(Respondents)

**APPLICATION FOR RESTORATION/  
RESURRECTION OF THE ABOVE PETITION  
FOR ITS DECISION ON MERITS WHICH HAS  
BEEN SINE DIE ADJOURNED BY THIS  
AUGUST COURT VIDE ORDER DATED 24-01-  
2018**

**Respectfully Sheweth:**

- 1) That the father of the petitioner namely Chamnay was arrested in case FIR # 461 dated 21-09-2007 under section 302, 324, 427, 148, 149, 109 PPC. Copy of the FIR is annexed herewith as "Annexure A".
- 2) That the trial court acquitted the father of the petitioner vide order dated 01-11-2012.

**FILED TODAY**

09 FEB 2018

  
Additional Registrar

- 3) That the appeal/ Cr A # 223-M of 2012 has been filed against the above mentioned judgment in this august court.
- 4) That due to non-appearance of the father of the petitioner, this august court directed the trial court to initiate proceedings under sections 88 of CrPC vide order dated 24-01-2017 whereby the property of the petitioner has been attached.
- 5) That the petitioner had filed the above objection petition in this august Court under section 6-A, 6-B of section 88 of CrPC. Copy of the Objections petition is **"Annexure B"**.
- 6) That this august vide order dated 24-01-2018 has ordered for sine die adjournment of the petition filed by the petitioner. Copy of the order dated 24-01-2018 is annexed herewith as **"Annexure C"**.
- 7) That this august court vide order dated 24-01-2018 dismissed the Cr A # 223-M Of 2012 & 231-M of 2012. Copy of the judgment/ order dated 24-01-2018 is annexed herewith as **"Annexure D"**.
- 8) That as this august court has maintained the acquittal order/ judgment of the trial court dated 01-11-2012 by dismissing the appeals, so the instant application is hereby filed for restoration/ resurrection of the petition for its decision on merits.

FILED TODAY

09 FEB 2018

  
Additional Registrar

It is, therefore, humbly prayed that on the acceptance of this application, the order for restoration/ resurrection of the



دستخط حامل کارڈ

حکومت پاکستان

قومی شناختی کارڈ

15601-9285347-7

نام : فضل بادی

جنس : مرد

والد کا نام : محمد چمنی الدینی عرف چمنے

شناختی علامت : کوئی نہیں

امتیاز تاجور تاریخ پیدائش : 01/08/1988

دستخط رجسٹرار جنرل



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شناختی نمبر: 15601-9285347-7 خاندان نمبر: UV2839

موجودہ پتہ: چپر یال، تحصیل مٹہ، ضلع سوات

مستقل پتہ: ایضاً

تاریخ اجراء: 11/02/2014 تاریخ تنسیخ: 11/02/2024  
گمشدہ کارڈ ملنے پر قریبی لیئر بکس میں ڈال دیں



above mentioned petition may kindly be issued and the same may kindly be restore for the ends of justice.

**Petitioner/Applicant  
Through**

*9/1/2018*

**WILAYAT ALI KHAN  
ADVOCATE**

*HL*

**AFFIDAVIT**

I, Fazal Hadi, Petitioner do hereby solemnly affirm on oath that the contents of this application are true and correct to the best of my knowledge and belief and nothing has been concealed from this august Court.

Deponent,

*Fazal Hadi*  
**Fazal Hadi**

**FILED TODAY**

**09 FEB 2018**

*[Signature]*  
Additional Registrar

S.No. 576  
Certified that the above was verified on Solemn  
affirmation before me on this 09th day  
of Feb 2018 by Fazal Hadi  
S/o Muhammad Channu who  
was identified by Self

Who is personally known to me  
*[Signature]*  
ADDL REGISTRAR  
Peshawar High Court  
Mingora Bench/Dar-ul-Qaza, Swat.

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**BEFORE PESHAWAR HIGH COURT, MINGORA**  
**BENCH (Dar-ul-Qaza), Swat**

Cr. M # 33m of 2018  
in

Misc No 41 OF 2017

**Fazal Hadi son of Chamanuddin Chamnay resident of Chuprial,  
Tehsil Matta, District Swat.**

(Petitioner)

**V E R S U S**

1. Amir Zaman Khan, the then SHO, P. S Matta, Swat.
2. State through Additional Advocate General.

(Respondents)

**CORRECT ADDRESS OF THE PARTIES**

**CORRECT ADDRESS OF THE PARTIES ARE AS UNDER:**

**Fazal Hadi son of Chamanuddin Chamnay resident of Chuprial,  
Tehsil Matta, District Swat.**

(Petitioner)

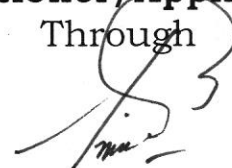
**CNIC #: 15601-9285347-7**

**Mobile #: 0344 9665035**

1. Amir Zaman Khan, the then SHO, P. S Matta, Swat.
2. State through Additional Advocate General.

(Respondents)

**Petitioner/Applicant**  
Through



**WILAYAT ALI KHAN**  
**Advocate**

**FILED TODAY**

**09 FEB 2018**

  
Additional Registrar



## ابتدائی اطلاعی رپورٹ

ابتدائی اطلاع نسبت جرم قابل دست اندازی پولیس رپورٹ شدہ زبردقہ ۱۵۴ مجموعہ ضابطہ فوجداری

بہارِ سبیل و ایمان

[illegible]

(علی بن خازن)

INSD / A80 / Ps. Charbagh  
26/05/2017

Attention to be  
The Conf

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**BEFORE THE PESHAWAR HIGH COURT**  
**MINGORA BENCH / DARUL QAZA SWAT**

Misc No. \_\_\_\_\_ / 2017

In

Criminal Appeal No. 223-M / 2012

Fazal Hadi S/o Chamanuddin Chamnay R/o Chuprial, Tehsil  
Matta, District Swat.

...Petitioner

**VERSUS**

1. Amir Zaman Khan the then S.H.O Police Station Matta.
2. State through Additional Advocate General.

...Respondents

**Objection Petition U/s 6 A, 6 B of Section 88**  
**of Cr. PC.**

**Respectfully Sheweth:**

The petitioner submits as under;

1. That the local police of police station Matta charged the father of the objector, Chamnay in case FIR No. 461 dated 21-09-2007 U/s 302,324,427,148,149,109 PPC (Copy of the FIR is annexure "A").
2. That the trial court acquitted the father of the objector vide order / judgment dated 01-11-2012 (Copy of the order dated 01-11-2012 is annexure "B").



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3. That the appeal / Cr A No. 223-M of 2012 has been filed against the judgment dated 01-11-2012 before this Hon'ble Court (Copy of memorandum of appeal is annexure "C").
4. That due to non-appearance of the accused Chamnay, this august court has pressed the provision of section 88 of the Cr. PC, by directing the trial court to initiate proceeding U/s 88 of Cr.PC, through order sheet dated 24-01-2017 (Copy of the order sheet dated 24-01-2017 is annexure "D").
5. That the local police of Police station Chuprial informed the objector about the attachment of the property of the objector U/s 88 of Cr.PC, as per direction of the trial court i.e. ATC at Gulkada Swat.
6. That the attachment of the property of the objector U/s 88 of Cr.PC is against the Law and facts hence vide order dated 24-01-2017 is liable to be set aside on the following grounds.

**Grounds:**

- i. That when the father of the objector acquitted and thereby released from the Paytam Sub jail Swat, the objector along with Barkat Ali Khan S/o Sher Zada Khan R/o Aghal Tehsil Matta District Swat and Sardar S/o Rahim Zada R/o Agal Tehsil Matta District Swat received the Chamnay Khan from the sub Jail above and got on motor car, when they reached from sub Jail Paytam to village Gashkor, there the Pak Army intercepted the vehicle of the Chamnay, and then took back the Chamnay the father of

the objector to unknown place and also badly beaten the objector along with two other persons namely above.

- ii. That the two other persons namely Barkat Ali and Sardar bounded with accused Chamnay, they being deponent swear by Allah regarding the interception of the vehicle and thereby taking back the accused Chamnay to unknown place, to this extent they filed there affidavits (Copy of the Affidavits are annexure "E & F").
- iii. That the objector tried his level best to search out the Chamnay Khan but on 5<sup>th</sup> February 2016 the two persons in plain cloths came to the house of objector, handed over the CNIC of the Chamnay and said to the objector that do not try for search of Chamnay and went back (Copy of CNIC is annexure "G").
- iv. That now the property of the father of the objector is devolved to the LR's of Chamnay, as such the property is joint, thus the same is not is not partitionable at this stage which for a legal cause shall be adopted.
- v. That the non-appearance of Chamnay is not his deliberate Act, but as per the oral statement of the two persons, the objector are sure that the Chamnay had died. How a dead person can approach to this Hon'ble Court.
- vi. That acquitted accused be presume innocent, it is the duty of the prosecution to prove its case, but the court can pass an order of acquittal in absence of accused.

It is therefore very humbly prayed that, by accepting the instant objection petition, earlier order dated 24-01-2017 may kindly be withdrawn.


Petitioner  
Through Counsel

  
Farman Ali  
Advocate High Court

**AFFIDAVIT:**

I do hereby solemnly affirm and declare on oath that all the contents of this objection petition are true and correct to the best of my knowledge and belief and nothing has been kept concealed from this august court.

Deponent

  
Fazal Hadi  
S/o Chamanuddin Chamnay  
CNIC No: 15601-9285347-7

**BEFORE THE PESHAWAR HIGH COURT**  
**MINGORA BENCH/DARUL QAZA SWAT**

Misc No. \_\_\_\_\_/2017

In

Criminal Appeal No. 223-M/2012

Fazal Hadi

VERSUS

Amir Zaman Khan etc

**Memo Of Addresses**

**Address of Petitioner**

Fazal Hadi S/o Chamanuddin Chamnay R/o Chuprial,  
Tehsil Matta, District Swat.

CNIC No: 15601-9285347-7

Cell No: 0344-9665035

**Address of Respondents:**

1. Amir Zaman Khan the then S.H.O Police Station Matta.
2. State through Additional Advocate General.

Petitioner  
Through Counsel



Farman Ali  
Advocate High Court

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**BEFORE THE PESHAWAR HIGH COURT**  
**MINGORA BENCH / DARUL QAZA SWAT**

Misc No. 41 / 2017

In

Criminal Appeal No. 223-M / 2012



Fazal Hadi S/o Chamanuddin Chamnay R/o Chuprial, Tehsil  
Matta, District Swat.

...Petitioner

VERSUS

1. Amir Zaman-Khan the then S.H.O Police Station Matta.
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...Respondents

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**of Cr. PC.**

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2. That the trial court acquitted the father of the objector vide order / judgment dated 01-11-2012 (Copy of the order dated 01-11-2012 is annexure "B").

**FILED TODAY**

**13 FEB 2017**

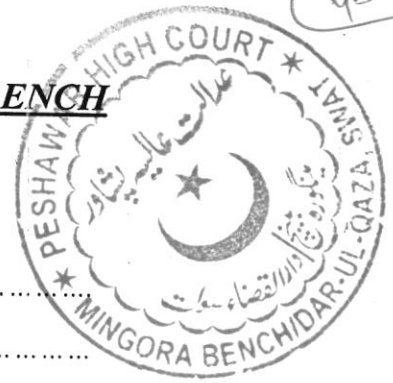
Additional  Advocate General

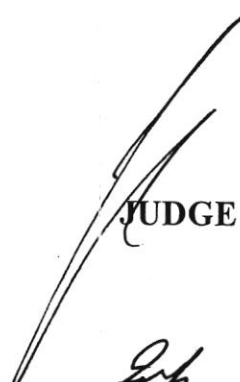

**PESHAWAR HIGH COURT, MINGORA BENCH**  
**(DAR-UL-QAZA), SWAT**

**FORM OF ORDER SHEET**

Court of .....

Case No..... of.....



Serial No. of order or proceeding	Date of Order or Proceedings	Order or other Proceedings with Signature of Judge and that of parties or counsel where necessary.
1	2	3
	24.01.2018	<p><b><u>Cr.M 41-M/2017 in Cr.A 223-M/2012</u></b></p> <p><b>Present:</b> Mr. Farman Ali Khan, Advocate for the Petitioners.</p> <p align="center">***</p> <p>Learned counsel for the petitioners submitted that W.P 411/2017 (Habeas Corpus) of the petitioners is also pending before the Hon'ble Principal Seat and requested that this petition may be adjourned <i>sine-die</i> till disposal of the said petition. Hence, this petition stands adjourned <i>sine-die</i>. Learned counsel for the petitioner is at liberty, wherever desires to file an application for its resurrection.</p> <p align="right">   <b>JUDGE</b> </p> <p align="right">   <b>JUDGE</b> </p>

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**JUDGMENT SHEET  
IN THE PESHAWAR HIGH COURT,  
MINGORA BENCH  
(Judicial Department)**

**1. Cr.A No. 223-M/2012**

***Abdul Jabbar Khan and 03 others***

***(Appellants)***

***Versus***

***Fazal Maula and 02 others***

***(Respondents)***

**Present:**

*Mr. Sher Muhammad Khan, Advocate for  
appellant.*

*Malak Sarwar Khan, Advocate for State.*

*M/S Liaqat Ali Khan and Fazli Ghafoor,  
Advocates for acquitted accused/respondents.*

**2. Cr.A No. 231-M/2012**

***The State***

***(Appellant)***

***Versus***

***Fazal Maula and 01 other***

***(Respondents)***

**Present:**

*Malak Sarwar Khan, Advocate for State.*

*M/S Liaqat Ali Khan and Fazli Ghafoor,  
Advocates for acquitted accused/  
respondents.*

**Date of hearing: 24.01.2018**

**JUDGMENT**

**ISHTIAQ IBRAHIM, J.-** Through this judgment we propose to decide this criminal appeal bearing Cr.A No. 223-M/2012 and the connected Cr.A No. 231-M/2012 both

Tajamul/PS\*

DB:

Mr. Justice Ishtiaq Ibrahim

Mr. Justice Muhammad Nasir Mahfooz

(Cr.A No. 223-M of 2012 Abdul Jabbar Khan and others Vs. Fazal Maula and one other)

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emanating from one and the same judgment dated 01.11.2012 of the learned Judge Anti-Terrorism Court-IV, Malakand Division at Matta, District Swat whereby the accused respondents have been acquitted in case F.I.R No. 461 dated 21.09.2007 under Sections 302/324/ 427/148/149 P.P.C read with Section 7 of the Anti-Terrorism Act, 1997, registered at Police Station Matta, District Swat.



2. Abstract of the prosecution case as set out in the F.I.R is that some unknown terrorists made firing on Muhammad Afzal Khan and his companions at 11:00 hours on 21.09.2007 on main Shakar Dara-Drushkhela road near Changazai Banr at a distance of 3/4 KMs from police station Matta. On receipt of information, S.H.O Amir Zaman Khan (PW-6) accompanied by police contingent, rushed to the place of occurrence where he found red colour Jeep bearing No.50/SW owned by Muhammad Afzal Khan. On further query it came to light that Muhammad Afzal Khan alongwith Abdul Jabbar Khan, Tehsil Nazim



Matta, and other companions were proceeding to his house from Shakar Dara in the vehicle, when they reached the place of occurrence, some unknown terrorists made indiscriminate firing at them from the nearby graveyard as a result of which Muhammad Khaliq and Sher Alam Khan, driver and gunner of Muhammad Afzal Khan, died on the spot whereas Muhammad Afzal Khan, Abdul Jabbar, Saraf Khan and Bakht Rawan sustained injuries who had already been shifted to hospital Matta. The vehicle was also found in damaged condition due to fire shots.

3. S.H.O of the police station who is also complainant in the case, drafted *Murasila* Ex.PA/1 and sent the same to police station as special report through constable Jamal-ud-Din. The contents of *Murasila* were incorporated in formal F.I.R (Ex.PA) by Habib-ur-Rehman ASI (PW-12).

4. The deceased and injured were medically examined by Dr. Hidayatullah Khan (PW-7) on the same day. Investigation on the



*[Handwritten signature]*

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spot was conducted by Zar Bakht ASI/Inv, who later on died and could not be examined at trial stage. The case was initially investigated by Khan Sherin S.I (PW-11) whereas partial investigation was also conducted by Muhammad Rehman S.I (PW-5).

5. Respondents accused Chamnay and Fazal Maula alongwith other absconding co-accused were nominated by Abdur Razaq and Yousaf Khan, father and brother of deceased Muhammad Khaliq and Sher Alam, respectively in their statements under Section 164, Cr.P.C recorded on 28.09.2010. Respondent Fazal Maula was arrested on 20.09.2010 whereas respondent Chamnay was arrested on 30.09.2010 whose confession was recorded on 11.10.2010.

6. After completion of investigation, challan was submitted in Court for trial of the respondents accused who were formally charged for the offences on 18.01.2011. They pleaded not guilty and opted to face the trial. In order to substantiate its case against the



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accused, prosecution examined as many as 15 witnesses and closed its evidence. During examination of the accused under Section 342, Cr.P.C, they pleaded to be innocent but did not opt to produce evidence in their defence or to record their statements on oath in terms of Section 340(2), Cr.P.C. At conclusion of the trial, the learned trial Court found the respondents accused innocent and they were acquitted of the charge vide judgment dated 01.11.2012, hence, this appeal and the connected appeal preferred by State.



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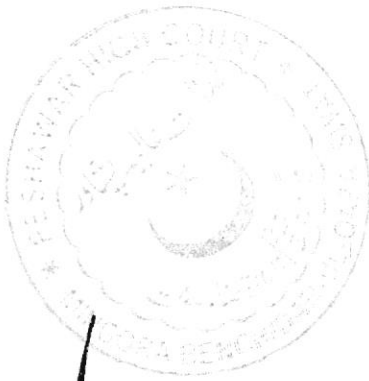
Z. During the course of his arguments, learned counsel for the appellants initially raised some legal points. He contended that Sharia *Nizam-e-Adl Regulation, 2009* was very much in vogue at the time of trial of the accused/respondents, therefore, the proceedings of their trial should have been conducted according to *Sharia* as ordained under Para-9 of the Regulation. He maintained that under Para-6(2) of the Regulation *ibid*, proceedings in criminal cases



are to be conducted by Courts of Qazis and the trial held before the Anti-Terrorism Court was *couram non judice*. The second legal point raised by learned counsel for the appellants is that confession of respondent Chamnay, which was disbelieved by learned trial Court, was not to be evaluated under the Qanoon-e-Shahadat Order, 1984 rather the same was to be treated under Section 19 of the *Actions (in Aid of Civil Power) Regulation, 2011*. On merits, learned counsel for the appellants submitted that voluntary confession was recorded by one of the acquitted respondents which was in accordance with law but the learned trial Court, without any legal justification, did not consider the same for conviction of the accused. He concluded that the impugned judgment of acquittal be reversed and the respondent be convicted in accordance with law. Learned State counsel supported the arguments of learned counsel for the appellants and further submitted that prosecution has brought reliable ocular and corroborative evidence against the accused but the same was

misinterpreted resulting into grave miscarriage of justice.

8. Learned counsels for the respondents accused submitted that the accused respondents have not been nominated in the F.I.R. rather they were charged in 161/164, Cr.P.C statements at a belated stage. Further contended that prosecution case is suffering from various infirmities and glaring contradictions, hence, does not qualify the standard for conviction of the accused. They submitted that confession recorded by accused Chamnay is not voluntary rather the same was recorded in Internment Center as a result of torture and pressure, therefore, the same cannot be legally considered for conviction of the accused. Learned counsels lastly submitted that prosecution has not proved its case through reliable and convincing evidence, therefore, the impugned judgment be maintained and both the appeals be dismissed.



2. We have gone through the record in light of valuable arguments of learned counsel for the parties.

10. At the very outset, a legal question arose as to whether these appeals can be entertained in absence of respondent Chamnay whose attendance could not be procured despite proceedings under Section 204 & 87, Cr.P.C have been carried out on the directions of this Court. This question cropped up before the august Supreme Court in the case titled "Hayat Bakhsh and others V/s. Muhammad Ali and others" (PLD 1981 SC 265) wherein it was held that appeal against acquittal of an accused can be heard even in his absence. Relevant portion of the judgment is reproduced below:-

"It would not be possible at all to adjourn an appeal against acquittal even against a single acquitted accused/absconding respondent, for an indefinite period, although the office of the Court would make efforts to secure his surrender/arrest in obedience to the process of the Court, for a reasonable period before fixing the appeal for hearing; and if he remains fugitive, the Court would proceed to determine the appeal in his absence. If after examination of the case the acquittal

merits to be reserved, there would be no impediment to decide the appeal accordingly, but in case the judgment of acquittal merits to be maintained, the same would not be reserved on account of the abscondence of the accused/respondent. This would apply to both the situations whether the appeal is against one acquitted or more".

In light of the above observations of the Hon'ble apex Court the appeals are being heard in absence of accused respondent Chamnay.

11. Before making any reference to merits of the case, first we would discuss the legal prepositions raised by learned counsel for the appellants. His first ground was with regard to trial of the accused by Court established under the Anti-Terrorism Act, 1997. According to contention of learned counsel for the appellant all criminal cases in Malakand Division are to be conducted by Courts of Qazis as contemplated in Para-(2) of Nizam-e-Adl Regulation, 2009 and the Special Court established under the Anti-Terrorism Act has got no jurisdiction to decide the fate of criminal cases in this area. It would be





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appropriate to reproduce Para-6(2) of the Regulation herein below for ready reference.

**"6. Qazis and their powers and functions,--**

- 1) .....
- 2) In relation to proceeding with and conducting the criminal or civil cases, all powers, functions and duties conferred, assigned or imposed on Judicial Officers in the North-West Frontier Province under any law for the time being in force, shall, subject to application of such law in the said area and established principles of Sharia'h, be exercised, performed or discharged by them as designated in column 3 of Schedule II".



*[Handwritten signature]*

Shari Nizam-e-Adl Regulation was notified on 16<sup>th</sup> April, 2009 while the Anti-Terrorism Act was extended to PATA on 05.12.2002 under Article 247(3) of the Constitution and from then onward the law was very much in existence in Malakand Division. The Courts were functioning even when the Regulation 2009 was not in operation in PATA. It is nowhere provided in the Regulation *ibid* that other Courts would lack jurisdiction and would have no legal authority to proceed with the cases under the special laws. Section 12 of the Anti-Terrorism Act,



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1997 empowers the Special Courts established thereunder to try the accused for the offences punishable under the Act. Section 12 of the Act *ibid* is reproduced for the sake of convenience.



**"12. Jurisdiction of (Anti-Terrorism Court)**

- 1) Notwithstanding anything contained in the Code or in any other law, a scheduled offence committed in an area in a Province shall be triable only by the Special Court exercising territorial jurisdiction in relation to such area.
- 2) Notwithstanding anything contained in sub-section (1), if, in respect of a case involving a scheduled offence committed in any area, the Government having regard to the facts and circumstances of the case, it satisfied that in order to ensure a fair trial, or for the protection and safety of witnesses, that such offence should be tried by (Anti-Terrorism Court) established in the relation to any other area, the Government may make a declaration to that effect.

**Explanation.**

Where a Special Court is established in relation to two or more areas, such Special Court shall be deemed, for the purpose

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of this sub-section, to have d been established in relation to each of such areas.

- 3) Where a declaration is made in respect of an offence committed in an area in a Province, any prosecution in respect of such offence shall be instituted only in the Special Court established in relation to such area, and, if any prosecution in respect of such offence is pending immediately before such declaration in any other Court, the same shall stand transferred to such Special Court and such (Anti-Terrorism Court) shall proceed with such case from the stage at which it was pending at that time without the necessity of recalling any witnesses".



Admittedly, the question of terrorism has not been included in Para-6(2) of the Regulation, 2009 which is of course part of the criminal law but having its own repercussions and for that matter the trial held under the Anti-Terrorism Act was very much within the mandate of Anti-Terrorism Court, Swat which has rendered the impugned judgment. Certain offences under the ordinary criminal law are also punishable under Section 7 of the Anti-Terrorism Act, 1997 which, in

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our view, cannot be adjudicated by Court of ordinary jurisdiction and for that matter Court of Qazi established under the Regulation, 2009 was not competent and only Anti-Terrorism Court has got the jurisdiction.

12. Now taking the second legal question raised by learned counsel for the appellant regarding confession which was disbelieved by learned trial Court. Learned counsel was of the view that confession of an accused is not to be evaluated under the Qanoon-e-Shahadat Order, 1984 rather the same was to be treated under Section 19 of the *Actions (for Aid of Civil Power) Regulation 2011*. The said provision is reproduced herein below.

**"19. Admissibility of evidence And its handing over.--- (1) Notwithstanding anything contained to the contrary in Qanun-e-Shadat, 1984 (P.O. 10 of 1984) or any other law for the time being in force all evidence, information, material collected, received and prepared by the Interning Authority, or its officials in accordance with the provisions of this Regulation shall be admissible in evidence and**



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shall be deemed sufficient to prove the facts in issue or the relevant facts.

(2) Notwithstanding anything contained in the Qanun-e-Shadat, 1984 (P.O. 10 of 1984) or any other law for the time being in force, any member of the Armed Forces, or any authorized official deposing on his behalf in or any official statement or before the Court to prove any event, offence or happening, shall be deemed to have proved the event, offence or happening by his statement or deposition and no other statements depositions or evidence shall be required. Such statement or deposition shall be sufficient for convicting the accused as well.

(3) .....

It is pertinent to note here that the occurrence in the present case took place on 21.09.2007. The Regulation was promulgated on 27<sup>th</sup> June 2011 and retrospective effect was given to it under sub-section (3) of Section (1) which reads as under:-

"1. Short title, application and commencement.-- (1) .....

(2) .....

(3) It shall come into force at once and shall be deemed to have taken effect from the 1<sup>st</sup> February, 2008".



The date of occurrence i.e 21.09.2007 is of much relevance in the present case as by then the Regulation, 2011 was not in existence and even if we assume that retrospective effect was given to it under Section 1(3) of the ibid Regulation even then the occurrence in the present case took place prior to 1<sup>st</sup> February, 2008. Even otherwise, the Regulation, 2011 contained penal provisions which cannot operate retrospectively. It is well settled that retrospective effect can be given to a statute as regards the matter of procedure but not to impair an existing right or obligation. In other words, if the matter is purely procedural then any change that does not affect any existing right or privilege can operate retrospectively but a privilege originally enjoyed by an accused under the old law cannot be taken away by retrospective operation. Reference in this regard can be made to the judgment in the case titled "Asif Ali Zardari Vs. The State" (1993 PCr.LJ 781 Karachi).





13. In addition to that Section 16 of the Regulation, 2016 provides definition of the offences while Section 17 thereof provides punishments which is reproduced herein below.




**“17. Punishments.—(1) Whoever commits an offence under this Regulation shall be punished with death or imprisonment for life or imprisonment up to ten years; and may also be liable to fine. The convict shall also be liable to forfeiture of his property.**

**(2) Whoever is prosecuted for committing offences mentioned in the laws specified in Schedule III to this Regulation shall be given the punishments provided for in the said respective laws”.**

But if we go through the charge of the present case, in our view, the provisions of Section 19 of the Regulation of 2011 would be attracted only when an accused is prosecuted under this Regulation while on the contrary the present case was tried under the Pakistan Penal Code alongwith relevant provisions of the Anti-Terrorism Act and charged was not framed at all under the penal provisions of the

Regulation, 2011. It can be safely inferred that Section 19 would be relevant only when accused is being prosecuted under the said Regulation. In our view, this assertion of learned counsel for the appellants is misconceived and against the settled norms of criminal justice.

14. On merits, the record manifests that initially the report was lodged against some unknown accused and respondents were nominated in the case by PW-2 Yousaf Khan and PW-3 Abdur Raziq in their 161/164, Cr.P.C statements recorded after three years of the occurrence. The above named PWs are not the eye witnesses rather PW-1 Abdul Jabbar Khan and PW-4 Bakht Rawan, being victims of the occurrence, have been examined as eye witnesses. PW-1 Abdul Jabbar Khan claims in his cross-examination to have seen the respondents at the time of firing but strange enough this PW though sustained injuries in the occurrence but did not charge the respondents prior to recording of his statement



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as PW-1 before the trial Court. Even his 161, Cr.P.C statement was not recorded by police as is evident from his cross-examination and no test identification was conducted through eye witnesses. Similar is the statement of PW-4 Bakht Rawan who made pointation of the place of occurrence to police in the light of which site-plan was prepared but he did not nominate the respondents at that time, as such, the respondents were charged after three years of the occurrence by relatives of the deceased and not by the above named two injured witnesses. From the above stated position of the case, it can safely be inferred that the respondents have not been identified by the alleged eye witnesses, hence, their testimony cannot be relied upon for conviction of the respondents.

15. The only evidence that is available on record against the respondents is confessional statement of respondent Chamnay but that too is of no help to prosecution. Admittedly, the statement was recorded in





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internment center under the control of Pak Army and the very premises wherein the statement was recorded cannot be termed as conducive environment for recording confession of an accused. The statement of PW-15 Sadaqat Ali Khan, Executive Magistrate Babozai, shows that at the time of recording the statement of accused, the doors and windows of the room were open and security forces were visible to accused at that time. In such situation particularly when the handcuffs of the accused were not removed, the confession cannot be held to have been recorded in accordance with law. In addition to above, the confessional statement allegedly recorded by Chamnay Khan does not bear any specification of his guilt. Keeping in view the above background of the confession allegedly made by accused, the learned trial Court has rightly discarded the same. The august Supreme Court while deciding the case of "Muhammad Ismail Vs. The State" (2017 SCMR 713) laid down certain requirements/standards for recording



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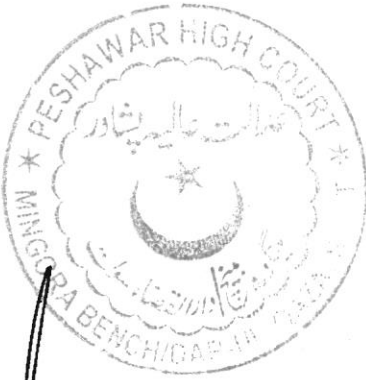
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ascertain the true cause thereof;

- (vi) While recording the confession, the same safeguards and precautions be adopted, by directing the Public Prosecutor, the complainant's counsel, the Naib Court and all other officials to leave the Court. If need be, the counsel who represents him, may be given an opportunity to be present inside the Court during the whole process, if the accused person, on asking by the Trial Judge, so demands;
- (vii) the handcuffs of the accused be removed and he be provided a chair on the dais. He may be given some time to think over the making of the confession and in that regard particular questions be put to him, as to why he was making the confession when he has already pleaded innocence and claimed trial at the time, the formal charge was framed;
- (viii) the Trial Judge shall explain to the accused that, in case of making confession, he has to face a capital sentence in a murder case or any offence punishable with death;
- (ix) the entire record of all the questions and answers recorded, be properly maintained and thereafter, a proper certificate be



appended thereto, showing the satisfaction of the Trial Judge that the accused person was not mentally sick and he was making the confession voluntarily, based on true facts and that, there was no other compelling reason behind that.



When we look at the confession recorded in the present case in light of the standards enumerated in the above referred judgment, we feel no hesitation in holding that the confession was neither voluntary nor recorded in accordance with law.

16. It is the well settled principle of criminal justice that once an accused is acquitted he earns double presumption of his innocence for confutation whereof very strong grounds would be required which are not available in the present case. Wisdom is derived from a recent judgment of the apex Court delivered in the case of "Zaheer Sadiq Vs. Muhammad Ijaz and others" (2017 SCMR 2007) wherein it has been held that:

"Even otherwise, it is well settled by now that in criminal cases every

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accused is innocent unless proven guilty and upon acquittal by a court of competent jurisdiction such presumption doubles. Very strong and cogent reasons are required to dislodge such presumption. The reasons given by the learned High Court, in the impugned judgment, have not been found by us to be arbitrary, fanciful or capricious warranting interference by this Court".



17. In light of our above discussion, we find no merits in this appeal, therefore, the same is dismissed. The connected Criminal Appeal No. 231-M/2012 is dismissed being infructuous.

Announced  
24.01.2018

JUDGE

JUDGE

S.No. 11  
Name of Applicant: Fazal Maulla  
Date of Filing of Appeal: 25-01-18  
Date of Completion of Appeal: 31-01-18  
No of Copies: 24P  
Urgent Fee: 48/-  
Fee Charged: 48/-  
Date of Delivery of Copies: 31-01-18

Certified to be true copy

EXAMINER  
Peshawar High Court, Peshawar/Dar-ul-Qaza, Swat  
Authorized Signatory: [Signature]  
31-01-18

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Mr. Justice Muhammad Nasir Mahfooz

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