JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A.No.367 of 2023
Imran Ahmad Khan Niazi
Versus
Federation of Pakistan and others

Date of Hearing:	21.11.2023
Appellant by:	M/s Salman Akram Raja, Barrister Salman Afridi, Intizar Hussain Panjutha, Barrister Gohar Ali Khan, Naeem Haider Panjutha, Ali Aijaz Buttar and Mirza Asim Baig, Advocates.
Respondents by:	Mr. Mansoor Usman Awan, learned Attorney-General for Pakistan. Barrister Munawar Iqbal Duggal and Aamir Rehman, learned Additional Attorney-Generals. Mr. Arshid Mehmood Kiani, learned Deputy Attorney-General. M/s Asia Batool and Imran Farooq, learned Assistant Attorney-Generals. M/s Raja Rizwan Abbasi, Zulfiqar Abbas Naqvi, Shah Khawar and Mudassar Hussain Malik, Advocates / Prosecutors for F.I.A. Mr. Tahir Kazim, Law Officer, ICT Police.
Assisted by:	Mr. Umar Farooq, Research Officer and Ms. Neha Touseef, Law Clerk.

MIANGUL HASSAN AURANGZEB, J:- Through the instant intra Court appeal filed under Section 3(2) of the Law Reforms Ordinance, 1972 (**"the 1972 Ordinance"**) the appellant, Imran Ahmad Khan Niazi, assails judgment dated 16.10.2023 passed by the learned Judge-in-Chambers, whereby writ petition No.2656/2023 filed by him, was disposed of with the observation that the said petition was without merit and that notification F.No.8(93)/2021-A-IV, dated 29.08.2023 issued by the Ministry of Law and Justice, did not warrant setting-aside. Furthermore, it was observed that in case the appellant has any grievance regarding his trial being conducted in jail, he may voice his grievance before the Special Court which was conducting the proceedings against him in jail precincts.

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2. Through the notification dated 29.08.2023 impugned in the said writ petition, the Ministry of Law and Justice had conveyed its "no objection" for the appellant's trial by the Special Court to be conducted on 30.08.2023 in District Jail, Attock. The said notification is stated to have been issued on the basis of "security concerns" as conveyed by the Ministry of Interior vide letter No.13/23/2022-NAP, dated 29.08.2023.

3. In the said writ petition, the appellant had also questioned the designation of the Judge Anti-Terrorism Court-I, Islamabad to try offences under the provisions of the Official Secrets Act, 1923 (<u>"OSA"</u>) on the ground that he lacks the essential qualification to be so designated.

<u>Chronology of events</u>:-

4. The documents on the record show that FIR No.06/2023 was registered on 15.08.2023 against the appellant and his co-accused under Sections 5 and 9 of the OSA read with Section 34 of the Pakistan Penal Code, 1860 (<u>"PPC"</u>) at Police Station Counter Terrorism Wing, FIA, Islamabad. As per the contents of the said FIR, while the appellant was serving as the Prime Minister and his co-accused, Shah Mahmood Qureshi, as Foreign Minister, they and their associates were involved in the communication of information (contained in a secret classified document which was a cypher telegram sent by Pakistan Representative ("Parep") Washington on 07.03.2022 to the Secretary, Ministry of Foreign Affairs) to the public at large. The appellant and the co-accused were alleged to have twisted the facts to achieve their ulterior motive and personal gains in a manner prejudicial to the interest of State security. They were also alleged to have held a clandestine meeting at village Bani Gala on 28.03.2022 in furtherance of a conspiracy to misuse the contents of the cypher in order to accomplish their nefarious designs. The appellant was also accused of having directed the former Secretary to the Prime Minister, Muhammad Azam Khan, to prepare minutes of the said meeting by manipulating the contents of the cypher so as to use it for his vested interest at the cost of national safety. The appellant was accused of having deliberately retained in his custody the accountable copy of the cypher sent to the Prime Minister's office never to be

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returned to the Ministry of Foreign Affairs. In the FIR, it was also stated that the cypher being an official secret document and classified as such was still in the appellant's possession and that the unauthorized retention and misuse of the cypher had compromised the entire cypher security system of the State and secret communication methods used by Pakistan's Missions abroad. The actions of the accused persons were said to have directly or indirectly benefitted the interests of foreign powers and caused loss to the State of Pakistan.

5. The said FIR was registered after an inquiry in the matter was concluded on 05.10.2022. The appellant was formally arrested in the case on 16.08.2023. The Investigation Officer had submitted an application before the learned trial Court for the appellant's physical remand but the said application was turned down as he was in judicial custody serving a sentence at District Jail, Attock after having been convicted vide judgment dated 05.08.2023 passed by the Additional Sessions Judge, Islamabad (East) for offences under Sections 167 and 178 of the Elections Act, 2017.

6. Vide order dated 16.08.2023, the learned Judge, Special Court turned down the prosecution's application for the appellant's physical remand and it was ordered that his judicial remand was to continue for fourteen days. In the said order dated 16.08.2023, the learned Judge, Special Court had recorded his apprehension regarding the appellant's security if he was to be brought all the way from Attock to Islamabad where the Special Court was to conduct its proceedings. The learned Judge, Special Court however did not express any desire for the proceedings against the appellant to be conducted in jail.

7. Vide order dated 28.08.2023 passed in Criminal Appeal No.273/2023, this Court suspended the sentence handed down to the appellant vide judgment dated 05.08.2023 passed by the Additional Sessions Judge, Islamabad (East). Since the appellant had also been arrested in case FIR No.06/2023, dated 15.08.2023 registered under Sections 5 and 9 of the OSA, his incarceration continued in District Jail, Attock.

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8. The first in the series of documents relevant to the conduct of the proceedings and trial against the appellant in jail is a letter dated 27.08.2023 from the office of the Islamabad Capital City Police Officer ("ICCPO") to the Deputy Commissioner, Islamabad Capital Territory ("ICT") wherein reference is made to a special report No.344/SB (Intelligence), dated 27.08.2023 (which has not been brought on record) from the Assistant Inspector General of Police, Special Branch, Islamabad stating that *"it has been learnt from various sources that on the occasion of the appearance of Chairman, PTI in court, the leadership of PTI is trying its best to gather maximum workers to express solidarity with Chairman, PTI."* It is also stated that *"the Lawyers Association of Insaf Lawyers Forum (ILF) has also directed to lawyers to assemble before the court."* This, according to the ICCPO, may create a law and order situation. Furthermore, in the said letter, it is also mentioned that there are life threats to the Chairman, PTI and a huge assembly of lawyers and workers of PTI may lead to an untoward incident. The said letter was sent to the Deputy Commissioner, Islamabad for information and necessary preventive measures.

9. Vide letter dated 29.08.2023, the office of the Chief Commissioner, ICT sent the said letter dated 27.08.2023 for *"information and appropriate action as per law"* to the Joint Secretary (ICT), Ministry of Interior. Vide Office Memorandum dated 29.08.2023, the Ministry of Interior sent the said letters dated 27.08.2023 and 29.08.2023 containing the special report to the Secretary, Ministry of Law and Justice. It was in these circumstances that the Ministry of Law and Justice issued notification dated 29.08.2023, which was impugned by the appellant in writ petition No.2656/2023. Vide order dated 30.08.2023, the appellant had been remanded in judicial custody for a further period of fourteen days.

10. After hearing the arguments of the learned counsel for the contesting parties, the learned Judge-in-Chambers reserved judgment on 12.09.2023. On the very same day, the learned Judge, Special Court sent a request to the Secretary, Ministry of Law and Justice for the issuance of a No Objection Certificate ("NOC") for the appellant's trial in

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case FIR No.06/2023 to be conducted in District Jail, Attock. In the said letter, the learned Judge, Special Court, after making reference to Section 352 of the Code of Criminal Procedure, 1898 (“Cr.P.C.”) and Rule 3 in Part-I of Chapter-I in Volume-III of the Rules and Orders of the Lahore High Court (“Rule 3 of the LHC Rules”), expressed his intention to conduct the trial in the said jail. The reason given for the said request was *“security issues and keeping in view the life threats”* to the appellant *“in the prevailing situation.”* Reference in this letter is made to the Law and Justice Division’s earlier notification dated 29.08.2023.

11. Vide notification dated 12.09.2023, the Ministry of Law and Justice conveyed its “no objection” to the trial to be conducted in District Jail, Attock. The said notification is stated to have been issued “in the light of” Rule 3 of the LHC Rules read with Section 352 Cr.P.C. as well as on the request dated 12.09.2023 of the learned Judge, Special Court. The said notification was only for the trial to be conducted in jail on 13.09.2023.

12. The Special Court’s order dated 13.09.2023 shows that it was on the basis of the said notification dated 12.09.2023 that the learned Judge, Special Court conducted the proceedings on 13.09.2023 at District Jail, Attock.

13. On 25.09.2023, the learned Judge, Special Court sent another request to the Secretary, Law and Justice Division for the issuance of an NOC for conducting the trial against the appellant in District Jail, Attock. The said letter dated 25.09.2023 is couched in the same language as the earlier letter dated 12.09.2023.

14. Vide notification dated 25.09.2023, the Ministry of Law and Justice conveyed its “no objection” to conducting the trial against the appellant but there is no mention in the said notification for the trial to be conducted in District Jail, Attock. Be that as it may, assuming that the said notification was a permission to conduct the trial in District Jail, Attock, the same was only for one day i.e. 26.09.2023.

15. On 26.09.2023, the appellant was transferred from District Jail, Attock to Central Jail, Rawalpindi pursuant to order dated 25.09.2023 passed by this Court in writ petition No.2471/2023, titled “Imran Ahmad Khan Niazi Vs. Federation of Pakistan”. On 02.10.2023, the prosecution

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submitted a report under Section 173 Cr.P.C. before the Special Court seeking trial against the accused in FIR No.06/2023. On the same day, the learned Judge, Special Court sent yet another request to the Secretary, Ministry of Law and Justice for the issuance of an NOC for conducting the trial against the appellant on 04.10.2023 in Central Jail, Rawalpindi. The learned Judge, Special Court also expressed his intention to conduct the trial at the said jail. We find the contents of the said letter rather curious inasmuch as after reference is made therein to the Law and Justice Division's earlier notifications dated 12.09.2023 and 25.09.2023, it reads thus:-

> ***"It is desired that whether in the prevailing situation there is any security risk with regard to production of under trial prisoner Imran Ahmed Khan Niazi is involved or not while producing above said accused before this Court. In case your good-office if feels appropriates and convenient in affirmative situation with regard to jail trial. Further, in the light of rules and orders of Hon'ble Lahore High Court."***

16. We have not tampered with the grammar in the paragraph extracted herein above but it has caused us to wonder as to whether the learned Judge, Special Court was conditioning his intention to conduct the trial in jail with what the Ministry of Law and Justice found "appropriate and convenient." Anyhow, in response to the learned Judge, Special Court's said letter dated 02.10.2023, the Ministry of Law and Justice issued notification dated 03.10.2023 conveying its "no objection" to the trial against the appellant to be conducted in the jail where he was confined *"till his security clearance by the quarters concerned (Interior Division)."* Subsequently on 13.10.2023, the Ministry of Law and Justice issued yet another notification conveying its "no objection" to the trial against the appellant *"& others"* to be conducted in the jail where they were confined *"until further orders."*

17. On 16.10.2023, the learned Judge-in-Chambers turned down the appellant's challenge to the Ministry of Law and Justice's notification dated 29.08.2023 by disposing of writ petition No.2656/2023.

18. The instant intra Court appeal against the judgment dated 16.10.2023 was filed on 23.10.2023 and on the same day, the learned Judge, Special Court framed the charge against the appellant and his co-

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accused. On 08.11.2023, the learned Judge, Special Court sent a letter to *"[t]he Federal Government through Chief Commissioner, Islamabad"* seeking the grant of approval for the trial in the case against the appellant etc. to be conducted in Central Jail, Rawalpindi. In the said letter dated 08.11.2023, the learned Judge, Special Court had taken the position that he was already conducting the trial in jail on the basis of the Ministry of Law and Justice's notification dated 13.10.2023 and that there were threats to the life of the appellant. He has also made reference to an application filed by the prosecution seeking the exclusion of the public during the trial.

19. Vide letter dated 08.11.2023, the office of the Chief Commissioner, ICT forwarded the said letter dated 08.11.2023 to the Ministry of Interior. Vide Office Memorandum dated 08.11.2023, the Ministry of Interior sent the above referred letters dated 08.11.2023 to the Secretary, Law and Justice Division for *"further and necessary action as per rules and procedure."* On 10.11.2023, the Ministry of Law and Justice submitted a summary for the Cabinet proposing that the Federal Government may accord approval for the trial against the appellant and his co-accused to be conducted in the jail where they were confined for offences under the OSA. Perusal of the said summary shows that the decision solicited by the Ministry of Law and Justice from the Cabinet was on the basis of Rule 3 of the LHC Rules.

20. On 12.11.2023, the Cabinet accorded approval to the proposal made in the Ministry of Law and Justice's summary dated 10.11.2023, which had been circulated in terms of Rule 17(1)(b) read with Rule 19(1) of the Rules of Business, 1973.

21. On 13.11.2023, the Ministry of Law and Justice issued a notification to the effect that the Federal Government had accorded approval for the trial against the appellant and his co-accused to be conducted in Central Jail, Rawalpindi or wherever they were confined for offences under the OSA.

22. Vide order dated 14.11.2023, this Court, after briefly hearing the learned counsel for the appellant and the learned Attorney-General for Pakistan, stayed the proceedings before the Special Court.

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23. On 15.11.2023, the Ministry of Law and Justice submitted another summary to the Cabinet proposing that the Federal Government may grant *"sanction / approval for the proceedings and trial of Mr. Imran Khan Niazi and others conducted by the Special Court having jurisdiction under the [Official Secrets Act, 1923] at District Jail, Attock and Central Jail, Adyala, Rawalpindi during the period from 29.08.2023 to 12.11.2023 (both days inclusive) for offences under the Official Secrets Act, 1923."* On the very same day, i.e. 15.11.2023, the Cabinet accorded approval to the said proposal made by the Ministry of Law and Justice, in its summary dated 15.11.2023, which had also been circulated in terms of Rule 17(1)(b) read with Rule 19(1) of the Rules of Business, 1973.

24. As per the notification dated 15.11.2023 issued by the Ministry of Law and Justice, the Federal Government granted sanction for the proceedings and the trial against the appellant and the co-accused conducted by the Special Court at District Jail, Attock and Central Jail, Rawalpindi during the period from 29.08.2023 to 12.11.2023 (both days inclusive) for offences under the OSA.

<u>Contentions of the learned counsel for the contesting parties</u>:-

25. Learned counsel for the appellant submitted that Mr. Abual Hasnat Muhammad Zulqarnain ("**Mr. Zulqarnain**"**) had been designated as the Judge of the Special Court to try offences under the OSA at the instance of the executive; that such designation by the executive is a serious inroad on the independence of the judiciary; that such designation ought to have been made with the consultation of the Chief Justice of Pakistan as the OSA is a federal statute; that the subject of official secrets is covered in Entry No.1, Part-I of the Fourth Schedule to the Constitution; and that the appointment of Mr. Zulqarnain as Judge of the Special Court to try offences under the OSA is illegal.**

26. Furthermore, it was submitted that the concept of jail trial goes against the requirements of due process; that the learned Judge, Special Court has not given any access to the media or the appellant's family members to witness the proceedings and trial in jail; that the trial is being conducted in a room where barely seven to eight people can stand; that

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the application submitted by the family members of the appellant's co-accused to attend the proceedings and the trial has been turned down by the learned Judge, Special Court; that the requirements of Section 352 Cr.P.C. read with Rule 3 of the LHC Rules had not been fulfilled when the proceedings and the trial were conducted in jail; that the notification dated 29.08.2023 impugned in writ petition No.2656/2023 was not a judicial order passed under Section 352 Cr.P.C.; that the notifications issued by the Ministry of Law and Justice for conducting the proceedings and the trial against the appellant in jail are in furtherance of the Government's strategy for his political victimization and repression; that the learned Attorney-General has brought on record several documents which, according to him, justify the appellant's trial in jail; that even though the appellant had challenged notification dated 29.08.2023 in writ petition No.2656/2023, this Court can take judicial notice of the events occurring and notifications issued after the judgment was reserved by the learned Judge-in-Chambers; that the learned Attorney-General's stance is that the requirements under Section 352 Cr.P.C. read with Rule 3 of the LHC Rules for conducting the trial against the appellant in jail had been fulfilled whereas the learned Judge-in-Chambers had held that the notification dated 29.08.2023 had been issued by the Ministry of Law and Justice under Section 9(2) Cr.P.C.; that Section 9(2) Cr.P.C. applies to a venue for the Court of Sessions and not to a venue for Special Courts; and that the law does not provide a remedy of an appeal against an order passed under Section 9(2) Cr.P.C.

27. Learned counsel for the appellant further submitted that notifications dated 29.08.2023, 12.09.2023, 25.09.2023, 03.10.2023, and 13.10.2023 issued by the Ministry of Law and Justice are liable to be declared unlawful on the sole ground that they are not preceded by any judicial order passed in terms of Section 352 Cr.P.C. or by the sanction of the Government contemplated by Rule 3 of the LHC Rules; that as regards the notifications dated 13.11.2023 and 15.11.2023 issued by the said Ministry, they are also unlawful inasmuch as the prerequisite of an order passed in judicial proceedings by the Special Court in terms of Section 352 Cr.P.C. had not been fulfilled; that the Cabinet, through its

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decision dated 15.11.2023, has given retrospective effect to its decision for the appellant's trial to be conducted in jail; that this implies that the proceedings and trial conducted in jail between 29.08.2023 and 12.11.2023 were not lawful; that validation of a past illegality requires statutory intervention that supplies the omission or defect with retrospective effect, and upon curing the defect declares the proceedings to have been validly taken; and that the Cabinet's decision dated 15.11.2023 fails on the ground that it is an executive sanction and not a statutory intervention and therefore cannot be given retrospective effect to cure the illegality that had occurred by way of unlawfully conducted jail proceedings and trial in violation of the appellant's rights to an open trial.

28. On the other hand, learned Attorney-General for Pakistan raised an objection to the maintainability of the instant appeal on the ground that since an order passed by a Court under Section 352 Cr.P.C. is a revisable order in terms of Section 439 Cr.P.C., the instant appeal is barred under the *proviso* to Section 3(2) of the 1972 Ordinance. In furtherance of this objection, he submitted that the co-accused, Shah Mahmood Qureshi, had filed criminal revision petition No.155/2023 before this Court against the order dated 09.10.2023 passed by the learned Judge, Special Court on the co-accused's application questioning the conduct of the proceedings against him in jail. He also submitted that although the notification dated 29.08.2023, which was challenged in writ petition No.2656/2023, could be termed as an administrative order against which there was no remedy of an appeal, revision or review but since the said notification had not been issued in any *"proceedings,"* therefore the instant intra Court appeal was not maintainable.

29. The learned Attorney-General brought on record several documents including letters dated 12.09.2023, 25.09.2023, 02.10.2023, and 08.11.2023 from the learned Judge, Special Court seeking sanction for the trial against the appellant to be conducted in jail in terms of Section 352 Cr.P.C. and Rule 3 of the LHC Rules. He also brought on record notifications dated 12.09.2023, 25.09.2023, 03.10.2023,

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13.10.2023, 13.11.2023, and 15.11.2023 issued by the Ministry of Law and Justice allowing for the proceedings and the trial against the appellant to be conducted in jail. He submitted that by operation of Section 352 Cr.P.C., the proceedings and trial conducted in jail will be deemed to be an open trial in an open Court, but since the room in which the proceedings were being conducted was small and could not accommodate representatives of the media and the appellant's family members, the trial could not be termed as a closed trial; that upon his intervention, the venue in jail where the trial was being conducted had been changed to a much bigger room which can easily accommodate the representatives of the media and the appellant's family members subject to the usual security arrangements; that no prejudice whatsoever was caused to the appellant on account of the proceedings and trial having been conducted thus far in the jail premises; that at best, the manner in which the proceedings and trial against the appellant had been conducted thus far can be termed as an irregularity which is liable to be ignored in terms of Sections 531 and 537 Cr.P.C.; that the framing of the charge and the recording of evidence have been in the appellant's presence and therefore the requirements of Section 352 Cr.P.C. had been complied with; that it was for the appellant's own security that the decisions were taken for the proceedings and the trial to be conducted in jail; that the grounds being agitated by the appellant in the instant appeal ought to be taken in his appeal in the event he is convicted by the learned Judge, Special Court; and that the process culminating in the Ministry of Law and Justice's notifications dated 13.11.2023 and 15.11.2023, based on the Cabinet's decisions dated 12.11.2023 and 15.11.2023, respectively do not suffer from any legal or jurisdictional infirmity. The learned Attorney-General prayed for the appeal to be dismissed.

30. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 24 above and need not be recapitulated.

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Objection to the maintainability of the intra Court appeal:-

31. We deem it appropriate to decide in the first instance the objection taken by the learned Attorney-General to the maintainability of the instant appeal. The instant appeal was filed under Section 3(2) of the 1972 Ordinance, which reads thus:-

> ***"An appeal shall also lie to a Bench of two or more Judges of a High Court from an order made by a single Judge of that Court under clause (1) of Article 199 of the Constitution of the Islamic Republic of Pakistan not being an order made under sub- paragraph (i) of paragraph (b) of that clause:***
>
> ***Provided that the appeal referred to in this sub-section shall not be available or competent if the application brought before the High Court under Article 199 arises out of any proceedings in which the law applicable provided for at least one appeal or one revision or one review to any court, tribunal or authority against the original order."***

32. The impugned judgment dated 16.10.2023 is a judgment of a single Judge of this Court passed under Article 199(1) of the Constitution, not being a judgment under sub-paragraph (i) of paragraph (b) of Article 199(1). The proviso to Section 3(2) *ibid* restricts the substantive right of a party to file an intra Court appeal only to cases in which the statutory remedy of an appeal, revision or review is not available at the time of the passing of the original order in the proceedings. In other words, an intra Court appeal is competent only in a case in which the statutory remedy of appeal, revision or review is not available at the time of the passing of the original order in the proceedings.

33. It is well established that a proviso to a Section is to be restrictively construed.[1] A proviso to a Section has an overriding effect and control over the substantive provision of the Section. The function of a proviso is to exclude and take out certain cases from the substantive provision to which it is a proviso.[2] In *Nawab Bibi vs. Allah Ditta*[3], the function of a proviso has been explained in the following terms:-

> ***"It is settled law that proper function of a proviso is to accept and deal with a case which would otherwise fall within the general language of the main section, and its effect is confined to the rule or section to which a proviso has been added. The proper way to regard the proviso is as a limitation upon the effect of principal section or rule. A proviso, which is in fact and in substance a proviso, can only operate to deal with a case which, but for it, would have fallen within the ambit of the section to***

[1] Abid Hussain vs. Additional District Judge, Alipur (2006 SCMR 100).
[2] Sabir Ali vs. Khalil Ahmed Bajwa (2005 MLD 1127); Lubna Afzal vs. Union Bank Limited (2003 CLD 868).
[3] 1998 SCMR 2381.

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which the proviso is a proviso. To put it in another way the section deals with a particular field while proviso excepts or takes or carries out from the field a particular portion and therefore, it is perfectly true that before a proviso can have any application the section itself must apply."

34. In writ petition No.2656/2023, the appellant had challenged notification dated 29.08.2023 issued by the Ministry of Law and Justice. For the purpose of clarity, the prayer clause of the said petition is reproduced herein below:-

"In view of the fore made submissions, it is humbly prayed that the impugned Gazette Notification No.F.No.8(93)/2021-A-IV dated 29-08-2023 issued by respondent No.01 and any orders passed there under or thereafter and the consequent shifting of the venue of trial from Judicial Complex Islamabad to District Jail Attock be declared as illegal and void.
It is also prayed that the appointment of the Judge designated Court/Judge ATC 1, Islamabad being lacking the essential qualification be declared as illegal and void.
Grant any other relief that this Honorable Court deems equitable and just in the unique circumstances of the case."

35. In order to decide the objection taken by the learned Attorney-General to the maintainability of the instant appeal, what needs to be determined is whether the notification dated 29.08.2023 (whereby the Ministry of Law and Justice conveyed its no objection for the appellant's trial to be conducted in District Jail, Attock on 30.08.2023) was revisable under Sections 435(1) and 439(1) Cr.P.C. If the answer to this is affirmative, the instant intra Court appeal cannot be held to be competent.

36. Section 435(1) Cr.P.C. provides *inter alia* that the High Court or any Sessions Judge may call for or examine the record of any proceedings before any inferior criminal Court situated within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, or as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record. Section 439(1) Cr.P.C. provides *inter alia* that *"in case of any proceedings, the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in*

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its discretion, exercise any of the powers conferred on a Court of appeal..."

37. In the case at hand, prior to the issuance of the said notification dated 29.08.2023, the learned Judge, Special Court had not passed any judicial order for holding the proceedings or trial in jail against which a revision could be preferred. The notification dated 29.08.2023 was clearly not an order passed in *"any proceedings before any inferior criminal Court."* This by itself is sufficient for us to hold that a criminal revision against the said notification was not competent. The learned Attorney-General was fair in his submission that the said notification dated 29.08.2023 was in the nature of an administrative order against which the law did not provide the remedy of an appeal, revision or review. There is no mention in the said notification as to the statutory power in exercise whereof the same had been issued. The contesting parties are in unison on their submission that the said notification has not been passed in exercise of the powers conferred by any of the provisions of Cr.P.C. and/or the OSA. It is not preceded by any judicial order passed by the learned Judge, Special Court requiring proceedings or trial in the case against the appellant to be conducted in jail. It was also not a notification / order that had been issued or passed in any proceedings. The mere fact that the said notification had not been issued in any *"proceedings"* would not *ipso facto* make the intra Court appeal incompetent.

38. Learned counsel for the appellant is apt in relying on the unreported order dated 20.11.2017 passed by the Hon'ble Supreme Court in C.P.No.4325/2017 and connected matters. In that case, the appellants had filed a writ petition before the Hon'ble Lahore High Court challenging notification dated 03.07.2012 issued under Section 31 of the Punjab Excise Act, 1914 whereby duty was levied at the rate of Rs.2/- per liter on the manufacture of spirit. The *vires* of the said notification was upheld and the writ petition was dismissed. The order passed by the learned Judge-in-Chambers was assailed in an intra Court appeal which was dismissed as not competent for the reason that Section 14 of the said Act had provided a remedy of an appeal. On behalf of the

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respondents in the said appeal, it was conceded that there was no order-in-original or an appellate order passed in the case against which an appeal could be filed, but it was contended that pursuant to the notification impugned in the writ petition, a demand notice had been issued against which a right of appeal was available. The Hon'ble Supreme Court held the intra Court appeal to be maintainable on the ground that Section 14 of the said Act provided a remedy of an appeal against an original order or appellate order of an Excise Officer but in the said case, there was no original or appellate order passed by the Excise Officer against which an appeal could be preferred.

39. The said notification dated 28.09.2023 had not been issued in any proceedings and was in the nature of an administrative order against which the provisions of Cr.P.C. did not provide the remedy of an appeal, revision or review. Therefore, the High Court, in exercise of its jurisdiction under Sections 435(1) and 439(1) Cr.P.C., could not have exercised revisional jurisdiction with respect to the said notification. Therefore, we hold that the instant intra Court appeal is maintainable.

Designation of Mr. Zulqarnain as Judge, Special Court empowered to try offences under the OSA:-

40. We now proceed to determine whether the designation of Mr. Zulqarnain to try cases under the OSA was violative of the law or the concept of separation of powers. The appellant's grievance against Mr. Zulqarnain's designation as such was that it had been made at the instance of the executive and thus was a serious inroad on the independence of the judiciary.

41. Article 175(3) of the Constitution provides that *"[t]he Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day."* It is this concept of separation of powers of which an integral component is the principle of the independence of the judiciary that caused the National Judicial (Policy Making) Committee to issue the National Judicial Policy-2009 paragraph 6 whereof under the caption *"Independence of Judiciary"* reads thus:-

> ***"6) All Special Courts / Tribunals under the administrative control of Executive must be placed under the control and supervision of the***

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judiciary, their appointments / postings should be made on the recommendation of the Chief Justice of concerned High Court."

42. The documents brought on record by the learned Additional Attorney-General show that vide notification dated 27.06.2023 issued by the Ministry of Law and Justice in exercise of the powers conferred by Section 13(1) of the OSA, Raja Jawad Abbas Hassan, District and Sessions Judge was designated as the Judge to exercise powers for conducting trials for offences under the said Act. At the time when the said notification was issued, Raja Jawad Abbas Hassan had also been notified as Judge, Special Court (Anti-Terrorism-I), Islamabad.

43. Vide letter dated 20.06.2023, the Registrar of this Court informed the Secretary, Ministry of Law and Justice as to the decision taken by the Hon'ble Chief Justice to *inter alia* nominate Raja Jawad Abbas Hassan as Judge, Special Court (Control of Narcotics Substances), Islamabad and Mr. Zulqarnain as Judge, Special Court (Anti-Terrorism-I), Islamabad. Mr. Zulqarnain was also nominated as a Judge for trying offences under the OSA. Thereafter on 21.06.2023, the Ministry of Law and Justice submitted a summary to the Cabinet proposing *inter alia* that Mr. Zulqarnain be appointed as Judge, Special Court (Anti-Terrorism-I), Islamabad and he also be designated to try cases under the OSA. The Cabinet, on 27.06.2023, approved the proposals made in the said summary. On the basis of the said approval, the Ministry of Law and Justice, in exercise of the powers conferred by Section 13(1) of the OSA, issued notification dated 27.06.2023 whereby the Special Court (Anti-Terrorism-I) was designated to try cases under the OSA.

44. Section 13(1) of the OSA provides that no Court inferior to that of a Magistrate of the First Class specially empowered in this behalf by the appropriate Government shall try any offence under the said Act. *"Appropriate Government"* has been defined in Section 2A of the OSA as in relation to matters enumerated in the Federal Legislative List in the Fourth Schedule to the Constitution, the Federal Government and, in relation to any other matter, the Provincial Government. Learned counsel for the appellant did not question the observation made by the learned Judge-in-Chambers in the impugned judgment that the subject of the

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OSA and offences committed thereunder finds its place in Entry No.1, Part-1 in Schedule-IV to the Constitution. Therefore, the word, "Government" used in Section 13(1) of the OSA would be relatable to the Federal Government. Similarly, Section 14(4) of the Anti-Terrorism Act, 1997 ("the 1997 Act"**) provides that a Judge of the Anti-Terrorism Court shall hold office for a period of two and a half years but may be appointed for such further term or part of term as the Government appointing the Judge may determine. It is not disputed that the appointment of a Judge Anti-Terrorism Court is also to be made by the Federal Government. It is also not disputed that the Federal Government (i.e. the Cabinet) on 27.06.2023 had approved the appointment of Mr. Zulqarnain as Judge, Anti-Terrorism Court-I, Islamabad and also designated the said Court to try offences under the OSA. There is nothing on the record to show that Mr. Zulqarnain's appointment as Judge, Anti-Terrorism Court-I, Islamabad or the designation of the said Court to try offences under the OSA had been initiated by the Ministry of Law and Justice. Since Mr. Zulqarnain's appointment as Judge, Special Court (Anti-Terrorism-I), Islamabad and his designation as a Judge to try offences under the OSA had been proposed by the Hon'ble Chief Justice of this Court, as is evident from the Registrar's letter dated 20.06.2023, the requirement of consultation between the Hon'ble Chief Justice and the Government will be considered to have been fulfilled. Therefore, we do not see any legal or jurisdictional infirmity in Mr. Zulqarnain being designated as the Judge to try offences under the OSA. Therefore, we have given no reason to hold that the designation of Mr. Zulqarnain as the Judge, Special Court to try offences under the OSA is violative of the principle of separation of powers.**

45. As regards the contention of the learned counsel for the appellant that since the 1997 Act and the OSA are Federal Statutes, the Hon'ble Chief Justice of Pakistan and not the Hon'ble Chief Justice of this Court should have been consulted before Mr. Zulqarnain was appointed a Judge, Special Court, (Anti-Terrorism-I), Islamabad or designated to try offences under the OSA, the same has no legal basis and is therefore spurned. This is because the Special Courts established in the ICT to try

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offences under the 1997 Act and the OSA come under the supervisory jurisdiction of this Court in terms of Article 203 of the Constitution as well as Section 6(2) of the Islamabad High Court Act, 2010, which reads thus:-

> ***"(2) Notwithstanding anything contained in any other law for the time being in force, all civil, criminal and revenue courts and all tribunals and special courts functioning in Islamabad Capital Territory which were within the jurisdiction and under the superintendence and control of the Lahore High Court before the commencement of this Act shall, as from the appointed date, fall within the jurisdiction and under the supervision and control of the Islamabad High Court."***

Vires of notification (F.No.8(93)/2021-A-IV) dated 29.08.2023 impugned in writ petition No.2656/2023:-

46. As mentioned above, in writ petition No.2656/2023, the appellant had challenged notification dated 29.08.2023 issued by the Ministry of Law and Justice. This one-paragraph notification is reproduced herein below:-

> ***"F.No.8(93)/2021-A-IV, Due to security concerns as conveyed by the Ministry of Interior vide their letter No.13/23/2022-NAP, dated 29.08.2023, Law & Justice Division has No Objection for the trial of Mr. Imran Khan Niazi by the Special Court on 30.08.2023 in District Jail, Attock under Official Secrets Act, 1923 (Act No.XIX of 1923)."***

47. The statutory power in exercise whereof the said notification was issued cannot be discerned from its text. The learned Attorney-General was also not clear in his submissions as to the statutory power that the Ministry of Law and Justice was exercising when the said notification was issued. All that was said about the said notification by the Secretary, Ministry of Law and Justice in his report submitted in the proceedings in W.P.No.2656/2023 was as follows:-

> ***"That Ministry of Interior, Islamabad had forwarded a Special Report of ICT Police to this Division on 29.08.2023, whereby it was communicated that there are potential threats to the life of the accused. In view of the said Report the M/o Law & Justice conveyed "No Objection" vide Notification dated 29.08.2023, for conducting the trial of the accused in District Jail, Attock under the Official Secrets Act, 1923"***

48. Section 9(2) Cr.P.C. provides that *"[t]he Provincial Government may, by general or special order in the official Gazette, direct at what place or places the Court of Session shall hold its sitting; but, until such order is made, the Courts of Session shall hold their sittings as heretofore."* The appellant's plea in the proceedings in

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W.P.No.2656/2023 was that the power under Section 9(2) Cr.P.C. could only be exercised by the Provincial Government which in the context of the ICT would be the Chief Commissioner, Islamabad. This plea did not find favour with the learned Judge-in-Chambers who rejected the appellant's said plea in the following terms:-

> ***"Insofar as shifting of the hearing is concerned, under Section 9(2) Cr.PC, the Provincial Government by general or special order can direct at what place or places the Court of Session would hold its sitting. Bare reading of sub-section 2 of section 9 Cr.PC, shows that the Provincial Government is competent to shift the place or places of sitting of the Court of Sessions only and does not have any jurisdiction to pass any order with respect to the special courts, constituted and administered under the Federal laws. Thus, the submission by the learned counsel for the petitioner to the effect that under section 9(2) Cr.PC, the Commissioner Islamabad was the competent authority has no substance."***

49. But the learned Judge-in-Chambers went on to hold that *"the governing ministry for the affairs of Islamabad Capital Territory is Ministry of Interior and, as already noted above, the appropriate government for the purposes of Official Secrets Act is the Federal Government with concerned ministry being the Ministry of Law and Justice."* Assuming that the sanction of the Chief Commissioner, ICT was not required for the Special Court established for trying offences under the OSA to have its sittings in the jail premises, the question that needs to be determined is whether the sanction in this regard either by the Ministry of Interior or the Ministry of Law and Justice would be sufficient to cloth the notification dated 29.08.2023 with legality. The parties before us do not dispute that for the purposes of the OSA, the appropriate government would be the Federal Government. As per the ratio in *Mustafa Impex vs. Government of Pakistan*[4] where a power is conferred by statute on the Federal Government then such power can only be exercised by the Federal Cabinet. A decision taken by the Ministry of Interior or the Ministry of Law and Justice cannot be equated with a decision taken by the Federal Cabinet. The learned Judge-in-Chambers erred by not appreciating that at no material stage was the sanction of the Federal Government (i.e. the Cabinet) obtained before changing the

[4] PLD 2016 SC 808.

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place where the Special Court established for trying the offences under the OSA is to hold its sitting to jail premises.

50. Since no sanction of the Government, be it the Federal Government or the Provincial Government, had been obtained and since admittedly the mechanism envisaged by Section 352 Cr.P.C. read with Rule 3 of the LHC Rules had not been adopted before the issuance of the notification dated 29.08.2023, we are of the view that the said notification was without lawful authority and of no legal effect.

Vires of notification (F.No.40(68)/2023-A-VIII) dated 12.09.2023; notification (F.No.40(68)/2023-A-VIII) dated 25.09.2023; notification (F.No.40(68)/2023-A-VIII) dated 03.10.2023; and notification (F.No.40(68)/2023-A-VIII) dated 13.10.2023 issued by the Ministry of Law and Justice:-

51. Now, the learned Attorney-General brought on record a number of documents (referred to in paragraph 29 above) to demonstrate that the legal formalities and prerequisites under Section 352 Cr.P.C. read with Rule 3 of the LHC Rules had been duly complied with for conducting the appellant's trial in jail. All these documents were issued after the date on which the judgment was reserved in W.P. No.2656/2023 by the learned Judge-in-Chambers. Since an appeal is a continuation of proceedings before the original forum and since an appellate Court can, while hearing an appeal under Section 3(2) of the 1972 Ordinance, take notice of subsequent events, the learned counsel for the appellant questioned the legality of the notifications issued by the Ministry of Law and Justice pertaining to the appellant's trial in jail, and the learned Attorney-General defended these notifications.

52. In the cases of *Evacuee Trust Property Board vs. Mst. Sakina Bibi*[5], *Mst. Muhammadi and others vs. Ghulam Nabi*[6], *Ali Asghar vs. Creators (Builders)*[7], *Syed Bhais vs. Government of the Punjab Excise and Taxation Department*[8], *Amina Begum vs. Ghulam Dastgir*[9], *Saeeda Khatoon vs. House Building Finance Corporation*[10], *Sheikh Fazal*

[5] 2007 SCMR 262;
[6] 2007 SCMR 761;
[7] 2001 SCMR 279;
[8] PLD 2000 Lahore 20;
[9] PLD 1978 SC 220;
[10] PLD 1998 Karachi 99;

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Rehman and Sons Limited vs. Ghee Corporation of Pakistan[11], ***Ch. Riyasat Ali, Advocate vs. Returning Officer***[12], ***Muhammad Rashid vs. Member (Revenue), Board of Revenue, Punjab***[13], and ***Muhammad Nazir vs. Collector/Deputy Commissioner, Lahore***[14], it was held *inter alia* that a Court has ample jurisdiction to look into subsequent events for the purpose of giving complete and effective relief in a case. We, after taking notice of notifications issued for the appellant's trial in jail after the date when the judgment in W.P.No.2656/2023 was reserved, proceeded to examine their vires.

53. The sequence in which the above mentioned notifications were issued by the Ministry of Law and Justice is set out in paragraph 10 to 16 herein above. These notifications were issued after the judgment in W.P.No.2656/2023 was reserved on 12.09.2023 and before it was announced on 16.10.2023. These notifications were preceded by requests made by the learned Judge, Special Court through letters dated 12.09.2023, 25.09.2023, and 02.10.2023 to the Secretary, Law and Justice Division for the issuance of NOCs for conducting the trial in case F.I.R. No.06/2023 in jail. All these letters make express reference to Section 352 Cr.P.C. and Rule 3 of the LHC Rules. These notifications dated 12.09.2023, 25.09.2023, 03.10.2023, and 13.10.2023 are stated to have been issued *"in the light of"* Section 352 Cr.P.C. and Rule 3 of the LHC Rules.

54. We need to examine the said notifications on the touchstone of Section 352 Cr.P.C. and Rule 3 of the LHC Rules. Section 352 Cr.P.C. reads thus:-

> *"352. Courts to be open. (1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them:*
> *Provided that the Presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be remain in, the room or building used by the Court."*

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[11] 2003 CLC 1823;
[12] 2003 CLC 1730;
[13] 2001 MLD 548;
[14] 2001 CLC 767.

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55. Section 352(1) Cr.P.C. embodies one of the surest guarantees of a citizen's liberty of providing him with an open public trial. The ordinary rule no doubt is that the trial or inquiry should be held in a usual courtroom. There, however, may be extraordinary circumstances due to which the Magistrate may consider it necessary for reasons of security of the accused or of the witnesses or for any other valid ground to hold the inquiry or trial in jail premises. Where the Magistrate exercises his discretion to exclude the public or to hold his Court in a building such as a jail, he must do so in accordance with Rule 3 of the LHC Rules, which have been admittedly adopted by this Court. Rule 3 of the LHC Rules reads thus:-

> ***"3. Court house in an open Court.—Section 352 of the Code of Criminal Procedure lays down that the place where a Criminal Court is held, "shall be deemed an open Court to which the public generally may have access so far as the same can conveniently contain them," but the discretion to exclude the public from the ordinary Court room rests with the presiding Magistrate. When, however, the presiding Magistrate, for any reason, excludes the public by holding his Court in a building such as a jail, to which the public is not admitted (and he is not entitled to do so without the permission of the Department concerned) he should obtain the sanction of Government thereto, through the District Magistrate, and should inform the High Court that sanction has been accorded."***

56. The Lahore High Court Rules, which have been adopted by this Court, were made in exercise of the powers conferred by Article 202 of the Constitution, which provides that *"subject to the Constitution and law, a High Court may make rules regulating the practice and procedure of the Court or of any Court subordinate to it."* Due weight is required to be given to rules which have a Constitutional sanction, as was held by the Hon'ble Supreme Court in *Tariq Aziz-ud-Din and others*[15]. In *Vice-Chairman, Punjab Bar Council and others vs. Government of the Punjab and others*[16], the Hon'ble Lahore High Court, after making reference to Article 202 of the Constitution, expressed the following views on its Rules and Orders:-

> ***"61. Thus, the High Courts have been conferred the constitutional power regarding rules of procedure which may not only regulate the practice and procedure of a High Court but also any court subordinate to it. In exercise of this power, LHC has made rules entitled 'High Court Rules and***

[15] 2010 SCMR 1301.
[16] PLD 2021 Lahore 544.

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Orders' which contain an elaborate procedure to be followed by the courts subordinate to it in matters relating to adjudication of cases before civil courts. Thus, not only has the High Court been delegated the power of making and amending rules in the First Schedule by the Code itself but also by the Constitution by virtue of Article 202. … Also while a reference to Article 202 of the Constitution has already been made, it also by implication follows that the exercise of rule making power is constitutional which resides in a High Court and, therefore, if such power has already been exercised, it emerges as an unwritten rule to be followed in all such matters that it is of utmost importance that consultation be held between a High Court and the government of province. It is not only essential for the administration of justice but also to preserve the independence of judiciary that in a unique situation where judicial legislation is permissible, Punjab should act conformably with LHC's rule-making process."

57. In the above-referred case, the Hon'ble Lahore High Court allowed a writ petition by striking down a provincial statute *inter alia* on the ground that it had been made in disregard of the provisions of the Lahore High Court Rules which were held not just to have a statutory but a Constitutional basis and the result of a thoughtful and inclusive consultative process. In the case at hand, we are not examining the *vires* of any statute on the touchstone of Rule 3 of the LHC Rules but of executive fiats in the nature of the above-mentioned notifications which do not have the sanction of the Federal Government (i.e. the Cabinet).

58. Where the requirements of Section 352 Cr.P.C. as well as Rule 3 of the LHC Rules are not complied with, notifications for conducting an accused's trial in jail have been interfered with by the High Courts in exercise of jurisdiction under Article 199 of the Constitution. Reference in this regard may be made to the following case law:-

(i) In *Akhlaq Ahmad vs. Government of Punjab*[17], the petitioner who had been accused of committing an offence under Section 302 PPC had not been produced before the Court of the Additional Sessions Judge, Lahore by taking the ground that Government of Punjab had issued a notification directing that the case against the petitioner and his co-accused be tried in the premises of Central Jail Kotlakpat, Lahore. The Hon'ble Lahore High Court declared such notification to be without lawful authority primarily on the ground that the requirements of Section 352 Cr.P.C. and Rule 3 of the LHC

[17] 1991 MLD 739.

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Rules had not been complied with. The manner in which the authority under Section 352 Cr.P.C. read with Rule 3 of the LHC Rules is to be exercised could not have been explained any better than by the Hon'ble Mr. Justice Malik Mohammad Qayyum speaking for the Hon'ble Lahore High Court in the following terms:-

> ***"Section 352 of the Criminal Procedure Code when read conjunctively with the aforesaid rules leaves no doubt that generally all trials are to be held in an open Court. The presiding officer has, however, been vested with the power to hold the proceedings in camera or at a place such as jail to which the public does not have any access but this power can be exercised by him only after obtaining permission from the Government through the District Magistrate. He is further under an obligation to inform the High Court that the sanction has been granted by the Government to hold the Court at a place other than the Court-house. Neither section 352 of the Criminal Procedure Code nor the rules on the subject empower the Government, the Home Secretary, or the District Magistrate to pass any order of their own directing the holding of trial at a place other than the Court-house. It is not difficult to understand the rationale as to why such a power has not been conferred upon the executive authorities. To allow them to determine the venue for holding Court would undermine the independence of the Judiciary."***

(ii) In *Muhammad Idrees and others vs. The State*[18], the petitioners had challenged the legality of an order issued by the Home Department of the Government of Punjab whereby approval was accorded for holding the trial of the accused in the premises of New Central Jail, Multan. Permission for conducting the trial in jail had not been sought by the Presiding Officer of the Court where the trial was to be conducted but by the District and Sessions Judge, Multan, who was not seized of the matter. The writ petition filed by the petitioners was allowed by the Division Bench of the Hon'ble Lahore High Court for want of adoption of the procedure provided in Section 352 Cr.P.C. read with Rule 3 of the LHC Rules. Paragraphs 6 and 7 of the report are reproduced herein below:-

> ***"6. A plain reading of the above provision of law shows that a criminal trial should always be held in an open Court where general public can have an easy access. However, in exceptional circumstances, the Presiding Judge or Magistrate may deny access to public in general or any particular person. A similar provision is contained in Volume III. Chapter 1, Part A(3) in the***

[18] 2004 PCrLJ 1163.

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> ***Rules and Orders of the Lahore High Court, Lahore, which gives discretion to the Presiding Officer alone to hold the trial in jail and for this purpose, the trial Court has to make a reference to obtain the sanction of the Government.***
> ***7. Admittedly, in the case in hand, the trial Court has not taken any decision in this regard and the Home Department, Government of Punjab, has accorded approval on a reference made by the learned District and Sessions Judge, Multan who was not seized of the matter. Thus, the impugned order cannot be sustained. Accordingly, we accept this writ petition and set aside the impugned order."***

59. It is an admitted position that the notifications dated 12.09.2023, 25.09.2023, 03.10.2023, and 13.10.2023 were not preceded by any judicial order passed by the learned Judge, Special Court for the proceedings or trial in case F.I.R. No.06/2023 to be conducted in jail. Much emphasis was placed by the learned Attorney-General on (i) letter dated 27.08.2023 from the office of the ICCPO to the Deputy Commissioner ICT, (ii) letter dated 29.08.2023 from the office of the Chief Commissioner ICT to the Inspector General of Police, ICT, and (iii) office memorandum dated 29.08.2023 from the Ministry of Interior to the Secretary, Ministry of Law and Justice in furtherance of his submission that there was a real and present danger to the appellant's security which necessitated the holding of the proceedings and trial against him in jail. These letters make reference to a special report of the ICT Police which has not been brought on record at any stage. None of these letters were marked or forwarded to the learned Judge, Special Court. When asked as to how the learned Judge, Special Court, in his letters dated 12.09.2023, 25.09.2023, and 02.10.2023, took the view that there were life threats to the appellant, the learned Attorney-General submitted that he may have gained knowledge as to such fact from his own sources. Be that as it may, no document was brought on record to show that the special report of the ICT Police or the above-mentioned letters were forwarded to the learned Judge, Special Court before he addressed his first letter dated 12.09.2023 to the Secretary, Ministry of Law and Justice seeking the issuance of an NOC for conducting the trial against the appellant in jail. At this stage it ought to be mentioned that this Court

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cannot sit in judgment over the conclusion drawn by the police as to the existence of life threats to the appellant.

60. Proceeding on the assumption that there did exist a judicial order for holding the proceedings and trial in FIR No.06/2023 in jail, there is nothing on the record to show that prior to the notifications dated 12.09.2023, 25.09.2023, 03.10.2023, and 13.10.2023, any sanction of the Federal Government (i.e. Cabinet) had been obtained through the District Magistrate for conducting the proceedings and trial in case FIR No.06/2023 in jail. Since this mandatory requirement envisaged by Rule 3 of the LHC Rules had not been fulfilled prior to the issuance of the said notifications, this is reason enough to declare the issuance of said notifications to be without lawful authority and of no legal effect.

Vires of notification (F.No.40(68)/2023-A-VIII) dated 13.11.2023 issued by the Ministry of Law and Justice on the basis of the Cabinet's decision dated 12.11.2023 and notification (F.No.40(68)/2023-A-VIII) dated 15.11.2023 issued by the said Ministry on the basis of the Cabinet's decision dated 15.11.2023:-

61. After the judgment in writ petition No.2656/2023 was announced on 16.10.2023, and the instant intra Court Appeal was filed on 23.10.2023, the learned Judge, Special Court addressed letter dated 08.11.2023 to the Federal Government through the Chief Commissioner, ICT, seeking approval for the trial in case F.I.R. No.06/2023 to be conducted in Central Jail, Rawalpindi. In the said letter, it is mentioned that the trial in the said case is already being conducted in jail *"in the light of"* notification dated 13.10.2023 issued by the Ministry of Law and Justice. It is also mentioned that there were *"security threats to the life of accused Imran Ahmed Khan Niazi."* The learned Judge, Special Court expressed his feeling that in order to *"avoid any future complication for the purpose of conducting jail trial"* approval be granted for the trial in the said case to be conducted in jail.

62. One need not wonder why the learned Judge, Special Court re-initiated the process for seeking approval for conducting the trial in case F.I.R. No.06/2023 in the presence of an earlier notification dated 13.10.2023 issued by the Ministry of Law and Justice, allowing the trial against the appellant and his co-accused to be conducted wherever they

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were confined. The learned Judge, Special Court's letter dated 08.11.2023 is indicative of his realization that the proceedings in jail had been conducted *sans* the sanction of the Federal Government as required by Rule 3 of the LHC Rules. Unlike the learned Judge, Special Court's earlier letters dated 12.09.2023, 25.09.2023 and 02.10.2023 which were all addressed to the Secretary, Law and Justice Division, the letter dated 08.11.2023 was addressed to the Federal Government through the Chief Commissioner ICT. It appears that the learned Judge, Special Court realized that the requirements of Rule 3 of the LHC Rules (which requires the Presiding Magistrate to obtain the sanction of the Government through the District Magistrate for holding a trial in jail) had not been fulfilled when the earlier notification dated 13.10.2023 had been issued. The learned Judge, Special Court was expected to exercise vigilance by satisfying himself that all the requirements of Section 352 Cr.P.C. and Rule 3 of LHC Rules had been fulfilled before he decided to hold Court in jail premises.

63. Vide letter dated 08.11.2023, the office of the Chief Commissioner, ICT forwarded the learned Judge, Special Court's letter dated 08.11.2023 to the Ministry of Interior. The Ministry of Interior vide Office Memorandum dated 08.11.2023 forwarded the said letters dated 08.11.2023 to the Secretary, Ministry of Law and Justice. The Ministry of Law and Justice on 10.11.2023 submitted a summary to the Cabinet proposing that *"the Federal Government may kindly accord approval for trial of the accused Mr. Imran Khan Niazi & others in jail or wherever they were confined, for offences under Official Secrets Act, 1923."* Approval was accorded to the said proposal by the Cabinet on 12.11.2023. On 13.11.2023, the Ministry of Law and Justice issued a notification to the effect that the Federal Government had accorded approval for the trial of the appellant and his co-accused to be conducted in Central Jail, Rawalpindi or wherever they were confined for offences under the OSA.

64. The instant intra Court appeal was taken up for hearing on 14.11.2023 whereon the learned Attorney-General informed the Court that the Cabinet had taken a decision with respect to the appellant's trial in jail but a copy of the said decision was not available. He sought some

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time to produce the same before the Court. Vide order dated 14.11.2023, this Court, after briefly hearing the learned counsel for the appellant as well as the learned Attorney-General for Pakistan, stayed the proceedings before the Special Court.

65. Now, it is most pertinent to bear in mind that by the time the said approval dated 12.11.2023 was granted by the Cabinet, the charge against the appellant and his co-accused had already been framed; the statements of three witnesses had been recorded on 07.11.2023, whereas the statement of one witness was recorded on 14.11.2023. The statements of the remaining witnesses were not recorded as the learned Judge, Special Court gained knowledge as to the stay order granted by this Court on 14.11.2023.

66. This Court, in its order dated 14.11.2023, while staying the proceedings in the trial before the learned Judge, Special Court, had *inter alia* observed as follows:-

> ***"Learned Attorney General also submitted that either yesterday or the day before yesterday, the Federal Cabinet has taken a decision to the effect that the appellant's trial can be conducted in jail. He is not in a position to produce a copy of the said decision or the summary on which such decision was taken. Let these documents along with all other relevant documents be filed by the next date of hearing.***
>
> ***Assuming that with the decision of the Federal Cabinet, all the legal formalities for conducting the appellant's trial in jail stand fulfilled, the legal status of the proceedings conducted thus far will have to be determined in that it will have to be determined whether the trial conducted thus far stands vitiated or can be termed as a mere irregularity not adversely affecting the appellant's right to a fair trial contemplated by Article 10A of the Constitution.***
>
> ***We are told that till date three witnesses have already been examined, and the trial is due to take place today.***
>
> ***Since the documentation referred to herein above is essential for the just adjudication of this matter, and since the questions of law affecting the appellant's fundamental rights have also to be determined in the light of such documents, we are sanguine that the proceedings in the trial be stayed until the next date of hearing i.e., <u>16.11.2023</u>."***

67. It is perhaps on account of the said observation that the Ministry of Law and Justice submitted another summary on 15.11.2023 to the Cabinet proposing that the Federal Government may grant *"sanction / approval for the proceedings and trial of Mr. Imran Khan Niazi and others conducted by the Special Court having jurisdiction under the [Official Secrets Act, 1923] at District Jail, Attock and Central Jail, Adyala,*

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Rawalpindi during the period from 29.08.2023 to 12.11.2023 (both days inclusive) for offences under the Official Secrets Act, 1923." **On the very same day i.e. 15.11.2023, the Cabinet accorded approval to the said proposal made by the Ministry of Law and Justice, in its summary dated 15.11.2023.**

68. As per the notification dated 15.11.2023 issued by the Ministry of Law and Justice, the Federal Government granted sanction for the proceedings and the trial against the appellant and the co-accused conducted by the Special Court at District Jail, Attock and Central Jail, Rawalpindi during the period from 29.08.2023 to 12.11.2023 (both days inclusive) for offences under the OSA. This is in effect an *ex-post facto* approval of the proceedings conducted between 29.08.2023 and 23.10.2023 and the trial conducted after 23.10.2023 and 12.11.2023 to be in jail.

69. We now need to examine the vires of the said notifications dated 13.11.2023 and 15.11.2023 issued by the Ministry of Law and Justice by judicially reviewing the process initiated through the learned Judge, Special Court's letter dated 08.11.2023 and culminating in the issuance of the said notifications.

70. It also needs to be determined whether the necessary requirements of due process and open trial had been fulfilled since it is the assertion of the learned Attorney-General that, at all material times, the proceedings in the trial against the appellant would be deemed to be open in terms of Section 352 Cr.P.C.

71. While exercising jurisdiction under Article 199 of the Constitution, this Court is to judicially review the process in which a decision is taken in order to ensure that it did not suffer from any illegality, irrationality or procedural impropriety. Courts, while exercising writ jurisdiction, do not sit in appeal over an administrative decision. Courts are to focus their scrutiny on the decision making process rather than the decision itself unless they find the decision to be in violation of a statutory provision or based on *mala fides.*

72. The virtues of an open trial cannot be emphasized enough. The open court principle is a hallmark of democratic society and applies to all

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judicial proceedings.[19] This principle has long been recognized as a cornerstone of the common law. Public access to the Courts guarantees the integrity of judicial process by demonstrating that justice is administered in a non-arbitrary manner, according to the rule of law.[20] Openness is necessary to maintain the independence and impartiality of the Courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by decisions of the Courts.[21] In *Scott vs. Scott*[22], Viscount Haldane held that the right of public access to the Courts is one principle turning not on convenience but on necessity. In the same case, Lord Shaw held that *"[i]n the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice."* Lord Atkin in *Ambard vs. Attorney-General of Trinidad and Tobago*[23], speaking for the Privy Council, held that "justice is not a cloistered virtue." *In Cora Lillian McPherson vs. Oran Leo McPherson*[24], it was observed that publicity is the authentic hallmark of judicial procedure and the Court must be open to any who may present themselves for admission. In *Estes vs. Texas*[25], it was held that publicity serves to advance several of the particular purposes of the trial and, indeed, the judicial process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence. In *Craig vs. Harney*[26], it was held that a trial is a public event and what transpires in the courtroom is public property. In *Sherman Estate vs. Donovan*[27], the Supreme Court of Canada held as follows:-

[19] Attorney General of Nova Scotia vs. Maclntyre, [1982] 1 S.C.R. 175.
[20] Canadian Broadcasting Corp. vs. New Brunswick (Attorney General), [1996] 3 S.C.R. 480.
[21] Vancouver Sun (Re), 2004 SCC 43.
[22] (1913) A.C. 417.
[23] [1936] AC 322.
[24] AIR 1936 Privy Council 246.
[25] 381 U.S. 532 (1965), at page 538-539.
[26] 331 U.S. 367 (1947).
[27] 2021 SCC 25.

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> ***"Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness – discouraging mischief and ensuring confidence in the administration of justice through transparency – such that the strong presumption of openness applies."***

73. The requirement of open trial predates the Constitutional history of Pakistan. Jurisprudence has also been developed in Pakistan, setting guidelines for decisions to be taken under Section 352 Cr.P.C. and Rule 3 of the LHC Rules to conduct trials of accused in jail. In *National Accountability Bureau vs. Hudaibya Paper Mills*[28], the Hon'ble Supreme Court termed the holding of proceedings of the Accountability Court at Attock Fort pursuant to an order passed by the Chairman, National Accountability Bureau to be *"deeply disconcerting".* The importance of a trial at a place easily accessible to the public was emphasized in the said report in the following terms:-

> ***"27. There is another matter which is deeply disconcerting. The Accountability Court was set up in Attock Fort, which was under the control of the Military and to which there was no public access. The reason for the unusual choice of venue was mentioned in the Final Reference: "the personalities involved and the ever present danger to the security of all persons involved in the trial of the accused, it is deemed necessary and appropriate in the interest of justice, fair play, and transparency of proceedings that this Reference be filed in the Hon'ble Court Attock Fort". Section 352 of the Code mandates "courts to be open" to which the public has access. Undoubtedly, the section enables the court to restrict the presence of the public when this is deemed necessary. The location of the Accountability Court in the Attock Fort was determined by the Chairman NAB though he had no power to do so. In the case of Emperor v. Md., Ebrahim Derbyshire CJ writing for the Division Bench, took exception to, receiving "instruction from an outside source", which "is open to the gravest objection". The Chairman felt that the "interest of justice, fair play and transparency of proceedings" required the case to be tried in the inaccessible Attock Fort; even though it deprived the accused of an open trial. A novel concept justified by using cherished words - interest of justice, fair play and transparency of proceedings. However, using agreeable words do not transform an inaccessible Military Fort into an open courtroom. Justice must not only be done but be seen to be done. Public trial secures the impartial***

[28] PLD 2018 SC 296.

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administration of justice. In the case of Ali Nawaz v. Mohammad Yusuf a five member Bench of this Court dismissed the request to hold in-camera proceedings. It had been averred that in-camera proceedings would be appropriate because it involved a high officer of the Government who also held military rank. The Court however held the trial should take place in public, and all the more, "at a time when the country lay under Martial Law, were compelling considerations that favoured an open trial so that justice should not only be done but should manifestly be seen to be done. The learned trial Judge therefore does not appear to have exercised his discretion improperly in ordering an open trial" (per S. A. Rehman J).”

74. In *Mairaj Muhammad Khan vs. The State*[29], the appellant, who was a former Minister of State, had been convicted by a Special Tribunal under Section 124-A PPC read with Rules 42 and 49 of the Defence of Pakistan Rules, 1971 for having delivered a seditious speech at a May Day rally under the auspices of the Karachi Electric Supply Company Workers' Union. One of the grounds on which the conviction was challenged was that the appellant's trial before the Special Tribunal was vitiated on account of the venue of the trial to have been changed from the City Court building to the Central Jail, Karachi which had the effect of denying the petitioner the right of an open trial. The said ground found favour with the Division Bench of the Hon'ble High Court of Sindh as the appellant's trial had been conducted in a manner which could not be termed as an open trial. This irregularity in the procedure was held to have resulted in substantial and grave injustice to the appellant. It was also held that *"[p]ublicity in the administration of Justice is one of the surest guarantees of our liberties and the Court should be doubly vigilant against its denial at its own motion."* Furthermore, it was held that power under the proviso to Section 352 Cr.P.C. which was a judicial power ought to be exercised with care and circumspection, and that the importance of an open public trial can never be underestimated. The manner in which the *"judicial power"* under Section 352 Cr.P.C. was to be exercised and adverse effects of a jail trial on the requirements of due process and fair trial was explained in the following terms:-

"There is, however, no provision in the Code of Criminal Procedure which compels a Magistrate to hold his Court in the usual Court room. Section 352 Cr.P.C. probably contemplates that a Magistrate can hold

[29] PLD 1978 Karachi 308.

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his Court anywhere he likes and the proviso to this section empowers the Court to exclude public generally or any particular person from having access to or remaining in the room or building used by the Court. ***The proviso confers a judicial power on the Magistrate, to be exercised judicially which would necessarily mean that he has to satisfy himself upon the material placed before him that not because of mere convenience but necessity obliged him to hold a trial in camera.*** *.... The Tribunal was equally unconscious of the fact that the Government had granted sanction for trial in jail under rule 4 of Chapter I-A. Volume III of Rules and Orders of the Lahore High Court which is a rule to give effect to the proviso to section 352 Cr.P.C. In other words it was to follow that trial would not be an open trial. Even otherwise trial in Jail in the nature of things would not be a trial open to public view. Public cannot be easily persuaded to attend a trial in jail where entry and exit is restricted under Jail Rules and every entrant has to have his name entered in an official register maintained for the purpose. The record does not show that the Tribunal took any steps to ensure a public trial at the Jail.* ***If the Tribunal had applied its mind it would have realized that in effect it was exercising it powers under the proviso to the said section 352 which was a judicial power to be exercised with care and circumspection, for importance of an open public trial can never be underestimated****. Publicity in the administration of justice is one of the surest guarantees of our liberties and the Court should be doubly vigilant against its denial on its own motion."*

(Emphasis added)

75. In *A.K. Ansari vs. The State*[30], the petitioner was a member of a political group known as the Plebiscite Front. He was detained under Rule 23 of the Civil Defence Rules and had moved an application under Section 491 Cr.P.C. His detention was followed by a report submitted to the Government of Pakistan by the Commission of Inquiry headed by Mr. Justice Noor-ul-Arifin of the erstwhile Sind-Baluchistan High Court about the hijacking incident involving an Indian Airliner, Ganga which was hijacked from Jammu and Kashmir by two youths. The Government had moved an application praying that in the public interest and security of the State, the proceedings be held *in camera*. It was urged on behalf of the Government that the petitioner being accused of anti-state activities, the evidence against him touched upon the security of the country and as such it was imperative that the proceedings be held in camera. The Hon'ble High Court of Jammu and Kashmir rejected the said application and after making reference to Section 352 Cr.P.C. as well as the law laid

[30] PLD 1972 Azad J&K 38.

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down in *Cora Lillian McPherson vs. Oran Leo McPherson*[31], explicated the importance of an open trial in the following terms:-

> ***"There is nothing secret about Court proceedings which are essentially and basically public proceedings in the sense that it takes place, especially a criminal proceeding, not only for the dispensation of justice between the parties before it but also for the good of the community as a whole. The public is interested in the punishment of an offender so that they may not only live in peace but remain convinced of the capability of the state to bring to justice any offenders against their person, property etc.; similarly it is also vitally interested that an innocent person may not be punished and that everyone has a fair trial. According to Rousseau one of the two primary considerations that led to Man's surrender of personal sovereignty in favour of the State so created, was to seek justice in a circle of superior force because while he could enforce his will on those weaker than himself, he was himself a victim of force, superior to his own.***
>
> ***It is therefore in the paramount interests of the State itself that there should be no suspicion whatsoever, as to what happened inside the Court while a case was being heard because secrecy unduly and unfairly tends to compromise the impartiality and integrity of the presiding officer. It is also necessary to convince the public at large that justice was not only being done but had, in fact, been done in any particular case.***
>
> ***It is not an uncommon experience that even the perpetrators of worst crimes do sometimes evoke public sympathy. Should unfortunately an impression be created that the offender was not tried fairly and impartially, the criminal is likely to become a martyr– a result that must be avoided. This is all the more true in the case of political workers as the petitioners who are not being presently tried but are detained under the preventive detention powers of the executive on the allegation of being enemies of the State–an allegation denied by them and countered by alleging victimization to achieve the ends of power politics. It is, therefore, all the more necessary that these proceedings should be held in public so that not only is the Government protected against any suspicions likely to result from a camera hearing but so that confidence in the even-handedness of the Court is also maintained and strengthened."***

76. In *Asif Ali Zardari vs. Special Judge (Offences in Banks)*[32], the Division Bench of the Hon'ble High Court of Sindh observed that *"trial in open Court is an almost inevitable consequence of our judicial system, which we have inherited and the ordinary rule is that it must be held in open Court unless it is conducive to justice to hold trial in jail."*

77. In the unreported judgment dated 18.09.2017 passed by the Hon'ble Lahore High Court in *Jahanzeb Khan vs. Special Judge, CNS*

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[31] AIR 1936 Privy Council 246.
[32] PLD 1992 Karachi 437.

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Court, Lahore[33]**, it was held *inter alia* that a fair trial is regarded more important in criminal proceedings and that the standards or criteria by which a trial is assessed in terms of fairness are numerous and constantly evolving. Reference in the said judgment was made to a guide published in March 2000 by the Lawyers Committee for Human Rights, USA in which the right to a public hearing was considered to be a valuable right of an accused during a hearing.**

78. In *Khuja vs. Times Newspaper Limited*[34], the significance of an open trial has been expressed by the Supreme Court of the United Kingdom in *inter alia* the following terms:-**

> ***"12. With limited exceptions, the English courts administer judgment in public, at hearings which anyone may attend within the limits of the court's capacity and which the press may report. In the leading case, Scott v Scott [1913] AC 417, public hearings were described by Lord Loreburn (p 445) as the "inveterate rule" and the historical record bears this out. In the common law courts the practice can be dated back to the origins of the court system. As Lord Atkinson observed in the same case at p 463, this may produce inconvenience and even injustice to individuals:-***
>
> > ***"The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."***
>
> ***13. The justification for the principle of open justice was given by Lord Atkinson in this passage, and has been repeated by many judges since, namely the value of public scrutiny as a guarantor of the quality of justice. This is also the rationale of the right to a public hearing protected by the European Convention on Human Rights. It is a "means whereby confidence in the courts can be maintained": B and P v United Kingdom, (2001) 34 EHRR 19, at para 36. Its significance has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions."***

79. Reference in the said judgment was also made to the following view about an open trial expressed by Lord Diplock in *Attorney General vs. Leveller Magazine*[35]:-

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[33] Criminal Appeal no. 70907/2017.
[34] 2017 SCMR 1605.
[35] [1979] 1 AII ER 745.

"As respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

80. In *Mohd. Shahabuddin vs. State of Bihar*[36], the Indian Supreme Court held as follows:-

"121. Every criminal act is an offence against the society. The crime is a wrong done more to the society than to an individual. It involves a serious invasion of rights and liberties of some other person or persons. The people are, therefore, entitled to know whether the justice delivery system is adequate or inadequate. Whether it responds appropriately to the situation or it presents a pathetic picture. This is one aspect. The other aspect is still more fundamental. When the State representing the society seeks to prosecute a person, the State must do it openly. ...

123. In dispensation of justice, the people should be satisfied that the State is not misusing the State machinery like the Police, the Prosecutors and other Public Servants. The people may see that the accused is fairly dealt with and not unjustly condemned. There is yet another aspect. The courts like other institutions also belong to people. They are as much human institutions as any other. The other instruments and institutions of the State may survive by the power of the purse or might of the sword. But not the Courts. The Courts have no such means or power. The Courts could survive only by the strength of public confidence. The public confidence can be fostered by exposing Courts more and more to public gaze."

Furthermore, it was held as follows:-

"135. People have inherent distrust for the secret trials. One of the demands of the democratic society is that public should know what goes on in court while being told by the press or what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. Criminal trial is a public event. What transpires is a public property. Therefore, I have no difficulty in concluding that open trial is the universal rule and must be scrupulously adhered to. The right to public trial has also been recognized under Section 327 of the Code."

81. In *Narotthamdas L. Shah vs. State of Gujarat*[37], the applicant challenged the *vires* of Section 198B(5A) of the Code of Criminal Procedure to the extent whereby the Court was placed under an obligation to hold a trial *in camera* on the mere expression of the desire

[36](2010) 4 SCC 653.
[37](MANU/GJ/0147/1970).

to that effect by either party. The Gujarat High Court, while allowing the application, made reference to Section 352 Cr.P.C. and held as follows:-

> ***"...the Court shall be deemed to be an open Court by first part of Section 352. A proviso was incorporated in it by which power was conferred upon the Presiding Judge that at any stage of any inquiry into, or trial of, any particular case, if he thinks fit that the public generally, or any particular person, shall not have access to or be or remain in the room or building used by the Court he may make an order accordingly. This power was limited to exclude certain persons from the Court during the course of the hearing of the case. This power conferred by the proviso would not enable the Court to direct a camera trial with all its implications. Therefore, it can be said that for the trial of offence concerning high dignitaries and public officials wherein in a given case the evidence as to matters considered secret by the State may have to be given that a camera trial may itself become necessary for achieving higher object for which the Courts are constituted. But in that case, the power shall be in the Court and it shall not be the privilege of a party. Therefore, in enacting a portion of Sub-section (5 A) by which power was conferred upon the Court to direct a camera trial, the provision would be proper and legitimate. The Legislature far exceeded the requirement by conferring privilege upon a party to claim camera trial at its mere desire."***

82. The Sixth Amendment to the American Constitution secures to persons charged with crimes a public as well as a speedy trial. Article 10A of our Constitution provides that *"for the determination of his civil rights and obligations or in any criminal charge against him, a person shall be entitled to a fair trial and due process."* The insertion of the said Article in the Constitution, through the Constitution (Eighteenth Amendment) Act, 2010, has elevated an accused's right to be tried in an open Court in the usual Court premises to a fundamental right. An open trial in accordance with the mandate of Section 352 Cr.P.C. is an integral component of a fair trial.

83. The ordinary rule is no doubt that the trial or inquiry should be held in the usual courtroom. It is, however, difficult to accede to the proposition that there cannot be any exception to the universal rule that all cases must be tried in open court. There is nothing in Cr.P.C. to compel a Magistrate to hold his Court in the usual Court premises. Though public trial or trial in open court is the rule yet in cases of extraordinary and exceptional nature where the Magistrate may think that the ends of justice would be defeated if the trial is held in public or where it is expedient for reasons of security of the accused, the

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witnesses or himself or for any other valid ground, he has jurisdiction to order for holding a trial *in camera* or in jail precincts. Section 352 Cr.P.C. and Rule 3 of the LHC Rules give discretion to the Magistrate as regards the place where a trial or inquiry is to be held. Therefore, the holding of a trial in jail cannot be said to be illegal and the entire trial cannot be questioned as vitiated provided the requirements of Section 352 and Rule 3 of the LHC Rules are strictly adhered to; the public has access to the courtroom in jail; and the trial is conducted in open view. Where these requirements are fulfilled, the holding of the trial within a jail compound will not cause prejudice to the accused.

84. In *Asif Ali Zardari vs. Special Judge (Offences in Banks)*[38], the Federal Government had issued notifications purportedly in exercise of powers under the provisions of the Suppression of Terrorist Activities (Special Courts) Act, 1975 and Offences in respect of Banks (Special Courts) Ordinance, 1984, by which the venue of trial in respect of three cases against the petitioner was changed from the ordinary Court premises to Juvenile Jail, Landhi, Karachi. These notifications were challenged *inter alia* on the grounds that the petitioner ought to have been tried in public view so that justice could not only be done but would manifestly have been seen to be done, and that the impugned notifications were issued in complete disregard of the provisions of Section 352 Cr.P.C. which empower the Trial Court alone to take a decision in this behalf, if it is expedient to do so for the safety of the accused or any other valid ground. The Hon'ble High Court of Sindh held *inter alia* that the provisions of the statutes referred to herein above empowered the Federal Government to fix a place of sitting of the Special Courts which will be the place of sitting of Special Courts for all cases falling under that jurisdiction and that they did not empower the Federal Government to fix the venue of a trial of one or more particular cases. Furthermore, after making reference to a catena of case law on the subject, the Hon'ble High Court summarized the ratio of the case law in the following terms:-

[38] PLD 1992 Karachi 437.

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> ***"The ratio of the above judgments is that although for reasons of security for the accused or for the witnesses or for any other valid ground, the trial in jail is legal but the Presiding Officers of the Courts must realise that the place where the trial is held must be something like an open Court to which the public generally may have access so far as the same may contain them. It was further made clear that it is also the duty of the Presiding Officers to see that proper facilities are given to the members of the Bar and the members of the public and that they are not restricted by the Jail Rules or by the officers incharge of the jail in attending the trial. The decision to hold trial in jail, however, rests with the trial Court and the Government is not competent to give any such direction."***

85. In *Abdul Rashid Chaudhury vs. The State*[39], it was observed that the general rule prevalent in almost all the civilized countries of the world is that a criminal trial should be held in a public place and that the public in general should have access to it but in view of the peculiar or extraordinary circumstances of the case, there may be a need to relax the rigidity of this rule of law. Furthermore, it was held as follows:-

> ***"Lack of space in the Court room may justify a Magistrate in admitting only a limited members of the public. Further, when indecent and obscene matters have to be canvassed during the trial, the Magistrate may well have a discretion to exclude certain section of the community. In the same way, the Court may, for cogent reasons, exclude those unconnected to the proceedings of the case to avoid apprehensions of breach of the peace or for any other emergent reasons. A Magistrate or the Presiding Judge is the master of the situation and is the person responsible to maintain the decorum of the Court and to regulate the proceedings. He has the power even to hold the proceedings in a camera. In view of my above observations, I am of opinion that the Court has the inherent jurisdiction to exclude all those who are not connected with the proceedings of the case and can hold proceedings in camera for cogent reasons after passing an order under section 352, Criminal Procedure Code."***

86. In India, the validity of a trial with reference to Section 352 of the Code of Criminal Procedure,1898, since re-enacted as Section 327(1), has been the subject matter of several decisions of different Courts. In the cases of *Kailash Nath Agarwal vs. Emperor*[40], *M.R. Venkatraman*[41], *T.R. Ganeshan*[42], *Prasanta Kumar Mukerjee vs. The State* [43], and *Narwarsingh vs. State*[44], it was held *inter alia* that there is no inherent illegality in jail trials if the Magistrate records valid reasons

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[39] PLD 1966 Lahore 562.
[40] AIR 1947 Allahabad 436;
[41] In re: M.R. Venkatraman (AIR 1950 Madras 441);
[42] In re: T.R. Ganeshan (AIR 1950 Madras 696);
[43] AIR 1952 Calcutta 91;
[44] AIR 1952 Madhya Pradesh 193.

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(such as security of the accused, the witness or the Magistrate himself, etc.) and follows the requirements of Section 352 Cr.P.C. In *Sahai Singh vs. Emperor*[45], the conviction of the accused was challenged on the ground that the whole trial was vitiated because it was held in the jail. In this case, the Hon'ble Lahore High Court dismissed the appeal against conviction by holding that, *"there is nothing to show that admittance was refused to anyone who desired it, or that the prisoners were unable to communicate with their friends or counsel. No doubt, it is difficult to get counsel to appear in the jail and for that reason, if for no other, such trials are usually undesirable, but in this case the Executive Authorities were of the opinion that it would be unsafe to hold the trial elsewhere."* In the case of *Kalish Nath Agarwal vs. Emperor*[46], a question was raised as to whether a Magistrate can hold his Court in the usual courtroom or whether he can hold it in jail precincts. It was held that there was no provision in the Cr.P.C. which compelled a Magistrate to hold his Court in the usual courtroom, and that Section 352 Cr.P.C. permits a Magistrate to hold his Court anywhere he likes but he must ensure that the place where the trial is held must be like an open Court to which the public generally may have access so far as the same can conveniently contain them.

87. In *Kehar Singh vs. State*[47], the shifting of the trial in jail was caused because of extraordinary situation which emerged after the assassination of Mrs. Indira Gandhi. The accused in the said case challenged their conviction *inter alia* on the ground that their trial was conducted in Tihar Jail. It could not be shown that the public, friends and relations of the accused were prevented from having access to the place of trial in jail. Additionally, various representatives of the press including representatives of international news agency like BBC, etc. were allowed to attend the proceedings in jail subject to the usual regulations of the jail. The appeal against conviction was maintained by the Indian Supreme Court. The test as laid down by the said Court was

[45] AIR 1917 Lahore 311.
[46] AIR 1947 Allahabad 436.
[47] AIR 1988 SC 1883.

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whether public could have reasonable access to the courtroom. It was held as follows:-

> ***"183. It may now be stated without contradiction that jail is not a prohibited place for trial of criminal cases. Nor the jail trial can be regarded as an illegitimate trial. There can be trial in jail premises for reasons of security to the parties, witnesses and for other valid reasons. The enquiry or trial, however, must be conducted in open Court. There should not be any veil of secrecy in the proceedings. There should not even be an impression that it is a secret trial. The dynamics of judicial process should be thrown open to the public at every stage. The public must have reasonable access to the place of trial. The Presiding Judge must have full control of the Court house. The accused must have all facilities to have a fair trial and all safeguards to avoid prejudice."***

88. In *Mohd. Shahabuddin vs. State of Bihar*[48] (*supra*), the allegation against the appellant was that he was involved in more than forty criminal cases; and that a reign of terror had been created by the appellant and his 'private army' for two decades. The appellant had committed notorious crimes and his gang of criminals had interfered with the administration of justice. During the raid conducted on 16.03.2001 on the appellant's house, the appellant and his private army fired upon the raiding party and burnt the vehicles of the Deputy Inspector General of Police, Saran Range, District Magistrate Siwan and Superintendent of Police Siwan. These criminals fired more than 100 rounds of ammunition from arms including AK 47 and AK 56 etc. In that firing, one constable was killed and several constables were injured. There were innumerable cases of the same kind in which the appellant was directly involved. The Indian Supreme Court upheld the direction of the Patna High Court to conduct the appellant's trial in Siwan Jail instead of the Siwan Court with the following observations:-

> ***"146. The importance of public trial in a democratic country governed by rule of law can hardly be over emphasised, but at the same time I cannot overlook the fact that primary function of the judiciary is to do justice between the parties which bring their causes before it. Therefore, it is difficult to accede to the proposition that there cannot be any exception to the universal rule that all cases must be tried in open court. In a case of extraordinary nature, the universal rule of open trial may not be adhered to."***

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[48] (2010) 4 SCC 653.

89. The vital question that needs to be determined is whether all the necessary requirements of Section 352 Cr.P.C. read with Rule 3 of the LHC Rules had been fulfilled before the proceedings in the trial against the appellant were conducted in jail. Section 352 Cr.P.C. and Rule 3 of the LHC Rules contemplate the exercise of discretion by the presiding officer when he orders exclusion of the public by holding his Court in a building such as a jail. Very rarely does a Trial Court exercise its discretion to direct any particular case to be tried in jail. This discretion is to be exercised sparingly and with caution. Such discretion is not unfettered and cannot be exercised arbitrarily. Exercise of discretion is always guided by the circumstances of the case including the conduct of the parties. An order for a jail trial ought to be passed in exceptional cases after formation of the view based on tangible material that the holding of the trial outside jail may disrupt public order or internal security due to a surcharged atmosphere as to spoil and vitiate the requirements of a calm, detached and fair trial. When exercising discretion, justice must be done in terms of equity, equality and fairness. In *Scott vs. Scott*[49] (*supra*), it has been explained that the power of an ordinary court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. It was held that if there is any exception to the broad principle which requires the administration of justice to take place in open court, that exception must be based on the application of some other overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.

90. The exercise of discretion under Section 352 Cr.P.C. and Rule 3 of the LHC Rules must be equitable to both the accused and the prosecution. This cannot be achieved without hearing the parties whose right to an open trial and the usual courtroom stand to be curtailed by the exercise of such discretion. It is an admitted position that the appellant was not afforded an opportunity to submit his views or objections to the learned Judge, Special Court's proposal in his letter dated 08.11.2023 to

[49] (1913) A.C. 417.

the Federal Government to conduct the trial against the appellant in jail. The issuance of the said letter dated 08.11.2023 is indicative of disregard for the appellant's basic right to an open trial and the requirements of due process regardless of the merits of the case registered against the appellant.

91. Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. The considerations which ought to weigh with the Trial Court in ordering to hold its sitting in jail are considerations of the interest of justice, expeditious hearing of the trial and the requirement of a fair and open trial. These considerations ought to be apparent in the judicial order that the trial Court is to pass for holding the trial in jail. In terms of the law laid down in *Mairaj Muhammad Khan vs. The State*[50] *(supra),* the jurisdiction to pass an order under the proviso to Section 352 Cr.P.C. is to be *"exercised judicially"* and that such an order is passed in exercise of *"judicial power."*

92. In the case at hand, there does not exist any judicial order requiring the trial in case F.I.R. No.06/2023 to be conducted in jail let alone an order supported by reasons. The letters written by the learned Judge, Special Court to the Secretary, Ministry of Law and Justice or the Federal Government through the Chief Commissioner, ICT cannot be equated with a judicial order contemplated by Section 352 Cr.P.C. read with Rule 3 of the LHC Rules for proceedings and trial in the case to be conducted in jail. As mentioned above, a Court is to exercise discretion while passing an order for further proceedings in a case to be conducted in jail. Such an order is not just required to be supported by justiciable reasons but is also to be passed after hearing the parties whose rights to an open trial are proposed to be curtailed by ordering a trial in jail.

93. We have read and re-read the order sheet maintained by the learned Judge Special Court but have not been able to locate any judicial order requiring the proceedings and trial in case F.I.R.No.06/2023 to be conducted in jail. Therefore, it is safe to hold that the essential prerequisite of passing a judicial order requiring for the trial against the

[50] PLD 1978 Karachi 308.

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appellant to be conducted in jail was not fulfilled in the instant case. In holding that a judicial order of the presiding officer under Section 352 Cr.P.C. is essential for initiating the process envisaged by Rule 3 of the LHC Rules for holding a trial in jail. Reliance in this regard is placed on the following case law:-

(i) In *Mairaj Muhammad Khan vs. The State*[51], it has been clearly held that the proviso to Section 352 Cr.P.C. confers a *"judicial power"* on the Magistrate, to be *"exercised judicially"* which would necessarily mean that he has to satisfy himself upon the material placed before him that not because of mere convenience but necessity obliged him to hold the trial in camera.

(ii) In *Hafeez Ahmad vs. The State*[52], it was held that it is the Magistrate who, with due regard to the circumstances of the case, has to decide whether the trial should be held in a place other than his courthouse, for instance, the jail premises.

(iii) In *Prasanta Kumar vs. The State*[53], the Magistrate had passed an order that the trial against the accused would be conducted in jail. The trial in jail culminated in the accused being convicted. The conviction was assailed before the Calcutta High Court. One of the grounds taken in the appeal was that the trial inside jail was improper and prejudiced the accused in his defense. The appeal was successful on the ground that the order whereby the Magistrate had ordered the trial to be conducted in jail was not supported by any reasons. The said High Court ordered for the trial to be conducted in open Court. In the said case, it was *inter alia* held as follows:-

> ***"The ordinary rule is that the trials are to be held in open Court. While there is nothing in law to prevent a Magistrate from holding open Court inside a jail wide discretion being given to the Magistrate by Section 352, Criminal P. C, the very nature of a jail building and the restrictions which are necessarily imposed on any one visiting jail, would make it ordinarily impossible for a Magistrate to hold open Court in jail. There may be circumstances in which for reasons of security for the accused or for the witnesses or for the Magistrate himself or for other valid reason***

[51] PLD 1978 Karachi 308.
[52] PLD 1975 Lahore 1453.
[53] AIR 1952 Calcutta 91.

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> ***the Magistrate may think it proper to hold Court inside a jail building or some other building and restrict the free access of the public. There is however nothing in the record of this case to show that there was any such reason which made the Magistrate decide in favour of holding the trial in a jail. All we can find on the record is that after the case was transferred to this Magistrate, he passed an order that the trial would be held in jail. There is nothing in the order sheet nor anywhere else on the record from which we can find the slightest indication as to what weighed with the Magistrate in ordering trial in the Jail at Hooghly instead of the usual place for trial viz., the Court building at Serampore. ...”***

(iv) In *The King vs. U Khemein*[54], it was observed that the question whether a trial should be held at a place other than a courthouse is a matter purely within the jurisdiction of the Magistrate himself and that where he decides to hold the trial in jail premises, he must pass a formal order directing that the trial shall be held in jail premises.

94. The learned Attorney-General had consistently taken the position that the proceedings and trial conducted by the learned Judge, Special Court in jail premises was not a closed trial or a trial *in camera* but since the room in the jail where the proceedings were being conducted was small and could not accommodate many people, this is why only the appellant and co-accused along with their counsel were present in the Court. He was unequivocal in his submission that the trial was an open trial and would be deemed as such on account of the deeming clause in Section 352(1) Cr.P.C.

95. Where-after compliance with the requirements of Section 352 Cr.P.C. and Rule 3 of the LHC Rules a trial is held at a place other than the place where the Court has its usual sittings, the deeming provision in Section 352 Cr.P.C. will be attracted and it will be assumed that the trial is being conducted in open Court where every citizen has a right to go unless there is evidence or material on record to suggest that the public was not permitted to attend the proceedings or someone was prevented from attending the trial or that the trial was *in camera*. Although we agree with the learned Attorney-General that a trial conducted in jail can also be an open trial as members of the public can be permitted to

[54] AIR 1940 Rangoon 72.

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witness the proceedings subject to security measures under the relevant prison rules, but we cannot bring ourselves to agree with him that the proceedings and trial conducted thus far against the appellant was open to the public.

96. The learned Attorney-General brought on record order dated 04.10.2023 passed by the learned Judge, Special Court deciding the prosecution's application dated 02.10.2023 under Section 14 of the OSA seeking the exclusion of the public in the proceedings. For the purposes of clarity, Section 14 of the OSA reads thus:-

> ***"14. Exclusion of public from proceedings. In addition and without prejudice to any powers which a Court may possess to order the exclusion of the public from any proceedings if, in the course of proceedings before a Court against any person for an offence under this Act or the proceedings on appeal, or in the course of the trial of a person under this Act, application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety of the State, that all or any portion of the public shall be excluded during any part of the hearing, the Court may make an order to that effect, but the passing of sentence shall in any case take place in public."***

97. The manner in which discretion is to be exercised by the magistrate while deciding an application under Section 14 of the OSA has been well explained by the Hon'ble Supreme Court in *Ghulam Muhammad vs. The State*[55]. It was held that the discretion vested in the magistrate has to be exercised properly and judicially, and that a mere desire of the public prosecutor will not be enough to exclude public hearing. It must be shown that the paramount consideration is 'safety of the State.' Furthermore, it was held as follows:-

> ***"In understanding and applying this section, two main features thereof have to be kept in mind. The initiative is that of the Public Prosecutor but the Magistrate has to determine the matter judicially. It, therefore, follows that the Magistrate in granting the prayer of the Public Prosecutor must exercise a judicial discretion. This would necessarily mean that he has to satisfy himself upon the materials before him that for safety of the State the trial should be held in camera and that it was not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. In other words, he must not pass an order without a careful and proper scrutiny of the grounds on which the application is made."***

[55] PLD 1967 SC 175.

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98. At no material stage was an order passed by the learned Judge, Special Court allowing the prosecution's application under Section 14 of the OSA. Nevertheless, perusal of the order dated 04.10.2023 shows that there was no public access to the proceedings being conducted by the learned Judge, Special Court. Our understanding of the said order was that the learned Judge, Special Court has held that if in the future the public gains access to the proceedings, the prosecution's application for the exclusion of the public would be considered. For the purpose of clarity, the operative part of the said order is reproduced herein below:-

> ***"... it is observed by this court firstly that there is no public access in jail before this court so far as the contention raised by the petitioner u/s 14 in this regard. It is clarified that whenever, this situation occurs in future before this court for the purpose of adjudication on merits and specially keeping in view u/s 14 of OSA, 1923 r/w section 352 Cr.PC & Rules-3 Vol.III Lahore High Court Rules.***
> ***Keeping in view exclusion of public whenever it will be observed by this court, it will be directed as per request of the prosecution in future for the purpose of exclusion of public during trial. There is no need for submission of application of this nature in future by the prosecution because section 14 of OSA, 1923 is itself speaking. Hence, the application filed by the prosecution stands disposed off accordingly."***

99. It appears that the learned Judge, Special Court proceeded on the assumption that when the proceedings or trial was shifted from the ordinary place where the Special Court is housed to the jail premises, it became a trial which was not open to the public. In view of the mandate of Section 352 Cr.P.C., this assumption has no legal foundation. The mandate of the said provision is very clear, i.e. wherever a trial of a criminal case is held, be it in the jail precincts or elsewhere, it will have to be an open trial. A trial in jail premises can be said to be open where permission is granted to friends and relatives of the accused as well as to outsiders who want to have access to the Court to witness the proceedings subject, of course, to jail regulations.

100. Order dated 27.10.2023 passed by the learned Judge, Special Court shows that after the charge was framed, the family members of the co-accused, Shah Mahmood Qureshi, had applied to be present at the proceedings. The said application was disposed of with the observation that if in the future the presence of the accused's family members is considered essential in the proceedings, *"the matter will be adjudicated*

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at that time." **For the purpose of clarity, the relevant portion of the said order dated 27.10.2023 is reproduced herein below:-**

> ***"Learned Counsel submitted second application regarding presence of immediate family members of accused Makhdoom Shah Mehmood Qureshi during trial proceedings of instant case, in this regard vivid directions are already laid down in Section 14 of Official Secret Act, 1923 however it is clarified that in future if the presence of family member of accused persons is essential during proceedings of instant case, the matter will be adjudicated at that time. Instant application stands disposed off on the above said observations."***

101. After having gone through the said orders dated 04.10.2023 and 27.10.2023, we are left in no manner of doubt that the learned counsel for the appellant is correct in his submission that the proceedings conducted thus far by the learned Judge, Special Court cannot be termed as open. The learned Judge, Special Court ought to have realized that an open trial is the minimum requisite of a fair trial, and that the manner in which he conducted the proceedings was destructive of the principles of fair trial. The learned Judge, Special Court was under no obligation to conduct the proceedings in the small room that was allocated by the jail authorities to be used as a courtroom. Even in cases where the executive draws the attention of the Magistrate to information such as security threats to the accused, the witnesses or the Magistrate himself, which causes the Magistrate to order for the proceedings to be conducted in jail, the Magistrate is nonetheless bound by the provisions of Section 352 Cr.P.C. as well as Rule 3 of the LHC Rules. It is his obligation to ensure that the place where the trial is held is an open court to which the public generally may have access so far as the same can conveniently contain them. It is also his duty to ensure that proper facilities are given to members of the Bar and members of the public and that they are not restricted by the Jail rules or the orders of the Jail Superintendent in attending the trial or inquiry. A trial in jail where members of the public are not permitted to witness the proceedings would not just be prejudicial to the accused but invalid. It is noted with dismay that the learned Judge, Special Court made no effort to ensure the place where the proceedings and trial against the appellant was conducted had semblance of an open Court.

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102. Ideally, the learned Judge, Special Court should have done what the Magistrate in the case of *Narwarsingh vs. State*[56] did. In the said case, the Magistrate had passed an order stating that for reasons of security it was desirable that the trial should be held in the Central Jail premises. In this order, the Magistrate had also emphasized the fact that his court will be an open court and that all facilities will be given to the pleaders and members of the public for attending the proceedings in his Court and that they shall have free access to the jail premises. This order was passed by the Magistrate in the presence of the appellant and the other accused persons and they were also informed of the facilities which the Magistrate proposed to give to the pleaders and the public. This caused the Madhya Pradesh High Court, Indore Bench to hold that the accused had no reason to complain that the trial in jail premises was prejudicial to him. It was also held that if at a subsequent stage *"the Magistrate finds or if it comes to his notice that the access of the public or the members of the Bar is restricted in any way, he will no doubt reconsider the matter and pass appropriate orders about the continuance or otherwise of the trial in the Jail premises, after giving full reasons for his decision."*

103. It is apparently on the basis of the indulgence shown by the learned Attorney-General that the place where the trial was being conducted in Central Jail, Rawalpindi was moved to a much larger room and that too when the arguments in the instant appeal had been partly heard. The learned Attorney-General brought on record photographs to illustrate this. He also submitted that on the last date of hearing, some family members of the appellant's co-accused had been permitted to witness the proceedings. Be that as it may, since the proceedings and trial conducted thus far were certainly not open to the public, which would include not just the appellant's friends and relatives but also the representatives of the media, we hold the proceedings or trial conducted thus far were not just prejudicial to the rights of the appellant but invalid and therefore the same stands vitiated.

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[56] AIR 1952 Madhya Pradesh 193.

104. The learned Attorney-General for Pakistan was of the view that the requirement in Rule 3 of the LHC Rules regarding sanction of the Government for holding a trial in jail is merely for the purpose of necessary arrangements to be made for a courtroom to be arranged in jail precincts. We cannot subscribe to this view of the learned Attorney-General for the simple reason that the decision in a case against a particular accused to hold the trial in jail denudes him of his right to an open trial at a place where the Court normally has its sittings. As mentioned above, the decision to hold the trial in jail is to be made in exceptional circumstances, bearing in mind that access of the public to a Court in jail is certainly not as free and unhindered as to a Court in its usual premises. In *Mairaj Muhammad Khan vs. The State*[57] (*supra*), it has been observed that *"public cannot be easily persuaded to attend a trial in jail where entry and exit is restricted under Jail Rules and every entrant has to have his name entered in an official register maintained for the purpose."* It is for this reason that Rule 3 of the LHC Rules requires the sanction of the Government (i.e., the Cabinet) which in its collective wisdom is to take a decision as to whether the trial against a particular accused is to proceed in the normal course or whether there exist exceptional circumstances as to warrant the trial to be conducted in jail. This decision is to be made with application of mind giving due regard to the judicial order passed by the Magistrate under Section 352 Cr.PC for a trial to be conducted in jail. In taking an informed and reasoned decision, the Cabinet ought to be made aware of the reservations, if any, of the accused regarding his trial to be conducted in jail. The order dated 30.08.2023 passed by the learned Judge, Special Court shows that the appellant had submitted two applications – one for a declaration that the notification dated 29.08.2023 issued by the Ministry of Law and Justice is unlawful, and the second for the proceedings in the case to be conducted in a regular Court to which the general public has access. For the purposes of clarity, the last paragraph of the order dated 30.08.2023 is reproduced herein below:-

[57] PLD 1978 Karachi 308.

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> ***"At this juncture, learned Counsel on behalf of accused submitted two independent applications: one application to declare Notification dated 29.08.2023 unlawful and second application to ensure the proceedings of instant case be conducted in Regular Court with the access to general public. In this regard let Notice be issued to State/FIA Authorities for arguments on 02.09.2023."***

105. The order sheet for 02.09.2023 was not brought on record but it is safe to assume that the said applications were not allowed as the learned Judge, Special Court continued with the proceedings in jail. Be that as it may, the Ministry of Law and Justice was well aware of the appellant's reservations regarding the proceedings or trial in jail. This was a necessary fact which ought to have been mentioned by the Ministry of Law and Justice in the summaries dated 10.11.2023 and 15.11.2023 so as to make them fair and objective. As per the ratio in the cases of *F.Q. Matiullah Khan Alizai vs. Chief Secretary, Government of N.W.F.P*[58] and *Jameel Ahmed Malik vs. Pakistan Ordinance Factories Board*[59], the word "objective" carries the meaning of detached, disinterested, dispassionate, equitable, factual, fair, fair-minded, impartial, impersonal, judicious and just. We are of the view that the summaries submitted to the Cabinet were neither objective nor in conformity with the law laid down by this Court in the case of *Noor-us-Saba vs. Federation of Pakistan*[60], wherein it has been held as follows:-

> ***"Whenever a summary is submitted by a Ministry for the Cabinet or the Prime Minister proposing a decision which adversely affects the rights of any person or class of persons, it is imperative for the views of such person or class of persons also to be submitted to the Cabinet or the Prime Minister so that an informed and well-reasoned decision is taken. A summary that sets out half-truths, or does not set out the point of view of the person or class of persons against whose interests a decision is solicited, would be against the canons of equity, justice and fair play."***

106. In *Munir Ahmed vs. Federation of Pakistan*[61], one of the grounds on which the Hon'ble Lahore High Court set aside the appointment of the Chairman, Pakistan Electronic Media Regulatory Authority, was that *"there was no proper summary before the Prime Minister to enable the Prime Minister to make the selection."* Furthermore, it was held that the

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[58] 1994 SCMR 722;
[59] 2004 SCMR 164.
[60] 2023 CLC 1245.
[61] 2018 PLC (CS) 746.

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summary submitted to the Prime Minister did not fulfill the requirements of Rule 15(2) of the Rules of Business, which require a self-contained, concise and objective summary to be placed before the Prime Minister stating the relevant facts and points for decision. The validity of the appointment of Chairman, Oil and Gas Regulatory Authority, came to be considered by the Hon'ble Supreme Court in the case of *Muhammad Yasin vs. Federation of Pakistan*[62]. In the said case, it was held by the Hon'ble Supreme Court that it was essential for government servants entrusted with the responsibility of assisting in decision-making and governance to provide necessary information to the final decision-maker, and that not disclosing crucial information in the summary subverts the decision-making process. In *Shaikh Zayed Hospital vs. Dr. Muhammad Saeed*[63], the Division Bench of the Hon'ble Lahore High Court held *inter alia* that where a decision is taken by the Prime Minister on the basis of a summary, the decision cannot be judicially reviewed without reviewing the summary preparation process. Paragraph 30 of the said report is reproduced herein below:-

> ***"30. The quality of discretion exercised by the Prime Minister is fundamentally dependent on the quality of the "summary" put up before the said authority by the concerned Division. Therefore, the "summary preparation process" is an intrinsic and integral part of the final discretion exercised by the Prime Minister. The decision of the Prime Minister cannot be judicially reviewed in isolation. This exercise would be deficient and cosmetic unless and until the "summary preparation process" is also judicially reviewed. Failure of discretion at any stage of the "summary preparation process" will result in the collapse of the entire discretionary edifice including the final order. Therefore, when we judicially review the impugned order passed by the competent authority we are also judicially reviewing the entire appointment process." "***

107. The learned Attorney-General submitted that the proceedings and trial conducted in jail before the Cabinet's sanction reflected in the notifications dated 13.11.2023 and 15.11.2023 issued by the Ministry of Law and Justice were, at best, an irregularity which would not result in vitiating the proceedings. In furtherance of this submission, he placed reliance on Sections 531 and 537 Cr.PC.

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[62] PLD 2012 S.C. 132.
[63] 2010 PLC (CS) 967.

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108. The State was well aware that in order for the appellant to be tried in jail the requirements of Section 352 Cr.P.C. and Rule 3 of the LHC Rules had to be fulfilled. It is for this reason that the Ministry of Law and Justice moved a summary on 10.11.2023 to the Cabinet soliciting an approval for the trial against the appellant and his co-accused to be conducted in jail. No explanation was presented for such a course not having been adopted before the proceedings in jail were at first conducted against the appellant.

109. We are in no manner of doubt that Section 352 Cr.P.C. and Rule 3 of the LHC Rules are provisions essential for securing the ends of justice. In *Mairaj Muhammad Khan vs. The State*[64] (*supra*), the primary reason why the appeal against conviction of the accused in the said case was allowed was because the closed trial conducted in jail was held to be an irregularity in procedure resulting in substantial and grave injustice to the accused. A lapse in procedure which results in a conviction being overturned cannot be termed as an irregularity with no consequence or prejudice to the accused. This requirement of the law cannot be overlooked as a simple irregularity liable to be ignored by a Court of Constitutional causes. Hence, the non-observance with the requirement of Section 352 Cr.P.C. and Rule 3 of the LHC Rules would not be a mere irregularity but fatal to the proceedings conducted in violation thereof. In holding so, reliance is placed on the following case law:-

(i) In *Imran Khan vs. State*[65], it has been held that a close reading of Section 537 Cr.PC would show that it applies to an error arising out of mere inadvertence, but willful departure from the procedure cannot be cured by pressing into service Section 537 Cr.P.C.

(ii) In *Ajeet Singh vs. State*[66], it has been held that prejudice to the accused is to be inferred from every breach of a provision of law meant for the protection or benefit of the accused. Furthermore, it was held as follows:-

> ***"9. The Code of Criminal Procedure like other procedural laws is meant to further the ends of justice and for that purpose***

[64] PLD 1978 Karachi 308.
[65] 2022 YLR 2123.
[66] PLD 1982 Lahore 10.

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contains provisions essential for securing justice. Some of the provisions are of vital nature and cannot be disregarded except at the risk of invalidating the trial while the others are not so vital and their breach may amount to an irregularity which can be taken as cured."

(iii) In *Muhammad Kamil vs. Muhammad Bashir*[67], the Trial Court at Sialkot took cognizance of offence under Sections 406 and 409 PPC against the petitioner in the said case when in fact the jurisdiction to try the accused for the said offences was with criminal Courts at Karachi. A plea that the proceedings conducted by the Court at Sialkot stood cured by Section 531 Cr.P.C. was spurned in the following terms:-

"I am afraid I cannot agree with this contention. It has been held in a number of cases that section 531, Cr. P. C. only protects trials which are finalized without the defect in the territorial jurisdiction having been discovered in the course of the trial, and will not cure proceedings where the trial Court went ahead with the trial and heard the case notwithstanding the knowledge that it lacked the jurisdiction."

(iv) In *Qadir Dad vs. Sultan Bibi*[68], A.S.M. Akram J. expressed an opinion that *"where the trial is found to have been conducted in a way not authorised by law and the rules of procedure relating to matters of a fundamental character, the decision in such a trial whether of conviction or of acquittal is of little consequence and the entire proceeding must be set aside irrespective of any question of prejudice to anyone."*

110. The learned Attorney-General submitted that no prejudice had been caused to the appellant on account of the proceedings and trial being conducted in jail since he along with his counsel were present in Court when the charge was framed and when the statements of some of the prosecution witnesses were recorded. After having come to the conclusion that the proceedings and the trial had throughout been conducted by the learned Judge, Special Court in a manner that cannot be termed as an open trial, prejudice to the appellant and his co-accused would be a natural consequence. As mentioned above, in *Kehar Singh*

[67] PLD 1974 Lahore 224.
[68] PLD 1956 Federal Court 129.

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vs. State[69] ***(supra),*** **the Indian Supreme Court held that no prejudice had been caused to the accused / appellant by his trial being conducted in jail since his counsel, public and representatives of the press including representatives of international news agencies like BBC etc. were permitted to remain present during the Court proceedings subject to the usual regulations of the jail. This cannot be said with respect to the appellant as not even family members were permitted to attend the proceedings (save on 14.11.2023 after this Court had made observations regarding the manner in which the proceedings were conducted) let alone the media or the public at large.**

111. Even though we have come to the conclusion that decisions of the Cabinet to conduct the trial against the appellant in jail are not sustainable on account of not having been preceded by an order of the learned Judge, Special Court passed in judicial proceedings requiring the trial to be conducted in jail, we nonetheless feel the need to determine whether the Cabinet through its decision dated 15.11.2023 could give ex-post facto approval for the proceedings and trial in jail from 29.08.2023 to 12.11.2023.

112. The reason why the Ministry of Law and Justice submitted a proposal to the Cabinet for sanctioning the trial against the appellant to be conducted in jail is because Rule 3 of the LHC Rules requires the Magistrate to "obtain the sanction of the Government." The said Rule or any other law does not empower the Government to issue such sanction with retrospective effect. It is a vested right of every accused for the trial against him to be conducted in open Court at a place designated for its usual sittings. It is well settled that retrospective operation cannot be given to executive orders so as to destroy vested rights of citizens. Hence, the notification dated 15.11.2023 issued by the Ministry of Law and Justice based on the Cabinet's decision dated 15.11.2023 giving *ex-post facto* sanction to the proceedings and trial conducted in jail between 29.08.2023 and 12.11.2023 is unlawful. In holding so, reliance is placed on the following case law:-

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[69] AIR 1988 SC 1883.

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(i) In *Rashid Hamid vs. The State*[70], an FIR was registered against a cashier employed in the office of the Cantonment Board, Wah for defalcation of accounts. The sanction for his prosecution had been accorded by the Executive Officer, Wah Cantonment who had been empowered to do so by a notification of the Provincial Government. The Special Judge took cognizance of the case and convicted the accused. One of the grounds on which the conviction was challenged was that since the Wah Cantonment was under the control of the Central Government, under Section 6(5) of the Pakistan Criminal Law Amendment Act, 1958, the sanction for prosecution could only have been issued by the Central Government or by an officer authorized by it. The Central Government had issued notification dated 10.11.1961 giving the power to sanction prosecution of public servants to be exercised on its behalf to an officer having the power to remove the public servant from office. Since the said notification dated 10.11.1961 was issued after the Court had taken cognizance of the case on 29.09.1961, it was held that there was no valid sanction when the Court took cognizance of the matter and the trial of the accused on this basis was held to be illegal and without jurisdiction.

(ii) In *Hashwani Hotels Ltd. vs. Federation of Pakistan*[71], it was held that it was a well settled principle of interpretation of a notification and/or an executive order that the same can operate prospectively and not retrospectively.

(iii) In *Government of Pakistan vs. Village Development Organization*[72], it was held that executive orders or notifications which confer rights and are beneficial, would be given retrospective effect and those which adversely affect or invade upon vested rights cannot be applied retrospectively. Law to the said effect was also laid down in the case of *Anound Power Generation Limited vs. Federation of Pakistan*[73].

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[70] PLD 1972 SC 271.
[71] PLD 1997 SC 315.
[72] 2005 SCMR 492.
[73] PLD 2001 SC 340.

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(iv) **In *Muhammad Ilyas Khokhar vs. Federation of Pakistan*[74], a departmental circular issued by the Auditor-General changing certain conditions with regard to promotion of officers to a higher grade was held by the Service Tribunal to be in violation of the Civil Servants Act, 1973 since approval from the Establishment Division with regard to such change had not been obtained. It had also been held that as an *ex-post facto* approval granted by the Establishment Division would not make the circular valid or legal for the reason that it had not been issued in accordance with the provisions of the Civil Servants Act, 1973.**

(v) **In *Murad Ali Shah and others vs. Government of Sindh*[75], FIRs alleging the commission of acts of corruption and misconduct were made against the petitioners / civil servants. The quashment of the FIRs was sought on the ground that in terms of Section 3 of the Sindh Enquiries and Anti-Corruption Act, 1991, only the Anti-Corruption Establishment of the Government of Sindh had the jurisdiction to inquire into any allegation of corruption against a civil servant or initiate proceedings for his prosecution. It was held that the registration of the FIRs was without jurisdiction as prior permission had not been accorded by the competent authority for the prosecution of the petitioners. Furthermore, *ex-post facto* approval of the Government / Anti-Corruption Committee for investigation in the said FIRs was held not to be of any help to the prosecution as according to the relevant rules, prior permission was necessary.**

113. Just before learned counsel for the appellant concluded his arguments, he submitted that if this Court is to allow the instant appeal, the matter may not be remanded to the learned Judge, Special Court who has conducted the proceedings and the trial thus far but to some other Judge as the appellant does not have expectation of justice from him. In support of this submission, reference was made to the orders dated 17.10.2023 and 27.10.2023 which show that the accused had

[74] 2006 SCMR 1240.
[75] PLD 2002 Karachi 646.

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applied for the provision of certain documents, including the Cypher Security Guidelines. Learned counsel for the appellant took the position that since this Court in its order dated 27.10.2023 passed in criminal miscellaneous application No.1534-B/2023 and connected matter had made specific reference to the "Security of Classified Matter in Government Departments," Chapter IV whereof dealt with classification of official matters and accountability, the denial by the learned Judge, Special Court to provide the said document to the accused was most unreasonable and indicative of the unfair manner in which he was proceeding with the trial. He also submitted that the learned Judge, Special Court had not discharged his obligation of ensuring that the trial conducted in jail was made accessible to the public so as to make it an open trial.

114. We are of the view that the question whether the trial should be conducted by the learned Judge, Special Court who has conducted the proceedings thus far is a question beyond the scope of the present appeal. If the appellant harbors apprehensions with respect to impartiality of the learned Judge, Special Court, and if he has adequate grounds for feeling so, he could consider making an application under Section 526(1) Cr.P.C.

115. The aforementioned are our reasons for the short order dated 21.11.2023, which is reproduced herein below:-

> ***"For detailed reasons to be recorded, we hold as follows:-***
>
> ***i. The instant intra Court appeal filed under Section 3(2) of the Law Reforms Ordinance, 1972 against the judgment dated 16.10.2023 passed in writ petition No.2656/2023 is maintainable.***
>
> ***ii. The designation of the Special Court (Anti-Terrorism-I) Islamabad, to try cases reported under the Official Secrets Act, 1923 through notification (F.No.40(64)/2023-A-VIII) dated 27.06.2023 issued by the Ministry of Law and Justice is valid and lawful.***
>
> ***iii. There is no provision in the Code of Criminal Procedure, 1898 ("Cr.P.C.") which compels a Magistrate to hold his Court in a usual Court Room. In exceptional circumstances and where it is conducive to justice, a trial can be conducted in jail in a manner that fulfills the requirements of an open trial or a trial in camera provided it is in accordance with the procedure provided by law.***
>
> ***iv. Notification (F.No.8(93)/2021-A-IV) dated 29.08.2023 issued by the Ministry of Law and Justice impugned in writ petition No.2656/2023 is declared to be without lawful authority and no***

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legal effect for want of an order by the appropriate Government and fulfillment of requirements provided in Section 352 Cr.P.C. as well as Rule 3 in Part-A of Chapter-1 in Volume-III of the Rules and Orders of the Lahore High Court, Lahore ("LHC Rules").

v. Notification (F.No.40(68)/2023-A-VIII) dated 12.09.2023; notification (F.No.40(68)/2023-A-VIII) dated 25.09.2023; notification (F.No.40(68)/2023-A-VIII) dated 03.10.2023; and notification (F.No.40(68)/2023-A-VIII) dated 13.10.2023 issued by the said Ministry are declared to be without lawful authority and no legal effect for want of fulfillment of requirements provided in Section 352 Cr.P.C. as well as Rule 3 of the LHC Rules.

vi. Notification (F.No.40(68)/2023-A-VIII) dated 13.11.2023 issued by the Ministry of Law and Justice on the basis of the Cabinet's decision dated 12.11.2023 as well as notification (F.No.40(68)/2023-A-VIII) dated 15.11.2023 issued by the said Ministry on the basis of the Cabinet's decision dated 15.11.2023 are declared to be of no legal consequence for not having been preceded by an order of the learned Judge, Special Court in terms of Section 352 Cr.P.C. passed in judicial proceedings.

vii. It is also declared by way of clarification that notification (F.No.40(68)/2023-A-VIII) dated 15.11.2023 issued by the said Ministry on the basis of the Cabinet's decision dated 15.11.2023 cannot be given retrospective effect.

viii. Consequently, the proceedings with effect from 29.08.2023 and the trial conducted in case FIR No.06/2023, dated 15.08.2023 registered under Sections 5 and 9 of the Official Secrets Act, 1923 read with Section 34 of the Pakistan Penal Code, 1860 at Police Station Counter Terrorism Wing, Federal Investigation Agency, Islamabad, in jail premises in a manner that cannot be termed as an open trial stand vitiated.

2. The instant appeal is allowed in the above terms."

(MIANGUL HASSAN AURANGZEB)
JUDGE

(SAMAN RAFAT IMTIAZ)
JUDGE

Qamar Khan*

19th December, 2023

APPROVED FOR REPORTING

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