ORDER SHEET

IN THE FEDERAL SHARIAT COURT

Crl. Misc. Application No.12-I of 2018
IN
Crl. Appeal No.131-I of 2007

NISAR VS. THE STATE.

PRESENT:

04. **12.09.2018** Nemo on behalf of petitioner
Islamabad Syed Abdul Baqir Shah, Advocate, Counsel for the State.

Seeks indulgence of this Court to grant premium to make an appropriate order under Section 35(2) read with Section 397 of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called The Code) for computing sentences concurrently awarded to the petitioner in two separate trials of F.I.Rs. No.30 and 32 of 2005 conducted by learned Additional Sessions Judge, Makran, at Turbat (in the judgments stamp of Sessions Judge has been affixed).

2. Crime-Report bearing No.30 of 2005 was registered against petitioner alongwith others under Section 17(4) of The Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 (Hereinafter called The Ordinance) at Levies Station Tump, District Ketch. The learned Trial Court after conclusion of trial holding the petitioner and his associate (Mujeeb) guilty, awarded him sentence of death as "Tazir" through judgment dated 30th May, 2007.

The petitioner preferred Jail Criminal Appeal No.131-I of 2007. Reference under Section 17(2) of The Ordinance read with Section 374 of The Code was sent by learned Trial Court for confirmation or otherwise of sentence of death. The appeal alongwith appeal preferred by co-convict and Reference was decided by a learned Full Bench of this Court through consolidated judgment dated 7th March, 2008.

Though, conviction was maintained but altering the provisions of law.

Petitioner was convicted under Section 394 read with Section 397 of The Pakistan Penal Code, 1860 (Act XLV of 1860). Sentence of death was converted into "life imprisonment" and fine to the tune of Fifty Thousand Rupees (Rs.500,000) and in default of payment of fine to further undergo one year simple imprisonment. Judgment of this Court attained finality as same was not assailed before Apex Court.

In case F.I.R. No.32 of 2005, which was registered under Section 13-E of The Arms Ordinance, 1965, the same learned Court after conclusion of trial through separate judgment of even date (30th May, 2007) while recording conviction awarded the petitioner sentence of two years R.I. alongwith fine of Rs.10,000/- and in default of payment of fine to further suffer six months simple imprisonment. Conviction and sentence awarded was not subject to challenge before any court.

3. The petitioner by way of miscellaneous application sent through Superintendent Central Jail, Mach, prays for computing both the sentences concurrently.

4. Through order dated 30th April 2018, direction was issued to procure report from Superintendent Central Jail, Mach regarding served and un-served portion of sentences in both the cases which was sent through letter dated 16th May, 2018 but since report was vague, therefore, learned law officer was called upon to make contact with concerned quarter and obtain detailed report, according to which, petitioner has undergone aggregate sentence of imprisonment for 14 years, 10 months 15 days. Un-served period in both the offences is 2 years, 9 months and 15 days.

5. Since the application was made from jail, therefore, there is no representation on behalf of petitioner.

6. Provision of Section 397 of The Code has been examined with the assistance of learned law officer, who during the course of arguments opposed the relief sought for.

7. Before dealing with the moot point, for the sake of clarification, we may add that expression "imprisonment for life" has been defined in Section 2(e) of The Ordinance VI of 1997, according to which it means "imprisonment till death."

However, sentence of "imprisonment for life" can only be awarded under Section 9(3) of The Ordinance.

Though charge was framed against the petitioner under Section 17(4) of The Ordinance and conviction was accordingly recorded by learned Trail Court but perusal of judgment of this Court announced

on 7th March, 2008 reveals that he was convicted under Section 394 read with Section 397 of The Act XLV of 1860 and sentence of life imprisonment was awarded under the said provisions keeping in view the enabling provision of Section 20 of The Ordinance. Pursuant to above, definition of expression "imprisonment for life" is irrelevant to decide the moot point.

8. The petitioner was tried and convicted in two separate trials through judgments rendered by learned Trial Court on one and the same day.

Case F.I.R. No.32 of 2005 was registered under Section 13-E of The Arms Ordinance XX of 1965 with the allegation of having illicit arms used in commission of offence in case F.I.R. No.30 of 2005. Both the offences form part of same transaction though independent F.I.Rs were registered and separate trials were conducted.

9. Section 35 of The Code deals with maximum term of punishment which can be awarded in case of conviction for several offences at one trial.

Section 397 of The Code caters the situation where sentences were awarded under various offences in more than one trial. Perusal of the provision reveals that person already undergoing a sentence of imprisonment or imprisonment for life, when after conviction in another offence in a separate trial is awarded similar type of sentence, said sentence shall commence after the expiry of earlier sentence. However, legislature has provided safeguard in order to protect the interest of convict by using the expression "unless the court directs that subsequent sentence shall run concurrently with such previous sentence".

However, admittedly trial court did not grant the premium though both the trials were tried and concluded on one and the same day.

Conviction and sentence awarded in case F.I.R. No.32 of 2005 registered under Section 13-E of The Arms Ordinance 1965 was not assailed by petitioner as per information furnished by office of the Superintendent Central Prison Mach through letter dated 4th April, 2018.

It appears that factum of conviction and quantum of sentence awarded in said offence was not brought to the notice of this Court as appeal was preferred through Jail in case F.I.R. No.30 of 2005. Judgment was announced by this Court on 7th march, 2008, modifying the provision of law recording conviction, altering sentence as well.

10. There are two questions for consideration before this Court. First, whether in order to grant allowance, this Court got jurisdiction? and second, if query is answered in affirmative, whether, law and facts of the case permits to do so.

11. Contention regarding review of judgment by this Court in case of acceptance of application is legally not sustainable for two fold reasons. First, omission to grant premium cannot be said to be intentional as factum of second sentence, as it appears, was not brought to the notice of the Court because petitioner filed appeal through jail. "Omission" in the circumstances cannot be said to be "denial" and as such exercise of jurisdiction, if permissible otherwise, will not amount to alter judgment.

12. Matter can be examined from another angle as well.

We are conscious that right to review like right of appeal is a substantive right and always creation of statute. (See: "HUSSAIN BAKHSH v. SETTLEMENT COMMISSIONER, RAWALPINDI AND OTHERS" (PLD 1970 SC I) and "MUZAFFAR ALI v. MUHAMMAD SHAFI" (PLD 1981 SC 94). No doubt under Section 369 of The Code, review of the judgment is not permissible except to correct a clerical error but the constitutional mandate authorizes this Court to review its judgment as is evident from Article 203(E) (9) of The Constitution of Islamic Republic of Pakistan, which reads as follow:

> "(9) The Court shall have power to review any decision given or order made by it."

Power conferred upon this Court is not qualified but is absolute.

Pursuant to above, objection is misconceived and ill-founded.

13. Now we will examine the second aspect of query.

14. Examining the vires of order of High Court to grant benefit under Section 382-B of The Code at later stage, the Apex Court in "GOVERNMENT OF KHYBER PAKHTUNKHWA through Secretary Home and Tribal Affairs Department Peshawar and others v. MEHMOOD KHAN" (2017 SCMR 2044), held at page 2046 as under:

> "It is the obligatory duty of the Judges to apply the correct law to a lis, and not of the litigant to point out the law applicable. Even the parties to a lis are under no obligation to hire the services of a lawyer/counsel for pleading their case because the primary duty to do the justice and to apply the correct law to the facts of a case, is the exclusive duty of the Judges. This principle has a legitimate background based on well entrenched "MAXIM" that *'law is written on the sleeves of the Judges and they are supposed to know each and every law by heart'*, thus any inadvertent omission on the part of the Court/Judges shall not deprive the party entitled to any relief if the law directs in clear language to be granted."

15. Viewed from whichever angle, we feel no hesitation to conclude that this Court got jurisdiction to entertain and decide the miscellaneous application.

16. Next question for consideration is whether a miscellaneous application made by petitioner has to be allowed on factual and legal premises.

17. Delay in approaching this Court as argued particularly when the petitioner got no expert assistance either at the time of preferring appeal before this Court or now hardly furnishes any ground to decline the relief sought for.

18. No doubt power conferred upon the Court under Section 397 of The Code for ordering various sentences awarded in different cases to run concurrently is discretionary but discretion has to be exercised judicially.

19. In Mst. ZUBAIDA v. FALAK SHER and others (2007 SCMR 548), scope of Section 397 was expounded at pages 550-551 in the following manner:

> "However, under section 397, Cr.P.C. the position of a person is different, who while already undergoing a sentence of imprisonment for life, is subsequently, convicted and sentenced

on another trial. His subsequent sentence would commence at the expiration of imprisonment for life for which he has been previously sentenced. But even in such cases, the said provision expressly enables the Court to direct that the subsequent sentence would run concurrently with the previous sentence. It is, therefore, abundantly clear that there was nothing wrong in treating the sentences of imprisonment for life of the convicts on four counts to run concurrently."

(Emphasis supplied)

20. Proposition was again examined and dealt with by the Hon'ble Supreme Court in the case of "Mst. SHAISTA BIBI and another vs. SUPERINTENDENT, CENTRAL JAIL, MACH and 2 others" (PLD 2015 SC 15) and while dealing with the provisions of Sections 35 and 397 of The Code, it was held at page-19 as follow:

"Besides the provisions of section 35, Cr.P.C. the provisions of section 397, Cr.P.C. altogether provide entirely a different proposition widening the scope of discretion of the Court to direct that sentences of imprisonment or that of life imprisonment awarded at the same trial or at two different trials but successively, shall run concurrently. Once the Legislation has conferred the above discretion in the Court then in hardship cases, Courts are required to seriously take into consideration the same to the benefit of the accused so that to minimize and liquidate the hardship treatment, the accused person is to get and to liquidate the same as far as possible. In a situation like the present one, the Court of law cannot fold up its hands to deny the benefit of the said beneficial provision to an accused person because denial in such a case would amount to a ruthless treatment to him/her and he/she would certainly die while undergoing such long imprisonment in prison. Thus, the benefit conferred upon the appellant/appellants through amnesty given by the Government, if the benefit of directing the sentences to run concurrently is denied to him/them, would brought at naught and ultimately the object of the same would be squarely defeated and that too, under the circumstances when the provision of Section 397, Cr.P.C. confers wide discretion on the Court and unfettered one to extend such benefit to the accused in a case of peculiar nature like the present one. Thus, construing the beneficial provision in favour of the accused would clearly meet the ends of justice and interpreting the same to the contrary would certainly defeat the same."

(underlining is our)

Again dealing with the provisions under reference, in "RAHIB ALI v. STATE" (PLJ 2018 SC 170), it was held at page-177 as follow:

"Generally, where a convict is undergoing sentence in earlier conviction and later in a separate trial(s) stand convicted and sentenced for imprisonment for life or otherwise for a shorter term, sentence in subsequent trial commences after sentence in earlier trial is exhausted. However, the trial Court seized of subsequent trial and the Appellate Courts in appeal arising there from are empowered under Section 397, Cr.P.C. to direct that the subsequent sentence(s) to run conjointly with previous sentence(s) of imprisonment of life or otherwise as the case may be. In the cases cited as Mst. Zubaida versus Falak Sher and others (2007 SCMR 548), this Court attending to question of multiple convictions in more than one crime and trial took charitable view of Section 397, Cr.P.C., while declining leave; observed that Section 397, Cr.P.C. empowers the Court to direct the subsequent sentence would run concurrently with the previous sentence. In the case of Shahista Bibi and another versus Superintendent, Central Jail, MACH and 2 others 9 (PLD 2015 Supreme Court 15) this Court examined provisions of Section 35 Cr.P.C. together with Section 397, Cr.P.C. also took charitable view and adopted interpretation beneficial to the accused by ordering concurrent running of sentence in two different trials. In a more recent pronouncement in the case of Sajjad Ikrram and others versus Sikandar Hayat and others (2016 SCMR 467) this Court at page 473 held, that:

"The provisions of Section 497, Cr.P.C. confers wide discretion on the Court to extend such benefit to the accused in case of peculiar nature" and Court further observed "that there is nothing wrong in treating the sentence of imprisonment for life of convict/appellants on three count to run concurrently."

Perusal of the facts of Report under reference reveals that Rahab Ali was convicted in two cases by two different Trial Courts. In one case, he was awarded sentences of life imprisonment and 10 years under different provisions, which were directed to run concurrently. In another case bearing No.25 of 2000, conviction was also recorded awarding him sentence of 14 years imprisonment, which was endorsed by High Court. In an appeal before Apex Court, conviction was maintained. However, sentence of 14 years was converted into life imprisonment keeping in view mandate of Section 365-A of Act XLV of 1860. Since factum of earlier sentences was not brought to the notice of Hon'ble Supreme Court, therefore, benefit under Section 397 of Act XLV of 1860 could not be granted. The convict approached High

Court by filing application under Section 397 read with Section 561-A of The Code which was declined as the Apex Court did not grant any such allowance. Order of High Court was assailed which was set aside by allowing criminal petition.

21. There is nothing on record to suggest any compelling circumstance prompting us to withhold premium claimed. Withholding of relief will create hardship to the petitioner, who has already undergone more than 14 years sentence of imprisonment. Charitable and beneficial interpretation of Section 397 of Act XLV of 1860 cast duty upon this Court to grant relief.

22. Pursuant to above, while accepting the criminal miscellaneous, it is ordered that sentences awarded to the petitioner by this Court through judgment dated 7th March, 2008, while accepting Jail Appeal No.131-I of 2007 converting sentence of death into life imprisonment and sentence of two years rigorous imprisonment awarded in case F.I.R. No.32 of 2005 by learned Trial Court through judgment dated 30th May, 2007 shall run concurrently.

SYED MUHAMMAD FAROOQ SHAH
JUDGE

MEHMOOD MAQBOOL BAJWA
JUDGE

SHAUKAT ALI KHSHANI
JUDGE

Approved for Reporting