IN THE FEDERAL SHARIAT COURT OF PAKISTAN
(Appellate/Revisional Jurisdiction)

Present:

MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE
MR. JUSTICE DR. SYED MUHAMMAD ANWER

Criminal Revision No.2/P of 2021
Aamir Ullah son of Abdul Qayum,
r/o Yousafabad, Dalazak Road, Peshawar.
….. Petitioner

VERSUS

1. Ghazi Gul son of Pervez,
r/o Judge Bangla Nothia, Peshawar

2. The State,
…. Respondents

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Counsel for the Petitioner	….	Mr. Muhammad Usman Khan Turlandi, Advocate
Counsel for the respondent	….	Mr. Qaiser Zaman, Advocate
Counsel for the State	….	Miss Abida Safdar, Assistant Advocate General KPK
FIR No. Date & Police Station	….	160/2018 Dated 03.03.2018 Daudzai, Peshawar.
Date of Impugned Order of Trial Court	….	18.05.2021
Date of receipt of Revision	….	25.05.2021
Date of hearing	….	27.09.2021
Date of Judgment		….

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JUDGMENT:

MUHAMMAD NOOR MESKANZAI, C.J.--- This revision petition calls in question the validity, legality and propriety of Order dated 18.05.2021 passed by the learned Additional District & Sessions Judge-IX, Peshawar, whereby the learned Additional District & Sessions Judge ordered for de-novo trial.

2. It was contended by learned Counsel for petitioner that the learned trial Court exceeded its jurisdiction by passing impugned Order. It was maintained that the trial Court was bound to adhere to and abide by the remand Order. It was emphatically stressed that right from the day one the learned trial Court with mala-fide intention wanted to shape the matter according to a designed goal, otherwise there was no justification for passage of the impugned Order. It was argued with vehemence that the impugned Order has prejudiced both the parties and the matter should have been concluded within the period stipulated in the remand Order, but is still lingering on just for extraneous reason. The charge was never objected upon by the respondent at any stage including this forum when the matter remained subjudice as appellate and revisional Court. Therefore, the revision petition be accepted and impugned Orders be set aside.

3. The learned Counsel for respondent opposed the submissions by maintaining that the trial Court was fully competent to adopt whatever course warranted by the circumstances of the case. Since the trial Court concluded that the best course is to alter the charge and the same was altered. Lastly, murmurously and half heartedly submitted that this revision petition is not competent before this forum as the

charge has been altered and the forum stands changed. The learned Counsel for the respondent has referred 2007 MLD 1004 and 2021 P.Cr.L.J 958 in support of his contentions.

4. The learned Assistant Advocate General supported the petition by maintaining that the trial Court acted illegally, in-fact, the impugned Order has been passed without taking into account the miseries of accused and legally it is a mis-exercise of jurisdiction.

5. We have heard the learned Counsel for parties and have gone through the record with their valuable assistance. This is the second time, we are seized with the matter. Earlier, both the parties feeling aggrieved with the judgment dated 11.07.2020 filed appeal and revision petition. The respondent filed an appeal against his conviction and the petitioner, dissatisfied with quantum of sentence sought enhancement of the sentence. After hearing the parties, both the matters were disposed of by a common judgment dated 29.03.2021 with following operative portion:-

> *"It can safely be concluded that the judgment passed by the trial Court suffers from incurable defect as contemplated by the provision of Section 367 Cr.P.C. Therefore, it is a fit case for remand to the trial Court for rewriting of judgment. Hence, we accept the appeal, set aside the conviction recorded vide judgment dated 11.07.2020 passed by the learned Additional Sessions Judge-IX, Peshawar and remand the case to the trial Court for rewriting of judgment. Since the impugned judgment has been set aside, therefore, the Revision Petition No.2/P of 2020 filed by the complainant has become infructuous. The trial Court shall adhere to the mandatory provisions of Section 367 Cr.P.C. and conclude the proceedings, preferably within two months after the receipt of copy of this judgment. Needless to observe that fair opportunity of addressing arguments shall be awarded to all parties."*

6. We find sufficient force and weight in the submissions of the learned Counsel for petitioner for a variety of reasons:-

(a) This was never the case of respondent/accused before the trial Court that the charge suffers from any material defect. The respondent did not raise any objection on the charge when it was framed by the learned trial Court and answered by the accused, which, of course, was a proper juncture for any objection.

(b) Thereafter, the prosecution produced its evidence and if the accused was of the opinion that the evidence so produced does not support the charge or the charge requires to be altered, he might have made such an application.

(c) When the accused was examined under Section 342 Cr.P.C a specific question was put to the accused. For the sake of convenience, the question and answer are reproduced:-

"QNo.20 It is in the evidence that vide memo Ex PW 7/21, the section of law 302 PPC was entered to 17(4) Haraba/412-15-AA. What do you say about it?

Ans. I have committed no offence either 302 or 17(3) Haraba, moreover this is the discretionary power of the court to frame charge against accused at any stage."

Similarly, during the course of arguments before the trial Court no such objection was raised.

(d) Had the Court been of the opinion that the charge is defective, the accused has been misled and thereby he has been prejudiced in his defence, while dictating judgment could have altered the charge which is legally permissible, as such, a solemn duty would have performed. But since this was not the position, therefore, the respondent remained satisfied with the charge so framed and the Court accepted the charge free from any legal defect.

(e) Feeling dissatisfied with the conviction recorded by the trial Court, the respondent filed appeal in this Court, no such grievance was ever raised. The grounds of appeal did not contain a single ground regarding any defect in the charge.

(f) Therefore, without prejudice to the denial of the charge, for all intents and purposes, the respondent was not aggrieved of the form, sum and substance of the charge including applicability and attractability of any section of any law. On the same analogy, while hearing the appeal filed by respondent, a full-fledged and complete hearing was given to both parties. The respondent raised a couple of objections on the legal approach and appreciation of the evidence by the trial Court, the proof of charge was refuted but the form and contents of the charge were neither objected nor disputed. At the time of hearing of appeal, we were well conversant with the facts of case, conscious of the charge, appraised of the evidence available on record, since the judgment suffered from a vital defect, as contemplated by Section 367(5) Cr.P.C, therefore, with consent of the parties the case was remanded for re-writing of judgment. While remanding the case, we confined our judgment on the legal issue without appreciating the evidence lest it may not prejudice the case of either party. Had we been of the view that the charge is groundless, erroneous, defective or suffers from any illegality or irregularity or the accused has been bewildered, misled and prejudiced in any way or manner in his defence, we would have had addressed that aspect.

(g) We are surprised how the trial Court adopted the course that was neither warranted by law nor the remand order could have allowed it to travel beyond ambit and ordains of the Order. It is not only strange but astonishing as well that the trial Court on a mere cursory view of record and a look at accused concluded that the accused is a teen-ager and charge does not commensurate with the facts of case.

(h) It is painfully observed that the trial Court passed Order dated 13.04.2021 without hearing the parties hence, the proceedings on 13.04.2021 were ab-initio void for want of non-representation of accused by any defence Counsel. The Order Sheet clearly reflects the presence of State Counsel only. On this date the trial Court passed an effective Order as it treated the accused teen-ager and referred him to Medical Board, declared the charge defective. Legally, murder cases of under-trial prisoners in absence of defence Counsel could not be proceeded with, therefore, it is an illegality sufficient enough to vitiate the Order dated 13.04.2021 followed by subsequent Orders. The accused in his statement under Section 342 Cr.P.C has stated his age 19 years. So the referral to Medical Board was a futile exercise, wastage of precious public time, which increased the miseries of an under-trial prisoner for no fault on his part.

(i) So far as reframing of charge is concerned, it is absolutely a colourful exercise of jurisdiction. None of the parties ever expressed any grievance nor the so called ground i.e. lodging of blind FIR legally can be treated a valid, viable and justified reason for declaring the charge defective. The trial Court appears to have failed to grasp, understand and comprehend the rational, theme, philosophy and object of framing charge. In simple words, the accused should know the exact nature of accusation made against him. He may not be misled and misguided in his defence. Furthermore, no yardstick regarding essential factors and particulars which a charge must contain, is available. The stage at which such an objection is raised is also material. A number of judgments can be referred. Reliance is placed on 2019 SCMR 542 Talal Ahmed Chaudhry Vs. The State, relevant at page 554 is reproduced:-

> *"Further, it has been settled by this Court in a number of cases, that since there is no yardstick available to fix the essential*

> *factors which a charge must contain, therefore, an omission or defect in charge which does not mislead or prejudice the right of the accused could not be regarded as material and made the basis to vitiate a trial on the ground of error or omission in framing charge, it does not even make a case of remand."*

Reference can readily be made to PLD 2006 SC 153 M. Younus Habib Vs. The State and 2005 SCMR 364 S.A.K. Rehmani Vs. The State.

7. We have given our due consideration and anxious thought to the proceedings conducted by the trial Court after remand of the case but have not been able to persuade ourselves to conclude that these proceedings were legal and justified. Rather it appears that the Presiding Officer was bent upon to intentionally linger on the proceedings on one or the other pretext. First attempt was to get the accused declared juvenile by a Medical Board and thereby start a de-novo trial. Simultaneously, second effort was made by altering the charge without adhering to respective provision of Code of Criminal Procedure. Thirdly, to create a jurisdictional dispute, the trial Court found the argument of defence Counsel reasonable i.e. expressed his opinion that by altering the charge forum of appeal is changed.

8. Above all, the trial Court by ignoring the command of the Appellate Court's Order, adopted a unique course, thereby exceeded its jurisdiction, transgressed legal limits, flouted the Order and thus, left no stone unturned to get the proceedings lingered on by increasing the miseries, difficulties and problems of an under-trial prisoner.

9. We have gone through the citations 2007 MLD 1004 Akbar Ali Vs. The State & 3 Others and 2021 P.Cr.L.J 958 Daim Vs. The State, referred by the learned Counsel for the respondent. There is no cavil with the preposition laid down by the Hon'ble High Courts of Lahore and Sindh, but since the facts being distinguishable, the citations referred to are unhelpful to the respondent.

10. Looking with this perspective, legal impact and effect, we do not find any such illegality, impropriety, imperfection, vagueness or defect that may cause prejudice to the accused. Therefore, we are inclined to accept this revision petition, set aside the Order dated 13.04.2021 and the subsequent proceedings including the impugned Order dated 18.05.2021.

11. Since the learned Presiding Officer Mr. Muhammad Tahir Aurangzeb, Additional District and Sessions Judge-IX, Peshawar has made up his mind prior to hearing the parties, so in the larger interest of justice, we direct the learned District & Sessions Judge, Peshawar to hear the matter himself or transfer it to any other Additional District & Sessions Judge within his territorial jurisdiction to decide the case. The Court seized with the matter shall decide the case within one month after the receipt of this judgment by strictly adhering to and complying with the remand Order dated 29.03.2021 referred to at Page 3 Paragraph 5 of this judgment. Needless to observe that the trial Court shall not be prejudiced by any observation made in this judgment.

12. As the Cr. Revision Petition No.2/P/2021 has been accepted, therefore, Cr. Misc. Application No.1/P/2021, wherein proceedings before the trial Court were ordered to be suspended, has borne fruit, stands disposed of accordingly.

MR. JUSTICE MUHAMMAD NOOR MESKANZAI
CHIEF JUSTICE

MR. JUSTICE DR. SYED MUHAMMAD ANWER

Dated, Islamabad, the

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