

HCJDA 38.

JUDGMENT SHEET
**IN THE LAHORE HIGH COURT
LAHORE
(JUDICIAL DEPARTMENT)**

Cr. Appeal No.1008 of 2008

Muhammad Afzal etc v. The State, etc.

Cr. Appeal No.997 of 2008

Muhammad Akram v. The State, etc.

Cr. Misc. No.147 of 2016

In Cr. Appeal No.1137 of 2008

Bashir Ahmad Khan v. Rasheed etc.

Date of hearing **23.05.2017**

For the Appellants: Syed Zahid Hussain Bukhari, Ms. Khalida Parveen and Sardar Khurram Latif Khan Khosa, Advocates.

For the complainant: Mr. Kazim Ali Malik, Advocate.

For the State: Mr. Humayoun Aslam, Deputy Prosecutor General.

AHMAD RAZA GILANI, J.- Rashid, Shahbaz Ahmad sons of Taj Din, Muhammad Afzal, Muhammad Arshad sons of Shaukat Ali, Muhammad Akram son of Muhammaf Rafi and Muhammad Ahsan s/o Abdul Rashid faced trial in case FIR No.637/2002 dated 29.09.2002 u/s 302/324/148/149 PPC police station Khurrianwala, Jaranwala, Faisalabad to dislodge the following charges;-

Firstly that on 29.09.2002 at about 5.00 p.m. in the area of Chowk Shahoowala you accused Akram

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and Ashan both armed with 12 bore Repeater Gun, Rashid and Shahbaz empty handed, Muhammad Afzal armed with 12 bore gun, Arshad armed with 30 bore pistol alongwith your co-accused Abbas since P.O. who was also armed with Repeater 12 bore in furtherance of your common intention formed unlawful assembly with common object to commit the murder of Nazar Khan deceased and by this way committed an offence punishable u/s 148 PPC which is within the cognizance of this Court.

Secondly that on the same date, time and place all armed as above you Akram, Ahsan, Rashid, Shabbaz, Afzal, Arshad alongwith your co-accused Abbas since P.O. arrived at Shahoowala Chowk, Shahbaz, Rashid shouted lalkara for teaching a lesson to Qasim for helping Dilbar. Arshad fired from his Repeater which did not hit Qasim, Akram fired from his 12 bore Gun at Nazar Khan which landed on his chest who fell on the ground. Abbas since P.O. fired from his repeater which landed on front side below umbilicus of Younas who also fell on the ground. Ahsan fired from his repeater which landed on the left shoulder of minor. Afzal fired from his 12 bore gun in the air. The fire shot which landed on the chest of Nazar Khan resulted in his death. Thus you all the accused persons in prosecution of your common object after Qatl-e-Amd of Nazar Khan deceased and causing fire arm injuries to the person thus you all the above said accused committed the offence punishable u/s 302/149 PPC which is within the cognizance of this Court.

Thirdly on the same date, time and place you all the above said accused persons while armed with deadly weapon in furtherance of your common intention formed unlawful assembly with your common object alongwith your co-accused Abbas since P.O. fired with his repeater which landed on

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the Naff umbilical of Muhammad Younas injured whereas Ahsan fired from his repeater gun which landed on the right shoulder of Rehan injured and thus launched murderous assault on the above said injured persons and fired on them with such intention and knowledge and under such circumstances, that if they would have died on sustaining such injuries you have been guilty of an offence Qat-e-Amd thereby you committed the offence u/s 324 PPC read with section 149 PPC which is within the cognizance of this Court.

Trial Court vide judgment dated 30.08.2008 held Muhammad Akram, Muhammad Ahsan, Muhammad Afzal and Muhammad Arshad guilty of committing Qatl-e-Khata of Nazar Khan and were accordingly convicted them u/s 319 read with section 149 PPC and each accused was held liable to pay *Diyat* amount declared vide notification for the year 2002-2003 to the legal heir of the deceased Nazar Khan. Each accused was also directed to undergo imprisonment for four years as Tazir. Muhammad Akram, Muhammad Ahsan, Muhammad Afzal and Muhammad Arshad were also convicted u/s 337-H1 read with section 149 PPC for causing injuries to Muhammad Younas and Rehan, each accused was directed to pay Arsh i.e. 5 % of *Diyat* amount according to the notification for the year 2002-2003 and were also directed to undergo imprisonment for two years as Tazir on each count. Arsh amount will be paid by the above said accused persons to Muhammad Younas and Rehan injured PWs. Benefit under section 382-B Cr.P.C. was extended to them. However, vide the same judgment, learned trial Court by

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extending benefit of doubt to co-accused Rashid and Shahbaz acquitted them of the charges.

Convict Muhammad Akram had challenged his convictions and sentences through Criminal Appeal No.997 of 2008 whereas convicts Muhammad Afzal and Muhammad Arshad had challenged their convictions and sentences through Criminal Appeal No.1008 of 2008. Bashir Ahmad complainant of the case had challenged the acquittal of accused persons Rashid, Shahbaz Ahmad, Muhammad Afzal, Muhammad Arshad, Muhammad Akram and Muhammad Ahsan from the charge of committing Qatl-e-Amd of Nazar Khan deceased through Cr. Appeal No.1137 of 2008. Bashir Ahmad complainant of the case had also filed Cr. Misc. No.147 of 2016 in Cr. Appeal No.1137 of 2008 wherein he had prayed that **appeal filed by the petitioner/complainant/aggrieved person may kindly be treated as Revision Petition against the judgment under challenged.**

In case the above said request is not allowed, this Court may exercise the suo motu revisional powers to do the real justice with the legal heirs of the deceased, the complainant and the injured PWs.

The conviction and sentence under the wrong penal provisions of sections 319 and 337-H (1) PPC may please be corrected and rectified in the manner that the respondents/convicts may please be convicted under sections 302(b) and 324 PPC read with 34 of the same Code.

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2. Brief facts of the case are that on 29.02.2002 at about 5.00 p.m. Bashir Ahmad complainant of the case alongwith Muhammad Younas, Qasim PWs were standing at shabwala Chowk, whereas, Rehan s/o Maqsood Ahmad was also standing nearby to the above said PWs. In the meanwhile, Nazar Khan s/o Murad Khan also arrived there after saying prayer. All of sudden, Rashid, Shabaz alias Wago s/o Taj Din empty handed, Abbas armed with repeater gun, Akram armed with repeater gun, Afzal alias Goga armed with 12 bore gun, Arshad armed with pistol 30 bore and Ahsan armed with repeater gun, residents of Chak No.71/RB arrived there. Rashid and Shabaz shouted lalkara for teaching lesson to Qasim for rendering help to Dilbar s/o Anwar. Arshad fired from his 30 bore pistol pointing at Qasim and said fire was missed. Straight fire shot made by Akram accused at Nazar Khan which landed on his chest who fell down on the ground. Abbas fired from his repeater gun which landed in the stomach area below umbilicus of Muhammad Younas who also fell down on the ground. Ahsan accused also fired from his gun which landed near left shoulder of Rehan minor. Afzal alias Goga also fired from his gun 12 bore. The above said PWs raised hue and cry, and firing of accused attracted Abbas s/o Ghulam Nabi, Allah Ditta s/o Nazar Khan as well as several other persons of the village. The accused persons managed to flee away while making aerial firing. The occurrence was witnessed by the complainant alongwith above said PWs and they attended the injured Nazar Khan who succumbed to the injuries at the spot. Whereas,

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Muhammad Younas and Rehan in injured condition were removed to the Hospital.

3. We have heard learned counsel for the appellants and learned Deputy Prosecutor General assisted by the learned counsel for the complainant and have also gone through the record.

4. Learned counsel for the complainant Bashir Ahmad in Cr. Appeal No.1137 of 2008 filed u/s 417(2) Cr.P.C. seeking therein reversal of acquittal of Rashid, Shahbaz Ahmad, Muhammad Afzal, Muhammad Arshad, Muhammad Akram and Muhammad Ahsan has drawn our attention to paragraph No.34 of the impugned judgment containing the reasons that prevailed while convicting the said respondents/accused persons u/s 319 read with section 149 PPC which are being reproduced as under;-

“The prosecution is primarily bound to establish the guilt of the accused by producing trust-worthy and reliable evidence enabling the Court to draw conclusion that the prosecution has succeeded in establishing the charge against the accused persons. However, the prosecution has been able to prove to the extent that Muhammad Akram, Muhammad Ahsan and Muhammad Abbas (since P.O) accused persons made firing at the spot which resulted into death of Nazar Khan and also causing of injuries to Muhammad Younas and Rehan PW. From the available evident, I can safely conclude that the accused persons had not any intention to commit the intentional murder of Nazar Khan rather the fire shots accidentally hit to Nazar Khan as well as Muhammad Younas and

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Rehan. So, it was not intentional murder, therefore, the accused persons are held guilty of Qatl-e-Khata of Nazar Khan and also caused hurt by rash and negligent act and thus injured two innocent persons in the occurrence.

Learned counsels representing the respondents in all fairness submitted that they are not on agreement with the reasons advanced by the learned trial Court in above paragraph No.34 of the impugned judgment and provision of section 301 PPC were overlooked by the trial Court, but their grievance is that respondents/convicts of the instant case are facing agonies and hardships of the case since 2002 and this Court have been conferred wide powers u/s 423 Cr.P.C. to convict accused not charged by the trial Court in view of sections 236, 237 and 238 Cr.P.C. In addition, learned counsel for the appellant Muhammad Akram in Cr. Appeal No.8997 of 2008 has produced copy of the judgment of trial Court dated 17.12.2011 whereby Muhammad Abbas co-accused of the appellant was acquitted on the basis of same evidence of the prosecution witnesses which was produced in the trial of the present respondents in Cr. Appeal No.1137 of 2008.

5. To answer the above raised question, it would be appropriate to reproduce the provisions of section 423 Cr.P.C. which deal with the powers of appellate Court in disposing of appeal which are as under;-

“423. Powers of Appellate Court in disposing of appeal. (1). The appellate Court shall then send for the record of the case, if such record is not

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already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under section 411-A, sub-section (2) or section 417, the accused, if he appears, the Court may if it considers that there is no sufficient ground for interfering, dismiss the appeal or may:

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or [sent for trial to the Court of Sessions or the High Court], as the case may be or find him guilty and pass sentence on him accordingly to law;

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retired by a Court of competent jurisdiction subordinate to such Appellate Court or sent for trial, or (2), alter the finding, maintaining the sentence, or, with or without altering the finding reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence but, subject to the provisions of the section 106, sub-section (3) not so as to the enhance the same;

(c) in an appeal from any other order, alter or reverse such order;

(d) make any amendment or any consequential or incidental, order that may be just or proper.”

In view of the above provisions, the appellate Court in an appeal from an order of acquittal is empowered to reverse such order and direct that further inquiry be made, or that the

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accused be retried, as the case may be or find him guilty and pass sentence on him according to law. Whereas while disposing of appeal filed by convict, the appellate Court can reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by the Court of competent jurisdiction subordinate to said appellate Court. Retrial may be resorted;

- A. where the accused did not get proper opportunity to cross-examine witnesses or;*
- B. Court lack jurisdiction or;*
- C. where the accused was not afforded opportunity to produce defense.*

An order of retrial wipes out from the record, the earlier proceedings and exposes the person accused to another trial which afforded the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial. In case reported as “Ajay Kumar Goshal v. State of Behar and ANR” in Cr. Appeals No.119 to 122 of 2017 the Hon’ble Supreme Court of India held that the powers conferred by this Clause is to be exercised only in exceptional cases where the appellate Court is satisfied that the omission or irregularity has occurred in failure of justice. It was further observed that circumstances should exist for warranting retrial must be such that where that trial was undertaken by the Court having no jurisdiction, or trial was initiated by serious illegality or irregularity on account of misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong

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admission or wrong rejection of evidence or the Court refused to hear certain witnesses who were supposed to be heard. Undoubtedly, the appellate Court has power to direct lower Court to hold denovo trial but in the safe administration of justice, it was held that such direction be made in extraordinary circumstances.

In case reported as *“Shahmand and six others v. State (1991 P.Cr.L.J 833)”* it was made clear that word **“retrial”** used in section 423 Cr.P.C. does not necessarily means **“denovo trial”**. The word **“him”** used in Clause ‘b’ of sub Clause (1) of section 423 Cr.P.C. is of great significance which will show that it is not the case which is to be remanded but it is the accused who is to be retried by the Court of competent jurisdiction and the appellate Court can make an order for retrial for a particular accused from a particular stage in proceedings of the case and is not obliged to make an order for retrial of the case as a whole or for the retrial of the co-accused who in its opinion had rightly been acquitted. In this regard reliance was placed on case reported as *“Muhammad Shafi and four others v. State (1974 SCMR 289)”*.

In cases reported as *“Muhammad Sadiq v. Lal Muhammad (1968 P.Cr.L.J 637)”* and *“Allah Rakhio Khan v. Muhkam Din etc (1997 P.Cr.L.J 14)”* it was held that **“retrial after long time of the occurrence has always been looked upon with disapproval in judicial authorities.** In case reported as *“Farrukh Sayyar and two others v. Chairman NAB Islamabad and others (2014 SCMR 1)”* the Hon’ble Supreme Court

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declined to accept the contention of learned counsel for the petitioners that the High Court having heard the case as an appellate Court was not empowered to remand the case for writing afresh judgment in view of Clause ‘b’ of section 423 Cr.P.C. and held that remand of a case for judgment writing is not retrial and is fully covered by Clause ‘d’ of section 423 Cr.P.C. which empowers the appellate Court to make any amendment or any consequential or incidental order that may be just or proper. In case report as “*Sahib Khan v. State (1997 SCMR 871)*” the Hon’ble Supreme Court finding the judgment recorded by the High Court which had not met the requirements of section 367 Cr.P.C. in as much, as it neither dealt with the point of determination nor contained evaluation of the evidence and reasons for arriving at the conclusion, the judgment was set aside and the case was remanded to the High Court for fresh hearing and fresh judgment for the. It was observed as under;-

“Without going into merits and demerits of the case of the parties, we hold the view that Criminal Appeals referred above were not decided in the light of afore noted statutory provisions. They shall, therefore, be deemed to be still pending adjudication. Needless to state that at the appeal stage whole original case stands reopened for its hearing and decision in accordance with law. Replying the contention of learned counsel for the petitioner that appeals may be heard and decided on merits by this Court to do substantial justice between the parties, the Hon’ble Supreme Court hold that we cannot substitute our opinion/ decision with the one which is still to be given by the High Court on the basis of evidence available on the record.”

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6. In view of the above noted discussion and in the light of referred judgments we are of the view that this is not a case of retrial but rewriting of judgment. Additionally, in case reported as **(PLD 2007 SC 237)** it was held that when the appellate Court is dealing with the appeal preferred against conviction, powers of appellate Court to alter a conviction are wide u/s 423 Cr.P.C. but are subject to the conditions that altered conviction should not be such which could not have been recorded by the trial Court. Provisions of section 423 (1)(b)(3) Cr.P.C. leave no doubt that by such alteration sentence cannot be enhanced. Thus this Court is not empowered to alter the finding of conviction u/s 319 PPC into 302 (b) PPC while disposing of appeal preferred against conviction.

7. As regards the acquittal of co-accused Muhammad Abbas tried in separate trial in the same case, provisions of Article 56 of Qanun-e-Shahadat Order 1984 would be relevant to answer the question raised. In case reported as *“Raju Rai v. State of Behar (2005(7) Supreme Court 459)”* it was held that judgment of acquittal in the trial of the co-accused tried separately is held irrelevant in the subsequent trial of the other accused who was not tried earlier; but separated and the judgment in that case is not admissible within the meaning of section 40 to 44 of the Evidence Act. Said provisions are identical to that of Article 54 to 58 of Qanun-e-Shahadat Order 1984. Thus, acquittal of a co-accused in separate trial cannot be made basis for quashing the proceedings against another co-accused who is being separately tried on the principle that each

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case has to be decided on the evidence adduced in that case. In case reported as **(1996 P.Cr.L.J 1683)** where trial Court had convicted the accused not on the basis of material produced before it but on the basis of judgment recorded by the High Court in appeal filed by co-accused maintaining his conviction and also on the verdict of the Hon'ble Supreme Court whereby appeal of the said accused was dismissed, it was held that accused being not a party to the aforesaid previous judgment, the same had no prejudicial order against him. Trial Court despite having individually evaluated and assessed the available material on record did not proceed to decide the matter individually which had caused prejudicial observation against it as ultimately conviction was recorded on wrong assumption of law and on the other hand since the accused was convicted for the reasons not recognized by law he could have file appeal only to such extent. Conviction and sentence of the accused consequently was set aside and case was remanded to trial Court for recording judgment individually in accordance with law after hearing the parties.

8. Cr. Misc. No.147 of 2016 has been filed by Bashir Ahmad in Cr. Appeal No.1137 of 2008 for treating said criminal appeal seeking reversal of finding of acquittal as revision in terms of section 439 read with section 435 Cr.P.C. We find it misconceived and against the law. Chapter XVI relates to offences effecting human body and in the said chapter different kinds of Qatl have been provided. Section 300 PPC defines Qatl-e-Amd and section 302 PPC provides punishment

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of Qatl-e-Amd which contained three Clauses having characteristics of distinct offences. Besides this, other kinds are Qatl Shibh-i-amd u/s 315 PPC, Qatl-i-Khata u/s 318 PPC, Qatl-bis-sabab u/s 321 PPC which are all mutually exclusive and if offender is punished under one of the said provisions, its conversion to other provision is not alteration of finding but it will amount to reversal of finding which essentially has entirely different features which this Court is debarred in view of provisions of section 439-4(a) Cr.P.C. and only appellate Court has been conferred power to reverse the finding of acquittal u/s 423 (1)(a) Cr.P.C. Therefore, we are not inclined to accept Cr. Misc. No.147 of 2016 which is accordingly dismissed.

9. For what has been noted and discussed above, we are inclined to accept Cr. Appeal No.1137 of 2008 filed by the complainant Bashir Ahmad against acquittal of accused persons Rashid, Shahbaz Ahmad, Muhammad Afzal, Muhammad Arshad, Muhammad Akram and Muhammad Ahsan u/s 417(2) Cr.P.C. and in view of provisions of section 423 (1)(b) Cr.P.C. remand the case to the trial Court to rewrite the judgment in accordance with law after hearing both the parties. As a result, judgment dated 30.08.2008 passed by the trial Court being impugned is set aside being against the provisions of Penal Code. Criminal Appeal No.997 of 2008 of Muhammad Akram and Criminal Appeal No.1008 of 2008 of Muhammad Afzal and Muhammad Arshad preferred against their convictions are disposed of in the above terms, their convictions u/s 319 PPC are set aside and their trial shall be deemed pending before the

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trial Court. Both the parties are directed to appear before the trial Court which shall rewrite the judgment within a period of two months from the date of receipt of copy of this judgment after hearing the parties afresh and till that time all the accused persons shall remain on bail subject to their furnishing bail bonds in the sum of Rs.2,00,000/- each with one surety each in the like amount to the satisfaction of learned trial Court.

(SYED SHAHBAZ ALI RIZVI)
JUDGE

(AHMAD RAZA GILANI)
JUDGE

Approved for Reporting

Judge