

***JUDGMENT SHEET***  
***IN THE PESHAWAR HIGH COURT,***  
***BANNU BENCH.***

*(Judicial Department)*

***Cr.A No.120-B of 2015 with***  
***Murder Reference No.09-B of 2015.***

***Karim Khan***  
***Vs***  
***The State & Afsar Khan etc***

***JUDGMENT***

Date of hearing \_\_\_\_\_ 13.02.2017 \_\_\_\_\_.

Appellant-Petitioner: ***Karim Khan by Muhammad***  
***Rasheed Khan Dirma Khel,***  
***Advocate.***

Respondent: ***State by Qudrat Ullah Khan***  
***Gandapur, Assistant Advocate***  
***General.***

***ISHTIAQ IBRAHIM, J---*** Through this appeal, Karim Khan, appellant has questioned the judgment of learned Additional Sessions Judge-I, Bannu, dated 07.10.2015, whereby he was convicted under section 302(b) P.P.C and sentenced to death with compensation of Rs.5,00,000/- (Five lac) under section 544-A Cr.PC payable to the legal heirs of the deceased and in default whereof to undergo six months S.I.

2. The prosecution case as per F.I.R is that on 09.08.2010 at 13.00 hours, Janan Khan, complainant in company of the deadbody of his son Aziz Khan, lodged a report in Police Station that, on the day of occurrence, he alongwith his deceased son left for village Nar Abdul Karim, in order to bring Rice seed. His son was ahead of him. When they reached at the Kacha road, near the house of one Allah Noor at about 08.00 hours accused/ convict came near them on motorcycle and after crossed him, he stopped the motorcycle and started firing with his Kalashnikov at his son Aziz Khan, as a result of which he was hit and fell on the ground. Accused decamped from the spot. He could do nothing being empty handed. When he attended his son he expired. Hence, the instant F.I.R.

On completion of investigating, the challan was put in Court under section 512 Cr.PC, as by then accused was absconding. The prosecution recorded the statement of complainant and other PWs in support of their case. On completion of proceedings under section 512 Cr.PC, the accused/convict was declared as proclaimed

offender, vide order dated 08.01.2010 by learned Additional Sessions Judge-IV, Bannu. Accused /convict was arrested on 04.03.2014 and after completion of investigation, supplementary challan was submitted before the learned trial Court, where after completion of codal formalities, the learned trial court charge-sheeted accused/ convict to which he pleaded not guilty and claimed trial. Prosecution evidence was recorded, as by then the complainant had died, his statement recorded earlier under section 512 Cr.PC against the accused was transposed on the request of prosecution as PW-5. On closure of prosecution evidence, statement of accused was recorded under section 342 Cr.PC and on conclusion of trial, accused/appellant was convicted and sentenced as mentioned above.

3. We have heard the learned counsel for the appellant and learned Asstt: A.G for the state. Record perused with their valuable assistance.

4. At the very outset learned counsel for appellant pointed out that impugned judgment is in violation of section 367 Cr.PC, as learned trial Court has

not evaluated the statement of complainant in his judgment, nor it was put to the accused/appellant during recording his statement recorded under section 342 Cr.PC, therefore, the impugned judgment is not sustainable.

5. When learned Asstt. A.G for the State was confronted with the proposition that judgment of learned trial Court is not in accordance with the provision of section 367 Cr.PC, he tacitly conceded that the impugned judgment is not of that standard, as required under section 367 Cr.PC, however, he argued that solitary eye-witness, the complainant Janan Khan, whose statement was recorded during earlier trial under section 512 Cr.PC had died, due to which after arrest of accused/ convict, when trial commenced, that statement was transposed to the present case file vide order dated 04.02.2015, which is in accordance with section 47 of the Qanun-e-Shahadat, hence, no illegality was committed. He further contended that it is not an illegality rather irregularity, which can be cured under section 537 Cr.PC, therefore, the learned trial

court has rightly relied upon the statement of complainant PW-5 and convicted the accused.

6. Before thrashing the evidence and giving findings on merits of the case, it would be in the interest of justice to see whether the judgment delivered by the learned trial Court falls within the parameters of section 367 Cr.PC or otherwise. For convenience and to clarify the position, we would like to reproduce section 367 Cr.P.C. herein below:-

**“S.367. Language of judgment: Contents**

**of judgment:** (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court or from the dictation of such presiding officer in the language of the Court, or in English, **and shall contain the point or points for determination, the decision** thereon and the reasons for the decision and shall be date and signed by the presiding officer in open Court at the time of pronouncing it and where it is not written by the Presiding Officer with his own hand, every page of such judgment shall be signed by him.

(2) It shall specify the offence (if any) of which, and the section of the Pakistan Penal Code or other law under which the accused

is convicted and the punishment to which he is sentence”. **(emphasis provided)**

7. It is basic requirement of section 367 Cr.PC that the judgment of the Court shall contain the points for determination, the decision thereon and the reasons for the decision. In case titled **“Sahib Khan and four others...Vs..The State and others” (1997 SCMR 871)** it was observed that:

*“For reasons to be recorded later, we set aside the impugned judgment in both these appeals for the reason that the impugned judgment does not contain valuation of evidence and discussion in the manner it should be and also does not assign reasons for arriving at the conclusion as required under section 367 Cr.PC”.*

Wisdom is also derived from a case titled **“Ashiq Hussain and others..Vs..The State and two others” (2003 SCMR 698).**

8. The use of word “shall” in section 367 Cr.PC is indicative of the fact that compliance with the provisions of the ibid section is mandatory, non-compliance whereof,

rendered the impugned judgment as inherently defective and illegal.

In a case titled **“Khalid Mehmood..Vs...The State” (2004 P.Cr.L.J. 984(FSC)**, the following observations have been made by their Lordships:-

***“As to the second limb of argument in the contention that the learned trial Judge has also failed to formulate the points for determination, it may be pointed out here that use of the word “shall” in provision of section 367 Cr.P.C, in accordance with the terms, is mandatory”.***

9. It is evident from the record that while recording of statement of accused/ appellant under section 342 Cr.PC no specific question was put with respect to the transposition of statement of complainant recorded during earlier trial under section 512 Cr.PC. Likewise plain reading of impugned judgment is reflective of the fact that learned trial court has altogether overlooked the statement of complainant and has given no findings on it and by doing this has made complete departure from the provision of section 367 Cr.PC. In this case complainant Janan Khan,

father of the deceased, was sole eye witness, whose statement was recorded under section 512 Cr.PC on 08.01.2010 and after arrest of accused/ convict, the said statement was transposed in the present case, as at that time he was dead. The learned trial court has accepted the testimony of complainant PW-5 purely on academic ground and factually the evidence of this witness has not been properly apprised and discussed with other circumstances of the case, therefore, the impugned judgment is nothing in the eyes of law. It was the legal obligation of the learned trial Court to have discussed each and every point, involved in the case, with reference to evidence produced by prosecution including the statement of complainant, but it is not the case here, which is an illegality, cannot be cured under section 537 Cr.PC, as it has substantial bearing on the merits of the case, hence, cannot be countenanced by any means. In case titled **“Farrukh Sayyar and 2 others Vs. Chairman NAB Islamabad and others” (2004 SCMR 1)**, it was observed that:



***“It is mandatory requirement of section 367 Cr.PC that a Court while writing a judgment shall refer to the point or points of determination, record decision thereon and also give reasons for the decision. The Court shall also specify the offence of which, and the section of the Pakistan Penal Code or other law under which, the accused is convicted and the punishment to which he is sentenced. In the present case the learned trial Court overlooked the mandatory provisions of section 367 Cr.PC and rendered a judgment which falls short of the requisite standard. Failure to specify the points for determination as required under section 367 Cr.PC is an omission which is not curable under section 537, Cr.PC and absence of decision on the points for determination and reasons in the judgment amounts to an illegality which prejudices the case of the accused.*”**

10. Thus for what has been discussed above, without dilating upon the merits of the evidence, lest it may prejudice the case of either side, we hold that the impugned judgment is violative of the statutory provisions of section 367 Cr.PC, therefore, is not sustainable. This appeal is allowed, the impugned judgment of the learned trial court is set-aside and the case is remanded back for re-examination

of accused/ appellant under section 342 Cr.PC, by putting him question regarding transposition of statement of complainant Janan Khan recorded during earlier trial under section 512 Cr.PC, apart from other questions and after re-hearing learned counsel for the parties, decision afresh by strictly adhering to section 367 of the Code of Civil Procedure, within shortest possible time. Accused/ appellant be treated as under trial prisoner. Murder reference is answered in negative. Parties are directed to appear before the learned trial court on 28.02.2017. Office is directed to remit the record to the trial court at the earliest.

**Announced.**

13.02.2017

\*Azam/P.S\*

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