

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Review Petition No. 16-M/2018

(1) *Barkat Ali son of Said Rahman (Petitioner)*
Versus

(1) *The State through A.A.G*
(2) *Hazrat Bilal son of Muhammad Yar (Respondents).*

Present:

*Mr. Sajjad Anwar, Advocate for the
convict-petitioner.*

*Mr. Rahim Shah., Asst. Advocate General
for the State.*

Date of hearing: **03.10.2018**

JUDGMENT

SYED ARSHAD ALI, J.- Through the instant review petition which was filed before this Court on 13.04.2018, the petitioner seeks review of the judgment passed by this Court on 03.03.2016 in criminal appeal No. 600-P of 2009 where the present petitioner was convicted under section 302 (b) PPC to undergo life imprisonment alongwith compensation of Rs. 200,000/- under section 544-A Cr.P.C payable to the legal heirs of the deceased or in default thereof, he shall further undergo SI for six (6) months.

2. Essential and relevant facts of the case are that the present petitioner was charged by Hazrat Bilal the complainant for the murder of his brother Liaqat Ali on 17.07.2007. The matter was reported to the local police on the same date and resultantly the FIR No. 1249 under section 302 PPC was registered against the present petitioner on 17.07.2007 at police station Mingora, District Swat. The present petitioner was sent to trial before the learned Sessions Judge/Zila Qazi Swat, who on conclusion of trial acquitted the present petitioner through judgment dated 14.11.2009. The said acquittal of the petitioner was challenged by the complainant Hazrat Bilal through criminal appeal No. 600-P of 2009 before this Court. After resorting to all modes of service, when the present petitioner could not be traced/turned up the appeal was decided in his absence vide impugned judgment dated 03.03.2016 and the petitioner was convicted as stated above. The petitioner through the instant review petition wants us to

set aside the aforesaid conviction recorded by this Court in its judgment dated 03.03.2016.

3. The learned counsel Mr. Sajjad Anwar, Advocate while appearing on behalf of the accused/petitioner has argued that indeed as evident from record the accused had abandoned his place of abode and therefore he could not receive any notice, summon or warrant of this Court and as such was not avoiding his presence before the Court, but he had no knowledge of the proceedings, therefore, his conviction in absentia is not only against all norms of justice but is also contrary to Article 10-A of the Constitution. In support of his arguments, the learned counsel for the petitioner placed reliance on case law cited as "Babar Hussain Shah and another vs. Mujeed Ahmed Khan and another (2012 SCMR 1235), "Habib-ur-Rehman vs. The State" (2010 P Cr. LJ 658), "Mst. Mumtaz Begum and 8 others vs. Shakil Hyder and 12 others" (1997 P Cr. LJ 776 Karachi), "Nazak Hussain vs. The State"

(PLD 1996 S.C. 178), “ Mohammad Hanif vs. The State” (PLD 1974 Karachi 22) and “Gulzar Hassan Shah vs. Ghulam Murtaza & 4 others” (PLD 1970 Supreme Court 335).

Whereas Mr. Rahim Shah, the learned Asstt: Advocate General appearing on behalf of the respondents has argued that this Court has no jurisdiction to review its judgment in terms of clear bar contained in section 369 of the Criminal Procedure Code (“Cr.PC”).

4. We have carefully gone through the record with the valuable assistance of the learned counsels of the parties, however, the issue raised by the petitioner cannot be resolved unless first we determine the maintainability of the present petition. Through judgment dated 03.03.2016 the petitioner was convicted and the said judgment of conviction was recorded by this Court on 03.03.2016. Thus, in our view we are being precluded by the clear and unequivocal prohibition contained in section 369 Cr.P.C to

alter, amend or set aside the said judgment.

Section 369 Cr.P.C reads as under:-

369. Court not to alter judgment. Save as otherwise provided by this Code or by any other law for the time being in force or, in case of a High Court, by the Letters Patent of such High Court no Court when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

5. Indeed, it is settled by the august Supreme Court of Pakistan that the right to claim review of any decision of a Court of law, like the right to appeal, is a substantive right and not a mere matter of procedure. The scope of review by a court under criminal jurisdiction has been elaborately expounded by the august Supreme Court of Pakistan in

"Imdad Ali Khwaja's case reported as 2016

SCMR 2057" as following:-

"Once an order is passed by one Bench, the other Bench cannot review such an order ordinarily. In proceedings with the matters in criminal jurisdiction, the High Court does not have the power to review an order."

The aforesaid law laid down by the august Supreme Court of Pakistan is also reflected in various judgments of the superior Courts reported as "2016 PLD 195 Peshawar, 2013 PCrLJ 767 Peshawar, 1971 PCrLJ S.C 483, PLD 2015 S.C 322, PLD 2004 SC 911, 2014 SCMR 1609, 2012 SCMR 334, 2008 SCMR 165, 2008 SCMR 880, PLD 2004 SC 32, 2002 SCMR 1239, 2002 SCMR 1611, PLD 2001 S.C 433 and 1986 SCMR 965".

6. However, judicial consensus has developed in our country that certain orders of criminal Court, which do not qualify to be a judgment as provided in Chapter XXVI of the Criminal Procedure Code, the High Court may review its order in exceptional circumstances under its inherent power. The law laid down by the august Supreme Court of Pakistan in "Gulzar Hassan Shah's case reported as PLD 1970 Supreme Court 335" referred by the learned counsel for the petitioner in support of his arguments is distinguishable as in the said matter the issue was relating to the

cancellation of bail of the accused in his absence. The order of the Court granting bail or cancellation does not qualify to be a judgment in terms of section 369 of the Cr.P.C, therefore, the ratio of the said judgment is not applicable to the present case because in the present case this Court has passed the order of conviction of the petitioner. This judgment was distinguished by the august Supreme Court of Pakistan in "Muhammad Khalil-ur-Rahman's case reported as PLD 1995 SC 633", wherein it was observed:-

"I am conscious of the fact that general principles of finality of judgment attaches to the decision or order of the High Court passed in criminal cases. But it will not apply to cases where an order is passed without jurisdiction or without giving any opportunity to the parties of being heard. In such cases section 561-A, Cr.P.C. can be invoked for the purpose of doing justice between the parties and for seeing that the act of the Court does not injury to any of the parties. This is an inherent power of the Court and has been preserved by the above

provision of law. In my opinion in rare and exceptional cases the High Court has inherent power to invoke, review or alter its own earlier decisions in cases which are not governed by Sections 369, 424 and 430, Cr.P.C. with a view to give effect to any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is, however, not possible to enumerate the circumstances in which this provision can be invoked. It may, however, be mentioned that the learned counsel for the appellant has conceded that application for bail can be made from time to time on fresh material. There is thus no difficulty in such cases."

7. On merit, the petitioner might have some arguable case, however, due to the fetters imposed by section 369 Cr.P.C and the law laid down by the august Supreme Court of Pakistan, we are unable to intervene in the matter and to review the judgment of this Court passed on 03.03.2016. Hence, this petition being not maintainable is dismissed.

Announced
03.10.2018


JUDGE


JUDGE