

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department]

Writ Petition No.2428-P/2023

Naseem Ullah s/o Hakim Ullah,
 (convict) Confined at Central Prison Peshawar.

Petitioner (s)

VERSUS

The Inspector General (Prison),
 Khyber Pakhtunkhwa, Peshawar and others.

Respondent (s)

For Petitioner (s) :- Mr. Shabbir Hussain Gigyani,
Advocate
 For Respondents :- Malik Haroon Iqbal, AAG .
 Date of hearing: 21.12.2023

JUDGMENT

ISHTIAQ IBRAHIM, J.- Petitioner Naseem Ullah,
 after facing trial in case FIR No.213 dated 10.07.2018,
 registered under Sections 302, 109 and 34 PPC and
 Section 15 KP Arms Act, 2013, at Police Station West
 Cantt. Peshawar, was convicted under section 302(b)
 PPC and sentenced to death and to pay rupees five lac,
 as compensation in terms of Section 544-A Cr.P.C. to
 legal heirs of Faisal Shams deceased and in default
 thereof to further undergo six months simple
 imprisonment and under section 15 KP Arms Act
 2013, to undergo three years rigorous imprisonment
 and to pay a fine of Rs.10,000/- and in default thereof
 to further undergo three months simple imprisonment,
 by learned Additional Sessions Judge/Model Criminal

Trial Court, Peshawar, vide judgment(s) dated 20.03.2021. The petitioner challenged his conviction and sentences before this court through Cr.A. No. 278-P of 2021 and Cr.A. No.283-P of 2021, whereas for confirmation of death sentence of the petitioner, the learned trial Court sent Murder Reference No.7 of 2021,. This court after hearing the aforesaid three matters, vide judgment(s) dated 08.03.2022, maintained conviction of the petitioner under section 302(b) PPC, however, altered/reduced sentence of death to imprisonment for life and answered Murder Reference in the Negative. While dismissing Cr.A. No.283-P of 2021, this court maintained conviction and sentence of the petitioner under section 15 KP Arms Act, 2013. The substantives sentences of imprisonment under the aforesaid two offences were not directed to run concurrently and similarly, benefit of Section 382-B Cr.P.C. was not extended to the appellant by the Appellate Court.

2. Feeling aggrieved, the petitioner through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, is seeking issuance of the following writ:-

“ It is, therefore, humbly prayed that on acceptance of this petition, this august Court may graciously be pleased to direct

*extension of benefit of Section 382-B
Cr.P.C. as well as concurrent running of
life imprisonment under section 302 PPC
with the sentence awarded under section
15 KP Arms Act, 2013 to the petitioner.”*

3. Initially, comments of the respondents were called, which were accordingly filed by them, wherein they have admitted the facts advanced by the petitioner in the writ petition.

4. Arguments of learned counsel for the parties heard and record perused with their able assistance.

5. Judgment dated 20.03.2021, depicts that learned trial court while convicting and sentencing the petitioner under section 15 KP Arms Act, 2013, has extended him benefit of Section 382-B Cr.P.C. and this court while dismissing Cr.A. No.283-P of 2021 has maintained the judgment dated 20.03.2021 of the learned trial Court, meaning thereby that benefit of Section 382-B Cr.P.C. already extended to the petitioner has been maintained by this court. However, neither the learned trial court neither this court while dismissing appeal of the petitioner has directed his sentence to run concurrently with the sentence of imprisonment for life.

6. In the murder charge, this court while altering death sentence of the petitioner to imprisonment for life under section 302(b) PPC has

inadvertently ignored the mandatory provisions of section 382-B Cr.P.C. as well as directing the substantive sentences of imprisonment under the two offences to run concurrently. To resolve the controversy it would be advantageous to refer to section Section 382-B Cr.P.C., which read as under:-

“S.382-B. Period of detention to be considered while awarding sentence of imprisonment:- Where a Court decides to pass a sentence of imprisonment on an accused for an offence, it shall take into consideration the period, if any, during which such accused was detained in custody for such offence.”

“Section 382-B Cr.P.C. was added by the Law Reforms Ordinance, 1972. The word “Shall” was substituted for the word “may “by the Code of Criminal Procedure (Second Amendment) Ordinance, No.LXIII of 1979.


7. The provisions of Section 382-B Cr.P.C. have undergone scrutiny by the worthy superior Courts and have been interpreted in a plethora of cases. For the sake of convince and ready reference some of the judgments are refereed herein below. In case titled, **“Qadir Vs State (PLD 1991 SC 1065),** the Hon’ble Supreme court while dilating upon the provisions of section 382-B Cr.P.C. has held that it being a beneficial provision is to be interpreted liberally.

Relevant observations in this regard are reproduced below:-

“It may be noted that the mandatory provision has been introduced because of the realization that an accused person is entitled to be put to trial or released on bail. If he is riot to be released on bail, he must be put to trial. If for any reason the State is unable to put him up for trial it is only fair that during the period he is detained to await his trial that period is taken into consideration in computing the sentence of imprisonment given to him. Another point to be noted is that the provision occurs in a criminal statute which requires strict construction as far as it imposes restrictions and punishments. Beneficial provisions need to be constructed liberally. These are axiomatic principles.”

In case titled, “Ramzan Vs the Ate (PLD 1992 SC 11)”, the august apex court has adhered to the exposition of law made in *Qadir’s case (supra)*. Similarly, in case titled, “Liaqat Hussain Vs State (PLD 1995 SC 485)”, it has been held by the Supreme Court that the trial court or the Federal Shariat Court had not pointed out any circumstance which would justify the denial of the extension of the benefit of section 382-B Cr.P.C. to the appellant in the said case. Thus, while maintaining the conviction and sentences of the appellant awarded by the trial court and affirmed by the Federal Shariat Court, the apex court directed that the benefit of

section 382-B Cr.P.C. would be extended to the appellant. In case titled "Muhammad Rafiq's case 1995 SCMR 1525), the Supreme Court while examining the provisions of section 382-B Cr.P.C. has held as under:-




"Section 67 of the English Act and section 428 of the Indian Act provide expressly that the sentence of imprisonment imposed by the court shall stand reduced by the pre-sentence period spent in jail (the English Act) or which is the same thing, that the pre-sentence period shall be set off against the term of imprisonment imposed on him (the Indian Act). The English and the Indian Acts do not, therefore, leave as regards the pre-sentence period spent in jail, anything to be done by the sentencing court. Instead, they direct that the period so spent in jail shall automatically count towards the sentence of imprisonment imposed by the court and the sentence of imprisonment shall stand reduced accordingly.

We wish that section 382-B of the Code were also couched in language as clear and unambiguous as the sections in the Indian and the English enactments are. If it were, then, it would be right to say, as has become customary to do, that the convict should get the benefit of that section. But unfortunately it does not."

In case titled, "Mukhtar ud Din Vs State (1997 SCMR 55), the Hon'ble supreme Court has

exhaustively dealt with the provisions of section 382-B

Cr.P.C. has held that:-




“(i) That strictly speaking section 382-B Cr.P.C. is attracted to, when a court decides to pass a sentence either in the trial or appellate or revisional proceedings against an accused for the offence charged with. In other words, if the sentence has already been passed by a trial court and the matter is brought before an Appellate Court, strictly speaking, section 382-B Cr.P.C. is not applicable. However, there is no legal bar and that an appellate Court is competent to grant the benefit of the above provision to a convict. Furthermore, a convict will be entitled to agitate before the Appellate Court the question, that the trial court had failed to consider the above provisions while imposing the sentence on him or that he was wrongly denied the benefit of the same, in such a case, the Appellate Court would be bound to examine the above question and to rectify the error/mistake, if any, committed by the trial Court.

(ii) That if an appellate court substitutes death sentence to that of imprisonment for life or rigorous imprisonment for a certain period, it is obligatory on its part to take into consideration above section 382-B Cr.P.C. for example, if a High court in a murder appeal/reference alters conviction from section 302 PPC to that under section 304 Part-I, PPC and substitutes death sentence to that of rigorous imprisonment for seven or ten years, it is mandatory for it to advert to the question of extending the benefit of the above provisions to the convict while imposing above sentence.

(iii) that though under section 382-B Cr.P.C. the court has discretion not to grant the benefit of the same to a convict but this discretion is to be exercised judiciously on sound judicial principles inter alia as explained hereinabove in para 9.

(iv) That since the provision of section 382-B Cr.P.C. is mandatory, in the absence of express manifestation of the application of the mind by the court that it has addressed itself to the above provision at the time of imposing sentence on the convict concerned, no presumption can be raised in favour of the court of having adverted to the same."



The aforesaid view has been reiterated by the Hon'ble Supreme Court in cases titled, "Ghulam Murtaza Vs the State (PLD 1998 SC 152), "Javed Iqbal Vs the State" (1998 SCMR 1539), "Ehsan Ellahi Vs Muhammad Arif (2001 SCMR 416). In case title, "Shah Hussain vs the State" (PD 2009 Supreme Court 460), while placing reliance on the judgments (supra), in its authoritative judgment has observed as under:-

"(1) While passing sentence, the court, in the absence of special circumstances disentitling the accused to have his sentence of imprisonment reduced by the period spent in jail during the trial, exercise its discretion in favour of the accused by ordering that such period shall be counted towards his sentence of imprisonment or that the sentence of

imprisonment shall be treated as reduced by that period.

(2) The discretion has to be ordered with the intention to promote the policy and objects of the law;

(3) Indeed, the court will use its good sense in determining the circumstances in which the discretion will not be exercised in favour of the accused. But as the discretion is a judicial discretion, the order of the court must show that the pre-sentence period has been taken into consideration and if the court thinks that the sentence should not be reduced by the period spent in imprisonment during the trial, the court must give reasons for so thinking;

(4) The word "shall" is intended to make the provision mandatory in the sense that it imposes a duty to do what is prescribed and same admits of no doubt whatever;

(5) The provision occurs in a criminal statute which requires strict construction as far as it imposes restrictions and punishments. Beneficial provisions need to be constructed liberally. In any event, the fact that when the section 382-B Cr.P.C. was first enacted the word used was "may" and later it was substituted by the word "shall" provides the clearest possible evidence that the intention was that the court must take the pre-sentence period of detention in jail "into consideration". Section 382-B Cr.P.C. is, therefore, a statutory limitation upon the court's discretion to determine the length of imprisonment. It must "take into consideration" the pre-sentence period spent in jail;


(6) The benefit of section 382-B Cr.P.C. is also available to a person whose sentence of death under section 302 PPC has been subsequently altered to imprisonment for life;

(7) As the accused is put in jail for the very offence for which he is convicted and sentenced to imprisonment, the pre-sentence period spent by him in jail is not in vain and must, therefore, be taken into account.”

8. In case titled, **“Government of Khyber Pakhtunkhwa through Secretary Home and Tribal Affairs Department Peshawar and others Vs Mahmood Khan” (2017 SCMR 2044)**, the Appellate court while altering death sentence of convict into imprisonment for life, inadvertently, did not extend benefit of Section 382-B Cr.P.C to the convict. The convict filed constitutional petition before the this court and the same was allowed, resultantly, he was extended benefit of section 382-B Cr.P.C. Feeling aggrieved the Government of KP through Secretary Home and Tribal Affairs Department Peshawar filed **Civil Petition No.332-P of 2017** before the Hon’ble Supreme Court, where while refusing leave to appeal, the august apex court held as under:-


“In the present case, as has been rightly pointed out, while partly accepting the appeal against death sentence awarded under section 302 PPC to the respondent,

it was reduced to life imprisonment, however, the learned Division Bench of the High Court conveniently ignored the mandatory provision of section 382-B Cr.P.C. which was an omission of technical nature and not substantive one, which would not attract any bar to amend the original judgment but through the impugned judgment the omission made was rectified and the command of the law was given effect in letter and spirit.



As highlighted and explained above, now extension of benefit of pre-conviction detention period be deducted from the sentence awarded is mandatory and for refusal to grant the same, cogent, strong and convincing reasons are to be recorded. In the instant case, it was a simple commission on the part of the learned Bench of the High Court to look at the substance of the mandatory provisions of section 382-B Cr.P.C., this it can be rectified at any stage and even the Jailer in whose custody the prisoner is undergoing sentence, is bound to award such benefit even if the judgment is silent unless the court for cogent and confidence inspiring reasons has expressly refused

to grant such benefit. (Bold and underlines supplied emphasis).



9. Taking the case of the petitioner at the touch stone of the law settled by the Hon'ble Supreme Court in the judgments (supra), we have noticed that the learned Appellate Court has not given any strong, cogent and convicting reasons for not extending benefit of Section 382-B Cr.P.C. to the petitioner while altering his death sentence to life imprisonment. In this view of the matter, it is a simple omission on the part of the learned Appellate Court to look at the substance of the mandatory provisions of section 382-B Cr.P.C, hence, the same can be rectified.

10. Adverting to another prayer of the petitioner that his sentence of imprisonment under section 302(b) PPC may be directed to run concurrently with his sentence of imprisonment under section 15 KP Arms Act, 2013. Section 35 Cr.P.C. is very much applicable to case of the petitioner as record shows that petitioner has been tried for more offences than one in one and the same trial. Section 35 Cr.P.C. subject to section 71 of the PPC, empowers not only the trial Court to award several sentences to a person charged for multiple offences in the same trial but in its discretion may direct that such sentences shall run concurrently. Even the Appellate Court while hearing the appeal against

the conviction may direct several sentences awarded in the same trial, to run concurrently. Unfortunately, in this case, neither the trial Court nor the appellant court passed any order with regard to sentences of imprisonment of the petitioner to run concurrently. Judgments of both the courts are silent in this regard. Section 397 Cr.P.C. enables and empowers the trial, and or the Appellate/Revisional Court, as the case may be, in a subsequent trial or in appeal or revision, arising out of the subsequent trial to order for the consolidation of sentences in subsequent trial with the sentence awarded in earlier trial(s) as may be maintained or modified in appeal/revision arising therefrom. In case titled, "Rahib Ali Vs the State" (2018 SCMR 418), it has been held by the Hon'ble Supreme Court that High Court and the Supreme Court had jurisdiction under section 561-A read with section 35 and 397 Cr.P.C., as the case may be, to order multiple sentences awarded in the same trial or in separate or subsequent trial to run concurrently.

11. For what has been discussed above, deriving guidance and placing reliance on the judgments (supra) of the Hon'ble Supreme Court, we are of the considered view that petitioner is entitled to benefit of section 382-B Cr.P.C. and his substantive sentences of imprisonment to run concurrently.

12. Accordingly, this writ petition is allowed. Consequently, benefit of Section 382-B Cr.P.C. is extended to the petitioner and his substantive sentences of imprisonment under section 302(b) PPC and section 15 KP Arms Act, 2013, shall run concurrently. The Superintendent of the concerned Jail is directed to do the needful.

Announced:

21.12.2023

M. Straj Afridi CS



Senior Puisne Judge

JUDGE

DB of Hon'ble Mr. Justice Ishtiaq Ibrahim senior Puisne Judge:
And Hon'ble Mr. Justice Sahibzada Asadullah

