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

Cr.Misc.QP No.96-P/2017

Qaiser s/o Fakhar-u-Zaman,
r/o Kot Ismail Zai, presently confined
in District Jail Mardan.

Petitioner

VERSUS

The State etc

Respondents

For Petitioner :- Mr. Shahid Zaman, Advocate.
State :- _____

Date of hearing: **19.03.2018**

JUDGMENT

ROOH-UL-AMIN KHAN, J:- Through instant petition under section 561-A Cr.P.C., petitioner Qaiser, seeks quashment of order dated 20.10.2017, rendered by learned Additional Sessions Judge-III, Mardan, whereby his application under section 397 Cr.P.C. has been turned down.

2. Facts in brief forming the background of the instant petition are that petitioner was tried in case FIR No.411 dated 21.11.2014, registered under section 9 (c) Control of Narcotics Substances Act, 1997 *(to be referred hereinafter as the Act of 1997),* thus, was convicted u/s 9 (c) of the Act of 1997 and sentenced to undergo 05 years R.I. and to pay a fine of Rs.1,00,000/- or in default of payment of fine to undergo 06 months S.I. Benefit of section 382-B Cr.P.C. was extended to him vide judgment dated 06.02.2016.

3. Similarly, the petitioner having been tried in FIR No.187 dated 02.06.2014, was convicted under section 9

(c) of the Act of 1997 and sentenced to undergo 01 year S.I. and to pay a fine of Rs.1,00,000/- or in default thereof to undergo 01 month S.I. Benefit of section 282-B Cr.P.C. has also been extended to him in this case.

4. After conviction of the petitioner submitted an application seeking benefit of section 397 Cr.P.C. before the learned Additional Sessions Judge-III, Mardan with a request that the sentences of the two cases be directed to run concurrently, however, the same was dismissed vide order dated 20.10.2017, hence, this petition.

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

6. Before determining the entitlement of the petitioner to the benefit of section 397 Cr.P.C., I would like to meet the legal proposition as to whether the petitioner can seeks the relief under section 397 Cr.P.C. by invoking the provision of section 561-A Cr.PC.?

7. The object of provision of Section 561-A Cr.PC is to enable the High Court to make such orders as may be necessary to give effect to an order under Criminal Procedure Code or to prevent the abuse of process of any Court or otherwise to secure the ends of Justice. Thus, powers under Section 561-A Cr.PC may well be exercised even in matter of Section 397, but only where petitioner/convict establishes that exercise of such powers would cure a failure on the part of Court and shall secure the ends of justice**.** The same point has been examined by the Hon'ble Supreme Court in case of "**Bashir v. State" (PLD 1991 SC 1145)** wherein it was held that:

> "However, during appeal or revision before the High Court, the High Court could itself, examine these questions, subject to limitations, if any, provided by law and principles laid

> down by this Court, and determine these matters. Again whereby inadvertence there is failure on the part of the High Court to determine these questions, I cannot see any reason why resort cannot be had to section 561-A of the Code to cure the failure, in order to secure the ends of justice."

8. To properly appreciate all the aspects of the provision of the Section 397 of the Criminal Procedure Code, I deem it appropriate to have a glance upon the said provision first, most particularly to read it in juxtaposition with Section 398 Cr.P.C, which, for the sake of convenience and better understanding, are reproduced hereunder:-

> **S. 397—Sentence of offender already sentenced for another offence.** When a person undergoing a sentence of imprisonment, or imprisonment for life is sentenced to imprisonment, or imprisonment for life, such imprisonment, or imprisonment for life, **shall commence at the expiration of the imprisonment, or imprisonment for life to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence.**
> (The underlines provides for emphasis)
>
> **S.398—Saving as to section 396 and 397. (1)** Nothing in section 396 or section 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.
>
> (2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment or to a sentence of [imprisonment of life], and the person undergoing the sentences is after its execution to undergo a further substantive sentence, or further substantive sentences, of imprisonment, or

> [imprisonment for life] effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.

Bare reading of the above quoted provisions of law will make it manifestly clear that the legislature has left no ambiguity about application, object and purpose of provision of section 397 Cr.P.C. The phrase i.e **'when a person undergoing a sentence'** used in the section ibid, in unambiguous term speaks only about such matter where an accused, though undergoing a sentence, yet appearing before a Court of law in other case/trial. From language of the quoted provision it seems directory because it without giving any discretion, first insists that subsequent sentence shall commence at the expiration of the imprisonment. Such insists is patent from the deliberate use of the word **'shall'** in this provision. The objective is so for the simple reason that punishment is awarded to the person for the offence/ crime after due trial**.** One will endorse that every sin/ offence, if proved, shall make criminal/the wrong doer to undergo the punishment, so fixed/determined, for such offence/sin**.** The Criminal Law though believes in innocence of accused but cannot be believed to be discriminatory or prejudice to society or State. Therefore, legislature insisted, through this provision, that a criminal shall undergo punishment for every offence, awarded through separate trial which could only be possible if subsequent punishment runs after expiration of earlier one, as stated in this provision. However, since one of basic concept of punishment is reformation, therefore, the Court, trying 'a person undergoing a sentence', has been vested with a discretion that such court can competently and legally change such order of the running of the sentence.

Thus even a subsequently awarded sentence for imprisonment can be ordered to run concurrently with that sentence of imprisonment which 'a person is already undergoing'.

9. At this juncture, I while referring to section 382 Cr.P.C. would state that normally a conviction commences from the time it is passed, but the provision of Section 382-B Cr.PC is a deviation to such provision. The Hon'ble apex Court in case titled, **"Shah Hussain Vs State" (PLD 2009 (Supreme Court) 460)** has made mandatory to give benefit of Section 382-(b) Cr.PC with reference to a logical and legal reasoning. The relevant part of the judgment read 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 exercised 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 prison during the trial, the court must give reasons for so thinking;
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> 38. The practical effect of reducing the sentence to the extent of pre-sentence custody period, particularly, the way it is done in Pakistan, is that the sentence takes effect from the date of arrest of the convict in connection with the offence. This is not

> prohibited by any specific provision of the Code of Criminal Procedure, rather this course, prima facie, appears to be permissible considering the provisions of section 382-B, Cr.P.C., read with sections 233 to 240, 383, 397 and 35, Cr.P.C. This position is also in line with the Botswana law as noticed in Thakes's case (supra), which empowers the Court to make the sentence effective by a specific order from an earlier date.

In view of the above, the Courts should not fall in error in awarding the benefit of Section 382-B Cr.P.C in a mechanical manner while awarding a sentence to a person already undergoing a sentence, for the simple reason that by awarding benefit of Section 382-B Cr.PC the convict becomes entitled for inclusion of period of his detention during his tria**l.** Had the intention of the legislature been so, there would not have been any need to bring the provision of Section 397 after the enactment of section 382-B of the Code.

10. The next point for determination before this Court is to unfold the situation as to under what circumstances the Court may order the subsequent sentence to run concurrently with already undergoing sentence, which is an exception to normal course. In case titled, "Ali Akber Shah Vs State" (PLD 2004 Karachi-589), it has been held that:

> "However, after considering the gravity of offence in the case particularly the fact that accused had committed two offences or serious nature within a period of five months, accused did not deserve any leniency as he, despite knowing that sentence of said offence which was death or imprisonment for life, did not care for his future'.

In case titled, **"Ali Khan Kakar Vs Hammad Abbasi" (2012 SCMR, 334),** it is held that:

> "The discretionary power vested in the Court to direct the sentence to run concurrently is to be exercised in the light of the facts and circumstances of each case i.e. depending on the nature and gravity of the offence.

In the case titled, **"Ghulam Farid Vs State" (2013 SCMR 16),** it has been ruled by the august apex Court that:

> "The ratio decidendi in the precedent case-law referred to in the preceding paragraphs is that in terms of section 397, Cr.P.C. consecutive sentences is a general rule while the concurrent sentence is an exception and is to be awarded in the exercise of discretion by the Court depending on the facts and circumstances of each case. **In the exercise of discretion, the Court may inter alia look into (i) the conduct of the convict, (ii) heinousness of crime and (iii) injury to the individual and the society**. In the instant case, the two murders were committed at two different places. One was committed at the house of Muhammad Rafique deceased (F.I.R. No.154 dated 27-12-2001) and the other namely that of Mst. Parveen Bibi was committed at petitioner's own house when she was asleep (F.I.R. No.155 dated 27-12-2001). These were two different transactions though in the defence plea, petitioner attempted to make it a single transaction which he miserably failed to prove. His own wife Mst. Shahzadan Bibi appeared during trial (F.I.R. No.155 dated 27-12-2001) to allege that the petitioner had developed illicit liaison with her own daughter Mst. Parveen Bibi deceased; that at his asking she accompanied him to the nurse to cause miscarriage of pregnancy of the said Parveen deceased and when the said act became public, he not only murdered Muhammad Rafique regarding whom he suspected that he had spread the rumour but also Parveen Bibi who to the petitioner by then had become symbol of his sin. Petitioner's son Ghulam Qadir also appeared during trial in the said case as P.W.12 and corroborated Mst. Shahzadan Bibi. **The petitioner not only committed gruesome murder of two persons but his conduct reflects a morbid, perverse and depraved character.**

11. From the above case laws it appears that in the exercise of discretion, the Court may, *inter- alia,* look into (i) the conduct of the convict, (ii) heinousness of crime and (iii) injury to the individual and the society and that all offences are akin or intimately connected with each other. Such discretion can well be exercised by Court**,** trying convict of other crime as an accused for other trial / charge; an appellate Court or Revisional Court where subsequent sentence is challenged, subject to limitation of law. The High Court, within meaning of the Section 561-A Cr.PC, can also exercise inherent jurisdiction but only to prevent the failure of justice or otherwise to secure the ends of Justice.

12. Coming to an understanding about object, import and application of the Section 397 Cr.P.C., I, revert to the merits of the case of the petitioner. In the instant case the petitioner has sought concurrent running of sentences, awarded to him through two different trial (s). The involvement of the petitioner in similar nature offence, committed at different times, shows his attitude of not mending his way. Further, the petitioner has been found guilty of offences, affecting the society at large, therefore, I am of the considered view that he has failed to bring his case within the exception where a deviation to normal course is resorted.

13. Accordingly, this petition being meritless is hereby dismissed.

Announced:
19.03.2018
Siraj Afridi P.S.

JUDGE

SB of Mr. Justice Rooh-ul-Amin Khan.