JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, BANNU BENCH.
(*Judicial Department*)

Cr.R No.06-B of 2015.

Mir Qad Ayaz etc Vs The state

JUDGMENT

Date of hearing ____09/12/2015_____

Appellant-Petitioner: **Mir Qad Ayaz By Mr. Iftikhar Ahmed Khan Durrani, Advocate.**

Respondent: **By Mr. Syed Fakhr-rd-Din Shah, Advocate.**
State By Mr. Saifur-Rehman Addl: AG.

***IKRAMULLAH KHAN*, J.-** Through the instant Criminal Revision Petition, the petitioners have called in question the impugned order dated 17.05.2015 rendered by the learned Additional Sessions Judge-III, Bannu, whereby application for shifting the statements of PWs, i.e. Mir Qad Ayaz FC 949 and Muhammad Akbar Khan SHO being dead while that of complainant/respondent Sabir Khan recorded in previous trial, against the

petitioner under Section 512, Cr.P.C. and one other acquitted co-accused Hamimullah, was accepted.

2. Allegedly, accused/petitioner alongwith acquitted co-accused Hameenullah and another were charged in case FIR No.133 dated 10/11/1998 under sections 302/324/34 PPC Police station Mirian.

3. During trial of present accused/petitioner, after recording some of the prosecution witnesses, PW Maqsood through his counsel submitted application for shifting statements of the PWs Mir Qad Ayaz 949, Muhammad Akbar SHO and complainant Sabir Khan, whose statements had already been recorded during trial of acquitted co-accused Hameenullah, on the grounds that police witnesses were dead while complainant of the case was proclaimed offender in another criminal case. Learned counsel for petitioner/accused had got no objection on transfer of statements of police officials, mentioned above, while raised objection on shifting of statement of complainant. Learned trial Court, thereafter, giving opportunity of hearing to both the parties, on the

application mentioned above, accepted the same and made direction for shifting/transfer of previous statements of all the three PWs, to be placed on record of trial against the petitioner, vide its order dated 17.02.2014, impugned herein.

4. Learned counsel for petitioner contended that the impugned judgment is against law and facts on record, hence liable to be set aside; that the complainant Sabir Khan, whose statement was recorded during course of previous trial in the same case FIR, is now absconder in a number of criminal cases vide FIRs Nos.42, 44, 104, 122 lodged against him under sections 302, 324, 34 PPC and 13 A.O of Police station Mirian, Bannu and as such fugitive of law, loses some of his normal rights conferred upon him by any substantive or procedural law, but learned trial court, has not appreciated this aspect of the case, which would seriously prejudice the trial of the case against the petitioner/accused on one hand while on the other hand, would deprive the petitioner therefrom his legal right to cross examine the witness, whose statement

would have to be brought under consideration by learned trial Court, against the petitioner/accused.

5. On the other hand, learned counsel for respondent supported the impugned judgment in view of the judgments of this court rendered in "***Amjad Ali and another Vs The state and another" (2013 P.Cr.L.J 282)*** ***and "Sohail Vs. The state and another" (PLD 2014 Peshawar 189)*** and argued that the impugned judgment of learned trial Court is based on correct and proper appreciation of law, could not be interfered with by this Court, as no illegality or irregularity was pointed out by learned counsel for petitioner in the impugned judgment.

6. We have heard learned counsel for parties and learned A.A.G on behalf of State in light of law and facts on record.

7. The proposition of law, confronted herein is, as to whether the statement of a witness, who had absconded in other criminal cases, and whose attendance was not possible to record his evidence, his previous statement could be transposed/transferred in the

subsequent trial against an accused, who remained itself fugitive of law in previous trial under the same FIR, held against him under Section 512, Cr.P.C.

8. It would not be out of context to reproduce the relevant law, in this regard, which authorizes the court to proceed against an accused, in his absence and the effect of such statement of a witness recorded his absence under section 512 Cr.P.C. which reads as;

> ***512. Record of evidence in absence of accused. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him the Court competent to try or (send for trial to the Court of Sessions or High Court) such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable"***

9. The provision contained in section 512 Cr.P.C , authorizes the court of Sessions or a High Court to record the statement of a witness in absence of an accused, who had gone into hiding and his presence before the court is if it is proved that such an accused had absconded and there is no immediate prospect of arresting him, in order to preserve the evidence if during subsequent trial, the attendance of such a witness could not be procured without an amount of delay, or he is dead or incapable of giving evidence.

10. The provision contained in section 512 Cr.P.C, not only empower the trial court to record evidence of a witness in absence of the accused, who had gone into hiding and such evidence, in case, the witness, was not available in subsequent trial, on account of the grounds mentioned in section 512 Cr.P.C, but also such deposition could be given in evidence against the under trial accused, however, section 512 Cr.P.C could be read, in conjunction of Article 47 of the Qanun-e-Shahadat Order, 1984, which reads as,

> ***47. Relevancy of certain evidence for proving, in subsequent proceedings, the truth of fact therein stated. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later state of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way but the adverse party, of if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable;***
>
> ***Provided that; the proceeding was between the same parties or their representatives-in-interest; the adverse party in the first proceeding had the right and opportunity to cross-examine; the question in issue were substantially the same in the first as in the second proceeding.***

11. So, keeping in view, the provision of Article 47 of the Qanun-e-Shahadat, Order, 1984, a deposition of a witness, would be relevant only in subsequent trial if the adverse party in the first proceeding had the right and opportunity to cross examine, apart from other two

ingredients mentioned in Article 47 of the Qanun-e-Shahadat, Order, 1984, is fulfilled.

12. In case in hand, the complainant namely Sabir Khan had appeared as a witness in the previous trial, against co-accused Hameemullah, but he was not properly cross examined on account of compromise, effected between the then accused and the complainant.

13. So, the question of admissibility of such a statement of a witness, or otherwise, would be dealt with by the learned trial court but, no legal restriction could be placed, on transposing the statement of a witness recorded in view of section 512 Cr.P.C. to subsequent trial.

14. As there is no apprehension, that by mere transposition of a deposition the accused would be prejudice, while the attendance of the witness could not be procured without an amount of delay, expense or inconvenience which, under the attending facts and circumstances of the case in hand, is unreasonable, where prosecution had already completed its evidence, justice

demand, that the deposition of the absconding witness be transferred in the case, in hand in view of section 512 Cr.P.C. to fulfill the requirements of law. However, as discussed herein above in the light of the submission of learned counsel for petitioner that, petitioner would be deprived to cross examine the person, whose statement would be used against him, is premature.

15. The evidentiary value of such deposition, would be adjudged by the trial court in light of the provision contained in article 47 of the Qaun-e-Shahadat, Order, 1984 and the principle of law enunciated by superior courts in this regard.

In case titled ***"Arbab Tasleem Vs. The State" (PLD 2010 SC 642)*** the Apex Court has held as,

> ***"Evidentiary value--- Statement of eye-witness in the form of examination-in-chief, though found legal and admissible in evidence, yet its evidentiary value could not be equated with such statement subject to cross-examination; therefore for giving weight to the statement of such witness, it would have to be seen whether the examination-in-chief intrinsically rang true***

and whether or not same was supported by circumstantial evidence---If such statement was supported by independent evidence in the shape of any circumstance or corroborated by any source, if would be good piece of evidence".

16. Keeping in view the reasons given herein above, this Revision petition fails on merit, dismissed accordingly.

Announced.
09.12.2015

J U D G E

J U D G E

****A/Awan"***