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

Cr.R No. 30-M/2020

Eslam Wazir*.....*(Petitioner)

vs

Nek Dar Khan & another*.....*(Respondents)

Present: *Mr. Shabbir Hussain Gigyani, Advocate for the petitioner via video link.*

Syed Abdul Haq, Advocate for the respondent No. 1.

Mr. Sohail Sultan, Asst:A.G for the State.

Dates of hearing: 12.10.2020 & 16.10.2020

JUDGMENT

WIQAR AHMAD, J.- Petitioner is aggrieved of order dated 08.07.2020 of learned trial Court, whereby his request for framing of a single charge in the two cases registered vide F.I.R No. 751 dated 29.08.2016 under sections 302/324/427/109/34 PPC at Police Station Khal, District Dir Lower (hereinafter referred to as **'FIR No. 751'**) and F.I.R No. 752 dated 29.08.2016 under sections 302/324/353/34 PPC & 7ATA at Police Station Khal, District Dir Lower (hereinafter referred to as **'FIR No. 752'**), was declined.

2. FIR No. 751 was registered on the complaint of Nek Dar Khan (respondent No. 1), wherein he has stated that he along with his brother

namely Sohail Ahmad had been traveling in their private motorcar on 29.08.2016. When they reached the place of occurrence at 11:30 A.M, petitioner/ accused namely Eslam Wazir appeared along with two other unknown persons from the bushes and suddenly started indiscriminate firing upon them, as a result of which his brother namely Sohail Ahmad received injuries on different parts of his body and died on the spot. Complainant remained unhurt, who has latter on charged the petitioner along with two other unknown accused for commission of the offence, while two other persons namely Anwar Khan and Imran had been charged for abetting the commission of the main offence. Two persons namely Liaqat and Bakhtiar have been cited as eye-witnesses of the occurrence in the FIR also.

3. FIR No. 752 has been registered on the basis of report of Abdul Rahman Khan SHO Police Station Khal, District Dir Lower, who has stated therein that he received information of commission of the offence described in FIR No. 751, on 29.08.2016, as well as the news about escape of the accused through motorcar bearing No. 1570/PST towards Rabat. Police Constables Fazal Wahab and Muhammad Zubair had laid a picket for arrest of the

accused for whose assistance and help, Aurangzeb ASI along with Police Constables namely Nasib Shah, Rahatullah and Mehmood Shah had also gone there. Motorcar bearing registration No. 1570/PST appeared suddenly and started firing upon the police party, the moment they noticed them. As a result of firing of accused party, Police Constables Fazal Wahab and Muhammad Zubair received serious injuries and died on the spot. Two other persons namely Huzaifa and Hashtullah also got injured as a result of firing of accused. The accused ran towards orchards at Rabat, who were traced by Aurangzeb ASI, with the help of inhabitants of the locality. One of the accused was arrested, who disclosed his name as Eslam Wazir son of Charra (petitioner herein), while the other co-accused succeeded in escaping from the scene.

4. Both the cases were submitted for trial before the Anti-Terrorism Court-III at Timergara, where charges were framed on 23.05.2017. After framing of charges, four witnesses were examined in case FIR No. 751, while one witness was examined in case FIR No. 752. The Ant-Terrorism Court ordered deletion of section 7 ATA from FIR No. 751, as well as from FIR No. 752, vide its order dated 07.01.2020. The cases were then sent to the Court of Sessions for

trial. Thereafter, learned counsel appearing on behalf of petitioner, filed an application for framing of a single consolidated charge in the two cases on 20.03.2020. The application was dismissed by the learned trial Court on 08.07.2020, with the following remarks;

"دونوں مقدمات کے ملزم، دفعات، جرم، محرکات، جائے وقوعہ، بیشتر گواہ اور بار ثبوت الگ ہیں۔ مقدمات کی یکجاء سماعت سے فریقین کو سہولت کی بجائے پیچیدگیوں کا امکان ہے۔

ضابطہ فوجداری کی دفعات 234 اور 235 کا اطلاق دونوں مقدمات کی صورت حال میں اس لئے نہیں ہوتا کہ دونوں ایک فرد (person) سے متعلق ہیں افراد (persons) سے متعلق نہیں۔ اس تکنیکی عذر سے قطع نظر دونوں مقدمات میں عائد کردہ جرائم کے الزامات الگ ہیں اس لئے دفعہ 234 ضابطہ فوجداری کا اطلاق موجودہ صورت حال پر نہیں ہوتا۔ اسی طرح دونوں مقدمات سے ایک وقوعہ ظاہر نہیں ہوتا بلکہ الگ، الگ وقوعے، اس لئے دفعہ 235 ظابطہ فوجداری کا اطلاق بھی نہیں ہوتا، اسی وجہ سے دفعہ 239 ضابطہ فوجداری کا اطلاق بھی مقدمات زیر غور کی صورت حال پر نہیں ہوتا۔ دفعہ 239 ضابطہ فوجداری کی دیگر ذیلی شقیں دونوں مقدمات کے حقائق سے متعلق نہ ہیں اس لئے زیر بحث نہیں لائی جاتی۔

اس متذکرہ بالا وجوہات کی بناء پر درخواست برائے عائد کرنے یکجاء فرد جرم مسترد کی جاتی ہے۔"

5. Learned counsel for petitioner argued the case via video link and submitted that both the offences have been committed in the course of one and the same transaction and therefore a single charge should have been framed in the two cases. Learned

counsel added that dictates of sections 234, 235 as well as section 239 of the Criminal Procedure Code, 1898 (hereinafter referred to as **'Cr. PC'**) required that both the cases should be tried jointly. He placed reliance on the judgments reported as ***1980 SCMR 402, 1992 SCMR 1583, PLD 2003 Supreme Court 891*** and ***1986 MLD 2477.***

6. Learned counsel appearing on behalf of complainant/respondent No. 1 submitted that offences in the two FIRs i.e. FIR No. 751 and FIR No. 752 have been entirely independent of each other, wherein charge could not be framed together. Learned counsel also added that four number of witnesses have been examined in FIR No. 751, while one witness has been examined in FIR No. 752 and the request for joinder of charge was a belated one. He placed reliance on the judgments reported as ***1973 SCMR 542, 1991 MLD 1973*** and ***PLJ 2005 FSC 33.***

7. Learned Asst:A.G appearing on behalf of the State also opposed framing of a single charge in the two cases and contended that it would create phenomenal confusion, not only for the parties but also for the prosecution witnesses, as well as the learned trial Court. He added that one person has been killed in

respect of which FIR No. 751 has been registered while two constables have been murdered and other two persons injured in respect of which FIR No. 752 has been registered and that both transactions were totally independent from each other. He placed reliance on the judgments reported as ***PLD 1964 (W.P) Lahore 339, PLD 1965 (W.P) Peshawar 65, 1973 P Cr. L J 457, 2000 MLD 1504*** and ***2002 P Cr. L J 1712.***

8. I have heard arguments of learned counsel for petitioner via video link, while arguments of learned counsel for complainant and learned Asst:A.G were heard directly and perused the record.

9. Section 233 Cr. PC lays down the general principle that for every distinct offence, of which any person is accused, there shall be a separate charge, and every such charge shall be tried separately. Exceptions have also been mentioned therein, which are contained in sections 234, 235, 236 and 239 Cr. PC. It is very much clear that the general rule has been provided as separate framing of charge for each independent offence or offences, as well as its separate trial. Exceptions have no doubt been provided in sections 234, 235, 236 and 239 Cr. PC, but same shall be

construed as exceptions to the general rule and can only be resorted to when a case is fully covered under the four corners of exceptions provided therein. Exceptions are therefore to be construed strictly as held by Federal Shariat Court in the case of **Muhammad Arshad Naseem vs. The State** reported as ***2004 P Cr. L J 371.*** Relevant part of observations of the Hon'ble Court is reproduced hereunder for ready reference;

> **"It may further be noted here that every person accused of an offence or offences is required to be charged distinctly and separately for each and every offence and though as per section 237, Cr.P.C. a person charged with one offence can be convicted for another yet, application thereof is limited to the cases covered by section 236, Cr.P.C. only. It would also be worthwhile to mention here that section 237, Cr.P.C. is an exception to the general rule that, no person can be convicted for an offence for which, he is not charged, therefore, it must be construed strictly and be applied in those cases only where either the offences allegedly committed are cognate or it is doubtful as to what offence is made out of the act or acts allegedly committed by the accused."**

Section 234 Cr. PC is discretionary in nature, which is evident from use of the word 'may be', and therefore same has been left to the discretion of the Court, for the reason that the Court shall see whether facts and circumstances of offences allows framing of

a single charge. In the case of **The State vs Mirza Azam Beg, P.C.S. and another** reported as ***PLD 1964 (W.P) Lahore 339***, it has been held that it was not obligatory on the Court to have joint trial of three offences committed within the period of 12 months, as such a power was discretionary in nature. Relevant part of observations of the Hon'ble Court is reproduced hereunder for ready reference;

> **"Section 234 Cr. P.C. is the first exception to the general rule of one trial for each distinct offence. The principle underlying this section is that the offences of the same kind in criminal Court within a space of short period, namely, twelve months from the first to the last of such offences, may be tried together. This section lays down three limitations. They are, (1) that the offences must be of the same kind, (2) that they must have been committed within the space of one year, and (3) that more titan, three offence should not be joined in the same trial. It is also important to observe here that the directions in regard to joinder of three charges stated under section 234 are not mandatory in the sense that it is not obligatory on the Magistrate not to try the offences separately, but it is entirely in the discretion of the, Magistrate whether or not to resort to section 234. The section is merely enabling section and does not in any way deprive the Court of ordering a separate trial. In other words, it is not obligatory on the Court to have joint trial of three offences committed within the period of 12 months. It is also important to notice that this section governs the case where there is only one accused. The case of several persons being accused of more offences than one of the same kind committed within the space of twelve months is dealt with in section 239 (c)."**

Similar view has also been expressed by same High Court in its judgment given in the case of **Zia-ul-Haq vs. The State** reported as ***1973 P Cr. L J 457***. In the case of **Ghulam Farooq alias Ghulam Qasim vs. The State** reported as ***2000 MLD 1504***, Hon'ble Balochistan High Court has held that where prosecution decided to split charges and try accused separately on those charges, accused could not insist on joinder of charges. It is thus amply clear that such power has been left to the discretion of the trial Court, where its desirability may be seen in relevant facts of the cases in which joinder of charges is sought.

10. The provisions of sections 233 to 240 Cr. PC, which deal with charges must also be dealt together and should not be considered in isolation. They are supplemental to each other and not mutually exclusive as held in the case of ***The State vs. Mirza Azam Beg*** *supra*, relevant findings recorded in said judgment are also reproduced hereunder for ready reference;

> **"This brings me to the one of the central questions in the case, namely, whether the exceptions contained in sections 234, 235, 236 and 239 are supplementary to each other or mutually exclusive. Though there is no divergent of views on this point, but the consensus of the opinion is in favour of the view that each of the four sections, namely,**

sections 234, 235, 236 and 239 can individually be relied upon as justifying a joinder of charges in matter of trials, but use cannot be made of two or more of these four sections together to justify a joinder. It is, therefore, not possible to combine the provisions of two or more sections or the different sub-clauses of section 239 in any one case, or to justify a trial of several persons partly by applying the provisions of one clause and partly by applying the provisions of another clause or other clauses, and a joint trial is permissible only if it is permitted by any one of these sections. Reference may be made to the decision in Sri Rain Varma v. State ((1956) All. 466). I may also quote the observation of Chagla, C. J., in Dt. K. Chandra v. State ((1952) Bom. 177 at 179) his Lordship observed:

> "It is not very helpful to consider whether the exceptions contained in sections 234, 235 and 236 are mutually exclusive. It would be better to lay down that if the prosecution wishes to justify a trial in which charges are joined, it is for the prosecution strictly to establish that the joinder is permissible under either section 234, 235 or 236. It is a well-known canon of construction that exceptions must be strictly construed, and unless the prosecution satisfies the Court that the exception has been strictly complied with the joinder of charges in a trial must be held to be contrary law. It maybe possible in a conceivable case for the prosecution to establish that a case falls under more than one exception. But if it falls under more than one exception it must so fall that it must not infringe the provisions of any of the three sections."

Again, while discussing the case of Bal Gangadhar Tilak (10 Bom. L R 973), His Lordship, observed :-

> "We do not dispute the correctness of the proposition laid down by the

> **learned Chief Justice that more than one section mentioned in section 233 can be made use of in co-operation, but the co-operation must not lead to the contravention of any of the sections mentioned in section 233."**

A somewhat similar view has also been recorded by Hon'ble Sindh High Court in its judgment given in the case of **Ramesh M. Udeshi vs. The State** reported as ***2002 P Cr. L J 1712*** in the following words;

> **"Sections 233 to 240, Cr.P.C. deal with joinder of charges and they must be read together and not in isolation. When the exceptions contained in sections 234, 235, 236 and 239 are read with the general rule contained in section 233, Cr.P.C., it appears that the object of exception is to avoid the necessity of same witnesses giving the same evidence two or three times in different trials and to join in one trial those offences with regard to which the evidence would overlap."**

In light of the principles discussed above, I would now analyze arguments of learned counsel for petitioner to see whether the learned trial Court had wrongly exercised its discretion by not treating the case falling in sections 234, 235 & 239 Cr. PC. Section 234 Cr. PC cannot be pressed in service in the case in hand. Joinder of charges in offences carrying capital punishment at different places and times can hardly be taken to be a reasonable

exercise of discretion vested in the Court by section 234 Cr. PC. It cannot be perceived that a person committing an offence of murder of different persons within a span of one year may be tried together. Such an interpretation would obviously offend against the general rule enshrined in section 233 Cr. PC.

11. So far as section 235 Cr. PC is concerned, it provides that if in one series of acts so connected together as to form the same transaction, more offences than one are committed by same person, he may be charged with, and tried at one trial for every such offence. This section may be argued to be more relevant for the present discourse, but it is equally important to note that essential condition mentioned herein has been;

a) **If more offences than one are committed by same person;**

b) **In one series of acts so connected together as to form the same transaction.**

Stories of the two FIRs reproduced hereinabove show that the offences were independent in nature and same could hardly be termed as forming same transaction. The offences under sections 302 & 324 PPC in respect of which FIR No. 751 has been registered stood completed at the spot. The accused left

and while travelling in the motorcar noticed the police party at a different place & time and made firing upon them, in respect of which FIR No. 752 has been registered. Except the factum of arrest of accused/ petitioner, and recovery of firearm (weapon of offence), rest of the evidence of the two cases are not common and has been independent from each other. The two transactions cannot be called so connected together as to form the same transaction. This Court while giving its judgment in the case of **Arshad Khan vs. The Chairman National Accountability Bureau NAB and 2 others** reported as *2017 YLR 1111,* has held that following test was normally employed by the Courts for determining whether the series of acts were so connected together to form one transaction;

> **"The test employed by the Courts for determining whether separate offences committed in course of the same transaction is whether they are connected together by (i) proximity of time and place; (ii) community of purpose and design and (iii) continuity of action. The two last are essential elements while the first is alone insufficient for a joint trial."**

Said judgment has been given in a NAB case, mostly involving allegations of financial misappropriation in a series of transactions, but even if we apply the test here, we do not find community of

purpose and design in the two offences, in respect of which FIR No. 751 and FIR No. 752 have been registered, nor has there been a continuity of action. As stated earlier, action in respect of the offence committed in FIR No. 751, ceased with fulfillment of objective of the accused as stated therein, they may or may not be knowing (what to talk of the intention), whether they would be confronting the police party in their way. Once they found the police party in their way, at a different place and time, there a new transaction started to happen, which has also been completed there. Offences in the two cases can therefore be safely held independent from each other and not forming part of one series of acts so connected together as to form the same transaction. Due to the intervening time and totally different venues, the 2nd offence can hardly be termed to have been committed in the course of hot pursuit. (Facts are referred in this judgment, as alleged and same should not be taken as findings of facts in any manner at this stage). Case of petitioner is therefore not falling in sections 235 Cr. PC also. So far section 239 Cr. PC is concerned, it provides for the persons who may be charged jointly. There is no question about the persons who may be put to trial in the two cases. All the four accused can no

doubt be tried jointly but the provisions of law relating to joint framing of charge and single trial, cannot be pressed in service in peculiar facts and circumstances of two cases, as explained above.

12. So far as judgments relied upon by learned counsel for petitioner are concerned, same have been returned on different set of facts by the Hon'ble Courts and the ratios laid down therein cannot be applied to the instant case. In the case of **Shah Nawaz vs. The State** reported as ***1992 SCMR 1583***, Hon'ble Supreme Court of Pakistan had been dealing with a case, where a Senior Clerk/Cashier in Government Science College Dokri, had been facing trial for an offence of criminal breach of trust and falsification of accounts. Similarly, in the case of **Nadir Shah vs. The State** reported as ***1980 SCMR 402***, Hon'ble Court had been dealing with case of Nadir Shah another Cashier in Bannu Woollen Mills, who had also been charged with commission of the offence of criminal breach of trust under section 408 PPC, with regard to various amounts received by him during the period of 29th June, 1959 to 8th February, 1963. Similar were allegations in the charge framed against respondent in the case of **State through Deputy Prosecutor General Camp Office, Karachi vs.**

Ramesh M. Udeshi, Ex-Secretary, Board of Revenue (Land Utilization), Sindh and others reported as ***PLD 2003 Supreme Court 891***, where he had been alleged to have disposed of public properties in various transactions in a dishonest manner. Other case relied upon by learned counsel for petitioner i.e. **Zahid Ali and 2 others vs. The State** reported as ***1986 MLD 2477*** was also related to joinder of charges against same persons committed similar offence of violation of customs law. Similar was the case with other judgment reported as ***2017 YLR 1111***, where the matter had been arising out of various NAB references. The law laid down therein cannot be applied to the facts and circumstances of the present case, where petitioners have been facing trial on charge of capital punishment for committing murder against different persons, at different times and places, with different motives. Such amalgamation of charge would complicate the matter not only for the prosecution witnesses, but for the defence and the learned trial Court as well.

13. Learned trial Court has exercised its discretion in a matter, which had been falling in its discretionary powers. Exercise of discretion by the learned trial Court below, can neither be termed as

illegal, perverse, arbitrary, nor resulting into any injustice or prejudice to the accused. In such circumstances, interference in order of the learned trial Court, by this Court as a Revisional forum is not justified.

14. The instant criminal revision was therefore found to have been lacking any substance and same is accordingly dismissed.

Announced
Dt: 16.10.2020

JUDGE

OAIC 28/10/2020