**Judgment Sheet**
**PESHAWAR HIGH COURT, BANNU BENCH**
*(Judicial Department)*

**Cr.A No.17-B/2021**

**Nek Din etc.**
**v.**
**The State etc.**

***JUDGMENT***

For appellant(s): **Mr. Farooq Khan Sokari Advocate.**

For respondent(s): **M/s Anwar-ul-Haq and Qaid Ullah Khan Khattak, Advocates.**

For State: **Hafiz Muhammad Hanif, Addl. A.G.**

Date of hearing: **18.10.2023**

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***Dr. Khurshid Iqbal, J.-***

**1.** This appeal is directed against the judgment, dated 06.01.2021, passed by the Additional Sessions Judge at Banda Daud Shah Tehsil of Karak District, whereby, the appellants Nek Din, Lal Mir, and Habib Ullah, involved in case FIR # 69, registered on 25.09.2001 with Police Station Teri, Karak, were convicted and sentenced as under:

i. Under section 148 / 149 PPC, to 03 years R.I. along with fine of Rs.3000/- each and in default, to suffer 03 months S.I.

ii. Under sections 324 / 148 / 149 PPC, to 10 years R.I. along with fine of Rs.100,000/- each and default, to suffer 06 months S.I.

iii. Under section 337-A(ii) PPC, to Arsh i.e. Rs.138867.65 with 5% of Diyat amount Rs.2777353/- payable to victim Kaleem Ullah, along with 03 years imprisonment as Ta'azir.

iv. Under section 337-D PPC, to payment of Arsh i.e. Rs.925784.33 as one-third of Diyat Rs.2777353/-, payable to victim Kaleem Ullah, along with 05 years imprisonment as Ta'azir.

v. Under section 337-F(iii) PPC, to payment of Rs.30,000/- as Daman to victim Nasir Khan, along with 02 years imprisonment as Ta'azir.

The sentences were ordered to run concurrently. The benefit under section 382-B Cr.P.C was also extended.

**2.** Facts shortly are that on 25.09.2001, at 17:00 hours, the complainant Gul Shah Din, in Emergency Ward of Civil Hospital Teri, reported that on the eventful day, at 16:00 hours, he, along with Khwaza Din, Muhammad Azam, Noor Saeed Khan, Kaleem Ullah, Nasir, Mst. Amtara Bibi, Rozi Gul, Sadiq Noor and Abdul Janan, after attending Court proceedings, were proceeding back home in a Datsun pickup driven by Bahader Khan. When they reached the spot, accused Nek Din, Habib, Nasim, Laal Mir, and Ashraf started firing at them with murderous intention. As a result of firing of accused Nek Din and Laal Mir, Abdul Janan was hit and died on the spot, while the firing of accused Nek Din caused Nasir firearm injuries. Similarly, from the firing of co-accused Habib and Nasim, Khwaza Din, Noor Saeed and Kaleem Ullah sustained injuries. Likewise, from the firing of co-accused Ashraf Khan, the driver Bahader Khan wounded and his Datsun pickup also got damaged. The accused after the commission of the offence decamped from the spot. Motive for the offence was disclosed as the elopement of Mst. Amtara Bibi by Moeen-ud-Din.

**3.** Initially, all the accused went into hiding. After completion of investigation, complete challan under section 173

Cr.P.C was submitted against them for proceedings under section 512 Cr.P.C. Later, accused / appellant Nek Din was arrested on 18.01.2016. It followed the arrests of co-accused / appellants Laal Mir on 08.02.2016 and Habib Ullah on 13.12.2016. Their supplementary challans were submitted before the trial Court. All of them were charge sheeted on 23.01.2017, to which they pleaded not guilty and claimed trial. On conclusion of trial, they were convicted and sentenced vide judgment, dated 04.01.2018. On appeal, it was set aside on the ground that the charge was defective as far as the conviction of the accused / appellant Habib Ullah under section 302 PPC was concerned. It is worth noting that he was not charged for the murder of the deceased Abdul Janan, but was charge sheeted and convicted for the murder. The case was, thus, remanded to the trial Court for retrial from the stage of the charge to be framed freshly against the appellants for the offences of murderous assault and causing injuries to the injured vide judgment, dated 10.12.2018 in Criminal Appeal No.12-B/2018.

**4.** Regarding murder, a compromise effected between the parties. So, on 11.01.2019, the trial Court proceeded to frame the charge under sections 324 / 337-A(ii) / 337-D / 337-F(iii) / 337-F(v) / 427 / 148 / 149 PPC, to which the appellants pleaded not guilty and claimed trial. On conclusion of the *de novo* trial, vide the impugned judgment, dated 16.01.2021, the appellants were yet again convicted and sentenced, as mentioned above. Hence, this appeal.

**5.** We have given our anxious consideration to the arguments addressed at the bar and perused the record.

**6.** Record shows that in the previous trial, the charge was defective in the sense that the appellant Habib Ullah was not

charged for the murder of the deceased Abdul Janan. However, he was charge sheeted and convicted by the trial Court under section 302(b) PPC and sentenced to life imprisonment vide its judgment, dated 23.01.2017. It was because of this reason, that this Court vitiated the trial in appeal and while invoking the provisions of section 232 of the Criminal Procedure Code, 1898 ("the Code"), the case was remanded for the retrial from the stage of the charge to be framed for the murderous assault and the injuries caused to the injured vide judgment, dated 10.12.2018. Though, the trial Court framed the charge afresh as directed and concluded the trial as well. However, it allowed some of the material witnesses to rely on their statements recorded in the previous trial. It also concurred with the learned counsel for the defence to rely on the cross-examinations of such witnesses recorded in the previous trial. In this regard, the statements of complainant Gul Shah Din (PW-01), Rozi Gul (PW-02), Mst. Amtara Bibi (PW-03), Nasir Khan (PW-04), and Noor Saeed Khan (PW-05) are worth perusal. The trial Court, thus, did not record the statements of these witnesses afresh. Even it left the partial cross-examination of PW-01 unsigned and, thus, the same cannot be termed as evidence in legal parlance. It read the evidence of the above said witnesses, recorded in the previous trial, as evidence in the *de novo* trial. Hence, before we proceed to embark upon the merits of the case, it is deemed appropriate to determine the pivotal question as to whether the trial Court acted in accordance with law or not to read the evidence recorded in the previous trial as evidence in the *de novo* trial.

**7.** Chapters XIX and XXII-A of the Code are relevant. They provide a complete mechanism regarding the charge, the procedure, and the steps to be followed in the conduct of a full-

fledged trial. Those also encompass the effect of addition, alteration and/or reframing of charge and the procedure to be followed. Section 231 thereof relates to recalling of witnesses when the charge is altered, whereas section 232 confers upon this Court the power to direct for a 'new trial' where the charge is defective. Section 265-F of the Code relates to evidence for prosecution where the accused does not plead guilty or the Court, in its discretion, does not convict him on his plea. Section 232 ibid is the most relevant provision which reads:

> **232. Effect of material error.** (1) If any Appellate Court or the High Court, or the Court of Session in the exercise of its powers of revision or under Chapter XVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by any error in the charge, it shall direct a new trial to be held upon a charge framed in whatever manner it thinks fit.
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> (2) If the Court is of the opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts provide, it shall quash the conviction.
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> (Underline is ours for emphasis)

**8.** The above cited provision of law makes it clear that in the case of an error in the charge which prejudiced the accused, convicted of an offence, the Court shall direct a 'new trial' *to be held upon a charge framed in whatever manner it thinks fit.* As noted above, the charge in the previous trial was defective which prejudiced the appellant Habib Ullah in the sense that he was convicted under section 302(b) without being charged for the murder. So, this Court under the mandate of section 232 of the Code directed a retrial to be conducted after the charge is framed afresh. Needless to mention, the retrial in the context of this section was a new and/or a *de novo* trial. It is imperative to

state that in the simplest term, the word *de novo* as per the *Black's Law Dictionary (9th Edition) p 500* means "a new". Similarly, as per the *Mitra's Legal Dictionary (6th Edition) p 227*, it means "new or fresh". It would also not be out of place to mention its Urdu meaning as well, which, as per the *Oxford English Urdu Dictionary (p 404)*, means "نئے سرے سے". In this perspective, once the charge was framed afresh and when the previous trial was vitiated as is explicitly evident from para-9 of the above said judgment of this Court, then, of course the trial court was left with no other option, but to examine the PWs afresh as if they were not examined at all, and to adopt the procedure as adumbrated in Chapter XXII-A of the Code. In the circumstances, the trial court, while reading the evidence recorded in the previous trial as evidence in the *de novo* trial, committed gross illegality and acted beyond the realm of law. In somewhat similar circumstances, the Lahore High Court, in *Zafrullah and others v. The State* **(1972 PCr.LJ 734 Lahore),** observed:

> 6. In my view, the evidence recorded in the previous trial could not be read as evidence in the present case even under any of the provisions of the Evidence Act. The previous statements made in the same case or at a previous stage of a same case are relevant if a witness is not to be found for reasons mentioned in section 33 of the Evidence Act, but there is no section of the Evidence Act which says that a previous statement made in the first trial can be used as a substantive evidence in the second trial. It was held in *In re*: *K. K. Umar Haji and others* that the transfer of a statement of a witness made at the previous trial during the proceedings of the *de novo* trial without the witness having been examined *de novo*, was a procedure which vitiated the trial notwithstanding the consent of the accused to the adoption of such

a procedure.

**9.** Additionally, if the instant case is considered on the touchstone of Article 47 of the Qanun-e-Shahadat Order, 1984—which is *pari materia* to section 33 of the repealed Evidence Act, 1872 as aforesaid—even then it does not become justified, as the conditions precedent for the purpose were not fulfilled either. Needless to mention, all these witnesses were alive. They were found and capable of giving evidence. In the case of *Ali Akbar v. The State* **(PLD 1997 Karachi 146)**, it was observed:

> Article 47 of the Qanun-e-Shahadat Order, 1984 prescribes the conditions under which secondary evidence of the testimony of a witness in the former proceeding, civil or criminal, is admissible in subsequent proceeding or in a later stage of the same proceeding where the question in controversy in both proceedings is identical and where the witness is dead or cannot be found or is incapable of giving evidence. Before such evidence could be made admissible, the following conditions are necessary to be complied with:
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> [...]
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> (v) That the witness is incapable of being called at the subsequent proceeding on account of death, or incapability of giving evidence or being kept out of the way by the other side or an unreasonable amount of delay or expenses.
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> 15. It is noted that above are conditions precedent before a previous deposition could be admitted for consideration. Absence of any one of them would not attract said Article nor was there compulsion to straight away believe such deposition if rightly or wrongly brought on record.

**10.** In our considered view, the procedure adopted by the trial Court, being incurable, has prejudiced the appellants in their defence and thereby it caused miscarriage of justice which runs in conflict with the concept of fair trial in the context of Article 10A of the Constitution. Needless to mention, the concept of fair trial is not just a right provided in our country, but a right internationally guaranteed through numerous Constitutions and Declarations all over the world. Reference, for example, may be made to Article 10 of the Universal Declaration of Human Rights, Article 6 of the European Convention on Human Rights, Articles 5, 6, and 7 of the African Charter of Human Rights, and Articles 102-108 of the 1949 Third Geneva Convention.

**11.** For these reasons, the question formulated is answered in the negative. Consequently, the impugned judgment, dated 06.01.2021, is set aside. The case is remanded to the trial Court for a *de novo* trial with the directions to re-summon the prosecution witnesses for examination with regard to the charge framed as per the directions of this Court and provide the appellants an opportunity of cross-examination in accordance with law. The trial shall be concluded and the case decided on merit as expeditiously as possible since the matter has turned an oldest one. As the appellants have been released on bail by this Court vide order dated 11.05.2022, therefore, they shall be deemed to be on bail during the trial.

***Announced***
*18.10.2023*
**(Ghafoor Zaman)**

**JUDGE**

**JUDGE**

**(D.B)**
**Hon'ble Mr. Justice Fazal Subhan**
**Hon'ble Mr. Justice Dr. Khurshid Iqbal**

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