

**P L D 2014 Balochistan 120**

**Before Muhammad Kamran Khan Mulakhail, J**

**ABDUL LATEEF and 13 others---Petitioners/Convicts**

**Versus**

**THE STATE---Respondent**

Criminal Revision No.46 of 2013, decided on 7th March, 2014.

**(a) Criminal Procedure Code (V of 1898)---**

----Ss. 537(b) & 225---Failure to mention particulars required to be stated in the charge---Effect--  
-Such was an error, curable subject to the condition that accused was not misled, or it had no  
occasion of failure of justice---Provisions of S.537(b), Cr.P.C., provided that every conceivable  
type of error, and irregularity referable to the charge, was curable; and it was not to be regarded  
as fatal, unless case of either party was prejudiced.

**(b) Criminal trial---**

----Motive---Scope---Motive was not always necessary to be brought, and in presence of  
unimpeachable ocular evidence, absence of motive was not helpful to the defence---Motive once  
alleged, if not proved, would lead to the failure of prosecution.

**(c) Penal Code (XLV of 1860)---**

---Ss. 337-A(i), 337-E(e), 337-F(v), 337-N(2) & 149---Causing Shajjah-i-Khafifah, Hashimah, awarding Tazir, common object---Appreciation of evidence---Benefit of doubt---Motive alleged by the prosecution, not only was admitted by defence, but same was sufficiently proved by the statement of the witnesses; and the suggestions made by the defence---Motive was not shrouded in mystery---Complainant reiterated the facts as contained in the F.I.R.---Injured prosecution witnesses had assigned specific roles to accused persons---Injuries on the person of the prosecution witnesses were further corroborated by the medical evidence---No plausible defence could be brought by any one of the accused persons, as none entered in his defence, nor produced any defence witness; and the question of mala fide was left unattended---Number of persons belonging to one family, were nominated in the case---Nomination of as many as elderly members of the opponent family was motivated by the object of humiliation; except the accused person, no overt act was assigned to the rest of the persons---Injured witness not always speak the whole truth---Out of 14 accused persons, case of eight accused persons was not free from doubt; benefit whereof would be extended in their favour, not as a grace, but as a right---Only five, out of total fourteen accused persons, had been assigned a specific role---Injuries caused to the injured prosecution witnesses were corroborated by means of unimpeachable evidence---Prosecution, in circumstances, had successfully proved its case against five accused persons, they were rightly held responsible for commission of offence, while rest of them could not be held responsible for any criminal wrong; their offence was covered by S.337-N(2), P.P.C., as nothing was on record to establish that they had any credentials or antecedents of being previous convict, hardened or habitual, desperate or dangerous criminals---Occurrence, had taken place about two and half years ago and accused had been facing the agony and anguish of a trial---Eight accused persons, were acquitted of the charge by extending them benefit of doubt in their favour, while five accused persons were convicted under S.337-A(i) and S.149, P.P.C. and sentenced to pay Daman---One of accused persons in addition to said sentence was also convicted under S.337-F(v), P.P.C. and sentenced to pay Daman.

Samano v. The State 1973 SCMR 162; Riaz Hussain v. The State 2001 SCMR 177 and Haji Maa Din v. The State 1998 SCMR 1528 ref.

**(d) Penal Code (XLV of 1860)---**

---S. 149---Common object---Scope of S.149, P.P.C.---While awarding the sentence, a distinction had to be made in respect of accused, who were armed with deadly weapons or

otherwise.

Babar Ali and others v. The State PLD 1968 SC 372; Mir Dad alias Amir Dad v. The Crown 1969 SCMR 419; Amir Hussain and others v. The State PLD 1971 Kar. 68 and Amir Hussain and 6 others v. The State 1971 PCr.LJ 297 ref.

Muhammad Qahir Shah for Petitioners.

Abdul Karim Malghani for the State.

Date of hearing: 13th December, 2013.

## **JUDGMENT**

**MUHAMMAD KAMRAN KHAN MULAKHAIL, J---**This Criminal Revision Petition under sections 435 and 439, Cr.P.C. is directed against the judgments dated 26th December, 2012 passed by the learned Judicial Magistrate, Zhob and thereafter, upheld by the learned Sessions Judge, Zhob vide judgment dated 27th June, 2013, whereby, the petitioners/convicts (the accused) were convicted and sentenced under section 337-A(i), P.P.C, for one year Rigorous Imprisonment with Daman of Rs.3000/- each, to be paid to the injured viz, Shams-ul-Karim, Roz-ud-Din, Jalal Din and Nasr-ud-Din. They were also convicted and sentenced under section 337-E(e) [sic] P.P.C, for one year Rigorous Imprisonment with Daman of Rs.3000/- each to be paid to the injured Shams-ul-Karim, in default whereof they shall remain in custody to suffer simple imprisonment till payment of fine (Daman) to the injured/victim.

Precisely the relevant facts are that the complainant Nasr-ud-Din (P.W.1) submitted an application against the petitioners/convicts, alleging therein that on 27th November, 2011 at about 12-00 p.m. he was at his home and his paternal cousin Shams-ul-Karim was grazing cattle in front of his house. All of a sudden, he saw the accused persons carrying spades and Lathis were drubbing his cousin, he, his brother Roz-ud-Din and another cousin Jalal-ud-Din were also trounced when they interceded. Thus, the F.I.R. No. 13 of 2011 was lodged under section 337-ADF read with sections 147, 148 & 149, P.P.C. with Levies Thana, Zhob.

3. After completion, the challan against the petitioners/convicts was submitted before the trial court and charge was framed against them on 26-3-2012, to which they did not plead guilty and claimed trial. Thereafter, the prosecution in order to substantiate the charge and to bring the guilt at home, produced as many as eight witnesses. After completion of the prosecution evidence the statements of the petitioners/convicts were recorded under section 342, Cr.P.C, wherein once again they professed their innocence, however, none of them opted to enter into his defence on oath. On conclusion of the trial the learned Judicial Magistrate passed conviction and sentenced the petitioners/convicts in the aforesaid terms vide judgment dated 26th December, 2012. On appeal, the judgment was upheld by the learned Sessions Judge, Zhob vide judgment dated 27th June, 2013.

4. Mr. Muhammad Qahir Shah, learned counsel for the petitioners/ convicts contended that the parties being relatives were in animus over a land dispute. He referred that the all-male family members were nominated, whereas majority of them are more than 65 years old. He added that the scuffle might had taken place between the youngers of both sides but in order to settle their personal grudge, elders of the family were dragged. He objected that though, the F.I.R. states about the motive i.e. land dispute but the witnesses have denied existence of any such motive before the trial court. He stated that a motive alleged, if not proved, leads to adverse inference against the prosecution. He objected that without specifying the details and role played by each accused the charge was defected. He reiterated that since none was attributed any specific role and act played by him towards the alleged offence, therefore, benefit of doubt should have been extended in their favour, the denial whereof was without any cogent reason. Thus, the impugned judgments being not sustainable are to be set aside and the petitioners/convicts be acquitted of the charge.

5. Mr. Abdul Karim Malghani, learned counsel representing the State contested the petition mainly on the ground that concurrent findings of facts cannot be altered. The petitioners/convicts could not raise any illegality or irregularity in the impugned judgments. He stated that the impugned judgments are according to the scheme of law, therefore, do not require any interference. He made an effort to cover all reading material and endeavored for dismissal of the petition.

6. Before discussing the merits of the case, firstly, the objection cum ambiguity with regard to defect in the charge is to be resolved. The backbone of overall contentions of the learned counsel for the petitioners revolves around this objection, therefore, the provision of Section 225 Cr.P.C. being applicable is reproduced hereunder:--

"225. Effect of errors.--No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case, as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."

From the above provision of law, it is clear that even if the particulars required to be stated are not mentioned in the charge, but the errors are curable subject to the condition that the accused is not misled or it has no occasion of failure of justice. Although no glaring error is noted in the charge, but while considering the contention of the learned counsel then be that as it may, the provision of section 537(b), Cr.P.C. will come into play, which provides that every conceivable type of error and irregularity referable to the charge is curable and it is not to be regarded as fatal unless case of either party is prejudiced. Thus, the objection to the extent of errors in charge is overruled.

7. The next limb of objection pertains to the question of motive. No cavil is left in view of the dictum laid down by the Hon'ble apex Court that motive is not always necessary to be brought and in presence of unimpeachable ocular evidence, an absence of motive is not helpful to the defence. Needless to observe that motive once alleged, if not proved, ultimately leads to the failure of prosecution. But in the instant case, in the cross-examination, all the injured witnesses were specifically suggested a dispute over partition of land between the parties. The suggestion itself corroborates the prosecution version that the complainant's side was beaten up on land dispute, therefore, motive alleged by the prosecution was admitted by the defence, the contention to this extent does not carry any weight. The motive has been sufficiently proved by the statement of the witnesses and the suggestions made by the defence, therefore, the defence cannot take benefit on this ground because the motive was no more shrouded in mysteries.

8. The careful consideration of the record manifests that the rough-and-tumble fight lead to a nomination of number of persons. The complainant Nasr-ud-Din reiterated the facts as contained in the F.I.R. The injured Jalal-ud-Din (P.W.2) assigned a specific role to the accused Muhammad Hassan and out of fourteen persons, he identified only four of them, viz., Abdul Latif, Muhammad Hassan, Juma Rahim and Habibullah, the rest were not known to him. The injured Shams-ul-Karim (P.W.3) assigned a specific role to the accused Abdul Latif, when a spade's blow on both hands went to fracture his right forearm and index finger of left hand. The injured Roz-ud-Din (P.W.5) attributed a role to the accused Abdul Latif and Aman for causing injury on his head and for damaging his one teeth (not specified). The injuries elaborated were further corroborated by the medical evidence produced by Dr.Shahbaz Khan (P.W.6), who confirmed the injuries as narrated by the injured witnesses. On completion of the prosecution evidence, the statements under Section 342, Cr.P.C, were recorded, wherein they have professed their innocence and pleaded their false implication. In reply to the last question, each of them stated that he is innocent and their nomination is mala fide, however, no plausible defence could

be brought by any one of them, as none entered in his defence nor produced any defence witness and the question of mala fide was left unattended.

9. The record shows that the allegation of unlawful assembly punishable under Section 149, P.P.C. was levelled and in terms of common object an assault was alleged. The section 149, P.P.C. is relevant in this case, although, the section does not create a new offence but provides liability for offences committed by others in furtherance of their common object. The provision is to be applied in view of the law laid down by the Hon'ble apex Court.

The section 149, P.P.C. is divided in two parts, in the present case; the assembly of more than five persons was alleged to have been constituted, which had used the force. But while awarding the sentence a distinction has to be made in respect of the accused, who were armed with deadly weapons or otherwise. An accused who is found to be a member of an unlawful assembly can be convicted of lesser offence if under the second part of section 149, P.P.C. it is clear that he was aware that such a lesser offence is likely to be committed in furtherance of their common object, although some members of the assembly may have travelled beyond that object and committed a grave offence. Thus a distinction shall necessarily be kept in mind that an offender who has travelled beyond the object of unlawful assembly, will be dealt separately as according to part played by him, therefore, the conviction and sentences passed by learned trial Court is required to be scrutinized at the touch stone of the law laid down on the subject. Reference can be made to Babar Ali and others v. The State PLD 1968 SC 372, Mir Dad alias Amir Dad v. The Crown 1969 SCMR 419, Amir Hussain and others v. The State PLD 1971 Kar. 68 and Amir Hussain and 6 others v. The State 1971 PCr.LJ 297.

The case as portrayed by the prosecution is not one of a free fight but looks a preplanned object, when by constituting unlawful assembly in furtherance of common object, the accused launched an assault upon the injured witnesses, therefore, each member of the unlawful assembly can be held responsible for the part played by any one of them, but keeping in view the second part of Section 149, P.P.C, any member of the assembly, who travelled beyond the common object, he shall alone be liable for such act.

10. I am mindful of the fact that a number of persons belonging to the one family are nominated in the case. The petitioners/convicts were admitted to bail, vide this court order dated 2-7-2013. During the pendency of this petition all of them have remained present before the court, it was noticed that majority of them (nine out of fourteen) are apparently feeble and of advanced age. Now, this tendency is run-of-the-mill in our society, when due to complexities of tribal scenario, as many as members of opponent's family are being nominated, just to harass and to malign them, particularly, the male members of an advanced age for settling the score of

grudge with sinister object of revenge, just to bring one's opponent to the lowest degree of humiliation and defamation. The object is obvious in this case, therefore, it looks that nomination of as many as elderly members of the opponent's family was motivated by the object of humiliation. It is further observed that except the accused mentioned herein above, no overt act was assigned to the rest of the petitioners/convicts.

11. The upshots of the above discussion and after reappraisal of evidence by applying the golden principle of sifting grains from chaff, it is concluded that the complainant (P.W.1) reiterated his allegation as stated in the F.I.R. The injured witness Jalal-ud-Din (P.W.2) named and identified only the petitioners/convicts (accused) No.1 Abdul Latif, No.2 Juma Rahim, No.5 Muhammad Hassan and No.6 Habibullah. The injured witness Shams-ul-Karim (P.W.3) attributed a specific role of spades' blow to Abdul Latif and the injured witness Roz-ud-Din (P.W.5) assigned a role to the petitioner/convict No.1, Abdul Latif and No.4, Aman. Only the complainant (P.W.1) named all of them by repeating the contents of the F.I.R. without assigning any specific role to anyone of them. The injured witness Jalal-ud-Din could not identify them even was unable to name them, while the injured witness Shams-ul-Karim (P.W.3) and Roz-ud-Din have attributed specific role to the petitioners/convicts viz, Abdul Latif and Aman (petitioners Nos.1 and 4).

12. The proposition with regard to the principle of "falsus in uno falsus in omnibus" (false in one thing, false in all) is not approved by the criminal justice system of our country; therefore, it is not necessary that the injured witness is always telling the whole truth. Reference is made to the cases of Samano v. The State 1973 SCMR 162 and Riaz Hussain v. The State 2001 SCMR 177. Thus, I am of the considered view that the case of the petitioners/convicts Nos.3 Jamal Din, No.7 Baitullah, No.8. Zahir, No.9. Rehman alias Zahro, No.10. Khan, No.11. Muhammad Tahir alias Wasay, No.12. Bakhtullah, No.13. Syedullah and No.14. Din Muhammad, is not free from doubt, the benefit whereof shall necessarily be extended in their favour, not as a grace but as a right. Only five, out of total fourteen petitioners/convicts, have been assigned a specific role. The injuries caused to the injured prosecution witnesses were corroborated by means of unimpeachable evidence, therefore, the prosecution has successfully proved its case against the petitioners/ convicts namely Abdul Latif, Juma Rahim, Aman, Muhammad Hassan and Habibullah and they were rightly held responsible for commission of the offence, while rest of the petitioners/convicts mentioned herein above cannot be held responsible for any criminal wrong, therefore, the ocular account up to their extent is disbelieved.

13. Before advertng to the question of sentence awarded to the petitioners/convicts. This is to be determined that injuries sustained by the injured/witnesses attract which provision of Qisas and Diyat, to make it punishable under the specific provision of the Pakistan Penal Code (P.P.C). However, subject to provision of section 149, P.P.C. as discussed herein above, the offender who traveled beyond the object of common intention and committed a grave offence will be dealt

separately. The injuries caused to the injured witnesses Nasr-ud-Din (P.W.1), Jalal-ud-Din (PW-2), Shams-ul-Karim (PW-3) and Roz-ud-Din (P.W.5), altogether fall within the definition of 'Shajjah-i-khafifah' under section 337(2) (a) of P.P.C. and explained under 337(3) (i) P.P.C. The offence is made punishable under section 337-A(I), P.P.C. Thus, the injuries caused to injured are 'Shajjah-i-khafifah' while in addition to said injuries, the injured Shams-ul-Karim (P.W.3) has sustained certain other injuries, whereby the inner and the longer of the two bones of his right forearm (Ulna) and index finger of his left hand, were fractured, these injuries are defined under section 337-E(e), P.P.C, as 'Ghayr-Jaifah Hashimah' and classified under subsection (3)(v) of 337-E, P.P.C. as 'Hashimah' which is punishable under section 337-F(v) P.P.C.

14. When adverting to the question of sentence awarded to the petitioners/convicts, the dictum laid down by the Hon'ble apex Court in the case of Haji Maa Din v The State 1998 SCMR 1528 is helpful, wherein the Hon'ble Apex Court has laid down the guidelines and factors to be considered for awarding Ta'zir in hurt cases, it leads me to the conclusion that the case of petitioners/convicts, who are responsible for commission of offence is covered by subsection (2) of section 337-N, P.P.C. Thus, keeping in view the principles enunciated in judgment supra I am, of the considered view that there is nothing available on the record of this case to establish that the petitioners/convicts had any credentials or antecedents of being "a previous convict, hardened or habitual, desperate or dangerous criminals", thus, their case falls within the ambit of section 337-N(2), P.P.C.

The occurrence in this case had taken place about two and half years ago and the petitioners/convicts have been facing the agony and anguish of a trial. They have repeatedly been in and out of the prison during all this while.

Resultantly, the petition to the extent of the petitioners/convicts namely, Jamal Din, Baitullah Jan, Zahir, Rehman alias Zahro, Khan, Muhammad Tahir alias Wasay, Bakhtullah, Syedullah and Din Muhammad is accepted and they are acquitted of the charge by extending benefit of doubt in their favour. While, the petition is partly accepted to the extent of setting aside the punishment of imprisonment awarded under Ta'zir to the petitioners/convicts Abdul Latif, Juma Rahim, Aman, Muhammad I Hassan and Habibullah, however, they are convicted under section 337-A (i) read with section 149, P.P.C, and sentenced to pay Daman of Rs.5000/- each (Total Rs.25,000/-) which shall be divided equally among the injured witnesses i.e. Rs.6250/- each, for causing injuries of 'Shajjahi Khafifah'. In default, they shall undergo Simple Imprisonment for a period of three months.

The petitioner/convict Abdul Latif in addition to aforesaid sentence is also convicted under section 337-F(v), P.P.C. and sentenced to pay a Daman amounting to Rs.30,000/- to the



injured Shams-ul-Karim for fracturing the bones of his forearm (Ulna) and index finger of his hand. In default he shall undergo Simple Imprisonment for a period of six months.

The petitioners/convicts are directed to pay the amount of Daman to the injured witness or to deposit the same in the trial court within a period of one month, till the payment of Daman their bail bonds shall remain intact, which shall be released after fulfilling the directions made herein above.

Copy of this judgment be sent to the learned Judicial Magistrate Zhob for compliance, who upon deposit of the amount of Daman by the petitioners/convicts shall pay the same to the injured witnesses.

This revision petition, thus, needs no further action and the same is, therefore, disposed of in the terms observed above. Order accordingly.

HBT/17/Bal.

Order accordingly.