

Form No: HCJD/C-121
ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT

Writ Petition No. 59534 of 2022

Hajra Javaid Makhdoom **Versus** Muhammad Tehmas Nasir, etc.

S.No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge and that of parties or counsel, where necessary.
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19-12-2023 Dr. Khalid Ranjha, Advocate for the petitioner

Through this writ petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has voiced his grievance as under:-

“In view of the above circumstances, it is most respectfully prayed that the above titled writ petition may kindly be allowed and the case be referred back to learned magistrate for retrial and there after for criminal revision before learned ASJ.

Any other adequate relief which this Honorable Court deems fit just and proper may also be awarded to the petitioner in order to meet the ends of justice.”

2. Tersely, the facts of the case are that the petitioner had instituted a private complaint under section 6(5) of the Muslim Family Laws Ordinance, 1961, before the learned Judicial Magistrate, Sargodha, against respondent No.1 with the allegation that he had contracted second marriage without her permission and, thus, committed an offence. After recording cursory evidence, learned J udicial Magistrate, Sargodha, summoned respondent No.1 to face the trial in terms of section 6(5) of the Ordinance *ibid*. Respondent No.1 joined the proceedings of the case and during the pendency of said proceedings, he filed an application under section 249-A, Cr.P.C. with the assertion that the allegation of contracting second marriage without the permission of petitioner was totally against the facts and the private complaint had been filed by petitioner just to blackmail him. In fact, he had

already divorced the petitioner which was effected on 06.07.2021 and thereafter he contracted second marriage. It was further asserted by the petitioner that there was no probability of his conviction in the private complaint, for the reason, he may be acquitted of the charge under section 249-A, Cr.P.C. This application was accepted by learned Magistrate Section-30, Sargodha, *vide* order dated 18.05.2022. Aggrieved by the above-mentioned order, the petitioner filed a criminal revision under section 439-A, Cr.P.C. before the court of learned Sessions Judge, Sargodha, which was entrusted to the court of learned Additional Sessions Judge, Sargodha, who, after hearing the learned counsel for the petitioner as well as learned Assistant District Public Prosecutor, dismissed the same *vide* order dated 16.07.2022. The petitioner has challenged both the orders of learned fora below through the instant writ petition with the prayer that the case may be referred back to learned Judicial Magistrate for re-trial and criminal revision may also be remanded back to learned Additional Sessions Judge.

3. It is *inter alia* contended by learned counsel for the petitioner that against the order of acquittal under section 249-A, Cr.P.C. a criminal revision in terms of section 439-A, Cr.P.C. was competent, because, acquittal order had not been passed on merits. Learned counsel for the petitioner has placed reliance upon the case-law titled as “The State through Advocate-General, Sindh High Court of Karachi v. Raja Abdul Rehman” (2005 SCMR 1544).

4. I have heard the learned counsel for the petitioner at length on the above short point and also gone through the documents appended with this petition.

5. Although petitioner has not challenged any specific order in the prayer clause as well as in the caption of instant writ petition yet he has prayed for the remand of case to the trial court as well as criminal revision to the court of Additional Sessions Judge. I am afraid that the prayer of the petitioner is misconceived, because, matter cannot be referred back to both the fora below at the same time. Even otherwise, supplication of the petitioner is without the backing of law. After going through the documents available with the file, I have noticed that the petitioner had filed a private complaint under section 6(5) of the Muslim Family Laws Ordinance, 1961, against respondent No.1, wherein respondent No.1 filed an application under section 249-A, Cr.P.C. which was accepted by the trial court *vide* order dated 18.05.2022 whereby respondent No.1 was acquitted mainly on the ground that he had already divorced the petitioner before contracting second marriage. Being aggrieved, the petitioner filed criminal revision against the acquittal of respondent No.1, which was dismissed by Additional Sessions Judge, Sargodha, *vide* order dated 16.07.2022 with the following observations:-

“3. According to assistance of learned counsel for the petitioner, learned ADPP, and record reveals that through impugned order learned lower court acquitted the respondent No.2, u / s 249-A Cr.P.C, and present petitioner challenged the acquittal of respondent No.2, through instant revision petition. Order of acquittal u/s 249-A Cr.P.C, not amenable to revision in view of remedy available to the petitioner u / s 417 (2) Cr.P.C. Sub-section 5 of section 439-A Cr.P.C, clearly provide that where in a court an appeal lies and no appeal is brought, not proceeded by way of revision shall be entertain at the instance of petitioner who could have appealed. Learned ADPP also added that instant revision is not proceedable. Hence, instant revision

petition is accordingly dismissed. The certified copy of this order be sent to the learned Lower Court for information. The file of this revision petition be consigned to record room after its due completion.”

6. The question, whether the order of acquittal under section 249-A, Cr.P.C. was amenable to criminal revision or the same was assailable before this Court through a petition for special leave to appeal as provided under section 417(2) Cr.P.C. has not been satisfactorily answered by learned counsel for the petitioner. For reference, section 417(2) Cr.P.C. is reproduced as infra:-

“417. Appeal in case of acquittal: (2) *If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.”*

Likewise by virtue of section 439(5), Cr.P.C. there is bar on the revisional jurisdiction of the court in the cases where remedy of appeal is provided under the Code *ibid.* Sections 439 and 439-A, Cr.P.C. are described as infra for the purpose of clarity:-

“439. High Court’s powers of revision: (1) *In the case of any proceeding the record of which has been called for by itself, [...] or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by section 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence, and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.*

(2) *No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.*

(3) *Where the sentence dealt with under this section has been passed by Magistrate [...], the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has*

committed, than might have been inflicted for such offence by Magistrate of the first class.

(4) Nothing in this section shall be deemed to authorize a High Court:

(a) to convert a finding of acquittal into one of conviction, or

(b) to entertain any proceedings in revision with respect to an order made by the Sessions Judge under section 439-A.]

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced, shall, in showing cause, be entitled also to show cause against his conviction.”

“439-A. Sessions Judge’s powers of revision: *(1) In the case of any proceeding before a Magistrate the record of which has been called for by the Sessions Judge or which otherwise comes to his knowledge, the Sessions Judge may exercise any of the powers conferred on the High Court by section 439.*

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him under any general or special order of the Session Judge].

7. Another intriguing aspect of this case which cannot be ignored is that whether a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, is competent against the order of acquittal under section 249-A, Cr.P.C, in this regard, I am of the firm view that when the statute has provided a specific alternate remedy of appeal against acquittal, constitutional petition is not competent against such an order, therefore, the writ petition in hand is not maintainable in the eyes of the law.

8. So far as the wisdom laid down by the Supreme Court of Pakistan in case-law titled as “The State through Advocate-General, Sindh High Court of Karachi v. Raja

Abdul Rehman (2005 SCMR 1544) is concerned, although it has been held in the aforementioned case-law that the order of acquittal of accused under section 249-A, Cr.P.C. would not have the same sanctity as order of acquittal on merits and the principles applicable to second category of acquittal would not apply to first category of acquittal, but I am of the view that it does not mean that the acquittal order passed under section 249-A, Cr.P.C. is amenable to revisional jurisdiction as enshrined in section 439-A, Cr.P.C. After going through the above mentioned case-law, it manifests that even in the said case also, appeal in terms of section 417, Cr.P.C. was filed before the Sindh High Court against the acquittal of accused under section 249-A, Cr.P.C. which was dismissed in *limine* and the same was challenged before the Supreme Court of Pakistan. In this way, it is abundantly clear that the case-law relied upon by learned counsel for the petitioner is not helpful to him.

9. It is noteworthy that criminal appeal and revision have different features. Appeal is filed on question of law and facts in the light of section 418, Cr.P.C. whereas in criminal revision only correctness, legality and propriety of any finding, sentence or order is to be seen. A criminal revision is not competent against the order of acquittal, because, it is prohibited according to section 439(4)(a) Cr.P.C.

10. Aftermath of above discussion is that the criminal revision before the court of learned Additional Sessions Judge was not competent, because, an order of acquittal can only be assailed by way of remedy provided under section 417(2), Cr.P.C. and not otherwise, therefore,

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there is no illegality or perversity in the order passed by learned Additional Sessions Judge, who has rightly dismissed the criminal revision. Resultantly, this constitutional petition has no force and the same is hereby **dismissed** in **limine**.

(Muhammad Tariq Nadeem)
Judge

Approved for reporting.

Judge

*Announced, dictated, prepared and signed
on 19-12-2023.*

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