

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Justice Jamal Khan Mandokhail
Justice Syed Hasan Azhar Rizvi
Justice Naeem Akhtar Afghan

**CRIMINAL PETITION NO.894 OF 2021,
CRIMINAL APPEALS NO.207 AND 215 OF 2021**

(On appeal against the judgment dated 29.05.2021 passed by the
Islamabad High Court, Islamabad, in CrI. Appeals No.81 & 82 of 2012)

Noman Mansoor alias Nomi
(CrI.P.894/21 & CrI.A.207/21)

Mst. Zainab Khattak
(CrI.A.215/21)

... Appellant(s)

Versus

The State (CrI.P.894/21 & CrI.A.207/21)
Noman Mansoor alias Nomi etc (CrI.A.215/21)... Respondent(s)

For the appellant

(CrI.P.894 & CrI.A.207/2021):

Mr. Khalid Masood Sandhu, ASC
Syed Rifaqat Hussain Shah, AOR

For the Appellant :
(CrI.A.215/2021 also for
Complainant)

Raja Muhammad Shafat Khan, ASC

For the State :

Mr. Fauzi Zafar, ASC
(as State counsel)

Date of hearing :

22.05.2024

O R D E R

Jamal Khan Mandokhail, J. Brief background of this case is that the petitioner-convict Noman Mansoor alias Nomi was convicted and sentenced u/s 302(c) of the Pakistan Penal Code, 1860 (**PPC**) to undergo Rigorous Imprisonment for a period of 14 years by the Additional Sessions Judge VI (West), Islamabad (**'the Trial Court'**) vide judgment dated 01.12.2012. He challenged the judgment by filing an appeal before the High Court. In the meanwhile, the complainant/wife of the deceased also filed an appeal u/s 417(2A) of the Code of Criminal Procedure, 1898 (**'Cr.P.C.'**), alleging therein that on the basis of the facts and circumstances of the case, the sentence u/s 302(b) PPC should have been awarded to the convict/petitioner, instead of u/s 302(c) PPC, but the needful was not done, which amounts to his acquittal in the said section.

The High Court did not agree with the complainant's plea of acquittal. However, while delivering its final judgment, the High Court converted the Criminal Appeal No.81/2012 filed against acquittal of the appellant/convict into a Criminal Revision Petition and allowed it. Consequently, the conviction and sentence awarded to the petitioner/convict by the Trial Court was converted from section 302(c) PPC to that of section 302(b) PPC and the sentence awarded to him was enhanced to imprisonment for life, hence this petition.

2. The complainant has also filed Criminal Appeal No. 215/2021 for further enhancement of the sentence from life to death. Both the titled matters are arising out of the same judgment impugned passed by the High Court, therefore, we propose to dispose of them together through a common judgment.

3. The question for consideration is as to whether the High Court can convert an appeal against acquittal into a Criminal Revision? Under section 439 Cr.P.C., the High Court may in its discretion, exercise any of the powers conferred on a court of appeal, whenever, facts calling its exercise either brought to its notice or otherwise comes to its knowledge. Since the complainant/respondent filed an appeal against acquittal of the petitioner, raising some substantial question of law, therefore, the High Court can consider it as Criminal Revision Petition and convert it accordingly, for the purpose of satisfying itself to the correctness, legality or propriety of any findings, sentence or orders. There is no impediment in doing so, therefore, the order of the conversion of the Criminal Appeal into a Criminal Revision suffers from no illegality or irregularity. Reliance in this behalf can be made upon the case of **Mian Asghar Ali**¹. Relevant portion therefrom is reproduced as under:

"Power to convert and or treat one kind of proceeding into another is derived from authority to do ex debito justitiae, which always existed and have always been exercised by the Court not only to advance the cause of justice but also to prevent the injustice. No fetters or bar could be placed on the High Court and or this Court to convert and treat one type of proceeding into another and proceed to decide the matter either itself provided it has jurisdiction over the lis that has fallen on its lap for adjudication in exercise of another jurisdiction vested in the very Court or may remit the lis to the court/forum/authority of competent jurisdiction for decision of the lis on its own merits. Courts have been treating and or converting appeal into revisions and vice versa and Constitution Petitions into appeal or revision and vice versa...."

4. The next question for consideration is as to whether upon filing of a direct Criminal Revision or after conversion of a Criminal Appeal into a

¹ 2017 SCMR 118

Criminal Revision, a notice as provided by sub-section (2) of section 439 Cr.P.C. has to be issued to the other side? If not what would be its effect? It is an admitted fact that a Criminal Appeal was filed through which the High Court considered it appropriate to reappraise the order impugned in light of the material available on the record and while exercising its inherent power, converted the Criminal Appeal into a Criminal Revision Petition, at the time of delivering the judgment. It is apparent, rather admitted fact that no notice of the proceedings upon the Criminal Revision was issued to the petitioner/convict. In its revisional jurisdiction, the High Court can enhance the sentence passed by *fora* below, but before it does so, it must comply with the provisions of sub-section (2) of section 439 Cr.P.C., which make it mandatory that 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 through a legal practitioner of his choice, so as to defend himself.² The purpose of issuing notice is to give an opportunity to the accused/convict either to pursue his matter personally or through a legal practitioner of his own choice so as to defend himself. Without issuing the mandatory notice the impugned judgment is contrary to the provisions of section 439 (2) Cr.P.C. This has deprived the petitioner from his legal as well as constitutional right of consulting a legal practitioner of his own choice and fair trial as provided by Article 10 and 10-A of the Constitution of the Islamic Republic of Pakistan, respectively. As far as the contention of the learned counsel for the complainant that the convict was already before the Court in his own appeal and both the matters were heard together, therefore, he was deemed to be served and no fresh notice was required. We are not in agreement with the learned counsel for the reason that the appeal filed by the convict and the revision filed by the complainant are altogether different in their nature and outcome. Once the law prescribes a thing to be done in a particular manner, it must be done as such, therefore, a separate notice as required by sub-section (2) of section 439 Cr.P.C. was mandatory, without which no order should have been passed, hence, the impugned judgment is not sustainable.

Thus, in view of the above, Criminal Petition No. 894/2021 is converted into an appeal and is partially allowed. The impugned judgment dated 29.05.2021 is set aside. The appeal filed by the petitioner against his conviction and the acquittal appeal which was converted by the High Court in a Criminal Revision Petition shall be deemed to be pending before the High Court. The High Court shall issue notice to the convict as required under section 439 (2) Cr.P.C., to be

² Farhad Ali v. Mutalib Khan and another (2012 SCMR 1072) and Hassan-ur-Rehman v. Haleem Shah and another (1998 SCMR 589)

served upon him personally. After service of notice, the High Court should provide opportunity of hearing to all concerned and decide the Appeal and the Criminal Revision afresh, in accordance with law, on its own merits and on the basis of the material available on the record. We are sanguine that the High Court shall proceed with the appeal and the Criminal Revision expeditiously and decide the same preferably within a period of thirty days, after service of notice to all concerned.

**CRL. APPEALS NO.207 AND 215 OF 2021 AND CRL. MISC.
APPLICATION NO.1780/2022 IN CRL.PETITION NO.894/2021**

5. In view of above discussion, these appeals as well as Crl. Misc. Application are dismissed as having become infructuous.

Judge

Judge

Judge

Islamabad

22.05.2024

*M. Saeed/Waqas Ahmad, LC/**

APPROVED FOR REPORTING