IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ.
Mr. Justice Javed Iqbal
Mr. Justice Raja Fayyaz Ahmed
Mr. Justice Ch. Ijaz Ahmed
Mr. Justice Sayed Zahid Hussain
Mr. Justice Muhammad Sair Ali

JAIL PETITION NO. 56 OF 2005

(On appeal against the judgment dated 11.9.2003 passed by the Peshawar High Court, Abbottabad Bench in Crl. Appeal No. 61/2001)

Shah Hussain .... PETITIONER

VERSUS

The State .... RESPONDENT

For the petitioner: Mr. Zulfiqar Khalid Maluka, ASC

For the State: Syed Tahaar Hussain, ASC
(on behalf of A.G., NWFP)

Amicus Curiae: Syed Iftikhar Hussain Gillani, Sr.ASC

Mr. Muhammad Akram Sheikh, Sr.ASC
(Assisted by Barrister M. R. Kamran Sheikh, Adv.)

Sh. Zameer Hussain, Sr.ASC
Ms. Naheeda Mehboob Elahi, DAG
Qazi Muhammad Amin, Addl.AG

Mr. Muhammad Naeem Sheikh, ASC
(With permission of the Court)

Dates of hearing: 7th & 11th May, 2009

JUDGMENT

IFTIKHAR MUHAMMAD CHAUDHRY, CJ. - This petition for leave to appeal has been filed through jail against the judgment dated

11.9.2003 passed by the Peshawar High Court at Abbottabad Bench in Cr. A. No. 61/2001.

2. The petitioner, his brother Akhtar Hussain and co-accused Muhammad Shaukat were tried by the Sessions Judge/Zila Qazi, Kohistan at Dassu for committing murder of one Farman Ali, causing injuries to Muhammad Siffat Khan (injured PW) and for the offence of *Haraabah* in respect of jeep bearing registration No.GLT-4406. They were convicted under section 392 read with section 34 PPC and section 20 of the Offences Against Property (Enforcement of *Hadd*) Ordinance, 1979 and were sentenced to 10 years' R.I. and a fine of Rs.25,000/- each, or in default of payment thereof, to undergo one year R.I. They were also convicted under section 394 read with section 34 PPC and section 20 of the Offences Against Property (Enforcement of *Hadd*) Ordinance, 1979 and were sentenced to imprisonment for life with a fine of Rs.25,000/- each, or in default thereof, to undergo one year R.I. In case of recovery of fine, 3/4 of it was ordered to be paid to the injured PW Muhammad Siffat Khan as compensation. Under section 302(b)/34 PPC, accused Shaukat was convicted and sentenced to death while the petitioner and his brother Akhtar accused were convicted and sentenced to imprisonment for life each. All three convicts were also ordered to pay a sum of Rs.100,000/- each as compensation to the legal heirs of deceased Farman Ali, or in default thereof, to suffer S.I. for six months. Their sentences were ordered to run consecutively. On a reference under section 374, Cr.P.C. and appeal filed by the convicts, the Peshawar High Court, vide judgment dated 11.9.2003, allowed the appeal of Akhtar Hussain, set aside his conviction and sentence and acquitted him of the charges but dismissed the appeal of the petitioner and maintained his conviction and sentence.

Accused Shaukat died during the pendency of appeal and the murder reference against him stood abated.

3. The FIR of the case was registered on 6.9.1999 at the report of Hafiz Janas Khan, SHO, P.S. Dubair, who, during his usual patrolling, found jeep No.GLT-4406 at the Karakurram Highway, which appeared to have met an accident. On search of the vehicle, he found a .30 bore pistol bearing No.5901-B loaded with magazine containing four rounds, an empty cartridge of .30 bore and blood. Off the roadside nearby, he found a dead body of an unknown person. He noticed one entry wound on the right eyebrow on the scalp with an exit wound near it. There were other injuries on the head, which showed that the dead body had been thrown down from somewhere. He registered case under section 302/34 PPC, prepared the injury sheet and inquest report and sent the dead body to the RHC Pattan for autopsy.

4. Sole eyewitness of the occurrence was PW8 Muhammad Siffat Khan, driver of the jeep. In his deposition, he stated that on 6.9.1999 two boys, namely, Shaukat and Shah Hussain (petitioner and co-accused) came to him and hired the jeep for the journey from Gilgit to Basham. He took Farman Ali (deceased) with him as a companion for the aforesaid journey. The petitioner sat with him on the front seat while the other took the back seat with Farman Ali. When they reached near a hotel at a deserted Nallah, he heard a fire shot behind him. He parked the vehicle at the roadside and found that Farman Ali had been shot by Shaukat. Thereafter Shaukat came to him and fired a shot at him injuring him on the neck and right shoulder. Shaukat wanted to fire more shots, but his pistol did not work. The petitioner pushed the injured PW out of the vehicle and occupied the driving seat. The accused threw the dead body of Farman Ali

off the roadside and took away the vehicle towards Basham. He was lying there in an injured condition when a bus came and he was taken to Basham Hospital. At the identification parade held in the jail premises, petitioner and Muhammad Shaukat were identified. Recoveries included the aforesaid jeep, a pistol, two empty cartridges, five .30 bore live cartridges, a wrist watch and bloodstained clothes of the petitioner. The crime weapon and two empty cartridges were to the firearms expert, which were found to have been fired from the said pistol. The autopsy of Farman Ali deceased showed firearm injuries on his body while the medical examination report of injured PW Siffat Khan showed firearm injuries on his person.

5. The petitioner admitted, in his statement, the occurrence. With minor discrepancies, he narrated the prosecution story as given by Siffat Khan PW, noted above. He stated that Shaukat accused fired at Farman Ali deceased and Siffat Khan PW with a .30 bore pistol. He also stated that after the snatching of the vehicle from Siffat Khan PW and after throwing of the dead body of Farman Ali deceased off the jeep, he drove the vehicle towards Basham when it met an accident in which he and Shaukat accused got injured. They spent the night in a deserted place. In the morning they met an old man named Samandur whom Shaukat accused told that they (Shaukat and the petitioner) were searching their brother. On their way back from that place, they were arrested by the police. Clearly, petitioner's statement is inculpatory in nature. Though at the trial, he retracted from his above statement, yet the same is corroborated on material particulars by the ocular account of the incident furnished by PW8 Siffat Khan, mentioned above. Likewise, the recovery of crime weapon coupled with the medical evidence also corroborated the prosecution case.

In law, the confessional statement of the petitioner was sufficient for his conviction and sentence. Hence, no case for interference with the impugned judgment of the Peshawar High Court is made out *qua* conviction and sentence of the petitioner.

6. During hearing of the petition on 6.5.2009, this Court noticed that the sentences of the petitioner, namely, 10 years' R.I., and imprisonment for life on two counts, were ordered to run consecutively, the benefit of section 382-B, Cr.P.C., was not given to him and the remissions granted by the Federal and the Provincial Governments during his pre-sentence custody period were also not allowed to him. Thus, we considered it a question of public importance relating to the enforcement of Fundamental Right of a prisoner as guaranteed under Article 9 of the Constitution and passed the following order on the said date: -

> "2. Learned counsel for the petitioner contends that learned trial Court has convicted and sentenced the petitioner on various counts, which were ordered to run consecutively whereas the Courts, while awarding sentences on different counts, normally order the same to run concurrently. Secondly, in view of the law laid down in *Haji Abdul Ali v. Haji Bismillah* (PLD 2005 SC 163), the petitioner is not entitled to any remission granted by the President of Pakistan or the Provincial Government during the period he remained confined in jail as under-trial prisoner when he was neither convicted of any offence nor was undergoing any sentence.
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> 3. It is to be noted that the petitioner has been in custody since 1999 and, prima facie, in the light of the law laid down in the case reported as *Ghulam Murtaza v. State* (PLD 1998 SC 152), the court is under an obligation to take into consideration the provisions of section 382-B, Cr.P.C. and in absence of special circumstances disentitling the accused, exercise its discretion in favour of the accused by ordering that such period shall be counted towards his sentence of imprisonment.
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> 4. In the instant case, the petitioner has neither been extended the benefit of section 382-B Cr.P.C., nor is entitled to any remission in view of judgment of two Hon'ble Judges in *Abdul Ali's case (supra).* Further, in the said case, the judgment of a three member Bench in *case of Ghulam Murtaza (supra)* was not considered. Another aspect of the matter is that in another judgment delivered by a Bench of four

> Hon'ble Judges in the case reported as Human Rights Case No.4115 of 2007 (PLD 2008 SC 71), the view taken in the case of Haji Abdul Ali (supra) has been reaffirmed. It may be noted that if a prisoner/convict remains in custody, his right to life under Article 9 of the Constitution remains available to him, therefore, such convicts should be dealt with in a manner in which they enjoy their fundamental right to life. This is not the only one case in which great difficulties and hardships have arisen for the prisoner but there are so many other cases wherein the prisoners are suffering in jail on account of delay in the trial of their cases for which generally they are not responsible in any manner. Therefore, we consider it appropriate to re-visit the judgments in the *cases of Haji Abdul Ali* and *the Human Rights Case No. 4115 of 2007 (supra)*. The office is directed to fix this matter before a Bench of more than five Hon'ble Judges. Adjourned to 7.5.2009. Copy of this order be sent to the learned counsel appearing on Court's call."

7. The learned counsel for the petitioner referred to the provisions of section 382-B, Cr.P.C., the corresponding provisions of section 428 of the Indian Code of Criminal Procedure, 1973 and section 67 of the U.K. Criminal Justice Act 1967, as amended by the Powers of the Criminal Courts (Sentencing Act), 2000 and particularly *Ghulam Murtaza's case* (supra), wherein it was held that the trial Court was under an obligation to take into consideration the pre-sentence period spent by a convict in jail, and in absence of special circumstances disentitling the accused, exercise its discretion in favour of the accused by ordering that such period should be counted towards his sentence of imprisonment. However, the learned counsel contended that in the instant case neither the trial Court extended the benefit of section 382-B, Cr.P.C., to the petitioner nor he was held entitled to any remission.

8. The learned counsel for the petitioner cited judgments in the cases of *Javed Iqbal v.* State (1998 SCMR 1539), *Muhammad Saleem v. State* (1996 P.Cr.L.J. 1598), *Ramzan v. State* (PLD 1992 SC 11), *Mukhtiar-ud-Din v. State* (1997 SCMR 55), *Muhammad Rafiq v. State* (1995 SCMR 1525), *Aamir Ali v. State* (2002 YLR 1902) at 1912, *R. Wust*

(2001) 1 SCR 455 = 2000 SCC 18 to argue that the grant of benefit of section 382-B, Cr.P.C., was a rule while its denial an exception, therefore, the same could only be withheld if the trial Court concluded, on taking into consideration that the accused for strong reasons was not entitled to the said benefit. He also referred to an article "*Pre-sentence custody and the determination of sentence: a framework for discussion*" by Allan Manson of the Faculty of Law, Queen's University, Kingston, Ontario. He further argued that section 382-B, Cr.P.C. had received beneficial interpretation from the Superior Courts, which was apparent from the following well-settled propositions: -

(1) If the Court did not record reasons in declining the benefit of section 382-B, Cr.P.C., no presumption could be raised in favour of the Court;

(2) The reduction of the sentence of a convict by the under-trial detention period exploded the myth that the pre-sentencing detention period and the post-sentencing period were different and the conviction and sentence could not be ante-dated because it blurred the line between the pre-sentencing and post-sentencing periods;

(3) The period spent in jail prior to formal conviction and sentence was punishment;

(4) Once the benefit of section 382-B, Cr.P.C. was extended to a convict, the remissions granted by any authority could not be withheld on any ground whatsoever;

(5) The benefit of this provision could be extended to convicts even after the passing of judgment by the High Court or the Supreme Court of Pakistan; and

(6) The Courts had held that the application seeking the said benefit would neither be review nor alteration of the main judgment.

9. Syed Iftikhar Hussain Gillani, Senior ASC, appearing as *amicus curiae*, opened up his arguments with the submission that the

extension of benefit under section 382-B, Cr.P.C., and the grant of remission granted during the under-trial period of a prisoner were inter-twined and interlinked and could not be dealt with in isolation from each other under any principle of interpretation as was done in the judgment in *Abdul Ali's case* (supra). To support his stance that the trial Court while taking into consideration provisions of section 382-B, Cr.P.C., was also under an obligation to grant the benefit of remissions granted by any authority under the Constitution or any statute during the pre-sentence period spent in jail, he dilated upon the terms 'conviction' and 'sentence' by quoting passages from the book titled "Access to Justice in Pakistan" by Justice Fazal Karim, a former Judge of the Supreme Court of Pakistan. He also referred to the cases reported as *Muhammad Rafiq v. State* (1995 SCMR 1525), *Qadir v. State* (PLD 1991 SC 1065), *Ramzan v. State* (PLD 1992 SC 11), *Liaqat Hussain v. State* (PLD 1995 SC 485), *Mukhtiar-ud-Din v. State* (1997 SCMR 55), *Ghulam Murtaza's case* (supra), *Javed Iqbal v. State* (1998 SCMR 1539) and *Ehsan Ellahi v. Muhammad Arif* (2001 SCMR 416). He further submitted that if a convict whose trial was prolonged was not treated at par with those convicts whose trials were concluded expeditiously, then four consequences would follow: -

(1) It would be discriminatory and violative of the equal protection clause. Convicts could not be classified on the basis of early and delayed conclusion of trial. It would be violative of Article 9 and Article 25 of the Constitution as well. Fundamental rights are available to prisoners (AIR 1974 SC 2092);

(2) It would militate against the rational treatment of pre-sentence detention period. Once a Court of competent jurisdiction under the provisions of section 382-B, Cr.P.C., declares and holds that the sentence begins from the date of arrest, this is a lawful order passed by a competent court and the sentence is to be treated as such for all purposes, not for certain purposes only;

(3) As soon as the Court directed that the benefit of section 382-B, Cr.P.C., should be granted, which practically meant that the sentence was reckoned from the date of arrest, then the benefit of remissions granted during that period would be

admissible. However, where the benefit of section 382-B, Cr.P.C., was declined, remission would not be granted.

(4) It would provide a tool in the hands of unscrupulous public functionaries to pick and choose amongst the prisoners.

10. Other submissions of Mr. Gillani were: -

(1) Sentencing was the power of the Court and primarily was a matter of judicial discretion. If the Court, on the facts and circumstances of a particular case, came to the conclusion that the benefit of section 382-B, Cr.P.C. would be granted, no other authority had the power to negate it by any methodology;

(2) Even in computing 2/3rd of the substantive sentence, if the Court had granted the benefit of section 382-B, Cr.P.C., it was the Court's order that would prevail;

(3) The ratio of *Shahid Nabi Malik's case* (PLD 1997 SC 32) and *Mahmood Khan Achakzai's case* (PLD 1997 SC 426) was that higher rights, e.g. independence of judiciary would prevail;

(4) The Court alone had the power to sentence. When an order is passed by the judicial organ of the State in the matter of admissibility of any remission, the Government had no power to say that such remission would not be available. Anything flowing from the Court could only be rectified by the higher court;

(5) For months the prisoners involved in petty cases were not produced before the Courts. The prisoners should not suffer for failure of the state machinery;

(6) While interpreting certain provisions of law, legalistic approach should be blended with equity and compassion;

(7) Interpretation was an art and not a science, therefore, the Court was not to follow a pre-determined path. Basic rule of interpretation applicable to this case was that the legislative intent to do more good and to do justice was to be ascertained through the interpretative process; and

(8) The pardon granted to a prisoner serves God's purpose – Islamic jurisprudence.

Mr. Gillani further stated that the Indian law was less beneficial. The Indian Courts were not required to consider anything at all. In Pakistan, the moment the benefit of section 382-B, Cr.P.C., was given, the Court was involved. Under the Indian law, it was not. Here, *Muhammad Rafiq's case* (supra) was to be improved. The sentence would become operative from the date of arrest, and not from the date of conviction. He lastly submitted that the question of exclusion of certain categories of convicts involved in certain heinous offences from the benefit of remission (e.g. NAB, anti-terrorism cases, kidnapping, abduction for ransom, *karo kari*, etc.) should be considered in appropriate cases separately.

11. Mr. Muhammad Akram Sheikh, Sr. ASC appeared as *amicus curiae*. He submitted that once the pre-sentence period was taken into consideration, the grant of remissions from the date of arrest of the convict was peripheral issue and the same could not be withheld. Reduction of sentence by the amount of pre-sentence period in jail meant that a convict's pre-sentence period was taken into consideration as a punishment towards his substantive sentence. Refusal to grant the remissions was discriminatory. He submitted that in pursuance of the judgment in *Abdul Ali's case* (supra), all the remissions earned by the prisoners under different categories and recorded in their history ticket were confiscated. The said remissions could not be revoked under the principle of *locus poenitentiae* unless a prisoner was guilty of practicing fraud. According to him, it was a right, which should be available to all the convicts. He pleaded that the pathetic conditions prevalent in jails, the suffering and the miseries of jail inmates when juxtaposed with the 'dignity of man' called for a rational treatment of remissions being granted during incarceration of a person as an under-trial prisoner. He submitted that law

was a very tiny branch of logic. If the substantive sentence was being reduced, it meant that everything that happened during that period was also to be taken into consideration. If a remission was granted on the eve of *Eid*, or for that matter on any other similar occasion, the benefit of remission should be available to all the prisoners, who were confined in prison as under-trial prisoners, whether they were convicted on a day prior to *Eid* or a day after *Eid*. He submitted that as held by this Court in the case of *Abdul Malik's case* (supra), the power of the President to grant pardon, remission, etc., under Article 45 of the Constitution could not be regulated by any sub-constitutional legislation, e.g., the Pakistan Prison Rules, or the Jail Manual. The restriction under the said rules to serve a specified minimum period would not be applicable to such cases. He pointed out that the system of grant of remissions in India was absolutely different from that of Pakistan. So far as the liberty element was concerned, both were supportive otherwise the system was different. If a person was considered to be incarcerated, he should be deemed to be a sentenced prisoner and should also be deemed to be entitled to remissions. He submitted that the aims and objects of punishment and the circumstances in which offences were committed were required to be kept in mind, as was done by Omar (RA), the Second Caliph, when he suspended the sentence of *Qata-e-yad* (cutting of hands in certain categories of theft cases) during the times of famine. Lastly, he submitted that the examination of the question of remission in NAB, ATC, etc., cases may be postponed to an appropriate time. He also filed written submissions.

12. Sh. Zamir Hussain, Sr. ASC also appeared as *amicus curiae*. He submitted that there was no ambiguity in the language employed in

section 382-B, Cr.P.C. The intent and purpose of the legislation was clear. Section 428 of the Indian law referred to 'investigation', 'inquiry' and 'trial' while the Pakistani law only referred to the trial period. He submitted that under the Indian law, the period was categorically set off, but under the Pakistani law the trial Court was required to consider it while passing the sentence. The benefit could be withheld in certain cases. Resultantly, the approach and treatment of the issue differed from Judge to Judge and from Court to Court. Here it was 'consideration', there it was clear 'set off'. He submitted that section 382-B, Cr.P.C. may be interpreted in line with the Indian and the English law. In the interpretative process, the Court was justified to supply the omission, if any, in an enactment, but re-writing of the law was not permissible. He stated that on the strength of *Muhammad Rafiq's case*, section 382-B, Cr.P.C., could be interpreted to include remissions granted during the pre-sentence period, but not, if the view in *Abdul Ali's case* was not overruled. He stated that there were different categories of prisoners under the Prison Rules, e.g. criminal prisoners, convicted criminal prisoners. The word 'remit' indicated that it was a post sentence phenomenon, therefore, remissions were not covered under section 382-B, Cr.P.C. By way of hypothesis he elucidated that in a case, FIR was registered on 1.1.1990, the accused was arrested on 2.1.1990 and sent to judicial lock up on 20.1.1990. His trial concluded after seven years and he was sentenced to seven years. If the benefit of section 382-B, Cr.P.C., was allowed and the remissions granted in that period were also allowed, he would not suffer one day in prison. He stated that there was judicial consensus that judgment of sentence could not be antedated. Lastly, he submitted that given the language of Article 9 of the Constitution, the right to life was always subject to law.

13. Ms. Naheeda Mahboob Elahi, learned Deputy Attorney General submitted that the use of word 'shall' in place of the word 'may' by the legislature had made it obligatory upon the Court to address itself to the issue of pre-sentence period spent by a convict in jail. She submitted that as compared to section 428 of Indian law, section 382-B, Cr.P.C. was not happily worded. She stated that the remission granted by the President would prevail.

14. Qazi Muhammad Amin, Additional Advocate General submitted that the provisions of section 382-B, Cr.P.C., were never considered in the backdrop of Articles 9 and 25 of the Constitution. The issue was being examined from this angle for the first time in the present case under order dated 6.5.2009. He referred to the case of *T.V. Vatheeswaran v. State of Tamil Nadu* [AIR 1983 SC 361(2)] wherein it was held that the prison walls did not keep the fundamental rights out. He contended that an accused was taken into custody for a purpose, i.e. on a specific charge and if ultimately the prosecution was able to drive home the charge, then he would be convicted and sentenced. He stated that if any benefit was available under the law from the date of arrest, the same could not be denied, particularly the rights under the Constitution could not be withheld. However, he submitted that there was no distinction between pre-sentence or post sentence periods of detention. Detention was detention. According to him, the entire concept was based on the classification of punitive and non-punitive detention. The notional distinction between 'punitive' and 'non-punitive' had been abolished. To give excessive remissions would not be a balanced approach. It was for the Government to grant remissions or not. If the government was of the opinion that under the prevailing law and order situation it was not

advisable to do so, the government was not under compulsion to grant any remission.

15. Syed Tahaar Hussain, ASC appeared for the State (on behalf of the Province of NWFP). He submitted that the 'wish' of the Supreme Court, such as the one expressed in *Muhammad Rafiq's case* (supra) was the highest piece of judicial verdict, which must be honoured. He submitted that section 382-B, Cr.P.C. was an important piece of legislation. Best word 'consideration' was used in it, which was the main issue. Not only the Court should not ignore the day and time spent by a person in jail, but the day and time when the convict committed the offence should also be kept in view. It was a rational provision. Its meaning was clear. The Court was bound to take into consideration the period spent by the accused in jail during trial and was to assign cogent reasons if it decided not to consider it. It was mandatory for the trial Court, but discretionary for the Supreme Court. If the benefit was not given by the trial Court or the High Court, the Supreme Court may direct that such benefit be given. In support of his submissions, he referred to the cases reported as *Ghulam Sarwar v. State* (PLD 1984 SC 218), *Ahmed Yar v.* State (1985 SCMR 1167), *Liaqat Hussain v. State* (PLD 1995 SC 485), *Noor Muhammad v. State* (1995 SCMR 671), *Muhammad Rafiq* (supra) and *Mukhtiar-ud-Din* (supra).

16. With the permission of the Court, Sh. Muhammad Naeem, ASC submitted that the provisions of section 382-B, Cr.P.C. should be interpreted liberally to include remissions so as to give relief to the prisoners as was done by this Court by expanding its jurisdiction in the case reported as *Al-Jehad Trust v. Federation of Pakistan* (1999 SCMR 1379) to secure the rights of the people of Northern Areas.

17. We have heard the learned counsel for the petitioner, the learned Senior Advocates appearing as *amicus curiae* and the learned Deputy Attorney General for Pakistan and have examined the case law cited at the bar.

18. The learned counsel for the petitioner vehemently contended that in absence of sound reasons the benefit of section 382-B, Cr.P.C., had been withheld illegally. He submitted that the petitioner in the instant case was sentenced to 10 years' R.I. and imprisonment for life on two counts. His sentences were ordered to run consecutively. The benefit of section 382-B, Cr.P.C., was not given to him and the remissions of the pre-sentence custody period were also not allowed. He prayed that not only the petitioner may be granted the said benefit, but he may be allowed the remissions granted in the said period and the sentences awarded to him may also be ordered to run concurrently.

19. In this background, first question being considered by this Court is whether the petitioner is entitled to the benefit of section 382-B, Cr.P.C., and if so, whether he would be entitled to the remission granted by the President of Pakistan, or the Provincial Government or any other authority? As the issue pertains to the interpretation of section 382-B, Cr.P.C., the same is reproduced below: -

> "**382-B. – Period of detention to be considered while awarding sentence of imprisonment.** – Where a court decides to pass a sentence of imprisonment on an accused for an offence, it [shall][1] take into consideration the period, if any, during which such an accused was detained in custody for such offence."

20. The provisions of section 382-B, Cr.P.C., have undergone scrutiny by the superior Courts and have been interpreted in a plethora of cases. In *Qadir v. State* (PLD 1991 SC 1065), this Court has held that

[1] Section 382-B, Cr.P.C. was added by the Law Reforms Ordinance, 1972. The word "shall" was substituted for the word "may" by the Criminal Law Amendment Ordinance (Ordinance No. LXXI) of 1979.

section 382-B, Cr.P.C., is a beneficial provision and is to be construed liberally. Relevant observation reads as under: -

> "It may be noted that the mandatory provision has been introduced because of the realization that an accused person is entitled to be put to trial or released on bail. If he is not to be released on bail, he must be put to trial. If for any reason the State is unable to put him up for trial it is only fair that during the period he is detained to await his trial that period is taken into consideration in computing the sentence of imprisonment given to him. Another point to be noted is that the provision occurs in a criminal statute which requires strict construction as far as it imposes restrictions and punishments. Beneficial provisions need to be construed liberally. These are axiomatic principles."

21. In *Ramzan v. State* (PLD 1992 SC 11), the Court adhered to the exposition of law made in *Qadir's case (supra)*. In *Liaqat Hussain v. State* (PLD 1995 SC 485), it was noted that the trial Court or the Federal Shariat Court had not pointed out any circumstance which would justify the denial of the extension of the benefit of section 382-B, Cr.P.C., to the appellant in the said case. Thus, while maintaining the conviction and sentences of the appellant awarded by the trial Court and affirmed by the Federal Shariat Court, the Court directed that the benefit of section 382-B, Cr.P.C. would be extended to the appellant.

22. In *Muhammad Rafiq's case* (*supra*), this Court made a threadbare examination and discussion of the provisions of section 382-B, Cr.P.C. After considering the corresponding provisions in the English Act (section 67) and the Indian Act (section 428), the Court held as under: -

> "9. Section 67 of the English Act and section 428 of the Indian Act provide expressly that the sentence of imprisonment imposed by the Court shall stand reduced by the pre-sentence period spent in jail (the English Act) or which is the same thing, that the pre-sentence period shall be set off against the term of imprisonment imposed on him (the Indian Act). The English and the Indian Acts do not, therefore, leave, as regards the pre-sentence period spent in jail, anything to be done by the sentencing Court. Instead, they direct chat the period so spent in jail shall automatically count towards the

sentence of imprisonment imposed by the Court and the sentence of imprisonment shall stand reduced accordingly.

10. We wish that section 382-B of the Code were also couched in language as clear and unambiguous as the sections in the Indian and the English enactments are. If it were, then it would be right to say, as has become customary to do, that the convict should get the benefit' of that section. But unfortunately it does not.

23. In *Mukhtiar-ud-Din v. State* (1997 SCMR 55), Saiduzzaman, J., as he then was, speaking for the Court held as under: -

"(i) That strictly speaking section 382-B, Cr.P.C. is attracted to, when a Court decides to pass a sentence either in the trial or appellate or revisional proceedings against an accused for the offence charged with. In other words, if the sentence has already been passed by a trial Court and the matter is brought before an Appellate Court, strictly speaking, section 382-B, Cr.P.C. is not applicable. However, there is no legal bar and that an Appellate Court is competent to grant the benefit of the above provision to a convict. Furthermore, a convict will be entitled to agitate before the Appellate Court the question, that the trial Court had failed to consider the above provisions while imposing the sentence on him or that he was wrongly denied the benefit of the same, in such a case, the Appellate Court would be bound to examine the above question and to rectify the error/mistake, if any, committed by the trial Court.

(ii) That if an Appellate Court substitutes death sentence to that of imprisonment for life or rigorous imprisonment for a certain period, it is obligatory on its part to take into consideration above section 382-B, Cr.P.C., for example, if a High Court in a murder appeal/reference alters conviction from section 302, P.P.C. to that under section 304. Part 1, P.P.C. and substitutes death sentence to that of rigorous imprisonment of 7 or 10 years, it is mandatory for it to advert to the question of extending the benefit of the above provision to the convict while imposing above sentence.

(iii) That though under section 382-B, Cr.P.C. the Court has discretion not to grant the benefit of the same to a convict, but this discretion is to be exercised judiciously on sound judicial principles inter alia as explained hereinabove in Para 9.

(iv) That since the provision of section 382-B, Cr.P.C. is mandatory, in the absence of express manifestation of the application of the mind by the Court that it has addressed itself to the above provision at the time of imposing sentence on the convict concerned, no presumption can be raised in favour of the Court of having adverted to the same.

24. In the case reported as *Ghulam Murtaza v. State* (PLD 1998 SC 152), the question before the Court was whether benefit of section 382-B, Cr.P.C., could be extended to the appellant who was awarded life imprisonment by converting the sentence of death awarded by the trial Court. After a survey of the case law, the Court answered the question in the affirmative as under: -

> "Unless there are any exceptional circumstances in a case which the Court considers sufficient for the purpose of denying the benefit of section 382-B, Cr.P.C., to the accused, the Court in all other cases, while awarding sentence, will take into consideration the period during which the accused remained in detention during his trial, and this period will normally be adjusted in the sentence awarded to the accused by allowing him the benefit of section 382-B, Cr.P.C."

25. In *Javed Iqbal v. State* (1998 SCMR 1539), this Court dealt with the issue from yet another angle. The judgment introduced a new concept when it held as under: -

> "It may be noted that the mandatory provision has been introduced because of the realization that an accused person is entitled to be put to trial or released on bail. If he is not to be released on bail, he must be put to trial. If for any reason the State is unable to put him up for trial it is only, fair that during the period he is detained to await his trial that period is taken into consideration in computing the sentence of imprisonment given to him. Another point to be noted is that the provision occurs in a criminal statute which requires strict construction as far as it imposes restrictions and punishments. Beneficial provisions need to be construed liberally. These are axiomatic principles."

In *Ehsan Ellahi v. Muhammad Arif* (2001 SCMR 416) this Court approved earlier decisions on the admissibility of benefit of section 382-B, Cr.P.C.

26. Some of the propositions expounded in the above judgments are noted here so as to adequately highlight the implications of, and bring home the manner, in which the provisions of section 382-B, Cr.P.C., were to be applied. They are: -

(1) While passing sentence, the Court, in the absence of special circumstances disentitling the accused to have his sentence of imprisonment reduced by the period spent in jail during the

trial, exercise its discretion in favour of the accused by ordering that such period shall be counted towards his sentence of imprisonment or that the sentence of imprisonment shall be treated as reduced by that period;

(2) The discretion has to be exercised with the intention to promote the policy and objects of the law;

(3) Indeed, the Court will use its good sense in determining the circumstances in which the discretion will not be exercised in favour of the accused. But as the discretion is a judicial discretion, the order of the Court must show that the pre-sentence period has been taken into consideration and if the Court thinks that the sentence should not be reduced by the period spent in prison during the trial, the Court must give reasons for so thinking;

(4) The word 'shall' is intended to make the provision mandatory in the sense that it imposes a duty to do what is prescribed admits of no doubt whatever;

(5) The provision occurs in a criminal statute which requires strict construction as far as it imposes restrictions and punishments. Beneficial provisions need to be construed liberally". In any event, the fact that when the section was first enacted the word used was 'may' and later it was substituted by the word 'shall' provides the clearest possible evidence that the intention was that the Court must take the pre-sentence period of detention in jail "into consideration". Section 382-B of the Code is, therefore, a statutory limitation upon the Court's discretion to determine the length of imprisonment. It must 'take into consideration' the pre-sentence period spent in jail;

(6) The benefit of section 382-B is also available to a person whose sentence of death under section 302 PPC has been subsequently altered to imprisonment for life;

(7) As the accused is put in jail for the very offence for which he is convicted and sentenced to imprisonment, the pre-sentence period spent by him in jail is not in vain and must, therefore, be taken into account;

(8) It explodes the notion that such period can be ignored because it is not spent in jail by way of 'punishment'. Not to treat that period as punishment, will be a play on the meaning of the word 'punishment'. Whether the detention in jail was punitive or non-punitive, the consequence, as regards the person detained was the same, namely, deprivation of liberty and that is certainly punishment.

27. Now we take up the judgment in *Abdul Ali's case*. Abdul Ali, petitioner in the said case was arrested on 24.7.1997 in a case under section 302/34, etc., but was acquitted by the Sessions Judge, Pishin *vide* judgment dated 19.10.1998. However, the High Court, by judgment dated 5.10.1999, set aside his acquittal, convicted him under section 302(b), PPC and sentenced him to suffer imprisonment for life. The 'benefit', as it

is commonly referred to, of section 382-B, Cr.P.C., was extended to him. Remissions granted by various authorities from time to time including the remissions of the pre-sentence custody period of the petitioner were recorded in his history ticket, which were challenged by the respondent-complainant in a writ petition. Vide judgment dated 12.5.2003, the High Court, *inter alia*, declared that the petitioner was not entitled to the remissions of his sentences for the period prior to his conviction. The High Court, in view of section 402-C, Cr.P.C., also disallowed remission of 60 days granted by a general order dated 5.1.2000 of the Government of Balochistan under section 401 Cr.P.C., as well as the remission of one year granted by the President of Pakistan under Article 45 of the Constitution on 5.1.2000 on the eve of *Eid-ul-Fitr* to the prisoners undergoing sentence of life imprisonment. In a petition filed against the judgment of the High Court, this Court examined the question of entitlement of the petitioner to the remissions granted by the President under Article 45 of the Constitution or by the Provincial Government under section 401, Cr.P.C. during his pre-sentence period spent in jail in connection with the trial etc., of the case, i.e. prior to the date of his conviction and sentence by the High Court in the light of the provisions of sections 35, 383, 396 and 397, Cr.P.C., and took the view that "*the conviction and sentence of an accused could not be made to run from the date prior to the date of conviction by a competent Court although in certain eventualities the execution of sentence of a convict could be postponed. Ordinarily, a conviction commences from the time it is passed. A criminal Court does not possess any power to make a sentence to precede the conviction. In other words, the conviction and sentence cannot be ante-dated*." Reliance was placed on the cases of *Baghel Singh v. the*

Emperor (1907 (5) Crl.L.J. Reports 217), *Emperor v. Tha Hmun* (1908) (7) Crl.L.J. 453), *Dangar Khan v. Emperor* (AIR 1923 Lahore 104), *Emperor v. Naga Po Min* (AIR 1933 Rangoon 28), *Gulzar Muhammad v. Crown* (1951) (52) Crl.L.J. 238 (Lahore), *State v. Jernelsingh* (AIR 1955 NUC Rajasthan 4613) and *State v. Chandra Khandapani* (1968 Crl.L.J. 1152). The definition of "*convicted criminal prisoner*" viz., "*any criminal prisoner under sentence of a Court or Court Martial…….*" given in section 3(3) of the Prisons Act, 1894, (Act IX of 1894) and that of "*convict*" viz., "*a convicted criminal prisoner under sentence of a Court*" given in rule 3 of the Prison Rules was also taken into account. As to the pre-sentence period spent by a convict in jail, it was observed that the Legislature in its wisdom enacted section 382-B, Cr.P.C., requiring the Court to take the same into consideration so as to give it "*more rational treatment*". It was concluded that there was nothing in section 382-B, Cr.P.C., or any other law to indicate that such a person was to be treated as convict from the very inception. Finally, it was held that remissions granted by the President under Article 45 of the Constitution or the Provincial Government were not available to the petitioner for the period during which he had not been convicted of any offence nor was he undergoing any sentence.

28. At this stage, it is just and proper that a brief survey of the case law relied upon in *Abdul Ali's case* (mentioned in the preceding paragraph) is undertaken. In *Baghel Singh's case* (supra), the Chief Court of the Punjab held as under: -

> "The accused on conviction by Mr. Meredyth Young, exercising the powers of a Magistrate of the first class in the Montgomery District was sentenced, by order dated 11th September 1906, under section 411 of the Indian Penal Code, to the period of imprisonment has already passed in the lock-up…….
>
> "Section 383, Criminal Procedure Code, requires that a warrant be issued but no such warrant was issued. ……..

> "The order of the Magistrate is obviously illegal. No sentence was passed. Had the Magistrate sentenced the prisoner to imprisonment until the rising of the Court, the requirements of the law would have been met. I see no reason for entering into the merits of the case. I set aside the order purporting to pass sentence and return the record to the Magistrate for disposal in accordance with law, either by passing sentence or by passing an order under section 562 of the Code of Criminal Procedure."

In *Tha Hmun's case* (supra), the Chief Court of Lower Burma held as under: -

> "The accused, after he had been in custody for a week, was convicted of a petty theft of plantains. He was sentenced "to undergo the imprisonment he has already suffered." The form of the sentence is bad. There is nothing in the Code of Criminal Procedure which authorizes a Magistrate to antedate the commencement of a sentence. As the Magistrate thought that the accused had been sufficiently punished by his detention while under trial, the proper course would have been to sentence him to one day's imprisonment. He would then be released on the same day on which he was sentenced."

In Dangar Khan's case (supra), the Lahore High Court held as under: -

> "The Magistrate has directed in the case of each appellant that half of the period during which he was detained in custody as an under-trial prisoner shall count as part of the sentence. This order is quite wrong. If the Magistrate considered that the appellants were entitled to lenience on account of their having remained a long time in custody he should have passed a smaller sentence. To set aside this order would have the effect of enhancing the sentences, unless the sentences are also reduced. The sentences passed under section 364, Indian Penal Code, are therefore, reduced in each case to six years' rigorous imprisonment."

In *Naga Po Min's case* (supra), the Rangoon High Court held as under: -

> "S. 383 says that an accused who is sentenced to imprisonment shall be forwarded to the jail in which he is to be confined, and contains no words which warrant the antedating of the sentence. S. 397 deals with the postponement of the commencement of the sentence of imprisonment, but nowhere does the Code provide for the antedating of a sentence of imprisonment, and the antedating of a sentence of imprisonment seems to be contrary to the spirit of Ss. 383 and 397."

In *Gulzar Muhammad*'s case (supra), the Lahore High Court held as under: -

> "A person is "undergoing" imprisonment within the meaning of S. 397 from the moment the sentence is passed. The fact that he is

> on bail is immaterial. The accused need not actually pass into the portals of the jail. Consequently, when at the time of passing a second sentence, the accused is "undergoing imprisonment", though on bail, and the order does not make the second sentence run concurrently, the sentence will be treated as consecutive.

In *Jernelsing's case* (supra), the Rajasthan High Court held as under: -

> "Although there is no direct provision in the Code which lays down that the sentence passed against an accused should commence from the date of the judgment convicting him, a sentence of imprisonment must be made to operate from the date of conviction and not from a date prior to the date on which the sentence is passed. (Sections 383, 35 and 397, referred).
>
> Where Magistrate has ordered that the period already undergone in custody be counted towards the sentence the order was illegal. In such a case two courses are open for the High Court in revision: one being that his sentence be reduced so as to synchronize with the date of his release or he should be made to serve the remainder of the sentence passed on him.
>
> Held, in the circumstances of the case that the only correct course open was to direct that the accused shall serve the unexpired period of his sentence to be counted from the date of his conviction."

In *Chandra Khandapani's case* (supra), the Orissa High Court held as under: -

> "The sentence of imprisonment awarded ought to commence from the time the sentence is passed and its commencement cannot be antedated. The Criminal P.C. does not provide for antedating the sentence, which will amount to passing an unexecutable sentence. Therefore, no Magistrate can have any jurisdiction to convert, by his order, the jail custody of an undertrial prisoner into a period of punishment awarded in the judgment. The only proper course to which the Magistrate is entitled, if he wanted to take a sympathetic view having regard to the long period of his jail custody is to pass a lesser sentence taking the period of custody as an undertrial prisoner into consideration. Hence the Magistrate has no jurisdiction to direct that any portion of the period of detention as an undertrial prisoner should be counted as a part of the sentence."

The accused in the precedent case just cited was convicted under section 380/75 of the Indian Penal Code and sentenced to undergo R.I. for 3 months and 5 days. He was taken into jail custody on 1.2.1966 where he remained till the date of judgment. The Magistrate directed that the sentence be computed from the date when he was taken to the jail custody, which would expire on 6.5.1966. The Orissa High Court set aside

the order of the Magistrate and with a view to regularizing the matter, reduced the sentence to the post judgment period of 11 days already undergone.

29. With great deference, it may be stated that all the judgments referred to in *Abdul Ali's case* (supra) were given in a different legal setting. They dated back to the pre-Law Reforms Ordinance, 1972 period when there existed no provision in the Code of Criminal Procedure as it did in the shape of section 382-B, Cr.P.C., in the post-promulgation period of the Law Reforms Ordinance. It is noticed that it was being pleaded successively on behalf of the convicts, and the Courts were also inclined to it in many cases, that the pre-sentence period of the convicts spent in jail in connection with the offence of which they were convicted, should not go unaccounted for and must be taken into consideration. The hue and cry of the convict-prisoners ultimately led to the enactment of section 382-B, Cr.P.C., which made a specific provision requiring the Court to take into consideration the pre-sentence period while passing the sentence. This was a new era in an area of the criminal law, which dealt with the liberty of a person. Prior to it, the time spent by the convicts in custody for the same offence would not be accounted for in any way. Having waited for the conclusion of their trials for months, and in many cases for years together, they would re-enter the jail to serve out the sentence imposed upon them. The enactment of section 382-B, Cr.P.C., brought a complete shift in the approach of the Court toward the issue of pre-sentence period of a convict. Hence, in our humble opinion, the case law preceding the enactment of the said provision had no relevance and bearing on the interpretation of that provision, which has been termed as a beneficial provision by all and sundry all along without exception. We would respectfully state that the

judgment in *Abdul Ali's case* did not address the issue in the changed perspective, nor the Court addressed itself to certain celebrated judgments of the superior Courts on the subject matter handed down in the cases of *Muhammad Bashir (1982)*, *Muhammad Rafiq (1995)*, *Mukhtiar-ud-Din* (1997), *Ghulam Murtaza (1998)*, *Javed Iqbal* (1998), etc., which had dwelt upon the subject exhaustively. Only one recent judgment delivered by a Single Judge of the Lahore High Court in the case of *Inayat Bibi v. Amjad Ali* (2001 P.Cr.L.J. 1453) was taken note of where a contrary was taken. But, the Court did not take into consideration even the judgment of a Division Bench of the same High Court in the case of *Aamir Ali v. State* (2002 YLR 1902), which dissented from the view taken in *Inayat Bibi's case*. It is pertinent to reproduce the relevant paragraph from *Aamir Ali's case*, which reads as under: -

> "Now we may advert to the question whether the appellant can avail of the benefit of jail remissions granted to a convict prior to the date of his conviction if he is given the benefit of section 382-B of the Criminal Procedure Code. The appellant's actual date of conviction is 10.5.2001 and his date of arrest is 21.2.2001. He was given the benefit of section 382-B of the Criminal Procedure Code. Meaning thereby that the period of his sentence would be deemed to have commenced from the date of his arrest, i.e. 21.2.2000. This question came up before a learned Single Judge of this Court in the case of Inayat Bibi v. Amjad Ali and others (2001 P.Cr.L.J. 1453) in which it was held that question of granting remissions to a convict would arise only after the trial was over and judgment delivered by the Court. Thereafter, from the date of conviction onwards the convict could claim the remissions granted by the competent Authority. The argument that since the substantive period of imprisonment was to be counted from the date of arrest of the convict by virtue of the provisions of section 382-B of the Criminal Procedure Code, therefore, remissions granted by the competent Authority from the date of arrest are to be counted towards the appellant's substantive sentence, was repelled. With due deference, we are not inclined to subscribe to the view expressed in the above referred case. It is true that the benefit of remissions is to be granted after announcement of judgment and passing of the sentence of imprisonment against a convict. However, the moment benefit of section 382-B of the Criminal Procedure Code is given to a convict, the period during which he remained in detention as under-trial prisoner, would be counted towards his substantive sentence. Legally he would be deemed to be in jail as a convict since the date of his arrest and

> would certainly be entitled to the benefit of remissions granted by the competent Authorities to the convicts after the said date." (*Emphasis supplied*)

30. Here, we may mention that the judgment in the *Human Rights' case* (supra) just followed the *dicta* laid down in *Abdul Ali's case*. Even otherwise, it being a human rights petition, only an Additional Advocate General from NWFP had appeared on Court's notice. No other lawyer had appeared in the matter and the attention of the Court could not be drawn to any of the aforesaid judgments. In the above backdrop, we have intended to re-visit the judgments in *Abdul Ali* and the *Human Rights cases* so as to reach an appropriate conclusion.

31. Relevant to the concept of antedating of a judgment of sentence are the terms, "conviction" and "sentence". To throw light on the connotations of these terms, Mr. Gillani, learned *amicus curiae*, took us through a passage from the book titled "*Access to Justice in Pakistan*" by Justice Fazal Karim, a former Judge of the Supreme Court of Pakistan, which we quote hereunder: -

> "Conviction and sentence are two different things. Conviction means to find guilty of an offence. Sentence is punishment awarded to a person convicted in criminal trial. Conviction is followed by sentence. Only when a person has been found guilty of an offence can the question of sentencing him arise."

In *Abdul Ali's case*, the Court, while making the observation that "*the conviction and sentence of an accused cannot be made to run from the date prior to the date of conviction by a competent Court*", altogether overlooked the practical effect of the provisions of section 382-B, Cr.P.C. Sentence preceding conviction, in our view, means that the accused is sentenced first, but convicted later, which was not the situation in *Abdul Ali's case*. There, the Court was called upon to just make the sentence

(pronounced certainly after conviction) effective from the date the convict was taken into custody in connection with such offence, and not from any date prior to the commission of the offence. Even otherwise, conviction follows proof of guilt of the convict, which is relatable to the time of the commission of the offence. Only its finding is reached on a subsequent date. On proof of guilt, the presumption of innocence is displaced and the convict is considered guilty of the offence from the very inception, i.e. from the date of commission of the offence. The Court also did not take into account the consequences of "consideration" in terms of section 382-B, Cr.P.C., which was a crucial aspect having material bearing on the determination of the moot point involved in the case regarding admissibility or otherwise of the remissions of the pre-sentence period.

32. The Courts, in the afore-noted cases from the Indian jurisdiction, referring to the provisions of sections 383, 35, 396 and 397 of the Code, took the view that a sentence could not be antedated. It may be seen that sections 383 and 396 Cr.P.C., respectively relate to execution of sentence of imprisonment in other cases and execution of sentence on escaped convicts, section 397 deals with sentence on offender already sentenced for another offence while section 35 deals with sentence in case of conviction of several offences at one trial. (*Emphasis supplied*). The Courts, taking note of the issuance of warrant for execution of sentence mentioned therein, by way of analogical deduction, concluded that there should be "executable sentence" because in their view, as noted in some of the above cases, where the *convict was sentenced to imprisonment already passed in the lock up*, or *to undergo imprisonment he had already suffered*, or *half of the period during which the accused was detained in custody as an under-trial prisoner should count as part of the sentence*, it

was tantamount to passing an unexecutable sentence. It may be noted that the issuance of warrant for execution of sentence of imprisonment "until rising of the Court" may be only a formality otherwise sentence in such a case is undergone by the convict in the presence of the Judge. Thus, the Courts in those cases never directly determined what actually was meant by the term "antedating of sentence". Even the judgment in *Abdul Ali's case* also did not address this issue, as noted earlier, any more other than saying that the conviction and sentence could not be antedated.

33. In the case of *Muhammad Rafiq's case* it was held that the pre-sentence custody of a convict could be treated nothing else but punishment in all its ramifications. As a matter of fact, this very realization, which received judicial pronouncement in the year 1995 after much water had flown under the bridges since the promulgation of the Law Reforms Ordinance, 1972 had emanated from the sufferings and miseries of the prisoners (whether they were detained as under-trial prisoners or as convicts) due to scarcity of accommodation in the jails/lock-ups and the resultant overcrowding, lack of health facilities in terms of inadequate food and medical treatment and protracted trials and the hearing of appeals. Such realization paved the way for the enactment of section 382-B, Cr.P.C., with a view to providing relief to the prisoners. The pre-sentence custody period certainly called for a rational treatment, which it got in the shape of enactment of section 382-B, Cr.P.C.

34. At this juncture, we take note of a judgment delivered by the Court of Appeal of Botswana in the case of *Thake v Attorney General* (CACLB-033-07) [2008] BWCA 23 (25 April 2008). This appeal had originated in a claim for damages for unlawful detention and involved the question of a correct interpretation of the date of commencement of a

concurrent sentence within the meaning of sections 300 and 309 of the Criminal Procedure and Evidence Act (of Botswana). The appellant was sentenced to an effective period of 10 years imprisonment on 24 April 1997 and to another effective period of 10 years imprisonment 32 days later, namely, on 26 May 1997. It was ordered that the latter sentence would run concurrently with the sentence of 24 April 1997. The crisp question for determination in the appeal was what was the effective date of the commencement of the sentence of 26 May 1997? The appellant contended that the effective date was 24 April 1997. The respondent on the other hand contended for a contrary proposition, namely, that the effective date was 26 May 1997. The Court of Appeal examined the issue in the light of section 300 of the Criminal Procedure and Evidence Act. For facility of reference, the said provision is reproduced below: -

> "***300.*** *(1) When a person is convicted at one trial of two or more different offences, or when a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offences or for such last offence (as the case may be) as the court is competent to impose.*
>
> *(2) Such punishments, when consisting of imprisonments, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such punishments shall run concurrently."*

For the purposes of the present case, more pertinent was the issue of date of commencement of sentence, concurrent or otherwise, involved in the precedent case, which was governed by section 309 of the aforesaid Act. This section provides as follows:-

> "***309.*** *Subject to the provisions of section 308, a sentence of imprisonment shall take effect from and include the whole of the day on which it is pronounced unless the court, on the same day that sentence is passed, expressly orders that it shall take effect from some day prior to that on which it is pronounced."*

The Court of Appeal relied upon its earlier judgment in the case of *Kolojane v. State* (1999 BLR 70 (CA) and held that the question of ante-dating a sentence was a matter which lay within the discretion of the trial Court. In exercising its judicial discretion, the trial Court takes into account all the relevant factors that have a bearing on the matter such as, for instance, the fact that the crimes under consideration are interrelated as in the instant case. After re-stating the above principles, the Court of Appeal held that since the learned trial Magistrate did not "expressly" order that the sentence of 26 May 1997 shall take effect from the date of the prior sentence, namely, 24 April 1997, that being the case, the provisions of section 309 came into play. The sentence of 26 May 1997 took effect from the same day, being the day on which the sentence was pronounced. It was held that the appellant's submission to the contrary was misconceived as it was squarely hit by section 309 *ibid*. Further, the appellant in the precedent conceded that the learned trial Magistrate did not "expressly" order that the sentence of 26 May 1997 shall take effect from the earlier sentence of 24 April 1997, he nevertheless sought to persuade the Court of Appeal that, by necessary implication, this sentence commenced on the latter date because, so he argued, the two sentences in the matter were ordered to run concurrently. The Court of Appeal held that the fallacy of this submission lay in the fact that concurrent sentences did not necessarily have to commence or end on the same day. Nor do they

necessarily have to be of the same duration. Indeed there may sometimes be an element of overlapping in concurrent sentences. It all depended on the particular circumstances of each case. It was for that reason that the Legislature in its wisdom had enacted that a sentence of imprisonment shall commence on the day on which it was pronounced unless the trial court expressly ordered it to commence on a day prior to the pronouncement. This applied equally to concurrent sentences.

35. The legal position in the precedent case, to some extent, elucidates the concept of antedating of a sentence. In that case, the crimes under consideration were inter-related trial whereof and the conviction and sentence therein followed one another. None of the judgments relied upon in *Abdul Ali's case* visualized such an eventuality nor addressed the issue from that angle. Such situations possibly would arise in trial of offences falling under the heading "Joinder of Charges" (sections 233-240, Cr.P.C.).

36. This brings us to the question as to how the provisions of section 382-B, Cr.P.C. have been applied ever since its enactment. On the language used in the section, particularly, prior to the amendment of 1979, which substituted the word "shall" with the word "may", the trial Courts would apply the provision very casually, rather at their sweet will. Sometimes, they would advert to it, sometimes they would not. Consequently, a lot of litigation emanated from the non-application of the section in its letter and in spirit and the superior Courts were called upon to lay down the principles for the exercise of power and jurisdiction under the said provision. After the amendment, the trial Courts were mandatorily obliged to take into consideration the pre-sentence custody period at the time of passing of the sentence.

37. In view of above circumstances and the generality of the language employed in section 382-B, Cr.P.C., this Court in its celebrated judgment in *Muhammad Rafiq's case* wished that the said provision was couched in language as clear and unambiguous as the sections in the Indian and the English enactments were. More than a decade having passed since passing of the above judgment, no step at all had been taken in this regard at the appropriate level. The learned Deputy Attorney General confirmed that the matter was never brought on the agenda.

38. The practical effect of reducing the sentence to the extent of pre-sentence custody period, particularly, the way it is done in Pakistan, is that the sentence takes effect from the date of arrest of the convict in connection with the offence. This is not prohibited by any specific provision of the Code of Criminal Procedure, rather this course, *prima facie*, appears to be permissible considering the provisions of section 382-B, Cr.P.C., read with sections 233 to 240, 383, 397 and 35, Cr.P.C. This position is also in line with the Botswana law as noticed in *Thakes's case* (supra), which empowers the Court to make the sentence effective by a specific order from an earlier date.

39. The under-trial prisoners, or criminal prisoners, particularly those who are later convicted of the offence in connection with which they were incarcerated, sooner or later join the ranks of convicted criminal prisoners. It is discriminatory not to treat them at par with their co-prisoners living in the same or similar premises, may be under the same very roof. They are equal before law and are entitled to equal protection of law under Article 25 of the Constitution. If remissions of the pre-sentence period were to be denied to the convicts after they were granted the benefit of section 382-B, Cr.P.C., we would be confronted with a situation where remission

granted on the eve of *Eid* would be admissible to a prisoner who was convicted a day before *Eid*, but not to a person who was convicted a day after *Eid*, though the two prisoners were on an equal footing two days before *Eid*, i.e., till then both of them were confined as under-trial prisoners and both of them also got the benefit of section 382-B, Cr.P.C. The classification of 'criminal prisoners' and 'convicted criminal prisoners' *qua* the admissibility of remissions granted by any authority where the Court has passed an order granting the benefit of section 382-B, Cr.P.C., does not meet the test of 'intelligible differentia' laid down in the case of *I.A. Sharwani v. Government of Pakistan* (1991 SCMR 1041). The under-trial prisoners getting the benefit of section 382-B, Cr.P.C., cannot be deprived of remissions accruing during their pre-sentence custody period. Article 9 of the Constitution guarantees the right to life of a person and is very much available to a prisoner along with certain other fundamental rights, such as to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment, though he is deprived of certain fundamental freedoms like the right to move freely throughout the country or the right to practice a profession, etc., as it was held in the case of *D.B.M. Patnaik v. State of A.P.* (AIR 1974 S.C. 2092). Therefore, the protection guaranteed under Article 9 remains available to the under-trial prisoners and they are entitled to the benefit of section 382-B, Cr.P.C., along with remissions if any, granted during their pre-sentence custody period, inasmuch as on account of denial thereof, they would be required to remain in prison for a longer time than warranted and deprived of their liberty. Article 9 has received interpretation by this Court in the case of *Shehla Zia v. WAPDA* (PLD 1994 SC 693). Relevant passage from the judgment reads as under: -

> "Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word 'life' is very significant as it covers all facets of human existence. The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. ……
>
> "The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it."

Keeping the *ratio* of the above cases in view, we are inclined to hold that refusal to allow remission of pre-sentence custody period to a convict whom the Court has granted the benefit of section 382-B, Cr.P.C., is tantamount to deprivation of his liberty within the contemplation of above Article of the Constitution. The cases of convict-prisoners who are expressly debarred under any law from the benefit of section 382-B, Cr.P.C., stand on a different footing. Thus, where section 382-B, Cr.P.C., itself is not applicable, no remission of the pre-sentence custody period can be allowed to the prisoner in question.

40. The petitioner in the instant case was sentenced to 10 years' R.I. and imprisonment for life on two counts. His sentences were ordered to run consecutively. The aggregate sentence of the petitioner would thus come to sixty years, which is contrary to the provisions of section 35, Cr.P.C. Proviso (a) to section 35, Cr.P.C. prohibits the giving of consecutive sentence in one trial beyond the period of 14 years. This issue

came up for examination by this Court in the case of *Javed Shaikh v. State* (PLD 1985 SC 153) wherein it was held as under: -

> "Life imprisonment is, according to section 57 of the PPC to be reckoned as equivalent to 25 years' R.I. This is one of the punishments which can be imposed on an offender, on account of the substitution of the punishment for transportation for life – which was one of the punishments that could be imposed on an offender under section 53 of the PPC and was reckoned as equivalent to fourteen years before its amendment by the Law Reforms Ordinance, 1972. No objection can, therefore, be taken to the imposition of the sentence of life imprisonment, after the promulgation of the Law Reforms Ordinance, 1972. However, the question is whether the appellant can also be sentenced to undergo a further sentence of seven years under section 307, PPC for his having attempted to murder Manzoor Hussain, PW5?
>
> A perusal of proviso (a) to subsection (2) of section 35, Cr.P.C., indicates that it prohibits the giving of consecutive sentence in one trial beyond the period of fourteen years, the maximum sentence, short of the death sentence, which could be imposed on an offender before the promulgation of the Law Reforms Ordinance, 1972. The said provision (section 35, Cr.P.C.) appears to be in consonance with the scheme and intendment of the Pakistan Penal Code that an offender should only suffer the maximum sentence of imprisonment for any heinous crime (as it stood until 1972) which should not exceed fourteen years. Therefore, the imposition of the sentence of life imprisonment (which means 25 years' R.I., plus seven years' R.I. under section 307 PPC would be inconsistent with the intendment of the provisions of proviso (a) to subsection (2) of section 35, Cr.P.C., inasmuch as the maximum punishment prescribed for heinous offences shall be exceeded. The difficulty in this case can be overcome if the sentences awarded to the appellant in respect of the two convictions under section 302, PPC and under section 307 PPC in one and the same trial are directed to run concurrently instead of running consecutively."

41. In view of the above discussion, our conclusions and directions are as under: -

(1) After the use of word “shall” for the word “may” in section 382-B, Cr.P.C., at the time of passing the sentence, it is mandatory for the trial Court to take into consideration the pre-sentence custody period in the light of the principles discussed above;

(2) The refusal to take into consideration the pre-sentence custody period at the time of passing the sentence is illegal inasmuch as if a Court sentences a convict to imprisonment for life, which is the alternate but maximum sentence for the offence of murder, but does not make allowance for the pre-sentence custody period, it would be punishing the convict-prisoner with imprisonment for life plus the pre-sentence custody period, that is to say, more than the maximum legal punishment;

(3) The convict-prisoners who are granted the benefit of section 382-B, Cr.P.C., shall be entitled to remissions granted by any authority in their post-sentence detention or during their pre-sentence detention in connection with such offence. However, the same shall not be available to the convicts of offences under the National Accountability Bureau Ordinance, 1999, Anti-terrorism Act, 1997, the offence of *karo kari,* etc, where the law itself prohibits the same;

(4) The law laid down in *Abdul Malik’s case* that under Article 45 of the Constitution, the President enjoys unfettered powers to grant remissions in respect of offences and no clog stipulated in a piece of subordinate legislation can abridge this power of the President, is hereby reaffirmed;

41. Consequently, we convert this jail petition into appeal, and partly allow it. The sentences of the appellant shall run concurrently. He shall be entitled to the benefit of section 382-B, Cr.P.C. The remissions

granted by any authority in his post-conviction period or during his pre-sentence detention period in connection with such offence shall be available to him. His sentences shall be reduced accordingly. The impugned judgment is modified to the above extent.

42. Before parting with the judgment, we place on record our thanks for the learned *amicus curiae* who have rendered valuable assistance in the decision of this case.

Chief Justice

Judge

Judge

Judge

Judge

Judge

ANNOUNCED TODAY
AT ISLAMABAD, THE ---- DAY OF MAY 2009

Chief Justice

APPROVED FOR REPORTING

JAIL PETITION NO. 56/2005

ORDER

Copies of the judgment in the above jail petition, pronounced in Court today, i.e. 1st of June, 2009, shall be sent to the Federal Secretary Interior, Chief Secretaries, Home Secretaries, Inspectors General of Police, Inspectors General of Prisons and Registrars of the High Courts of the Provinces for information and onward transmission to the concerned quarters, including the prisoners, etc., for the purpose of its implementation in letter and in spirit. The concerned authorities shall submit report within a period of two weeks to the Registrar of this Court for our perusal in Chambers in respect of the implementation of the judgment, also giving the number of prisoners benefited from it.

CHIEF JUSTICE

JUDGE

JUDGE

JUDGE

JUDGE

JUDGE

Islamabad
1.6.2009

JAIL PETITION NO. 56 OF 2005.
(Shah Hussain versus the State)

I have had the benefit and privilege of going through the judgment recorded by the Hon'ble Chief Justice of Pakistan and generally agree therewith. In view of importance of the case, I deem it prudent to add few words in support thereto:

2. It is a settled maxim that justice delayed is justice denied. In view of undue delay in criminal trials, either due to shortage of judicial officer or failure in procedural working, the necessity occurs to give benefit to the accused/prisoners. Section 382-B Cr.P.C. was, therefore, introduced through Law Reforms Ordinance, 1972 in Criminal Procedure Code. See *Qadir & another versus The State* (PLD 1991 SC 1065).

3. Right of speedy trial of any accused is one of the basic and fundamental right to life and liberty as enshrined by Article 9 of the Constitution of Islamic Republic of Pakistan.. It is the constitutional obligation of the State that cases of the under trial prisoners must be finalized as soon as possible. This right was recognized in India by the Supreme Court of India while interpreting Article 21 of the Indian Constitution which is exactly similar to Article 9 of our Constitution in Hussain Ara Khatoon's case (AIR 1979 SC 1360 at 1367). The importance of speedy trial has been emphasized by the Indian Supreme Court in the following judgments:-

i) *Hussainara Khatoon and others versus Home Secretary, State of Bihar, Patna* (AIR 1979 SC 1369).
ii) *State of Andhra Pradesh versus P.V. Pavithran* (AIR 1990 SC 1266)
iii) *Abdul Rehman Antulay etc. versus R.S. Nayak and another etc.* (AIR 1992 SC 1701)
iv) *P.Ramachandra Rao versus State of Karnataka* (AIR 2002 SC 1856)
v) *Smt. Maneka Gandhi versus Union of India and* another (AIR 1978 SC 597)

4. The paramount purpose of criminal justice is the protection of the innocent and the punishment to the offender.

5. Once the benefit of section 382-B has been given to any of the accused at the time of awarding conviction/punishment then it deems to be effected on the date of arrest that is why the period he had remained in jail during the period of trial before the announcement of his conviction would be deducted otherwise it would not be possible. The insertion of Section 382-B is based on principles of equity and justice on the basis of which the detention period undergone by him as under trial prisoner was deducted from his sentence. The purpose and object of the provision of law/act for which it was enacted must be kept in mind at the time of interpretation of the same. It is settled principle of law that court can supply an obvious omission in a particular provision of statute or omit the same which is apparently redundant in the context of the provision keeping in view to advance object of the act and not to frustrate the same. There are several guiding principles laid down by the superior courts qua supplying of omission such as one interpretation is possible construction should be preferred which carries into affect the object of the statute.

6. The object of this section is to compensate the accused if he has remained incarcerated for long period as under trial prisoner and bail was not granted to him. The object of this new provision of law is to grant to the accused the benefit of a concession by treating, in appropriate cases, the period of detention undergone by him as an under trial prisoner as that spent by him as a convict, so as to relieve him from the burden of undue incarceration to which he may have been subject as a result of any delay in the trial. In view of the mandatory language of this section, the Court is duty bound in each case to apply its mind to this question, but this does not mean that it is bound in all cases to grant the concession. The trial court should, therefore, in each case record its reasons for withholding the said concession. Since the provision is

founded in equity, this section should be liberally applied, unless for certain strong or special reasons, to be expressly recorded, the Court considers otherwise.

7. Section 382-B Cr.P.C. cast a duty on a Court while awarding sentence of imprisonment to take into consideration the period, if any, during which such accused was in custody for such offence. This being a palliative provision is an important string to maintain a balance among different theories of punishment. A perfect system of criminal justice cannot be based on any one theory of punishment. Every theory has its own merits and every effort must be made to take the good points of all. The deterent aspect of punishment must not be ignored. Likewise, the reformative aspect must be given its due place. The personality of the offender is as important as his action and we must not divorce his action from his personality. The offender is not merely a criminal to be punished. He is also a patient to be treated. Punishment must be in proportion to the gravity of the crime. If interpretation of any provision of criminal law confers any benefit upon the accused, then that benefit should be given to the accused as accused is a favourite child of law. Section 382-B Cr.P.C. takes care of maladies of administration of justice and fundamental rights of accused relating to life and speedy trial. In fact, the intent and object of Section 382-B Cr.P.C. is based on a legal maxim *actus curiae neminem gravabet,* that is, an act of Court shall prejudice no man. The use of word 'shall' in the above stated contributory circumstances has rendered the provision of Section 382-B Cr.P.C. mandatory in character and, therefore, a Court is bound to give benefit of Section 382-B Cr.P.C. to the accused while awarding sentence of imprisonment, unless otherwise found by the Court.

(Justice Ch. Ijaz Ahmed)