P L D 1984 Lahore 204

Before Fazl-i-Mahmood and Muhammad Sharif, JJ

ASLAM PERVAIZ-Petitioner

Versus

THE STATE-Respondent

Criminal Miscellaneous No. 281 of 1982/BWP in Criminal Appeal No. 87 of 1980/BWP, decided on 25th February, 1984.

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

S. 382-B-Scope, import and scheme of S. 382-B.

Section 382-B, Cr. P. C. is not a remedial provision like those for an appeal, revision or review. This section of the Criminal Procedure Code only provides that where a Court decides to pass sentence of imprisonment on an accused for an offence, it shall take into consideration the period, if any, during which such accused was detained in custody for such offence. This obligation has been cast primarily upon the Court passing original order of conviction and sentence.

Ali Sher v. The State P L D 1980 S C. 317 ref.

The relief in terms of this section can also be obtained from a Court of appeal or in revision through competently instituted proceedings on showing by the accused/convict that it is due and justified in the facts and circum stances of each case.

The benefit under section 382-B, Cr. P. C. is not extendable mechanically or as a matter of course. A burden lies on an accused or convict to satisfy the Court that the delay in trial was not the result of his dilatory tactics, but occasioned solely on account of law's delays. This of necessity would require some sort of inquiry by the Court for its judicial satisfaction. 1t is only when the Court is satisfied that the accused/convict is in no manner to blame for the delay, that the Court would order that period of his custody in jail for the offence in respect of which the sentence of imprisonment is being passed be treated as period already undergone, or in view of such period the Court may correspondingly award lesser sentence of imprisonment. Adoption of either course is a mere matter of form without changing the substance. The provision under consideration does not stand on the footing of those mandatory provisions which affect the jurisdiction of the Court itself in the category of incurable illegalities which bring about vitiative infirmities in the decision rendered by the Court. The plea on a question of this nature ought to be raised and benefit claimed by the accused or convict as the case may be, at proper stages during the trial. If wrongly refused, then it can be got redressed in appeal or revision on making out a proper case. The alleged omission to take into consideration the period spent in custody by an accused for an offence in

respect of which sentence of imprisonment is passed, either because it was not specifically claimed at the proper stage or if claimed the Court did not grant it, would have no bearing on the validity of the judgment or conviction which verdict must precede the award of sentence. The quantum of sentence within the limits laid down by law is a matter essentially resting in the judicial discretion of the Court to be decided on the facts of each case after taking into consideration a variety of relevant factors and circumstances and the merits in the light of sound judicially pronounced principles including mitigating circumstances. In a case where a Court has awarded a sentence of imprisonment to an accused which runs beyond the maximum punishment prescribed by law for that offence the decision to that extent would be without jurisdiction or conversely if the law prescribes a fixed penalty or two alternate punishments or while prescribing the maximum sentence also lays down that it shall not be less than that provided for that offence then any infraction of the mandate of law will render the decision illegal and without jurisdiction to the extent of its being violative of statutory law. In the former category of cases, it is for the accused to seek redress from the Court which has the power to undo the wrong through competently instituted proceedings and in the latter case it would be for the State or the complainant similarly to agitate the matter in the like manner.

The scheme of section 382-B, Cr. P. C. no doubt obliges the Court deciding to pass a sentence of imprisonment on an accused for an offence to take into consideration the period if any, during which such an accused was detained in custody for such offence but the Court is invariably not bound to grant this benefit. The matter would rest in the judicial discretion of the Court to be decided in the peculiar facts and the attending circumstances of each case, inter alia, the role played, severity of the offence, otherwise lenient view taken by the Court in the light of sentence prescribed and conduct of the accused during trial.

Muhammad Aslam etc. v. The State 1982 S C M R 709 ref

By virtue of section 382-B, Cr. P. C. the Court when passing a sentence of imprisonment on an accused for an offence, is required to take into considera tion the period during which that accused was detained in custody "for such offence". The expression "for such offence" clearly refers to the offence in respect of which sentence of imprisonment is being passed.

Where the word `such' occurs in a section it must not be- ignored, but must be read as referring back to the preceding provisions, even though this gives rise to a result which appears anomalous.

Abdul Aziz and another v. Muhammad Ibrahim P L D 1977 S C 442 ref.

There is no warrant id law while interpreting section 3&2-B, Cr. P. C. to substitute the word `such' occurring in the last part of the section with the word `any' as this would undoubtedly run counter to the expressed manifest legislative intent and materially change its true import and scope. The substitution if made would read: "the period, if any, during which such accused was detained in custody for any offence."

The grant or refusal of benefit under section 382-B, Cr. P. C. involves examination of a variety of factors followed by a judicial finding as a result of an inquiry into factual aspects. It is not the form but the substance and the effect of an order passed by a Court which will provide a true test for decision of the question whether it amounts to altering or reviewing the judgment.

Section 382-B, Cr. P. C. is placed in Chapter XXVII under the heading "of execution". This, placement, however, does not appear to have much bearing on or of help in construing this provision. It is so because the next section 382-C also refers in point of time to the stage of passing of a sentence on an accused for any offence. The Court at that time may take into consideration the scandalous or false or frivolous plea taken in defence by accused or on his behalf. None of the two sections relate to execution of sentence but govern the situation at the time of passing of sentences, of course, before judgment is signed and pronounced. These two provisions appear to be misplaced in this Chapter.

Section 382-B would stand attracted at the time of passing the sentence of imprisonment.

In section 382-B, no such requirement for reasons to be recorded has been incorporated. Therefore, the failure to record reasons in the absence of a statutory requirement would not bring about an infirmity in the judg ment of High Court so as to make it without lawful authority. On general principles the question of grant or refusal of this benefit should not be without reasons.

Section 382 ought to be read together with section 497 to avoid anomalous results.

The scheme of the law analysed tends to lend further support to the views that benefit for the period an accused remained in custody is extendable on the Court being judicially satisfied that delay was not occationed by the acts of the accused. There is little scope for disputing that all three eventu alities visualised by the Code of Criminal Procedure are designed to grant relief to the accused and convicts resulting from inordinate law's delays.

Difference in phraseology in respect of section 382-B, Cr. P. C. in comparison to proviso of sections 497(1-A) and 426(1), Cr. P. C. is the result of conscious ness of the Legislature of the fundamental scheme of the Code of Criminal-Pro cedure regarding award of sentences of imprisonment having been left to the judicial discretion of the Courts on consideration of a variety of factors within the limits laid down by the Penal Code or special Statutes providing for penalties for different offences. On no reasonable hypothesis, therefore, section 382-B can be construed to be designed to alter the all pervading scheme of the Criminal Procedure Code in the matter of passing sentence of imprisonment which is grounded on sound principles and backed by ages old precedents and authority of the superior Courts.

(b) Criminal Procedure Code (V of 1898)-

-- S. 382-B-Penal Code (XLV of 1860), S. 326-Accused at time of appeal not asking for benefit under S. 382-B, Cr. P. C. and as result of that High Court not expressing any views in that behalf-No means available for High Court to find out whether such omission on part of accused's counsel was due to inadvertence or not-Inference from circumstances that accused being satisfied with judgment in appeal, did not challenge conviction and sentence any further-Treatment of accused with leniency reflecting in judgment though not specifically stated-Held, in such situation, a belated plea ought not be enter tained-High Court refused to allow undesirable practice of a second round before same Court on basis of an afterthought when matter had become a transaction past and closed and scheme of S. 382-B also barred such a course.

(c) Judgment-

Judgment of superior Court carries with it a strong presumption of being a considered and solemn decision-Onus lies heavily on person who wishes to dislodge such presumption. ;Burden of proof].

(d) Criminal Procedure Code (V of 1898)-

--- S. 382-B-Failure of accused to raise plea of benefit of S. 382-B, Cr. P. C. during hearing of appeal cannot by any plausible process of reasoning be construed to be a fault or failure of Court.

(e) Criminal Procedure Code (V of 1898)-

-- Ss. 369 & 561-A-Division Bench of High Court cannot undertake exercise to review or alter judgment rendered in criminal appeal by another Division Bench--Exercise of such power under S. 561-A, Cr. P. C. not available.-[Review-Judgment].

Juan Sullivan v. The State 1971 S C N R 618 ref.

(f) Criminal Procedure Code (V of 1898)-

-- Ss.. 382-B & 369-Application under S. 382-B, Cr. P. C. submitted after pronouncing and signing of judgment in criminal appeal-Incom petent-Court becomes functus officio after pronouncing and signing judgment in appeal-Such application barred and-.r S. 369, Cr. P. C. -[Judgment]. .

The application under section 382-B, Cr. P. C. which has been sub mitted, when High Court after pronouncing and signing the judgment in the criminal appeal had become functus officio, is incompetent as there is a clear bar standing in its way by virtue of section 369, Cf. P. C. to alter or review the judgment even though to the extent of sentence of imprisonment or the period of sentence the convict shall actually have to undergo under the appellate judgment.

The decision of the question based on section 382-B would amount to altering or reviewing the judgment which is expressly prohibited under the Criminal Procedure Code.

(g) Penal Code (XLV of 1860)-

--- Ss. 302/34 & 326-Criminal Procedure Code (V of 1898), S. 382-B Accused detained in custody for offence of murder under S. 302/34, P. P. C. but convicted and sentenced to imprisonment for an altogether different offence under S. 326, P. P. C.-Accused cannot claim benefit of S. 382-B, Cr. P. C. Stricto senso as a matter of right, in circumstances.

(h) Criminal Procedure Code (V of 1898)-

-- Ss. 369 & 382-B-Jurisdiction under S. 369, Cr. P. C. confined to correcting clerical errors-Omission to consider or grant benefit under S. 382-B, Cr. P. C. cannot have even a remote semblance of such error.

(i) Criminal Procedure Code (V of 1898)-

-- S. 369-Words "alter or review" occurring in S. 369-Scope. [Words and phrases].

Crown v. Habib Ullah P L D 1952 Lah. 587 and Black's Law Dictionary, 3rd Edn. ref.

(J) Words and phrases-

--- Word "review"-Meaning.-[Review].

Black's Law Dictionary, 3rd Edn. ref.

(k) Criminal Procedure Code (V of 1898)-

-- S. 561-A-Inherent jurisdiction not available to High Court to reconsider question of sentence passed by subordinate Court and High Court.-[Sentence].

Muhammad Samiullah Khan and another v. The State P L D 1963 S C 237 ref.

(l) Criminal Procedure Code (V of 1898)-

-- S. 561-A-Inherent power of High Court not at all available to cross express bars contained in Cr. P. C.-High Court to lean in favour of preserving finality of its judgments in criminal appeal.

Ghulam Muhammad v. Muzammal Khan P L D 1967 S C 317 and Javardhan Reddy v. State of Hyderabad A I R 1951 S C 217 ref

(m) Criminal Procedure Code (V of 1898)-

-------S. 561-A-Inherent powers not available to High Court to bring about material change or alter judgment of High Court in criminal appeal so as to interfere with term of imprisonment that accused has to undergo under that appellate judgment.

Malik Firoz Khan Noon v. The State P L D 1958 S C (Pak.) 333 ref.

(n) Constitution of Pakistan (1973)-

-- Art. 199-Constitutional jurisdiction of High Court-Limitations High Court cannot issue order in nature of writ to itself nor is an application for such writ maintainable to question validity of High Court's own judgments.

Ramzan v. Ch, Muhammad Aslam, Magistrate 1st Class P L D 1972 Lah.809 ref.

(o) Constitution of Pakistan (1973)-

-- Art. 199--High Court cannot take upon itself role of a recom mendatory body-High Court , passes orders, issues directions or commands which, by Constitution and law,. concerned authorities are bound to obey and High Court has power to enforce-Order or judgment of High Court would bind State and authorities being functionaries of State would be equally bound by that.

(p) Interpretation of Statutes-

--Statutory provisions ought not to be construed in isolation and if necessary Court must examine whole of Statute in order to discover true intent of Legislature.

(q) Jurisdiction-

--- Where there is want or absence of jurisdiction in a Court, approached by a party for any relief, merits of case, grounds raised or result sought to be achieved by litigant are not material.

(r) Criminal Procedure Code (V of 1898)-

-- S. 382-B-Application before High Court for claiming relief in terms of S. 382-B, Cr. P. C. filed after lapse of six years-Such application hopelessly belated-Such application relating to period before word "may" occurring in S. 382-B, Cr. P. C.-High Court while accepting appeal and dealing with connected murder reference not awarding to convict extreme penalty of death but altering imprisonment for life-Application silent whether plea claiming benefit under S. 382-B (as it existed at that time) was raised -Such application, held, devoid of merit, incompetent and liable to be dismissed.

A. R. Tayyab for Petitioner.

Sh. Riaz Ahmad, A.-G. with Rashad Aziz, A.-A.G., Riaz-ud-Din Khan and N. A. Bhatti for the State.

Dates of hearing : 26th and 28th April, 1982.

JUDGMENT

FAZL-I-MAHMOUD, J.-This Criminal Miscellaneous Application has been filed on behalf of Aslam Pervaiz convict under section 382-B of the Criminal Procedure Code simpliciter claiming the benefit of this provision on the plea that it was not granted to him by another Division Bench of this Court while pronouncing judgment in his appeal (Criminal Appeal No. 87 of 1980/BWP and Murder Reference No. 3 of 1981 /B WP on 22nd February, 1982).

2. The brief facts are that applicant Aslam Pervaiz, alongwith two others, had been tried on charge of murdering Muhammad Akram and convicted and sentenced under section 302/34, P. P. C. to suffer death penalty by learned Sessions Judge, Bahawalpur on 14-9-1980. He was also fined Rs. 2,000 and in default of it to undergo rigorous imprisonment for three months. He was further ordered to pay a sum of Rs. 2,000 as compensation to the legal heirs of the deceased or in default to suffer further rigorous imprisonment.

3. The convicts filed Criminal Appeal No. 87 of 1980/BWP and the matter also came up before the Court for confirmation of death sentences by way of Murder Reference No. 3 of 1981/BWP. Both the matters were heard by another Division Bench of this Court. The judgment was signed and pronounced on 22-2-1982, with the result that the appeal of co-accused Sher Muhammad and Muhammad Ilyas was accepted and they were acquitted. In so far as Aalam Pervaiz applicant is concerned, it was accepted partly to the extent that his conviction under section 302, P. P. C. was altered to one under section 326, P. P. C. and he was sentenced to undergo seven years' R. I. and fined Rs. 4,000. In default of payment of fine, he was to suffer further rigorous imprisonment for one year. The fine if realised, half of it was to be paid to the heirs of the deceased. His death sentence was not confirmed and Murder Reference was answered accordingly.

4. This Criminal Miscellaneous application under section 382-B, Cr. P. C. was filed about five weeks after the judgment had been signed and pronounced by the Division Bench. The prayer made is that benefit of section 382-B, Cr. P.- C. may kindly be granted to the petitioner and the period of his detention in custody during trial may be directed to be considered towards the -sentence. The application is based on the following grounds :-.-

"(a) That since section 382-B, Cr. P. C invests the petitioner with a right to take the benefit of such period during which the petitioner had remained in custody and he claims the right to be granted.

(b) That due to inadvertence the petitioner could not make a reference to the said section and for that reason no view was expressed about the same at the time of decision of the abovesaid Criminal appeal of the petitioner on 21-22/2-1982.

(c) That since no decision was taken on this point, according to period of detention during trial as sentence will not be the review of the .previous judgment.

(d) That it would be in the interest of justice if the recommendation is made to the, Director .of Prisons to instruct the Jail Authorities to keep this provision in view while calculating the sentence even though no observation about it is made in the judgment of any Court."

5. The learned counsel appearing in support of this application seems to be labouring under a misconception regarding the scope and import of section 382-B, Cr. P. C. We feel that section 382-B, Cr. P. C. is not a remedial provision like those for an appeal, revision or review. This section; of the Criminal Procedure Code only provides that where a Court decides to pass sentence of imprisonment on an accused for an offence, it shall take into consideration the period, if any, during which such accused was detained) in custody for such offence. This obligation has been cast primarily upon the Court passing original order of conviction and sentence as held by the Supreme Court in Ali Sher v. The State (P L D1980 S C 317). The relief in terms of this section can also be obtained from a Court of appeal or in revision through competently instituted proceedings on showings by the accused/convict that is due and justified in the facts and circumstances of each case.

6. In ground (b) noticed above; there is a frank admission of inadvertence on the part for the applicant in failing to make a reference to section 382-B of the Criminal Procedure Code which .in other words means not asking for the benefit under it and as a result of the omission, non-expression of any views by this Court at the time of the decision of the criminal appeal on 22-2-1982. We have no means of finding out whether this omission on the part of the applicant's counsel was due to inadvertence or not. It seems to us to be the result of his satisfaction with the decision at that time, as can be inferred from the circumstance that the applicant has not chal lenged his conviction and sentence any further. In this case, the maximum. punishment prescribed for the offence under section 326, P. P. C: is impri sonment for life or sentence upto ten years which has not been awarded. The treatment of the accused with leniency as thus clearly reflected in the Judg ment though not specifically stated. In such a situation, a belated plea ought not to be entertained and we refuse to land ourselves for a game of hide and seek and permit laying foundations of a somewhat undesirable practice of a second round before the same Court on the basis of an after, thought when the matter has become a transaction part and closed and the scheme of law also bars such a course.

7. It must be observed that every judgment of a superior Court carries with it a strong presumption of being a considered and solemn decision. The onus will lie heavily on a person who wishes to dislodge such presumption. The confessed failure of the applicant to raise the plea of benefit of section 382-B, Cr. P. C. during the hearing of the criminal appeal cannot by any plausible process of reasoning be construed to be a fault or failure of the Court. This plea ought to be raised and benefit claimed in each case. The benefit under section 382-B, Cr. P. C. is not extendable mechanical) or as a matter of course. A burden lies on an accused or convict to satisfy the Court that the delay in trial was not the result of his dilatory tactics, but occasioned solely on account of law's delays. This of necessity would re quire some sort of inquiry by the Court for its judicial satisfaction. It is only when the Court is satisfied that the accused/convict is in no manner to blame for the delay, that the Court would order that period of hi

custody in jail for the offence in respect of which the sentence of impri sonment is being passed be treated as period already undergone, or in view of such period the Court may correspondingly award lesser sentence of imprisonment. Adoption of either course is a mere matter of form with out changing the substance. The provision under consideration does not stand on the footing of those mandatory provisions which affect the jurisdiction of the Court itself in the category of incurable illegalities which bring about vitiative infirmities in the decision rendered by the Court. The plea on a question of this nature ought to be raised and benefit claimed by the accused or convict as the case may be, at proper stages during the trial. If wrongly refused, then it can be got redressed in appeal or revision on making out a proper case. The alleged omission to take into consideration the period spent in custody by an accused for an offence in respect of which sent en of imprisonment is passed, either because it was not specifically claimed t at the proper stage or if claimed the Court did not grant it, would have no bearing on the validity of the judgment or conviction which verdict must precede the award of sentence. The quantum of sentence within the limits laid down by law is a matter essentially resting in the judicial discretion of the Court to be decided on the facts on each case after taking into con sideration a variety of relevant factors and circumstances and the merits in the light of sound judicially pronounced principles including mitigating circumstances. In a case where a Court has awarded a sentence of imprison ment to an accused which runs beyond the maximum punishment prescri bed by law for that offence the decision to that extent would be without jurisdiction or conversely if the law prescribes a fixed penalty or two alternate punishments or while prescribing the maximum sentence also lay down that it shall not be less than that provided for that offence then an i infraction of the mandate of law will render the decision illegal and with out jurisdiction to the extent of it being violative of statutory law. In the former category of cases, it is for the accused to seek redress from the Court which has the power to undo the wrong through competent instituted proceedings and in the latter case it would be for the State or the complainant similarly to agitate the matter in the like manner.

8. Apart from the above features of this case, we must hold on the authority of the decision of the Supreme Court In re : Juan Sullivan v. The State (1971 S C M R 618) that this Division Bench of the Court cannot undertake the exercise to review or alter the judgment rendered in criminal appeal by c another Division Bench. In the precedent case, the appellant had been) convicted by a Special Judge. On appeal, a learned Judge of the High Court of West Pakistan, Karachi Bench, upheld the conviction of the appellant but reduced his sentence of imprisonment to the term already undergone. The fine was remitted, except to the extent of the eleven hundred U. S. Dollars, which had been taken from his person. The appellant then approached the learned Supreme Court by way of special leave to appeal inter alia on the plea that the High Court gave him no relief when he applied for the remission of the sentence of fine on the ground that the authorities had released 1100 Dollars in favour of his wife for her passage money, when she came out of Jail, with the permission of the State Bank and the money was thus not available towards payment of the fine imposed on him. He had no other resources on which he could draw for the payment of the fine. The High Court turned down this prayer on the ground that a judgment in a criminal case could not be reviewed in the face of the provisions of section 369 of the Criminal Procedure Code. Leave was granted in this case. The Supreme Court held that "the

High Court were apparently right in holding that section 369 of the Criminal Proce dure Code precluded them reviewing the order." The Supreme Court in these circumstances reduced the fine of the appellant Juan Sullivan to a sum of Rs. 100 or in default of payment to suffer one week's rigorous imprison ment. In the present case, the applicant if he felt aggrieved by non-grant of concession under section 381-B of Cr. P. C., ought to have approached the learned Supreme Court through a petition for special leave to appeal as was done in the precedent case noted above, to seek appropriate relief. The appli cation under section 382-B, Cr. P. C. which has been submitted, when this Court after pronouncing and signing the judgment in the criminal appeal had become functus officio, is incompetent as there is a clear bar standing in it way by virtue of section 369, Cr. P. C. to alter or review the judgment even though to the extent of sentence of imprisonment or the period of sentence the convict shall actually have to undergo under the appellate judgment.

9. The scheme of section 382-B, Cr. P. C. no doubt obliges the Court deciding to pass a sentence of imprisonment on an accused for an offence to take into consideration the period if any, during which such an accused was detained in custody for such offence but the Court is invariably not bound to grant this benefit. The matter would rest in the judicial discretion of the 1 Court to be decided in the peculiar facts and the attending circumstances of each case, inter alia, the role played, severity of the offence, otherwise lenient view taken by the Court in the light of sentence prescribed and conduct of the accused during trial. We find support for our views from the case of Muhammad Aslam etc. v. The State (1982 S C M R 709). In the precedent case, relief was prayed for from the Supreme Court under section 382-B of the Criminal Procedure Code by the convicts who had been convicted and sentenced under section 302, P. P. C. by the trial Court to imprisonment for life in addition to fine and in default thereof to further undergo rigorous imprisonment. The High Court had dismissed their criminal appeal. The Supreme Court while rejecting the plea for the grant of benefit of section 382-B, Cr. P. C. observed :-

> "It may be mentioned that the accused (petitioners in C. P. No. 85/81) filed a belated application that they should be given the benefit of section 382-B, Cr. P. C. But considering the severity of the attack and the number of injuries caused by them to the deceased and the fact that they have already been dealt with leniently, we do not consider it a fit case for granting the relief prayed for by them."

In the present case, the applicant cannot reasonably be heard to say, in view of the punishment prescribed for the offence, that he has not been treated with leniency by award of a sentence of seven years' R. 1. We cannot review or revise the question of quantum of sentence inclusive of the grant or refusal of benefit of section 382-B, Cr. P. C. without undertaking a second exercise to J examine the case on merits and proper sentence to be awarded. We do not think that adoption of this course is permissible under the prevailing scheme of the Criminal Procedure Code. We also find ourselves in no position to substitute our discretion for the discretion exercised by the learned Division Bench which decided the appeal of the present applicant. The applicant is doubly to blame himself for the alleged omission on the part of the Division Bench by admittedly not raising the plea and additionally in not following the normal legal

course of approaching the Supreme Court by way of special leave to appeal which remedy, according to the learned counsel, the applicant has failed to avail.

10. In the facts and circumstances of the matter under disposal, the provisions of section 382-B, Cr. P. C., on proper interpretation, do not appear to be strictly applicable. By virtue of this section the Court when passing a sentence of imprisonment on an accused for an offence, is required to take 'into consideration the period during which that accused was detained in custody "for such offence". The expression "for such offence" clearly refers to the offence in respect of which sentence of imprisonment is being passed. We rely on the decision of the learned Supreme Court in re: Abdul Aziz and another v. Muhammad Ibrahim (PLD19775C442), wherein it has been authoritatively laid down as to how the word "such" should be construed. The Supreme Court ruled

> "Considering its implication that it refers generally and naturally to its last antecedent the use of this word is with a definite purpose, i. e. to identify the ownership of the building with that before mentioned in the introductory part of clause (ii). In this connection we would also refer to the rule as to how the word 'such' should be construed as stated by Maxwell in his book on the Interpretation of Statutes, 12th Edition at page 30 ;
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> "Where the word 'such' occurs in a section it must not be ignored, but L must be read as referring back to the preceding provisions, even though this gives rise to a result which appears anomalous."

The petitioner was detained in custody for the offence of murder under section 302/34, P. P. C. but has been convicted and sentenced to imprisonment for an altogether different offence under section 326, P. P. C. In such a situation, prima facie, it appears extremely doubtful, under the existing state `t of law, if the applicant can claim the benefit of section 382-B, Cr. P. C. stricto senso as a matter of right. This may well be the reason for non-raising of the plea by the applicant and in turn the Court may have considered this provision not attracted to the peculiar facts and circumstances of the case. We find no warrant in law while interpreting this section to substitute the r word 'such' occurring in the last part of the section with the word 'any' as this would undoubtedly run counter to the expressed manifest legislative intent and materially change its true import and scope The substitution if made would read ; "the period, if any, during which such accused was detained in custody for any offence". We, however, wish to leave the ques tion open for deeper and detailed consideration in a case properly coming up before us for decision.

11. We may also refer here advantageously to the decision of the Supreme Court in the case of Amiruddin v. The State and another (P L D 1977 S C 602') and the following observations made in the report

"According to section 369 of the Code no Court when it has signed its 'judgment', shall alter or review the same except to correct a clerical error. But strictly speaking an order allowing or cancelling bail does not amount to a judgment within the meanings of this section. In Gulzar Hassan Shah v. Ghulam Murtaza and 4 others (P L D 1970 S C 335)

this Court has held that an order passed under section 498 of the Code is not a 'judgment' within the meanings of section 369 of the Code so as to operate as a bar against its alteration or review. In this connection the Court further observed that the general principle of finality of judgment no doubt attaches to the decisions or orders of the High Court passed in criminal cases. Nonetheless, in the opinion of the Court in rare and exceptional cases the High Court has inherent power to revoke, review or alter its own earlier decisions in cases which were not governed by sections 369, 424 and 430, with a view to give effect to any order under the Code or to prevent abuse of the process of the Court or otherwise to secure the ends of justice. At the same time the Court further observed that it was not possible to enumerate the circumstances in which the inherent power can be invoked."

On a careful appreciation of the ratio of the precedent case, we are strongly of the view that the application under disposal is not maintainable for the simple reason that the decision of the criminal appeal of the applicant is albeit a judgment of this Court. It is not one of those cases were it can, be said that either the case was decided without hearing the party or the order was without jurisdiction. The decision of this Court rendered in the criminal appeal of the applicant cannot reasonably be said to be not governed by any of the provisions specified by the learned Supreme Court i. e. sec tions 369, 424 or 430, Cr. P. C. It is far from us to deviate from or even attempt to find an. escape from the binding dicta of the Supreme Court even, with best of intentions. We must firmly repel the insinuation made to draw fine distinctions in the Supreme Court judgments which on deeper considera tion turn out to be more artificial than real. We are unable to appreciate the distinction between asking for re-opening of a final judgment of this Court in criminal appeal on the basis of benefit of section 382-B, Cr. P. C. or any other legal or factual grounds, including those touching upon the merits despite express statutory bars. We are not minded to undermine the solemnity and finality of the judgments of this Court on belated or ill merited pleas of convicts. The rigours of the law cannot be relaxed to open floodgates. Where and how would the Court draw the line in each case in those cases which are not exceptional and are not outside the pale of the prohibition laid down by the Supreme Court. Our jurisdiction in terms of, section 369, Cr, P. C. is confined to correcting clerical errors. It cannot be' urged with any degree of reasonableness that the alleged omission to consider or grant benefit under section 382-B, Cr. P. C. can have even a remote/ semblance of such an error.

12. We would now like to address ourselves to the further question whether acceptance of the plea of the applicant by passing an order to give him the benefit in terms of section 382-B, Cr. P. C. would amount to altering or reviewing of the judgment. We have in the earlier part of the judgment made it sufficiently clear that the grant or refusal of benefit under sec tion 382-B, Cr. P. C. involves examination of a variety of factors followed by a judicial finding as a result of an inquiry into factual aspects. It is not the form but the substance and the effect of an order passed by a Court which will provide a true test for decision of the question whether it amounts to altering or reviewing the judgment. This Court has already examined the scope of the words "alter or review" occurring in section 369, Cr. P. C. in a decision reported as Crown v. Habib Ullah (P L D 1952 Lah. 587). In the words of Kayani J., it was observed :-

> "(2) Alternation or Review.-These words do not appear to have been used in any special sense. An alteration means a change, whether in character or appearance, and a document would be altered if it is made different in some respect, whether that and is achieved by a mere insertion or by the substitution of something for something else. There would thus be an alteration of the judgment when an argument is added even in support of the existing arguments. The judgment would, therefore, be altered if certain words are inserted in it, whether they do or do not alter the sense. An alteration which changes the sense also, whether wholly or partially, will be covered by the term 'review'. Now since the insertion of the words in question will not alter the purport of the judgment, which is that a sentence of death has been passed, but only indicate the mode in which that purport is' to be accomplished, it will -not amount to a review of the judgment.1 There will nevertheless be an alteration."

We may further refer to the judicially defined meanings of the word "alter" as given in the Black's Law Dictionary (Third Edition) :-

> "To make a change in; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected."

We may also refer to the import of the word "review" as given in the said Dictionary. It has been said to mean "To re-examine judicially. A re consideration; second view -or examination; revision; consideration for s purposes of correction." After examining the interpretation placed on the words "alter" or "review" as noticed above, we entertain no doubt that the exercise to be undertaken by us by judicially deciding the question of grant or refusal of benefit under section 382-B, Cr. P. C., apart from-the other, reasons already listed by us, would definitely amount to both altering and g reviewing the judgment: in material respects. It will entail of necessity an inquiry into factual questions and examination of the contentions of the convict and the State and then rendering a decision. It must be observed at this stage that the learned Advocate-General, Punjab Sh. Riaz Ahmad assisted by Mr. Rashid Aziz Khan, Additional Advocate-General and Mr. Riaz-ud Din Ahmad Khan, Advocate who appeared for the State have strongly opposed the application. Therefore, by no stretch of imagination, it can reasonably be urged on behalf of the applicant that the decision of the ques tion of relief prayed for would not amount to a second view or examination or consideration for the purpose of correction. We are therefore, perfectly clear in our mind that the decision of the question based on section 382-B would amount to altering or reviewing the judgment which is expressly prohibited under the Criminal Procedure Code.

13. In so far as the reliance on section 561-A, Cr. P. C: is concerned, it would suffice to observe that it is not available in those cases where exercise of this power would entail overriding the express prohibitions contained in the Criminal Procedure Code. This power is available on the plain reading of section 561-A to make such orders as may be necessary to give effect to any order under the Code. The phrasealogy employed by the Legislature needs to be noted with care. 'The exercise of this power is pre-conditioned, V by necessity, to give effect to any order under this Code in contradistinction to the

desire to give effect to any provision under the Code. There are no impediments shown in the way of giving effect to the order of the Division Bench in terms that it was made. There thus arises no occasion for falling back on the provisions of section 561-A, Cr. P. C. The other two criteria of abuse of process of the Code or otherwise to secure the ends of justice do not stand attracted as these elements are conspicuous by their absence in the facts and circumstances of the instant case.

We at this stage wish to rely on the decision of the Supreme Court in the case of Muhammad Samiullah Khan and another v. The State (P L D 1963 S C 237). The Full Court, speaking through Hamoodur Rahman, J. while examining the scope of section 561-A and section 435 read with section 439, Cr. P. C., held

"The jurisdiction under S. 561-A of the Criminal Procedure Code, [898 is of an extraordinary nature intended to be used only in extraordinary cases where there is no other remedy available. It is of a *limited scope and cannot be utilised where there is other express remedy provided by the Code of Criminal Procedure. In the exercise of the Inherent jurisdiction under this section the High Court can neither exercise the powers of a Court of appeal nor can it enhance a sentence nor can it even reconsider the question of sentence. It is designed to prevent an abuse of the process of Court and cannot be regarded as being wide enough to give to the High Court the same power that it has under section 435 read with section 439 of the Code of Criminal Procedure to examine the correctness, legality or propriety of any finding, sentence or order passed by an inferior Court. Such wide powers only be exercised under section 439 of the said Code."

(Underlining* is by us).

It is crystal clear from the above enunciation that the inherent jurisdic tion of this Court is not available to reconsider the question of sentence passed by a subordinate Court. This rule will apply more vigorously where the question of reconsideration of sentence awarded by this Court is concerned. We may once again refer to the case of Juan Sullivan where the question involved was merely of remission of fine imposed and despite that it was held that the High Court was right in refusing to entertain an applica tion for that relief in view of the bar contained in section 369, Cr. P. C. and indeed the Court would be alive to .the concept of inherent powers of the High Court. The reasons earlier given would also fully apply while examining the question of inherent jurisdiction.

We find further support from the decision of the Supreme Court in the case of Ghulam Muhammad v. Muzammal Khan (P L D 1967 S C. 317). In this precedent, it has been laid down that the inherent jurisdiction should not normally be invoked where another remedy is available. Inherent powers are preserved to meet a lacuna in the Criminal Procedure Code in extraordinary cases and are - not intended for vesting the High Courts - with powers to make any order which they are pleased to consider to be in the interests of justice. These- powers are as much controlled by principles and precedents as are its express statutory powers. It has been further held that the inherent jurisdiction given by section 561-A is Pot an alternative jurisdiction or an additional jurisdiction but it is a jurisdiction preserved in the interest of justice to redress grievances for

which no other procedure is available or has been provided by the Code itself. The power given by this section can certainly not be so utilised as to interrupt or divert the ordinary course of criminal procedure as laid down in the procedural statute. In our humble view, from the above enunciation of law by the Supreme Court it follows as a logical corollary that the inherent power of the High Court would not at all be available to cross express bars[, contained in the Criminal Procedure Code. This Court, therefore, must lean in favour of preserving the finality of its judgments in criminal appeals.

We have noticed a decision of Indian jurisdiction in re: Javerdhan Reddy v. State of Hyderabad (A I R 1951 S C 217). The Supreme Court of India has observed that the principle of finality of judgments of a criminal Court of appellate jurisdic tion finds place in every system of civilised law, and section 430 of the Code of Criminal Procedure gives expression to the recognition of this principle in the law of India. The position is no different in Pakistan where this section of the Code of Criminal Procedure is operative in similar form.

14. To conclude the question of availability of inherent powers of this Court under section 561-A, Cr. P. C., we wish to refer to the decision of the Supreme Court in re: Malik Firoz Khan Noon v. The State (P L D 1958 S C (Pak.) 333). In the precedent case, the Supreme Court at page 353 of the judgment while examining the scope of the inherent powers of the High Court as recognised by section 561-A vis-a-vis section 369 of the Code of Criminal Procedure, held as under :-

"On the contrary, the Code of Criminal Procedure contains a provision in section 369 which expressly provides that `Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter by the Letters Patent of such High Court, no Court when it has signed its judgment, shall alter or review the same, except to correct a clerical error', and, we have the authority of the Privy Council itself in Lal Jairam Das v. King Emperor 72 I A 120, that a High Court has no inherent jurisdic tion under section 561-A to alter its judgment which is prohibited by section 369 of the Code. The general principle that no Court can claim inherent jurisdiction to exercise powers expressly taken away by legislation has also been clearly stated by the Privy Council in Kumal Singh Chhahajar v. King-Emperor 73 I A 199. It seems to me to be perfectly clear, therefore, that by reason of section 369, Code of Criminal Procedure, a High Court has no inherent jurisdiction to amend its judgment by deleting passages from, it."

We may further refer to the observations made by Rahman, .J. at page. 382 of the same report:

> "The answer to the question posed, in my opinion, should be in the negative, in the face of the express provision contained in section 369 of the Code of Criminal Procedure. The power in question could have been described as an inherent power of a Court of record but it will not be available when the legislature has enacted law in the contrary sense in the shape of section 369, Criminal Procedure Code. The judgment of the learned Single Judge--the instant case is as much a judgment of the High Court as would be the judgment

> of the appellate Bench of that Court arid both judgments would be subject to the limitations imposed by S. 369 of the Code in respect of alteration or review though the appellate judgment may possibly render the judgment appealed against ineffective. Only a clerical error can be corrected under that section and no substantive change in any Part of the judgment would be permissible after it had been signed. This view has the support of the Privy Council judgments in Lala Jairam Das v. King-Emperor 72 1 A 120 and Kumar Singh Chhahajar v. King-Emperor 73 1 A 199

*[Underlining is ours]

On a careful perusal of the above precedent case, we are clearly of the view that the ratio decidendi of this case is that the inherent powers of the High Court are not available to us to bring about a material change or alter the judgment of this Court in a criminal appeal so as to interfere with the term of imprisonment that the applicant has to undergo under that appellate judgment.

Next, it still remains to consider the question whether we can come to the aid of the applicant by treating this application under section 382-B, Cr. P. C. to be one under our Constitutional jurisdiction. We must observe that one of the well-recognized and known limitations on the power of the High Court acting in Constitutional jurisdiction is that it cannot issue an order in the nature of writ to itself nor is an application for such wilt maintainable to question the validity of the High Court's own judgments. We need not dilate on the nature of this jurisdiction and the conditions and qualifications for its exercise and the functionaries or authorities to whom it can be issued for the purpose of the present case. It appears sufficient to rely on a decision of this Court in re: Ramzan v. Ch. Muhammad Aslam, Magistrate Ist Class (P L D 1972 Lah. 809). The Division Bench at page 835 laid down as under

> "29. The last question to be dealt with relates to the jurisdiction of this Court to review the orders passed by it under section 491, Cr. P. C. After the dismissal of the petition filed by Naseer (paramour) under S. 491, Cr. P. C. and the orders passed by this Court directing that the detenu be handed over to her father, it cannot be seriously questioned that the same subject cannot be re-opened in review under section 491, Cr. P. C., because in criminal matters, review of judgments, or orders in the nature of judgments, is not permissible. This Court has no inherent jurisdiction (apart from Criminal Procedure Code) to review its orders. The situation, however, has slightly changed by Ramzan petitioner having moved the Court under Article 98 of the Constitution and also by the fact that the same case is now being heard by a special Division Bench. Factually speaking, the change is there and it cannot be denied. But the fact remains that the matter is before the same Court. The High Court (although in a Single Bench) passed the earlier orders under section 491, Cr. P. C., and the (same) High Court is again being asked to re-open the matter in writ jurisdiction, before another Bench consisting of two Judges of the Court. In both the relevant provisions, the expression used is the High Court. Whether the High Court decides the matter in a Single Bench or a Division Bench, the question of Letters Patent Appeal being not relevant, the fact remains that the

> decision at both the stages is to be by the High Court. I am, therefore, of the view that this Special Bench acting under Article 98 of the Constitution cannot override the provisions of the Criminal Procedure Code in so far as the question of review is concerned and cannot modify the order passed by the High Court on 20-4-1911, and reiterated on 26-4-1971 under section 491, Cr: P. C."

We respectfully follow the earlier decision of Division Bench of this Court in the above-noted precedent which proceeds on sound legal principles.

16. In so far as ground (d) taken by the applicant in the application, under disposal is concerned, we consider it sufficient to observe that this Court has never taken upon itself the role of a recommendatory body. It passes orders, issues directions or commands which, by constitution and law, the concerned authorities are bound to obey and this Court has the power to enforce. The Director of Prisons was not even a party to the proceedings to the criminal appeal nor is he a party to this application. However, the position would have been entirely different if in the course of competently instituted proceedings the question of the benefit of section 382-B, Cr. P. C. was decided in favour of the accused and not a recommendation but a direction would issue obliging the Jail Authorities to treat the period during which the accused remained in custody as the period already undergone or to direct them to compute the same towards the total sentence which such accused would factually have to undergo. The order or judgment of this Court would bind the State and the Jail Authorities being the functionaries of the State would be equally bound by it. We are rather surprised that the learned counsel appearing in support of this application in this very ground has sought a recommendation despite an admission to the effect even though no observation about it is made in the judgment of any Court". The plea lacks total merit and we have no hesitation in repelling it.

17. We may point out that section 382-B, Cr. P. C. is placed in Chapter XXVII under the beading "Of execution". This placement, however, does not appear to have much bearing on or of help in construing this provi sion. It is so because we find that the next section 382-C also refers in point of time to the stage of passing of a sentence on an accused for any offence c The Court at that time may take into consideration the scandalous or false t or frivolous plea taken in defence by accused or on his behalf. None of the two sections relate to execution of sentence but govern the situation at the time of passing of sentences; of course, before ejectment is signed and pronounced.. . These two provisions appear to be misplaced in this Chapter.

18. We wish to examine the matter now rather in a somewhat different, light. It is necessary to recapitulate the cardinal principle of interpretation of statutes that a statutory provisions ought not to be construed in isolation and if necessary the Court must examine the whole of the statute in order to discover the true intent of its makers. While proceeding in this manner, we must advert not only to the provisions of section 382-B but also to the provi sions of the third proviso to subsection (1) of section 497 which was added by Section 3 of the Code of Criminal Procedure (Second Amendment) Ordinance (LXXI of 1979). The same Ordinance had brought about the substitution of the word "may" by the word "shall" occurring in section 382-B. The third proviso to section 497(1) reads :-

> "Provided further that the Court shall, except where it is of opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail

We may now take notice of the amendment introduced in section 426 of the Code of Criminal Procedure by insertion of subsection (1-A) by the Law Reforms Ordinance, 1972. It reads: -

> (1-A) An Appellate Court shall, unless for reason to be recorded in writing it otherwise directs, order a convicted person to be released on bail who has been sentenced .

On a careful. consideration of these three provisions, it emerges clear to us that all three of them are designed to deal with situations arising out of abnormal law's delays at different stages of criminal cases. Section 497(1) Would apply in the event when an accused is in custody for any offence for a e4ntinuous period specified therein and whose trial for that offence has not concluded within a given period in respect of the two categories covered by clause (a) or (b), whereas section 382-B would stand attracted at the time of passing the sentence of imprisonment. Subsection (I-A) of section 426,V Cr. P. C. comes into play during pendency of criminal appeal whose disposal delayed. While examining the effect of these provisions, we do not desire t0 travel into fields which are not relevant for adjudication of the limited question before us. However, we rely to some degree for a limited purpose of subsection (1-A) of section. 426 which provides that an appellate Court shall, unless for reasons to be recorded in writing in it otherwise directs, order a convicted person to be released on bail who has been sentenced to various terms of sentences specified therein and whose appeal could not be disposed of within the given time. In section 382-B under examination, no such requirement for reasons to be recorded has been incorporated. Therefore, the failure to record reasons in the absence of: a statutory requirement would not bring about an infirmity in the judgment of this Court so as to make ii without lawful authority. We do not wish to be understood as saying that even on general principles the question of grant or refusal of this benefit should be without reasons.

19. Now reverting to the provisions of third proviso, to section 497(1), C. P. -C. relating to grant of bail on account of delays in conclusion of trial; beyond the statutory period, indeed a valuable right has been conferred on ark accused to be admitted to bail as of right and not in discretion except were the Court is of the opinion that the delay in trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf. In out: humble view, section 382-B ought to be read together with section 497 to avoid anomalous results. We may illustrate that purpose in a case for grant of bail on account of delay in conclusion of the trial under the third proviso to section 497(1), Cr. P. C. going up to the Supreme Court, it was found by the learned Court that the accused was not entitled to be released on bail on forming the opinion that the delay in the trial had been occasioned by an act or omission of such accused or any other person acting on his behalf. The same period during which the

accused remained in custody pending the trial will again become relevant for consi deration by virtue of section 382-B before the trial Court in the original trial proceedings or before the High Court in appeal or revision. It would be rather strange that despite having once been held after due application of mind and hearing the accused and the State that the delay in the trial was due to the conduct of the accused or any other person acting on his behalf, the trial Court would ignore these material circumstances while considering the plea of grant of the benefit for the same period spent in custody for the purpose of passing of sentence of imprisonment in respect of that offence or to order that such period be treated towards the sentence already undergone by the same accused. The scheme of the law analysed by us above, tends to lend further support to the view that we have expressed in the earlier parts of the judgment that benefit for the period an accused remained in custody is extendable on the Court being judicially satisfied that delay was not occasioned by the acts of the accused. There is little scope for disputing that all three eventualities visualised by the Code of Criminal Procedure are designed to grant relief to the accused and convicts resulting from inordinate law's delays.

20. However, it seems that the difference in phraseology in respect of section 382-B in comparison to the two other provisions mentioned above, is the result of consciousness of the Legislature of the fundamental scheme of the Code of Criminal Procedure regarding award of sentences of imprison ment having been left to the judicial discretion of the Courts on consideration of a variety of factors within the limits laid down by the Penal Code or l special Statutes providing for penalties for different offences. On no reason able hypothesis, therefore, section 382-B can be construed to be designed to alter the all pervading scheme of the Criminal Procedure Code in the matter of passing sentence of imprisonment which is grounded on sound principles and backed by ages old precedents and authority of the superior Courts.

Before concluding, we may also observe that where there is want or absence of jurisdiction in a Court, approached by a party for any relief, the merits of the case, grounds raised or the result sought to be achieved by a~ litigant are not material. We do not wish to multiply reasons, as enough has been said to bring home our considered opinion.

21. We are also disposing of together with this application another application being Criminal Miscellaneous No. 59 of 1982/B.W.P. in Criminal Appeal No. 491 of 1974/BWP decided by a Division Bench- of this Court on 19-4-1976. The application for claiming relief in terms of section;382;B, Cr. P. C. was filed before this Court on 1y-1-1982 after a lapse of about six years. Suffice to observe that in addition to the reasons already recorded, the application is hopelessly belated and furthermore it relates to a period before the word "may"-occurring in section 382-B was substituted by, the word "shall" t in the year 1979. The High Court while accepting the appeal and dealing with the connected murder reference had decided not to award the convict the extreme penalty of death but altered it to imprisonment for life. The applica tion is silent whether a plea was raised claiming the benefit under the state of law as it existed at that time. The application is devoid of merit and is incompetent and accordingly liable to be dismissed.

22. The net result is that both these applications being Criminal Miscellaneous Nos. 281 of 1982/13 W.P. and 59 of 1982/13 W P are held- to be incompetent and accordingly dismissed.

23. We wish to record our appreciation for the valuable assistance rendered by Sheikh Riaz Ahmad, Advocate-General, Punjab assisted by Mr. Rashid Aziz Khan, Additional Advocate-General, Mr. Riaz-ud-Din Ahmad Khan, Advocate, Bahawalpur, Mr. N. A. Bhatti, Advocate and Mr. A. R. Tayyab, Advocate, for the applicants.

M. Z. M. Petitions dismissed.

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