

P L D 2009 Supreme Court 460

Present: Iftikhar Muhammad Chaudhry, C.J., Javed Iqbal, Raja Fayyaz Ahmad, Ch. Ijaz Ahmed, Sayed Zahid Hussain, and Muhammad Sair Ali, JJ

SHAH HUSSAIN---Petitioner

Versus

THE STATE---Respondent

Jail Petition No. 56 of 2005, decided on 1st June, 2009.

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

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

---S. 382-B---Applicability of S.382-B, Cr.P.C.---Scope---Some of the propositions expounded in the judgments of Supreme Court were noted so as to adequately highlight the implications of, and bring home the manner, in which the provisions of S.382-B, Cr.P.C. were to be applied.

Some of the propositions expounded in the Supreme Court 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 and same 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 382-B, Cr.P.C. 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, Cr.P.C. 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, Cr.P.C. is also available to a person whose sentence of death under section 302, P.P.C. 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 a punishment.

Qadir v. State PLD 1991 SC 1065; Ramzan v. State PLD 1992 SC 11; Liaqat Hussain v. State PLD 1995 SC 485; Muhammad Rafiq's case 1995 SCMR 1525; Mukhtar-ud-Din v. State 1997 SCMR 55; Ghulam Murtaza v. State PLD 1998 SC 152; Javed Iqbal v. State 1998 SCMR 1539 and Ehsan Ellahi v. Muhammad Arif 2001 SCMR 416 ref.

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

---S. 382-B---Interpretation of S.382-B, Cr.P.C.---Case-law preceding the enactment of S.382-B, Cr.P.C. had no relevance and bearing on the interpretation of said provision, which had been termed as a beneficial provision---Judgment in Haji Abdul Ali's case reported as PLD 2005 SC 163 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---Supreme Court intended to revisit the judgment in Haji Abdul Ali's case so as to reach an appropriate conclusion.

The enactment of section 382-B, Cr.P.C., 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 towards the issue of pre-sentence period of a convict. Hence, 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. The judgment in Haji 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 reported as PLD 1982 SC 139, Muhammad Rafiq reported as 1995 SCMR 1525, Mukhtiar-ud-Din reported as 1997 SCMR 55, Ghulam Murtaza reported as PLD 1998 SC 152, Javed Iqbal reported as 1998 SCMR 1539 and others, which had dwelt upon the subject exhaustively.

The judgment in the Human Rights' case reported as PLD 2008 SC 71, just followed the dicta laid down in Haji 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, Supreme Court intended to re-visit the judgments in Haji Abdul Ali and the Human Rights cases so as to reach an appropriate conclusion.

In Haji 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, means that the accused is sentenced first, but convicted later, which was not the situation in Haji 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.

Abdul Ali's case PLD 2005 SC 163; Muhammad Bashir's case PLD 1982 SC 139; Muhammad Rafiq's case 1995 SCMR 1525; Mukhtiar-ud-Din's case 1997 SCMR 55; Ghulam Murtaza's case PLD 1998 SC 152; Javed Iqbal's case 1998 SCMR 1539; Inayat Bibi v. Amjad Ali 2001 PCr.L.J. 1453 and Aamir Ali v. State 2002 YLR 1902 ref.

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

---S. 382-B---Constitution of Pakistan (1973), Art.9---Refusal to allow remission of pre-sentence custody period to a convict whom the court has granted the benefit of S.382-B, Cr.P.C. is tantamount to deprivation of his liberty within the contemplation of Art.9 of the Constitution---Cases of convict prisoners who were expressly debarred under any law from the benefit of S.382-B, Cr.P.C. stand on a different footing---Where S.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---Principles.

Human Rights' case No.4115 of 2007 PLD 2008 SC 71; Access to Justice in Pakistan by Justice Fazal Karim; Muhammad Rafiq's case 1995 SCMR 1525; Thake v. Attorney General (CACLB-033-07) [20081 BWCA 23 (25 April, 2008); Kolojane v. State (1999 BLR 70 (CA); I.A. Sherwani v. Government of Pakistan 1991 SCMR 1041; D.B.M. Patnaik v. State of A.P. AIR 1974 SC 2092 and Shehla Zia v. WAPDA PLD 1994 SC 693 ref.

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

---S. 382-13---Supreme Court desired that provision of S.382-B, Cr.P.C. was couched in language as clear and unambiguous as the sections in the Indian and English enactments were.

Muhammad Rafiq's case 1995 SCMR 1525 ref.

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

---Ss. 382-B & 35---Accused, in the present case, was sentenced to 10 years' R.I. and imprisonment to life on two counts, his sentences were ordered to run consecutively---Aggregate sentences of the accused would thus come to sixty years, which was contrary to the provisions of S.35, Cr.P.C.---proviso (a) to S.35, Cr.P.C. prohibited the giving of consecutive sentence in one trial beyond the period of 14 years---Supreme Court converted jail petition into appeal and partly allowed the same and directed that the sentences of the convict shall run concurrently; he shall be entitled to the benefit of S.382-B, Cr.P.C.; remission 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 and his sentences shall be reduced accordingly---Impugned judgment of the High Court was modified by Supreme Court accordingly.

Javed Shaikh v. State PLD 1985 SC 153 ref.

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

---S. 382-B [as amended by Code of Criminal Procedure (Second Amendment) Ordinance (LXXI of 1979), S.21---Constitution of Pakistan (1973), Art.45---Interpretation and application of S.382-B, Cr.P.C. ---After the use of word "shall" for the word "may" in section 382-8, 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---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---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 Ordinance, 1999, Anti-Terrorism Act, 1997, the offence of Karo Kari, etc., where the law itself prohibits the same---

Law laid down in Haji Abdul Malik's case reported as PLD 2005 SC 163 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 reaffirmed---Supreme Court ordered that copies of the judgment 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---Concerned authorities shall submit report within a period of two weeks to the Registrar of Supreme Court for court's perusal in respect of the implementation of the judgment, also giving the number of prisoners benefited from it.

Zulfiqar Khalid Maluka, Advocate Supreme Court for Petitioner.

Syed Tahaar Hussain, Advocate Supreme Court for the State (on behalf of A.G., N.-W.F.P.)

Syed Iftikhar Hussain Gillani, Senior Advocate Supreme Court Amicus Curiae:

Muhammad Akram Sheikh, Senior Advocate Supreme Court (Assisted by Barrister M. R. Kamran Sheikh, Advocate).

Sh. Zameer Hussain, Senior Advocate Supreme Court.

Ms. Naheeda Mehboob Elahi, D.A.G. Qazi Muhammad Amin, Addl. A.-G.

Muhammad Naeem Sheikh, Advocate Supreme Court (with permission of the Court)

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