

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.****Criminal Appeal No.D-181 of 2012****Present.**

Mr. Justice Muhammad Iqbal Kalhoro.  
Mr. Justice Adnan-ul-Karim Memon.

Date of hearing: 19.02.2019

Date of decision: 19.02.2019

Appellant: Ashraf  
Through Syed Shahzad Ali Shah, Advocate.

Complainant: None present for complainant.

The State: Ms Rameshan Oad, A.P.G.

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**MUHAMMAD IQBAL KALHORO,J:-** By means of this appeal the appellant namely Ashraf has challenged the judgment dated 30.05.2012 passed by learned Additional Sessions Judge/Special Judge Sanghar, in Special Case No.34 of 1999, whereby he has been convicted under section 302(b) PPC and sentenced for life imprisonment as Tazir with direction to pay Rs.50,000/- to the legal heirs of deceased Police Constable Qurban Ali, and in case of default to suffer six(06) months more as simple imprisonment. In addition, he has been convicted under section 324 PPC for ten (10) years with fine of Rs.30000/- payable to the Government and in case of default to suffer S.I. for three (03) months more. He has also been convicted for the offences punishable under sections 353, 341, 147, 148, 149 PPC to suffer R.I. for two (2) years and to pay fine Rs.10,000/- payable to the Government and in case of default to suffer S.I. for two (02) months more. All the sentences have been ordered to run concurrently.

2. As per precise allegations in FIR bearing crime No.182 of 2000 PS Tando Adam, the appellant along with co-accused armed with weapons with common intention deterred police party from duty and had an encounter with

them near cotton crop Chutta Mori Tando Adam Branch, Tando Adam, on 08.09.1999 at 0900 hours in which PC Qurban Ali was killed. The appellant and other co-accused were able to flee from the spot after the encounter. Subsequently appellant was arrested and after usual formalities the trial against him commenced in which the prosecution examined as many as 10 witnesses. Subsequently statement of appellant/accused Ashraf under section 342 Cr.P.C. was recorded at Ex.21 wherein he denied the allegations against him. Finally at the conclusion of trial, learned trial Court after hearing the parties convicted the appellant vide impugned judgment in the terms as stated above. Being aggrieved by the same, the appellant has preferred instant appeal.

3. Today in terms of last order the Jail Authorities have submitted Jail Roll of the appellant which shows that he has remained in Jail for 18 years, 09 months, 27 days and has earned remissions of 10 years and one month, total 28 years 10 months and 27 days. His remaining portion of sentence has been shown as 22 years 03 months. The Jail Roll further reflects that the appellant has not only been convicted in the present crime and offence but he has also been convicted in crime No.80 of 1997 PS Tando Adam for offence u/s 302(b) PPC for life imprisonment.

4. Learned counsel for the appellant has submitted a photostat copy of the judgment dated 13.11.2018 passed by this Court in Criminal Jail Appeal No.46 of 2013 [confirmation case No.10 of 2013] which was filed by the appellant against his conviction and sentence in aforesaid crime No.80 of 1997 PS Tando Adam, which shows that appellant was awarded death penalty by the trial Court but the same was converted into life imprisonment through the said judgment dismissing his appeal on merits. This means that currently the appellant is undergoing two sentences of life imprisonment one in the present crime and offence and the other in crime No.80 of 1997 PS Tando Adam, hence his remaining sentence has been shown as 22 years and 03 months. Learned counsel submits that the Jail authorities are counting two sentences awarded to the appellant in above two crimes and offences consecutively, which is against the scheme of section 397 Cr.P.C. He further submits that he will not press the

instant appeal on merits if the two sentences awarded to the appellant in two separate cases are ordered to run concurrently as the appellant has already remained in Jail for more than 28 years and which is more than life term as provided under section 57 PPC. In support of his contentions he has relied upon the cases of (i) Mst. SHAHISTA BIBI and another v. SUPERINTENDENT, CENTRAL JAIL, MACH and 2 others (PLD 2015 Supreme Court 15), (ii) GHULAM NABI and 2 others v. THE STATE (PLD 2016 Sindh135), (iii) DILBAR v. THE STATE (2017 P.Cr.L.J. 844) and (iv) NISAR v. THE STATE (2019 P.Cr.L.J. 87).

5. Ms. Rameshan Oad, learned Assistant Prosecutor General Sindh has recorded no objection if the sentence awarded to the appellant in the present case is ordered to run concurrently with the one which he is undergoing in crime No.80 of 1997 PS Tando Adam.

6. We have considered submissions of the parties and have perused the material available on record including the case law relied at bar.

7. The scope of sections 35 and 397 Cr.P.C. which empowers the Court at the stage of trial or appeal etc. to order more than one sentence either in the same trial or in separate trials to run concurrently have been the subject matter of various pronouncement of this Court as well as Honourable Supreme Court. In a latest judgment in the case of **RAHIB ALI v. THE STATE** reported in 2018 SCMR 418 the Honourable Supreme Court has exhaustively dealt with this issue and while allowing the petition ordered two sentences of life imprisonment of the petitioner in Crime No.23 of 1999 PS Tando Yousuf and Crime No.01 of 2000 PS Bhitai Nagar both under section 365-A PPC to run concurrently. The Relevant paras of the aforesaid decision of Honourable Supreme Court for the purpose of guidance are reproduced herein under:-

“.....

**12. Generally, where a convict is undergoing sentence in earlier conviction and later in a separate trial(s) stand convicted and sentenced for imprisonment for life or otherwise for a shorter term, sentence in subsequent trial commences after sentence in earlier trial is exhausted.**

*However, the trial court seized of subsequent trial and the Appellate Courts in appeal arising there from are empowered under section 397, Cr.P.C. to direct that the subsequent sentence(s) to run conjointly with previous sentence(s) of imprisonment of life or otherwise as the case may be. In the cases cited as Mst. Zubaida v. Falak Sher and others (2007 SCMR 548), this Court attending to question of multiple convictions in more than one crime and trial took charitable view of section 397, Cr.P.C., while declining leave; observed that section 397, Cr.P.C. empowers the court to direct the subsequent sentence would run concurrently with the previous sentence. In the case of Shahista Bibi and another v. Superintendent, Central Jail, MACH and 2 others (PLD 2015 Supreme Court 15) this court examined provisions of section 35, Cr.P.C. together with section 397, Cr.P.C. also took charitable view and adopted interpretation beneficial to the accused by ordering concurrent running of sentence in two different trials. In a more recent pronouncement in the case of Sajjad Ikram and others v. Sikandar Hayat and others (2016 SCMR 467) this Court at page 473 held that "The provisions of section 397, Cr.P.C. confers wide discretion on the court to extend such benefit to the accused in case of peculiar nature" and court further observed "that there is nothing wrong in treating the sentence of imprisonment for life of convict/appellants on three count to run concurrently."*

13. *In view of the discussion made above, position that emerges is that the Courts in Pakistan generally take charitable view in the matter of sentences affecting deprivation of life or liberty of a person and unless some aggravating circumstances do not permit so, liberally exercise enabling power under section 35 and section 397, Cr.P.C. respectively to order concurrent running of sentence in one trial and so also consolidation of earlier sentence while handing down sentence of imprisonment in a subsequent trial.*

14. *Taking stock of the legal position as noted above, examining the case in hand, in the first mentioned crime, the petitioner was convicted for life sentence and in the second mentioned case his 14 years imprisonment sentence was enhanced by this Court to life imprisonment. Treating and computing life sentences in two different trial/transactions to run consecutively or second sentence after the exhaustion of the first mentioned life sentence would be in negation of section 57 of P.P.C., as amended, which prescribes that sentence of imprisonment for life corresponds to maximum imprisonment for 25 years and in any case cannot be less than 15 years (per Rule 140 of the Pakistan Prison Rules 1978); after earning remissions as may be extended by the executive functionaries from time to time but subject to section 401, Cr.P.C., Rule 216 and Rule 218 of the Pakistan Prison Rules, 1978.*

15. *Learned Counsel for the Petitioner/convicts concedes that at the time of proceeding with the second conviction before this court earlier conviction was not brought to the notice of this Court nor there was anything on record for this Court to take into consideration the earlier conviction while handing down sentence to life in Criminal Appeal No.420 of 2002 on 28.8.2012 otherwise the Court would have considered and ordered running of the imprisonment sentence to run concurrently. However sentence in lieu of*

*fine attached to a substantive sentence of imprisonment for life or otherwise would run after the substantive sentence(s) are exhausted. Courts have no jurisdiction to order sentence of fine to run concurrently with substantive sentence(s), for the simple reason that imprisonment in lieu of or, in default in payment of fine is not a sentence but a penalty, which a convict sustain as a consequence for non-payment of fine the (see also sections 64 to 70 P.P.C): Courts, however, are empowered under section 388, Cr.P.C. to regulate the recovery of fine, in instalment by releasing offender on completion of substantive sentence of imprisonment, on furnishing bond and or surety as may be ordered by the court.*

*16. Before parting with this judgment, we may well observe that section 35, Cr.P.C. subject to section 71 of Pakistan Penal Code empowers not only the trial Court to hand down several Punishment/sentences to a person charged for multiple offence in same trial and in its discretion direct that such conviction/sentence may run concurrently (per proviso thereto, in no case be more than 14 years in aggregate) even the Appellate Court while hearing the appeal against the conviction may direct several sentences/punishment handed down in same trial; to run concurrently. Whereas section 397, Cr.P.C.; enables and empowers the trial, and or Appellate/Revisional court, as the case may be, in a subsequent trial or in appeal or revision arising out of subsequent trial to order for the consolidation of sentence in subsequent trial with the sentence(s) handed down in earlier trial(s) as may be maintained or modified in appeal/revision arising there from. In case earlier, conviction was not brought to the notice of the at the time of handing down the subsequent conviction sentence the Trial or Appellate/ Revisional Court could exercise such jurisdiction even after the sentence of imprisonment in subsequent trial is announced in exercise of its inherent jurisdiction under section 561-A, Cr.P.C. read with section 397, Cr.P.C., provided of course, where the trial, or superior courts of appeal have specifically and consciously ordered the sentences either in same trial or in subsequent trial to run consecutively.*

*17. In the light of discussion made above, there remains no doubt that the High Court and so also this Court have jurisdiction under section 561-A read with section 35 and or section 397, Cr.P.C. as the case may to ordered such multiple sentences in same transaction/trial or in a separate and subsequent trial to run concurrently.*

*18. It seems that when Criminal Appeal No.420 of 2002 arising out of consolidated judgment dated 21.5.2002 (arising out of Criminal Appeals Nos.11 and 12 of 2002 from the judgment of the High Court) came up for hearing neither the petitioner herein nor the Prosecutor General informed this Court that the petitioner had been tried in earlier crime of similar nature, has been sentenced to life, which conviction and sentence of imprisonment was maintained by this Court, apparently for this reason no direction or order to treat sentences of imprisonment awarded in separate and successive trial to run concurrently was made.*

*19. In this view of the matter, we would convert this petition into appeal and allow and direct that sentences*

***awarded in both the trials as detailed in paragraph 4 above to be run concurrently.”***

8. In the light of what Honourable Supreme Court has observed in aforesaid decision there remains no ambiguity that appellate Court has the power under section 397 Cr.P.C. to order two sentences awarded in two separate trials to run concurrently or order the subsequent sentence to run concurrently with the sentence the accused is already undergoing. There appears no legal impediment either in the present case to disallow request of learned defence counsel which has been acceded by learned Assistant Prosecutor General. The appellant as per Jail roll has already remained in Jail for 28 years 10 months and 27 days which is more than term of life imprisonment as defined under section 57 PPC i.e. 25 years and apparently covers the term he has to suffer on account of non-payment of compensation and fine, which the Courts have no jurisdiction to order to run concurrently with substantive sentence(s).

9. Accordingly, in view of above discussion this appeal is dismissed as not pressed. However, the sentence awarded to the appellant in the present crime and offence i.e. Crime No.182 of 1999 PS Tando Adam, is hereby ordered to run concurrently with the sentence awarded to the appellant in Crime No.80 of 1997 PS Tando Adam and which in terms of judgment of this Court in Criminal Appeal No.D-46 of 2013 [confirmation case No.10 of 2013] has already been converted from death to imprisonment for life.

10. The appeal stands disposed of in the above terms.

11. Let a copy of this judgment be sent to the Superintendent Central Prison Hyderabad for compliance.

JUDGE

JUDGE

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