IN THE PESHAWAR HIGH COURT, PESHAWAR,

[Judicial Department].

Cr.A. No.263-P/2015

Date of hearing:- 09.03.2017

Petitioner(s):- Zuhrab Gul by Mr. Noman ul Haq Kakakhel, Advocate.

Respondent (s):-The State by Syed Sikandar Hayat Shah, AAG and respondent No.2 by Barrister Amirullah Chamkani.

JUDGMENT

ROOH-UL-AMIN KHAN, J:-This criminal appeal filed by appellant Zuhrab Gul, is directed against the judgment dated 28.04.2015, rendered by learned Trial Court/Additional Sessions Judge-V, Nowshera, whereby the appellant having been found guilty of committing various offences, has been convicted and sentenced in case FIR No.717 dated 20.08.2012 under sections 302/324/449/148/149 PPC, Police Station Nowshera Kalan, as under:-

> **Under section 302 PPC:** To death on six counts for murder of deceased Suleman, Shehzad, Ijaz, Mst. Raima, Mst. Asma and Mst. Sehrish. To be hanged by the neck till declared dead and to pay Rs.10,00,000/- to the LRs of the deceased as compensation in terms of section 544-A Cr.P.C. and in default thereof to undergo 01 year S.I.
> **Under Section 324 PPC:**- To undergo imprisonment for 10 years and to pay a fine of Rs.50,000/- or in default thereof to undergo 03 months S.I.
> **Under Section 337**-F (iii) PPC: To undergo imprisonment for 03 years and to pay Rs.40,000/- as Daman to injured Zakir.

Under section 148 PPC: To undergo imprisonment for 03 years.
Under section 449 PPC: To undergo imprisonment ofr 10 years and to pay a fine of Rs.50,000/-.

All the sentences have been directed to be run concurrently and benefit of section 382-B Cr.P.C. has been extended to the appellant.

2. The learned Trial Court has sent Murder Reference No.08 of 2015, in terms of Section 374 Cr.P.C. for confirmation of death sentence of the appellant-convict. Since, both the matters are the outcome of one and the same judgment of the learned Trial Court, therefore, we propose to decide the same through this single judgment.

3. As per contents of First Information Report, on 20.08.2012 at 00.20 hours, injured Suleman in company of injured Zakir, reported to Mumtaz Khan SHO (PW.11), in emergency unit of Divisional Headquarter (DHQ) hospital, Nowshera, that on the fateful night he along with his wife Mst. Raima, cousin Zakir, brothers Shehzad, Ijaz, maternal cousins Mst. Asma and Mst. Sehrish, was present in his house. Electric bulb of the house was lit when at 23.45 hours, appellant Zuhrab Gul along with absconding co-accused Sahib Gul, Maqsood, Manzoor and Ibrar, duly armed with firearms, entered their house and opened fire at them, as a result, he and Zakir sustained injuries. Similarly, Shehzad, Ijaz, Mst. Rima, Mst. Asma and Mst. Sehrish also got hit and died on the spot. Abduction of a girl of accused family, namely, Mst. Raima for the purpose of

marriage by Suleman was stated as motive behind the crime. In addition to complainant, the incident is stated to have been witnessed by PW Zakir and other inmates of the house. Report of the injured was reduced into writing in the shape of Murasila Exh.PA/1, which besides the thumb impression of complainant and signature of author of the Murasila, was endorsed by Dr. Mujtaba Ali (MO) DHQ, Nowshera who also furnished a certificate qua stability and consciousness of the injured at the time of report, on the margin of the report.

4. Mumtaz Khan SHO (PW.11) prepared injury sheets of injured Suleman Exh.PW.11/1 and injured Zakir Exh.PW.11/2 and referred them for medical examination. Dr. Mujtaba Ali examined them and furnished their medico legal reports over Exh.PW.11/1 and Exh.PW.11/2. Injured Suleman, later on, succumbed to the injuries, hence, his autopsy was conducted by Dr. Iftikhar Ahamd (PW.5) in KMC.

5. The dead bodies of the deceased were also brought to DHQ, Nowshera. Dr. Mujtab Ali (PW.5) conducted postmortem examination on the dead body of deceased Shehzad and Ijaz, while Lady Doctor Bushra Nisar WMO DHQ, Nowshera (PW.16), conducted postmortem examination on the dead bodies of deceased Mst. Raima and Mst. Sehrish.

6. On arrest of the appellant and completion of necessary investigation, challan was submitted against him before the learned Trial Court, where he was formally charge sheeted to which he pleaded not guilty and claimed Trial. To prove its case prosecution examined as many as seventeen witnesses. After closure of the prosecution evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution allegations and professed his innocence. He, however, neither wished to be examined on oath as his own witness under section 340 (2) Cr.P.C. nor opted to produce evidence in defence. On conclusion of trial, the learned Trial Court, after hearing both the sides, convicted and sentenced the appellant as mentioned above, hence, this appeal.

7. We heard the exhaustive arguments of learned counsel for the parties and learned AAG for the State and perused the record with their able assistance.

8. Without dilating upon the merits of the case on the available evidence, lest it may prejudice the case of either side, suffice to say that the prosecution case besides the ocular account of PWs Zakir and Sardar, rests on the dying declaration of deceased then injured Suleman in the shape of Murasila Exh.PA/1 which has not only been endorsed by Dr. Mujtaba Ali (PW.5), but has also furnished a certificate on its margin qua the consciousness and

capability of the deceased then injured to make a statement. The examination of deceased then injured and injured Zakir by Dr. Mujtaba Ali is also evident from the medico legal reports, furnished over Exh.PW.11/1 and Exh.PW.11/2. Though the said doctor during trial has been examined as PW.5, but he has furnished statement only to the extent of conducting autopsy on the dead bodies of deceased Shahzad and Ijaz, and has not been examined to the extent of initial examination of deceased then injured Suleman and injured Zakir, that's why in cross-examination when he was replying a question posed by the defence regarding examination of injured Suleman, he responded in the negative. The medico legal reports of deceased then injured Suleman, injured Zakir and endorsement and certificate over the dying declaration, bear the signatures of Dr. Mujtaba Ali, but due to omission, mistake or misunderstanding he could not be examined in this regard. Even otherwise, in the statement of Dr. Mujtaba Ali, the defence by itself has confirmed from this PW that he was the only male doctor present in DHQ hospital Nowshera at the time of report. On one hand, in this untoward incident, six persons have been done to death and one has sustained injuries, while on the other hand, five persons have been directly charged for the commission of offence. In case of non-examination of Dr. Mujtaba Ali to the extent of initial examination of the

deceased then injured and verifying the factum of his making report in his presence would not only amount to deprive the prosecution from important evidence but this Court will also face hardship in administering the justice, hence, may results in grave miscarriage of justice. Thus, re-examination of Dr.Mujtaba Ali appears to be essential to the just decision of the case. This Court being an appellate Court has wide jurisdiction under section 428 Cr.P.C. to direct additional evidence so as to avoid any injustice. For the sake of convenience, we would like to reproduce section 428 Cr.P.C.:-

> *"S.428. Appellate Court may take further evidence or direct to be taken:- (1) In dealing with any appeal under this Chapter, the appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by a Magistrate or, when the Appellate Court is a High Court, by a Court of session or a Magistrate.*
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> *(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court and such Court shall thereupon proceed to dispose of the appeal;*
>
> *(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken…*

> *(4) The taking of evidence under this section shall be subject to the provision of Chapter XXV as if it were an inquiry".*

The bare reading of section 428 Cr.P.C. reveals that if an Appellate Court while dealing with an appeal thinks that recording of additional evidence is necessary, it shall record its reasons and can either take such evidence itself or direct it to be taken by Magistrate or where the Appellate Court is a High Court, by a Court of Session. The main object of section 428 Cr.P.C. relating to production of additional evidence is that a guilty person should not escape through carelessness or ignorant proceedings of the Trial Court or innocent person should not be wrongly accused when the Court, through same carelessness or ignorance, had omitted to record the circumstances essential to explanation or reach at the truth. It may be noted that section 428 Cr.P.C. is not meant for either of the parties to a criminal case, but its object is to see that justice is done. This section can be pressed into service for the ends of justice, whenever it is required either for prosecution or for defence, keeping in view requirement of Society because before a criminal Court there is always a third party namely the Society. It may also be noted that power to record additional evidence at the appellate stage is to be exercised only where additional evidence either was not available at the Trial or party

concerned was prevented from producing the same by circumstances beyond its control or by reasons of misunderstanding or mistake. In case titled, "Ali and another Vs Crown" (PLD 1952 Federal Court 71), while dealing with identical controversy observed as under:-

> "A brief survey of reported cases discloses that, despite the wide terms in which the power is expressed, it has only been exercised where the additional evidence was either not available at the trial or the party concerned was prevent from producing it either by circumstances beyond its control or by reason of misunderstanding or mistake".

The aforesaid view was further refined in case titled, "Fazal Elahi and others Vs Crown" (PLD 1952 Lahore 388), in the following words:-

> "The powers to be exercised by an appellate Court under section 428 are subject to two overriding consideration: (1) That the additional evidence is considered to be necessary by the appellate Court in the interest of justice; and (2) that the accused is not denied his right to a fair trial.
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> While exercising these powers Courts of Criminal Appeal in this country should never overlook the basic position that the duty of a criminal Court is fundamentally different from that of a Court of Civil Appeal. While the latter is a tribunal inter partes, the Court of Criminal Appeal always has a third party before it, namely, society, and its discretionary powers are not controlled by rules of stopped, waiver, etc. Therefore, negligence, laches, even admission by counsel are not a bar to the Court's exercising the power to take further evidence, provided the power is intended to be exercised in the interest of

> justice and the accused is not prejudiced in his defence on the merits.
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> As regards the taking of additional evidence, I think we have power to take it on any point bearing upon the guilt or innocence of the accused, that is to say, it may bear on his guilt or it may bear on his innocence. For the interest of justice are not always identical with the interests of the accused, and if in the present case we were told that we filled gaps for the prosecution, we should accept the accusation only if we thought that our function was not to do justice to the accused and to the person whom he is alleged to have killed, but to find a pretext for acquitting the accused. In that case, we would be doing injustice to the deceased person and the society for the reason that the society was inefficiently represented at the time of the trial. For the same reason, I am not impressed by the argument that questions put by the Court of appeal should not be in the nature of cross-examination. If the power to call in evidence lies with the Court and the Court exercise it, I do not understand why it should sometimes have to say to the prosecution: "I am not going to cross-examine the witness lest I should betray an anxiety to bring out the truth." If indeed the object of cross-examination is to bring out the truth".

In case titled, **"Dildar Vs the State through Pakistan Narcotics Control Board Quetta" (PLD 2001 Supreme Court 384),** the Hon'ble Supreme Court was pleased to enunciate the principle as guideline for additional evidence in the following words:-

> "Where the Appellate Court considers additional evidence to be necessary, after recording its reason, the Appellate Court may take such evidence itself or direct the same to be taken by the Trial Court. Such powers and provisions are not to be utilized at the appellate stage to cure the inherent infirmities or fill up a lacuna in the prosecution case. Appellate Court can exercise such powers only where the additional evidence was either not available at the Trial or the party concerned was

> present from producing it either by circumstances beyond its control or by reasons of misunderstanding or mistake".

The same proposition came up before the worthy Sindh High Court in case title, **"Nasir Khan and others Vs the State", (2005 P Cr L J 01),** and the additional evidence was directed to be recorded. In case titled, **"Taqi Vs the State" (PLD 1991 Quetta 39),** the worthy Balochistan High Court while dealing with the same proposition has held that under sections 428 Plenary power vests in Appellate Forums to rectify omission or commission of trial Court for achieving ends of justice. Jurisdiction of High Court for recalling witnesses to clarify the position or recording additional evidence is very wide, indefinable, extraordinary and limitless. Criteria regulating such authority, however, mainly would be to administer real and substantial justice and to prevent abuse of the process of Court. In the said judgment the Hon'ble Court has emphasized that the High Court can even suo motu summon evidence aimed at promoting ends of justice.

9. Apart from section 428 Cr.P.C., this Court under section 540 Cr.P.C. has ample power to examine or recall and re-examine any person if his evidence appears to be essential to the just decision of the case. For the sake of convenience, we would like to reproduce section 540 Cr.P.C. below:-

> "Power to summon material witness or examine persons present:- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person, if his evidence appears to it essential to the just decision of the case".

The words **"any Court"** and words **"at any stage of any inquiry, trial or other proceeding under this Code",** are of significant importance. The bare reading of the section reveals that it has two parts. The first is discretionary in nature whereas the second is mandatory. It is to be noted that the only purpose of judicial proceedings in criminal cases is to find out the truth and to arrive at a correct conclusion and avoid any injustice. Under section 540 Cr.P.C. the Court has unfettered powers to compulsorily examine any person whose evidence will provide help to elucidate the truth for reaching at a just and fair conclusion of the case.

9. In the circumstances of the case and deriving wisdom from the judgments (supra), we are of the considered view that non-examination of Dr. Mujtaba Ali with regard to Medico legal reports of the two injured and endorsement on Murasila/ certificate qua consciousness of

Suleman deceased then injured is a serious omission on the part of prosecution as well as Trial Court, which being essential for just decision of the case, would not amount to fill up any lacuna, rather after his examination the Court will be able to do justice between the parties. It is also pertinent to mention that the prosecution has not made any request for examination of Dr. Mujtaba Ali, rather, this Court considers his re-examination as essential for its own aid to reach at a correct conclusion. Resultantly, the impugned judgment of the learned Trial Court is set aside along with conviction and sentences of the appellant and the case is remanded to the learned Trial Court for re-examination of Dr. Mujtaba Ali with regard to medico legal reports of injured Zakir and Suleman deceased then the injured and endorsement/certificate on Murasila, providing opportunity of cross-examination to the defence and thereafter to record the statement of the appellant under section 342 Cr.P.C. and defence evidence, if any, then to decide the case afresh in accordance with law as early as possible but not later than three months. Parties are directed to appear before the learned Trial Court on 29.03.2017. Office shall transmit the record to the learned Trial Court, within two days, positively. During this period the appellant shall remain as under trial prisoner.

10. On setting aside of the conviction and sentences of the appellant-convict, the connected **Murder Reference No.08 of 2015,** sent by the learned Trial Court in terms of section 374 Cr.P.C., is answered in the ***Negative.***

Announced:
09.03.2017

Siraj Afridi P.S.

JUDGE

JUDGE