IN THE PESHAWAR HIGH COURT, PESHAWAR.

[Judicial Department]

Cr.A. No.1097-P/2021

Iqbal ud Din s/o Zoor Talab Khan
r/o Zarin Abad Nowshera.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :- Mr. Muhammad Saeed Khan, Advocate.
For State :- Mr. Numan ul Haq Kakakhel AAG
For complainant :- Mian Arshad Jan, Advocate.
Date of hearing: **18.03.2024**

JUDGMENT

ISHTIAQ IBRAHIM, J.- This criminal appeal, filed by Iqbal-ud-Din, the appellant, is directed against the judgment dated 25.11.2021 (**"impugned judgment"**), passed by learned Additional Sessions Judge-VI, Nowshera (**"Trial Court"**), whereby he has convicted and sentenced the appellant in case FIR No.411 dated 06.07.2017, registered under sections 324 PPC at Police Station Nowshera Kalan, as under:-

> **Under Section 324 PPC:-** To undergo five years rigorous imprisonment and to pay rupees fifty thousand as fine and in default thereof to further undergo six months simple imprisonment.
>
> **Under section 337-D PPC:-** To pay one third (1/3rd) of Diyat to injured complainant.
>
> Benefit of section 382-B Cr.P.C. has been extended to the appellant.

2. According to First Information Report (**"FIR"**) Exh.PA on 06.07.2017 at 1935 hours, complainant Atif-ur-Rehman, reported to Mir Akbar SI (PW.5) in injured condition in casualty of DHQ hospital Nowshera Kalan to the effect that his Nikah was performed with Mst. Sana Iqbal (daughter of appellant) and 16th August 2017 was fixed as the date of *Rukhsati*; that on 06.07.2017 he along with other family members visited the house of his father-in-law (appellant), situated in village *Zarin Abad Nowshera Kalan* where an altercation took place between him and the appellant; that the appellant took out his pistol and gave blows to him and his brother due to which they sustained injures; that the appellant then opened fire at them, as a result, he (complainant) got hit and sustained injury on his neck. Motive behind the occurrence was a dispute over *Rishta.* Report of complainant was recorded in the shape of Murasila Exh.PA/1 by Mir Akbar SI (PW.5), who also prepared his injury sheet Exh.PW.5/1 and referred him for medical examination.

3. Dr. Ikram (PW.10) examined the injured complainant and found entry wound on left angle of mandible and exit left lateral surface of left orbit. Patient was referred to the Neuro Surgery Ward LRH for further management.

4. Jehanzeb Khan SI (PW.9) conducted investigation in the case, who after registration of the FIR proceeded to the spot and prepared site plan Exh.PB on the pointation of eyewitness Fazal ur Rehman. During spot inspection he took into possession one empty shell of 30 bore Exh.P.1 vide recovery memo Exh.PW.3/2. Vide recovery memo Exh.PW.3/1 he took into possession blood stained earth from the place of injured complainant Exh.P.2. Vide recovery memo Exh.PW.3/3 he took into possession bloodstained garments of the injured, initiated proceedings under sections 204 and 87 Cr.P.C. against the appellant, recorded statements of the PWs under section 161 Cr.P.C. and sent the bloodstained articles to the FSL report whereof is Exh.PK. The appellant was arrested by Kashif Khan SI (PW.2), who obtained his physical remanded, interrogated him and recorded his statement under section 161 Cr.P.C. and after completion of investigation handed over case file to the SHO, who submitted challan against the appellant before the learned trial court.

5. On receipt of challan by the learned trial court, the appellant was summoned and formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as ten witnesses. After closure of the prosecution's evidence, statement of the appellant was recorded under section

342 Cr.P.C., wherein he denied the prosecution's allegation and professed his innocence. He, however, neither wished to be examined on oath 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 in the initial paragraph of the judgment, hence, this appeal.

6. Arguments of learned counsel for the parties heard. Record and evidence perused with their able assistance.

7. In this case the occurrence has taken place on 06.07.2017 at 1855 hours, in front of house of appellant Iqbal-ud-Din situated in village *Zarin Abad Nowshera Kalan* which has been reported with promptitude at 1935 hours by injured complainant Atif-ur-Rehman (PW.6) in DHQ hospital Nowshera Kalan. Ocular account of the occurrence has been furnished by injured complainant and his brother Fazal-ur-Rehman (PW.7). The former while appearing in the witness box reiterated the same story as set forth by him in his initial report Exh.PA/1. He once again directly and singularly charged the appellant for commission of the offence. As stated earlier, the occurrence has been report with promptitude eliminating the possibility of consultation and deliberation on the part of complainant in making report. Similarly, being a broad day light occurrence and appellant being father-in-law of the complainant,

question of mistaken identity also does not arise. Complainant having stamp of injury on his person his presence at the spot cannot be doubt. Recovery of blood from the place of the injured vide recovery memo Exh.PW.3/1, his bloodstained garments taken into possession vide recovery memo Exh.PW.3/3 and positive Serologist report Exh.PK in respect thereof corroborate the ocular account of the prosecution's case. Similarly, medical evidence furnished by Dr. Ikram (PW.10), also supports version of the injured complainant.

8. The testimony of Fazal ur Rehman (PW.7), who is also an eyewitness of the occurrence corroborates the ocular account furnished by injured complainant. PW Fazal ur Rehman is brother of the injured complainant and his visit to the house of appellant along with complainant so as to finalize the arrangement for marriage of the complainant with the daughter of the appellant seems quite natural. He deposed that when they reached the place of occurrence an altercation (exchange of hot words) took place between the appellant and the complainant during which course the appellant opened fire at them, as a result, complainant got hit and sustained injury; that the injured was shifted to DHQ hospital Nowshera Kalan where he reported about the occurrence in injured condition and he verified the same.

9. Both the above named eyewitnesses have been subjected to lengthy and taxing cross-examination by the defence but nothing beneficial could be extracted from their mouths. They remained stuck to their stance and corroborated each other on all material particulars of the occurrence such as the day, date, time and place of occurrence as well as mode and manner of the occurrence. Nothing of the sort has been brought from their mouths so as to suggest false implication of the appellant for some ulterior motive.

10. On reappraisal of the prosecution's evidence I have arrived at the conclusion that the prosecution has proved guilt of the appellant under section 324 PPC, however, keeping in view the peculiar facts and circumstances of the case revealing from the available evidence, sentence of the appellant under section 324 PPC requires a bit consideration. Admittedly, there was no previous ill will between the parties rather appellant was father-in-law of the injured complainant and on the fateful day the complainant party visited the house of the appellant to finalize marriage ceremony of his daughter with the complainant. Reason, on the basis of which exchange of hot words took place between the complainant and the appellant, has not been disclosed by any of the eyewitness. Similarly, report of the complainant Exh.PA/ is also silent in this regard,

meaning thereby that the occurrence took place at the spur of moment and the appellant in the heat of passion opened fire at the complainant party, as a result, he sustained injury on his neck. The complainant has not attributed the role of repetition of firing to the appellant. Similarly, except injury on his neck, he has not stated about any injury sustained by him on his chest or any other part of his body. In this view of the matter, conviction of the appellant under section 324 PPC is maintained, however, his sentence is reduced from five years rigorous imprisonment to three years rigorous imprisonment. His sentence of fine under section 324 PPC is also maintained.

11. As per medico legal report, hurt is also caused to injured complainant on his neck by the act of firing of the appellant, in addition of attempt to commit quatl-e-Amd, the appellant shall also be liable to the punishment provided for the hurt caused to him. As per findings of the learned trial court, hurt caused to the complainant falls within the definition of ***"Jaifah"***, punishable under section 337-D PPC., however, findings of the learned trial court are not supported by prosecution's evidence. In his initial report Exh.PA/1 the injured complainant has categorically stated that he received single firearm injury on his neck due to firing of the appellant. He reiterated the same fact in his court statement recorded as PW.6.

Similarly, as per medico legal report Exh.PW.10/1 furnished by Medical Officer who examined the injured at first instance only one entry wound on the left angle of mandible with exit on left lateral surface of orbit was found on the person of the injured complainant. No doubt, later on, on 19.08.2017 as per maxillofacial ward report there was left ZMC (Zygomatic) fracture with the bullet shot and loss of sensation on the left Zygomatic region and a single bullet in the chest was also shown removed by thoracic surgeon in LRH. In view of the report ibid, the nature of injury of the complainant was declared to be *Jaiffa* punishable under section 337-D PPC. This court is not in agreement with the findings of the learned trial court because the injured neither in his report nor in his court statement has uttered a single word about any injury sustained by him on his chest. He has categorically stated that he received single fire shot on his neck. No evidence such as treatment record of the complainant so as to prove his injury within the meaning of section 337-D PPC has been brought on record. Evidence available on record prove only single firearm entry wound on left angle of mandible having exit left lateral surface of left orbit, which falls within the definition of *Shajjah-i-Hashimah*, has been proved. Under section 337-A(iii) PPC, if any person causes *Shajjah –i-Hashimah* to any person shall be liable to

Arsh which shall be ten percent of the diyat and may also be punished with imprisonment of either description for a term which may extend to ten years as *Ta'azir*. Although, no charge has been framed against the appellant under section 337-A (iii) PPC, however, under section 423 Cr.P.C. the appellate court has ample power to alter findings of the learned trial court, maintain the sentence or with or without altering the findings reduce the sentence or with or without such reduction and with or without altering the finding alter the nature of the sentence. For the sake of convenience and ready reference section 423 Cr.P.C. is reproduced below:-

> "**S.423. Powers of Appellate Court in disposing of appeal**:- (1) The appellant Court shall then send for the record of the case, if such record is not already in court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under section 411-A sub-section (2) or section 417, the accused, if he appears, the court may if it considers that there is no sufficient ground for interfering, dismiss the appeal or may
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> (a)in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retired or sent for trial to the court of Sessions or the High Court, as the case may be or find him guilty and pass sentence on him according to law;
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> **(b) in an appeal from a conviction (1) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by**

a court of competent jurisdiction subordinate to such Appellate Court or sent for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence but, subject to the provisions of section 106 sub-section (3) not so as to enhance the same.

(c)In an appeal from any other order, alter or reverse such order;

(d) Make any amendment or any consequential or incidental order that may be just or proper.

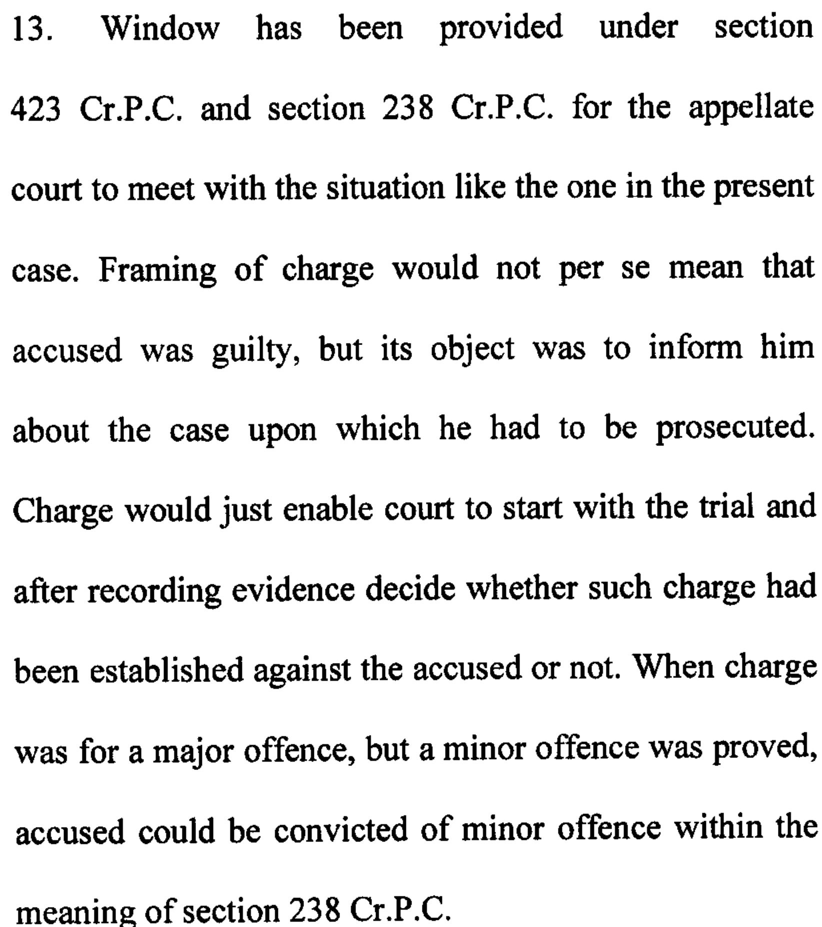
12. As stated earlier appellant has not been charge sheeted under section 337-A (iii) PPC, however, under provisions of section 238(2) Cr.P.C., when an accused is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. For the sake of convenience and guidance section 238 Cr.P.C. is reproduced below:-

"**S.238. When offence proved included in offence charged:-** (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may

be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(2A) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.



13. Window has been provided under section 423 Cr.P.C. and section 238 Cr.P.C. for the appellate court to meet with the situation like the one in the present case. Framing of charge would not per se mean that accused was guilty, but its object was to inform him about the case upon which he had to be prosecuted. Charge would just enable court to start with the trial and after recording evidence decide whether such charge had been established against the accused or not. When charge was for a major offence, but a minor offence was proved, accused could be convicted of minor offence within the meaning of section 238 Cr.P.C.

14. In view of the provisions of section 238 and 423 Cr.P.C., this court instead of remanding the case to the learned trial court, has ample power to rectify the error committed by the learned trial court in the sentence of the

appellant. Accordingly, by invoking the provisions of section 423 and 238 Cr.P.C., this court alter the conviction of appellant from section 337-D PPC to section 337-A (iii) PPC and sentenced the appellant to pay Arsh equal to ten percent of diyat to injured complainant. No doubt, section 337-A(iii) PPC besides the sentence of Arsh also provides that the offender may also be punished with imprisonment of either description for a term which may extent to ten years as *Ta'azir,* however, such punishment is subject to proof of the essential ingredients enumerated in section 337-N (2) PPC. In case titled, **"Abdul Wahab and others Vs the State and others" (2019 SCMR 516),** Hon'ble Supreme Court while examining the provisions of section 337-N(2) PPC has held that:-

> "We have noticed that according to the provisions of section 337-N(2) PPC, a punishment of imprisonment by way of Ta'azir can be passed against a convict only **if the convict is "previous convict, habitual or hardened, desperate or dangerous criminal or the offence has been committed by him in the name or on the pretext of honour".** It had been held in the cases of Ali Muhammad Vs the State (PLD 2009 Lahore 312), Mazhar Hussain Vs the State and another (2012 SCMR 887) and Haji Maa Din and

> another vs the State and another (1998 SCMR 1528) that in a case pertaining to causing of hurt unless the provisions of section 337-N(2) PP are attracted to the case of the convict he cannot be awarded a sentence of imprisonment by way of Ta'azir.

An iota of evidence is not available on file to prove the essential ingredients of section 337-N (2) PPC against the appellant, therefore, punishment as *ta'zir* is not awarded to the appellant under section 337-A (iii) PPC.

15. With the above modification in the conviction and sentences of the appellant, this appeal stands disposed of accordingly.

Announced:
18.03.2024
M.Siraj Afridi CS

Senior Puisne Judge

SB of Hon'ble Mr. Justice Ishtiaq Ibrahim senior Puisne Judge