CHAPTER—XXVI

OF THE JUDGMENT

366. Made of delivering judgment.—(1) The judgment in every trial in any Criminal Court of orignial jurisdiction shall be pronounced, or the substance of such judgment shall be exaplained.—

(a) in open Court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their advocates, and

(b) in the language of the Court, or in some other language which the accused or his advocate understands;

Provided that the whole judgment shall be read out by the presiding Judge, if he is requested so to do either by the prosecution or the defence.

(2) The accused shall, if in custody, be brought up, or if not in custody, required by the Court to attend, to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is accquitted, in either of which cases it may be delivered in the presence of his advocate.

(3) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his advocate on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving on the parties or their advocates, or any of them, the notice of such day and place.

(4) Nothing in this section shall be construed to limit in any way the extent of the provisions of section 537.

Scope and application—Judgment means the expression of opinion of the judge or Magistrate arrived at after due consideration of the evidence and of the arguments. The delivery of judgment and the passing of sentence is an integral part of the criminal trial and must be done by the judge himself. The judgment must be delivered in open court. The

judgment in a criminal case must be passed without undue delay. Judgment shall be written, signed, dated and pronounced in open court. Accused has to attend in person when judgment is to be pronounced unless his personal attendance during trial has been dispensed with, the sentence that the court proposes to pass is one of fine only or the Court intends to accquit him his presence is not mandatory. The mere absence of the counsel of the accused on the notified day for delivering the judgment does not invalidate the judgment (AIR 1965 Tri 17).

44 DLR 116—H. M. Ershad Vs. The State—'Trial' whether it includes judgment—Trial as appearing in various sections of the Cr. P. C had not been specifically defined but considering the scheme of the law, it is found to be a 'drama' played in three successive act. i. e. investigation, inquiry and trial. Judgment is a separate scene where the judge is the only player writing down his judgment on the basis of the last scene of the drama already played. Thus, trial does not include judgment.

40 DLR 331—Chowdhury Tanbir Ahmed Siddiqui Vs. Bangladesh—Right of Parties to address the Court generally on the whole case is called an agrument.

7 BCR 347—Abdul Jabbar Vs. The State—Pronouncing judgment in Court before preparing and signing and dating it is violative of provisions of sections 366 and 367 Cr. P. C it is therefore illegal. Establishment of large number of Courts overnight manned by young and immature officers, advocates and staff without sufficient knowledge and experience has resulted in glaring miscarriage of justice as in this case causing untoled miseries, harassment and sufferings.

35 DLR 208—Mozahar Sikder Vs. State—The expression 'judgment' has not been defined in the Code of Criminal Procedure but on examination of the various sections of the Code makes it apparent that 'judgment' in the case means a judgment of conviction or acquittal. Every order in a criminal case is not a judgment. The case having been dismissed for default when it was neither heard nor disposed of on merits, the petitioner in all fairness and for ends of justice should be

afforded an opportunity of being heard in the matter (Ref : 35 DLR 235, 3 BCR 98, 3 BLD 96).

33 DLR 218—Ali Meah Vs. Sultan Ahmed—It is a settled law that before signing the judgment the Judge does not become functus officio and the judgment can be reviewed (Ref : 14 DLR 76 (SC)).

26 DLR 326—Abdul Hakim Mollah Vs. Lutfur Rahman Khan—The order of discharge could not be passed in respect of the accused who did not appear before the court in obedience to the non-bailable warrants issued against them nor were they produced before the court under arrest.

16 PLD (AD) 111—Mastansir Billah Vs. Bepari Abdur Rob and others—Delivery of Judgment—A judgment is a final result of a case but it cannot be considered as an integral part of the trial of a criminal case. Staying delivery of judgment of a case at the conclusion of the trial in the name of the disposal of the counter case for unlimited period is highly deprecated.

367. Language of judgment, Contents of judgment.—(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court or from the dictation of such presiding officer in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.

(2) It shall specify the offence (if any) of which, and the section of the Penal Code or other law under which the accused is convicted, and the punishment to which he is sentenced.

(3) **Judgment in alternative.**—When the conviction is under the Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, the Court shall in its judgment state the reasons for the sentence awarded.

(6) For the purposes of this section, an order under section 118 or section 123, sub-section (3), shall be deemed to be a judgment.

Scope and application—Section 367 is based upon good and substantial grounds of public policy (AIR 1942 Lah 100). It applies to judgment in trials and in appeals. This section does not apply to orders passed in summary proceedings under section 264 (14 DLR 595). or to orders on petitions. No particular form of judgment has been prescribed (9 DLR 123). A judgment should not be written in a slipshod manner. Where there are several accused persons, the judgment should analyse the evidence against each of them separately (AIR 1952 All 443). The accused person is entitled to have an independent judgment of the trying Court, and such judgment must be prepared in accordance with, and must contain the particulars required by section 367 otherwise it is no judgment at all. Where there are several accuseds the case of each accused should be dealt with in detail and the judge should arrive at a decision with regard to each individual accused. Every judgment must contain the reasons for decision. A judgment which states merely the offence and the punishment and contains no statements of the reasons for conviction is insufficient and invalid. The judgment of the court must be based on legal evidence and not on conjectures and surmises. An appellate judgment like the judgement of the court of first intance must fulfil the conditions laid down in this section i.e. the judgment must state the points for determination, the decision thereon and the reasons for the decision. An appellate judgment must be quite independent and self-contained. It ought not to be read in connection with or a supplementary to the judgment of court of first instance.

Clause (5) has been added as a safeguard to ensure that the case has been examined as elaborately from point of view of sentence as also from the point of view of guilt and in order also to ensure confidence of the people in the courts by showing that discretion is judicially exercised. It would also provide good material at the time when a recomendation for mercy is to be made by the court or a petition for mercy is considered. It would also facilitate the task of the High Court Division in appeal or in the proceedings for confirmation in respect of death sentence. The Judge has full discretion to award death or lesser sentence. The Judge also take into consideration of prolonged agony due to long lapse of time in holding trial and also the time since the imposition of capital sentence has ameliorative effect and superior courts have substituted life sentence for death sentnce.

56 DLR 12—Abul Hossain & ors. Vs. State—The revisional court is competent to direct the trial Court to write a fresh judgment in a case where the trial court has failed to discuss and assess the evidence and written its judgment without trying to determine the fact in issue.

53 DLR (HC) 99—While dispossing of a criminal appeal, the appeallate court consider at least the material evidence of the case and arrive at independent finding on all material points at issue. Mere saying that it concurred with finding to the trial court is not sufficient to meet the requirement of Law.

47 DLR 53—Ekram Ali Fakir Vs. Abdus Samad Biswas—The Additional Sessions Judge sitting on appeal did not apply his mind at all in order to come to an independent decision. He came to the conclusion found nothing illegal in the impugned order' just after quoting in his judgment some portions of the judgment of the trial Court. In such a posiiion no rule need be issued—The case is sent back for delievering a proper judgment.

42 DLR 160 (AD)—Moslehuddin Vs. State—Judgement—Writing of a proper judgment—If the trial Court's judgment is such that it cannot be termed as a judgment as per requirement of this section, then an order for writing a proper judgment may be necessary—When the entire matter is open

to the criminal appeliate Court which is required by law to assess the evidence independently and come to its finding, then merely because there has been some omission made by the trial Court in not considering a piece or pieces of evidence, would hardly offer a valid ground for sending the case on remand for a proper judgment. Practice—Congnizance of reality and First Appellate Court's duty—Such Courts should be a little more practical and take note of the congestion of pending cases in the original courts and abhor making an order of remand. Retrial—Considerations in making an order of re-trial-Even in cases where retrial may be ordered, the court takes into considerations the aspects of delay, usefulness, harassment to the accused, etc. before passing an order for retrial. RETRIAL :—General rule—As a general rule an order for retrial would be proper where the trial in the original trial court has been vitiated by illegality. irregularity or otherwise defective or when original trial has been unsatisfactory for any particular reason etc. (42 DLR 142 (AD)).

42 DLR 171 (AD)—Abed Ali Vs. State—Section 367. As amended by the Law Reforms Ordinance (XLIX of 1978), section 2 & schedule thereto read with the Penal Code section 302. Substitution of sub-section (5) section 367 Cr. P. C by Law Reforms Ordinance—Effect of charge on sentencing—Previously Death sentence was normal sentence for murder and the court was required to give reasons if the lesser sentence of life imprisonment was given—After the substitution now reasons have to be given in either case—A death sentence is to be justified in as much as in the same way as in the case of lesser sentence of life term imprisonment. Sentence—Commutation of death Sentence—Delay of about two years or so in the disposal of the Death Reference Case and the Jail Appeal in the High Court Division, cannot be itself be a ground for awarding lesser sentence. "Extenuating Circumstance", meaning of-what constitutes "extenuating circumstances" is not capable of any precise formulation which may be judicially determined in the facts of each particular case-grave and sudden provocation has sometimes

been considered as an extenuating circumstance. (Ref : 10 BLD 89 (AD), 25 DLR 444, 15 DLR 51 (SC)).

41 DLR 274—M. M. Rafiqul Hyder Vs. The State—Appraising evidence as doubtful at the time of writing judgment without observing anything about the demeanour of witnesses during their examination—The trial judge's adverse observation about the credibility of the witnesses whom the prosecution did not declare hostile and challenge their statement as untrue is untenable-Trial Court's right to believe or disbelive any witness has to be exercised judiciously.

41 DLR 349—Abdul Khaleque Vs. State—Burden of proof—Wrong allocation of burden of proof on the accused appellants to prove their innocence is a dangerous proposition—Conviction cannot be based on materials produced by prosecution.

39 DLR 187—Bangladesh Vs. Sakim Halsana—Particulars detailed in the section to be complied with when writing a judgment Perfunctory way of disposing a case without following the provision of section 367 is condemned. Travelling out of the record of the case and resort to conjecture for finding of not guilty is a perverse way of dealing with the case witness—Veracity and reliability of their evidence—Relationship or partisanships always not a valid ground for rejection of evidence if circumstances show that the evidence is worthy of credit. (Ref : 13 DLR 119).

8 BLD 193 (AD)—Md. Nurul Huda Vs. Bhashanu Sarder—Contents of judgment—Provisions for writing out the judgment were not strictly followed by the Magistrate but the main points in the case under sections 379 and 147 Penal Code are found to have been duly considered by him—High Court Division in the circumstances of the case rightly observed that though Judgment of the Magistrate was not in proper form, some reasons have been given for acquitting the accused persons—No miscarriage of justice have been caused by non compliance with the provisions provided for writing a judgment. (Ref : 23 DLR 96).

7 BCR 210 (AD)—Md. Matiur Rahman Vs. Asgar Ali—The provisions of section 367 Cr. P. C do not apply to a judgment passed under section 264 Cr. P. C. Minimum requirements in section 263 or 364 Cr. P. C to be complied with in delivering a judgment in a case tried summarily. Section 263 Cr. P. C does not require the Court to give reasons for acquittal. Only a brief statement of the reasons is required to be given where it is a case of conviction. It is always desirable that the Magistrate passing an order of acquittal should at least give some indication as to how on evidence the order of acquittal was passed (Ref : 1 BSCD 113).

3 BCR 239—Akram Ali Vs. The State—Court is obliged to record its own decision on the points at issue giving reasons in terms of section 367 (1) and 424 of the Code of Criminal Procedure. A judgment given in appeal must not be a supplementary to the judgment of the court of first instance. Failure of the Sessions Judge to record his independent findings on the points at issue with reference to the evidence has been his main undoing which has rendered the judgment liable to be set aside.

36 DLR 14 (SC)—Nasiruddin Mahmud Vs. Momtazuddin Ahmed—When a litigant brings a litigation before the Court, he is entitled to a decision adjudication of the dispute and such adjudication is to be performed in accordance with the laws of the country and the rules of procedure. Any deviation from such course is bound to affect administration of justice in as much as the whole system rests on public confidence and once the public confidence is shaken there ends the matter.

34 DLR 303—Md. Abdul Karim Mondal Vs. Fazlul Bari—Accused convicted on two different penal sections but the order said nothing under which section the sentence was passed. The irregularity cured by section 537 (Ref : 9 DLR 39 (WP)).

34 DLR 95—Ali Akbar Khan Vs. State—Conviction of several accused person on omnibus statement of PWs connot be sustained.

32 DLR 51—Moksed Ali Vs. State—Judgment of Court of appeal—Formulation of points for determination—Conclusion to be arrived at on facts and law—Discussion of evidence. It is well settled that a final Court of facts must formulate the point or points for determination in the case and give its decisions thereon on the basis of reasons. The law enjoints that the appellate Court hearing an appeal on facts and law must arrive at independent conclusion on all the points at issue. The discussions of the evidence must show that the appellate Court has applied his mind independently to the points at issue. It has been stated and restated by this Court that as also by the erstwhile Dhaka High Court that the finding of Court of appeal on facts should at least give some indication in its Judgment as to the application of its mind to the evidence on record from which the Court of revision would be in a position to judge whether there had or had not been a proper appreciation of the evidence on all the points falling to be decided in the case. A mere statements of the conclusion alone without the reason in support of that conclusion is fair neither to the accused appellant nor to the Court of revision for, thereby that accused is deprived of the opportunity of pointing out to the revisional Court that the method of treatment of his case by the Court of appeal was improper, and this Court is also not in a position to say either one way or the other as to whether the judgment differed or did not consider all the relevant points to be considered in the case. Reference may be made for aforesaid proposition to the decisions in the cases of Kalu Bepari. Vs. The State. (10 DLR 346 & 25 DLR 330). 7 BLD 435, 7 BCR 215, 7 DLR 81).

20 DLR 434—M. K. Zaman Vs. Matiur Rahman—Section 367 (1) Cr. P. C requires that the judgment of a criminal court shall be dated and signed by the presiding officer in open court at the time of pronouncing it. Non-compliance of this section vitiates the judgment and the judgment is liable to be set aside together with order of conviction and sentence (Ref : 15 DLR 30).

19 DLR 486 (SC)—Abdur Rashid Munshi Vs. The State—Order (judgment) dismissing an appeal summarily under

section 367 must show that the court dismissing it as such applied its judicial mind to the question of fact and law though it need not write a full judgment as required under section 421.

18 DLR 425—Maijuddin Vs. The State—Document filed by the defence to prove their possession, not considered—Cases of accused individually not considered, conviction set aside.

11 DLR 226 (SC)—Askar Ali Vs. The State—High Court's judgment, dismissing an appeal, without examination of facts or legal issues, and simply agreeing with the judgment of trial court without considering the judgment of the Appellate Court which was in favour of the accused High Court should have expressed its reasons for disagreeing with the views expressed by the Sessions judge although Sessions Judge's judgment was without jurisdiction.

10 DLR 372—Sona Meah Vs. The State—Setting down the conclusions without reasonings in support of them is not a proper way of disposing with the appeal.

8 DLR 157 (SC)—Munawar Ahmed Vs. The State—Serious omission in not discussing discrepancies in evidence by High Court, calls for interference by the Supreme Court.

7 DLR 119—The Crown Vs. Seraj Ali—In fixing the measure of punishment one is to be guided not by section 367 Cr. P. C. but by various other matters, for instance, the enormity or otherwise of the offence and particular circumstances under which the accused committed it.

6 DLR 339—Kashimuddin Ahmed Vs. The Crown—One judgment to cover two cases which proceeded paripassu, held illegal.

18 BLD (HC) 485—Dulal Miah alias Dulal alias Nurun Nabi Vs. Ruhul Amin and ors.—Contents of judgment—It is the function of the trial Court to analyse the evidence both direct and circumstantial, in the back-ground of the respective cases of the prosecution and the defence and to separate the grains from the chaffs. If the trial Court is swayed by the oratory of the lawyer of a party to the case and without properly analysing the evidence on record in the context of the case of

the prosecution and defence arrives at any finding on consideration of irrelevant matters assigning artificial reasons, then those reasons are likely to be manifestly wrong and perverse and decision arrived at on the basis of such reasons may result in failure of justice.

4 BLC 559—Babu Mollah and ors Vs. State—On perusal of the impugned judgment it appears that the learned Sessions Judge has not properly given the reason for his decision and hence the impugned judgment itself is illegal being not written in accordance with section 376 of the Code.

4 BLC 152—Manik (Md) Vs. Chand Mian Sarder and others—As a trial Court the learned Special Tribunal was required to discuss the two PWs as mandated under section 367, Cr.P.C and the judgment which appears to be a very slipshod judgment cannot be said to be a speaking one.

5 BLC 641—Asiruddin (Md) alias Asiruddin Sarker and others Vs. State and another—Sectin 367 and 424—While affirming the order of conviction and sentence of the trial Court the learned Additional Sessions Judge did not formulate the main point at issue and failed to give his own reason and finding discussing the evidence on record in his judgment in its true perspective omitting totally to consider the inconsistency and contradiction of the evidence of the PWs.

12 BLT (HC) 177—Monu Sheikh & Ors. Vs. The State—The accused-appellants were charged under Sections 458/302/34 of the Penal Code and the learned Trial Court found to have convicted the accused-appellants under Section 302/34 of the Penal Code, but remained silent about the fate of charge so framed under Section 458 of the Penal Code which indicates the impugned judgment was not drawn as per provisions of Section 367 of the Code of Criminal Procedure. [Para-25]

368. Sentence of death.—(1) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

(2) **Sentence of transportation.**—No sentence of transportation shall specify the place to which the person sentenced is to be transported.

Scope and application—Section 53A of the Penal Code has been inserted by Ordinance No. XLI of 1985 dated 3. 8. 85. So practically by this ordinance sentence of transportation has been deleted.

20 BLD (HC) 493—Yasin Mollah and anr. Vs. The State—While disposing of a criminal appeal, the appellate Court is required to formulate the points for determination, the decisions thereon and the reasons for the decisions. This necessarily implies that the appellate court must consider at least the material evidence of the case and arrive at his independent findings on all material points at issue. Mere saying that it concurred with the findings of the trial Court without referring to the material evidence on record is not sufficient to meet the requirements of law. (Ref : 8 BLT (HC) 356).

369. Court not to alter judgment.—Save as otherwise provided by this Code or by any other law for the time being in force no Court when it has signed its judgment shall alter or review the same, except to correct a clerical error.

Scope and application—The judgment of a criminal court is final so far as that court is concerned and on signing and pronouncing it, such court becomes functus officio and has, therefore, no power to review, override, alter or interfere with the judgment in any manner except where it is otherwise provided by the Code or by any other law for the time being in force or for the purpose of correcting clerical errors (1980 P. Cr. LJ 180). No court has any power to alter or review judgment in view of provisions of section 369, except to correct a clerical error nor can section 561A be invoked for reviewing or altering it. No Judge or Magistrate can add to alter or review his proceedings or judgment in any case after they are signed and published (10 CWN 1062). The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a section expressly authorising review of judgment, but the former contains no corresponding section. As soon as the appellate judgment is pronounced and signed by the Judges, the High Court Division is functus officio, and neither the

court itself nor any bench of it has any power to revise the decision or interfere with it in any way (41 Cr. LJ 711).

15 BLD 457—Anowar Hossain Vs. Md. Idris Miah—In a criminal case a judgment mens a judgment of conviction or acquitial. Every order passed in a criminal case cannot therefore, be termed as a judgment. So, an order dismissing a criminal revision for default is not a judgment within the meaning of section 369 of the Code. In the absence of any specific bar in the Code of Criminal Procedure, a petitioner, whose revisional application has been dismissed for default and not on merit, is not debarred from filing second revisional application to challenge an illegal order.

45 DLR 394—Samad Ahmed Vs. the State—Review—Application praying for review of judgment passed in a criminal case is totally contrary to the provisions of section 369.

7 BCR 181 (AD)—Jobed Ali Vs. The State—Whether the High Court Division can review, recall or alter its earlier decision in a Criminal Revision as the High Court Division discharged the Rule without having any opportunity of hearing the accd, petr, Section 561A Cr. P. C gives ample jurisdiction for rehearing of a case which has been dismissed in limine. It is well settled that Section 369 Cr. P. C operates in full force and applies to all judgments of Criminal Court including the High Court. The question of resorting to section 561A does not arise which was passed on merit because inherent power is merely a legislative recognition (Ref : 4 BLD 168 (AD)).

33 DLR 88—Md. Adiluddin Vs. Md. Adiluddin Sheikh—Under section 369 of Cr. P. C a finality has been attached to the judgments already delivered and signed and is has been clearly laid down that no court which has signed its judgment shall alter or review the same except to correct a clerical error (Ref : 1 BCR 298, 5 DLR 71 (WP)).

14 DLR 76 (SC)—Amin Sharif Vs. Sayeda Khatun—Signing of the judgement to be a lawful judgment must be in open court and not at home. The judgment which is referred to in section 369 means a judgment which has been delivered in

accordance with section 366, 367 and 369 of the Cr. P. C. At the same time, the signing which is referred to in section 369 is the signing in the open court at the time of the pronouncement of the judgment and not a signing at home.

18 BLD (HC) 439—Moniruzzaman alias Muhammad Maniruzzaman Vs. The State—Court not to alter Judgment—The consistent view of our superior Courts is that once a criminal case has been decided on merit, the Court has no further power to review its own judgment. Just because a judgment has not been formally signed after its transcription by mechanical devices, it cannot be said that the Court can still review its judgment by way of re-hearing the matter in which the verdict of the Court has been pronounced by delivering the judgment in the open Court.

51 DLR 543—Mostafa Aminur Rashid Vs. State—The provision of section 369 of Code of Criminal Procedure clearly bars alteration of a judgment in a Criminal matter where it is already signed excepting to correct clerical error if any.

370. Omitted.

371. Copy of judgment, etc. to be given to accused on application.—(1) On the application of the accused a copy of the judgment, or, when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay, such copy shall, in any case other than a case under Chapter XX, be given free of cost.

(2) Omitted.

(3) **Case of person sentenced to death.** When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal, should be preferred.

Scope and application—As a copy is granted under this section free of cost, it is not necessary to affix any court-fee stamp on it when preferring an appeal. Free of cost means free of all costs including payment of court-fees. The period of

limitation for appeal from a sentence of death is 7 days from the date of the sentence. Article 150, Limitation Act. provides for the time requisite for obtaining copies (section 12 of the Limitation Act). Under sub-section (3), the Judge should not only inform the accused that he must file his appeal within 7 days, but should also record that the accused was so informed, and whether he desires to appeal.

372. Judgment when to be translated.—The original Judgment shall be filed with the record of proceedings, and, where the original is recorded in a different language from that of the Court and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

373. Court of Session to send copy of finding and sentence to District Magistrate.—In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

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CHAPTER—XXVII

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION

374. Sentence of death to be submitted by Court of Session.—When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court Division and the sentence shall not be executed unless it is confirmed by the High Court Division.

Scope and application—In dealing with appeals of reference proceedings where the question of confirming a death sentence is involved, the High Court Division has to deal with the matter carefully and to examine all relevant and material circumstances before upholding the conviction and confirming the sentence of death. The High Court Division is not bound in law to go by the discretion exercised by the Sessions Judge in the matter of sentence on a reference made to it under this section (1970 Cr. LJ 91). In an appeal the Supreme Court has same powers as the High Court Division has in an appeal against acquittal by the High Court Division, the Supreme Court would be incompetent to pass a sentence of death even if it was the only appropriate sentence on the face of the case.

56 DLR 376—State Vs. Saiful Islam and another—Accused Fazilutennessa made a confessional statement which was not only true but also voluntary. A person confesses from remorse. Therefore, she could realise what she had done with her husband. Moreover, she has been languishing in the condemned cell since 14-2-2000—the above fact is a mitigating circumstance and, as such, her death sentence shold be commuted to one for imprisonment for life.

56 DLR 124—State Vs. Mir Hossain alias Mira and Ors.—It is not possible to lay down any cut and dried formula in imposing proper sectence but the object of sentencing should be to see that the crime does not go unpunished and the society have the satisfaction that justice has been done. In imposing sentence both mitigating and aggravating circumstances are to be taken into consideration and a co-relationship has to be drawn up.

54 DLR 146 (AD)—Giasuddin and another Vs. State—When everything has been proved beyond all reasonable doubt mere long delay in the disposal of the case cannot by itself be a ground to commute the sentence.

53 DLR 439—State Vs. Md Shamim alias Shamim Sikder and ors.—The sentence of death being too harsh for a young man and in the facts of the case is reduced to imprisonment for life.

47 DLR 92 (AD)—Zahiruddin Vs. State—The murder was not committed by a vicious macho male. Before causing death of his wife the appellant suffered for sometime from a bitter sense of being wronged by his wayward wife. In this case ends of justice will sufficiently be met if the sentence of death is commuted to one of life imprisonment. Ref : 3 BLT 115 (AD).

47 DLR 203—Abdul Baset Vs. Govt. of Bangladesh—Since the words "as if the sentences were passed by him" appearing in paragraph 3 of the Proclamation relate to execution of sentence of death, they need be given an interpretation favourable to the condemned prisoners. Pursuant to such interpretation the Sessions Judge is under an obligation to follow the provision of section 374 Cr. P. C and make a reference to the High Court Division for execution of the sentence passed by the Martial Law Court before issuing warrant therefore (Ref : 15 BLD 210).

46 DLR 353—State Vs. Abdul Khaleque—A death reference made by the Court of Session, may be disposed of even if the condemned accused is absconding.

46 DLR 423—Mujibur Rahman Gazi Vs. State—Commutation of death sentence—In consideration of the evidence that the appellant is a young man of 35 and initially he had no premeditation to murder, ends of justice would be met if he is sentenced to imprisonment for life. Accordingly the sentence of death is commuted to imprisonment for life.

44 DLR 225 (AD)—Abul Khair Vs. State—Commutation—Delay by itself is no extenuating circumstance for commuting the sentence. There must be other circumstances of a compelling nature which togather with delay will merit commutation.

44 DLR 556—Abdur Rahman Syed Vs. State—Commutation of sentence—In the instant case there is an immediate voluntary confession. The accused could have taken a plea of innocence but being repentant he made rather an open breast of everything and may be asking for mercy of God. This aspect of his character need be kept in view and then the delay in hearing this reference had not been done by him but he had suffered the agony all these 6 years and modified to imprisonment for life.

24 BLD 462—The State Vs. Bhusan Das—Commutation of death sentence—None of the witnesses examined in this case, including the sisters of the accused stated that the condemned prisoner was mentally imbalanced or he was suffering from any disease and therefore, the accused also did not make any such complaint during his examination under section 342 of the Cr.P.C. There is no cogent ground for altering the sentence of death to a sentence of imprisonment for life.

24 BLD 481—The State Vs. Mofiz Uddin and ors.—It is well settled that mere abscondance cannot always be a circumstance leading to the interference of guilt of the accused. Abscondance of an accused cannot be treated as a corroboration of the confessional statement of another accused so as to base thereupon conviction of the absconding accused.

13 BLD 306—State Vs. Md. Tuku Biswas—In a reference under Section 374 of the Cr. P. C whether the proceeding shall be submitted to the High Court Division and the sentence shall not be executed unless it is confirmed by the High Court Division-Whether a Death Reference may be disposed of even if the condemned accused is absconding.

Held : (i) In a reference by the learned Sessions Judge under section 374 Cr. P. C the proceeding shall be submitted to the High Court Division and the sentence shall not be executed unless it is confirmed by the High Court Division. (i) A Death Reference made under Section 374 Cr. P. C may be disposed of by this Court (i. e. High Court Division) even if the condemned accused is absconding.

42 DLR 171 (AD)—Abed Ali Vs. State—Sentence—Commutation of death sentence—Delay of about two years or so in the disposal of the Death Reference Case and the Jail Appeal in the High Court Division, cannot by itself be a ground for awarding lesser sentence (Ref : 32 DLR 227, 31 DLR 312, 10 BLD 89 (AD)).

5 BCR 195 (AD)—The State Vs. Md. Haroon—Leave was granted that the finding of facts has been reversed by the High Court Division without cogent reasons and on unsubstantial grounds and this reversal is not in accordance with the well settled principles regarding appreciation of evidence and the benefit of doubt that was given by the High Court was not warranted inasmuch as no plea was put by the defence specifically which would raise a doubt in hearing the evidence for giving benefit to the accused.

6 BCR 225 (AD)—State Vs. Paran Chandra Baroi—Submission of the state (Appellant) was that the High Court Division gave more importance to surrounding circumstances than occular evidence of P. W 4 Malina and other eye witness. Inadmissibility of statements in inquest report noticed by third Judge in the High Court Division but in the indian Supreme Court decisions reported in AIR 1978 (SC) 1558, AIR 1975 (SC) 1252 and 1962 that no where it was laid down that inquest report is inadmissible (Ref : 1 DLR 71).

1 BCR 104—Shafali Begum Vs. The State—Conviction can be based on self inculpatory confessions if found true and voluntary, though retracted subsequently. No reliance placed on unsubstantiated allegations of torture and inducement raised at a late stage. Conviction can be altered from sections 302/34 to 302/109 although accused was not charged specifically under those sections.

21 DLR 109 (SC)—Gul Hassan Vs. The State—If a prisoner decamps on whom a sentence of death has been passed by the trial court he thereby forfeits the right of audience before the High Court and the sentence of death may be confirmed in his absence. Lawyers have grave responsibility involving contempt of court in appearing for fugitive convict (Ref : 33 DLR 12).

3 DLR 309 (FC)—Md. Sarwar Vs. Crown—It is not the function of the Federal Court to rectify any technical errors only which might have crept into the Judgment of the High Court. The Federal Court will take notice of technical errors only if injustice has been caused owing to a disregard of the forms of legal process or due to a violation of some principle of natural Justice.

16 BLD (HC) 80—The State Vs. Abul Kalam Azad—Commutation of death sentence—Pangs of separation from the wife, frustrations of the condemned prisoner arising out of the failure of his efforts to get back his wife and the serious mental torments and agonies preceding the unfortunate killing are sufficient mitigating circumstances for commutation of the death sentence. (Ref : 48 DLR 103).

48 DLR 382—Abdul Aziz Mina and others Vs. State—The extenuating circumstances like lack of premediation, sudden quarrel and in the heat of passion, he inflicted the injuries which nevertheless falls within the purview of section 302 of the Penal Code. In our view accused Abdul Aziz Mina if be sentenced to imprisonment for life ends of justice would be met. In such view of the matter we alter the death penalty to that of imprisonment for life.

50 DLR 121—State Vs. Afazuddin Sikder—Part of the confessional statement found true may be accepted by the court to convict the accused rejecting the other part which is not true. There is no merit in the contention that when one part of the confessional statement is rejected, other part, even if true, cannot be accepted.

Learned Sessions Judge could reject a part of the confessional statement if he found the same contrary to other evidence on record. But he could not reject the same on mere surmise and conjecture. A part of the confessional statement favourable to the accused should be given due weight to it unless Court finds the same not true being contrary to other evidence on record.

50 DLR 67—State Vs. Md. Jamaluddin—There was quarrel between the accused and his mother on the day preceding the

occurrence as he pressed for sale of a cow and the sale proceeds and the quarrel led to the occurrence of murder—this apart he is a young man of only 20—In such circumstances his death sentence is commuted to that of life imprisonment.

3 BLT (AD) 115—Zahiruddin Vs. The State—Zahiruddin killed his wife Velua Khatoon on suspicion of her illicit relationship with a paramour such fact being proved by PW 4 and having if corroborated by confessioned statement of the accused the husband was convicted u/s 302 of the penal code and sentenced to death on death code and sentenced to death on death reference. High Court Division confirmed the death sentence. Appellate Division commuted it to one of life imprisonment.

Before causing death of his wife if one is suffered for some time from in bitter sense of being wronged by his wife having illicit connection with her paramour, sentences of death can be commuted to one of life imprisonment for ends of justice.

7 BLC (AD) 52—Nurul Hoque Kazi Vs. State (Criminal)—Although the PWs who corroborated one another in their testimony regarding the prosecution case and they are all natural witnesses but the sentence of death was not affirmed as the offence was committed more than eight years back and, as such, ends of justice will be met if the sentence of death is reduced to one for imprisonment for life.

53 DLR 439—State Vs. Md. Shamim alias Shamim Sikder and ors (Criminal)—The sentence of death being too harsh for a young man and in the facts of the case is reduced to imprisonment for life.

4 BLC 296—State Vs. Md Amir Hossain and others—Section 374 and 376—Although there was a deliberate and determind attack committed by some persons causing violent murder but scrutinising the evidence and considering the submissions of both the sides it is found that there is a dent in the story of the prosecution, caused by the prosecution itself and such evidence creates a reasonable doubt in prosecution case and hence the appellants are entitled to the benefit of doubt as a result of which the reference is rejected and the appeals are allowed.

375. Power to direct further inquiry to be made or additional evidence to be taken.—(1) If when such proceedings are submitted the High Court Division thinks that a further inquiry should be made into or additional evidence taken upon, any point bearing upon, the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

(2) Unless the High Court Division otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court Division, the result of such inquiry and the evidence shall be certified to such Court.

Decision

7 DLR 1 (FC)—Khan Vs. The Crown—Identity of accused in dispute—Prosecution given two opportunities by Sessions Judge to establish identity—Chief Court ordering recording of further evidence—Power not exercised judicially.

5 DLR 13 (WP)—Fazal Elahi Vs. The Crown—There is no rule where an accused person may himself recall a witness and examine him in appeal and then claim as of right an opportunity to rebut his evidence, if any such claim were to be recognised, as founded on any rule of law on principle of natural justice. Once an accused person succeeded in having a witness re-called, he could prolong indefinitely the proceedings by calling witnesses adinfinitum, each to rebut the other (Ref : 5 DLR 44 FC).

4 DLR 551 (FC)—Ali Vs. The Crown—Further inquiry or additional evidence at appellate stage—Should not be ordered to cure infirmities in prosecution case. Denial of accused's right to rebut such evidence amounts to a violation of principles of natural justice (Ref : 4 DLR 111 FC).

376. Power of High Court Division to Confirm sentence or annul conviction.—In any case submitted under section 374, the High Court Division—

(a) may confirm the sentence, or pass any other sentence warranted by law, or

(b) may annul conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or

(c) may acquit the accused person.

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

Scope and application—When a case is submitted under section 374, the whole case is re-opened before the High Court Division, and the High Court Division is bound to go into the facts as well as the law (16 Cr. LJ 818). The power conferred on the High Court Division on a reference under section 374 Cr. P. C is subject to the results of the appeal. If the appeal itself succeeds on its own grounds, its result should not be allowed to be affected by the exercise of any power conferred on the High Court Division. Thus, if an appeal is filed by a condemend prisoner, that appeal has to be disposed of before any order is made on the reference for confirmation of the death sentence (AIR 1968 (SC) 1438).

35 DLR 290 (AD)—Moazzem Hossain, Deputy Attorney General Vs. State—Death reference case cannot be disposed of unless the conneted appeal by the accused is disposed of. The observation of the Court that "the court has been unable to proceed with the case since 2nd February 1983 solely and wholly because of the conduct of the Deputy Attorney-General" is totally unfounded. Bench has no power to grant leave of absence from office duties to a Govt. office like the Assistant Attorney-General. That power lies only with the Government Court's special responsibility in maintaining the self-imposed code of conduct-Behaviour and dealings with reference to those who come in contact, their keeping open and fair mind and impartiality-all emphasised. Both the Bench and the Bar are two arms of the same machinery and unless

they work harmoniously justice cannot be properly administered. An erring judge and erring contemner are both a danger to the pristine purity of the seat of justice.

8 BLD 79—The State Vs. Ful Meah—Commutation of sentence—Facts showing mental agony of the accused to be considered—The condemned prisoner is in custody since 15.6.76. He was once before sentenced to death on 31.5.78, retried and again so sentenced on 11.5.85—He is in mental agony for over last 10 years—His death sentence is therefore commuted to imprisonment for life.

7 BLD 324 (AD)—Nausher Ali Sarder Vs. The State—Death Sentence-Question of commutation—Bitter matrimonial relationship played a part in the nefarious situation and the same cannot be overlooked—Ends of justice will be met if the appellants are sentenced to transportation for life instead of death (Ref : 5 BLD 130, 8 DLR 554).

6 BLD 402—Abdur Rouf Vs. The State—Commutation of death sentence—It is clear that the condemned prisoner was used by some veteran criminals whom the court is unable to catch hold of and other culprits who engineered the whole game were not brought before the court either on the failure of the state machineries or the public prosecutor though the condemned prisoner participated in the liberation war and he has been in jail hajat for 6 years before his conviction and his custody for one year 5 months more since his conviction—The delay in disposal of the death reference may also be taken as an extenuating circumstances to commute the death sentence to transportation for life. The condemned prisoner though not of such a tender age but in addition to other circumstances his age may also be taken into consideration in commuting sentence of death to transportation for life (Ref : 4 BLD 257, 228).

21 DLR 29 (SC)—Rashid Ahmed Vs. The State—No appeal lies to the Supreme Court as of right when High Court alters a sentence of death to transportation for life either under section 376 or section 423 Cr. P. C (Ref : 15 DLR 219 (SC)).

18 BLD (HC) 605—The State Vs. Md. Monir Ahmed alias Monir Hossain—Commutation of death sentence—The condemned-prisoner is in the condemned-cell for a period of 4 years and 11 months and he has been suffering mental agony of death within the death cell for all these days. Considering the facts and circumstances of the case and also fact that the death sentence remained pending for 4 years and 11 months, the High Court Division held that the sentence of life imprisonment instead of death will meet the ends of justice.

49 DLR 381—State Vs. Kamal Ahmed—The condemned prisoners being in the cell for 4 years 7 months in the agony of death sentence hanging over their neck, their death sentence is commuted to life imprisonment.

51 DLR 373—Shahajan (Md) Vs. State—Provocation in the mind of the condemned prisoner which was a continuous one because of illicit intimacy between the deceased and the wife of the condemned prisoner led to the killing of the deceased victim. So the sentence of death should be altered into sentence of imprisonment for life. [Ref : 5 BLC 250].

50 DLR 517—State Vs. Hamida Khatun and another—The fact that the condemned prisoner committed the murder under influence of some provocation should not be ignored while considering the question of sentence.

50 DLR 517—State Vs. Hamida Khatun and another—Since Hamida did not play the principal role in murdering her husband and there is no evidence to show that she along with Abu Taher planned in advance to kill her husband in furtherance of common intention, ends of justice would be met if the sentence of death is reduced to one of imprisonment for life.

52 DLR (HC) 633—State Vs. Md. Khosbar Ali—In view of the omissions and laches on the part of the State defence lawyer, the submission of the learned Advocate on point of sentence deserves consideration.

20 BLD (HC) 484—The State Vs. Akkel Ali and others—Vicarious liability and commutation of death sentence—Since

the condemned prisoners Omar Ali, Quasem Ali did not give the fatal blows they are only vicariously liable under section 34 of the Penal Code for the offence of murder but ends of justice will be met if their sentence is commuted and reduced to one of imprisonment for life. Since the accused Akkel Ali gave the channy blow on the stomach and the ribs and there was infection as a result of that injury the High Court Division inclined to maintain his sentence of death.

20 BLD (HC) 45—The State Vs. Billal Hossain—Commutation of sentence—The condemned prisoner was arrested on 11.12.91, conviction and sentence to death on 20.9.94. He has suffered the agony of death sentence for more than 5 years, moreover he is a man of 25 years. He has an old mother, one wife and two children to support and look after. He is not a hardened criminal. He found his wife (deceased) in illicit connection and in an inappropriate situation with Delwar and thus suffered from a sense of being wronged by her. He cannot be termed as "vicious macho male" and accordingly the sentence of death is reduce to life imprisonment.

9 BLC 220— State Vs. Md Milton—Record does not indicate that condemned prisoner Masud was a hardened criminal and a menace to society. If Masud would have been a menace to society he would not have been allowed to survive anymore. Taking into account the fact and circumstances of the case and, also, his 24 years of age and, also, that he had been in death cell for two years and three months and suffered agony of death for such period, ends of justice would be met if his neck is saved and thus sentence of death is altered to that of imprisonment for life.

6 BLC (AD) 96—Mofazzal Hossain Pramanik Vs. State—High Court Division on consideration of the evidence found that the petitioner had killed two victims without any provocation whatsoever and the killing was a result of premeditation and that the petitioner who has taken two lives should give his won life and the sentence of death was not commuted to imprisonment for life.

6 BLC (HC) 187—State Vs. Mannan Gazi (Criminal)—The allegation remains according to PW 1 that the victim was beaten by the condemned prisoner along with others. But it is not in evidence and there are admittedly no eye-witnesses and ocular evidence in the case as to who inflicted the fatal injury on the neck of the victim and hence the ends of justice will be met if the condemned prisoner is sentenced to imprisonment for life instead of awarding him sentence of death.

5 BLC 304—State Vs. Azad Miah @ Md Azad—As only death sentence has been prescribed for the offence under section 6(2) of the Nari-o-Shishu Nirjatan (Bishes Bidhan) Ain, 1995 and when the offence under such section is proved there is no scope for awarding a lesser sentence on any ground.

5 BLC 210—State Vs. Jashimuddin @ Jaju Mia—As the condemned prisoner has been in condemned cell for four and a half years and he did not cause any injury to the deceased persons which may be considered as mitigating circumstances in awarding a lesser sentence and ends of justic will be met if the sentence of death is commutted to imprisonment for life.

5 BLC 230—State Vs. Abul Kalam—In the absence of any evidence as to the immediate cause of committing the offence ends of justice will be met if the sentence of death is altered to one of imprisonment for life.

4 BLC 426—State Vs. Md Monir Ahmed—It is contended on behalf of the condemned prisoner that she was not properly defended by appointing a competent defence lawyer and she was not fairly treated by the mistress and her daughter and she was abused and ill treated and as a result of hot alteration she lost her control and she might have inflicted bati-dao blow but it was without any permeditation and she has been suffering from mental agony of death sentence for more than 4 years and hence she should be considered for imposing lesser sentence. Considering the submission of both the sides the High Court Division reduced the sentence of

death to imprisonment for life. *State Vs. Romana Begum @ N*The condemned prisoner has been languishing in the condemned cell for a period of 4 years and 11 months and has been suffering from constant mental agony of death and taking this view into consideration his sentence of death is altered to life imprisonment.

5 BLC 353—State Vs. Eunus Khan—As the condemned husband gave only one kick at the lower part of the abdomen of his wife as a result of which she died and the interest of justice will be better served if lesser sentence is imposed from capital sentence to imprisonment for life.

5 BLC 386—Mahir Mollah and others Vs. State—Section 376 and 417—It is not correct to say that the case as made out in the FIR has been given a go-bye and a new case developed during the trial and the learned trial Court most illegally discarded the evidence of 8 eye-witnesses and hence the findings and decisions of the learned trial Court are not supported by the evidence on record and as such the impugned judgment and order of acquittal are considered to be perverse and it is set aside.

377. Confirmation of new sentence to be signed by two Judges.—In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court Division, shall when such Court consists of two or more judges, be made, passed and signed by at least two of them.

378. Procedure in case of difference of opinion.—When any such case is heard before a bench of Judges and such Judges are equally divided in opinion, the case with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit shall deliver his opinion, and the judgment or order shall follow such opinion.

Scope and application—When one judgment is for conviction and another for acquittal, the duty of the third

Judge is to examine the whole evidence and come to an independent opinion (AIR 1961 AP 70, 6 DLR 104 (WP)).

6 DLR 101 FB—Hamid Nizami Vs. The Crown—Cases on difference of opinion between two Judges referred to third Judge—Reference by third Judge on question of law to Full Bench—Competent.

379. Procedure in cases submitted to High Court Division for Confirmation.—In cases submitted by the Court of Session to the High Court Division for the confirmation of a sentence of death, the proper officer of the High Court Division shall, without delay after the order of confirmation or other order has been made by the High Court Division, send a copy of the order, under the seal of the High Court Division and attested with his official signature, to the Court of Session.

380. Omitted.

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CHAPTER–XXVIII

OF EXECUTION

381. Execution of order Passed under section 376.– When a sentence of death passed by a Court of Session is submitted to the High Court Division for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court Division thereon cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

Scope and application–Only the Sessions Judge which passed the death sentence can issue warrant for execution of sentence.

382. Postponment of capital sentence on pregnant Woman.– If a woman sentenced to death is found to be pregnant, the High Court Division shall order the execution of the sentence to be postponed, any may, if it thinks fit, commute the sentence to imprisonment for life.

383. Execution of sentence of transportation or imprisonment in other cases.– Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be, confined, and unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.

384. Direction of warrant for execution.– Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be, confined.

385. Warrant with whom to be lodged.– When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

386. Warrant for levy of fine.–(1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may–

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the collector of the District authorising him to realise the amount by execution according to civil process against the movable or immovable property, or both of the defaulter;

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

(2) The Government may make rules regulating the manner in which warrants under sub-section (1), clause (a), are to be executed and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Courts issue a warrant to the Collector under sub-section (1), clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly;

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

Scope and application—In a case where the offender can be and has been sentenced only to pay a fine, the proper procedure for levying the fine is that laid down in this section and not under section 388 (AIR 1953 Call 76). A sentence of fine should be specific as to each offender fined. Where the offender has been committed to jail for failure to pay the fine but the full term of imprisonment for default has not been completed, the proviso does not apply and a warrant can be

issued (AIR 1939 Cal 337). A warrant under clause (1) (b) can be issued only by the court which sentences the accused, it cannot be issued by others.

5 BLD 166 AD—The state Vs. Abul Kashem—Whether a Magistrate can order for imprisonment in default of payment of fine when the offence is punishable with fine only. Section 33(1) Cr. P. C authorises the Magistrate to award such term of imprisonment in default of payment of fine. Section 33 (1) Cr. P. C governs both the cases. Whether the offences is punishable with imprisonment as well as fine and where offence is punishable only with fine the imprisonment in default of payment of fine shall be simple and the maximum term is six months. All courts including court of Magistrate got power to direct recovery of fine, when the offence is punishable only with fine by any of the three methods, such as by issuing distress warrants or by referring the matter to the Collector or by committing the offender to the prison (Ref : 37 DLR 91 AD, 5 BCR 265 AD).

34 DLR 32—Sasanka Sekhar Bose Vs. Government of Bangladesh—Fine, sentence of, passed by Summary Military Court Realisation thereof under the provisions of the Cr. P. C is in accordance with law.

16 DLR 106 (WP)—Md. Hanif Vs. Mosammat Anis Fatema—Maintenance—Attachment of monthly salary when salary and neither been received by office nor was ready for disbursement Attachment not legal.

13 DLR 731—Haji Matiur Rahman Chowdhury Vs. The State—District Magistrate himself is not competent to issue distress warrant for realisation of fine.

6 DLR 217—Jamal Ahmed Chowdhury Vs. Collector of Customs—Realisation of penalty by Custom officer acting under section 193, Sea Custom Act, with the aid of Magistrate acting under section 386, (1) (a) Cr. P. C is not a criminal proceedings but a revenue matter. High Court is not competent to interfere under section 439.

52 DLR (HC) 282—Ali Hossain (Md) and others Vs. State—Fine is a charge upon the assets of the convict as a public

dues and it continues to be so even after his death and it is recoverable from his successor-in-interest under the provisions of section 386 of the Code. (Ref : 8 BLT (HCD) 191, 5 MLR (HCD) 299).

52 DLR (HC) 510—Rowshan Ali (Md) Vs. State—Fine imposed by the Criminal Court upon an accused is of the nature of a financial punishment as distinguished from physical punishment and it must be realised from him under all normal circumstances. The accused has no option in the matter. (Ref : 5 MLR (HCD) 342).

52 DLR (HC) 282—Ali Hossain (Md) and others Vs. State—Fine imposed upon an accused in a criminal proceeding is of the nature of a financial punishment as distinguished from physical punishment and it must be paid by him under all normal circumstances.

Revision— An order of the Magistrate passed under this section in his judicial capacity is subject to revision under section 435 and 439A Cr. P. C.

6 BLC (AD) 30—Hussain Muhammad Ershad Vs. State—There being a clear provision in substantive law dealing with the subject it would not be proper to invoke Article 104 of the Constitution by ignoring the provisions of sections 68 and 69 of the Penal Code when exercise of such inherent power comes into direct conflict with the express provision of the law.

21 BLD (HC) 33—Md. Rowshan Ali Vs. The State—A fine imposed by a criminal court is a financial punishment and must be realised from the accused under all normal circumstances. The accused has no option to plead that he would prefer to suffer imprisonment for a fixed term in lieu of payment of fine. The imposition of a fine by a criminal court upon an accused as a financial punishment is meant for prompt realisation as a public due in a summary way under section 386 of the Code of Criminal Procedure, without the necessity of initiating an independent time consuming and cumbersome proceeding. If an accused is allowed to exercise an option in the matter of payment of fine, the relevant public authority or body suffering financial injury at the instance of

the accused shall be left with no prompt and easy measure for realisation of its losses from the accused, who would then enrich himself at the expense of the aggrieved. This will tantamount to giving a premium to the delinquent at the cost of the expropriated. The fine is thus a charge upon the assets of the convict as a public due and it continues to be so even after his death and it must be recovered with utmost promptitude. It is only when the assets of the convict are not sufficient to cover the amount of the fine, he shall then suffer imprisonment for default to pay the fine.

387. Effect of such warrant.—A warrant issued under section 386, sub-section (1), clause (a), by any Court may be executed within the local limits of the jurisdiction such Court, and it shall authorise the attachment and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Metropolitan Magistrate within the local limits of whose jurisdiction such property is found.

Scope and application—There is no provision in the Cr. P. C by which the Magistrate can take bail from a person convicted and sentenced to fine and the Magistrate cannot refuse to release such a person before the payment of the fine or take bail for such release.

Revision—An order endorsing an order for execution of sentence of fine is a judicial order in so far as the District Magistrate endorsing the warrant must see that it is a legal warrant. Such order is open to revision by the Sessions judge under section 435 and 439A Cr. P. C (AIR 1964 Mad. 185).

388. Suspension of execution of sentence of imprisonment.—(1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may—

(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and

(b) Suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made : and if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) The provisions of sub section (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; and, if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.

Scope and application—When an accused is sentenced to a fine only and in default of payment to imprisonment for a certain term, time should be given for payment of the fine.

389. Who may issue warrant.—Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor in office.

390. Execution of sentence of whipping only.—When the accused is sentenced to whipping only, the sentence shall subject to the provisions of section 391 be executed at such place and time as the Court may direct.

391. Execution of sentence of whipping, in addition to imprisonment.—(1) When the accused—

(a) Is sentenced to whipping only and furnishes bail to the satisfaction of the Court for his appearance at such time and place as the Court may direct, or

(b) is sentenced to whipping in eddition to imprisonment, the whipping shall not be inflicted until fifteen days from the date of the sentence, or, if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

(2) The whipping shall be inflicted in the presence of the officer-in-charge of the jail, unless the Judge or Magistrate orders is to be inflicted in his own presence.

(3) No accused person shall be sent nced to whipping in addition to imprisonment when the term of imprisonment to which he is sentenced is less than three months.

392. Mode of inflicting punishment.—(1) In the case of person of or over sixteen years of age whipping shall be inflicted with a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the Government directs, and, in the case of a person under sixteen years of age, it shall be inflicted in such mode and on such part of the person, and with such instruments, as the Government directs.

(2) **Limit of number of stripes.** In no case shall such punishment exceed thirty stripes and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes.

393. Not to be executed by instalments exemptions.— No sentence of whipping shall be executed by instalments; and none of the following persons shall be punishable with whipping namely;

(a) females;

(b) males sentence to death or to imprisonment for life or to imprisonment for more than five years :

(c) males whom the Court considers to be more than forty-five years of age.

394. Whipping not to be inflicted if offender not in fit state of health.—(1) The punishment of whipping shall not be

inflicted unless a medical officer, if present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

(2) **Stay of Execution.**—If, during the execution of a sentence of whipping a medical officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

395. Procedure if punishment cannot be inflicted under section 394.—(1) In any case in which, under section 394, a sentence of whipping is, wholly or partially, prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it : and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months, or to a fine not exceeding five hundred taka, which may be in addition to any other punishment to which he may have been sentenced for the same offence.

(2) Nothing in this section shall be deemed to authorise any Court to inflict imprisonment for a term or a fine of an amount exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict.

Scope and application—When the sentence of whipping cannot be executed, section 395 allows the court to remit the sentence altogether or to sentence to offender in lieu of whipping to imprisonment or fine. Therefor, the Magistrate cannot in such a case order the accused to give a bond for one year (AIR 1938 Rang 218).

396. Execution of sentences on escaped convicts.—(1) When sentence is passed under this Code on an escaped convict, such sentence, if of death, fine or whipping, shall subject to the provisions herein before contained, take effect immediately, and, if of imprisonment, or transportation, shall take effect according to the following rules, that is to say :—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when be escaped the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, or imprisonment for life as the case may be, for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

Explanation.—For the purposes of this section—

(a) a sentence of imprisonment for life shall be deemed severer than a sentence of imprisonment ;

(b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement; and

(c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

397. Sentence on offender already sentenced for another offence.—When a person already undergoing a sentence of imprisonment or imprisonment for life is sentenced to imprisonment, or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment, or transportation to which he has been previously sentenced unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence :

Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of imprisonment for life, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced;

Provided, further, that where a person who has been sentenced to imprisonment by an order under section 123 in

default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

Scope and application—Where an accused is sentenced to concurrent terms of imprisonment, no one of which alone is appealable, he is not entitled to appeal against them collectively (14 Cr. LJ 254). In the case of imprisonment for one day, as the day on which the sentence is passed counts as one day, the accused cannot be detained in jail on a warrant issued for such period (50 Cr. LJ 135).

8 DLR 250—Mazharul Huq Vs. The Crown—Section 397 lays down the principle that a sentence commences to run from the time of its being passed, and this section creates an exception in the case of persons already undergoing imprisonment and postpones the operation of subsequent sentence until after the expiry of the previous sentence unless the court directs that a subsequent sentence shall run concurrently with such previous sentence.

398. Saving as to section 396 and 397.—(1) Nothing in section 396 or section 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of imprisonment for life and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences, of imprisonment, or imprisonment for life, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.

399. Confinement of youthful offenders in reformatories.—(1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail shall be confined in any

reformatory established by the Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the Government prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) Omitted.

Scope and application—In order that section 399 may apply, the offender must be sentenced to imprisonment. The Magistrate should determine precisely the age of the accused by inquiry before action is taken under this section (AIR 1951 Punj. 187). Where the accused is not under the age of fifteen years he cannot be ordered to be detained in a reformatory (25 Cal. 333).

400. Return of warrant on execution of sentence.— When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it issued, with an endorsement under his hand certifying the manner in which the sentence has been executed.

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CHAPTER—XXIX

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES

401. Power to suspend or remit sentences.—(1) When any person has been sentenced to punishment for an offence, the Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the Government for the suspension or remission of a sentence, the Government, may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused; together with his reasons for such opinion and also to forward with the statement of such opnion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Government, not fulfilled, the Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police-officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which as sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(4A) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposses any liability upon him or his property.

(5) Nothing herein contained shall be deemed to interfere with the right of the President to grant pardons, reprieves, respites or remissions of punishment.

(5A) Where a conditional pardon is granted by the President, any condition thereby imposed, of whatever nature shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly.

(6) The Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which pertitions should be presented and dealt with.

Scope and application—This section may be read along with Ordinance No. XLI of 985 dated 3.8.85. A sentence of imprisonment for life may be treated as imprisonment for the whole of remaining period of the convicted persons natural life that means it shall be assumed that the prisoner has to undergo aggregate imprisonment of 25 years. This section may be read with section 57 Penal Code. This section gives no power to the Government to reverse the judgment of the court. It only provides the power of remitting the sentence (AIR 1968 Punj 233). The court is concerned only with the passing of the sentence, to carry it into effect is the function of the executive government. It is upto them to decide whether they should invoke their powers of granting remission in a particular case or not (PLD 1965 Quetta 15). This section confers a mere discretionary power which may or may not be exercised at all (PLD 1963 Dac 422). The Government can remit a sentence passed by a Special Military Court. This section clearly provides both for remission and of suspension. The Government may by notification grant special remission not covered by the Jail Manual. Government is not empowered to remit imprisonment in default of payment of fine (AIR 1969 All 116).

40 DLR 244—Nasiruddin Meah Vs. The State—Section 401 Cr.P.C empowers the Government to remit and suspend a sentence passed by a Court but for such remission and suspension of sentence the order of conviction is not reversed. It remains in force, but the convict due to an order of remission and suspension passed under section 401 Cr. P. C is

not to serve out the period of sentence so suspended and is not to pay the fine so remitted (Ref : 7 BCR 289).

1 BLD 107 (SC)—Kh. Ehtheshamuddin Ahmed alias Iqbal Vs. Bangladesh—Power to suspend or remit sentence is within the absolute discretion of the Government or the President and the court cannot give any direction in this regard (Ref : 7 DLR 91 (WP)).

20 DLR 25 (WP)—Md. Hossain Vs. The State—Life sentence means 20 years of imprisonment. Remission earned on the basis of rules framed under section 56 of the Prisons Act reducing 20 years to 14 years and after 14 years completion the matter to be refferred to the Provincial Government for action. Convict cannot claim 14 years as a matter of right (Ref: AIR 1967 Mys 181, 21 DLR 155).

16 DLR 442 (SC)—Lt. Col.G.L.Bhattacharjee Vs. The State— Provincial Government's powers of remission of a sentence remain unaffected by section 5 of the President's Order 26 of 1962. When a direction is given by the President reducing a sentence of imprisonment the direction not being one which would fall under Article 98 of the Constitution, the Provincial Government reducing the sentence in exercise of the powers vested in it under section 401 Cr.P.C in compliance with President's direction. The sentence thus reduced is just the sentence reduced by the Provincial Government under section 401 (Ref : 15 DLR 175).

3 DLR 308 (FC)—Abdul Rashid Vs. Crown—Whenever an application is made to the Government for the suspension or remission of the sentence, the Government may require the presiding judge of the Court by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused. It is not obligatory on the Government to consult the High Court in this respect.

17 BLD (HC) 195—Mohammad Jahangir Alam Vs. Govt. of Bangladesh and others—General Clauses Act, 1879 (X of 1879) Section-21

Acting President's Order No. 70 of 1990—Order of clemency dated 14.1.1991 passed under section 401 (1) Cr.P.C.

was given effect to on and from 14.1.1991. Refusal of the said clemency benefit to the present detenu under a subsequent Government order is an act of discrimination in the matter of giving amnesty benefits to convicts.

When a legal right accrues in favour of a man and it is given effect to, then such a right cannot be taken away or nullified by a subsequent government order under section 21 of the general clauses Act.

402. Power to commute punishment.—(1) The Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after if :-

death, imprisonment for life, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) Nothing in this section shall effect the provisions of section 54 or section 55 of the Penal Code.

Scope and application—The Government can commute a sentence under this section but that is done as a matter of grace and not in the exercise of judicial discretion. Therefore the act of Government under this section is not open to scrutiny by the High Court Division.

21 DLR 60 (WP)—Mir Zaman Vs. Secretary, Government of West Pakistan—Commutation of sentence under section 402 and 402A Cr.P.C on the ground that the convict was in detention for 24 months in the condemned cell cannot be claimed under Article 98 of the Constitution.

402A. Sentences of death.—The powers conferred by sections 401 and 402 upon the Government may, in the case of sentences of death, also be exercised by the President.

Scope and application—Only a death sentence can be suspended by the President under section 402A Cr. P. C.

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CHAPTER—XXX

OF PREVIOUS ACQUITTALS OR CONVICTIONS

403. Person once convicted or acquitted not to be tried for same offence.—(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be affterwards tried for such last-mentioned offence, if the consquences had not happend, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

Explanation—The dismissal of a complaint, the stopping of proceedings under section 249, or the discharge of the accused is not an acquittal for the purposes of this section.

ILLUSTRATIONS

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or, upon the same facts, with theft simply, or with criminal breach of trust.

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery : but it appears from the facts that A committed robbery at the time when the murder was committed : he may afterwards be charged with, and tried for, robbery.

(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(d) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.

(e) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B.A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph 3 of the section.

(f) A is charged by the Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with and tried for robbery on the same facts.

(g) A. B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D.A.B and C may afterwards be charged with, and tried for dacoity on the same facts.

Scope and application—This section is exhaustive on the subject of the effect of previous acquittal or conviction. For applicability of the provision of this section three essential conditions have to be satisfied, namely (a) there must have been a trial of the accused of the offence charged against him. (b) the trial must have been by a Court of competent jurisdiction and (c) there must have been a judgment of

conviction or order of acquittal (PLD 1970 Kar 386). The order of the competent court is binding and conclusive in all subsequent proceedings between the parties to the adjudication. This section does not apply unless the accused has been tried and convicted or acquitted. Article 35 (2) of the Constitution of the People's Republic of Bangladesh guarantees immunity from double jeopardy. This section may be read along with section 417, 423, 439 Cr. P C. The burden of proving the facts necessary to establish a plea is on the accused (AIR 28 Pat 577). A man may not be put twice in trial for the same offence. The principle that has been sought to be enacted in the section is that no man should be vexed with several trials for offences arising out of the identical acts committed by him. There is nothing like resjudicate in a criminal trial as long as it does not terminate in either acquittal or conviction so as to attract the provisions of this section. Sections 403(1) will operate in cases covered by sections 236 and 237 Cr. P. C but will not operate in cases covered by section 235 (1). Section 403 does not apply to proceedings for taking security either under section 107 or 110 as there is no conviction of any offence.

47 DLR 313—Gadahar Namadas Vs. Joytun Akther—Acquittal of the accused under section 247 Cr. P. C is not an acquittal within the meaning of section 403 of the Code and connot bar a fresh prosecution. (Ref : 15 BLD 377).

45 DLR 533—H.M. Ershad Vs. State—Double Jeopardy—The accused is going to be prosecuted in respect of an offence which did not occur during the earlier transaction nor the present case arose out of the same fact and for the present offence he was not tried previously. In such a position the doctrine of the constitution or of the code as to double jeopardy is not applicable in the present case.

42 DLR 22 (AD)—Arfan Ali Vs. State—When facts of the case are such that it is doubtful which of the several offences has been committed the accused may be charged with having all or any of such offences; and after trial for one such offence the accused may be convicted for the other offence even though he was not charged thereafter. In the instant case

"robbery" and "unauthorised possession of fire arms" are not offences of the same nature contemplated in sections 236 and 237 (1) Cr. P. C. but these are two distinct offences for which a person may be charged for each of them as provided in section 235 (1) Cr. P. C.

8 BLD 64—Alhaj Mantaj Meah Vs. The State—Fresh case on the same offence—When no bar—After an illegal dismissal of an earlier case, the lodging of fresh FIR in respect of the same offence and starting a fresh case on the basis of such FIR is not barred.

7 BCR 184 (AD)—Sultan Mahmudul Hossain Vs. The State—In the present case before us, there seems to be no scope for the application of the principle allowing a second prosecution, as contained in Clause (2) of section 403. Neither can the principle emboided in section 237 be invoked for holding the second trial. As provided in section 236, the appellant should have been charged for the offences he is now being charged with at the first trial. Section 403 has incorporated a salutary English common law doctrine of autre fois acquit and autre fois convict, its aim being to prevent harassment to the accused who has previously been either acquitted or convicted by exposing him afresh to another trial for the same offence or on same facts for some other offence (Ref : 33 DLR 231, 8 DLR 634).

36 DLR 58 (SC)—Abdus Salam Master Vs. The State—Dismissal of a complaint or discharge of an accused is not the same thing as acquittal. There cannot be a fresh prosecution after acquittal of the accused. Fresh complaint against the same accused, after acceptance of final report, though legally permissible, yet must be entertained in exceptional cases showing manifest illegality or other sufficient causes. Fresh complaint may also be entertained if the order of dismissal of the previous complaint had been passed on misunderstanding of the scope and extent of enquiry under section 202 Cr. P. C.

32 DLR 177 (SC)—Gopinath Ghose Vs. The State—The doctrine of previous acquittal or previous conviction known in English Common Law as autre fois acquit or autre fois convict

has been embodied within language of section 403 (1) of the Cr. P. C. The underlying principle is that of a person has been tried by a competent court for an offence and has been either convicted or acquitted of such offence, he shall not be tried again for the same offence or on the same facts for any other offence for which a different charge might have been made under section 236 or he might have been convicted under section 237 of the Code (Ref : 29 DLR 366, 14 DLR 263, 29 DLR 157, 31 DLR 127).

21 DLR 35 (SC)—Adam Vs. Collector of Customs—Conviction by court for sumggling goods as well as proceedings for confiscation of the contraband goods by the Customs Authority are different matters and as such, proceedings before the court as well as before the Customs Authority on the same transaction not hit by the rule of double jeopardy.

20 DLR 423—Superintendent and Remembrancer of Legal Affairs, Government of East Pakistan Vs. Jilani Khan—Every contravention of every notice to aquit constitute a fresh offence. It this be not so, the result would be disastrous for the reason that a foreigner once convicted or acquitted for contravening aquit notice would become immune from further prosecution and this would enable him to go on residing in this country illegally and with immunity.

19 DLR 684—Amanullah Molla Vs. Dhaka Municipality—Accused convicted in the first trial under section 115 and 116 of the Municipal Administration Ordinance. He was Convicted in a second trial under the same sections and sentenced to pay Rs. 20 per diem till he stopped runing the mill. Punishment thus envisaged is permissible (Ref : 16 DLR 55 (SC), 13 DLR 892).

14 DLR 235 (SC)— Rana Md. Fazal Khan Vs. The State—Refusal to take cognizance of an offence under section 182 P. C for absence of complaint by public servant concerned does not amount to acquittal. It is open to the public servants concerned to file complaints on which proceedings can be taken de novo.

14 DLR 526—Motiur Rahman Vs. The State—Subsequent trial on the same set of facts not illegal when the offence committed comes within the ambit of a different law.

12 DLR 823—Abdul Jabbar Khan Vs. The State—In the case of an order of discharge the accused can again be put on his trial on the same facts.

18 DLR 128 (FC)—M.S.K. Ibrat Vs. Ministry of Defence—The only statutory provisions which recognise the rule against double jeopardy are provided in section 403 of the Cr. P. C and section 26 of the General Clauses Act. 1897. The former bars a second trial; the latter prohibits a person from being punished twice for the same offence (Ref : 18 DLR 82 (WP). 8 DLR 250. 5 DLR 114 (WP)).

4 DLR 305—Hurmat Ali Vs. The Crown—The accused was tried under section 5 (2) of Act II of 1947 and convicted by an Assistant Sessions Judge. On appeal the Sessions Judge set aside the order of conviction and sentence for want of a valid sanction and directed retrial. Fresh sanction was accorded. On application for quashing of the proceedings; **Held :** that the order of the Sessions Judge for retrial cannot be legally supported. Held further, that if the authorities so desire fresh prosecution may be instituted for the same offence and section 403 (1) Cr. P. C would be no bar. Autre fois acquit or autre fois convict—Principle of double jeopardy—A second trial cannot be allowed.

16 BLD (HC) 113—Abdur Rashid alias Rashid and others Vs. The State—Person once convicted or acquitted is not to be tried for the same offence

Principle of double jeopardy—Reading the provisions of section 403 (1)(2) of the Code of Criminal Procedure together with Article 35 of the Constitution it becomes clear that although the present case is in respect of an offence under section 19A of the Arms Act and the previous case was in respect of offences under section 395/397 of the Penal Code, which ended in conviction of the petitioners, the recovery of the rifle during investigation of the earlier case and the rifle in question being subject matter of the dacoity case as an alamat and the connected acts forming same transaction the subsequent proceeding offends against the provisions of section 403 Cr. P. C. and Article 35 of the Constitution and as

such the subsequent case is not maintainable in law. (Ref : 1 BLC 180).

16 BLD (HC) 533—The State Vs. Mesbahuddin—Acquittal of non-appealing accused—After the Court finds that the order of conviction as a whole is not maintainable in law it should acquit even the non-appealing accused so that nobody is deprived of the fountain of justice.

51 DLR 473—Parveen and another Vs. State—The statutory provisions recognise the Rule against double jeopardy and the principle of res judicata should apply to criminal proceedings in the same way as to civil proceedings but there being no conviction in the cases under reference, the principle of double jeopardy does not apply.

52 DLR (HC) 374—Mohammadullah Vs. Sessions Judge and others—The whole basis of section 403(1) of the Code as well as Article 35(2) is that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal—if the court is not so competent, the whole trial is null and void and it cannot be said that there was any conviction or acquittal in force such a trial does not bar a subsequent trial of the acused.

7 BLT (AD) 227—Dewan Obaidur Rahman Vs. The State & Anr—After acquittal under section 247 Cr. P. C. Lodging of the Second complaint on the self same allegations was barred under section 403 Cr. P. C.

4 BLT (AD) 258—Jotish Das Vs. Chandan Kumer Das—Fresh Complaint, over the self same occurrence—When a proceeding is stopped under section 339 C of the Code of Criminal Procedure and the acused stands released thereunder, such release is neither an acquittal nor a discharge as has been contemplated under the code and as such the accused cannot claim the Protection of section 403 of the code from facing trial for the same offence.

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