IN THE HIGH COURT OF SINDH, KARACHI

Cr. Accountability Appeal No.33 of 2001
Cr.Revision Application Nos.95 to 105 of 2001

DATE	ORDER WITH SIGNATURE OF JUDGES

Before:-
Mr.Justice Muhammad Ali Mazhar
Mr.Justice Salahuddin Panhwar
Mr.Justice Zulfiqar Ahmad Khan

Cr. Accountability Appeal No. 33 of 2001
[Abdul Sattar Dero v/s. State]

Cr. Revision Application No. 95 of 2001
[Mrs. Zahid Sattar v/s. State]

Cr. Revision Application No. 96 of 2001
[Tufail Ahmed Chandio v/s. State]

Cr. Revision Application No. 97 of 2001
[Mst. Tehmina v/s. State]

Cr. Revision Application No. 98 of 2001
[Roshan Ali Dero v/s. State]

Cr. Revision Application No. 99 of 2001
[Hakim Khatoon v/s. State]

Cr. Revision Application No. 100 of 2001
[Fawad Dero v/s. State]

Cr. Revision Application No. 101 of 2001
[Fozia Anwar v/s. State]

Cr. Revision Application No. 102 of 2001
[Fahad Dero v/s. State]

Cr. Revision Application No. 103 of 2001
[Ashraf Ali v/s. State]

Cr. Revision Application No. 104 of 2001
[Muhammad Akram v/s. State]

Cr. Revision Application No. 105 of 2001
[Abdul Hameed Dero v/s. State]

Date of hearing: 10.09.2018

M/s. Shahab Sarki, Mushtaque H. Qazi, Ali Asghar Bariro, Merajuddin, Khurram Nizam, Mobeen Lakho, Zulfiqar Ali Langha and Mr.Ahmed Raza Shah, Advocates for the Appellant.

Appellant Abdul Sattar Dero is also present.

M/s. Abid S. Zuberi, Yasir Morai, Shakeel Rabbani and Ms.Shahreen Advocates for Applicants in Cr.Revision Application Nos.95 to 105 of 2001

Mr.Munsif Jan, Special Prosecutor NAB.

Muhammad Ali Mazhar, J: This full bench has been constituted under the administrative orders of the honourable Chief Justice, Sindh High Court to resolve the situation congregated in the midst of my learned brothers Justice Salahuddin Panhwar and Justice Zulfiqar Ahmad Khan after announcement and signing the short order with concurrence as a result of which the accused was acquitted and connected revision applications were also disposed of accordingly. However vide separate reasons, Justice Zulfiqar Ahmad Khan dismissed the Appeal and connected Revision applications and maintained the conviction.

2. The learned counsel for the appellant argued that the short order in the above matter was passed on 27.11.2017 in the open court and duly signed by the learned Judges, as a result, the appellant was acquitted, his bail bond was discharged and the connected Criminal Revisions were also disposed of. On 12.12.2017 detailed reasons were authored by the learned senior member of the divisional bench in support of the short order. The other learned member of the same bench also signed the reasons on 15.12.2017 but added a note that *"I will write my own reasons"* but he did not put any dissenting note. There was no difference of opinion between the bench with regard to short order as well as para 19 of the detailed reasons dated 12.12.2017, hence a larger bench or a referee judge could not be nominated/constituted in the circumstances. Once a short order is signed and

announced in the open court it attains finality. In support of his line of argument, the learned counsel cited the following judicial precedents: **D.G. A.N.F. Rawalpindi & others v. Munawar Hussain Manj & others** (**2014 SCMR 1334) Office Reference dated 28.04.1981, answered on 24th May, 1981 (PLD 1982 Karachi 250), The State v. Asif Adil & others (1997 SCMR 209) and Basar v. Zulfiqar Ali & others (2010 SCMR 1972).**

3. The learned counsel for the applicants in the connected Revision Applications argued that other learned member of the bench also signed the same reasons on 15.12.2017 and while signing and agreeing to the paragraph 19 of the reasons did not put any dissenting note and accepted the judgment of the Senior Member. He further argued that there was no difference of opinion hence a larger bench could not be constituted. It is well settled principle of law that once a short order is signed and announced in the open court, it attains finality. In support of his argument, the learned counsel referred to case of **District Bar Association v. Federation of Pakistan (PLD 2015 SC 401), Chief Justices of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61), Ghulam Hussain v. The State (PLD 1981 Karachi 711), Office Reference dated 28.04.1981, answered on 24th May, 1981 (PLD 1982 Karachi 250) The State v. Asif Adil & others (1997 SCMR 209).**

4. He further argued that Section 369 of the Cr.P.C. precludes a court from altering or reviewing its judgment once it is signed and announced in open court and thus the court has become functus officio. He further contended this court does not possess or vests in any

inherent power to alter or review the order/judgment in the criminal case which has been finally decided by it. Having signed the short order and the reasons recorded on 15.01.2018, it had to be in consonance with the short order and could not deviate or contradict. The matter could not have been referred to the hon'ble Chief Justice for passing any administrative order for constituting larger bench. The learned counsel also referred to the case of **Iqbal Pervaiz v. Harsan and others (2018 SCMR 359) & Dr.Imran Khattak and others v. Ms.Sofia Waqar Khattak (2014 SCMR 122)**.

5. It was further averred that an administrative order cannot override a judicial order, thus the constitution of the larger Bench amounts to 'double jeopardy" and is in violation of Section 403 of the Criminal Procedure Code, 1898. Once the accused was acquitted by a court of competent jurisdiction, he cannot be tried for the same offence as he enjoys the presumption of double innocence. The party cannot be made to suffer from an act or omission on part of the court. **Ref: Ch.Muhammad Akrm v. Registrar, Islamabad High Court and others (PLD 2016 SC 1961) & Nazir Ahmed v. Capital City Police Officer, Lahore (2011 SCMR 484)**

6. The learned counsel also focused on the judgment passed in the Review Petition in the case of **Justice (Retired) Abdul Ghani Sheikh and others,** reported in **PLD 2013 SC 1024.** He contended that other learned member of the bench misapplied this judgment which is quite distinguishable as in this very judgment Mr.Justice Anwar Zaheer Jamali, (as he then was), observed that the matter may be referred to hon'ble Chief Justice of Pakistan to take up this case as suo motu by constituting

a larger bench to resolve the difference of opinion whether the review can be withdrawn or not. But it was categorically held by the majority of the bench that the short order signed and recorded by the judges and announced in open court was the final order. As regards the another judgment cited by the second learned member of the Division Bench, reported as **Tahir Jawed @ Tara v. The State**, **(2017 SCMR 1946),** the learned counsel invited attention that in this case also the short order was treated to be a final order and the case was treated as disposed of, however the circumstances in the instant case are altogether different from the reported judgment, here the learned member has also signed the detailed reasons supporting the short order, however he put up a note that *"I will write my own reasons".*

7. The Special Prosecutor NAB did not oppose to the arguments of counsel for appellant/applicants with regard to the implication and consequence of short order and candidly conceded to the settled principle of law that when a short order is signed and announced in open court, it cannot be altered or reviewed within the scope of Section 369 Cr.P.C. on account of having attained finality. However he stated that under Section 561-A CR.P.C, this court may review an order to avoid abuse of process.

8. Heard the argument. Before leading ahead, it is quite imperative to jot down sequential minutiae of the case. On 27.11.2017, the above **Cr. Accountability Appeal and Revisions** were fixed when my two learned brothers/members of this full bench *(Justice Salahuddin Panwar and Justice Zulfiqar Ahmed Khan)* while holding the ***Divisional Bench*** passed the following short order:

"For hearing of case.

27.11.2017

Mr. Shahab Sarki advocate along with appellant.
Mr. Abid S. Zuberi advocate for applicants in Cr. Revisions.
Mr. Munsif Jan, Special Prosecutor, NAB.

For reasons to be recorded later, impugned judgment dated 23rd June 2001 passed in Reference No.15/2000 is hereby set aside. Appellant is acquitted from the charge. Appellant is on bail, his bail bonds are discharged. [Emphasis applied]

As a result, Criminal Revision Applications are disposed of.

Sd/-
(Justice Salahuddin Panhwar)

Sd/-
(Justice Zulfiqar Ahmad Khan)

9. After announcement of the short order with concurrence and togetherness, the reasons authored by Justice Salahuddin Panhwar were passed on to Justice Zulfiqar Ahmad Khan. For the ease of reference, the last paragraph of the reasons is reproduced as under:

"19. In view of above discussions, we are of the considered view that conviction of the appellant cannot sustain. Thus while considering the prosecution evidence insufficient and sketchy, this Appeal was allowed by order dated 27.11.2017 and listed Cr. Revision Applications were disposed of.

Sd/-
(Justice Salahuddin Panhwar)
12.12.2017
Sd/-
(Justice Zulfiqar Ahmad Khan)
15.12.2017
I will write my own reasons."

10. After putting a note that ***"I will write my own reasons"*** to the reasons assigned by Justice Salahuddin Panhwar in furtherance and sustenance of short order, Justice Zulfiqar Ahmad Khan penned down his own reasons on 15.1.2018. The paragraph No.22 and 23 have much significance which are reproduced as under:-

"22. I am thus of the considered view that the prosecution having satisfied fully the ingredients of offence under Section 9(a)(v) of NAO being present, shifted the burden towards the Appellant, and the Appellant being a civil servant having

miserably failed to show that he has not accumulated assets and pecuniary resources disproportionate to his known source of income, as well as, failing to satisfy or to provide an account of the same, leads me to the conclusion identically reached by the trial court that the properties as detailed in the impugned judgment are actually the properties accumulated by the Appellant in the names of his wife, children, relatives and associates. I therefore find no reasons to interfere with the impugned judgment, hence dismiss this appeal. As a corollary, connected Revision Applications filed by the beneficiaries/claimants in respect of movable and immovable properties are also dismissed. [Emphasis applied]

23. Before parting, it is imperative to pen down that my above view is in contrast to the conclusion reached in the Short Order, which is though not an extremely desirable situation, however under the circumstances where huge sum of public exchequer are involved, *and being cognizant of the fact that a short order is no order unless followed by detailed reasons* (2017 SCMR 1946 and 2017 PCrLJ 706), guidance for such a departure could be steered through the Apex Court's judgment rendered in the case of Reviews on behalf of Justice (Retd.) Abdul Ghani Sheikh & others (PLD 2013 SC 1024) where it has been held by three Hon'ble Members of the Bench that in situation where despite unanimous Short Order of the court, subsequently there was difference of opinion, it was appropriate that the matter be referred to the Chief Justice to take up the case suo motu by constituting a larger Bench to resolve such difference of opinion amongst the Members of the Bench, more particularly, when huge sum of public exchequer was involved in the matter which was a sacred trust".

11. As a consequence, Office had put up a Reference to the honourable Chief Justice of this court for orders. Relevant portion of the office reference is reproduced as under:-

"It is further submitted that in the end of reasons recorded by Hon'ble Mr. Justice Zulfiqar Ahmad Khan, his Lordship in paragraph No.23 has been pleased to refer to Apex Court's judgment rendered in the case of Reviews on behalf of Justice (Retd.) Abdul Ghani Sheikh & others (PLD 2013 SC 1024) where following has been held by three Hon'ble Members of the Bench:-

"that in situation where despite unanimous Short Order of the court, subsequently there was difference of opinion, it was appropriate that the matter be referred to the Chief Justice to take up the case suo moto by constituting a larger Bench to resolve such difference of opinion amongst the Members of the Bench, more particularly, when huge sum of public exchequer was involved in the matter which was a sacred trust."

The Short Order dated 27.11.2017 and detailed reasons recorded by their Lordships, separately, may kindly be seen at flags "A" "B" & "C" respectively.

It is proposed that the matter may be placed before Hon'ble Chief Justice for kind perusal and appropriate orders.

Sd/-
Assistant Registrar (Criminal Branch)"

On 19.1.2018, the hon'ble Chief Justice was pleased to pass following order on the aforesaid Office Reference:

> **"In view of dicta laid down by Hon'ble Supreme Court in PLD 2013 S.C 1024, larger bench is constituted, to be headed by Justice Mohammad Ali Mazhar and the two members of the bench, who decided the appeal for re-hearing"**.

12. It is well settled exposition of law that a right of appeal is a right of entering into a superior court and invoking its aid and interposition to redress the error of the court below. It is essentially continuation of the original proceedings as a vested right of litigant to avail the remedy of an appeal provided for appraisal and testing the soundness of a decision and proceedings of the court below. It is always explicated and elucidated that the right of appeal is not a mere matter of procedure but it is a substantive right. While considering the matters in appeal, the appellate courts may affirm, modify, reverse or vacate the decision of lower courts. It is understood rather well-established principle that while deciding the appeal, the Court/judge who heard and decided the matter must have full comprehension and command as to what was argued; what was debated upon at the time of hearing of the matter and what was the understanding of the Judge or judges while adverting and attending to the pleas raised by the appellant and defence counsel. It is also assumed that the evidence led in the trial court has also been appreciated pertinently by the appellate court before passing the judgment.

13. The set of circumstances in this case are unique, distinctive and exceptional. Rather than moving ahead, it is indispensable to first determine my own role in this bench. It is somewhat communal that in the event of any difference of opinion or dissent by any member of a

division bench, they both contribute their own separate judgments/orders and in order to resolve the diversity and miscellany of viewpoints to an ultimate order/judgment of the court, the Chief Justice by means of an administrative order transmit the matter to any senior judge of the same court as a referee judge to consider both findings and jot down his verdict as a referee judge however in that particular situation he may agree or disagree any of the findings before him as referee judge to make an ultimate order of the court. Another situation is rehearing of the case which situation can only arise or come across when in any case the judgment is reserved but at the time of writing judgment any vital question is cropped up in the minds of judge or judges or any point needs further elaboration or explanation which was not addressed or take care of perfectly at the time of hearing, the same bench in its own wisdom may direct the office to fix the case for rehearing with notice to the parties. Here the situation is poles apart. Neither is it case of rehearing nor a case of deviating views or a case of note of dissent which could have been resolved through the intercession of referee judge. The circumstances in this case are quite the reverse where a short order was signed by both the honourable judges and compliance of the order was also made by the office, thereafter Justice Salahuddin Panwar authored the reasons and when it was passed on to Justice Zulfiqar Ahmed Khan, his lordship signed the reasons without any demur but added a note the he will write his own reasons. From this note it could not be comprehended that my lord was going to withdraw his consent or concurrence on the short order nor it signifies that he wanted to show any dissent/disagreement or any reservation on the reasons of the short order authored by

Justice Salahuddin Panwar. It is time and again seen in the various dictums laid down by the Supreme Court and High Courts that where any important or intricate question of law is interpreted or any legal fiction is expounded or entrenched, the honorable members of the bench every so often contribute their own notes in support of the reasons assigned by the author judge and sometimes they add their note of dissent. The honourable Chief Justice of this court constituted this full bench with my addition to rehear the case but with all humility to my command and self-efficacy, the rehearing does not deserve in the unique circumstances. Even the judicial precedents cited by Justice Zulfiqar Ahmed Khan in his separate reasons are not applicable in the present scenario for constitution of full bench by the Chief Justice after signing the short order and signing the reasons by Justice Zulfiquar Ahmed Khan which were assigned by Justice Salahuddin Panwar.

14. The appellate court possesses such a jurisdiction where the entire matter reopens so in all conscience when my both learned brothers heard the above appeal, it is believed that they must have heard the arguments at length and also appraised the evidence and thereafter reached to a conclusion that the impugned judgment before them is liable to be set aside and with concurrence signed the short order without any reservation or demur. Why it is obvious? The reason that the matter was not reserved but the impugned judgment was set aside through a short order announced in the open court for the reasons to be recorded later. The decision so made and announced through short order is presumed to be solemn, well considered, conscious, deliberate and a final verdict covering all points arising out of the case. Both

the honourable judges signed the short order and compliance was made by the office. In the division bench, the members may have divergent views with their independent application of mind and in the case of any diversity of views or opinion, instead of announcing short order in court, it is most suitable way to reserve the judgment for reflection which is quite common practice but after signing the short order and even after signing the reasons assigned by other member of bench with a note that he will assign his own reasons does not mean or permit that the separate reasons may differ the short order however the separate reasons may be contributed in support of consensual short order but not against it. If it is on, with all humility to my command, this will upset well settled principles of administration of justice and create a sense of disquiet or more precisely become a sword of Damocles for other benches and their members as from the date of passing the consensual short order by the bench till signing the reasons by all members or contributing independent note in support of short order and not in deviation of it. It will also give life to an undesirable practice or situation for future which would be quite precarious to our judicial system and administration of justice.

15. In various judicial precedents, the aftermath and ramification of ***"short order"*** and consequences of no reasons assigned in the backing of short order or the reasons assigned with departure and divergence have been articulated very eloquently as under:-

> **1. The Judges of the Supreme Court signed the short order, then for all intents and purposes it had to be treated as a final disposition, and absence of any detailed judgment did not require rehearing of the same matter.**
>
> **2. Short orders recorded and signed by the concerned judges and pronounced in Court. Such order shall be fully operative in**

law and in consequence thereof, the case in respect of which the same has been passed shall stand disposed of in law.

3. Short orders duly signed and pronounced by Judges of High Court for all intents and purposes in view of the situation obtaining are final orders. Party should not be made to suffer on account of an act or omission on the part of court or other State functionaries.

4. Short order/order of the court was in fact the judgment of the Court and was valid even in the absence of supporting reasons.

5. The judgment of 20th of July had been signed by all the thirteen Honourable Members of the Bench and, even in the absence of the supporting reasons, was a valid judgment as declared by this Court in the case of State vs. Asif Adil and others (1997 SCMR 209).

6. Sections 369 & 561-A. Such orders not open to review except in case of being *coram non judice* or in contravention of law or where no opportunity of hearing afforded to parties concerned.

7. High Court never invested with inherent power to alter or review a criminal case finally and legally decided by it Short order passed by High Court.

8.Division Bench hearing appeal passing short order allowing appeal and proposing to pronounce reasons subsequently but one of Judges died hence no reasons recorded. Division Bench having not only signed its short order acquitting appellants but further in pursuance of such order writ of release for appellants also having been issued, neither such order can be modified or revised nor can appeal be reheard due to order having been passed with jurisdiction and after hearing parties concerned. Remaining Judge having also heard appeal can however write his reasons in support of short order passed previously.

9. Verbal decision announced without even a short order being recorded by Court. Cannot be an effective judgment disposing of case.

10.Cases in which short orders recorded and signed by concerned Judge stand disposed of as such orders fully operative in law.

11. Judge ceasing to hold office cannot record reasons in cases where verbal orders announced. Reasons in support of decision recorded by one of available members of Bench, on request to serve as minutes of his individual opinion for use before Supreme Court in case of appeal.

12. The cases in which short orders have been recorded and signed by the concerned Judges, these cases stand disposed of as these orders are fully operative in law.

13. The Judges who have ceased to hold office cannot record reasons, but in cases in which one of the Members of the Bench was a Judge who is still available, he may be requested to record his reasons in support of the decision which will, however, serve as minutes of his individual opinion for use as deemed fit by the Supreme Court in case appeals are filed against such orders.

14. Once a case was finally decided, the court became functus officio. Only provision which allowed changes in the final order was the provision of review, scope of which was limited to correcting an error that was floating on the face of the record. To have a second opinion of the findings reached in the final

order by the same court was not permissible while exercising power of review.

15. Short orders which have been recorded and signed by the judges concerned and have been pronounced in Courts shall be fully operative in law and in consequence thereof the cases in respect of which the same have been passed shall stand disposed of in law.

16. Short Order would be determinative of the rights and obligations of the various parties in the matter.

17. Reasoning for Short Order which was recorded at a later date could only be in support of the Short Order and not in deviation from the same.

18. Short Order was sufficient for disposal of a lis as well as being operative for all intents and purposes and even in the absence of the supporting reasons, was a valid judgment.

19. Such Order which had been recorded and signed by the Judges concerned and had been pronounced in court shall be fully operative in law and in consequence thereof, the case in respect of which the same had been passed shall stand disposed of in law even in the absence of the supporting reasons, was a valid judgment.

20. In the present case, short order was analogous to a decree while the detailed reasoning of each of five Judges (given separately) could be equated with a judgment; "decree" i.e. operative part had been made by all the five Judges while each of them had given his own respective reasons.

21. Reasoning of the Judges could only support the Short Order and could not be in variation from the same. Parties concerned will have to follow the Short Order in letter and spirit with all consequences of such Order taken to their logical and legal conclusion.

22. The learned High Court, as discussed above, has not put in the detailed reasons/judgment for its short order. The cases pending before the deposed Judges in which order has been announced and the short order had been recorded/signed by the hon'ble Single Judge and in case of Division Bench, by both the hon'ble Members of the Division Bench, shall be treated as disposed of cases. In these circumstances, we are of the firm opinion that notwithstanding the fact that learned High Court has answered the murder reference in the negative and while maintaining the convictions of the appellant and his co-convict, reduced the sentence of appellant from death to imprisonment for life, it would not be proper to scrutinize the evidence on record in absence of detailed reasons which would have weighed with the learned High Court while reaching the said decision. We, therefore, allow this appeal, set aside the short order passed by the learned High Court and remand the case back to the learned High Court to decide the criminal appeals filed by the appellant.

23.The short order passed in the open Court was signed by the honourable Judges which order as it has been held in the case of the State v. Asif Adil 1997 SCMR 209 shall be fully operative in law and in consequence thereof, the case in respect of which the same has been passed shall stand disposed of in law.

24. Short order dated 14-11-2008 was recorded in clear terms and was signed by Judges of this Court, whereby the judgments of Trial Court as well as of Appellate Court were set aside, the conviction and sentence awarded to the petitioner were also set aside and the petitioner was acquitted of the charge. Needless to observe that the decision so made and announced through

Short Order is presumed to be solemn, well considered, conscious, deliberate and a final verdict covering all points arising out of the case. Considered as such, in our view it ought not to have been fixed for re-hearing. Admittedly, the order dated 19-3-2009 was passed without hearing the petitioner. Having said so, in the light of above cited case (1997 SCMR 209), we are clearly of the view that the lis in the instant matter cannot be treated to be pending having already attained the finality in the eyes of law. Therefore, the order dated 19-3-2009 recalling the short order with direction that the case be fixed for re-hearing after notice to the parties is set aside; as a result the short order dated 14-11-2008 shall stand revived and operative in law. Office is directed to consign the file to record.

25. The law is quite settled by now that a short order passed by this Court has all the effects of a judgment of this Court if such short order has been signed by all or a majority of the Hon'ble Judges hearing the matter even if for some reason such order is not followed by a detailed judgment. A reference in this respect may be made to the cases of The State v. Asif Adil and others (1997 SCMR 209), Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 SC 61) and Dr. Agha Ijaz Ali Pathan v. The State (2010 SCMR 322). In the case in hand all the Hon'ble Judges hearing the above mentioned appeal and jail petition had signed the short order passed on 11-11-2008 and, thus, for all intents and purposes that has to be treated as a final disposition of the above mentioned matters and absence of any detailed judgment does not require rehearing of the same. In these circumstances these matters are returned to the office.

Ref:-2014 SCMR 1334 (D.G. A.N.F. Rawalpindi and others vs. Munawar Hussain Manj and others), 1997 SCMR 209 (The State vs. Asif Adil and others), 2010 SCMR 1972 (Basar vs. Zulfiqar Ali and others), PLD 2015 S.C. 401 (District Bar Association, Rawalpindi and others vs. Federation of Pakistan and others), PLD 2010 S.C. 61 (Chief Justice of Pakistan Iftikhar Muhammad Chaudhry vs. President of Pakistan and others), PLD 1981 Karachi 711 (Ghulam Hussain vs. The State), PLD 1982 Karachi 250 (In re: Office Reference dated 28.4.1981, answered on 24th May, 1981), 2018 SCMR 359 (Iqbal Pervaiz and others vs. Harsan and others), PLD 2013 S.C. 1024 (Reviews on behalf of Justice (Retd.) Abdul Ghani Sheikh and others) and 2017 SCMR 1946 (Tahir Javed @ Tara vs. The State), 2010 SCMR 1125 (Wafi Associates (Pvt.) Ltd. vs. Farooq Hamid) & 2010 SCMR 322 (Dr. Agha Ijaz Ali Pathan vs. The State)

16. At this juncture, the reference of Section 17 of National Accountability Ordinance, 1999 would be noteworthy which germane to provisions of the Code to apply. According to clause (f) of Section 5 (definitions clause) of National Accountability Ordinance, 1999, the "Code" means the Code of Criminal Procedure, 1898. It is distinctly postulated in Section 17 that notwithstanding anything contained in any other law for the time being in force, unless there is anything inconsistent with the

provisions of this Ordinance, the provisions of Code of Criminal Procedure, 1898 shall mutatis mutandis apply to the proceedings under this Ordinance, however, in clause (c), the court may, for the reasons to be recorded, dispense with any provision of the Code and follow such procedure as it may deem fit in the circumstances of the case. According to Section 369 of the Criminal Procedure Code, no court when it has signed its judgment shall alter or review the same except to correct a clerical error. For the ease of reference, Section 369 of Criminal Procedure Code is reproduced as under:

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

Keeping in mind the niceties of above provision it is explicitly and unambiguously translucent that the short order signed by both the learned Judges could not be altered or reviewed except to make some correction of clerical error which is not the case here. The judiciousness and prudence coming behind the restraint embodied under Section 369 Cr.P.C. is with the sole prominence to preserve and uphold the evenness and steadiness so that the criminal justice system may continue decorously to its right pathway and if on any ground review of a final judgment would be permitted, it may envision severe disarray and turmoil which would erode the public confidence.

17. While referring the matter to the hon'ble Chief Justice of this court for constituting the full bench, his lordship Zulfiqar Ahmad Khan relied on **PLD 2013 S.C. 1024, 2017 SCMR 1946 and 2017 P Cr L J 706,** so I would

like to take up rudiments of these dictates separately. In the first judgment reported in ***PLD 2013 S.C. 1024 (Reviews on behalf of Justice (Retd.) Abdul Ghani Sheikh and others),*** the gist of this judgment reflects that vide unanimous order of the hon'ble Supreme Court dated 11.04.2013, it was held and declared that ***"the law enunciated in the case of Accountant General Sindh and others vs. Ahmed Ali U. Qureshi and others (PLD 2008 SC 522) is per incuriam and consequently this judgment is set aside. The titled appeal is accepted and the judgment impugned therein is also set aside".*** This judgment further envisages that reasons in support of the aforesaid short order had been issued later. Two hon'ble members of the bench had consistent with the wording of the order of 11.4.2013 in their reasoning that all consequences of the said order will follow and as a result the benefits, if any, received by any person by virtue of the judgment in the case of **Accountant General v. Ahmed Ali U. Qureshi (PLD 2008 SC 522)** will have to be returned to the public exchequer being money of the people of Pakistan. However, the three hon'ble Judges of the apex court in their reasoning observed that the amounts received by various persons pursuant to the aforesaid judgment need not be returned to the public exchequer, notwithstanding the order dated 11.4.2013 which was passed by all five hon'ble members of the bench.

The hon'ble Mr. Justice Jawwad S. Khawaja (as he then was) held that it would be the short order dated 11.4.2013 which will be determinative of the rights and obligations of various parties in the matter. My Lord further held that it has not been said in the short order that the consequences thereof will not follow in relation

to some amounts despite the setting aside of the case of **Ahmed Ali U. Qureshi**. It was further held that the reasoning which was recorded at a later date can only be in support of the said short order and not in deviation from the same. My Lord further held that the short order has consistently been considered sufficient by Supreme Court for disposal of a lis as well as being operative for all intents and purposes. While giving reference to the case of **State v. Asif Adil and others (1997 SCMR 209)**, it was further observed that the *"short orders which have been recorded and signed by the judges concerned and have been pronounced in Courts shall be fully operative in law and in consequence thereof the cases in respect of which the same have been passed shall stand disposed of in law".* My Lord also referred to the observations made in the case of **Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61)** that "the said judgment of the 20th of July had been signed by all the thirteen Honourable Members of the Bench and even in the absence of the supporting reasons, was a valid judgment...". In paragraph 4, hon'ble Mr. Justice Jawwad S. Khawaja (as he then was) held as under:

> **"In the foregoing circumstances, it is necessary to state that the reasoning of the learned Judges can only support the Order dated 11-4-2013 and cannot be in variation from the same. Therefore, while the petitioners are allowed to withdraw their Review Petitions, this is subject to the reiteration of the legal principle that the Order to be implemented is the one dated 11-4-2013 with all consequences flowing from the same without exception."**

The hon'ble Mr. Justice Mian Saqib Nisar (now Chief Justice of Pakistan) in his separate note held as under:

> **".....When the short order dated 11-4-2013 in Constitution Petition No.127 of 2012 was being deliberated and composed, there was complete consensus amongst the Members of the Bench that the law enunciated in the judgment reported as**

> **Accountant-General, Sindh and others v. Ahmed Ali U. Qureshi and others (PLD 2008 SC 522) should be declared as per incuriam and the said judgment should be overruled. However, at the same time consensus could not be developed about the recovery of the amount already received by the hon'ble retired Judges on the basis of the judgment, or in other words if the judgment should have retrospective effect or not, therefore, it was consciously, as per the clear understanding of the Members of the Bench, left open for each of the Hon'ble Judge(s) to give his/their own decision, which would follow the short order. The short order thus was never formulated and was not meant to be final and conclusive in regard to the recovery of the said amount; and thus the detailed reasons in this context were avoided. It is for such reason that it was not provided in the short order what consequences shall follow and it is not always necessary that in the eventuality of setting aside a judgment under challenge in any proceedings, it shall entail all the conceivable consequences. In any case, the Court/Bench consciously refrained to provide and specify that the amount already received by the hon'ble retired Judges shall be recovered from them, and the judgment shall have retrospective effect. Therefore, in my candid view three Members of the Bench, who have declined the recovery have passed the judgment(s) well within their authority and nothing eluded their attention while doing so. In the above backdrop, it may be emphatically stated that the reasoned judgment(s) given by three learned Members of the Bench on the issue about the non-recovery of the amount already received by the hon'ble retired Judges in no way is either beyond the scope of the short order, or in variation or in deviation or in derogation thereof (emphasis supplied), which should be construed and implemented to be so, on the touchstone of the law and the reasoning assigned and propounded by my learned brother(s). Resultantly, I do not find any justification for clarification in the matter, as is envisaged by Paragraph No.4 of the order of my learned brother."**

In the concluding paragraph of his lordship's note, it was observed as under:

> **"In the light of above, I am of the firm opinion that, as the petitioners have unconditionally withdrawn their review petitions, which is their right under the law, therefore, these petitions be dismissed simpliciter as withdrawn, as has been done in some other petitions which were earlier dismissed by another Bench."**

The hon'ble Mr. Justice Muhammad Ather Saeed (as he then was) strongly endorsed the opinion of hon'ble Mr. Justice Mian Saqib Nisar (now Chief Justice of Pakistan) and dismissed the review petitions as withdrawn, whereas hon'ble Mr. Justice Iqbal Hameedur Rahman (as he then was) concurred the views of hon'ble Mr. Justice

Mian Saqib Nisar and honourable Mr. Justice Muhammad Ather Saeed. After due deliberation the order of the bench was as follows:

> **"The case file has now been received back by me. My three learned brothers (Justice Mian Saqib Nisar, Justice Muhammad Ather Saeed, and Justice Iqbal Hameedur Rahman) have held that the petitioners be allowed to withdraw their review petitions simpliciter. Three brothers (Justice Anwar Zaheer Jamali, Justice Ijaz Ahmed Chaudhry and myself) have reiterated the contents of the short order dated 11-4-2013 while allowing the review petitioners to withdraw their petitions. However, our learned brother Justice Anwar Zaheer Jamali, has also suggested that the matter be referred to Hon'ble the Chief Justice for constituting a larger Bench".**

In the case of **Tahir Javed @ Tara vs. The State** reported in **2017 SCMR 1946**, the hon'ble bench of the Supreme Court observed that the learned High Court has not put in the detailed reasons/judgment in its short order while reappraising the evidence qua the conviction/sentence of the appellant and his co-convict, therefore, the bench was of the view that notwithstanding the fact that learned High Court answered the murder reference in the negative and while maintaining the convictions of the appellant and his co-convict, reduced the sentence of appellant from death to imprisonment for life, it would not be proper to scrutinize the evidence on record in absence of detailed reasons which would have weighed with the learned High Court while reaching the said decision. In such circumstances, the apex court set aside the short order passed by the learned High Court and remanded the case back to the learned High Court to decide the criminal appeals filed by the appellant. In this case the apex court remanded the matter back to learned Lahore High Court for the reason that no detailed judgment was available on record.

The third case of **Muhammad Ali vs. Special Judge, Central, Faisalabad reported in 2017 P.Cr.LJ 706** is also not applicable in the present controversy. In this case the Special Judge had given no reasons as to why the cancellation report filed by the Inspector Federal Investigation Agency has not been agreed upon.

18. What I understand that Mr.Justice Zulfiqar Ahmad Khan predominantly relied upon **PLD 2013 S.C. 1024** as a source of his departure. In my humble understanding of this judicial precedent, there was complete consensus amongst the members of the bench that the law enunciated in the judgment reported as Accountant-General, Sindh and others v. Ahmed Ali U. Qureshi and others (PLD 2008 SC 522) should be declared as per incuriam and the said judgment should be overruled. There was no difference of opinion amongst the honourable members of bench after signing the short order with regard to the crux of the judgment having the effect and impact of declaring the judgment rendered in the case of **Accountant-General, Sindh and others v. Ahmed Ali U. Qureshi** per incuriam and overruled but consensus could not be developed about the recovery of the amount already received by the hon'ble retired Judges on the basis of the judgment so basically there was no deviation of the short order and it was not the case that after signing the short order any member of the bench of apex court come forward and said that his lordship is not agreeable to the short order or assigned the reasons that the above judgment may not be overruled or may not be declared per incuriam rather they held that the short order has consistently been considered sufficient by Supreme Court for disposal of a lis as well as being operative for all intents and purposes.

19. At this juncture, I would like to quote the case of **State vs. Daniyal alias Dani (PLD 2015 S.C. 322)** In this case, the learned division bench of this court heard the criminal appeal and murder reference and for the reasons to be recorded later, the appeal was dismissed. The death sentence awarded by the trial court was confirmed, however, on 26.05.2014 the learned Division Bench passed the following order:

> **"While recording reasons, we have found that the appellant is a very young boy and the counsel appearing for the appellant did not invite our attention to his statement under section 342, Cr.P.C. and perhaps was a first offender, therefore, we would like to re-hear this appeal. Let notice be issued to the Counsel for the appellant as well as to the Prosecutor General and counsel for the complainant for 28-5-2014 at 11-00 a.m. Head Bailiff to serve the notices and be present in Court on 28-5-2014. Production Order be also issued through Fax. The Assistant Registrar should also telephonically assure that the custody of the appellant is produced definitely."**

The arguments of the learned Additional Prosecutor General, Sindh and the counsel for the complainant are mentioned in paragraph 3 of the above supreme court judgment in which they raised a plea that after having passed and signed the short order dated 21.05.2014 the learned Division Bench of the High Court could not have fixed the matter for rehearing and it could not thus change its earlier decision at any later stage. They further maintained that a signed short order of the court is akin to a final judgment and in absence of any review jurisdiction High Court cannot alter the substance of the judgment already announced and signed by it and they further had drawn support from the judgment rendered in the case of "**The State vs. Asif Adil and others (1997 SCMR 209)**, **Chief Justice of Pakistan Iftikhar Muhammad Chaudhry vs. President of Pakistan and others (PLD 2010 S.C. 61), Dr. Agha Ijaz Ali Pathan vs. The State (2010 SCMR 322), Wafi Associates (Pvt.)**

Ltd. vs. Farooq Hamid (2010 SCMR 1125), D.G. A.N.F. Rawalpindi vs. Munawar Hussain Manj (2014 SCMR 1334)" and a judgment rendered by Supreme Court of United Kingdom in the case of **L and B (Children) (2013 SCMR 842)**.

My lord Mr. Justice Asif Saeed Khan Khosa held as under:-

> **"We understand that the said contention of the learned Additional Prosecutor-General and the learned counsel for the complainant is well founded and is amply supported by the above mentioned precedent cases. It goes without saying that in a case where the judgment is reserved a Court is well within its jurisdiction to fix the matter for rehearing of any point which needs further elaboration but if a judgment is announced with a final verdict regarding the fate of an accused person and such announcement is through a short order to be followed by detailed reasons and such short order is actually signed by the Members of the Bench then the Court is left with no jurisdiction to change the verdict subsequently or even to fix the case for rehearing on the merits or even on the question of sentence unless such Court possesses review jurisdiction which may even be exercised suo motu.[emphasis applied] In the case in hand the matter was that of a criminal appeal and in such a matter the High Court of Sindh, Karachi had no review jurisdiction available to it and, therefore, once the above mentioned short order had been passed by it deciding the fate of the respondent and of his appeal then the High Court was subsequently bereft of any jurisdiction to order rehearing of the matter for the purposes of considering alteration of its earlier announced judgment.**
>
> **4. The above mentioned factual and legal position has created a very difficult situation for us because if we treat the earlier short order of the High Court of Sindh, Karachi to be the final judgment of that Court then we do not have any detailed judgment of the High Court available vis-a-vis confirmation of the sentence of death passed against the respondent and if the subsequent detailed judgment released by the High Court is to be treated as its final judgment then the same cannot be accepted as such because that detailed judgment was bereft of any legal validity impinging upon its very existence. Faced with this bizarre situation we have decided to send the matter back to the High Court for a fresh decision of the respondent's appeal and the connected Murder Reference on all aspects of the case after hearing the learned counsel for all the parties because that way, we consider, the interests of justice may be served well.**
>
> **5. For what has been discussed above this appeal is allowed, the impugned detailed judgment passed by the learned Division Bench of the High Court of Sindh, Karachi on 30-5-2014 is set aside, the short/interim orders passed by the said learned Division Bench on 21-5-2014, 26-5-2014 and 28-5-2014 are also set aside and the matter is remanded to the High Court of Sindh, Karachi for a fresh decision..."**

20. In the wake of above discussion, I have reached to the conclusion that neither any case of rehearing is made out in the present set of circumstances nor we are the court of appeal which may set aside the short order or remand the matter back but what can be held in the peculiar circumstances of the case is that the short order of acquittal passed by both learned members of the divisional bench in the above appeal with consensus and unanimity on 27.11.2017 is still valid and the reasons contributed by my learned brother Justice Zulfiqar Ahmad Khan cannot nullify, alter or convert the outcome of short order of acquittal of the appellant into dismissal of appeal through separate reasons whereas the appeal was already allowed on 27.11.2017 without any note of dissent by his lordship.

Sd/-
Judge

Sd/-
Judge

Judge

Karachi:
Dated.24.12.2018

With profound respect, I cannot bring myself to agree with the instant judgment authored by my distinguished colleague. I will thus contribute my dissenting note highlighting the points of disagreement.

Sd/-
Zulfiqar Ahmad Khan; J