

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ
نَحْمَدُهُ وَنُصَلِّي عَلَى رَسُولِهِ الْكَرِيمِ

Law of Previous Acquittals or Convictions

Ch: XXX (S. 403) Cr. P. C. 1898

[Justice ® Dr. Munir Ahmad Mughal]

<http://ssrn.com/author=1697634>

Introduction

There is an ancient maxim of Latin: *Nemo debis bis vexari* which means in the English language: A person cannot be tried a second time for an offence which is involved in the offence with which he was previously charged. The same principle *Autrifois acquit* (formerly acquitted) and *Autrefois convict* (formerly convicted) is prevailing in the common law. Important

principles underlying invocation of this rule is that if such person is tried by a Court of competent jurisdiction for an offence irrespective of the fact whether he is convicted or acquitted he cannot be tried again for the same offence and contemplates of a situation where a person has once been tried by a Court of competent jurisdiction and acquitted by such Court cannot be tried again for the same offence nor for an other offence based on similar facts.

Chapter XXIV of Part VI of the Code of Criminal Procedure, 1898 which contains only one section (i.e. section 403 Cr. P. C.) and has exhaustively covered the subject of Double Jeopardy. This paper discusses it in the light of the judicial precedents.

What is the text of the law contained in section 403 of the Code of Criminal Procedure, 1898 ?

Section 403 Cr. P. C. 1989 reads as under:

“403. Persons once convicted or acquitted not to be tried for the 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 remain 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 for 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 sections 235, subsection (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 afterwards tried for such last-mentioned offence, if the consequence had not happened, or were not happened, 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 he is subsequently charged.

(5) Nothing in this section shall affect the provision 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 acquittal for the purpose 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 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 is acquitted. There is no charge of robbery, but it appears 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 tries A. 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 this section.

(f) A is charged by a 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 after wards be

charged with and tried for dacoity on the same facts.”

Analysis of Section 403 Cr. P. C.

- Section 403 Cr. P. C. is based on the maxim “*Nemo debet bis vexari pro una act eadem causa*”¹.
- Section 403 Cr. P. C. along with section 26 of the General Clauses Act, 1897 provides a procedural shield.²
- Section 403 Cr. P. C. comes into play after criminal proceedings are culminated to their logic end after trial.
- Section 403 Cr. P. C. contains a bar against twice vexation of an accused person. It will be applicable only,

¹ It means no person should be twice disturbed for the same cause.

² PLD 1998 Lahore 239.

when, *inter alia*, the predominant conditions are satisfied, i.e. that the accused has been tried by a Court of competent jurisdiction; that he has been convicted or acquitted for such offence; and that his conviction or acquittal is still in force.

- The whole basis of section 403 (1) of the Cr. P. C. is that the first trial should have been before a Court of Competent to hear and determine the case and to record a verdict of conviction or acquittal. If the Court is not so competent it is irrelevant that it would have been competent to try other cases of other class or indeed the case against the particular accused in different circumstances e.g., if a sanction has been obtained.³

³ PLD 1949 Privy Council 108; PLD 1951 Lahore 430.

- The principles underlying this section are founded on public policy. It is exhaustive on the subject to the effect of previous acquittal or conviction.⁴

Elevation of the principle of double jeopardy to the status of a Constitutional right

Article 13 of the Constitution of the Islamic Republic of Pakistan, 1973 reads:

“No person shall be prosecuted or punished for the same offence more than once; or shall when accused of an offence be compelled to be a witness against himself.”

⁴ AIR 1939 Calcutta 65.

Article 13 is a complete protection against prosecution and punishment for the same offence more than once which means that no person should be jeopardized or vexed twice for the same offence.⁵

What is the wisdom behind the legislation of section 403 Cr. P. C.?

If an accused is tried on certain charges and acquitted, it will be clearly unjust and highly oppressive and amount to an abuse of the process of the Court to permit his repeated prosecution on identical evidence in respect of identical charges even though relating to different items. In case of acquittal where section 403 Cr. P. C. does not apply in terms, the principle of *autrefois acquit* embodied in the section may be properly

⁵ 2007 P. Cr. L. J. 1623.

invoked in order to meet the ends of justice.⁶

Benefit of doubt

Where an accused is given benefit of doubt and acquitted, he cannot be prosecuted for same offence a second time.⁷

Order of discharge on merits

An order of discharge which is passed on merits and which is not plainly or substantially an order passed in default, although it does not in law constitute a legal bar will practically have the same effect as an order of acquittal.⁸

⁶ PLD 1965 Lahore 461

⁷ PLD 1982 FSC 265.

⁸ PLD 1962 SC 242; PLD 1962 Dacca 671.

When a case is not hit by the principle of double jeopardy?

- Where offence emanates from different set of facts.
- Where first complaint was withdrawn and second complaint was made. The bringing of second complaint does not violate the provisions of section 403 Cr. P. C., nor attracts rule of double jeopardy arising out of Article 13 of the Constitution.⁹
- Where offence is continuing offence.¹⁰
- Where previous prosecution and punishment are null and void.¹¹
- Facts not at all alleged at the previous trial.¹²

⁹ 2001 YLR 1107.

¹⁰ 2001 MLD 802.

¹¹ 2001 MLD 802.

¹² PLD 2005 Quetta 1.

How to test that an offence is distinct for the purposes of section 403 Cr. P. C.

The principle enshrined in section 403 Cr. P. C. is analogous to the spirit of the General Clauses Act, 1897.

The judicial precedent is available in Muhammad Noor's case¹³ where the honouable Supreme Court of Pakistan observed:

“ The same principle is laid down in section 26 of the General Clauses Act, 1897 which provides that if an act or omission constitutes offence/offences under two or more enactments, then the offender though can be prosecuted either or any of those enactments, but cannot be punished twice for the same offence.”

¹³ PLD 1985 SC 325.

This principle is not applicable where the offences are distinct. While explaining the expression “distinct offence”, it need not necessarily be totally unconnected because same transaction may involve distinct offenders in which case they cannot be said to be totally unconnected. The test to determine whether the offences charged at two trials are distinct for purpose of section 403 Cr. P. C. would be whether , if the offences were charged at the same trial, separate sentence could be passed in respect thereof under section 71 of the Penal Code. Another test it to see whether the evidence necessary to prove the two offences is the same or different. Where the two charges are in respect of totally distinct offences committed by different accused at different times, merely because same accused happens to be

common in both the cases or that the later offence may have been committed with a view to destroy or cause disappearance of certain evidence which would have been material in the other case cannot bar a trial for the subsequent offence. Even if the finding that the offences which are the subject matter of the two cases are “similar” can be accepted. Section 403 Cr. P. C. would not bar such a trial. Where the first charge is under section 9 (a) (iii) read with section 10 of the NAB Ordinance, 1999 and also under section 409 PPC, read with serial No. 6 of Schedule annexed with the Ordinance but the second charge under which the accused was convicted under serial No. 8 of the NAB Ordinance, there might be some overlapping in certain sub-heads of the second charge but the conviction under

the remaining sub-heads of the second charge was held valid as the sub-heads are distinct offence.¹⁴

Interpretative Approach: Guidelines

- Keeping in view that the rule envisaged in section 403 CrPC has been elevated to Constitutional right, the provision of this section has to be given a broad and liberal interpretation. A restrictive or procedural interpretation is likely to destroy rather than safeguard this right having bearing on liberty of an individual.¹⁵

¹⁴ 2004 YLR 3201 (Lahore).

¹⁵ PLD 1997 Lahore 307.

- Where plea of section 403 Cr. P. C. is not technically available, the principle would be available to the person proceeded against under the provisions of Sind Crimes Control Act, 1975 when the interest of justice requires its extension in his favour.¹⁶

Significance of section 403 CrPC and Article 13 of the Constitution 1973

Liberty of human beings is the most important thing in any social order. The above two provisions specially take care of it. However, rights of the complainant are also equally important and the Constitution and law do take care of it. This is also the requirement of fair and just administration of justice.

¹⁶ 1989 P. Cr. L. J. 821.

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