JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

CASE NO. : CRL. REV. NO.57-2017

Raja Khurram Ali Khan
Vs.
Mst. Tayyaba Bibi (complainant) through her father & Another

Petitioner by : Raja Rizwan Abbasi, Advocate
Respondents by : Raja Zahoor-ul-Hassan, Advocate
Mian Abdur Rauf, Advocate General, Isd.
Ch. Abdul Khaliq Thind, AAG
Date of decision : 23.05.2017

AAMER FAROOQ J. The petitioner is aggrieved of order dated 10.05.2017 passed by the Judge-in-Chambers in Crl. Misc. No.264-M of 2017, whereby application under section 345 Cr.P.C., for recording acquittal of the petitioner on the basis of compromise, was dismissed.

2. The relevant facts are that, at the instance of minor Tayyaba d/o Muhammad Azam, FIR No.483 dated 29.12.2016 under sections 342/506/328-A/201/337-A(i)/337-F(i)/34 PPC at Police Station Industrial Area, Islamabad, was lodged. On conclusion of the investigation, report under section 173 Cr.P.C. was presented before the learned trial court i.e. the Court of Magistrate, Islamabad, however, this Court, vide order dated 24.03.2017 passed in Crl. Misc. No.162-T-2017, transferred the proceedings from the referred court to this Court under section

526 Cr.P.C. During the course of proceedings before this Court in Criminal Trial No.01-2017, an application was filed under section 345 Cr.P.C. for recording acquittal of the petitioner on the basis of compromise between the petitioner and parents of respondent No.1. The referred application was dismissed learned Judge-in-Chambers vide order dated 10.05.2017.

3. At the very outset, learned Advocate General, ICT, Islamabad objected to the maintainability of the instant petition on the ground that, a petition under section 439 of Criminal Procedure Code, 1898, is not maintainable before this Court against an order passed by the learned Judge-in-Chambers, while trying case on the original side.

4. Raja Rizwan Abbasi, learned counsel for the petitioner, *inter alia,* contended that instant petition is maintainable. In this behalf, it was contended that instant petition is under section 439 Cr.P.C. and there is no restriction or bar for the Court, under the relevant provision, to examine the correctness of an order passed by the learned trial court. In support of his contentions, learned counsel placed reliance on cases reported as 'Parbati Devi Vs. The State' (AIR 1952 Calcutta 835) & 'Krishnaji Vithal Kangutkar Vs. Emperor' (AIR (36) 1949 Bombay 29) [C.N.6].

5. With respect to the merits of the case, learned counsel submitted that all the offences, with which the petitioner has been charged except Section 201 PPC, are compoundable and in such like cases, the principle of 'merger' applies i.e. non-compoundable offence merge in the compoundable offence(s). Reliance was placed on case reported as 'Ashique Solangi and Another Vs. The State' (PLD 2008 Karachi 420). Learned counsel took the Court through Section 345 Cr.P.C., in particular, Section 345 (4) ibid to submit that where the person, competent to compound the offence, is a minor (under the age of eighteen years) and is an idiot or a lunatic, any person competent to contract on his behalf, may with the permission of the Court, compound such offence; that when such a request is made before the Court, it has no discretion in the matter. Raja Rizwan Abbasi, Advocate further contended that Judge-in-Chambers erred in refusing to compound the offences inasmuch as the compromise was binding and could not be refused.

6. Learned counsel for respondent No.1, *inter alia,* contended that the parents of Mst. Tayyba, have forgiven the petitioner and have no complaint against him.

7. Learned Advocate General, ICT, Islamabad, on merit, contended that under subsection (4) of Section 345 Cr.P.C., an offence can only be compounded with the permission of the

Court and in this behalf, the principles laid down by the Hon'ble Supreme Court of Pakistan in case reported as 'Naseem Akhtar & Another Vs. The State (PLD 2010 SC 938), are attracted.

8. The arguments advanced by learned counsel for the parties have been heard and the documents placed on record have been examined.

9. The learned Advocate General, ICT, Islamabad raised an objection regarding maintainability of the instant petition, which has been filed under section 439 Cr.P.C. For the sake of convenience and brevity, the relevant provision is reproduced below: -

> *"439. **High Court's powers of revision** (1) In the case of any proceedings the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections, 423, 426, 427 & 428 or on a Court by section 338, and may enhance the sentence and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.*
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> *(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.*
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> *(3) Where the sentence dealt with under this Section has been passed by a Magistrate, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Magistrate of the first class.*

(4) Nothing in this section shall be deemed to authorize a High Court;

(a) to convert a finding of acquittal into one of conviction; or

(b) to entertain any proceedings in revision with respect to an order made by the Sessions Judge under section 439-A

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under subsection (2) for showing cause, why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction"

Though the instant petition is under the above mentioned Section, however, similar power exists, whereby the record of any inferior court can be examined by this Court i.e. under section 435 Cr.P.C.; the relevant provision is as follows: -

*"**435. Power to call for records of inferior Courts. (1)** The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record"*

As mentioned above, the trial of the petitioner is pending before this Court and the order impugned before us is passed in the referred proceedings. The question regarding maintainability of a petition

under sections 435 & 439 Cr.P.C. when the trial is being conducted by the High Court, came up for consideration before the Hon'ble Supreme Court of Pakistan in a case reported as 'Malik Firoz Khan Noon, Karachi Vs. The State (PLD 1958 Supreme Court (Pak.) 333); the august Apex Court observed as under:-

> *"In my opinion the insertion of Section 411-A in the Criminal Procedure Code has merely enlarged the appellate powers of the High Court and has not created a new Court to which the Judge exercising original criminal jurisdiction is inferior or subordinate. Before the enactment of section 411-A there was no appellate jurisdiction in the High Court over any Judge or Judges of the High Court exercising original criminal jurisdiction and it is difficult to see how a mere provision empowering a bench of the High Court in a restricted class of cases to rectify errors of members of the same Court can have the effect of making the latter inferior to the former, particularly when the two positions are not constant and can be interchanged from time to time by an order of the Chief Justice. In Goonesinhu Vs. Kretser (1) privy Council has held that a writ of certiorari, which is in the nature of a revisional order and can only be issued to and inferior Court, cannot be issued by a superior Court to bring up an order made by a Judge of hat Court, and in civil cases revisional jurisdiction has never been claimed by a Division Bench hearing under the Letters Patent and appeal from the follow if the reasoning in the Bombay case or the Calcutta case on which reliance is placed by Mr. Bashir Ahmad were correct. It appears to me that the mere conferment of restricted additional appellate jurisdictdion on a bench of the High Court does not have the effect of converting another bench which exercises the original powers of the High Court, a subordinate or inferior Court. Section 411-A confers limited appellate powers on the High court and does not give to that Court full powers of appeal from the judgment of a judge exercising original criminal jurisdiction. Though an appeal under hat section lies as of right on a question of law, no appeal on a question of fact lies unless the case is certified by the original Judge to be a fit one for appeal, or unless the leave of the appellate bench is obtained. Further, an appeal under that section can be brought only by a person who has been convicted or by the Public prosecutor under the instructions of the Provincial Government. The additional jurisdiction of the High Court having been defined with such precision it is impossible to argue that any*

more powers were impliedly intended to be conferred so as to make that Court a Court of general revisional jurisdiction qua other members of the same Court. The Court that functions in exercise of the original criminal jurisdiction or in exercise of the appellate jurisdiction under section 411-A is the same Court viz,, the High Court, and not two different Courts, the respective powers possessed by the Judges while functioning in two different capacities being the powers of the same Court and the arrangement among the Judges of the same Court and the distribution of those powers being no mere than and internal arrangement among the Judges of the same Court. He records of both the benches are records of the same Court. The records of both the benches are records of the same Court and not of two different Courts. There are of course two judgments in such a case, one by the original Judge or Judges and the other by the appellate Judges, but they are both judgments of the same Court though by law the judgment of the appellate bench in case of reversal or modification over rides the judgments of the original Judges. I do not see how subsection (4) of section 439 can help Mr. Bashir Ahmad. Admittedly before the enactment of section 411-A no revisional powers existed and such powers are now being claimed only as a result of that enactment. But sub-section (4) in its present form existed even before the insertion of section 411-A and if revisional powers did not exist after that subsection had been enacted, section 411-A can have nothing to do with the existence or non-existence of those powers.

As regard the contention that since the appellate bench may remit the case for retrial to the original bench, the latter is a Court of competent jurisdiction subordinate to the appellate benches, all that need be stated is that the argument begs the question and assumes what has to be shown. If the original bench is not subordinate, the case cannot be remitted to it for retrial. The remittal must be to some other competent Court because after the trial of a case in exercise of the extraordinary criminal jurisdiction of the High Court the original bench, being functus officio, ceases to exist, and can be re-formed only by an order of the Chief Justice if the case after having been remitted to another subordinate Court of competent jurisdiction is again intended to be tried on the original side of the High Court.

For the reasons just stated the Judge trying a criminal case in exercise of the extraordinary criminal jurisdiction of the High Court cannot be held to be and inferior criminal Court within the meaning of section 435 of the Code of Criminal Procedure. Nor can it be said that the record of the trial Judge in such a case otherwise comes to the knowledge of

the High Court within meaning of section 439 of the Code. The record mentioned in that section is the record of an inferior Court and not of the High Court itself which is always supposed to be within the knowledge of that Court, and to which the words in section 439 "which otherwise comes to its knowledge" are clearly inapplicable. I am therefore of the view that the bench hearing the appeal of the convicted persons under section 411-A has no revisional jurisdiction over the Judge who tried this case and consequently no power to expunge any remarks or passages from his judgment. In this view of the matter it is unnecessary to consider the next in the phraseology of section 435 and section 423 of the Code of Criminal Procedure, a Court of revision has wider powers, both as regards subject-matter and the form of revisional order, than a Court of appeal. And it is not and cannot be contended that and Appellate Court, merely as such Court, has the jurisdiction to expunge passages from a judgment under appeal. Of course to which the objectionable passages relate but it does not possess to which the objectionable passages relate but it does not possess the power of expunction simpliciter, which in its nature and incidents, is essentially different. Any contrary view would invest all appellate Courts, including subordinate Courts, with a power which has never existed, been exercised or claimed. And in the present case, the appellant has, in view of the terms of section 411-A, no locus standi to move the appellate Court under that section and the Court cannot act suo motu, its powers to entertain an appeal and to pass orders thereon having been exhaustively defined by section 411-A read with section 423, Criminal Procedure Code. The power to grant relief of the present nature is neither included in the appellate Court's power to "make any amendment" which obviously refers to the power to make and order that the appellate Court may pass under clauses (A), (b) and (C) of subsection (1) of section 423, nor in the power to make any consequential or incidental order which refers to the power to make and order subsidiary to the effective order that it may decide to make under those clauses"

The referred judgment was followed by the learned Division Bench of Hon'ble Sindh High Court in case reported as 'Naeem Sabir Mughal Vs. Nazim alias Nizamuddin and 6 Others' (1987 P.Cr.LJ 1656). The Hon'ble Singh High Court discussed the law

on the subject in India and disagreed with it in light of the above judgment of the august Apex Court. It was observed as follows: -

> *"7. The above cases of the Indian jurisdiction do support the contention of Mr. Khalid M. Ishaque to some extent. However, in our view, it is not open to us in presence of the above quoted observations of the Honourable Supreme Court of Pakistan to take different view in the matter.*
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> *However, we may also observe that under section 411-A Cr.P.C. a convicted accused has been given a right to file an appeal against his conviction and sentence subject to the restrictions contained therein referred to hereinabove in para 4. Keeping in view the above provisions, we cannot hold that a complainant party has unfettered right to file a revision against an acquittal order under section 439, Cr.P.C. on questions of law and facts as it will be contrary to the apparent intention of the Legislature manifested by the above section 411-A Cr.P.C."*

Similar view was taken by the learned Division Bench of Peshawar High Court in a case reported as 'Mir Alam Khan Vs. The State (1980 P.Cr.LJ 1152). It was observed as follows:-

> *"When confronted with the position that under section 411(A)(1) of the Criminal Procedure Code only a convicted person on a trial held by a High Court in the exercise of its original criminal jurisdiction has been allowed the right of appeal and under subsection (2) thereof the Provincial Government has been authorized to direct the public prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in exercise of its original criminal jurisdiction, the learned counsel for the complainant submitted that the appeal may be treated as a Revision Petition under section 439 of the Criminal Procedure Code. Learned counsel for the complainant is laboring under misconception of law in asking us to treat his appeal as a petition under section 439 (ibid), as the powers under the said section are not available to the High Court to revise an order of the Court itself passed by a Single Judge"*

10. In view of above judgments, this Court holding trial in its original jurisdiction, is not a court inferior within the meaning of

the words as provided in section 435 Cr.P.C.; neither the record of the proceedings pending before this Court can be called for the purposes and meaning of Section 439 ibid.

11. In view of the interpretation rendered by the Hon'ble Supreme Court of Pakistan and other judgments noted hereinabove, a petition under section 439 Cr.P.C. is not maintainable against an order passed by this Court in exercise of jurisdiction while conducting trial under section 526 Cr.P.C.

12. For the reasons set out above, instant petition is not maintainable and is accordingly dismissed.

(MIANGUL HASSAN AURANGZEB)
JUDGE

(AAMER FAROOQ)
JUDGE

Zawar