

Form No: HCJD/C-121
JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

Crl. Appeal No. 155 of 2019

Saqlain Abbas Syed

Vs

The State & another

Appellant by : Ms. Mehak Ali, Advocate.
Respondents by : Malik Altaf Hussain Kandwal, Advocate
Mr Alamgir, Inspector/I.O.
Dates of Hearing : **14.09.2022**

ATHAR MINALLAH, C.J.- This appeal is directed against order, dated 05.04.2019, passed by the learned Judicial Magistrate Section 30, Islamabad whereby application under section 249-A of the Criminal Procedure Code, 1898 (hereinafter referred to as the "**Cr.P.C.**") was allowed and respondent no.2, Dr. Ch. Muhammad Safdar, was handed down acquittal.

2. The learned counsel for the petitioner has contended that; acquittal could not be handed down while exercising power under section 249-A of Cr.P.C, merely because the complainant was not pursuing the case; the complainant was abroad and it was the responsibility of the prosecution to produce the witnesses; the petitioner did not receive any notice nor had been served in

accordance with law; the prosecution was required to produce its witnesses/evidence because it was not a complaint case; reliance has been placed on "The State vs Muhammad Afzal and another" **2000 MLD 220**.

3. The learned counsel for respondent no.2 has argued that the impugned order does not suffer from any legal infirmity; the petitioner had failed to pursue the case; the latter was required to prosecute the respondent accused but he failed to do so despite several opportunities having been granted to him.

4. The learned counsels have been heard and the record perused with their able assistance.

5. Pursuant to a complaint filed by the petitioner FIR No.12/2016, dated 08.01.2016 was registered at the Police Station Shalimar, Islamabad under section 337-A (ii)/34 of Pakistan Penal Code, 1860 (hereinafter referred to as the "**PPC**"). After completion of the investigation, report under section 173 of Cr.P.C was submitted before the learned trial court. The charge was framed on 17.02.2018. Respondent no.2 filed an application under section 249-A of Cr.P.C. The learned trial court endeavored to serve notices but the complainant i.e. the petitioner did not attend the proceedings. Subsequently, the learned trial court allowed the application while exercising power under section 249-A of Cr.P.C. A plain reading of the impugned order, dated 05.04.2019 shows that the power vested under section 249-A of Cr.P.C was exercised on the ground that the complainant had not pursued his complaint. Moreover, it is also

obvious from the impugned order that notice was issued and endeavored to be served on petitioner/complainant in relation to the application under section 249-A of Cr.P.C. The petitioner was not summoned for any other purpose. The learned trial court while allowing the application under section 249-A of Cr.P.C has also observed that the prosecution had failed in producing witnesses/evidence. However, the record shows that the learned trial court had not proceeded against the prosecution in order to compel the latter to produce its witnesses/evidence. In the case in hand, it was not an obligation of the complainant but that of the State to produce the witnesses/evidence. In case the prosecution was of the opinion that no such evidence/witnesses were required to be produced and that no case was made out then it could have informed the learned trial court accordingly.

6. It is noted that section 249 of Cr.P.C empowers the Magistrate of the First Class, or with the previous sanction of the Sessions Judge, any other Magistrate to stop the proceedings at any stage without pronouncing judgment either of acquittal or conviction when the complainant is absent. On the other hand section 249-A empowers a Magistrate to acquit an accused at any stage, if after hearing the prosecutors and the accused it considers that the charge is groundless and there is no probability of the accused being convicted of any offence. Both these sections are distinct. In case of absence of a complainant, section 249 of Cr.P.C would be attracted. The prosecution had failed in its duty to produce witnesses/evidence and the learned trial court had also not taken appropriate action to

compel it to do so. The absence of the complainant, therefore, could not have been made a ground for allowing the petition under section 249-A of Cr.P.C. Moreover, the failure on part of the prosecution to fulfill its obligation to produce witnesses/evidence also could not be treated as a justified ground for allowing the application under section 249-A of Cr.P.C. The prosecution, however, after examining the record could have formed an opinion whether the charge is groundless or that there was no probability of the accused being convicted of any offence.

7. For the above reasons, the petition is allowed and the impugned order, dated 05.04.2019 is hereby set aside. The application filed under section 249-A of Cr.P.C shall be treated as pending before the learned trial court. The learned trial court is expected to grant an opportunity to the prosecution to form an opinion, on the basis of the evidence it may have collected during the course of investigation, whether the charge is groundless or that there is no probability of conviction of the accused. In case the prosecution is of the opinion that the charge is not groundless or that there is a probability of the accused being convicted of the offence, then the learned trial court in such an eventuality would be expected to proceed in accordance with law. In the event of absence of the complainant, the learned trial court may consider passing^g of an order under section 249 of Cr.P.C.

(CHIEF JUSTICE)

Asif Mughal/.