

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
(JUDICIAL DEPARTMENT)

Criminal Appeal No.202/2018

The State

versus

Naila Ashraf & 5 others

State by: Ms. Ramsha Izhar, State Counsel.
Naveed, S.I., P.S. Lohi Bher, Islamabad.

Respondents by: Rao Muhammad Sarfraz, Advocate.

Date of Hearing: 18.02.2020.

MOHSIN AKHTAR KAYANI, J: Through the instant criminal appeal, the State has called in question order of the learned Judicial Magistrate Section-30 (East), Islamabad, dated 15.02.2018, whereby Respondents No.1 to 6 have been acquitted from case FIR No.89, dated 18.04.2016, under Sections 334/324/34 PPC read with Sections 10/11 of the Transplantation of Human Organs and Tissues Act, 2010, P.S. Lohi Bher, Islamabad.

2. Brief facts referred in the instant appeal are that one Abbas Ahmad (*hereinafter referred to as "complainant"*) filed a complaint to S.H.O., P.S. Lohi Bher, Islamabad with the allegations that on 26.03.2016, when he arrived at Faizabad Bus Station, Rawalpindi searching for work, two persons namely Ahmad and Rafique approached the complainant and offered him a job, whereafter they took the complainant in their vehicle to a house situated in Bahria Town, where one Imran along with two ladies were present. The complainant after taking tea offered by one of the lady became unconscious for many days and it was on 10.04.2016, when the complainant came into senses and noticed a cut at his left side of abdomen, regarding which the said Ahmad and Rafique told him that they had removed his kidney, whereafter the complainant was taken blindfolded from the place of occurrence to G.T. Road. On the basis of said complaint, the above referred FIR No.89/2016 was lodged. Pursuant to investigation, the respondents were arrested and put to face the trial. However,

on the basis of a compromise effected between the parties the respondents filed application under Section 249-A Cr.P.C. seeking their acquittal of the charge, whereby they have been acquitted by the learned trial Court vide impugned order dated 15.02.2018. Hence, the instant criminal appeal.

3. Learned State Counsel while opposing the impugned order contends that the learned trial Court has not applied its judicial mind while taking into consideration the gravity of the offence and resorted to passing the impugned order, which is absolutely illegal and arbitrary without any legal justification; that the offence under Sections 10 and 11 of Transplantation of Human Organs and Tissues Act, 2010 is non-compoundable and this aspect has not been considered by the Trial Court; that sufficient material is available against the respondents/accused persons to connect them with the commission of heinous crime; that the learned trial Court has not judiciously exercised its discretion as the reason for acquittal of respondents recorded in the impugned order is not in accordance with law, therefore, the same may be set-aside.

4. Conversely, learned counsel for respondents in support of the impugned order contends that a compromise between the parties has been effected, which has rightly been appreciated by the learned trial Court and passed the impugned order in accordance with law; that the complainant is no more interested to pursue the case against the respondents, and as such, there is no probability of conviction of the respondents and prosecution of the respondents would be a futile exercise, which fact has rightly been appreciated by the learned trial Court vide impugned order, therefore, the same may be upheld.

5. Arguments heard, record perused.

6. Perusal of record reveals that the respondents have been charged under Sections 334/324/34 PPC read with Sections 10/11 of the Transplantation of Human Organs and Tissues Act, 2010 vide FIR No.89, dated 18.04.2016, P.S. Lohi Bheri, Islamabad, on the complaint of Abbas Ahmad, who alleged that his left

kidney has been removed by the organized gang of respondents after intoxicating him and few days after the incident, he was left on G.T. Road. Pursuant to registration of a criminal case, the Investigating Officer arrested the respondents, who have been challaned, however during the course of trial, the complainant entered into a compromise with the respondents by submitting his affidavit of compromise on different dates of hearing. As a result of said affidavit of compromise, the learned Trial Court, vide impugned order dated 15.02.2018, acquitted the respondents of the charge under Section 249-A Cr.P.C.

7. The instant appeal has been filed by the State against said order of acquittal with the contention that the question of compounding of offences under the Transplantation of Human Organs and Tissues Act, 2010 has not been discussed or addressed by the learned Trial Court in any of the orders, even otherwise, the wordings used in the affidavit of compromise spell out that the complainant on the basis of some oath exonerated the respondents and as such, the alleged involvement of respondents is determined by the Investigating Officer as the so called hospital (private home) used by the respondents for the purpose of transplantation of human organs and tissues is reflected from the record. Similarly, the role of doctors, who had performed such surgery without due authorization and in violation of the PMDC Ordinance together with the Transplantation of Human Organs and Tissues Act, 2010, has not been considered by the learned Trial Court. No doubt, the offences under Sections 324 and 334 PPC are compoundable, but the other offences falling under the Transplantation of Human Organs and Tissues Act, 2010 are not.

8. The wisdom laid down in Section 345 Cr.P.C. clearly spells out that such compounding of offences requires leave of the Court only against those offences which were enlisted in the table and the Court should not act in a mechanical manner and allow the same as a matter of course or routine or should sit as a spectator as held in 1981 SCMR 294 (Abdur Rahim vs. The State). Whereas,

MAR 2020

Sindh High Court
Karachi
Islamabad

in this case the learned trial Court has only accepted the affidavit of the complainant and decided the fate through application of Section 249-A Cr.P.C.

9. However, the learned Trial Court has not followed the spirit of Section 345 Cr.P.C. which cannot be stretched too far by including non-compoundable offences therein under the garb of humanitarian ground or any extraneous consideration. The tabulation of offences as made under Section 345 Cr.P.C. being unambiguous, removed all doubts, uncertainty and must be taken as a complete and comprehensive guide for compounding of offences. Reliance is placed upon PLJ 2005 SC 303 (Muhammad Rawab vs. The State). Judicial notice of compromise in non-compoundable offences not mentioned in Section 345(1) Cr.P.C. can be taken and same may be considered only for the purpose of grant of bail and not otherwise. Reliance is placed upon 2010 P.Cr.LJ 1482 (Muhammad Makki vs. The State).

10. Taking into account the above referred position, the conduct of the learned Trial Court in appreciating the law with respect to giving effect to the compromise is oblivion to law as the Court in such type of cases may refuse to give effect to such deal, especially when the scenario referred in the offence is gruesome, brutal, cruel, appalling and causing sensation to the society. Reliance is placed upon PLD 2010 SC 938 (Naseem Akhtar vs. The State).

11. The other important aspect completely ignored by the learned trial Court is the application of Transplantation of Human Organs and Tissues Act, 2010, which is a special law and provides a complete mechanism regarding donation of tissues by a living person and it requires a complete process by the Evaluation Committee notified by the Federal Government in terms of Section 5 of the said Act, which comprises of surgical specialist, a medical specialist, a transplant specialist, a nephrologist, and a neurophysician, etc. Likewise, Section 7 of the Act restricts transplantation of human organs and tissues from a donor without the permission from the Evaluation Committee, while a Monitoring Authority

has been defined in terms of Section 8 of the Act. Furthermore, Sections 10 and 11 prescribe punishment for removal of human organs without authority and commercial dealings in human organs, respectively, in violation whereof, sentence of 10 years imprisonment with fine of Rs.1 million has been provided, even the medical practitioners participated in such illegal activity have to be proceeded by the Pakistan Medical and Dental Council in a way not limited to removal of their names from the register of the PMDC for the period of three (03) years initially, and permanently for subsequent commission of offence.

12. All these provisions refer that the Transplantation of Human Organs and Tissues Act, 2010 is a special law and it has a special procedure, therefore, its wisdom has to be applied in that sense and as such, reference to that effect has been highlighted in 2015 P.Cr.LJ 1758 Lahore (Sharafat vs. Additional Sessions Judge/Justice of Peace). The legislature has intentionally omitted the compounding of offences under this special law to curb such kind of illegal trade by the medical practitioners or other persons, however the learned Trial Court has ignored all these provisions while passing impugned order in terms of Section 249-A Cr.P.C. At this stage, the legal question which requires due consideration is that if the compoundable offence(s) stands compounded between the parties, whether the benefit of said compounding shall be extended to the accused is non-compoundable offence? In my humble view, in such eventuality the benefit of compounding of compoundable offense shall not be extended to the accused in non-compoundable offence and accused shall certainly be prosecuted in non-compoundable offence and trial Court without summoning prosecution evidence and without proceeding further with the case cannot acquit the accused merely on the ground that in compoundable offence, parties have entered into compromise, hence, further proceedings in the case would be a futile exercise. In the instant case, learned trial Court has erred while holding that "in view of the

statement of the complainant and his affidavit, there is no probability of the accused persons/applicants being convicted." Whereas, the learned trial Court has remained oblivious of the fact that accused persons are also charged under Sections 10/11 of the Transplantation of Human Organs and Tissues Act, 2010. Even the Prosecuting Inspector, appearing on behalf of the State did not assist the Court on this ground. In this regard I am fortified by the principle laid down by the Hon'ble Supreme Court of Pakistan in case reported as PLD 2019 SC 749 (Moinuddin, etc. vs. The State, etc.), wherein it has been held that:

"an offence which the law declares to be non-compoundable remains non-compoundable even if in a coordinate compoundable offence a compounding takes place between the relevant parties and, therefore, despite any compounding of the coordinate compoundable offence an acquittal cannot be recorded in the non-compoundable offence on that sole basis."

13. Similarly, the order in terms of Section 249-A Cr.P.C. shows the presence of Prosecuting Inspector for State, who has not performed his duties diligently, rather his mysterious silence for not providing due assistance in such type of sensitive cases is considered to be a criminal misconduct, even the Court, which acted as a silent spectator, is equally responsible for not considering the true sense of law, therefore, this Court truly believes that the prosecutor who has not performed his duties in a proper manner be dealt with separately by the competent authority of police department and he be removed being the Prosecuting Inspector from the Courts and shall be debarred from holding such position. The District Attorney, who is otherwise considered to be the person appointed in this regard, is also negligent in performance of his working in such type of sensitive cases as due assistance was not provided and as such, it is the failure on the part of Federal Government in appointing a competent Prosecuting Inspector, State Counsel or provision of the infrastructure, which is lacking in the Islamabad Capital Territory.

14. The entire background in which the prosecution services have been provided in the Islamabad Capital Territory expresses the inability on the part of Federal Government, Ministry of Interior, Ministry of Law, Chief Commissioner, Islamabad and the Inspector General of Police, who are not performing their duties efficiently under the constitutional mandate to eliminate such sadistic crimes being committed in such type of cases.

15. Poles apart, the instant criminal appeal has been filed by the Advocate General against the order of acquittal passed in favour of private respondents and not against the two doctors i.e. Dr. Fawad Mumtaz and Dr. Altamash, who have been acquitted vide order dated 02.11.2017 by the same Court. Although, the said doctors have been acquitted in terms of Section 249-A Cr.P.C., but this does not mean that the State shall close its eyes to all these illegal actions, regarding which no logical justification has been brought on record by the office of Advocate General as to why the said doctors have not been impleaded in the instant appeal or why no appeal has been filed against them, who in fact have performed a major role in the commission of offence, or even what actions have been taken against them by the Pakistan Medical and Dental Council or by its Disciplinary Committee. Such criminal negligence calls for action against all those delinquents, who are responsible for this slackness.

16. To crown it all, the matter in which the affidavit has been submitted by the complainant requires objection on the part of State to initiate legal action against those individuals, who later on resiled from their initial allegation in a mysterious manner, therefore, it is high time to settle all these questions and this Court while taking into account the law on subject and background of the case is confident to hold that the compromise effected, if any, is considered to be illegal and not binding upon the Court, hence, the instant criminal

appeal is ALLOWED, the impugned order of the learned Trial Court, dated 15.02.2018, passed on the basis of compromise is hereby SET ASIDE. Similarly, by exercising power under Section 561-A Cr.P.C., which deals with inherent jurisdiction of the High Court and enables the High Court to make such order as may be necessary to give effect to an order under the Criminal Procedure Code or to prevent the abuse of process of any Court or otherwise to secure the ends of justice. It is also true that ordinarily inherent powers of the Court should not be invoked because inherent powers are meant to be exercised in extraordinary and exceptional cases in the interest of justice. The Jurisdiction under Section 561-A Cr.P.C. is neither alternative, nor additional in its nature and is to be rarely invoked only to secure the ends of justice as to seek redress of grievance for which no other procedure is available and thereafter the provision should not be used to obstruct or direct the ordinary course of criminal procedure. This kind of jurisdiction is extraordinary in its nature and designed to do substantial justice. It is neither akin to the appellate jurisdiction nor to the revisional jurisdiction. Reliance is placed upon 2002 SCMR 1076 (Maqbool Rehman vs. The State). Therefore, the acquittal order earlier passed by the learned Trial Court to the extent of Dr. Fawad Mumtaz and Dr. Altamash, dated 02.11.2017, is also illegal as the learned Trial Court has ignored the basic principles of compounding as set out in Section 345 Cr.P.C., hence, to eliminate the illegality conducted by the learned Trial Court in the earlier acquittal order of 02.11.2017, the State has to initiate proceedings separately under the law while considering the provisions of the Transplantation of Human Organs and Tissues Act, 2010.

17. In view of above position, all the accused persons are directed to appear before the learned Trial Court on 10.03.2020, whereafter the learned Trial Court shall proceed in accordance with law and while considering the provisions of

Transplantation of Human Organs and Tissues Act, 2010. The learned Trial Court shall decide the matter within the period of 04 months, under intimation to this Court.

18. Copy of this judgment may also be sent to the I.G. of Police, Islamabad, Chief Commissioner, Islamabad, Secretary Ministry of Interior, Secretary Ministry of Law and the Monitoring Authority under the Transplantation of Human Organs and Tissues Act, 2010 as well as to the Federal Government for their consideration and appropriate legal actions.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 28.02.2020.

JUDGE

Khalid Z.