

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

Cr.R 26-M/2016

JUDGMENT

Date of hearing: 23.11.2017

Petitioners: (Muhammad Saeed & others) by
Mr. Khurshid Ali Walikhel, Advocate.

Respondents: (Haider Ali & others) by
Syed Sultanat Khan, Advocate.

(State) by
Mr. Rab Nawaz Khan, A.A.G

ISHTIAQ IBRAHIM, J.- This Criminal Revision under 439 Cr.P.C is directed against the order dated 17.2.2016 rendered by the learned Additional Sessions Judge/Izafi Zila Qazi-VI, Swat, whereby complaint of the petitioners was dismissed.

2. Background of the instant revision petition is that the present respondents filed a complaint against the petitioners before the Deputy Commissioner, Swat, thus, the petitioners also brought a complaint u/s 500 P.P.C against them in the

Court of Sessions Judge/Zila Qazi, Swat who entrusted the same to the learned Additional Sessions Judge/Izafi Zila Qazi-VI, Swat. Later on, the petitioner filed an application for withdrawal of the said complaint with permission to present it before the proper forum, they were allowed and consequently they filed a fresh complaint before the learned Judicial Magistrate/Illaqa Qazi-II, Swat and after recording statements u/s 200 Cr.P.C, the complaint was forwarded to the learned Sessions judge u/s 190 (2) Cr.P.C as the same was triable by the Court of Session, which was assigned to the learned Additional Sessions Judge/Izafi Zila Qazi-VI, Swat for disposal. The respondents were summoned and after arguments on maintainability of the complaint, it was dismissed vide the impugned order dated 17.2.2017 on the ground that once the petitioners have already withdrawn their complaint of similar nature and subsequent

complaint is not competent, hence, this revision petition.

3. Learned counsel for the petitioners contended that the according to law the petitioners were granted permission by the Court at the time of withdrawal of the first complaint to file a fresh one, whereafter they have filed the subsequent complaint which was entrusted to learned trial Court for disposal; that the impugned order is not appealable but it is revisable as the respondents have not been acquitted; that the provisions of section 248 Cr.P.C are applicable only to those cases which are pending before the Court of Magistrates and these are not applicable to the complaints which are triable by the Court of Session, as such, the learned trial Court has not applied its judicial mind while dismissing complaint of the petitioners has not followed the law in its true perspective, therefore, the learned trial Court by passing the impugned order has



committed gross illegality. He further contended that complaint of petitioners was not dismissed on merits but was dismissed on technical ground to present it before proper forum, thus, there was no bar in filing of the subsequent complaint. He requested for reversal of the impugned order of the learned trial Court.


4. Learned counsel for the respondents strongly opposed the above contentions by stating that as the petitioners have withdrawn their complaint and as per section 248 Cr.P.C, the subsequent complaint dismissed through the impugned order was not competent; that the revision of the petitioners not competent as the learned trial Court has dismissed whole complaint and that the impugned judgment given by the learned trial Court is well reason, which is not open to any interference or exception, therefore, the same is liable to be dismissed.

5. Learned Additional Advocate General supported the contentions of learned counsel for the petitioners and requested for acceptance of the revision petition.

6. Before proceeding further with this revision petition, it is necessary to see as to whether the impugned order of the learned trial Court is revisable under 439 Cr.P.C or appealable under 417 (2) Cr.P.C and as to whether a complaint withdrawn would amount to acquittal of the accused and the subsequent complaint would be barred u/s 403 Cr.P.C or otherwise.

7. The provision of section 248 of the Cr.P.C in unequivocal terms provides that:

“248. Withdrawal of Complaint. If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint the Magistrate may permit him to withdraw the same and shall thereupon acquit the accused.”



The above provision of the Code of Criminal Procedure is only for the Magistrate and no reference is there with regard to the complaint pending in the Court of Session or an offence which is triable by the Court of Sessions Judge. Section 248 is embodied in Chapter XX of the Criminal Procedure Code, which deals with the cases triable by the Magistrates, therefore, this Court cannot by implication consider section 248 Cr.P.C as applicable in complaint cases which are triable by the court of Session because Chapter XXII-A of the Cr.P.C provides independent mechanism for the trial of offences by the Court of Session.

8. Moreover, by virtue of an amendment made in the Pakistan Penal Code in the year 2004, section 502-A PPC was inserted therein. For convenience, section 502-A P.P.C is reproduced herein below.

“502-A. Trial of offence under this Chapter. Notwithstanding anything contained in the code of Criminal Procedure, 1898 (Act V of 1898), the


Court of Session shall have the jurisdiction to try an offence under this Chapter and decide it within a period of ninety days."

So, in view of this amendment, the Court of Session can entertain a complaint filed u/s 500 of the ~~Cr.P.C~~ P.P.C as the amendment in the relevant chapter XXI of the P.P.C relating to the matter of defamation. Wisdom in this regard, can well be derived from the judgment of this Court reported as **2016 P Cr. L J 1469**, wherein it has been held that:

"16. In view the above discussion, it can safely be held that the offences under Chapter XXI of PPC shall be tried only by Court of Session, however, cognizance is to be taken by the Magistrate under section 190, Cr.P.C. No Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case is sent to it by a Magistrate under section 193, sub-section (1) of the Code of Criminal Procedure."

9. In addition to the above, the complaint was referred to the learned trial Court by the Judicial Magistrate after compliance of the provision of section 190 (2)

Cr.P.C. Needless to say that order of withdrawal of the first complaint is not an order construing acquittal of the accused. In other word, there is nothing which would attract the provision of section 403 of the Cr.P.C. In this regard, I would like to refer herein below section 403 of the Cr.P.C for ready reference.



“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 remains in force, not to 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 36, 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 with which 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 purposes of this section."

The above explanation to this section apparently shows that the dismissal of a complaint as well as stopping of proceedings under section 249 Cr.P.C or the discharge of an accused is not acquittal. In this regard, reliance is placed on the case of **'Azmat Bibi and another Vs. Asifa Riaz and 3 other'** reported as PLD 2002 Supreme Court 687, wherein the following precedent was laid down:

"-----S 248-----Withdrawal of complaint—Provision of S.248 Cr.P.C-

--Applicability—Where the complaint was dismissed for non-prosecution, the provision of S.248 Cr.P.C would not be attracted---Provision of S.248 Cr.P.C would be applicable only in those cases where the trial had commenced."




As stated earlier that there exists no order with regard to the acquittal or conviction of the accused, however, it is crystal clear that the earlier Complaint has been withdrawn by the petitioners with the condition to file a fresh complaint, therefore, in these circumstances the provision of section 248 Cr.P.C would not be applicable to the case in hand. Moreso, record reveals that the previous complaint was withdrawn by the petitioners only on the ground to file a fresh complaint before the proper forum, thereafter they have brought fresh complaint which after compliance of the provisions of section 190 (2) Cr.P.C was referred to the Court of Session being triable by it. The application for withdrawal of the complaint is clear to the effect that they be given permission to approach proper forum but the words "*with permission to file a fresh complaint before*

proper forum” are not mentioned in the order dated 16.11.2015, whereby in light of the application of the petitioners, their complaint was dismissed as withdrawn. However, the said order is also mute that why they were not granted permission for filing fresh complaint before proper forum, so, in these circumstances, it can safely be said that it would be the result of inadvertence. Therefore, the subsequent complaint filed by the petitioners before the learned trial Court was competent in view of the conditional withdrawal of the earlier complaint. Reliance is placed on the case of ‘ Nazar Ahmad Vs. Muhammad Aslam and 2 others (1988 P Cr.LJ 1787), wherein it has been held as under:

“S. 248-Complaint, case—Withdrawal of ---Challenge to---Whether complaint can be withdrawn by Complainant—Question of---A complaint in summons case triable under Chapter XX can only be withdrawn with permission of Magistrate--- Instant case was not triable under Chapter XX of Cr.P.C. Held: Additional Sessions Judge had no authority to permit complainant to withdraw complaint or to dismiss it as

having been withdrawn—Case remanded for proceedings in accordance with law”.



Situation in the above referred case and that of this case is almost similar as in light of the above judgment, the learned trial Court i.e. the Court of Additional Sessions Judge was having no authority to permit the withdrawal of the complaint. In this case most particularly through an application the earlier complaint was withdrawn with permission to file a fresh one in accordance with law. Moreover, the earlier complaint was not decided on merits rather the same has been withdrawn on the ground of procedural defect coupled with the fact that the respondents have not earned their acquittal, therefore, the question of acquittal does not arise here. It is also settled principal of law that no person should be knocked out in respect of his rights on the basis of mere technicality. Therefore, this revision petition is very much competent in the circumstances highlighted above.

10. For what has been discussed above, this revision petition is allowed. The impugned order dated 17.2.2016 is set aside and resultantly complaint of the petitioners is restored with the directions to the learned trial Court to proceed further with the complaint in accordance with law. It is pertinent to note here that the learned trial Court shall not be swayed by the above observations of this Court as the same are limited only for the disposal of this revision petition.

Announced
23.11.2017


JUDGE

Att-
36711