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

Cr.M (B.C.A) No. 67-M/2017

Date of hearing: **14.02.2018**

Petitioner(s): (Zaiwar Khan) by
Mr. Rahimullah, Advocate

Respondents: (State) by
Malak Sarwar Khan, Advocate.
(Sahib Zada) by
Sardar Gul Muhammad Khan Katana, Advocate.

ORDER

ISHTIAQ IBRAHIM, J.- Petitioner has sought cancellation of bail of respondent accused Sahib Zada granted to him vide order dated 21.06.2017 by learned Additional Sessions Judge, Swat at Kabal in case F.I.R No. 345 dated 11.08.1998 under Sections 302/34 P.P.C registered at Police Station Kabal, District Swat.

2. Khalid son of Peeray, father of the petitioner, is complainant in this case who had lodged a report on 19.07.1998 regarding murder of his daughter Mst. Hajira and minor grand-daughter namely Basmina consequent upon which inquiry under Section 174, Cr.P.C was initiated. On 11.08.1998, the complainant recorded his statement under section 164, Cr.P.C to the effect that his

daughter Mst. Hajira was wedded to respondent Sahib Zada whose father Mian Jan had been killed some 30 years ago for which the complainant and his two brothers were charged. That case was compromised in lieu of marriage of Mst. Hajira with the respondent and the wedlock resulted into birth of a daughter namely Basmina. Complainant further stated that relations between the spouses remained strained; respondent used to beat his wife and send her to her parents' house. He had earlier beaten the lady after tying her with ropes with the help of co-accused Sher Afzal whereafter she informed her father that respondent is bent upon to kill her. Complainant further stated that he got information to the effect that dead bodies of his daughter and grand-daughter were lying in the stream namely Lalai Khwar which were brought to his house with the help of relatives, however, he had no knowledge of the cause of deaths at that time, so, he could not inform the police to this effect. He charged the respondent and co-accused Sher Afzal for the murder of his daughter and grand-daughter. On the bases of above statement recorded by complainant, the above referred F.I.R was registered against the

respondent and his co-accused Sher Afzal who has already been acquitted after trial.

3. Respondent was arrested on 08.05.2017. He filed bail petition before learned Additional Sessions Judge, Swat at Kabal, however, the same was dismissed vide order dated 31.05.2017. Thereafter, challan was submitted by prosecution in Court alongwith an application under Section 4 (c) read with Section 5 (b) of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005 for discharge of the accused on the ground of insufficient evidence in the case. The trial Court while entertaining that application, heard the arguments of both the sides. The petitioner herein, brother of the deceased Mst. Hajira, submitted before the trial Court that he wanted to prosecute the accused and requested for an opportunity for producing evidence in the case. The learned trial Court on 21.06.2017 passed the impugned order wherein discharge of the accused was not ordered, however, the respondent was granted bail. Being aggrieved, the petitioner has filed this petition with the prayer for cancellation of bail granted to respondent by learned trial Court.

4. Learned counsel for the petitioner, *inter alia*, contended that respondent was charged for the murder of his wife and daughter. The occurrence took place in 1998 whereas the respondent was arrested on 08.05.2017, after almost 19 years of the occurrence. His main argument was that the impugned letter/application dated 09.06.2017 forwarded by District Public Prosecutor was illegal and against the spirit of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005. He also fortified his arguments by submitting that the submission of challan, discharge of the accused and cancellation of a case is the domain of Investigating Officer and not of the District Public Prosecutor or anyone else. He lastly submitted that the bail granting order is illegal, without jurisdiction, hence, the same be recalled and the accused be taken into custody. Learned State counsel supported the arguments of learned counsel for the petitioner.

5. Learned counsel for the accused repelled the arguments of learned counsel for the petitioner and submitted that it is a case of no evidence as there is no eye witness to the

occurrence. He further submitted that the accused has not absconded and he was unaware of the registration of the case against him. He lastly submitted that the District Public Prosecutor was justified under the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005 to move the application, as such, he has rightly recommended for the discharge of the accused.

6. Arguments heard and record perused.

7. The first question which is to be answered by this Court is as to whether the District Public Prosecutor under the Khyber Pakhtunkhwa Persecution Service (Constitution, Function and powers) Act, 2005 can direct the discharge of an accused who is charged for the offence punishable with death or imprisonment for life. Section 4 of the Act ibid lays down the powers and functions of a Public Prosecutor, which is reproduced below:

> "**4. Powers and Functions of a Public Prosecutor.**— (1) A District Public Prosecutor or a Public Prosecutor, as the case may be, shall be in-charge of the Prosecution in the district concerned and in discharge of his lawful duties with respect to a case the prosecution whereof is lawfully assigned to him, shall perform the following functions, in relation to conducting prosecution of

offences before courts of competent jurisdiction, namely:-

(a) safeguard the interest of the public in prosecution of cases before the courts of competent jurisdiction;

(b) shall, on receipt of the final report,-

(i) lodge the same before the competent court trial; or

(ii) withhold the same for want of proper evidence and return it to the Investigation Officer with written direction to resubmit the report after removal of the deficiencies so identified by him;

(c) in respect of compoundable offences, other than those which are punishable by death or life imprisonment, the Director General Prosecution, and in respect of compoundable offences punishable with imprisonment for seven years or less, the District Public Prosecutor, may

(i) withhold prosecution if reasonable ground exists to believe that the offence is compoundable; provided that if the offence is not compounded within a period of one month, a report shall be lodged in the court of competent jurisdiction for prosecution and trial; or

(ii) apply, for reasons to be recorded in writing, to the court of competent jurisdiction for the discharge of the case, if its institution has been found to be malafide, wrongful or weak from evidentiary point of view:

Provided that an application under this section shall accompany the final report under section 173 of the Code:

Provided further that the competent court may dispose of the application in such manner as it may deem fit.

(2) In respect of any case instituted by a Public Prosecutor before a competent court, any private person representing the complainant shall act under the directions of the Public Prosecutor".

It is clear from the language of clause (c) of Subs-section (1) that District Public Prosecutor is not competent under the Act *ibid* either to withhold prosecution or apply to the Court for discharge of the accused in respect of offences punishable with death or life imprisonment, which have specifically been mentioned in the said clause; even Director General Prosecution cannot exercise those functions under the law. Admittedly, the present case is that of murder and application for discharge of the accused has been filed by the District Public Prosecutor under Section 4 (1)(c)(ii) of the Act, hence, his this act is without any statutory backing as is clear from the plain reading of the above referred provision. Reference in this regard is made to the case titled *"Tariq Habib Vs.*

The State" (2009 YLR 1364) wherein it has been held that:

> **"In case of Muhammad Ashraf alias Bhuller (2008 YLR 1462 Lahore) it has been emphatically laid down that District Public Prosecutor is not competent to direct Investigating Officer to submit challan in a Court of law as the District Public Prosecutor is assigned duty to submit an opinion which has no legal sanctity for the guilt of the accused and the Court has to charge the accused. The relevant provisions of law keeping in view the evidence available on record regarding the crime alleged and not the District Public Prosecutor".**

District Public Prosecutor, no doubt, acts as a head of the prosecution in a district but he by himself cannot approach the Court for discharge of an accused. He can give guidelines and can direct the Investigating Officer for removal of shortcomings and faults in the investigation and can also provide guidelines for investigating the case but he cannot directly order the discharge of an accused or cancellation of a case, as the case may be which is otherwise the domain of Investigating Officer/Police who shall make the above mentioned recommendations.

8. Section 173 of the Criminal Procedure Code empowers Officer Incharge of a police station to submit challan against an accused in the Court of competent jurisdiction. It is the sole prerogative of the Officer Incharge of a police station under the Code to ask for discharge/cancellation of a case or even for placing the name of an accused in column No.2 or Column No.3 of the challan. The relevant provisions of the Criminal Procedure Code in this regard are Sections 63 and 169 which empower the Officer Incharge of a police station to discharge an accused. It would be appropriate to reproduce the above referred sections herein below for ready reference.

> "**63. Discharge of person apprehended.—** No person who has been arrested by a police-officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate".
>
> **"169. Release of accused when evidence deficient.**—If, upon an investigation under this Chapter, it appears to the officer incharge of the police station or to the police-officer making the investigation that there is not sufficient evidence, or reasonable ground or suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties as such officer may direct, to appear, if and when so required, before a Magistrate

empowered to take cognizance of the offence on a police report and to try the accused or send him for trial".

The above provisions clearly show that the prerogative regarding discharge of an accused is solely enjoyed by Investigating Officer and none else have got the power to ask the Court for passing any order regarding discharge of an accused as no legal sanctity is attached to his opinion qua his guilt. In this regard I would refer the judgment of Lahore High Court in the case titled *"Muhammad Sharif alias Bhuller Vs. The State"* **(2008 YLR 1462)** wherein it has been held that:-

"7. On perusal of report under section 173, Cr.P.C. I have found that the Investigating Officer concluded that so many persons appeared before him in defence of the accused and they stated that Muhammad Shafique deceased had died his natural death and accused-petitioner Ashraf was found innocent and recommended to be placed in Column No.2 of challan, but thereafter the District Public Prosecutor gave a note at the end of the report under section 173, Cr.P.C. to place the name of petitioner-accused in Column No.3, which, in my considered view, falls out of the purview of duties assigned to the District Public Prosecutor. As no legal sanctity is attached to the opinion of District Public Prosecutor qua the guilt of an accused and it is always the Court, which is to charge the

accused under the relevant provisions of law keeping in view the evidence available on record regarding the crime alleged and not the District Public Prosecutor. Reference can be had to PLD 1954 Sindh-256. Even no Court can order to the Investigating Officer to submit challan while placing the name of the accused in Column Nos.2, 3 and 4, rather the Court can direct the Investigating Officer only to submit final report after completing investigation. Reference can be had to 1983 SCMR 370".

9. Although Chapter XXVIII of the Criminal Procedure Code deals with the Public Prosecutors but only Section 494 of the code can authorize him for withdrawal of the case which is not the question before this Court in this petition. Admittedly, an Investigating Officer or Officer Incharge of a police station under his powers conferred upon him under Section 173 of the Criminal Procedure Code can refer an accused to be tried by a Court of competent jurisdiction and similarly he may submit a report before the Court regarding his innocence. He derives these powers from the Federal Statute i.e Criminal Procedure Code and by virtue of that authority the S.H.O/I.O of the concerned police station has submitted supplementary challan before the Court with the

request to try the accused for the offence in accordance with law. On the other hand, the D.P.P has submitted application under Section 4(1)(c)(ii) of the Khyber Pakhtunkhwa Prosecution Service (constitution, functions and powers) Act, 2005 which is a provincial statute and that too when the said Act does not empower the D.P.P to apply for discharge of the accused in a murder case keeping in view the provision under Clause (c) of Section 4(1). No doubt, provinces have the power to make laws with respect to criminal law, criminal procedure and evidence even after cessation of Concurrent Legislation in light of 18th amendment but there is Article 143 of the Constitution according to which the Act of Parliament shall prevail in case of repugnancy between the Acts of Parliament and Provincial Assembly. For convenience sake the said Article is reproduced herein below:-

> **"143. If any provision of an Act of a Provincial Assembly is repugnant to any provision of any Act of Maglis-e-Shoora (Parliament which Maglis-e-Shoora (Parliament) is competent to enact, then the Act of Majlis-e-Shoora (Parliament), whether passed before or after the Act of the Provincial Assembly, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void".**

The anomaly in this case is that S.H.O of the concerned police station has submitted supplementary challan in Court for trial of the accused while the D.P.P has moved application for discharge of the accused due to insufficient evidence. In such situation, this Court is of the opinion that the Federal Statute shall prevail as contemplated in Article 143 of the Constitution and the trial Court should have proceed with the trial of accused without giving preferential attention to application submitted by D.P.P. Wisdom is derived from the judgment in the case titled *"Shams Textile Mills Ltd. And others Vs. The Province of Punjab and 02 others" (1999 SCMR 1477)* wherein it has been held that:-

> **"Under Article 141 [(Majlis-e-Shoora) (Parliament)] may make laws for the whole or any part of Pakistan and a Provincial Assembly may make laws for the Province or any part thereof. Under Article 142 [Majlis-e-Shoora (Parliament)] has exclusive powers to make laws with respect to any matter in the Federal Legislative List and [Majlis-e-Shoora (Parliament)] and a Provincial Assembly also have powers to make laws with respect to any matter in the Concurrent List. Under clause (c) of Article 142 a Provincial Assembly shall and [Majlis-e-Shoora (Parliament)] shall not,**

have power to make ' laws with respect of any matter not enumerated in either the Federal Legislative List or the Concurrent Legislative List. Further, in the event of any inconsistency between the Federal law and the Provincial law, the mandate of the Constitution, as contained in Article 143 is that then the Act of [Majlis-e-Shoora (Parliament)) whether passed before or after the Act of the Provincial Assembly, or, as the case may be, the existing law, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy be void".

Although the above judgment was delivered by the august Supreme Court when the Concurrent list was there but guidelines have been given in the said judgment when there is conflict between the Federal Law and the Provincial Law. It has already been held in the preceding paras that in view of Clause (c) of the Act ibid, a Public Prosecutor has no power to apply for discharge of the accused. If it be presumed that the Public Prosecutor was empowered under the Prosecution Act, 2005 to direct for discharge of accused even then the provisions of the Criminal Procedure Code are to be followed being a Federal Statute and having the prevailing status.

10. Upshot of the above discussion is that the District Public Prosecutor had no legal authority to move an application to the trial Court under Section 4 (1)(c) (ii) of the Khyber Pakhtunkwa Prosecution Service (constitution, Functions and Powers) Act, 2005 for discharge of the accused in a murder case. When the said application had no legal backing, the impugned bail granting order passed by learned trial Court, which is mainly based on the said application of D.P.P., is illegal and without any jurisdiction.

11. For what has been discussed above, this bail cancellation petition is allowed and the impugned bail granting order is set aside. Resultantly, the bail of respondent Sahib Zada is recalled. He be taken into custody and sent to judicial lockup.

12. Above are the reasons of my short order of the even date.

Announced.
Dt: 12.10.2017

JUDGE

Attic, 4/12 WR