

JUDGMENT SHEET

**PESHAWAR HIGH COURT
MINGORA BENCH
(Judicial Department)**

Cr.A No. 199-M/2021

Waheed Gul son of Abid Shah

(Appellant)

Versus

Rokhan Shah & others.

(Respondents)

Present:

Miss Mehnaz, Advocate for the appellant.

Mr. Saeed Ahmad, Asst: A.G for the State

*Mr. Zubair Khan, Advocate, for the
acquitted accused/respondents.*

Date of hearing: **07.03.2023**

JUDGMENT

MUHAMMAD IJAZ KHAN, J.- The appellant has filed the instant appeal under section 417 of the Criminal Procedure Code 1898, against the order/judgment of acquittal dated 15.07.2021 passed by the learned Judicial Magistrate/Judge Model Trial Magisterial Court Buner at Dagger, whereby he has acquitted respondents No. 1 to 3 from the charges leveled against them by invoking the provision of section 249-A Cr.P.C, in case FIR No. 07 dated 14.01.2021 registered under sections 452/506/337 L (ii)/34 PPC at Police Station Gagra District Buner.

2. Precisely the facts of the case are that the present appellant being a complainant registered the aforesaid FIR whereby he has levelled clear allegations of criminal intimidation, firing for the purpose of terrifying the complainant's son and beating the complainant with knife and sticks blow, as a result of which he sustained injuries on different parts of his body. Motive behind the occurrence was stated to be a dispute over the cutting of trees. After registration of the FIR the Worthy Investigating Officer conducted an extensive investigation by preparing the site plan, placed on record the medical evidence of the appellant/complainant. The Investigating Officer has also investigated the motive part of the case and thus at the end of his investigation submitted complete *challan* to the Court of learned Judicial Magistrate Buner for the trial where too he has categorically opined that prima facie the accused/respondents are connected with the commission of offence.

3. The record shows that the charge was framed against the acquitted respondents on 05.03.2021 and thereafter statements of eight (08)

prosecution witnesses were also recorded, when in the meanwhile, the acquitted respondents submitted an application under section 249-A Cr.P.C on 12.07.2021 for their acquittal, in which notices were issued to the State as well as to the complainant and after hearing both parties the accused/respondents were acquitted of the charges levelled against them vide the impugned order /judgment of acquittal dated 15.07.2021 of the Court of learned Judicial Magistrate Buner at Daggar, which order has now been challenged by the appellant before this Court through the instant appeal.

4. Arguments of learned counsel for the parties as well as learned Astt: A.G for the State were heard and the record perused with their able assistance.

5. The record would reveal that the accused/respondents were acquitted of the charges leveled against them by the learned trial Court vide the impugned order and judgment dated 15.07.2021 by entertaining an application filed under section 249-A Cr.P.C. The record further indicates that the acquitted respondents were charged by the appellant/

complainant in the aforesaid FIR mainly for the allegations that they have criminally intimidated the complainant's son namely Saneef Gul by extended him threats and they have also resorted to firing in order to terrify him. They were also charged for beating the complainant with knife blows as a result of which he got injured on different parts of his body. In support of the aforesaid charge, the appellant/complainant produced the ocular account when he himself appeared in Court as PW-6, however, in the middle of the way, the learned trial Court in a very hasty and casual manner entertained the application submitted by the accused/respondents under section 249-A Cr.P.C and thereby acquitted them of the charges vide the impugned order and judgment 15.07.2021 even without waiting for statements of the concerned doctor who examined the injured victim and the Investigating Officer of the case, whose evidence for the fate of prosecution's case was surely essential but the learned trial Court without procuring their attendance has resorted for a short-cut and has

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acquitted the accused/respondents through the impugned order/judgment.

6. It may be noted that production of the doctor and Investigating Officer being the official witnesses of the prosecution was the duty of the Public Prosecutor and of the Court and to ensure their availability before the Court for recording of their evidence, however, without recording their evidence the learned trial Court on the basis of its own assumptions and presumptions has acquitted the accused/respondent through the impugned order and judgment, which is not sustainable in the eyes of law.

7. In the recent past Article 10A has been inserted in The Constitution of Pakistan, 1973 where due process of law has been recognized and acknowledged as one of the fundamental right of every person, however, in the present case due process of law has been denied to the appellant/complainant as legally he should have been provided a reasonable and fair opportunity to prosecute the person(s) who has nominated them as an accused of offences, but the record of the case speaks otherwise

as he has been deprived of the prescribed process of the law without any fault on his part. In the case of "Model Custom Collectorate Islamabad v/s Aamir Mumtaz Qureshi" reported as 2022 SCMR 1861 it was held by the Apex Court that there is no cavil to the proposition that by enacting sections 249-A and 265-K, Cr.P.C., the Legislature provided power to acquit an accused at any stage of the case if, after hearing the prosecutor and the accused and for reasons to be recorded, it considers that the charge is groundless or that there is no probability of the accused being convicted of any offence. But acquittal, under the said sections, could be made only if there was no probability of conviction of the accused. However, each case must be judged on its own special facts and circumstances and the reasons are to be recorded in support of conclusion that charge is groundless or that there is no probability of accused being convicted. If there is remote probability of conviction then of course courts are not empowered to invoke the said provisions i.e. 249-A and 265-K Cr.P.C. Reliance in this regard may be placed on the case of The State through

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Advocate-General, Sindh High Court of Karachi v. Raja Abdul Rehman (2005 SCMR 1544) wherein it was held that though there is no bar for an accused person to file application under section 249-A, Cr.P.C. at any stage of the proceedings of the case yet the facts and circumstances of the prosecution case will have to be kept in mind and considered in deciding the viability or feasibility of filing an application at any particular stage. The special or peculiar facts and circumstances of a prosecution case may not warrant filing of an application at a stage. This Court in the case of Bashir Ahmad v. Zafar ul Islam (PLD 2004 SC 298) did not approve decision of criminal cases on an application under section 249-A, Cr.P.C. or such allied or similar provisions of law, namely, section 265-K or section 561-A, Cr.P.C. and observed that usually a criminal case should be allowed to be disposed of on merits after recording of the prosecution evidence, statement of the accused under section 342, Cr.P.C., recording of statement of accused under section 340(2), Cr.P.C. if so desired by the accused persons and hearing the arguments of the counsel of the

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parties and that the provisions of section 249-A, section 265-K and section 561-A of the Cr.P.C. should not normally be pressed into action for decision of fate of a criminal case especially when apparently there is probability of conviction after recording evidence. In the present case, trial court disrupted the normal course of law against the mandate of supra judgment i.e. Bashir Ahmad v. Zafar ul-Islam and others (PLD 2004 SC 298). In the case of The State through Collector Customs and Excise, Quetta v. Azam Malik and others (PLD 2005 SC 686) this Court held as under:-

"22. This brings us to the third question i.e. whether the prosecution had sufficient material/evidence to warrant the prosecution of the respondents or there was no probability of accused being convicted of any offence. We have gone through the FIR registered against the respondents and the absconding co-accused as also the evidence led before the Court. There were serious allegations that there was tampering/overwriting/cutting of the relevant register of bills of entry, the matter was inquired into at the departmental level and the allegations were found to be correct. Ex facie there was documentary, oral and circumstantial evidence to prove the charges. In the face of this material the Trial Court could not have invoked section 265-K, Cr.P.C. and acquit the respondents."

Reliance may also be placed on the cases of Muhammad Sharif v. The State (PLD 1999 SC 1063), Ghulam Farooq Tarar v. Rizwan Ahmad

and others (2008 SCMR 383). Similarly, in the case of "Muhammad Amjad v/s The State" reported as 1992 P Cr.LJ 331, the Lahore High Court has held that it was a *challan* case and it was the duty of the Court itself to summon the witnesses properly and, even to use coercive measures for their attendance. Only after exhausting all, legal available methods for forcing their attendance, the Magistrate could have closed the evidence. The whole approach was illegal and incorrect. Similarly, in the case of "Syed Anwar Ali Shah v/s Yar Muhamamd & 03 others" reported as "1986 P Cr.LJ 1278", the Hon'ble Sindh High Court has held that before parting with the case, I would like to make a few observations with regard to exercise of jurisdiction conferred by section 249-A, Cr.P.C. It is noticed that there has been growing tendency amongst the lower Courts to frequently invoking of the above section. As has been pointed out above the Magistrate has power to acquit the accused under the said section even prior to framing of charge and recording of evidence. But the order of acquittal to be passed by him should not only be supported by cogent and convincing reasons but

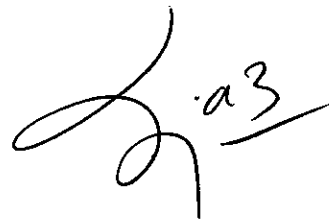


should also be grounded on the material, which the Magistrate is legally permitted to take into consideration. Until the evidence is recorded, the only material available to the Magistrate is the police papers which are laid before him alongwith the charge-sheet. On perusal of the police papers if he comes to the conclusion that no offence is made out or the material contained in the police papers is so scanty that it is most unlikely to lead to conviction, the accused can be acquitted even at that early stage. But it must be borne in mind that for purpose of exercising jurisdiction under section 249-A, Cr.P.C. the Magistrate is not competent to consider any extraneous material. In other words he cannot make such material as basis of his order which has not been brought on record in accordance with the law. The material produced by the accused not in course of the proceedings either through witnesses examined by him in his defence or at the time of giving his statement under section 342, Cr.P.C. cannot be considered, much less made the basis of his acquittal under section 249-A, Cr.P.C.

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8. In view of the above discussion, this Court has no other option but to set aside the impugned order/judgment of acquittal dated 15.07.2021 and remand the case back to the learned trial Court to record the remaining evidence or/and at least to record the statements of the concerned doctor and Investigating Officer and thereafter the case be decided on merits, however, it will be appreciated if the trial in the instant case is concluded at the earliest preferably within a period of two months from the receipt of judgment of this Court. The parties are directed to appear before the learned trial Court on 20.03.2023. Needless to mention here that since during trial the accused/respondents were on bail as transpires from the record, therefore, they shall remain on bail in the post remand proceedings till the final decision of the case on merits.

Announced
Dt. 07.03.2023



JUDGE

Office
10/03/2023
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