

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, D.I.KHAN BENCH
(Judicial Department)

Criminal Appeal No.49-D of 2019

Momin

Versus

The State and another

JUDGMENT

For Appellant:	Haji Muhammad Shakeel, Advocate
For State:	Mr. Adnan Ali, Asstt: A.G
For respondent No.2:	Muhammad Kamran Baloch, Advocate
Date of hearing	<u>07.11.2019</u>

S.M.ATTIQUE SHAH, J.- Through the instant appeal under section 18 of Juvenile Justice System Act, 2018, the appellant has called in question the judgment dated 29.5.2019 of learned ASJ-IV/Judge Juvenile Court, D.I.Khan, whereby he was convicted under section 377 PPC and sentenced to ten years imprisonment and fine of Rs.50,000/- or in default of payment of fine, to undergo further six months imprisonment with benefit of section 382-B Cr.P.C extended to him.

2. The prosecution story, in brief, is that on 25.8.2018, complainant Gul Khan alongwith his minor son namely Arsalan aged about 11/12 years reported the matter to local police at police station Daraban, D.I.Khan to the effect that he was on the way to his house from Gandhi Ashiq and when reached near Gandhi Eesab, his son Arsalan met him who was weeping. Upon inquiry, the minor told that at about 01.30 PM while he was grazing cattle in

the land situated in the limits of Gandhi Esab, accused Momin came there, tied his hands with chadar, removed his shalwar and subjected him to unnatural lust. On this report of the complainant, a case vide FIR No.109 dated 25.8.2018 was registered against the appellant under section 377 PPC read with section 53 of Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 at police station Daraban Kalan, D.I.Khan.

3. After completion of usual investigation, complete challan against the appellant was submitted before the learned trial Court where he was formally charged under section 377 PPC. He did not plead guilty to the charge and claimed trial. In order to establish the guilt of the appellant, the prosecution examined seven P.Ws. Thereafter, statement of the appellant was recorded under section 342 Cr.P.C, wherein he professed innocence and falsely implication. However, he neither appeared as his own witness under section 340(2) Cr.P.C nor produced any evidence in his defence. After hearing arguments, the learned trial Court convicted and sentenced the appellant as mentioned above vide judgment dated 29.5.2019, hence the instant appeal.

4. I have heard the arguments of learned counsel for the parties and have gone through the record.

5. Section 265-D Cr.P.C deals with framing of charge. For the sake of convenience, it is reproduced below:-

“If, after perusing the police report or, as the case may be, the complaint, and all other

documents and statements filed by the prosecution, the Court is of opinion that there is ground for proceeding with the trial of the accused it shall frame in writing a charge against the accused.”

Perusal of record reveals that complete challan against the appellant was submitted by the local police under section 377 PPC read with section 53 of Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010. The learned trial Court framed charge against the appellant under section 377 PPC, however, there is nothing in the proceedings of learned trial Court that either section 53 of Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 was not applicable in the case or there was no ground for proceeding with the trial of the appellant under the ibid section of law. Framing of charge means commencement of trial, object to make accused aware and alert about the allegations and the basis on which allegations are levelled against him. Both the sections of law are penal sections and when section 53 of Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 by itself covers the allegations levelled against the appellant, framing of charge against the appellant under section 377 PPC is beyond comprehension. According to section 61 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010, the provisions of the ibid Act shall have an overriding effect, notwithstanding anything contained in any other law for the time being in force, with the exception of any section or sections of any other law for the time being in force, which may be more protective in case of a child at risk. There appears no exception

that section 377 PPC is more protective in the instant case. It is a cardinal principle that whenever there is a special law, it would override the general law. Moreover, even if there are two parallel laws, even then the law which is later in time would prevail. **Mahmood Khan Achakzai and others. Vs. Federation of Pakistan and others (PLD 1997 SC 426).** In the circumstances narrated above, the framing of charge against the appellant under section 377 PPC and omitting to frame the same under section 53 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 is against the parameters of law and thus the impugned judgment is not sustainable in the eye of law.

6. For the reasons mentioned above, this appeal is accepted, the impugned judgment of conviction and sentence dated 29.5.2019 is set aside and the case is remanded to learned ASJ-IV/Judge Juvenile Court, D.I.Khan for de-novo trial in the light of observations made above. In the meanwhile, the appellant shall be dealt with as an under-trial prisoner.

7. Before parting with this judgment, it is observed with concern that not only in the case-in-hand but also in other cases of alike nature, the local police is registering cases against the accused persons simultaneously under section 377 PPC read with section 53 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010. When Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 has been promulgated to provide for the care, protection, maintenance, welfare, training, education,

rehabilitation and reintegration of children at risk in the Khyber Pakhtunkhwa and has been given overriding effect, then such practice is not justified. Therefore, copy of this judgment be sent to District Police Officer, D.I.Khan with the directions to circulate the same to the incharge of police stations under his jurisdiction for future guidance.

Announced.
Dt:07.11.2019.
Habib/*

JUDGE

(SB)
Hon'ble Mr. Justice S.M. Attique Shah