

2021 Y L R 1109

[Balochistan (Sibi Bench)]

Before Muhammad Hashim Khan Kakar and Rozi Khan Barrech, JJ

Mir DOST alias KIRARO and others---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.(s) 73 and Murder Reference No.(s) 2 of 2019, decided on 23rd December, 2019.*

Penal Code (XLV of 1860)---

---Ss. 302(b) & 34---Criminal Procedure Code (V of 1898), S. 345---Qatl-i-amd, common intention---Appreciation of evidence---Compounding of offence---Scope---Accused were charged for committing murder of five persons of the complainant party---Record showed that the medical certificates of the deceased lady was available on record, according to which she was also seven months pregnant---Accused had committed qatl-i-amd of the deceased lady out of ghairat---Murder in the name of family honour and religion could not be sanctified---In cases where the Qatl-i-amd had been committed on the pretext of "Karo Kari", "Siah Kari" and similar other customs, the provisions of S.345(2), Cr.P.C., did not allow the compounding of offence---Court might refuse to give an effect to such a deal, especially coupled with the scenario when the offence was gruesome, brutal, cruel, appalling, odious, gross and repulsive which caused terror and sensation in the society---Present case was the one in which the entire family had been killed while asleep, for no apparent cause but to avenge the refusal of marriage and grapple the property thus, the case fell within the category (abovesaid), therefore, the leave for the compromise was refused and the application was dismissed, in circumstances.

Naseem Akhtar and another v. The State PLD 2010 SC 938 rel.

Adnan Ejaz Sheikh for Appellants.

Jameel Akhtar Gajani, A.P.G. for the State.

Date of hearing: 25th October, 2019.

JUDGMENT

ROZI KHAN BARRECH, J.---The Criminal Appeal No.(s) 73 of 2019 has been filed under section 410, Cr.P.C. by appellants namely Mir Dost alias Kiraro son of Bacha Khan, Ghulam Qadir alias Jooja son of Rawat Khan and Sikandar Ali son of Muhammad

Bachal challenging vires of the judgment dated 07.05.2019 ("impugned judgment") passed by the learned Additional Sessions Judge Naseerabad at Dera Murad Jamali ("trial court") in Sessions Case No.158/2018, FIR No.35/2018 dated 16.10.2018, in respect of offences under sections 302, 109 and 34 P.P.C., registered at Police Station Baba Kot whereby they were convicted and sentenced as under:-

"22 Under section 302(b), P.P.C. 1860 as Tazir and sentenced with death on three counts each for committing the murders of Hameedullah, Manzoor Ahmed and Irshada. They be hanged by the neck till they are dead. They are also directed to pay Rs.20,000/-(rupees two lac) each separately to the legal heirs of deceased persons Hameedullah, Manzoor Ahmed and Irshada as compensation under section 544-A of Cr.P.C. In default of payment of compensation amounts to the legal heirs of deceased persons the accused persons shall further undergo simple imprisonment for six months for each default.."

Murder Reference No.(S) 02 of 2019 has been sent up by the trial Court under section 374, Cr.P.C. for confirmation or otherwise of death sentence of appellants. Both the cases are being decided through this common judgment.

2. Briefly stated facts of the case are that on the written report (Ex.P/1-A) of complainant namely Moula Dad the FIR No. 35/2018 was lodged under sections 302, 109 and 34, P.P.C. with the allegation that on 16.10.2018 at 6:45 am at Goth Ghulam Qadir Umrani, the appellants/accused along with Mashooq Ali and absconding accused persons Ali Dost and Zahhid in furtherance of their common intention being equipped with firearm weapons made firing on Laila Bibi and Raheem Dad after declaring them Siahkar, resulting in their death. It was further alleged in the FIR that on the same date and time when the deceased Raheem Dad's brother namely Hazoor Bakhsh came to Hameedullah, Manzoor Ahmed and Fazal Muhammad who happened to be relatives of accused persons and apprised them about the incident, the accused persons along with absconding accused also came there and made firing on them, due to which Hameedullah, Manzoor Ahmed and Irshada Bibi died. Further it was alleged in the FIR that the accused persons committed the offence at the behest of appellant/accused Ghulam Qadir alias Joja. Thus, the crime report.

After completion of the investigation the challan was submitted before the trial court. Charge was framed and read over to the appellants, which the appellants denied and claimed trial. The prosecution in order to substantiate the charge produced as many as eleven witnesses. On conclusion of the prosecution side the statement of the appellants were recorded under section 342, Cr.P.C. wherein they once again professed their innocence, however the appellants neither recorded their statements on oath as envisaged under section 340(2), Cr.P.C. nor produced any evidence in their defense. On conclusion, the trial court acquitted the co-accused Mashooq Ali extending benefit of doubt to him but convicted the appellants and sentenced them in the aforesaid terms. Being aggrieved the appellants have also filed Criminal Appeal bearing No. (S) 73 of 2019 whereas the Murder Reference bearing No. (S) 02 of 2019 has also been sent to this court for confirmation of the sentence of death of the appellants or otherwise by the trial court.

3. We have heard learned counsel for the appellants, the learned A.P.G. and have also

perused the available record.

4. This appeal was admitted for regular hearing on 15.05.2019, where-after on 26.09.2019 Criminal Miscellaneous Application bearing No.(S) 121/2019 was filed on behalf of appellants under section 345, Cr.P.C. stating therein that parties have arrived at compromise and in result thereof the legal heirs of the deceased Hameedullah, Manzoor Ahmed and Irshada Bibi pardoned the convict/ appellants and also waived the right of Qisas and it was prayed that the compromise be accepted and the appellants be acquitted of the charge. Along with approved proforma, affidavits of the legal heirs of the victims affirming the fact of the compromise was also filed, which was accompanied with certificate disclosing the detail of the legal heirs of the deceased.

Since the compromise deed has been submitted before the court, therefore to verify the genuineness of the compromise effected between the parties and also to determine that the same was affected without duress and compulsion and to confirm the detail of legal heirs of the victims. All the relevant papers were marked to the trial court with direction to submit a comprehensive report to the effect. In compliance whereof verification report was received from the trial court vide letter No. 2940 dated 08.10.2019. Thereafter the matter was heard on 25.10.2019 and reserved for announcement of orders to the extent of acceptance or otherwise of the compromise effected between the parties. Perusal of compromise deed and report of the trial court transpires that deceased Hameedullah has the following legal heirs:

1. Mst. Almaa wife of Hamza (mother of deceased Hameedullah).
2. Fazal Muhammad son of Hamza (brother).
3. Azizullah son of Hamzo (brother).
4. Zeenat Bibi wife of Shadi Khan (sister).
5. Zareena Bibi (sister).
6. Papi (sister).
7. Shahidan Bibi (daughter/minor).

The legal heirs of Irshadan Bibi are as follows:

1. Abdul Nabi (father of deceased Irshadan Bibi).
2. Haseena Bibi (mother).
3. Shahida Bibi (daughter/minor).

Whereas legal heirs of Manzoor Ahmed are as below:

1. Mst. Almaa wife of Hamzo (mother of deceased).
2. Fazal Muhammad son of Hamzo (brother).
3. Azizullah son of Hamzo (brother).
4. Zeenat Bibi wife of Shadi Khan (sister).

5. Zareena Bibi (sister).
6. Papi (sister).

5. In present case seven of the adults Walis of the victim asserted to have waived their right of Qisas without accepting any compensation, and they appeared and affirmed the fact. The formal inquiry made by the trial court thereby affirmed the details of the legal heirs, and the fact of effecting of compromise without any duress or compulsion, with their free will by the mentioned persons being legal heirs of the deceased. It was to the extent of satisfaction. But, the matter remains for consideration to the extent of one legal heirs namely Shahidan described as minor whose diyat amount has not been deposited by the accused/appellant, therefore the compromise deed is incomplete. It is to be dealt separately. Sections 309 and 310, P.P.C. specifically dealt with the situation if the right of Qisas vests in a minor "Wali". Section 309, P.P.C. speaks about an "adult sane wali" being empowered to waive the right of Qisas. But it is specifically provided therein that:--

"Provided that the right of Qisas shall not be waived:

- (a) where the Government is the Wali; or
- (b) Where the right of Qisas vests in a minor or insane."

This provision placed an embargo on exercise of right of waiver on part of a minor being Wali of a victim. Nor any other person can exercise such right on his behalf. But, section 310, P.P.C. is an exception.

Subsection (2) of the section is relevant, which reads as under:--

"(2) Where a Wali is a minor or an insane, the Wali of such minor or insane wali may compound the right of Qisas on behalf of such minor or insane wali.

Provided that the value of Badl-e-Sulh shall not be less than the value of Diyat."

6. In present case on behalf of one minor legal heir i.e. Shahida Bibi, the father and mother of deceased Hameedulah and Irshadan Bibi appeared before the court and recorded their statement on her behalf, with an assertion that they have waived the right of Qisas on behalf of the minors being their mother and father natural guardian, and also forgone the Diyat. But, in view of section 309, P.P.C. there can be no waiver of right of Qisas to the extent of minors, rather the only right available would be compounding of right of Qisas, which can be exercised by wali of a minor on his/her behalf. But, this right is further protected by the proviso contained in subsection (2) of the section. There must be an acceptance of Badl-e-Sulh and value of it shall not be less than the value of Diyat.

The question remains to the extent of the minor legal heirs. Though the adult legal heirs of the deceased waived their (minor's) right of Qisas on their (minor's) behalf without accepting any compensation, which was neither legal, nor just. The condition provided in section 310, P.P.C. of Badl-e-Sulh is to be observed being a legal requirement. Therefore, without determination of value of Badl-e-Sulh the right of Qisas cannot be allowed to be compounded. In the above circumstances the compromise effected between the parties and the report of the learned Additional Sessions Judge, Naseerabad at Dera Murad Jamali is

incomplete.

7. It is the prosecution's case that on 16.10.2018 at 6:15 pm at Goth Ghulam Qadir the accused/appellants being equipped with firearms made firing on one deceased Lal Bibi and Raheemdad (to the extent of murders of Lal Bibi and Raheemdad, the accused/appellants were acquitted from the charge by the trial court) after declaring them Siahkar due to which they died and subsequently on the same date and time when the deceased Raheemdad's brother namely Hazoor Bakhsh came to the relatives of the accused persons Hameedullah, Manzoor Ahmed and Fazal Muhammad and apprised them about the said incident the accused/appellants came there and made firing upon them due to which Hameedullah, Manzoor Ahmed and Irshada Bibi died. It is important to mention here that the medical certificates of the deceased Laila Bibi is available on record according to which she was also seven months' pregnant. The accused/ appellants have committed Qatl-i-Amd of the deceased out of Ghairat. The murder in the name of family honor and religious could not be sanctified, therefore, in cases where the Qatl-i-Amd had been committed on the pretext of "Karo Kari", "Siah Kari" and similar other customs, the provisions of section 345(2), Cr.P.C. did not allow the compounding of the offence. Before proceedings any further it would be advantageous to reproduce the relevant provision of section 345(2), Cr.P.C. and section 338-E (1), P.P.C. which read as under:--

"338-E. Waiver or compounding of offences.---(1) Subject to the provisions of this Chapter and section 345 of the Code of Criminal Procedure, 1898 (V of 1898), all offences under this Chapter may be waived or compounded and the provisions of sections 309 and 310 shall mutatis mutandis, apply to the waiver or compounding of such offences:

Provided that, where an offence has been waived or compounded. the Court may, in its discretion having regard to the facts and circumstances of the case, acquit or award tazir to the offender according to the nature of the offence:

Provided further that where an offence under this Chapter has been committed in the name or on the pretext of honour such offence may be waived or compounded subject to such conditions as the Court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case.

345. Compounding Offences.--(1) The offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table.

[(2) The offense punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in third Column of that table.

[(2-A) Where an offence under Chapter XVI of the Pakistan Penal Code, 1860 (Act XLV of 1860), has been committed in the name or on the pretext of karo kari, siyah kari or similar other customs or practices, such offence may be waived or compounded subject to such conditions as the Court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case].

8. The second proviso to section 338-E(1), of P.P.C. and (2-A) of section 345, Cr.P.C. have been inserted by Criminal Law Amendment Act, 2004 (Act I of 2005). Both these provisions are identical. Before the insertion of these amendment, all the offences under Chapter XVI of P.P.C. might be waived or compounded.

9. It is stated earlier that the Qatl-i-Amd has been committed on pretext of Karo Kari and five persons have lost their lives out of whom one was seven months pregnant, therefore under such circumstances the question as to whether the appellants on basis of the compromise effected between the parties be acquitted of the charge, needs an answer. In this regard the guidelines laid down by the Hon'ble Supreme Court in the case of Naseem Akhtar and another v. The State (PLD 2010 SC 938) would come in handy wherein it was held as under:

"5. In the above context, the relevant parts of the sections 345(5) and (7), Cr.P. C. are reproduced as below.

S.345(5)

"When the accused has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court before which the appeal is to be heard."

S.345(7)

"No offence shall be compounded except as provided by this section".

Before proceeding to analyze the noted provision, it may be pertinent to mention here that the expressions "an appeal is pending" and "the Court" appearing *ibid* (section 345(5)) for all intents and purposes of the law shall also mean the leave petition pending before this Court. Be that as it may, because of the use of word 'No', in both the subsections the command of law is in the negative form, thus, the composition of an offence is prohibited lacking (without) the leave of the Court. As per the Black's Law Dictionary (Fifth Edition 801), the noted expression is defined to mean "Permission obtained from a Court to take some action which, without such permission, would not be allowable." Thus, the object requiring leave from the Court as per the clear intention of the legislature is neither meaningless nor purposeless and it cannot be construed that while considering the compromise plea, even of a compromise which is lawfully entered, by free consent of the legal heirs, the Court, should act in a mechanical manner and allow the same as a matter of course or routine; should sit as a silent spectator or to conduct as a post office simpliciter and affix a judicial stamp upon it. Rather it is the duty and the prerogative of the Court to determine the fitness of the case for the endorsement and sanction of the compromise and in appropriate cases, where the compromiser and offender is directly or indirectly beneficiary of the crime; the offence is committed or is caused thereof for an obvious object of grabbing the property of the deceased by the compromiser, through his offspring, who may ultimately benefits himself (the offender) as well, the Court may refuse to give an effect to such a deal, especially coupled with the scenario when the offence is gruesome, brutal, cruel, appalling, odious, gross and repulsive which causes terror and sensation in the society. The case in hand is the one in which the entire family has been killed while asleep, for no apparent cause but to avenge the refusal of marriage and grapple the property. And in my candid view, the instant case falls within the above category, therefore, the leave for the compromise is refused and the application is hereby dismissed.

6. As far as the merits of the case are concerned, the prosecution witnesses have given a quite accurate account of the incident; the ocular evidence have sustained the test of cross-examination, and the testimonies of eye-witnesses, except some insignificant discrepancy have not been shattered; they have been believed by the two Courts below and such appreciation of evidence and the conclusions, drawn therefrom upon our own reappraisal thereof are not erroneous. The alleged weak or non-proof of the motive as per the settled law is not fatal to the case of the prosecution. The role assigned to and performed by each of the petitioners has been clearly described by the eye-witnesses which, to our mind, when tested on the touchstone of the medical evidence, is substantially corroborated. We do not find that the submissions made by the petitioners' counsel in any way brings this case within the ambit of either an unseen occurrence or a case for the benefit of doubt to the accused has been made out.

7. Resultantly, this petition being devoid of merits is, accordingly, dismissed. Leave to appeal declined."

In view of above discussion and the dictum laid down by the Hon'ble Supreme Court, we are not inclined to accept the compromise deed. Since the matter was not heard on merits, therefore office is directed to prepare paper book of the case at the cost of appellants. Notice be issued to the parties for arguments and the case be fixed as per roster after winter vacations.

JK/72/Bal.

Appeal dismissed.