

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE MUNIB AKHTAR

(A.F.R.)
CIVIL APPEAL NO. 699 OF 2017
(On appeal from the judgment/order dated
27.01.2017 of the Khyber Pakhtunkhwa Service
Tribunal, Peshawar passed in SA No. 881 of
2014).

**Commandant, Elite Force,
Khyber Pakhtunkhwa,
Peshawar and others**

Jamshed Ali

Versus

... Appellant(s)

... Respondent(s)

For the appellant(s)

Mr. Qasim Wadood, Addl. AG

For the respondent(s)

Hafiz S.A. Rehman, Sr. ASC

Date of hearing

28.02.2019

ORDER

UMAR ATA BANDIAL, J. The learned Khyber Pakhtunkhwa Service Tribunal ("**Tribunal**") has by its impugned judgment dated 27.01.2017 ordered the reinstatement of the respondent on the basis of his acquittal vide the learned High Court judgment dated 07.05.2014 under a compromise with the complainant party in case FIR No. 659 dated 08.11.2011. The respondent had earlier been convicted in that case by the learned Trial Court for offences under Sections 302/324 PPC.

2. The learned Additional Advocate General appearing for appellants submits that in the present case, no inquiry could be held against the respondent because immediately after the lodging




of the FIR on 08.11.2011 the respondent went into hiding as pleaded by himself in his departmental appeal filed against the dismissal order dated 06.05.2013.

3. The learned counsel for the respondent submits that disciplinary proceedings against the respondent were conducted ex-parte, since in fact the respondent who was at the time in jail. He had replied the final show cause notice with a request of a fresh inquiry.

4. It appears to us that both parties before us are interested in the holding of a proper inquiry in relation to the allegations leveled by the appellants against the respondent. The learned Tribunal in the impugned judgment has overlooked that aspect of the case and directed reinstatement as an immediate consequence of merely the compromise between the parties. Accordingly, we allow the appellants to conduct a fresh inquiry in accordance with the provisions of law. The inquiry shall be completed within two months. The respondent shall have no entitlement to back benefits unless the allegations against him are dismissed in the inquiry.

5. Insofar as the legal question as to the effect of a compromise in criminal proceedings upon the entitlement of a government servant to remain in service is concerned that matter has already been dealt with by a number of judgments. In Shafqat @ Shafaat versus The State (PLD 2019 SC 43) a different view has been expressed calling for determination by a Larger Bench of the Court. Therefore, we are not inclined to deal with the effect of the



respondent's acquittal in this judgment. As a result of the foregoing, the impugned judgment is set aside and this appeal is allowed in the terms noted above.

Sd/- Umar Ata Bandial, J

My separate not is added.

Sd/- Qazi Faez Isa, J

01.04.2019

Please see my note below

Sd/- Munib Akhtar, J

04.04.2019

Islamabad

28.02.2019

Naseer



NOT APPROVED FOR REPORTING

Qazi Faez Isa, J. The order authored by my very learned brother Umar Ata Bandial, J. received today (1st April, 2019) directs the holding of an inquiry within two months, with which I am in respectful agreement. However, this case has once again highlighted the necessity for an early determination of an important question. If a compromise, submitted under section 345(6) of the Code of Criminal Procedure ("**the Code**"), is accepted, whether it results in the automatic acquittal of a convict-murderer or only has a bearing on the sentence part of the conviction?


2. In *Suo Moto Case No. 3 of 2017* (PLD 2018 Supreme Court 703), hereinafter referred to as "**the SMC case judgment**", it was decided that:

"(ii) In the context of the provisions of section 345 (6), Cr.P.C. the effect of an acquittal recorded by a court on the basis of a successful and complete compounding of a compoundable offence shall include all the benefits and fruits of a lawful acquittal."

Subsequently, in the case of *Shafqat v State* (PLD 2019 Supreme Court 43) it was determined, that:

"26. The question, whether the compounding of an offence results in the setting aside of the conviction and the automatic acquittal of the convict, has been considered from a number of different angles; by examining the PPC, the Code and the Holy Qur'an, by ascertaining the meaning of *afw* and by reading analogous foreign judgments. And, having done so we are of the view that when the compromise is accepted it brings to an end the punishment of the offence, but it does not simultaneously result in the setting aside of the conviction and the acquittal of the convict.


27. In our opinion a number of provisions referred to above were not considered by the learned Bench of this Court in the SMC case judgment, and most probably because the requisite assistance was not provided by the



law officers. Whilst we agree that by accepting the compromise it brings the sentence to an end, we are of the view that the convict does not secure an automatic acquittal as a consequence thereof. We, however, are mindful of the principle of *stare decisis* and that if a bench of a Court which comprises of an equal number of judges does not concur with the views of the other bench a larger bench should be constituted to resolve the matter. In this regard reference may be made to the cases of Multiline Associates v Ardeshir Cowasjee (PLD 1995 Supreme Court 423), Ardeshir Cowasjee v Karachi Building Control Authority (KMC) (1999 SCMR 2883) and Atma Ram v State of Punjab (AIR 1959 Supreme Court 519). This is all the more important in this case because the determination of the issue in hand will affect a very large number of cases. Therefore, it is all the more important that every aspect of the matter is thoroughly examined and determined. Consequently, we refer this case to the Hon'ble Chief Justice for the constitution of a larger bench.

28. We are however cognizant of the fact that a compromise has been effected between the legal heirs of the deceased Zahir Mehmood (also known as Zahir Hussain), and the petitioner-convict, therefore it would be appropriate that till the determination of the question in hand, the remaining sentence of imprisonment of the petitioner-convict (Shafqat alias Shafaat) is brought to an end, which we hereby do, and order that he be released forthwith unless required to be detained in any other case. The larger bench to be constituted will decide whether the petitioner-convict, as a consequence of accepting the compromise, is also to be acquitted."

3. My Secretary ascertained from the Office about the fate of the order passed in the case of *Shafqat v State* (above) decided on 29th October, 2019 which had stated, that, "*we refer this case to the Hon'ble Chief Justice for the constitution of a larger bench*" and he is informed that the file was put up to the then Hon'ble Chief Justice (Mian Saqib Nisar, CJ) who declined to constitute a larger



bench. In my humble opinion and with respect, when this Court passes a judicial order and refers the case to the Hon'ble Chief Justice for the constitution of a larger bench then the Hon'ble Chief Justice does not have the discretion not to constitute a large bench; his discretion in such a situation is limited to administratively determine the constitution of such bench.

4. In my humble opinion the question - *whether upon acceptance of a compromise submitted under section 345(6) of the Code results in the automatic acquittal of a convict-murderer or only has a bearing on the sentence part of his conviction* - needs to be decided. This issue affects a very large number of pending cases and will also have a bearing on future compromises. Since applications under section 345(6) of the Code are also submitted before the High Courts and Session Courts throughout the country, therefore, the answer to this question of law needs to be clearly enunciated in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan.


Judge

Islamabad
01.04.2019
(M. Tauseef)

Approved for Reporting

Munib Akhtar, J.: I have had the advantage of reading the order proposed to be made by my learned brother, Umar Ata Bandial, J. I am in agreement with the same. I have also had the advantage of reading the separate note prepared by my learned brother, Qazi Faez Isa, J. It is with regret that I find myself unable to take the same view with regard to certain matters set out therein as has found favor with my learned brother. Given the importance of the same, I have also ventured to express my own views.

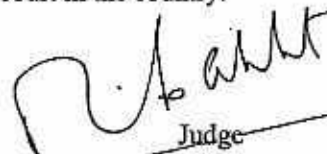
2. The effect of a compromise was considered and dealt with by a learned three member Bench of this Court in *Suo Moto Case No. 3 of 2017* PLD 2018 SC 703 ("*Suo Moto* case"), and the operative part of the decision, as relevant for present purposes, has been reproduced in para 2 of the separate note authored by my learned brother. Thereafter, another learned three member Bench, in *Shafqat v State* PLD 2019 SC 43, had occasion to consider the effect of a compromise in the facts and circumstances of the case before them. Two of the learned members (Qazi Faez Isa and Yahya Afridi, JJ.) felt that the view taken in the *Suo Moto* case ought to be reconsidered (if only, so it would seem, to a certain extent). The third learned member, Gulzar Ahmed, J., was unable to agree. He expressed his full agreement with the view taken in the *Suo Moto* case (see PLD 2019 SC at pg. 64). By majority, for the reasons set out in paras 26 to 28 (pp. 61-62; also extracted in the separate note), the matter was referred to the Hon'ble Chief Justice for constitution of a larger bench.

3. In para 3 of the separate note, my learned brother has noted that according to information received by him the then Hon'ble Chief Justice did not constitute a larger Bench. My learned brother has expressed the view that "when this Court passes a judicial order and refers the case to the Hon'ble Chief Justice for constitution of a larger bench then the Hon'ble Chief Justice does not have the discretion not to constitute a large[r] bench; his discretion in such a situation is limited to administratively determine the constitution of such bench". With respect, I am unable to agree. The binding effect of the *ratio decidendi* of a judgment of a Bench, on Benches of the same or smaller composition (by number) of the same Court, is well established. This rule is one of the main aspects of what is sometimes referred to as "horizontal" *stare decisis*. The point has been made with clarity by Gulzar Ahmed, J. in para 2 of his dissenting note. If a subsequent Bench of the same (or smaller) size is of opinion that the earlier decision merits reconsideration, it cannot for that reason take a different view. The subsequent Bench can certainly ask for the constitution of a larger bench in such circumstances. However, any request so made (howsoever phrased or expressed) cannot be tantamount to an "order" that mandatorily requires the Chief Justice to constitute a larger Bench.

M.A.

With respect, the position of the Chief Justice is not, and cannot be, reduced to a mere administrative conduit in such circumstances. If such were the case, then the next step could well be for the subsequent Bench to, without more, arrogate to itself the power to order the constitution of the larger Bench, with power to issue directions in this regard to the Registrar or Office of the Court. In my respectful view that is not, and cannot be, the law. It is well established that the Chief Justice is the "master of the roster". That position cannot, with respect, be affected in the manner that appears to be suggested by my learned brother. Of course, the Chief Justice to whom such a request is made is not irrevocably bound by an initial inclination not to accede to the same. He may later change his view and act accordingly. *A priori*, any inclination not to accede to such a request is not binding on any subsequent holder of the office of Chief Justice. But, and this in my respectful view is the crucial point, the matter rests, and must necessarily rest, in the hands of the Chief Justice alone. This is the position at law as I conceive it to be.

4. In para 4 of the separate note, my learned brother has expressed certain apprehensions. With great respect, I am unable to agree. The position is clear as regards the applicability of *stare decisis*. In the present situation the law continues to be that as laid down in the *Suo Moto* case. In its "horizontal" aspect, i.e., insofar as this Court itself is concerned, *stare decisis* applies in terms as stated above. As regards the "vertical" aspect, i.e., in terms of Article 189, all other courts in the country are bound to apply the law so laid down. This remains so regardless of the (apparently so far unattended) request for a larger Bench made by the majority in *Shafqat v State*. With great respect, for purposes of *stare decisis* that request, as a matter of law, is not to be taken into account either by this Court or any other court in the country.


Judge

Islamabad
April 04, 2019.

APPROVED FOR REPORTING

