

ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Crl. Suo-Moto Rev. No. 155 of 2023

Date	Order with signature of the Judge
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For hearing of Case

For hearing of main case

15.08.2023

M/s Muhammad Hanif Samma and Ibbad-ul-Hasnanin, advocates / Amicus Curiae
Respondent in person.

Mr. Mushtaque Ahmed Abbasi AIG Legal-I, CPO on behalf of IGP Sindh.

M/s Muhammad Saleem Buririo, Addl.PG, Pervaiz Ahmed Mastoi, AAG and Shafique Ahmed, AAG alongwith Inspector/SHO Badal Qazi PS Mirwah Khairpur, SIP/I.O Ashique Dasti, PS Mirwah Khairpur.

JUDGMENT

Salahuddin Panhwar, J:- Brief facts of the instant Revision application are that while hearing Criminal Misc Application 284/2018, it has been brought by Amicus Curaie to the notice of the Court that accused Sarang Shar allegedly involved in the children rapes has been acquitted by the trial Court by extending him benefit of doubt inter-alia on the ground that alleged video was not sent for its forensic examination. However, learned APG submitted that application for forensic examination of the alleged video was not allowed by the trial Court. Learned Amicus curiae placed on record statement along with the judgment passed by the trial Court and sought indulgence of this Court for calling record and proceedings while exercising powers under Section 435 Cr.P.C. However, after going through the judgment of the trial Court, this Court while exercising Revisional powers provided under Section 435 Cr. P.C, directed to call R&Ps of Case No. 10 of 2023 Sate vs. Sarang Shar (Crime No.105 of 2020 under Section 377, 501, 503 and 506 PPC r/w section 21 and 22 of Prevention of Electronic Act, 2016) registered at P.S Mirwah Khairpur. Perusal of record reflects that a compromise application was filed along with affidavit by the complainant party which is available at page 106, **wherein it is submitted that that they have entered into compromise**

with accused Sarang Shar on Holy Quran and have forgiven him with regard to the offence of rape; hence they have no objection, if the accused is acquitted of the charges by the trial Court. Such application was taken on record by the learned Presiding Officer on 18.03.2023. However; judgment of the trial Court is not reflecting with regard to compromise application as well as reasons for non-mentioning the same in case diary as well as the impugned judgment. The deposition of the Complainant also shows that an application for compromise was filed before the trial Court but same was not decided, even not referred in the judgment. The relevant portion of the deposition is reproduced as under:-

“It is correct that I have filed application before this Court today that I have compromised with accused... ..”

The trial Court has neither considered the ground that the offence was non-compoundable and the said application was not maintainable. The trial Court should have dismissed the said application but the trial Court had not decided the said application. Even the same was not discussed in the impugned Judgment.

2. It was observed by the Apex Court time and again that the offences which are compoundable in Islam, have also been made compoundable under the statutory law and in compoundable offences, it is permissible for the Courts to give effect to the compromise between the parties at any stage of the proceedings before or after the final conclusion of the matter whereas a compromise in non-compoundable offences, cannot be given legal cover at any stage. This is settled law that Courts can interpret the provisions of law but cannot change or substitute such provisions and also cannot go beyond the wisdom of law. Reference may be made to the Case of *Ghulam Farid alias Farida v. The State (PLD 2006 Supreme Court 53)*. Similarly in another Case *Muhammad Rawab v. The State (2004 SCMR 1170)*, it was held by the Apex Court as under:-

“The pivotal question which needs determination would be as to whether parties can be allowed to compound the offences which are not compoundable by virtue of the provisions as contemplated in section 345, Cr.P.C. specially in view of the specific bar as mentioned in subsection (7) of section 345, Cr.P.C. There is no denying the fact that section 365-A, P.P.C. read with section 7(e) of the Anti-Terrorism Act, 1997 is not compoundable. The provisions as contained in section 345(7), Cr.P.C. have been couched in such a plain and simple language that there is hardly any scope for any

interpretation except that a non-compoundable offence cannot be made compoundable by this Court for the simple reason that no amendment, deletion, insertion or addition could be made by this Court and it could only be done by the Legislature as this aspect of the matter falls in its exclusive domain of jurisdiction. The provisions as contained in section 345, Cr.P.C. cannot be stretched too far by including the non-compoundable offence therein under the garb of humanitarian grounds or any other extraneous consideration. The offences committed by the appellant are not of grave and alarming nature but the same are against the society as a whole and cannot be permitted to compound by any individual on any score whatsoever. It may be noted that tabulation of the offences as made under section 345, Cr.P.C. being unambiguous remove all doubts, uncertainty and must be taken as complete and comprehensive guide for compounding the offences. The judicial consensus seems to be that "The Legislature has laid down in this section the test for determining the classes of offences which concern individuals only as distinguished from those which have reference to the interests of the State and Courts of law cannot go beyond that test and substitute for it one of their own. It is against public policy to compound a non-compoundable offence, keeping in view the state of facts existing on the date of application to compound. No offences shall be compounded except where the provisions of section 345, Cr.P.C. are satisfied as to all 'matters mentioned in the section'. (Emphasis provided)".

3. **Besides, accused not only involved in committing sodomy with minor boy but the accused having the history of committing such a heinous offence with other minor boys/students, capturing the video clips and flashing the same on electronic media is not disputed.** The USB received by the prosecution was exhibited in evidence including the photographs of accused person with victim while committing sodomy, however, no specific question was asked in the statement of accused recorded under Section 342, Cr.P.C with regard to production of USB as well as photographs which were produced without any objection, even accused failed to examine himself on oath as provided under Section 340(2) Cr.P.C. The paragraph 21 of the trial Court judgment being relevant is reproduced herewith:-

"21. Moreover, the prosecution has also relied upon a USB containing video recording of alleged incident. It is pertinent to mention here that the video evidence is an important piece of evidence and it can be presented before a Court of Law if some conditions are met. Before getting it admitted, exhibited, it will be necessary to explain how was it acquired or what was its origin or source. A forensic should be presented to show that the video has not been edited. Such conditions are lacking in the present case and without fulfilling such conditions video evidence will have no probative value. Admittedly, in the present case the video clip was not for forensic analysis. In absence of any forensic report about

the genuineness or otherwise of the said video clip, no reliance can be place on such piece of evidence as held in the case of Asfandayr and another vs. Kamran and another (2016 SCMR 2084)

4. Surprisingly, the victim namely Sahil Hussain was examined by the prosecution before the trial Court and the learned ADPP declared the said witness hostile and requested for cross-examination but such request of the learned ADPP was straightaway declined by the trial Court without mentioning reasons for declining such request though the victim was material witness of the prosecution. It is also matter of record that the statement of one Qurban Ali, father of victim, was recorded by the Magistrate under Section 164, Cr.P.C. on 06-08-2020 but the trial Court has failed to examine the said Magistrate to record his evidence to determine the truth or falsehood of the evidence of Qurban Ali. It is settled principle of law that if a witness, resile from his evidence, in that eventuality, the learned Magistrate who recorded the statement under Section 164 Cr.P.C. was required to be examined. However, that legal course was not adopted by the trial Judge. Hence, this is a clear case of miscarriage of justice.

5. Perusal of above, it reveals that despite availability of USB, the same was not sent to Forensic examination; whereas record further speaks that application was filed by the prosecution to refer that USB to the Forensic examination, which is available at page 73 of R&Ps and but it was declined by the trial Court vide order dated 13.04.2023. Perusal of the Order dated 13.04.2023 shows that the trial Court has only mentioned the reason for declining the application for sending USB containing videos of the incident that the I.O. did not bother to send the USB to the Forensic Laboratory, which does not appear to be justification to decline the request on the part of the Complainant/Prosecution. Mere failure of the Investigating Officer or negligence on the part of the Investigating Officer during the course of investigation does not absolve the trial Court to send the USB containing videos of the incident to the Forensic Laboratory to call expert opinion, which was material and essential to the just decision of the case. Since, the trial Court Judge failed to get the USB forensically examined with regard to this heinous offence, which is an offence against the society, the trial judge has also failed to play USB in Court to ascertain that whether the accused is same person who has committed such a heinous offence. Whereas, paragraph No.21 of the impugned judgment is contradictory, which say USB was not sent to the forensic.

6. So far as the exercise of powers under Section 435, of the Code of Criminal Procedure, 1898 are concerned, a careful reading of Section 435, Cr.P.C. reveals that the High Court has authority, not only *suo motu* but also on an application of an aggrieved party, to call for and examine the record “of any proceeding before any inferior criminal court” and pass appropriate orders in terms of powers vested under section 439 Cr.P.C. Thus, in order to invoke the revisional jurisdiction of the High Court under section 435, Cr.P.C., two conditions precedent constituting jurisdictional facts would require to be fulfilled: First, it should relate to “proceedings”; and second, the said “proceedings” should be before an “inferior criminal court”. Reference may be made to the Case of *Ali Gohar and others v. Pervaiz Ahmed and others (PLD 2020 Supreme Court 427)*.

7. In view of given circumstances, IGP, Sindh, shall ensure that USB shall be sent to the Forensic examination and he shall also ensure that Forensic examination is carried out by any competent public or private lab within country or out of the country within a period of two months. Nazir shall seal the same and handover the police officer assigned by the IGP Sindh.

8. It appears that the accused was in custody at the time of trial; therefore, he shall be taken into custody with direction to the SHO concerned that accused shall be kept in District Jail Khairpur. Learned District Judge, Khairpur, shall proceed with the case himself and shall examine the persons who will submit forensic report.

9. Thus, this Criminal *Suo Motu* Revision No.155 of 2023 with regard to crime No. 105 of 2020 is allowed, the accused is taken into custody. The case is remanded to the learned District & Sessions Judge, Khairpur for *de novo* trial by providing sufficient opportunity to the prosecution to record evidence of the material witnesses and after summing up the prosecution evidence the statement of the accused shall be recorded in accordance with the provisions of Section 342, Cr.P.C. putting all the material questions relating to the incriminating evidence appearing in the prosecution evidence as well as photographs and USB shall be examined/assessed as per law and forensic report shall be brought on record, then the case should be decided afresh on merits in accordance with law without being influenced of the impugned judgment.

10. With regard to the compromise application as the same is not reflecting in the case diary of trial court and non-examination of the Magistrate, who recorded 164 CrPC statement. The MIT-I shall examine these aspect with regard to judicial conduct of the Presiding Officer with due notice and thereafter if case of any negligence and misconduct, he shall take-up the matter on the departmental side. The copy of this order shall be provided to the Officer(s) available who has taken the accused into custody as well as copy shall also be provided to the learned Additional Prosecutor General for information, during course of the day.

Office shall return R &Ps to the learned District & Sessions Judge, Khairpur.

J U D G E