# THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Crl. Appeal No.S-**77** of 2023
(***Arbelo alias Arbab Kosh v. The State***)

Crl. Appeal No.S-**78** of 2023
(***Arbelo alias Arbab Kosh v. The State***)

| Date of hearing | Order With Signature Of Judge. |
|---|---|

**Hearing of Case**

1. For hearing of MA 5644/2023
2. For hearing of MA 5645/2023
3. For hearing of main case.

Mr. Saeed Ahmed Panhwar, Advocate for appellant in both matters.
M/s Aftab Ahmed Shar, Additional P.G & Imran Mobeen Khan, Assistant P.G for the State.

Date of Hearing: **13-05-2024**
Date of Decision: **31-05-2024**

## O R D E R

**MUHAMMAD IQBAL KALHORO J.-** Appellant Arbelo alias Arbab Kosh was tried by learned Additional Sessions Judge-II, Mirpur Mathelo in Sessions Cases No.176 and 389 of 2021, arising out of Crime No. 94 of 2021 (under section 24 Sindh Arms Act, 2013) and Crime No.92 of 2021 (under sections 302 & 311) PPC registered at PS Wasti Jiwan Shah- Ghotki and vide judgments dated 18.08.2023, he was convicted for offence u/s 302(b) PPC and sentenced to imprisonment for life as Ta'zir with fine of Rs.10,00000/- (One Million) to be paid to legal heirs of deceased, in default, to suffer S.I for six months more. For offence u/s 24 Sindh Arms Act, he was sentenced to suffer R.I for seven years plus fine of Rs.30,000/- and in case of default, to suffer S.I for three months more, with benefit of Section 382-BCrPC, duly extended to him.

2. As per brief facts of prosecution case, ASI Muhammad Ameen Leghari lodged an FIR on 01.09.2021alleging therein that on the said date when he along with PC Shahnawaz, PC Allah Ditto, and PC Rab Nawaz, while on patrol duty, received spy information that appellant Arbelo Kosh was attempting to murder his stepsister Mst. Fatima, aged about 19/20 years, on allegation of her affair with one Abdul Majeed Kosh. Upon which, he along with his team rushed to the spot and saw appellant, armed with a gun, dragging a lady from his house and shouting about her affair with a person. Then, in their presence, he shot fires from his gun critically injuring her. She fell down and he, seeing the police, made his escape good. The police promptly stopped the vehicle and came over the injured

girl, who identified herself as Fatima before losing her senses. The police noticed a gunshot wound on her left chest with blood oozing out of it. He attempted to shift her to hospital, but she succumbed to injuries and died at the spot. After due formalities there, the police brought the dead body of Fatima at Taluka Hospital, Daharki for a postmortem. Although, the police tried to locate the appellant, but could not find him, and when no one from her family appeared at PS for a report, the said ASI lodged the FIR on behalf of the State against the appellant.

3. In investigation, he was arrested with a gun recovered from his possession, found to be crime weapon in the lab report. After submission of the Challan in the Court, a formal charge was framed against the appellant. He denied it and claimed trial in which the prosecution examined as many as five witnesses, who have produced all necessary documents viz. FIR, relevant memos, postmortem report, FSL report, site plan etc. After their evidence, statement of appellant u/s 342 CrPC was recorded. He denied the evidence against him and professed innocence. However, neither he preferred to examine himself on oath nor led any evidence in defense. Learned trial Court after hearing the parties and appraising the evidence rendered the impugned judgments, in the terms as stated above, which the appellant has challenged by filing two separate appeals, as numbered above.

4. While the appeals were still pending, the appellant and legal heirs of deceased Mst. Fatima filed applications u/s 345(2) and 346(6) CrPC seeking compounding of the offence and his acquittal on the basis of compromise in Crl. Appeal No.S-78 of 2023. Vide order dated 13.11.2023, these applications were sent to the trial Court for finding out legal heirs of the deceased and genuineness of compromise between them.

5. Learned 2nd Additional Sessions Judge, Mirpur Mathelo has submitted a report dated 04.01.2024 stating that legal heirs of deceased Mst. Fatima, an unmarried girl, were examined by him. They in their statements have voluntarily, without any fear, pressure or any inducement forgiven appellants in the name of Almighty ALLAH and waived their right of Qisas and Diyat.

6. After receiving such report, learned defense counsel and leaned Addl. PG were put on notice to assist the court as to whether in this case principle of *Fsad-Fil-Arz* was attracted as apparently an innocent girl was done to death by her stepbrother on allegations of her love affair with a boy of her cast. And whether on the basis of compromise between her slayer and legal heirs who are equally

related to him, and who even did not get upset to lode the FIR of her murder, the appellant can be set free. Both the learned counsel have addressed the court on these points. Learned defense counsel has favoured acquittal of the appellant by urging that principle of *Fsad-Fil-Arz* is not attracted in this case and the superior courts in the past in identical situations have accepted the compromise and let go of the assassin. He in order to bring home his point has cited following case law[1], while learned Addl.PG has contested his claim by referring to some case law[2] with a different view.

7. I have heard the parties and perused the record including the case law cited at bar. In this case, admittedly none of the family members of deceased girl had come forward to report the matter against the appellant. Therefore, ultimately the police had to register the FIR on behalf of the State and give evidence in the court describing the entire episode starting from their arrival at the spot and murder of the deceased within their sight by the appellant. It was based on their evidence the trial court succeeded in determining guilt of the appellant and convicted him in the terms as stated above. The family members of the deceased from the very inception preferred to stay aloof like a silent spectator. Not only they decided to not report against the appellant but also stayed detached from entire investigation by not appearing before the IO to support or otherwise the case against the appellant. They even avoided from appearing in the trial and did not attempt either to approach the court in order to put up their version of incident to see justice is served. Their lackluster conduct throughout is indicative of the fact that either they were accomplice in the offence or too scared of the appellant to question his action at any stage. Both of the probabilities make them incompetent to compound the offence with the appellant and give no objection to his release. An accomplice is not permitted in law to forgive his fellow and ask for his release by waiving right of Qisas or Diyat which due to some natural idiosyncrasy happen to befall on him. Likewise, when a person is too afraid of accused to even report against him of murdering his stepsister just for having a love affair, his affidavit in the court later on forgiving the latter would be looked at with extra care and caution and with a strong suspicion into the reason compelling him to do so. Because, at no stage that person dared to come forward and tell the whole story and depose against the culprit who murdered his daughter/sister/wife etc.

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[1] 2014 SCMR 1155, 2016 P Cr. L J Note 31, 2023 P Cr. L J Note 81 and 2022 MLD 2006.
[2] 2012 GBLR 10, 2021 YLR 1109 and 2018 P Cr. L J Note 181.

8. Here also the court is faced with the same peculiar situation. It did not happen that parents of the deceased initially felt outraged at her murder by appellant, registered the FIR and deposed against him in the court. Then subsequently out of some parental feelings, they gave in and decided to forgive him and compound the offence. On the contrary, from the very onset their conduct was odious to murdered girl. They did not try to save her or to stop the appellant from carrying out her murder on alleged ground. Then after her murder, they did not try to approach the police for the FIR to ensure commencement of investigation, collection of relevant evidence, etc. for the justice to be served in the public interest. In contrast, they depicted cruel indifference to entire proceedings and stayed away from the trial hoping perhaps that it would pan out ultimately in favour of the appellant in the shape of his acquittal. However, when it did not metalize, they appeared in the court with the affidavits pleading his release because of compromise realizing now it to be the only way to earn his freedom from murder of his sister. In such backdrop, it is normal to question the motive pushing the parents of murdered girl to forgive the appellant, their own son. Ostensibly, this situation is too alarming for a civilized society to overlook. An innocent girl of very young age lost her life at the hands of her stepbrother for no fault of her. Her supposed guardians and protectors at the time of this gruesome incident chose to stay onlookers, and thereafter maintained an eerie silence till conviction and sentence to the appellant. Then they decided to come in the court not for getting justice for their slain daughter but for securing release of her slayer by compounding the offence and waiving the right of Qisas and Diyat against him. In affidavits, the legal heirs have not tried to articulate a single reason warranting their mysterious omissions throughout in the whole chapter starting from actual act: murder of the girl until filing of applications by them in the court for release of appellant after his conviction in the wake of a full-dressed trial.

9. Yet, when we look at the whole story, things start rolling out to give an accurate account of what has eventually ended up in the court in the shape of applications in hand and affidavits in support thereof. Seemingly, the reason why legal heirs of the deceased were nonchalant to her murder entire time was that she was understood by them to be Kari due to her alleged love affair with a boy. Which her family considered a sufficient cause to give carte blanche to her stepbrother to kill her brutally without any qualms or fears for repercussions for his act. Be that as it may, at the same time, let us not forget that section 345 CrPC permits legal heirs of deceased to compound the offence of her murder with the

accused/convict, and there is no embargo in law that the court can enforce for refusing composition for the offence. It is stipulated in sub. section (1) thereof that 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. Nonetheless, there is a proviso in sub section (2-A) providing that where an offence under chapter XVI of the Pakistan Penal Code 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. The second proviso to section 338-E is in pari materia with the one provided in sub section (2-A) of section 345 CrPC. These provisions of law confirm that when the offence of murder is committed on the ground of karo kari, siyah kari or similar other customs or practices, it cannot be allowed to be compounded without the court first looking at all relevant facts and circumstances to determine its composition in the given situation.

10. When the court is facing such situation, the paramount duty cast upon it would be to see whether such offence can be allowed to be compounded and right of Qisas and Diyat waived in a routine manner like in the cases where a person(s) is not killed as Karo Kari, etc. The phrase in the said provisions that 'such offence may be waived or compounded subject to such conditions as the court may deem fit to impose with the consent of parties having regard to the facts and circumstances of the case' conveys strongly ample authority of the court to even refuse to accept such compromise between the parties if it is warranted in consideration of the given facts and circumstances. Its seems that much emphasis has been put on consideration of facts and circumstances of each case as to be of paramount importance to give effect to compromise between the parties. It is obvious that the authority of the court to impose such conditions as it may deem fit with the consent of the parties for effecting the compromise has been made subservient to having regard to the facts and circumstances of each case. Without resorting to such exercise that entails noting down every possible repercussion which may adversely affect the public interest -- and thus needs to be avoided in all circumstances -- the exercise of authority by the court giving effect to compromise in such cases would be illegal and against the scheme of law. The court has to see, apart from genuineness and voluntariness of such compromise, the manner in which the offence was carried out, conduct of legal heirs of the deceased to save her/him from such brutal end, or in the wake of which their

relentless, or lack of it, toil to seek help of the police for investigation and arrest of the accused and their cooperation with the police for collecting relevant evidence, their vigorous efforts to pursue the murderer and to take him to the court for justice, their relationship with the accused. All these factors and many more others (germane to context of each case) are the relevant facts and circumstances the court has to have regard for deciding fate of compromise between the parties in such cases.

11. In the present case as has been discussed in detail above, the legal heir of murdered girl did nothing to either save her or report the matter to the police for the FIR, or in the wake of the FIR by the police, tried to cooperate in the investigation and point out to relevant facts, nor did they appear in the court at least to depose against the accused. They maintained unnatural silence throughout and never tried to own murdered girl by participating at any stage in proceedings initiated by the police for bringing the culprit to justice. Their sudden turn around and that too only in favour of the accused cannot be looked at therefore in isolation of aforesaid facts and circumstances. Their callous conduct from outset towards murdered girl has made them incompetent to compound her murder and waive right to Qisas and Diyat. The Balochistan High court in the case of ***Mir Dost alias Kiraro and other Vs. The State (2021 YLR 1109)*** has observed that murder in the name of family honour and religion cannot be sanctified, and in cases where murder has been committed on the pretext of Karo Kari, Siah Kari and similar other customs, the provisions of sec. 345(2) does not allow the compounding of the offence and the court may refuse to give an effect to such a deal. An identical view was taken earlier by the Peshawar High court while deciding the case of ***SanoBar khan Vs. The State. (2018 Cr.LJ Note 181)***.

12. It may further be said that in section 345 (5) CrPC, it is provided that 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. It is thus obvious from above discussion that compounding or waiver in the offences such as the one in hand is not a routine matter. The court' leave is also mandatory for letting composition of such an offence be effective which will essentially mean that the court can even refuse to grant leave and/or accept to give effect to such a deal, if it founds that the offence of murder has been committed on the ground of Karo Kari, Siah Kari and similar other customs or practices and the facts and circumstances obtaining in the case do not warrant actualization of such arrangement by the Court. It must be remembered that offence of Karo kari is often justified by the perpetrator as a means to restore

family honor and pride. However, it is essential to recognize that this practice is a form of violence and oppression, rooted in patriarchal norms and gender-based discrimination. It has devastating impact on victims, families and society as a whole, in addition to its character of being in violation of fundamental human rights, including the right to life, dignity, and equality guaranteed under the Constitution.

13. In view of above discussion, I am not inclined to accept the compromise between the parties and dismiss the applications (MAs. 5644/2023 and 5645/2023) filed for such purpose and dispose them of accordingly. Since the appeals were not heard on merits, the office is directed to fix the appeals as per roaster within four weeks after notice to all concerned in advance.

***Office to place a signed copy of this order in captioned connected matter***.

**JUDGE**

Ahmad