

ORDERSHEET

IN THE HIGH COURT OF SINDH BENCH AT SUCKER.

Crl. Revision Application No.S-41 of 2022

DATE ORDER WITH SIGNATURE OF JUDGE

1. For Orders on office objection.
2. For hearing of main case.

Mr. Shabbir Ali Bozdar advocate for applicant.
Syed Sardar Ali Shah, Additional P.G.

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ORDER.

07-08-2023.

Khadim Hussain Soomro, J. The applicant Ali Sher was tried by the Court of IInd Civil Judge & J.M Ghotki in Crime No. 15/2017, offence u/s 377, 511 PPC registered at Police Station Khairpur Mahar, whereby he has been convicted and sentenced to suffer S.I for 02 years and fine of Rs. 10,000/- in case of default whereof, he shall suffer S.I one month more vide judgment dated 15-09-2017, hence he impugned the said judgment by filing Crl. Appeal No. 18/2017 Re. Ali Sher Vs. The State before the Court of Sessions, later-on the same was assigned to IIIrd Additional Sessions Judge Mirpur Mathelo, where it was dismissed in default for non-prosecution vide order dated 12-04-2022; hence, the applicant has preferred instant Crl. Revision Application.

2. Brief facts of the case are that complainant Saifal Siyal lodged the FIR alleging therein that Zahoor Ahmed aged about 16/17 years, is his son who has a mobile shop in Khanpur City. Accused Ali Sher Mahr was pressurizing him for an unnatural offence. On 17-02-2017 in the evening time, his son Zahoor Ahmed after closing his mobile shop was returning to the home by foot through Bambli minor top/way, the complainant and his nephew Ghulam Shabbir Siyal were also returning home by the same path. At about 6:00 pm when Zahoor Ahmed reached near the home of

accused Ali Sher where; accused Ali Sher armed with a pistol along with two unidentified persons, were standing, who, on force of weapons, dragged away his son Zahoor Ahmed into a room with intent to commit sodomy, but Zahoor Ahmed raised cries; hence the complainant rushed towards the room and knocked the door of that room, the accused fled away from rear door of the room. Zahoor Ahmed opened the door and narrated that accused Ali Sher Mahar, along with two unidentified persons armed with pistols, had attempted to commit sodomy with him, but due to their arrival, they fled away. Ultimately complainant lodged the above-said FIR.

3. After the usual investigation, the case was challaned against the accused. The case was assigned to IInd Civil Judge & J.M Ghotki, who, after supplying the case papers to the accused, framed the charge against him, to which the accused pleaded not guilty and claimed to be tried. The prosecution, after examining the complainant and all other material witnesses, closed its side of the evidence. The statement of the accused was recorded, to which he denied the allegations levelled against him and stated that he had falsely been implicated in this case due to a dispute with the complainant party over an electric connection. He further submitted that prior to this case, he had filed a harassment petition before this Court against the complainant party, and due to such grudge, the complainant lodged this FIR; however, the accused did not opt to record his statement on oath and did not produce any witness in his defence and pleaded himself to be innocent and prayed for justice. Ultimately, the trial Court pronounced the judgment dated 15-09-2017, which was impugned by the applicant/appellant before learned Sessions Judge Mirpur Mathelo, wherefrom it was transferred to the Court of learned IIIrd Additional Sessions Judge Mirpur Mathelo, who has dismissed the said appeal in

default for non-prosecution vide order dated 12-04-2022, which the applicant impugns before this Court.

4. Learned counsel for the applicant contended that the impugned order passed by the appellant Court is not warranted by law and has been passed in hasty manner; that impugned order is based on surmises and conjectures; learned trial Court and appellant Court have not considered the evidence of complainant and witnesses as well as contradiction between their evidence. He further submits that appeal is dismissed in default for non-prosecution though after admission of criminal appeal, it could not be dismissed without adverting to the merits thereof. In support of his arguments, he placed his reliance on case of *Muhammad Younis Vs. Yasin Ayub and another* (2009 P.Cr.L.J 1095), *Lt. Col. (Retrd). Tariq Latif Vs Mst. Jamila Sultana and another* (2006 P.Cr.L.J 476 and *Zahoor and another Vs. Said-ul-Ibrar and another* (2003 SCMR 59).

5. On the other hand, learned Additional P.G for the State conceded the arguments advanced by learned counsel for the applicant.

6. It is borne out from the record that the learned third Additional Session judge Mirpur Mathelo has dismissed the appeal of the applicant in non-prosecution by observing that he was not preceding the matter despite various chances. It is a well-established legal principle of law that once a criminal appeal has been admitted for regular hearing, it cannot be dismissed without considering its merits, and the non-appearance of the appellant or his counsel is not a ground for dismissal unless all the raised questions are resolved, coupled with legal and factual aspect are thrashed as contemplated by section 423, Cr.P.C. I respectfully refer the esteemed judgment of the Hon'ble Supreme Court of Pakistan in case of *Muhammad Bakhsh v. The State* (1986 SCMR 59) wherein Apex Court has observed asunder:--

"The proposition of law that a criminal appeal once admitted to regular hearing by the High Court must be decided on merits and cannot be dismissed for non-prosecution, is fully supported by the pronouncement of this Court in Muhammad Ashiq Faqir v. The State PLD 1970 SC 177".

7. In light of the above cited case law, I am of the considered opinion that the impugned order dated 12-04-2022, passed by learned III-Additional Session Judge Mirpur Mathelo in CrI. Appeal No 18 / 2017, is not justified by law and violated a well-established principle of criminal jurisprudence; therefore the same is hereby, set aside and the matter is remanded back to the learned appellate Court for decision of the appeal afresh on merits expeditiously, after hearing both the parties strictly in accordance with law. Before parting with this order; it is pertinent to mention here that since the applicant is/was on bail, he shall remain on bail unless and until an order is to be passed otherwise.

8. The case law cited by the counsel for the applicant is distinguished from the facts and circumstances of the case.

9. The instant revision is disposed of in the above terms

JUDGE