

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Present:

Mr. Justice Muhammad Iqbal Kalhoro.

Mr. Justice Fahim Ahmed Siddiqui.

Criminal Appeal No. D- 65 of 2013.

Anwar Ali Khokhar.Appellant

Versus

The State.Respondent

Messrs Safdar Ali Bhutto and Habibullah G. Ghouri, Advocates
for appellant.

Mr. Muhammad Ashiq Dhamraho, Advocate for complainant.

Mr. Khadim Hussain Khooharo, Addl. P.G. for the State.

Date of Hearing: 30.01.2017

Date of Judgment: 20.02.2018.

J U D G M E N T

Fahim Ahmed Siddiqui, J: Being aggrieved of the judgment dated 12-10-2013 in Sessions Case No. 272/2009, the appellant of Criminal Appeal No. D- 65/2013 has challenged the conviction and sentence awarded to him. However, during pendency of the appeal, the appellant/ convict and aggrieved party (complainant and/or legal heirs of decease) reached at a settlement outside the Court, and they filed requisite applications in terms of Section 345 Cr.P.C.

As the offence is compoundable; therefore, the request of the parties for compounding the offence was considered and the matter was sent to the trial Court for ascertaining genuineness and voluntariness of the compromise. The trial Court has examined the entire material and called the legal heirs of the deceased for ascertaining the sincerity and authenticity of the compromise. After completing all the requisite formalities, the learned trial Court submitted report in which verified that the compromise between the



parties is genuine, and as per report of concerned Mukhtiarkar and SHO besides major legal heirs, the deceased left behind two minor sons namely Ajeeb Ali (15 years) and Ali Raza (10 years). On completion of the process of verification of the fact of compromise, and waiver of the right of Qisas and Diyat on part of legal heirs of the deceased, the matter was finally heard. The learned Addition PG shows his no objection to the compromise and acceptance thereof. While the learned counsel for the parties request for acceptance of the compromise, and in consequence thereof prayed for acquittal of the appellant.

As per practice, the Wali can enter into compromise on behalf of minor legal heirs subject to safeguarding the interest of minors relating to their share in the diyat amount. However, Mr. Safdar Ali Bhutto, the learned counsel for the appellant, controverts this practice by submitting that since the compromise is in respect of the offence under Section 302 (b) P.P.C, which provides punishment under "Tazir", therefore, there is no need to deposit the share of minors in the court. He further submits that "badl-e-sulh" is required to be paid in case of Qisas under Section 302 (a) PPC only but it is not necessary to be paid in cases of ta'zir under Section 302 (b) P.P.C. After referring to Sections 309 and 310 PPC, he submits that the payment of "badl-e-sulh" is required in case of waiver and compounding of qatl-i-amd liable to Qisas and not to ta'zir. He places reliance on 2004 SCMR 236 & 2011 SCMR 1155.

On the other hand, Mr. Khadim Hussain Khooharo, the learned Addl: P.G, ably assisted by the learned counsel for the complainant, submits that as the minors have no capacity to forgo their monetary benefits; therefore, it is necessary that the share must be deposited in the Court. According to him, a 'wali' of a minor legal heir of deceased under no circumstance is capable to forego 'diyat' on behalf of the said minor. He submits that a 'wali' can enter into a



settlement on behalf of minor but an offender cannot get away without payment of 'diyat' or 'badl-e-sulh' to the minor legal heir. According to him, it is the duty of the Court to safeguard the interest of minors and that can only be possible if amount required to be payable to them should be deposited in any profitable scheme under the control of the Court. He takes reliance from 1994 P.Cr.L.J. 1413, 1994 P.Cr.L.J 1587 & 2008 SCMR 265.

We have heard the arguments and ponder over the entire material in the light of valuable submissions made before us.

Before entering into further discussion, it would be appropriate to refer to statutory provision of Section 338-E PPC, which provides for the waiver or compounding of offences and stipulates that:

"(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 ta'zir 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.

(2) *All questions relating to waiver or compounding of an offence or awarding of punishment under Section 310, whether before or after the passing of any sentence, shall be determined by trial court:*

Provided that where the sentence of Qisas or any other sentence is waived or compounded during the pendency of an appeal, such questions may be determined by the appellate court."

The offences compoundable have been described in Section 345 of the Criminal Procedure Code, wherein not only a table of the compoundable offences under the PPC is mentioned but are also described the persons in third column of the table who may compound the same. It is mentioned in the third column that the 'heirs of the victim' may compound the offence of Qatl-i-Amd. As the plural number is used, meaning thereby that all the legal heirs irrespective of their gender and age should enter into compounding of offence. It is also worth mentioning that in second column of the table of subsection (1) of Section 345, wherein all the compoundable offences are mentioned, Section 302 for offence 'qatl-i-amd is mentioned without its three derivatives 'Qisas', 'ta'zir' and 'punishment where Qisas is not applicable according to injunction of Islam'. From a bare reading of Section 302 PPC, it is clear that 'ta'zir' is actually alternate to punishment of Qisas as such in case of compounding; both will have the same effect.

It may be relevant to mention here that section 309, PPC refers to waiver (afw) of right of **Qisas** in a case of Qatl-i-amd and section 310, PPC mentions compounding (sulh) in a case of Qatl-i-amd, which is possible in case of ta'zir also. For the purpose of compounding, the 'badl-e-sulh' may be demanded as monetary consideration also known as 'blood money'. The amount of money is not fixed for 'badl-e-sulh' but when the question of the interest of minors or those arises, who cannot enter into monetary contract due to their incapacity on account of age, infirmity or any other reason, then the yard stick of 'diyat' is used to safeguard their interest, as per proviso under subsection (2) of Section 310 PPC. We consider that regarding the case in hand, a case of the Hon'ble Supreme Court

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reported as Muhammad Anwar v. The State (PLD 2012 Supreme Court 769) is relevant, in which it is held as:

"Although there is not a plethora of case-law on the subject but a judgment rendered in this respect by our lord the Chief Justice Iftikhar Muhammad Chaudhry in suo motu action regarding non-payment of the compensation amount to the poor electrician who was pressurized by the political figure of PML (N) as well as by the police to enter into a compromise with the accused Murderers of his 12 years old son reported in 2012 Supreme Court Monthly Review 437 holds the field. Though we show our contentment on the aforesaid judgment authored by our lord the Chief Justice regarding determination of amount of Diyat according to the rate prevailing at the time when the compromise was effected between the parties, yet, we add a bit of our state of mind for our own satisfaction that the compromise in between the legal heirs of the deceased and the convict is a type of a contract that if the legal heirs of the deceased make a statement before the Court of law pardoning the convict they will get Badl-e-Sulan in the shape of Diyat amount and if they forgive the convict in the name of Almighty Allah they will get reward thereof from the Allah Almighty. In case there are some minor legal heirs of the deceased, their natural guardian i.e. mother or father, as the case may, do forgive the convict but their interest is to be safeguarded by paying them their due share as Diyat amount according to the rate of Diyat prevailing at the time of arriving at of the compromise between the parties as contract could not have retrospective effect. More so, under section 299(e) of Pakistan Penal Code Diyat means the compensation specified in section 323 of the Code ibid payable to the heirs of the victim according to which value of Diyat shall have to be fixed by the court subject to the Injunctions of Islam as laid down in the Holy Quran and Sunnah and keeping in view the financial position of the convict and the heirs of the victim which shall not be less than the value of thirty thousand six hundred and thirty grams of silver. According to subsection (2) of section ibid the amount of Diyat shall be declared by the Federal Government by notification in the official gazette on the first day of July each year or on such date as it may deem fit which shall be the value payable during a financial year. In view of the language of section 323 of Pakistan Penal Code it is crystal clear that the value of the Diyat amount is to be assessed by the Court which shall not be less than the value of thirty thousand six hundred and

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thirty grams of silver, thus, it is apparent that the rate of Diyat in vogue at the time of compromise shall be applicable and not the rate prevailing at the time of commission of offence."

Keeping in view the above discussed legal aspects and the facts and circumstances of the case in hand, it is necessary to determine the amount of 'badl-e-sulh' for which the minors are entitled, which obviously will be calculable on the basis of 'diyat.' Besides, determination of 'badl-e-sulh' to which the minors are entitled, the prevailing rate of "diyat" of the present time will be considered. As all the adult legal heirs of the victim have entered into compromise, and it reflects from the report of trial Court that the same is without any duress and compulsion; therefore, the compromise upto their extent is hereby accepted.

[Now there remains the question of the share of minors namely Ajeeb Ali (aged about 15 years) and Ali Raza (aged about 10 years). Although, the mother of both the minors, by entering into compromise with the appellant Anwar Ali Khokhar, has waived the right of 'Qisas' on their behalf but she cannot do so without accepting 'badl-e-sulh.' The amount of 'badl-e-sulh' is not only mandatorily payable for the minor but the same should not be less than their respective shares in the amount of prevailing rate of 'diyat'. As such the instant compromise is also accepted on behalf of minors and the appellant is acquitted from the charge under Section 302 (b) PPC subject to payment of their respective share in 'diyat.' However, unless the share of minors is not paid, the appellant cannot be released from jail. The accountant of this Court is directed to ascertain the share of the minors and after receiving the said amount from the appellant, the same should be invested in any profit bearing government scheme on behalf of minors till they attain the age of majority. As soon as the share of minors is deposited in the Court, the release writ should be issued as per rules.]

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The Criminal Appeal No. D- 65/2013 stands disposed of in terms of above.


JUDGE


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Approved by us.



20-2-2018
Judge

