

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Crl. Jail Appeal No.S-77 of 2019.

DATE OF HEARING	ORDER WITH SIGNATURE OF HON'BLE JUDGE
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1. For orders on M.A.No.2119/2021.
2. For orders on M.A.No.744/2021.
3. For orders on M.A.No.745/2021.

24.05.2021

Mr. Zafar Ali Malgani, advocate for the appellant.

Mr. Habibullah G. Ghouri, Amicus.

Mr. Aitbar Ali Bullo, D.P.G.

Mr. Habibullah G. Ghouri, learned counsel, who was appointed as Amicus in this particular case to assist the Court on the point whether brothers and sisters of the deceased are entitled to claim Diyat on the ground that they are Walis of deceased in the event the deceased did not marry during their life time and their parents are alive when they were murdered. Mr. Ghouri has gone through a judgment of the Hon'ble Supreme Court reported as *Sartaj and others v. Mushtaque Ahmad and others* (2006 SCMR 1916); a judgment of the learned Division Bench of the Lahore High Court reported as *Ahmad Nawaz alias Gogi v. The State* (PLD 2007 Lahore 121) as well as a judgment of a learned single Judge of this Court reported as *Bashir Ahmed v. The State* (PLD 1995 Karachi 5). The essence of Mr.Ghouri's detailed arguments in Court is that if the parents or a parent of a deceased who did not marry during his life time are alive then only they are the surviving parent will be categorized as the Wali of the deceased and that the brothers and sisters of the deceased in such a situation will have no right to claim Diyat.

Mr. Aitbar Ali Bullo, learned D.P.G full heartily supports
the contention and submissions of learned Amicus and submits

further that it will only be after the death of both parents that the right to inherit may evolve upon the brothers and sisters of the deceased.

I noticed that the learned counsel for the appellant has filed an application for seeking leave under section 345 (2), Cr.P.C. The reading of the Section 345, Cr.P.C in its entirety in my opinion reflects that the leave of the Court in a case where an appeal is pending before this Court is sought in terms of Section 345 (5) Cr.P.C. Learned counsel submits that he will file an amended title rectifying the Section of the law under which the application has been filed. Learned counsel may do so within two days. Office shall return the file for detailed orders to be written, once learned counsel has filed the requisite application.

Mr. Zafar Ali Malgani, learned counsel appearing on behalf of the accused had earlier also argued the same but had relied solely on the decision of the case of *Bashir Ahmed v. The State* (PLD 1995 Karachi 5). Reserved for orders. However, the Court would like to put on record its appreciation for the invaluable assistance rendered to it by Mr. Habibullh G. Ghouri, in his role as Amicus.


Judge

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Crl. Jail Appeal No.S-77 of 2019

Appellant : Gulab son of Allah Warayo Marfani,
through Mr. Zafar Ali Malgani, Advocate.

Respondent : The State, through Mr. Aitbar Ali Bullo,
Deputy Prosecutor General.

Mr. Habibullah G. Ghouri, Amicus Curiae

Date of hearing : 24.05.2021.

Date of Judgment : 27.05.2021.

ORDER.

Omar Sial, J.: This appeal has been filed by Gulab Marfani impugning a judgment of the learned Sessions Judge, Jacobabad dated 3-8-2019. In terms of the said judgment Marfani was convicted and sentenced as follows:

- i) 3 years imprisonment and Rs.10,000/- fine (or in default a further 1 month imprisonment) for an offence under section 148 P.P.C.
- ii) 3 months imprisonment and Rs.3,000/- fine (or in default a further 7 day imprisonment) for an offence under section 337-H(2) and 149 P.P.C.;
- iii) Life imprisonment and Rs.100,000/- fine (or in default a further 6 month imprisonment) for an offence under section 302(b) and 149 P.P.C.

2. During pendency of this appeal it appears that the legal heirs of the deceased (Barkat Ali and Akhtar Ali) compounded the offence and forgave the appellant. In this connection C.M.A. 744 of 2021 was filed (wrongly) under section 345(2) however, the same should have been filed under section 345(5) Cr.P.C. seeking leave of this Court for the compromise. The office may correct this error with red ink. Simultaneously, C.M.A. 745 of 2021 was filed under section 345(6) Cr.P.C. seeking the release of Marfani on account of the compromise.

3. On 19-2-2021 documents connected with the compromise were sent to the learned trial court to verify the genuineness of the compromise. The

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learned trial court vide its report dated 15-3-2021 confirmed the genuineness of the compromise and recorded that all the legal heirs of deceased had entered into the compromise on their own free will without any pressure or coercion. It also confirmed that the legal heirs had voluntarily waived their right of *Qisas*.

4. When the report of the learned trial court was received, it was noted by this court that 2 brothers of the deceased, shown as his legal heirs, were minors. The learned counsel for Marfani however argued that it had been settled by the Honorable Supreme Court that if the parents of the deceased were alive (as is the position in the current case) then the brothers and sisters of the deceased would not be treated as the *walis* of the deceased for the purpose of *diyat*. Notice was issued for the learned counsel as well as the Deputy Prosecutor General to assist the court on this point. Mr. Habibullah G. Ghouri, a senior counsel of this court, was appointed as *amicus curiae*.

5. All learned counsel are in agreement that in the present circumstances when the parents of an un-married deceased are alive, the question of the brothers and sisters of the deceased does not arise, hence it would not be necessary for Marfani to deposit the *diyat* amount for the minor brothers of the deceased. The Honorable Supreme Court in the case of **Sartaj and others Vs Mushtaq Ahmad and others (2006 SCMR 1916)** was faced with a similar situation. The Court after referring to authoritative treatise in this regard was of the view that "*However, preponderance of opinion has been in favour of total exclusion of brothers and sisters by the father of the deceased.*" Earlier, similar views were expressed by a learned Division Bench of the Lahore High Court in **Ahmed Nawaz alias Gogi Vs The State (PLD 2007 Lahore 121)** and by a learned Single Judge of this Court in **Bashir Ahmed Vs The State (PLD 1995 Karachi 5)**.

6. In view of the above judgments, it appears that when an unmarried person dies leaving behind his parents or a parent then irrespective of the school of thought of the deceased's family, his brothers and sisters would not fall within the ambit of the definition of "*wali*" as contained in section 305 P.P.C. The trial court confirming that the compromise is genuine and that the legal heirs of the deceased have waived their right to *diyat*, the application under section 345(5) and 345(6) Cr.P.C. are allowed. The appellant stands

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acquitted and may be released forthwith if not required in any other custody case.

7. The appeal and the connected applications stand disposed of in the above terms.


JUDGE 27/9/21