

**P L D 2004 Supreme Court 875**

**Present: Iftikhar Muhammad Chaudhary, Rana Bhagwandas and Sardar Muhammad Raza Khan, JJ**

**MUHAMMAD SHAFI---Petitioner**

**Versus**

**MUHAMMAD ASGHAR and others---Respondents**

Criminal Petition No.292-L of 2001, heard on 30th April, 2004.

(On appeal against the judgment dated 16-4-2001 passed by Lahore High Court Lahore in Criminal Appeal No.282 of 1992).

**Per Iftikhar Muhammad Chaudhary J; Rana Bhagwandas and Sardar Muhammad Raza Khan, JJ. Contra--(Minority view)**

**(a) Criminal Procedure Code (V of 1898)---**

---S. 417(2A)---Penal Code (XLV of 1860). Ss. 302 & 332---Constitution of Pakistan (1973) Art. 185(3)---Acquittal---Offence of murder and hurt--Person aggrieved---Scope---Provision of S. 417(2-A), Cr.P.C. concedes a right of appeal in case of acquittal to a person aggrieved i.e. heirs (Walis) of the deceased in a murder case and to a victim in hurt cases and in their presence no one else including the informer can exercise such right--Held, in a case, pertaining to murder, if his Wali(s) are alive and in case of hurt victim (himself) both fall within the definition of "person aggrieved" and they can challenge an acquittal order and in their presence no one else, including the informer or any other person who is not primarily interested in the prosecution of the case can legitimately prefer acquittal appeal---Principles---Leave to appeal was refused.

Federation of Pakistan through Secretary Ministry of Law and others v. Gul Hassan PLD 1989 SC 633 and Mir Gul v. Abdul Karim 1999 PCr.LJ 1507 ref.

Zahid Ali v. Abdul Hameed and another 1996 PCr.LJ 586; The State through Deputy Director (FIA) of Pakistan at Quetta v. Zahid Nadeem and others 1996 MLD 506 and Sardar Muhammad v. Muhammad Israr 1995 SCMR 1356 distinguished.

**Per Rana Bhagwandas, J; Sardar Muhammad Raza Khan, J agreeing--[Majority view]**

**(b) Criminal Procedure Code (V of 1898)---**

----S. 417(2-A)---Penal Code (XLV of 1860), S. 302---Constitution of Pakistan (1973), Art. 185(3)---Appeal against acquittal before Supreme Court---Expression "person aggrieved" occurring in S. 417(2-A), Cr.P.C.--Scope---Provision of S.417(2-A), Cr.P.C. confers a right of appeal before the High Court against acquittal on a "person aggrieved"--- Such provision would not be strictly applicable to the proceedings before the Supreme Court---Principles---Leave to appeal was granted by Supreme Court to the petitioner .who was nephew of the deceased. He was eyewitness to the occurrence and first informant in the case and thus undoubtedly an "aggrieved, person".

No doubt provision of S.417(2-A), Cr.P.C. confers a right of appeal before the High Court against acquittal on a person aggrieved the fact remains that such provisions would not be strictly applicable to the proceedings before Supreme Court.

Strictly speaking the provisions of Code of Criminal Procedure 1898 would not apply to the proceedings before Supreme Court and proceedings of criminal nature before Supreme Court are not governed by the Code.

It is therefore, hard to say that an appeal under Article 185(3) of the Constitution before Supreme Court would be subject to the limitations placed by section 417, Cr.P.C. for filing an appeal against acquittal before the High Court Supreme Court has never recognized such limitations as

binding upon it and has consistently entertained appeals under Article 185(3) of the Constitution at the instance of a person not otherwise competent to file an appeal under section 417, Cr.P.C. Such appeals were entertained by Supreme Court at the instance of private parties even when under section 417, Cr.P.C, only the State had the right and privilege to file an appeal against acquittal in the High Court. Of course, this right was extended by way of grant of special leave to private complainant and it was only by Act XX of 1994 that subsection (2-A) was added to section 417, Cr.P.C. providing a right of appeal to private person.

The paramount consideration for the exercise of jurisdiction, in terms of Article 185(3) of the Constitution, has been to foster the dictates of justice and not to look at the person invoking the jurisdiction of Supreme Court. In a murder, it would neither be just nor proper to restrict the meaning and scope of the expression "person aggrieved" only to the "legal heirs" of the deceased. It would be difficult to hold that brothers and sisters of a slain person would not be the "persons aggrieved" simply because they do not fall within the category of his legal heirs. Similarly, it can hardly be held that parents of a deceased would not be the "persons aggrieved" on the murder of their child simply because they do not happen to be his legal heirs on account of difference of religion. The term "person aggrieved" cannot, by any stretch of reasoning, be confined to "persons competent- to compound", as in that case there will be no "aggrieved person" in non-cognizable offences. Ordinarily, in criminal cases any citizen can bring the machinery of law into motion and initiate proceedings but every person is not competent to terminate them as crime is regarded as "wrong against the whole society". With the exception of offences recognized by law as compoundable one proceedings cannot be terminated at the behest of a private person. Similarly, it would not be necessary that criminal proceedings may be initiated or continued only at the instance of person competent to terminate them. In the cases of Qatl-i-Amd waiver or compounding of right of Qisas will not necessarily bring an end to the proceedings which may be continued at the discretion of the Court for the purpose of imposing the punishment of Ta'zir within the contemplation of section 311 Pakistan Penal Code.

Under Article 185 of the Constitution jurisdiction of the Supreme Court, which is final Court of the country and ultimate hope of its people to seek justice, is very wide. The Constitution has not placed any limitation on it and this has been done purposely to ensure that in any event, no injustice is done to a party. Ideal must always be a system that gives to every person what is his. Supreme Court has never made a fetish of technicalities and indeed has always avoided all sorts of technicalities for doing complete justice.

All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. Any system, which by giving effect to the form and not to the substance defeats the substantive, rights is defective to that extent.

In the matter of entertainment of petitions and grant of relief in equitable and discretionary jurisdiction, it is necessary not to be guided wholly by the technicalities of the law but also by substance of the controversy when the proceedings did not suffer from male fides of fact.

There may be no cavil with the proposition that only the Wali or the legal heirs of a deceased would be entitled to claim Qisas and receive compensation or to waive the right of Qisas in the event of composition of an offence before or after the conviction but such proposition cannot possibly be overstretched while non-suiting an appellant, who bona fide and in good faith opts to challenge the acquittal of an accused. It is difficult to subscribe to the view that since maternal nephew of the deceased would not fall within the purview of a legal heir or a Wali. He would not be entitled to maintain the proceedings challenging the acquittal of a person earlier convicted. Position would, however, be altogether different, if upon hearing the appeal, the Court forms an opinion that the respondents were arbitrarily acquitted or that their acquittal being unjustified be converted into conviction and a request for permission to compound the offence with the consent of the complainant-non Wali is brought before the Court. So far as the maintainability of an action for challenging the wrongful acquittal of a person is concerned, such an action cannot be struck down simply because such person would not be in a position to waive the right of Qisas or receive the compensation in the event of composition of an offence.

It would neither be just nor proper to refuse leave merely because the petitioner does not fall within the purview of legal heirs particularly, when besides being a nephew of the deceased, he is eye witness to the occurrence and first informant in the case and thus, undoubtedly an "aggrieved person".

Siraj Din v. Kala PLD 1964 SC 26; Rashid Ahmad v. State PLD 1969 SC 362; Mammooty v. Food Inspector AIR 1987 Kar. 270; P.S.R. Sadhanantham v. Arunachalam AIR 1980 SC 856; Imtiaz Ahmad v. Ghulam Ali PLD 1963 SC 382; Pakistan Engineering Council v. I.H Osmani 1991 SCMR 654; State v. Muhammad Nawaz PLD 1966 SC 481 Manager Jammu and Kashmir State Property v. Khuda Yar PLD 1975 SC 678; Khushdil v. State PLD 1981 SC 582; Safia Bibi v. Aisha Bibi 1982 SCMR 494; United Bank Limited v. Yousaf Haji Noor Muhammad Dhadhi 1988 SCMR 82; Sultan Mir v. Umar Khan 1992 SCMR 1206; Noorul Amin v. Muhammad Hashim 1992 SCMR 1744; Allah Ditta v. Barkat Ali 1992 SCMR 1974; Province of Punjab v. S. Muhammad Zafar Bukhari PLD 1997 SC 351; Gatron (Industries) Ltd. v. Government of Pakistan 1999 SCMR 1072; Barkat Ali v. Muhammad Ehsan 2000 SCMR 556; Mir Gul v. Abdul Karim 1999 PCr.LJ 1507; Zahid Ali v. Abdul Hameed 1996. PCr.LJ 586 and State v. Zahid Nadeem 1996 MLD 506 ref.

**(b) Penal Code (XLV of 1860)---**

---S. 302---Constitution of Pakistan (1973). Art. 185(3)---Leave to appeal was granted by the Supreme Court to examine as to whether the appraisal of evidence done by the High Court was in consonance with the principles of law for appreciation of evidence in criminal cases.

**Per Sardar Muhammad Raza Khan, J agreeing with Rana Bhagwandas, J--[Majority view]**

**(c) Criminal Procedure Code (V of 1898)---**

---S. 417(2-A)---Constitution of Pakistan (1973), Art. 185(3)---Appeal against acquittal before Supreme Court---"Person aggrieved"---Scope--Matter of an appeal before the Supreme Court is not dealt with by S.417, Cr.P.C. but by Art. 185 of the Constitution---Provision of S. 417(2-A), Cr.P.C. furnishes no answer as to where the appeal would lie if acquittal is recorded by the High Court---Words "a person aggrieved" are of wider import than the term "Wali", therefore, a person who can genuinely prove his grievance by the order of acquittal, can file an appeal--Person who was real nephew of the deceased and happened not only to be the complainant of the F.I.R. but also an eye-witness, though admittedly not "Wali", he fulfilled the requirements of "a person aggrieved" as given in S.417(2-A), Cr.P.C.---Principles---leave to appeal was granted.

The perusal of subsection (1) of S. 417, Cr.P.C. would indicate that in case of acquittal, the right of appeal is given to the Provincial Government which may direct the Public Prosecutor to present an appeal to the High Court. If an acquittal is recorded in private complaint under section 200, Cr.P.C., the right of appeal under subsection (2) is granted to the complainant provided the High Court grants special leave to appeal. Subsection (2-A) was inserted in section 417 by Act XIX of 1994 which confers a right of appeal upon a person aggrieved by the order of acquittal passed by any Court other than a High Court. The very language of section 417, Cr.P.C. would clearly indicate that it pertains only to those appeals which are preferable before the High Court. Section 417(2-A), Cr.P.C., furnishes no answer as to where the appeal would lie if acquittal is recorded by the High Court. Apparently, it seems that the matter of an appeal before the Supreme Court is not dealt with by section 417, Cr.P.C. but by Article 185 of the Constitution.

Anyhow even if the analogy is derived from section 417, Cr.P.C., which cannot be at the face of it, yet amendment introduced by Act XIX of 1994 i.e. subsection (2-A) only suggests of a person aggrieved' by the order of acquittal. It does not in any manner specifically refer to the 'wali' or that 'a person aggrieved' under all circumstances be a `wali' of the deceased despite the fact that the legislature in the year 1994, while passing Act XIX of 1994 and while inserting subsection (2-A), was fully cognizant of the amendments introduced in the Pakistan Penal Code by way of substituting sections 299 to 338-H through Criminal Law (Second Amendment Ordinance 1990), the enforcement whereof remained continued up to the time of insertion of subsection (2-A) in section 417 of the Cr.P.C. Had the legislature intended to confine the right of appeal to a 'wali' alone, it could have mentioned the word 'wali' in the newly added subsection (2-A) instead of using the words 'a person aggrieved'. The words 'a person aggrieved' are of wider import than the term 'wali'. Therefore, a person who can genuinely prove his grievance by the order of acquittal can file an appeal. In the present case, the complainant is the real nephew of the deceased who happens not only to be the complainant of the F.I.R. but also an eye-witness. Though admittedly not a `wali', he fulfils the requirements of `a person aggrieved', in the circumstances.

The relevant sub-Article (3) of Article 185 of the Constitution provides for an appeal before the Supreme Court from any judgment decree, order or sentence passed by a High Court, subject, of course, to the grant of leave to appeal by the Supreme Court. It does not lay down as to who, in particular, has the right to appeal. Article 185 does not restrict the entity of one who goes in appeal provided the Supreme Court is satisfied that he, in the circumstances of the case, is an aggrieved person and has a locus standi. While granting leave to appeal the Supreme Court has the authority to look into the matter and to observe as to whether the appellant before it, is really a person who should be allowed to agitate the matter before the Supreme Court and is he the right person at whose instance the acquitted accused be called upon to show as to why such acquittal be not set aside. This situation might vary from case to case. So far as the present case is concerned, the petitioner being the real nephew of the deceased and also being a complainant and an eye-witness has a right to file an appeal even if he be not a 'wali' in the strict sense of the term.

The applicability of sections 309 to 313 of the RRC is not required in the present case. Those sections and a few others contemplate of situations where the presence of a 'wali' is of prime importance. The presence of a 'wali' should be strictly asked for only at the occasions where it is unavoidable under the law of 'Shariah' as made applicable through the amendments mentioned earlier in the P.P.C. and also in the Cr.P.C.

The Qur'anic injunction in verse 33 of Suraah 'Bani Israel is clearly expressive of the fact that a right of retribution is bestowed by Almighty Allah upon the legal heirs whereas, the right of appeal can by no stretch of imagination be considered analogous to the right of a legal heir or 'wali' qua the demand of 'Qisas', the demand of 'Diyat' or complete waiver of both. According to Ibn-e-Kaseer a 'wali' can exercise one of the three options mentioned in the Surah. The right of a 'wali' given through Qur'anic injunction qua 'Qisas' 'Diyat' or waiver of both cannot be shared by anyone and the same is not even disputed in the present case.

Quite distinct from the Qur'anic rights of a 'wali' is the right of appeal under section 417 of the Cr.P.C., or Article 185 of the Constitution which is a matter of grant by the legislature pertaining to the procedural law of the land. The present petitioner can neither claim 'Qisas' nor 'Diyat' nor can waive both of them, in the presence of the 'walis' of the deceased but, in the circumstances of the present case and the peculiar position that lie holds he has a right to appeal, being the real nephew, the complainant of F.I.R. and an eye-witness of the case.

Federation of Pakistan v. Gul Hassan PLD 1989 SC 633 ref

Muhammad Yaqub Sabir, Advocate Supreme Court for Petitioner.

Zulfiqar Ahmed Bhutta Advocate Supreme Court and Ejaz Muhammad Khan Advocate-on-Record (absent) for Respondent No.1.

Nemo for Respondent No.2.

Muhammad Akbar Tarar Addl. A.-G. and Mrs. Afshan Ghazanfar A.A.-G. for the State.

Date of hearing: 30th April, 2004.