

**JUDGMENT SHEET  
IN THE PESHAWAR HIGH COURT,  
MINGORA BENCH (DAR-UL-QAZA), SWAT  
(Judicial Department)**

**Cr. R No. 28-M/2022**

**(Syed Ahmad Versus The State and others)**

**Present:**

Muhammad Hayat, Advocate for petitioner.

Hafiz Ashfaq Ahmad, Assistant A.G. for State.

Mr. Sanaullah, Advocate for respondent No.2.


Date of hearing: **17.01.2024**

**JUDGMENT**

**MUHAMMAD NAEEM ANWAR, J.-** Complainant Syed Ahmad, herein petitioner, through this petition under Section 439 read with Section 561-A of the Code of Criminal Procedure, 1898 has challenged the order of the learned Sessions Judge, Dir Lower at Timergara dated 13.05.2022 whereby application of the District Public Prosecutor (DPP) was accepted and the accused were discharged in case FIR No. 131 dated 24.12.2021 under Sections 302, 109/34 PPC, 15 A.A. registered at P.S Talash, District Dir Lower.

**2.** Precise facts of the case are that petitioner made a report to local police on 24.12.2019 at 09:00 hours regarding dual murders of Siddiq Ullah and Mst. Nabila Bibi, his son and daughter-in-law respectively, on the same day at 06:45 hours in their residential room by some unknown accused. Petitioner recorded his statement under Section 164, Cr.P.C. on

10.11.2021 wherein he charged Ubaid Ullah, Amjad Ali and Muhammad Sherin for committing murders of both the deceased at the instigation of their co-accused Mst. Bakht Haram (Eram Bibi) out of whom Ubaid Ullah (respondent No.4) remained at large whereas the remaining accused (respondents No. 2, 3 & 5) were arrested. Final report under Section 173, Cr.P.C. was submitted before the Court with request for trial of the arrested accused and for proceedings under Section 512, Cr.P.C. against the absconding accused. Alongwith challan, the DPP submitted application under Section 4(1)(c)(ii) of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005 read with Section 494, Cr.P.C. for discharge of the accused, except the absconding accused, from the case. After hearing the parties, the learned trial Court accepted the application vide order dated 15.05.2022 and accordingly discharged the accused, hence, instant petition.

 **3.** Learned counsel for the petitioner contended that the learned trial Court has accepted the application of prosecution for discharge of the accused against the law, norms of justice and without application of judicious mind. He further contended that the Prosecution Act does not empower the DPP to withdraw from prosecution in the offences of murder,

therefore, the order of the learned trial Court is not legally sustainable. He placed reliance on "Syed Aijaz Hussan Vs. The State" (1983 P Cr. L J 1741 Karachi).

4. Conversely, the learned counsel representing the accused respondents opposed the above contentions of learned counsel for the petitioner and contended that in view of insufficient evidence, the DPP has moved the application in accordance with the relevant provisions of law for discharge of the accused, therefore, the impugned order may be maintained. He fortified his view point with "Muhammad Nawaz Khan Vs. The State" (1990 P Cr. L J 986 Karachi).

5. Arguments heard and record perused.

6. In essence, the petitioner is aggrieved of discharge of the accused by learned trial Court on accepting the application of the District Public Prosecutor under Section 4(1)(c)(ii) of the Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act, 2005 (**hereinafter the Prosecution Act**) read with Section 494 of the Code of Criminal Procedure, 1898 (**hereinafter the Code**). In order to know the powers and functions of the DPP under Section 4(1)(c)(ii) of the Prosecution Act, the said provision is reproduced herein below.

**"4. Powers and Functions of a Public Prosecutor.**

(1) A District Public Prosecutor or a Public

Prosecutor, as the case may be, shall be in-charge of the Prosecution in the district concerned and in discharge of his lawful duties with respect to a case the prosecution whereof is lawfully assigned to him, shall perform the following functions, in relation to conducting prosecution of offences before courts of competent jurisdiction, namely: -

- (a) safeguard the interest of the public in prosecution of cases before the courts of competent jurisdiction;
- (b) shall, on receipt of the final report, -
  - (i) lodge the same before the competent court trial; or
  - (ii) withhold the same for want of proper evidence and return it to the Investigation Officer with written direction to resubmit the report after removal of the deficiencies so identified by him;
- (c) in respect of compoundable offences, other than those which are punishable by death or life imprisonment, the Director General Prosecution, and in respect of compoundable offences punishable with imprisonment for seven years or less, the District Public Prosecutor, may
  - (i) withhold prosecution if reasonable ground exists to believe that the offence is compoundable; provided that if the offence is not compounded within a period of one month, a report shall be lodged in the court of competent jurisdiction for prosecution and trial; or
  - (ii) apply, for reasons to be recorded in writing, to the court of competent jurisdiction for the discharge of the case, if its institution has been found to be mala fide, wrongful or weak from evidentiary point of view:

Provided that an application under this section shall accompany the final report under section 173 of the Code:

Provided further that the competent court may dispose of the application in such manner as it may deem fit.

(2) In respect of any case instituted by a Public Prosecutor before a competent court, any private person representing the complainant shall act under the directions of the Public Prosecutor". (emphasis supplied)

The record shows that the accused

respondents have been charged for dual murders of a married couple which offence is punishable with death

as *qisas* or *ta'zir*, imprisonment for life or imprisonment which may extend to twenty-five years as emerging from the three clauses of Section 302 PPC. It is manifest from close perusal of clause (c) of the Prosecution Act that no application can be made for withholding the prosecution of an accused who is charged with offences punishable with death or imprisonment for life, hence, the Director General Prosecution is empowered to move an application for discharge of an accused who is charged with compoundable offences punishable with imprisonment above seven years except the offences punishable with death or imprisonment for life whereas the DPP can only move such application for discharge of an accused indicted with compoundable offences entailing the punishment of seven years or less. The scheme of the above provision shows that sub-clauses (i) and (ii) are to be read in conjunction with the main portion of clause (c) containing the specification of the powers of Director General and DPP. In other words, sub-clause (ii) cannot be read in isolation for the purpose of authorization of the DPP for withholding prosecution of accused in each and every case. Thus, it is abundantly clear from clause (b) of Section 4(1) of the Prosecution Act that the learned DPP had no powers to request for discharge of the accused respondents who are charged for commission of the offence of murders entailing the punishment of death or imprisonment for life as neither he nor the Director General Prosecution was authorized to move application for withdrawal of prosecution of the

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accused respondents in view of the bar contained in the aforesaid provision. I would fortify my above view with the judgment of this Court in the case titled **"Zaiwar Khan Vs. Sahib Zada and another" (2018 YLR 2025)** wherein it has been observed that:

**"District Public Prosecutor is not competent under the Act ibid either to withhold prosecution or apply to the Court for discharge of the accused in respect of offences punishable with death or life imprisonment, which have specifically been mentioned in the said clause; even Director General Prosecution cannot exercise those functions under the law".**

**7.** No doubt, Section 494, Cr.P.C. is in the field which empowers the Public Prosecutor to withdraw from prosecution of accused with consent of the Court and before the judgement is pronounced but Section 11 of the Prosecution Act gives overriding effect to the said Act over other laws for the time being in force. The said provision reads as under:

**11. Act to override other laws.** The provisions of this Act shall be enforced notwithstanding anything repugnant or contrary contained in any other law for time being in force.

The non-obstante clause has been added to the above provision in order to uphold its enforceability over any provision in any other law for the time being in force which is contradictory or repugnant to it. Section 494, Cr.P.C. confers the power on any Public Prosecutor to withdraw from prosecution of an accused irrespective of the nature of allegations leveled against him, however, those powers of the Public Prosecutor have been curtailed by the Prosecution Act. Insertion of

Section 11 in the Prosecution Act manifests the unambiguous and clear intention of the law makers to limit the powers enjoyed by the Public Prosecutor under Section 494, Cr.P.C. Thus, after promulgation of the Prosecution Act, having the overriding effect on any other law for the time being enforce, the learned DPP was debarred to exercise his powers under Section 494, Cr.P.C. Wisdom is taken from **"Messrs Rajby Industries Karachi and others Vs. Federation of Pakistan and others" (2023 SCMR 1407)**. In the said case, the Hon'ble apex Court, while highlighting the meaning and scope of the expression 'non-obstante', observed that said phrase, for all intents and purposes, invests powers in the legislature to set down any provision which may have an overriding effect on any other legal provision under the same law or any other laws, being a legislative apparatus and method of conferring overriding effect over the law or provisions that qualifies such clause or section of law. Likewise, the Prosecution Act though is a provincial enactment but it is a special law and it is settled rule that where there was a conflict between a special law and a general law, the former would prevail over the latter. Wisdom is drawn from **"Syed Mushahid Shah and others Vs. Federal Investment Agency and others" (2017 SCMR 1218)**. Even otherwise, the judicial order is

revisable by High Court when direction improperly or arbitrarily exercised by Court. An application moved under Section 494, Cr.P.C. for withdrawal from prosecution not made on any ground of public policy or public peace and interest but merely on grounds directly related to detailed appreciation of evidence would tantamount to an attempt to throttle prosecution and to interfere with ordinary course of justice. While discussing the scope of Section 494, Cr.P.C. and supervisory powers of the Courts, the Hon'ble apex Court observed in the case titled "Mir Hassan Vs. Tariq Saeed and others" (PLD 1977 S.C 451) that:

It is clear that this supervisory function of the Court can be exercised only on a consideration of all the facts and circumstances of the case available to the Court, and not in disregard of any material factor or circumstance having a bearing on the issue. At the same time, it is also clear that in undertaking this exercise the Court cannot embark upon the kind of detailed analysis of the evidence which can appropriately be undertaken only at the conclusion of a judicial trial. Any such attempt would amount to throttling the prosecution or interfering with the ordinary course of justice.

In light of the wisdom contained in the afore-referred dicta, the learned trial Court has committed an illegality in exercise of its discretion arbitrarily by giving consent for discharge of the accused on the sole ground of insufficient evidence. The case law in Muhammad Nawaz Khan's case (1990 PCr.LJ 1986 Karachi) supra relied upon by learned counsel for the



respondents is not applicable to the present case having distinguishing background.

8. Even otherwise, in terms of Section 169, Cr.P.C. recommendation for discharge of an accused is the sole prerogative of Investigating Officer. When in light of investigation it appears to Investigating Officer that the evidence is not sufficient to justify forwarding of the accused to a Magistrate, he shall release the accused, if in custody, on his executing a bond for his appearance before the Magistrate when required. Section 169, Cr.P.C. reads as under:

**169. Release of accused when evidence deficient.**---If, upon an investigation under this Chapter, it appears to the officer incharge of the police station or to the police-officer making the investigation that there is not sufficient evidence, or reasonable ground or suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or send him for trial.

In case the Investigating Officer is satisfied that sufficient evidence is available against the accused, he shall forward him in terms of Section 170, Cr.P.C to concerned Magistrate for his trial. In both the cases either under Section 169 or 170, Cr.P.C. the Investigating Officer shall submit final report under Section 173, Cr.P.C. and thereafter it is the sole domain of the Magistrate to agree or disagree with the opinion of the Investigating Officer. In view of the

powers conferred upon the Investigating Officer for discharge of the accused or his recommendation for trial under the aforesaid provisions, no sanctity is attached to the opinion of Public Prosecutor. In this regard the judgment in the case titled **"Muhammad Sharif alias Bhuller v. The State" (2008 YLR 1462)**

may be referred wherein it has been held that:

"On perusal of report under section 173, Cr.P.C. I have found that the Investigating Officer concluded that so many persons appeared before him in defence of the accused and they stated that Muhammad Shafique deceased had died his natural death and accused-petitioner Ashraf was found innocent and recommended to be placed in Column No.2 of challan, but thereafter the District Public Prosecutor gave a note at the end of the report under section 173, Cr.P.C. to place the name of petitioner-accused in Column No.3, which, in my considered view, falls out of the purview of duties assigned to the District Public Prosecutor. As no legal sanctity is attached to the opinion of District Public Prosecutor qua the guilt of an accused and it is always the Court, which is to charge the accused under the relevant provisions of law keeping in view the evidence available on record regarding the crime alleged and not the District Public Prosecutor. Reference can be had to PLD 1954 Sindh 256. Even no Court can order to the Investigating Officer to submit challan while placing the name of the accused in Column Nos.2, 3 and 4, rather the Court can direct the Investigating Officer only to submit final report after completing investigation. Reference can be had to 1983 SCMR 370".

9. The record further shows that the I.O. has submitted the final report before the Court for trial of the accused already arrested but to the contrary, the learned DPP has submitted the application for

discharge of the accused. Before submitting the application for withdrawal from prosecution of the accused, which was otherwise incompetent, the learned DPP was bound under sub-clause (ii) of clause (b) of Section 4(1) of the Prosecution Act to withhold the final report for want of proper evidence and should have returned it to the I.O with directions in writing to resubmit the report after removal of the deficiencies so identified by him. Sub-clause (ii) of clause (b) referred to above is reproduced below for ready perusal.

- (ii) withhold the same for want of proper evidence and return it to the Investigation Officer with written direction to resubmit the report after removal of the deficiencies so identified by him;

There is nothing on the record to show any such effort on the part of the DPP under the above mandatory provision of giving any directions to the I.O for removal of deficiencies or collecting of further evidence rather he straightaway filed application for withdrawal of the accused, for which not only he was not authorized under the law but the application was otherwise also no warranted in circumstances of the case.

10. We deem it appropriate to note that the learned DPP has filed application for discharge of the arrested accused namely Muhammad Sherin, Amjad Ali and Mst. Bakht Haram but the impugned order of the learned trial Court suggests that all the accused

including the absconding accused Ubaid Ullah son of Waris Khan were discharged because no specification with regard to discharge of the accused except Ubaid Ullah is emerging from the impugned order. Request of the I.O to the Court for proceedings under Section 512, Cr.P.C. has nothing to do with Section 173, Cr.P.C. nor any such request of the I.O can be termed as final report. Since, there was no final report in consonance with Section 173, Cr.P.C before the learned trial Court in respect of absconding accused Ubaid Ullah as required under the first Proviso to Clause (c) of Section 4(1) of the Prosecution Act, therefore, his discharge by the learned trial Court along with the remaining accused, as suggested by the impugned order, was illegal.

**11.** In light of what has been discussed, the impugned order is not legally sustainable. Resultantly, instant petition is allowed, the impugned order is set aside and the learned trial Court is directed to proceed with trial of the accused in accordance with law.

**Announced**  
**Dt: 17.01.2024**

  
**JUDGE**

  
**JUDGE**

Office  
24/1/2024  
WR

Tajamul/CS\*

DB:

Hon'ble Mr. Justice Muhammad Naeem Anwar  
Hon'ble Mr. Justice Shahid Khan