2003 Y L R 535

[Lahore]

Before Abdul Shakoor Paracha, J

ABDUL KHATTAB---Petitioner

versus

THE STATE---Respondent

Criminal Miscellaneous No. 1249/B in Criminal Appeal No. 463 of 2002, decide on 31st October, 2002.

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

----S. 426---Suspension of sentence-- Principle---Court, no doubt, cannot enter into reappraisal of evidence which should be considered at the hearing of appeal, but where the impugned judgment suffers from any legal or jurisdictional error High Court would be competent under S. 426, Cr. P. C. to suspend the sentence of accused and grant him bail without even discussing the merits of the case and appreciating the evidence.

Noor Abdullah and others v. State 1981 SCMR 85; Jamshed Azam v. State 1990 SCMR 1393 and Farhat Azeem v. Waheed Rasool PLD 2000 SC 18 ref.

(b) Juvenile Justice System Ordinance (XXII of 2000)---

----Ss. 3, 4 & 5---Trial of the child-- Complete procedure and mechansim is provided for the trial of the child under the Juvenile Justice System Ordinance, 2000, and if such provision of the said Ordinance is not followed, the trial will become illegal.

(c) Jurisdiction---

---- Total absence of jurisdiction can never be waived by the parties, nor an illegality in the order can be cured by consent of the parties.

Sultan Ali v. Khushi Muhammad 1983 SCMR 243; Peer Sabir Shah v. Shah Muhammad Khan PLD 1996 SC 66 and Khooshamonai Khan v. Provincial Government N.-W.F.P. 2000 SCMR 1657 ref.

(d) Criminal Procedure Code (V of 1898)---

----S. 426---Penal Code (XLV of 1860), S.308---Supension of sentence---Additional Sessions Judge after the promulgation of the Juvenile Justice System Ordinance, 2000, on 1-7-2000, had no jurisdiction to record the evidence---Recording of evidence of prosecution witnesses statement of the accused under S. 342, Cr. P. C. and defence evidence, had seriously prejudiced the case of the accused which was quite illegal---Such illegality apparent on the record could not be overlooked even at ball stage---Sentence of accused was suspended in circumstances and he was admitted to bail accordingly.

Sultan Ali v. Khushi Muhammad 1983 SCMR 243; Peer Sabir Shah v. Shah Muhammad Khan PLD 1996 SC 66; Maulvi Noor Muhammad and others v. The State 2000 PCr.LJ 1583; Khooshamonai Khan v. Provincial Government N.-W.F.P. 2000 SCMR 1657; Noor Abdullah and others v. State 1981 SCMR 85; Jamshed Azam v. State 1990 SCMR 1393 and Farhat Azeem v. Waheed Rasool PLD 2000 SC 18 ref.

Malik Muhammad Rafique Khan for Petitioner.

Mukhtar Ahmad Gondal for the State.

ORDER

Through this application under section 426 of Cr.P.C. the petitioner seeks for suspension of judgment of the learned Sessions Judge, Rawalpindi, dated 29-6 2002. Whereby petitioner Abdul Khattab was tried alongwith his adult co-accused Ghulam Abbas, Abdul Mateer, Abdul Khaliq, Haq Nawaz and Shoukat to face trial in case F.I.R. No.389, dated23-5-1999 under sections 302/324/148/149, P.P.C. Police Station Gujar Khan, District Rawalpindi. Abdul Khattab petitioner stated to have inflicted Chhuri to Sajjad Ayub therefore, he was found guilty for Qatle-e-Amd of Sajjad deceased in furtherance of his common intention with adult co-accused Ghulam Abbas. Therefore, he was convicted under section 308/34, P.P.C. for the murder of Sajjad Ayub and was sentenced under section 308, P.P.C. being minor at the time of the occurrence he was liable to pay Diyat amount of Rs.3,00,000 (three lacs) to the legal heirs of Sajjad Ayub deceased recoverable from his property if any or payable by his legal Wali Shoukat Ali, his father. He was also sentenced under section 308, P.P.C. as a Tazeer to undergo 14 years imprisonment and also given benefit under section 382-B, Cr.P.C.

2. Learned counsel for the petitioner in support of this petition for suspension of the sentence and for grant of bail has argued that admittedly petitioner was minor at the time of occurrence and was to be tried by competent Court as being covered under Juvenile Justice System Ordinance, 2000. According to him P. W .1 and P. W .2 were recorded by the competent Court of Additional Sessions Judge. He submits that Juvenile Justice System Ordinance, 2000 was promulgated on 1-7-2000 and it came into operation on the same day on 1-7-2000. Thereafter the recording of the evidence from P.W.3 up to the Mehndi Khan P.W.18, recording of the statement under section 342, Cr.P.C. were corum non judice and also the Ltefence evidence up to P.W.6 Qamar-ud-Din was without jurisdiction as Manzoor Ahmad Mirza learned Additional Sessions Judge was not the competent Court established under the Juvenile Justice System Ordinance, 2000. Thereafter the case was sent to the learned Sessions Judge who convicted petitioner through the impugned judgment.

3. Learned counsel states that the whole proceedings of trial of the procedure are from recording the statement of P.W.3 is liable to be quashed. He has also referred to the para. No. l of the judgment which reads as follows:

> "The challan against the present accused was separated but learned counsel for the parties have relied upon the evidence already recorded in joint trial."

And argues that above finding is factually incorrect, the challan was not separated in this case. The counsel for the parties never relied upon evidence already recorded in the joint trial. In alternative he maintained that assuming but not conceding that the learned counsel for the parties had relied upon the evidence already recorded in the illegal trial, illegality is not curable and the proceedings will not become legal with the consent of the parties. Reliance has been placed on the following judgments: Sultan Ali v. Khushi Muhammad PLD 1983 SC 243, Peer Sabir Shah v. Shah Muhammad Khan PLD 1996 SC 66, Maulvi Noor Muhammad etc. v. The State 2000 PCr.LJ 1583, and Khooshamonai Khan v. Provincial Government N.-W.F.P. 2000 SCMR 1657. In this view of the matter he prays for suspension of the impugned judgment and grant of bail as the acceptance of the application.

4. Learned Assistant Advocate-General assisted by the State Counsel argues that the points raised by the learned counsel for the appellant for suspension of the judgment

and for grant of bail are to be decided at the time of appeal and these cannot be considered at
this stage while seeking the suspension and bail.

5. It is well-established principle of law, that Court cannot enter into reappraisal of the evidence which should be considered at the time of appeal. But, where the judgment suffers from any legal error or for that matter jurisdictional error, it would within the competency of the High Court in exercise of its jurisdiction under section 426, Cr.P.C. to suspend the sentence and grant the bail. Merits of the case may not be discussed nor the evidence is appreciated. See the case of Noor Abdullah and others v. The State 1981 SCMR 85 and Jamshed Azam v. The State 1990 SCMR 1393. In case of Farhat Azem v. Waheed Rasool reported as PLD 2000 SC 18 at page 29, the above principle for suspension of judgment of the trial Court and grant of discretionary relief of bail was valid and maintained by the Hon'ble Supreme Court by observing:--

> "The discretion has to be exercised judiously by considering the relevant facts without commenting on the merit of the case. If the contention raised requires consideration of the merits, the Appellate Court would refrain from entering such contentions. The Court cannot enter into a reappraisal of the evidence which should be considered at the time of hearing of the appeal. But, where on perusal of the facts and judgment impugned, the Court comes to the conclusion that the judgment suffers from any legal error, it would be justified to suspend the sentence and grant the bail. In this regard the reasonable and legal views expressed by the trial Court should be given due consideration and weight, but every effort should be made to ensure that neither the evidence is reappraised nor the merits of the case are discussed."

To appreciate the real controversy in this case some provisions of the Juvenile Justice System Ordinance (No. XXII of 2000) are relevant and to be read as under:---

> Section 4(1) .
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> Section 4(2) .
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> Section 4(2)(a) .
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> Section 4(2)(a)(i) .
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> Section 4(2)(a)(ii) .
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> Section 4(2)(b) .
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> Section 3. The Juvenile Court shall have the exclusive jurisdiction to try cases in which a child is accused of commission of an offence.
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> Section 4(4). Subject to subsection (3), on commencement of this Ordinance, all cases pending before trial Court in which a child is accused of an offence shall stand transferred to the Juvenile Court having jurisdiction.
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> Section 4(5). The Juvenile Court shall not, merely by reason of a change in its composition or transfer of a case under subsection (4), be bound to recall or rehear any witness who has given evidence and may act on the evidence already recorded.
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> Section 4(6). On taking cognizance of an offence, the Juvenile Court shall decide the case within four months.

> Section 5. No joint trial of a child and adult person. ---Notwithstanding anything contained in section 239 of the Code, or any other law for the time being in force, no child shall be charged with or tried for an offence together with an adult.
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> Section 5(2). If a child is charged with commission of an offence for which under section 239 of the Code, or any other law for the time being in force such child could be tried together with an adult, the Court taking cognizance of the offence shall direct separate trial of the child by the Juvenile Court."

From combined reading of the provisions of Ordinance ibid and. the above stated provisions manifestly make it clear that, there is complete procedure and mechanism provided for the trial of the child under the Juvenile Justice System Ordinance; 2000 and if some provision of the Ordinance is not followed, the trial will become illegal.

6. The recording of the statements of P.W.3 up to the P.W.8 Mehndi Khan, statement under section 342, Cr.P.C. and the defence evidence recorded by the Court who had no jurisdiction caused serious prejudice to the petitioner. No doubt the matter was transferred to the Court having the jurisdiction after the recording of the statement under section 342, Cr.P.C. and the defence evidence before the announcement of the judgment but the irregularity committed by the Additional Sessions Judge in recording the evidence from P.W.3 up to P.W.18, the statement under section 342, Cr.P.C. of the petitioner and the defence evidence having no jurisdiction in the matter would not cure the proceedings.

7. The reference has been made by the learned Sessions Judge in the impugned judgment that the challan against the present petitioner/accused was separated is factually incorrect, challan was never separated. Even for the sake of arguments the parties have relied upon the evidence already recorded in a joint trial as observed by the learned Sessions Judge, "the illegality will not be rectified because the evidence has been recorded by the Court who had no jurisdiction at all. It is cordial principle of interpretation that where there is total absence of jurisdiction the parties can never waive the same nor can an illegality in order to be cured by consent of the parties. See case or Sultan Ali v. Khushi Muhammad 1983 SCMR 243. In case of Pir Sabir Shah v. Shad Muhammad Khan, Member, Provincial Assembly, N.-W.F.P. and others PLD 1995 Supreme Court page 66 the Hon'ble Supreme Court held:

> "Question of jurisdiction being very important and fundamantal in nature, if a forum had no jurisdiction the same could not be conferred upon it by consent of parties. Court has to consider the question of jurisdiction even though not raised by the parties."

In case reported as Khooshamonai Tribe of Samagole v. Provincial Government of N.-W.F.P. 2000 SCMR 1657 the ratio regarding the jurisdiction was followed by observation:--

> "Litigants cannot confer jurisdiction on a Court or Tribunal which otherwise is not possessed by it."

8. In view of the above position I am of the firm view that there was no jurisdiction to the Additional Sessions Judge to record the evidence on the promulgation of the Juvenile Justice System Ordinance, 2000 after 1-7-2000. The recording of the prosecution evidence from P.W.3 to P.W.18, statement under section 342, Cr.P.C. and defence evidence have seriously prejudiced the case of the petitioner which is quite illegal. The above-referred case-law is squarely applicable to the facts and circumstances of the present case.

9. There is no force in the contention of the learned counsel for the State that these points can be overlooked at the time of bail stage and these are the points which can be decided at the time of the hearing the appeal. The Hon'ble Supreme Court in case of Farhat Azeem v. Waheed Rasool reported as PLD 2000 SC 18 at page 29 has enunciated the principle that:

> "Where on perusal of facts and judgment impugned, the Court comes to the conclusion that the judgment suffers from any legal error, it would be justified to suspend the sentence and grant the bail. "

The illegality is apparent on the record which cannot be overlooked.

10. On the touchstone of the above stated case-law, I am inclined to accept this application. Resultantly, this application under section 426, Cr.P.C. is accepted. The judgment of the learned Sessions Judge, dated 29-6-2000 is suspended. The petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs.1,00,000 with one surety in the like amount to the satisfaction of the trial Court.

N.H.Q./A-657/L

Sentence suspended

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