IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISIDCTION)

(21)

PRESENT

Mr.Justice Aftab Hussain — Chairman
Mr.Justice Zahoorul Haq — Member
Mr.Justice Pir Muhammad Karam Shah — Member

CRIMINAL APPEAL NO.59/I OF 1981

Mst.Saleem Akhtar	...	Appellant
	Vs	
Faisal and others	...	Respondents
For the appellant	Malik Rab Nawaz Noon, Advocate.	
For the respondents	Hafiz S.A. Rehman, Advocate.	
Date of hearing	...	16.1.1982

JUDGMENT

ZAHOORUL HAQ, MEMBER: This is an appeal against the judgment of Additional Sessions Judge, Rawalpindi dated 16th April, 1981, whereby the complaint/case filed against the present respondents under Section 11 of Ordinance VII of 1979 was dismissed and the respondents were therefore released on the ground that the Additional Sessions Judge could not directly take cognizance of the case without the cognizance having first been taken by a magistrate as provided under Section 190(3) read with Section 193 of Criminal Procedure Code.

2. The facts giving rise to this appeal are that the appellant had instituted a complaint against the respondents No.1 and 2 before Additional Sessions Judge, Rawalpindi alleging that they had tresspassed into the house of complainant and committed Zina bil Jabr with her daughter Mst.Rukhsana. The complaint was entrusted to the Additional Sessions Judge on 5.4.1981 and after examining the complainant and her P.Ws.non-bailable warrants were issued against the respondents. The respondents took objection that

(22)

the Session court was barred to take cognizance of any offence directly unless the same was sent to it by a magistrate under Section 190(3) of Criminal Procedure Code. The learned Additional Sessions Judge upheld the said objection and made the impugned order relying upon P.L.D.1977 Lahore 535 (537 and 538).

3. Hence This appeal.

4. Malik Rab Nawaz Noon learned counsel for the appellants contends that there was no necessity of the initial cognizance of the case by magistrate under Section 190 of Criminal Procedure Code since the case is exclusively triable by a court of Session and therefore the court of Session could itself take the initial cognizance and proceed with the trial of the case. He has based his arguments on Section 29 of Cr.P.C. which reads as under:

> "(1) subject to the other provisions of the Court, any offence under any other law shall, when any court is mentioned in this behalf in such law, be tried by such court.
>
> (2) when no court is so mentioned it may be tried by the High Court or subject as aforesaid by any court constituted under this Code by which such offence is shown in the 8th Col. of the second schedule to be triable."

5. Malik Rab Nawaz states that the second priviso of Section 20 of Ordinance VII of 1979 has provided for trial of offence of zina by a court of Session and not by a magistrate. The relevant provisions of Section 20 of Ordinance VII of 1979 are hereunder reproduced:

> " The provisions of Code of Criminal Procedure (Act V of 1898), herein after in this connection referred to as the Code, shall apply, mutatis mutandis, in respect of cases under this Ordinance:
>
> Provided that, if it appears in evidence that the offender has committed

(23)

> a different offence under any other law, he may, if the Court is competent to try that offence and award punishment therefor, be convicted and punished for that offence.
>
> Provided further that an offence punishable under this ordinance shall be triable by a Court of Session and not by a Magistrate authorised u/s 30 of the said code and an appeal from an order of the court of session shall lie to the Federal Shariat Court.
>
> Provided further that a trial by a court of Session under this ordinance shall ordinanarily be held at the headquarters of the tehsil in which the offence is alleged to have been committed.

The contention of the learned counsel is that the Sessions Judge being exclusively empowered to try the offence under Ordinance VII of 1979, he alone could take the cognizance of the case and therefore, the proceedings were competent.

6. In P.L.D.1977 Lahore 535(537 and 538) Mr.Justice Abdul Jabbar Khan had taken into consideration the provision of Section 190(3) of Cr.P.C. and other relevant provisions of the Criminal Procedure Code especially Section 193 of Cr.P.C. and after taking note of the changes introduced by the Law Reform Ordinance 1972 under Section 190(3) he had come to the following conclusion:

> "Under the Law Reform Ordinance, what has been laid down is that the Magistrate will no more enter into the exercise of recording preliminary evidence in cases which are exclusively triable by the court of Session but will only send them as provided under Section 190(3) Cr.P.C. for trial to the Session Court. There could be no two opinions about this legal position. Therefore, the Court of Session will be barred to take cognizance of any offence directly as a court of original jurisidction unless the same had been sent to him under the relevant Section 190(3) Cr.P.C."

6. We xxx agree with the observations made in the judgment cited. In order to appreciate the position in law we would reproduce the

(24)

sub-Section 1 of Section 193 Cr.P.C. as under:-

> "193 (1) Except as otherwise expressly provided by this Code or by any other law for the time being inforce , no Court of Session shall take cognizance of any offence as a Court of Original Jurisidction unless the case has been sent to it under Section 190 sub-Section(3) of Criminal Procedure Code."

7. If we read the provisions of Section 28 and 29 of Cr.P.C. together, which provide for the trial of offence by the Courts and further read them with Sections 190 to 194 of Cr.P.C. it becomes quite apparent that the Criminal Procedure Code has made a separate provision for the trial of offence by the competent court and for taking of cognizance of the cases by the Magesterial Court, Session Court and High Court. Section 2 Cr.P.C. is the general section in respect of trial of the cases under the Penal Code by the High Court or by the Court of Session or by any other Court by which such offence is shown to be triable in the 8th Col. of second schedule of the Code. Section 29 of the Code has been reproduced above and provides for the trial of offence under any other law by the court mentioned in that law. These two sections are therefore, in respect of the trial of the cases although the sub-heading of Chapter 3 is "Description of offences cognizable by each Court, but we are quite clear in our mind that the sub-heading will not be helpful in the interpretation of Sections 28 and 29 of the Code which really deal with the trial of the cases. Thereafter we find Ch.15 of the Code which refers to the "Jurisdiction of the Criminal Court Inquires and Trials" in its sub-heading (b) relating to "Conditions requisite for initiation of proceedings," Section 190 to 199(b) are found. We are not concerned with the rest of the sections but we may note that xxx Sections 190 to 194 Cr.P.C.

(25)

are more important for the purpose of this appeal. Section 190 Cr.P.C. deals with cognizance of offence by Magistrate (a) upon receiving a complaint, (b) upon a report in writing from a Police Officer and (c) upon receipt of information from any other person or upon his own knowledge or suspicion. Sub-Section 3 of Section 190 is however important and is reproduced below:-

> 190(3) "A Magistrate taking cognizance under sub-Section 1 of an offence triable exclusively by a Court of Session shall, without recording any evidence send the case to the Court of Session for trial."

8. Section 191 Cr. P.C. deals with the situation where the cognizance has been taken by a Magistrate upon his own knowledge then the accused has to be informed that he is entitled to have this case tried by another Court.

9. Section 192 Cr.P.C. deals with the situation where a Magistrate taking a cognizance of a case can send the same for trial to any Judicial Magistrate specified by the Sessions Judge.

10. Section 193(1)Cr. P.C. deals with cognizance of offence by Court of Session and Section 193(1)is the most important provision in this aspect and it bars the Session Court from taking cognizance of any offence as a Court of Original Jurisdiction unless the case has been sent to it under Section 190(3) Cr.P.C.

11. Similarly Section 194 Cr.P.C. authorises the High Court to take cognizance of any offence in the manner provided therein and that manner is provided in sub-Section 2 of the said Section where information is conveyed by the Advocate General. It has however, been made clear in Section 194 Cr.P.C. that the provisions of any Letters Patent or Order by which a High Court

(26)

is constituted or continued or any other provision of the Code shall not be affected by any provision of Section 194 Cr.P.C.

12. The position, therefore emerges is that the trial of the cases can be proceeded with by the competent Courts as prescribed in Sections 28 and 29 of the Code and any special law read with 8th Col. of second schedule of the Code. But for the purpose of initiation of proceedings and the taking of cognizance a particular mode has been provided as mentioned above in Sections 190 to 194 Cr.P.C. The Session Court as a Court of Original Jurisidiction cannot take cognizance of any offence and in this respect we do not find the 3rd proviso of Section 20 of Ordinance VII of 1979 providing any other mode of initiation of proceedings. The provision of Criminal Procedure Code 1898 have been applied mutatis, mutandis in respect of cases under Ordinance VII of 1979 by Section 20(1) of the same Ordinance. The word 'Mutatis,Mutandis' means that the necessary changes in points of detail are to be made when necessary. Therefore, it means that the provisions of the Criminal Procedure Code have to be substantially applied to the offences tried under Ordinance VII of 1979 and only some changes in points of detail can be made but no substantial changes in Code of Criminal Procedure can be made on the basis of the word 'Mutatis,Mutandis'. This means that the provision of Section 193(1) of Criminal Procedure Code have to be followed in the cases under Ordinance VII of 1979, irrespective of the fact that the Session Judge alone has the exclusive jurisdiction to try those offences, The legislature in its wisdom has not done away with

(27)

the bar provided under Section 193(1) of Cr.P.C. and therefore, the complaint has to be instituted before the Magistrate under Section 190 of Criminal Procedure Code. Thereafter the Magistrate, since he does not have the jurisidction to try the offence under Ordinance VII of 1979, has to send the case to the Court of Session for trial without recording any evidence. This may appear to be an exercise in futility at the first sight because the Magistrate is not entitled to record any evidence, but the purpose may be that the Magistrate may refuse to take cognizance of an offence under Section 190 of Cr.P.C. if upon bare reading of the complaint or the report he comes to the conclusion that there was no offence made out for trial by the Session Court.

13. In the scheme of Criminal Procedure Code trial and cognizance are treated differently and before a competent court can try the offence it is necessary that the case should be initiated and thus cognizance be taken only in a particular manner prescribed by Sections 190 to 199 B of Cr.P.C.

14. In this respect we may usefully refer to PLD 1953 F.C.145 where the Federal Court held that where a magistrate was not empowered to act under Section 190(1) (c) of Cr.P.C, then he could not add any accused to the already existing list of accused before him in a case which was pending before him and had been validly transferred to him by a Sub Division magistrate.

15. In this respect it would be useful to refer to two judgments to understand the question whether a court which has the jurisdiction to try an offence can do so without following the procedure prescribed in respect of cognizance of cases by the Criminal Procedure Code.

28

16. In P.L.D. 1969 Lahore 251 Sardar Muhammad Iqbal J.(Muhammad Azhar Hassan and another Vs. District Cricket Association, Lahore) as he then was examined the question whether the High Court could entertain a direct complaint in respect of an offence under Section 76(2) for failure to call a meeting. After taking note of Sections 1(2), 5(2), 28, 29, 190, 193 and 194 of Cr.P.C. and Sections 76, 130 and 278 of the Companies Act he come to the conclusion that the High Court was competent to try an offence under Section 76(2) of the Companies Act as provided in Section 29(2) of the Criminal Procedure Code but in view of Section 5(2) of Criminal Procedure Code it could not try the same except information of Advocate Generla or unless the same had been committed to it or transferred under Section 526 of Criminal Procedure Code. The relevant paragraph 7 of the said judgment is reporduced here:

> "It is also provided in section 29 that when no Court is specifically mentioned to try an offence created under the Act other than the Pakistan Penal Code it may be tried by the High Court. Subsection (2) of Section 29 of the Code of Criminal Procedure, giving juris-diction to High Court to try such offences, does not contain the words "subject to the other provisions of the Code". A question arises whether the High Court can take cognizance of an offence on a complaint made to it without following the procedure laid down in the Code for invoking the jurisdiction of the High Court. The Companies Act does not provide for the manner, place or offences under the Act. The inquiry and the trial of the offences under the Act, therefore, had to be in accordance with the provisions of the Code of Criminal Procedure. Under section 194 of the Code of Criminal Procedure, as I have already mentioned, the High Court can try a case if it is committed to it. The High Court may also try under sub-section (2) of section 194, a case at the instance of the Advocate General when he, after having obtained previous sanction of the Government, places an information before it containing a definite statement of the charge. It may also try an offence of which a Magistrate has taken cognizance, but the High Court can try an offence under subsection (2) of section 29 subject to the provisions of section 5(2) of the Cr.P.C., and

(29)

> unless a case is committed to the High Court, it cannot on a complaint made to it try an offence under the Act."

17. To make things more clear it is necessary to refer to another case viz AIR 1936 All 830, a full Bench case which has been relied upon by in case of Sardar Iqbal J / Muhammad Azhar Hussain and another Vs. District Cricket Association, Lahore.

> "There is absolutely no conflict between the provisions of sections 5 and 29 of the Code. The mere fact that section 29 empowers High Court to try an offence under any other law than the Penal Code does not show that the High Court can take cognizance of the offence straight off, try the accused and convict and punish him without following the procedure laid down in the Code. So in the case of an offence due to contravention of the provisions of Section 85, Companies Act, the High Court has no jurisdiction to take cognizance of and try any such offence and impose the fines prescribed by the Companies Act. The High Court would have jurisdiction to try the accused only if the case is committed to the High Court under section 194(1), Criminal Procedure Code, or if proceedings are started on an application of the Advocate General under section 194(2) or are transferred to it under section 526 Criminal P.C. It would not have jurisdiction to try the accused merely on an application made -nder section 85, Companies Act."

17. The position therefore is clear that merely having the power to try a case is not enough for the High Court for the purpose of having cognizance of the case unless the other provisions of the code are complied with to bring the case within its cognizance.

18. Similar is the position in respect of the offences under Ordinance VII of 1979. The Sessions Judge has the exclusive jurisdiction to try those cases but Section 5(2) of Cr.P.C. provides that all offences under any other law shall be inquired into tried and otherwise dealt with in accordance with the same provisions and thus provisions of Section 193 of

(30)

Criminal Procedure Code are attracted to the trial of each cases and there is nothing in the provisions of Ordinance VII of 1979 which is inconsistent or derogatory to the provisions of Section 193 of Cr.P.C. which bars the Sessions Judge from taking cognizance of a case unless it is sent to it by a magistrate under Section 190(3) of Cr.P.C.

19. It is thus quite clear that a Sessions Judge cannot entertain a direct complaint unless it is sent to him under Section 190(3) of Cr.P.C.

20. We may as well take note of the manner in which corruption cases are taken cognizance of and tried by special Judges. Police report is filed before the special Judges directly without complying with procedure under Section 190(3) of Cr.P.C. But that is done because Section 4 of Cr.P.C., Law Amendment Act 1958 has authorised the taking cognizance of those cases by special Judges and therefore in respect of those offences different manner of taking cognizance has been prescribed and hence the bar of Sec.193 of Cr.P.C. is not attracted. If there had been a similar procedure prescribed in Ordinance VII/1979 then of course direct cognizance could be taken, but it is not so prescribed and hence bar of Sec.193 of Cr.P.C. is attracted.

21. The upshot of the above discussion is that the impugned order is correct in law and this appeal is therefore found to be of no merit and is dismissed.

MEMBER - I

CHAIRMAN

MEMBER - V

Fit for Reporting

Islamabad, the 17th January, 1982.

AZN