Quarterly Case Law Update

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Supreme Court of Pakistan

Compounding in *Tazir* Cases

PLD 2019 Supreme Court 461

Muhammad Yousaf v. The State

Present

[**Asif Saeed Khan Khosa, C.J.**, Mushir Alam, Maqbool Baqir, Manzoor Ahmed Malik, Sardar Tariq Masood, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ]

Surviving heirs of the victim and not the heirs of the heirs of the victim have the right to compound in *Tazir* cases under Section 345 Cr.PC.

Qisas and Ta'zir belong to separate legal regimes. The two concepts have different origins as the concept of Qisas has its origin in divine Islamic law and jurisprudence pertaining to offences in respect of human life and body whereas the origin of the concept of Ta'zir is secular and in our context it is derived mainly from Anglo-Saxon traditions. In the regime of Qisas the offence is committed against the victim whereas in the regime of Ta'zir the offence is committed against the State and the society as a whole. In cases of Qisas the right of Qisas as well as the right to waive or compound the offence vest in the victim or his wali whereas in cases of Ta'zir the serious offences committed in respect of human life or body were originally not compoundable in our law but subsequently only a limited concession was made in that regard by the State by amending the law and providing for compounding of most of such offences by the victim or his heirs. Even while making such concession and providing for composition of such offences no right to compound was conferred on the victim or his heirs and any composition proposed by the parties was made subject to permission or leave of the relevant court which may refuse to grant the requisite permission or leave in the peculiar circumstances of a given case. Partial compromise is permissible in a case of Qisas but is not allowed in a case of Ta'zir. Devolving of a right of Qisas, waiver or compounding on the heir of a dead wali of the victim is recognized in cases of Qisas but is not permitted or recognized in cases of Ta'zir. Claiming Qisas is a right in Islamic dispensation whereas compounding in a case of Ta'zir is a concession subject to permission or leave of the relevant court in serious offences. A right in law ordinarily devolves upon an heir but a concession extended to a particular person is not to devolve on another unless the law expressly provides for the same. We entertain no manner of doubt that while expressly providing for some principles applicable to compounding of offences in cases of Qisas and while omitting to expressly provide for the said principles vis-à-vis cases of Ta'zir the legislature was conscious of the difference between the two concepts and their requirements. The silence of the legislature in this regard speaks, and speaks quite loudly, and we as a Court of law cannot ignore it or override it by transposing the principles applicable to one regime of law to the other. We cannot shut our eyes to the clear provisions of section 345(7), Cr.P.C. according to which in a case of Ta'zir "No offence shall be compounded except as provided by this section.

Syed Mansoor Ali Shah, J. agreeing with the conclusion but for his own reasons.

Application of Principle of *'falsus in uno, falsus in omnibus'*

PLD 2019 Supreme Court 527

In Re: Notice to Police Constable Khizar Hayat son of Hadait Ullah on account of his false statement.

Present

[**Asif Saeed Khan Khosa, C.J**,, Mazhar Alam Khan Miankhel and Sajjad Ali Shah, JJ]

The rule *falsus in uno, falsus in omnibus* shall henceforth be an integral part of our jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and spirit.

A judicial system which permits deliberate falsehood is doomed to fail and a society which tolerates it is destined to self-destruct. Truth is the foundation of justice and justice is the core and bedrock of a civilized society and, thus, any compromise on truth amounts to a compromise on a society's future as a just, fair and civilized society.

Verification of Credibility of the Eye-Witnesses after Test of Identification Parade

2019 SCMR 956

Mian Sohail Ahmed v. The State

Present

[Asif Saeed Khan Khosa, C.J., Sajjad Ali Shah and **Syed Mansoor Ali Shah**, JJ]

Identification of an accused, a two-step process; First, the suspects undergoes a test identification parade and second, the credibility of the eye-witness is assessed by weighing the evidence in the light of the estimator variables. A non-exhaustive list of "estimator variables" i.e., stress, weapon focus, duration, distance and lighting, characteristics of witness and perpetrator, memory decay negatively affecting the memory process stated.

Vigilantism cannot be equated with Justice

Criminal Appeals No. 145-L and 146-L of 2017

Ali Raza alias Peter v. The State

Present

[Asif Saeed Khan Khosa, C.J,, Mazhar Alam Khan Miankhel and **Qazi Muhammad Amin Ahmed**, JJ]

Retributive torture, that too by mobs through street justice, would not only have most de-humanizing impact on our society but also triggers chaos and anarchy as is evident in the present case besides being violative of Constitutional mandate.

Vendetta cannot equate itself with justice. It is devoid of solemnity inherent in the process of law, leaving an offender as a victim, an object of sympathy at the end of the day, without judicial certainty about his guilt.

https://www.supremecourt.gov.pk/downloads_judgements/crl.a._145_l_2017.pdf

Appointment of Interpreter in case of Deaf & Dumb Witness

2019 SCMR 64, PLJ 2019 SC (Cr.C.) 405

Muhammad Mansha v. The State

Present

[Dost Muhammad Khan & **Qazi Faez Isa,** JJ]

A deaf and dumb person is the solitary eye-witness in this case, however, the trial Court did not determine the level of his comprehension. There is also nothing on record to show how the Court concluded that Muhammad Munir was "well versed with his language of signals." It is also not clear in what capacity Muhammad Munir interpreted the sign language of the deaf and dumb witness, whether he did so as a translator or as an expert in terms of Article 59 of the Qanun-e-Shahadat.

Jurisdiction of Anti-Terrorism Courts

2019 SCMR 1365

Akhmat Sher v. The State

Present

[Manzoor Ahmad Malik, Sardar Tariq Massod and **Qazi Muhammad Amin Ahmed**, JJ]

Every crime is repugnant, murder being most abhorrent and shocking; impacts and aftermaths of violence upon the victims, their families and surroundings are seldom benign with fear invariably concomitant thereof, nonetheless, special jurisdiction under the Anti-Terrorism Act, 1997 has been created to deal with situations enumerated in section 6 thereof; these fall outside the ambit of personal pursuits and vendettas, carried out through violence.

Rule against Strictures

Criminal Appeal No. 03-P of 2017

Miss Nusrat Yasmeen v. Registrar Peshawar High Court

Present

[Manzoor Ahmad Malik, **Syed Mansoor Ali Shah** and Qazi Muhammad Amin Ahmed, JJ]

The High Court should not pass strictures in a judgment against a judge of the District Judiciary or summon a judge in judicial proceedings, relating to his or her judgment, for public reprimand in open court. The course open to the High Court is on the administrative side and the judge(s) of the High Court hearing the case, can apprise the Chief Justice of the Court through

a confidential administrative note highlighting the grave illegalities, irregularities and improprieties noticed, leaving to the Chief Justice or the Administrative Committee of the High Court, as the case may be, to take an appropriate disciplinary action against the judge of the District Judiciary.

https://www.supremecourt.gov.pk/downloads_judgements/crl.a._03_p_2017.pdf

Foreign Superior Courts

SUPREME COURT OF UNITED STATES

Judicial Review of Gerrymandering

(588 U. S. (2019))

Rucho v. Common Cause

Before

[Roberts, C. J, Thomas, Alito, Gorsuch, Kavanaugh, Kagan, Ginsburg, Breyer, Sotomayor, JJ]

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," does not mean that the solution lies with the federal judiciary. [P]artisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. Judicial action must be governed by standard, by rule, and must be principled, rational, and based upon reasoned distinctions found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements. (Majority View)

The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters did not have an equal opportunity to participate in the political process. Their votes counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene. (Minority View)

(KAGAN, J. wrote the dissent in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined).

SUPREME COURT OF UNITED KINGDOM

Legality of Prime Minister's Advice to Queen to Prorogue Parliament is Justiciable

[2019] UKSC 41

Miller v. Prime Minister

Before

[**Lady Hale, President, Lord Reed, Deputy President,** Lord Kerr, Lord Wilson, Lord Carnwath, Lord Hodge, Lady Black, Lord Lloyd-Jones, Lady Arden, Lord Kitchin and Lord Sales]

Although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it. Almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense.

If the issue before the court is justiciable, deciding it will not offend against the separation of powers. The court will be performing its proper function under constitution. Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers.

It is their [courts'] particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context.

HIGH COURT OF AUSTRALIA

Procedural Fairness

[2019] HCA 3

Minister for Immigration v. SZMTA

Coram

[**Bell, Gageler, Keane,** Nettle and Gordon, JJ]

For a breach [of procedural fairness] to constitute jurisdictional error on the part of the Tribunal, the breach must give rise to a "practical injustice": the breach must result in a denial of an opportunity to make

submissions and that denial must be material to the Tribunal's decision. Materiality, whether of a breach of procedural fairness in the case of an undisclosed notification or of a breach of an inviolable limitation governing the conduct of the review in the case of an incorrect and invalid notification, is thus in each case essential to the existence of jurisdictional error. A breach is material to a decision only if compliance could realistically have resulted in a different decision.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Liability of legal causation of unlawful arrest to unlawful remand detention---principles

[2019] ZACC 32

De Klerk v. Minister of Police

Coram

[Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and **Theron** J]

A claim under the *actio iniuriarum* (action for non-patrimonial damages) for unlawful arrest and detention has the following requirements:

the plaintiff must establish that their liberty has been interfered with;

the plaintiff must establish that this interference occurred intentionally;

the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not; and

the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.

The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. A remand order by a Magistrate does not necessarily render subsequent detention lawful. The liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. The determination of legal causation is based on the consideration of the various factors, including direct consequences, reasonable foreseeability, and the presence of a *novus actus interveniens*. A reasonable arresting officer in the circumstances may well have foreseen the possibility that, pursuant to an unlawful arrest, the arrested person would routinely be remanded in custody after their first appearance. The arresting officer knew that the applicant's further detention after his court appearance would be the consequence of her unlawful arrest of him. She reconciled herself with this knowledge in proceeding to arrest him. To impose liability on the respondent [Minister of Police] for the entire period of the detention [including detention post court-appearance], in the circumstances, would not be exceeding the bounds of reasonableness, fairness and justice.

SUPREME COURT OF CANADA

Privileged Communication—Exceptions

2019 SCC 22

R v. Mills

Judges

[Wagner C.J, Richard, Abella, Rosalie Silberman, Moldaver, Michael, Karakatsanis, Andromache, Gascon, Clement, **Brown,** Russel, Martin and Sheilah, JJ]

In order to challenge an alleged search under s. 8 [of the Constitution Act, 1982, which gives protection against unreasonable search or seizure], one must demonstrate the objective reasonableness of his claim to privacy — the assessment of which must have regard to the totality of the circumstances. This is not purely a descriptive question, but rather a normative question about when Canadians ought to expect privacy, given the applicable considerations. This appeal involves a particular set of circumstances — the police created one of the communicants and controlled her every move — and two considerations become decisive: the nature of the investigative technique used by police, and the nature of the relationship between the communicants. Specifically, here, the investigative technique did not significantly reduce the sphere of privacy enjoyed by Canadians because the technique permitted the state to know from the outset that the adult accused would be communicating with a child he did not know. In these circumstances, any subjective expectation of privacy the adult accused might have held would not be objectively reasonable.

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