

Quarterly Case Law Update

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Supreme Court of Pakistan

Effect of Compromise on Sentencing in Non-compoundable Offence

https://www.supremecourt.gov.pk/downloads_judgments/c.a._1772_2008.pdf

Moinuddin v. The State

Present

[Asif Saeed Khan Khosa, CJ; Mushir Alam, Manzoor Ahmad Malik, Sardar Tariq Masood, Ijaz Ul Ahsan, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ.]

An offence which the law declares to be non-compoundable remains non-compoundable even if in a coordinate compoundable offence a compounding takes place between the relevant parties and, therefore, despite any compounding of the coordinate compoundable offence an acquittal cannot be recorded in the non-compoundable offence on that sole basis...In an appropriate case, keeping in view the peculiar circumstances of the case, compounding of a coordinate compoundable offence may be considered by a court towards reduction of the sentence, within the permissible limits, passed for commission of a non-compoundable offence. Consideration of this factor vis-à-vis reduction of the sentence passed for commission of the non-compoundable offence lies within the

discretion of the court and cannot be treated as automatic or as a matter of course.

Resort to Dictionary Meaning of Words in Absence of Statutory Definition

https://www.supremecourt.gov.pk/downloads_judgments/c.p._4719_2017.pdf

Phoenix Security (Pvt) Ltd v. Pir Muhammad

Present

[Gulzar Ahmed and Yahya Afridi, JJ.]

The question before the Court was: whether a 'security guard' is included in the term 'watchman' used in the provisions of Section 5(1)(ix) the West Pakistan Shops & Establishments Ordinance, 1969.

Definition of the term 'watchman' is not available in the Ordinance of 1969. No definition of the word 'watchman' in any of the other labour laws is referred. In the absence of the definition of term 'watchman' in the very Ordinance of 1969 and in any other law, resort is made to the dictionary meaning, to ascertain its meaning---The common feature of the meanings of the term 'watchman' given in the dictionaries is that it is defined by nature of its duties, and the duty of watchman has been given that of guarding, patrolling and overseeing the building, group of buildings or other property or a man whose job is to guard a building, for example, a Bank, an office building or a factory, especially at night...In all the meanings given in the noted dictionaries the word 'guard' is common.

The Court found that both the terms, watchman and security guard, are synonymous to each other and in the nature of their duties also, and held that the term 'watchman' includes a 'security guard'.

Legitimate Expectation---Civil Service Matters

https://www.supremecourt.gov.pk/downloads_judgments/c.a._1219_2015.pdf

Chairman, FBR v. Mrs. Naureen Ahmed

Present

[Umar Ata Bandial and Yahya Afridi, JJ.]

Seniority in service is a valuable right and the civil servants have a legitimate expectancy that the probationary service law prevalent at the time when they enter their probation shall remain in force until their confirmation. The principle of legitimate expectancy aims at enforcing fairness and preventing arbitrariness...This rule of fairness and non-arbitrariness is recognised in our jurisprudence to mean that an advantage or benefit derived from a competent legal dispensation, departmental practice or established procedure that has been extended to and enjoyed by a person may legitimately be expected to remain available unless notice or opportunity to defend or adjust his position is given to that person.

Public Interest Litigation---Principles of Withdrawal

https://www.supremecourt.gov.pk/downloads_judgments/const.p._39_16122019.pdf

The Jurists Foundation v. Federal Government

Present

[Asif Saeed Khan Khosa, CJ., Mazhar Alam Khan Miankhal and **Syed Mansoor Ali Shah**, JJ.]

A public interest litigation (PIL) can only be withdrawn with the permission of the Court. This is because it does not raise a personal issue limited to the petitioner; it is not a *dominis litis* (the person to whom a suit belongs) that would give a right to the petitioner to withdraw it as a matter of choice. In granting the permission (to withdraw) the Court would be guided by considerations of public interest and would also ensure that it does not result in the abuse of the process of law. Courts must guard against possibilities of such litigants settling the matters out of Court to their advantage and then seeking withdrawal of the case. Sometimes withdrawal of public interest litigation, for oblique ends, can be used to the detriment of the public interest agitated therein. The Court has to be cautious not to fall prey to such oblique motives.

Judicial Restraint---Substantive and Procedural

Judicial restraint in its substantive approach urges Judges considering constitutional questions to give deference to the views of the elected branches and invalidate their actions only when constitutional limits have clearly been violated; while the principle, “if it is not necessary to decide more, it is necessary not to decide more” well states its procedural aspect.

Essential Legislative Function---Delegation

Though the Legislature can confer upon any person or body the power to make subordinate/delegated legislation (rules, regulations or byelaws, etc) in order to give effect to the law enacted by it yet it must perform itself the essential legislative function, i.e. to exercise its own judgment on vital matters of policy and enact the general principles providing guidance for making the delegated legislation. Delegation of an “essential legislative function” by the Legislature to the Executive is not permissible under the Constitution. The foundation of embargo owes its genesis to the concept of trichotomy of powers between the Legislature, the Executive and the Judicature, which is a fundamental principle of our constitutional construct. Under the Constitution, these three organs of the State have been entrusted with separate and specified functions. The primary function of the Legislature is to legislate laws, of the Executive to execute laws, and of the Judicature to interpret laws. The Legislature cannot abdicate performance of the function assigned to it by the Constitution and set up a parallel legislative authority.

Legal Source of Office Memorandums

https://www.supremecourt.gov.pk/downloads_judgments/c.a._1481_2015.pdf

Muhammad Saleem v. Federal Public Service Commission

Present

[Umar Ata Bandial and **Munib Akhtar**, JJ.]

The Civil Servants Act, 1973 speaks in large measure in generalities, providing for much of the detailed structure of the terms and conditions to be determined as “prescribed”, i.e., as established in the exercise of the rule making power under section 25. Many rules including in particular the Civil Servants (APT) Rules, 1973 have been framed under and with specific reference to section 25...The legal source for the issuance of the Office Memorandums that are concerned with the terms and conditions of service of the civil servants can only be the 1973 Act itself. Thus, the legal power whereby the Office Memorandums are issued is nothing other than an aspect (and exercise) of the rule making power conferred in terms of section 25.

Status of Office Memorandums vis-a-vis Service Rules

The Office Memorandums are co-equal with other rules framed in terms of section 25, such as the APT Rules. They cannot be considered subordinate to such rules. It follows from this that the Office Memorandums cannot, in case of any inconsistency, be regarded as yielding to the rules otherwise made under section 25, i.e., more formally with specific reference thereto. Since in the legal hierarchy they are of equal standing, the Office Memorandums and rules such as the APT Rules must be read together in a harmonized and consistent manner, to the maximum extent possible...The Office Memorandums and the APT Rules act in tandem. They operate in their own, though interlocking, spheres...It is only if there is an irreconcilable difference that the question of which will prevail would arise. And that question would have to be addressed by resort to well established rules of interpretation including, but not limited to, those such as relating to earlier versus later in time, or general versus specific etc.

Foreign Superior Courts

SUPREME COURT OF NETHERLANDS

Climate Change Justice

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2006>

State of the Netherlands v Urgenda

A District court ruled in 2015 that the country was required to cut its carbon emissions by 25 percent by 2020 compared to 1990 levels. Supreme Court while upholding the decision, observed:-

“In the Dutch state system, decision-making on the reduction of greenhouse gas emissions belongs to the government and parliament. They have a great deal of freedom to make the necessary political decisions. It is up to the judge to judge whether the government and parliament have kept their decisions within the limits of the law to which they are bound. These limits stem, among other things, from the ECHR. The Constitution requires the Dutch court to apply the provisions of this treaty. The court must do this in accordance with the interpretation thereof by the ECtHR. This task for the judge to offer legal protection, also against the government, is an essential part of the democratic constitutional state.”

SUPREME COURT OF NEW YORK

Mandatory Vaccination---Exemption on Religious Grounds

2019 N.Y. Misc. LEXIS 6444

F.F. v State of New York

Before

Denise A. Hartman, J. [Acting Justice of the Supreme Court]

The constitutionality of legislation which repealed New York's Public Health Law provision that had allowed religious exemptions from mandatory vaccinations for children who attend public and private schools in the State was brought under question on the grounds that it violated rights under the Free Exercise Clause of the First Amendment of the United States Constitution and Article 1 § 3 of the New York Constitution besides being offensive to the Equal Protection Clause of the United States Constitution and forcing to engage in compelled speech in violation of the First Amendment.

The Court observed, while acknowledging respect for religious beliefs, the legislative memoranda expressed the collective legislative view that public health concerns should prevail. The stated purpose of the legislation was the protection of public health; the elimination of the medical exemption would be contrary to that purpose.

SUPREME COURT OF THE STATE OF WASHINGTON

Individual Legislators---Records Disclosure

2019 Wash. LEXIS 828

Associated Press v. Wash. State Legislature

Before

[Justice **Susan Owens**. WE CONCUR: Chief Justice Mary E. Fairhurst, Justice Barbara A. Madsen, Justice Charles K. Wiggins. AUTHOR: Justice Debra L. Stephens. WE CONCUR: Justice Charles W. Johnson, Justice Mary I. Yu. AUTHOR: Justice Sheryl Gordon McCloud. WE CONCUR: Justice Steven C. González]

A coalition of news media outlets filed a complaint against the institutional legislative bodies and four individual legislative leaders in their official capacities alleging that they violated the Public Records Act (PRA) by withholding public records. The defendants refuted the allegations, arguing that the PRA sets out a narrower public records disclosure mandate specific to the legislative branch, which it argued exempts both its institutional bodies and individual legislators' offices from the PRA's general public disclosure mandate binding on "agencies." The issue this case presented for the Washington Supreme Court's review centered on whether the state legislative branch was subject to the general public records disclosure mandate of the PRA.

The Court determined that under the plain meaning of the PRA, individual legislators were "agencies" subject in full to the PRA's general public records disclosure mandate because they were expressly included in the definitional chain of "agency" in a related statute. Furthermore, the Court held the institutional legislative bodies were not "agencies" because they were not included in that definitional chain, but they were, instead, subject to the PRA's narrower public records disclosure mandate by and through each chambers' respective administrative officer.

HIGH COURT OF CANADA

Judicial Review---Reasonableness vs. Correctness Review

2019 SCC 65

Minister of Citizenship and Immigration v. Alexander Vavilov

Coram

[Wagner, Richard; Abella, Rosalie Silberman; Moldaver, Michael J.; Karakatsanis, Andromache; Gascon, Clément; Côté, Suzanne; Brown, Russell; Rowe, Malcolm; Martin, Sheilah]

“V” was born in Toronto in 1994 when his parents were posing as Canadians under assumed names. In reality, they were foreign nationals working on assignment for the Russian foreign intelligence service. V did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, he lived and identified as a Canadian, and he held a Canadian passport. In 2010, V's parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia. Following their arrest, V's attempts to renew his Canadian passport proved unsuccessful. However, in 2013, he was issued a certificate of Canadian citizenship. In 2014, the Canadian Registrar of Citizenship cancelled V's certificate on the basis of her interpretation of s. 3(2)(a) of the Citizenship Act. This provision exempts children of “a diplomatic or consular officer or other representative or employee in Canada of a foreign government” from the general rule that individuals born

in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception to the rule of citizenship by birth in s. 3(2)(a), as she interpreted it, applied to V, who therefore was not, and had never been, entitled to citizenship. V's application for judicial review of the Registrar's decision was dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appealed. Supreme Court dismissed the appeal holding the decision of Registrar unreasonably. It was observed:-

"Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable."

THE COURT OF JUSTICE OF THE EUROPEAN UNION

Difference Between Information Society Service and a Real Estate Agent

(<http://curia.europa.eu/juris/celex.jsf?celex=62018C0390&lang1=en&type=TEXT&ancre=>)

Airbnb Ireland UC Case

Judges

Ruling from the investigating judge of the Tribunal de grande instance de Paris (Regional Court, Paris) (France))

Ireland UC, a company established in Dublin (Ireland) under Irish law, offers an electronic platform the purpose of which is, on payment of a commission, to establish contact, in particular in France, between, on the one hand, hosts, whether professionals or private individuals, with accommodation to rent and, on the other, people looking for such accommodation. Airbnb Payments UK Ltd, a company established in London (United Kingdom) under the law of the United Kingdom, provides online payment services as part of that contact service and manages the payment activities of the Group in the European Union. In addition, Airbnb France SARL, a company established under French law and a supplier to Airbnb Ireland, is responsible for promoting that platform among users in the French market by organising, inter alia, advertising campaigns for target audiences. The investigating judge of the tribunal de grande instance de Paris (Regional Court, Paris, France) requested ruling on whether the

National legislation imposing certain restrictions on the exercise of the profession of real estate agent are applicable to Airbnb.

Article 2(a) of Directive 2000/31, which refers to Article 1(1)(b) of Directive 2015/1535, must be interpreted as meaning that an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services, while also providing a certain number of services ancillary to that intermediation service, must be classified as an 'information society service' under Directive 2000/31

Article 3(4) of Directive 2000/31 must be interpreted as meaning that, in criminal proceedings with an ancillary civil action, an individual may oppose the application to him or her of measures of a Member State restricting the freedom to provide an information society service which that individual provides from another Member State, where those measures were not notified in accordance with that provision.

COURT OF APPEALS, STATE OF MICHIGAN

Bottled Water ----Not Life Essential

2019 Mich. App. LEXIS 7659

Nestlé Waters North America, Inc. Vs Township of Osceola

Coram

Stephens, P.J., and Servitto and Ronayne Krause, JJ.

Osceola Township, appealed by leave granted the circuit court's order overturning the decision of defendant's planning commission denying the request of plaintiff, Nestlé Waters North America, Inc., for a permit to construct a booster-pump building on a location zoned for agricultural uses. The circuit court observed that water was life essential and proposed booster pump facility was an essential public service. The Court of Appeal while overturning the decision of Circuit Court observed:-

"---[O]ther than in areas with no other source of water, bottled water is not essential. The trial court erred in effectively concluding that because water is essential, the provision of water in any form, manner, or context is necessarily an "essential public service."

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Research Centre

Supreme Court of Pakistan

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