

IN THE SUPREME APPELLATE COURT GILGIT-BALTISTAN

Before: **Mr. Justice Muhammad Nawaz Abbasi, Chief Judge,**
Mr. Justice Syed Jaffar Shah,
Mr. Justice Muhammad Yaqoob,

Cr. Appeal No. 03/2009

Tota Jan Appellant

Versus

The State Respondent

Cr. Appeal No 04/2009

Ibrar & others Appellants

Versus

The State Respondent

CHARGE UNDER SECTION 17/(3) HARABAH OFFENCE AGAINST PROPERTY (HUDOOUD) ORDINANCE 1979 READ WITH SECTION 341/506 PPC FIR NO. 156/2004 POLICE STATION CANTT GILGIT.

**PETITION FOR LEAVE TO APPEAL AGAINST THE JUDGMENT/ORDER OF DIVISION BENCH OF CHIEFCOURT
DATED 26-8-2009**

Present: **Mr. Johar Ali, Advocate for the appellant along with,**
Mr. Muhammad Abbas Khan Advocate on record.
Deputy Advocate General for the State.

Date of hearing: 17-11-2009.

J U D G M E N T

SYED JAFFAR SHAH,.....J. These two appeals bearing Nos. 03/2009 and 04/2009 by leave arise from the judgment dated 26-08-2009 passed by Divisional Bench of Chief Court Gilgit Baltistan in Criminal Appeal NO. 5/2008 and 06/2008, whereby the learned Chief Court maintained the sentence awarded by Additional Sessions Judge Gilgit in a case registered against the appellants vide F.I.R. No. 156/2004 Under Section 17 Harraba which was later on substituted by section 392 PPC.

1. Brief facts giving rise to the present appeals are that one sajjad Hussain A.S.I./Incharge Police Check Post Danyore lodged a complaint with Police Station Air Port Gilgit alleging therein that on 03-08-2004 one Faisal Shahzad driver of a Truck reported the matter to Danyore Police Chowki that on the night of occurrence he along-with co-driver Rahimullah and cleaner of Truck No. LSC 3082, Babar Nawaz was on his way to Rawalpindi from Hunza and when his truck reached near a place known as Juglote Gah he having seen the road blocked with stones, directed the cleaner to remove the stones and on his direction the cleaner got down from the truck and started removing the stones from the road, in the meanwhile three armed persons suddenly appeared and started aerial firing and directed to switch off the light of the vehicle and robed a sum of Rs.14500/- and a wrist watch and ring from him and Rs.400/- from the co-driver. On his report FIR No. 156/2004 was registered with Police Station Air Port Gilgit under Section 17 Hudood Ordinance 1979.

2. After completion of necessary investigation the Police report was submitted in Anti Terrorist Court Gilgit in terms of Section 173 Cr.P.C. after recording the prosecution evidence the case was transferred to Sessions Judge Gilgit on the request of District Attorney as the provisions of ATA were not attracted who entrusted the matter to Additional Sessions Judge Gilgit for disposal. After completion of the proceedings the Additional Sessions Judge Gilgit convicted the appellants Under Section 392 Cr.P.C. for a terms of Seven Years R.I. each and imposed fine of Rs. 30,000/-.

3. The appellants filed separate appeals against their conviction while the state preferred a Revision Petition for enhancement of sentence awarded to appellants by Trial Court. The learned Division Bench of the Chief Court vide impugned judgment dated 26-08-2009 dismissed the appeals against conviction and also the Revision for enhancement of sentence.

4. We have heard the learned counsel for appellants and A.G for the state at length, the learned counsel for the appellants at the very out set submitted that the Trial Court as well as the appellate court have based their finding on the identification parade conducted inside Police Station premises under supervision of a Naib Tehsildar and two witnesses/identifiers allegedly identified co-accused namely Saeed

Hasan and Ibrar as culprits while no identification parade was conducted to the extent of appellant Tota Jan. He further contended that there was no other evidence to connect the appellants with the present crime except so called identification test as such both the learned courts below have seriously erred in convicting the appellants in absence of sufficient evidence.

5. On the other hand the learned Advocate General controverted the above submission made by learned counsel for appellants and vehemently opposed the Appeal. He submitted that two witness namely Babar Nawaz and Faisal Shahzad had identified the appellants Saeed Hassan and Ibrar during identification parade and also during court proceeding. He stressed that the evidence of these two witnesses was sufficient for conviction of the said two appellants so far as the other appellant namely Tota Jan is concerned the prosecution had successfully recovered the incriminating articles and looted cash from his possession. He went on saying that the Trial Court as well as Chief Court have rightly convicted the appellants.

6. After hearing the arguments on both sides and perusal of the record we have come to the conclusion that the prosecution case solely rested on the identification parade as the other evidence regarding recovery of looted amount and the weapons has already been discarded/rejected by the learned courts below as such it need not be discussed.

7. Admittedly the occurrence took place during a dark mid night in a place far from the local population, according to the statements of driver and cleaner i.e PW-7,8 and 9 when they reached in the area of Jaglote Gah at about 23:30 hours where they found the road having been blocked by the rocks on the road, stopped the truck and PW- 9 on the directives of PW-8 got down from the truck in order to remove the stones/rocks, mean while accused opened aerial firing and looted an amount of Rs.14500/= from the pocket of PW- 8 and articles from PW-9. However PW -7 disclosed at the time of examination in Chief before the trial court that the looted amount was Rs.3000/- only and there after the accused fled away from the scene of occurrence and the complainant and witnesses proceed towards police check post to lodge the complaint. The witness also deposed before the trail court that it was dark on the night of occurrence and there was no moon light. The head lights of the truck

were also stated to be off when the accused came at the site of occurrence and the only source of identification of accused according to witnesses was dim light of upper side light of truck.

8. The prosecution examined 10 witnesses and as stated earlier the trial court as well as the Hon'ble Chief Court based their finding/conviction on the statement of PW-8, 9 and PW -5. PW-8 and 9 are Driver and Conductor of the truck who allegedly identified the appellants during the identification test carried out in police station Airport. While PW-5 is a Naib Tehsildar in whose supervision the identification parade was conducted.

9. It is strange that the statement of co-driver of truck namely Rahimullah PW-7 was neither discussed nor considered by the two courts below. The said witness despite of his presence at the time of occurrence was not called by the prosecution to participate the identification parade. This witness during Re-Examination categorically stated that "I do not charge the accused present in court".

10. The only piece of evidence on the basis of which the appellants were convicted is the identification parade conducted under the supervision of PW-5 in the premises of police station Air Port, admittedly the appellant Ibrar and Saeed were arrested by the Police on 16/08/2004 but their identification parade was held on 23/08/2004. This delay of 7 days in identification parade goes un-explained. According to Rule 26-32 of Police Rules 1934 and guidelines laid down by Superior Judiciary of Pakistan the identification parade is required to be carried out as soon as possible without any delay and soon after the arrest of suspect. But the prosecution failed to carryout the same soon after the arrest of the suspect in the present case.

11. The identification parade conducted under supervision of PW-5 who happened to be a Naib Tehsildar at the time of holding of identification parade, the prosecution examined him as PW-5 who deposed that on the directives of SDM Gilgit, he conducted the identification parade in Police Station Airport on 23-08-2004 wherein appellant Saeed and Ibrar were identified by PW -8 and 9 and after completion of process of identification parade he prepared report/memo ex-PW-5/1, on cross examination he admitted that he was Naib Tehsildar at that time, participants/dummies were not wearing similar dress, their ages were also different,

some of dummies were clean shaved and others having beard, identifier were present in the office of S.H.O prior to his arrival in Police Station and suspect could also be seen in the lock up from the window of office of S.H.O. He though did not mention the number of dummies mixed in the identification parade however according to ex-PW-5/1, the number of dummies is ten. While the number of identifiers in column NO. 5 form 26 –(32) is mentioned as four.

12. In absence of any corroborative piece of evidence the prosecution should have carried out the identification parade in accordance with procedure/criteria laid down in section 26 rule 32 of Police Rules or guidelines laid down by superior courts of the country but unfortunately the prosecution adopted a novel procedure un warranted in law while holding the identification parade. No law authorizes an investigator to hold the identification parade in side the Police Station especially when the suspects/accused were visible from the office of SHO, where the identifiers were made seated and under these circumstances the possibility to have seen the accused by the identifiers before identification parade cannot be ruled out. The concerned SHO or investigating officer was required to detain the accused/appellants in jail without wasting a single moment and without showing them to identifiers. The investigating agency instead of holding the identification parade in a fair and transparent manner adopted a self styled procedure for identification parade, inside the premises of Police Station in presence of Naib Tehsildar instead of a Magistrate first class. The dummies intermingled with two accused in the joint identification parade as per ex-PW-5/1, were ten while as per section 26.32 (d) 9 or 10 dummies of similar dress and of the same religion, age and social status are required to be intermingled with one suspect/accused but the same is not done in the present case. The identifier also failed to attribute any role to the accused/suspect at the time of identification parade.

13. We have also gone through the judgment of Chief Court the learned Chief Court has based its finding mainly on the identification parade and has relied upon the statement of PW-8 and 9 and has held that these two witness being honest and disinterested their statements are reliable, without deeply minuting the statement of these two witnesses it is sufficient to discard their statement quo identification of the

appellant in a dark night merely on dim light of the truck especially when the witnesses were in a condition of fear to their lives. Even if it is presumed that the said witnesses are symbols of truth their statements are not sufficient for conviction because of non transparent rather illegal procedure adopted by the investigator while conducting the identification parade as discussed above and in absence of other material.

In the light of above discussion we have come to the conclusion that the prosecution has failed to establish the guilt of the appellants beyond reasonable doubt. It is well established principle that every doubt which may arise would go in favour of accused as such conviction of the appellants in given circumstances is not sustainable. Consequently we accept these appeals, set aside the impugned judgment of learned Chief Court dated 26-8-2009 and judgment dated 09-4-2008 passed by Additional Session Judge Gilgit and acquit the appellants from the charge giving them benefit of doubt, our short order by virtue of which the appeals were accepted and the appellants were released is treated as part of this judgment.

Chief Judge

Judge

Judge