

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH
(Judicial Department)

Cr.A No. 58-M/2016
With M.R Nos. 2 and 2-A/2016

- 1) *Sangeen Khan s/o Ali Jan r/o Ghazi Baba, Odigram presently at Khwaja Abad, Mingora, District Swat.*
- 2) *Ilyas s/o Khurshed Anwar r/o Hafiz Abad, Odigram, District Swat.*

(Appellants)

Versus

- 1) *The State.*
- 2) *Amjad Ali s/o Muhammad Gul r/o of Afsar Abad, Saidu Sharif, District Swat.*

(Respondents)

Present:

Mr. Sher Muhammad Khan, Advocate for the appellants.

Mr. Rabnawaz, Additional Advocate General for State.

M/S Muhammad Amin Khan, Razaullah and Faisal Khan, Advocates for the complainant.

Date of hearing: **20.11.2017**

JUDGMENT

ISHTIAQ IBRAHIM, J.- Impugned herein is the judgment dated 23.02.2016 rendered by learned Additional Sessions Judge/Izafi Zilla Qazi, Kabal, District Swat in case F.I.R No. 13 dated 09.01.2014 registered under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, Section 13 of the Pakistan Arms

Ordinance, 1965 read with Section 34 of the Pakistan Penal Code, 1860 whereby the appellants were convicted and sentenced as under.

- 1) Both the appellants were convicted under Section 302(b)/34 P.P.C and sentenced to death with payment of Rs.300,000/- each as compensation under Section 544-A, Cr.P.C to legal heirs of the deceased.
- 2) They were convicted under Section 392/34 P.P.C and sentenced to suffer rigorous imprisonment of 08 years each with fine of Rs.50,000/- each and in case of default thereof to further undergo 03 months S.I each.
- 3) They were also convicted under Section 13 A.O/34 P.P.C and sentenced to 01 year R.I each.

The sentences were ordered to run concurrently”.

We have also before us Murder References No.02/2016 and 2-A/2016 sent by learned trial Court for confirmation of death sentences awarded to the appellants.

2. According to the first information report, complainant Amjad Ali son of Muhammad Gul made a report to local police

on 09.01.2014 at 18:15 hours in Emergency Ward of hospital Kabal to the effect that his father Muhammad Gul (deceased) was a taxi driver having motorcar No. 0101/ PSSS white coloured Model 1998 for this purpose; on the same day he was present in Chowk of hospital Saidu Sharif at late afternoon when his taxi was hired by Ilyas and Sangeen Khan (appellants) for Kabal. The complainant further stated in his report that at 17:30 hours he received the information that the mentioned accused have killed his father and snatched the taxi from him.

3. Report of the complainant was recorded vide *Murasila* (Ex.PW-5/1) the contents whereof were incorporated in formal F.I.R (Ex.PA). The appellants while travelling in the same car they had snatched from the deceased, were arrested on the same day at Gora Gat Checkpost. The motorcar was taken into possession vide recovery memo Ex.PW-5/7. The local police recovered a 30 bore pistol as weapon of the crime on pointation of appellant Ilyas and took it into possession vide

recovery memo Ex.PW-15/2. Both the appellants confessed their guilt before the learned Judicial Magistrate-I, Kabal by recording their statements under Sections 164/364, Cr.P.C on 15.01.2014.

4. After completion of investigation, challan was submitted before the trial Court. The appellants were formally indicted for the offences to which they pleaded not guilty and opted to face the trial. Prosecution produced and examined as many as nineteen (19) PWs in support of its case whereafter the appellants were examined under Section 342, Cr.P.C. They denied the allegations of prosecution and pleaded to be innocent, however, they neither produced any evidence in their defence nor opted to be examined in terms of Section 340(2), Cr.P.C. After hearing the arguments, the learned trial Court vide judgment dated 23.02.2016 convicted and sentenced the appellants as mentioned earlier, hence, this appeal as well as Murder References No.2 & 2-A of 2016.

4. Vide order dated 13.11.2017, this Court directed learned counsel parties as well as learned A.A.G. to assist this Court on the point of maintainability of this appeal in view of the formal charge which was framed under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 while conviction was recorded under Section 302(b) and 392 PPC read with 13 A.O.

5. While assisting this Court on the point of maintainability of the present appeal, learned counsel for the appellants contended that the Court which assumed appellate jurisdiction, had the authority to hold, with application of mind, that the charge had been framed either rightly or wrongly. He further argued that the case fell under Sections 302, 392/34 P.P.C, therefore, charge was wrongly framed under Section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and this Court has got the jurisdiction to entertain this appeal. He placed reliance on 2015 P Cr. L J 203 (Federal

**Shariat Court/ and 2015 MLD 155 (Federal
Shariat Court)**

6. As against that learned counsel for the complainant as well as learned A.A.G. argued that formal charge was framed against the appellants under Section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979, and they were tried by the trial court for the same offence, therefore, they should have approached the proper forum while assailing their conviction and sentence. Reliance was placed on 1984 SCMR 129 (Shariat Bench), PLD 1999 Supreme Court 1063, 2010 YLR 657 (Lahore), 2017 YLR 835 (Peshawar), 2017 YLR 888 (Karachi), PLD 2016 Karachi 191 and 2014 YLR 288 (Peshawar).

7. We have considered the above rival submissions of learned counsels for the parties and learned A.A.G and gone through the record.


8. Record would reveal that on 22.03.2014 formal charge was framed against

the appellants inter alia under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and they were tried for the said offence. The trial culminated into their conviction under Section 302(b)/392/34 P.P.C and they were awarded death sentences. The appellants have assailed their conviction and sentence through this appeal the maintainability whereof has been made disputed by learned counsels for the complainant and learned A.A.G.

9. Prior to discussion on the point of maintainability in light of the relevant case law, I would replicate for the sake of convenience the second proviso to Section 24 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 which is relevant.

“Provided further that an offence punishable under section 9 or section 17 shall be triable by a Court of Sessions and not by a Magistrate authorized under section 30 of the said Code and an appeal from an order under either of the said sections or from an order under any provision of this Ordinance which impose a sentence of imprisonment for a term exceeding two years shall lie to the Federal Shariat Court”.

10. While dealing with the case of "Muhammad Sharif V/s. The State" (PLD 1999 Supreme Court 1063), the Hon'ble apex Court made an elaborate discussion with regard to proper forum for entertaining appeals against the judgments rendered in the liked nature cases.



"The amendment so introduced in the second proviso to Article 27 of the prohibition Order and section 24 of the Offences against Property ordinance made the Federal Shariat Court appellate forum against the orders imposing punishment of more than two years imprisonment. Legislative history of these enactments, as was rightly pointed out by the learned Judge of High Court of Sindh, Karachi, shows that the jurisdiction of the Federal Shariat Court was enlarged progressively and even now it is confined to a certain category of cases mentioned in the second proviso and that the jurisdiction to hear appeal against other judgments i.e conviction entailing less than two years imprisonment or acquittal must necessarily be covered by provisions of the Code of Criminal Procedure. They are, however, not right in holding that appeal against any order of acquittal would lie to High Court and not to Federal Shariat Court".'

In another judgment rendered in the case of "Muhammad Abbas V/s. The State" (1984 SCMR 129), the august Supreme Court held that:-

“The next objection was in regard to the competency of the reference before the Federal Shariat Court, as according to learned counsel the reference for confirmation of the death sentence on a murder charge could lie only before the High Court. In this connection, he pointed out that in fact an appeal (Criminal Appeal No. 171 of 1983) had already been preferred before the High Court and was still pending there. As the trial by the Court of Session under the provision of the Ordinance was competent, the appeal would lie only before the Federal Shariat Court in view of the fourth proviso to section 20 (P L D 1967 S C 425) and a reference for confirmation of the death sentence, to that Court would be competent under subsection (1976 P Cr. L J 545) of the said section. The objection too had been rightly rejected by the Federal Shariat Court”.

In the light of the above referred judgment of the apex Court, the Lahore High Court while confronting with almost similar situation in the case of “Ghazanfar Ali V/s. The State” (2010 YLR 657) [Lahore] held that:-

“5. Since the appellant was also charged and tried under Section 17 (Haraba) of Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 notwithstanding the fact that he was acquitted from the charge under the Hudood Ordinance but convicted only under Pakistan Penal Code, the appeal would lie to the Federal Sharit Court and not before this Court in view of the law laid down by the Honourable Supreme Court in case of Muhammad Abbas V/s. The State 1984 SCMR 129 and Federal Sharit Court decision in Fazal Din’s

case PLD 1983 FSC 33 and thus the appeal of the convict would lie before the Federal Shariat Court and a reference for confirmation of death sentence would also competent before the said Court”.

Similar is the view of this Court in the judgment rendered in the case titled “Khushdil V/s. The State” (2017 YLR 835) wherein reliance was placed on various judgments of the apex Court including the above referred dicta. The relevant para of the judgment reads as under:-

“5. The order of conviction was challenged through the instant jail appeals before this Court, under misconception that the appellants have been convicted and sentenced under the Pakistan Penal Code. Undisputedly, the charge against the appellants was framed under section 17(4) Haraba of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979. The august Supreme Court of Pakistan has settled the law in cases titled Muhammad Abbas and another v. The State (1984 SCMR 129), Atta Muhammad v. The State (1984 SCMR 1109), Muhammad Sharif v. The State (PLD 1999 SC 1063) and Khizar Hayat v. Noor and others (2004 SCMR 209), according to which if an accused person is charged with an offence under the Hudood Laws, then in case of conviction or acquittal the forum of appeal would be the Federal Shariat Court and not the High Court. The Shariat Appellate Bench of august Supreme Court of Pakistan Jurisdiction in Sharif Khan's case on scanning the entire law on the subject, was pleased to hold that in such a situation for the purpose of Prohibition

Order and Ordinance VI of 1979, the word referred in section 417, Cr.P.C. in the context would mean the Federal Shariat Court and the appeal filed before the Federal Shariat Court would be competent. The above referred view was reiterated by the Sindh High Court in case titled Ijaz and another v. The State (2016 P Cr. LJ 130) and it was held that through the FIR and charge were framed under the Hudood laws but the sentence was awarded under the P.P.C. Mere passing of sentence under "Tazir" was not the determining factor for forum of appeal, rather it would be the "charge" that determined the forum of appeal".

11. In the backdrop of the above discussion in the light of the persistent view of the superior Courts, the present appeal against conviction is not competent before this Court and the proper forum for entertaining it is the Federal Shariat Court. The case law referred by learned counsel for the appellant cannot be relied upon for the reason that from the very inception the cases referred above were ordinary offences under the Pakistan Penal Code while in the present case the appellants have also been convicted under Section 392 P.P.C for snatching the car of the deceased.

12. Resultantly, office is directed to send the case file to Additional Registrar (J) at

the principal seat for its onward transmission
to the Federal Shariat Court alongwith Murder
References No.2 & 2-A of 2016.

Announced
20.11.2017

JUDGE

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23/11