

**JUDGMENT SHEET**  
**IN THE PESHAWAR HIGH COURT,**  
**MINGORA BENCH (DAR-UL-QAZA), SWAT**  
**(Judicial Department)**

**Cr.A No. 512-M/2019**

**Wajid Ali.....(Appellant)**

**VS**

**The State & 1 other.....(Respondents)**

**Cr.A No. 529-M/2019**

**Saida Jan.....(Appellant)**

**VS**

**The State & 1 other.....(Respondents)**

**Present:** *M/S Aurangzeb Khan and Mehboob-ur-Rahman, Advocates for the appellants.*

*Mr. Haq Nawaz, Asst. A.G for the State.*

*Mr. Zubair Khan, Advocate for the complainant.*

**Date of hearing: 30.04.2020**

**CONSOLIDATED JUDGMENT**

**WIQAR AHMAD, J.-** This order is directed to dispose of the instant appeal filed by Wajid Ali as well as the connected appeal bearing No. 529-M/2019 filed by the appellant namely Saida Jan under section 410 of the Criminal Procedure Code, 1898 (hereinafter referred to as 'Cr. PC'), against judgment and order dated 22.10.2019 passed by the learned Senior Civil Judge/Judicial Magistrate/Judge Model Trial Magistrate Court, Buner, whereby they were convicted

for commission of the offences and sentenced as follows;

- i. Under sections 457/34 PPC to undergo 7 years simple imprisonment along with fine of Rs. 50,000/- each and in default they shall further undergo six months S.I.
- ii. Under sections 380/34 PPC to undergo 7 years simple imprisonment along with fine of Rs. 25,000/- each and in default they shall further undergo three months S.I.

2. FIR No. 926 dated 07.06.2017 registered under sections 457/380/34 PPC and 15-A.A at Police Station Gagra, District Buner (Ex PW 6/1), was lodged on the basis of Murasila (Ex PW 2/1) sent to Police Station by Salih Zada Khan Assistant Sub-Inspector of Police Post Amnwar. Complainant was stated to have met the Assistant Sub-Inspector while he was on *gusht* in Bazaar Amnwar on 07.06.2017 at 22:00 hours and stated that he had locked his cattle-shed the previous night and had gone to his village Amnwar. When he visited his cattle-shed on 07.06.2017 at 07:00 AM, he found that two of his cows valuing Rs. 1,50,000/- were missing there-from. He also stated that on inquiring about the matter, he had come to know that accused namely Saida Jan, Wajid Ali and Amir Zeb had surreptitiously taken away his cows and thus

nominated them for committing theft of cattles of the complainant/respondent No. 2.

3. Investigation in the case was started. The cows were shown to have been recovered from the accused vide a joint recovery memo Ex PW 2/3. Same were also identified by the complainant vide identification memo dated 08.06.2017 (Ex PW 3/1). A pistol was also shown recovered from accused Saida Jan. On completion of investigation, complete challan was submitted before the trial Court i.e. Judicial Magistrate/Trial Model Court, Buner.

4. Charge was framed on 07.03.2018. Prosecution produced six (06) witnesses, whereafter statements of the accused were recorded under section 342 of Cr. PC. On conclusion of proceedings in the case, accused/appellants were convicted of commission of the offence and sentenced with a punishment as reproduced above.

5. Accused/appellants then filed appeals before the Court of learned Sessions Judge, Buner at Daggar, wherein the Court held that appeals before the Court of Session were not maintainable and same were disposed of accordingly vide consolidated order dated

07.11.2019 of the Court of learned Sessions Judge, Buner at Daggar.

6. Learned counsel for accused/appellants stated during the course of their arguments that appeals before the Court of learned Sessions Judge were perfectly maintainable under section 408 Cr. PC and same have wrongly been returned for presentation before this Court. Learned counsel also submitted that through Law Reforms Ordinance, 1972 (hereinafter referred to as '**the Ordinance**'), amendments have been made in Section 408 Cr. PC which had duly been adopted in the Province of Khyber Pakhtunkhwa vide a separate Notification dated 26.12.1975 published in the official Gazette on 30.12.1975. Both the learned counsel for accused relied upon the judgments reported as *2013 SCMR 1281*, *2018 SCMR 149*, *1999 P Cr. L J 1107*, *2005 P Cr. LJ 1435*, *2006 YLR 1718*, *2013 MLD 1054*, *2018 YLR 96* and *2019 YLR Note 63*, in support of their contentions.

7. Learned counsel for complainant supported the impugned judgment and stated that Sessions Court did not have the jurisdiction to hear appeal in the case.

8. Learned amicus curiae relied upon the judgments reported as *1994 P Cr. L J 1973*, *2005 P Cr. LJ 1435* & *2017 P Cr. L J 463* and opined that appeals before this Court are maintainable as sentences of more than four years imprisonment, have been assailed therein.

9. The learned Asst:A.G appearing on behalf of the State also supported the impugned judgment.

10. I have heard arguments of learned counsel for the parties, learned amicus curiae, learned Asst:A.G for the State and perused the record.

11. Perusal of record reveals that Clause 'b' of Section 408 Cr. PC has been amended vide item No. 141 (iii)(a) of Schedule to the Ordinance, whereby the words '**a Magistrate specially empowered under section 30**' have been omitted. Resultantly, power of hearing appeals against all sentences passed by all Classes of Magistrate was left with Court of Sessions except those appeals falling in Clause (c) of Section 408 Cr. PC, which provided that a person convicted by a Magistrate for an offence under section 124-A of PPC, may make an appeal before High Court. Original text of Section 408 Cr. PC prior to the amendments, is reproduced hereunder for ready reference;

**408.** Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under section 349 or in respect of whom an order has been made or sentence has been passed under section 380 by a Magistrate of the first class, may appeal to the Court of Session:

Provided as follows:

(a) \* \* \* \* \*

(b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal of all or any of the accused convicted at such trial shall lie to the High Court;

(c) when any person is convicted by a Magistrate of an offence under section 124-A of the Indian Penal Code, the appeal shall lie to the High Court."

12. Sub-section 2 of Section 1 of the Ordinance provided that the Ordinance shall come into force at once except the provisions of the schedule relating to amendments in Cr. PC, which shall come into force in any Province with effect from such date as the Provincial Government thereof may, by Notification in the official Gazette, specify in this behalf, and different dates may be so specified for different provisions and for different areas of a Province so that the amendments in Cr. PC are brought in force throughout the Province progressively. The Ordinance has been notified to have come into force in the Province of Khyber Pakhtunkhwa vide

Notification No. S.O.Judl.Misc.(HD)/75 dated 26.12.1975 published in the official Gazette on 30<sup>th</sup> December, 1975. Said Notification is reproduced hereunder for ready reference;

**"Law Reforms Ordinance, 1972**

**(Enforcement of provisions of the Schedule of Ordinance relating to Amendments in Cr. P.C)**

**[Gazette of N.-W.P.F., Extraordinary, 30<sup>th</sup> December 1975]**

No. S.O. Judl. Misc (HD)/75.—In exercise of the powers conferred by subsection (2) of section 1 of the Law Reforms Ordinance, 1972 (Ordinance XII of 1972), the Government of the North-West Frontier Province are pleased to appoint the 26<sup>th</sup> day of December 1975 to be the day on which the following provisions of the Schedule to said Ordinance relating to amendments in the Code of Criminal Procedure, 1898 (Act V of 1898), shall come into force throughout the North-West Frontier Province, except the Tribal Areas, namely:—

Items 1, 2-A, 11, 12-A, 15 (i), 22 (i), 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 (ii), 43 (ii), 46, 49 (ii), 55, 58-A, 60 (ii), 61, 62, 63 (ii) and (iii), 64, 65 (i), 67, 69, 70 (ii-A) and (iii), 70-A, 71-A, 73, 74, 75, 77, 78, 79, 79-B, 80, 81, 82, 83, 84, 85, 85-A, 85-B, 86, 87, 88, 89, 90, 91 (ii), 92, 93, 94, 95, 95-A, 97, 98, 99, 100, 102, 103, 104, 105, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117 (i), 118, 119, 120, 121, 122, 124, 125, 126, 128, 129, 130, 137, 139-A, 141 (ii), 144, 145, 146, 147, 148, 149, 150-A, 152, 152-A, 153 (i) and (iii), 154, 155, 156, 157, 158, 159, 160, 162, 164, 165-A, 166, 167, 168, 169, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 184, 185 (ii), 189, 190, 191, 192, 193, 194, 195, 196, 197, 197-A, 198, 199, 200, 201, 201-A, 202, 203, 206, 207, 208, 209, 210, excepting sub-item (vii) (a) and (b), 211 (ii), (v) (b) and (c) and 213."

Provisions of schedule to the Ordinance relating to amendments in Cr. PC had also been brought in operation in the area forming part of the erstwhile PATA vide Notification No. 127-S.O. (TA-1)HD/76 dated 25.06.1976 published in the official Gazette on 5<sup>th</sup> day of June, 1976, wherein it had been provided that provisions enumerated therein shall come into force on 25<sup>th</sup> day of June, 1976. Said Notification being relevant is also reproduced hereunder for ready reference;

**"Law Reforms Ordinance, 1972**

**(Enforcement of amendments in Cr. P.C in the Provincially Administered Tribal Areas of Chitral, Dir, Kalam, Swat and Malakand Protected Area)**

**[Gazette of N.-W.P.F., Extraordinary, 5<sup>th</sup> June 1976]**

No. 127-S.O. (TA-1)HD/76.—In exercise of the powers conferred by subsection (2) of section 1 of the Law Reforms Ordinance, 1972 (Ordinance XII of 1972), the Government of the North-West Frontier Province are pleased to appoint the 25<sup>th</sup> day of June 1976, to be the day on which the following provisions of the Schedule to said Ordinance relating to amendments in the Code of Criminal Procedure, 1898 (Act V of 1898), shall come into force in the Provincially Administered Tribal Areas of Chitral, Dir, Kalam, Swat and Malakand Protected Area namely:—

Items 1, 2-A, 11, 12-A, 15 (i), 22 (i), 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 (ii), 43 (ii), 46, 49 (ii), 55, 58-A, 60 (ii), 61, 62, 63 (ii) and (iii), 64, 65 (i), 67, 69, 70 (ii-A) and (iii), 70-A, 71-A, 73, 74, 75, 77, 78, 79 (B), 80, 81, 82, 83, 84, 85, 85-A, 85-B, 86, 87, 88, 89, 90, 91 (ii), 92, 93, 94, 95, 95-A,



97, 98, 99, 100, 102, 103, 104, 105, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117 (i), 118, 119, 120, 121, 122, 124, 125, 126, 128, 129, 130, 137, 139-A, 141 (ii), 144, 145, 146, 147, 148, 149, 150-A, 152, 152-A, 153 (i) and (iii), 154, 155, 156, 157, 158, 159, 160, 162, 164, 165-A, 166, 167, 168, 169, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 184, 185 (ii), 189, 190, 191, 192, 193, 194, 195, 196, 197, 197-A, 198, 199, 200, 201, 201-A, 202, 203, 206, 207, 208, 209. 210, excepting sub-item (vii) (a) and (b), 211 (ii), (v) (b) and (c) and 213.”

13. Operation of certain provisions of the Ordinance had been extended vide Notification of the Home Department bearing No. S.O. Judl. Misc. (HD)/75 dated 26.12.1975 published in the N.W.F.P Gazette extension dated 30.12.1975. Same had also been extended to erstwhile Provincially Administered Tribal Areas of Chitral, Dir, Kalam, Swat and Malakand vide Notification No. 127-S.O. (TA-1)HD/76 dated 25<sup>th</sup> day of June, 1976. But it is important to be mentioned here that relevant Clause ‘b’ of Section 408 of Cr. PC was intended to be amended vide item No. 141 (iii)(a) of the Ordinance, which had neither been made applicable in Khyber Pakhtunkhwa nor in erstwhile PATA. The provisions of the Ordinance as it existed in the Province of Khyber Pakhtunkhwa was also extended again to PATA through N.-W.F.P Regulation No. 1 of 1999 (The Shari-Niazam-E-Adl Regulation, 1999). Same was extended to PATA again

vide Shariah Nizam-e-Adl Regulation, 2009 (Khyber Pakhtunkhwa Regulation No. 1 of 2009). But it is important to be noted that provisions of the Ordinance in both 1999 Regulation as well as the 2009 Regulation, it had been provided that the laws, as it had been applicable in the Province of Khyber Pakhtunkhwa, were extended to the areas forming erstwhile PATA. Reference in this respect may be made to Section 3 of the 1999 Regulation as well as to Section 3 of 2009 Regulation. Item No. 141 (iii)(a) has never been made applicable in the Province of Khyber Pakhtunkhwa, same cannot therefore be deemed to have ever been extended to the area of erstwhile PATA. Resultantly, relevant part of Clause (b) of provisos to Section 408 Cr. PC has never been amended in the Province of Khyber Pakhtunkhwa or PATA and therefore appeal for a sentence of more than four years imprisonment shall continue lie to the High Court in this Province in accordance with un-amended Section 408 Cr. PC. The contention of learned counsel for the appellants was therefore misplaced and the learned Sessions Court has rightly held the appeals as non-maintainable before it. So far as the judgments relied upon by learned counsel for the appellants, are concerned, it has no doubt been held in the case of

**Aman Ullah vs. The State** reported as *2005 P Cr. L J 1435*, by a Division Bench of Hon'ble Lahore High Court that Section 408 (b) of the Cr. PC stood amended and therefore appeal against the decision of Magistrate Section 30 should lie before the Court of Session. View of the said judgment was also followed by Hon'ble Islamabad High Court in the case of **Jehanzeb and 3 others vs The State and another** reported as *2013 MLD 1054* as well as in the subsequent judgment of Hon'ble Lahore High Court in the case of **Khadim Hussain vs The State** reported as *2006 YLR 1718* and case of **Abdul Waheed and another vs The State and others** reported as *PLD 2016 (Lahore) 255*, but position of the Province of Khyber Pakhtunkhwa is different in this respect as relevant provision of the Article i.e. Item No. 141 (iii)(a) of the Schedule to the Ordinance has never been made applicable in this Province or the erstwhile PATA. Ratio of the said judgments cannot therefore be relied upon in the case in hand.

14. Coming to merits of the case, it is important to be noted that prosecution has been relying on the evidence of arrest, recovery of two cows, a Datsun and a 30 bore pistol (from one of the accused

namely Saida Jan), beside the pointation allegedly made by the accused/appellants. Complainant has charged the accused in his first report but he has never been an eye-witness of the occurrence and it is also a mystery as to how had he got the information about commission of the offence by the three accused. The accused were shown arrested, and the case property recovered from them on 08.06.2017. Their card of arrest Ex PW 2/2 and recovery memo Ex PW 2/3 were stated to have been prepared on the spot. The prosecution has been relying in this respect, mainly on the evidence of PW-2 Salihzada as well as to some extent on the evidence of PW-3 namely Said Jamil ASI and the Constable namely Bakhti Gul examined as PW-5. Salihzada Incharge Police Post Amnawar (PW-2) has stated in his statement that the complainant met him on 07.06.2017 at 22:00 hours, during his routine patrolling of the area and lodged report of the occurrence, which was reduced by him in the shape of Murasila Ex PW 2/1. The most important part of his statement is related to arrest and recovery of the stolen cows, in which respect he stated that he had arrested the accused/appellants Saida Jan, Wajid Ali and the absconding accused namely Amir Zeb on 08.06.2017 at a place known as Teraj Kandaw and issued their

card of arrest Ex PW 2/2. The cows were stated to have been loaded in a Datsun, which were recovered vide recovery memo Ex PW 2/3. A pistol was also stated to have been recovered from accused Saida Jan vide recovery memo Ex PW 2/3. He stated in his cross-examination that the accused were arrested in the afternoon. He also stated that he had not contacted the SHO of the concerned area known as Gul Bandi and that recovery had been effected on a tip-off given by an informer. He also stated that he was accompanied by Constables Bakhti Gul and Said Wahid at the time of recovery.

15. Investigating Officer in the case was examined as PW-3, who has stated that when he got information that the stolen cows had been seized by police at Teraj Kandaw, he went there and took in his possession the recovered cows, prepared its identification report as well as site plan of the spot, where recovery had been effected and conducted other necessary investigation. In his cross-examination, he stated that investigation in the case was handed over to him on 07.06.2017 at 23:20 hours and that he left Police Station Gagra for the purpose of investigation at 04:45 hours, the day following. He added that he went

to the place of recovery from Police Station through a route, where Police Posts Dewana Baba, Budal, Batara and Gul Bandi as well as a check post come in the way. The cows were stated to have been handed over to him at 10 o'clock, and that he had spent about 1-1/2 hour on the spot, which was left at 11:30 AM. Investigating Officer had also stated in his examination-in-chief that he had obtained copies of the relevant daily diaries and had placed the same on record. There is a daily diary report on file, which contains excerpts of Naqal Mad No. 8 dated 08.06.2017, which shows that Said Jamil Khan ASI had taken the three accused named above out of the lockup at 08:30 AM on 08.06.2017 for producing before the Court. This is very strange that when they had been locked in lock up at 08:30 AM on 08.06.2017, then how had they been arrested on 08.06.2017 at afternoon time, according to the statement of PW-2, from a far-off place. The Investigating Officer has himself stated that he left the place of recovery along with the accused and case property at 11:30 AM on 08.06.2017. Further ahead he has stated that he has produced the accused in the Court at 09:30 AM. He had not clarified as to which date he was referring to, but the application filed for

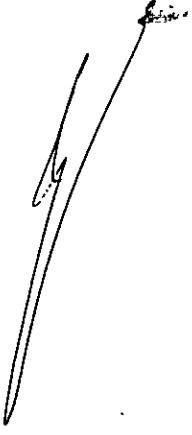
seeking custody of the accused Ex PW 3/5 shows a date of 08.06.2017, where at two points, the date appears to have been changed from 07.06.2017 to 08.06.2017. Similarly, the date on recovery memo Ex PW 2/3 also appears to have been changed from 07.06.2017 to 08.06.2017. This change of dates along with discrepancy in the evidence of two witnesses makes it doubtful that the accused had either been arrested on the date and time given in the statements of two witnesses and that recovery of the stolen cows had been effected from them on the said date and venue. Statement of Bakhti Gul recorded as PW-5 also reveals that he had gone to the place of recovery i.e. Bartiraj along with I.O. The I.O. had gone to the spot after coming to know that police had already made recovery of the stolen cows, according to his statement. Regarding the recovery memo Ex PW 2/3, he had also stated that in his presence, the I.O. has taken in possession two cows along with Datsun and had also taken in possession a 30 bore pistol. Statement of PW-2 reveals that recovery had been effected by him in the presence of this witness and later on, same had been handed over to the I.O. Presence of this witness at the time of recovery along with PW-2 also becomes doubtful. It is also interesting to note that PW-1

namely Habib Taj Constable has stated in his examination-in-chief that the accused had been taken for the purpose of pointation of the spot on 07.06.2017 in his presence, who had made pointation of the spot to the I.O, report of which was prepared and exhibited as EX PW 1/1. Though pointation of the spot has been shown in the pointation memo Ex PW 1/1 to have been made on 09.06.2017 but mentioning of date by PW-1 to be 07.06.2017 cannot be treated as a clerical mistake because of change of date on certain documents mentioned above and the discrepancy arising out of existence of daily diary report No. 8 dated 08.06.2017. The accused have been shown arrested on 08.06.2017, then how could they be taken for pointation on 07.06.2017. When recovery and arrest of the accused from the venue of Teraj Kandaw at the time and date given in the recovery memo and card of arrest become doubtful, it is sufficient to dislodge the whole case of prosecution against the accused/ appellants. The prosecution have therefore failed in proving case against the accused/appellants namely Saida Jan and Wajid Ali beyond reasonable doubt.

16. The learned trial court while convicting the accused had mainly relied upon omissions of the



learned counsel for the appellant in cross-examining the witnesses of prosecution on certain aspects of the case, which were accepted as admitted facts by the learned trial Court. Learned private counsel for complainant as well as the learned Asst:A.G also laid great stress on the fact that learned counsel for the accused had not even disputed certain material aspects of the case during the course of cross-examination and thus the facts should be considered as accepted and admitted. The principle that a fact is deemed admitted in case of absence of cross-examination viz-a-viz the said fact, was a principle applicable to civil cases and not to criminal cases, as laid by the Hon'ble Apex Court in the case of Nadeem Ramzan vs The State reported as **2018 SCMR 149**. Relevant part of observation of the august Court is reproduced hereunder for ready reference;




**"We have specifically attended to the sentence of death passed against the appellant and have noticed in that context that the motive set up by the prosecution had not been established by it. While discussing the motive part of the case the High Court had observed that both the eye-witnesses had stated about the alleged motive and they had not been cross-examined by the defence on that aspect of the case and, thus, the alleged motive stood proved. This approach adopted by the High Court has been found by us to be fallacious."**

Mere failure to make cross examine on a particular aspect of facts cannot therefore be deemed as admitted facts in a criminal case. Same has wrongly been so considered by the learned trial Court in the impugned judgment.

17. In light of what has been discussed above, prosecution have been unable to prove case against the accused/appellants beyond reasonable doubt. Judgment dated 22.10.2019 of the Court of learned Senior Civil Judge/Judicial Magistrate/Judge Model Trial Magistrate Court, Buner is set aside to the extent of the appellants/accused by extending them benefit of doubt. Declaration of the absconding accused namely Amir Zeb as proclaimed offender by the learned trial Court in the impugned judgment shall however remain intact.

18. These are the reasons for my short orders of even date, which read as follows;



**"For reasons to be recorded later, I allow both the appeals, set-aside the judgment of conviction dated 22.10.2019 passed by the learned Senior Civil Judge/Judge Model Trial Magistrate Court, Buner in case FIR No. 926 dated 07.06.2017 registered under sections 457, 380, 34 PPC read with section 15-A.A at Police Station Gagra, District Buner and resultantly acquit the accused/appellants namely Wajid Ali son of Arzumand and Saida Jan son of Sher Afzal of the charges leveled against them. They be**

released forthwith, if not required in any other case.”

Announced  
Dt:30.04.2020

JUDGE

Office  
03/06/2020  
W/R