

**HIGH COURT OF AZAD JAMMU AND KASHMIR**  
(SHARIAT APPELLATE BENCH)

Criminal Appeal No. 90/2017  
Date of Institution 01.11.2017  
Date of Decision 29.12.2022.

Muhammad Zaroob son of Wazir Hussain Bhatti by  
caste resident of Mangla Hamlet Tehsil and District  
Mirpur, Azad Kashmir presently at Bun Khurman  
District jail Mirpur,

**(Appellant)**

**VERSUS**

1. The State, and others
2. Nisar Ahmed son of Haji Muhammad Boota Mughal  
by caste resident of Sahab Chak Mirpur, Azad  
Kashmir,
3. Attiq-ur-Rehman, son,
4. Iram Nisar,
5. Iqra Nisar,
6. Ifra Nisar,
7. Zainab Nisar, Daughters of Nisar Ahmed Mughal by  
caste residents of Sahab Chak, Tehsil and District  
Mirpur, ,

**(Respondents)**

Criminal Appeal No. 91/2017  
Date of Institution 01.11.2017.

Nisar Ahmed son of Haji Muhammad Boota Mughal by  
caste resident of Sahab Chak Mirpur, Azad Kashmir,

**(Appellant)**

**VERSUS**

1. Sabir Hussain son of Nazar Hussain Kashmiri by  
caste resident of Shahpur Jalalpur Jattan District  
Gujrat,

2. Malik Faisal son of Muhammad Mushtaq Awan by caste resident of Dhamal Police Station Karianwala District Gujrat,
3. Muhammad Jamil son of Muhammad Din Jatt by caste resident of Mohra Sadha District Bhimber,
4. Muhammad Ilyas son of Ghulam Muhammad Faqeer by caste resident of Shah Hussain District Gujrat,
5. Muhammad Zaaroob son of Wazir Hussain Bhatti by caste resident of Hamlet District Mirpur,
6. Muhammad Nazir alias Mehendi son of Lal Khan Kumar by caste resident of Cheema Police Station DHINGA District Gujrat,

**(Respondents)**

7. The State through Advocate General,
8. Attiq-ur- Rehman son of Nisar Hussain, (son of deceased),
9. Irum Nisar,
10. Iqra Nisar,
11. Ifra Nisar,
12. Zainab Nisar, Daughters of Nisar Hussain, (daughters of deceased)

**(Proforma-Respondents)**

**APPEALS AGAINST THE JUDGMENT AND ORDER  
OF LEARNED ADDITIONAL DISTRICT COURT OF  
CRIMINAL JURISDICTION, MIRPUR DATED  
24.04.2017.**

**Before: 1) Justice Mian Arif Hussain, J.**  
**2) Justice Chaudhary Khalid Rasheed, J.**

***DIVISION BENCH***

***PRESENT:***

- 1) Mr.Arshad Majeed Malik, Advocate for Convict-Appellants.
- 2) Raja Inamullah Khan, Advocate for Complainant.
- 3) AAG, for the State.

## **JUDGMENT:**

**Justice Mian Arif Hussain, J.** Both the captioned appeals originate from single judgment and order dated 24.04.2017 recorded and passed by Additional District Court of Criminal Jurisdiction Mirpur, whereby, in a criminal case registered in the offences under sections 17(4)(2)EHA, 324,337A,F, 400/458 APC and 13/20/65 Arms Act, after conducting the trial, the learned trial Court has convicted and sentenced the accused persons as under:—

1. Accused Zaroob was convicted under section 109 for offence under section 392 APC and was awarded three years rigorous imprisonment along with payment of fine of Rs.10,000/, failing which, he will have to undergo further six months simple imprisonment.
2. Accused Ilyas was convicted under section 392 APC and was awarded five year rigorous imprisonment alongwith fine of Rs.20,000/- failing which, he will have to undergo further six months simple imprisonment.
3. Accused Jameel was convicted under section 302(c) and 392 APC and has been awarded 10 years and seven years rigorous imprisonment respectively along-with a fine of Rs.100,000/-

failing which, he will have to undergo further six months simple imprisonment. He is also ordered to pay an amount of Rs.100,000/- as compensation to the legal heirs of the deceased named Nasreen Begum under section 544- A Cr.P.C, failing which, he will have to undergo further six months simple imprisonment.

4. Accused persons Sabir and Faisal were convicted under section 392 APC and have been awarded seven years imprisonment along with a fine of Rs.50,000/-, each, failing which, both have been ordered to undergo six months imprisonment each.

5. Accused Nazir Mehdi, is acquitted of the charge.

All the convicted accused persons have been the extended benefit of 382-B Cr.P.C and sentences awarded, have been ordered to run concurrently.

Since, all the captioned appeals have been directed against the same judgment of Additional District Court of Criminal Jurisdiction, Mirpur, hence, are proposed to be disposed of through this single judgment.

Facts of the case, in brief, are that Nisar Ahmed, complainant made a written report to Police Station Mangla on 14.01.2007, alleging therein, that at 04:45 am, night of 13/14 January 2007, he along with

his wife named "Nasreen", son named "Attiq-ur-Rehman" and daughters "Iram Nisar", "Iqra Nisar", "Ifra Nisar" and "Zainb Nisar" was sleeping at his home. At about 03:30am, four persons with muffled faces entered into the house and pointed their pistols at him and asked him to handover whatever he has in his possession, whereupon, he replied that he has nothing. It is alleged that complainant gave a kick to one of masked person and in response, he fired on him which hit at abdomen and another accused fired on her wife which hit her face, resultantly, his wife fell down. It is alleged that meanwhile, son of complainant came out from another room and tried to catch hold the accused person, result of which, one of the accused person fired at him which hit him at the shoulder, accused persons tried to flee away. The complainant's son chased the accused person and during this, mask of one of the accused person slipped from his face and his face complexion was found black who was speaking in Punjabi language. It is alleged that his wife subsequently succumbed to the injuries, hence, proceedings against accused persons may be initiated as per law.

In the light of aforesaid report, a case in the offences under section 14(4)(2)EHA, 324, 337-A-F,

400/458 APC and 13/20/65 Arms Act was got registered at Police Station Mangla.

After conducting investigation, Challan report was submitted before the Court of Competent Jurisdiction.

At submission of challan in the Court of competent jurisdiction, while taking cognizance of the matter, proceedings were initiated. Statements of the accused-persons were got recorded under section 242 Cr.P.C who denied the veracity of allegations, pleaded not guilty and claimed trial, whereupon, prosecution was ordered to lead evidence in support of its version.

Out of 25 witnesses recited in challan report, 20 were got recorded, whereas, five witnesses were given up and after recording the evidence of prosecution, accused-persons were examined under section 342 Cr.P.C. All of them again denied the veracity of allegation and opted not to produce any evidence in their defense

At the conclusion of the trial, arguments were heard and after evaluating the evidence, the learned Additional District Court of Criminal Jurisdiction, Mirpur, seized with the lis, through the judgment and order impugned herein, dated 27.04.2017 has convicted, sentenced and acquitted the accused-respondents in the temrs narrated hereinabove.

Feeling dissatisfied, parties to the lis have challenged the validity of judgment impugned herein through the captioned appeals.

Arguments heard.

The learned counsel representing the Zaroob convict appellant after narration of the facts of the case at some length argued that four persons with muffled faces were nominated in the F.I.R but after investigation, prosecution has claimed that "Sabir", "Jamil", "Zaroob", "Ilyas" and "Faisal", Nazir Mehdi and Zaroob are involved in the commission of offence. It is urged that neither the fifth person was nominated in the F.I.R nor any role has been attributed and the Investigation Agency without any sufficient material arrested the Zaroob and declared him guilty of offence. The learned counsel argued that prosecution in respect of Zaroob has claimed that gloves used by the four accused persons have been recovered from the house of Zaroob at his pointation and the rifle has also been claimed to be recovered from his possession, hence, being facilitator and abettor is also involved in the alleged occurrence. The learned counsel pressed into service that no single piece of evidence connecting the Zaroob, the convict-appellant, has been brought on record and so far as recovery of gloves is concerned, it is not proved that gloves recovered from

the house of the Zaroob are the same gloves which were used by the other co-accused persons involved directly in the commission of offence. Further added that so far as recovery of rifle is concerned, the same was recovered in another criminal case wherein, Zaroob has been acquitted, hence, on the said recovery Zaroob cannot be involved in the case in hand. The learned counsel maintained that learned trial Court has categorically narrated that no involvement of Zaroob is established in the alleged occurrence, hence, to the extent of application of 109 APC, findings recorded by learned trial Court being beyond the evidence are not liable to be sustained. The learned counsel further added that one of the convict-appellant Ilyas has been died. The convict appellant Jamil has served the penalty awarded to him. The learned counsel maintained that one of the accused Nazir Mehdi has been acquitted by the trial court, hence, in view of evidence placed on record by the prosecution, Zaroob convict-appellant deserves to be acquitted. The learned counsel further submitted that while accepting the appeal of Zaroob order impugned herein is requested to be set aside whereas the counter appeal preferred on behalf of the complainant for enhancement of conviction be dismissed.



Conversely, the learned counsel representing complainant-appellant and other legal heirs of the deceased submitted that admittedly four unknown persons were nominated in the F.I.R and during the course of occurrence the victim, who sustained serious injuries categorically identified all four accused persons. It is claimed that convict appellant Nazir one of the accused is head of the Gang of dacoits, whereas, Zarooob is facilitator in the vicinity, so, said both the accused persons stand fully involved in the said occurrence but the learned trial court on the one hand has wrongly acquitted Nazir Mehdi beyond the evidence and on the other hand while convicting the five other accused persons took a lenient view for determining the quantum of punishment, whereas, in the offence of such nature, no leniency is desirable but the learned trial Court despite of solid proof on the record has awarded the lesser punishment, so, by allowing the appeal in hand it is solicited that sentenced be enhanced.

The learned AAG, opted the arguments advanced on behalf of the learned counsel for the complainant and requested that punishment be enhanced and accused persons acquitted by the trial Court be convicted and sentenced accordingly.

After having heard the arguments of the learned counsel for parties, We have also gone through the record made available at the file.

From the perusal of record it depicts that in occurrence of dacoity accompanied with offence of murder, complainant nominated four persons with the assertion that they had muffled their faces through masks, who entered into the house of complainant and pointed pistol at the complainant and asked him to hand over whatever he possesses and subsequently the said accused persons made him victims of injuries and fired at her wife too and one of the accused fired at his son, who also sustained injuries and wife of the complainant succumbed to the injuries.

After investigation, six accused persons named, "Sabir Hussain", "Malik Faisal", "Muhammad Jamil", "Muhammad Ilyas", "Muhammad Zaroob" and "Nazir Mehdi" were arrested and after investigation challan against them was submitted before the Court of competent jurisdiction through which Malik Faisal, Jamil, Muhammad Ilyas and Sabir Hussain were held principle accused for the commission of alleged occurrence, whereas, Nazir Mehdi was declared head of the Gang and Zaroob was declared facilitator and abettor in the said occurrence.

At conclusion of the trial, learned trial Court has acquitted Nazir Mehdi whereas Zaroob convict-appellant was convicted and awarded three years rigorous imprisonment under section 109 APC for abetment in offence under section 392 APC and other accused persons directly nominated in the F.I.R were also convicted and awarded the different kinds of sentences, who after serving their penalties, have been released.

Zaroob-convict appellant along with his appeal through filing an application under section 426 Cr.P.C has availed the concession of bail till disposal of appeal in hand.

From the contents of F.I.R and challan report it is very much clear that only four persons with muffled faces were narrated in the F.I.R, which subsequently were identified as Sabir, Malik Faisal, Muhammad Jamil and Muhammad Ilyas. Accused Nazir Mehdi and Zaroob appellant herein were brought on record during the course of investigation.

Now firstly it is to be examined as to whether Nazir and Zaaroob are involved in the said occurrence or not ?.

In this regard, statement of complainant is of vital importance, who in his statement deposes that he

had already knew Nazir Mehdi who fired at the person of his son. Similarly, Attiq-ur- Rehman injured person narrates that Nazir fired at him but question arises here that if the Nazir was identified by him during the course of occurrence, then why his name was not incorporated in the F.I.R and why the names of five persons were not requested to be listed in the F.I.R. moreover, the allegation of firing against Nazir is concerned, no arm weapon has been recovered from the said accused person. It is worthy to mention here that Irfan Saleem, witness in his statement simply deposes that he is head of Gang, meaning thereby, that Nazir is only associated mere on the apprehension that in the vicinity he is known as head of criminals and may be involved in criminal activities of such nature. In view of said situation, the statement of complainant and his son regarding involvement of Nazir clearly stands improvement in the prosecution story, therefore, the learned trial Court has rightly acquitted the Nazir Mehdi.

So far as the allegation of abetment against Zarooob is concerned, prosecution in this regard, has based on the statement of one of the witness Murtaza and recovery of gloves and rifle etc. The learned trial Court while appreciating the evidence and statement of Murtaza P.W is of the view that said witnesses depose

that Zaroob has been found in suspicious condition outside the house of complainant and four pairs of gloves have been recovered from his house, hence, against him, the allegation of abetment is established.

In our estimation, in view of said evidence regarding involvement of Zaroob, the alleged offence as abettor does not establish as if the statement of the Murtaza P.W is treated true that Zaroob has been seen outside the house of compliant before the Commission of alleged offence and four pair of gloves have been recovered from his house, even then it is not proved that the said gloves claimed to be recovered from the house of Zaroob were the same gloves which were used by the principle accused persons, moreover, it does not establish that said gloves were handed over to the main accused persons by Zaroob and after their use, same were handed over to Zaroob, hence, recovery of gloves and presence of Zaroob outside the house of complainant does not constitute the offence of abetment.

So far as recovery of rifle is concerned, neither the said rifle is claimed to be used in the occurrence nor is claimed to be handed over to the principle accused persons, hence, it can safely be observed that findings of the trial Court regarding involvement of Zaroob in

terms of abetment and conspiracy being beyond evidence are not sustainable in the eye of law.

So far as the question of other convict appellants is concerned, no appeal against the said conviction order except Zaaroob has been preferred rather on behalf of the Muhammad Jamil convict appellant, appeal of the complainant is being defended.

From the perusal of evidence, it depicts that all the four accused persons "Jamil", "Sabir", "Faisal" and "Ilyas" have been identified through process of identification parade and complainant and other injured persons have categorically mentioned the roles of the said accused persons, meaning thereby that, in view of nature of evidence available on the record, the learned trial Court has rightly convicted and sentenced the said convict-appellants according to role attributed to them during the course of occurrence. One of them, Muhammad Jamil convict appellant has been held liable for the offence of 302 APC coupled with section 392 APC, whereas, the other convict appellants have been declared the guilty of offence of 392 APC.

Admittedly, Muhammad Ilyas, one of the convict appellant has passed away and Muhammad Jamil and other convict appellants have served their penalties awarded to them and the said convict appellants have

preferred no appeal against the said conviction order and keeping in view the nature of evidence, in our estimation, request for enhancement of penalties awarded by the learned trial Court stands not justified as admittedly it is not a case of ocular count and accused persons nominated in the F.I.R were claimed to be muffled, so, probability of mistake in identifying the , accused persons cannot be ruled out. Thus, in the matter of crime of such nature, until and unless cogent evidence has not been brought on the record, no major penalty relying upon meager type of evidence could be suggested, therefore, it can safely be observed that there exists no space for enhancement of penalties awarded to convict-appellants.

The crux of above discussion is that appeal no.90/2017 preferred on behalf of "Muhammad Zaroob" is accepted and while setting aside the judgment impugned herein to the extent of Zaroob, recorded by the learned Additional District Court of Criminal Jurisdiction Mirpur, convict-appellant Muhammad Zaroob is acquitted of the charge levelled against him, whereas, impugned judgment to the extent of other accused persons shall remain intact and the appeal no.91/2017 preferred on behalf of the "Nisar Hussain" complainant regarding enhancement of the penalties

stands dismissed. A copy of the judgment is ordered to be annexed with the connected files.

Muzaffarabad.  
29.12.2022.

**JUDGE**

**JUDGE**

Judgment has been written and duly signed. The Dy. Registrar Headquarters is directed to transmit the file forthwith to Circuit Mirpur. The Dy. Registrar Circuit Mirpur, shall announce the judgment in presence of learned counsel for parties after issuing notices to them.

**JUDGE**

**JUGDE**