IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI
MRS. JUSTICE AYESHA A. MALIK

CRIMINAL APPEAL NOs. 363 TO 366 OF 2021
(Against the judgment dated 07.03.2017 passed by the Lahore High Court, Rawalpindi Bench in Criminal Appeal Nos. 01 & 02/2014 & Murder Reference No. 09/2014)

Muhammad Ali **(In Cr.A. 363/2021)**
Khurram Shahzad **(In Cr.A. 364/2021)**
Muhammad Sajjad, complainant **(In Cr.As. 365 & 366/2021)**
...Appellants

VERSUS

The State etc **(In all cases)**
...Respondent(s)

For the Appellant(s): Mr. Basharatullah Khan, ASC
Syed Rifaqat Hussain Shah, AOR
(In Cr.As. 363-364/2021)

For the Complainant: Malik Qamar Afzal, ASC
(In Cr.As. 365-366/2021)

For the State: Mr. Muhammad Jaffer, Addl.P.G.

Date of Hearing: 22.09.2022

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Appellants Khurram Shahzad and Muhammad Ali along with co-accused Muhammad Waheed Akhtar were tried by the learned Sessions Judge, Chakwal, pursuant to a case registered vide FIR No. 172 dated 14.11.2012 under Sections 302/324/396/449 PPC at Police Station Dhudial, District Chakwal for committing dacoity and murder of Hafiz Muhammad Ijaz. The learned Trial Court vide its judgment dated 03.01.2014 while acquitting the co-accused, convicted the appellants as under:-

i) **Under Section 460 PPC**
To death.

ii) **Under Section 396 PPC**
To death with a fine of Rs.50,000/- each or in default whereof to further suffer SI for six months.

iii) **Under Section 302 (b) PPC**
To death with a direction to pay an amount of Rs.100,000/- each to the legal heirs of the deceased.

iv) **Under Section 337-A(ii) PPC**
To five years RI each with a direction to pay the amount of Arsh, which shall be 5% of the Diyat in equal shares to the said injured.

2. In appeal, the learned High Court while maintaining the conviction of the appellants under Section 460/396 PPC, altered the sentence of death into imprisonment for life. The amount of fine and the sentence in default whereof was maintained. Benefit of Section 382-B Cr.P.C. was also extended to the appellants. The conviction and sentence of the appellants under Section 337-A(ii) PPC was also maintained. However, the learned High Court set aside the conviction and sentence of the appellants under Section 302(b) PPC. All the sentences were ordered to run concurrently. Being aggrieved by the impugned judgment, the appellants filed Jail Petition No. 322/2017 & Criminal Petition No. 520/2017 whereas the complainant filed Criminal Petition Nos. 631 & 632/2017. This Court granted leave in the afore-noted petitions on 04.11.2021 and the present Criminal Appeals have arisen there-from.

3. The prosecution story as given in the judgment of the learned Trial Court reads as under:-

> "2. The facts of the case, as enshrined in the statement (Exh:PR) made by Muhammad Sajjad complainant (PW-5) before the police, are that he is resident of Dhoke Chach and has his residential house at village Bheen and was running a medical store/clinic at the main market; that his wife and children remained in the house and he while leaving for his clinic, used to lock the main door from outside; that on 14.11.2012, when he reached back home at about 8.30 p.m. after the closure of shop, he opened the main gate, all of a sudden, three dacoits, who were armed with pistols, another armed with chopper (Toka) entered his house whereas one of their companion remained at the gate; that the dacoits snatched an amount of Rs.5,000/- and mobile phone of the complainant; that one of the dacoits, who

> was quite young, made blows with the reverse side of pistol on the head of the complainant and his right shoulder, who became injured; that the dacoits asked the complainant to get the grill of the courtyard opened; that the complainant called his wife Aqsan Anwar, who on hearing his noise, bolted the room from the inside and made telephonic calls to the brothers of the complainant, informing them about the situation; that the brothers of the complainant arrived whereafter the assailants after pushing the grill entered the courtyard and then in the rooms; that one of the dacoits made a shot with pistol hitting on above the right eye of Hafiz Muhammad Ijaz, the brother of the complainant, who fell down due to the injury; that the other brother of the complainant Muhammad Nawaz came forward; that the second fire was made on him by the other assailant and the fire shot hit on the abdomen of Muhammad Nawaz; that the complainant etc thereafter, grappled with the assailants and caught hold one of the dacoits; that in that process, his other companion made a chopper blow, which hit on the head of his own companion; that thereafter, the assailants after making fire shots went out of the house; that Muhammad Zameer, the brother of the complainant also sustained a fire shot injury on the finger of his right hand; that one of the dacoits died on the road side due to the injuries; that on hearing the report of firing, so many persons from the locality gathered there and seeing them and also taking advantage of the darkness, the dacoits succeeded in running away. The one who died at the spot was later on identified as Noman Masood s/o Muhammad Masood Pervez. The injured were taken to the hospital and in the way, Hafiz Muhammad Ijaz, one of the brothers of the complainant, died due to the injuries."

4. After completion of investigation, report under Section 173 Cr.P.C. was submitted before the Trial Court. In order to prove its case the prosecution produced as many as 20 witnesses. In their statements recorded under Section 342 Cr.P.C, the appellants pleaded their innocence and refuted all the allegations leveled against them. However, they did not make statements on oath under Section 340(2) Cr.P.C in disproof of allegations leveled against them. They also did not produce any defence evidence.

5. At the very outset, learned counsel for the appellants argued that there are material contradictions and discrepancies in the statements of the prosecution witnesses, which have been overlooked by the courts below. Contends that the prosecution case is full of doubts and infirmities, as such, appellants deserve benefit of doubt. Contends that the

prosecution case is based upon conjectures and surmises and it has to prove its case without any shadow of doubt but it has miserably failed to do so. Contends that the prosecution witnesses are interested and related, therefore, their evidence has lost its sanctity and the conviction cannot be based upon it. Contends that the identification parade was conducted in Police Station without observing the instructions/guidelines enunciated by the superior courts. Contends that during identification no role whatsoever was ascribed to the appellants. Contends that in-fact the two co-accused of the appellants had murdered the brother of the complainant but they have been done to death in a police encounter, therefore, the appellants cannot be saddled with the criminal liability. Contends that the recoveries of weapon of offence from the appellants are planted upon them. Contends that on the same set of evidence, co-accused of the appellants has been acquitted, as such, the appellants also deserve the same treatment to be meted out. Lastly contends that the reasons given by the learned High Court to sustain conviction of the appellants are speculative and artificial in nature, therefore, the impugned judgment may be set aside.

6. On the other hand, learned Law Officer assisted by the learned counsel for the complainant has defended the impugned judgment. It was contended that the prosecution case is free from doubts and all PWs have supported the case of prosecution and there are no material contradictions in their evidence. It was further contended that the eyewitnesses were subjected to lengthy cross-examination but their evidence remained unshaken. Lastly contended that the prosecution has succeeded to prove its case beyond any shadow of doubt, therefore, the appellants do not deserve any leniency from this Court.

7. We have heard learned counsel for the parties at a considerable length and have perused the evidence available on record.

It is cardinal principle of criminal jurisprudence that each criminal case has its own peculiar facts and circumstances, therefore, needs to be decided accordingly. As per the prosecution version disclosed

in the crime report, it is the case of the prosecution that four dacoits trespassed into the house of complainant Muhammad Sajjad while one of their companion remained outside the gate to provide protection to other companions during occurrence. During the course of investigation, one Waheed Akhtar was also disclosed as one of the companion, who was ascribed the role of abetment. As a consequence, the tally of the accused involved in the said occurrence enhanced to six. It is an admitted fact that one of the co-accused namely Nouman was done to death by his companions during the occurrence while two of the accused namely Muhammad Waqas and Tallat Mehmood were done to death in a police encounter. During the course of proceedings before the Trial Court, the prosecution advanced its case mainly upon the ocular account, medical evidence, identification parade and recovery of weapon of offence from the appellants. The ocular account was furnished by Muhammad Sajjad, complainant/injured (PW-5) and Muhammad Nawaz, injured (PW-7). Both of these witnesses of the ocular account remained consistent on each and every material point qua the date, time, mode, manner of the occurrence and the locale of the injuries on the person of the deceased and the injured PWs. Although both of them were subjected to cross-examination at length but the defence miserably failed to detect anything which can hamper the prosecution case on salient features. The medical evidence fully corroborates the ocular account. During the course of investigation, the accusation against the appellants was fully established as per the contents of the crime report. The main thrust of the arguments advanced by the learned counsel for the appellants was that the ocular account furnished through related witnesses has lost its strength on the ground that occurrence has taken place inside the house at 8.30 pm, which clearly reflects that the inmates of the house are supposed to be at home, therefore, their presence at the spot cannot be doubted in any manner keeping in view the place and the time of occurrence. The other assertion of the learned counsel relates to minor discrepancies, which cannot hamper the prosecution case as it is repeatedly held by this Court that minor discrepancies do not frustrate the prosecution case unless and until

there is something which directly shatters the salient features of the prosecution case but the same is squarely absent in the instant case. Reliance is placed upon Allah Bakhsh Vs. Ahmad Din (1971 SCMR 462). As far as the recovery of the weapon of offence and the identification parade are concerned, it is suffice to say that the recovery of pistol has already been held inconsequential by the learned High Court. Whereas the identification parade looses its strength if the appellants are identified during the course of proceedings before the Trial Court although it is an admitted fact that Muhammad Zulqarnain, Civil Judge/Judicial Magistrate, Rawalpindi (PW-17) who conducted identification parade has categorically stated that the aforesaid witnesses had duly identified the appellants during the course of identification parade. It is an admitted fact that the matter pertains to an occurrence in which dacoity was committed. During the course of the said dacoity, one person was done to death whereas two sustained injuries. To evaluate the strength of participation and criminal liability, it seems advantageous to reproduce the relevant provisions of law, which read as under:-

> **"391. Dacoity:** When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".
>
> **395. Punishment for dacoity:** Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which shall not be less than four years nor more than ten years and shall also be liable to fine.
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> **396. Dacoity with murder:** If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, everyone of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which shall not be less than four years nor more than ten years, and shall also be liable to fine."

8. The Legislature while defining provisions of Sections 391/396 PPC has deliberately used the word "conjointly", which is not used anywhere in PPC except in the afore-said provisions. 'Conjointly' indicates

jointness of action and understanding. Every one acts in aid of other. 'Conjointly' means to act in joint manner, together, unitedly by more than one person. According to Black's Law Dictionary, 'conjoint robbery' means where the act is committed by two or more persons. 'Conjoin' means 'join together', as per the Oxford Large Print Dictionary. According to Corpus Juris Secundum, 'Conjointly is explained as 'together', the one with knowledge, consent and aid of the other and pursuant to an agreement or understanding or 'unitedly'. In the 'Words and Phrases' 'Vol. 8 A', published by 'West Publishing', same meaning is adopted as in Corpus Juris Secundum. It explains that conjoint robbery is where the act is committed by two or more persons. According to Webster's New International Dictionary 'conjoint' means 'united', 'connected' associated or to be in conjunction or carried on by two or more in combination. The use of word 'conjointly' in Section 391 PPC indicates that five robbers act with knowledge and consent and in aid of one another or pursuant to an agreement or understanding i.e. unitedly. A bare perusal of the aforesaid provisions clearly reflects that the purpose of using the word "conjointly" relates to overlapping each and every act of participants in the occurrence on equal basis without any distinguishing feature. The aforesaid provisions are based upon entirely different footing as compared to ordinary case of murder where conviction can be recorded on the basis of role ascribed coupled with the fact of having common object or common intention. The law has been devolved on these lines since long but as far as these two provisions i.e. Sections 391/396 PPC are concerned, there is absolutely no chance to distinguish the criminal liability on the basis of act or role ascribed to each accused rather each one of them becomes equally responsible soon after they make preparation for the commission of the offence, act during the course of occurrence and even the acts committed while retreating after commission of the offence. No one can be distinguished on the basis of role or criminal liability with reference to such like offences as these offences are squarely against the fabric of the society and heinous in nature by all means. Section 396 declares in specific terms that the liability of other persons is co-extensive with that of the

actual murderer. All that is required to be proved is that they have been conjointly committing dacoity and during the course of dacoity death caused by a dacoit would be murder and would be attributed to all of them. The death need not be proved against any of the dacoits in particular so long as death is the result of cumulative effect of violence used by the gang. The primary element of the offence under this provision of law is that the dacoity was committed conjointly by all persons involved, and the secondary element is that murder was committed while the dacoity was being committed. The fact that Section 396 PPC is a self-contained provision stands out right away upon its first reading. The Section is unique, in that, it imposes vicarious liability upon all members of the gang without there being any distinction and to that extent is *sui generis* in nature. Section 396 PPC in its plain term applies to every situation in which five or more persons commit dacoity and in the course of the commission of such dacoity anyone of the said person commits murder. Thereby all five or more people become squarely responsible for the crime of "dacoity with murder" and expose themselves to the penalties outlined in the aforementioned provision of law. The three essential ingredients for invoking Section 396 PPC are that **(i)** one of the persons must commit murder, i.e., his act must amount to "murder" within the meaning of Section 300 PPC, **(ii)** the said person must be one of the five or more persons who have joined together to commit dacoity, and **(iii)** the murder must be committed in the course of commission of such dacoity. If these conditioned are fulfilled, Section 396 PPC would set in and bring all the persons involved in the act of dacoity in the same category even if they did not commit the murder. In other words, so far as the remaining persons are concerned, the prosecution is not required to prove any overt act in order to entail Section 396 PPC to apply with their intention to commit dacoity. Neither intention nor knowledge that murder would be committed in the course of the commission of such dacoity is required to be proved to exist in the contemplation of any of the said other persons. As a consequence, all persons must, therefore, possess the *mens rea*. They would all nevertheless be exposed to the rigour of Section

396 PPC. The provision is, therefore, *sui generis*, in nature, therefore, it seeks to hold persons liable for the offence.

9. So far as the argument of learned counsel for the appellants that on the same set of evidence co-accused has been acquitted is concerned, the same is misconceived. The case of the appellants is distinguishable to that of the acquitted co-accused. The said co-accused was ascribed the role of abetment but no evidence whatsoever regarding the role played by him in the commission of the offence could be placed on record. No specific date, time and place where the conspiracy was hatched has been placed on record. Even name and number of witnesses to that extent is not available on the record. Perusal of Section 107 PPC reveals that three ingredients are essential to dub any person as conspirator i.e. **(i)** instigation, **(ii)** engagement with co-accused, and **(iii)** intentional aid qua the act or omission for the purpose of completion of abetment. All the three ingredients of Section 107 PPC are *prima facie* missing in this case. In order to link the said co-accused, the prosecution had also produced evidence of extra judicial confession. According to which, he had made confession before Muhammad Bashir, Muhammad Naseer & Zahid Mehmood PWs. According to said witnesses, the accused had appeared before them and disclosed to them that the complainant is under the belief that the dacoity in his house was got committed by him and he had requested for pardon. The learned Trial Court has extensively examined this aspect of the matter and rightly came to the conclusion that from the narration of the witnesses it is nowhere established that the accused himself had made any confession that he was involved in the offence or the same was got committed by him. Rather, his statement was that it was the plea of the complainant with regard to his involvement in the commission of offence and for that reason he had approached the witnesses for pardon. Such a statement cannot come in the definition of extra judicial confession as in extra judicial confession, an accused has to confess his guilt before an independent person. As far as the case of the appellants qua conviction and sentence is concerned, after a careful analysis it is observed by us that the learned High Court has already taken

a lenient view while converting the sentence of death into imprisonment for life. The impugned judgment is well reasoned, proceeds on correct principles of law enunciated by this Court and the same does not call for any interference by this Court.

10. For what has been discussed above, all these appeals having no merit are accordingly dismissed. The above are the detailed reasons of our short order of even date.

JUDGE

JUDGE

JUDGE

Islamabad, the
22nd of September, 2022
Approved For Reporting
Khurram