IN THE FEDERAL SHARIAT COURT
(APPELLATE / REVISIONAL JURISDICTION)

PRESENT
MR. JUSTICE DR. SYED MUHAMMAD ANWER

JAIL CRIMINAL APPEAL NO. 03-I OF 2020

SHAHID ULLAH SON OF SHAKIR ULLAH, RESIDENT OF MUSA ZAI, PRESENTLY HAZAR KHAWANI PESHAWAR.

APPELLANT

VERSUS

THE STATE.

RESPONDENT

COUNSEL FOR THE STATE	…	BARRISTER BABAR AWAN, ASSISTANT ADVOCATE GENERAL, KPK.
FIR NO. DATE AND POLICE STATION	…	NO.151, 15.02.2018 CHAMKANI, DISTRICT PESHAWAR.
DATE OF JUDGMENT OF TRIAL COURT	…	22.03.2019
DATE OF RECEIVING OF APPEAL FROM PESHAWAR HIGH COURT, PESHAWAR.	…	10.03.2020
DATE OF HEARING	…	14.09.2020
DATE OF DECISION	…	14.09.2020
DATE OF JUDGMENT	…	21.09.2020

DR. SYED MUHAMMAD ANWER, J: This is a Jail Criminal Appeal sent by Additional Registrar (Judicial), Peshawar High Court, Peshawar, vide his office letter No.8967/Judl. dated 07.03.2020 against the judgment dated 22.03.2019 passed by learned Additional Sessions Judge-VIII, Peshawar, in Sessions Case No.01/HC of 2019 and F.I.R. No.151 dated 15.02.2018 under Section 17(4) Haraabah, the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 at Police Station Chamkani, District Peshawar. Through this impugned judgment, the appellant/accused Shahid Ullah was convicted and sentenced to undergo 10 years rigorous imprisonment with fine of Rs.300,000/- to be paid to the legal heirs of the deceased under Section 544-A Cr.P.C. Benefit of Section 382-B was also extended to the appellant/accused.

2. The appellant firstly filed the Criminal Appeal No.1172-P of 2019 against the impugned judgment before the Peshawar High Court, Peshawar, through Superintendent Central Prison, Peshawar, vide its letter No.11007/WF/ASW dated 16.09.2019. The Peshawar High Court vide its order dated 02.03.2020 held that "*the appellant has been convicted and sentenced under section 17(4) Haraabah, the Offences Against Property (Enforcement of Hudood) Ordinance, 1979. Legally speaking, under 2nd proviso of sub-section (1) of section 24 of the Ordinance, when the awarded sentence is exceeding for a term two years, then in that case the appeal shall lie to the Federal Shariat Court.*"

Consequently, it was also held that the *"Jail Criminal Appeal is not competent before Peshawar High Court, Peshawar, therefore,*

Additional Registrar (Judicial) of Peshawar High Court is directed to send this appeal alongwith the original record of the case to the Federal Shariat Court."

On 17.03.2020, this Jail Criminal Appeal was fixed before the court and was admitted for regular hearing.

3. Brief facts of the case as per F.I.R. (Ex.PA-1) are that the complainant/Bakht Muhammad (P.W.4) reported the matter to police on 14.02.2018 at 22:35 hours in presence of his elder brother Habib Ullah (P.W.5) that he works in a Bakery shop along with his brother. On the day of occurrence, he along with his elder brother Gul Muhammad (deceased), after closing the Bakery shop was proceeding to his home on motorcycle driven by his brother Gul Muhammad while he was seated behind him. When they reached the place of occurrence an unidentified person fired at them due to which Gul Muhammad the brother of the complainant was hit and injured. Consequently, they fell down. Upon the hue and cry of the complainant, the people from nearby vicinity came to the spot and put Gul Muhammad in a Suzuki, who was alive at that time but unfortunately he died on the way to the hospital. According to F.I.R., the complainant charged an un-known accused for commission of offence.

4. Learned State Counsel/Assistant Advocate-General, KPK, appeared in this case and acted as a professional and honest officer of the court. He acknowledged the facts that charge under Section 17(4) The Offences Against Property (Enforcement of Hudood) Ordinance, 1979 was wrongly framed in this case as the FIR does not contained any allegation of

Haraabah; therefore, this case may be remanded to the learned Trial Court.

5. Though, the learned State Counsel has concurred for remand of the case but in addition to such concurrence, a couple of irregularities were found to have been committed by the learned Trial Court, which render the judgment illegal and can be summarized as under:

a) Initially the case was registered under Sections 302 and 324 PPC but later the charge was converted into Section 17(4) Haraabah read with Section 15AA. The only reason stated in the impugned judgment for converting the charge from Section 302 and 324 PPC to 17 (4) Haraabah in the case is the statement of father of the deceased (P.W.6) Pir Muhammad under Section 164 Cr.P.C. wherein he charged the accused facing trial for commission of the offence of Haraabah. To the contrary, the statement in chief of father of the deceased (P.W.6) does not contain any such allegation; rather in the cross-examination he clearly admits that he is not an eye-witness of the occurrence.

b) While introducing the charge of Haraabah in this case the Trial Court failed to comprehend and appreciate the very definition of 'Haraabah' as mentioned in Section 15 of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979. which is reproduced hereunder :

> **"15. Definition of haraabah.** When any one or more persons, whether equipped with arms or not, make show of force <u>for the purpose of taking away the property</u> of another and attack him or cause wrongful restraint or put him in fear of death or hurt, such person or persons are said to commit haraabah."
>
> (Emphasis added)

It is evident from this definition that the pivotal point which constitutes Haraabah in commission of a crime is the use of force or show of force for the purpose of taking away the property of

another person, and all these ingredients to constitute the offence are absolutely absent in this case.

c) After going through the impugned judgment and the file of the case, it clearly appears that the offence of Haraabah is not made out from any allegation or the statements made by the witnesses including the statement of the Investigating Officer (P.W.3).

d) As per allegation and contents of FIR, initially the case was rightly got registered under Sections 302 and 324 PPC, but later on erroneously converted into Section 17(4) Haraabah read with Section 15AA, which resulted into miscarriage of justice. A murder was committed, whereby an innocent person lost his valuable life. The incidence was duly reported to police station. In consequence of which , the investigation and the prosecution were supposed to act in accordance with law to provide justice to the legal heirs of the deceased but unfortunately on the contrary in this case by wrongly converting the charge of Section 302 and 324 PPC into 17(4) Haraabah read with Section 15AA made the case of prosecution weak. As the FIR does not contain any allegation of Haraabah.

e) It is the primary duty of any trial Court to carefully see whether the charge has been framed properly; if not, it is the duty of the trial Court to rectify any mistake therein. On the contrary in this case instead of rectifying any mistake in framing of charge, the Trial Court committed the mistake of converting the right charge under Sections 302 and 324 PPC into a wrong charge of 17(4) Haraabah as held in *SHAH NAWAZ Vs. THE STATE* **(1992 SCMR 1583)**, *(MURAD BALOCH alias MICHEL VS. THE STATE)* 2011 SCMR 1417, *SAHIB KHAN AND 4 OTHERS Vs. THE STATE AND OTHERS* **(1997 SCMR 871)** and *S.A.K REHMANI Vs. THE STATE* **(2005 SCMR 364)**.

f) The impugned judgment is out rightly based on conjecture and surmises which has no linkage whatsoever with the facts of the case as stated by the key witnesses in this case including the

complainant (P.W.4), I.O. (P.W.3), father of the deceased (P.W.6) and brother of the deceased (P.W.5). (P.W.5) Habib Ullah, the brother of deceased admitted during cross-examination that he is not an eye-witness of the occurrence; similarly his father (P.W.6) Pir Muhammad also admitted the same that he is not an eye-witness during his cross-examination which renders his evidence as hearsay evidence regarding the actions related to the commission of offence. It is well embedded principle of law and justice that 'no one should be construed into a crime on the basis of presumption in the absence of strong evidence of unimpeachable character and legally admissible one. Similarly, mere heinous or gruesome nature of crime shall not retract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner'. As held in Azeem Khan and another vs Mujahid Khan and another (2016 SCMR 274).

g) The Trial Court failed to pass judgment fulfilling the requirement of Section 367 Cr.P.C., which requires that a judgment must contain therein points of determination and reasons for the decisions thereupon. This section of Cr.P.C puts duty upon courts to formulate points for determination and the court while writing the judgment has to deliberate overall possible situation and probabilities for drawing such decision. Provision of this section is mandatory. Judgment not showing the points for determination of decisions thereon is not a judgment in the eyes of law as held by the Apex Court in the cases of Rafiullah Vs The State (2006 SCMR 1594), *MUDDASSAR alias JIMMI Vs. The State* **(1996 SCMR 3)** and *ABDULLAH JAN Vs. The STATE and others* **(2019 SCMR 1079)**.

h) The impugned judgment is silent about the fact under which section of Law the accused is convicted and the punishment to which he is sentenced. Under Section 367(2) of Cr.P.C., it is mandatory that the judgment should specify the offence and the Section of the Pakistan Penal Code or any other law under which the accused is convicted

as no section of PPC has been mentioned for which the appellant has been sentenced so the impugned judgment of the trial court is not sustainable in the eyes of law. It is also a well settled law as held in Farrukh Sayyar and 2 others vs. Chairman NAB and others (**2004 SCMR 1**) that : "Failure to specify the points for determination as required under Section 367, Cr.P.C. is an omission which is not curable under section 537, Cr.P.C. and absence of decision on the points for determination and reasons in the judgment amounts to an illegality which prejudices the case of the accused."

i) The section 20 of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979, states:

> "**20. Punishment for haraabah liable to tazir.** Whoever commits haraabah which is not liable to the punishment provided for in section 17, or for which proof in either of the forms mentioned in section 7 is not available, or for which punishment of amputation or death may not be imposed or enforced under this Ordinance, shall be awarded the punishment provided in the Pakistan Penal Code, for the offence of dacoity, robbery or extortion, as the case may be."

Therefore, if the punishment was to be given in the present case then the same could have been in either of the three offences, i.e., dacoity, robbery or extortion. In the present case, no such offence or section of PPC under which the appellant has been convicted is mentioned, hence, it is not clear that under which provision of PPC the appellant / accused was sentenced.

6. For the aforementioned reasons, acknowledgment of the State Counsel and for the non-compliance of the aforementioned statutory provisions by the Trial Court while passing the impugned judgment, I am inclined to accept this appeal, set aside the impugned judgment dated 22.03.2019 and the case is remanded back to the learned Trial Court for *de-novo* trial. The proceeding shall be concluded within the span of sixty

(60) days after the receipt of copy of this judgment. The office shall transmit the file and record of the case to the Trial Court immediately.

7. The above are the reasons of my short order dated 14.09.2020.

(JUSTICE DR. SYED MUHAMMAD ANWER)
JUDGE

Dated, Islamabad the
21st September, 2020
*Mubashir**