

# IN THE FEDERAL SHARIAT COURT OF PAKISTAN

(Appellate/Revisional Jurisdiction)

**PRESENT**

**MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH, JUDGE**

**MR. JUSTICE SHAUKAT ALI RAKHSHANI, JUDGE**

**Crl. Appeal No.02/I of 2019**

Bakht Nawab son of Bacha Khan, resident of village Batkhela Tehsil and District Malakand.

.....Appellant

**Versus**

1. Sohail Khan son of Bacha Hussain, resident of Talash Timargara, Tehsil and District Timargara.
2. The State.

...Respondents

Counsel for Appellant	---	Mr. Muhammad Sajid Khan, Advocate
Counsel for Respondent	---	Malik Daniyal Khan, Advocate
Counsel for the State	---	Malik Akhtar Hussain Awan, Assistant Advocate General, Khyber Pakhtunkhwa.
Case FIR No, date & Police Station.	---	147 dated 31.03.2015 P.S Lahor, Swabi.
Date of impugned Judgment.	---	20.10.2018.
Date of institution	---	16.01.2019.
Date of hearing	---	12.09.2019.
Date of decision	---	12.09.2019.

## **JUDGMENT.**

**SYED MUHAMMAD FAROOQ SHAH, J:-** The appellant *Bakht Nawab* son of *Bacha Khan* through the instant appeal has assailed the judgment dated 20<sup>th</sup> October, 2018, rendered and pronounced by the learned ASJ-II/Camp Court Lahor, Swabi, in Sessions Case No.4/HC of 2016, thereby the appellant was found guilty for committing *Harabah*. The requirement prescribed for establishing '*Harabah*' liable to *Hadd* were not available, therefore, he was convicted for committing *Harabah* liable to *Ta'zir* and sentenced to

undergo life imprisonment and to pay fine of Rs.500,000/- (five lac only) to the legal heirs of the deceased; in default of payment of fine to undergo imprisonment for six months simple imprisonment more. The benefit of Section 382-B Cr.P.C was extended to the convict/appellant Bakht Nawab. However, by extending benefit of doubt, co-accused Shah Khalid and Ibrahim were acquitted. The case against absconding accused namely Jaleel and Shahzada was kept on dormant file. A prayer to set aside the impugned judgment has been made on facts and ground averred in the memo of appeal.

2. Story of the prosecution case in nutshell is that on 31<sup>st</sup> March, 2015, at 19:30 hours, Bacha Hussain, driver of dumper/truck bearing registration No. C-8626/SW had been forcibly de-boarded alongwith complainant Sohail Khan son of Bacha Hussain and PW Asif Khan. The culprits duly armed with firearm weapons snatched cellular phones, and an amount of Rs.4, 000/- from PW Asif Khan. During scuffle with one of dacoit, Bacha Hussain had succumbed bullet injury of .30 bore pistol at the spot. However, deceased had been succeeded to snatch the said pistol from the culprit/accused. The FIR was lodged on the same day of incident at 20:15 hours. Subsequently, on 23.04.2015, statement of complainant Sohail Khan had been recorded under section 164 Cr.P.C, wherein he involved four accused in commission of the alleged offence by stating that, *"I have searched matter and now I am fully satisfied that said offences have been committed by Jaleel and Shahzada sons of Enzar Gul and Bakht Nawab s/o Bacha Khan resident of Batkhela alongwith one unknown accused"*. The accused Ibrahim, Shah Khalid and appellant Bakht Nawab have been arrested and on completion of usual investigation, they were charge sheeted under section 173 Cr.P.C. On commencement of trial, formal Charge was framed by the trial court for offences punishable under section 17 (4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with

section 411 PPC. The accused did not admit their guilt and claimed to be tried.

3. Ocular account of the prosecution case rest on sole testimony of complainant Sohail Khan. Another eye witness PW Asif Khan had been abandoned being unnecessary witness through joint statement made by Mr. Ikram Ullah APP for the State and Malik Danial Khan, Advocate for complainant (available at page 42 of paper book). On completion of circumstantial, medical and expert evidence of prosecution witnesses, statements of the accused under section 342 Cr.P.C were recorded, in which, they have denied all the allegations and pleaded their innocence. However, neither they adduced any defence evidence nor they appeared as their own witness as provided under section 340 (2) Cr.P.C.

4. Arguments heard. Record perused.

5. Learned counsel representing the appellant argued that the impugned judgment is perverse, arbitrary, based on surmises, conjectures, delivered in hasty manner, without touching the merits as there is no independent evidence in the case, so much so that in *Murasila* /FIR (Exh:PA), the only eye witness, complainant/PW-5 Sohail Khan has not given any description (Hulia) of the accused; stated in cross-examination that after arrest of the accused, he was immediately taken to the police station where he saw the accused and categorically stated that *"the identification of the arrested accused was conducted on 07.05.2015 after my arrival at police station on 23.04.2015. I was also shown the SIM and mobile phone at the PS which were shown to be recovered from the accused facing trial."* Learned counsel contended that identification parade after identification of the accused at the police station is having no worth and sanctity in the eyes of law. To ascertain the legal authenticity of such an identification parade, learned counsel argued that neither any memo of identification was drawn by the concerned magistrate nor he

mentioned the names of dummies or their description as to whether they were having same structure, age etc;

6. Learned counsel for the appellant argued that involvement and nomination of the accused on the basis of supplementary statement has always been depreciated and disapproved by the Hon'ble Supreme Court of Pakistan. In case, the complainant or prosecution witnesses are allowed to involve accused on the basis of supplementary statement, then such premium would demolish the entire structure whereupon the criminal administration of justice is based. Thus such practice by all means needs to be discouraged and such supplementary statements require to be discarded as of complainant/PW-5 Sohail Khan. In this regard, reliance is being placed on the dictum expounded in the cases of "Kashif Ali versus the Judge ATC No.2 Lahore and others" (PLD 2016 SC 951), "Akhtar Ali and others versus the State" (2008 SCMR 6) and "Kaleem Ullah versus the State and another" (2018 YLR 2363). It is next argued that putting the present case to the test laid down by series of judgments of Superior Courts, it is clear that in view of discrepancies in the evidence beside non association of the independent witnesses, the prosecution has failed to bring home guilt of the appellant as the impugned judgment is result of complete mis-reading of evidence, to produce a positive miscarriage of justice. To sum up his arguments, learned counsel for the appellant argued that it is now well settled principle of law that if a single circumstance creates reasonable doubt in a prudent mind about the guilt of the accused then he shall be entitled to such benefit not as a matter of grace but as a matter of right; more particularly, the findings of learned trial Court are based on erroneous and speculative presumption including non-reading/mis-reading of evidence.

7. After arguing the matter at some length, learned counsel representing the Appellant submitted that the learned trial judge in

non-compliance of section 367 Cr.P.C. did not draw point or points for determination and findings with reasons for the decision in the impugned judgment as required under the provision of sub section 2 of section 367 Cr.P.C, wherein it is mandatory that the judgment should specify the offence and the section of the PPC or any other law under which the accused is convicted and the punishment to which he is sentenced. As no offence or section of the PPC has been mentioned for which the appellant has been sentenced so the judgment of the trial Court is not sustainable in law. Moreso, in non compliance of sub-section 5 of Section 367 Cr.P.C reasons for awarding lesser punishment of imprisonment for life has not been specified by the learned trial Court.

8. Conversely, learned counsel for the appellant as well as learned counsel representing the State did not controvert the legal submissions made above by the learned counsel for the Appellant and argued that the appellants were sentenced to life imprisonment as *Tazir* but the offence for which they were sentenced has not been mentioned by the learned trial Court. The FIR was registered under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1997, Challan was submitted under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and under Section 411 PPC and similarly even charge was framed under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with Section 411 PPC. Under Section 367(2) Cr.P.C. it is mandatory that the judgment should specify the offence and the section of the Pakistan Penal Code or other law under which the accused is convicted, and the punishment to which he is sentenced. As no offence or section of the Penal Code has been mentioned for which the appellant has been sentenced so the judgment of the learned trial Court is not sustainable in law. Even otherwise, under Section 17(4) of the Offences Against Property (Enforcement of Hudood)

Ordinance, 1979, it is mentioned that *"whoever, being an adult, is guilty of Harrabah in the course of which he commits murder shall be punished with death imposed as Hadd"* and under Section 20 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 it is mentioned that *"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."* In this situation, it is clear that if 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 as mentioned above. In the present case as no offence or section of PPC under which the appellant has been convicted has been mentioned so it is not clear that under which provision of PPC the Appellant/ accused was sentenced, therefore, in non compliance of the aforementioned statutory provisions, the captioned appeal may be remanded back to the learned trial Court for re-writing of judgment in accordance with law.

9. It is not out of context to mention that the learned Trial Judge in non compliance of mandatory provisions of sub-sections (2), (3) and (5) of section 367 of the Criminal Procedure Code, neither has drawn the point / points for determination and findings with reasons for the decision in the impugned judgment nor the offence for which the Appellant was sentenced has been mentioned, so much so that sufficient reasons or plausible mitigating circumstances for awarding lesser punishment of imprisonment of life have not been specified. It needs to be reiterated that the duty of a Judge is to ensure not only that he dispenses justice but the justice also seems to have been done. Provision of this section is mandatory and intended to constitute a substance as distinguished

from mere form of judgment. If need arises, reliance may conveniently be placed on the cases reported as "Mudassar alias Jimmi Vs. The State" (1996 SCMR 3) and "Sahab Khan and 4 others vs. The State and others" (1997 SCMR 871).

10. Be that as it may, we are of the view that mandatory provisions of section 367 Cr.P.C. have not been followed in deciding the case. It shall be advantageous to reproduce section 367 Cr.P.C. as follows:

**S 367. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court, or in English; and shall contain the point or points for determination, the decisions thereon and the reasons for the decisions; and shall be dated and signed by the presiding officer in open court at the time of pronouncing it and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.**

**(2) It shall specify the offence (if any) of which, and the section of the Pakistan Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.**

**(3) Judgment in alternative. When the conviction is under the Pakistan Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.**

**(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.**

**(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed."**

**(6) For the purposes of this section, an order under section 118 or section 123, sub-section (3), shall be deemed to be a judgment.**

11. Without advertent to the merits and de-merits of the case in hand, we hold the view that the impugned judgment was not delivered in the light of the aforementioned statutory provision. Having such a glaring defect, the impugned judgment is not sustainable in law and is liable to be set aside. The net result is that the present appeal is accepted, the impugned judgment is set aside; the case is remanded back to the learned trial Court for re-writing of judgment strictly on merits, preferably within two months of the date of this order / judgment. The office shall transmit the file and record of this case to the learned trial Court immediately. Needless to mention that opportunity of hearing should be afforded to all concerned for re-writing and pronouncement of fresh judgment in accordance with the evidence and on the basis of record. The learned trial Court shall see that the judgment is recorded in accordance with the provisions of Criminal Procedure Code, especially while fulfilling the lacunas identified by this Court.

JUSTICE SHAUKAT ALI RAKHSHANI  
JUDGE

JUSTICE SYED MUHAMMAD FAROOQ SHAH  
JUDGE

Islamabad the  
12<sup>th</sup> September of 2019  
M.Ajmal/\*\*.

Approved for reporting

JUDGE