

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT
JUSTICE IQBAL HAMEEDUR RAHMAN, CHIEF JUSTICE
JUSTICE DR. SYED MUHAMMAD ANWER

CRIMINAL APPEAL NO. 01-QOF 2022

SADDAM HUSSAIN SON OF GHULAM RASOOL
ABDUL WAHEED SON OF HAJI MUHAMMAD KHAN
(PRESENTLY CONFINED IN CENTRAL JAIL GADDANI)

Appellants

VERSUS

THE STATE

Respondent

LINKED WITH

CRIMINAL APPEAL NO. 04-QOF 2022

NAVEED SON OF MITHA KHAN
(PRESENTLY CONFINED IN CENTRAL PRISON GADDANI)

Appellant

VERSUS

THE STATE

Respondent

Counsel for the Appellants : M/s. Ilahi Bakhsh Mengal, Abdul Samad
In Cr.A.No.1/Q/2022 Sasoli, Advocates

Counsel for the Appellant : Mr. Ali Ahmed Lehri, Advocate
In Cr.A.No.4/Q/2022

Counsel for the complainant: Mr. Jamroz Khan Afridi, Advocate

Counsel for the State : Mr. Abdul Latif Kakar, Additional
Prosecutor General, Balochistan.

FIR No., Date & Police : 226/2020, dated 24.07.2020
Station : Hub City, Lasbela.

Date of Impugned Judgment : 10.02.2022

Date of Institution : 29.10.2022

Dates of Hearing : 15.11.2023 & 16.11.2023

Date of Decision : 16.11.2023

JUDGMENT

IQBAL HAMEEDUR RAHMAN-CJ.Through this judgment, we intend to dispose of Criminal Appeal No.1-Q of 2022 "SADDAM HUSSAIN and another vs. The STATE" and Criminal Appeal No.4-Q of 2022 "NAVEED vs. THE STATE etc." arising out of one and the same judgment of conviction dated 10th of February, 2022, handed down by learned Additional Sessions Judge-II, Lasbela at Hub.

2. That in the trial of case F.I.R. No.226 of 2020 registered under Section 17(4) of The Offences against Property (Enforcement of Hudood) Ordinance, 1979 (VI of 1979) (Hereinafter called The Ordinance), learned Additional Sessions Judge-II, Lasbela at Hub through judgment dated 10.02.2022 recorded conviction against the present appellants under Section 396/34 of The Pakistan Penal Code, 1860 (Act XLV of 1860) (Hereinafter called The Code) and awarded each appellant sentence of rigorous imprisonment for life alongwith fine to the tune of Rs.100,000/- each and in case of default of payment of fine to further undergo six months R.I. They were also ordered to pay compensation of Rs.100,000 each to the legal heirs of deceased/Muhammad Danish under section 544-A of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called Act V of 1898) in default whereof to further undergo six months S.I. Benefit of Section 382-B of The Act V of 1898 was also extended in favour of appellants.
3. The F.I.R. (Ex.P/10-A) was lodged by the complainant

Muhammad Sajid (P.W.1), who was working at the petrol pump of Muhammad Danish (deceased) against unknown accused with the allegation that on 24.07.2020. he alongwith Muhammad Danish owner of Japan Mini petrol pump were present at the petrol pump at about 1:20 a.m and when they were closing the main gate of petrol pump after filling diesel in a vehicle, three unknown persons whose faces were muffled and armed with pistols came on motor cycle and tried to enter the petrol pump whereupon Muhammad Danish offered resistance. During the scuffle one accused person fired upon Muhammad Danish who sustained injuries in his abdomen and fell down, then all the three armed persons entered the petrol pump, one person pointed pistol on the complainant's head while the others entered the room of petrol pump and took away alongwith them one white iron box containing cash of Rs.200,000/-, receipt books, cards original file of Union Star motorcycle No. KKE-4924, one pair of clothes. The complainant informed his father through telephone and without informing police in order to save injured Muhammad Danish took him in a vehicle to Trauma Center, Civil Hospital, Karachi where he succumbed to his injuries.

4. By way of present appeals, the appellants have called in question vires of said judgment, seeking acquittal while setting aside the judgment.

5. The appellants earlier preferred appeal before Honourable

High Court of Balochistan, Quetta and for want of jurisdiction, it was remitted to this Court through order dated 19.10.2022.

6. The occurrence is stated to be seen by Muhammad Sajid/Complainant (P.W.1) who was working at the Japan Mini petrol Pump.

7. Since the assailants were unknown, therefore, after arrest of the present appellants being suspects who were arrested on the same date i.e. 24.07.2020. Thereafter, identification parade conducted on 30.07.2020 under the supervision of Bashir Ahmed Kakar, Judicial Magistrate, Usta Muhammad (P.W.7) and in the identification parade, the complainant Muhammad Sajid (P.W.1) identified the appellants as assailants as well as the white iron box. During the course of investigation police had recovered one white iron box containing cash of Rs.200,000/-, Receipt books, cards, original file of Union Star motorcycle No. KKE-4924 and one pair of clothes alongwith TT pistols from each appellants through recovery memos (Ex.P4-A to Ex.P4-C).

8. After usual investigation and observing codal and legal formalities Report under Section 173 of the Act V of 1898 was submitted. The appellants who were charged under Sections 396/34 of the Code read with Section 17(4) of the Ordinance pleaded not guilty and claimed to be tried.

9. The prosecution in order to prove its case produced as many as ten witnesses including complainant, Muhammad Sajid (P.W.1) (eye-witness). The appellants in their respective statements recorded under Section 342 of the Act V of 1898 denied the whole incriminating evidence with which they were confronted and pleaded innocence. They neither appeared as their own witnesses nor led evidence in defence under section 340 (2) of the Act V of 1898.

10. The learned Trial Court after hearing the parties recorded conviction against the appellants awarding them sentence under section 396/34 of the Code which has been mentioned in para-2 of the judgment.

11 We have heard the learned counsel for the appellants, the learned Additional prosecutor General, Balochistan and the learned counsel for the complainant with their able assistance and gone through the material available on record.

12. That the learned Additional Prosecutor General at the very outset has brought to our notice that the impugned judgment of the trial court wherein punishment of Harabah under section 17(4) of the Ordinance has not been awarded to the appellants and in view of the same, the sentence has been awarded in *Tazir* under section 396/34 of the Code. In doing so, the learned trial court has overlooked the fact that there were only three accused persons

to convert the conviction it should have awarded under section 392 of the Code read with section 302 (b) of the Code. Furthermore, he has extensively argued that the learned trial judge while not awarding the death sentence should have given reasons which are not found in the impugned judgment, as such is contrary to mandatory provisions of section 367 (5) of the Act V of 1898 as well as the dictum laid down by the Hon'ble Supreme Court and also by this Court.

13. Learned counsel for the appellants when confronted with this situation, could not controvert the same view of the dictum laid down by Supreme Court.

14. Perusal of impugned judgment dated 10.02.2022 reveals that the appellants have been convicted under section 396/34 of the Code. The relevant section is reproduced below for ready reference:

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.

In order to better understand definition of dacoity, relevant section of the Code is also reproduced hereunder:

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".

The section 391 of the Code describe the number of accused persons committing the offence of a robbery conjointly committed by five or more persons, however, section 396 of the Code provides punishment to the accused involving the offence of robbery committed conjointly by five or more persons. So far as, this case is concerned only three persons have been booked for the offence of committing robbery with murder which does not fall within the category of dacoity with murder as per section 396 of the Code whose requirement of number of accused is five or more, the same has not been taken into consideration by the trial court.

15. Moreover, the learned trial court has also failed to give reasons for not awarding the death sentence as the offence with which the appellants were charge sheeted under section 17(4) of the Ordinance which mandates the awarding of sentence of death. The section 17(4) of the Ordinance is reproduced hereinbelow:

17. Punishment of 'Haraabah':

(1)

(2)

(3)

(4) Whoever, being an adult, is guilty of haraabah in the course of which he commits murder shall be punished with death imposed as hadd.

That in the absence of proof of evidence under section 7 of the Ordinance the learned trial Court is required to award sentence under section 20 of the Ordinance which is reproduced as under:

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 (Act XLV of 1860) for the offence of dacoity, robbery of extortion, as the case may be.

In this regard mandatory provision of Section 367 (5) of the Act V of 1898 is also reproduced below:

367. Language of judgment: Contents of judgment.

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

In the backdrop of the aforesaid mandatory provision of law the learned trial court while awarding alternative sentence was required to take into consideration the mandatory provisions of law as required under section 367 of the Act V of 1898. The trial court was obliged to state the reasons in its judgment as to why death sentence was not passed as required by sub-section (5) of section 367 of the Act V of 1898.

16. In this regard, we are fortified by the judgment of Hon'ble Supreme Court in case of Muhammad Ismail vs. The State reported in 2017 SCMR 713 held that "It is a bedrock principle of law that, once a Statute or rule directs that a particular act must be performed and shall be construed in a particular way then, acting contrary to that is impliedly prohibited."

17. In the light of section 367 of the Act V of 1898 and taking into consideration the dictum laid down by the Hon'ble Supreme Court, we are inclined to accept these appeals, set aside the impugned judgment and remand the case to the Trial Court for re-writing of judgment by taking into consideration the mandatory provisions contained in section 367, Cr.P.C. with the result, the case shall be treated pending before the Trial Court and the parties shall be allowed an opportunity of addressing arguments. The matter shall be concluded preferably within one month after the receipt of this judgment.

18. These appeals are disposed of in the above terms and the Criminal Miscellaneous Application No. 02/Q of 2022 having become infructuous is dismissed.

IQBAL HAMEEDUR RAHMAN
CHIEF JUSTICE

DR. SYED MUHAMMAD ANWER
JUDGE

Dated 16.11.2023
Ajmal/*