

# **IN THE FEDERAL SHARIAT COURT**

(APPELLATE JURISDICTION)

## **PRESENT:**

**MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE  
MR. JUSTICE KHADIM HUSSAIN M. SHAIKH**

## **CRIMINAL APPEAL NO.08-K OF 2020**

AZMAT KHAN SON OF SHAHZAD GUL MEHMAND PATHAN,  
RESIDENT OF HOUSE NO.433, MASOOM SHAH COLONY,  
PATHAN COLONY, HYDERABAD  
(PRESENTLY CONFINED IN CENTRAL PRISON HYDERABAD)

Appellant

VERSUS

THE STATE

Respondent

Counsel for the Appellant : Mr. Ali Ahmed @ Zaman Khan Patoli,  
Advocate

Counsel for the complainant: Mr. Ali Asghar Buriro, Advocate  
along-with complainant Asif Ali.

Counsel for the State : Mr. Zahoor Shah, Deputy Prosecutor  
General, Sindh.

FIR No., Date & : 34/2008, 11.04.2008  
Police Station : Makki Shah.

Date of Impugned Judgment : 01.09.2020

Date of Institution : 22.09.2020

Date of Hearing : 11.06.2021

Date of Decision : 11.06.2021

## **J U D G M E N T**

**Khadim Hussain M. Shaikh –J.** The captioned criminal appeal is directed against the judgment dated 01.09.2020, passed by the learned Model Criminal Trial Court-II/IVth Additional Sessions Judge, Hyderabad in Sessions Case No.231-A of 2008 re-The State v. Muhammad Faisal and two others, emanating from Crime No.34 of 2008 registered at Police Station, Makki Shah Hyderabad for offence under Section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 whereby appellant Azmat Khan son of Shahzad Gul Mehmand Pathan

has been convicted under Section 17 (4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and sentenced to suffer imprisonment for life as *Ta'zir* and to pay compensation of Rs.200,000/- (two lac) each to the legal heirs of three deceased within the purview of Section 544-A of the Code of Criminal Procedure, [Act V of 1898] (**the code**) extending him benefit of Section 382-B of **the code**.

2. Briefly, the facts of the prosecution case are that on 11.04.2008 complainant Asif Ali Kalhoro his younger brother Safdar Ali, servants Aftab Jiskani, Muhammad Ayoub Palari and Ghulam Nabi Buriro were present in Mobilink Franchise shop of complainant's brother Aijaz Hussain situated in Fazal-e-Rabbi Heights, Fatima Jinnah Road, Hyderabad, when at about 08:30 p.m. two persons armed with pistols entered into the shop and on the strength of their pistols they snatched the repeater from Muhammad Ayoub Palari and cash of Rs.70,000/- and four mobile phones along-with sims from the complainant. In the meanwhile complainant's brother Aijaz Hussain entered into the shop, followed by a police official in uniform seeing them, the perpetrators opened direct fires from their pistols upon the complainant party which hit complainant's brother Aijaz Hussain, his servant Muhammad Ayoub Palari and police constable Mevo Khan, who fell down receiving firearm injuries and then the perpetrators, making firing, made their escape good. Thereafter all the above three injured persons were shifted to hospital, but all of them succumbed to their injuries. The complainant then lodged the subject F.I.R. After usual investigation, one of the accused, who was shown in custody, was sent up with the challan and whereas appellant Azmat Khan and co-accused Muhammad Nisar @ Fouji were shown as absconders therein. Afterwards the learned Trial

Court received information about the confinement of appellant Azmat Khan in Central Jail Rawalpindi and then in Central Prison Faisalabad in some criminal cases, wherefrom he was ultimately shifted and produced before the learned Trial Court on 14.01.2019. After completing the formalities a formal charge was framed against the appellant at Ex.16 to which he pleaded not guilty and claimed his trial vide his plea recorded at Ex.16/A.

3. In order to prove its case, the prosecution examined in all 8 (eight) PWs namely PW.1 complainant Asif Ali at Ex.17, PW-2 Malik Noor Muhammad at Ex.18, PW-3 Sajid Ali Kalhoro at Ex.19, PW-4 Dr. Abdul Samad Solangi at Ex.20, PW-5 Safdar Ali at Ex.21, PW-6 Ghulam Nabi at Ex.23, PW-7 SIP/Inspector Mehmood Akhtar at EX.24, who produced order of SP investigation dated 02.10.2009 at Ex.24/A, order of RPO dated 02.10.2009 at Ex.24/B, entry No.56 at Ex.24/C, application moved to learned Magistrate for investigation at Ex.24/D, memo of arrest of present accused at Ex.24/E, application moved to learned Magistrate at Ex.24/F, and PW-8 SIP/Inspector Nek Muhammad at Ex.25, who produced 11 photographs of place of incident at Ex.25/A to Ex.25/K, FIR No.42/1998 at Ex.25/L, FIR No.41 of 1998 at Ex.25/M, FIR No.90 of 2005 at Ex.25/N and then the prosecution side was closed vide statement at Ex.26. Thereafter, the statement of the appellant under section 342 of **the code** was recorded wherein he denying the prosecution allegations professed his innocence. He, however, neither examined himself on oath under section 340(2) of **the code** nor did he produce any person as his defence witness.

4. At the conclusion of trial and after hearing the parties' counsel, the learned trial Court convicted and sentenced the appellant

vide impugned judgment dated 01.09.2020 as discussed in paragraph-I *supra*.

5. Having felt aggrieved by the impugned judgment dated 01.09.2020, the appellant has preferred this criminal appeal.

6. The learned Counsel for the appellant has mainly contended that the name of the appellant was not mentioned in F.I.R; that no proper identification parade of the appellant was conducted; that no independent person was examined by the prosecution although the incident had taken place in a busy place situated in thickly populated area; that there are material contradictions in the evidence led by the prosecution; and, that the learned Trial Court without appreciating the evidence in proper manner has convicted and sentenced the appellant. The learned counsel prays for acquittal of the appellant.

7. Conversely, the learned Deputy Prosecutor General, Sindh and counsel for the complainant have mainly contended that the appellant is a habitual offender and is involved in so many heinous crimes committed by him and his accomplices in various cities of Pakistan; that brutal murders of three innocent persons namely Aijaz Hussain Kalhoro, Muhammad Ayoub Palari and police constable Mevo Khan have been committed during the course of robbery by the appellant and his accomplices; that the complainant and other PWs, examined by the prosecution have supported the prosecution case; that the F.I.R was promptly lodged; that the appellant was identified by the prosecution witnesses; that the medical evidence is in line with the ocular evidence; that no enmity or animosity of the complainant party with the appellant is alleged; and, that the prosecution has proved its

case against the appellant beyond any shadow of doubt. They pray for dismissal of the instant criminal appeal.

8. We have heard the arguments of the learned counsel for the appellant, the learned Deputy Prosecutor General, Sindh and the learned counsel for the complainant and have gone through the record.

9. From a perusal of the impugned judgment dated 01.09.2020 it would be seen that the learned trial Court has rendered the finding of the guilt of the appellant holding that the prosecution has successfully proved its case against the accused Azmat Khan S/o Shahzad Gul (**the appellant**) beyond reasonable doubt by adducing convincing evidence for committing murders of deceased Aijaz Hussain, Muhammad Ayoub Palari and constable Mevo Khan during robbery. However, on one hand the learned Trial Court has held that the requirements of section 07 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 for awarding conviction to accused under "**Hadd**" are missing and on the other the learned Trial Court has convicted the appellant for an offence punishable under section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (**the ordinance**) and sentenced him to suffer life imprisonment as *Ta'zir*, although sub-section (4) of section 17 of **the ordinance** only provides death sentence as "**Hadd**" for an adult guilty of **Haraabah** in course of which he commits murder and it does not provide any other sentence. For the sake of convenience sub-section 4 of section 17 of **the ordinance** is reproduced here:

***"Whoever, being an adult, is guilty of haraabah in the course of which he***

***commits murder shall be punished with death imposed as hadd."***

Section 20 of **the Ordinance** provides 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.*"

10. Even otherwise for awarding conviction and sentence under the provisions of Pakistan Penal Code Act No.XLV of 1860 other than the death sentence the learned 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 code**, which for the sake of convenience is reproduced here:-

***"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."***

11. Needless to add that the provisions of section 367 of **the code** are not permissive, but are imperative and compliance of its terms is mandatory. In the case of **MUHAMMAD ISMAIL V. STATE (2017 SCMR 713)**, the Hon'ble Supreme Court of Pakistan has 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. That means, doing of***

*something contrary to the requirements of law and rules, is impliedly prohibited."*

12. This case is involving horrific crime of brutal murders of three innocent persons namely Aijaz Hussain, Muhammad Ayoub Palari and constable Mevo Khan committed by the culprits by indiscriminate firing at them with weapons during the course of robbery in the Mobilink Franchise shop of deceased Aijaz Hussain Kalhoro located in heart of Hyderabad City and in such like cases, the approach of the Court should be dynamic and pragmatic in approaching true facts of the case and drawing correct and rational inference and conclusion while deciding such type of cases and not static, as inflicting conviction and imposing sentence is not a mechanical exercise, but it is onerous responsibility to inflict fair, reasonable and adequate sentence, commensurate with gravity and or severity of crime, involving conscious application of mind and it is duty of a Judge to ensure not only that he dispenses justice, but what is equally of vital importance, that justice also seems to have been done. The characteristic of a good judgment is that it must be self-evident and self-explanatory, in other words, it must contain the reasons that justify the conclusion arrived at and these reasons should be such that a disinterested reader can find it convincing or at least reasonable and the law never allows the judge to make departure from the mandatory procedure and to ignore settled principle of law. And, thus the learned Trial Judge was left with no other option but to make legal determination of the offence, following the mandatory provisions of law. Patently the learned Trial Judge was not alive to the law and he without applying his conscious judicious mind has awarded sentence of life imprisonment as *Ta'zir* under section 17 (4) of **the ordinance** to the

appellant and that too by holding that the requirements of section 7 of **the ordinance** for awarding conviction to the accused under "**Hadd**" are missing, despite the fact that section 17 (4) of **the ordinance** does not provide any other sentence except the death sentence as "**Hadd**" as discussed *supra*; and he has also not specified in the impugned judgment the reasons and or mitigating circumstances for awarding lesser punishment of imprisonment of life as mandated by the provisions of section 367 (5) of **the Code**, which legally he was not competent to do so and that being completely in negation of the mandate of the law, having been impliedly prohibited, cannot be approved as is held by the Hon'ble Supreme Court of Pakistan in case of **MUHAMMAD ISMAIL** *supra*. And, thus the impugned judgment, which is violative of the mandatory provisions of the law and procedure, suffering from incurable defects, as discussed *supra*, is not sustainable in law, therefore, we refrain ourselves from dilating upon the merits of the case, lest it may prejudice case of the either side. Facing with such situation, the learned Deputy Prosecutor General, Sindh and learned counsel for the complainant have conceded that the learned Trial Court while passing the impugned judgment has committed material irregularities and the impugned judgment suffering from such incurable defects cannot sustain, therefore, they pray that the case may be remanded to the learned Trial Court for re-writing of the judgment. The learned counsel for the appellant has stated that the case may be decided on merits, but he has not been able to controvert the aforesaid legal flaws and incurable defects in the operative part of the impugned judgment. As it is a fit case for remand to the learned Trial Court for re-writing of the judgment, hence we are left with no other option than to remand the

case to the learned Trial Court. Accordingly, without dilating upon the merits of the case, we are inclined to accept this appeal, set aside the impugned judgment and remand the case to the learned Trial Court for re-writing of the judgment by adhering to the mandatory provisions of law and by applying conscious judicious mind and affording opportunity of hearing to the parties concerned as mandated by Article 10-A of constitution of Islamic Republic of Pakistan 1973, within a span of period of three months from the date of receipt of copy of this judgment. These are the reasons of short order announced by us on 11.06.2021, which reads as under:

***“For the reasons to be recorded separately, we are inclined to accept this appeal, set aside the impugned judgment, and remand the case to the Trial Court for re-writing of judgment within the span of three (3) months after hearing the parties, concerned.”***

\_\_\_\_<sup>th</sup> August 2021

**(JUSTICE KHADIM HUSSAIN M. SHAIKH)  
JUDGE**

**(JUSTICE MUHAMMAD NOOR MESKANZAI)  
CHIEF JUSTICE**

*Khurram\**