

(23)

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

HON:MR.JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.54/I of 1997.

1. Gulzar s/o Appellants
Hussain Khan

2. Mushtaq Ahmad s/o Sabir

3. Dilbar Shah s/o ^{Sultan}
Syed Rasool Shah

4. Dildar @ Raja
s/o Sattar Muhammad

r/o village Kakotri,
Teh & Distt: Haripur

Versus

1. Fida Hussain Shah Respondents
s/o Syed Zaman Shah

2. The State

Counsel for the Saeed Akhtar Khan
Appellants Advocate

Counsel for the State Mr.Azam Khan, AAG, NWFP

FIR No. Date and 3 dated 18-2-1994
Police Station P.S. Swabi Maira

Date of the judgment 24-04-1997
of the trial Court

Date of Institution 4-06-1997

Date of hearing 17-06-1997

Date of Decision 17-06-1997

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JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- Appellants have been convicted by Additional Sessions Judge, Haripur on 24.4.1997 under section 392 P.P.C and have been sentenced to undergo R.I for 3 years and the imposition of fine of Rs:5000/- each in default of payment each one to undergo R.I for one month. They have also been convicted under section 458 P.P.C and sentenced for a period of 2 years R.I. Both sentenced are ordered to run concurrently with benefit of section 382-B Cr.P.C given.

2. Briefly, the facts of the case are that one Fida Hussain Shah moved a complaint (Ex:PA/1) on 18-2-1994 before SHO police station Swabi Maira stating therein that he is an employee in Air Force and his brother Imdad Hussain Shah has died 6/7 years back. His widow and her children are residing in the village. In the night of 2nd and 3rd February, 1994, his Bhabi Mst.Zahida Bibi was sleeping alongwith minor children in her house. Suddenly 3 / 4 persons entered into the house, but his Bhabi remained silent to save her honour. The culprits took T.V (Black & White), Doorbeen, Cemeraz, VCR, Tape recorders, Watches, Golden ornaments, cloths etc. There was none-else in the

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except minors,
house, therefore, his Bhabi sent intimation of this incident
to him to Rawalpindi. On this intimation he reached the village
and investigated and got satisfied that this theft was committed
by the appellants etc. On the basis of this complaint an FIR
was lodged on 18-2-1994 at 03-30 hours. The appellants were arrested
challenged and charged by the trial court on 13-11-1994.

3. I have heard both the learned counsel for appellants
and State. At the outset the learned counsel for appellants has
made a reference to section 222 (1) Cr.P.C which reads as under:-

222 "Particulars as to time, place and person. (1)
The charge shall contain such particulars as to
the time and place of the alleged offence, and
the person (if any) against whom, or the thing
(if any) in respect of which, it was committed,
as are reasonably sufficient to give the accused
notice of the matter with which he is charged."

According to the learned counsel for appellants the charge
dated 13-11-1994 neither contains such particulars as to the
time and place of the alleged offence nor it contains particulars
about the things in respect of which offence was committed.

Substantial part of the charge is reproduced as below:

"That you on the night between 2/3 February 1994
at unknown time committed lurking house tres-pass
in the house of Mst. Zubaida Bibi located within
limits of village Kakotri P.S. Swabi Maira, with

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intent to commit theft after having made preparation to cause restrain and assault to the inmates of the house and thereby committed an offence punishable u/s 458 PPC and within my cognizance. That after the commission of the theft of house hold articles from the house of Mst.Zubaida Bibi, it was recovered from your possession the value of which exceeds Nisab as defined u/s 6 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and thereby committed an offence punishable u/s 9 of the Order and within my cognizance."

According to the counsel for the appellants, the charge makes reference to article 9 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 for which the punishment is that of the right hand from the wrist as a Hadd according to the impugned judgment the offence of Hadd was not proved and therefore, it was brought under the purview of the Ta'zir but as Ta'zir the appellants have been punished under section 392 PPC which is robbery and has nexus with article 17 of the Offences Against Property (Enforcement of Hudood) Ordinance 1979 which punishment is higher than theft as it is punishment for Haraba but the appellants were originally charged for theft and not for Haraba. Reliance has been placed on P.L.J. 1991 Cr.C (Lahore) 131 in which the principle which has been enunciated is quoted verbatim:

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"Ss. 148/149 read with Section 324- Conviction under Section 148/149 PPC-- Appeal against-- Appellate Court acquitting them but convicting them under section 324 PPC-- Challenge to-- Whether conviction was justified when no charge under section 324 PPC was framed-- Question of--Petitioners were charged under section 148/149 PPC-- Additional Sessions Judge set aside conviction under these sections and instead, convicted petitioners under section 324 PPC-- Held Petitioners who were charged with minor offence under sections 148/149 PPC without charge under this section-- Held further: There can be no two opinions that conviction of petitioners by Additional Sessions Judge is bad in law-- Petitioners acquitted."

Another judgment on which reliance has been placed is that of this Court cited as NLR 1995 SD 585. The principle which has been enunciated is quoted verbatim:

"S.22. Defect in framing of charge would cause prejudice to accused and would be a ground for setting aside conviction/sentence recorded against him with remand of case for re-trial after framing a valid charge. "

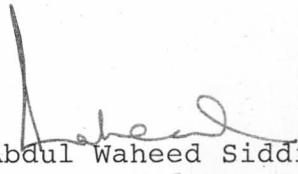
The learned counsel for State has disagreed with the proposal that the case is fit for acquittal, but he has agreed with the proposal that this case in fact, falls within the meaning of the principle laid down in NLR 1995 SD 585.

Consequently the conviction and sentences of the

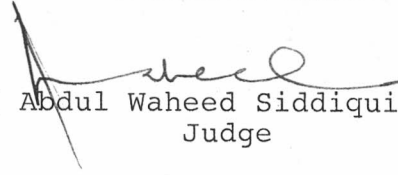
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appellants are set aside and the case is remanded back to the trial Court with direction that a de novo trial shall be held after giving a proper charge to the appellants which should inter alia disclose as to what offence they had attempted to commit. The requirements of section 222 (1) Cr.P.C are mandatory in nature and, therefore, the charge should be framed in accordance with the provisions of the said section. The appeal is disposed of in the aforesaid terms.


(Abdul Waheed Siddiqui)
Judge

APPROVED FOR REPORTING


(Abdul Waheed Siddiqui)
Judge

17th June, 1997
Islamabad.

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