IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN
MR. JUSTICE MUHAMMAD JEHANGIR ARSHAD
MR. JUSTICE SHEIKH AHMAD FAROOQ

CRIMINAL APPEAL NO.75/I OF 2008

Sayed Bashir Hussain son of Zawar Hussain caste Sayed Bukhari, resident of Chah Kotwala, Mauza Dhanote, District Lodhran. — Appellant

VERSUS

1. Abdul Waheed son of Abdul Rashid, caste Rajput, resident of Mauza Dhanote, District Lodhran. — Respondents

2. Muhammad Bilal son of Elahi Bakhsh, caste Thaheem/Qsal, resident of Mauza Dhanote, District Lodhran.

3. Muhammad Imran son of Muhammad Iqbal, caste Rajput, resident of Ward No.29, Kehrorpacca.

4. Muhammad Akbar son of Muhammad Umar, caste Rajput, resident of Chah Munshi Wala, Tehsil, Kehrorpacca.

Learned counsel for the appellant:		Malik Abdul Haq Advocate
Learned counsel for the respondents	:	Mr. M. Shahid Kamal Khan Advocate
Learned counsel for the State	:	Dr. Muhammad Anwar Khan Gondal, learned APG
FIR No Date & PS	:	62 dated 25.04.2004, Police Station Dhanote, District Lodhran.
Date of impugned Judgment of learned trial Court	:	31.05.2008

Date of Institution of appeal : 01.08.2008

Date of hearing : 24.04.2013

Date of judgment : 24.04.2013

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JUDGMENT

JUSTICE MUHAMMAD JEHANGIR ARSHAD, JUDGE:- This appeal is directed against the judgment dated 31.05.2008 passed by Mr. Sana Khan Atiq, learned Additional Sessions Judge, Lodhran in Hudood Case No.29/H.C. of 2004 and in Hudood Trial No.07 of 2005 whereby the learned trial Court acquitted all the respondents in case FIR No.62/2004, dated 25.04.2004 under section 395/411 PPC read with section 10 (4) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 registered with Police Station, Dhanote, District Lodhran.

2. The facts briefly stated are that complainant Sayed Bashir Hussain got registered the above noted FIR through (Ex.PA/1) complaining therein that he alongwith his wife and daughter was sleeping on the night 24/25.04.2004, in his room at his house whereas his brother-in-law Muhammad Ali Shah who came to see them and was sleeping in the courtyard of cattles-shed and at about 12/01.00 of night the complainant opened door at the knock/call of said Muhammad Ali Shah, when five

persons armed with pistols 30 bore entered in the room, amongst whom both complainant and Muhammad Ali Shah identified in the bulb light, as Abdul Waheed son of Abdul Rashid, resident of Dhobi Wala Dhanote and Muhammad Bilal son of Elahi Bakhsh resident of Gali Santoo Wali Dhanote who tied the complainant and Muhammad Ali Shah with clothes whereas, three persons remained in the courtyard. Accused who had entered the room demanded keys of the iron-box from his wife and after opening the lock, picked Rs.50,000/- and 5 tolas of golden ornaments, wrist-watch and photocopy of the identity card of the complainant. Meanwhile, two accused took him and Muhammad Ali Shah outside and others accused maltreated his wife and committed zina-bil-jabr with her. Meanwhile, Muhammad Qasim son of Bagh Shah came and the accused ran away after seeing him. The description of the other 6 accused is the same as of middle height, middle body and young.

3. The case was properly investigated and on the completion of investigation challan was submitted against the accused. On receipt of the

challan, the accused were summoned by the learned trial Court. However, Muhammad Imran and Muhammad Akbar accused were declared juvenile by the learned trial Court vide order dated 01.03.2005 and separate challan as such was filed per Court direction, therefore, their trial was held separately by the learned trial Court under the Juvenile Justice System Ordinance, 2000 and they were also charged separately on 14.04.2005 which is reproduced below:-

> ***"I Abdul Mustafa Nadeem, Additional Sessions Judge, Special Court constituted under Juvenile Justice System Ordinance, 2000, Lodhran do hereby charge you above named accused as under:***
>
> ***Firstly:-*** ***That you Muhammad Imran and Muhammad Akbar accused alongwith co-accused Abdul Waheed, Muhammad Bilal and Muhammad Usman alias Kala, Muhammad Siddique alias Rahim Dad, Muhammad Ajmal son of Noor Muhammad and Muhammad Bilal Pathan son of un-known since declared (POs) during the night between 23/24/2004 (at about 12-00 mid night) within the area of Mauza Dahnot falling within the jurisdiction of P.S. Dahnot while armed with lethal weapons in order to commit dacoity committed the house tress-pass of Sayed Sayed Bashir Hussain son of Zawar Hussain resident of said Mauza and thus committed an offence punishable under section 450 PPC which is within the cognizance of this Court.***
>
> ***Secondly:-That you Muhammad Imran and Muhammad Bilal accused persons alongwith your above mentioned accused persons on the same date, time, place and under the above mentioned circumstances committed dacoity and looted cash amount of***

Rs.50,000/- 10 tolas of Golden ornaments, wrist-watch and a copy of National Identity Card belong to complainant Sayed Bashir Hussain on the point of lethal weapon and made assault on the person of his wife Mst. Shazia Batool and thus committed offence punishable under section 395 PPC which is within the cognizance of this Court.

Thirdly: *That you on the same date, time, place and under the above mentioned circumstances alongwith your co-accused namely Abdul Waheed and Muhammad Bilal committed zina-bil-jabbr turn-by-turn with Mst. Shazia Batool and also torn away her shirt. Thus, you being juvenile committed an offence under section 10 (4) read with section 7 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 which is within the cognizance of this Court.*

Fourthly:- *That you accused persons alongwith your co-accused named above after committing dacoity of the house of complainant dishonestly received the share of looted property and retained the same in your possession by knowing or having to believe that the said property was looted by you as well as your co-accused at the time of dacoity at the house of Sayed Sayed Bashir Hussain and thus you committed an offence punishable under section 412 PPC which is within the cognizance of this Court.*

And I hereby direct that you to be tried by this Court on the said charge.

4. Whereas Abdul Waheed and Muhammad Bilal accused were tried by the learned trial Court separately as an adult accused and their charge was also framed separately on 28.03.2005 which is reproduced below:-

"I Abdul Mustafa Nadeem, Additional Sessions Judge, Lodhran do hereby charge you above named accused are as under:-

Firstly:- *That you Abdul Waheed and Muhammad Bilal son of Elahi Bakhsh accused persons alongwith co-accused Muhammad Akbar and Muhammad Imran (declared juvenile as and tried separately), Muhammad Usman alias Kala, Muhammad Ajmal son of Noor Muhammad, Muhammad Siddique alias Rahim Dad and Muhammad Bilal Pathan son of un-known since declared (P.O) during the night between 23/24/04/2004 at about 12.00 mid night within the area of Mauza Dahnot fall within the jurisdiction of Police Station Dahnot while armed with lethal weapons in order to commit dacoity committed the house tress-pass of Sayed Sayed Bashir Hussain son of Zawar Hussain resident of said Mauza and thus committed an offence punishable under section 450 PPC which is within the cognizance of this Court.*

Secondly:-That you Abdul Waheed and Bilal accused persons alongwith your above mentioned accused persons on the same date, time, place and under the above mentioned circumstances committed dacoity and looted the amount of Rs.50,000/- 10 tolas of Golden ornaments, wrist-watch and copy of National Identity Card belonging to complainant Sayed Sayed Bashir Hussain on the pointation of lethal weapons and made assault on the person of his wife Mst. Shazia Batool and thus committed of offence punishable under section 395 PPC which is within the cognizance of this Court.

Thirdly: *That you on the same date time and place under the above mentioned circumstances alongwith your co-accused persons committed Zina-Bil-Jabbr turn-by-turn with said Mst. Shazia Batool and also torn away her shirt. Thus, you committed an offence punishable under section 10 (4) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 which is within the cognizance of this Court.*

Fourthly:-That you accused persons alongwith your co-accused named above after committing dacoity at

> ***the house of complainant dishonestly received the share of looted property and retained the same in your possession by knowing or having to believe that the said property was looted by you as well as your co-accused at the time of dacoity at the house of Sayed Sayed Bashir Hussain and thus you committed an offence punishable under section 412 PPC which is within the cognizance of this Court.***
>
> ***And I hereby direct that you be tried by this Court on the said charge.***

5. The learned trial Court after holding both the above noted trials separately and after recording of evidence as well as statement of the accused/respondents separately ultimately found them innocent and finally acquitted them through his consolidated/single judgment dated 31.05.2008. The above noted judgment of acquittal has now been impugned before this Court through this appeal.

6. In view of the impugned judgment, neither the facts of the case in detail nor the gist of evidence produced by the prosecution before the learned trial Court is being reproduced here to avoid repetition.

7. On 06.12.2012, this Court after hearing the parties framed, the following two preliminary points which are reproduced as under:-

> *"(i) According to learned counsel for the respondents as the limitation for filing the appeal against acquittal under section 13 (2) of the Juvenile Justice System Ordinance, 2000 is 30 (thirty) days whereas the present appeal which has been filed after the expiry of said period, therefore, is not maintainable, whereas according to the learned counsel for the appellant as the forum for filing the appeal against judgment/order passed under the provisions of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 has been determined vide section 20 of the said ordinance as the present Court (Federal Shariat Court), therefore, per rule 18 of the Federal Shariat Court of Pakistan (Procedure) Rules 1981, the limitation for filing the appeal before this Court is 60 (sixty) days from the date of the order or decision of the appeal from, hence, this appeal was within time.*
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> *(ii). Whether the learned trial Court was competent to pass consolidated judgment of two different trials one under ordinary law and second under Juvenile Justice System Ordinance, 2000 and if consolidated judgment is passed, what is its legal effect qua the acquittal of juvenile who is not claiming any prejudice."*

8. It was also observed in the above order that as the prayer of the appellant was that after setting aside the impugned judgment, the accused/respondents be inter-alia convicted under section 10 (4) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 i.e. Gang Rape which entails punishment with death, therefore, in the opinion of the Court, it would be appropriate if the matter be heard by a bench consisting of not less than three judges one of whom be an Aalim Judge.

9. In the light of the above noted observations, this appeal has been fixed before this Full Bench.

10. We have heard the learned counsel for the parties at great length on both the questions noted above. So far as the question of limitation is concerned the contention of the learned counsel for the respondents/accused is that as section 13 (2) of Juvenile Justice System Ordinance, 2000 prescribed the period of 30 days for preferring the appeal against order of acquittal passed by a Juvenile Court, therefore, this appeal having definitely been filed beyond the period of thirty days was barred by time and was liable to be dismissed because a valuable right had accrued to the respondents/accused to presume their acquittal as a past and close transaction, after the expiry of period of limitation prescribed for preferring the appeal, therefore, this appeal was liable to be dismissed.

11. On the other hand, learned counsel for the respondents submits that as this appeal has been filed under Rule 17 and 18 of the Federal Shariat Court of Pakistan (Procedure) Rules, 1981 the limitation for filing the appeal

before this Court under these rules is 60 days from the date of the order or decision appealed from, therefore, the appeal was within time.

12. We have examined the above noted contentions of the learned counsel for the parties and find that this appeal is within time. The basis of our opinion is that in fact, the period of limitation for filing the appeal under Hudood laws is governed by the Federal Shariat Court of Pakistan (Procedure) Rules, 1981 which provides a limitation by filing such appeal within 60 days from the date of the order or decision appealed from. The said rules were framed by this Court in exercise of powers conferred by Article 203-J of the Constitution of Islamic Republic of Pakistan, 1973 and the same would have over-riding effect qua limitation prescribed under Juvenile Justice System Ordinance, 2000. In this respect, we may also refer to a judgment of an another Full Bench of this Court passed in Criminal Appeal No.37/I of 2011 authored by one of us namely Mr. Justice Sheikh Ahmad Farooq. In the said case also similar question was raised which was answered by the learned Full Bench in the following words:-

"15. The Federal Shariat Court has made Rules for carrying out the purposes of Chapter 3-A of the Constitution of Islamic Republic of Pakistan, which are called as Federal Shariat Court (Procedure) Rules, 1981. According to Rule-18(a) of Rules ibid, an appeal shall be presented to the Court within sixty days from the date of the order or decision appealed from.

Provided the Court may for sufficient cause extend the period.

(Emphasis supplied)

16. It is worth consideration that the instant appeal was entertained by the office of the Federal Shariat Court of Pakistan under Rule 18(a) of the Federal Shariat Court (Procedure) Rules, 1981 which provides a period of sixty days for filing an appeal. There is also no denying of the fact that according to the office of the Federal Shariat Court of Pakistan, the instant appeal was filed within the period of limitation i.e sixty days. Hence, it is held that the provision of section 417(2-A) Cr.P.C would not be applicable to the instant appeal which is being heard and decided in accordance with the jurisdiction vested in the Federal Shariat Court as provided under Article 203DD of the Constitution of Islamic Republic of Pakistan.

17. Needless to mention here that the Federal Shariat Court (Procedure) Rules, 1981 which have been framed in exercise of the powers conferred by Article 203J of the Constitution of Islamic Republic of Pakistan would have precedence over any other procedural law including Cr.P.C. Consequently, the objection of the learned counsel for respondent No.2/Muhammad Sharif regarding the filing of the instant appeal after the period of limitation is over ruled and the instant appeal is held to be within the period of limitation as provided under Rule 18(a) of the Federal Shariat Court (Procedure) Rules, 1981."

13. Similar view was also taken by an another Division Bench of this Court in the case of ***Azmat Hussain Vs. The State (PLD 1982 FSC P.4***). So far as the factual aspect of the case is concerned, we may observe that the impugned judgment was passed by the learned trial Court on 31.05.2008 whereas the application for obtaining copy of the impugned judgment was made on 14.06.2008 and the copy was delivered on 17.06.2008, therefore, this appeal which was filed on 01.08.2008 was within period of 60 days and the above noted objection of the learned counsel for

the respondents that the appeal was barred by time is over ruled and the appeal is held as within time.

14. After deciding the question of limitation in favour of the appellant/complainant we are now left with the question about the legal validity of the impugned consolidated judgment passed by learned trial Court in two trials although held separately; one under ordinary law and other under the Juvenile Justice System Ordinance, 2000. The answer to the said question is very simple and involves no complication. Section 5 of the Juvenile Justice System Ordinance, 2000 is very much clear which is reproduced below:-

> ***"5. No joint trial of a child and adult person.— Notwithstanding anything contained in section 239 of the code, or any other law for the time being in force, no child shall be charged with or tried for an offence together with an adult.***
>
> ***(2) If a child is charged with commission of an offence for which under section 239 of the code, or any other law for the time being in force such child could be tried together with an adult, the Court taking cognizance of the offence shall direct separate trial of the child by the Juvenile Court."***

15. The bare reading of the above reproduced provision makes it abundantly clear that wherein accused is declared as child/juvenile after

regular procedure, he shall neither be charged with nor tried for an offence together with an adult and the Court taking cognizance of the offences shall direct separate charge as well as trial of the child in the Juvenile Court. In the present case, not only Muhammad Imran and Muhammad Bashir/respondents were declared child but they were also separately charged and their trial was also held separately likewise. Therefore, judgment in both the trials also should have been recorded separately, otherwise the object of framing separate charge and holding of separate trial would have become meaningless and by recording the consolidated judgment the learned trial Court rendered the entire exercise as illegal. Even otherwise recording of separate judgment of juvenile accused/respondents was the mandatory requirement under law i.e. section 6 (1) of Juvenile Justice System Ordinance, 2000 and section 367 Cr.P.C. We are fortified in our view that requirement of separate judgments on both the cases was mandatory by a judgment of Sindh High Court in the case of ***Ghulam Hussain and others Vs. The State (1996 P.Cr.L.J. 514)*** wherein the

learned Single Judge of Sindh High Court after going through the entire case law on the subject held ***"there is no provision in the Code of Criminal Procedure, 1898 whereby the trial courts are entitled to dispose of more than one case by one consolidated or by one common judgment. Perusal of sections 366 and 367, Cr.P.C. suggests that each criminal case has to be disposed of by a separate judgment. It is pertinent to note that it is the mandatory requirement of the law that the judgment must be written by the Judge, Presiding Officer or Officer of the Court or from the dictation of such Presiding Officer. All such judgments should contain the point or points for determination, the decision thereon and the reasons for the decision. In the instant case, all these particulars are missing. I am fortified in my view by the case of Muhammad Younis v. the Crown. It was held in this case that the action of the learned Judge in writing one composite judgment without taking the precaution of discussing the evidence pertaining to each case separately have caused prejudice to the accused and, therefore, such judgment cannot stand. Therefore, it was not***

proper for the learned trial Judge to write only one composite judgment in all the six cases. He has not discussed evidence of each case separately. A trial Court has to separately assess evidence of each witness in relation to the charge and to the defence, if any, and particularly in reference to the point for determination. On this ground also, the impugned judgment is not sustainable in law". It is an established principle of law that when something is required under law to be done in a particular manner, it must be done in that way and not otherwise as held by the Apex Court in the case of ***Hamayun Sarfraz Khan and others Vs. Noor Muhammad (2007 SCMR P.37***). It was also held in the same judgment ***"where a law provides for writing, announcing and signing a judgment all that must be done in a way to give validity to the judgment".***

16. At this stage, we would like to attend the arguments of the learned counsel for the accused who while supporting the impugned judgment contended that writing a consolidated judgment instead of separate judgment may be a technical irregularity which is curable under section 537

Cr.P.C. Learned counsel for the accused/respondents further argued that instead of writing a separate judgment, writing a consolidated judgment is an act of Court which could not prejudice the respondents who had already suffered agony of trial for more than nine years and at this stage, sending the case back to the learned trial Court, would not only amount to throwing the accused/respondents at the mercy of trial Court for another indefinite period but would also add to their agonies which is against the principle of natural justice. However, we are not inclined to agree with both these contentions of the learned counsel for the accused/respondents for the simple reasons that non-writing of separate judgment is not a technical defect but in fact, is a basic defect in the proceedings. It is an established principle of law that the Court should pass a final judgment through conscious application of mind and after referring to the facts, circumstances and evidence on the record. We are, further strengthened in our view that after incorporation of section 24-A in the General Clauses Act it has now become mandatory requirements that the Court should pass a speaking judgment after affording opportunity

of hearing to the parties and also through conscious application of mind but in the instant case even no separate judgment was passed at all by the learned trial Court while exercising jurisdiction as a Juvenile Judge. Similarly, as the learned trial Judge failed to pass a separate judgment, which was a necessary requirement of law as noted above, therefore, the same can neither be considered as a mere irregularity curable under section 537 Cr.P.C. nor an act of a Court causing prejudice to the parties. Rather, non-exercise of jurisdiction by the learned trial Court would render its proceedings as coram-non-judice. In the light of the above noted discussion, the contention of the learned counsel for the respondents are repelled being violative of the relevant provisions of law.

17. The upshot of above discussion and observations is that by not writing judgment separately in the case of juvenile and adult accused/respondents, the learned trial Court not only acted illegally, but also the said judgment suffers from jurisdictional defect. Resultantly, the judgment of the learned trial Court dated 31.05.2008 is set aside and the

matter is sent back to the learned trial Court in terms of Article 203DD of the Constitution of Islamic Republic of Pakistan, 1973 read with section 423 Cr.P.C. with the direction to decide both the matters separately afresh strictly in accordance with law within two months of the receipt of this judgment.

18. Parties are directed to appear before the learned trial Court on 27.05.2013.

JUSTICE MUHAMMAD JEHANGIR ARSHAD

JUSTICE ALLAMA DR. FIDA MUHAMAMD KHAN

JUSTICE SHEIKH AHMAD FAROOQ

Islamabad,
the **24.04.2013**
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Approved for Reporting.

JUSTICE MUHAMMAD JEHANGIR ARSHAD