IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF
MR.JUSTICE ALI MUHAMMAD BALOCH

CRIMINAL APPEAL NO.22/I of 2000

1. Bismillah Khan son of Lajbar,Caste Barech, resident of Sakar. 2. Hassan Jan son of Muhammad Saeed,Caste Barech,resident of Katvi Camp.Loralai. Both presently confined in Central Jail,Mach.	--	Appellants
	Versus	
The State	--	Respondent
Counsel for the appellants	—	Mr.Muhammad Aslam Chishti,Advocate.
Counsel for the State	--	Qari Abdur Rashid, Advocate.
No.date of FIR and police station	--	No. dated 23.6.1999 P.S.Levies Kingri.
Date of the order of trial Court	--	21.1.2000
Date of institution	--	14.2.2000
Date of hearing and decision	--	28.9.2000

JUDGMENT

CH. EJAZ YOUSAF, J.- This appeal is directed against the judgment dated 21.1.2000 passed by the learned Sessions Judge, Loralai whereby the appellants have been convicted under section 396/34 PPC read with section 20 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and sentenced to life imprisonment each and a fine of Rs.5,000/-each or in default thereof to further undergo imprisonment for one year.each. They have also been convicted under section 397/34 PPC read with section 20 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and sentenced to imprisonment for seven years.each. Both the sentences have been ordered to run concurrently. However, it has not been mentioned in the judgment as to what would be nature of the sentence of imprisonment required to be undergone by the appellant, in case of default in payment of the amount of fine. Benefit of section 382-B Cr.P.C. has been extended to the appellants.

2. Briefly stated, the prosecution case as gathered from the record is that on 23.6.1999 report Exh.PD, was sent by Haji Khan Resaldar Levies to Naib Tehsildar Kingri wherein it was alleged that as per information received by. the complainant, robbery was committed at Gidar Dag, a place situated five kilometers from Kingri. It was further alleged therein that the culprits were travelling in a white colour Toyota car which had no number plate on it. They stopped truck No.1873-ZBT and attempted to snatch cash from the truck driver namely, Saifullah. On resistance, offered by the said truck driver ,firing was opened with pistol/revolver. In consequence, Altaf son of Rana Muhammad Aslam after receiving bullet injuries, died instantly whereas, the truck driver and one Muhammad Asghar sustained bullet injuries. In pursuance of the above report, Naib Tehsildar Kingri informed Rakhni Levies on wireless set and requested for arrest of the accused persons. Resultantly, the accused persons were intercepted at Levies Check Post Kauri and were

accordingly taken into custody. Investigation was carried out and on completion thereof the appellants were challaned to the court for trial

3. Charge under section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with section 324/34 PPC was accordingly framed to which the appellants pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove the charge and substantiate the allegations levelled against the accused/appellants produced 12 witnesses, in all. Whereafter the appellants were examined under section 342 as well as 340(2) Cr.P.C. In their above statements they denied the charge and pleaded innocence. They produced two witnesses namely, Haji Azam Khan and Shaikh Norez in their defence.

5. After hearing arguments of the learned counsel for the parties, the learned trial Court convicted the appellants and sentenced them to the punishment as mentioned in the opening para hereof.

6. We have heard Mr.Muhammad Aslam Chishti, Advocate, learned counsel for the appellants, Qari Abdul Rasheed, Advocate, learned counsel for the State and have also perused the entire record with their assistance

7. It has been mainly contended by the learned counsel for the appellants that since in the instant case cognizance of the offence was taken by the learned Sessions Judge directly, and the case was not forwarded to him by a Magistrate as required by section 193 PPC., therefore, the proceedings drawn by him were patently illegal. In furtherance of his contention the learned counsel for the appellants submitted that in the criminal procedure code a court of session has no original jurisdiction to take cognizance of the offences and it cannot try a case unless it is sent to it by a Magistrate duly empowered in this regard within the purview of section 190(3) Cr.P.C. He submitted that challan of the instant case was never presented before a Magistrate for the purpose of cognizance and it was sent to the court

of Sessions simply on the recommendation of District Attorney concerned, therefore, the learned Sessions Judge was not competent to try and convict the appellant for the offence. In order to supplement his contention the learned counsel for the appellants has placed reliance on the following reported judgments:-

1. Doran Khan Vs. The State-PLD 1985 Quetta 188 wherein, it was held that Court of Sessions has no original jurisdiction in respect of any offence and will try only those cases, for which it has exclusive jurisdiction and which are sent up for trial to the Court by a Magistrate.

2. P.C. Gulati Vs.Lajwa Ram and others AIR 1966 Supreme Court (India) 595, in which case it was held that there is no express provision in the Code which empowers the Court of Sessions to take cognizance of the case as a Court of original jurisdiction unless the accused was committed to it by a Magistrate duly empowered in that behalf.

3) Pandaran Mani and others Vs. State of Kerala- AIR 1966 Kerala 1, in which case a Full Bench of Kerala High Court was pleased to hold that the Sessions Court can try an offender, only for acts which are the subject-matter of the commitment and not for acts which are not covered by the indictment.

It is further his case that conviction of the appellants under section 396 PPC was otherwise illegal because the instant case was not a case of dacoity with murder as number of the accused persons

involved in the offence was less than five. Learned counsel for the appellant submitted that since the defect regarding taking of cognizance is not curable, therefore, the case be sent back for retrial.

8. Qari Abdul Rashid, Advocate, learned counsel for the State candidly conceded and submitted that since under the Offences Against Property(Enforcement of Hudood) Ordinance,1979 the case was exclusively triable by a Court of Session, which had no original jurisdiction to take cognizance of the offence,therefore, proceeding carried out by the learned court below were not valid. In addition to the case law relied upon by the learned counsel for the appellant he referred to the following reported judgments:-

1). Riffat Hayat Vs. Judge Special Court for Suppression of Terrorist Activities, Lahore and another reported as 1994 SCMR-2177, wherein Hon'ble Supreme Court of Pakistan after thoroughly examining the law on the subject was pleased to detail procedure regarding taking of cognizance in criminal cases by the Courts.

2) Muhammad Saeed and six others Vs. The State and another, reported as 1983 PSC 1485 in which case the Hon'ble Supreme Court of Pakistan was pleased to lay down that Sessions Judge was competent to take cognizance of the offence originally triable by it on the report of the Magistrate submitted in consequence of the inquiry carried out under section 202 PPC.

3) Bago and two others Vs. The State reported as PLJ 1996 Cr.C (Karachi) 1228, in which case a Division Bench of the Hon'ble High Court was pleased to hold that no Court of Sessions shall take cognizance of any offence as a Court of original jurisdiction unless case has been sent to it under section 190 sub-section (3) of the Cr.P.C.

9 Notwithstanding the fact that the learned counsel for the parties have at the very outset conceded that the learned Sessions Judge had no original jurisdiction to take cognizance of the case and have also prayed for remand of the case, we have considered it appropriate to decide all important question of "cognizance of offences by the courts of Session" after examining all aspects of the matter...

Before dilating upon the contention we deem it appropriate to have a glance at the relevant provisions. Section 190 of the Criminal Procedure Code which provides for "cognizance of offences" by Magistrates reads as follows:-

"S.190. Cognizance of offences by Magistrates. (1) Except as hereinafter provided, any District Magistrate or a Sub-Divisional Magistrate or any other Magistrate specially empowered in this behalf by the Provincial Government on the

recommendation of High Court may take cognizance of any offence:

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon a report in writing of such facts made by any police-officer;

© Upon information received from any person other than a police-officer, or on his own knowledge or suspicion that such offence has been committed.

The Provincial Government may empower any Magistrate to take cognizance under sub-section (1), clause (a) or clause (b), of offences for which he may try or send to the Court of Session for trial:

Provided that in case of Judicial Magistrate, the Provincial Government shall exercise this power on the recommendations of the High Court.

(3) A Magistrate taking cognizance under sub-section (1) of an offence triable exclusively by a Court of Session shall, without recording any evidence, send the case to Court of Session for trial."

Whereas, section 193 of Cr.P.C. which accumulate for cognizance of offences by Courts of Session reads as follows:-

"S.193. Cognizance of offences by Courts of Sessions. (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been sent to it under section 190 sub-section (3).

(2)Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Provincial Government by

general or special order may direct them to try, or as the Sessions Judge of the division, by general or special order, may make over to them for trial.

In order to comprehend the scheme of law, regarding cognizance of offences by the Courts of original jurisdiction, it may be mentioned here that prior to the amendment brought in the Criminal Procedure Code vide the Law Reforms Ordinance, 1971 the procedure provided for in the Code regarding cognizance of offences was a bit different.

10. In the originally promulgated section 193 Cr.P.C. it was povided in latter part of sub-section (1) that "no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf" and since the committal proceedings were done away with by the Law Reforms Ordinance, 1972, therefore, the words "commit for trial" used in closing part of sub-section (1) of section 190 were substituted by the words "sent to the Court of Sessions for trial. Likewise the words "committed to the Courts of

Session" used in section 191 Cr.P.C. were substituted by the words "sent to the Court of Session". In section 193(1) also the words "unless the accused has been committed to it by a Magistrate duly empowered in that behalf" were substituted by the words "unless the case has been sent to it under section 190(3) Cr.P.C."

Prior to the above referred amendment whole current of judicial decisions available on the subject, ranging from the case of the Queen Empress vs. Jagat Chandra Mali and another 22C50 (1894) was in favour of the view that "except in the cases, in which a Court of Session is expressly empowered to take cognizance of offence as a Court of original jurisdiction, it had no power to do so unless a commitment had been made by a Magistrate duly empowered in that behalf. In this regard, following reported judgments may be referred to:-

1) Maula Khan 27 AWN 178.
2) Experor vs. Stewart AIR 1927 Sind 28
3) P.C. Gulati vs. Lajya Ram and others AIR 1966 SC 595

So much so, in those cases even ,in which, an approver was put on trial for violating the condition of pardon, it was held that his trial as an accused, subsequently, was dependent upon the fact that he was duly committed. Reference in this regard, may be made to the cases of Shashni Rajbanshi vs. Emperor – 42C 856 and Queen Empress vs. Rama Teran and others ILR 15. Mad.352.

It was, persistently, held by the superior Courts that since object behind the preliminary enquiry, in serious offences, was to enable the accused to have information of the case, he has to meet, therefore, he cannot be taken by surprise.

11. Subsequent to the amendment however, question arose "as to whether in the absence of committal proceedings still the clog of reference as envisaged by section 193(1), was there. In the case of Muhammad Aslam and two others vs. Mst.Natho Bibi reported as PLD 1977 Lahore 535 the contention raised on behalf of the State, was that since after amendment the Magistrate was not required to

record evidence, in a case which was triable exclusively by a Court of Session, therefore, by implication the Court of Session was competent to take cognizance of an offence directly without the media of the Magistrate. It was pleaded that when ultimately the matter was to be decided by the Court of Session, there was hardly any sense left to allow the Magistrate to take cognizance of the offence without powers to proceed under section 202 Cr.P.C. The contention was repelled and it was held that since the Law Reforms Ordinance has laid lot of emphasis on the form of the complaint to be made, pertaining to the cases triable by the Court of Session, therefore, for that reason, the power of the Magistrate to take initial cognizance of the offence has been left intact. It was further observed that since the Magistrate, under the law, was assigned duty to scrutinize the complaints and to find whether they conform to the proforma laid down in this behalf and to apply his mind to the facts of the case, therefore, his discretion always remain there to refuse to send the

same to the Court of Session, thereby positively reducing the burden which otherwise would have fallen on the Court of Session.

Later on in the case of Mehar Khan vs. Yaqoob Khan and others 1981 SCMR 267, the above view was approved by the Hon'ble Supreme Court of Pakistan and it was held that even under amended provisions of sub-section (1) and (3) of section 190 as substituted by Law Reforms Ordinance, 1972, Magistrate taking cognizance of an offence under any clause of sub-section (1) of section 191 Cr.P.C. was still required to apply his mind to ascertain whether case in question was one he was required to "send" for trial to Court of Session or if he could have tried the same himself.

12. It would be pertinent to mention here that in addition to the cases cited at the bar by the learned counsel for the parties in the following cases too, the Courts were of the same view:-

1) Rahim Dad vs. The State and another 1980 P.Cr.LJ 500
2) Muhammad Ishaque vs. The State PLJ 1978 Cr.C. (Lah)487.
3) Muhammad Yaqoob and two others vs. Muhammad Ismail and another - 1979 P.Cr.LJ note 116

4) Damon and 6 others vs. The State 1992 MLD 1992

5) Fareed vs. Allah Wasaya PLD 1979 Quetta 156

6) Mst.Saleem Akhtar vs. Faisal and others,PLD 1982 FSC 95

The controversy was, however, finally set at rest by the Hon'ble Supreme Court of Pakistan in the case of Riffat Hayat vs. Judge Special Court for Suppression of Terrorist Activities and another reported as 1994 SCMR 2177 and NLR 1995 SCJ 43 wherein, while examining sub-section (1) of section 5 of the Suppression of Terrorist Activities Act regarding taking of cognizance directly, by a Special Court constituted thereunder it was unequivocally laid down that "a Court of Session under section 193 of the Code is debarred from taking cognizance of the case as a Court of original jurisdiction unless the case is sent to it by a Magistrate under section 193 of the Code. It would be advantageous to reproduce hereinbelow the relevant discussion which reads as follows:-

"Subsection (3) of section 5 of the Act provides that the Special Court may directly take cognizance of a case triable by that Court without the case being sent to it under section 190 of

the Code. A comparison of provisions of section 190 of the Code with section 5 of the Act will show that neither application of section 173 nor 190 of the Code is excluded either specifically or by necessary implication. The provision relating to taking of direct cognizance by the Special Court contained in subsection (3) of section 5 of the Act is not a new one as a similar provision for taking cognizance of the case directly by a Magistrate already existed under sub-section (2) of section 190 of the Code. Section 5 of the Act, which appears to be a combination of sections 173 and 190 of the Code differs from these provisions only to the extent hereinafter indicated. Section 173 of the Code provides for submission of the report by the incharge of police station to the concerned Magistrate, who in term forwards the same to the Court competent to try the case. Under section 5 of the Act, the incharge of police station is required to submit the report in a case triable by Special Court directly to that Court. Section 173 of the Code provides no time limit for submission of the report on the conclusion of the investigation by the officer incharge of the police station to the concerned Magistrate while section 5 of the Act lays down a time limit of 14 days for submission of such a report to a Special Court and delay in compliance of this time limit is punishable as disobedience of the order of the Special Court. A Court of Session under section 193 of the Code is debarred from taking cognizance of a case as a Court of original jurisdiction unless the case is sent to it by a Magistrate under section 190 (3) of the Code *whereas a Special Court under the Act can take cognizance of case directly as a Court of original jurisdiction in the same manner as a Magistrate is empowered to take cognizance of a case under section 190 of the Code."

* underlining is ours.

13. It is needless to point out that since the impediment to take cognizance of an offence by a Court of Session directly, is subject to the exception contained in the opening words of section 193(1) Cr.P.C. i.e. that "except as otherwise expressly provided by the Code or by any other law for the time being in force", therefore, the Court of Session is competent to take cognizance of an offence, right away, as a Court of original jurisdiction if it is specifically or by necessary implication authorized in this behalf. For instance, in the cases covered by the provision of section 480 C.P.C. or the offences triable by the Special Courts under the Suppression of Terrorist Activities Act,1975.

14. In the instant case, the perusal of challan form shows that it was never presented before a Magistrate for the purpose of taking of cognizance and has been filed directly in the Court of Session merely on the recommendation of the District Attorney. Though after the amendment brought about in section 173 of the Criminal Procedure

Code by Act XV of 1992, whereby vide the proviso tagged to clause (b) of section 173, it was provided that officer incharge of the police station shall within three days of the expiration of requisite period forward to the Magistrate through Public Prosecutor an interim report in the prescribed form, the Session Judge was not competent to take cognizance of the offence on the "report" directly submitted to him through the District Attorney. Legal position being so, we are constrained to observe that since in the instant case, the condition precedent for exercise of jurisdiction i.e. sending the case by Magistrate to the Court of Session, as required by section 193 (1) Cr.P.C. was not fulfilled, therefore, the proceedings carried out by the learned Sessions Judge, Loralai, were patently illegal.

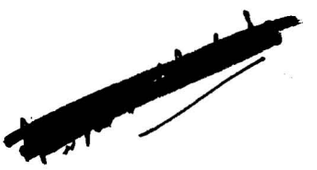
15. As regards the next contention of the learned counsel for the appellants that the appellants being only two in number could not have been convicted and sentenced under section 396 PPC, it may be pointed out here that no doubt, in order to attract section 396 PPC

number of the accused persons involved in the offence must be five or more. Section 391 PPC which provides for the definition of dacoity also lays down that when five or more persons conjointly commit or attempt to commit a robbery, or when whole number of persons conjointly committing or attempting to commit a robbery such commission or attempt, amount to five or more, every person so, committing, attempting or aiding is said to commit dacoity. Therefore, the learned trial Court while awarding the sentence should have been alive to the situation.

16. The upshot of the above discussion is that the impugned judgment dated 21.1.2000, passed by the learned Sessions Judge, Loralai, with consent of the parties, is set aside. The Advocate General, Balochistan, is directed to ensure that challan of the instant case, through Public Prosecutor, is forwarded to the Magistrate empowered to take cognizance of the offence, who after doing the

needful shall send the same to the Court of Session, for trial afresh, in accordance with law.

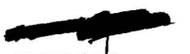
These are the reasons of our short order of the even date.



(Ch. Ejaz Yousaf)
Judge

(Ali Muhammad Baloch)
Judge

(Fit for reporting)



JUDGE

Islamabad,dated the
28th September,2000
ABDUL RAHMAN