

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

16

PRESENT

MR.JUSTICE CH.EJAZ YOUSAF

CRIMINAL APPEAL NO.243-I-2001

- 1) Masho Khan son of Hassal
 - 2) Jalal-ud-Din son of Masho Khan
 - 3) Fazal Din son of Masho Khan and
 - 4) Nazar Din son of Masho Khan,
- All residents of Silli Halqa Toi-Sar, Tehsil Musakhail
(now confined in District Jail, Loralai)

Appellants

Versus

The State

Respondent

For the appellants

Raja Israr Ahmad Abbasi,
Advocate

For the State

Qari Abdul Rashid,
Advocate

No.& date of F.I.R
Police Station

No.12/2000,dt.15.5.2000
P.S Toi Sar

Date of order of
The trial court

9.10.2001

Date of Institution

22.11.2001

Date of hearing
And decision

14.5.2002

JUDGMENT

CH.EJAZ YOUSAF, J. - This appeal is directed against the judgment dated 9.10.2001 passed by the learned Sessions Judge, Musa-khail at Lora Lai whereby the appellants were convicted under section 20 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as 'the Ordinance') and sentenced to undergo R.I for seven years each and to pay a fine of Rs.5000/- or in default thereof to further undergo S.I for three month's each. Benefit of section 382-B Cr.P.C was however, extended to the appellants.

2. Facts of the case, in brief, are that on 15.5.2000 report was lodged by one Abdul Ghaffar son of Ghulam Rasool wherein, it was alleged that on 12.5.2000 the complainant had handed over his 30 sheeps to a Shepherd namely Raza Gul for the purpose of grazing. On 12.5.2000 when the said Roza Gul was grazing the sheeps on a mountain suddenly, the accused persons namely Mashu Khan son of Hassal, Umar Din alias Mado Khan, Jalal Din, Fazal Din, and Nazar Din all sons of Mashu Khan alongwith Shah Gul son of Bismillah appeared and forcibly snatched away the sheeps from

the said Shepherd. On the stated allegations a formal F.I.R bearing No.12 under section 17(3) of the Ordinance read with section 34 PPC was registered at police station Toi Sar District Musakhail and investigation was carried out in pursuance thereof. On the completion of the investigation the accused persons were challaned to the court for trial.

3. Charge was accordingly framed under section 17(3) of 'the Ordinance' to which the accused persons pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove the charge and substantiate the allegation levelled against the accused persons produced five witnesses, in all whereafter accused persons were examined under section 342 Cr.P.C. In their above statements all the accused persons denied the charge and pleaded innocence.

5. After hearing arguments of the learned counsel for the parties the learned trial court convicted the appellants and sentenced each of them to the punishments as mentioned in the opening para hereof. However, the case

against absconding accused persons namely Umar Din and Shah Gul was ordered to be kept on the dormant file, till their arrest.

6. I have heard Raja Israr Ahmad Abbasi, Advocate, learned counsel for the appellants, Qari Abdul Rashid, Advocate, for the State and have also perused record of the case with their assistance, carefully.

7. At the very outset, this preliminary objection has been taken by the learned counsel for the State through Criminal Misc. Application No. 89-I of 2002, that since the learned trial Judge has failed to specify or mention, the penal provision/section of the Pakistan Penal Code under which the accused persons have been convicted and sentenced, therefore, failure to do the needful has rendered the impugned judgment as untenable. In order to supplement his contention, learned counsel for the State has added that since section 20 of the Ordinance is not a penal provision but is merely an enabling section which empowers the court to inflict sentences for the offences, in cases of haraabah liable to ta'zir therefore, the learned trial Judge ought to have inflicted sentences on the appellants under the provisions of the PPC provided for the offences of dacoity, robbery or

extortion as the case was. He has maintained that since omission to pass appropriate sentences under the relevant provision, being patently in violation of section 367 PPC, has culminated in gross miscarriage of justice therefore, the impugned judgment may be set aside and the case be remanded to the learned trial Judge for re-writing of the judgment.

8. Raja Israr Ahmad Abbasi, Advocate, learned counsel for the appellants on the other hand though frankly conceded that section 20 of the Ordinance being merely an enabling section, the appellants could not have been convicted and sentenced thereunder yet, attempted to argue that since the defect was minor in nature therefore, it was curable under section 537

Cr.P.C.

9. I have given my anxious consideration to the respective contentions of the learned counsel for the parties and have also gone through the record of the case carefully.

10. Before entering into the proposition it would be highly appropriate to have a glance at section 367 Cr.P.C which reads as follows: -

Sec.367. Language of judgment, Contents of judgment. (1).

Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court or from the dictation of such presiding officer in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open court at the time of pronouncing it and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.

(2) It shall specify the offence (if any) of which, and the section of the Pakistan Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced,

(3).....

(4).....

(5).....

(6).....

A bare perusal of the above provision leads to the inference that compliance with section 367 of the Code of Criminal Procedure is essential in accordance with its terms and departure therefrom is not permissible in law.

The use of word 'shall' in section 367(2) Cr.P.C implies that the provision in question is not permissive but imperative. It may be mentioned there that section 20 of 'the Ordinance', which too, for the sake of convenience and ready reference is reproduced herein below, is merely an enabling section and empowers the court to inflict punishment for the offences of dacoity,

robbery or extortion, in those cases of "Haraabah liable to ta'zir" wherein either the offenders are not liable to the punishment provided for under section 17 of 'the Ordinance' or for which proof in either of the forms mentioned in section 7 is not available. However, section 20 of the Ordinance being not a penal provision, a person can, by no stretch of imagination, be convicted thereunder. Section 20 of the Ordinance reads as follows:-

"Sec.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, for the offence of dacoity, robbery or extortion, as the case may be."

Failure of the trial court to pass sentence under the appropriate section of the Pakistan Penal Code and to specify, in its judgment the same, to my mind, has rendered the impugned judgment as unsustainable. This view receives support from the following reported judgments: -

- i) Abdul Wahab and four others Vs. The State
1984 P.Cr.L.J-1921
- ii) Farzand Ali Vs. The State
1983 P.Cr.L.J-398 and

- iii) Muhammad Hussain and eight others
Vs. The State and other
1980 P.Cr.L.J-822
- iv) Issa Khan and others Vs. The State
PLD 1987 Quetta-174
- v) Muhammad Ghayoor alias Ghauri and others Vs. The State
1986 P.Cr.L.J-2344
- vi) Ghulam Hussain and another Vs. The State
1986 P.Cr.L.J-864,
- vii) Intaz Ali and 3 others Vs. The State
1968 P.Cr.L.J-953
- viii) Muhammad Ramzan Vs. The State
KLR 1985 CrI.C-311

What to speak of omission to specify the penal section in the judgment, in

the case of Mudassar alias Jimmy Vs. The State, 1996 SCMR-3, it has been

unequivocally laid down by the Hon'ble Supreme Court of Pakistan that the

court was duty bound to specify even, the relevant sub-section, of the main

section i.e section 302 PPC, whereunder the accused persons were convicted

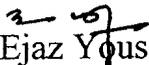
and sentenced.

It would be pertinent to mention here that, as provided by section 367 Cr.P.C, a judgment must contain therein sufficient details qua facts of the case, points for determination, decision thereon and the reasons for decision. It is further the import and object of the above referred provision that the court while convicting an accused is also under legal obligation to

specify the offence, of which the accused is convicted, and shall also cite the relevant section of the law under which he is sentenced.

As regards the submission made by the learned counsel for the appellants that since the defect, in not specifying the relevant section, being minor is curable under section 537 Cr.P.C, it may be pointed out here that under section 537 Cr.P.C, only the defects of merely of formal nature, arising from in-advertence, can be cured and it is never intended to allow the court to violate or dis-obey an express provision of law and it would not apply to an infringement of a statutory requirement.

The upshot of the above discussion is that the impugned judgment dated 9.10.2001 passed by the learned Sessions Judge, Musakhail at Loralai is set aside and the case is remanded to the learned trial court for re-writing of the judgment in accordance with law, within one month of the receipt hereof.


(Ch. Ejaz Yousaf)
Judge

Islamabad, 14.5.2002
M. Akram/

Fit for reporting.


JUDGE