

IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT

MR. JUSTICE CH. EJAZ YOUSAF, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN

CRIMINAL APPEAL NO.152/I OF 2003 (LINKED WITH)

Asad Khan son of Sabir Khan, -- Appellant
resident of Chamba, P.S.Havelian.
District Abbottaba

Versus

The State -- Respondent

CRIMINAL REVISION NO.19/I OF 2003

Mohsin Ali Khan son of Haji Saeed -- Petitioner
Khan, resident of Village Chamba, Teh:
and District Abbottabad

Versus

1.Asad Khan son of Sabir Khan -- Respondents

2.The State

Counsel for the appellant

-- Mr.Fazal-i-Haq Abbasi,
Advocate

Counsel for the complainant

-- Mr.Gul Sherin Khan
Jadoon, Advocate

Counsel for the State

-- Mr.Muhammad Sharif
Janjua, Advocate

F.I.R.No., date and Police
Station

-- No.158, dated 17.4.2002
P.S. Havelian

Date of the Order of Trial Court

-- 25.6.2003

Dates of Institution

-- 18.7.2003

Date of hearing

-- 3.12.2003

.Date of decision

-- 3.12.2003

JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This judgment will dispose of Criminal Appeal No.152/I of 2003, filed by Asad Khan son of Sabir Khan appellant against the judgment dated 25.6.2003 passed by the learned Additional Sessions Judge, Abbottabad, whereby the appellant was convicted under section 377 PPC and sentenced to three years R.I. and a fine of Rs.10,000/- or in default thereof to further undergo two months' S.I. with benefit of section 382-B Cr.P.C. and Criminal Revision No.19/I of 2003 filed by Mohsin Ali Khan for enhancement of sentence inflicted on the appellant and also for his conviction under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the Ordinance").

2. The circumstances giving rise to the appeal as well as the revision are as follows:-

On 17.4.2002, report was lodged by one Mohsin Ali Khan son of Haji Saeed Ajmal Khan with P.S. Havelian, District Abbottabad, wherein, it was alleged that on the said date at about 1845 hours, the

complainant, in order to irrigate their fields, went to Dour Nallah, alongwith the appellant. No sooner they reached there the appellant caught hold of the complainant and dragged him to a nearby situated place known as Narhan-da-katha, laid him on the ground, forcibly removed his shalwar and committed sodomy on him. On returning to his house, the complainant narrated the entire facts to his uncle who carried him to the police station for lodging the report. On the stated allegation formal FIR bearing No.158 dated 17.4.2002 was registered under section 377 PPC and section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 at the said police station and investigation was carried out in pursuance thereof. On the completion of investigation the accused-appellant was challaned to the Court for trial.

3. Charge was accordingly framed to which the appellant pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove the charge and substantiate the allegation leveled against the appellant produced ten

witnesses, in all. Where after, the appellant was examined under section 342 Cr.P.C. He, however, failed to lead any evidence in his defence or to appear himself as his own witness in terms of section 340(2) Cr.P.C.

5. After hearing arguments of the learned counsel for the parties the learned trial Court convicted the appellant and sentenced him to the punishments as mentioned in the opening para hereof.

6. We have heard Mr.Fazal-ul-Haq Abbasi, Advocate, learned counsel for the appellant, Mr.Gul Sherin Khan Jadoon, Advocate, learned counsel for the complainant/petitioner, Mr.Muhammad Sharif Janjua, Advocate, learned counsel for the State and have also perused the entire record with their assistance.

7. It has been, at the very outset, objected to by the learned counsel for the State that the appellant having not been charged and convicted under any of the provisions of the Hudood Ordinance, the appeal was not maintainable before this Court. The learned counsel for the appellant while candidly conceding to the proposition

submitted that though the appellant was charged and convicted under section 377 PPC only yet, since in the FIR section 12 of "the Ordinance" was also incorporated, therefore, he under the wrong impression that the appeal was maintainable before this Court, had filed the same. Prayed that, in order to approach the appropriate forum, he may be permitted to withdraw the appeal.

8. Learned counsel for the complainant, in Criminal Revision 19/I of 2003, however, urged that since FIR was registered under section 12 of "the Ordinance" and in the challan too, section 12 of "the Ordinance" was incorporated, therefore, notwithstanding the fact that appellant was charged and convicted under section 377 PPC only both appeal as well as the revision were maintainable before this Court. He has pointed out that since the trial Court had omitted to charge the appellant under section 12 of the Hudood Ordinance, therefore, he had submitted an application before the trial Court praying that appellant may be charged there -under as well and tried accordingly.

Unfortunately the said application could not find favour, it was kept pending and was ultimately dismissed vide the impugned judgment.

9. We have given our anxious consideration to the respective contentions of the learned counsel for the parties. It may be mentioned here that though in pursuance of Article 203-DD of the Constitution appellate jurisdiction against the order of Sessions Judge working under the "Hudood Ordinance" has been conferred upon this Court yet, as per our estimation, in all those cases in which neither the accused has been charged under any of the provisions of the "Hudood Ordinance" nor has he been convicted or tried there under, an appeal against the order/judgment of the Court of the first instance, shall not lie to the Federal Shariat Court. It would be pertinent to mention here that section 5 (1) of the Cr.P.C. (hereinafter referred to as "the Code") though prescribes that all offences, under the Penal Code, have to be investigated, inquired into, tried, and otherwise be dealt with in accordance with the provisions of the Code yet, sub-section (2) thereof makes it incumbent that all offences, under other laws, have to

be investigated, inquired into, tried and otherwise, be dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiry or trial. The relevant provision is reproduced herein below for ready reference and convenience:-

“S.5. Trial of offences under Penal Code : (1) All offences, under the Pakistan Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) **Trial of offences against other laws:** All offences, under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

Here it would also be advantageous to have a glance at sections 28 and 29 of the Criminal Procedure Code which specifies the forum of trial for different offences under the Code as well as other laws:-

“S.28. **Offences under Penal Code.**—Subject to the other provisions of this Code any offence under the Pakistan Penal Code may be tried—

- (a) by the High Court, or
- (b) by the Courts of Sessions, or

- (c) by any other Court by which such offence is shown in the eighth column of the Second Schedule to be triable:

Provided that the offences falling under Chapters VIII, X, XIII and XIV of the Pakistan Penal Code (Act XLV) of 1860), except offences specified in section 153-A and section 281 of the said Code, shall be tried by the Executive Magistrates and the expression "Magistrate" used in the said eighth column shall mean Executive Magistrate of the respective class.

S.29. Offences under other laws.- (1) Subject to the other provisions of this Code, any offence under any other law shall when any Court is mentioned in this behalf in such law,-

- (i) be tried by such Court if it is a Court other than a Court of Magistrate; and
(ii) be tried by an Executive Magistrate if it is a Court of Magistrate.

(2) When no Court is so mentioned, it may be tried by the High Court or subject as aforesaid by any Court constituted under this Code by which such offences shown in the eighth column of the Second Schedule to be triable:

Provided that the Provincial Government, may, in consultation with the High Court, notify the offences under the laws which shall be tried by the Executive Magistrate", or "Provided that all offences punishable with imprisonment for a term of less than three years shall be tried by the Executive Magistrates.

11. A bare perusal of the above provisions would lead to the clear inference that where all offences under the Penal Code are required to be tried by the Courts constituted there under, the offences under other laws must be tried by the Courts mentioned or specified by the

relevant laws, having jurisdiction to try the offence or if no such

Court is so mentioned then by the Court which is mentioned in the eighth column of the Second Schedule, meaning thereby that provisions of the General Law, to the extent of repugnancy, must yield to special law.

12. It would also be worthwhile to mention here that since, no separate procedure for investigation or inquiry has been provided under the "Hudood Ordinance" and the provisions of the Cr.P.C, by virtue of section 20 of "the Ordinance" come into play straight-away, therefore, in most of the cases it is really hard to differentiate "as to under which of the enactments the inquiry or trial has been conducted particularly when the offences are culpable by different laws and forums of trial prescribed there under, though different, are yet, alike as it is in the case of Session Judge who is competent to hold trial under "the Code" as well as "the Hudood Laws" therefore, forum of appeal has to be determined on the basis of the charge framed.

Needless to point out that though primarily, averments in the

complaint/FIR gives jurisdiction to the Court yet, for the purpose of taking cognizance and framing charge, material available on record may also be evaluated and if prima facie it reveals the commission of several or any of the offences, culpable by different or any particular enactment, then it would be for the Court to decide "as to under which of the law/laws the offence or offences are made out. In the wake of above, it thus proceeds that when in a case charge is not framed under any particular law, trial cannot be deemed to have been conducted there under. Having regard to the express term of section 233 Cr.P.C. which provides that for every distinct offence there shall be a separate charge, it may be mentioned here that conviction for an offence with which the accused is not charged is an exception to the general rule and the provisions of section 237 Cr.P.C., where under a person charged with one offence may be convicted for an other or section 238 Cr.P.C. which enables the Courts to convict an accused person for such minor offence which was either cognate to, or a part of, or was

an attempt to commit the principal offence, with which the accused was originally charged, must be construed strictly.

13. It would be pertinent to mention here that though first proviso tagged to section 20 of the Hudood Ordinance provides that the Court constituted under Hudood Ordinance is competent to try other offences as well and award punishment therefor, yet, to our mind, it could not have been done in the instant case, because firstly; the appellant having been charged under the substantive provisions of PPC only could not have been convicted under the Hudood Ordinance because no corresponding or parallel provision to the above quoted proviso is available in the Cr.P.C and secondly the punishment provided for the offence under section 12 of the Hudood Ordinance, being more and severe, the appellant having been charged for the minor offence i.e. under section 377 PPC, could not have been convicted for the major offence.

14. Perusal of the impugned judgment reveals that the learned trial Judge while rejecting application filed by the complainant seeking

amendment of charge has observed that since on the basis of the material available on record no case of kidnapping or abduction of the victim was made out and the intention of the appellant only was to commit sodomy, therefore, he could not have been charged under section 12 of the Hudood Ordinance. At this stage, we do not deem it appropriate to indulge in assessing sufficiency or otherwise of the reasons, which weighed with the learned trial Judge in rejecting the application under reference, lest it may prejudice the case of either of the parties at any subsequent stage yet, the fact remains that in the instant case, the appellant has not been ostensibly charged for any offence punishable under the Hudood Ordinance. Therefore, in our view, the appeal against the impugned judgment is not maintainable before this Court. It is well settled that if, a Court, even not possessed of jurisdiction to try a case, assumes jurisdiction wrongly and exercises power not vested in it, then appeal from its decision would lie in the same manner, as an appeal would lie from a decision made with jurisdiction. In this view we are fortified by the observations of

the Hon'ble Supreme Court of Pakistan made in the case of

Muhammad Ishfaq vs. The State reported as PLD 1973 SC 368.

Further, in the case of Rasool Bakhsh and others, vs. The State and others reported as 1998 P.Cr.L.J 438 a full Bench of this Court has already laid down that a party aggrieved of the decision passed without jurisdiction may raise the controversy before the appellate forum in the same hierarchy and if appellate forum comes to the conclusion that the decision so made was without jurisdiction, it can set aside the judgment on the ground of illegal assumption of jurisdiction leaving the option with the concerned authorities to have the matter decided by the original forum of competent jurisdiction and that on the basis of wrong exercise of jurisdiction by the trial Court its judgment cannot be assailed before any appellate forum, other than the one prescribed under the law, against the judgment of the Court of first instance.

15. Learned counsel for the complainant has also tried to canvass that in case application for framing charge under section 12 of "the

“Ordinance” filed in the trial Court would have been refused or accepted earlier, during trial, the order so passed, would not have been immuned from scrutiny by this Court in exercise of its revisional jurisdiction therefore, this Court may now, interfere and direct the learned court below to proceed against the appellant under section 12 of “the Ordinance”. We are afraid, the argument advanced by the learned counsel cannot prevail because this Court though in its revisional jurisdiction is competent to call for and examine record of any case decided by any criminal Court, under any law, relating to the Enforcement of Hudood, for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and also as to the regularity of any proceedings of, such Court yet, keeping in view the fact that trial in this case having been concluded and judgment pronounced, the impugned order/judgment at this stage cannot be interfered with because in revision a direction to alter the charge so as to include an offence for which the accused was not originally charged can be given only if the

trial Court itself could have taken such action. Obviously the trial

Court after pronouncement of the impugned judgment itself has

become functus officio and therefore, clock, at this belated stage,

cannot be turned back unless the impugned judgment is set aside by a

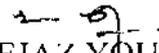
Court of competent jurisdiction.

16. The upshot of the above discussion is that this appeal is not

maintainable before this Court, the same therefore, be returned to the

appellant for its presentment before the proper forum. The revision is,

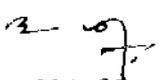
however, dismissed.


(CH. EJAZ YOUSAF)
Chief Justice


(DR. FIDA MUHAMMAD KHAN)
Judge

Islamabad, the
3rd December, 2003.
ABDUL RAHMAN**

FIT FOR REPORTING.


Chief Justice