

**IN THE FEDERAL SHARIAT COURT**  
**(Appellate/Revisional Jurisdiction)**

**PRESENT:**

**MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH**  
**MR. JUSTICE SHAUKAT ALI RAKHSHANI**

**JAIL CRIMINAL APPEAL NO.20-I OF 2019**

SAJJADULLAH SON OF FARIDULLAH, RESIDENT OF VILLAGE MALAK  
ABAD, DISTRICT SWABI.  
(NOW PRESENTLY CONFINED IN CENTRAL PRISON, MARDAN)

APPELLANT

VERSUS

1. THE STATE
2. HAMAYUN KHAN SON OF AZEEM KHAN, RESIDENT OF VILLAGE  
TOPI, DISTRICT SWABI.

RESPONDENTS

**CRIMINAL APPEAL NO.21-I OF 2019**

AMINULLAH SON OF ALI REHMAN, RESIDENT OF VILLAGE PABANAI,  
TEHSIL & DISTRICT, SWABI.  
(NOW PRESENTLY CONFINED IN CENTRAL PRISON, MARDAN)

APPELLANT

VERSUS

1. HAMAYUN KHAN SON OF AZEEM KHAN, RESIDENT OF VILLAGE  
TOPI, DISTRICT SWABI.
2. THE STATE

RESPONDENTS

**CRIMINAL REVISION NO.2-P OF 2019**

HAMAYUN KHAN SON OF AZEEM KHAN, RESIDENT OF VILLAGE TOPI,  
DISTRICT SWABI.

PETITIONER

VERSUS

1. SAJJADULLAH SON OF FARIDULLAH, RESIDENT OF VILLAGE  
MALAK ABAD, DISTRICT SWABI.
2. AMINULLAH SON OF ALI REHMAN, RESIDENT OF VILLAGE  
PABANAI, TEHSIL & DISTRICT, SWABI.  
(NOW PRESENTLY CONFINED IN CENTRAL PRISON, MARDAN)

3. THE STATE

RESPONDENTS

COUNSEL FOR THE APPELLANTS : MIAN FAHIM AKBAR,  
IN J. CR. A. NO.20/I/2019 AND ADVOCATE.  
CR. A. NO.21/I OF 2019

COUNSEL FOR THE COMPLAINANT : MR. MUHAMMAD SAEED KHAN,  
IN J. CR. A. NO.20/I/2019 , ADVOCATE.  
CR. A. NO.21/I/2019 AND  
PETITIONER IN CR. REVISION  
NO.02/P/2019

COUNSEL FOR THE STATE : MR. WILAYAT KHAN,  
ASSISTANT ADVOCATE,  
GENERAL, KPK.

FIR NO., DATE & PS : 11/2017, DATED 23.01.2017,  
P.S. IDS, DISTRICT SWABI.

DATE OF IMPUGNED : 07.09.2019  
JUDGMENT OF THE  
TRIAL COURT

DATE OF INSTITUTION OF : 20.11.2019  
J. CR. A. NO.20/I/2019 AND  
CR. A. NO.21/I OF 2019

DATE OF INSTITUTION OF : 19.09.2019  
CR. REVISION NO.02/P/2019

DATE OF HEARING : 28.01.2020

DATE OF DECISION : 28.01.2020

DATE OF JUDGMENT : 28.01.2020

#### JUDGMENT

**SHAUKAT ALI RAKHSHANI, J:-** Indictment of homicidal culpability during the course of robbery culminated into the conviction and sentence after a full dress trial on 07<sup>th</sup> of November 2019 ("Impugned Judgment") penned by Additional Sessions Judge/Judge, Model Criminal Trial Court, Swabi ("Trial Court") whereby the Appellant Sajjadullah was convicted under Section 302(b) of The Pakistan Penal Code [XLV OF 1860] ("Penal Code") and sentenced to undergo for life imprisonment as Tazir as well as to pay compensation under Section 544-A of The Code of Criminal Procedure [Act V of 1898] ("The Code") to the tune of Rs. 200,000/- (two lacs) payable to the

legal heirs of the deceased, recoverable as arrear of land revenue and in default of payment of compensation to further suffer S.I for 6 (six) months. Appellant Sajjadullah was also convicted under Section 394 of The Penal Code and sentenced to undergo R.I for 10 (ten) years with fine of Rs. 100,000/- (one lac) and in default of payment of fine to further suffer S.I for 3 (three) months. Appellant Aminullah was convicted under Section 302(c) of The Penal Code for having common intension in committing of murder and sentenced to undergo imprisonment for 15 (fifteen) years as Tazir as well as to pay compensation under Section 544-A of The Code to the tune of Rs. 200,000/- (two lacs) payable to the legal heirs of the deceased, recoverable as arrear of land revenue and in default of payment of compensation to further suffer S.I for 6 (six) months. Appellant Aminullah was also convicted under Section 394 of Penal Code and sentenced to undergo R.I for 10 (ten) years with fine of Rs. 100,000/- (one lac) and in default of payment of fine to further suffer S.I for 3 (three) months. All the sentences of the appellants were ordered to run concurrently with the benefit of Section 382-B of The Code.

2. Appellant Sajjadullah has preferred Jail Criminal Appeal bearing No.20-I of 2019 and appellant Aminullah has put in Criminal Appeal bearing No.21-I of 2019, challenging the veracity, legality and validity of the judgment on numerous grounds, seeking acquittal whereas complainant Hamayun Khan (PW.14) also has impugned the judgment by means of filing a Criminal Revision bearing No.2-P of 2019 for enhancement of sentences of appellants Sajjadullah and Aminullah.

As both the aforesaid appeals and the Criminal Revision Petition are knit by a single thread as they arise out of a single judgment, henceforth, we impart with them through a common judgment in hand.

3. On 23<sup>rd</sup> of January 2017 a dead body was found on Besak Road near Daray Palosai within the precincts of Police Station Industrial Development Estate ("IDS") district Swabi, wherein report in the shape of mursaila (Ex.PA) was made by Hamayun Khan (PW.14) father of the deceased with SHO Bakht Afzal Khan (PW.1), which was reduced into FIR (Ex.PA/1) by HC Manzar Ali (PW.16) contending therein that his son namely Mujahid Khan (deceased) used to ply a car bearing No.LXD-37 as a taxi, who was hired last evening by some unknown towards Gadoon; subsequently done to death by firearm.

He neither nominated any culprit nor did he claim animosity with anyone.

4. Investigating officer, SI Muntazir Khan (PW.15) arrived at the crime scene, prepared site plan (Ex.PB), recovered blood stained earth through recovery memo (Ex.PW.6/1), blood stained clothes of deceased Mujahid Khan (deceased) (Ex.PW.6/2), following the inquest report (Ex.PW.1/2) and medical examination conducted by Dr.Waqar Medical Officer (PW.2), who opined that the deceased had received an entry wound on back of the skull with visible brain matter, making an exit wound through left nostril and upper lip with some scratches and bruises on left flank, resulting into the unnatural death due to firearm. On 23<sup>rd</sup> of January 2017, the investigating officer also took into possession a motorcar 2-O-D bearing No.LXD-73 (Ex.PN) from Maini Pabani Road Gulbahar No.2 near graveyard through recovery memo (Ex.PW.8/1). During investigation Call Data Record ("CDR") was collected and taken into possession through recovery memo (Ex.PW.15/29) where-after complainant Hamayun Khan (PW.14) got recorded his statement under Section 164 of The Code, wherein Sajjadullah and Aminullah were nominated as culprits and on 29<sup>th</sup> of January 2017 the accused were arrested. Record also reflects that on 01<sup>st</sup> of February, 2017 on the joint pointation of appellants Sajjadullah and

Aminullah, a purse belonging to deceased Mujahid Khan was got recovered, which was taken into possession through recovery memo (Ex.PW.5/3) inclusive of a National Identity Card and driving license of the deceased. Appellant Sajjadullah also got recovered pistol .30 bore, which was taken into possession through recovery memo (Ex.PW.13/1) on 01<sup>st</sup> of February 2017 and a separate FIR bearing No.15 dated 29<sup>th</sup> of January, 2017 at Police Station IDS district Swabi was lodged under Section 15 of Khyber Pakhtunkhwa Arms Act, 2013. The appellants got recorded their confessional statements before Mr. Naveed Ullah Khan Gigyani Civil Judge-cum-Judicial Magistrate (PW.12), who testified before the Court to have recorded the confessional statement of appellant Sajjadullah (Ex.PW.12/1), he produced his questionnaire as (Ex.PW.12/2) and certificate as (Ex.PW.12/3); he produced the confessional statement of appellant Aminullah as (Ex.PW.12/4), questionnaire as (Ex.PW.12/5) and certificate as (Ex.PW.12/6). Appellants were thereafter sent to judicial custody and on conclusion of the investigation the challan was submitted in the Trial Court.

5: Appellants entered into a plea of denial of the formal charge read over to them under Section 17(4) of The Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 ("Hudood Ordinance"), which led the prosecution to adduce as many as 18 (Eighteen) witnesses; following in examination of the appellants under Section 342 of The Code, whereby allegation put forth to them were strenuously denied and rebutted, pleading innocence. They did not step into the witness box to testify on oath under Section 340(2) of The Code nor did they produce any witness in their defence, however, the Trial Court relying upon the prosecution evidence and disbelieving the version of the appellants held them guilty of the charge and convicted and sentenced both of the appellants for the deeds mentioned herein before.

6. We have heard learned counsel for the adversarial parties including the state and have perused the entire record minutely with their able assistance.

7. Learned counsel for the appellants Mian Fahim Akbar argued at some length, besides inviting our attention towards numerous contradictions, which arose in the testimony of prosecution witnesses as well as the infirmities, illegalities and irregularities in the impugned judgment, particularly the judgment impugned herein being delivered in violation of Section 367 of The Code and banked upon the flaw in framing of the charge more forcefully. In the meanwhile, when confronted with the illegalities in the charge as well as in the impugned judgment as highlighted, Mr. Wilayat Khan, learned Assistant Advocate General, KPK and Mr. Muhammad Saeed Khan, learned counsel for the complainant/petitioner in Criminal Revision bearing No.2-P of 2019 graciously conceded to the infirmities, illegalities and irregularities of the learned Trial Judge, while framing the charge as well as in regard to the impugned judgment; henceforth the parties at the both ends conceded and consented to set-aside the impugned judgment and agreed to remand the case to the Trial Court for denovo trial.

8. Without going into the merits of the case to appreciate the incriminating evidence brought forwarded by the prosecution we would merely like to dilate upon the legal implication of defective charge and non-compliance of Section 367 of The Code as the counsel for the rivals at both ends have conceded and consented to put at naught the judgment impugned for the same being defective from the very genesis of the trial, commencing from an incurable flaw of charge, leading to precipitate into drawing of the judgment under scrutiny, sequelling to proceed a denovo trial.

9. As a legal compulsion, it was obligatory upon the Trial Court to have had complied with the provision of Section 223 of The Code, while framing the charge. For ease of understanding, Section *ibid* is reproduced herein below:-

*"Sec.223. When manner of committing offence must be stated. When the nature of the case is such that the particulars mentioned in section 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose."*

(emphasized applied)

10. The most crucial evidence brought forwarded by the prosecution is the confessional statements of both the appellants, whereupon the prosecution as well as the learned Trial Judge has mainly placed reliance. Appellant Sajjadullah confessed to have fired the fatal shot with pistol at the instance of appellant Aminullah; with further narration that the later also hit the deceased with a stone; whereas appellant Aminullah while confessing his guilt put the entire burden of murder upon appellant Sajjadullah, exonerating himself from striking the deceased with stone and playing any role in the murder of the deceased, however, confessed to have played an active role in taking away the purse, money therein and vehicle of the deceased.

11. Perusal of the charge reflects that the Trial Court, while framing charge has not adhered to the requisites of framing charge as contemplated under Sections 221 to 222 and 223 of The Code. Neither he has specified roles of each appellant played by them in the crime nor has specified that as to whether the offences were committed by them conjointly in furtherance of common intention or individually. Moreover, even the name of the deceased has wrongly been mentioned as Javed instead of Mujahid Khan. The charge so framed in our view has misled the defence to take plea, which is in utter violation of Section 225 of The Code, culminating into miscarriage of justice and causing prejudice.

12. Adverting to the judgment impugned herein, we have regretfully observed that the judgment rendered by the learned Trial Court is not in consonance with clause (1) and (5) of Section 367 of The Code. For the convenience, Section 367 of The Code is reproduced herein below:

"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 (XLV of 1860) or other law under which, the accused is convicted, and the punishment to which he is sentenced.

(3) Judgment in alternative. When the conviction is under the Pakistan Penal Code (XLV of 1860) and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted, and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.

(6) For the purposes of this section, an order under section 118 or section 123, sub-section (3), shall be deemed to be a judgment."

(underline is ours)

Clause (1) of Section 367 expressly provides that the judgment shall contain the point or points of determination, which surprisingly does not figure in the judgment impugned herein. The Court has failed to formulate any point of determination whereupon the decision had to be made, while scrutinizing and scanning the evidence available on record. The learned Trial Judge by not observing the requisite formality and legal compulsion as enunciated under clause (1) of Section 367 of The Code has diminished the very foundation of the principles for rendering a judgment, making the same nullity in the eyes of law, for being not curable under Section 537 of The Code. In this regard reliance can be placed upon the judgments reported as MURAD BALOCH VERSUS THE

STATE (2011 SCMR 1417), FARRUKH SAYYAR AND 2 OTHERS VERSUS CHAIRMAN, NAB ISLAMABAD AND OTHERS (2004 SCMR 1) and SAHIB KHAN AND 4 OTHERS VERSUS THE STATE AND OTHERS (1997 SCMR 871). The relevant portion of "Farrukh Sayyar's case supra is reproduced as below;

*"It is mandatory requirement of section 367, Cr.P.C. that a Court while writing a judgment shall refer to the point or points of determination, record decision thereon and also give reasons for the decision. The Court shall also specify the offence 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. In the present case the learned trial Court overlooked the mandatory provisions of section 367, Cr.P.C. and rendered a judgment which falls short of the requisite standard. Failure to specify the points for determination as required under section 367, Cr.P.C. is an omission which is not curable under section 537, Cr.P.C. and absence of decision on the points for determination and reasons in the judgment amount to an illegality which prejudice the case of the accused."*

13. Appellant Sajjadullah has been convicted under Section 302(b) of the Penal Code and sentenced to suffer life imprisonment as Tazir besides under Section 394 of the Penal Code to undergo R.I for 10 (ten) years with fine of Rs.100,000/- (one lac) and in default of payment of fine to further suffer S.I for 3-(three) months, but the learned Trial Judge has failed to assign any mitigating circumstance, prevailing upon him to award lesser punishment than a normal sentence of death to appellant Sajjadullah while convicting under Section 302(b) of The Penal Code. Appellant Aminullah has been convicted under Section 302 (c) of The Penal Code and sentenced to suffer 15(fifteen) years rigorous imprisonment as Tazir, besides under Section 394 of The Penal Code and sentenced to undergo rigorous imprisonment for 10(ten) years with fine of Rs.100,000/- (one lac) but again the learned Trial Judge has failed to give any reason to award lesser punishment of 15 (fifteen) years rigorous imprisonment instead of 25 (twenty five) years as provided under Section 302(c) of The Penal

Code, henceforth, the judgment impugned herein on such score is unsustainable, deserving to be set at naught.

14. As discussed herein before, non-compliance of clause (1) and (5) of Section 367 of The Code are mandatory in nature and its non-adherence has rendered the judgment inherently defective and illegal, therefore, in such backdrop, without considering the evidence on merits, least it may prejudice the case of either side and keeping in view the consent of both the sides, we hold that the judgment impugned herein being not in consonance with the spirit of Section 367 of The Code, requires to be set at naught.

15. For the foregoing reasons the impugned Judgment dated 07<sup>th</sup> of September 2019 authored by the learned Trial Court, Swabi is set-aside and transmitted back the case to the Trial Court to proceed with the matter denovo by framing the charge strictly in accordance with the provisions ibid and provide a fair opportunity of evidence to the both ends as desired by them and render a judgment in accordance with law within a period of 40 (forty) days after receipt of the judgment and case file.

16. The captioned appeals are disposed of in the above terms whereas the Criminal Revision for enhancement of sentences and Criminal Miscellaneous Application bearing No.37-I of 2019 for suspension of sentence as a natural corollary stands dismissed for having become infructuous.

(SYED MUHAMMAD FAROOQ SHAH)  
JUDGE

(SHAUKAT ALI RAKHSHANI)  
JUDGE

Islamabad, 28<sup>th</sup> of January 2020/  
khurram

Approved for reporting

JUDGE