

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE M.MAHBOOB AHMAD, CHIEF JUSTICE.
MR.JUSTICE CH.EJAZ YOUSAF.

JAIL CRIMINAL APPEAL NO.118/Q OF 1998.

Nizam-ud-Din son of Fazal Muhammad,
presently confined in District Jail Quetta.

Appellant

Versus

The State

Respondent

For the appellant

Miss.Tehmina Razzaq Bhatti,
Advocate

For the State

Qari Abdul Rashid,
Advocate.

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

No.69/70,dt.27.4.1997
P.S Satellite Town,Quetta

Date of judgment
of trial court

6.6.1998

Date of Institution

30.9.1998

Date of hearing
and decision

26.2.1999.

JUDGMENT

CH.EJAZ YOUSAF, J.- This jail criminal appeal has been forwarded by Hon'ble High Court of Baluchistan for disposal. It arises out of judgment dated 6.6.1998 of learned Additional Sessions Judge-I Quetta, whereby the appellant was convicted and sentenced to the punishment as follows:-

Under section 324 PPC = to undergo R.I for ten years and further directed to pay Daman amounting to Rs.10,000/- under section 337-I PPC.

Under section 380 PPC = to undergo R.I for seven years and to pay a fine of Rs.15,000/- or in default thereof to further undergo R.I for one year.

2. The facts lie in a small compass. Theft was allegedly committed in the house of complainant Haji Aman-Ullah, in consequence whereof, report Ex.P/1 was lodged with S.H.O Police Station Satellite Town, Quetta on 27.4.1997. Later on, formal F.I.R bearing No.69/97 was registered under sections 454, 380, 324 and 337 PPC read with section 9/14 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the "Hudood Ordinance") at Police Station Satellite Town, Quetta, on the basis thereof. On the completion of investigation Challan Ex.P/8-C was submitted in court wherein, though

in the title only sections,324,337,380 and 454 PPC were mentioned yet, on the reverse page there appears an endorsement made by the District Attorney-V,Quetta which reads as follows:-

"Forwarded to the Judicial Magistrate-II, Quetta for onward submission to Sessions Judge for trial against the accused mentioned in 3 of challan under section 324 PPC read with section 9/14 of the Offences Against Property (Enforcement of Hadd) Ord-1979."

Record reveals that Judicial Magistrate-II, Quetta on receipt of the challan forwarded/sent the case to the District and Sessions Judge,Quetta wherefrom, it was transferred to the file of Additional Sessions Judge-I Quetta, for trial. The learned trial court on 4.8.1997 called upon the appellant to answer the charges under sections 324,337-J, 380 and 454 PPC only, to which, the appellant pleaded not guilty and claimed trial. On the completion of trial the appellant was convicted and sentenced to the punishments as mentioned in the opening para hereof. It would be pertinent to mention here that though in the title as well as in the opening para of the impugned judgment, a reference to sections 9/14 of the "Hudood Ordinance" (with regard to registration of the F.I.R thereunder) was also made yet, in 3rd para of the judgment it was clearly mentioned that the appellant was charged under sections 324,337-J,380 and 454 PPC

only. Record shows that this jail appeal at the very outset was filed in the High Court of Baluchistan Quetta and was placed before a Single Bench. His Lordship while relying on the following reported cases observed that though in the case conviction was recorded under section 380 PPC yet, since challan was submitted under the provisions of sections 9/14 of the "Hudood Ordinance" and other offences of P.P.C committed in the same transaction cannot be bifurcated for the purpose of jurisdiction, therefore, the appeal would lie to the Federal Shariat Court.

- a) 1984 SCMR-506(Taj Din Vs.The State)
in which case, the appellant was tried under section 10 of the Offence of Zina(Enforcement of Hudood) Ordinance,1979 for committing rape on Mst.Rajan deceased,and under section 302 PPC for murdering her in the same transaction. The appellant in that case was convicted under section 10(3) of the Hudood Ordinance read with section 302 PPC and sentenced accordingly.
- b) PLD 1984 FSC-3 (Muhammad Abbas Vs.The State)
in which case the appellant Muhammad Abbas was tried and convicted under sections 18/19 of the Hudood Ordinance read with sections 302/347 449 PPC and sentenced accordingly.
- c) PLJ 1995 Cr.C (Quetta)-74 (Nazak Mir Vs.State)
in which case the appellant Nazak Mir was tried and convicted under section 20 of the Offences Against Property(Enforcement of Hudood)Ordinance, 1979 read with section 216-A,PPC.

3. We have heard Miss Tehmina Razzaq Bhatti, Advocate, learned counsel for the appellant and Qari Abdul Rashid, Advocate, for the State and have also perused the entire record with their help.

4. Having been called upon to explain "as to how in the absence of charge framed, trial conducted and sentence passed under the provisions of the "Hudood Ordinance" the appeal is maintainable before this Court, Miss. Tehmina-Razzaq Bhatti, Advocate, learned counsel for the appellant candidly conceded that the appellant having been neither charged nor tried nor convicted under any of the provisions of the "Hudood Ordinance", this appeal is not maintainable before this Court. Qari Abdul Rashid, Advocate, learned counsel for the State is also of the same view. Both the learned counsel for the parties have maintained that the appeal at first, was rightly filed in the High Court of Baluchistan, Quetta.

5. Notwithstanding the position that the learned counsel for the parties at the very outset, have conceded that the appeal is not maintainable before this Court, we have considered it appropriate to decide the all important question of jurisdiction after examining all aspects of the matter.

6. No doubt in pursuance of Article 203-DD of the Constitution appellate criminal jurisdiction against the Order of Sessions Judge holding trial under the "Hudood Ordinance" has been conferred upon this Court vide second proviso to section 24(1) of the "Hudood Ordinance" yet, as

per our estimation, in all those cases, in which, neither the accused has been charged with any of the offences punishable under the "Hudood Ordinance" nor has he been tried or convicted thereunder, an appeal against the order/judgment of the court of the first instance shall not lie before the Federal Shariat Court. Before dealing with the proposition, it would be advantageous to reproduce herein below section 24(1) of the "Hudood Ordinance" which reads as follows:-

"Sec.24. Application of Code of Criminal Procedure,1898.(1) The provisions of the Code of Criminal Procedure,1898,shall apply, mutatis mutandis, in respect of cases under this Ordinance:

Provided that, if it appears in evidence that the offender has committed a different offence under any other law, he may, if the Court is competent to try that offence and to award punishment therefor, be convicted and punished for that offence;

Provided further that an offence punishable under section 9 or section 17 shall be triable by a Court of Session and not by a Magistrate authorised under section 30 of the said Code and an appeal from an order under either of the said sections or from an order under any other provision of this Ordinance which imposes a sentence of imprisonment for a term exceeding two years shall lie to the Federal Shariat Court:

Provided further....."

A bare perusal of the above provision would show that offences punishable under the "Hudood Ordinance" are

exclusively triable by a court of Sessions and an appeal from the order of the court of sessions thereunder lies to the Federal Shariat Court. Simultaneously it has been provided therein that if an offender has committed different offences, out of which, one is covered by Hudood Ordinance, and the other by some other law, then if the court is competent to try that other offence or offences and to award punishment therefor, then that offence or offences will also be tried alongwith the offence under "Hudood Ordinance".

Meaning thereby that holding of a "trial" under the "Hudood Ordinance" is a condition precedent for maintainability of appeal before the Federal Shariat Court. Now, here the question arises "as to whether trial of an offence wherein an accused person has neither been charged nor convicted under any of provisions of "Hudood Ordinance" can be termed and regarded as "a trial under the "Hudood Ordinance". Section 5(1) of the Cr.P.C provides that all offences under the Penal Code shall be investigated, inquired into and otherwise dealt with in accordance with the provisions of the Cr.P.C, never-the-less, sub section 5(2) thereof stipulates that 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.

It therefore, follows that provisions of general law to the extent of repugnancy must yield to special law.

7. Since, no separate procedure for investigation/inquiry has been provided under the "Hudood Ordinance" and the provisions of the Cr.P.C by virtue of section 24 of the "Hudood Ordinance" come into play straight-away, therefore, in certain 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 enactments and appeals thereunder lie to different courts) unless it is specified in the charge, and that is the point which separates the inquiry stage from the trial. It is hardly necessary to add that at this juncture entire evidence collected and produced by the prosecution is evaluated and if prima facie it unveils the commission of several or any of the offences, culpable by different or any particular enactment, 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 a particular enactment, trial cannot be deemed to have

been conducted thereunder. Having regard to the express terms of section 233 Cr.P.C it may be pointed out here that conviction for an offence with which the accused is not charged is an exception to the general rule and sections 225, 237 and 238 Cr.P.C which contain the exceptions, must be strictly construed.

8. There is another aspect of the matter. Though, the first proviso tagged to section 24 of the "Hudood Ordinance" implies that a court, trying an offence under the "Hudood Ordinance" is competent to try other offences as well and award punishments therefor, yet, it could not have been done in the instant case primarily for the reasons; firstly, that the appellant having been charged under the substantive provisions of the PPC only, could not have been convicted under any of the provisions of the "Hudood Ordinance" because no corresponding or parallel provision to the above quoted proviso is available in the Cr.P.C and secondly, that the punishment provided for the offence under section 9 of the "Hudood Ordinance" being more severe, the appellant having been charged for the minor offence could not have been convicted for the major offence.

9. The proposition in hand has yet, another facet. From the language of the charge it appears that though, the learned trial court had called upon the appellant to answer the charge that he, by entering the house of the complainant, had committed

theft therein and had also administered some intoxicant to the watchman for the purpose aforesaid, yet, had not ostensibly charged him for the offences punishable under the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, thus even if, the instant case was punishable under sections 9/14 of the "Hudood Ordinance" and the trial court had wrongly assumed jurisdiction to try the same under the provisions of the Pakistan Penal Code, even then the impugned judgment cannot be assailed before this Court. It is well settled by now, that if a court not possessed of jurisdiction to try a case, wrongly assumes the same and exercise power not vested in it and passes a judgment in consequence thereof, appeal from its decision would lie in the same manner, as an appeal would lie from a decision made with jurisdiction. This view receives support from the observations of the Hon'ble Supreme Court of Pakistan in the case of Muhammad Ishfaq Vs. The State reported as PLD 1973 SC-368. Further, a Full Bench of this Court in the case of "Rasool Bakhsh and others Vs. The State and others reported as 1998 P.Cr.L.J-438" has already laid down that a party aggrieved of the decision passed without jurisdiction could raise that 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 could not be assailed before any appellate forum, other than the one prescribed under the law, against the judgment of the court of first instance.

10. A resume of the cases relied upon by the Hon'ble Judge in the High Court shows that in all those cases the accused persons were charged and convicted under the substantive provisions of the PPC alongwith the offences punishable under the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 or Offences Against Property (Enforcement of Hudood) Ordinance, 1979 etc. Whereas, nothing of the sort has happened in the instant case. Thus the cases under reference being clearly distinguishable have no application to the facts of the present case.

11. We, therefore, hold that this appeal is not maintainable before this Court and was rightly filed in

the High Court of Baluchistan to which High Court it
should be sent back at once. Order accordingly.

(M.MAHBOOB AHMAD)

CHIEF JUSTICE

(CH.EJAZ YOUSAF)

JUDGE

(Approved for reporting)

Judge

Islamabad, 26.2.1999.
M.Akram/