ORDER SHEET

HIGH COURT OF SINDH AT KARACHI.

Criminal Appeal No. Nil of 2003

Date of hearing : 9.4.2003.
Appellant: Fayyaz Ahmed through Mr. Javed Chhatari, Advocate.
Respondent: None present.

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MUHAMMAD SADIQ LAGHARI, J. The facts leading to this order are that Appellant Fayyaz Ahmed was booked and then sent for offence under Section 17(3) Offences Against Property (Enforcement of Hudood) Ordinance, 1979. Allegation against him was that on 1.5.1997 at 10:15 A.M. he, together with his two associates entered the house of Barkatullah and committed robbery from their at pistol point. They were tried for offence under Section 17(3) and ultimately convicted for offence under Section 392/34 PPC . Sentence awarded to them is five years with fine of Rs. 5000/=, in default to suffer one month's RI further. The conviction and the sentence have been challenged through present appeal.

Arguing on the question of maintainability of this appeal before this Court Mr. Javed Chhatri, the learned Advocate for the appellant contended that although the appellant was charged for offence under Section 17(3) Offences against Property (EHO) Ordinance, 1979 but ultimately he was convicted for offence under Section 392 PPC therefore the appeal lies before this Court and not the Federal Shariat Court. In support of his contention he referred to the pronouncement of the Honourable Apex Court in **ATTAULLAH Vs. ABDUL RAZAQ AND ANOTHER, (PLD 2002 SC 534).**

The Appellant and his two co-convicts were sent for offence under Section 17(3) Offences Against Property (EHO) Ordinance, 1979. The learned IIIrd Additional Sessions Judge Karachi South exercising the jurisdiction under said Ordinance read over the charge under Section 17(3) and then conducted the trial. It is true that conviction has been awarded for offence under Section 392/34 PPC but the result of the trial would not determine the forum. The provisions of Section 24 Offence Against Property (EHO) 1979 relate to the competency of the trial Court in awarding the sentence and forum of appeal therefore for proper decision the examination of that section is essential. It reads as under:-

> "24. **Application of Code of Criminal Procedure, 1898 (Act V of 1898).** (1) The provisions of the Code of Criminal Procedure, 1998 (Act V of 1898), shall apply, mutates mutandis, in respect of cases under this Ordinance:
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> 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 therefore, be convicted and punished for that offence:
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> (Provided further that an offence punishable under section 9 or section 17 shall be triable by a Court of Sessions and not be 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 or imprisonment for a term exceeding two years) shall lie to the Federal Shariat Court:
>
> Provided further that a trial by a Court of Session under this Ordinance shall ordinarily be held at the headquarters of the Tehsil in which the offence is alleged to have been committed."

First proviso enlarges the scope of the authority of the Court trying the offence under the Ordinance. If the evidence on record proves commission of the offence other than one with which the accused is charged the trial Court can competently award punishment for such offence, if it is competent to try that offence.

The Second proviso speaks of Appellate forum saying that if the accused has been tried u/s 9 or 17 of the Ordinance 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 or imprisonment for a term exceeding two years shall lie to the Federal Shariat Court. Thus it is clear that in case of punishment in the result of trial under Section 9 or 17 of the Ordinance the appeal shall lie to the Federal Shariat Court, irrespective of the quantum of the sentence or imprisonment, and the appeal from any other order under any other provision of the Ordinance shall lie to the Federal Shariat Court only when the imprisonment or sentence exceeds two years.

The two provisos make it clear that it is the accusation and the nature of the offence for which the accused was tried which would form the basis for determining the forum of appeal and not the result of trial. Thus the appeal arising out of the cases of the offence cognizance whereof was taken in Hudood Law would lie only before the Federal Shariat Court and not before the High Court even though the conviction has been awarded under PPC.

The Shariat Bench of Honourable Apex Court in **ZAFAR IBAL AND OTHERS Vs. THE STATE (1984 SCMR 167)** examined the same question and held that a person if tried under the Ordinance is convicted for some other offence the appeal against conviction would lie before Federal Shariat Court, if the trial Court was competent to try that offence also and the sentence was not less then two years. The Division Bench of Balochistan High Court also considered the question and delivered detailed judgment in the **STATE Vs. PIRAK, (1979 P.Cr.L.J.1900).** Referring to the series of decisions in the judgment the Honourable Bench held that, if a person was tried for offence under Section 302 PPC and 17 of Offences Against Property (EHO) Ordinance 1979

and acquitted for offence under Section 17 then also Appeal against conviction only under Section 302 PPC would lie before Federal Shariat Court. In **Mehtab Shah Vs. The State and others, 1999 P.Cr.L.J. 485**, Single Bench of this Court also took same view.

The pronouncement of the Honourable Apex Court referred to by Mr. Javed Chhatari, is mainly on the principle that no one can take two different stances on the same issue before two Courts. In that case convict first filed appeal before the High Court and after adverse order in that appeal he changed the position before the Honourable Apex court and pleaded lack of jurisdiction in the High Court.

Since present appeal lies before the Federal Shariat Court and has wrongly been filed before this Court the memo thereof together with annexures be returned to the learned Advocate of the appellant for presentation before the competent Court.

JUDGE