**SUPREME COURT OF AZAD JAMMU & KASHMIR**

[Shariat Appellate Jurisdiction]

PRESENT:
Ch. Muhammad Ibrahim Zia, CJ.
Raja Saeed Akram Khan, J.

1. Cri. Appeal No.41 of 2018
(Filed on 19.11.2018)

1. Muhammad Shabbir s/o Muhammad Sharif, caste Domal, r/o Bagrot, Tehsil fatehpur Thakyala, District Kotli.
2. Muhammad Abid s/o Muhammad Sabir, caste Thakyal, r/o Jandrot.
3. Muhammad Nazim s/o Fateh Muhammad, caste Thakyal, r/o Mera Nakyal, Tehsil Fatehpur Thakyala, District Kotli.

…. APPELLANTS

*v e r s u s*

1. Tariq Hayat s/o Muhammad Tufail, caste Thakyal, r/o Peena-Co-Town Area, Tehsil Fatehpur Thakyala, District Kotli.

…. RESPONDENT

2. Advocate-General

…. PROFORMA RESPONDENT

[On appeal from the judgment of the Shariat Appellate Bench of the High Court,
dated 30.10.2018 in Cri. Appeals No.19 & 25 of 2018]

1. Cri. Appeal No.56 of 2018
(Filed on 26.12.2018)

Tariq Hayat s/o Muhammad Tufail, caste Thakyal, r/o Peena-Co-Town Area, Tehsil Fatehpur Thakyala, District Kotli.

…. APPELLANT

*v e r s u s*

1. Muhammad Shabbir s/o Muhammad Sharif, caste Domal, r/o Bhagrot.
2. Muhammad Abid s/o Muhammad Sabir, caste Thakyal, r/o Jandrot.
3. Muhammad Nazim s/o Fateh Muhammad, caste Thakyal, r/o Mera Nakyal, Tehsil Fatehpur Thakyala, District Kotli.

…. RESPONDENT

4. Advocate-General

…. PROFORMA RESPONDENT

[On appeal from the judgment of the Shariat Appellate Bench of the High Court,
dated 30.10.2018 in Cri. Appeals No.19 & 25 of 2018]

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| FOR THE COMPLAINANT: | Syed Sharafat Hussain, advocate |
| FOR THE STATE: | Mr. Mehmood Hussain Chaudhdary, Additional Advocate-General. |
| FOR CONVICTS: | Mr. Abdul Aziz Ratalvi and Sardar Hamid Raza, advocates. |

*Date of hearing*: 19.2.2019

**JUDGMENT**:

***Raja Saeed Akram Khan,*** **J.—**Both the above-titled appeals are offshoot of the impugned consolidated judgment of the Shariat Appellate Bench of the High Court (to be referred as the High Court hereinafter), dated 30.10.2018, whereby the separate appeals filed by the complainant and the convict-appellants have been dismissed, therefore, we intend to dispose off the same through the proposed single judgment.

2. The gist of the facts involved in the case in hand are that a report was lodged at the Police Station Fatehpur Thakyala, by Tariq Hayat, complainant-appellant, stating that he was running the business of foreign currency-exchange with the trade-name as Al-Ghausia Currency Exchange in Milad Chowk, Fatehpur Thakyala. On 10.7.2015, at 1:20 pm, the complainant left for offering *Jumma* prayer and on his return, he found the bolt of the backdoor of the shop as well as the lock of the money vault, broken. He also found some thief has stolen Pakistani and other countries' currency. On this report, a case under sections 454/34, APC and 14-EHA was registered on 12.7.2015. During

investigation, the convict-respondents and one Muhammad Fayyaz were found guilty. After completion of the investigation, challan was submitted before the Additional Tehsil Criminal Court, Fatehpur Thakyala. The trial Court examined the convicts under section 242, Cr.P.C., 1898, who pleaded innocence. Their statements were recorded and thereafter, on completion of the evidence, they were examined under section 342, Cr.P.C., wherein, they again denied the guilt and claimed trial. The trial Court, after conclusion of the trial, convicted the respondents and awarded them simple imprisonment of seven years under section 454/34, APC, and also awarded simple impressments of 3 years' each under section 14-EHA, vide judgment dated 15.12.2017. The complainant filed an appeal for enhancement of the sentence, whereas the convict-respondents also filed an appeal for acquittal, in the District Criminal Court, Kotli. The learned first appellate court maintained the sentence awarded to the convict-respondents vide judgment dated 28.5.2018, and dismissed both the appeals. Again feeling aggrieved, the parties filed appeals before the High Court, which have been dismissed through the

impugned judgment dated 30.10.2018, hence these appeals.

3. Mr. Abdul Aziz Ratalvi and Sardar Hamid Raza, advocates, counsel for the convict-appellants, submitted that all the three Courts below have failed to apprise the evidence in a legal manner, while awarding the sentence. The learned counsel submitted that challan was submitted against the convict-appellants under section 454, APC, which is not attracted in the case in hand, as the said provision relates to the house trespass, whereas no such crime has been committed in the case in hand. They further argued that under section 14-EHA, the punishment is provided as three years' sentence and the convict- appellants have already served more than that period of imprisonment, as they are behind the bars for more than 3½ years. In continuation of the arguments, the learned counsel submitted that a fake recovery of the amount of Rs.68,55,000/- has been planted against the accused-appellants, as the recovery has been made in midnight (2:00 to 4:00 am) and no public witness has been cited while the recovery witnesses are closed relatives of the convict-appellants and such evidence cannot be

believed safely and no conviction can be recorded on the basis of the same. They also submitted that the prosecution failed to prove the case beyond reasonable doubt. All the courts below have failed to adhere to the law that even the benefit of slightest doubt must go to the accused, as a matter of right.

4. On the other hand, Syed Sharafat Hussain, advocate, counsel for the complainant, submitted that provisions of section 454, APC, are fully attracted in the case in hand, as the section postulates that whoever commits criminal trespass by entering into or remaining in any building including one, used as a place for the custody of the property, is said to commit house-trespass and the punishment provided in section 454, APC, is ten years. He submitted that it is well-established principle of law that if the case is proved beyond reasonable doubt, full sentence provided under law shall be awarded, whereas the trial Court has failed to discharge its duty while taking lenient view in awarding 7 years' sentence and the learned High Court has also overlooked this important aspect of the case. The learned counsel submitted that no *mala fide* or ill-will has come on the record to falsely implicate the

convicts in the case in hand. All the prosecution witnesses have fully supported the prosecution case, which is further corroborated with the recovery of huge amount of Rs.68,55,000/-, which cannot be planted.

5. The learned Additional Advocate-General adopted the arguments of the counsel for the complainant and requested for enhancement of sentence and dismissal of the appeal filed by the convict-respondents.

6. We have heard the learned counsel for the parties, the learned Additional Advocate-General and gone through the impugned judgment along with the record made available.

7. The accused-appellants were arrested in a case falling under sections 454 and 34, APC, read with section 14-EHA, on registration of an FIR, lodged at Police Station Fatehpur Thakyala, wherein, they were originally not nominated. The argument, which was forcefully raised by the counsel for the convict-appellants is that the convicts were not nominated in the FIR and the whole case is based on circumstantial evidence and no detail has been provided about the

amount, which was stolen. Furthermore, no independent witness from the area of recovery was cited. It may be observed here that the case established by the prosecution is that the occurrence took place at the time of *Jumma* prayer. In our society, the shops, offices and businesses remain closed at the time of *Jumma* prayer. Especially in small towns, the people observe *Jumma* as holiday at least during till *Jumma* prayer. This fact goes against the convict-appellants, as it can safely be believed that the convicts chose the time when all the people of the bazaar were busy in offering *Jumma* prayer and this was the golden time to commit the offence, therefore, the argument of the counsel for the convict-appellants is not convincing in nature and is repelled. Furthermore, each and every detail is not required to be entered into the FIR, which is only required to bring the law into motion. The most important aspect of the case is the recovery of the amount of Rs.68,55,000/-, from the convict-respondents. Such a huge amount cannot be planted. Even otherwise no ill-will or malice has been brought on the record against the complainant to falsely implicate the convict-respondents.

8. So far as the argument of the counsel for the convict-respondents that no independent witness of recovery has been cited, rather closed relatives of the convict-appellants have been cited as witnesses, and the Police tried to show its efficiency, is also not convincing in nature, as, at the relevant time, when the recovery was made, during midnight, presence of the independent witnesses is not possible and being inmates of the house, their presence was natural. On this ground, the recovery cannot be disbelieved.

9. Another burning argument raised by the counsel for the convict-respondents is that the offence, as alleged, was committed in the shop, which does not fall within the definition of house trespass, as section 454, Cr.P.C., is confined to the lurking house trespass or the house-breaking. After going through the provisions of section 442, Cr.P.C., where house trespass has been defined, it postulates that the words 'in any building' and 'or as a place for the custody of property' has been used. The word 'building' cannot be confined only to the extent of house. The ordinary and usual dictionary meaning of the word 'building' is 'a block of bricks or stone, covered by a roof'. Moreover,

for the purpose of the section, word ‘building’ also includes a building used for the custody of property. The argument of the counsel for the convict-appellants is, therefore, rejected and it can safely be concluded that the trial Court, after evaluating the evidence brought on the record, has rightly came to the conclusion that the convict-appellants are liable to be punished under section 454, APC, and section 14, EHA, and the findings of the trial Court have rightly been upheld by the two Courts below. We have failed to find out any serious dent in the prosecution story. This court always remain reluctant to interfere with the findings recorded by the trial Court and upheld by the first and second appellate Court, unless the same appear to be perverse, arbitrary or against the law and record. Resultantly, finding no force, Criminal Appeal No.41/2018, filed by the convict-appellants, is hereby dismissed.

So far as the counter appeal, filed by the complainant, for enhancement of sentence awarded to the convict-respondents is concerned, it may be observed that the complainant-appellant has failed to point out any misreading or non-reading of the

evidence on the part of the learned courts below and the reasons recorded by the learned courts below for recording lesser sentence of the respondents have not been found to be arbitrary. We have no legitimate reason to enhance the sentence awarded to the convict-appellants, as it will, in no manner, secure the ends of justice. Moreover, the trial Court has given very sound, cogent and plausible reasons while awarding the sentence of *ta'zir*, which is not open to exception on any legal and factual premises. In these circumstances there is hardly any occasion for us to interfere with the impugned judgment. Resultantly, counter Criminal Appeal No.56/2018 is also dismissed.

**JUDGE** **CHIEF JUSTICE**

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