IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Shariat Appellate Jurisdiction)

PRESENT:

MR. JUSTICE KHAWAJA M. NASIM
MR. JUSTICE RAZA ALI KHAN

CRIMINAL APPEAL NO. 50 OF 2024

Civil Misc. No. 24 of 2024

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 27.06.2024, passed in Crim. Appeal No. 03 of 2020).

Muhammad Riaz s/o Deewan Ali and another.

…Appellants

VERSUS

The State and others.

… Respondents

Appearances:

For the Appellants:	Mr. M. Zubair Raja, Advocate.
For the State:	Mr. Ahmed Saad Khan, Asstt. Advocate-General.
Date of hearing:	20.02.2025

JUDGMENT:

***Raza Ali Khan, J*:-** The captioned appeal arises from the judgment of the Shariat Appellate Bench of the High Court (High Court), rendered on June 27, 2024, in Criminal Appeal No. 03 of 2020.

2. A case was registered against the convict-appellants under Sections 3, 4, 14, and 26(2) of The Prohibition (Enforcement of Hudood) Act, 1985 (hereafter to referred as *Act, 1985*) at the Police Station Charhoi, vide F.I.R. No. 39/2014 dated 14.05.2014. Upon completion of the investigation, the police submitted a report under Section 173 of the Cr.P.C. before the competent Court. The statements of the accused-appellants were recorded under Section 242 Cr.P.C. on 10.09.2014, wherein they pleaded not guilty, prompting the prosecution to present evidence in support of its version. Subsequently, the accused-appellants recorded their statements under Section 342 Cr.P.C., denying the allegations and opting to produce evidence in their defense. After hearing both parties and evaluating the evidence, the learned Tehsil Criminal Court, Charhoi, convicted the accused-appellants vide judgment dated 12.03.2021 and sentenced them to five years' imprisonment each along with a fine of Rs. 50,000 for offences under Sections 3 and 4 of Act 1985. Aggrieved by the conviction, the convicts filed an appeal before the learned Additional District Criminal Court, Kotli. The appellate court, while modifying the trial court’s judgment, maintained the earlier sentences and enhanced the sentence additionally awarding 20 lashes to each convict. Feeling aggrieved by the enhancement of the sentence, the appellants filed an appeal before the High Court which has

been dismissed through the impugned judgment on June 27, 2024.

3. The learned counsel for the convict-appellant raised a singular point, arguing that there was neither an appeal filed by the State seeking enhancement of the sentence nor any show cause notice issued by the learned Additional District Criminal Court to the convict-appellant prior to enhancing the sentence, hence, the mandatory procedural requirement had been disregarded. He further argued that the learned High Court also failed to consider this crucial aspect while dismissing the appellant's appeal, therefore, the judgments passed by both the courts below are legally unsustainable and, therefore, liable to be set aside.

4. When this position was put before the learned Assistant Advocate-General, Mr. Ahmed Saad Khan, he candidly conceded that no appeal had been filed on behalf of the State seeking enhancement of the sentence. He further acknowledged that, prior to enhancing the sentence, the learned Additional District Criminal Court had not issued any show cause notice to the convict-appellant, thereby confirming the procedural lapse.

5. We have heard the learned counsel for the parties and carefully examined the record of the case. A perusal of the record reveals that the learned trial court, upon conclusion of the proceedings, convicted the appellants and sentenced them to five years' imprisonment each along with a fine of Rs. 50,000. However, on an appeal filed by the convicts, the learned Additional District Criminal Court, Kotli, while modifying the judgment of the trial court, additionally awarded 20 lashes to each convict.

6. Although it is settled that even in the absence of an appeal filed by the State, the revisional court is vested with the jurisdiction to enhance the sentence, the exercise of such power is not unfettered and is subject to the fulfillment of certain statutory conditions. For proper appreciation and clarity, Section 439 read with Section 439(A) of the Cr.P.C. is reproduced hereunder:

> **439. High Court's powers Of revision**: (1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court, may, in its discretion,, exercise any of the powers Conferred on a Court of Appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338, and may enhance the sentence and, when the Judges Composing the Court of Revision are equally divided in. opinion, the case shall be disposed of in manner provided by Section 4.29.
> (2) No order under this section, shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.
> (3) Where the sentence dealt with under this section has been passed by a Magistrate the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Magistrate of the First Class.
> (4) Nothing in this section shall be, deemed to authorize a High Court— (a) To convert a finding of acquittal into one of conviction; or (b) to entertain any proceedings in revision, with respect to an order made .by the Sessions Judge under Section
> (5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.
> (6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be

> entitled at so to show cause against his conviction.
> **439-A. Sessions Judge's powers of revision**: (1) In the case of any proceedings before a Magistrate the record of which has been called for by the Sessions Judge or which otherwise comes to his knowledge; the Sessions, Judge may exercise any of the powers conferred on the High Court by Section 439:
> (2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under, this Chapter in respect of any case which nay be transferred to him under any general or special order of the Sessions Judge."

7. Section 439 Cr.PC, confers revisional powers upon the learned High Court, enabling it to call for the record of any criminal proceeding from subordinate courts or act on cases that come to its knowledge through other means. The High Court may exercise the same powers vested in an appellate court under Sections 423, 426, 427, and 428, APC, including altering, reversing, or enhancing sentences. Section 439-A, APC extends similar revisional powers to the learned Sessions Judge, in cases before Magistrates. The Sessions Judge, or an Additional Sessions Judge acting under a general or special order, may call for the record of such proceedings and exercise the powers conferred on the High Court by Section 439. A pivotal safeguard within Section 439 is embedded in subsection (2), which mandates that no order prejudicial to the accused shall be passed unless the accused has been provided an opportunity of being heard, either personally or through a pleader. The requirement to issue a notice for a personal hearing or representation through counsel before enhancing a sentence is not merely procedural but a substantive right of the accused. Non-compliance with this mandate renders any such revisional order illegal and unsustainable, as it undermines the fundamental right to a

fair hearing. Our view finds support from a recent judgment of the Supreme Court of Pakistan in the case titled *Noman Mansoor alias Nomi vs. The State and another*[1], wherein, it has been observed as under: -

> "The next question for consideration is as to whether upon filing of a direct Criminal Revision or after conversion of a Criminal Appeal into a Criminal Revision, a notice as provided by sub-section (2) of section 439 Cr.P.C. has to be issued to the other side? If not what would be its effect? It is an admitted fact that a Criminal Appeal was filed through which the High Court considered it appropriate to reappraise the order impugned in light of the material available on the record and while exercising its inherent power, converted the Criminal Appeal into a Criminal Revision Petition, at the time of delivering the judgment. It is apparent, rather admitted fact that no notice of the proceedings upon the Criminal Revision was issued to the petitioner/convict. In its revisional jurisdiction, the High Court can enhance the sentence passed by fora below, but before it does so, it must comply with the provisions of subsection (2) of section 439 Cr.P.C., which make it mandatory that no Order under this section shall be made to the prejudice of the accused, unless he has had an opportunity of being heard either personally or through a legal practitioner of his choice, so as to defend himself. 2 The purpose of issuing notice is to give an opportunity to the accused/convict either to pursue his matter personally or through a legal practitioner of his own choice so as to defend himself. Without issuing the mandatory notice the impugned judgment is contrary to the provisions of section 439 (2) Cr.P.C. This has deprived the petitioner from his legal as well as constitutional right of consulting a legal practitioner of his own choice and fair trial as provided by Article 10 and 10-A of the Constitution of the Islamic Republic of Pakistan, respectively. As far as the contention of the learned counsel for the complainant that the convict was already before the Court in his

[1] [PLD 2024 SC 805]

> own appeal and both the matters were heard together, therefore, he was deemed to be served and no fresh notice was required. We are not in agreement with the learned counsel for the reason that the appeal filed by the convict and the revision filed by the complainant are altogether different in their nature and outcome. Once the law prescribes a thing to be done in a particular manner, it must be done as such, therefore, a separate notice as required by sub-section (2) of section 439 Cr.P.C. was mandatory, without which no order should have been passed, hence, the impugned judgment is not sustainable."

Similar view has been taken in a judgment titled Farhad Ali vs. Mutalib Khan and another[2], wherein, it has been held as under: -

> "In view of the clear language of section 439(2) Cr.P.C, as reproduced above, it was mandatory for the revisional Court to have afforded proper opportunity of hearing to the petitioner, after due notice to him, which the revisional Court admittedly failed to follow."

8. In the present case, the learned Additional District Criminal Court, while exercising revisional jurisdiction under Section 439-A APC, enhanced the sentence of the accused without issuing the mandatory notice required under Section 439(2). This failure to provide an opportunity for the accused to be heard constitutes a direct violation of the statutory provision. Enhancing a sentence without affording the accused a fair chance to defend himself or present mitigating circumstances results in a miscarriage of justice and renders the order procedurally flawed and legally untenable. The High Court also neglected this important factor.

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[2] [2012 SCMR 1072]

Therefore,, recognizing this critical omission, we set aside the judgments passed by both the Courts below and by accepting the instant appeal, we remanded the case to the learned Additional District Criminal Court with explicit directions to rehear the matter in strict compliance with Section 439 & 439(2) APC and then decide the same afresh within two months from the date of communication of the order.

JUDGE JUDGE

Mirpur:
20.02.2025