IN THE SUPREME APPELLATE COURT GILGIT-BALTISTAN
AT GILGIT

(Appellate Jurisdiction)

Cr. Appeal No. 04/2011 in C.P.L.A. NO. 13/2011

Before:- Mr. Justice Rana Muhammad Arshad Khan, Chief Judge.
Mr. Justice Raja Jalal-ud-Din, Judge.

The State **Petitioner/Appellant**

VERSUS

1. Sufi Ali s/o Abdul Karim r/o Khapulu District Ghanche.
2. Ghulam Muhammad s/o Abdullah r/o Khapulu District Ghanche.
3. Syed Nawaz Hussain s/o Hassan, Khateeb, Khanqa-e-Mualla r/o Gulapur, Shigar District Skardu.
4. Ali Muhammad Hadi s/o Hadi r/o Gulapur, Shigar, District Skardu.

Respondents/Accused

PETITION UNDER ARTICLE 61 OF THE GILGIT-BALTISTAN (EMPOWERMENT AND SELF GOVERNANCE ORDER) 2009 READ WITH SECTION 417(2) Cr.P.C. AND SECTION 25 OF ATA 1997 AGAINST ORDER/JUDGMENT OF HON'BLE CHIEF COURT DATED 25-05-2011 WHEREBY THE RESPONDENTS HAVE BEEN ACQUITTED FROM CHARGES U/S 153-A P.P.C READ WITH SECTION 8/9 ATA AND THE IMPRISONMENT WITH FINE AWARDED TO THEM BY THE ANTI TERRORISM COURT HAS BEEN SET AISDE.

FOR SETTING ASIDE THE IMPUGNED JUDGMENT AS THE SAME BEING PATENTLY ILLEGAL, UNWARRENTED BY LAW, NOT SUSTAINABLE AND MERITS REVERSAL AND RESTORTION OF CONVICTION AWARDED BY TRIAL COURT TO MEET THE ENDS OF JUSTICE.

PRESENT:-

1. Mr. Asad Ullah Khan, Advocate General Gilgit-Baltistan on behalf of the Petitioner/Appellant.
2. Malik Haq Nawaz, Advocate for respondent No. 4.
3. Mir Ikhlaq Hussain, Advocate for respondent No.1, 2 & 3.

<u>Date of Hearing:- 16-05-2014.</u>

JUDGMENT

RAJA JALAL-UD-DIN,J.........This appeal has been preferred against the Judgment dated 25.05.2011 passed by the learned Division Bench of the Chief Court Gilgit-Baltistan whereby the appeal filed under Section 25 of the Anti-Terrorism Act, 1997 against the Judgment dated 29.09.2010 passed by learned Judge of Anti-Terrorism Court No. 1 of Gilgit-Baltistan was accepted and the conviction and sentence awarded to the respondents herein was set aside.

2. Briefly, the facts of the case of the prosecution as gleaned out from the record are that the indictment No. 17/2010 was registered with Police Station Skardu on 12.04.2010 for an occurrence which had taken place on 23.03.2010 under Section 153-A P.P.C read with Section 9 of the Anti-Terrorism Act, 1997. The case was registered at the instance of Shamsher Ali IP/SHO Police Station Skardu who had received secret information to the effect that one Sufi Ali was distributing the objectionable pamphlet under the subject “☎⇧◷”ℬ”⑩◷☪✆ ” among the people of different sects in Skardu. It was informed further that the booklet contained undesired material which was quite derogatory to the honour and dignity of *Aimma-e-Karam* and through this method, he was creating hatred among different sects of the society which could create law and order situation at any time in the area. The complainant/Police Officer, on receipt of this information, incorporated the same in the “Rapat

Roznamcha" at Serial No. 5 and he immediately alongwith police personals proceeded in search of that man. The accused was found in the premises of the hospital at Skardu while distributing the pamphlets. When he was interrogated at the spot, he disclosed that he had taken those pamphlets from one Ghulam Muhammad. He allegedly conceded that he had distributed those pamphlets among the people of different sects. He, thereafter, handed over the remaining incriminating material to the said Police Officer. The material was taken into possession vide recovery memo Exh. PW-5/A. Consequently, the aforereferred case was registered against him and other three persons namely, Ghulam Muhammad son of Abdullah, Ali Muhammad Hadi son of Hadi and Syed Nawaz Hussain son of Hassan. It is pertinent to mention here that the complainant had statedly proceeded, under Section 157 Cr.P.C, in search of the accused after incorporating the secret information at Sr. No. 5 of the "Rapat Roznamcha".

3. On the registration of the case, the investigation was carried out by the investigator and on the conclusion of the same, the report under Section 173 Cr.P.C was prepared and submitted in the Anti-Terrorism Court No.1 Gilgit, while placing the name of Ghulam Haider in Column No. 2 as no sufficient evidence could be collected against him and the names of Zaman Sufi Ali, Ghulam Muhammad, Syed Nawaz Hussain and Ali Muhammad Hadi were placed in Column No. 3 of the report.

4. On the receipt of the Challan, the learned Trial Court after completing all the legal formalities had proceeded to frame the charge against the accused persons respondents herein under Section 153-A P.P.C read with Section 9 of the Anti-Terrorism Act, 1997 and the same was put to the respondent/accused, to which they did not plead guilty and had claimed trial. The learned trial Court had taken the cognizance of the offence and issued the process while summoning the evidence of the prosecution. The prosecution produced as many as 10 PW's against the accused persons in order to substantiate its case. The learned Trial Court recorded the evidence of the PW's produced by the prosecution namely, PW-1 Sher Ali, PW-2, Syed Sana Ullah, PW-3, Abdur Rehman, PW-4, Mohammad Yaqoob, PW-5, Nizam-ud-Din, PW-6, Ghulam Muhammad, PW-7, Yaqoob, PW-8, Liaqat Ali, SGC, PW-9, Sultan Azam, District Superintendent of Police, PW-10, Shamsher Ali, IP/SHO. The documents produced by the prosecution were also placed on the record. The prosecution evidence was closed on the statement made by the public prosecutor on 10.06.2010.

5. The accused, thereafter, were examined under Section 342 Cr.P.C enabling them to explain the circumstances appearing in the evidence against them. The respondents/accused in their statements categorically denied the allegation and proclaimed their absolute innocence on the ground that they had been falsely implicated in this case while relying upon the fake evidence. However, while answering

to the question, “why this case against you and why the PW's deposed against you?”, the appellant had stated that “**It is absoultly incorrect. If any such speech was ever delivered before 15/20 years are 4/5 years these were delivered at with in the jurisdiction of police station Taisar and police station shiger and no speech was delivered with in the jurisdiction of police station skardu. Therefore the police Skardu has no jurisdiction to register the case against me. I never stated my speeches that the battled between Yazeed and Hazarat Imam Hussain (R.A) were to gain power**”.

However, the accused persons did not opt to appear under Section 340(2) Cr.P.C on oath in disproof of the charge or allegation leveled against them.

6. On the conclusion of the trial, the learned trial court convicted Ali Muhammad Hadi and Syed Nawaz Hussain under Section 9 of the Anti-Terrorism Act, 1997 and sentenced them to suffer 5 years imprisonment with an order of fine of Rs. 50,000/- each and in default thereof to undergo further Six months imprisonment, whereas, Sufi Ali and Ghulam Muhammad were convicted under Section 9 of the Anti-Terrorism Act, 1997 and were sentenced to suffer Six months imprisonment with an order of payment of fine of Rs. 10,000/- each and in default of payment of fine to suffer further one month imprisonment. The convicts were also extended the benefit of Section 382(b) Cr.P.C.

7. Syed Nawaz Hussain s/o Hassan and Ali Muhammad Hadi s/o Hadi, respondent No. 3 & 4 herein, feeling aggrieved and dissatisfied with the Judgment dated 29.07.2010 passed by the learned trial Court filed separate appeals bearing No. 14/2010 and 15/2010 against their conviction and sentence, whereas, the state filed a Criminal Revision Petition No 12/2010 against Sufi Ali son of Abdul Karim and Ghulam Muhammad son of Abdullah for the enhancement of their sentence. The Hon'ble Chief Court vide its Judgment dated 25.05.2011, accepted the appeals of the respondents namely, Syed Nawaz Hussain and Ali Muhammad Hadi and acquitted them of the charges, whereas, the Criminal Revision Petition filed by the State was dismissed as being meritless.

8. The State through C.P.L.A. No. 12/2011 challenged the Judgment dated 25.05.2011 passed by the learned Division Bench of the Chief Court Gilgit-Baltistan in which leave to appeal was granted by this court vide order dated 06-09-2011 and the notices were issued to the respondents namely Syed Nawaz Hussain, Ali Muhammad Hadi, Sufi Ali and Ghulam Muhammad and in pursuance of the leave granting order, the appeal bearing No. 04/2011 was accordingly filed.

9. The learned Advocate General Gilgit-Baltistan appearing on behalf of the state argued that the prosecution had brought on record sufficient incriminating material connecting the accused

persons with the crime and fully substantiated its case for conviction and sentence. The prosecution produced as many as 10 PW's who entered appearance and made their statements before the Court and through the evidence brought on the record, the prosecution succeeded to prove the guilt of the accused persons. He submitted further that the PW's remained consistent in their statements despite searching cross examination by the defense but the defense could not succeed to shatter the prosecution witnesses at all and no favourable material and an iota of evidence, favourable to the defense, could be brought on the file. He vehemently argued that all the respondents have been proved to be involved in the crime. The investigating agency had collected the evidence against accused persons which was sufficient to convict them as the learned trial Court had correctly convicted and sentenced them but the learned Division Bench of the Chief Court Gilgit-Baltistan did not adhere to the statements of the PW's produced by the prosecution nor it were properly appreciated and acquitted Syed Nawaz Hussain and Ali Muhammad Hadi of the charges illegally and without application of judicious mind while not keeping in view the attending circumstances of the case. The learned Advocate General Gilgit-Baltistan emphasized that the accused persons could not be acquitted as they had not committed the crime against the state with an intention to inflame the sectarian issue in order to achieve ulterior motive.

10. Conversely, the learned counsel for the respondents vehemently argued that the prosecution has failed to prove the guilt of the respondents though truthful and confidence inspiring evidence. The learned counsel argued further that the prosecution could not bring on file even an iota of evidence against the respondents herein through trust worthy witnesses who did not remain consistent in their statements during the trial. They strenuously argued that the secret information with regard to the commission of cognizable offence was incorporated in “Rapat Roznamcha” and no case under Section 154 Cr.P.C was recorded which is indicative of fact that the occurrence had not taken place in a manner suggested by the prosecution which creates a serious doubt and the benefit of which is to go to the accused persons. It has been argued vigorously that the respondents were charged under Section 153-A P.P.C which deals promotion of enmity among the different groups by words, either spoken or written and if, one promotes or attempts to promote particularly on the ground of religion etc, the recording of the FIR is not the procedure to bring home the guilt of the accused. The procedure has been laid down in Section 196 Cr.P.C to deal with the matter in a legal manner. The learned counsel for the respondents emphasized that if the legal course provided in the law is not made applicable or adhered to, the whole super structure would come to the ground. Lastly, it is argued that if the procedure contemplated under Section 196 Cr.P.C is not followed, the whole trial is vitiated. The learned trial Court did not revert to this aspect of the case at all which renders the whole exercise of trial a futile and therefore, the

prosecution has miserably failed to prove its case against the respondents and the appeal merits dismissal.

11. We have heard the learned counsel for the respective parties at full length and examined the record very carefully with their able assistance.

12. At the very inception, it would be appropriate to make it clear that there is remarkable difference between the appraisement of evidence in an appeal against the acquittal and in an appeal against conviction. The principle of appraisal of evidence on record is required to be carried out very consciously and with application of judicious mind and very strictly in an appeal against conviction but the same method cannot be applied as there is already a decision of acquittal rendered by the Court of competent jurisdiction in a judgment under question. During the reappraisal of evidence different inference can only be drawn when it appears so apparently that there had been a gross misreading of the evidence or a very essential part of the evidence has not been taken into consideration, reflecting if, that would have been read, the inference could have been different and particularly, if, it leads to miscarriage of justice.

13. It is well settled by now that if the law requires to do certain things in a certain manner, it should have been done in that manner or not at all. Ordinarily, the apex court, as principle, does not interfere in the case of acquittal rather a due weight is to be given to

the finding of court acquitting the accused. In view of what has been said above, it evolves that the approach for reappraisal of evidence in an appeal against acquittal is slightly different from that in an appeal against conviction. The leave is always granted for re-appraisement of evidence to meet the ends of justice and the benefit of every reasonable doubt is to be extended to the accused. The accused is presumed to be innocent unless he is found guilty. The learned Division Bench of the Chief Court Gilgit-Baltistan after reappraisal of evidence acquitted the respondents herein. No any other interference would be appropriate with acquittal on the ground that on the reappraisal of the evidence, the court may come to the different conclusion from that of acquitting court.

14. The Chief Court after reappraisal of prosecution evidence acquitted the respondents No. 3 and 4 herein, this Court cannot substitute its own finding unless it is found that the findings of the Chief Court are basing on mis-reading of the evidence leading to miscarriage of justice and apparently, it appears to be ridiculous and shocking. In the case Yar Muhammad and others v. the State (1992 SCMR 96), it was held that in a murder case the learned trial court after recording the evidence and its plausible appraisement acquitted the accused. The appeal against acquittal of the accused was preferred and the High Court accepted the appeal while setting aside the acquittal of the accused and they were convicted and sentenced. The Hon'ble Supreme Court of Pakistan after reappraisal of evidence came to the exclusion that there was no misreading and non reading of the evidence at all and High Court has not even pointed out that

the Courts below had made any misreading of evidence. Keeping in view the attending circumstances of the case, the judgment of conviction was set aside and the acquittal was restored. It is well settled principle by now that the reappraisement of the evidence is to be done very carefully and consciously as the accused persons have already earned acquittal.

15. Now we revert to the case in hand, admittedly, the occurrence had taken place on 23.03.2010 and the case was registered on 12.04.2010 with the delay of almost 20 days. According to the narration of FIR the SI/SHO on receipt of secret information incorporated the information in the "Rapat Roznamcha" and he, alongwith the Police Officials, proceeded under Section 157 Cr.P.C in search of the accused person. Chapter XIV of the Code of Criminal Procedure deals with the information of commission of an offence cognizable and non cognizable. The plain reading of section 154 Cr.P.C reveals clearly that every information pertains to the commission of a cognizable offence, either given orally to an officer incharge of a Police Station, the same shall be reduced in writing by him. The information given in writing or reduced in writing shall be read over to the informant and shall be entered in a book to be kept in the Police Station as prescribed by the provincial government. The Section 156 Cr.P.C made conferment of powers on an officer incharge of the Police station to investigate any cognizable offence within the local limits of his area. The succeeding Section of the Cr.PC i.e. 157 denotes that if any information is received or otherwise and the

Police Officer has reason to suspect the commission of an offence which he is otherwise empowered to proceed with the investigation under section 156 Cr.P.C. The aforereferred section costs an obligatory duty upon the Police Officer that on receipt of suspected information, he shall forthwith send a report to a Magistrate having jurisdiction to take cognizance of that offence upon a police report. The police officer, thereafter, would proceed to the place of occurrence in person or he shall depute one of his subordinates to inspect the spot in order to investigate facts and circumstances of the case.

16. The perusal of the record transpires that the police officer had not only found the alleged offender while distributing the undesirable pamphlets in the people of different sects in order to infuse hatred among the people but also affected the recovery of objectionable material constituting the offence. It is noted with pain that the information was received on 23.03.2010 and the accused was also arrested on the same day. It was foremost duty of the Police Officer to send a report to the Magistrate concerned forthwith. The perusal of the record is indicative of the fact that the Police Officer did not send any such report to the Magistrate. Non sending of the report causes a serious doubt about the secret information and the proceedings of the police officer in search of the accused. The examination of his own statement before the Court transpires that he could not register the case with promptitude. The non registration of the case without any plausible explanation makes the case of the prosecution doubtful. PW-1 Sher Ali, PW-2 Syed Sanaullah, PW-4

Muhammad Yaqub, PW-5 Nazam-ud-Din and PW-6 Ghlam Muhammad have categorically stated in their statements that they were never associated with the investigation of this case nor their statements under Section 161 Cr.P.C were ever recorded by the Investigating Officer. If, the Investigating Officer did not associate the prosecution witnesses during the course of investigation, no any other inference can be drawn except that witnesses had not seen the accused person while committing the offence and the whole exercise undertaken by the investigator, while collecting the incriminating material from the appellants/accused, renders futile and such kind of evidence cannot be relied upon for conviction and sentence particularly, when the appeal is against the acquittal of the accused person. The Investigating Officer had appeared as PW-10 and stated before the Court that the incriminating material allegedly recovered from the possession of Ali Muhammad Hadi containing questionnaire reportedly written by Ali Muhammad Hadi was never set to hand writing expert for his opinion. Obviously, this kind of alleged incriminating material cannot be used against the appellant/accused because it has not been proved on the record by the prosecution. Such kind of material cannot be used against the accused for their conviction and sentence because it casts a serious doubt upon the case of the prosecution.

17. Lastly, it has been argued by the learned counsel for the respondents herein that the cognizance in an offence under Section 153-A P.P.C could not be taken by any court in view of Section 196

Cr.P.C. The registration of an FIR in such a manner is clearly void ab initio. To meet with the argument, it would be appropriate to reproduce Section 196 Cr.P.C for ready reference:

> **"196. Prosecution for offences against the State.** No Court shall take cognizance of any offence punishable under Chapter VI or IXA of the Pakistan Penal Code (except section 127), or punishable under section 108A, or section 153A, or section 294A, or section 295A or section 505 of the same Code, unless upon complaint made by order of, or under authority from, the Central Government, or the Provincial Government concerned, or some officer empowered in this behalf by either of the two Governments."

18. If the Section 196 is read with the juxtaposition of Section 153-A P.P.C it makes abundantly clear that offence under Section 153-A P.P.C cannot be termed as an offence against the individual rather it is an offence against the state. The plain reading of the Section 196 Cr.P.C reveals that the cognizance of the offence committed in a manner which is punishable under Section 153-A P.P.C the Court would take the cognizance only upon a complaint made by Federal Government or Provincial Government concerned or some officer so empowered in this behalf by any of the two governments. The minute examination of the record available transpires that no sanction was accorded enabling the learned Judge Anti-Terrorism Court to take the cognizance in the offence under Section 153-A P.P.C as no order has been passed by the Federal Government or the Provincial Government or by any authorized officer so empowered in this behalf for filing of complaint. There is distinction existed between FIR and the "complaint". The word

complaint has been defined in Section 4(h) Cr.PC which reads as follows:-

> **"(h) 'Complaint'.** 'Complaint' means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the reports of a police-officer;"

19. The plain reading of the aforereferred definition makes it abundantly clear that the allegation made orally or in writing to a Magistrate for his taking action under Code of Criminal Procedure to the effect that some person whether known or unknown had committed an offence, but did not include the police report. It means that the case under Section 153-A P.P.C can only be proceeded on the complaint filed by either of the two governments or by an officer so authorized but an embargo has been laid that no case in an offence under Section 153-A P.P.C can be proceeded on the report prepared under Section 173 Cr.P.C. The omission while not observing the provisions of Section 196 Cr.P.C is such an illegality and irregularity which is not curable even under Section 537 Cr.P.C. Non adherence and observance of the provisions of Section 196 Cr.P.C renders the subsequent proceeding nullity. Where, a condition for the exercise of jurisdiction is not fulfilled, the whole proceedings subsequent thereto, becomes *coram non judice* and have no legal effect and shall render the whole exercise not only illegal but also without jurisdiction.

20. The learned judge of Anti-Terrorism Court No. 1, Gilgit had taken the cognizance of the case and after recording the evidence, the learned trial Court convicted the respondent/accused without adverting to the legal provisions under which the sanction for prosecution was mandatory and the absence of the same, vitiates the whole trial as being nullity in law. The law as contemplated under Section 196 Cr.P.C and omission to follow the same is a negation of the mandatory provision of law.

21. In view of what has been discussed above, we have reached to the inescapable conclusion that the Judgment of the Division Bench of the Chief Court, whereby the respondents herein were acquitted, is unexceptionable and does not require any interference. The instant Appeal bearing No. 04/2011 is dismissed accordingly.

Announced:- 16-05-2014.

Chief Judge

Judge