

HIGH COURT OF AZAD JAMMU & KASHMIR
(Shariat Appellate Bench)

Criminal Appeal No.32/2007;
Date of Institution 26.12.2007;
New No. 16/2017, dated 01.11.2017;
Date of Decision 03.08.2022.

Habib Hussain Shah S/o Muzamil Hussain
Shah Caste Syed R/o Mahori Syedan Tehsil
Sehnsa District Kotli.

Appellant

VERSUS

1. Zaman Begum widow;
2. Munir Hussain Shah;
3. Tasawar Hussain Shah;
4. Shabbir Hussain Shah;
5. Naeem Hussain Shah sons;
6. Shaheen Fatima;
7. Shamim Fatima;
8. Shazia Batool;
9. Nazia Batool;
10. Shaista Batool daughters of Wazir Hussain
Shah Caste Syed R/o Mozia Jabri Tehsil
Sehnsa. (legal heirs of deceased Wazir
Hussain Shah)
11. The State through Advocate General Azad
Jammu & Kashmir Muzaffarabad.

Respondents

(2) *Criminal Appeal No.03/2008;*
Date of Institution 28.03.2008;
New No.15/17, dated 01.11.2017;

1. Zaman Begum widow;
2. Munir Hussain Shah;
3. Tasawar Hussain Shah;
4. Shabbir Hussain Shah;
5. Naeem Hussain Shah sons;
6. Shaheen Fatima;
7. Shamim Fatima;
8. Shazia Batool;
9. Nazia Batool;
10. Shaista Batool daughters of Wazir Hussain Shah Caste Syed R/o Mozia Jabri Tehsil Sehnsa. (legal heirs of deceased Wazir Hussain Shah)

Appellants

VERSUS

1. Habib Hussain Shah S/o Muzamil Hussain Shah Caste Syed R/o Mahori Syedan Tehsil Sehnsa District Kotli;
2. The State through Advocate General, Muzaffarabad.

Respondents

APPEALS AGAINST THE JUDGMENT OF ADDITIONAL DISTRICT COURT OF CRIMINAL JURISDICTION, SEHNSA, DATED 28.11.2007

**Before:- Justice Sardar Muhammad Ejaz Khan, J.
Justice Khalid Rasheed Chaudhary, J.
(Division Bench)**

PRESENT:

Mr. Rafiullah Sultani, Advocate, for Habib Hussain Shah, convict-appellant/respondent No.1.

Raja Javaid Akhtar, Advocate, for respondents/appellants, legal heirs of deceased Wazir Hussain Shah.
A.A.G. for the State.

JUDGMENT:

Sardar Muhammad Ejaz Khan, J. The captioned appeals have been filed by the appellants against the judgment passed by the learned Additional District Court of Criminal Jurisdiction, Sehnsa, on 28.11.2007 whereby convict-appellant, Habib Hussain Shah, was convicted and awarded sentence under Section 302 APC read-with Section 306 (3), Section 308 (1) & (2) APC for 14 years imprisonment & half '*Diyat*' amounting to Rs.3,95,125/- in default of payment of compensation, he shall undergo further imprisonment of two months, he was convicted and awarded sentence in offence under Section 13/20/65 AA for three years imprisonment and fine, in default of payment of fine, he shall undergo further two months imprisonment, he was convicted & awarded sentence of '*Daman*' under Section 337/A, F-1 APC amounting to Rs.5000/- and imprisonment of one year, he was convicted and awarded sentence of '*Arsh*' under Section 337/A-3

amounting to Rs.39510 and imprisonment of three years, the amount of 'Daman' shall be paid to Mst. Aneeqa and the amount of 'Arsh' shall be paid to injured-Sonia, in default of payment, he shall remain in judicial lockup, he was convicted and awarded sentence under Section 211 APC for five years and fine of Rs.25,000/-, in default of payment, he shall undergo further six months of imprisonment, in overall sentence, he shall bear three years rigorous imprisonment and rest of simple imprisonment. Convict-appellant, Habib Hussain Shah filed an appeal for *setting-aside* the sentence awarded to him whereas a cross-appeal filed by legal heirs of deceased, Naheed Fatima, against the acquittal of appellant passed in offences under Section 324, 336, 201 & 203 APC as well as enhancement of sentence.

2. Since both the appeals filed by the convict-appellant and legal heirs of deceased, Naheed Fatima, arise out of the same incident and judgment, therefore, these appeals were

consolidated and will be decided through this single judgment.

3. According to prosecution story, on 17.08.2006 at about 05:00 A.M. complainant, Habib Hussain Shah (convict-appellant) submitted a written report stating therein that accused-Azad Hussain Shah S/o Lal Hussain Shah, Qayyum Hussain Shah, Mukhtoom Hussain Shah sons of Nazir Hussain Shah, Tasawar Hussain Shah, Sabir Hussain Shah sons of Khadim Hussain Shah, Shahzad Hussain Shah S/o Azad Hussain Shah, Nazaraf Hussain Shah S/o Tasawar Hussain Shah, Kalsoom Fatima wife of Azad Hussain Shah caste Syed R/o Mahori Syedan Tehsil Sehnsa belongs to same Deh and same community and there is a land dispute between the complainant and above accused-persons going on since long. Today, accused-persons 1 to 8 entered into Shamlat Deh land to snatch the peaceful possession of the complainant on which complainant with his wife Naheed Fatima and daughters Sonia & Aneeqa went

on the spot to prohibit them but the accused- persons having common intention to murder attacked on the complainant party while accused- Azad Hussain Shah, having 12 bore rifle in his hand fired at the hips of his wife Naheed Fatima and accused Qayyum Hussain Shah hit with hatchet/axe at the head of his wife then she fell down. Accused-Tasawar Hussain Shah hit with hatchet/axe at head of wife when she was lying on ground. Accused-Kalsoom Fatima, having shopper of grinded chilly in her hands, threw in the eyes of complainant while accused-Sajjad Hussain Shah, Makhtoom Hussain Shah and Sabir Hussain Shah grabbed and threw him down from the hill and they also badly beat and injured his daughters Sonia and Aneeqa. During the incident, his wife Naheed Fatima succumbed to her injures at the spot, her dead body is lying at the spot. The occurrence was witnessed by Mehmood Hussain Shah & Ulfat Hussain Shah caste Syed R/o Mahori Syedan,

hence, legal proceedings may be initiated against the accused-persons.

4. On this report, a case illat No.90/2006 in offences under Sections 302, 324, 337-F, 337-A, 147, 148 & 149 APC was registered at Police Station Sehnsa District Kotli while injured persons and dead body were rushed to THQ Hospital Sehnsa where autopsy of Naheed Fatima was conducted. The investigating agency visited at the spot and collected the material used in the incident through different recovery memos and statements of eye witnesses under Section 161 of Cr.P.C. were recorded while Patwari got prepared site plan of the spot and later on, recovered articles were sent to Forensic Lab Lahore for chemical examination. The accused-persons were apprehended by the police who during investigation denied the guilt of offence while accused Qayyum Hussain Shah and Tasawar Hussain Shah obtained pre-arrest bail and joined the investigation while negating the guilt of offence. During the investigation police visited the house of

Azad Hussain Shah where 12 bore rifle was taken into custody upon which a separate F.I.R. in offences under Sections 13/20/65 A.A. was registered and thereafter, an incomplete report under Section 173 of Cr.P.C. was submitted before the competent Court of law.

5. During investigation, Syed Wazir Hussain Shah, father of deceased, Naheed Fatima, submitted a written report to D.S.P. Kotli stating therein that relation between Habib Hussain Shah (complainant) and his deceased daughter was not cordial due to domestic violence. Accused-Habib Hussain Shah with the pretext to remove the fence took his daughter and grand-daughters with him at the place of occurrence where he asked them to remove the obstacles and then he fired the victim from very close distance with the intention of murder which hit at her hips, resultantly, she succumbed to her injuries on spot. Accused Habib Hussain Shah badly beat his grand-daughters Sonia and Aneeqa with the barrel of rifle and threw

grinded red chilly powder in their eyes on account of which their eyes were badly affected and injured rather accused submitted concocted and fabricated report to the police while the alleged accused Azad Hussain Shah etc. are innocent persons and have got no nexus with the commission of offence, hence it has been prayed for initiating proceedings under law. In this regard father of the victim and injured Sonia and Aneeqa got recorded their statements under section 161 Cr.P.C. in which injured persons nominated their father for committing murder of their mother and they also got recorded statements under Section 164 of Cr.P.C. before SDM, Sehnsa, on 10.09.2006, hence, he was apprehended by the police. On his poitation weapon of offence was recovered vide recovery memo *Exh. "PF"*. The alleged accused persons Azad Hussan Shah etc. were exonerated of the charges as being innocent.

6. After completion of investigation, the investigating agency submitted a report under section 173 of Cr.P.C. in offences under Sections

336, 337-A, 147, 148, 149, 201, 203, 211, 337/F-1, 337/A-1,2,3 APC & 13/20/65 A.A. before the trial Court on 17.10.2006 and thereafter, statement of convict-appellant under section 265-D of Cr.P.C. was recorded by the learned trial Court in which he denied the guilt of offence on which the prosecution was directed to produce the evidence. In order to prove its case, the prosecution produced P.Ws. Mst. Sonia (PW-1), Mst. Aneeqa (PW-2), Wazir Hussain Shah (PW-3), Thair Hussain Shah (PW-4), Asad Raza (PW-5), Zakir Hussain Shah (PW-5), Bashir Hussain Shah (PW-6), Zaheer Hussain Shah (PW-7), Zalfat Hussain Shah (PW-8), Zafar Hussain Shah (PW-9), Raza Hussain Shah (PW-10), Kafiat Ali (PW-11), Sardar Muhammad Ashfaq Patwari Constituency (PW-12), Dr. Shahnawaz Khan C.M.O (PW-13), Dr. Tassarwar Hussain Shah C.M.O (PW-14), lady Dr. Tahria Umair C.M.O (PW-15), Ansar Yaqoob S.D.M Sehnsa (PW-16), Abdul Aziz Constable 273 (PW-17), Muhammad Azeem Marar head Constable (PW-18), Raja Shahzad Ahmed

D.S.P Investigation (PW-19) and Muhammad Sagheer S.H.O/S.I. Police Station Sehnsa (PW-20). The prosecution after tendering in evidence the report of chemical examiner (*Exh. "PJ"*) Forensic Science Laboratory, Lahore (*Exh. "PH"*) closed its case. The accused in his statement recorded under Section 342 of Cr.P.C. pleaded his innocence and he neither produced defence evidence nor appeared before the trial Court as a witness as provided under Section 340 (2) of Cr.P.C. After conclusion of trial Habib Hussain Shah-appellant was convicted and sentenced as mentioned in pre-paras vide impugned judgment dated 28.11.2007, hence, these appeals.

7. Mr. Rafiullah Sultani, Advocate, representing the convict-appellant argued that a false and fabricated case has been registered against his client on account of enmity while all the prosecution witnesses are interested and close relatives of the respondent, hence, their evidence is not reliable. The learned counsel maintained that

after registration of case investigating agency submitted incomplete report under Section 173 of Cr.P.C. wherein it has been mentioned that crime weapon has been recovered on the pointation of Azad Hussain Shah and there is material contradiction between the ocular evidence and medical evidence while the prosecution story is full of dent and material contradiction but the learned trial Court relied upon the prosecution evidence, hence, the impugned judgment is not sustainable thus convict-appellant is entitled to be acquitted of the charges and in support of his contentions, he referred to and relied upon the following case law:-

- i. [PLJ 2007 SC AJK 18];*
- ii. [1995 P.Cr.L.J. 248];*
- iii. [2007 P.Cr.L.J. (Karachi) 1220];*
- iv. [1999 MLD 1423]; and*
- v. [2022 SCMR 1107].*

8. Conversely, while controverting the arguments advanced by the learned counsel for the convict-appellant, the learned counsel for the respondent/appellant vehemently argued that on account of prosecution evidence, it is not proved

that there is any enmity between the convict-appellant and her real daughters P.W-1 & P.W-2 who were eye witnesses while weapon of offence was recovered on his instance. The learned counsel averred that statements of Mst. Sonia P.W-1 and Mst. Aneeqa P.W-2 fully prove the prosecution version. Finally, the learned counsel advanced the arguments on behalf of legal heirs of deceased that the learned trial Court appreciated the evidence in its true perspective and came to the right conclusion, however, while awarding conviction and sentence, the learned trial Court committed grave error because lesser sentence was awarded in view of gravity of offence and erroneously acquitted the convict-appellant of the charges in offences under Sections 201, 203, 324 & 336 APC, hence, the learned trial Court was legally bound to award punishment as provided under Section 302 APC.

9. In rebuttal, the learned counsel for the convict-appellant submitted that the prosecution has miserably failed to prove its case against the

convict-appellant, hence, the appeal filed by the legal heirs of deceased may be dismissed.

10. The learned A.A.G. representing the State owned the arguments advanced by the learned counsel for the respondents/legal heirs on all counts.

11. We have given our due consideration to the arguments advanced by the learned counsel for the parties in the light of material available on record as well as case law referred to and relied upon for and against. By keeping the defence version in *juxtaposition*, we have also gone through the impugned judgment with great care and caution.

12. The prosecution case is based upon ocular version furnished by Mst. Sonia (P.W-1) and Mst. Aneeqa (P.W-2). Both are eye witnesses as well as injured witnesses who are real daughters of convict-appellant. From deep perusal of statements of above-mentioned star witnesses of the occurrence who are real daughters of the deceased, Naheed

Fatima and convict-appellant, Habib Hussain Shah, shows that Sonia (P.W-1) and Aneeqa (P.W-2) having age of 15 & 12 years appeared before the learned trial Court on 02.11.2006 and 07.11.2006 and got recorded their statements wherein they unanimously deposed that they were sleeping where their father forcibly woke them up and asked them to come with me where there was a land dispute with Azad Hussain Shah & others at about 04:00 A.M. early in the morning, which was still a dark hour of night rather they did not want to go there but their father, convict-appellant, having rifle, took them with him forcibly at the spot who also wrapped rifle and his body with '*Shawl*'. On reaching at the spot, they started removing the obstacles and convict-appellant started walking around them due to which their bodies and mind became motionless while their father was facing them and their mother back was in their front meanwhile their father fired direct shot of rifle from a very short distance at their mother, which hit at

her hips due to which she fell down on the ground and she (deceased mother) asked for water. Instead of giving water, their father, convict-appellant brutally beat their mother with Butt of the rifle and rode on her back. They further deposed that convict-appellant having red grinded chilly in a shopper, threw at their eyes and brutally beat them due to which they fell unconscious. Their father, convict-appellant, went to home and came thereafter short time ago while earlier their father wore white dress and when convict-appellant came from home at the place occurrence, wore '*Khaki*' dress. Their paternal uncle also came at the spot and said to their father, he has committed injustice that what you have done and did a lot of injustice and soon after their father, convict-appellant, and paternal uncle asked them to keep their mouth shut and to give statements against the Azad Hussain Shah & Qayyum Shah while father, convict-appellant threatened them to give statements against his said opponents otherwise he

will kill them as he killed their mother. In this incident, time of occurrence, place of occurrence and manner of occurrence is very important to mention here that the convict-appellant intentionally brought her wife and daughters at the place of occurrence who chose time early in the morning at about 05:00 A.M. to fulfill his hatching conspiracy to kill her wife just to implicate the rival party in the commission of offence and on account of which convict-appellant fired at his wife from close range and threw grinded chilly in the eyes of his daughters and also threatened them of dire consequences to keep their mouth shut. Initially, the convict-appellant, by giving fear of dire consequences and their murder, managed to get recorded statements of his daughters before the police against his opponents and for making himself camouflage and secure, he took two daughters with him at the place where he accomplished his hatching plan so that he could implicate his opponents and has tried to make a strong case

against them. From the perusal of postmortem report of deceased Naheed Fatima reveals that she died on account of firearm injury, which hit at hips of the deceased, hence, autopsy report fully testifies the version of eye witnesses that deceased was done to death by firearm injury. As regard to plea of contradiction of ocular account, we did not find any substance because the defence counsel failed to point out that as what was the material dent in the prosecution case, which was sufficient to bring the principle of benefit of doubt into operation regarding the case of convict-appellant. In the instant case all the prosecution witnesses particularly Mst. Sonia P.W-1 and Mst. Aneeqa P.W-2 are in confirmatory with each other in respect of the incident, its time, narration of incident and even specific allegation brought on record against the convict-appellant fully establishes that both the eye witnesses sustained injuries during the occurrence as such this fact of the matter has not been denied by the other side, hence, in both the statements made by

P.W-1 & P.W-2, no material contradiction appears to have been found.

13. It is also relevant to mention here that in this case admittedly, only child witnesses (P.W-1 & P.W-2) are the eye witnesses of the occurrence who appeared before the learned trial Court for recording their statements and at that time their ages were 12 & 15 years.

14. No doubt, the learned trial Court did not give any opinion during recording of evidence about their competency as witnesses, however, from their statements, it becomes quite clear that they understood the questions put to them and they have answered with full understanding. So, it can safely be concluded that Mst. Sonia (P.W-1) & Mst. Aneeqa (P.W-2) are competent child witnesses. Our this view finds support from a case reported as Abdullah Shah vs. The State [PLD 1968 Peshawar 1]. The relevant part of the report is reproduced as under:-

“The sole test is whether the witness has sufficient intelligence to depose or whether he can appreciate the duty of speaking the truth. The general rule is that the capacity of the person offered as a witness is presumed”. The witness having been put to the test laid down in the section, the trial Court proceeded to examine the witness. As such Mst. Jamsheda’s evidence is as good as that of any other witness. The competency of children is regulated not by their age, but by the degree of understanding which they appear to possess. The first hand information of the occurrence immediately after the incident conveyed by the witness to her grandfather eliminates the suggestion of her being tutored or anything of the sort. The credibility of the witness remains absolutely unshaken. The facts of the case do not warrant the suggestion that the witness may have been coached to falsely implicate her father.”

Likewise this proposition came under consideration before the apex Court in a case reported as *Qadeer Hussain vs. The State through Advocate-General, Azad Jammu & Kashmir Government, Muzaffarabad* [1995 P.Cr.L.J. SC AJ&K 803] wherein it has been observed as under:-

“So what is required by law is not the factor of age but the important criteria

has always been the intelligence that a particular child witness has in the circumstances of the case. It may also be pointed out that in the instant case, the child witnesses who were produced by the prosecution in support of their case, were of the age of 14 and 12 years respectively. They were not of the age so as not to understand the nature of question put them. Yet there is another criteria that is the evidence of the child witnesses itself. From the perusal of the evidence of the child witnesses we find them as intelligent witnesses because they gave rational replies to the question put to them by the learned counsel for the defence and they in fact understood the nature of questions posed to them. So after analysis of the case-law, and the provisions of Article 3 of the Qanun-e-Shahadat we are of the view that the rule enunciated in Article 3 is not an absolute or inflexible rule. Therefore, the objection of the learned counsel for the appellant is hereby repelled.”

15. Where ocular evidence is reliable and satisfactory, the conviction in law can be recorded on such evidence without any further corroboration but in the instant case the ocular account finds support from ample circumstantial evidence. The Courts always expect for the corroboration as rule of caution and in order to exclude the possibility of

involvement of an innocent person. The corroboration can be offered by anything in the circumstances of the case which should satisfy the conscious of the Court that evidence is reliable and trustworthy. Reliance can be placed on a case reported as *Zahir Hussain Shah vs. Shah Nawaz Khan and 3 others* [2000 SCR 123] in which it has been opined that:-

“Before discussing the available confirmatory evidence, it would be expedient to point out as to what corroboration means, ‘Corroboration’ of the statement of interested witnesses really means is that to accept it as wholly true it is desirable that it should have a confirmatory support. In fact when it is said that the statement of a witness needs corroboration to support it, this finding proceeds on the basis that version of p.w. is prima-face correct but by way of precaution it needs corroboration to attain clarity.”

It has further been observed in the aforesaid report, which reads as under:-

“It is, thus, manifest that corroboration is insisted upon only to satisfy the mind of the Court that the witnesses in the circumstances of the case are speaking truth. What facts

and circumstances are sufficient to satisfy the mind of the Court about the truthful nature or otherwise of the testimony of an ocular interested witness, is a question which varies from case to case and no hard and fast rule can be formulated on the point.”

16. Coming to the instant case as stated earlier that ocular account finds support from medical evidence. Moreover, weapon of offence 12 bore rifle was recovered on the pointation of convict-appellant in presence of witnesses, Tahir Hussain Shah (P.W-4) and Syed Ashad Raza (P.W-5). The report of FSL (*Exh. “PH”*) shows that crime empty had been found to be fired by 12 bore rifle recovered on the pointation of convict-appellant. During investigation, the investigating agency also brought corroboratory evidence particularly grinded red chilly and other important incriminating material on record, which further strengthens the ocular account. In view of the confirmatory evidence stated above, we are fully satisfy that evidence of eye witnesses is natural, confidence inspiring and worth

of credence and there is nothing to cast doubt on their testimony.

17. The motive behind the occurrence, which elucidates from the statements of witnesses, Raza Hussain Shah (P.W-11) and Kafiyat Ali (P.W-12) is that convict-appellant did not have cordial relationship with his deceased wife and he often used to beat her and before birth of forth child, when her wife was pregnant, he took with his wife and got admitted in the Hospital where he got injected his wife for abortion of her pregnancy. When this incident came into the notice of her father, he took her at his house from the Hospital and after 15/20 days, a '*Jirga*' of some notable persons was solemnized in which convict-appellant admitted his mistake and promised to feed sixty persons as penalty. During '*Jirga*' it was disclosed that convict-appellants sent proposals for his marriage through different persons at the houses of Zakir Hussain Shah and Sabir Hussain Shah but due to interference of father of deceased, Naheed

Fatima, they refused the said proposals, so, he murdered his wife because of his intention of a new marriage. It is crystal clear from the statements of the above P.Ws that convict-appellant killed his wife for another marriage and has gained twofold purposes i.e. first to kill his wife for another marriage, second to implicate rival party in a murder case of his wife and also got a piece of land.

18. It is a primary and basic question in our mind that when convict-appellant hatched the plan to kill her wife then why he took with him his daughters at the place of occurrence. In order to attend this question, we examined the whole statements of prosecution witnesses as well as police file.

19. We are clear in our consciousness that in order to accomplish these two objectives, first the convict-appellant kicked out his wife by committing preplanned murder to straighten the way just to execute second marriage and second objective was to implicate the rival party in a murder case, so, to

perform his nefarious designs, he took his daughters with him where there was a land dispute between convict-appellant and Azad Shah & others and selected the time early in the morning. After reaching at the place of occurrence, firstly the convict-appellant murdered his wife with firearm shot of 12 bore rifle and thereafter, he brutally injured his daughters and threw red grinded chilly in their eyes. After accomplishing offence, the convict-appellant threatened and frightened his daughters to keep their mouth shut before the police and also make statement before the police as per his instructions. At the very beginning, the convict-appellant, by extending fear of their murder and bearing dire consequences, managed to get recorded statements of his daughters before the police against his opponents and for making himself camouflage and secure, he took his two daughters with him at the place of occurrence where he accomplished his hatching plan so that he could implicate his opponents and try to make a strong

case against them. In this scenario, we came to the conclusion that there is nothing on record, which even remotely suggests that the convict-appellant has falsely been implicated in the commission of offence.

20. Adverting to appeal filed by the legal heirs of the deceased Naheed Fatima, the learned counsel pointed out that the learned trial Court appreciated the evidence of the parties in judicious manner and arrived at the correct conclusion but has committed serious legal error while awarding punishment under Section 308 APC. Under the relevant provisions of law, the learned trial Court was legally bound to award the punishment to convict-appellant as provided under Section 302 (a) of APC.

21. It transpires from the impugned judgment that the learned trial Court failed to specify under what provision of law the convict-appellant was awarded punishment. The question is yet to be determined that whether Habib Hussain Shah, convict-appellant could be punished with 'Qisas' for

Qatl-i-Amd of Naheed Fatima deceased in view of provisions of Section 306 of APC as the said deceased had left two daughters and two sons out of her wedlock with Habib Hussain Shah, convict-appellant as such they are 'Wali' of the deceased Mst. Naheed Fatima and are direct descendants of the offender namely Habib Hussain Shah. For proper appreciation of the matter, it would be advantageous to reproduce herein below Section 306 of APC, which reads as under:-

306. *Qatl-e-amd not liable to qisas:*

Qatl-i-Amd shall not be liable to qisas in the following cases, namely:--

- (a) when an offender is a minor or insane:
Provided that, where a person liable to qisas associates himself in the commission of the offence with a person not liable to qisas, with the intention of saving himself from qisas, he shall not be exempted from qisas;*
- (b) when an offender causes death of his child or grand-child, how low-so-ever;
and*
- (c) when any wali of the victim is a direct descendant, how low-so-ever, of the offender.”*

22. Sections 306, 307 & 308 APC would only attract in the cases of *Qatl-i-Amd*, which is liable to 'Qisas' under Section 302(a) of APC and not in cases in which sentence for *Qatl-i-Amd* awarded to 'Tazir', under Section 302 (b) APC. For removing the confusion and misconception of law on the subject matter, as reveals from the impugned judgment that the above-mentioned provisions must be understood in its true spirit. Section 306 of APC provides that *Qatl-i-Amd* shall not be liable to 'Qisas' under certain cases mentioned above and thus, it is clear that in such cases the punishment of 'Qisas' will remain inoperative but there is neither any exception in a case of *Qatl-i-Amd* punishable as 'Tazir'. Extending the benefit of the aforesaid sections would amount to grant a permission of killing of innocent person by their 'Walis'. This point has been resolved in a case titled *Faqir Ullah vs. Khalil-uz-Zaman and others* [1999 SCMR 2203] wherein it has been opined as under:-

“16. We find force in the first contention of the learned Senior Advocate Supreme Court appearing on behalf of the petitioner that the impugned order having been passed without the impleadment of the petitioner who is father of the deceased and had also lodged the F.I.R. and was, thus, the complainant is violative of the Article 25 of the Constitution. Again the maxim: audi alteram partem (no man shall be condemned unheard)” is not confined to proceedings which are judicial in form but extends to all proceedings, by whomsoever held which may affect the person or property or other right of the parties concerned in the dispute. In the Islamic Law of Crimes, the complainant and Wali in case of murder and hurt to body is a necessary party both in the cases involving ‘Qisas’ and ‘Tazir’. Faqirullah petitioner was, therefore, entitled to be impleaded as party to the Constitution Petition No.36 of 1994 and should not have been condemned unheard and therefore, the impugned order would be coram non iudice.

17. We are, however, unable to agree with Mr. Muhammad Ismail Qureshi learned Senior Advocate Supreme Court, that there is no Injunction of Qur’an that absolves an offender from the sentence of death by way of Qisas if Wali of the victim is descendant of the offender.”

Similar point has been resolved in a case titled *Muhammad Akram vs. The State* [2003 SCMR 855] in which it has been observed as under:-

“The first contention of the learned counsel relating to the application of section 308, P.P.C. by virtue of sections 306, P.P.C. is without any substance, sections 306, 307 and 308, P.P.C. is without any substance, sections 306,307 and 308, P.P.C. would only attract in the cases of Qatl-i-Amd which are liable to Qisas under Section 302(a), P.P.C. and not in the cases in which sentence for Qatl-i-Amd has been awarded as Tazir under section 302 (b) and (c), P.P.C.”

Reliance can also be placed on a case reported as *Muhammad Ramzan vs. The State* [2016 P.Cr.L.J (Lahore) 142 wherein following dictum has been laid down:-

“We have observed that in this case, the appellant was convicted under section 308, P.P.C. whereas, it is, by now, a well settled proposition of law that conviction under section 308, P.P.C. can only be passed in a case in which proof of Qatl-i-AMD liable to qisas as provided under section 304, P.P.C. is available but the conviction cannot be passed as qisas due to the reasons given in sections 306 and 307, P.P.C. whereas, in the instant

case, sufficient proof of Qatl-i-amd liable to qisas is not available on record and the conviction was to be passed as Ta'zir and where the conviction can only be passed as Ta'zir and not as qisas, the provisions of section 306, 307 and 308, P.P.C. cannot be applied. In this regard, guidance is sought from the esteemed judgment passed by the Hon'ble Supreme Court of Pakistan in the case of Zahid Rehman v. The State (PLD 2015 SC 77) in the light of which it is held that the judgment passed by the learned trial Court convicting the appellant under section 308, P.P.C. is not sustainable in the eye of law.

7. Hence, in view of common stance taken by all concerned and the case law referred above, the impugned judgment dated 28.06.2004 passed by the learned sessions Judge, Toba Tek Singh is set aside and the matter is remanded back to the learned trial Court with the direction to rewrite the judgment after hearing both the parties within four weeks after receipt of this judgment and till then the appellant would remain on bail subject to his furnishing bail bond in the sum of Rs.1,00,000/- with one surety in the like amount to the satisfaction of the learned Sessions Judge, Toba Tek Singh.

8. The case is sent to the learned Sessions Judge, Toba Tek Singh, who may decide the matter himself or may entrust one same to any other court of competent jurisdiction. Muhammad Ramzan (appellant) is directed to appear before the learned Sessions

Judge, Toba Tek Singh on 20.06.2015. Office is directed to transmit the relevant record to the learned Sessions Judge, Toba Tek Singh forthwith. Both these matters i.e. Criminal Appeal No.76-J of 2006 and Criminal Revision No.1132 of 2006 are disposed of accordingly.”

Likewise, in a case titled *Khalid Mehmood vs. The State* [2017 SCMR 201] in which it has been observed as under:-

“After hearing the learned counsel for the parties and going through the record we have straightaway observed that the law has been settled by this Court through an authoritative judgment rendered in the case of Zahid Rehman v. The State (PLD 2015 SC 77) and it has been clarified that the provisions of sections 306, 307 and 308, P.P.C. are relevant only to a case of Qisas and not to that of Ta’zir. The case in hand was surely a case of Ta’zir and not that of Qisas. As regards the question regarding mitigation of the appellant’s sentence we have noticed that in the backdrop of strained relations with his wife and her shifting to her brother’s house the appellant had not only killed his wife and brother but had also injured three others. For committing the said offences the appellant had not only used a pistol but also a screw-driver with the use of which he had tried to

take out the eyes of some of his victims. The record makes it abundantly clear that the appellant had acted in the matter brutally and mercilessly and that he is a desperate person evoking no sympathy in the matter of his sentence. This appeal is, therefore, dismissed and all the convictions and sentences of the appellant recorded and upheld by the courts below are maintained.”

23. In the instant case, convict-appellant committed a brutal murder of his wife and also caused injuries to his minor daughters with premeditation and thereafter, he filed a false application before police for registration of murder case of his wife against his opponents and succeeded in lodging F.I.R. illat No.90/2006 in offences under Sections 302, 324, 337-F, 337-A, 147, 148 & 149 APC, hence, convict-appellant has committed premeditated murder of his innocent wife in a brutal manner as such in these circumstances, death sentence as provided under Section 302 (b) APC is justified.

24. Before parting with the judgment, on last day of hearing Mst. Sonia appeared before the Court along-with her younger brother and when she was asked about to sit with her father for a short time because he is your father and is a person to look after you rather your mother is no more alive, she bluntly and straightaway refused the suggestion of the Court and stated that he murdered her mother in a brutal manner who also caused injuries to her and her sister by throwing red grinded chilly in our eyes due to which her eyes have lost their sight and now she is living a disabled life, hence, he is not entitled to any mercy and concession.

25. The analysis of the above discussion is that the prosecution has proved its case against the convict-appellant beyond any shadow of doubt, hence, appeal No.16 of 2017 filed by convict-appellant, Habib Hussain Shah, is hereby dismissed whereas appeal No.15 of 2017 filed by the legal heirs of the deceased, Naheed Fatima, is disposed of in the manner that 14 years imprisonment awarded

by the trial Court under section 302 APC read-with section 306(3), 308(1)&(2), APC to the convict-appellant is altered and he is awarded death sentence as '*Tazir*' under Section 302 (b) APC. We also modify the order of '*Diyat*' as compensation to the legal heirs of the deceased, Naheed Fatima, in terms of Section 544-A of Cr.P.C. The sentences awarded by the trial Court under section 337/A, F-1, 337/A-3, 211 APC are upheld. The convict-appellant shall be taken into custody forthwith accordingly. A copy of this judgment shall be annexed with other relevant file.

Muzaffarabad:
03.08.2022 (ZEB)

-Sd-
JUDGE
(E)

-Sd-
JUDGE
(K)