IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE KH. MUHAMMAD NASIM
MR. JUSTICE RAZA ALI KHAN

CRIMINAL APPEAL No. 28 OF 2022

(Against the Judgment dated 03.08.2022 passed by the Shariat Appellate Bench of the High Court of AJ&K in Crim. Appeals. No. 15 & 16 of 2017)

Habib Hussain Shah s/o Muzamil Hussain Shah caste Syed r/o Mahori Syedan Tehsil Sehnsa District Kotli, presently confined in District Jail, Kotli.

…Convict-Appellant

VERSUS

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

…Complainant-Respondents

Appearances:

For the convict-appellant:	Sardar Abdul Hameed Khan, Advocate.
For the State:	Kh. Maqbool War, Advocate-General.
Date of hearing:	04.04.2023

JUDGMENT

RAZA ALI KHAN, J:- Impugned before us is the judgment dated 03.08.2022, rendered by the learned Shariat Appellate Bench of the High Court *(hereinafter to be referred as High Court),* passed in Criminal Appeals No. 15 & 16 of 2017, whereby the appeal filed by the convict-appellant has been dismissed, whereas, the other appeal filed by the legal heirs of the deceased, Naheed Fatima, has been disposed of while altering the sentence of 14 years' imprisonment, the convict has been awarded death sentence.

2. The brief facts forming the background of the captioned appeal are that on 17.08.2006, at about 05:00 a.m. Habib Hussain Shah, convict-appellant, herein, presented a written report at police station Sehnsa, stating therein that he and the 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 son of Azad Hussain Shah, Nazaraf Hussain Shah son of Tasawar Hussain Shah, Kalsoom Fatima wife of Azad Hussain Shah caste Syed R/o Mahori Syedan Tehsil Sehnsa, belong to the same Deh and community and there had been land

dispute between them. It was stated that the nominated accused persons entered into the Shamlat Deh with intent to dispossess the complainant from the said land, upon which the complainant along with his wife, Naheed Fatima and daughters, Sonia and Aneeqa reached the spot to stop them but the accused with the common intention of murder, attacked the complainant. Accused- Azad Hussain Shah, having 12 bore rifle in his hand fired at the back of the body of his wife, Naheed Fatima and accused Qayyum Hussain Shah inflicted hatchet/axe blow at the head of his wife and she fell to the ground. Accused, Tasawar Hussain Shah inflicted another hatchet blow at the head of his wife when she was lying on the ground. Accused, Kalsoom Fatima, was carrying a shopping bag full of chili powder in her hands, and threw the powder into complainant's eyes while accused Sajjad Hussain Shah, Makhtoom Hussain Shah and Sabir Hussain Shah grabbed and threw him down from the hill and they also badly caused injuries to his daughters Sonia and Aneeqa. During the incident, his wife, Naheed Fatima, succumbed to the injuries, and her dead body was lying at the spot. It was alleged that the occurrence was witnessed by Mehmood Hussain Shah Ulfat Hussain Shah.

3. On this report, a case bearing No.90/2006 in the offences under Sections 302, 324, 337-F, 337-A, 147, 148 and 149, APC was registered at Police Station Sehnsa, while injured persons and dead body were rushed to THQ Hospital Sehnsa where autopsy of Naheed Fatima was conducted. The investigating Officer visited the spot and different recovery memos were made, statements of eyewitnesses under Section 161, Cr.P.C. were recorded, and Patwari prepared a site map of the spot. Later on, recovered articles were sent to Forensic Science Lab

Lahore for chemical examination. The accused persons were apprehended by the police who during the investigation, denied the guilt of the offence while accused Qayyum Hussain Shah and Tasawar Hussain Shah obtained pre-arrest bail and also negated the guilt of the 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 the offence under section 13 of Arms Act, 1965 was registered and thereafter, an incomplete report under Section 173 Cr.P.C. was presented in the Court of competent jurisdiction.

4. During the course of investigation, Syed Wazir Hussain Shah, father of the deceased, (Naheed Fatima), submitted a written application to D.S.P. Kotli stating therein that the relations between Habib Hussain Shah (*complainant*) and the deceased were not cordial due to domestic conflicts. Accused Habib Hussain Shah on the day of occurrence, along-with the deceased and daughters went to the place of occurrence where he asked them to remove the fence and then shot the deceased from a very close distance with intention to kill which hit at her back, resultantly, she succumbed to the injuries on the spot. The accused Habib Hussain Shah has also badly inflicted injuries to his grand-daughters Sonia and Aneeqa with the barrel of the rifle and threw red chilly powder in their eyes which badly affected their eyes. The accused submitted a concocted and fabricated report to the police and alleged accused persons as per that fabricated report of the occurrence are innocent and are not involved in the commission of offence. In this regard the statement of the father of the victim and injured, Sonia and Aneeqa were recorded under section 161 Cr.P.C. in which the injured nominated their father to have committed the murder of

their deceased mother. The statements under Section 164, Cr.P.C. before Sub-Divisional Magistrate, Sehnsa, on 10.09.2006, were also recorded and the accused was apprehended by the police. The weapon of offence was recovered vide recovery memo Exh. "PF" from the possession of the accused. The alleged accused Azad Hussain Shah and others in the previous report were exonerated of the charges.

5. After completion of the investigation, the police presented the report under section 173 Cr.P.C. in the offences under Sections 302, 324, 336, 201, 203, 211, 337-F(i),337-A(i)(ii)(iii) APC read with section 13 of Arms Act, 1965, before the trial Court on 17.10.2006 and thereafter, the statement of convict-appellant under section 265-D, Cr.P.C. was recorded in which he denied the guilt of the offence, on which the prosecution was ordered to adduce evidence. The prosecution produced P.Ws., i.e. 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), Kafayat Ali (PW- 11), Sardar Muhammad Ashfaq Patwari Constituency (PW-12), Dr. Shahnawaz Khan C.M.O (PW-13), Dr. Tassawar Hussain Shah C.M.O (PW- 14), lady Dr. Tahira Umair C.M.O (PW-15), Ansar Yaqoob S.D.M Sehnsa (PW-16), Abdul Aziz Constable 273 (PW-17), Muhammad Azeem Muharar 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 the chemical examiner (Exh. "PJ"), and the report of Forensic Science Laboratory, Lahore (Exh. "PH"). The

accused in his statement recorded under Section 342, of Cr.P.C. pleaded his innocence but he neither produced evidence in defence nor appeared before the trial Court as a witness as under Section 340 (2), Cr.P.C. At the conclusion of the trial, the trial Court vide its judgment dated 28.11.2007, convicted and sentenced the accused as under: -

"بحالات بالاملزم حبیب حسین شاہ کو جرائم 324، 336، 201 اور 203 APC کے مواخذہ سے بعدم ثبوت بری کیا جاتا ہے، اور ملزم حبیب حسین شاہ ولد مزمل حسین شاہ قوم سید ساکن مہوری سیداں تحصیل سہنسہ ضلع کوٹلی کو مجرم قرار دیکر بااثبات ارتکاب جرم دفعہ 302 APC معہ خواندگی 306 کے ضمنی دفعہ 3 اور دفعہ 308 کی ضمنی دفعہ 1 اور 2 کے تحت 14 سال قید اور نصف دیت مبلغ تین لاکھ پچانوے ہزار ایک صد پچیس روپے کی سزا دی جاتی ہے، دیت بحق شرعی ورثاء باقساط ادا ہو، عدم ادائیگی کی صورت میں مجرم بند حوالات جوڈیشل ہو، مجرم کو بااثبات ارتکاب جرم 65/20/13 اسلحہ ایکٹ میں 3 سال قید و پانچ ہزار روپے جرمانہ کی سزا دی جاتی ہے، عدم ادائیگی جرمانہ مجرم مزید دو ماہ قید برداشت کرے گا، مجرم کو بااثبات ارتکاب جرم 337-A and F(i) میں 5 ہزار روپے بطور ضمان اور ایک سال قید کی سزا دی جاتی ہے، جرم 337-A(3) میں مجرم کو بطور ارش انتالیس ہزار پانچ صد دس روپے اور تین سال قید کی سزا دی جاتی ہے، ضمان کی رقم مسماۃ علیقہ کو ادا ہوا اور ارش کی رقم مضرور یہ سونیا کو ادا ہو، عدم ادائیگی رقم ضمان اور ارش مجرم بند حوالات جوڈیشل ہو، بااثبات ارتکاب جرم 211, APC میں مجرم کو پانچ سال قید اور 25 ہزار جرمانہ کی سزا دی جاتی ہے، عدم ادائیگی جرمانہ مجرم مزید 6 ماہ قید کی سزا برداشت کرے گا سزائے قید میں سے 3 سال قید بامشقت ہوگی اور باقی سزائے محض ہوگی، جملہ سزائیں بیک وقت شروع ہونگی مال منضبطہ از قسم مٹی شلوار دوپٹہ، چھرے وچرخی اور پسی ہوئی مرچ تلف ہوں، بندوق 12 بور بٹ شکستہ او Hand Grip آلہ قتل بحق سرکار ضبط ہو کر تحت ضابطہ نیلام ہو کر رقم داخل خزانہ سرکار ہو نقل فیصلہ بدوں اجرت سزا اجلاس مجرم کو تقسیم ہوئی مسل بعد از تکمیل ضابطہ داخل دفتر ہو، حکم سنایا گیا"

The convict-appellant, Habib Hussain Shah filed an appeal before the High Court for setting aside the conviction and sentence awarded to him whereas a cross-appeal was also filed by the daughters (legal heirs/ injured persons), against the acquittal of convict-appellants in the offences under Section 324, 336, 201 and 203, APC as well as for enhancement of sentence awarded. The learned High Court after necessary proceedings through the impugned consolidated judgment dated 03.08.2022, dismissed the appeal filed by the convict-appellant, whereas the other

appeal filed by the legal heirs of the deceased was accepted and 14 years' imprisonment awarded by the trial Court under section 302, APC read with section 306(3) and 308(1) (2), APC was altered into the death sentence as "Tazir" under section 302(b) APC. The order of 'Diyat' was also altered into compensation to be paid to the legal heirs of the deceased in terms of section 544-A Cr.PC. The sentence awarded by the trial Court in the offences under section 337-A, 337 F(i), 339-A(iii) and 211APC have been upheld.

6. The learned counsel for the convict-appellant argued that the learned High Court failed to appreciate the facts of the case in their true perspective and the judgment passed by both the courts below are the result of misreading and non-reading of evidence which culminated into miscarriage of justice hence, not sustainable. He argued that the High Court has travelled in the wrong direction while awarding the death sentence as 'Tazir' under section 302(b) APC whereas, in the light of principle of law laid down in the case titled "*Muhammad Hanif vs. The State",* death sentence could not be awarded. He further argued that numerous dents in the prosecution evidence were pointed out by the convict appellant before the trial court, but neither the trial court nor the High Court has considered them. He further argued that the judgment of the High Court to the extent of conviction and sentence awarded to the convict- appellant is the result of a misconception of law and the facts. The prosecution has not produced a single incriminating evidence admissible under the law against the convict, and both the courts below have based their findings just on surmises and conjectures. All the alleged recoveries were proved to be fake hence, the convict-appellant was liable to be acquitted of the charges. The learned advocate submitted that the learned

courts below failed to pay attention towards the contradictory statements of the prosecution witnesses, who have made material improvements in their court statements as compared to their statements under Section 164, Cr. PC. Both the courts below have also failed to consider this important factor that all the prosecution witnesses are close relatives of the deceased and no independent and impartial witness has been produced by the prosecution to prove its case, therefore the conviction of the appellant on the basis of such evidence does not meet the ends of justice. He further submitted that the prosecution did not produce an important witness i.e. Lady Dr. Tahira Umari who had conducted the post-mortem rather produced another doctor who is a close relative of the deceased which also makes the prosecution case doubtful. The grounds mentioned in the impugned judgments are flimsy and have no value in the eye of law. Both the courts below have failed to consider the material contradictions in the statements of the alleged witnesses, medical evidence and other circumstantial evidence, which have made the whole case of the prosecution doubtful. He finally prayed for acquittal of the appellant. In support of his submissions, the learned Advocate placed reliance on the cases reported as *Muhammad Hanif vs. State and another* [NLR 2012 Cr. 451], *Zahir Hussain Shah vs. Shah Nawaz Khan and others* [2000 SCR 123], *Muhammad Akram vs. The State* [2003 SCMR 855], *Faqir-Ullah vs. Khalil-uz-Zaman and others* [1999 SCMR 2203] and *The State vs. Mst. Falawat Jan and another* [1992 SCR 344].

7. On the other hand, the learned Advocate-General appeared on behalf of the State and submitted that the sentence awarded by the High Court is based on correct appreciation of evidence brought on record. The convict-appellant has failed to point out any legal ground for

interference by this Court in the impugned judgment and conviction hence, his appeal deserves dismissal. He further submitted that the convict-appellant is fully connected with the commission of murder and the prosecution has successfully proved its case beyond any shadow of doubt against the convict-appellant by the producing the ocular, circumstantial and corroboratory evidence, whereas, the defence has failed to point out any dent in the prosecution story. He finally submitted that the impugned judgment of the High Court is quite in accordance with law and the facts of the case, which is liable to be upheld.

8. We have heard the learned counsel for the convict-appellant, the learned Advocate-General and perused the entire record thoroughly.

9. The learned counsel for the convict-appellant at the very outset has raised a legal objection that the High Court has travelled in the wrong direction while awarding the death sentence as 'Tazir' under section 302 (b), APC whereas, in the light of the principle of law laid down in the case titled *"Muhammad Hanif vs. The State through Additional Advocate-General*[1], that death sentence cannot be awarded in the cases which fall in the ambit of section 306 APC. The argument of the learned counsel for the appellant has substance, as the convict-appellant is the legal heir of the victim, so he cannot be awarded sentence under section 302, APC rather, the provision of section 308, APC shall be attracted. The codal provision dealing with the question is sub-section (2) of section 308, APC which speaks that the Court having regard to facts and circumstances of the case in addition to the punishment of 'Diyat' may punish the offender with imprisonment of either description for a term which may

[1] [NLR 2012 Criminal 451]

extend to 14 years as ‘tazir’. Now It is the sole discretion of the Court to award any punishment below the maximum limit in view of the facts and circumstances of the case but not above the prescribed limit. The relevant portion of the judgment supra is reproduced hereunder: -

> “We have heard the learned counsel for the parties and also gone through the record made available. The first question involved in these appeals in view of the peculiar facts lof this case is that as the accused is implicated for murder of his wife and real daughter; thus under which provisions of law and what quantum of sentence could be awarded? The learned trial Court awarded the sentence under section 302(b), APC, whereas the learned Shariat Court has concluded that the accused's case falls within the purview of section 306, APC and the punishnient shall have to be awarded under section 308, APC. To this extent we have no cavil with the conclusion drawn by the learned Judge Shariat Court, however, on the question of quantum of sentence, we are unable to subscribe the view of the learned Judge Shariat Court. The codal provision dealing with the question is sub- section (2) of section 308, APC which speaks that the Court having regard to facts and circumstances of the case in addition to the punishment of Diyat' may punish the offender with imprisonment of either description for a term which may extend to 14 years as 'tazir'. The awarding of maximum doze of punishment is not mandatory. The words "it may extend" clearly provide the maximum limit of punishment/ imprisonment and it is the discretion of the Court to award any punishment below the maximum limit in view of the facts and circumstances of the case.”

Besides that, as the convict-appellant had four children from the deceased, the penalty of Qisas was inapplicable under section 306(c) APC of the Penal Code, and the death penalty could not be awarded because *Wali* (Legal heirs) of the victim were direct descendants of the offender. The Supreme Court of Pakistan in the case reported as

Muhammad Abdullah Khan vs. The State[2], has also taken same view and observed as under: -

> "A bare perusal of the provisions as contained in sections 306 and 308, P.P.C. would reveal that the same are free from any ambiguity and capable enough to meet all sort of eventualities and thus, no scholary interpretation is called for. As mentioned hereinabove, the deceased was survived by Gulnaz Bibi who is admittedly the Wali of the deceased and descendant of the appellant and, therefore, the appellant is not liable to Qisas in view of the provisions as enumerated in section 306, P.P.C. and conviction could only be awarded under section 308(2), P.P.C. A similar proposition was discussed in case titled Khalil-uz-Zaman v. Supreme Appellate Court, Lahore PLD 1994 SC 885 with the following observations:--
> "On our independent assessment of the facts, circumstances of the case and appreciation of the relevant provisions of law, we find that the F.I.R. and the prosecution evidence reveal that the deceased was the wife of the offender. A daughter namely, Mst. Amina was born out of the wedlock. Mst. Amina is alive. She is a Wali of the deceased and is also the direct descendant of the offender/petitioner. From the judgment of the trial Court and the appellate Court it is very much obvious that both the learned Courts were fully aware of this aspect of the case. Yet, the offender has been sentenced to death as Qisas under section 302(a) of P.P.C., whereas provisions of section 306(c), P.P.C. clearly lay down that Qatl-i-Amd committed by the husband of his wife leaving behind child/children is not liable to Qisas. Law has specifically provided punishment for Qatl-i-Amd not liable to Qisas, under section 308, P.P.C. which does not provide death penalty, so we are in no manner of doubt that the trial Court and also the learned Appellant Court had no lawful authority/jurisdiction/power whatsoever to convict the petitioner under section 302, P.P.C. or to impose penalty of death on him, and have acted in gross violation of law. The Courts derive authority to punish the accused from the Statute. If the Statute does not provide death penalty for the offence then obviously the

[2] [2001 SCMR 1775]

> Court would have no jurisdiction to award the same, and, as such, the conviction and sentence. of the petitioner recorded under section 302, P.P.C. is corum non judice."
> The above reproduced verdict lends support to the conclusion that the appellant could only be convicted under section 308, P.P.C. which does not provide the sentence of death or life imprisonment. We are, therefore, inclined to modify the impugned judgment and resultantly the appellant is convicted under section 308(2), P.P.C. to undergo 14 years R.I. and shall also be liable to Diyat. The appeal is, accordingly, dismissed with above modification."

The same view has been taken in the case reported as *Zahid Rehman vs. The State*[3], wherein, it has been observed as under: -

> "I also find that the cases not fulfilling the requirements of section 304, PPC are cases of Ta'zir and the provisions relating to Qisas have no relevance to the same. It is also evident to me that the cases covered by the provisions of sections 306 and 307, PPC are primarily cases of Qisas but because of certain considerations the punishment of Qisas is not liable or enforceable in those cases and instead some alternate punishments for such offenders are provided for in section 308, PPC. I, thus, feel no hesitation in concluding that the provisions of and the punishments provided in section 308, PPC are relevant only to cases of Qisas and that they have no relevance to cases of Ta'zir and also that any latitude or concession in the matter of punishments contemplated by the provisions of sections 306, 307 and 308, PPC and extended to certain categories of offenders in Qisas cases mentioned in such provisions ought not to be mistaken as turning those cases into cases of Ta'zir with the same latitude or concession in the punishments. Upon a careful consideration of the legal issue at hand I endorse the legal position already declared by this Court in the second category of the precedent cases referred to above as on the basis of my own independent assessment and appreciation I have also reached the same conclusions as were reached in the said cases. I, therefore, declare that Qisas and Ta'zir are two distinct and separate legal regimes which are mutually exclusive and not

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[3] [PLD 2015 SC 77]

> overlapping and they are to be understood and applied as such".

In view of the above, the learned High Court while handing down the impugned judgment has not taken into account the judgment of this Court, (supra), and passed the impugned judgment. Now another question which needs to be resolved is that what should be the quantum of the sentence in the matter in hand. Although, this Court does not reappraise the evidence generally, however, to attend the questions involved in the case in hand, this Court has scrutinized the evidence assiduously.

10. Admittedly the case is of ocular account. There are two eye-witnesses of the occurrence i.e. *Mst. Sonia* pw1 and *Mst. Aneeqa,* pw2, who are the real daughters of the convict-appellant. At the time of recording their statement, they were aged 15 & 12 years. The defence has also raised an objection regarding the competency of the child witnesses. Article 3, Chapter II, of Qanun-e-Shahdat, 1984, deals with the competency of the witness. It lays down the main test of competence of a witness; which is capacity to understand and rationally answer the questions put to him and such competence of that witness is subject to the satisfaction of the Court in regard to the injunctions of Holy Quran and Sunnah and other aspects; as per provisos of same provision. Under this Article, a child witness falls under a competent witness as no specific age has been provided under law which could determine the question of the competency of a child. Such evidence depends upon the capacity and intelligence of the child to understand the questions put to him and his/her capacity of appreciating the difference between falsehood and truth as well as his/her capability to give rational answers. Although, no hard and fast rule has been set to ascertain whether a child is a competent witness or not, because it is

absolute matter of the facts and circumstances of each case. It is now well settled that Courts, as a matter of prudence, are generally chary of putting absolute reliance on the evidence of child witnesses and looking for corroboration of the same from other circumstances in the case but evidentiary value of their testimony must be carefully evaluated, for that purpose Court often consider the age, maturity and cognitive abilities of child witness when assuming the reliability and credibility of their testimony which are not absolute or fixed rules but mere factors to be consider for Court's own satisfaction before determining or reaching at a just conclusion or view. In the matter in hand, the perusal of the statements of the two child eye-witnesses reveals that they have answered all the questions with full understanding put to them and the Court was satisfied of their competence to testify and capability of accurately deposing what they have seen and experienced. In light of above, the objection raised by the learned counsel for the convict-appellant is overruled.

11. The statements of p.w1 and p.w2 were recorded before the Court on 02.11.2006, and 07.11.2006 respectively. It is pertinent to mention here that these witnesses are the only eye-witnesses of the incident and daughters of the deceased and convict-appellant, herein. The perusal of their statements reveal that they remained unanimous on the material facts and no contradiction is found in their statements, which means that their testimony is confidence-inspiring. The statement of p.w.1, Aneeqa, is reproduced hereunder: -

"مظہرہ حبیب حسین شاہ اور محمود سین شاہ کو جانتی ہے، مقتولہ ناہید فاطمہ کو بھی جانتی ہے 17/08/06 کا واقعہ ہے سحری 04:00 بجے کا وقت تھا، مظہرہ کے والد ملزم حبیب حسین شاہ، والدہ ناہید فاطمہ، ہمشیرہ سونیا جاگ رہے تھے، مظہرہ کو والد نے جگایا مگر مظہرہ اٹھنے کیلئے تیار ہوئی پھر مظہرہ کو ملزم حبیب حسین شاہ

کو زبردستی اٹھایا، اور کہا کہ زمین کا تنازعہ چل رہا ہے، اس کے بنے اکھیڑ نے ہیں، والدم حبیب حسین شاہ کا تنازعہ آزاد وغیرہ کے ساتھ چل رہا تھا ملزم حبیب حسین شاہ نے چادر لپیٹی ہوئی تھی جس کے نیچے رائفل تھی اور نہ جانے کیا کیا تھا 10/15 میں ہم جائے تنازعہ پر پہنچے وہاں پہنچنے پر والد نے ہم کو کہا کہ ذرا آرام کرو کچھ اور آدمیوں کو بھی بلایا ہوا ہے وہ آجائیں تو پھر بنا اکھیڑتے ہیں پھر ہم نے بنے اکھیڑ نے شروع کر دیئے پھر والد حبیب حسین شاہ نے ہمارے ارد گرد چکر لگانے شروع کر دیئے۔ چکر لگانے کے بعد ملزم حبیب حسین شاہ نے مظہرہ کی والدہ کو گولی ماری اس وقت مظہرہ اور مظہر کی بہن سونیا کا منہ ملزم حبیب حسین شاہ کی طرف تھا جبکہ والدہ کی پیٹھ ملزم حبیب حسین شاہ کی طرف تھی پھر والدہ نے پانی مانگا ملزم نے پانی دینے کے بجائے والدہ کی پیٹھ پر چڑھ گیا اور اس کے سر پر رائفل کے بٹ مارے پھر مظہرہ کی بڑی بہن سونیا کو بھی والد حبیب حسین شاہ نے مارا پھر والد حبیب حسین شاہ نے مظہرہ کے سار پر رائفل کی نالی ماری جس سے مظہرہ مضروب ہوئی اس کے بعد ملزم حبیب حسین شاہ نے ایک پیکٹ سے مرچ نکال کر ہماری آنکھوں میں ڈالی جس سے ہم ایک منٹ کے لئے بیہوش ہو گئے پھر ملزم گھر چلا گیا۔ والدم گھر سے کپڑے تبدیل کر کے واپس آیا اس وقت تایا محمود حسین شاہ بھی والدم کے ساتھ آیا پھر والد حبیب حسین شاہ اور تایا نے کہا کہ تم نے آزاد شاہ اور قیوم شاہ کے خلاف بیان دینا اگر تم نے ان کے خلاف بیان نہ دیئے تو تم کو اور تمہاری بہن کو تمہاری والدہ کی طرح مار ڈالوں گا۔ تایا محمود شاہ نے والدم حبیب حسین شاہ کو کہا کہ تم نے ظلم کر ڈالا ہے اب تم بھی یہیں لیٹ جاؤ۔ وقوعہ ہذا ہم دونوں بہنوں نے دیکھا ہے مظہرہ نے پولیس کے پاس بیان ریسٹ ہاؤس میں 08/09/2006 کو دیئے تھے اور پھر 11/09/2006 کو SDM کے پاس بیان دیئے تھے۔ مظہرہ کا بیان زیر دفعہ 164 ض ف Exh.PA دیکھ اور سن لیا ہے وہی ہے جو مظہرہ نے SDM کے پاس قلمبند کروایا تھا جس پر دستخط Ex.PA/1 مظہرہ کے ہیں، درست ہیں۔"

Same like, the other p.w., Sonia, stated that: -

"گواہ بیان کرتی ہے کہ مظہرہ حبیب حسین شاہ اور محمود حسین شاہ کو جانتی ہے، مقتولہ ناہید فاطمہ کو بھی جانتی ہے، 17/08/2006 سحری کے 04:00 بجے کا وقت تھا، مظہرہ اپنے گھر سوئی ہوئی تھی، اپنے والد اور اپنی والدہ کی باتوں کی آواز سن کر مظہرہ جاگ گئی، والد مظہرہ کی والدہ کو کہہ رہے تھے کہ تنازعہ کی جگہ پر چلنا ہے، کیونکہ وہاں پر اور افراد بھی بلائے ہوئے ہیں اور وہاں پر بنے اکھیڑ نے ہیں، والدم نے مظہرہ کی چھوٹی بہن کو بازو سے زبردستی پکڑ کر اٹھایا اور ساتھ چلنے کا کہا، اور جائے وقع پر ہم چلے گئے، والدم نے کہا کہ آپ لوگ بیٹھو میں سگریٹ پیتا ہوں، آدھ گھنٹہ وہاں پر بیٹھے پھر والدم نے ہم کو کہا کہ بنے اکھیڑو، جس پر ہم نے بنے اکھیڑ نے شروع کر دیئے تقریباً ہم دس منٹ تک بنے اکھیڑتے رہے، جس جس کے بعد والدم نے آکر ہمارے گرد چکر لگائے، والدم نے چادر اوڑھ رکھی تھی، پھر وہ اتار دی، والدم کے چکر لگانے کے بعد ہمارے اعضاء سن ہو گئے پھر والدم نے فائر کیا جو والدہ کی پیٹھ پر لگا، والدہ نے پانی مانگا، جس پر والد والدہ کے کندھوں پر چڑھ گئے، پھر والدم نے ہم دونوں بہنوں کے سر پر رائفل کی نالی ماری، نالی مظہرہ کے سر، ماتھے اور آنکھ پر ماری تھی، مظہرہ کو بھی والد کی جانب سے کئے گئے فائر کا چھرہ بائیں بازو پر لگا تھا، جس کے بعد والدم نے ایک شاپر سے مرچ نکال کر ہمارے آنکھوں میں ڈالی جس کے بعد مظہرہ دو منٹ کیلئے بے ہوش ہو گئی، ہوش آنے پر مظہرہ زور زور سے رونے لگی، مظہرہ کی

بہن کو مظہرہ نے اٹھایا، اور والدہ کے پاس گئی، والدم اس کے بعد گھر گئے، گھر سے واپس آکر ہمیں کہا کہ تم نے بیان دینا ہے کہ آزاد شاہ، قیوم شاہ اور مختوم شاہ نے یہ واقعہ کیا ہے، اگر تم نے یہ بیان نہ دیا تو تمہیں بھی تمہاری والدہ کی طرح جان سے مار دونگا، جس کے بعد تایا محمود آیا جس نے والدم کو کہا کہ تم نے اس کو مار ڈالا ہے تو اب تم بھی یہیں لیٹ جاؤ، مظہرہ کا پولیس کے پاس بھی بیان ہوا تھا، DSP کے پاس بیان ہوا تھا، مظہرہ کا بیان کچہری میں اس کی رہائش پر ہوا تھا، وہ آدمی پولیس کا نہ تھا، اگر وہ آدمی مظہرہ کے سامنے آئے تو مظہرہ اس کو پہچان سکتی ہے۔"

12. It is evident from the testimony of both witnesses that the convict-appellant purposely brought his wife and daughters to the place of the incident. He chose a time early in the morning at around 5:00 A.M. to execute his conspiracy to kill his wife and to enrope the other party and falsely implicate them in the offence. As a result, the convict-appellant shot his wife from a close range, threw chilly powder in his daughters' eyes, and also threatened them with dire consequences so that he remains unexposed. The convict-appellant initially succeeded in obtaining statements from his daughters before the police against his opponents by invoking fear of severe repercussions. Moreover, in order to disguise himself and implicate his opponents and put a convincing story against them, he brought his daughters to the location where he committed the offence. The post-mortem report clearly corroborates the narrative of eyewitnesses that the deceased was killed by a firearm injury, as is evident from the postmortem report. During the investigation, the police also recovered the Crime weapon i.e. 12 bore rifle on the pointation of the convict-appellant in presence of the recovery witnesses. The Report of Forensic Science Laboratory (FSL), also reveals that the bullets sent for the examination have been fired from the same rifle which was recovered from the convict-appellant which further establishes the guilt of convict-appellant.

13. The learned counsel for the convict-appellant has taken the plea that the eyewitnesses of the occurrence and the male Doctor who conducted the Post-mortem of the dead body are the close relatives of the convict-appellant, therefore, their testimony cannot be relied on. This argument of the learned Advocate has no substance, as it would be material to make it clear that it is not the relationship which makes one a witness of truth or otherwise. It is now a well-settled principle of law that the evidence of a witness could not be disbelieved or discarded merely on the basis of relationship, unless and until it is proved that the witness was inimical towards the accused. The defence has failed to bring any such proof or evidence which could be helpful in this regard. This Court in its authoritative judgment reported as *Syed Kamran Hussain Shah vs. State*[4], has held as under: -

> "23. Here another aspect is worth-understanding that the term 'related' should not be confused with the term 'interested' because both are entirely distinct concepts. There is considerable distinction between the terms 'related and 'interested', because the interested witness need not necessarily, be a related but it is the person who has such a motive on account of enmity or any other consideration that due to such enmity or consideration, he has prepared himself to depose falsely. The term 'related' is positive in its meaning while the term 'interested' is negative in its meaning because the term 'interested' has a concept to gain favour for whom or what he/she is interested with. Although the burden is always upon the prosecution to prove truthfulness of a related witness but where the defense claims the witness as 'interested', burden shifts upon defense to establish that such witness had a motive on account of enmity or any other

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consideration which compelled him to depose falsely against the accused."

14. It has also been argued by the convict-appellant that the maternal grandmother of both eyewitnesses has not been cited as a witness, so the Court should draw an adverse inference that if the evidence of the referred witness was recorded that would have been unfavorable to the prosecution. So far as this argument is concerned, it may be observed here that firstly, she was neither the eye-witness of the occurrence nor she was alleged to be present at the place of occurrence even after incident. Even otherwise, the defence has failed to furnish any plausible reason for the damage caused to the convict-appellant for not producing the said witness which could satisfy the Court.

15. The contention of the learned counsel for the convict-appellant that there are material contradictions in the statements of the eyewitnesses, has no force. As there is overwhelming evidence on record to prove that the incident had taken place and once the genesis of the occurrence is proved, the contradictions which are minor in nature and do not in any way prejudice the case, would not be sufficient to dispel the entire prosecution case. Minor contradictions are pretty much natural to be expected in the human statements. The discrepancies in the evidence of the eyewitnesses, if found not to be minor in nature, maybe a ground for disbelieving and discrediting their evidence. The learned counsel for the convict-appellant has endeavoured hard to highlight certain discrepancies among the testimony of the witnesses, but in our considered opinion, these discrepancies are absolutely minor in nature and do not

discredit the cumulative evidence, hence, the argument of the learned counsel to this extent lacks substance.

16. In the light of what has been stated above, as the learned trial Court had reached the conclusion vide judgment dated 28.11.2007, that the convict-appellant is guilty of the offence and the appellant's conviction was upheld by the learned High Court modifying the punishment into death sentence under section 302 (c) APC as *Tazir*, which in our considered view, is not maintainable as discussed in preceding paragraph No. 9 and in the light of wisdom of the judgment cited as *PLD 2015 SC 77*, which has already been mentioned in the same paragraph of this judgment. However, two concurrent findings of guilt against the convict-appellant are supported by the evidence on record which has been independently examined by this Court too, and consequently, we are of the view that the learned trial Court's impugned judgment is based on correct legal and factual findings and the learned High Court fell in error of law while modifying the same to the extent of death sentence, therefore, while setting aside the judgment of the learned High Court, the sentence awarded by the trial Court is hereby restored. Consequently, this appeal stands partly accepted.

JUDGE **JUDGE**

Muzaffarabad,
28.04.2023
Approved for reporting.