IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Shariat Appellate Jurisdiction)

PRESENT:

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

CRIMINAL APPEAL NO. 15 OF 2022

(On appeal from the judgment of the High Court dated 26.08.2022, passed in Crim. Appeals No. 07/2018 & 5 of 2019).

Mohammad Maqsood s/o Faiz Ahmed caste Duli r/o Tangrah Tehsil Abbaspur District Rawalakot.

…Appellant

VERSUS

Shahbaz Zaffar s/o Zaffar Iqbal caste Duli r/o Madarpur Tehsil Hajira District Rawalakot and another.

… Respondents

Appearances:

For the convict-Appellant:	Mr. Mehboob Ellahi Chaudhary, Advocate.
For the complainant Respondents:	Sh. Masood Iqbal, Advocate-General and Sardar Iftikhar Ahmed, Advocate.
Date of hearing:	26.06.2025

JUDGMENT:

***Raza Ali Khan, J*:-** This appeal impugns the judgment dated August 26, 2022, passed by the Shariat Appellate Bench of the High Court, (*hereinafter referred as*

High Court) whereby the appeal filed by the convict-appellant was dismissed, and the reference sent by the trial court for confirmation of the death sentence was answered in the affirmative.

3. On December 3, 2015, Shahbaz Zaffar, a resident of of village *Madarpur*, lodged a written complaint at Police Station Hajira, stating that his sister, *Mst. Saima Zaffar*, was married with Muhammad Maqsood and the marriage was dissolved on the basis of '*khula'* and she was also granted custody of their three minor children through a Court order. She was residing at a rented premises on Narian Road, Hajira. At approximately 7:20 p.m. on the December 03, 2015, while the complainant and his cousin Rashid Iqbal were present in the house of the sister, when the convict- stepped into the veranda, harbouring *mens rea* and with intent to contravene a subsisting custody order, fired multiple shots from a 30-bore pistol, striking her sister in the chest and ribs. She was immediately taken to Civil Hospital, Hajira but succumbed to her injuries. The incident, arising from an unlawful attempt to reclaim custody of minors through use of force attracts the offence under Section 302 Azad Penal Code (APC).

4. Pursuant to the aforesaid complaint, formal FIR No. 146/2015 (Exh. PB) was registered at Police Station Hajira on December 3, 2015, in the offences under Section 302 APC. On conclusion of investigation, the police presented a report under Section 173 Cr.P.C. on January 6, 2016, charging the accused under Sections 302, APC read section with 13 of the Arms Act, 1965. The accused's statement under Section 265-D Cr.P.C. was recorded on March 16, 2016, wherein he denied the charge,

necessitating trial. Upon conclusion of the prosecution evidence, the accused's statement under Section 342 Cr.P.C. was recorded, wherein he reiterated his denial; however, he neither opted to testify under Section 340(2) Cr.P.C. nor adduced evidence in defence. Upon culmination of trial and hearing arguments inter parties, the trial court, vide judgment dated October 18, 2018, convicted the appellant under Section 302(b) APC, sentenced him to death, and directed for payment of Rs. 200,000/- as compensation to the legal heirs under Section 544-A, Cr.P.C. He was further sentenced to two years' rigorous imprisonment with a fine of Rs. 1,000/- under Section 13 of the Arms Act, 1965. The said judgment was assailed in appeal before the High Court and simultaneously, a reference for confirmation of capital punishment was also forwarded. The learned High Court, through impugned judgment dated August 26, 2022, dismissed the appeal and answered the reference for confirmation of death sentence in affirmative.

5. Mr. Mehboob Ellahi Chaudhary, counsel for the convict-appellant, contended that the imposition of capital punishment even under *Tazir*, becomes legally impermissible where one of the legal heirs extended pardon to the convict. In support of this submission, he referred to Islamic Criminal Law, written by *Maulana Salamat Ali Khan*, wherein, it is stated that if even one of the legal heirs forgives the convict, the punishment of *Qisas* shall not be enforced. He submitted that the prosecution sought to establish its case on the basis of ocular testimony, however, the purported eye-witnesses admitted during their depositions that they were inside a room and only emerged after hearing the sound of gunfire,

thus, their claim of witnessing the incident is inherently unreliable. He submitted that their testimonies are mutually contradictory and lack of material corroboration. With regards to alleged confession recorded under Section 164, Cr.P.C., the learned counsel concluded that it lacked evidentiary sanctity as it was recorded while the accused was in police custody. Notably, the Sub-Divisional Magistrate (SDM) who purportedly recorded confessional statement under section 164, Cr.PC did not appear before the trial Court. Instead, a clerk testified that the confessional statement was prepared by him on the SDM's dictation, thereby further undermining its probative value. He submitted that the prosecution witnesses are closely related to the deceased and thus are interested witnesses, which diminishes credibility, especially in the context of imposing the ultimate punishment of death. Moreover, he argued that the forensic report revealed no ballistic match between the weapon of offence and the recovered empties thereby, creating additional doubt regarding prosecution's case. Stressing that the prosecution's case is riddled with material contradictions and procedural infirmities, he invoked the cardinal principle of criminal jurisprudence that benefit of even slightest doubt must be extended to the accused as a matter of right, not concession. In support, reliance was placed on precedents reported as *2022 SCR 1489*, *2017 SCMR 344*, *2003 SCMR 561*, *2000 YLR 793*, *2022 SCR 1541*, 1994 PCr.LJ 1587, 1994 Pcr.LJ 1413, 2001 SCMR 232, 1999 SCMR 403 and PLD 2015 SC 77.

6. Conversely, Sardar Iftikhar Ahmed, the learned counsel for complainant-respondent, contended that the presence of the eyewitnesses at the residence of the

deceased was natural, and their testimony could not be discarded merely on the basis of their relationship with the deceased. He submitted that the prosecution's version was corroborated by medical evidence, recovery of the weapon of offence on the convict's pointation, the recovery of crime empties recovered from the locus in quo, and the convict's confessional statement recorded under Section 164 Cr.P.C. He argued that the prosecution had succeeded in establishing its case beyond reasonable doubt, through a combination of direct and circumstantial evidence, whereas the defence had failed to raise any plausible doubt. He further asserted that the motive behind the occurrence was duly substantiated through consistent oral testimony, and was further reinforced by the line of cross-examination adopted by the convict-appellant. Emphasis was placed on the deposition of the medical officer, which corroborated the ocular account, confirming that the deceased had sustained firearm injuries resulting in fatal damage to the vital organ including liver, lungs, spleen, and heart. He maintained that in a case of *Qatl-i-amd*, where *Qisas* is inapplicable, the court retains discretion under Section 311, APC to impose punishment under *Tazir*, which was rightly exercised by both the trial and the appellate courts. In support of his arguments, reliance was placed on the case law, reported as *2011 SCR 240*, *2005 SCMR 1958*, *2017 SCMR 201*, *PLD 2015 SC 77*, and *2003 SCMR 855*.

7. Sh. Masood Iqbal, Advocate-General, fully endorsed the submissions advanced by counsel for the complainant and maintained that both the trial court and the High Court had rightly exercised their judicial discretion in awarding the death penalty under *Tazir*. He

contended that the impugned judgments are well-reasoned, legally tenable, and firmly rooted in the evidentiary corpus. In support of his contentions, he referred to and relied on two judgments of this Court reported as *2007 SCR 1* and *2015 SCR 1114*.

8. Heard counsel for the parties and perused the case record. The present adjudication pivots on a jurisprudential proposition of considerable importance, whether, upon an unequivocal waiver (Afw) extended by one of the legal heirs, the Court may nonetheless impose death penalty under *Tazir* in cases it does not satisfy the threshold of *fasād fil-arḍ* (mischief on earth), as contemplated under Islamic legal tradition and the statutory penal frameworks. The material remain undisputed: the convict-appellant, ex-husband of the deceased, was convicted for *qatl-i-amd* under Section 302 APC and was awarded the death penalty as *Tazir*. During pendency of proceedings, Kunzal Eman, daughter of the both, deceased and convict-appellant (one of the legal heirs) voluntarily and unconditionally extended *tanāzul* (forgiveness). Notwithstanding this lawfull waiver, the learned trial Court and the Hihg Court proceeded to uphold death sentence under *Tazir*, anchoring their conclusion, solely, on the gravity of the offence. The legal matrix that emerges demands a critical examination of the extent to which the State/ Court's discretionary penal jurisdiction survives in the face of a valid and unconditional *Afw*, particularly where the offence does not qualify as *Fisad-fil-Ard*, that is where it does not give rise to widespread public disorder, moral collapse or systematic disruption.

9. The starting point for this Court's analysis must be the Holy Qur'an, which enshrines the doctrinal foundation of *Qisās* (retribution) and ʿ*Afw* (pardon) in unequivocal terms. In Surah Al-Baqarah, verse 178, Almighty Allah proclaims:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى... فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتِّبَاعٌ ۖ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ۗ ذَٰلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ

O you who believe! Prescribed for you is legal retribution (Qisas) in cases of murder... but if the killer is forgiven by the heir of the slain, then grant fair compensation and follow it up with kindness. This is a concession and a mercy from your Lord.

This verse encapsulates the foundational principle of Islamic Criminal jurisprudence with regard to homicide; that *Qisas* represents the default penal response, yet it is ultimately subject to the sovereign prerogative of pardon granted to the *Awliyāʾ* (legal heirs of the deceased). The Divine phrase *"تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ"* ("a relief and mercy from your Lord") unequivocally indicates such forgiveness is not a peripheral or discretionary gesture within the legal framework but rather a sanctified act of clemency, expressly endorsed by divine will. Accordingly, when the lawgiver, the Almighty Allah, explicitly authorizes the waiver of retribution through '*afw*', any temporal legal system grounded in Islamic ethos must recognize, respect and facilitate such pardon. The Authority to forgive is not merely procedural, it is theological, moral and logical in equal measure. Any attempt by the State to override that mandate, by unilaterally imposing the death penalty under *Tazir* in

absence of a demonstrable case of *fasād fil-arḍ* or other exceptional aggravating circumstances, constitutes a juridical transgression. It is axiomatic that the authority of State must operate within the parameters prescribed by both *Sharīʿah* and statutory laws. No circumstances may it, under the guise of maintaining public order or enforcing retributive justice, invalidate or encroach upon an act of lawful pardon divinely elevated as a manifestation of mercy.

10. In order to evaluate the permissibility of imposing punishment under *Tazir* notwithstanding a lawful waiver of *Qisās*, the determinative inquiry must turn on whether the offence falls within the doctrinal scope of *fasād fil-arḍ*. In this regard, Surah Al-Mā'idah, (5:33) provides critical jurisprudential guidance:

...إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَن يُقَتَّلُوا أَوْ يُصَلَّبُوا
Indeed, the penalty for those who wage war against Allah and His Messenger and spread mischief in the land, is that they be killed or crucified...

11. This verse, stands as the sole explicit Qur'anic source basis for the imposition of capital punishment under *Tazir*. Crucially, it predicates such extreme penal consequences on clear and demonstrable link between the conduct in question and act tantamount to waging war against divine order or orchestrating systematic disorder and moral disintegration within society. In the absence of such a nexus, the State's punitive authority must remain constrained by the limits, set by divine and legal sanction. The jurisprudential threshold under this provision is exceptionally high; it contemplates crimes that transcend the sphere of personal grievances and directly imperil

public safety, societal cohesion or moral equilibrium. Prototypical manifestations include acts of terrorism serial homicide, armed insurrection, or offences that sow widespread fear, chaos and institutional breakdown. Accordingly, the imposition of death under *Tazir* in the face of a valid and lawful *afw,* demands that the Court undertake a rigorous and principled judicial inquiry. It must be conclusively established that offence satisfies the criteria of *fisal-fil-ard*, rather than arising from domestic altercation, a burst of private animus, or an isolated act lacking systemic or societal ramifications. To relax this threshold is to erode the extraordinary nature of *fisad-fil-ard* and to distort the Quranic distinction between individualized retributive justice and punishment for crime threating the collective moral and legal order. Absent such expectational aggravation, the state lacks the legitimate authority to override the divinely sanctioned prerogatives of forgiveness vested in the heirs of deceased.

12. Before invoking the standard of *fasād fil-arḍ*, it is imperative to contextualise the inquiry within the relevant statutory framework. Section 302 APC, which is structurally aligned with its federal counterpart, delineates three distinct punitive modalities for *qatl-i-amd* (intentional homicide):

- **(a):** Death as *Qisas*, if not forgiven.
- **(b):** Death or life imprisonment under *Tazir*, if Qisas is not applicable.
- **(c):** Life imprisonment under *Tazir*, where the circumstances so justify.

Section 309 APC provides that:

"In the case of qatl-i-amd, an adult sane wali of the deceased may, at any time and without any compensation, waive his right of Qisas."

The statutory language is plain, unequivocal, and categorical—it vests complete discretion in the legal heir (*Wali*) to forgo the right of *Qisās*. Upon the valid and voluntary exercise of such forgiveness, the penal consequence of *Qisas*; i.e. death penalty, stands legally extinguished. However, Section 311 APC introduces a critical qualification

"*Where all the walis do not waive the right of Qisas or where the principle of fasād fil-arḍ applies, the Court may, having regard to the facts and circumstances of the case, punish the offender with death or life imprisonment as Tazir."*

13. This provision articulates two foundational principles:

Complete Waiver: Where all legal heirs unequivocally waive their right of Qisas, the offender is exempted from retributive death sentence.

Judicial override in exceptional cases: - Where such waiver is validly granted, the Court retains the discretion to impose a capital or life imprisonment.

The doctrine of *fisal-fil-ard*, functions as a safeguard against arbitrary or strategic forgiveness that may undermine the rule of law. It demands a judicial findings that the crime has caused such widespread moral, social or legal disruption that leniency would threaten public order and embolden future transgression. In such

cases, the Court is not merely bound by wishes of the heirs but must act in defence of the collective conscience and security of society.

14. Applying this legal framework to the present case, the record unequivocally affirms that the convict-appellant committed a grave offence, the intentional killing of his ex-wife. However, one of the deceased legal heirs, her daughter, has voluntarily, and unconditionally extended *ʿAfw (forgiveness)*. There is no material on record indicating that the convict-appellant has a prior criminal history, nor is there any evidence suggesting recidivist tendencies, involvement in terrorism, sedition or conduct indicative of a systematic threat to societal peace and order. While act remain morally reprehensible and deeply tragic, it occurred within the family structure. In the absence of any aggravating circumstances that would elevate the offence to the threshold of *fisad-fil-ard*, and statutory jurisprudential preconditions for the imposition of death penalty punishments under *Tazir* are clearly not satisfied.

15. Furthermore, the doctrine of proportionality, an entrenched principle in both Islamic jurisprudence and constitutional criminal law, demands that penal sanctions must be proportionate not only to the gravity of the offence but also to its broader familial and social implications. In the present context, the execution of death sentence to the convict-appellant would neither serve the ends of justice nor advance public interest, rather it would inflict irreparable harm upon the minor children of deceased, who have already suffered profound loss of their mother and would, by such punitive outcome,

be rendered entirely orphaned and destitute. Such consequence would not only contravene the spirit of justice but would also run apout of the compassionate objectives of Islamic Criminal law, which places significant emphasis on reconciliation, rehabilitation and the welfare of vulnerable. Thus, in view of the unequivocal *afw* extended by one of the legal heirs, the absence of any demonstrable element of *fisad-fil-ard*, and the disproportionate hardship that death sentence would impose upon the surviving family, particularly the minor daughters, we find it legally unsustainable, morally unjustifiable, and religiously impermissible to affirm the death sentence under *Tazir*.

16. As regards the evidentiary substratum, the prosecution has undeniably succeeded in discharging its burden of proof against the convict, Muhammad Maqsood. It stands conclusively established that the deceased, Mst. Saima Zaffar, who had previously obtained a judicial decree for dissolution of marriage, was fatally shot by the convict-appellant on December 3, 2015, at approximately 7:20 p.m. within the veranda of her residential premises. The motive rooted in the convicts resentment over the dissolution of martial bond and his desire to assert the custody of minor children is both manifest and credible. Ocular testimony was furnished by three prosecution witnesses: the complainant, Rashid Iqbal (a cousin of deceased), and the deceased's daughter, Kunzal Eman. All three consistently deposed to having witnessed the occurrence, and their account are mutually corroborative, free from contradictions and aligned with medical and circumstantial evidence. Rashid Iqbal's affirmative response to a defence suggestion directly implicating the accused constitutes a tacit admission and, therefore,

assumes evidentiary significance. Kunzal Eman, despite her tender age, she furnished a vivid, coherent and unblemished account of the incident. Her testimony cannot be discredited solely on the basis of her familial relationship with the deceased. Her close proximity to the occurrence and the absence of any suggestion of mala fides or tutoring lend intrinsic credibility to her statement. The medico-legal evidence corroborates the ocular account in material particulars, unequivocally conforming that the cause of death was *cardiorespiratory* arrest resulting from massive hemorrhaging due to firearm inflicted trauma affecting the vital organs, namely, the liver, lungs, spleen, and heart, thus affirming the *mens rea* of *animus nocendi*. Moreover, the recovery of the weapon of offence, a 30-bore pistol loaded with live rounds was effected pursuant to the disclosure made by the convict. The ballistic analysis conducted by the forensic science laboratory conclusively established that the said weapon matched the crime scene bullet casings. Recovery witnesses Azhar Ali and Rashid Iqbal duly corroborated the memorandum of recovery without deviation or embellishment. The prosecution's case, therefore finds reinforcement across the full evidentiary spectrum, ocular, medical and motivational, all of which are seamlessly interwoven with the psychological backdrop of the convict’s animosity. The principle *falsus in uno, falsus in omnibus* finds inapplicable, as no material contradiction or deliberate falsehood brought on record. Thus, the chain of evidence remains unbroken, internally consistent and wholly incompatible with any plausible hypothesis of innocence.

16. The learned defence counsel attempted to assail the prosecution’s case by highlighting certain

discrepancies and incongruities in the testimonies of the prosecution witnesses; however, these variations are minor, peripheral and natural to human recollections. They do not impinge upon the core narrative of the occurrence, which remain coherent, credible and unimpeached. It is well settled that inconsequential contradictions do not vitiate the evidentiary worth of otherwise trustworthy. Furthermore, the precedents cited by the learned counsel for the convict-appellant in support of his submissions, have been scrupulously examined but are found to be factually distinguishable and legally inapplicable to the case in hand. The judicial ratio therein does not advance the appellant's case, either on facts or on law.

17. In view of the forgoing discussion, the appeal is partially allowed. The judgment of the learned High Court is set aside to the extent of the death sentence awarded under *Tazir*. However, the conviction of the appellant under Section 302(b) APC is maintained. Accordingly, the convict-appellant is sentenced to rigorous imprisonment for life, with the benefit of remissions in accordance with the prison rules. He shall also be entitled to the benefit of Section 382-B Cr.P.C., and all relevant periods of detention already undergone shall be counted towards his substantive sentence.

JUDGE **JUDGE**

Muzaffarabad:
08.07.2025