

IN THE FEDERAL SHARIAT COURT  
( Revisional Jurisdiction )

PRESENT

MR.JUSTICE DR.FIDA MUHAMMAD KHAN  
MR.JUSTICE MUHAMMAD KHIYAR  
MR.JUSTICE CH. EJAZ YOUSAF

CRIMINAL REVISION No.3/Q OF 1999

Baz Muhammad son of  
Said Muhammad, Caste  
Mengal, resident of  
Umer Shah, presently  
confined at Central  
Jail, Mach.

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Petitioner

Versus

The State

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Respondent

Counsel for the  
petitioner

--

Mr.Salahuddin Mengal,  
Advocate.

Counsel for the  
respondent

--

Qari Abdul Rasheed,  
Advocate.

No.date of FIR  
and police station

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No.39/93 dated 12.10.19  
P.S.Tehsil Dalbandin.

Date of the order  
of trial Court

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20.4.1999

Date of institution

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3.5.1999

Date of hearing

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30.6.1999

Date of decision

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30.6.1999

JUDGMENT

CH.EJAZ YOUSAF, J.- This revision is directed against the order dated 20.4.1999, passed by learned Sessions Judge, Nushki, whereby he has rejected application filed by the petitioner for the acceptance of compromise entered into by the petitioner as well as legal heirs of deceased Abdul Rahman.

2. Facts of the case, in brief, are that petitioner alongwith one Sultan Muhammad son of Lal Muhammad, were tried and convicted by the learned Additional Sessions Judge, Nushki and sentenced to death under section 396 PPC alongwith a fine of Rs.one lac each or in default thereof to further undergo R.I. for two years each, for allegedly committing harrabah in course whereof one Abdul Rahman was murdered.

3. At the trial, charge under section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with section 302 Qisas and Diyat Ordinance, was framed. However, on the conclusion of trial the accused persons were convicted and sentenced under section 396 PPC.

Being aggrieved they preferred an appeal i.e.(bearing No.58/Q/1996)

in this Court, which was disposed of alongwith Criminal Murder Reference No.3/Q of 1996, vide judgment dated 9.10.1998. Since it was found that the number of accused persons involved in the offence was less than five as required by section 391 PPC, therefore, conviction and sentences recorded against them were altered and they were punished under sections 302(b) read with section 392 PPC. It would be advantageous to reproduce herein below operative part of the judgment for the sake of convenience;-

"It has also been contended by the learned counsel for the appellants that the accused/appellants being less than five in number, the conviction and sentences recorded against them by the trial Court under section 396 PPC are not maintainable. The contention appears to have force in it. A glance at section 396 would reveal that it provides for punishment for the offence of dacoity with murder and in order to attract the same, the number of persons con-jointly committing the offence shall be more than five as provided by section 391 PPC. As such, the instant case appears to be a case of robbery with murder punishable under section 302 read with section 392 PPC.

The conviction and sentences of the appellants under section 396 PPC as such are not maintainable. However, since the prosecution has been successful in bringing home the guilt against the accused at the trial, without any reasonable doubt, therefore we, while maintaining death sentences awarded to

both the appellants by the learned Sessions Judge, Nushki, convict them under section 302(b) PPC. They are also convicted under section 392 PPC and sentenced to five years R.I. each and a fine of Rs.one lac each in default whereof they shall have to undergo two years further R.I. each."

4. It has been contended by the learned counsel for the petitioner that subsequent to the passing of the judgment by this Court, since the parties had entered into a compromise and the offence concerning death of the deceased under section 302 PPC was compounded, therefore, an application for acceptance of the compromise was filed in the Court of learned Sessions Judge, Nushki, which was dismissed vide order dated 20.4.1999. Basically, it is grievance of the learned counsel for the petitioner that the learned Sessions Judge was not justified to reject the application in question because the offence of murder punishable under section 302 PPC was compoundable. He maintained that the conclusion drawn by the learned Sessions Judge to the effect that since accused persons were not tried for a compoundable offence and their sentences were altered by the Federal Shariat Court from section 396 PPC to that of section 302(b) read with section 392 PPC, therefore, he had no jurisdiction to entertain the

application, was misconceived. Learned counsel for the petitioner has submitted that since the view taken by the learned trial Court, is patently against law, therefore, impugned order may be set aside and he be directed to decide the application filed by the petitioner afresh, on merits.

5. Learned counsel for the State having been confronted with the above proposition, candidly conceded and submitted that since the petitioner was convicted under section 302 read with section 392 PPC and the offence punishable under section 302 P. P.C, was compoundable, therefore, the learned trial Court ought to have accepted the compromise, if it otherwise was genuine and legal.

6. We have given our anxious consideration to the respective contentions of the learned counsel for the parties, and have also perused the record carefully. It reveals that application filed by the petitioner has been dismissed by the learned trial Judge, primarily for the reason that since under section 310 PPC, "only in cases of Qisas" legal heirs of the deceased were competent to compound the offence and enter into a compromise, therefore, he had no jurisdiction to deal with the matter. It appears that the learned trial Court perhaps under a mis-conception has taken the above view otherwise law is well settled, in this regard.

Having regard to the express terms of section 338-E PPC, it may be observed here that subject to the provisions of section 345 Cr.P.C. as well as Chapter XVI of the Pakistan Penal Code, all the offences affecting the human body, under the Chapter, may be waived or compounded and section 302(b) under which the petitioner has been convicted, is not an exception to the rule. Repeatedly, it has been laid down by the Superior Courts that though section 338-E PPC has to be interpreted in the light of the guidelines for interpretation provided in section 338-F, PPC which commands that the Court while interpreting and applying the provisions of Chapter XVI of the PPC and in respect of the matters ancillary and akin thereto, shall be guided by the Injunctions of Islam as laid down in the Holy Quran and Sunnah of the Prophet Muhammad (S.A.W.) yet, keeping in view the provision of section 345(2) Cr.P.C. the sentences awarded for murder as Ta'zir can also be compounded with permission of the Court concerned. Reference in this regard may be made to the case of Sh.Muhammad Aslam v. Shaukat Ali alias Shauka, etc. reported as 1998 Shariat Decisions 550, wherein the Hon'ble Supreme Court of Pakistan was pleased to lay down as under;-

"There is no doubt that section 338-E, PPC provides

that subject to the provisions of this Chapter and section 345 of Cr.P.C., all offences under this Chapter may be waived or compounded and the provisions of sections 309 and 310 shall mutatis mutandis apply to the waiver of compounding of such offences. The proviso to the same lays down that where offences have been<sup>waived</sup> or compounded, the Court may by its discretion having regard to the facts and circumstances of the case acquit or award Ta'zir to the offender according to the nature of the offence. The above section is to be interpreted in the light of the guidelines for interpretation provided in section 338-F, which enjoins that the Court while interpreting and applying the provisions of the Chapter in question of the PPC and in respect of matters ancillary or akin thereto, shall be guided by the Injunctions of Islam as laid down in the Holy Quran and Sunnah. In our view, this provision does not nullify the well-settled proposition of law that in case where an accused person has been awarded sentence for murder as Ta'zir and not Qisas, the legal heirs cannot waive or accept Badal-i-Sulh. However, in view of the amendment in section 345(2) Cr.P.C., the sentence awarded for murder as Ta'zir can be compounded by all the legal heirs of the deceased with the permission of the Court concerned.

In the above context, reference may also be usefully made to the case of Nazak Hussain v. The State (PLD 1996 SC 178), wherein the Hon'ble Supreme Court of Pakistan while dealing

with the subject of waiver and compounding of the offences was pleased to lay down the following guidelines for the benefit of the citizens as well as the subordinate Courts:-

"For the guidance of the subordinate Courts and the citizens, it is hereby laid down that--

(i) in case of Qatl-e-Amd, if the right of Qisas is waived without any compensation, or compromise is arrived at between the parties i.e. accused and the adult legal heirs of the deceased, during the pendency of trial, the application for permission to compound the offence shall be made before the trial Court who shall determine all questions relating to waiver or compounding of an offence or awarding punishment under section 310, P.P.C.

(ii) In case of Qatl-e-Amd, if the right of Qisas is waived without any compensation or the legal heirs of the deceased compound their right of Qisas within the meanings of sections 309 and 310, P.P.C., during the pendency of appeal, applications for permission to compound the offence shall be made before the appellate Court, who shall determine all questions relating to waiver or compounding of an offence or awarding punishment under section 310, P.P.C.

(iii) Under section 338-E(1), P.P.C., subject to the provisions of Chapter XLV and section 345 of the Code of Criminal Procedure, all



offences under Chapter XLV, P.P.C. relating to homicide and hurt may be waived or compounded and the provisions of section 309 and 310 P.P.C. shall, mutatis mutandis, apply to the waiver or compounding of such offences. So, if any offence under Chapter XLV affecting the human body is waived or compounded after the decision by the trial Court or the decision of appeal, if any, an application for permission to waive or compound the offence shall lie before the trial Court which shall determine all questions relating to the waiver or compounding of an offence or awarding of punishment under section 310, P.P.C., and if the trial Court is convinced that the waiver of right of qisas or compounding of an offence punishable under Chapter XLV is genuine and in order, it shall acquit the accused.

- (iv) If a question arises as to whether any person is or is not the legal heir of the deceased, such question shall be determined by the Court competent to receive application on the basis of waiver or compromise between the parties.
- (v) For the purpose of determination of questions relating to the waiver or compounding of an offence the accused and the legal heirs of the deceased shall be treated parties to the proceedings under section 338-E(1), P.P.C."

7. It would not be out of place to mention here that concept of waiving the right of Qisas or compounding the offences is not restricted only to the cases pending before the Court, but these provisions can be invoked at any time


before execution of sentence and as detailed above, Court is always competent to entertain and give effect to the compromise between the parties even after decision of the case and would not be functus officio in matters of compromise.


8. While deciding the application it has been further observed by the learned Sessions Judge that since the case in hand was of not a case of Qatal-i-Amd, therefore, the parties were not competent to compound the offence. Learned Court below has perhaps lost sight of the fact that in the instant case deceased Abdul Rahman was intentionally murdered by the accused persons in committing the offence of haraabah/ robbery. They as such, were charged under section 302 PPC read with section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, therefore, by no stretch of imagination it could have been concluded that the case was not a case of Qatal-i-Amd. It would not be out of place to mention here that the learned Sessions Judge while finally deciding the case had himself observed so in the following words at page 16 of the judgment dated 1.10.1996:-


"The accused persons were charged for intentionally causing the death of deceased Abdul Rahman."

Thus findings to the contrary are patently misconceived.

9. The upshot of the above discussion is that the revision petition is allowed. Impugned order dated 20.4.1999 is set aside and the matter is remanded to the trial Court for its decision afresh, in accordance with law.

  
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( Ch. Ejaz Yousaf )  
Judge


  
~~\_\_\_\_\_~~  
( Dr. Fida Muhammad Khan )  
Judge

  
~~\_\_\_\_\_~~  
( Muhammad Khiyar )  
Judge

APPROVED FOR REPORTING

Islamabad, dated the  
30th June, 1999

ABDUL RAHMAN /\*\*\*\*

  
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JUDGE