IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction )

PRESENT

**MR.JUSTICE FAZAL ILAHI KHAN, CHIEF JUSTICE**
**MR.JUSTICE DR.FIDA MUHAMMAD KHAN**
**MR.JUSTICE CH.EJAZ YOUSAF**

**CRIMINAL APPEAL NO. 91-I OF 2001**

Mst.Rizwana Bibi widow of Ashiq Dad,
daughter of Ajab Khan, resident of Karach,
Teh: Haripur — Appellant

Versus

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|---|---|
| The State | Respondent |
| For the appellant | Mr. Muhammad Aslam Uns, Advocate. |
| For the State | Mr.Muhammad Sharif Janjua, Advocate |
| No. Date of F.I.R | No.314,dt.22.9.97 |
| Police Station | P.S Saddar Haripur |
| Date of judgment of trial Court. | 11.3.1999 |
| Date of institution | 23.4.2001 |
| Date of hearing | 3.6.2002 |
| Date of decision | 5.11.2002 |

**CRIMINAL APPEAL NO.47-I OF 1999**

Muhammad Riafat son of Muhammad Akbar,
R/o village Karachh,Tehsil and District Haripur — Appellant

Versus

1. Abdul Malik son of Suleman
2. Mst.Rizwana Bibi
3. Zaiwar Rehman
4. Muhammad Rafique and
5. The State — Respondents

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| For the appellant | Malik Rab Nawaz Noon, Advocate |
| For the respondents | Mr.Saeed Akhtar Khan, Advocate |
| Date of institution | 3.4.1999 |
| Date of hearing | 3.6.2002. |
| Date of decision | 5.11.2002 |

**CRIMINAL REVISION NO.8-I OF 1999**

Muhammad Riafat — Petitioner

Versus

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| Mst.Rizwana Bibi and the State | Respondents |
| For the petitioner | Malik Rab Nawaz Noon, Advocate |
| For the respondent No.1 | Mr.M.Aslam Uns, Advocate |
| For the State | Mr.Muhammad Sharif Janjua, Advocate |
| Date of Institution | 3.4.1999 |
| Date of hearing | 3.6.2002 |
| Date of decision | 5.11.2002 |

**JUDGMENT**

**CH.EJAZ YOUSAF, J.** - This judgment will dispose of Criminal Appeal No.91/I of 2001 filed by appellant Mst.Rizwana Bibi against her conviction and sentences recorded under section 308 PPC, through Mr.M.Aslam Uns,Advocate, and Cr.A.No.47-I-1999 filed by Muhammad Riafat, against acquittal of respondents namely Abdul Malik,Mst.Rizwana Bibi, Zaiwar Rehman and Muhammad Rafique, through Malik Rab Nawaz Noon,Advocate and Cr.Rev.No.8-I-1999 filed by Muhammad Riafat for alteration of conviction of the respondent Mst.Rizwana Bibi from under section 308 PPC to that of under section 302 PPC, as both the appeals as well as the revision arise out of the same judgment dated 11.3.1999 passed by the learned Additional Sessions Judge, Haripur whereby appellant Mst.Rizwana Bibi was convicted under section 308 PPC and sentenced to undergo R.I for 14 years. Benefit of section 382-B Cr.P.C was however, extended to the appellant by the learned trial judge.

2. Facts of the case, in brief , are that on 22.9.1997 at about 11.00 a.m report was lodged by one Muhammad Riafat son of Muhammad Akbar with police station Saddar Haripur wherein it was alleged that on 21.9.1997 at about 8.30 p.m. the complainant was present in his house when, his brother namely Muhammad Afsar told him that an unidentified dead body was lying in the deserted house (Khola) of Zaman Shah. On receiving the above information, the complainant rushed towards the house of said Shah Zaman and on reaching there found that a dead body was lying there which was heavily stinking. Other villagers were also present. In the torch light the complainant also found, lying near the dead body, sindhi chaddar belonging to his brother namely Ashiq Dad. On suspicion, the complainant inquired from his parents as well as the wife of said Ashiq Dad regarding his whereabouts whereupon, Mst.Rizwana wife of Ashiq Dad disclosed that Ashiq Dad, in order to join his duty, had left the house on 17.9.1997. The complainant therefore, in order to verify, as to whether or not Ashiq Dad had joined duty, send his brother namely Abbas to Nowshera who, on telephone, informed that Ashiq had not joined his Unit. It was alleged by

the complainant that from the clothes as well as by appearance the dead body appeared to be of his brother namely Ashiq Dad. It was further alleged by him that he i.e the complainant had a reason to believe that deceased was killed by some un-known persons/person. He however, stated that he or his brother had no enmity with any body. On the stated allegations formal F.I.R bearing No.314 dated 22.9.1997 was registered at police station Saddar Haripur under sections 302/201/202/34 PPC read with section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and investigation was carried out in pursuance thereof. In the course of investigation Mst.Rizwana Bibi wife of the deceased allegedly confessed her guilt and disclosed that she and co-accused person namely Abdul Malik had conspired to kill the deceased and in prosecution of the object she had brought a double barrel shot gun from the house of her father along with ammunition and Abdul Malik according to the plan killed the deceased by firing on him, from the said shot gun, while the deceased was sleeping in his room. Initially the dead body was kept by them in the said room but lateron it was thrown in the deserted house of Shah Zaman wherefrom it was

recovered. She got recorded her confessional statement on 27.9.1997 and led the police to the cattle shed of her father and produced the crime weapon i.e shot gun which was found concealed underneath the heap of grass. Subsequently co-accused Abdul Malik was also arrested and the case on completion of investigation, was challaned to the court for trial.

3. Charge was accordingly framed to which the accused persons pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove the charge and substantiate the allegations levelled against the accused persons produced ten witnesses, in all. P.W.1 Mr.Aqal Badshah, Judicial Magistrate Haripur had on 27.9.1997 recorded confessional statement of Mst.Rizwana Bibi. He deposed that he had recorded the confessional statement after observing all the necessary formalities. He while producing the same in court as Ex.PW.1/2 stated that he was satisfied that the statement was made by the accused, voluntarily. P.W .2 Ahmad Khan Madad Moharrir P.S Haripur had on the receipt of murasila Ex.PA/1 incorporated contents thereof into the formal F.I.R i.e Ex.PA. P.W.3 Muhammad Afsar is cousin of the deceased

Ashiq Dad. He had identified the dead body. P.W.4 Nazar Hussain is a marginal witness of the recovery memo Ex.P.W.4/1 vide which shirt Ex.P/1, Shalwar P/2, having corresponding cut marks, one Sindhi Chaddar Ex.P/3, a phial Ex.P/4 containing cardboard Ex.P/5 and pellets Ex.P/6, blood stained earth alongwith a few hair Ex.P/7, were taken into possession by the I.O on 22.9.1997. He is also a marginal witness of recovery memo Ex.P.W.4/2 vide which Mst.Rizwana got recovered two empties of 12 bore Ex.P.8 from "Bhakar" bushes and a 12 bore shot gun Ex.P/9 from the cattle shed of her father which was found concealed under neath the heap of grass. He is also a marginal witness of the pointation memo Ex.P.W.4/3 vide which Abdul Malik had pointed out the place of occurrence as well as the Khola of Shah Zaman where, he had allegedly thrown the dead body. P.W.5 Abdul Malik S.I had on the completion of investigation submitted challan i.e Ex.P.W.5/1 in court. P.W.6 Shabbir Hussain Shah MHC Police Station Saddar Haripur was entrusted with seven parcels by Muhamamd Anwar Additional SHO for keeping the same in safe custody. He deposed that on 7.10.1997 all the parcels were handed over by

him to Muhammad Arif FC for taking the same to FSL and Chemical Examiner Peshawar. He produced photostat copies of the entries made in that regard, in the Receipt of Rahdari as Ex.P.W.6/1 and Ex.P.W.6/2, respectively. He deposed that as long the said parcels remained with him in the malkhana it were intact. P.W.7 Mehboob Khan I.C.H P.S Saddar Haripur had on 22.9.1997 at 11.00 a.m had recorded the report i.e Ex.PA/1 and sent the same to the police station for formal registration of the F.I.R. He had also partially investigated the case and prepared inquest report Ex.P.W.7/1, injury sheet Ex.P.W.7/2 of the deceased and he had also prepared site plan Ex.P.W.7/3. He had also taken into possession certain articles i.e Ex.P/1 to P/7 as detailed in the statement of P.W.4. Subsequently he had handed over investigation of the case to Anwar Khan Additional SHO. P.W.8 Dr.Waheedur Rahman Medical Officer,DHQ Hospital Haripur had on 22.9.1997 at about 3.00 p.m performed post mortem examination on the dead body of Ashiq Dad and observed as under:-

**EXTERNAL APPEARANCE**

Body emaciated and decomposed wearing shalwar and qamees, body covered with maggots.

INJURIES

1. An entrance fire arm wound on the back at D-12 level, size not accurately estimated due to maggots.
2. Multiple exit wounds at the upper chest anterior side, wound full of maggots.

INTERNAL EXAMINATION.

D-11 and D-12 fractured, Membrane, brain and spinal card putrefied, pluae injured, right and left lungs injured, abdominal aorta and anfenier venacava injured. Peritoneum intact but contain huge clotted blood. Diaphragm injured Stomach decomposed, pancreas decomposed,.Muscles bones and joints, proximal and distal phalanx of right hand thumb absent."

In his opinion the death had occurred due to profuse hemorrhage from major vessel of body i.e abdominal aorta which was injured due to fire arm . He produced in court P.M report as Ex.P.W.8/1. P.W.9 Muhammad Anwar Khan Additional SHO had completed investigation in the case. P.W.10 Muhammad Riafat is the complainant. He, at the trial, while reiterating the version contained in the F.I.R deposed that though he had, in the report,stated that some unknown persons were responsible for the murder yet, having come to know that the deceased was got murdered by Mst.Rizwana through Abdul Malik, he had charged both the accused persons for the murder of his brother. He further deposed that Mst.Rizwana had no

liking for his deceased brother and she used to quarrel with him and had also illicit relations with Abdul Malik.

5. On the conclusion of the prosecution evidence the accused persons were examined under section 342 Cr.P.C. In their above statements they denied the charge and pleaded innocence.. Acquitted accused Abdul Malik in answer to the question as to why co accused Mst.Rizwana had, in her confessional statement, involved him? and what he has to say; stated that the so called confession of accused was the result of torture, undue influecne and third degree methods and no corroboration thereto from any independent source was available. He added that Mst.Rizwana was kept in illegal custody, inspite of this fact that she was arrested on the first day of the report. Further after obtaining remand she was not taken to Central Prison Abbottabad as directed by Magistrate and was interrogated outside the Central Prison. Mst.Rizwana Bibi in answer to the similar question regarding her confessional statement i.e Ex.P.W.1/2 stated that she was arrested on 22.9.1997 and was kept in police station without any legal remand. She was pregnant from her husband deceased Ashiq Dad.She was

tortured and beaten in the police station. The accused persons however, failed to lead any evidence in their defence or to appear as their own witnesses in terms of section 340(2) Cr.P.C.

6. After hearing the arguments of the learned counsel for the parties the learned trial court convicted the accused-appellant Mst.Rizwana Bibi and sentenced her to the punishment as mentioned in the opening para hereof. However, rest of the accused persons were acquitted of the charges.

7. We have heard Mr.Muhammad Aslam Uns,Advocate,learned counsel for appellant Mst.Rizwana Bibi, Malik Rab Nawaz Noon,Advocate, learned counsel for the appellant Muhammad Riafat ,Mr.Muhammad Sharif Janjua,Advocate,for the State, Mr.Saeed Akhtar Khan,Advocate, learned counsel for the respondents and have also perused the entire record with their assistance.

8. Mr.Muhammad Aslam Uns,Advocate,learned counsel for appellant Mst.Rizwana Bibi has raised the following contentions:-

(i) That the socalled confession of Mst.Rizwana Bibi being the result of torture,coercion and mal-treatment was inadmissible .

(ii) That the confession even otherwise being exculpatory could not have been taken into consideration against appellant Mst.Rizwana Bibi.

(iii) That no evidence on record was available to connect the appellant with the crime.

(iv) That Mst.Rizwana Bibi being wali (ولی) of the deceased could not have been sentenced to imprisonment and at the most, could have been directed to pay diyat in view of third proviso to section 308 PPC.

9. Malik Rab Nawaz Noon,Advocate, learned counsel for the complainant/appellant Muhammad Riafat in Cr.A.No.47-I-1999, has urged:-

1) That the learned trial Judge has wrongly discarded confessional statement of respondent Mst.Rizwana Bibi despite the fact that at the trial it was proved to have been made voluntarily and it also found corroboration from the recovery of empties as well as the crime weapon i.e double barrel shot gun, at the pointation of Mst.Rizwana. Further failure to take into consideration the judicial confession of Mst.Rizwana Bibi against Abdul Malik accused-respondent too, was neither legal nor justified.

2) That the respondents were un-justifiably acquitted from the charge under section 201 PPC.

3) That conviction of respondent Mst.Rizwana Bibi under section 308 PPC instead of section 302 PPC too, was illegal.

10. Mr.Saeed Akhtar,Advocate,learned counsel for the acquitted accused persons namely Abdul Malik, Zaiwar Rehman and Muhammad Rafique

submitted that since, on record, an iota of evidence, was not available to connect the acquitted accused persons with the crime,therefore, the impugned judgment to their extent were unexceptionable. He submitted that confession of an accused persons may though be taken into consideration against other accused persons but it cannot be done unless it find strong corroboration from any independent source and since no corroborative evidence to the retracted confession of Mst.Rizwana was available on record in the instant case, therefore, the respondents were rightly acquitted of the charge.

11. Mr.Muhammad Sharif Janjua,Advocate, learned counsel for the State while supporting the judgment submitted that since guilt of the appellant Mst.Rizwana Bibi was substantiatlly and materially brought home at the trial by the prosecution, through reliable evidence, therefore, the impugned judgment was unexceptionable.

12. In furtherance of his first contention that the retracted judicial confession of Mst.Rizwana Bibi was the result of torture, coercion and mal-treatment, Mr.Muhammad Aslam Uns,Advocate, learned counsel for

appellant Mst.Rizwana Bibi has contended that since the confession in question was extracted from the lady by applying third degree methods, therefore, it was inadmissible. He stated that Mst.Rizwana was arrested on 22.9.1997 and she remained in police custody until 27th September, 1997. On 26.9.1997 she for the purpose of recording of her confessional statement was produced before the Magistrate, as is evident from the application i.e Ex.25-A made by the investigating officer for the purpose but since she was not willing and prepared to get record her confessional statement therefore, she was again remanded to the police custody. On the next day, she was again brought and produced before the Magistrate and her statement was got recorded. The learned counsel maintained that handing over custody of Mst.Rizwana back to police on 26.9.1997 give rise to the presumption that since on 26th she was not ready to confess her guilt therefore, she was handed over to the police so that the confession may be extracted from her. Learned counsel for the State as well as Malik Rab Nawaz Noon, Advocate, learned counsel for appellant-complainant Riafat, in order to meet with the objection, have

submitted that Mst.Rizwana was not arrested on 22.9.1997, as alleged by her, but was arrested on 23rd of September,1997. She remained in police custody for only two days and she was produced before the Magistrate on the 26th but since the Magistrate at the relevant time was busy in other judicial work,therefore, the police was directed to produce her on the next day. The circumstances,therefore, do not lead to the inference that the confession was extracted from Mst.Rizwana.

In order to ascertain as to whether or not there is substance in the contention we have ourselves minutely gone through the record of the case. Admittedly, F.I.R in the case was recorded on 22.9.1997 at 11.00 a.m and since therein neither any person was nominated by the complainant nor was suspected, therefore, the possibility that Mst.Rizwana Bibi was arrested at the very outset has to be ruled out because by that time there was no indication that she was involved in the crime. It appears, that during investigation Mst.Rizwana Bibi was also interrogated and having found some clue the police arrested her on 23.9.1997 but it cannot be instant. Recovery of empties as well as the shot gun on 24.9.1997, on her pointation,

leads to the same inference otherwise it could have been conveniently effected on the next day i.e on 23.9.1997.Record does not indicate that confessional statement of Mst.Rizwana was extracted from her because P.W.1 Mr.Aqal Badshah, Judicial Magistrate, Haripur, who had recorded the confessional statement has, at the trial, confirmed that before recording the confessional statement he had not only observed all the legal formalities but having satisfied that it was being made by Mst.Rizwana voluntarily, had recorded the same. He has categorically denied the suggestion as incorrect that the accused lady, at the time of recording of her confessional statement, had complained regarding application of third degree methods. Regarding non-recording of her confessional statement on 26.9.1997, when she was initially produced before him, the Magistrate has explained that since he was busy in recording another confessional statement of some other accused,therefore, he had remanded Mst.Rizwana to judicial lock up with the direction that she may be produced on the next day. The investigating officer too, has confirmed that on 27.9.1997 Mst.Rizwana was brought from the judicial lock up at Abbottabad and it is also evident from the application

made by him to the Magistrate. It would be pertinent to mention here that report of the Ballistic Expert has confirmed that both the crime empties recovered on the pointation of the appellant were fired from the same shot gun which too, was got recovered by her. It has also come on record that certain other articles i.e a piece of nawar and blood stained earth taken by the investigating officer from inside the room wherein the murder was allegedly committed, were found stained with human blood, therefore, in the absence of any evidence to the contrary the only inference possible to be drawn is that murder was committed in the very room as disclosed by Mst.Rizwana and the contents of the confessional statement were not only true but it was made by her voluntarily. The contention therefore, has no force.

13. Adverting to the next contention raised by the learned counsel for appellant Mst.Rizwana that the confession being inculpatory could not have been taken into consideration against the appellant, it may be pointed out here that though the confessional statement does not indicate that Mst.Rizwana Bibi had killed the deceased herself, yet, it implies that she had

not only planned to get the deceased killed but had master-minded the entire episode. In order to get rid of the deceased she besides instigating co-accused Abdul Malik to commit the crime had facilitated and aided him by providing a shot gun and opening door of the room wherein, the deceased was sleeping. Throwing of empties in the field and dead body in the deserted house as well as concealment of crime weapon underneath the heap of grass subsequent to the occurrence establishes the fact that she was not only sharing guilty intention with the other accused persons but was fully involved in the crime. Therefore, it can by no stretch of imagination, be concluded that the confessional statement was inculpatory and thus, could not have been read in evidence against the appellant.

14. As regards the next contention of the learned counsel for the appellant that since no evidence on record was available to connect the appellant with the crime therefore, her conviction was bad in law, it may be pointed out here that the contention on the face of it appears to be devoid of force because in addition to confessional statement of Mst.Rizwana, sufficient incriminating material was available on record to connect her with the

crime. Recovery of shot gun as well as the empties which she had allegedly thrown in the field not only render sufficient corroboration to the prosecution version but leads to the inference that the contents of the confessional statement were true. It also finds support from the medical evidence. Nature and seat of the injuries i.e two entrance wounds close to each other on the back of the deceased and numerous exits wounds in the front, possibly of pellets shown in the postmortem report i.e Ex.PW.8/1 particularly, in the sketch of the body annexed therewith,indicate that a shot gun was used in the crime. Serologist's report regarding the piece of "Nawar" taken from the cot whereon the deceased was allegedly killed as well as the earth taken from the floor of the room render further corroboration to the confessional statement. The contention therefore, has no force.

15. In order to supplement his last contention that Mst.Rizwana being wali of the deceased could not have been sentenced to imprisonment and, at the most, was liable to pay Diyat, if found guilty, the learned counsel for the appellant submitted that since proviso three to section 308 PPC provides that

in the cases, where the qisas is not enforceable under clause (c) of section 307 PPC, the offender shall be liable to diyat only if there is any wali other than offender and if there is no wali other than the offender, he shall be punished with imprisonment of either description for a term which may extend to fourteen years and as per record two other walies i.e the complainant as well as his brother namely, Bashir Ahmad, were available,therefore, the appellant could not have been sentenced to imprisonment.

Before entering into the proposition we deem it appropriate to have a glance at section 308 PPC which reads as follows:-

> "Sec.308. **Punishment in qatl-e-amd not liable to qisas, etc.—(1)** Where an offender guilty of qatl-e-amd is not liable to qisas under section 306 or the qisas is not enforceable under clause (e) of section 307, he shall be liable to diayat:
>
> Provided that, where the offender is minor or insane, diyat shall be payable either from his property or by such person as may be determined by the Court.
>
> Provided further that where at the time of committing of qatl-e-amd the offender being a minor had attained sufficient maturity or being insane, had a lucid interval, so as to be able to realize the consequences of his act, he may also be punished with imprisonment of either description for a term which may extend to fourteen years as tazir.
>
> Provided further that where the qisas is not enforceable under clause (c) of section 307 the offender shall be liable to diyat only if there is any wali other than offender and if there is no wali other than

the offender, he shall be punished with imprisonment of either description for a term which may extend to fourteen years as tazir.

(2) Notwithstanding any thing contained in sub-section (1), the Court having regard to the 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 fourteen years, as tazir."

A bare perusal of the above provision would lead to the inference that the offender shall be liable to diyat only if there is any wali other than offender and if there is no wali other than the offender than he shall be punished with imprisonment of either description for a term which may extend to fourteen years as tazir. We are afraid the argument advanced by the learned counsel for the appellant cannot prevail, simply for the reasons that; neither did appellant's case fall within the ambit of section 307 (c) which is the condition precedent to attract the proviso in question as the right of qisas never devolved on the appellant as a result of death of any wali of the victim nor her case was covered by the exception contained in section 306 PPC. Here, it would be advantageous to go through sections 306 and 307 PPC as well, which read as follows:-

"Sec.306. **Qatl-I-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 with himself in the commission of the offence 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.

**Sec.307. Cases in which qisas for qatl-I-amd shall not be enforced:** Qisas for qatl-I-amd, shall not be enforced in the following cases, namely:-

(a) when the offender dies before the enforcement of qisas;

(b) when any wali voluntarily and without duress, to the satisfaction of the court, waives the right of qisas under section 309 or compounds under section 310; and

(c) when the right of qisas devolves on the offender as a result of the death of the wali of the victim or on the person who has no right of qisas against the offender."

It may be mentioned here that proviso three tagged to section 308 (1) cannot be detached and read independently but has to be interpreted in the light of the main provision i.e section 308 PPC, as a whole. The fact cannot be lost sight of that sub-section (2) of section 308 PPC stipulates that "notwithstanding any thing contained in sub-section (1), the court, having regard to the 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 fourteen years, as tazir , meaning thereby that if, case of the appellant was covered by the proviso in

question, even then, having regard to the facts and circumstances of the case sentence of imprisonment could have been inflicted on her. We are, therefore, unable to subscribe to the contention that the sentence of imprisonment could not have been inflicted on the appellant and she was liable to diyat only.

16 Adverting to the first contention raised by the learned counsel for complainant Muhammad Riafat, in Criminal Appeal No.47-I-1999, that the learned trial Judge has wrongly discarded confessional statement of respondent Mst.Rizwana it may be pointed out here that the objection, on the fact of it, appears to be misconceived because the judgment itself indicate that the confessional statement in question was taken in to consideration by the trial court as an incriminating piece of evidence against the appellant.

As regards the second limb of argument in the contention that failure to take into consideration the judicial confession of Mst.Rizwana against Abdul Malik respondent too, was unjustified, it may be pointed out here that though judicial confession of an accused person may be taken into consideration against an other accused under Article 43 of the Qanun-e-

Shahadat Order, 1984 yet, it alone cannot warrant his conviction unless find strong corroboration from any other independent source or reliable piece of evidence. In this view we are fortified by the following reported judgments:-

1) Javed Masih Vs.The State PLD 1994 SC-314
2) The State Vs.Asfandyar Wali and two others, 1982 SCMR-321
3) The State Vs.Minhun alias Gul Hassan PLD 1964 SC-813.
4) Abdul Majid Vs. The State 1980 SCMR-935
5) Muhammad Haleem Chauhan Vs. The State PLJ 1980 Cr.C (Lah) 118
6) Fakhruddin Vs. Emperor AIR 1925 Lah:435
7) Muhammad Nadeem Vs. The State 1997 SD 412
8) Mst.Zafran Vs. The State PLJ 1996 Cr.C (Pesh) 1762

Since in the instant case, involvement of the acquitted accused persons especially Abdul Malik respondent, was not proved by the prosecution through any other reliable piece of evidence as neither he was seen by any of the witnesses nor the so-called disclosure made by him while in police custody too, for want of recovery of any incriminating piece of evidence, was found inadmissible, therefore, the learned trial Judge had rightly acquitted him of the charge. It may be mentioned here that any information received from an accused person, while he is in custody, cannot be proved at the trial unless any fact is deposed to as discovered in consequence thereof. The provisions of Articles 38 and 39 of the Qanun-e-Shahadat Order, 1984 (hereinafter

referred to as 'the Order') are explicit in this regard which lay that a confession made by an accused person, while he is in custody of police is not admissible. However, if something related to the case is recovered or any fact is discovered in consequence of the information conveyed by the accused person then the information so received would be admissible in evidence within the purview of Article 40 of "the Order" because then the presumption would be towards its truthfulness. It would be beneficial to reproduce hereinbelow Article 40 of 'the Order' which reads as follows:-

> "40. When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of police officer, so much of such information whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

But if nothing "related" to the case, rather incriminating, in consequence of the "disclosure" is recovered then the information so received by itself would not be admissible. It would be worthwhile to mention here that Article 40 is an exception to the rule enacted in Articles 38 and 39 of "the Order" and in order to bring the case within the ambit of Article 40 the prosecution must establish that firstly; the information conveyed by the

accused actually led to the discovery of some fact and secondly; the fact was unknown to the police and it was for the first time derived from the accused and thirdly; discovery of the fact must relate to commission of the offence or connect the accused with the crime. In the instant case it is alleged that respondent Abdul Malik in pursuance of the disclosure made by him that; he was involved in the crime, had led the police to the place of occurrence and pointed the same out vide Ex.P.W.4/C however, nothing was recovered on his pointation. In the circumstances, pointation of the place of occurrence by the accused itself would not advance case of the prosecution because the place of occurrence being already within knowledge of the police, its pointation could not have been termed to be the discovery of any fact much less in the absence of any recovery. Thus, having failed to find corroboration from any source, the learned trial Judge had rightly acquitted accused-respondent Abdul Malik of the charge and also the other accused persons against whom no other incriminating piece of evidence except the confessional statement of Mst.Rizwana was available.

17. In furtherance of his last contention that conviction of appellant Mst.Rizwana Bibi under section 308 instead of 302 PPC was illegal, Malik Rab Nawaz Noon,Advocate, learned counsel for the complainant submitted that since case of Mst.Rizwana Bibi was not covered by any of the exceptions contained in sections 306 or 307 of the Pakistan Penal Code,therefore, she could not have been convicted under section 308 PPC and was therefore, liable to be punished under section 302 PPC. The contention appears to have force in it because Mst.Rizwana being wife though would have, in normal course, been entitled to inherit from the deceased and therefore, could have been termed as "wali" within the purview of section 305 PPC yet, she being a slayer seized to enjoy such status. It would be pertinent to mention here that where section 306 PPC prescribes the kinds of persons exempted from Qisas which are restricted to the cases of minors or insane persons and antecedents or descendants of the deceased, section 307 PPC provides that Qisas for qatl-I-amd shall notbe enforced in the cases when the offender dies before the enforcement of qisas or any wali voluntarily and without duress/waives the right of Qisas under

section 309 or compounds under section 310 or right of qisas devolves on the offender as a result of the death of the wali of the victim or on the person who has no right of qisas against the offender. Apparently, case of Mst.Rizwana Bibi did not fall in any of the categories prescribed by section 306 and 307 PPC and therefore, the only possible argument available to her that she being wife and one of the heirs of the victim within the purview of section 305 PPC might have waived her right of qisas under section 307 (b) too, was not available to her because under the Islamic Law as well as section 317 PPC a slayer is debased from succeeding to the estate of the victim as an heir. Relevant provision is reproduced herein below for ready reference: -

> **"Sec.317 Person committing qatl debarred from succession:** Where a person committing qatl-i-amd or qatl shibh-i-amd is an heir or a beneficiary under a wali, he shall be debarred from succeeding to the estate of the victim as an heir or a beneficiary."

It would be pertinent to mention here, that the above provision is based upon the following well-known Hadith of the Holy Prophet Muhammad (S.A.W):

"عَنْ ابی هُریرة عَن النبی صلی اللہ علیہ وسلم قَالَ ، القَاتِلُ لا یَرِثُ

(It is reported on the authority of Abu Hurraira (May God Bless Him) that the Holy Prophet (S.A.W) said the slayer shall not inherit.)

Reference, in this regard, may also be usefully made to the following reported judgments: -

i) Fazal Ghafoor Vs. Chairman Tribunal Land Dispute Deer 1993 SCMR 1073
ii) Mahiya and others Vs. Shahyia and other PLD 1991-SC-724 1991 PSC-1089
iii) Ameenullah Vs. The State PLD 1982 SC-429
iv) Mst.Baigman and two others Vs. Saru and another PLD 1964 (w.p) LHR-451
v) Syed Muhammad Nawaz Shah Vs. Ameer Hussain Shah 1989 C.L.C 1712
vi) Lal Hussain Vs. Noor 1982 C.L.C-92
vii) Shahzad and 3 others Vs. State and another 2011 P.Cr.L.J 1636
viii) Kenshava Kom Sanyellappa Hosmani and another Vs. Girimallapa Somasagor (A.I.R 1924 P.C 209)

In the wake of above it therefore, proceeds that no sooner Mst.Rizwana Bibi caused death of her husband she seized to be his heir and thenceforth was precluded to waive the right of qisas or compound the offence. Resultantly, conviction of the appellant under section 308 PPC is set aside and she, instead, is convicted under section 302 (b) PPC and sentenced to imprionment for life as tazir. It may be mentioned here that since from the evidence it is proved that Mst.Rizwana Bibi had not killed the deceased

herself but had simply abetted the offence, therefore, in our view, normal penalty for murder i.e death needs not to be inflicted on her.

Upshot of the above discussion is that both the criminal appeals being misconceived and unwarranted by facts and law are hereby dismissed. The criminal revision is allowed. The conviction recorded by the learned trial Judge against appellant Mst.Rizwana Bibi vide judgment dated 11.3.1999 is altered from under section 308 PPC to that of section 302(b) PPC. Benefit of section 382-B Cr.P.C extended to appellant Mst.Rizwana Bibi by the learned trial Judge shall remain intact.

**(Ch.Ejaz Yousaf)**
**Judge**

**(Fazal Ilahi Khan)**
**Chief Justice**

**(Dr.Fida Muhammad Khan)**
**Judge**

Announced on 5.11.2012
At Dera Ismail Khan
M.Akram/

**Fit for reporting**

**JUDGE**