

**IN THE FEDERAL SHARIAT COURT**  
(Appellate / Jurisdiction)

PRESENT

**MR.JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE**  
**MR.JUSTICE DR.FIDA MUHAMMAD KHAN**  
**MR.JUSTICE RIZWAN ALI DODANI**

JAIL CRIMINAL APPEAL No.26/I OF 2011.L.W.

Habibullah son of Muhammad Waris .... Appellant  
Dakhan r/o village Hoat Khan Jalbani Taiuka  
Piryaloi District Khairpur.

Versus

The State

.....

Respondent

**SUO MOTO NO.1/K OF 2011**

The State

...

Appellant

Versus

Habibullah

Respondent

Counsel for the appellant

.....

Mr. M.Rifaqat Ali, Advocate

Counsel for the State

.....

Mr. Saleem Akhtar,  
Addl: Prosecutor General for State

Case FIR No. date &  
Police Station

.....

No.67/1998, dated 4-6-1998 P.S.  
Faiz Ganj District Khairpur

Date of judgment of  
trial Court.

.....

22-04-2009

Date of Institution of Jail  
Appeal in FSC

.....

26.04.2011

Date of hearing

.....

21.05.2012

Date of decision

.....

21.05.2012


**JUDGMENT**

**JUSTICE RIZWAN ALI DODANI, J :-** This judgment

will dispose of Suo Moto Notice No.1/K of 2011 and the Jail Criminal Appeal preferred by appellant Habibullah son of Muhammad Waris Dakhan against the judgment dated 22.4.2009 passed by 2nd learned Additional Sessions Judge, Khairpur in Sessions case No.183 of 2000, arising out of FIR No.67 of 1998 P.S. Faiz Ganj whereby he was convicted and sentenced as under :-

i. U/s 302 ( c ) PPC      20 years R.I with fine of Rs.50,000/- in default whereof to further undergo 6 months R.I. with benefit of section 382-B C.P.C.

2.            Brief facts of the case as narrated in the FIR No.67 of 1998, dated 04.06.1998 registered at police station Faiz Ganj District Khairpur under section 17(4) Harraba and 13 of Arms Ordinance, 1965 are that complainant Imam Bakhsh Rajper lodged report that on 4.6.1998 his nephew Hamadullah was going on motorcycle to attend his duty at Zaffar Abad that he also accompanied Hamadullah as he had to

 look after his lands situated in Deh Hussain Pato , that at about 10.30

a.m. they reached the land where he got down from motorcycle and started walking to the lands and after covering the distance of 70/80 paces he heard the cries raised by Hamadullah on which he (complainant) turned around and saw that two persons fired shots at Hamadullah and then took away the motorcycle. The complainant saw faces of both the accused very well. The complainant recorded his complaint in daily dairy book of police post Akri at serial No.6 which was incorporated in FIR book at P.S. Faiz Ganj vide Crime No.67/1998.

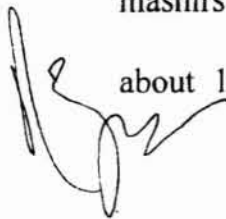
3. The case was duly investigated, statements of the PWs were recorded under section 161 Cr.P.C. the accused/ appellant was arrested after two years of the occurrence. After completing investigation challan was submitted in the trial Court. The learned trial Court framed the charge against the accused on 11-4-2005 under section 17(4) Offences Against Property (Enforcement of Hadood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

4. The prosecution in order to prove its case produced 09 witnesses

at the trial. The gist of the witnesses is as follows:-

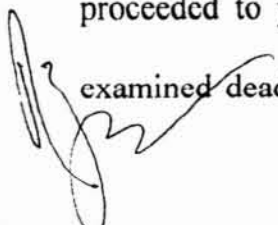


- i) Muhammad Aslam, PW-1 who deposed that on 4.6.2000, he was posted as SHO P.S. Faiz Ganj, and on that day accused Habibullah Dakhan, was already under arrest at P.S. Mirwah, in some other case and he arrested him in this case in presence of mashirs who were his subordinate and prepared such mashirnama and read over contents to them they signed on it. He produced mashirnama of arrest at Exh.7 and stated that it is same, true and correct and bears his signature and also signatures of mashirs on 5.6.2000, he produced suspect Habibullah before Judicial Magistrate, Mirwah where complainant and two witnesses identified the suspect in identification parade he gave such letter to Magistrate, and he produced copy of Exh.8, and stated it bears his signature. On 7.6.2000, accused Habibullah voluntarily produced country made pistol from sandy dunes just near to his village Hassan Pato, in presence of mashirs Farozedin and Zafaruddin, and disclosed that it is same pistol with which he alongwith his friend committed murder of deceased during robbery of motor cycle. He secured the pistol and sealed on the spot and prepared such mashirnama on the spot in presence of mashirs. He produced mashirnama at Ex.9, and stated that it is same, true and correct and bears his signatures and signature of two mashirs. He had left the P.S. for the purpose of recovery at about 1420 hours, he produced entry No.15 and 18, at



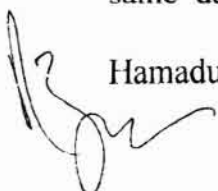
Ex.10. After completing investigation of this crime, he handed the custody of accused to P.S. Mirwah.

- ii) Fateh Khan, PW-2 deposed that on 4.6.1998, he was posted as ASI at P.S. Faiz Ganj, and on that he was present as incharge duty officer and he received copy of roznamcha entry No.6 from incharge of PP Akri, through PC Bashir Ahmed and he incorroborated that entry in FIR book at serial No.67/98 and sent the copy of FIR to incharge PP Akri, through same constable. He produced FIR at Ex.12 and stated that it is same, true and correct and bears his signature.
- iii. Ali Gulab, PW-3 deposed that on 4.6.1998, he was posted as ASI and incharge PP Akri, of P.S. Faiz Ganj, and at about 12.30 noon, complainant Imam Bux, came at PP and he complained of commission of offence, that his nephew Hamadullah has been murdered by two unknown persons and he then recorded his complaint in daily diary book vide entry No.6, and read over contents to him and he signed on it. He then sent the roznamcha entry to P.S. Faiz Ganj, through constable where it was incoborated in FIR book vide crime No.67/1998, he received copy of FIR and he saw at Ex.12, and stated that it is same, the original copy of roznamcha entry is not available with him know. He then proceeded to place of wardat alongwith complainant and examined dead body of deceased Hamadullah in presence



of mashirs Ferozuedin and Zafar Din, and prepared inquest report which he produced at Exh.14, and stated that it is same, true and correct and bears his signature and signatures of two mashirs. He prepared dead body examination form and referred dead body, through PC Abdul Majeed for post mortem, he produced dead body examination form at Ex.15, he secured blood stained earth in seal parcel and one empty cartridge of 12 bore from place of wardat and he prepared mashirnama of place of wardat in presence of same, mashirs and read over contents to them, and it signed. He produced mashirnama of place of wardat at Ex.16, and stated that it is same, true and correct and bears his signature and signatures of two mashirs. PC Abdul Majeed handed over dead body to Imam Bux, the cloth of deceased from hospital which he secured under the mashirnama prepared in presence of same mashirs, he produced mashirnama of recovery of cloth of deceased at Ex.18, and stated that it is same, true and correct and bears his signature. He produced report of ballistic expert at Ex.19. Thereafter he handed over the case paper to SHO Illahi Bux Mithani, for further investigation.

- iv. Dr.Maqbool Hussain, PW-4 deposed that on 4.6.1998 he was posted as Medical Officer (R.H.C) at Faiz Ganj. On the same day he received a dead body of a person namely Hamadullah s/o Ghulam Muhammad Pato Rajper aged



about 42 years referred by police station Faiz Ganj through P.C/242 Abdul Hameed for examination and post-Mortem report. He produced such letter at Ex.21. The dead body was identified by that's relative namely Haji Sharfuddin s/o Nawaz Ali and Javed Hussain s/o Sharfuddin by the deceased. He started postmortem examination at 2.00 .p.m. and completed at 4.00 p.m. The body of male, Muslim of this built aged about 42 years. On external examination he found following injuries on his person.

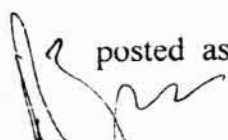
1. A lacerated wound round in shape measuring 6 cm x 5 cm x bone deep horizontal in direction at the right side of chest in front, below, and at lateral end of the right clavicle and shoulder joint. The wound extend medially causing laceration to all the visera of the chest i.e. right lung, pleura, trachea, esophague, left lung and heart.

Note .

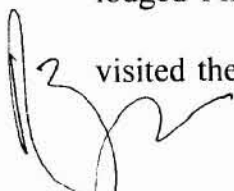
46 pallets which have been taken from the body of deceased are sent to SHO P.S. Faiz Ganj alongwith that postmortem report.

On the external as well as internal examination of the dead body of deceased Hamadullah s/o Ghulam Muhammad he is of the opinion that death has occurred due to hemorrhage shock caused by injury to vital organ, by all injuries are caused by the discharge of the fire arm. All the injuries of ante mortem. He issued such postmortem report which he produced at Ex.22.

- v. Imam Bux, PW-5 complainant deposed that deceased Hamadullah is his nephew being son of his cousin. He was

 posted as field Assistant in the Agricultural Department

Zafarabad. This incident took place on 4.6.1998 , and on that day his nephew Hamadullah was going on motor cycle attend his duty at Zafarabad, on he also accompanied him on motorcycle driven by Hamadullah as he had to look after his land situated in the Hussain Pato, and at about 10.30 a.m, they reached at their land and he got down from motor cycle and started going to the land and when he reached at the distance for about 70/80 paces from Hamadullah all of sudden he heard cries raised by Hamadullah on which he went back and he saw two persons who were on motor cycle standing near to Hamadullah and one of that two accused fired pistol shot at Hamadullah, which hit Hamadullah on the left side chest. He saw both accused and their faces were opened but he could not identify the accused by name, but he had seen the faces of accused very well. Hamadullah fell down and both accused escape and they took away their motor cycle and so also motorcycle of Hamadullah. He then informed police post Akri, and Akri police came at place of wardat and Dr. Maqbool Ahmed also came at place of wardat and there from dead body taken on police mobile to hospital some of their relative started tracking the foot prints as well as wheel marks of motor cycle. He had lodged first report at PP Akri, he then lodged FIR at P.S. Faiz Ganj, he saw FIR at Ex.12 police visited the place of wardat on the first day of incident. On

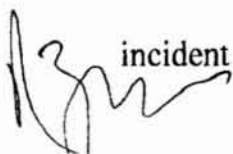




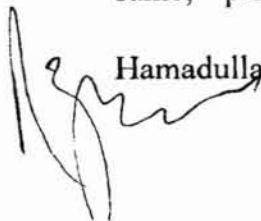
5.6.2000, he identified accused Habibullah before Judicial Magistrate Mirwah.

- vi. Moula Dad, PW-6 deposed that deceased Hamadullah was son of his maternal uncle. Complainant Imam Bux is also his relative. This incident took place on 4.6.1998, on the day of incident he and Rahim Bux were working in their land at about 10.30 a.m, deceased Hamadullah came on motor cycle alongwith complainant Imam Bux, all of sudden they heard cries raised by Hamadullah on which they saw two accused person who made attempt to commit robbery of motor cycle from him and when they rushed to Hamadullah one of the two accused who was later on identified accused Habibullah and now present in court, fired pistol shot at Hamadullah and then robbed motor cycle from deceased. Police came at place of Wardat at about 12.30 noon on same day of incident and recorded his statement. After this incident he saw accused in court of Magistrate at Mirwah on 5.6.2000, where he identified the accused present in court to be same. He is giving this statement voluntarily. Accused present in court is same who fired pistol shot at deceased Hamadullah and robbed motor cycle from him, and he had seen at place of wardat and then identified him before Magistrate.

- vii. Zaffaruddin appeared as PW-7 who deposed that this incident took place in the years, 1998, it was about 103

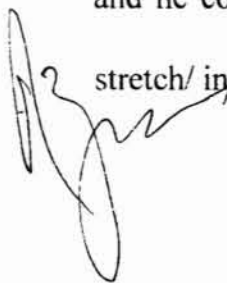


PPM and all of sudden he heard that Hamadullah Rajpur, has been murdered, then he rushed to the place of wardat, where many persons were present, police came on place of wardat, and he was already present there, police offered him and Ferozuddin if they are ready to act as Mashir and they agreed, police examined dead body of Hamadullah and prepared some paper police prepared mashirnama of place of wardat on the spot on which he and Ferozuddin signed, he saw mashirnama of place of wardat at Ex.16, and said that it is same, trace and correct and bears his signature and signature of Ferozuddin, he saw inquest report of deceased Hamadullah at Ex.14, and stated that it is same, true and correct and bears his signature and signature of Ferozuddin, police secured blood stained earth, in seal parcel and two empty cartridges from place of wardat, the dead body was taken to Faiz Ganj hospital for post mortem, the cloth of deceased were brought by police at Faiz Ganj police station when mashirnama of cloth was prepared which he saw at Ex18; Later on police came in their village and called complainant Imam Bux, he himself and co-mashir Ferozuddin disclosed that accused Habibullah ready to produced country made pistol from under the sand in the bottom of sim bush of crier tree, and disclosed that it is same, pistol with which he committed murder of Hamadullah, the place of recovery is at the distance of



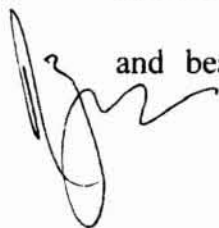
about 1 and 1 upon four km, from village Hussain Pato on northern side, police prepared mashirnama of recovery of country made pistol on the spot, on which he and Ferozuddin signed after the contents were read over. He saw mashirnama of recovery of country made pistol at Ex.9 and stated that it is same, true and correct and bears his signature. After arrest of accused police called them at court at Mirwah, where complainant Imam Bux, two witnesses namely Moula Dad and Rahim Bux, and he himself alongwith Ferozuddin identified the accused Habibullah, complainant Imam Bux identified the accused Habibullah and thereafter witness Moula Dad identified him and then witness Rahim Bux came and identified the accused. He signed on the mashirnama of identification at the place of identification, he produced mashirnama of identification at Ex.28, Accused Habibullah present in court is same.

- viii. Atta Hussain appeared as PW-8 and deposed that he has posted as Tapedar of Tape and Deh Hussain Pato, place of wardat of this case is situated in Deh Hussain Pato, and he visited the same, on 21.2.2009, on the directions of the court received through Mukhtiakar Revenue Faiz Ganj, mashir Zafaruddin pointed out the relevant points to him and he conducted mearsument with standard top and such stretch/ in duplicate, which he produced at Ex.30, 30-A.



xi. Muhammad Umar appeared as PW-9 who deposed that on 5.6.2000 he was posted as Judicial Magistrate Mirwah and on that day SHO P.S. Faiz Ganj produced suspect Habibullah for identification parade through complainant Imam Bux and PW Moula Dad and Rahim Bux and he submitted such letter, he saw copy of letter as Ex.8 and stated that it is same. First of all the complainant and PWs were directed to stand behind the Court building and in such way so that they could not see the accused. The hand cuffs of accused Habibullah were opened and he was asked to stand in the row of total 10 persons of similar nature and accused stood at S.No.9 on his own wishes from eastern side and complainant Imam Bux Rajpar was call through peon of Court and complainant identified the suspect. Thereafter the accused stood at S.No.7 and P.W Moula Dad Rajpar was called through peon and PW identified the accused. Again the accused was asked to change his position and he stood at S.No.4 and PW Rahim Bux was called who identified the accused. After identification the accused was back to police custody. Such mashirnama of identification was prepared in presence of mashirs Ferozuddin and Zafaruddin. He saw mashirnama of identification at Ex.28 and stated it is same, true and correct

and bears his signature and signatures of the mashirs.



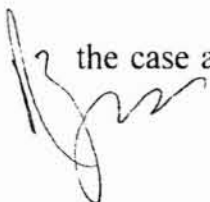
Accused present in court is same who was produced before him for identification.

5. The learned DDPP closed the prosecution side on 28.2.2009. The examination of the accused Habibullah as provided under section 342 Cr.P.C. has been recorded at Ex.33. He declined to examine himself on oath or any witness in his defence but stated that he is innocent.

6. Heard the learned counsel for the appellant and learned Additional Prosecutor General for the State and perused the record and relevant laws.

7. The learned counsel for the appellant candidly submitted that he would not argue the case on merits but would only address firstly an omission committed by the learned trial Court while awarding conviction and sentence to the appellant. He contended that the learned trial Court wrongly convicted and sentenced the appellant under section 302(c) PPC although the pre-requisites as laid down under section 306 PPC attached to it are not available per the facts and circumstances of

the case and that it may have been under section 302(b) as Tazir as the



evidence available on the record does not fulfill the condition enumerated under section 304 PPC. The learned counsel took us to the relevant law i.e. section 302(c) PPC and 306 PPC which read:-

“302. Punishment of qatl-i-amd. Whoever commits qatl-e-amd shall, subject to the provisions of this Chapter, be –

302 (c)PPC     punished with imprisonment of either description for a term which may extended to twenty-five years, where according to the Injunctions of Islam the punishment of qisas is not applicable.”

306 PPC     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 himself in the commission of the offence with a person not liable to qisas with the intention of saving himself from qisas, he shall not be exempted from qisas;

(b) when an offender causes death of his child or grandchild, how lowsoever; and

(c) when any wali of the victim is a direct descendant, how lowsoever, of the offender.”

That after going through sections 302 (c) and 306 of Pakistan Penal

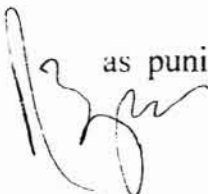
Code, seemingly none of the pre-conditions is available on the record of

the case in hand that attracts the section 302(c) PPC. That it may be

mentioned here that in impugned judgment the trial Court has awarded

the sentence under section 302 (c) PPC as Tazir which is misconceived

as punishment prescribed in the latter section may be awarded when



Qisas could not be applicable due to the Injunctions of Islam such as contained under sections 306 and 307(c) PPC and not as a result of non adherence of section 304 PPC. Therefore, if the trial Court in the instant case was of the view that sentence be given as Tazir then section 302(b) PPC was the relevant provision of law.

8. As such we are of the view that the sentence to the appellant ought not to be awarded under section 302 (c) PPC and that the trial Court went erroneously to opt for the latter provision of law and it should have been under section 302(b) as Tazir.

9. Secondly, the learned counsel for the appellant, submitted with regard to the Suo-Moto Notice taken by this Court on the point that no reason was given by the trial Court while extending the concession of not awarding death penalty to the appellant inasmuch as is the mandatory requirement enshrined under section 376 Cr.P.C. The learned counsel for the appellant contended that there are sufficient reasonable mitigating circumstances available on the record which were not

mentioned by the trial Court inadvertently, those are namely that though

all the concerned prosecution witnesses have identified the appellant but the identification parade was not carried out as per the rule as envisaged under the police rules. i.e. the dummies were not similar and so on they were not similarly dressed as required under the rules. He further submitted that the appellant was arrested after two years of the occurrence and the identification parade was carried out after his arrest and as such the complainant party identified the appellant after the period of two years. He also contended that the alleged theft vehicle/motorcycle was not recovered at all. He lastly argued that it could also be mitigating circumstance that the appellant has been acquitted in criminal case challaned against him under section 13-D of Pakistan Arms Ordinance, 1965 and prayed that the Suo-Moto Notice taken by this Court against the appellant regarding enhancement of the sentence may be re-called in the interest of safe administration of justice.

10. On the other hand Mr. Saleem Akhtar, Additional Prosecutor General Sindh appearing on behalf of the State though does not object to

the extent of wrong application of provision of law i.e. section 302(c)





PPC however, he has argued in respect of Suo-Moto Notice that it was rightly issued under the facts and circumstances inasmuch as there is sufficient evidence on the record to prove that the appellant committed the murder of Hamadullah in a bid to snatch his motorcycle.

11. That keeping in view the fact that the learned counsel for the appellant has not argued the case on the merits but only the legal points touching the quantum of sentence and the mitigating circumstances have been submitted by the learned counsel for the appellant which in our considered view are reasonable particularly that the appellant/accused was identified by the complainant party after the period of two years and moreover the appellant accused is in jail for about 12 years.

12. Consequently we alter the conviction and sentence awarded to the appellant under section 302(c) PPC to that under section 302 (b) PPC and sentence him to life imprisonment. The appellant shall also be liable to pay fine of Rs.50,000/-, or in default thereof to suffer six months rigorous imprisonment. The benefit of section 382-B Cr.P.C. extended to

the appellant shall remain intact. The amount of fine if recovered shall




Jail Cr.Appal No.26/I of 2011 L.W.  
Suo Moto No.1/K of 2011

-18-


be paid to the legal heirs of deceased Hamadullah. With the above modification in the sentences, both the Jail Criminal Appeal No.26/I of 2011 and the Suo-Moto Notice No.1/K of 2011 are disposed of accordingly.



JUSTICE RIZWAN ALI DODANI



JUSTICE AGHA RAFIQ AHMED KHAN  
Chief Justice



JUSTICE DR.FIDA MUHAMMAD KHAN

Islamabad, the  
21<sup>st</sup> May, 2012  
Abdul Majeed/-

Approved for reporting.



JUSTICE RIZWAN ALI DODANI