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

JAIL CRIMINAL APPEAL NO. 34-K OF 1998

1. Shaukat Ali alias Tayyab Ali son of Taj Ali
2. Muhammad Younis son of Taj Ali and
3. Muhammad Riaz alias Raja son of Deen Muhammad
(Now confined in Central Prison, Karachi)

Appellants

Versus

The State	Respondent
For the appellants	Mrs. Aftab Bano, Advocate,
For the State	Mr.Arshad Lodhi, Asstt:Advocate General,Sindh
No. Date of F.I.R	No.22/95 dt.1.2.1995
Police Station	P.S Gizri (CIA)
Date of judgment Of trial Court.	11.7.1997
Date of institution	25- 05-1998
Date of hearing	7.10.2002
Date of decision	7.10.2002

CRIMINAL REVISION.NO.10-K-1997

Ghulam Sarwar son of Abdul Karim Brohi,
Barrister-at-Law resident of Bungalow No.2-A/2,
Golf Course Road No.2,
11th Commercial Street, D.H.A Karachi

Petitioner

Versus

1. Shaukat Ali alias Tayyab Ali **Respondents**
2. Muhammad Younis
3. Muhammad Riaz alias Raja and
The State

For the petitioner	Mr.Muhamad Mustafa Hussain, Advocate
Date of institution	**30.10.1997**
Date of hearing And decision	7.10.2002.

JUDGMENT

CH.EJAZ YOUSAF, J. - These two connected matters i.e Criminal Revision No.10-K of 1997 filed by Ghulam Sarwar son of Abdul Karim Brohi and Jail Criminal Appeal No.34-K of 1998, filed by Shaukat Ali alias Tayyab Ali,Muhammad Younis and Muhammad Riaz alias Raja appellants are directed against the judgment dated 11.7.1997 passed by learned Sessions Judge, Karachi South whereby the appellants were convicted under section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the Ordinance) as well as under section 412 PPC and sentenced as under:-

i) Under section 17(4) of the Ordinance the appellants were sentenced to undergo life imprisonment and to pay a fine of Rs.10, 000/- each or in default to further undergo R.I for one year each.
ii) Under section 412 PPC they were sentenced to undergo R.I for five years each and to pay a fine of Rs.5000/- each or in default to further undergo R.I for six months each.

Both the substantive sentences of imprisonment were ordered to run concurrently. It was further ordered that each of the appellants shall also pay a sum of Rs.50, 000/- which amount, if realized, be paid to the complainant

as compensation. Benefit of section 382-B Cr.P.C was however, extended to the appellants. Since the appeal as well as the revision arise out of the same judgment, therefore, we propose to dispose of the same by this common judgment.

2. Facts of the case, in brief, are that on 1.2.1995 at 1445 hours report was lodged by one Ghulam Sarwar Brohi with SHO Police Station Gizri,District South Karachi, wherein, it was stated that the complainant was an Advocate and was residing in Bungalow No.2-A/II, Golf course road No.2, Street No.11, Phase-4, D.H.A Karachi. On the said date, at about 7.30 a.m. after having breakfast he had gone to drop her younger daughter namely, Kishwar Sultana at Agha Khan Medical University. Thereafter he went to High Court and remained busy there in routine work. In the after noon he returned to his house and sounded horn at the main gate but it was not opened. He, therefore, got down from his car and a rang the door bell yet, there was no reply. The complainant, therefore, proceeded to gate No.2 and pushed the same. It was open. The door of the house was also open. Complainant thus got worried and started calling his wife and daughter but

there was no reply. On entering the house the complainant found that dead body of his daughter namely Sarwar Sultana was lying in a pool of blood on the floor of the room along the kitchen. Her throat was cut with some sharp edged weapon. The complainant also saw the dead body of his wife namely, Mst.Mukhtar Bibi lying on the floor in the bed room. Her throat was also cut with sharp edged weapon. The complainant therefore, immediately contacted his neighbours and narrated the entire incident to them who in turn, informed the police. After a few minutes police reached at the spot. It was alleged by the complainant in the report that since his chowkidar namely, Tayyab Ali Junejo was absconding and cash as well as ornaments were also missing, therefore, he had a reason to believe that said Tayyab Ali was involved in the crime. The complainant also suspected that some other unknown persons may also be involved in the offence. On the stated allegations formal F.I.R bearing No.22 was registered at the said police station under section 17(4) of the Ordinance and investigation was carried out in pursuance thereof. In the course of investigation Shaukat alias Tayyab Ali was arrested. On the disclosure made by him that he had committed the

crime with the help of his companions namely, Muhammad Younis and Muhammad Riaz, the other two accused persons were also arrested. Crime weapon i.e kitchen knife, too, was recovered. During investigation the accused persons not only confessed their guilt but also led the police to the recovery of stolen property. Blood stained clothes of appellant Shaukat were also recovered from the store of the house wherein the offence was committed. On the completion of investigation the accused persons were challaned to the court for trial.

3. Charge was accordingly framed to which the accused-appellants 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 appellants, produced 14 witnesses, in all. P.W.1 Dhani Bakhsh Magistarate, had on 26.2.1995 recorded confessional statement of all the accused persons namely, Shaukat Ali, Muhammad Younis and Muhammad Riaz. P.W.2 Ghulam Sarwar is the complainant. He, at the trial, while reiterating the version contained in the F.I.R confirmed that accused Shaukat present in the court was the same

person who was working in his house for the last 8 to 10 years and had disappeared after the occurrence though was present in the morning. P.W.3 Dr.Abdul Hameed Shaikh,Medical Legal Officer, J.P.M.C Centre Karachi, had on 1.2.1995 conducted postmortem examination on the dead body of Kishwar Sultana and found as under:-

"EXTERNAL EXAMINATION

Female age about 20/22 years with weak built. Description of clothes: green shalwar and Kameez flower printed.

GENERAL POSITION ABOUT FEATURES:-

General features were identifiable, signs of decomposition were not present, postmortem levity were present on dependant parts of the body (found fixed)
Mouth opened, tongue inside, eyes were opened, pupils were dilated and fixed. Both hands were found clenched. Blood oozing from ENT not present.

SURFACE WOUNDS AND INJURED:-

Injury No.1 incised wound 15 c.m x 4 c.m x structure deep, over Antero-lateral aspect of neck just below thyroid cartilage.
Injury No.2 contusion mark is circled the both wrists. Injury No.3 contusion 5 c.m x 2 c.m on Darrel aspect of both lower legs.
Injury No.4 contusion 1.5 c.m. x 1 c.m on right side nose.
Injury No.5 contusion 1 c.m x 1 c.m on left side of face.
Column No.14 yeast (antemortem).

INTERNAL EXAMINATION.

Head:- On removal of scalp found no any bony lesion on spinning the cavity found no any blood or fluid seen
Neck: - On dissection of neck found muscles, vessels, trachea and other relevant surface were cut (several).
Thorax: - on opening the thoracic cavity contain no say blood or fluid seen. Both lungs found in normal in size and shape. Heart is normal, with patent coronaries.
Abdomen: - On opening the abdominal cavity contain no any blood or fluid seen. Stomach contains semi-digested food particles, which

were undistinguishable. Urinary bladder found with full of urine. Rest of the viscera were found in size and shape. No any mark of violence seen over lower abdomen and vaginal area."

In his opinion cause of death was due to cardio respiratory failure resulting from shock and hemorrhage due to the throat cut by sharp edged weapon. He produced in court the postmortem examination report as Ex.21. On the same day he also conducted postmortem on the dead body of Mst.Mukhtiar Bibi and found as under:-

EXTERNAL EXAMINATION

Female age about 50/55 years. Rigger mortis developed but except muscles of fingers of hand and tears. General features are identifiable, signs of decomposition were not present. Postmortem levity were present on dependant part of the body found fixed, mouth closed, eyes were closed, tongue inside, pupil were dilated fixed, both hands were clenched. Blood oozing from ENT not present.
Surface wounds and injuries:-
Injury No.1 incised wound 18 c.m x 6 c.m x structure deep, over anterolateral aspect of neck just below thyroid cartilage.
Injury No.2 contusion 5 c.m x 1.5 c.m over both wrists antero lateral aspect.
Injury No.3 contusion 4 c.m x 2 c.m over both lower legs antero medially, these injuries were antemortem.

INTERNAL EXAMINATION

Head:- On removal of scalp found no any bony lesion present. On opening the skull cavity found no blood or fluid seen
Neck: - On dissection of neck found muscles, vessels, and trachea cut etc.
Thorax: - On opening the thoracic cavity contain no blood or fluid seen. Both lungs were normal in size and shape. Coronaries were patent.
Abdomen: - Stomach contains digested food and secretion juices, which were not distinguishable. Urinary bladder contain few cc of

residual urine about 30 cc. Resting all other viscera were normal in size and shape."

In his opinion her death also occurred due to cardio respiratory failure resulting from shock and hemorrhage due to the throat cut by sharp edged weapon. In his opinion time elapsed between death and postmortem was between 8 to 12 hours. He produced the MLR report as Ex.22. P.W.4 Masiullah is a marginal witness of the recovery memos of the dead bodies i.e Exs. 17 and 18. He is also a marginal witness of the recovery memo Ex.15, vide which police secured blood stained towel, bed sheet, kitchen knife and a piece of rope from the place of occurrence. P.W.5 Muhammad Mustafa Brohi, is son of the complainant. He had identified the allegedly stolen articles from the house i.e coins as well as ornaments etc, in presence of the Magistrate, vide memo Ex.26. P.W.6 M.Akhtar is a marginal witness of the recovery memo Ex.26, vide which a few clothes, one pair of socks, a khaki colour jacket, blood stained, a light brown colour chaddar also blood stained and a pair of brown shoes were recovered from the servant quarter of the bungalow. He is also a marginal witness of the identification memo of

the ornaments as well as coins i.e Ex.11. P.W.7 Manzoor Ahmad is the marginal witness of the memo of arrest of appellant Shaukat i.e Ex.29. P.W.8 Saeed Ahmad is another witness of Ex.,29. P.W.9 Ahmad Mujtaba Brohi is the nephew of the complainant. He deposed that on the day of occurrence he had gone to P& T Colony to see his in-laws and was supposed to see the complainant on return. On reaching at the bungalow of the complainant he gave bell and also knocked at the door. Resultantly , accused Shaukat who was working as domestic servant in the said bungalow came out and opened the door. The witness enquired from him as to why he had opened the door so late whereupon he replied that since his relatives had come to see him and he was talking with them,therefore, it so happened. The witness enquired from him regarding his maternal uncle and other family members whereupon Shaukat told him that the complainant alongwith his daughter had already left the bungalow whereas, Begum Sahiba had gone to purchase something. While the witness was still talking with accused Shaukat two unknown persons came out of the bungalow. On enquiry accused Shaukat told the witness that they were his guests. After shaking

hand with them and leaving a message regarding his arrival, for the complainant, the witness departed. P.W.9 added that accused Shaukat had also informed him that in the morning maid servant Mst.Sharifan had also come. Subsequently, it was learnt that wife of the complainant and her daughter were murdered. The witness correctly identified the accused persons to be the servant of the complainant and his companions who had met him on the day of occurrence. P.W.10 Ameer Afzal is the marginal witness of the recovery memo Ex.33 vide which police, at the pointation of accused persons, had recovered golden and silver ornaments as well as foreign currency notes and coins. P.W.11 Fakhruddin, S.I Gizri, deposed that in his presence the investigating officer had completed the proceedings and had also prepared the inquest report of the dead body i.e Exs.16 and 18. P.W.12 Mst.Sharifan deposed that she was working in the house of the deceased for the last 14 years. Accused Shaukat was also working in the same bungalow. She was being paid Rs.10/- to 20/-, on each visit, as fare. On the day of occurrence she had gone to the house of the deceased at 9.30 a.m. She rang the door bell twice and on third occasion Shaukat came at the

gate. He, however, did not open the main gate and said that since inmates of the house had gone to condole the death of their relatives, therefore, she should also leave. He also gave her a sum of Rs.10/- as fare. The witness therefore, returned to her house. On the following day when she again went to attend her duty it was learnt that the deceased were killed. She also correctly identified accused Shaukat in court. P.W.13 Saeed Tariq Chaudhry had initially investigated the case. P.W.14 Siraj Ahmad, had subsequently carried out investigation.

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. In answer to the question, has he anything else to say? Appellant Shaukat stated that he had been working with the complainant for about 3/3 ½ years. However, he had committed no offence. He added that after the incident he went to his brother's friend. On the next day he read in the paper that he was one of the suspects of the murders. Then Ghulam Farid came to know of the incident and phoned Muhammad Iqbal to reach Karachi. Muhammad Iqbal and Ghulam Farid

produced him at the Gizri police station where, he was detained whereas both the above named persons were allowed to go. He was beaten by the police for 8/10 days and subsequently handed over to CIA police. CIA also kept him under remand for 6/7 days and also gave him beating. Thereafter he was produced in court. The Magistrate only enquired from him his name. On the following day he was sent to jail. He pleaded that there was a dispute over the property between the deceased Mukhtiar Bibi and his son. Whereupon the complainant had driven away his son and instead, he was falsely implicated. Case of the other two accused persons was of total denial.

6. After hearing arguments of the learned counsel for the parties the learned trial court convicted the appellants/respondents and sentenced them to the punishments as mentioned in the opening para hereof.

7. We have heard Mrs.Aftab Bano Rajput,Advocate, learned counsel for the appellants Mr.Muhammad Mustafa Hussain,Advocate,learned counsel for the complainant and Mr.Arshad Lodhi,Assistant Advocate General,

Sindh for the State and have also perused the entire record with their assistance

8. Mrs.Aftab Bano Rajput,Advocate,learned counsel for the appellants has raised the following contentions:-

i) That the so-called confessional statements having been extracted from the appellants by applying third degree methods were not admissible.
ii) That the occurrence was unseen and an iota of evidence was not available to connect the appellants with the crime.
iii) That since appellant Shaukat being not an adult was not liable to Qisas within the purview of section 306 (a) of the PPC therefore, the prayer contained in Criminal Revision No.10-K of 1997 regarding enhancement of sentence, cannot be granted.

9. Mr.Muhammad Mustafa Hussain, Advocate, learned counsel for the complainant, on the other hand, while controverting the contentions raised by the learned counsel for the appellants submitted that all the accused persons in furtherance of their common intention, had not only committed cold blooded murder of Mst.Mukhtiar Bibi, but had also slaughtered her innocent daughter Mst.Sarwar Sultana and in prosecution of the object i.e robbery they also took away golden ornaments, money including foreign currency and precious coins, lying in the house. The prosecution in order to prove charge against them besides proving on record the judicial confessions

of all the accused persons has also examined Mst.Sharifan, the maid-servant and Muhammad Mustafa Brohi, P.W.5 who both had seen appellant Shaukat present in the house of the deceased just before the occurrence, the medical evidence of Serologist and other circumstantial evidence including the evidence of recoveries lead to the inference that the occurrence had taken place in a manner as suggested by the prosecution. In support of the grounds taken in Criminal Revision No.10-K of 1997, he submitted that since the accused persons including appellant Shaukat, who was a servant in the house of the complainant for the last 8 to 10 years, had committed the murder of two innocent and helpless ladies and, at the trial, their guilt was proved to the hilt, therefore, the learned trial Judge was not justified to inflict life imprisonment instead of normal penalty i.e death on them.

10. Mr.Arshad Lodhi,Assistant Advocate General Sindh while supporting the judgment, contended that since guilt of the accused persons was substantially and materially brought home at the trial by the prosecution through independent and reliable evidence,therefore, the impugned judgment was unexceptionable. Regarding quantum of sentence however, he

submitted that since as per the confessional statements it was appellant Shaukat who had inflicted knife blows to both the ladies and the other two appellants had only aided him,therefore, normal penalty for murder should have been inflicted on him. He submitted that since age of the appellant as per his statement recorded under section 342 Cr.P.C was 18/19 years,therefore, in the absence of evidence to the contrary, his case was not covered by the exception contained in section 306(a) PPC.

11. We have given our anxious consideration to the respective contentions of the learned counsel for the parties and have also perused the record of the case carefully.

12. To supplement her first contention that since the judicial confessions were extracted from the appellants by applying third degree methods,therefore, it were inadmissible, the learned counsel for the appellants submitted that all the appellants were arrested on 19.2.1995. They for the purpose of recording of their confessional statements were produced before the Magistrate on 26.2.1995 after seven days, therefore, the

only inference possible to be drawn is that the confessional statements were extracted from them.

In order to ascertain as to whether or not there is substance in the contention we have ourselves minutely gone through the relevant record. No doubt, the appellants were arrested on 19.2.1995, as pointed out by the learned counsel for the appellants, and they were produced before the Magistrate on 26.2.1995 and appellant Shaukat in the course of his 342 Cr.P.C statement has also complained that he was beaten by the police but the record does not indicate that coercive methods were applied by the police because P.W.1 Dhani Bakhsh,Magistrate, who had recorded the confessional statements in question, at the trial, has confirmed that before recording the confessional statements in question he had not only observed all the legal formalities but having satisfied that it were being made by the accused persons voluntarily, had recorded the same. In the course of his statement he has categorically denied the suggestion as incorrect that accused persons at the time of recording of their confessional statements had complained before him regarding application of third degree methods.

Further perusal of the confessional statements shows that all the accused persons were specifically questioned by the Magistrate with regard to the application of third degree methods but all had answered the questions in negative. The record indicates that each and every answer recorded in the confessional statements was authenticated by the accused persons themselves by putting their respective signatures, therefore, in the absence of any evidence to the contrary presumption would be towards its truthfulness. The contention,therefore, has no force.

13. As regards the next contention of the learned counsel for the appellants that since an iota of evidence was not available to connect the appellants with the crime,therefore, they could not have been convicted for the offence, it may be pointed out here that the contention on the face of it appears to be misconceived because on record, sufficient incriminating material was available to connect the appellants with the crime. The prosecution case is primarily based on the confessional statements i.e Exs.8,9 and 10 of the appellants, and the recovery of stolen property at the instance of appellant Shaukat as well as the recovery of crime weapon and

the blood stained clothes of appellant Shaukat from the store of the house wherein, the murder was allegedly committed render strong corroboration thereto. The statement of Mst.Sharifan to the effect that she had seen appellant Shaukat in the house just before the occurrence in the morning leads to the inference that the appellant was not only present at the time of occurrence but was very much aware as to what happened on the fateful days. The statement of P.W.4 to the effect that he had seen appellant Shaukat as well as the other accused persons present in the house just before the occurrence and that appellant Shaukat had disclosed to him that inmates of the house had gone to attend a funeral, which statement was apparently wrong as dead bodies of both the ladies were recovered from the house subsequently and presence of the other accused persons with him just before the occurrence, indicates that he had guilty intention. It would be pertinent to mention here that in the FIR which was lodged by the complainant promptly, soon after his returning home, appellant Shaukat was straightaway nominated. He was suspected for the murders because as per complainant the appellant was present in the house in the morning but had

disappeared after the occurrence. Appellant Shaukat in the course of his statement recorded under section 342 Cr.P.C himself has stated that he had "after the occurrence" gone to see his brother's friend. The exact words uttered by him are as under:-

> "After the incident I went to my brother's friend. On the next day I read in the paper that I was one of the suspects of this murder."
> 'underlining is our'

The underlined words i.e "after the incident" used by him in his statement are of much significance because it imply that before and during the incident he was present in the house but had left thereafter. He has offered no explanation as to what prompted him to leave the house soon after the occurrence and that too, without permission from the owner. In the given situation, if he was not involved in the crime, at least, was supposed to know as to who was responsible for the murder. His silence and disappearance from the scene of occurrence therefore leads to the only inference that the prosecution version was true. It would be pertinent to mention here that as per prosecution version appellant Shaukat after his arrest had disclosed that he had committed the offence with the help of other appellants. In pursuance

of the disclosure he had led the police to the recovery of the stolen property i.e ornaments, cash Rs.50,000/- as well as coins from the house of accused persons namely, Muhammad Riaz and Muhammad Younis which were taken into possession by the police vide Ex.33. Later on the recovered material was identified by Muhammad Mustafa Brohi son of the deceased Mst.Mukhtiar Begum in presence of the Magistrate vide memo Ex.11. All the accused persons also confessed their guilt before the Magistate i.e P.W.1. Facts disclosed by the appellants in their confessional statements find strong corroboration from the other evidence produced by the prosecution. Here, it would be advantageous to have a glance at the confessional statement of appellant Shaukat which is reproduced herein below in extenso:-

سوال :۔ کیا اپنے جواب یعنی بیان میں جو کچھ کہنا ہے وہ حقیقت بیان کرو ۔

جواب :۔ میں غلام سرور بروہی صاحب کے گھر میں ملازم تھا ان کا گھر ڈیفنس میں واقع ہے ۔ مجھے غلام سرور بروہی صاحب وکیل کی بیگم صاحبہ تنگ کرتی تھی اور گاؤں جانے کی چھٹی بھی نہیں دیتی تھی اس لئے میں نے یہ بات اپنے بھائی محمد یونس کو بتلائی اور کہا کہ ان سے اس کا بدلہ اچھی طرح لینا ہے ۔ تب میرے بھائی یونس اور دوسرا رشتہ دار بنام ریاض الدین بھریاسٹی سے مورخہ ۱/ ۲/۱۹۹۵ صبح میرے پاس بروہی صاحب وکیل کے بنگلہ

پر آئے ۔ میں ان دونوں کو بنگلہ کے اندر لے گیا ۔ اس وقت بیگم صاحبہ اندر کمرہ میں لیٹی ہوئی تھی ۔ پھر میرا بھائی اور ریاض بیگم صاحبہ کو باندھنا چاہتے تھے لیکن ان دونوں کے قبضہ میں بیگم صاحبہ نہ آئی ۔ تب میں نے چھری سے جو کچن سے اٹھائی تھی اور میرے ہاتھ میں تھی اس سے میں نے بیگم صاحبہ پر حملہ کیا اس وقت میرے دماغ کو پتہ نہیں کیا ہو گیا تھا اور آخر میں ، میں نے اسی چھری سے بیگم صاحبہ کا گلا کاٹا تب وہ مر گئی اسی دوران میرا بھائی اور ریاض بیگم صاحبہ کو پکڑے ہوئے تھے ۔ اس کے بعد وکیل صاحب کی بیٹی جو دوسرے کمرہ میں تھی اور وہ اندر سے کنڈھی لگائے پڑھ رہی تھی جس کو اس واقعہ کا کوئی علم نہیں تھا میں نے اس کے دروازہ پر دستک دی اس پر اس نے دروازہ کھولا اور جیسے ہی وہ نکلنے لگی تو میں نے اس کے منہ پر ہاتھ رکھا اور چھری گلے پر رکھی ۔ تب لڑکی نے اپنی جان چھڑانے کے لئے جیسے ہی ہاتھ پاؤں مارے اور گلے کو جھٹکے دیئے تو لڑکی کا گلہ بھی کٹ گیا اور وہ بھی مر گئی ۔ پھر ہم تینوں نے بنگلہ سے سونے کے زیورات اور باھر کے کسی ملک کے سکے تھے وہ اٹھا کر اپنے گاؤں چلے گئے ۔ قتل کرتے ہوئے میرے کپڑے خون سے بھر گئے اور تب میں نے اپنے کپڑے تبدیل کئے باقی میرے بھائی یونس اور ریاض کے کپڑے جو پہنے ہوئے تھے رنگین تھے اس لئے ان کے کپڑوں پر معمولی خون کے چھینٹے ظاھر نہیں تھے ۔ اس واقع کے فوری بعد مائی شریفاں جو اس بنگلہ پر کام کرتی تھی ، آئی تو میں نے ان کو کہا کہ گھر کے افراد باھر گئے ہوئے ھیں اور ان کو میں نے دس روپیہ کرایہ کا دیا وہ دس روپیہ لیکر واپس چلی گئی ۔ میں نے اپنے خون والے کپڑے جب کراچی سے باھر ہم گئے تو وہاں پھینک دیئے ۔ مجھے بس یہی کہنا ھے "

پڑھ کر سنایا گیا جو
درست تسلیم کرکے اپنے
دستخط کئے ۔

It would also be worthwhile to mention here that both the other appellants in their confessional statements had taken the similar stand as was of appellant Shaukat with the exception that it was appellant Shaukat who had inflicted knife blows to the deceased ladies. We are therefore unable to subscribe to the contention that an iota of evidence was not available on record to connect the appellant with the crime.

14. Adverting to the last contention of the learned counsel for the appellants that since appellant Shaukat at the time of occurrence was not beyond 18 years of age, therefore, he was not liable to Qisas within the purview of section 306 PPC, it may be pointed out here that no doubt it has been provided by section 306 (a) PPC that if an offender is minor or insane he shall not be liable to Qisas, yet, the argument advanced by the learned counsel for the appellants, in our view, cannot prevail because firstly, it is not evident on record that the appellant was definitely a minor within the ambit of section 299(a) and (i) of the PPC and secondly; if the sentence of death as Qisas could not have been inflicted on him for committing Qatl-e-amd under section 302(a) in view of the bar contained in section 306 PPC

even then the sentences of death or imprisonment for life could have been inflicted on him as tazir under section 302(b) PPC. For the sake of clarity here, it would be beneficial to have a glimpse of sections 306 and 302 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 grandchild, how low-so-ever and
> (c) .....
>
> **S. 302. Punishment of qatl-I-amd:** Whoever commits qatl-I-amd shall, subject to the provisions of this Chapter be-
> (a) punished with death as qisas;
> (b) punished with death for imprisonment for life as tazir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or
> (c) ....."

In the above context it would also be helpful to go through sub-sections (a) and (i) of section 299 PPC which read as follows:-

> "Sec.299 **Definition:** In this Chapter, unless there is anything repugnant in the subject or context:-
> (a) "adult means a person who has attained the age of eighteen years;
> .....
> .....
> (i) "minor" means a person who is not an adult".

A bare reading of sub-section (a) of section 299 PPC leads to the inference that a person who has not attained the age of eighteen years shall be deemed to be a minor. Though in the statement recorded under section 342 Cr.P.C the age of appellant Shaukat has been described as 18/19 years yet, in the absence of any evidence on record and the fact that at the trial he has claimed no exception with regard to his age it cannot be concluded that was definitly a minor. Be that as it may, case of appellant Shaukat otherwise, is not covered by section 302(a) PPC as no proof within the purview of section 304 of the PPC, in this case, was available. We therefore, do not find any force in this contention of the learned counsel for the appellants

15. While arguing in support of the grounds taken in Criminal Revision No.10-K of 1997 preferred for enhancement of sentences of the appellants the learned counsel for the complainant/petitioner submitted that in the absence of any mitigating or extenuating circumstance the learned trial Judge was not justified to inflict lesser sentence on the appellants particularly, on appellant Shaukat. It may be pointed out here that the learned trial Judge, having found the accused persons guilty under section

17(4) of the Ordinance, has convicted and sentenced them to imprisonment for life along with the sentences of fine. They have been further been convicted and sentenced under section 412 PPC for keeping in possession the stolen property. It would be pertinent to mention here that under section 17(4) of the Ordinance the only sentence provided for committing the offence of Harrabah is death as Hadd. Therefore, if the punishment provided for the offence under section 17(4) of the Ordinance was not attracted, either for want of proof of theft liable to Hadd within the purview of section 7 of the Ordinance or due to any other reason, than the learned trial Judge ought to have convicted the appellants under the provisions of the Pakistan Penal Code in view of section 14 of the Ordinance which provides punishment for the offence of theft liable to tazir. Since in the instant case proof of theft liable to Hadd, within the purview of section 7 of the Ordinance was not available, therefore, conviction of the appellants under section 17(4) of the Ordinance cannot be sustained it therefore, is set aside and the appellants are convicted under section 302(b) read with section 392 PPC, instead.

16. Learned trial Judge has also convicted and sentenced the appellants under section 412 PPC. In our view conviction recorded against the appellants under section 412 PPC cannot sustain because if the appellants were responsible for committing robbery in the house of the complainant than they could not have been convicted under section 412 PPC for keeping in possession the stolen property for the simple reason that legally, the same person cannot be a robber as well as receiver of the pillage. It would be pertinent to mention here that the offence of robbery cannot be committed unless something is taken away by an offender , within the purview of section 390 PPC, as otherwise it would be mere an attempt to commit the offence or some thing else. The convictions and sentences of the appellants under section 412 PPC therefore are set aside.

17. So far as the sentences inflicted on the appellants by the learned trial Judge are concerned, it may be pointed out here that case of appellant Shaukat Ali alias Tayyab is a bit different from the other accused persons. In their confessional statement though all the accused persons have admitted to commit the crime but all are unanimous on the point that it was appellant

Shaukat Ali who had inflicted knife blows to both the ladies. We are unable to understand that in the absence of any extenuating or mitigating circumstances as to why the normal penalty i.e death was not inflicted on appellant Shaukat by the learned trial Judge. In the case of Muhammad Yaseen and two others Vs. The State reported as 2002 SCMR-391 it was held by the Hon'ble Supreme Court of Pakistan that when an offence is proved against an accused person a judge should never hesitate to award punishment for that offence, even if it was a capital punishment. Their Lordships were further pleased to observe that leniency was being shown in matters of capital punishment by the courts below, even in those cases where act/crime involved was of heinous nature and no doubt, a Judge ought to be lenient or compassionate in awarding punishment but at the same time he should be more cautious in believing the prosecution story as it is narrated before him and efforts should not be made to look for mitigating circumstances, creating doubt in the prosecution case and extend benefit of doubt to the accused so that the miscreants may not be set at free who are causing unrest in the society as a whole and this menace should be curbed.

The above view was also affirmed by the Hon'ble Supreme Court of Pakistan in the case of Anees Ahmad alias Muhammad Umar and another Vs. The State reported as 2002 SCMR 1431. Reference in this regard, in addition to the above judgments may also be usefully made to the following reported judgments:-

i) Ijaz alias Billa and three others Vs. The State 2002 SCMR-294
ii) Sakhawat Vs. The State 2001 SCMR 244
iii) Muhammad Fazal Vs. Ghulam Asghar and other PLD 2000 SC-12
iv) Ch.M.Yousaf and another Vs. The State 1992 SCMR 983
v) Waris Ali alias Dulli and other Vs. The State 1999 SCMR 1469
vi) Pervez and others Vs. The State 1998 PSC (Cr) 875
vii) Noor Muhammad Vs. The State 1999 SCMR 272
viii) Mst.Bismillah and other Vs. M.Jabbar and other 1998 SCMR-862
ix) Muhammad Sharif Vs. Muhammad Javed alias Jedda Tedi PLD 1976 SC-452.

Upshot of the above discussion is that the appeal being misconceived and unwarranted by law and facts is hereby dismissed. Cr.Rev.No.10-K of 1997 to the extent of Shaukat alias Tayyab son of Taj Ali is allowed. Convictions of the appellants are altered from section 17(4) of the Ordinance to that of under section 302 (b) read with section 392 PPC and they are sentenced as under: -

i) Appellant Shaukat is sentenced to **DEATH**. He may be hanged by neck till he is dead.

ii) Sentences of imprisonment for life inflicted on appellants Muhammad Younis and Muhammad Riaz by the learned trial Judge are maintained.

iii) All the appellants are also sentenced to ten years R.I alongwith a fine of Rs.5000/- each or in default to further undergo R.I for six months each under section 392 PPC.

All the sentences of imprisonment shall run concurrently. Benefit of section 382-B Cr.P.C extended to the appellants by the learned trial Judge shall remain intact. The amount of fine if realized shall be paid to the legal heirs of the deceased under section 544-A Cr.P.C, as ordered by the learned trial Judge.

These are the reasons for our short order of the even date.

Note: - In our short order, while specifying the sentences inflicted on the appellants in the end of the sentence "conviction and sentences recorded against the appellants under section 412 PPC" instead of the word 'set aside' the word 'maintained' was typed due to typographical mistake therefore, it may be read as set aside.

(Ch.Ejaz Yousaf)
Judge

(Fazal Ilahi Khan)
Chief Justice

(Dr.Fida Muhammad Khan)
Judge

At Karachi, 7.10.2002
M.Akram/

Fit for reporting

JUDGE