

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

MR. JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE
MR. JUSTICE DR. ALLAMA FIDA MUHAMMAD KHAN
MR. JUSTICE SHEIKH NAJAM UL HASSAN
MR. JUSTICE ZAHOOR AHMED SHAHWANI
MRS. JUSTICE ASHRAF JAHAN

SHARIAT PETITION NO.04/I OF 2005

Dr. Muhammad Aslam Khaki, Advocate
Office No.2, 1st Floor Hashim Plaza, F-8 Markaz
Islamabad

..... Petitioner

Versus

1. Federation of Pakistan through President of Pakistan.
2. Ministry of Law Justice & Parliamentary Affairs through its Secretary, Pak Secretariat, Islamabad

.... Respondents

Counsel for the Petitioner	....	In Person
Counsel for Federal Govt.	....	Mr. M. Pervez Khan Tanoli, Advocate
Counsel for Baluchistan Govt.	....	Mr. Muhammad Ayaz Khan Swati, Additional Advocate General
Counsel for Sindh Govt.	....	Mr. Ahsan Hameed Dogar, Advocate
Counsel for Punjab Govt.	....	Mr. Rashid Hafeez, Additional Advocate General
Counsel for KPK Govt.	....	Mr. Arshad Ahmed, Assistant Advocate General
Date of Institution	....	02.04.2015
Date of hearing	....	22.04.2016
Date of decision	....	02.05.2016

JUDGMENT

DR. ALLAMA FIDA MUHAMMAD KHAN, Judge.-

The Petitioner Dr. Muhammad Aslam Khaki, Advocate has challenged Section 302(b) PPC and prayed that the same may be declared against justice and repugnant to the Injunctions of Holy Qur'an and Sunnah of the Holy Prophet ﷺ. The impugned Section is reproduced as under:-

“302(b) Punishment of Qatl-i-amd. Whoever commits qatl-i-amd shall, subject to the provisions of this Chapter, be punished with death or 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.”

For easy reference Section 304 PPC is also reproduced hereinunder:-

“304PPC Proof of qatl-i-amd liable to qisas, etc. (1) Proof of qatl-i-amd liable to qisas shall be in any of the following forms, namely:

- (a) the accused makes before a Court competent to try the offence a voluntary and true confession of the commission of the offence; or
 - (b) by the evidence as provided in Article 17 of the Qanun-e-Shahadat, 1984 (P.O. No.10 of 1984)
- (2) The provisions of sub-Section (1) shall, mutatis mutandis, apply to a hurt liable to qisas.”

2. This Petition was admitted to regular hearing and comments were called from the Federal as well as the Provincial Governments. In compliance, the Federal Government as well as the Government of Punjab filed their comments. The Governments of Balochistan, KPK and Sindh adopted the comments filed by the Federal Government. The Government of KPK, in addition to that, further elaborated the same. According to the comments, the Federal as well as the Provincial Governments have opposed the instant Petition.

3. The Government of Punjab, placing reliance on the judgments reported as 1997 SCMR 1307 (Sheikh Muhammad Aslam & another Vs. Shauakat Ali alias Shauka), 2004 SCMR 236 (Bashir Ahmed Vs. The State) and 2005 SCMR 599 (Khan Muhammad Vs. The State), has submitted that the issue raised in the Petition has been competently resolved in these judgments.

4. One of the juris-consult Mr. Muhammad Mushtaq Ahmed has also submitted written comments. A Public Notice was also issued

which was published in various renowned newspapers on 21.03.2013.

However, none from the public has appeared.

5. We have heard learned counsel/Petitioner, standing counsel for the Federal Government as well as representatives of the Provincial Governments and perused the written comments submitted by the above juris-consult.

6. The learned counsel/Petitioner contended that the said provisions of law for an offence committed under Section 302(b) PPC is against the justice and, therefore, repugnant to the Injunctions of Islam on the following grounds:-

- * as per Islamic principles, the punishment in Tazir in the same offence should not reach or exceed the punishment of Qisas or Hadd;
- * as per Section 302(a) PPC the Qisas is proved either by Confession or by the credible testimony of at least two male Muslim witnesses having the test of Tazkia-tul-Shahood while in Section 302(b) no such proof is required. However, while the offence in Section 302(a) PPC where there is definiteness of the involvement of the accused is made compoundable, the offence in Section 302(b) PPC where the testimony is doubtful, the offence is not compoundable. This is against the logic, justice, fairness & against the

principles of Shariah as laid down by Holy Quran & Sunnah.

- * there is no precedent in Sunnah where an accused was punished in Tazir equal or more than the punishment provided in Hadd or Qisas for the same offence.
- * the justice demands a lesser punishment for the offence which is proved by a weak type of evidence as compared to the offence which is proved by a high degree of evidence like the one in Section 302(a) PPC.

The learned Petitioner vehemently contended that the benefit of doubt which is normally extended by a Court should also be provided in the law itself. The crux of his arguments was that the sentence of death should not be awarded in 302(b) PPC if its proof is less than what is required for Qatl-i-amd in Section 302(a) PPC.

7. The learned standing Counsel for Federal Government, the Additional Advocate General Punjab, Additional Advocate General Baluchistan, Assistant Advocate General KPK and the Advocate on behalf of Advocate General Sindh placing reliance on the judgments reported as PLD 1996 SC 1 (Abdul Haque vs. The State and another), 2000 SCMR 338 (Abdus Salam vs. The State), PLD 2005 SC 252 (Muhammad Abdullah Yousaf and others vs. Miss Nadia Ayub and

others) and PLD 2015 SC 77 (Zahid Rehman vs. The State) vehemently opposed the Petition.

8. We have anxiously considered the points raised by the learned Petitioner but the moot question involved in this Petition relates to the powers and jurisdiction of the State. The question is whether an Islamic State is empowered to legislate appropriate laws for offences committed within its jurisdiction. The answer is unquestionably positive.

The Islamic State is bound to exercise its power and authority within the limits prescribed by the Injunctions of Islam, through the chosen representatives of the people. It is an undeniable fact that there are so many crimes which were not conceivable in the early periods but have now immensely flooded the modern society and, with the passage of time, everyday the nature of crimes especially of committing murder etc are on the ever-increase and in normal circumstances the proof required for enforcing the punishment of Qisas is usually not forthcoming on record but the State in performance of its obligation has to legislate for maintaining law and order situation in all circumstances and has to resort

to various measures including promulgation of laws for protection of life, honour and property of the citizens. If the standard required for Qatl-i-amd as provided under Section 304 PPC is not forthcoming but despite that, guilt of the accused is established beyond any reasonable doubt through other reliable evidence, to the entire satisfaction of the Court, the offender cannot be let escort free to spread "*Fasaad Fil-Arz*" and remain a permanent source of threat to the life, honour and property of other citizens. At times modern technologies like DNA tests, medical test, chemical examiner's reports, security cameras and various other bits and pieces of circumstantial evidence etc. prove the offence of murder to the hilt, without leaving any slightest room for reasonable doubt, but, as is the situation, the standard of proof as required by Section 304 PPC is not usually available for various reasons. In such situations, justice demands that such culprits must be punished according to the nature of the gravity of offence committed by them.

9. The learned counsel conceded that the State is vested with the powers to enact laws but as far as Taazir is concerned, he maintained,

punishment other than death should be awarded. The learned Petitioner was, however, unable to lay hand on any specific Verse of the Holy Qur'an or Sunnah of the Holy Prophet ﷺ to support his contention. The reference made by him to a Hadith regarding inflicting lesser punishment in cases of Hadd, if not proved by the required standard of evidence, is strictly confined to cases of Hadd and not at all applicable to the cases of Qisas as both these terms have different connotations and stand completely distinguishable from each other. It is to be appreciated that as envisaged under Section 203D of the Constitution, the Federal Shariat Court while exercising its original jurisdiction is constitutionally bound to base its Judgment on specific "Nass" (نص) of the Holy Qur'an and Sunnah and not on any other ground or consideration.

10. We may mention that Islamic law has enunciated and strictly maintained the principles of justice in all circumstances. Therefore, if any offence is proved by some credible confidence-inspiring piece of evidence, beyond any reasonable doubt, Islamic law provides to strike hard and long to take the offender to the logical end,

according to law. No leniency in this connection has been allowed in any “Nass”. It is well said:-

ترحم بریلنگِ تیز دندان ستمگاری بُود بر گوسفندان

“Showing mercy to a wolf amounts to great injustice to a flock of sheep”

11. We may add that as far as the relief sought in this Petition is concerned, it has already been provided in Sections 311 PPC and 345 Cr.P.C. which read as under:-

“311PPC

Ta'zir after waiver or compounding of right of qisas in qatl-i-amd: Notwithstanding anything contained in Section 309 or Section 310 [where all the walis do not waive or compound the right of qisas or [if] the principle of fasad-fil-arz (فساد فی الارض) [is attracted]] the Court may, [***] having regard to the facts and circumstances of the case, punish an offender against whom the right of qisas has been waived or compounded with [death or imprisonment for life or] imprisonment of either description for a term which may extend to [fourteen] years [but shall not be less than ten years] as ta'zir.”

“345Cr.P.C.

Compounding offences. (1) The offences punishable under the Section of the Pakistan Penal Code [specified] in the first two

columns of the table next following may be compounded by the persons mentioned in the third column of that table:-

Offence	Sections of the Pakistan Penal Code applicable	Persons by whom offence may be compounded
[Qatl-i-amad	302	By the heirs of the victim [,other than the accused or the convict if the offence has been committed by him in the name or on the pretext of <i>karo kari</i> , <i>siyah kari</i> or similar other customs or practices.]

12. In view of the above, the Petition being misconceived is dismissed accordingly.

MR. JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN

MR. JUSTICE RIAZ AHMAD KHAN
CHIEF JUSTICE

MR. JUSTICE SHEIKH NAJAM UL HASSAN

MR. JUSTICE ZAHOOR AHMED SHAHWANI

MRS. JUSTICE ASHRAF JAHAN

Announced in open Court
On _____ at Islamabad
Umar Draz/*