

Under the direction of the Hon:Justice Abdul Karim Kundi, Judge, Peshawar High Court, a copy of a judgment dated 18.11.92 has been sent to this Court for consideration and examination of the provision of section 417 of Criminal Procedure Act. Under this section, a private complainant is not allowed to prefer an appeal to the High Court against acquittal passed by the Lower Courts. Only a provincial Government can prefer an appeal to the High Court through a public prosecutor. However in practice, much more complicated procedure is adopted by the officials of Provincial Govt which ultimately results jeapardous to the rights of the complainant or the heirs of the victim. Though this provision being a procedural matter, does not fall within the ambit of our jurisdiction, nevertheless, keeping in view the importance of this issue and its direct concern to the rights of the victim's heir, it is pertinent to consider this issue and to give Shariah view point.

In Islam a crime of Murder has been declared a heinous and abominable offence and stringent punishments have been prescribed for the offender. It is appeared in the Holy Quran that **ولا تقتلوا نفس التي حرم الله إلا بالحق**

"Take not the life which Allah Almighty had made secret except by way of justice. (6:151). The Holy Prophet Peace Be Upon Him said: **لا ترجعوا بعدي كفارا يضرب**

بعضكم رقاب بعض " بخاری ج ۱ ص ۱۰۲

"After my death do not become disbeliever, by striking (cutting) the necks of one another."

It is appeared in the tradition that the first case to be decided among the people (on the day of resurrection) will be those blood shed.

قال النبي صلى الله عليه وسلم أول ما يقضى بين الناس من الدماء بخاری ج ۱ ص ۱۰۲

There are three cases in which a murder of a Muslim can legally be justified as appeared in the tradition of the Holy Prophet that

لا يحل دم امرئ

مسألة الأبا حدى ثلاثة النفس بالنفس البتة التراف

والمغارق لدينه - "بخارى" ١٦

"It is not allowed to take the life of a muslim except these three cases. The first one is that, in retaliation, a murderere is killed by the heirs of the victim. The second is that when a married person commits illicit sexual intercourse, he is killed by stoning. And the third one is that when a muslim reverts from Islam and becomes murtad(Apostate) he is liable to execution. Except these three cases if an innocent muslim is killed, the Holy Quran says " **وَمَنْ قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لَوْلِيهِ سُلْطَانًا** " If any one is slain wrongfully, we have given his heir authority to demand Qisas or to forgive(Abdullah Yousuf Ali) (17:33)

As this Qurainc verse directly deals with the issue under consideration, therefore it is pertinent to reproduce below the commentry of this verse by some eminent commentators.

Allama Qurtubi writes that

سلطانا اى تسليطا

ان شاء عفا وان شاء اخذ دية - "لجامع لاحكام القرآن" ٢٥٥

"Sultan means authority, the heirs of the victim is authorised wether to retaliate or to make pardon or to accept blood money."

Maulana Maududi writes that " This also lays down legal principles that in a case of murder, the real plaintiff is not the Government but the Guardian of the Murdered person who is authorised to pardon the Murderer or receive blood money instead of taking his life (The meaning of the Holy Quran Vol.VI P.131).

Maulana Ameen Ahsan Islahi writes that

- اس آیت سے یہ بات نکلتی ہے کہ اسلامی قانون میں قتل کے معاملے میں

اصل مدعی کی حیثیت حکومت کی نہیں بلکہ اولیا مقتول کی ہے حکومت کا کام صرف یہ ہے کہ اولیا مقتوم کی مرضی ٹھیک ٹھیک نافذ کرا دے حکومت مدعی صرف اس شکل میں ہوگی جب مقتول لا وارث ہو یا وارث ہوں تو بھی لیکن کسی میت سے ان کو مقتول کے معاملے سے کوئی دلچسپی نہ رہ گئی ہو، موجودہ قوانین میں سارا اختیار صرف حکومت ہی کو حاصل ہوتا ہے اولیاء کو سرے سے کوئی تعلق نہیں رہ جاتا۔ ہمارے نزدیک موجودہ قوانین اسلامی قانون کی بہت سی برکتوں سے خالی ہے۔ (تدبر قرآن - آیت ۱۷ تا ۲۳)

It is appeared in Tafseer Ibn Kaseer that

اگر کوئی شخص ناحق دوسرے ہاتھوں قتل کیا گیا تو اس کے وارثوں کو اللہ تعالیٰ نے قاتل پر غالب کر دیا ہے۔ اسے قصاص لینے اور دیت لینے اور بالکل معاف کر دینے میں سے ایک کا اختیار ہے۔ ایک عجیب بات یہ ہے کہ حضرت عباس نے اس آیت کے عموم سے حضرت معاویہ کی سلطنت پر استدلال کیا ہے کہ وہ بادشاہ بن جائیں گے۔ اسلئے کہ حضرت عثمان کے ولی آپ ہی تھے۔ اور حضرت عثمان انتہائی مظلومی کے ساتھ شہید کیے گئے تھے۔ حضرت معاویہ قاتلان عثمان حضرت علی سے طلب کرتے تھے کہ ان سے قصاص لیں اسلئے کہ یہ اموی تھے اور حضرت عثمان بھی اموی تھے۔ حضرت علی بس پر درا ڈھیل کر رہے تھے ادھر حضرت علی کا مطالبہ حضرت معاویہ سے یہ تھا کہ ملک شام ان کے سپرد کر دیں۔ حضرت معاویہ فرماتے تھے تا وقتیکہ آپ قاتلان عثمان نہ دیں ملک شام کو آپکی زیر حکومت نہیں کرونگا۔ چنانچہ آپ نے مع کل اہل شام نے بیعت حضرت علی سے انکار کر دیا اس جھگڑے نے طول پکڑا اور حضرت معاویہ ملک شام کے حکمران بن گئے۔

(تفسیر ابن کثیر، آیت ۳۳، سورہ بنی اسرائیل)

It is appeared in the tradition of the Holy Prophet that

من قتل له قبیل فهو الخیر النفرین
إما ان یؤدی او یقاد۔ بخاری ج ۱، تعاص ۳۰۳

"The relative of the deceased person has the right to choose one of the two compensations i.e. to the killer killed or to accept blood money.

From the observations cited above, it transpires that (1) The real Wali of the deceased person is his heirs not the Govt. the Govt shall become Wali in circumstances when the deceased person had no Wali or there is Wali but not

competent to act as Wali. (II) The Wali has been granted absolute power either to retaliate or to pardon or accept blood money. (III) The Qisas shall be executed by the heir of the victim under the supervision of the Govt if they are capable to do so, in case, the heirs of the deceased person make pardon or accept blood money, the State can award Tazirⁱⁿ punishment to culprit.

As a power to kill the offender in retaliation or to make pardon or to accept blood money is conferred on the Wali of the deceased person, therefore, the right of appeal should also be given to the Wali of the deceased person instead of the Govt. Because the aggrieved party is the relative of the deceased person not the Govt. Secondly the purpose of Qisas Law according to the Holy Quran, is the security and saving of the community (وذلك للحفاظ على حياة المجتمع)

For this purpose, it is vital to gratify the heart of victim's heir. This gratification may be achieved by the execution of the offender or by adopting other alternate or without it. If the right of appeal not given to the real plaintiff or judicial proceeding is not conducted properly, the heart of complainant party shall not be gratified and ultimately they will take revenge from the rival party and thus the objectives for which Qisas Law has been implemented, shall not achieved, Because the urge to take revenge latent in the depth of human heart.


(Fazal Elahi) 31/1/93