

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

MR. JUSTICE ASIF SAEED KHAN KHOSA
MR. JUSTICE DOST MUHAMMAD KHAN
MR. JUSTICE QAZI FAEZ ISA

CRIMINAL APPEAL NO. 589 OF 2006
CRIMINAL APPEAL NO. 130 OF 2009
CRIMINAL APPEAL NO. 96 OF 2011

*(On appeals from the judgments, respectively dated
21.6.2004 in CrI.A. No. 480 of 2000 M.R. No. 614 of 2000,
dated 28.3.2001 in CrI.A. No. 109-J of 1996, M.R. No. 28 of
1996 and dated 25.5.2010 in CrI.A. No. 186 of 2005, M.R.
No. 88 of 2005, of the Lahore High Court, Lahore)*

Abdul Ghaffar (in Cr.A. 589/2006)
Abdul Rasheed (in Cr.A. 130/2009)
Muhammad Arshad (in Cr.A. 96/2011)

.... Appellant(s)

Versus

The State (in all cases)

.... Respondent(s)

For the Appellant : Sheikh Khizar Hayat, Senior ASC
(In Cr.A.589/2006) Chaudhry Munir Sadiq, ASC

For the Appellant : Mr. M. Zaman Bhatti, ASC
(In Cr.A.130/2009)

For the Appellant : Mrs. Farhat Zafar, ASC
(In Cr.A. 96/2011)

For the State : Mr. Ahmed Raza Gillani, Ad. PG, Punjab
(In CrI.As. 589/06 & 130/09)

For the State : Mr. Zubair Ahmed Farooq, Ad. PG, Punjab
(In Cr.A.96/2011)

For the Complainant: Mr. Muhammad Latif Khan Khosa, Senior ASC
(In Cr.A.589/2006)

For the Complainant: Chaudhry Farooq Haider, ASC
(In Cr.A.96/2011)

Date of Hearing : 1st April, 2015

J U D G M E N T

QAZI FAEZ ISA, J- In these three appeals leave was granted only to consider whether the compromise with an heir, and not all the heirs, of the victim-deceased may have an effect on the sentence of death imposed upon each convict by the trial courts, which were upheld and affirmed by the High Court, and whether such compromise merits reduction of each sentence to imprisonment for life.

2. We have heard Sheikh Khizar Hayat, Chaudhry Munir Sadiq, Mr. M. Zaman Bhatti and Mrs. Farhat Zafar, the learned Advocates of the Supreme Court ("**ASC**") representing the appellants, Mr. Ahmed Raza Gillani and Mr. Zubair Ahmed Farooq, the learned Additional Prosecutor Generals Punjab, Mr. Muhammad Latif Khan Khosa learned Senior ASC and Chaudhry Farooq Haider learned ASC, representing the complainants. With the able assistance of the learned counsel we have examined the applicable provisions of the Pakistan Penal Code ("**PPC**") and the Code of Criminal Procedure ("**Code**") and the following judgments: Muhammad Aslam v. Shaukat Ali (1997 SCMR 1307), Riaz Ahmad v. State (2003 SCMR 1067), Muhammad Ahmad v. State (PLD 2003 SC 583), Niaz Ahmad v. State (PLD 2003 SC 635), Bashir Ahmed v. State (2004 SCMR 236), Muhammad Ali v. State (PLD 2004 Lahore 554), Abdul Jabbar v. State (2007 SCMR 1496) and Zahid Rehman v. State (PLD 2015 SC 77).

3. Section 338-E PPC provides for the waiver or compounding of offences and stipulates that:

"(1) Subject to the provisions of this Chapter and Section 345 of the Code of Criminal Procedure, 1898 (V of 1898), all offences under this Chapter may be waived or compounded and the provisions of Sections 309 and 310 shall, *mutatis mutandis*, apply to the waiver or compounding of such offences:

Provided that, where an offence has been waived or compounded, the court may, in its discretion having regard

to the facts and circumstances of the case, acquit or award *ta'zir* to the offender according to the nature of the offence.

Provided further that where an offence under this Chapter has been committed in the name or on the pretext of honour, such offence may be waived or compounded subject to such conditions as the court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case.

(2) All questions relating to waiver or compounding of an offence or awarding of punishment under Section 310, whether before or after the passing of any sentence, shall be determined by trial court:

Provided that where the sentence of *qisas* or any other sentence is waived or compounded during the pendency of an appeal, such questions may be determined by the appellate court."

Section 345 of the Code lists the offences under the PPC which may be compounded and those who may compound the same, which are the persons mentioned in the third column of the table contained therein. In respect of the offence of *qatl-i-amd* "the heirs of the victims", i.e. all the heirs, may compound the offence. Therefore, if a convict has been sentenced to death as *ta'zir* then all the legal heirs of the deceased must enter into a compromise to enable compounding of the offence under subsection (2) of section 345 of the Code; reference in this regard may be made to the cases of Muhammad Aslam (above at pages 1329-1330 P and 1335 R), Niaz Ahmad (above at page 639 F), Abdul Jabbar (above at page 1504D) and recently reiterated in the judgment of this court in the case of Zahid Rehman (above at page 116 I).

4. That whilst it is settled that in order to effect a compromise in a *ta'zir* case all the legal heirs of the deceased must agree to the compromise, the question which concerns us in these appeals is whether a compromise by one or more of the heirs of a deceased has a bearing on the sentence. In the abovementioned cases a partial compromise did not secure the lesser punishment, nonetheless, the judgments did

not specifically exclude it as a factor in the determination of sentence. There appears to be no direct authority on this proposition, however, in the case of Muhammad Ali (above) a Division Bench of the Lahore High Court observed that:

“There is no cavil with the proposition that, as held by the Hon’ble Supreme Court of Pakistan in the case of Sh. Muhammad Aslam v. Shaukat Ali alias Shauka (1997 SCMR 1307), a partial compromise cannot be given effect to in a case of Ta’zir as far as the matter of compounding of the offence is concerned but the matter of sentence is entirely a different matter and the same lies within the jurisdiction and discretion of the trial Court.”

5. Before we attempt to answer the question it would be appropriate to refer to the definition of murder or *qatl-i-amd* contained in section 300 PPC, as under:

“*Qatl-i-amd* – Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit *qatl-i-amd*.”

Once the criteria constituting *qatl-i-amd*, set out in the abovementioned section, is established the accused is convicted for the offence of *qatl-i-amd*. It is to be noted that section 300 PPC does not prescribe the punishment for *qatl-i-amd*, which is attended to separately in section 302 PPC, reproduced hereunder:

“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 or imprisonment for life as *ta’zir* 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) punished with imprisonment of either description for a term which may extend to twenty-five years

where according to the injunctions of Islam the punishment of *qisas* is not applicable

Provided that nothing in this clause shall apply to the offence of *qatl-i-amd* if committed in the name or on the pretext of honour and the same shall fall within the ambit of clause (a) or clause (b), as the case may be".

The punishment for the offence of *qatl-i-amd* as *ta'zir* attracts clause (b) of section 302 PPC and is punishable either with death or imprisonment for life, and to determine which of the two sentences to impose the court is required to have "*regard to the facts and circumstances of the case*". The law does not elaborate what facts and circumstances are required to be taken into account; therefore, in the absence of statutory criteria, this court has been identifying the factors that attract the punishment of death and those when the lesser punishment of imprisonment for life is to be imposed.

6. Chaudhry Farooq Haider, the learned ASC, by referring to some of the cited cases, including the case of Zahid Rehman (above), contended that a partial compromise is not acceptable in cases of *ta'zir*; which, undoubtedly, is the correct legal position with regard to the matter of compounding of offences, however, it does not follow that a partial compromise cannot be taken into consideration in the matter of sentencing, nor was it so stated in any of the said cases. Mr. Ahmed Raza Gillani, the learned Additional Prosecutor General of Punjab, has contended that the "*facts and circumstances*" mentioned in clause (b) of section 302 PPC relate to the offence itself, and not to any subsequent event, such as a partial compromise. However, we cannot bring ourselves to agree with him, because, if the facts and circumstances of the offence were required to be taken into consideration, then the legislature would not have used the word '*case*' and would instead have used the word '*offence*'. Moreover, when the heirs of a victim enter into a compromise with the killer who has been convicted it is clearly *after the facts and circumstances* of the '*offence*'. Such a compromise is entered into in terms of section 345 of the Code. The

heirs of the deceased may also "*pardon the convict or enter into a compromise with him even at the last moment before execution of the sentence*" (proviso to section 381 of the Code).

7. However, it needs to be restated that even if a compromise has been entered into by all the heirs the courts still retain discretion, "*having regard to the facts and circumstances of the case [whether to], acquit or award ta'zir to the offender according to the nature of the offence*" as provided in the first proviso to section 338-E PPC (above). It is noteworthy that the term 'offence' is used in the first proviso because the court, despite the compromise with the heirs, may still punish the convict in the facts and circumstances of the 'offence'. Under section 345 of the Code the court also retains its discretion; both subsection (2) and (4) of section 345 specify that an offence can not only be compounded *with the permission of the court* and subsection (5) of section 345 stipulates that, *no composition for the offence shall be allowed without the leave of the court*.

8. Once it is established that the offence has been committed by the accused the appropriate sentence is awarded to him/her, which in respect of *qatl-i-amd* as *ta'zir* could be either death or imprisonment for life. The section requires that the "*facts and circumstances of the case*" be considered in determining the appropriate sentence. A compromise with one or more of the heirs of the victim would in our opinion be amongst the *facts and circumstances of the case* that require to be taken into account in determining the quantum of punishment, but that in itself would not be the conclusive factor as all the facts and circumstances of the case have to be considered. Merely because an heir has compromised with the convict would not automatically result in the imposition of the lesser punishment of imprisonment for life.

9. That having decided that a compromise with an heir of the victim may be a factor in determining the quantum of punishment we now proceed to consider whether in the facts and circumstances of each of these cases the sentences of death

imposed by the trial court and which were upheld and confirmed by the High Court should be reduced to imprisonment for life.

Criminal Appeal No. 589 of 2006

On 14th of August 1999 the appellant and his co-accused went into the house of Fida Hussain shot him and killed his son Ghulam Mustafa. The appellant used a dagger to inflict two wounds to the neck, one to the chest and one in the abdomen thereby killing Ghulam Mustafa. The widow of the deceased, who is the sister of one of the co-accused and a cousin of the appellant, agreed to compromise but the other heirs did not. Trespassing and entering someone's property at night; committing a premeditative murder, brutally and repeatedly stabbing another human being does not permit leniency in sentencing regardless of the said compromise by one of the heirs and even though the appellant has been incarcerated since 6th September 1999 and has spent more than ten years in a death cell.

Criminal Appeal No. 130 of 2009

On the 5th of May 1994, the appellant brutally murdered his wife and daughter. Mercilessly wielding a hatchet he struck his daughter sixteen times and his wife twice. The barbarous and inhuman murders of his wife of over twenty years and his young daughter who were under the care of the appellant, does not elicit any empathy to persuade us to interfere with the discretion exercised by the trial court and the High Court, despite his remaining incarcerated since his arrest on 12th May 1994 and in a death cell for over fourteen years and even though his four adult sons and one adult daughter agreed to compromise with the convict; there are also two other minor heirs to whom the appellant had agreed to pay *diyat*. The mother / grandmother did not forgive or agree to compromise.

Criminal Appeal No. 96 of 2011

The appellant had murdered his mother-in-law by shooting her in her face. Earlier too, he had attempted to kill her on two separate occasions and cases under

section 353/332, 34 PPC and 307/34 PPC were registered against him. It has also come on record that he was involved in a number of other serious crimes. The daughter of the deceased, who is the wife of the convict, had agreed to forgive him, but neither the husband of the deceased nor her other two daughters and son agreed to do so. The appellant was taken into custody on the 22nd of January 2003 and has been in a death cell for over five years. The appellant's propensity to violence, the ruthlessness of his character and the manner in which he killed the mother of his own wife detract us from reducing the sentence of death to one of imprisonment for life, despite the stated compromise.

10. That since it has already been determined that there isn't any merit in the appeals and as we, in the facts and circumstances of each case, have not been able to find any reason to reduce to imprisonment for life the sentence of death awarded by the trial courts, which were upheld and confirmed by the High Court, we are constrained to dismiss all the three appeals.

JUDGE

JUDGE

JUDGE

Announced in open court

On _____April 2015

At Islamabad

By_____