IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Asif Saeed Khan Khosa
Mr. Justice Ejaz Afzal Khan
Mr. Justice Ijaz Ahmed Chaudhry
Mr. Justice Dost Muhammad Khan
Mr. Justice Qazi Faez Isa

Criminal Appeal No. 126 of 2012
(Against the judgment dated 23.11.2011 passed by the Islamabad High Court, Islamabad in Criminal Appeal No. 30 of 2004, Criminal Revision No. 19 of 2004 and Murder Reference No. 54 of 2005)

Zahid Rehman *... Appellant*

versus

The State *... Respondent*

Criminal Petition No. 568 of 2011
(Against the judgment dated 23.11.2011 passed by the Islamabad High Court, Islamabad in Criminal Revision No. 19 of 2004)

Sheerin Zafar *... Petitioner*

versus

Zahid-ur-Rehman, etc. *... Respondents*

Criminal Appeal No. 80 of 2001
(Against the judgment dated 20.04.2000 passed by the Lahore High Court, Rawalpindi Bench, Rawalpindi in Criminal Appeal No. 95 of 1994)

Amir Khan *... Appellant*

versus

Muhammad Aslam, etc. *... Respondents*

For the appellants: Kh. Haris Ahmed, ASC
(in Cr.A. 126 of 2012)
Hafiz Hifz-ur-Rehman, ASC
(in Cr.A. 80 of 2001)

For the petitioner: Nemo. *(in Cr.P. 568 of 2011)*

For respondent No. 1: Kh. Haris Ahmed, ASC
(in Cr.P. 568 of 2011)
Malik Muhammad Kabir, ASC
(in Cr.A. 80 of 2001)

For the State: Mr. Ahmed Raza Gillani, Additional Prosecutor-General, Punjab
(in Cr.P. 568 of 2011 & Cr.A. 80 of 2001)
Nemo. *(in Cr.A. 126 of 2012)*

Dates of hearing: 14.10.2014 & 15.10.2014

JUDGMENT

Asif Saeed Khan Khosa, J.: The law regarding *Qisas* in cases of murder and bodily hurt had been introduced in the criminal jurisprudence of this country about a quarter of a century ago but unfortunately the distinction between *Qisas* and *Ta'zir* and applicability of the two concepts to different kinds of cases has confused our courts ever since with the result that even this Court has rendered conflicting judgments in that respect. One of the reasons why leave to appeal had been granted in the case of Zahid Rehman convict-appellant was that an authoritative judgment may be rendered by this Court removing the prevalent confusion in this important field of criminal law and conclusively setting the controversy at rest. While granting leave to appeal in that case the following order had been passed by this Court on 09.03.2012:

> "**Criminal Petition No. 581 of 2011**
>
> It has *inter alia* been contended by the learned counsel for the petitioner that the case in hand was a case of circumstantial evidence only as no eye-witness of the alleged occurrence had been produced by the prosecution. The learned counsel for the petitioner has maintained that links in the chain of the circumstantial evidence were broken at many places and, thus, it could not be said that the prosecution had succeeded in proving its case against the petitioner beyond reasonable doubt. He has also argued that the motive set up by the prosecution had been discarded by both the learned courts below, the extra-judicial confession allegedly made by the petitioner was not only a weak piece of evidence but the same had not been sufficiently proved before the learned trial court and the gun and the crime-empties had been recovered and sent together diminishing, if not eliminating, the evidentiary value of such recoveries. On the legal plane it has been argued by the learned counsel for the petitioner that even if the case of the prosecution against the petitioner was accepted as correct on the factual side still it was a case attracting the provisions of section 306(b) and (c), P.P.C. and not a case attracting section 302(b), P.P.C. It has been maintained by the learned counsel for the petitioner that in this case attracting the provisions of section 306(b) and (c), P.P.C. the sentence of the

petitioner could have been recorded under section 308, P.P.C. which carried a maximum sentence of 14 years' imprisonment at the time of the alleged occurrence. In this context the learned counsel for the petitioner has pointed out that this Court has expressed different opinions in respect of the above mentioned legal issue from time to time and the said issue requires a detailed examination by a Larger Bench of this Court. In this regard the learned counsel for the petitioner has referred to the cases of Naseer Ahmed v. The State (PLD 2000 SC 813), Dil Bagh Hussain v. The State (2001 CMR 232), Muhammad Abdullah Khan v. The State (2001 SCMR 1775), Amanat Ali v. Nazim Ali and another (2003 SCMR 608), Muhammad Ilyas v. The State (2008 SCMR 396) and Khalid Mehmood v. The State (2011 SCMR 1110) wherein it had been held that in a case like the one in hand an accused person found guilty is to be convicted under section 306, P.P.C. and is to be punished under section 308, P.P.C. He has also referred to the cases of Faqir Ullah v. Khalil-uz-Zaman and others (1999 SCMR 2203), Muhammad Afzal alias Seema v. The State (1999 SCMR 2652), Umar Hayat v. Jahangir and another (2002 SCMR 629), Muhammad Akram v. The State (2003 SCMR 855), Ghulam Murtaza v. The State (2004 SCMR 4), Nasir Mehmood and another v. The State (2006 SCMR 204), Abdul Jabbar v. The State and others (2007 SCMR 1496), Iftikhar-ul-Hassan v. Israr Bashir and another (PLD 2007 SC 111) and Tauqeer Ahmad Khan v. Zaheer Ahmad and others (2009 SCMR 420) wherein this Court had categorically held that the provisions of sections 306 and 308, P.P.C. stand attracted to a case of Qisas only and they do not apply to a case of Ta'zir. Such divergence of opinion expressed by this Court in the above mentioned precedent cases requires an authoritative pronouncement by a Larger Bench of this Court to settle the legal controversy at rest.

2. For what has been noted above this petition is allowed and leave to appeal is granted to consider the factual and legal aspects of this case highlighted by the learned counsel for the petitioner. The Hon'ble Chief Justice may graciously consider constitution of a Larger Bench of this Court to determine the issues involved in the case, if so advised.

Criminal Petition No. 568 of 2011

3. Through this petition the petitioner-complainant seeks enhancement of the amount of compensation ordered by the learned trial Court to be paid by respondent No. 1. Let this petition be heard along with the appeal of the convict/respondent No. 1."

(*reported as Sheerin Zafar and another v. Zahid Rehman and others (2012 SCMR 728)*)

The titled Criminal Appeal No. 126 of 2012 has arisen out of the above mentioned Criminal Petition No. 581 of 2011 and the connected Criminal Petition No. 568 of 2011 had been ordered to be heard along with the appeal arising out of Criminal Petition No. 581 of 2011. The titled Criminal Appeal No. 80 of 2001 has stemmed from Criminal Petition No. 143 of 2000 in which leave to

appeal had been granted by this Court on 31.01.2001 in the following terms:

> " ---------- We have heard the learned counsel at length and perused the file. Contentions of the learned counsel are that if a person in his statement under Section 342 Cr.P.C. claims his age to be less than 18 years and at that stage produces school leaving certificate should that be relied upon as conclusive proof when the prosecution has not been given the chance to rebut the same and should the scribe of such certificate be not produced for cross-examination? According to the learned counsel Section 308 PPC is applicable only to cases which are to be dealt with Section 302(a) PPC i.e. *Qatl-e-Amad.* In the instant case the conviction was recorded under Section 302(b) PPC, which is *Tazir,* therefore, 308 PPC would not be applicable to such like cases.
>
> Points raised by learned counsel need examination, therefore, we grant leave to appeal to reappraise the evidence and to consider the points noted above. Let bailable warrant of arrest in the sum of Rs. 1,00,000/- with two sureties each in the like amount returnable to Sessions Judge, Attock, be issued against Muhammad Aslam, respondent No. 1."

On 12.06.2013 Criminal Appeal No. 80 of 2001 was ordered to be heard alongwith Criminal Appeal No. 126 of 2012 as the issue involved in the said appeal was also as to whether in a case of *Ta'zir* an accused person can be convicted and sentenced under section 308, PPC or not.

2. In view of the legal controversy involved in these matters we have decided to resolve the legal issue first and then to leave the present appeals and the connected petition to be decided by appropriate Benches of this Court on the basis of their respective merits in the light of the legal position declared through the present judgment.

3. Assisting the Court on the legal issue involved Kh. Haris Ahmed, ASC appearing for the appellant in Criminal Appeal No. 126 of 2012 has taken us through different provisions of the Pakistan Penal Code, 1860 (hereinafter referred to as PPC) and has also referred to a large number of precedent cases to which reference shall be made in the later part of this judgment. His main arguments have been that *Qisas* and *Ta'zir* are different kinds of punishments provided for an offence of *Qatl-i-amd* (intentional murder); the punishments for such murder prescribed

in section 302, PPC are "subject to the provisions of this Chapter" (Chapter XVI of PPC); the provisions of sections 306 and 307, PPC are independent provisions falling in the same Chapter and the same are not controlled or regulated by the provisions of section 302, PPC and, thus, the punishments provided in section 308, PPC are not to be looked at through the prism of section 302, PPC; and such punishments can be awarded in an appropriate case irrespective of the fact whether the relevant case is a case of *Qisas* or of *Ta'zir*. The central theme of his submissions is that section 306, PPC constitutes a distinct offence and the same entails different punishments under section 308, PPC and, therefore, in a case attracting the provisions of section 306, PPC there is hardly any relevance of sections 302 or 304, PPC. As against that Hafiz Hifz-ur-Rehman, ASC appearing for the appellant in Criminal Appeal No. 80 of 2001 has maintained that for attracting the provisions of sections 306, 307 and 308, PPC a case has to be a case of *Qisas* and that the said provisions have no relevance to a case of *Ta'zir*. According to him a case of intentional murder wherein proof in either of the forms specified in section 304, PPC is not produced or is not available has to be treated as a case of *Ta'zir* entailing the punishments of death or imprisonment for life as mandated by the provisions of section 302(b), PPC. Malik Muhammad Kabir, ASC representing respondent No. 1 in Criminal Appeal No. 80 of 2001 has adopted and supported the above noted arguments advanced by Kh. Haris Ahmed, ASC whereas Mr. Ahmed Raza Gillani, Additional Prosecutor-General, Punjab appearing for the State has argued on the same lines as has been done by Hafiz Hifz-ur-Rehman, ASC.

4. After hearing the learned counsel for the parties and attending to the legal provisions and the precedent cases cited by them in support of their respective contentions I may observe at the outset that, putting it in its broadest terms, *Qisas* in Islamic terms is Almighty Allah's law dealing with the offences of murder and bodily hurt and *Ta'zir* is the manmade law for such offences and the standards of proof and the punishments provided therefor

are by and large different. It is generally understood that the two concepts are mutually exclusive and they represent separate legal regimes. Since the year 1990 the concepts of *Qisas* and *Ta'zir* have coexisted in our criminal jurisprudence and for the purposes of the present cases the following provisions of the Pakistan Penal Code are relevant:

> **Section 299. Definitions.-** In this Chapter, unless there is anything repugnant in the subject or context,-
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> ---
>
> (k) "qisas" means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed qatl-i-amd and in exercise of the right of the victim or a wali;
>
> (l) "ta'zir" means punishment other than qisas, diyat, arsh or daman; -------
>
> **Section 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 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.
>
> **Section 304. Proof of qatl-i-amd liable to qisas, etc.--** (1) Proof of qatl-i-amd 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.
>
> **Section 305. Wali.-** In case of qatl, the wali shall be-
>
> a) the heirs of the victim, according to his personal law but shall not include the accused or the convict in case of qatl-i-amd if committed in the name or on the pretext of honour; and
>
> b) the Government, if there is no heir.
>
> **Section 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 or grandchild, how low-so-ever; and

(c) when any wali of the victim is a direct descendant, how low-so-ever, of the offender.

Section 307. Cases in which qisas for qatl-i-amd shall not be enforced.- (1) Qisas for qatl-i-amd shall not be enforced in the following cases namely:-

a) when the offender dies before the enforcement of qisas;

b) when any wali, voluntarily and without duress, to the satisfaction of the Court, waives the right of qisas under section 309 or compounds under section 310; and

c) when the right of qisas devolves on the offender as a result of the death of the wali of the victim, or on the person who has no right of qisas against the offender.

(2) To satisfy itself that the wali has waived the right of qisas under section 309 or compounded the right of qisas under section 310 voluntarily and without duress the Court shall take down the statement of the wali and such other persons as it may deem necessary on oath and record an opinion that it is satisfied that the waiver or, as the case may be, the composition was voluntary and not the result of any duress.

Illustrations

(i) A kills Z, the maternal uncle of his son B. Z has no other wali except D the wife of A. D has the right of qisas from A. But if D dies, the right of qisas shall devolve on her son B who is also the son of the offender A. B cannot claim qisas against his father. Therefore, the qisas cannot be enforced.

(ii) B kills Z, the brother of her husband A. Z has no heir except A. Here A can claim qisas from his wife B. But if A dies, the right of qisas shall devolve on his son D who is also son of B, the qisas cannot be enforced against B.

Section 308. Punishment in qatl-i-amd not liable to qisas, etc. -- (1) Where an offender guilty of qatl-i-amd is not liable to qisas under section 306 or the qisas is not enforceable under clause (c) of section 307, he shall be liable to diyat:

Provided that, where the offender is minor or insane, diyat shall be payable either from his property or by such person as may be determined by the Court:

Provided further that where at the time of committing qatl-i-amd the offender being a minor, had attained sufficient maturity or being insane, had a lucid interval, so as to be able to realize the consequences of his act, he may also be punished with imprisonment of either description for a term which may extend to twenty-five years as ta'zir.

> Provided further that where the qisas is not enforceable under clause (c) of section 307 the offender shall be liable to diyat only if there is any wali other than offender and if there is no wali other than the offender, he shall be punished with imprisonment of either description for a term which may extend to twenty-five years as ta'zir.
>
> (2) Notwithstanding anything contained in sub-section (1), the Court having regard to the facts and circumstances of the case in addition to the punishment of diyat, may punish the offender with imprisonment of either description for a term which may extend to twenty-five years as ta'zir.
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> **Section 311. 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* 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 as ta'zir:
>
> Provided that if the offence has been committed in the name or on the pretext of honour, the imprisonment shall not be less than ten years.
>
> **Explanation.-** For the purpose of this section, the expression *fasad-fil-arz* shall include the past conduct of the offender, or whether he has any previous convictions, or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community, or if the offence has been committed in the name or on the pretext of honour.

5. The provisions of section 299, PPC clearly show that in the context of a *Qatl-i-amd* (intentional murder) *Qisas* and *Ta'zir* are simply two different kinds of punishments for such offence and that they are different from conviction for the said offence. As is evident from the provisions of section 304, PPC a conviction for an intentional murder can entail the punishment of *Qisas* only if the accused person makes before a court competent to try the offence a voluntary and true confession of commission of the offence or the requisite number of witnesses are produced by the prosecution before the trial court and their competence to testify is established through *Tazkiya-tul-shahood* (scrutiny of the witness before trial of the accused person) as required by Article 17 of the Qanun-e-Shahadat Order, 1984 and this was also so declared by this Court in the case of *Abdus Salam v. The State* (2000 SCMR 338). The cases of intentional murder other than those fulfilling the

requirements of section 304, PPC are cases entailing the punishment of *Ta'zir*, as provided in and declared by section 302(b), PPC, and the provisions relating to the punishment of *Qisas* are to have no application or relevance to the same. The relevant statutory provisions reproduced above make it abundantly clear to me that in all cases of conviction for the offence of intentional murder the question as to whether the convict is to be punished with *Qisas* or with *Ta'zir* is dependant upon the fact whether the conviction is brought about on the basis of proof in either of the forms mentioned in section 304, PPC or not. If the conviction is based upon proof as required by section 304, PPC then the sentencing regime applicable to such convict is to be that of *Qisas* but if the conviction is based upon proof other than that required by section 304, PPC then the sentencing regime relevant to such convict is to be that of *Ta'zir*. It is only after determining that the sentencing regime of *Qisas* is applicable to the case of a convict that a further consideration may become relevant as to whether such convict is to be punished with *Qisas* under the general provisions of section 302(a), PPC or his case attracts the exceptions to section 302(a) in the shape of sections 306 or 307, PPC in which cases punishments different from that under section 302(a), PPC are provided. I have entertained no manner of doubt that the general provision regarding an intentional murder being punishable through *Qisas* is section 302(a), PPC carrying only the punishment of death but section 302, PPC is subject to the other relevant provisions of Chapter XVI of the Pakistan Penal Code which provide punishments different from that of death for certain special classes of murderers mentioned therein despite their cases otherwise attracting a punishment of *Qisas*. Sections 306, 307 and 308, PPC belong to such category of cases which cases are exceptions to the general provisions of section 302(a), PPC but nonetheless all such cases are to be initially proved as cases entailing a punishment of *Qisas* which punishment is then to be withheld because the offender belongs to a special class for which an exception is created in the matter of his punishment. A plain reading of the provisions of sections 306 and 307, PPC shows, and

shows quite unmistakably, that the cases covered by those provisions are primarily cases of *Qisas* but because of certain considerations the punishment of *Qisas* is not liable or enforceable in those cases. It goes without saying that before considering the question of his punishment in such a case a convict must have incurred the liability or enforceability of the punishment of *Qisas* against him which punishment is to be withheld from him in view of the considerations mentioned in sections 306 and 307, PPC and that is why some alternate punishments for such offenders are provided for in section 308, PPC. In other words a conviction for an offence entailing the punishment of *Qisas* must precede a punishment under section 308, PPC and such conviction can only be recorded if proof in either of the forms mentioned in section 304, PPC is available before the trial court and not otherwise. The provisions of section 311, PPC provide another example in this context showing how in a case otherwise entailing a punishment of *Qisas* the offender may be handed down a punishment of *Ta'zir* and the said section also falls in Chapter XVI of the Pakistan Penal Code specifying an exception to the general provisions of section 302(a), PPC. It, thus, ought not to require much straining of mind to appreciate that the provisions of and the punishments provided in section 308, PPC are relevant only to cases of *Qisas* and that they have no relevance to cases of *Ta'zir* as in the latter category of cases a totally different legal regime of proofs and punishments is applicable.

6. I have not found Kh. Haris Ahmed, ASC to be justified in maintaining that section 306, PPC constitutes a distinct offence and the same entails different punishments under section 308, PPC and, therefore, in a case attracting the provisions of section 306, PPC there is hardly any relevance of sections 302 or 304, PPC. The general scheme of the Pakistan Penal Code shows that a section constituting a distinct offence specifies and contains the essential ingredients of such offence and thereafter either the same section or some following section prescribes the punishment for such offence. A bare look at section 306, PPC, however, shows that

no constituting ingredient of any offence is mentioned therein and the same only provides that the punishment of *Qisas* shall not be liable in cases of certain classes of murderers specified therein. According to my understanding that section provides an exception to the general provision regarding liability to the punishment of *Qisas* contained in section 302(a), PPC and for such an exceptional case a set of different concessional punishments is provided in section 308, PPC. A section dealing only with the issue of a punishment cannot be accepted as a section constituting a distinct offence nor can a section catering for a concession in the matter of a punishment be allowed to be treated as a provision altering the basis or foundation of a conviction. Any latitude or concession in the matter of punishments contemplated by the provisions of sections 306, 307 and 308, PPC and extended to certain special categories of offenders in cases of *Qisas* mentioned in such provisions ought not to be mistaken as turning those cases into cases of *Ta'zir* with the same latitude or concession in the punishments. This is the fine point of distinction which needs to be understood with clarity if the distinction between the provisions of section 302(b), PPC on the one hand and the provisions of sections 306, 307 and 308, PPC on the other is to be correctly grasped. The discussion about the relevant case-law to follow will highlight as to how blurring of vision regarding this fine distinction had in the past led to incorrect and confused interpretations and results.

7. The first category of the relevant precedent cases is that wherein all the convicts falling in different categories of persons mentioned in sections 306 and 307, PPC were held to be punishable only under section 308, PPC without even considering whether the cases in issue were cases of *Qisas* or of *Ta'zir*. As a matter of fact the first reported case dealing with sections 306, 307 and 308, PPC was itself the case which sowed the seeds of all the monumental confusion which was to follow and that was the case of *Khalil-uz-Zaman v. Supreme Appellate Court, Lahore and 4 others* (PLD 1994 SC 885) decided by a 2-member Bench of this Court. It

was a case of a person who had killed his wife and at the relevant time the couple had a living minor child. Using some strong expressions in the judgment this Court had castigated the learned court below for not appreciating that such a case did not attract the provisions of section 302, PPC and that the only provisions relevant to such a case were those of sections 306 and 308, PPC. The said judgment was, however, reviewed and reversed by a 5-member Bench of this Court later on in the case of *Faqir Ullah v. Khalil-uz-Zaman and others* (1999 SCMR 2203) and the conviction and sentence of the offender recorded by the trial court under section 302(b), PPC were restored. It was clearly held that the case was not a case of *Qisas* and, therefore, the punishment mentioned in section 308, PPC was not attracted or applicable to the case.

8. The case of *Muhammad Iqbal v. The State* (1999 SCMR 403) decided by a 3-member Bench of this Court was a case of a killer of his wife having a living minor child from the matrimony. It was held in that case that the case of such a convict attracted the provisions of section 308, PPC and for reaching that conclusion a reference was made to the case of *Khalil-uz-Zaman* (*supra*) the judgment wherein had been reviewed and reversed in case of *Faqir Ullah* (*supra*) by a 5-member Bench of this Court.

9. In the case of *Sarfraz* alias *Sappi and 2 others v. The State* (2000 SCMR 1758) a 3-member Bench of this Court had held that a convict of murder who was minor could be punished only under section 308, PPC but in that case also the judgment handed down earlier on by a 5-member Bench of this Court in the case of *Faqir Ullah* (*supra*) was not adverted to.

10. The next case in this category of the precedent cases was the case of *Naseer Ahmed v. The State* (PLD 2000 SC 813) decided by a 3-member Bench of this Court. In that case no discussion was made at all about the case being one of *Qisas* or of *Ta'zir* and it was held as a matter of course that the case of a minor convict of murder attracted the provisions of section 308, PPC. The earlier

judgment rendered by a 5-member Bench of this Court in the case of *Faqir Ullah* (*supra*) had, obviously, escaped notice.

11. The case next in line was that of *Dil Bagh Hussain v. The State* (2001 SCMR 232) decided by a 3-member Bench of this Court. That was the case of a person who had killed his son-in-law who was survived by the killer's daughter and her son who were wali of the deceased as well as of the killer. For holding that such a case attracted sections 306 and 308, PPC and not section 302, PPC this Court had relied upon the case of *Khalil-uz-Zaman* (*supra*) without even noticing that the judgment in the said case had already been reviewed and reversed by a 5-member Bench of this Court in the case of *Faqir Ullah* (*supra*).

12. The case to follow was that of *Muhammad Abdullah Khan v. The State* (2001 SCMR 1775) decided by a 3-member Bench of this Court and that case was also a case of a killer of his wife having a living minor child from the wedlock. In that case too applicability of sections 306 and 308, PPC to the case was taken for granted without any discussion while placing exclusive reliance upon the case of *Khalil-uz-Zaman* (*supra*) without having been apprised of the fact that the judgment in the said case had already been reviewed and reversed by a 5-member Bench of this Court in the case of *Faqir Ullah* (*supra*).

13. The next case was that of *Amanat Ali v. Nazim Ali and another* (2003 SCMR 608) decided by a 3-member Bench of this Court wherein no discussion was made regarding the case being one of *Qisas* or of *Ta'zir* and it was declared as a matter of course that the case of a minor convict of murder attracted the provisions of section 308, PPC and not those of section 302(b), PPC. Obviously, the judgment handed down by a 5-member Bench of this Court in the case of *Faqir Ullah* (*supra*) was not brought to the notice of the Court on that occasion.

14. The last of this category of cases was the case of *Muhammad Ilyas v. The State* (2008 SCMR 396) decided by a 3-member Bench of this Court. Alas, in that case too no discussion was made in respect of the case being one of *Qisas* or of *Ta'zir* and it was taken for granted and declared as a matter of course that the case of a murderer of his minor daughter attracted the provisions of section 308, PPC and not those of section 302(b), PPC. Once again, and unfortunately so, the judgment handed down by a 5-member Bench of this Court in the case of *Faqir Ullah* (*supra*) was not even adverted to or brought under consideration before reaching the decision that was reached.

15. The second category of the relevant precedent cases is that wherein it had categorically been concluded and held by this Court that the provisions of sections 306, 307 and 308, PPC are attracted only to cases of *Qisas* and that the said provisions have no relevance to a case of *Ta'zir*. The first case of this category of cases was the case of *Muddassar* alias *Jimmi v. The State* (1996 SCMR 3) wherein a 2-member Bench of this Court had observed as follows:

> "31. Ostensibly section 304, P.P.C. plays pivotal role in determining fate of persons found guilty for murder "Qatl-i-Amd" under section 302, P.P.C.:--
>
> (i) in cases where evidence as envisaged under section 304 P.P.C. is proved an accused shall be punished for offence under section 302, part (a) and sentenced to Qisas.
>
> (ii) In case where evidence as required under section 304, P.P.C. is brought on the record but sentence of Qisas cannot be applied because of bar imposed under section 306, P.P.C. It reads:--
> ---
>
> (iii) But where the evidence is available but does not fulfil the condition laid down under section 304, P.P.C. the person may be convicted and sentenced for Ta'zir under section 302, part (b) to death or imprisonment for life."

16. The case to follow was the case of *Faqir Ullah v. Khalil-uz-Zaman and others* (1999 SCMR 2203) mentioned above which case was decided by a 5-member Bench of this Court. Khalil-uz-Zaman convict in that case had killed his wife who was survived by a living minor child from the marriage and in the earlier round a 2-member

Bench of this Court had declared that the convict's sentence of death was not warranted because his case was covered by the provisions of section 308, PPC and had remanded the case to the High Court (PLD 1994 SC 885). Subsequently Faqir Ullah complainant's review petition was accepted by a 5-member Bench of this Court, the judgment in the case of Khalil-uz-Zaman was reviewed and reversed and the conviction and sentence of Khalil-uz-Zaman recorded by the trial court for an offence under section 302(b), PPC were restored. It was clearly held that the case was not a case of *Qisas* and, therefore, the punishment mentioned in section 308, PPC was not attracted or applicable to the case. It is of critical importance to mention here that the numerical strength of the said Bench of this Court was, and still remains to be, greater and larger than that of any other Bench of this Court deciding all the other cases falling in both the above mentioned categories of the precedent cases on the subject under consideration. I have already mentioned above that in none of the cases falling in the first category of cases referred to above this judgment rendered by a 5-member Bench of this Court had been referred to or discussed which fact had substantially impaired the probative, persuasive or precedent value of the judgments delivered in those cases.

17. The next case in this category of cases was the case of *Muhammad Afzal alias Seema v. The State* (1999 SCMR 2652) which had been decided by a 3-member Bench of this Court. In that case the convict of murder was a minor but after a discussion of the legal position it had been declared by this Court that the said case was not one of *Qisas*, sections 306 and 308, PPC did not stand attracted to a case of *Ta'zir* and, thus, the convict was liable to be convicted and sentenced under section 302(b), PPC.

18. Thereafter in the case of *Muhammad Saleem v. The State* (2001 SCMR 536) the plea of a convict of murder regarding reduction of his sentence of death on the ground of his minority and the case against him attracting the provisions of section 308,

PPC was rejected by a 3-member Bench of this Court by observing that

> "Moreover, even otherwise the said provisions would not apply as the penalty of death in this case has not been imposed as Qisas but has been awarded as Ta'zir."

19. The case to follow was that of *Umar Hayat v. Jahangir and another* (2002 SCMR 629) and the same had been decided by a 3-member Bench of this Court. In that case too the convict of murder was a minor and after discussing the provisions of section 306, PPC this Court had gone on to record his conviction and sentence under section 302(b), PPC because the case was one of *Ta'zir* and not that of *Qisas*.

20. The later case of *Muhammad Akram v. The State* (2003 SCMR 855) decided by a 3-member Bench of this Court was a case of a killer of his wife who was survived by living minor children from the matrimony. The issue at hand had received particular attention of this Court in that case and it had been observed in that regard as follows:

> "The next contention of the learned counsel for the petitioner related to the quantum of sentence. According to the learned counsel petitioner being Wali of the deceased would be entitled to the benefit of section 308, P.P.C., therefore, the conviction and sentence of the petitioner under section 302(b), P.P.C. was illegal. In the alternative, learned counsel argued that in any case the immediate cause of occurrence being not known, it would not be a case of extreme penalty. The first contention of the learned counsel relating to the application of section 308, P.P.C. by virtue of section 306, P.P.C. is without any substance, sections 306, 307 and 308, P.P.C. would only attract in the cases of Qatl-i-Amd which are liable to Qisas under section 302(a), P.P.C. and not in the cases in section 302 (b) and (c), P.P.C. For the purpose of removing the confusion and misconception of law on the subject the above provision must be understood in the true spirit. Section 306, P.P.C. provides that Qatl-i-Amd shall not be liable to Qisas in certain cases mentioned therein and thus it is clear that in such cases the punishment of Qisas will remain inoperative but there is no such exception in a case of Qatl-i-Amd punishable as Tazir. Under section 307, P.P.C. the sentence of Qisas for Qatl-i-Amd cannot be enforced in the cases referred therein and therefore, the exceptions mentioned in sections 306 and 307, P.P.C. are confined only to the cases liable to Qisas and not Tazir. Under section 308, P.P.C. it is provided that where an offender guilty of Qatl-i-Amd is not liable to Qisas in terms of section 306, P.P.C., the sentence of Qisas will not be enforced against him as provided under section 307, P.P.C., and he shall be liable to Diyat

> and may also be punished with imprisonment which may extend to a term of 14 years as Tazir. The above provision of law can be made applicable only if the essential conditions contained therein are available in a case which is liable to Qisas, and not in the cases of Qatl-i-Amd punishable as Tazir. The petitioner was tried for the charge of Qatl-i-Amd under section 302(b), P.P.C. and was convicted and sentenced to death as Tazir, therefore, he would not be entitled to the benefit of section 308, P.P.C. and was rightly punished under section 302(b), P.P.C. It is not permissible to extend the benefit of provisions of section 308, P.P.C. in the cases of Qatl-i-Amd which are punishable under section 302(b) and (c), P.P.C. as Tazir and therefore, the extension of such benefit to cases falling under section 302(a) and 302(c), P.P.C. would amount to grant the licence of killing innocent persons by their Walies."
>
> (*underlining has been supplied for emphasis*)

21. In the ensuing case of *Ghulam Murtaza v. The State* (2004 SCMR 4) the convict of murder was a minor and a 3-member Bench of this Court had not felt any hesitation in concluding that section 308, PPC was attracted only to a case of *Qisas* and not to a case of *Ta'zir*.

22. The subsequent case of *Nasir Mehmood and another v. The State* (2006 SCMR 204) was a case of a murderer of his wife who had been survived by living minor children from the wedlock. A 3-member Bench of this Court was pleased to hold that the said case was a case of *Ta'zir* and, therefore, the provisions of section 306, PPC had no application to such a case.

23. An elaborate discussion regarding the issue at hand was later on made by a 3-member Bench of this Court in the case of *Iftikhar-ul-Hassan v. Israr Bashir and another* (PLD 2007 SC 111) and an effort was made to remove any "ambiguity" or "misconception" in that respect. The case was of a convict of murder who was a minor and it had been concluded in no uncertain terms that sections 306, 307 and 308, PPC have no application in cases of *Ta'zir*. It was observed as follows:

> "6. The sole question for determination in the present appeal, relates to the scope of section 308, P.P.C. and for better appreciation of the proposition, we deem it proper to examine the relevant provisions in Chapter XVI of P.P.C., along with the definition of "Adult", "Qatl-e-Amd", "Qisas" and "Tazir" to

ascertain correct legal position regarding the application of sections 306 and 307, P.P.C. in respect of the punishment of Qisas and Tazir for Qatl-i-Amd under section 302, P.P.C.

> "299. (a) "Adult" means a person who has attained the age of eighteen years;
> ---
> (k) "Qisas" means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed Qatl-i-amd in exercise of the right of the victim or a Wali.
>
> (l) "Tazir" means punishment other than qisas, diyat, arsh or daman. "

Qatl-i-Amd has been defined in section 300, P.P.C. as under:-

> "300. 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."

The punishment of Qatl-i-Amd liable to qisas is provided in section 302(a), P.P.C. whereas Tazir under section 302(b) and (c), P.P.C. as under:--

> "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 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; 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."

7. In sections 306 and 307, P.P.C. certain exceptions have been created to deal with the cases in which Qatl-i-Amd is not liable to qisas or the punishment of qisas is not enforceable. In the cases falling within the purview of sections 306 and 307, P.P.C., the offender is liable to the punishment of diyat under section 308, P.P.C. and having regard to the facts and circumstances of the case, the Court may in addition to the punishment of diyat, also punish him with imprisonment of either description which may extend to 14 years as tazir. Sections 306 to 308, P.P.C. provide as under:--

> "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 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, howlowsoever; and

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

307. Cases in which qisas for Qatl-i-Amd shall not be enforced.-- qisas for Qatl-i-Amd shall not be enforced in the following cases, namely:--

(a) when the offender dies before the enforcement of qisas;

(b) when any wali voluntarily and without duress, to the satisfaction of the Court, waives the right of qisas under section 309 or compounds under section 310; and

(c) when the right of qisas devolves on the offender as a result of the death of the wali of the victim, or on the person who has no right of qisas against the offender.

308. Punishment in Qatl-i-Amd not liable to qisas, etc.--(1) where an offender guilty of Qatl-i-Amd is not liable to qisas under section 306 or the qisas is not enforceable under clauses (c) of section 307, he shall be liable to diyat:

Provided that, where the offender is minor or insane, diyat shall be payable either from his property or, by such person as may be determined by the Court:

Provided further that, where at the time of committing Qatl-i-Amd the offender being minor, had attained sufficient maturity or being insane, had a lucid interval, so as to be able to realize the consequences of his act, he may also be punished with imprisonment of either description for a term which may extend to fourteen years as Tazir:

Provided further that, where the qisas is not enforceable under clause (c) of section 307, the offender shall be liable to diyat only if there is any wali other than offender and if there is no wali other than the offender, he shall be punished with imprisonment of either description for a term which may extend to fourteen years as tazir.

(2) Notwithstanding anything contained in subsection (1), the Court, having regard to the facts and circumstances of the case in addition to the punishment of diyat, may punish the offender with imprisonment of either description for a term which may extend to fourteen years, as tazir."

Section 338-F, P.P.C. provides that in the matter of interpretation and application of provisions of The Chapter XVI, P.P.C. of the offences relating to the human body and qisas and diyat, the Court shall be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of Holy Prophet

(p.b.u.h.).

8. The punishment for Qatl-i-Amd as qisas in the command of Holy Qur'an is prescribed in section 302(a), P.P.C. whereas the sentence of death as tazir is provided under section 302(b) and combined study of the provisions of law referred above, would clearly show that section 308, P.P.C. has limited scope to the extent of cases falling within the ambit of section 306, P.P.C. and 307, P.P.C. in which either an offender of Qatl-i-Amd is not liable to qisas or the punishment of qisas is not enforceable under law. The punishment of qisas is different to the punishment of tazir and the two kinds of punishments cannot be mixed together for the purpose of sections 306 and 307, P.P.C. to attract the provisions of section 308, P.P.C. The punishment of death for Qatl-i-Amd liable to qisas as provided under section 302(a), P.P.C. can only be awarded if the evidence in terms of section 304, P.P.C. is available and in a case of Qatl-i-Amd in which such evidence is not available, the Court may, having regard to the facts and circumstances of the case, convict an offender of Qatl-i-Amd under section 302(b), P.P.C. and award him the sentence of death as tazir. In a case of Qatl-i-Amd in which the offender is liable to qisas but by virtue of prohibition contained in section 306, P.P.C. he cannot be awarded punishment of death under section 302(a), P.P.C. as qisas or the punishment of qisas is not enforceable under section 307(c), P.P.C. he shall be liable to the punishment of diyat under section 308, P.P.C. and may also be awarded the punishment of imprisonment as provided therein but in a case in which the offender is awarded punishment under section 302(b), P.P.C. as tazir, the provision of section 308, P.P.C. cannot be pressed into service for the purpose of punishment. Section 304, P.P.C. provides as under:--

> "304. 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 subsection (1) shall, mutatis mutandis, apply to hurt liable to qisas."

9. The ambiguity regarding the application of section 308, P.P.C. in all cases of Qatl-i-Amd in which the offender cannot be awarded the punishment under section 302(a), P.P.C. is removed in the light of above discussion as careful examination of the different provisions of law referred hereinbefore, would clearly show that in the cases in which the offender is not liable to qisas for the reasons given in section 306, P.P.C. or the punishment of qisas cannot be enforced under section A 307(c), P.P.C. section 308, P.P.C. is attracted but in the cases in which the punishment of death is awarded under section 302(b), P.P.C. as tazir this section is not applicable. The right of qisas means the right of causing similar hurt on the same part of body and in case of death, the offender will be done to death in the manner he committed death of his fellow person and thus the punishment of death as qisas provided under section 302(a), P.P.C. cannot be awarded unless the evidence in terms of section 304, P.P.C. is available and in a case of Qatl-i-Amd in which the punishment of qisas cannot be awarded, the Court may on proving charge

against the offender, having regard to the facts and circumstances of the case, award him the punishment of death or life imprisonment as tazir under section 302(b), P.P.C. In view of the above distinction, a minor offender of Qatl-i-Amd may in case of punishment of tazir, avail the benefit of minority in the matter of sentence under section 302(b), P.P.C. but cannot claim the benefit of section 308, P.P.C.

10. This Court in Sarfraz v. State, referred hereinbefore, has held that a minor accused who has committed an offence of Qatl-i-Amd under influence of others cannot be awarded sentence of death as qisas under section 302(a), P.P.C. This is settled law that provisions of sections 306 to 308, P.P.C. attract only in the cases of Qatl-i-Amd liable to qisas under section 302(a), P.P.C. and not in the cases in which sentence for Qatl-i-Amd has been awarded as tazir under section.302(b),P.P.C. The difference of punishment for Qatl-i-Amd as qisas and tazir provided under sections 302(a) and 302(b), P.P.C. respectively is that in a case of qisas, Court has no discretion in the matter of sentence whereas in case of tazir Court may award either of the sentence provided under section 302(b), P.P.C. and exercise of this discretion in the case of sentence of tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of Qatl-i-Amd, keeping in view the circumstances of the case, may award the offender the punishment of death or imprisonment of life by way of tazir. The proposition has also been discussed in Ghulam Murtaza v. State 2004 SCMR 4, Faqir Ullah v. Khalil-uz-Zaman 1999 SCMR 2203, Muhammad Akram v. State 2003 SCMR 855 and Abdus Salam v. State 2000 SCMR 338.

11. The careful examination of the provisions referred above, would clearly show that section 308, P.P.C. is attracted only in the cases liable to qisas in which by virtue of the provisions of sections 306 and 307, P.P.C., the punishment of qisas cannot be imposed or enforced and not in the cases in which punishment is awarded as tazir. In the light of law laid down by this Court in the judgments referred above, we are of the considered view that in the facts of the present case, section 308, P.P.C. is not attracted for the reasons firstly that respondent has not been able to bring on record any legal evidence to the satisfaction of the law that at the time of occurrence, he was minor and secondly, in absence of the evidence in terms of section 304, P.P.C. to bring the case within the ambit of section 302(a), P.P.C. for the purpose of punishment of qisas, the respondent was awarded sentence of death by the trial Court under section 302(b), P.P.C. as tazir. There is misconception of law that the provision of section 308, P.P.C. is also applicable in the cases in which punishment of death is awarded as tazir whereas the correct legal position is that this special provision is invokeable only in the cases in which either offender is not liable to qisas or qisas is not enforceable. This is against the spirit of law that in all cases of Qatl-i-Amd in which sentence of death is awarded either as qisas under section 302(a) or as tazir under section 302(b), P.P.C., an offender who at the time of committing the offence, was less than 18 years of age shall be liable to the punishment provided under section 308, P.P.C. rather the true concept is that section 308, P.P.C. will operate only in the cases which fall within the ambit of sections 306 and 307, P.P.C. in which either offender is not liable to qisas or Qisas is not enforceable."

(*underlining has been supplied for emphasis*)

24. Thereafter came the case of *Abdul Jabbar v. The State and others* (2007 SCMR 1496) wherein a 3-member Bench of this Court concluded in the following terms:

> "13. A bare look at the afore-referred provision of law would indicate that Qatl-i-Amd is punishable with death as Qisas if the proof in either of the forms specified in section 304, P.P.C. is available. In absence of such a proof a Qatl-i-Amd can be visited "with punishment of death or imprisonment for life as Ta'zir having regard to the facts and circumstances of the case under section 302(b), P.P.C." In the instant case as admittedly the evidence led did not satisfy the requirement of proof as required in section 304, P.P.C. the case fell within the ambit of section 302(b), P.P.C. and the respondents were liable to be 'punished with death or imprisonment for life as Ta'zir'."

25. The case to follow was that of *Tauqeer Ahmed Khan v. Zaheer Ahmad and others* (2009 SCMR 420) which was also decided by a 3-member Bench of this Court. It was again a case of a convict of murder who was a minor. Explaining "the true concept" it was held by this Court in categorical terms that the provisions of section 308, PPC are attracted only in cases of *Qisas* and not in cases of *Ta'zir*. It was observed as under:

> "10. A careful examination of the different provisions of law would show that section 308, P.P.C. is attracted only in the cases liable to "Qisas" in which by virtue of the provisions of sections 306 and 307, P.P.C., the punishment of "Qisas" cannot be imposed or enforced and not in the cases in which punishment is awarded as "Tazir". In the light of law laid down by this Court, we are of the view that in the facts of the present case, section 308, P.P.C. is not attracted as respondent has not been able to bring on record any legal evidence to the satisfaction of the law that at the time of occurrence, he was minor and liable to punish provided under section 308, P.P.C., rather the true concept is that section 308, P.P.C. will operate only in the cases which fall within the ambit of sections 306 and 307, P.P.C. in which either offender is not liable to "Qisas" is not enforceable."
>
> (*underlining has been supplied for emphasis*)

26. The next case of *Samiullah and others v. Jamil Ahmed and 2 others* (PLJ 2009 SC 243) was also a case of a convict of murder who was a minor. After some discussion of the legal issue a 3-member Bench of this Court concluded in that case that the provisions of section 308, PPC did not stand attracted to the case

because it was a case of *Ta'zir* and not a case of *Qisas*. The following observations were made:

> "19. The trial Court has convicted the appellant under Section 308 PPC. A minute study of the said section would show that it is attracted only in the cases liable to "*Qisas*" in which by virtue of provisions of Sections 306 & 307 PPC, the punishment of "*Qisas*" cannot be imposed or enforced and not in the cases in which punishment is awarded as "*Ta'zir*". Reference can be made in this context to the cases of *Ghulam Murtaza v. The State* (2004 SCMR 4) and *Iftikhar-ul-Hassan v. Israr Bashir* (PLD 2007 SC 111). Even otherwise, Section 304 PPC contemplated "proof of *Qatl-i-Amd*" liable to Qisas, which is reproduced as under:-
>
> > "304. 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 subsection (1) shall, *mutatis mutandis*, apply to hurt liable to qisas."
>
> 20. The facts of the instant case, when put to the test of "proof of Qatl-i-Amd liable to Qisas" as provided in the above referred provision of law, and the dictum laid down by this Court not fulfilling the required criteria for the purpose, neither the accused had made before the Court of competent jurisdiction a voluntary and true confession nor Article 17 of the "Qanun-e-Shahadat" Order, 1984, applied. The High Court has rightly observed that the appellant is not liable to conviction under Section 302(a) PPC, for want of application of Section 304 PPC."

27. The case of *Ahmad Nawaz and another v. The State* (2011 SCMR 593) happens to be the last reported case of the second category of the precedent cases on the subject. In that case too a 3-member Bench of this Court had unambiguously held that sections 306, 307 and 308, PPC have no application to cases of *Ta'zir* and while holding so reference had been made to the earlier judgments of this Court delivered in the cases of *Iftikhar-ul-Hassan, Ghulam Murtaza, Faqir Ullah, Muhammad Akram* and *Abdus Salam* (*supra*).

28. A survey of all the precedent cases available on the subject so far clearly shows that in the first category of cases mentioned above the provisions of section 308, PPC had been applied to the

cases of *Ta'zir* as well without seriously considering the apparent distinction between *Qisas* and *Ta'zir* cases and also that the declaration of law to the contrary made by a 5-member Bench of this Court in the case of *Faqir Ullah v. Khalil-uz-Zaman and others* (1999 SCMR 2203) was never adverted to in those cases. The survey further reveals that the 5-member Bench of this Court deciding the case of *Faqir Ullah* (*supra*) still remains to be the largest Bench of this Court deciding the legal question involved and, thus, on account of its numerical strength the judgment passed by that Bench still holds the field overshadowing, if not eclipsing, all the other judgments rendered on the subject by the other Benches of lesser numerical strength. Another highlight of the survey conducted above is that on a number of earlier occasions this Court had tried to remove the "confusion", "ambiguity" and "misconception" engulfing the legal issue under discussion but unfortunately uncertainty and misunderstanding in this regard still subsists and this is why we have now been called upon to pronounce upon the matter.

29. After hearing the learned counsel for the parties intently, examining all the relevant statutory provisions minutely and going through all the relevant precedent cases exhaustively I have found, as already observed above, that in view of the provisions of section 304, PPC a case is one of *Qisas* only if the accused person makes before a court competent to try the offence a voluntary and true confession of commission of the offence or the requisite number of witnesses are produced by the prosecution before the trial court and their competence to testify is established through *Tazkiya-tul-shahood* (scrutiny of the witness before trial of the accused person) as required by Article 17 of the Qanun-e-Shahadat Order, 1984. I also find that the cases not fulfilling the requirements of section 304, PPC are cases of *Ta'zir* and the provisions relating to *Qisas* have no relevance to the same. It is also evident to me that the cases covered by the provisions of sections 306 and 307, PPC are primarily cases of *Qisas* but because of certain considerations the punishment of *Qisas* is not liable or enforceable in those cases and

instead some alternate punishments for such offenders are provided for in section 308, PPC. I, thus, feel no hesitation in concluding that the provisions of and the punishments provided in section 308, PPC are relevant only to cases of *Qisas* and that they have no relevance to cases of *Ta'zir* and also that any latitude or concession in the matter of punishments contemplated by the provisions of sections 306, 307 and 308, PPC and extended to certain categories of offenders in *Qisas* cases mentioned in such provisions ought not to be mistaken as turning those cases into cases of *Ta'zir* with the same latitude or concession in the punishments. Upon a careful consideration of the legal issue at hand I endorse the legal position already declared by this Court in the second category of the precedent cases referred to above as on the basis of my own independent assessment and appreciation I have also reached the same conclusions as were reached in the said cases. I, therefore, declare that *Qisas* and *Ta'zir* are two distinct and separate legal regimes which are mutually exclusive and not overlapping and they are to be understood and applied as such. I expect that with this categorical declaration the controversy at hand shall conclusively be put to rest.

30. It needs to be mentioned here that the provisions of section 302(c), PPC have also remained problematic in the past and their interpretation has also not been free from controversy. The interpretation placed upon the said provisions by one Bench of this Court in the case of *Abdul Haq v. State* (PLD 1996 SC 1) was disagreed with by another Bench of this Court in the case of *Ali Muhammad v. Ali Muhammad and another* (PLD 1996 SC 274) and later on the interpretation advanced in the case of *Ali Muhammad* (*supra*) was followed by this Court in the cases of *Abdul Karim v. The State* (2007 SCMR 1375) and *Azmat Ullah v. The State* (2014 SCMR 1178). According to my understanding the provisions of section 302(c), PPC are relevant to those acts of murder which are committed in situations and circumstances which do not attract the sentence of *Qisas* and I further understand that sections 306 and 307, PPC are person specific whereas section 302(c), PPC

relates to certain situations and circumstances wherein a murder is committed and according to the Injunctions of Islam the punishment of *Qisas* is not applicable to such situations and circumstances. In the case of *Ali Muhammad* (*supra*) it had been declared by this Court that such situations and circumstances are the same which were contemplated by the Exceptions to the erstwhile section 300, PPC and I tend to agree with the said view. It had been observed by this Court in the case of *Ali Muhammad* that

> "28. ---------- It seems to me, therefore, that the class of cases to which clause (c) of section 302 applies is different from the cases enumerated in section 306 and punishable under section 308 and that clause (c) of section 302 is not limited to cases enumerated in section 306 and punishable under section 308."

Without dilating upon the scope and applicability of the provisions of section 302(c), PPC any further I leave the matter to be discussed in detail in some other appropriate case as while hearing the present matters this issue has cropped up only incidentally and I have not received adequate and proper assistance in the present proceedings so as to comfortably resolve the same. One thing may, however, be clarified here that section 302(c), PPC and section 338-F, PPC, both falling in Chapter XVI of the Pakistan Penal Code, speak of the Injunctions of Islam and it must never be lost sight of that by virtue of the provisions of Article 203G of the Constitution of the Islamic Republic of Pakistan, 1973 this Court, or even a High Court, has no jurisdiction to test repugnancy or contrariety of any existing law or legal provision to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah and such jurisdiction vests exclusively in the Federal Shariat Court and the Shariat Appellate Bench of this Court. It, thus, may not be permissible for this Court, in the context of the present set of cases, to compare two or more provisions falling in Chapter XVI of the Pakistan Penal Code for holding or declaring as to which provision is in accord with the Injunctions of Islam and which provision is not.

31. There are certain other issues relevant to cases of *Qisas* and *Ta'zir* and I take this opportunity to clarify the legal position in respect of such issues as well. The matter of compromise in cases of murder has also remained subject of some controversy before this Court in the past but the legal position in that respect has now been settled and I would like to restate the settled legal position so as to remove all doubts. Sections 309, 310 and 338-E, PPC and section 345, Cr.P.C. are relevant in this respect and the same are reproduced below:

> **309. Waiver –Afw of qisas in qatl-i-amd.-** (1) In the case of qatl-i-amd an adult sane wali may, at any time and without any compensation, waive his right of qisas:
>
> Provided that the right of qisas shall not be waived--
>
> (a) where the Government is the wali; or
>
> (b) where the right of qisas vests in a minor or insane.
>
> (2) Where a victim has more than one wali, any one of them may waive his right of qisas:
>
> Provided that the wali who does not waive the right of qisas shall be entitled to his share of diyat.
>
> (3) Where there are more than one victim, the waiver of the right of qisas by the wali of one victim shall not affect the right of qisas of the wali of the other victim.
>
> (4) Where there are more than one offenders, the waiver of the right of qisas against one offender shall not affect the right of qisas against the other offender.
>
> **310. Compounding of qisas (Sulh) in qatl-i-amd.-** (1) In the case of qatl-i-amd, an adult sane wali may, at any time on accepting badal-i-sulh, compound his right of qisas:
>
> Provided that a female shall not be given in marriage or otherwise in badal-i-sulh.
>
> (2) Where a wali is a minor or an insane, the wali of such minor or insane wali may compound the right of qisas on behalf of such minor or insane wali:
>
> Provided that the value of badal-i-sulh shall not be less than the value of diyat.
>
> (3) Where the Government is the wali, it may compound the right of qisas:
>
> Provided that the value of badal-i-sulh shall not be less than the value of diyat.

(4) Where the badal-i-sulh is not determined or is a property or a right the value of which cannot be determined in terms of money under Shariah the right of qisas shall be deemed to have been compounded and the offender shall be liable to diyat.

(5) Badal-i-sulh may be paid or given on demand or on a deferred date as may be agreed upon between the offender and the wali.

Explanation.- In this section badal-i-sulh means the mutually agreed compensation according to Shariah to be paid or given by the offender to a wali in cash or in kind or in the form of movable or immovable property.

338-E. Waiver or compounding of offences.- (1) Subject to the provisions of this Chapter and section 345 of the Code of Criminal Procedure, 1898, all the 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:

Provided further that where qatl-i-amd or any other offence under this Chapter has been committed as an honour crime, such offence shall not be waived or compounded without consent of the Court and subject to such conditions as the Court may deem fit having regard to the facts and circumstances of the case.

345. Compounding of offences.-(1) ----------

(2) The offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table:

Offences	Sections of the Pakistan Penal Code	Persons by whom offence may be compounded

	applicable	
Qatl-i-amd	302	By the heirs of the victims other than the accused or the convict if the offence has been committed by him in the name or on the pretext of *karo kari, siyah kari* or similar other customs or practices

This Court has already declared that section 309, PPC pertaining to waiver (*Afw*) and section 310, PPC pertaining to compounding (*Sulh*) in cases of murder are relevant only to cases of *Qisas* and not to cases of *Ta'zir* and a reference in this respect may be made to the cases of *Sh. Muhammad Aslam and another v. Shaukat Ali* alias *Shauka and others* (1997 SCMR 1307), *Niaz Ahmad v. The State* (PLD 2003 SC 635) and *Abdul Jabbar v. The State and others* (2007 SCMR 1496). In the said cases it had also been clarified by this Court that in cases of *Ta'zir* the matter of compromise between the parties is governed and regulated by the provisions of section 345(2), Cr.P.C. read with section 338-E, PPC. In the same cases it had further been explained and clarified by this Court that a partial compromise may be acceptable in cases of *Qisas* but a partial compromise is not acceptable in cases of *Ta'zir*. The cases of *Manzoor Hussain and 4 others v. The State* (1994 SCMR 1327), *Muhammad Saleem v. The State* (PLD 2003 SC 512), *Muhammad Arshad* alias *Pappu v. Additional Sessions Judge, Lahore and 3 others* (PLD 2003 SC 547), *Niaz Ahmad v. The State* (PLD 2003 SC 635), *Riaz Ahmad v. The State* (2003 SCMR 1067), *Bashir Ahmed v. The State and another* (2004 SCMR 236) and *Khan Muhammad v. The State* (2005 SCMR 599) also throw sufficient light on such aspects relating to the matter of compromise. It may be true that compounding of an offence falling in Chapter XVI of the Pakistan Penal Code is permissible under some conditions both in cases of *Qisas* as well as *Ta'zir* but at the same time it is equally true that such compounding is regulated by separate and distinct provisions and that such limited common ground between the two does not obliterate the clear distinction otherwise existing between the two separate legal regimes.

32. The provisions of section 311, PPC had also posed some difficulty in the past and had remained a subject of controversy before different courts of the country but that difficulty has now dissipated and the controversy now stands resolved by this Court. Section 311, PPC is reproduced below:

> **Section 311. 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* 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 as ta'zir:
>
> Provided that if the offence has been committed in the name or on the pretext of honour, the imprisonment shall not be less than ten years.
>
> **Explanation.-** For the purpose of this section, the expression *fasad-fil-arz* shall include the past conduct of the offender, or whether he has any previous convictions, or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community, or if the offence has been committed in the name or on the pretext of honour.

In the cases of *Manzoor Hussain and 4 others v. The State* (1994 SCMR 1327), *Khan Muhammad v. The State* (2005 SCMR 599), *Iftikhar-ul-Hassan v. Israr Bashir and another* (PLD 2007 SC 111) and *Iqrar Hussain and others v. The State and another* (2014 SCMR 1155) this Court has already declared that the provisions of section 311, PPC are relevant to and can be pressed into service in cases of *Qisas* only and not in cases of *Ta'zir*.

33. Having declared the correct legal position relevant to the cases of *Qisas* and *Ta'zir* I direct the office of this Court to fix the titled appeals and the connected petition for hearing before appropriate Benches of the Court for their decision on the basis of their respective merits in the light of the law declared through the present judgment.

(Asif Saeed Khan Khosa)
Judge

I have gone through the exhaustive judgment authored by my learned brother Mr. Justice Asif Saeed Khan Khosa. I, with utmost respect for my brother and his view and for the reasons recorded separately, don't tend to agree therewith.

(Ejaz Afzal Khan)
Judge

I have the privilege of going through the opinions rendered by my learned Brothers i.e. Hon'ble Mr. Justice Asif Saeed Khan Khosa and Hon'ble Mr. Justice Ejaz Afzal Khan. Though both are elaborate, but I respectfully agree with the opinion rendered by Hon'ble Mr. Justice Ejaz Afzal Khan.

(Ijaz Ahmed Chaudhry)
Judge

I agree with main judgment of my lord brother Mr. Justice Asif Saeed Khan Khosa but with my own additional reasons.

(Dost Muhammad Khan)
Judge

I agree with Hon'ble Justice Asif Saeed Khan Khosa. However, I have also added a separate note.

(Qazi Faez Isa)
Judge

JUDGMENT OF THE COURT

By a majority of three against two the opinion recorded by Asif Saeed Khan Khosa, J. is declared to be the judgment of the Court.

Judge

Judge

Judge

Judge

Judge

Announced in open Court at Islamabad on: 15.01.2015

Judge

Islamabad
15.01.2015
Approved for reporting.

Arif

EJAZ AFZAL KHAN, J.- I have gone through the detailed judgment authored by my brother Mr. Justice Asif Saeed Khan Khosa. Though the judgment is elaborate, almost exhaustive on many aspects of the subject but I don't tend to agree therewith because it appears to be against the letter and spirit of the relevant provisions of the PPC and their legislative scheme. My reasons in this behalf run as follows :-

2. The word "qisas" as defined in section 299(K) PPC means "punishment by causing similar hurt at same part of the body of the convict as he has caused to the victim or by causing his death if he has committed qatl-i-amd, in exercise of the right of the victim or a wali. According to Arabic English Lexicon compiled by Edward William Lane, the word qisas means "return of evil for evil". It also means retaliation". Another word, close in meaning to the word qisas is retribution which means a punishment inflicted in return for a wrong and thus distinctively stresses the operation of strict justice by administering merited punishment. The word "tazir" as defined in section 299(l) PPC means punishment other than qisas. But literally it means chastisement. Punishment of tazir is not prescribed by the Holy Quran and Sunnah. What punishment, in the circumstances of a case, was to be awarded, in the first instance lay with the discretion of the Court; with the passage of time exercise of such discretion was structured but at the

end of day discretion was replaced by the codified law. However, there are no two opinions on the point that punishment of tazir cannot be as stern and stringent as that of qisas.

3. Section 304 PPC sets out the mode for proof of qatl-i-amd liable to qisas. Section 302(a) provides punishment for qatl-i-amd liable to qisas. Section 302(b) provides punishment for qatl-i-amd liable to tazir when proof in either of the forms specified in section 304 PPC is not available. This is not the end, because it is not the form of proof alone which takes qatl-i-amd outside the pail of qisas. Section 302 (c) PPC deals with qatl-i-amd where according to the injunctions of Islam punishment of qisas is not applicable. There is another class of cases where qatl-i-amd shall not be liable to qisas in view of the circumstances mentioned in clauses (a), (b) and (c) of section 306 PPC. There is yet another class of cases where qisas shall not be enforceable in view of the circumstances mentioned in clauses (a), (b) and (c) of section 307 PPC.

4. Section 308 deals with punishments falling within the purview of section 306 and 307 (c) PPC. In case we subscribe to the view that provisions contained in section 306 and 308 PPC apply to the cases of qisas only, it is apt to give

rise to an anomaly. The anomaly is that if sentence in qatl-i-amd liable to qisas, despite stern and stringent forms of proof, can be lenient in view of the circumstances mentioned in section 306 and 308 PPC why can't it be lenient in view of the same circumstances in the case of tazir notwithstanding the forms of proof and sentence provided thereunder are comparatively less stern and stringent. At no stage, I say so with utmost respect, an effort was made to resolve this anomaly in the light of the relevant provisions of the statute.

5. Before appreciating the true import of section 306 PPC and legislative intent behind it, a look there at would be necessary and useful, which reads as under :-

*"**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 and 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 or grand child; how low-so-ever; and

c) when any wali of the victim is a direct descendant, how low-so-ever, of the offender."

This section when read in its correct perspective leaves little doubt that it is a continuation of section 302 PPC. Clauses

(a), (b) and (c) of this section like clauses (b) and (c) of section 302 PPC state the circumstances taking qatl-i-amd out of the pail of qisas. However, according to proviso to clause (a) of the section the offender shall not be exempted from qisas if he, with the intention to save himself from qisas, associates with himself in the commission of an offence a person not liable to qisas. Legislative intent behind the words used in clause (a), (b) and (c) of the section being clear and unambiguous, does not admit of any other interpretation. Restricting the application of this section to qisas only would, thus, amount to reading down the above mentioned clauses without any interpretative justification. Above all else what has been ignored is that qatl-i-amd committed by a minor or insane, father or grandfather of the child or by a direct descendent of the victim is not liable to qisas from day one. Circumstances stated in clause (a), (b) and (c) of the section being inherent in the offender and existent at the time of commission of the crime are independent of the forms of proof. Such case has to be dealt with independently without being linked with the forms of proof. It doesn't appeal to mind that qatl-i-amd committed by a minor or insane, father or grandfather of the child or by a direct descendent of the victim could be punished under section 308 PPC if it is proved to be one of qisas. This is what was ignored in the cases of

"Faqir Ullah. vs. Khalil-uz-Zaman and others" (1999 SCMR 2203), "Muhammad Afzal alias Seema. Vs. The State" (1999 SCMR 2652), "Muhammad Saleem. Vs. The State" (2001 SCMR 536), "Umar Hayat. Vs. Jahangir and another" (2002 SCMR 629), "Muhammad Akram. Vs. The State" (2003 SCMR 855), "Ghulam Murtaza. Vs. The State" (2004 SCMR 4), "Nasir Mehmood and another. Vs. The State" (2006 SCMR 204), "Iftikhar-ul-Hassan Vs. Israr Bashir and another" (PLD 2007 S.C. 111), "Abdul Jabbar. Vs. The State and others" (2007 SCMR 1496), "Taqueer Ahmed Khan. Vs. Zaheer Ahmed and others" (2009 SCMR 420), "Samiullah and others. Vs. Jamil Ahmed and 2 others" (PLJ 2009 SC 243), "Ahmed Nawaz and another. Vs. The State" (2011 SCMR 593) and other judgments endorsing the same view.

6. Section 307 PPC though also states the circumstances taking qatl-i-amd outside the pail of qisas, but they are not the ones existing at the time of commission of the crime. They, as a matter of fact, arise out of the events taking place subsequent thereto. A distinction thus has to be drawn between the circumstances stated in this section and those stated in the section preceding it. Qisas, in any event, shall not be enforced in the following cases :-

a) when the offender dies before the enforcement of qisas;

b) when any wali, voluntarily and without duress, to the satisfaction of the Court, waives the right of qisas under section 309 or compounds under section 310; and

c) when the right of qisas devolves on the offender as a result of the death of the wali of the victim, or on the person who has no right of qisas against the offender.

Right of qisas in view of clause (a) shall not be enforced if the offender dies before its enforcement. Such right if waived or compounded under clause (b) shall be dealt with under section 309(2) or 310(4) respectively. Such right if devolved on the offender as a result of death of the wali of the victim or on the person who has no such right against the offender under clause (c) may end up in payment of diyat or punishment under tazir or both in view of the provision contained in section 308 PPC.

7. Section 308 PPC, which is also a continuation of sections 302, 306 and 307 elaborately deals with the cases by providing that where an offender guilty of qatl-i-amd is not liable to qisas under section 306 PPC or qisas is not enforceable under clause (c) of section 307 PPC he shall be liable to diyat. In case the offender is minor or insane, such diyat, according to first proviso to sub-section (1), shall be payable from his property or by such person as may be

determined by the Court. But where the offender being a minor has attained sufficient maturity or being insane had a lucid interval so as to be able to realize the consequences of his act, he according to the second proviso to sub-section (1), may be punished with imprisonment of either description for a term which may extend to 14 years as tazir. Where qisas is not enforceable under clause (c) of section 307 PPC, the offender, according to third proviso to sub-section (1) shall be liable to diyat only if there is any wali other than the offender, and where there is no wali other than the offender, he shall be punished with imprisonment of either description which may extend to 14 years as tazir. The Court, according to subsection (2), having regard to the facts and circumstances of the case in addition to the punishment of diyat, may punish the offender with imprisonment of either description for a term which may extend to 25 years as tazir notwithstanding anything contained in sub-section (1) of section 308 PPC.

8. Even waiver and compounding have been restricted to the cases of qisas by reading section 309 and 310 PPC in isolation. Section 338-E, which indeed is a key provision in this behalf inasmuch as it determines the scope and amplitude of section 309 and 310 PPC has been ignored altogether. The result is that a piecemeal rather than holistic view of the relevant provisions contained in chapter XVI holds

the field. Verbatim reproduction of Section 338-E would not thus be out of place, which reads as under :-

> "***338-E. Waiver or compounding of offences.*** *(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 section 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 tazir to the offender according to the nature of 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;*
>
> *Provided further that where qatl-i-amd or any other offence under this Chapter has been committed as an honour crime, such offence shall not be waived or compounded without permission*

> *of the Court and subject to such conditions as the Court may deem fit having regard to the facts and circumstances of the case."*

9. The above quoted provision infallibly shows that all offences under chapter XVI can be waived or compounded and the provisions of section 309 and 310 PPC shall mutatis mutandis apply to the waiver or compounding of such offences. The words *"the provisions of section 309 and 310 PPC shall mutatis mutandis apply to the waiver or compounding of such offences"* used in the above quoted provision not only dilute their rigidity but also widen their scope and extent. Proviso to sub-section (1) of section 338-E which unequivocally provides that *"the Court in its discretion may, having regard to the circumstances of the case, acquit or award tazir to the offenders according to the nature of offence where it has been waived or compounded"*, leaves no doubt about the scheme of the law and legislative intent behind it. These provisions, thus, cannot be interpreted narrowly as has been done in the past in some of the judgments cited in the main judgment. Reference to section 345 of Cr.P.C., in the provision quoted above by no means restricts the application of section 306, 307 and 308 PPC to the cases of qisas only. Nor does it prevent a wali from waiving or compounding the offence of

qatl-i-amd. The relevant entry relating to qatl-i-amd also deserves a reference which reads as under :-

"(Qatl-I-amd)	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 *karo kari, siyah kari* or similar other customs or practices].
Qatl under ikrah-i-tam	303	-do-
Qatl-i-amd not liable to qisas.	308	-do- "

10. It, therefore, follows that the provisions contained in section 306 and 308 PPC also apply to the cases going outside the pail of qisas, with the same force and vigor. Any leniency in punishment available in the cases of qisas in view of the circumstances mentioned in section 306 and 308 of the PPC cannot be denied to a person guilty of qatl-i-amd liable to tazir. The interpretation placed on the provisions of Chapter No. XVI in the cases of **"Faqir Ullah. vs. Khalil-uz-Zaman and others"**, **"Muhammad Afzal alias Seema. Vs. The State"**, **"Muhammad Saleem. Vs. The State"**, **"Umar Hayat. Vs. Jahangir and another"**, **"Muhammad Akram. Vs. The State"**, **"Ghulam Murtaza. Vs. The State"**, **"Nasir Mehmood and another. Vs. The State"**, **"Iftikhar-ul-Hassan Vs. Israr Bashir and another"**, **"Abdul Jabbar. Vs. The State and others"**, **"Taqueer Ahmed Khan. Vs. Zaheer Ahmed and others"**, **"Samiullah and others. Vs. Jamil Ahmed and 2 others"** and **"Ahmed Nawaz**

and another. Vs. The State" (supra) does not appear to be in conformity with their letter and spirit, the more so when it leads to discrimination and even injustice, notwithstanding the nature of the crime committed is the same.

11. Ratio of the judgments rendered in the cases of **"Muhammad Iqbal. Vs. The State" (1999 SCMR 403)**, "**Sarfraz alias Sappi and 2 others. Vs. The State" (2000 SCMR 1758), "Naseer Ahmed. Vs. The State" (PLD 2000 SC 813), "Dil Bagh Hussain. Vs. The State" (2001 SCMR 232), "Muhammad Abdullah Khan. Vs. The State (2001 SCMR 1775), "Amanat Ali. Vs. Nazim Ali and another (2003 SCMR 608) and "Muhammad Ilyas. Vs. The State" (2008 SCMR 396)** appears to be correct though it has not been rationalized in the light of the relevant provisions of the PPC.

12. Judgment rendered by a five member bench of this Court in the case of **"Faqir Ullah. vs. Khalil-uz-Zaman and others" (supra)** appears to be binding on the subsequent benches of same or less number of Judges in view of the dicta laid down in the cases of **"The Province of East Pakistan. Vs. Dr. Azizul Islam (PLD 1963 SC 296), "Multiline Associates. Vs. Ardeshir Cowasjee and 2 others" (PLD 1995 SC 423), "Muhammad Afzal alias Seema. Vs. The State" (1999 SCMR 2652) and "Gulshan Ara. Vs. The State" (2010 SCMR 1162),** but since it is against the letter and spirit of the provisions of

chapter XVI of the PPC, it being per-incuriam does not have that binding force.

13. The sum total of what has been discussed above is that Section 306, 307 and 308 PPC are equally applicable to the cases going outside the pail of qisas.

Judge

Dost Muhammad Khan, J.— I have carefully gone through the original judgment drawn by my brother Mr. Justice Asif Saeed Khan Khosa, the earlier Larger Bench's decision and majority decision of the 3-Members Benches cited therein. In view of well settled principle of law, the same have a binding effect and any departure therefrom is thus, not permissible.

2. The provisions of Ss.299, 302, 304, 306, 307, 308, 311, 337-P, 338-E and 338-F PPC along with other provisions were added to the Pakistan Penal Code in light of the judgment of this Court (Appellate Shariat Bench), after the draft bill was routed through and approved by Islamic Ideology Council.

3. All these penal provisions, primarily have been based on the commandment of Almighty Allah given in different verses of the '*Holy Quran'* or the '*Sunnah'* of the Holy Prophet (Peace Be Upon Him). The same were enforced through an Ordinance, which was extended from time to time and finally it was made an Act of the Parliament (Act II, 1997) thus, it occupied a permanent seat in PPC as Chapter XVI.

4. To understand and to effectively resolve the prevalent controversy it has become essential to follow the

universally acknowledged and accepted principle with regard to the construction and interpretation of Statute. The power of judicial review to construe and interpret Statute is invested in the superior courts however, there are some restrictions and limitations and the Judges are to act within the parameters universally acknowledged and acted upon. In this process, the Judges may enter upon in construing and interpreting Statute if it does not convey a clear meaning and the intention of the law maker. Similarly, Judges would strive in search of the intent of the law maker in case a Statute is ambiguous or it conveys two different meanings and the Courts would give that meaning to a Statute which is more reasonable and further the purpose and object of the enactment intended by the Parliament.

In exercise of these powers, the primary and fundamental principle is that the Courts/Judges have to discover the true intention of the law maker. In case the Statute is plainly understandable and its meaning is conveniently conceivable then it cannot put a different meaning on a Statute nor it can stretch the same to cover those matters or to apply to the cases which are not covered by the same, either impliedly or expressly.

5. It is the duty of the Courts to undertake the exercise of construction and interpretation of Statute when it does not convey conceivable meaning or the intention of the law maker is not clearly flowing therefrom so to make it workable and beneficial one. Again, in the course of that, the Courts/Judges are supposed to give true meaning to the Statute keeping in view the objects of the enactment, the law maker wanted to achieve. Undoubtedly, the scope of this exercise is regulated by well settled principles and in no manner the Courts/Judges can enter into the field of legislation as that process falls within the province of the Legislature because of the constitutional command.

6. Of course, there is one exception to this rigid rule and that is when any Statute or enactment has encroached upon the fundamental rights of the citizens and comes inflict or clashing with those fundamental provisions of the Constitution, guaranteeing fundamental rights being inviolable in nature to make it in conformity with those fundamental rights.

7. I have the benefit of going through the original judgment drawn by my brother Mr. Justice Asif Saeed Khan Khosa, the judgment rendered by earlier larger Bench of five Judges in the case of *Faqir Ullah v. Khalil-uz-Zaman*

(1999 SCMR 2203) and the elaborate reasoning given in support of dissenting note of my brother Hon'ble Mr. Justice Ejaz Afzal Khan (J.).

8. With utmost respect to the view held by my brother (Mr. Justice Ejaz Afzal Khan, J.) putting a different construction on the relevant provisions of the Pakistan Penal Code referred to above is not in conformity with the fundamental principle relating to construction of Statute rather it amounts to legislation and an attempt has been made to extend the scope of these provisions of penal law to cover the cases expressly omitted to be covered by the same.

9. It is not the province of the Courts to supply the omissions or to repair the defect in the Statute because that role and authority is undeniably vested in the law makers. The maxim, *"A Causus Omissus"* can in no eventuality be supplied by a Court of law as that would amount to make laws. A Court is not entitled to read words into an Act of Parliament unless unavoidable circumstances provide a clear reason for acting in that manner. It is also not the domain of a Court to add to nor to take from, a Statute anything unless there are very strong grounds for holding that the Legislature intended something, which it

has failed to express however, in the course of such exercise no undue inference could be drawn to that effect. Similarly, a Court has no power to fill up any gap in any Statute as doing so would amount to usurp the function and to encroach upon the constitutional power of the Legislature, whether the omission is intentional or inadvertent is not the concern of the Court and a *"Causus Omissus"* cannot be supplied by a Court of law. It is better to leave the same for the wisdom of the Legislature and the Court has to point out the defect or omission in any Statute. It is not the function of the Court to repair the blunders found in any Statute enacted by the Parliament rather those must be corrected by the Legislature itself. There is no reported decision where Court has added words to a Statute to fill up apparent omissions or lacunas while exercising such jurisdiction.

Similarly, it is not for the Court to change the clear meaning of the Statue for the reason that it would cause hardship to the accused or would bring about inconvenient consequences. Such considerations are alien to the science of construction of Statute and even in this kind of Statute the meaning cannot be departed from by the Court on the ground of public policy because it is the exclusive business of the Legislature and not of the Judges to remedy the

defects in a particular Statute. The Court is neither supposed nor vested with powers to subvert the true meaning of a Statute by putting on it more liberal construction to cover the cases which were never intended by the Legislature.

10. It is also cardinal principle of law that Legislature cannot be attributed negligence to bring an evil because legislation is a delicate function and laws are enacted to suppress the evils and not to nurture the same. It is equally the duty of the Courts not to exonerate parties who plainly come within the scope of law enacted, on account of highly technical and forced construction because that would narrow down and exclude cases fairly falling within and covered by the Statute. Mere verbal nicety or forced construction is never to be resorted to in order to exonerate persons plainly coming within the scope of a Statute. True that Penal Statutes are to be strictly construed and in case of doubt in favour of the accused. In that case too, Courts are not authorized to interpret them in a manner to emasculate the same when they otherwise convey a clear and definite meaning. Adhering to the strict grammatical meanings of the words used in the Statute is a well settled principle of construction and has been emphasized time and again by the Superior Courts.

11. Keeping in view the above bedrock principle and cannons of interpretation of Statute, we have to see whether punishment by way of '*Ta'azir'* is expressly included in the provisions of S.306 where '*Qatl-i-Amd*' shall not be liable to *'Qisas'* in the category of cases enumerated in the provisions of Ss.306, 307 and 308 PPC and it can also be enforced as provided therein and whether same treatment is to be given in the case of Ss. 309 and 310 PPC read with S.345 Cr.P.C.

12. To further clarify the legal position, it is necessary to refer to the classification of crimes made by S.299, the definition clause and S.302 PPC. On combined reading of these two provisions in view of the new dispensation of justice, the crimes defined against the human body and the punishments provided therefor are as follows:-

> *"S.299: …….*
>
> *(k) "qisas' means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed 'qatl-i-amd' and in exercise of the right of victim or a 'Wali'.*
>
> *(l) "tazir" means punishment other than qisas, diyat, arsh or daman.*
>
> *(b) "arsh" means the compensation specified in this Chapter to be paid by the victim or his heirs;*

(d) "daman" means the compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to arsh;

(e) "diyat' means the compensation specified in section 323 payable to the heirs of the victim.

Similarly, the provision of section 302 PPC consists of three clauses, providing that, whoever, commits qatl-i-amd shall, subject to the provision 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 Injunction of Islam the punishment of qisas is not applicable.

A proviso was added to clause (c) by Act-I of 2005 on 10.1.2005.

13. The provisions of Ss.306, 307, 308, 309 and 310 in unequivocal and clear terms mention the punishment of "*Qisas"* leaving no room for *'Taizir'* punishment to be read or included therein by implication. Same is the position of Ss. 311 and 312. However, the most important one is clause (a) of sub-section (2) of section 313 where, in case, the deceased/victim has left behind no *'Wali',* then the Government shall have the right of *'Qisas'*.

In the cases of *'Qisas', 'Diyat', 'Arsh', 'Daman' and Badl-e-Sulah",* the victim or the "Wali" (legal heir of the deceased) has been placed on higher pedestal vis-à-vis the State because of the injunctions of Islam laid down by the *Holy Quran* and *Sunnah* of the Holy Prophet (Peace Be upon Him) while the State has been relegated to the secondary status. However, after going through the entire scheme of Chapter XVI of the PPC and the criminal justice system, provided under the Criminal Procedure Code, the State still holds the overall dominating position because no victim or *"Wali"* of deceased has a right to take *'Qisas'*, *'Diyat', 'Arsh', 'Daman' or 'Badl-e-Sulah'* without due process of law as such right would only accrue after the accused/offender is booked for such crimes, investigation is carried out by the Investigating Agency, inquiry and trial is conducted by the Courts and the accused is held guilty for the offence of *'Qisas', 'Diyat', 'Arsh', 'Daman' etc.*

14. Not only the Anglo-Saxon law but the Islamic Injunctions also acknowledge the supremacy of the State to prevent crimes or to investigate into the same through its agencies and try the offenders for the crimes through the established Courts.

After brief elaboration of the above legal position the only conclusion is that punishment by way of *'Ta'zir'* exclusively rests with the State because such crimes are considered crimes against the society at large, while in the other categories of cases beside being crimes against the society, the victim/Wali has been given a preferential status excluding the State. In this way there is a marked distinction between the punishments for the two categories of crimes, one relates to the realm of the State authority and the other is vested in individuals who are victims of such crimes or *Wali/*legal heirs of the person killed. In case of *Ta'zir,* if fine is imposed then it shall go to the government treasury, while in the case of *'Diyat'*, *'Arsh' and 'Daman',* it is payable to the individuals like the victim or the *'Wali'* (Legal heirs of the deceased).

15. While drawing such distinction between two types of crimes and entirely different kinds of punishment provided therefor, would lead us to a definite conclusion that the one exclude the other therefore, both cannot be read together or can be construed a substitute for the other, even in cases mentioned in the provisions of Ss.306, 307, 308, 309, 310 and 311 PPC. If the Legislature intended also to exonerate the accused from *'Ta'zir'* punishment, in such eventualities, it would have definitely

included *'Ta'zir'* punishment as well with *'Qisas'* which is not the case in hand. Rather it is expressly confined to cases falling under *"Qisas"*. Additionally, after being exonerated from *"Qisas"* punishment, the accused is still liable to punishment by way of *"Ta'zir"*.

16. In the case of *Niaz Ahmad v. Azizuddin and others* (PLD 1967 SC 466) this Court has held that the plain language of clause (b) of subsection (1) of section 45, Electoral College Act, 1964 do not seem to be consistent with such an interpretation. There was no reason for reading the words "marked" and "or written by the voter" disjunctively in this clause. These provisions relate to the lowest tier of democracy in the country. It was further held that the language used by the Legislature being different in the Act, from that employed in the corresponding provisions of the National and Provincial Assemblies (Elections) Act, 1964, the Referendum Act and the Presidential Election Act, this should, if any, justify a different interpretation rather than an identical construction.

Similarly, in the case of *Brig. (Rtd.) F.B. Ali v. The State* (PLD 1975 SC 506) it was held that language of a penal Statute is to be strictly construed and the question of carrying forward any "legal fiction" does not arise. In

another case, a declaratory judgment given by this Court, on a Reference made by the President of Pakistan (PLD 1957 SC 219), it was held that while interpreting Statute and provisions of Constitution, the following guidelines must be adhered to:-

(i) *Discover the intention of Legislature;*

(ii) *The whole enactment must be considered to find the intention;*

(iii) *Statute is not to be extended to meet a case for which a clear and distinct provision has already been made;*

(iv) *In case of a particular and general enactment in the same Statue, the particular enactment must be operative and general enactment applies to other part;*

(v) *Same principle applied to the interpretation of the Constitution as to the Statute, effect is to be given to the intention of the framer of the Constitution;*

(vi) *Effect must be given to every part and every word of the Constitution;*

(vii) *In the case of repugnancy between different provisions, the Court should harmonize them if possible (PLD 957 SC 219).*

Similarly, in the case of *Khizar Hayat v. Commissioner Sargodha Division* [PLD 1965 LHR 349 (F.B)] it was held that the Courts cannot extend a Statute or its meaning to meet a case for which a provision has 'clearly and undoubtedly' not been made and Court has no power to fill gaps in a Statute. Also in the case of *Chairman Evacuee*

Trust Property v. Muhammad Din (PLD 1956 SC 331) the well known maximum "Expresio Unius Est Exclusio Alterius" was pressed into service and adopted, which means expressed mention of one thing in a Statute implies the exclusion of another. Statute limiting a thing to be done in a particular form necessarily excludes the negative i.e. things shall not be done otherwise nor any thing should be read in it, which has not been mentioned therein expressly. Similarly, in the case of *E.A. Evans v. Muhammad Ashraf* (PLD 1964 SC 536) it was held that when there is expressed mention of certain things, then anything not mentioned is deemed to have been excluded. If doing of a particular thing is made lawful, doing something in conflict of that will be unlawful.

17. If the Legislature intended so then by express words it would have inserted a non obstante clause in the provision of Ss. 306 to 311 PPC to the effect that "notwithstanding any thing contained in section 299 and 302 PPC" and only in that case a different construction could be placed on these provisions and its scope could be widened to include *'Ta'zir'* punishment with *'Qisas'* and *'Diyat'* etc. but once the Legislature has omitted the same from the above provision of law then it stands excluded for all purposes and intents and by no stretch of imagination

Court is invested with powers to include in it and read in the said provision of law relating to cases/punishments of "*Ta'zir"* because that would amount to legislation bringing amendment in the law, which is the exclusive domain and authority of the Legislature

18. Similarly, the provision of 338-E and F cannot be pressed into service to enlarge the scope of the above provision of law to include therein *Ta'zir* cases and punishment therefor, because the former provision has not been given any overriding or superimposing effect over Ss. 299, 302, 306 to 311 PPC, therefore, the said provisions of law have no nexus with the question of putting a construction and interpretation on the cited provisions of PPC to the contrary nor *Ta'zir* cases and punishment could be read into it by implication when it has been expressly omitted therefrom.

19. For the above stated reasons and keeping in view the above cardinal principle with regard to construction and interpretation of Statutes and also keeping in view the Islamic Injunctions the cases of *Ta'zir* and the punishment provided therefor cannot be construed to be at par and to be read as integral part of the provisions in question, which is meant for cases exclusively for *Qisas,*

Diyat, Arsh and Daman etc. called the Islamic *Ta'zirat* and for the said reasons I am unable to subscribe to the dissenting view held by my brother Hon'ble Mr. Ejaz Afzal Khan, rather I would agree with the reasonings and view held, the conclusion drawn by my brother Hon'ble Mr. Justice Asif Saeed Khan Khosa (J.), who has written the main judgment.

20. There is another strong reason in support of the above view that once a five members larger Bench in the case of *Faqir Ullah* (supra) has held a similar view then, this Bench of equal strength has no authority to override or annul the same rather in view of the consistent practice and the principle of law laid down, the proper course was to have suggested to Hon'ble Chief Justice for constituting a larger Bench of more than five Judges. The above proposition is clearly laid down in the case of *The Province of East Pakistan v. Dr. Azizul Islam* (PLD 1963 SC 296), *The Province of East Pakistan and others v. Abdul Basher Cohwdhury and others* (PLD 1966 SC 854), *Multiline Associates v. Ardeshir Cowasjee and others*(PLD 1995 SC 423) and *Sidheswar Ganguly v. State of West Bengal* [1958 SC (India) 337]

21. After having the above view, at this stage, I deem it essential to point out to the Government to make suitable amendment in clause (b) of section 302 PPC omitting therefrom death sentence and only life imprisonment shall be awardable when for want of standard of proof as required u/s 304 PPC, the punishment of *Qisas* cannot be inflicted, then awarding death sentence is not desirable or justified because under the provision of section 314 PPC procedure of execution of *"Qisas'* punishment is almost one and the same and is executed by a functionary of a government by causing death of the convict as the Court may direct. The only addition made is that it shall be executed in the presence of the "*Wali"* of the deceased or their representative. However, when they fail to present themselves, then it shall be executed by the State functionaries. We should not ignore that till date, the execution of death sentence is carried out in the old fashion and style by hanging the offender on the gallows through his neck till he is dead and when no specific harsh method has been provided for execution of *'Qisas'* like beheading the offender by the State functionaries or the "*Wali"* then there is no difference between the execution of one or the other sentence therefore, the Government is well advised to bring suitable amendment in clause (b) of section 302 PPC

ordinarily providing punishment of life imprisonment unless the commission of the crime is attended by an element of terrorism, sectarian revenge or the murder is committed in a ruthless, cruel and brutal manner, which appear unconscionable and no mitigating circumstance is there to reduce the gravity of the crime in particular cases.

22. Similarly, once the punishment of Qisas cannot be enforced or the offender is not liable to punishment under Qisas in the cases enumerated in Ss.306 to 311 PPC then *Ta'zir* punishment shall also not be inflicted or it should be mild in nature and not like death or life imprisonment. The proper course is that the courts are vested with a discretion in this regard to award punishment by way of "*Ta'zir*" but not death sentence or life R.I. barring the above exceptions and also compensation to the "*Wali*" of deceased or victim of hurt crime.

The law point in all these appeals/petitions is thus, answered in the above terms.

(Justice Dost Muhammad Khan)

QAZI FAEZ ISA, J.- I have had the benefit of reading the judgments of my learned and distinguished colleagues. Justice Asif Saeed Khosa set out the sections from chapter XVI of the Pakistan Penal Code ("**PPC**") which needed examination, including the different interpretations made by this court on these provisions and systematically examined the same. With lucid precision he analyzed the same and drew certain conclusions and I am in respectful agreement with him.

2. My learned brother Justice Ejaz Afzal Khan, however, was of a different opinion that appears to be premised on an interpretation of *qisas*, with which with the greatest of respect I cannot bring myself to agree. I must, however, at the outset acknowledge my inadequacy to interpret Almighty Allah's commands with certainty and seek His protection and mercy for any mistake in my understanding. My distinguished colleague states that the word *qisas* means "return of evil for evil" and also "retaliation" or "retribution". However, Abdullah Yusuf Ali in his commentary on the 178th and 179th verses of *surah Al-Baqarah*, wherein the word *qisas* is mentioned writes:

> "Note first that this verse and the next make it clear that Islam has much mitigated the horrors of the pre-Islamic custom of retaliation. In order to meet the strict claims of justice, equality is prescribed, with a strong recommendation for mercy and forgiveness. To translate *qisas*, therefore, by retaliation, is I think incorrect. The Latin legal term Lex Talionis may come near it, but even that is modified here. In any case it is

> best to avoid technical terms for things that are very different. "Retaliation" in English has a wider meaning equivalent almost to returning evil for evil, and would more fitly apply to the blood-feuds of the Days of Ignorance."

Moreover, when we examine the said two verses (2:178 and 179) they do not mandate *stern and stringent punishments*, but seek to inculcate forgiveness and charity in hardened hearts. "This is a concession and Mercy from your Lord" (2:178) and "In the law of *qisas* there is (saving of) life to you, O ye men of understanding; that ye may restrain yourself (2:179)." In any case there is no need to translate or interpret the word *qisas* because we are only concerned with how it has been used in the PPC, i.e. a defined term (section 299 (k) of PPC); similarly, *tazir* is also required to be considered as used in section 299 (l) PPC.

3. My learned colleague also states that, "*there are no two opinions on the point that punishment of tazir cannot be as stern and stringent as that of qisas*", but the said statement is not referenced and I have also not been able to discover its source. I may however question whether a person who comes forth and makes a *voluntary and true confession* of murder (*qatl-i-amd*), thereby coming within the statutory definition of *qisas*, should be deserving of a greater punishment than the one whose crime is painstakingly established through other forms of evidence?

4. This Bench was assembled to consider whether sections 306 and 308 PPC are applicable to cases of *tazir*. Section

306 attends to three different categories of cases. The first category is, "when an offender is a minor or insane" (section 306 (a) PPC), i.e. the offender does not have full mental capacity on account of age or state of mind. Had this exception not been provided, then an offender who is a minor or insane would have to be sentenced to death under section 302 (a) which prescribes no other exception. The second category is, "when an offender causes the death of his child or grandchild, how lowsoever" (section 306 (b) PPC). And the third category is, "when any *wali* of the victim is a direct descendant, how lowsoever, of the offender" (section 306 (c) PPC). In the second and third categories "*qatl-i-amd* is not liable to *qisas*" therefore it has been made liable to *tazir*. However, if the offender is also not liable to *tazir* (as held by my learned brother Justice Ejaz Afzal Khan), then the offender would only "be liable to *diyat*" (in terms of sub-section (1) of section 308 PPC), which is monetary compensation (section 323 PPC), subject however to the stated exceptions (the second and third provisos to sub-section (1) of section 308 and sub-section (2) of section 308). In Muhammad Akram v. The State (2003 SCMR 855) this court had held that such an interpretation, "*would amount to grant the licence of killing innocent persons by their Walies*." Therefore, this is yet another reason for me to agree with the opinion of my learned brother Justice Asif Saeed Khosa.

JUDGE