

Athar Minallah, J.- A young university student, Mohammad Hayat, was deprived of his life in the most gruesome, brutal and shocking manner while he was in the custody of armed members of a paramilitary force. It was a case of extra judicial custodial killing of an innocent citizen. The cowardly act had taken place in the administrative district of Turbat, Balochistan. We had heard the appeal and it was partly allowed by a majority of two to one. The conviction of the appellant, Shadiullah, was unanimously upheld while the sentence was modified from death to imprisonment for life by a majority of two to one vide the short order of even date. I am, therefore, recording the reasons for my dissent and upholding the sentence of death which was confirmed by the High Court vide the impugned judgment dated 27.04.2023.

2. The appellant was appointed and he was serving as a member in the Frontier Corps, Balochistan (**'FC Balochistan'**). On the day when the brutal occurrence had taken place, he was on duty along with fifteen other members of the force. The deceased victim was a bright university student and visiting his parents. The appellant was one of the sixteen members of FC Balochistan who were travelling in two vehicles when an improvised explosive device was detonated near one of them. It was followed by another explosion. Some of the members traveling in the vehicles had sustained injuries as a result of the explosions. The parents of the deceased victim, Mirza (PW-2) and Mst. Noor Bibi (PW-10) were collecting dates from a date plantation near the place where the explosives were detonated. The twenty-eight years old victim had brought breakfast for his parents. According to the eye witness testimonies, two uniformed armed members of FC Balochistan entered the date plantation after the explosions and took the unarmed young victim in their custody. He was dragged by his hair to the place where the other armed members of the force were present. The young victim was not armed nor was he a threat to the members of the uniformed armed paramilitary force. The

appellant forced the helpless victim to lay on the ground with his face down and then fired on his back eight times, using the automatic firearm arm weapon and bullets issued to him exclusively for the purpose of discharging his duties. The parents had desperately pleaded for mercy but their cries fell on deaf ears and in their presence their young son was mercilessly shot by the appellant. The other armed members of the paramilitary force did not attempt to resist nor restrain the appellant. It appears that the police officials who had arrived at the crime scene after the explosions did not inquire regarding the identity of the perpetrator of this gruesome crime. This incident had taken place around 12 p.m. on 13.08.2020 and, pursuant to the complaint filed by Murad Muhammad (PW-1), Crime Report No.160/2020 dated 13.08.2020 was registered against an unidentified person at police station, city, Turbat for the commission of the alleged offence under section 302 of the Pakistan Penal Code, 1860 ('PPC'). The appellant was subsequently identified by the unit of FC Baluchistan where he was serving. The official weapon used in the commission of the crime was handed over to the in charge of the police station by an officer of the paramilitary force with the rank of a captain. The custody of the appellant was handed over to the in charge of the police station on 13.08.2020 by Havaladar Umar Khatab of FC Balochistan and the same day he was formally arrested in this case. Though the appellant was identified but the test identification parade was also held on 18.08.2020, supervised and conducted by Waseem Ahmed, Judicial Magistrate (PW-06). The father of the deceased victim, Mirza (PW-2), had identified the appellant during the test identification parade. The appellant had recorded his confessional statement under section 164 of the Code of Criminal Procedure, 1898 ('Cr.P.C.') and these proceedings were also supervised by Waseem Ahmed, Judicial Magistrate (PW-6). The eight crime empties collected from the crime-scene and the official weapon taken into possession were sent to the Forensic Science

Laboratory ('FSL') for forensic analysis. The latter, *vide* report dated 21.8.2020, had confirmed that the eight crime empties were fired from the official crime weapon which was handed over by the FC Balochistan to the in charge of the police station. The charge was framed on 05.01.2020 and the appellant retracted from his judicial confession because he did not plead guilty. During the trial, the prosecution had produced three witnesses to depose the ocular account i.e. Mirza (PW-2), Mst. Noor Bibi (PW-10) and Shakir Ali (PW-4) respectively. The medical evidence was brought on record by Dr. Noor Zaman (PW-5). The appellant did not opt to be examined under oath and, therefore, his statement under section 342 of the Cr. P.C. was recorded. The trial court, after conclusion of the proceedings had, *vide* the judgment dated 20.01.2021, convicted the appellant under section 302(b) of the PPC and he was sentenced to death. The trial court had further ordered payment of compensation of Rs.1,000,000/- (one million) to the legal heirs of the deceased under section 544-A of the Cr.P.C. and, in default thereof, to further suffer simple imprisonment for six years. The trial court sent a reference to the High Court for confirmation of the sentence of death in accordance with the mandate of section 374 of the Cr.P.C. The High Court, *vide* the impugned judgment dated 27.04.2023, maintained the conviction and the reference was answered in the affirmative, thereby confirming the sentence of death.

3. We have heard the private counsel engaged by the appellant i.e. Mr. Sher Afzal Marwat, ASC. The petition was fixed for hearing on 24.02.2025 but no one had appeared on behalf of the petitioner and, therefore, we had appointed Mr. Aftab Alam Yasir, learned ASC, at State expense to assist us on behalf of the appellant. On 12.06.2025 the matter was adjourned pursuant to the written request filed by Mr. Sher Afzal Marwat, ASC. Today, the latter as well as the counsel appointed at State expense were heard at great length. The counsel for the complainant, Mr.

Tahir Ali Baloch, ASC, had appeared from the Branch Registry of this Court at Quetta and he, along with the State-counsel, had also advanced their arguments. We had also carefully perused the record with the assistance of the counsels.

4. The manner in which the crime in this case was committed by a trained member of a disciplined and uniformed paramilitary force was undoubtedly inhuman, gruesome, shocking, brutal and cowardly. It was definitely outrageous to the public conscience and thus fell within the expression '*fasad-fil-arz*' defined under clause (ee) of section 299 of the PPC. An unarmed, helpless and innocent young university student was first taken into custody and then mercilessly killed in the presence of other armed members of the paramilitary force and the parents of the victim. The crime weapon and bullets used for this cowardly act were given to the appellant for performing official duties and not for pointing the barrel towards innocent citizens and that too while they are in custody. The FC Balochistan is led by serving officers seconded from the Pakistan Army and, therefore, the bar of responsibility on the part of its members and duty of care towards civilian citizens is much higher than any other paramilitary organization. The appellant must have been a highly trained member of the force. The crime report was registered against an unknown person. However, the FC Balochistan had not only identified the appellant as the person who had committed the crime, his custody, along with the official firearm weapon, was also handed over to the in charge of the police station. The identity of the perpetrator of the crime was further proved beyond reasonable doubt when the father of the deceased victim, who was an eyewitness, had identified the appellant during the test identification parade conducted by a judicial magistrate in accordance with the law. The identification of the appellant as the person who had committed the murder of the victim was established beyond reasonable doubt. He had reordered his confessional statement

under section 164 of the Cr.P.C before a judicial magistrate who had entered the witness box as (PW-6). The proceedings supervised and conducted by the judicial magistrate were reliable and trustworthy because they were held in accordance with the principles and law enunciated by this Court. The necessary safeguards and precautions had been properly observed. The judicial confession, having been made by the appellant voluntarily and out of his free will, is also not in doubt. Moreover, it was corroborated by confidence inspiring independent evidence which was brought on record by the prosecution. The eyewitness account deposed by three credible witnesses was consistent, trust worthy and confidence inspiring. It was supported by the medical evidence brought on record. The eight crime empties collected from the crime scene and sent to the FSL had matched the official crime weapon issued to the appellant. In his confessional statement, the appellant had explicitly acknowledged that the victim was shot while he was in the custody of the armed members of the paramilitary force. The reason offered for his violent and cowardly action was that he felt 'sad and angry' after some of the members of the paramilitary force had sustained injuries due to the explosions. This confessional statement was later retracted because the appellant did not plead guilty to the charge framed against him by the trial court. He had also denied his guilt while recording his statement under section 342 of the Cr.P.C. The confessional statement recorded under section 164, though retracted, was corroborated by independent trustworthy and reliable evidence. The guilt of the appellant was proved by the prosecution beyond a reasonable doubt and, therefore, the findings that had led to his conviction handed down by the trial court and upheld by the High Court were unexceptionable and, therefore, do not require interference. However, it was argued before us that the appellant had confessed his guilt and had explained that he was provoked by the injuries sustained by his

colleagues due to the two explosions. He took the plea that he had suspected the victim to have been involved in the terrorist attack on the official vehicles. The learned counsels have argued that the plea taken by the appellant in his confessional statement, recorded under section 164 of Cr.P.C, was a sufficient mitigating factor to show leniency and thus modify the sentence of death to imprisonment for life. As noted above, the appellant had retracted his confession and it clearly established that he had no remorse for his brutal action. The trial court has recorded reasons in its judgment for handing down the sentence of death. In the opinion of the trial court as well as the High Court the aggravated factors in this case warranted severe punishment. Moreover, the appellant had taken a special plea that his mind and senses were impaired because he was provoked by the injuries suffered by his colleagues. The questions for our consideration are; whether the discretion exercised by the trial court in handing down the sentence of death and, subsequently, its confirmation by the High Court was lawful and in accordance with law and whether the special plea taken by the appellant in his retracted judicial confession could be treated as a mitigating factor for awarding the lesser punishment of imprisonment for life. In order to answer these questions, it would be beneficial to make some preliminary determinations. The position and role of the appellant and the FC Balochistan and their relationship with the victim and the society are crucial factors for the determination of the quantum of sentence.

5. The FC Balochistan has been established under section 3 of the Frontier Corps Ordinance, 1959 (**Ordinance of 1959**). Section 2(a) defines 'active service' as meaning 'service against external aggressor or enemy or against hostile tribes, raiders or other hostile persons or persons cooperating with or assisting such aggressor, enemy tribes, raiders or hostile persons'. The expression 'custody' has been defined as meaning 'the arrest or confinement of a person according to the usages

of service' while Frontier Corps as meaning 'the corp or unit referred to in section 3 or any of the individual forces comprising it, as the context may require'. The expression 'member of the Frontier Corp' is defined in section 2(g) as meaning 'a person other than a person appointed under section 5 of the Ordinance of 1959 by the Federal Government'. Section 2(a) provides that the expressions 'assault, criminal force, fraudulently, murder, reason to believe and voluntarily causing hurt' have the meaning respectively assigned to them in the Pakistan Penal Code, 1860. Section 3 provides that there shall continue to be maintained by the Federal Government the Frontier Corps Force or units as listed in the First Schedule, primarily for the better protection and administration of the external frontiers of Pakistan within the limits of adjoining tribal areas of Pakistan. The Federal Government is empowered to make any addition or omission to or from the list in the First Schedule through a notification published in the official gazette. Section 5 empowers the Federal Government to appoint superior officers such as Inspector General, Deputy Inspector General and the Commandants or other officers. Section 6 empowers the Inspector General or the Commandants to appoint all subordinate officers and other members of the Frontier Corps in such manner and subject to such conditions as may be prescribed. The superintendence, command, control and administration of the Frontier Corps exclusively vest in the Federal Government as contemplated under section 7. Section 8 defines heinous offences while section 9 the less heinous offences. Section 15 exclusively provides that it shall be the duty of every member of the Frontier Corps to promptly obey and to execute all orders and warrants lawfully issued by a competent authority and to detect and bring offenders to justice or to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient grounds exist.

6. A cumulative reading of the provisions of the Ordinance of 1959 shows that the Frontier Corps, Balochistan has been established primarily for the better protection and administration of the external frontiers of Pakistan. The purpose of its existence is to protect the citizens against external aggressions, enemies, hostile entities and persons or those who cooperate with them. The superintendence, command and control exclusively vest in the Federal Government, which is also empowered to appoint the superior officers such as the Inspector General etc. The senior officers are seconded serving officers of the Pakistan Army. The FC Balochistan, therefore, is a paramilitary law enforcement disciplined force and its exclusive duty and obligation is to protect the citizens from the mischief of external aggressors and enemies. It has the onerous task to protect Pakistan, particularly the people of Baluchistan, from external aggression and hostilities by the enemy or other people. It has been established solely to serve the people and protect them from harm. The officers and members are provided weapons and ammunition for the exclusive use to protect the people and to serve them in their best interest. As a uniformed disciplined force, each officer and member of the FC Baluchistan is presumed to be highly trained and that each would demonstrably display high standards of professionalism and exemplary conduct at all times while dealing with the civilian population for whose benefit they have been entrusted with onerous duties and obligations. The officers and members owe a duty of care to each citizen because they enjoy a position of authority and trust. They, therefore, owe a fiduciary duty and obligation to the people for whose benefit the paramilitary force has been established. It is their duty to act in the best interest of the people and in utmost good faith. This duty is the foundational principle that underlies the relationship between a citizen and each officer and member of the FC Baluchistan. They enjoy a relationship of trust and, while dealing with a citizen, the officers and members are required to

exercise high standards of care and judgment. The breach of this duty has profound consequences for the people, society and the FC Baluchistan itself. The nature of their relationship with the citizens and the onerous duty owed to them definitely attracts the highest standard of accountability when it is breached. The appellant, as a member of FC Baluchistan, therefore, was presumed to have been adequately trained and could only have acted in the best interest of the deceased victim. The official automatic firearm weapon given to him was meant for its exclusively use to protect the people, including the victim, against external aggressors and enemies.

7. The learned counsel for the appellant has argued at length regarding the jurisdiction of the Sessions Court to try the appellant for an offence committed under section 302 (b) of the PPC. His argument that the appellant could only have been tried by a military court under the Pakistan Army Act 1952 ('**Army Act**') is misconceived. The appellant was governed under the Ordinance of 1959. He was identified by the FC Balochistan as the person who had committed the offence and, pursuant thereto, his custody was also handed over to the in charge of the police station. The Army Act was neither attracted in this case nor was the court which had handed down the conviction and sentence of death bereft of jurisdiction. The appellant was a member of FC Balochistan and he was governed under the Ordinance of 1959 and not the Army Act. He had allegedly taken the life of an innocent young student while he was in custody. The manner of commission of the crime was brutal, shocking and outrageous to the public conscience. The Session Judge, Mekran at Turbat was competent and vested with jurisdiction to try the appellant in this case for the commission of the offence. The unprovoked and cowardly act of the appellant and the manner in which he had committed the offence caused grave harm to the victim, his loved ones, the society as a whole and the FC Balochistan. The transparency, fairness and

impartiality of the trial was of utmost importance and it could only have been ensured through open proceedings before the Sessions Court. The FC Balochistan had rightly handed over the custody of the appellant so that he could be tried by a competent court in accordance with the law. It is not in the public interest nor the security of Pakistan to refer trials to military courts in which the rights of civilian citizens and interests of the society are involved. The scheme of the Constitution unambiguously contemplates shielding of the armed forces from being exposed to any controversy involving the civilians. The Constitution has expressly restricted the role and functions of the armed forces under Article 245 of the Constitution to defend Pakistan against external aggression or threat of war and, subject to law, to act in aid of civil power when called upon to do so. The trust of the people in the paramilitary forces, particularly when they are commanded by serving officers of the armed forces, is crucial for the discharge of the duties entrusted to them under the law and the Constitution. In this case, a young university student was a victim of extra judicial custodial killing by a member of a paramilitary force commanded by serving officers of the Pakistan Army. As already noted, the appellant and FC Baluchistan are governed under a special statute, the Ordinance of 1959 and, thus, the court of Sessions Judge was competently vested with jurisdiction for conducting the trial of the appellant. In the facts and circumstances of this case, trial before a military court would have been against the public interest, illegal and unconstitutional.

8. It is obvious from the above discussion that the appellant was holding a position of authority and trust. He owed a duty of care towards the deceased victim and his brutal, shocking and cowardly act and the manner in which the offence was committed had profound consequences not only for the victim and his loved ones but also for the society. It definitely had consequences for maintaining the trust of the people in the

FC Balochistan. The appellant was charged with the commission of the offence under section 302(b) of the PPC which prescribes two alternate punishments; death or imprisonment for life. The learned counsels for the appellant have argued that the plea taken by the latter while recording his judicial confession did not justify the imposition of the harsher sentence of death. The question which is required to be answered is how the discretion to choose one of the prescribed punishments ought to be exercised by a trial court. There is no definite or mathematical formula which could be applied by a trial court in choosing one of the prescribed legal punishments. The legislature has left it to the discretion of a court to choose one of these prescribed punishments. The fundamental statutory guideline has been set out by the legislature in section 302(b) by the expression "having regard to the facts and circumstances of the case". The court can impose one of the prescribed legal punishments and, therefore, the exercise of discretion has been circumscribed to the expression 'having regard to the facts and circumstances of the case'. It is noted that the stage to consider the sentence follows the finding of guilt by a trial court upon conclusion of trial. If the trial court has found the accused guilty then he/she is convicted for the offence charged. In case the legislature has prescribed more than one punishment for the offence, then the trial court has to decide which one of them is to be imposed. This process requires application of mind and taking into consideration multiple factors. It is noted that the trial court has no jurisdiction to hand down a sentence other than death for commission of the offence under 302(a) because that is the only prescribed punishment. However, in the case of section 302(b) two legal punishments have been prescribed. In some jurisdictions statutory guidelines have been prescribed for each offence and forums have also been established to set out sentencing guidelines. The process of sentencing and its determination is distinct and it is as important as

handing down a conviction. It requires proper application of mind, having regard to the facts and circumstances of the case. Many factors have to be taken into consideration. In the absence of statutory prescribed guidelines, the superior courts, particularly this Court, has enunciated principles. In the recent past, two provincial legislatures i.e. the Punjab and the Khyber Pakhtunkhwa Assemblies have enacted legislation setting out statutory sentencing guidelines, The Punjab Sentencing Act 2019 and the Khyber Pakhtunkhwa Sentencing Act 2021 respectively. It would be beneficial to examine the precedent law enunciated regarding the principles and guidelines in the context of exercising discretion while handing down one of the prescribed legal sentences under section 302(b) of the PPC.

9. In Khurram Malik's case¹, the nature of the crime and the manner in which it was committed was held to be brutal and desperate. The convict had, after the commission of the crime, displayed inhuman conduct by dismembering the dead body into several pieces and throwing them at different places. This Court had observed that justice was not for one but it is for all and while examining the facts and circumstances of a case the court also owed a duty to the legal heirs/relatives of the convict and the society to ensure that justice is seen to be done to all the stakeholders. It was emphasized that the sentence must serve as deterrence for likeminded persons. A larger Bench of this Court in Abdul Malik's case² has held that the question of sentence is primarily a matter of judicial discretion which is to be exercised in the first instance by the trial court. The court of appeal was empowered to enhance the sentence if the same is found to be inadequate or not in accordance with the judicial principles laid down by superior courts in this regard. The

¹ *Khurram Malik and others v. The State and others* (PLD 2006 SC 354)

² *Abdul Malik and others v. The State and others* (PLD 2006 SC 365)

principle earlier enunciated in the case of Zarin³ was reiterated and it was held that the sentence would essentially depend on the circumstances of a particular case and that it would be undesirable to lay down a principle of general application. It was further held that cases entailing capital charge are to be decided with utmost care. It was emphasized that when the law vests discretion in courts to award a sentence of death or imprisonment for life, it casts a heavy duty on them to balance various considerations which underlie these sentencing provisions. The circumstances surrounding the offence, the question of *mens rea*, the principle of proportionality of sentence, the gravity of the offence charged, the consideration of prevention or of deterrence and of rehabilitation were some of the factors highlighted by this Court which ought to be kept in consideration while handing down a sentence. In Muhammad Sharif's case⁴, it was observed that inhibition or hesitance to award the punishment of death by a trial court was not a proper exercise of discretion. It was explained that though courts must have regard to the sanctity of human life and liberty but the law had taken care of this aspect by setting out the essential precautions and safeguards to ensure that an accused is not deprived of life and liberty except when it becomes necessary and justified in the facts and circumstances of the case. The principles enunciated under the law of evidence, placing the onus on the prosecution, conceding to the accused the liberty of a privileged lawyer, and above all the golden rule of extending the benefit of doubt in favour of the accused are safeguards aimed at protecting human life against false implication and underserved punishment. The failures of the legal system can be remedied by the executive by undoing the mischief by exercising executive powers. The primary object of punishment is to prevent repetition of violent crimes by

³ Zarin v. The State (1976 SCMR 359)

⁴ Rajasab Khan and others v. The State (PLD 1976 SC 452)

means of awarding punishments that would create deterrence. It was, therefore, observed that the tendency of the trial courts to avoid awarding the death penalty or unjustified commutation of the sentence by the High Courts and frequent and liberal remissions of sentences, both earned and conferred, are factors which erode the impact of deterrence and thus indirectly contributes to encouraging the commission of heinous crimes. In Bakhshish Elahi's case⁵, it was observed that the legislature has conferred wide discretion on the courts in the matter of imposing a sentence and that the courts must not avoid imposing severe sentences by exercising discretion judiciously and taking into consideration the increase of crime in the society and the deteriorating law and order. The Court was, therefore, emphasizing the factor of deterrence. In Jetharam's case⁶, this Court had enhanced the sentence of the convict from imprisonment for life to death because the latter had taken the life of an unarmed and helpless woman who was in the sanctuary of her own house. In Muhammad Sharif's case⁷, it was held that a court was required to do justice keeping in view each and every aspect strictly in accordance with law and that the alternatives could not be molded to favour the guilty. It was observed that no mercy could be shown to those convicts against whom it is proved that they had acted mercilessly. In the case of Noor Muhammad⁸, this Court had declined to interfere with the sentence of death because in the facts and circumstances of that case aggravated factors justified handing down the most severe sentence. In that case two innocent girls were murdered in the most brutal and gruesome manner. This Court had observed that people were losing faith in the courts for the reason that either convicts are acquitted on technical grounds or a lenient view is taken while awarding one of the prescribed

⁵ *Bakhshish Elahi v. The State* (1977 SCMR 389)

⁶ *Jetharam v. Weram and others* (1986 SCMR 1056)

⁷ *Muhammad Sharif and others v. The State* (1991 SCMR 1622)

⁸ *Noor Muhammad v. The State* (1999 SCMR 2722)

sentences. It was further observed that the courts owe a duty to the legal heirs and loved ones of the victim and also to the society and, therefore, while awarding a sentence the factor of deterrence must be taken into consideration. In the case of Muhammad Afzal⁹, it was observed that even in cases where motive is not established but the offence is of a heinous nature then the accused may not be entitled to any leniency while awarding the punishment. It was emphasized that the question would depend upon the circumstances of each case. The principles enunciated in the above cases were affirmed in Ms. Najiba's case¹⁰ and it was held that once the prosecution had proved its case beyond a reasonable doubt then it becomes a duty of the court to impose deterrent punishment so as to make evil doers an example. The sentence should be such that would serve as a warning to likeminded people. It was further held that when an appropriate sentence is not imposed, keeping in view the facts and circumstances of the case, then it may amount to a gross miscarriage of justice. It was noted by this Court with great concern that when people fail to get justice from the courts of law then they resort to taking the law in their own hands to settle their matters on their own. It was emphasized that the courts must hold the scale of justice in favour of all the parties while adjudicating between them. In cases where the court forms an opinion that mitigating and extenuating circumstances warrant lesser punishment then, while awarding lesser punishment, reasons justifying the same ought to be recorded by the trial court. The court, while accepting the appeals, had altered the sentence of life imprisonment to death because in the facts and circumstances of that particular case the prosecution had proved the guilt beyond reasonable doubt and the crime had led to the brutal and gruesome premeditated murder of three human victims followed by burying their bodies in the

⁹ *Muhammad Afzal v. Ghulam Mustafa and others* (PLD 2000 SC 12)

¹⁰ *Ms. Najiba and another v. Ahmed Sultan alias Sattar and others* (2001 SCMR 988)

houses where they had been killed. In Dadullah's case¹¹, this Court has highlighted the fundamental concept of punishment. It was held that the sentence is awarded keeping in view the concept of retribution, deterrence or reformation. The purpose was twofold i.e. to create such an atmosphere which would serve as deterrence for the people who show an inclination towards crime and to work as a medium in reforming the offender. Deterrent punishment is not only to maintain a balance between the gravity of wrong done by a person but also to make the offender an example for others as a preventive measure for reformation of the society. In the case of heinous crimes committed with premeditation and in a gruesome manner no leniency ought to be shown to the culprits. This Court has further observed that a sentence of death would create a deterrence in the society due to which no other person would dare to commit the offence of murder. If in a case the prosecution has proven guilt then taking a lenient view would amount to jeopardizing the peace, tranquility and harmony of the society, thus opening doors to vandalism. The courts were advised not to hesitate in awarding the maximum punishment in cases of heinous and brutal crimes where the involvement of the accused has been proven beyond any shadow of doubt. Deterrence was recognized as one of the crucial factors to be taken into consideration while awarding a sentence, especially the sentence of death. The Court has further observed that a very wide discretion in the matter of sentencing has been vested in courts which must be exercised judiciously. In case where the court decides to award the sentence of imprisonment for life instead of death, then reasons must be recorded. The punishment must commensurate with the proportion of the crime. It was emphasized that courts could not sacrifice the factor of deterrence and retribution in the name of mercy and expediency. In Muhammad

¹¹ *Dadullah and another v. The State* (2015 SCMR 856)

Aslam's case ¹² , this Court while exercising Shariat Appellate Jurisdiction, has observed that the quantum of sentence has to be determined by the trial court or the appellate court, as the case may be, in consideration of; (a) the nature of offence, (b) the circumstances in which the offence was committed, (c) the gravity and degree of deliberation shown by the offender and such other factors which may appear from appraisal of the evidence. In the case before the Bench of this Court the victim was a minor child, around 12 years old, and she had been subjected to one of the most heinous crimes merely to fulfill sexual lust. In the facts and circumstances of that case it was held that the convict did not deserve any leniency in the matter of sentence. It was emphasized that the purpose of sentence is prevention of crime and to discourage others. It was further observed that leniency in the matter of imposing a sentence in case of heinous offences was against the object and wisdom of law and frustrates the rationale of deterrence which is aimed at eliminating crime or at least to reduce or discourage it in the interest of peace and harmony in the society. The ultimate purpose of deterrence or taking a lenient view in matters of imposing sentences is relatable to reformation of an individual as well as of society. A larger Bench of this Court in the judgment rendered in Dilawar Hussain's case¹³ had observed and held that clause (b) of section 302 of the PPC empowers the court to give either the death penalty or imprisonment for life in appropriate cases. It was held that the discretion to hand down the death penalty was without doubt within the discretion of the court and that it may be imposed without hesitation if the circumstances of the case permit it to do so e.g. the victim having been done away with in a cold-blooded, ghastly and brutal manner or when a victim is roasted alive, etc. It has been emphasized, however, that the court must exercise

¹² *Muhammad Aslam v. The State* (PLD 2006 SC 465)

¹³ *Dilawar Hussain v. The State* (2013 SCMR 1582)

its discretion very carefully and cautiously and must not ignore the gravity of the offence committed by the accused. In Hassan's case¹⁴, this Court interpreted sub section 5 of section 367 of the Cr.P.C. and it has been held that the said provision of law does not indicate the sentence of death being a normal sentence in the context of section 302(b) of the PPC. It has been held that the punishment prescribed by the legislature provides for two alternate sentences i.e. sentence of death or sentence of imprisonment for life and that it does not state that one of these sentences is to be treated as a normal sentence. Section 302(b) of the PPC itself provides that one of the two alternative sentences prescribed therein is to be imposed having regard to the facts and circumstances of the case. What is required under sub-section 5 of section 367 of the Cr.P.C. is that such facts and circumstances of a case which warrant imposition of a sentence other than death, ought to be mentioned by the trial court in its judgment. In Zafar's case¹⁵ this Court had observed that the courts, while exercising discretion regarding handing down the sentence, must also consider the principle of proportionality. It was observed that there must be at least some semblance of proportion between the injury or insult and the reaction thereto. The factor of time lapse between the provocative act and the violent reaction would also be a relevant factor to consider. The principle of proportionality as a factor in the context of determining the quantum of sentence was reiterated in the cases of Muhammad Ilyas¹⁶ and Asad Mahmood¹⁷.

10. There is also another crucial aspect in the context of this case which must be taken into consideration while determining what sentence is to be imposed having regard to the facts and circumstances of the case. The status of the accused becomes relevant, particularly when he/she

¹⁴ *Hassan and others v. The State and others* (PLD 2013 SC 793)

¹⁵ *Zafar and another v. The State* (1999 SCMR 2028)

¹⁶ *Muhammad Ilyas and another v. Muhammad Sufian and another* (PLD 2001 SC 465)

¹⁷ *Asad Mahmood v. Akhlaq and another* (2010 SCMR 868)

holds a position of authority and trust. When a law enforcement officer appointed by the State is involved in a crime in breach of duty then it profoundly aggravates the crime. This aggravating factor would attract harsher punishment. In *Suo Moto Case No.10/2011 in the matter of 'brutal killing of a young man by Rangers'*¹⁸ while considering the murder of a citizen who was in the custody of a law enforcement agency i.e. the Sindh Rangers, this Court had declared the act to be an act of barbarism. It was further observed that even if there was an allegation against the citizen relating to the commission of an offence and he had been overpowered or was in custody then it was the duty and obligation of the law enforcement agency to hand over such a person to the police so that the matter could be dealt with in accordance with the law. It was held that no law enforcement agency had the authority to open fire under section 5(2)(i) of the Anti-Terrorism Act, 1997 (**'Act of 1997'**). This Court had held that it was an obligation imposed on the State under the Constitution to provide protection and safety to the lives of the citizens and any act contrary to such duty was a negation of the fundamental rights guaranteed under article 9 of the Constitution. In the case before this Court, it was held that it was a classic example of highhandedness of the law enforcing agency and that the matter appeared to attract section 7 of the Act of 1997. The accused in this case were later tried by an Anti-Terrorism Court and they were sentenced to death not only under section 302(b) of the PPC but section 7(a) of the Act of 1997 as well. The High Court had upheld the death sentence. The convictions were challenged before this Court and they were upheld in the judgment rendered in *Shahid Zafar's case*¹⁹. It was held that there could be no leniency shown to an official of a law enforcing agency who chooses to take the life of a citizen mercilessly while he or she is in custody. It was

¹⁸ *Brutal killing of a young man by Rangers'* (PLD 2011 SC 799)

¹⁹ *Shahid Zafar and others v. The State* (PLD 2014 SC 809)

further declared that the manner in which the law enforcement agency officials had taken the life of a citizen was so cruel and gruesome that it attracted the definition of the expression '*fasad fil arz*'. However, in that case the convicts had reached a compromise with the legal heirs of the deceased. Nonetheless, while upholding the conviction under section 7(a) of the Act of 1997 this Court had modified the sentence of death to that of imprisonment for life on the basis of the compromise and declared the crime as falling in the definition of '*fisad-fil-arz*'. In Rashid Ali's case²⁰ this Court had upheld the death sentence of a member of a law enforcing agency who had killed his colleague while using the official rifle issued to him. It was observed that the official belonged to a disciplined force and was entrusted with an official assault rifle meant for the purposes of the State and, therefore, any recklessness or callousness could not be justified and thus the perpetrator of the crime could not invoke sympathy or leniency. In Malik Muhammad Mumtaz Qadri's case²¹, this Court had restored the conviction and sentence under section 7(a) of the Act of 1997. In this case a police official who was performing his official duties had taken the life of the person who was under his protection. This Court had observed that the perpetrator of the crime, being a serving officer of a law enforcing agency, would be presumed to know the importance and requirement of recourse to the law. It was further observed that a law enforcing officer who takes the law in his own hands becomes the worst manifestation of bad faith. A citizen who is under the protection of a law enforcement agency, whatever the credentials of such person may be, could not be deprived of his life. The law of the land did not permit an individual to arrogate unto himself the roles of a complainant, prosecutor, judge and an executer. A trained official of a law enforcement agency who was performing official duties and functions and who has

²⁰ *Rashid Ali v. The State* (2011 SCMR 1037)

²¹ *Muhammad Mumtaz Ahmad Qadri v. The State and others* (PLD 2016 SC 17)

been given an official weapon and bullets cannot take the law into his own hands. This Court had further emphasized that throughout the world an official of a law enforcing agency who commits a crime is dealt with more sternly in the matter of his sentence than an ordinary person, because an expectation is attached with such a person that under no circumstances, he would breach the law or take it in his own hands.

11. The survey of the precedent law clearly shows that the determination of sentence is as important as handing down the verdict of conviction. The process regarding determination of sentence follows the conviction of an accused. As noted above, in case of section 302(b) of the PPC the legislature has prescribed two legal punishments and the trial court has to exercise discretion by choosing one of them having regard to the facts and circumstances of the particular case. The discretion has to be exercised with great care and proper application of mind. There is no hard and fast rule, rather the process of sentencing is a complex and intricate judicial exercise of discretion. The discretion has to be exercised judiciously. It cannot be exercised in a mechanical manner nor could a sentence be imposed on flimsy or whimsical grounds. The trial court is required to record its reasons, particularly when it chooses to impose the punishment other than death. The exercise entails taking into consideration multiple factors. An exhaustive list of such factors or circumstances cannot be laid down because the matter falls within the realm of discretionary exercise of power vested in a court. The objects sought to be achieved by the legislature by prescribing alternate punishments cannot be excluded from consideration. The factors have to be weighed carefully by the court judiciously so that the determined sentence serves the purpose intended to be achieved by the legislature. The sentence handed down by a trial court after convicting an offender must be adequate and appropriate in the facts and circumstances of the case. A sentence will be adequate when the trial court has made the

determination as a result of weighing all the relevant factors, particularly the aggravating and mitigating circumstances. The precedent law of this Court, discussed above, indicates that there are certain fundamental factors which must be taken into consideration. The punishments prescribed by the legislature are not intended to merely punish the offender for the harm done to the victim, but the harm suffered by the loved ones and the society also requires retribution. The nature of the offence and its severity, the gravity of the harm caused, the role of the convict and degree of culpability, the impact on the victim, the latter's loved ones and the society are some of the broad factors that guides a court in handing down an adequate sentence. If the nature of the crime and the manner in which it was committed is violent, brutal, shocking and pre meditated then the punishment would be harsher because of these aggravated circumstances. Likewise, the vulnerability of the victim e.g a crime committed against a child, a differently abled person or an elderly person, would be considered as an aggravated circumstance. The status of the convict at the time of commission of the crime, such as a person holding a position of authority or trust e.g a law enforcement officer or a caregiver, would attract stern accountability and thus a higher sentence. The punishment has to manifest the proportionality to the nature and the manner of commission of the offence. The past record of the offender, his mental health or cognitive disability, remorse and age are also factors required to be taken into consideration while determining the quantum of sentence. The objects or goals of sentencing a convict plays a crucial role in handing down a sentence. Deterrence is the preeminent goal of sentencing an offender and it is special as well as general in nature. The latter refers to deterring the convict from repeating the crime while the former is aimed at protecting the society from such crimes by making it known to others the consequences of committing similar crimes and, therefore, causing general deterrence. An adequate

sentence would reflect the harm suffered by the victim of the crime, the latter's loved ones and the society as a whole. Sentence is also an expression of denunciation of the type of crime committed and of the conduct of the offender. The rehabilitation of the convict, if possible, under the circumstances, may also be considered as a relevant factor. It is a crucial goal of imposing an adequate sentence as an expression to condemn the extent of encroachment upon the collective values of the society and the gravity of transgression of the law. Extra judicial custodial killing of an innocent citizen by a member of the law enforcement agency or paramilitary force would attract the most severe punishment. The principle of proportionality is a crucial factor in determining the quantum of sentence. The punishment should neither be unreasonably lenient nor unduly harsh keeping in view the facts and circumstances of the case. The determination should manifest that it is reasoned and measured. Deterrence, retribution, reformation, restitution of harm suffered by the victim and the community are essential goals of punishing a convict by imposing an adequate sentence. The court is required to carefully and judiciously weigh the mitigating and aggravated circumstances while handing down an adequate sentence and the judicious application of mind ought to be manifestly reflected in the reasoning recorded in the judgment. The aggravated factors may outweigh the mitigating factors and thus warrant the imposition of a harsher punishment.

12. We will now revert to the question of an adequate sentence relating to the culpability of the appellant, having regard to the facts and circumstances of this case. The appellant was a member of a paramilitary force, the FC Baluchistan. The FC Baluchistan, its officers and members hold a position of authority and trust. Their primary duty is the protection and administration of the external frontiers of Pakistan. Their active service is defined as service against external aggressors and

enemies. The FC Baluchistan, its officers and members owe a duty of care to every citizen. It is their duty to act at all times in the best interest of the people and in utmost good faith. The FC Baluchistan is commanded by the serving officers of Pakistan Army and, therefore, this duty becomes more profound and onerous. In a society where grievances relating to enforced disappearances, use of excessive force, abuse of power, extra judicial killings and violation of fundamental rights by law enforcement agencies are widespread, impunity in case of crimes committed against the citizens becomes the most aggravated form of transgression of law. The gravity intensifies when a citizen falls victim to aggression by a law enforcement agency or its officers and members. Any such act or conduct is intolerable in a society governed under the Constitution. The rule of law is eroded when the law enforcers take the law into their own hands and arrogate to themselves the role of a judge and an executor. This is what had exactly happened in this case. The appellant had gravely breached his duty. He had abused his position of authority and trust. His cowardly conduct had consequences for the FC Baluchistan itself. The identification and handing over of the appellant to the in charge of the police station was an appreciable act on the part of the officers of the FC Baluchistan. The victim was a young university student. He was unarmed and did not offer any resistance when he was taken into custody and dragged by his hair to the place where other armed members were present. The helpless unarmed young man, held in custody by several members of the paramilitary force, was forced by the appellant to lay face down on the ground. The victim did not resist and while he was lying on the ground face down the appellant, using the officially issued automatic firearm weapon, shot him eight times in his back. This most gruesome extra judicial custodial killing of a young university student happened in the presence of his parents who were pleading for mercy. There was no provocation. It was the most cowardly

and brutal act by a trained member of a paramilitary force. The appellant had arrogated to himself the role of a judge and an executor by choosing to take the law in his own hands. Regrettably, the other armed members of the paramilitary force did not restrain the appellant. The appellant, in his judicial confession recorded under section 164 of the Cr.P.C, had taken the stance that he was 'sad and angry' because some of his colleagues' had sustained injuries due to the explosions. This reason had further aggravated the nature of the crime committed by him. If this reason is accepted as a mitigating factor for extra judicial custodial killing, then it would have the effect of encouraging vigilantism by law enforcing agencies and would unjustifiably trivialize one of the most heinous crimes. Enforced disappearances, extra judicial killings, custodial torture and murders, and excessive use of force are the most intolerable crimes in a democratic society and the worst form of violation of the Constitution and the fundamental rights guaranteed there under. There can be no tolerance for such acts and conduct by law enforcement agencies and its members and would warrant imposing the severest punishment when guilt is proved. The appellant had no remorse for what he had done or for the extent of harm he had caused to the victim, his parents and the society. He had subsequently retracted his judicial confession by not pleading guilty to the charge. He had also claimed his innocence while recording his statement under section 342 of the Cr.P.C. There are no mitigating factors in this case to show any leniency. Moreover, the harshest punishment was justified in this case as an expression of condemnation of the society for the cowardly conduct of the appellant. It was also necessary to deter other law enforcement agencies from transgressing the law and to denounce the commission of heinous crimes such as extra judicial custodial killings, enforced disappearances and excessive use of force. The object of punishing the appellant as retribution for the harm he had caused could only be

achieved in this case by upholding the sentence of death confirmed by the High Court. The reasons recorded by the trial court for handing down the sentence of death are unassailable. The appellant, on account of his own conduct, does not deserve any leniency, compassion or mercy. The conviction as well as the sentence of death are maintained and consequently the appeal is dismissed.

Judge

APPROVED FOR REPORTING

*M. Azhar Malik/Habib, Law Clerk**