JUDGMENT SHEET.

ISLAMABAD HIGH COURT, ISLAMABAD, JUDICIAL DEPARTMENT.

W.P No.650/2011.

Muhammad Ziyam Samma	**Vs.**	**Inspector General of Police, Islamabad and others.**

Petitioner by:	Mr. Mushtaq Hussain, Advocate.
Respondents No.1 to 4 by:	Mr. Sadaqat Ali Jahangir, State Counsel.
Respondent No.5 by:	Sardar Bashir Hussain, Advocate.
Respondents No.6, 7 & 8 by:	Mr. Ijaz Ahmed Chadhar, Advocate. Rafi Ullah, S.I, P.S Kohsar, Islamabad.
Date of Hearing:	**06.12.2019.**

MOHSIN AKHTAR KAYANI, J:- Through this writ petition, the petitioner has prayed for following relief:-

> *"It is therefore, very respectfully prayed that the instant writ petition may very kindly be allowed and respondents No.1 to 4 be directed to complete the final investigation report of the crime referred to above in the light of forensic, circumstantial and other evidence relating to the commission of the offence by specifically detecting the murderers of the petitioner's mother and consequently direction the issue to commence the trial of the accused respondents No.5 to 8 and others, if any, in the light of submission above.*
>
> *Any other relief this Honourable Court deems appropriate may also please be granted."*

2. Learned counsel for the petitioner contends that the petitioner is minor, who was born on 23.11.2017 and has filed instant writ petition through her real maternal grandmother Mst. Riffat Aman, who has no adverse interest against the petitioner; that real mother of the petitioner was murdered on 17.04.2018 and FIR No.178, dated 17.04.2008, U/S 302/34 PPC, P.S Kohsar, Islamabad was registered on the complaint of husband of the deceased/respondent No.5, however, during the course of investigation on the basis of recovery of blood stained clothes, shoes with hairs of the deceased, DNA test report dated 02.06.2008 proved that respondents No.5 to 8 are accused of that case; that the deceased mother Mst. Ammara has left three

legal heirs namely Aman Ullah Chaudhry (father), Mst. Riffat Aman (mother) and the petitioner (minor son), whereas both maternal grandparents in capacity of parents of the deceased issued affidavit in favour of accused persons/respondents No.5 to 8 and got recorded their detailed statements in their favour before learned Trial Court during hearing of bail application and exonerated the accused, however, they were not committed to waive of the Qisas, Diat, Arsh and Daman to the extent of present petitioner as he is entitled to one third share in the legacy of the deceased mother; that challan was submitted on 27.08.2008 before the Illaqa Magistrate, which was sent to learned Sessions Judge, Islamabad on 28.08.2008 for trial. However, application U/S 265-K, Cr.P.C was filed, which was allowed vide judgment dated 01.09.2008 and respondents No.5 to 8 were acquitted. Learned counsel further contends that the petitioner seeks indulgence of this Court to determine *"who committed murder of the petitioner's mother and what is the impact of Human DNA dated 02.06.2008 on the said case"*; that on the basis of available record in evidence, acquittal order 01.09.2008, passed by learned Sessions Judge is not sustainable in the eyes of law and respondents No.5 to 8 could not be acquitted in terms of section 311, PPC.

3. Conversely, learned counsel for respondents No.5 to 8 contends that the respondents have been acquitted by learned Trial Court after hearing detailed arguments vide order judgment 01.09.2008 by learned Sessions Judge, Islamabad in terms of section 265-K, Cr.P.C mainly on the ground that complainant Aman Ullah and his wife appeared before the Court on 27.06.2008 and sworn their affidavits to the effect that after taking oath from the accused for their innocence, their suspicion stands removed and that they have no objection on acquittal of the accused; that statements of both the maternal grandparents of the petitioner were recorded by Additional Sessions Judge in Court, which made the very basis of acquittal of respondents No.5 to 8 as there was no probability of conviction on record; that minor son (present petitioner) has also been referred in the statements of Ch. Aman Ullah and his wife Mst. Rifat Aman before the Court and as such the plea raised by the petitioner is not justified under the law; that instant writ petition is based upon malafide and has been filed as counterblast to the custody petition filed by

respondent No.5 (father of the petitioner) against maternal grandparent at Lahore on 07.02.2011, where-after the present writ petition was advertently filed on 25.02.2011 by the petitioner, who intends to engage respondent No.5 and to use this case as shield to deprive father/respondent No.5 from seeking custody; that instant writ petition is not maintainable in view of Article 13 of the Constitution of Islamic Republic of Pakistan, 1973 read with section 403, Cr.P.C as the main *lis* has already been adjudicated by the competent Court and this very fact was in the knowledge of the petitioner, even otherwise instant writ petition is hit by principle of laches as the instant writ petition was filed after three years of the acquittal and no justified reason has been brought on record; that instant writ petition is also not maintainable as remedy under Article 199 of the Constitution cannot be used as substitution of the statutory remedy i.e. section 417(2) Cr.P.C against acquittal order of respondents No.5 to 8.

4. Learned State Counsel contends that instant case is open and shut case, whereby the role of respondents No.5 to 8 is proved in the investigation and they have been challan U/S 173, Cr.P.C by the I.O and the very judgment of learned Sessions Judge regarding acquittal of respondents No.5 to 8 U/S 265-K, Cr.P.C is not maintainable.

5. I have heard the arguments and perused the record.

6. Perusal of the record reveals that Mst. Amara Asif wife of Muhammad Asif Samma/respondent No.5 and mother of the petitioner was murdered in the confines of House No.2, 8th Avenue, Sector F-7/1, Islamabad by un-known persons and respondent No.5 lodged complaint to police station, Kohsar, Islamabad, which was converted into FIR No.178, dated 17.04.2008, U/S 302/34 PPC, P.S Kohsar, Islamabad, however, during the course of investigation, an application was filed by Ch. Aman Ullah (father of the deceased) on 18.04.2008 and expressed his suspicion upon respondent No.5 and his family members that they were involved in the alleged murder of his daughter Mst. Amara. The investigation officer after collection of entire evidence arrested Muhammad Asif/respondent No.5 and collected technical evidence and submitted the final report alongwith DNA result before the competent Court. During the proceedings of the case, respondent No.5

filed an application for his post arrest bail, which was heard by learned Additional Sessions Judge, Islamabad, who also recorded statements of Ch. Aman Ullah and Mst. Rifat Aman (father and mother of the deceased) on 24.06.2008, whereby they have exonerated respondent No.5 and his family members from the murder case of deceased Mst. Amara. Statement of Ch. Aman Ullah is reproduced as under:-

> *"It is stated that I am father of deceased Ammara Asif of case FIR No.178 dated 17.4.2008 offence U/S 302 PPC Police Station, Kohsar, Islamabad. Said FIR was initially registered on the report of Asif Saman against unknown persons. Later on, on my application, petitioners Naseem Akhtar and Shazia Raja were implicated as accused persons in the instant case. The petitioners and their co-accused have been given oath on Holy Quran regarding their innocence and also to the effect that neither they have committed the murder of Ammara Asif nor they are involved, in any way, in her murder. My daughter Ammara Asif was married with Asif Saman and they had one son namely Ziyam aged about 18 months. Her legal heirs includes myself, my wife Riffat and Ziyam Asif. In the light of oath given by accused persons regarding their innocence, I have no objection over the grant of post-arrest bail to the petitioners. Similarly, I have no objection if all the accused persons of the instant case namely Asif Saman, Naeem Saman, Begum Nasim Akhtar and Shazia Raja are acquitted from the case or are discharged by the police from the case. I waived my right of Qisas, Diat, Arsh and Daman. Since the accused persons have assured me regarding their innocence, hence, it is decided between the parties that subsequent to their acquittal, the accused persons will fully cooperate with me and the local police for the detection and arrest of actual culprits. I furnish my affidavit Mark-A in this regard."*

7. In view of above referred statement, respondents No.5 to 8 were granted post arrest bail by learned Additional Sessions Judge, Islamabad vide order dated 27.06.2008, however, the challan was submitted before the Court on 20.07.2008. Respondents No.5 to 8 filed an application U/S 265-K, Cr.P.C before learned Sessions Judge, Islamabad, who after hearing the respondents side as well as District Attorney, acquitted respondents No.5 to 8 vide impugned judgment dated 01.09.2008. The petitioner, who born on 23.11.2007 and was of 5 months of age at the time of alleged murder of his mother has filed instant writ petition through his maternal grandmother Mst. Rifat Amman and claims that investigation of the case of his real mother was not completed and entire trial has to be conducted. The instant writ petition was filed on 05.03.2011 against respondents No.5 to 8, however, respondents No.5 to 8 have brought the certified record, whereby respondents No.5 being father of the petitioner filed application U/S 25 of the

Guardians and Wards Act, 1890 before Guardian Judge Lahore and claimed custody of the petitioner (minor), which made very basis of filing of the instant writ petition by maternal grandmother, who has already got recorded her statement in favour of respondents No.5 to 8 before the Court of learned Additional Sessions Judge, Islamabad.

8. The custody petition filed by respondent No.5 was allowed by Guardian Judge Lahore vide order dated 31.3.2016 and it was directed that custody of the minor be handed over to respondent No.5. The said order was assailed before learned District Judge, Lahore in appeal by maternal grandparents, but the appeal was dismissed vide judgment dated 14.9.2018 (comprising of 28 pages) by learned Additional District Judge Lahore, whereby learned Judge has thrashed out entire evidence including allegations of maternal grandparents. After concurrent findings against the maternal grandparents, they challenged the same before the Lahore High Court, Rawalpindi Bench in writ petition No.239299/2018, which is pending adjudication.

9. The above referred history demonstrates that instant writ petition has been filed as counter blast to the custody petition filed by the father/respondent No.5 against maternal grandparent, who are not willing to hand over custody of the minor/petitioner to the father despite the fact that respondents No.5 to 8 were acquitted, even on the statements of maternal grandparents of the petitioner/real parents of the deceased Mst. Amara.

10. During the course of arguments, learned counsel for the petitioner tried to convince this Court that impugned judgment U/S 265-K, Cr.P.C is defective and has been passed on their back and they were not aware regarding passing of the impugned judgment, however, their statements have been refuted by their own pleadings in paras 8 & 13 of the instant writ petition, in which it has been acknowledged by the petitioner that respondents No.5 to 8 were acquitted from the case U/S 265-K, Cr.P.C. Similarly, the petitioner has also referred in ground-X, in which he has acknowledged that the respondents were acquitted through short order, although detailed judgment is available on record and the record has been requisitioned by this Court and even the copy appended by the petitioner himself

with the writ petition at pages No.38 to 44 reveals that certified copy of the detailed judgment was obtained vide application No.10571, applied on 02.09.2008, which was prepared on 03.09.2008 and received on the same day, hence, the ground raised by the petitioner is an afterthought and against his own arguments as copy of the judgment was with them but despite receiving the said copy of detailed judgment, the petitioner's maternal grandparents have not assailed the said judgment before any Court of law.

11. In view of above position, I have gone through the provisions of section 417(2) Cr.P.C, which deals with the appeal in case of acquittal, whereby a person aggrieved by the order of acquittal passed by any Court other than High Court may within 30 days, file appeal against such order but surprisingly no such appeal was filed and instant writ petition was filed after delay of almost 3 years, therefore, instant writ petition is not competent as Article 199 of the Constitution cannot be used as substitution of the remedy provided under Cr.P.C i.e. section 417(2-A), whereby right to file appeal against acquittal order has been provided. Reliance is placed upon ***2008 P Cr. L J 1067 [Lahore] (Ahmad Din vs. Haseeb Ullah and 3 others)***.

12. Moreover, the instant writ petition is hit by principle of laches as the same has been filed after three years of the acquittal and no justified reason has been brought on record. Reliance is placed upon ***PLD 2003 SC 90 (Masood Begum through Legal Heirs vs. Government of Punjab through Secretary, Forest, Lahore and 9 others)***.

13. Moreover, High Court has to consider the following test to determine the adequacy of the relief in the light of judgment reported as ***2011 SCMR 1813 (Dr. Sher Afghan Khan Niazi vs. Ali S. Habib and others)***:-

> *"9. The learned High Court will have to consider in each case the following tests to be applied to determine the adequacy of the relief:-*
>
> *(i) If the relief available through the alternative remedy in its nature or extent is not what is necessary to give the requisite relief, the alternative remedy is not an "other adequate remedy" within the meaning of Article 199.*
>
> *(ii) If the relief available through the alternative remedy, in its nature and extent, is what is necessary to give the requisite relief, the 'adequacy' of the alternative remedy must further be judged, with reference to a*

comparison of the speed, expense or convenience of obtaining that relief through the alternative remedy, with the speed, expense or convenience of obtaining it under Article 199. But in making this comparison those factors must not be taken into account which would themselves alter if the remedy under Article 199 were used as a substitute for the other remedy.

(iii) In practice the following steps may be taken:-

(a) Formulate the grievance in the given case, as a generalized category;

(b) Formulate the relief that is necessary to redress that category of grievance;

(c) See if the law has prescribed any remedy that can redress that category of grievance in that way and to the required extent;

(d) If such a remedy is prescribed the law contemplates that resort must be had to that remedy;

(e) If it appears that the machinery established for the purposes of that remedy is not functioning properly, the correct step to take will be a step that is calculated to ensure, as far as lies in the power of the Court, that that machinery begins to function as it should. It would not be correct to take over the function of that machinery. If the function of another organ is taken over, that other organ will atrophy, and the organ that takes over, will break clown under the strain;

(f) If there is no other remedy that can redress that category of grievance in that way and to the required extent, or if there is such a remedy but conditions are attached to it which for a particular category of cases would neutralise or defeat it so as to deprive it of its substance, the Court should give the requisite relief under Article 199;

(g) If there is such other remedy, but there is something so special in the circumstances of a given case that the other remedy which generally adequate, to the relief required for that category of grievance, is not adequate to the relief that is essential in the very special category to which that case belongs, the Court should give the required relief under Article 199.

If the procedure for obtaining the relief by some other proceedings is too cumbersome or the relief cannot be obtained without delay and expense, or the delay would make the grant of the relief meaningless this court would not hesitate to issue a writ if the party applying for it is found entitled to it, simply because the party could have chosen another course to obtain the relief which is due." (Ibrahim T.M. Ltd. v. Federation of Pakistan PLD 1989 Lah. 47, Allah Ditta v. Muhammad Saeed Vatoo PLD 1961 Lah. 479, Shamas Din and Bros. v. Income-tax and Sales Tax Officer PLD 1959 Lah. 955, Khaliq Najam Co. v. Sales-Tax Officer PLD 1959 Lahore 915)."

14. In view of above principles, the statutory remedy U/S 417(2-A), Cr.P.C cannot be bypassed in any manner and by filing instant writ petition, the petitioner intends to circumvent the legislative intent provided under Criminal Justice System.

15. I have also gone through Article 13 of the Constitution, which provides protection to every individual from prosecution for same offence more than once and the said principle has also been provided in section 403 Cr.P.C, which is reproduced as under:-

> ***"403. Persons once convicted or acquitted not to be tried for the same offence.*** *(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not to be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 36, or for which he might have been convicted under section 237.*
>
> *(2) A person acquitted or convicted for any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under sections 235, subsection (1).*
>
> *(3) A person convicted of any offence constituted by any act causing consequences which together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequence had not happened, or were not happened, or were not known to the Court to have happened, at the time when he was convicted.*
>
> *(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.*
>
> *(5) Nothing in this section shall affect the provision of section 26 of the General Clauses Act, 1897, or section 188 of this Code."*

16. The above referred section clearly spells out that once a person was acquitted and the said order *"**remained in force**"* the said person cannot be retried on same charges, as such the ground raised by the petitioner in this case cannot be considered valid as judgment of acquittal in case FIR No.178, dated 17.04.2008, U/S 302/34 PPC, P.S Kohsar, Islamabad still holds field.

17. I have also gone through the prayer clause of the writ petition, whereby the petitioner tried to convince this Court that final investigation report was not filed, which is not a true fact as per contents of the pleadings of the petitioner as well as from the record because challan was submitted before the Trial Court after its completion on 20.7.2008, therefore, such kind of prayer is against the facts and is not justified.

18. The matter has already been investigated. The entire evidence was collected and same was placed before the Court, whereby learned Sessions Judge through detailed judgment has acquitted respondents No.5 to 8 while considering no

probability of conviction, especially when the only star witnesses Ch. Aman Ullah and Mst. Rifat had expressed their suspicion against respondent No.5 and later on resiled from their stance after being satisfied on the explanation and oath of respondents No.5 to 8. In the given circumstances, learned Sessions Judge had no other option but to acquit respondents No.5 to 8, however, the question raised by the petitioner regarding waiver of Qisas is not justiciable and in this regard I have gone through sections 309, 310, 311 & 312 PPC as well as section 345 Cr.P.C., whereby the complete concept of compounding has been highlighted and the Wali of a minor can waive or compound the right of Qisas. The record reflects that the petitioner was well in knowledge that the maternal grandparents, who are Wali of the minor Muhammad Ziyam Samma, at the time of recording of their statements before learned Trial Court, have waived and compounded the matter, although the entire case is based upon suspicion, where there was no direct evidence or witness who suggest that Respondents No.5 to 8 have committed the murder of deceased Mst. Ammara Asif. It is settled law that suspicion cannot be replaced with evidence and learned Trial Court has considered this aspect in proper manner, even the proposition in hand to that extent is also considered in the light of judgment reported as ***PLD 2019 SC 461 (Muhammad Yousaf vs. The State)***.

19. In view of above discussion, the instant writ petition is not maintainable on merits, due to *laches*, malafide on part of maternal grandparents of the petitioner (who earlier recorded their own statements before the learned Trial Court upon which the Respondents No.5 to 8 have been acquitted of the charge) as well as due to non-availing the alternate remedy U/S 417(2-A), Cr.P.C, which was available to the petitioner, but he has not exercised the same at proper time, therefore, the instant writ petition stands ***DISMISSED***.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 11.12.2019.

JUDGE

R Anjam