

**Judgment Sheet**

IN THE PESHAWAR HIGH COURT,  
PESHAWAR

**JUDICIAL DEPARTMENT**


**Cr.A No. 540-P of 2016**

With

**Murder Reference No.14-P/2016**

**JUDGMENT**

Date of hearing.....02.10.2017.....

 Appellant(s)...(Aitbar Shah and others): By Barrister Zahoor-ul-Haq  
and Mr. Abdul Latif Afridi, Advocates.

Respondent(s)/State: By Mian Arshad Jan, AAG assisted by Mian  
Faheem Akbar and Sahibzada Asadullah Advocates,  
counsel for complainant.



**QALANDAR ALI KHAN, J:-** In the instant  
criminal appeal, the convict/appellants, Aitbar  
Shah, Bawar Shah and Gulzar sons of Hajab  
Shah, Lal Bahadar son of Muqadar Shah and  
Sher Zamin son of Aitbar Shah, assailed

judgment dated 04.08.2016 of the learned trial Court/Additional Sessions Judge-I, Swabi, whereby, all the five appellants were convicted under section 302 (b) PPC and sentenced to death as *Ta'zir* on two counts for the *Qatl-i-amd* of deceased Qaiser and Munaris Khan, and also made liable to pay compensation under section 544-A Cr.P.C to the tune of Rs:500000/- to the legal heirs of the two deceased, recoverable from them as arrears of land revenue; and, owing to want of property, to further S.I for six months. In addition to the sentence of death, the appellants were also convicted under section 324 PPC for attempting to commit *qatl-i-amd* of the complainant, Falak Sher, and PWs Naser and Ajmal; and sentenced to undergo imprisonment for a period of three years and fine of Rs:20,000/- and in default of payment of fine to simple imprisonment for six months. The execution of death sentences awarded to the convict/appellants were made subject to confirmation of this Court; and in this regard, a

murder reference (No.14/2016) was also sent to this Court.

2. The case under sections 302/324/148/149 PPC vide FIR No.633 dated 15.04.2012 was initiated on the report of Falak Sher, complainant, lodged in Police Station Kalu Khan, Swabi, where he had brought the dead bodies of his father Manaris Khan and cousin Qaiser in a Datsun Pickup; and reported about the occurrence which took place at 1800 hours on 15.04.2012 when the complainant along with both the deceased, his uncle Ajmal and another cousin namely Naser were returning from *Jirga* held in the *Hujra* of Mian Said and were reportedly fired at by the appellants and the absconding co-accused, Gul Zamin, with their deadly weapons, resulting in the death of Manaris and Qaiser; while the complainant and the other PWs mentioned in the FIR escaping unhurt. The motive for the offence was mentioned as their joint enmity with Wajid etc, with whom the complainant party was going to enter into

compromise to the annoyance of appellants/accused mentioned in the FIR.

3. After registration of the case, investigation was conducted by the local police, and on completion of investigation, complete challan against the appellants was submitted; and, at the same time, challan under section 512 Cr.P.C was also submitted against the absconding co-accused, Gul Zamin; leading to commencement of trial, and after compliance with the mandatory provisions of section 265-(C) Cr.P.C, to framing of formal charge against the appellants/accused facing trial under section 148 PPC, section 302 PPC read with section 149 PPC and section 324 PPC read with section 149 PPC, to which the appellants/accused facing trial pleaded not guilty and claimed trial; whereafter as many as twelve PWs were examined by the prosecution. After prosecution closed its evidence, statements of the appellants/accused facing trial were recorded

under section 342 Cr.P.C; wherein, they, though, denied allegations of the prosecution against them, but declined to be either examined on oath or produce defence evidence; and after hearing learned SPP for the State, assisted by learned counsel for the complainant, and learned defence counsel, the learned trial Court/Additional Sessions Judge-I, Swabi, recorded a detailed judgment, whereby, the appellants/accused were convicted and awarded the sentences mentioned hereinabove; hence the instant appeal.

4. After learned counsel for the convict/appellants had argued the appeal at greater length, the learned AAG pointed out that the learned trial Court/Additional Sessions Judge-I, Swabi, had not recorded any findings either of conviction or of acquittal in respect of charge against the appellants under section 148 PPC, which was legal infirmity making the impugned judgment dated 04.08.2016 liable to be set aside.

5. Although, learned counsel for the appellants, having thoroughly argued the case, initially resisted the objection on the ground that the appellants had already endured the agony of protracted trial, therefore, remand/sending back the case to the trial Court would serve no other purpose but to add to the predicament of the appellants who are behind the bars since long; yet there was consensus that the impugned judgment dated 04.08.2016 failed to meet the mandatory requirements of section 367 Cr.P.C owing to omission on the part of the learned trial Court/Additional Sessions Judge-I, Swabi, to record findings on the charge under section 148 PPC.

6. Needless to say that all the appellants/accused were distinctly and separately charged under section 148 PPC for 'rioting' while armed with deadly weapons, carrying the penalty of imprisonment upto three years or with fine or with both; but, contrary to the express mandatory provision of

section 367 Cr.P.C, the learned trial Court failed to even advert to this charge, what to speak of recording either acquittal or conviction of the appellants under section 148 PPC, thus creating scope for remand/sending back of the case for rewriting the judgment after hearing learned counsel for both the parties.

7. Consequently, the appeal is partially accepted, and the impugned judgment dated 04.08.2016, as well as conviction and sentences awarded to the appellants, are set aside; and the case is remanded/sent back to the learned Sessions Judge, Swabi, with consent of learned counsel for the parties and learned AAG, for decision afresh/rewriting of the judgment after providing opportunity of hearing to both the parties. The murder reference No.14/2016 is answered in the negative; and the office is directed to send record of the case along with a copy of this judgment/order, forthwith, to the Court of learned Sessions Judge, Swabi, for the

needful as early as possible in order to mitigate sufferings of both the parties.

8. Before parting with the judgment/order, we are constrained to observe that not only the parties endured the rigours of trial but the Court also had to take the pain of conducting trial and recording a detailed judgment, which has been nullified owing to a legal infirmity in the judgment; certainly, avoidable with little more care and pain on the part of the learned trial Court. We, therefore, deem it appropriate to guide the learned trial Courts to exercise extra care and caution and take cognizance of all relevant facts and legal provisions applicable to the case while deciding a case, especially involving capital punishment.

**Announced.**  
**02.10.2017.**

  
JUDGE

  
JUDGE

*\*M.Iqbal\**

(D.B) *Hon'ble Mr. Justice Lal Jan Khattak.*  
*Hon'ble Mr. Justice Qalandar Ali Khan.*