*Judgment Sheet*

# PESHAWAR HIGH COURT, ABBOTTABAD BENCH

JUDICIAL DEPARTMENT

**Criminal Appeal No.91-A/2022 with**
**Murder Reference No.02-A/2022**

***Hassan Ali…*** ***(Appellant)***

***Versus***

***The State and another...*** ***(Respondents)***

**Present:** Mr.Astaghfirullah, Advocate for appellant.

Sardar Waqar-ul-Mulk, Assistant Advocate General for State;
Mr.Hussain Ali, Advocate for complainant.

***AND***

**Criminal Appeal No.94-A/2022 with**
**Murder Reference No.02-A/2022**

***Tauseef Ahmad…*** ***(Appellant)***

***Versus***

***The State and other…*** ***(Respondents)***

**Present:** Mr.Muhammad Asjad Parvez Abbasi, Advocate for appellant.

Sardar Waqar-ul-Mulk, Assistant Advocate General for State;
Mr.Hussain Ali, Advocate for complainant.

Date of hearing: **10.05.2023.**

## *JUDGMENT*

**MUHAMMAD IJAZ KHAN, J.-** This single judgment is directed to decide the instant criminal appeal No.91-A/2022 titled **"Hassan Ali vs. The State etc"** and Criminal Appeal No.94-A/2022 titled **"Tauseef Ahmad**

**vs. State and other"** as well as **Murder Reference No.02-A/2022**, being outcome of the one and same judgment dated 09.04.2022 passed by learned Judge Anti-Terrorism Court, Hazara Division at Abbottabad in a case registered vide FIR No.16 dated 31.12.2016 under sections 302/365-A/34 PPC read with Section 7 ATA of Police Station CTD Hazara Region, Abbottabad, whereby both the appellants of the aforesaid appeals namely Tauseef Ahmad son of Sahib Khan and Hassan Ali son of Atta-ur-Rehman were separately convicted and sentenced as under:-

(i) to death under section 7(e) Anti-Terrorism Act, 1997 read with section 365-A PPC and they be hanged by the neck till they are dead subject to confirmation by the high court within the meaning of section 374 Cr.PC;

(ii) to death under section 7(a) of ATA, 1997 read with section 302(b) PPC (on second count) and they be hanged by neck till they are dead subject to confirmation by the high court. They are also burdened to pay Rs.10,00,000/- as compensation to the legal heirs of the deceased for mental anguishes and physiological damage under section 544-A Cr.PC. The amount of compensation shall be recovered as an arrear of land revenue, in default of payment of recovery the convicts to suffer further imprisonment for six months simple imprisonment. Their movable and immovable property stood confiscated to the State;

(iii) to simple imprisonment for two years with a fine of Rs.10,000/-, in default of payment of fine to suffer simple imprisonment for two months under section 203 PPC.

**2.** Precisely, the facts of the present case are that on 30.12.2016 at 23.45 hours, complainant Faizan Aslam son of Muhammad Aslam alongwith the dead body of his minor daughter Marwa aged 3/4 years, lodged report with local police on the rooftop of the house of Sahib Khan son of Sumandar Khan situated at Mohallah Tanolian Jhangi Saidan to the effect that on that day at about 01.15 p.m., his daughter namely Marwa went out of the house but did not come back, therefore, they started search of her but in vain; he and his relatives were busy in search of her and his father lodged a report in Police Station Mirpur regarding the missing of her daughter; when in the meanwhile, his father, on his cell No.03449496786, received a call from an unknown person from PTCL No.0992383640, who told him that Marwa is in his custody and asked him to strike a deal with him and that he will contact him again; after that his father received another call from mobile phone No.03175595539 and the caller demanded Rs.500,000/- as ransom money, however, his

father and the said caller struck a deal of Rs.400,000/- and they were asked to come near Frontier Medical College; then his father and the said caller remained in contact with each other; the caller used to change the places for payment of the ransom amount and lastly asked his father to come to his Mohallah Tanolian and then he turned off his mobile phone. During this period, his father remained in constant contact with the local police and lateron he came to know that mobile SIM No.03175595539 is in use of Tauseef Ahmad son of Sahib Khan; they started search of the said Tauseef and came to know that Tauseef is at home; so they informed the police to this effect and the SHO of Police Station Mirpur alongwith other police personnel rushed and raided the house of Tauseef wherefrom Tauseef was arrested and was enquired about Marwa; in the meanwhile, Hassan son of Atta-ur-Rehman rang a missed call on Mobile number of Tauseef, so police also rushed and raided the house of the said Hassan where Hassan was also arrested; police interrogated both of them about Marwa who disclosed that she is available on the rooftop of Sahib Khan's house; both Tauseef and Hassan, in the presence of the

complainant, Nadeem son of Banaris Khan, Safeer Ahmad son of Muhammad Miskeen, Ehsan son of Muhammad Aslam, other relatives and the inhabitants of Mohallah, jointly led the police, through upstairs, to the rooftop of the said house and pointed out a greenish brown colour canvas bag, placed behind a big cage, which was opened and checked in which the dead body of Marwa was lying having a noose of drawstring (*Azarband*) around her neck as well as a white printed cloth. No motive for the occurrence was mentioned. The complainant charged both Tauseef and Hassan Ali (appellants herein) for kidnapping his daughter for ransom and committing her qatl-i-amd after torture. His reported was jotted down in shape of Murasila Ex.PA/1 which resulted into the registration of FIR Ex.PA.

**3.** After the completion of investigation, the complete challan was submitted before the court against the appellants upon which a full-fledged trial was conducted and on the conclusion thereof, the appellants were initially convicted and sentenced to death etc by the learned trial court, vide judgment and order dated 31.05.2019, however, being aggrieved of the said judgment and order, both the appellants had filed their

separate appeals before this court which were allowed and the judgment and order of the learned trial court was set aside and the case, for want of some deficiencies in the charge, was remanded back for reframing of the charge and denovo trial vide order and judgment dated 29.09.2020. In the wake thereof, the learned trial court reframed the charge against both the appellants to which they pleaded not guilty and claimed trial and commenced the denovo trial. Prosecution in order to prove its case against the appellants, produced as many as nineteen (19) witnesses including the important statements of Faizan Aslam as PW-7, who is the complainant of this case and narrated almost the same fact which he recorded in his report Ex.PA/1. PW-8 is Muhammad Aslam (grandfather of the deceased). He narrated the facts regarding the occurrence while toeing the complainant. PW-10 is Shakir Khan Computer Operator. He furnished the Verisys Reports Ex.PW-10/1 and Ex.PW-10/3 and CDR etc Ex.PW-10/2, Ex.PW-10/4 and Ex.PW-10/6. PW-13 is Usman Ghani, who stated that on the eventful day at 06.00 p.m. Hassan Ali (appellant) met him on the way and told him that they had abducted and confined Marwa Bibi

for ransom and will release her after receiving the ransom, however, he took his statement lightly. PW-14 is Khurram Shahzad, who purchased a SIM and handed over the same to Hassan Ali. PW-15 is Tahir Saleem SI, who exhibited Madd No.17 as Ex.PW-8/1. He further stated that he alongwith other police officials raided the house of appellants, arrested and interrogated them and on their pointation recovered the dead body of the deceased from the spot and bag detailed above. During search of appellant Tauseef, he recovered mobile phone having SIM No.03175595539 and SIM No.03165834932 and copy of his ID card from pockets of his pant; similarly, during search of appellant Hassan Ali, he recovered Q-mobile phone having SIM No.03169205119 from pocket of his shirt alongwith the bag and other articles detailed in recovery memo Ex.PW-15/3. PW-16 is Niaz Khan ASI, who remained present with SHO/PW-15 during the proceedings conducted by him and accordingly stated about the facts in line with PW-15. He stood the marginal witness to recovery memo Ex.PW-15/3. PW-17 is Rizwan Khan (then) SP CTD. He stated that appellants Tauseef Ahmad and Hassan Ali were produced by the I.O. for

recording their confessional statements. He, after observing legal formalities, got satisfied that appellants are voluntarily making their statements, as such, recorded their confessional statements. PW-18 is Muhammad Tanveer Khan (then) SHO, Police Station CTD, Abbottabad. He chalked out FIR Ex.PA. He also conducted the investigation of the case and exhibited the relevant documents during his statement as Ex.PW-18/1 to Ex.PW-18/38 besides endorsing the documents already exhibited and other allied investigations. PW-19 is the transposed statement of Sahib Khan as he passed away after recording his statement in the earlier trial. Thereafter statements of both the appellants were recorded under section 342 Cr.P.C before the learned trial court, wherein they claimed innocence. However, they neither wished to produce the defense evidence nor desired to be examined as witness under section 340(2) Cr.PC. After hearing arguments of both the sides, the learned trial court passed convictions and sentences against the appellants under the relevant sections of law as stated hereinabove, through order and judgment dated 09.04.2022. Now feeling aggrieved with order and judgment dated 09.04.2022 of the

learned trial court, the appellants have preferred above-mentioned separate Criminal Appeals for their acquittal.

**4.** Arguments of the respective learned counsel for the appellants as well as learned Assistant Advocate General assisted by the learned counsel for complainant were heard in considerable detail and record perused with their able assistance.

**5.** It is the case of prosecution as set up by the complainant namely Faizan Aslam, at the time of recovery of the dead body of his minor daughter Marwa aged about 3/4 years on the rooftop of the house of one Sahib Khan (father of appellant Tauseef) of the same Mohallah that on the day of occurrence at about 1.15 p.m., his daughter namely Marwa went missing and they started search of her but could not succeed. He alongwith his other relatives made extensive search and in the meantime his father Muhammad Aslam (PW-8) went to Police Station Mirpur and lodged a report vide Madd No.17 about the missing of her daughter and it was after lodging of the aforesaid report when in the meanwhile, his father received a call from PTCL No.0992383640 on his Cell No.03449496786 from an

unknown person who told him that Marwa is in his possession and also asked him to strike a deal with him and for that he will contact him later, thereafter another call was made from cell No.03175595539 and this time he demanded Rs.500,000/- as ransom money. Accordingly, his father and the unknown caller agreed on Rs.400,000/- as the ransom amount and the caller asked them to come near Frontier Medical College. This contact between the father of the complainant and the caller remained continued. He was changing places for handing over of the demanded ransom amount and, at last, directed him to come to his Mohallah namely Mohallah Tanolian for meeting and thereafter he switched off his mobile. In the report, it is further stated that his father remained in constant contact with the police and the complainant was informed by the police that mobile phone No.03175595539 is under the use of appellant Tauseef Ahmad and they came to know that Tauseef is at his house, therefore, they informed the local police upon which SHO concerned alongwith other police personnel came, raided the house of said Tauseef and arrested him. At this point of time, the said Tauseef received a missed call on his phone number

from appellant Hassan Ali, therefore, the police also raided the house of appellant Hassan Ali and arrested him and both the above-mentioned appellants were jointly investigated by the police who disclosed to the local police that Marwa is available on the rooftop of the house of Sahib Khan, father of appellant Tauseef and then both of them jointly led the police party to the rooftop of the said house in presence of the complainant as well as in the presence of Nadeem, Safeer Ahmad, Ehsan, other relatives of the complainant and inhabitants of the Mohallah. Both of them pointed out a bag placed behind a cage. On opening of the said bag, the dead body of Marwa was lying in it and she was having a drawstring around her neck and a cloth was also placed on her mouth, therefore, the complainant charged both the appellants for kidnapping his daughter for ransom and thereafter for her murder.

**6.** The record of the case would reveal that though the complainant has charged both the appellants namely Hassan Ali and Tauseef Ahmad (appellants herein) jointly for kidnapping his daughter for ransom and then for her murder, however, on the available record and evidence produced by the prosecution, the cases of both

the appellants are distinguishable on many features, therefore, their cases are to be taken and discussed separately.

**7.** As far as the case of appellant Hassan Ali is concerned, it is an admitted fact that none of the prosecution witnesses has uttered a single word that either he has seen the appellant Hassan Ali while picking the minor or the minor in his company or handing over the minor by appellant Hassan Ali to co-appellant Tauseef, and thus prosecution has not brought on record an iota of evidence to prove that it was appellant Hassan Ali who kidnapped minor Marwa. Similarly, it has also never been the case of the prosecution that appellant Hassan Ali has directly approached to the complainant party for demanding any ransom amount as on the available record, these allegations of demanding the ransom amount have been levelled against the co-appellant Tauseef Ahmad as it is the case of the complainant that his father namely Muhammad Aslam was contacted for payment of ransom amount from Cell/SIM No.03175595539 which Cell was lateorn recovered from the direct possession of co-appellant Tauseef Ahmad at the time of his arrest

and regarding which a recovery memo Ex.PW-17/3 was also drafted, therefore, neither the allegation of kidnapping nor allegations of any demand of ransom by appellant Hassan Ali from the complainant party have ever been alleged nor established by the prosecution through any evidence.

**8.** It is also relevant to mention here that even for the murder of minor Marwa, the prosecution has not brought on record any evidence to connect appellant Hassan Ali with the same as though the prosecution has relied upon the confessional statements of the appellants made before the SP / PW-18 under section 21-H of The Anti-Terrorism Act, however, if the said confession is taken as true and correct even then appellant Hassan Ali has statedly brought the minor to the house of co-appellant Tauseef and simultaneously if the confessional statement of co-appellant Tauseef is taken into consideration then it was he who statedly administered three intoxicant tablets to minor Marwa. The cause of death of minor Marwa as per Post Mortem Report is from strangulation and suffocation, that allegation, too, has neither been alleged by the prosecution against appellant Hassan Ali nor the same

finds support from the combined reading of the confessional statements of the two appellants and rightly so as throughout this period, deceased Marwa remained in the exclusive possession of appellant Tauseef, therefore, for both the sets of offences i.e. for kidnapping and demanding the ransom amount and thereafter for the murder of the minor, the prosecution has not been able to prove its case against appellant Hassan Ali.

**9.** It is also relevant to mention here that during the course of arguments, the learned counsel for the complainant party made much stress that infact both the appellants were in close contact before and at the time of commission of offence through texting messages to each other which as per the stance of the complainant's counsel also finds support from the confessional statements, however, though the prosecution has produced the voice transcript/conversation transcript, however, the timings of these messages do not tally and commensurate with the plea of complainant party as as per the contents of the FIR as well as Madd No.17, the minor deceased went missing at 01.15 p.m., however, these messages are of much earlier time and if these

messages are taken into consideration even then they are not sufficient to establish that appellant Hassan Ali was having any intention of murder of the minor, whereas to the extent of demanding of the ransom money, as stated hereinabove, the prosecution has not brought on record an iota of evidence that Hassan Ali has ever contacted them or demanded the ransom amount.

**10.** It is also one of the distinguishing features of the case of appellant Hassan Ali that it is the case of prosecution that infact he brought the minor Marwa to the house of co-appellant Tauseef and thereafter she was murdered and then both the appellants made a joint pointation of the dead body which is a place on the rooftop of the house of appellant Tauseef Ahmad, however, it does not find any support from the evidence available on file that how appellant Hassan Ali could know the place of placing the dead body at the rooftop of the house of co-appellant Tauseef as it has never been a case of prosecution that both of them have murdered her inside the house of co-appellant Tauseef and then they have placed the dead body at the rooftop of the said house. Therefore, even for the recovery of

the dead body from the rooftop of the house of appellant Tauseef, appellant Hassan Ali could not be saddled and more particularly when it is an admitted position that it is a residential house where father, mother and other siblings of appellant Tauseef are residing and it is also an admitted fact that both the appellants are not relatives then how appellant Hassan Ali would have any access to the rooftop of co-appellant Tauseef Ahmad, therefore, it is beyond imagination that appellant Hassan Ali had the knowledge of placing the dead body at the rooftop of the house of co-appellant Tauseef.

**11.** Another important aspect of the matter which not only distinguishes the case of appellant Hassan Ali from co-appellant Tauseef Ahmad but also excludes the involvement of the former in the occurrence as the prosecution has failed to produce any witness to furnish any convincing last seen evidence against appellant Hassan Ali that he was seen either inside, or near and around the house of co-appellant Tauseef or in his company before or after the occurrence or in the company of minor Marwa on the day of occurrence despite the fact that allegedly she left her house in broad daylight. Though prosecution produced one

Usman Ghani (PW-13) for furnishing the alleged last seen evidence against appellant Hassan Ali, however, his testimony is merely hearsay basing on the statement of appellant Hassan Ali and, that too, without uttering a single word that he saw appellant Hassan Ali in the company of Marwa on the day of occurrence or near the house of co-appellant or in his company. Besides that, how involvement of Hassan Ali in the occurrence could be inferred when admittedly he was not arrested from the spot of recovery of dead body rather undeniably from his own house. This scenario not only indicates that important links in the chain of story set by the prosecution against appellant Hassan Ali are missing but the same also creates a reasonable doubt in a prudent mind regarding the role attributed to appellant Hassan Ali in the commission of alleged offence and thus in view of above reasons, the case of prosecution is doubtful all around qua the involvement of appellant Hassan Ali in the commission of offences, therefore, he is entitled for its benefits and consequently, he is acquitted of the charges levelled against him under section 365-A PPC as well as section 302(b) PPC.

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**12.** It is also an admitted fact that the dead body of deceased Marwa and her belongings were recovered from the rooftop of the house of appellant Tauseef, who himself has concealed the same there. It is also an admitted fact that the said house is residential and dwelling house where four other persons are also residing and it is also an admitted fact that appellant Hassan Ali is not a relative of co-appellant Tauseef who has access to enter the house of appellant Tauseef, therefore, any allegation of concealment of the dead body of deceased or her belongings by appellant Hassan Ali is a remote phenomenon, therefore, he is also acquitted of the charges levelled against him under section 203 PPC.

**13.** It is settled since long that for giving benefit to an accused, it is not essential that there should be many grounds for the same, even a single doubt is sufficient to extend its benefit to an accused person as it is the cardinal principle of criminal administration of justice that let hundred guilty persons be acquitted but one innocent person should not be convicted. In the case of **"Bashir Muhammd Khan vs. The State"** reported as **2022 SCMR 986**, the Hon'ble Apex Court has held that

single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefits, not as a matter of grace and concession but as a matter of right. The conviction must be based on unimpeachable; trustworthy and reliable evidence. Any doubt arising in prosecution's case is to be resolved in favour of the accused and burden of proof is always on prosecution to prove its case beyond reasonable shadow of doubt. Likewise, in the case titled **"The State through P.G. Sindhand others vs. Ahmed Omar Sheikh and others"** reported as **2021 SCMR 873**, the Apex Court has held that even if a single circumstance creates reasonable doubt in a prudent mind regarding guilt of an accused then the accused shall be entitled to such benefit not as a matter of grace and concession but as a matter of right and such benefit must be extended to the accused person(s) by the Courts without any reservation. The same rational has been reiterated in cases of **"Khalid Mehmood alias Khaloo vs. The State"** reported as **2022 SCMR 1148**, **"Muhammad Mansha vs. The State"** reported as **2018 SCMR 772**, **"Tariq Pervaiz vs. The State"** reported as **1995 SCMR 1345**.

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**14.** As far as the convictions of appellant Hassan Ali under section 7(e) and 7(a) of The Anti-Terrorism Act is concerned, since we have disbelieved the evidence of prosecution qua his involvement for offences of kidnapping and demanding of ransom amount from the prosecution and, thereafter, his involvement in the murder of Marwa, as it has never been the case of prosecution that he through his cell has contacted them for demanding a ransom amount nor the prosecution has produced any evidence that deceased Marwa was seen in his company or that he handed over Marwa to appellant Tauseef or that he has seen by any of prosecution witness(es) entering the house of the co-appellant Tauseef or near and around the house of the appellant, or that he has joined hands with co-appellant Tauseef in the murder and then concealing his dead body, therefore, when the prosecution has not been able to prove the substantive offences of kidnapping and then demanding of ransom as well as of murder of the deceased Marwa as against appellant Hassan Ali then he could also be not convicted and sentenced under sections 7(a) and 7(e) of The Anti-Terrorism Act as for maintaining these convictions prosecution were required to prove that the substantive offences of

kidnapping and murder were committed with such a design and mode and manner so that the same may attract the essential ingredients to constitute the offence of terrorism and since we have held that the prosecution has not been able to prove their case against appellant Hassan Ali qua his involvement in the kidnapping and murder of deceased Marwa then the mode and manner of the commission of these offence become irrelevant to his extent, therefore, he is also acquitted of the charges levelled against him under section 7(a) and 7(e) of The Anti-Terrorism Act.

**15.** As far as the case of appellant Tauseef Ahmad is concerned, it is the case of prosecution that the grandfather of minor Marwa namely Muhammad Aslam (PW-8) received a call from Cell No.03175595539 who was demanding the ransom amount for the release of Marwa and it was the said cell/SIM from whom the caller remained in contact with the grandfather of Marwa and then the caller kept changing the places for payment of the ransom amount and then at the time of raid conducted by the local police on the house of appellant Tauseef, a mobile set having the same SIM number was recovered from his possession, therefore, the prosecution has been able to

prove their initial stance as set up in the First Information Report qua the contact from a particular number which was lateron recovered from the direct possession of appellant Tauseef.

**16.** Another distinguishing feature of the case of appellant Tauseef from the case of co-appellant Hassan Ali is that it is the case of prosecution as well as the stance of the appellants in their confessional statements that Marwa was handed over to Tauseef in a healthy and sound condition and it was he who lateron administered intoxicant tablets to her inside his house and then it was he in whose custody Marwa met his unnatural death and then it was his house where the dead body was concealed and which was lateron recovered from the rooftop his house, therefore, in the given facts and circumstances, both sets of allegations i.e. demanding ransom for kidnapping and murder are established on the face of record against appellant Tauseef.

**17.** It is also relevant to mention here that the father of appellant Tauseef namely Sahib Khan appeared in the court as PW-8 (transposed as PW-19), however, during his examination-in-chief, he stated that the dead

body was recovered on the pointation of appellant Hassan Ali only and thereby exonerated his son Tauseef Ahmad from the allegations and thus he was declared as hostile witness, therefore, both the prosecution and defence have cross-examined him. The plain reading of his statement would show that he has apparently extended concession to his son and has tried to implicate appellant Hassan Ali but this stance is neither reasonable nor logical nor appealable nor the same finds any support from the attending circumstances of the case as as stated hereinabove that the dead body was recovered from a residential and dwelling house where several persons including parents and siblings of appellant Tauseef were residing then how it was possible for appellant Hassan Ali to come to their house and place the dead body at the rooftop of their house, therefore, it is established that the whole chain of the alleged offences comprising of demanding a ransom amount and thereafter murdering the kidnapee has been executed by appellant Tauseef Ahmad from inside his house. It is also settled law that the evidence produced by a hostile witness could not be outrightly rejected and it is to be read in juxtaposition with the

other material and evidence available on file. In the case titled **"Niaz Ahmad vs. The State"** reported as **PLD 2003 Supreme Court 635**, wherein it has been observed by the Apex Court that the law is clear that the statement of a hostile witness to be viewed in the light of the circumstances of the case and thereafter it is to be ascertained as to what truth actually flows from their statement, whether favouring the prosecution or the defence.

**18.** As far as contention of the learned counsel for appellant Tauseef qua the non-preparation of the separate recovery memo of the dead body of deceased which omission is sufficient to create doubt in the prosecution case is concerned, suffice it to say that the very initial report in the form of Murasila Ex.PA/1 was lodged in the house of appellant Tauseef Ahmad at the time of recovery of the dead body, which fact is duly reflected in the contents of FIR and when neither this fact of recovery of the dead body from the house of appellant Tauseef has been denied by him nor he has asserted that the dead body was recovered from some other place, rather in written arguments submitted by his learned counsel, it was contended that the said

house was not in exclusive possession of appellant Tauseef as three other persons were also residing there, meaning thereby that the recovery of the dead body has been admitted from the house where appellant Tauseef Ahmed is also residing.

**19.** It is also very astonishing that on one hand, it was asserted by the learned counsel for appellant Tauseef that the real culprits were Khurram Shahzad and Ijaz Shah, but on the other hand, the aforesaid three inhabitants of the said house besides appellant Tauseef have neither been named nor attributed any role nor any reason has been advanced or established to the effect that it was either Khurram Shahzad or Ejaz Shah who had brought the dead body to their house. It is also relevant to mention here that substitution of real culprits with innocent persons by the real father of a minor daughter is a rare and remote phenomenon, therefore, these contentions are of no avail to appellant Tauseef Ahmad. In the case titled **"Shamsher Ahmad and another vs. The State and others**" reported as **2022 SCMR 1931**, in which it has been held that substitution in such like cases is a rare phenomenon. The complainant would not prefer to spare the real

culprit who murdered his son and falsely involve the petitioner without any rhyme and reason.

**20.** In view of above discussions and on the basis of available record, the role of both the appellants in the context of two sets of allegations are quite distinguishable from each other and this court has come to the conclusion that it is appellant Tauseef Ahmad who is guilty of the commission of these offences. It is vital to mention here that by now it has become an established principle that in criminal cases courts are required to sift grain from the chaff in order to reach at a just conclusion. In the case titled **"Munir Ahmad and another v. The State and others"** reported as **2019 SCMR 79**, it has been held that for dispensation of justice in criminal cases courts are required to sift grain from the chaff in order to reach at a just conclusion. If some independent and strong corroboration is available the set of witnesses which has been disbelieved to the extent of acquitted co-accused of the appellant can be believed to the extent of the appellant. Likewise, in the case titled "**Sarfraz alias Sappi and 2 others vs. The State",** reported as **2000 SCMR 1758**, it has been held that originally the opinion of the Court was that if a

witness is not coming out with a whole truth his evidence is liable to be discarded as a whole meaning thereby that his evidence cannot be used either for convicting accused or acquitting some of them facing trial in the same case, however, for safe administration of justice a condition has been imposed namely that the evidence which is going to be believed to be true must get independent corroboration on material particulars meaning thereby that to find out credible evidence principle of appreciation of evidence i.e. sifting chaff out of grain was introduced. Same view was not only adopted in the case "**Ziaullah vs. The State",** reported as **1993 SCMR 155**, but has also been reiterated in the case tilted "**Khadim Hussain vs. The State",** reported as **2010 SCMR 1090**. In view of the above discussion, the prosecution through the ocular account of PW-7 Faizan Aslam and PW-8 Muhammad Aslam and unbroken circumstantial evidence have proved their case against appellant Tauseef and as such he has rightly been convicted.

**21.** However, the next question which is to be answered by this court that as to whether, on the available evidence, appellant Tauseef is liable for the

capital punishment or the same requires to be reduced. In order to determine the quantum of punishment in the case of appellant Tauseef, it is relevant to mention here that at the time of arrest of appellant Touseef, his age was recorded by the local police as 18/19 years, whereas his age at the time of recording his statement under section 342 Cr.PC was recorded as 19/20 years, therefore, prima facie, it appears that if at the time of occurrence, he was not a juvenile but was surely at the borderline of ages between juvenility and majority. Similarly, while awarding the capital punishment to appellant Touseef, the learned trial court has heavily relied on his confessional statement recorded by SP CTD/PW-17 under section 21-H of The Anti-Terrorism Act. It may be mentioned here that under normal circumstances, a confession made before the police personnel is not admissible under Article 40 of Qanun-e-Shahadat Order, 1984, however, the same has been made conditionally admissible under section 21-H of The Anti-Terrorism Act to the effect that the confession so made must find independent corroboration from other circumstances of the case. Though the confession of appellant Touseef finds support from other circumstances in the form of his continuous

contact with Muhammad Aslam/PW-8 for demanding of the ransom amount and recovery of dead body of the deceased from his house, however, after the recording of aforesaid confession, the SP CTD/PW-17 again handed him over to the Investigating Officer and who on the next day again produced him before the Judicial Magistrate for recording of his confessional statement, however, appellant Touseef refused to record the same, therefore, in such state of affairs, the confessional statement so recorded by SP CTD/PW-17 appears to be not voluntary more particularly when the same has been recorded by him after 29 days of police custody. It is also relevant to mention here that though the evidence produced by the police could not be underestimated as they are as good witnesses as any other witness is, however, in the present case, though the prosecution has cited two private persons namely Muhammad Asad son of Muhammad Akram and Naseer Ahmad son of Muhammad Miskeen over the recovery memo Ex.PW-15/3 vide which the dead body of the deceased was recovered, however, those private witnesses were not produced and thus all these circumstances could be considered for reduction of his capital punishment into that of imprisonment for life.

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*Hon'ble Mr.Justice Muhammad Ijaz Khan.*

**22** In view of the above discussions, this court has come to the conclusion that as like the concept of benefit of doubt for considering the question of guilt or otherwise, the court of law could also consider any mitigating circumstance(s) for awarding lesser penalty keeping in view the facts and circumstances of the case. The aforesaid principle of appreciating of evidence qua considering the mitigating circumstances for the purpose of reduction in capital punishment was applied by the Apex Court in the case titled "**Mir Muhammad alias Miro** vs. **The State**" reported as **2009 SCMR 1188** where the Apex Court converted the death sentence awarded to the accused into that of life imprisonment. Similarly, in the case titled "**Mir Muhammad alias Miro vs**. **The State**" reported as **2007 SCMR 1413**, it has been observed by the Apex Court that normally penalty for an act of commission of Qatl-i-Amd provided under the law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case. Similarly, in case titled "**Abdul Qayyum vs**. **The**

**State**" reported as **2003 PCr.LJ 1059**, the Honourable Lahore High Court while maintaining conviction has reduced the sentence of death into that imprisonment for life on the ground of age. In view of the above discussion and for mitigating circumstances as highlighted in the preceding Paras of this judgment, the sentences of appellant Tauseef awarded to him under section 302(b) PPC as well as under section 365-A PPC are reduced from that of death to the imprisonment for life on the two counts.

**23.** The next question before this court is that as to whether appellant Tauseef has rightly been convicted and sentenced to death under sections 7(a) and 7(e) of The Anti-Terrorism Act and as to whether he has committed these offences with the required design, intention and mode and manner which may attract the definition of terrorism as worded in section 6 of The Anti-Terrorism Act, 1997. As stated in the preceding Paras of this judgment that to the extent of appellant Hassan Ali, prosecution has not been able to prove the commission of both sets of offences i.e. kidnapping for ransom and murder of Marwa, however, to the extent of

Toseef, it would be relevant to reproduce section 7(a) and 7(e) of The Anti-Terrorism Act as under:

> **7. Punishment for acts of terrorism.-** [(1)] Whoever commits an act of terrorism under section 6, whereby-
> (a) death of any person is caused, shall be punishable, on conviction, with death or with imprisonment for life, and with fine; or
> (b) ….
> (c) ….
> (d) ….
> (e) the offence of kidnapping for ransom or hostage-taking has been committed, shall be punishable, on conviction, with death or imprisonment for life.

The aforesaid both the provisions of law i.e. section 7(a) and section 7(e) under which appellant Tauseef was convicted and sentenced to death would show that he has been convicted for causing the death of Marwa as well as for the offence of kidnapping for ransom and both these sections of law i.e. sections 7(a) and 7(e) of The Anti-Terrorism Act are punishable with death or imprisonment for life and conversely the offence of qatl-i-amd under section 302(b) PPC and the offence of kidnapping under section 365-A PPC are also punishable with death or imprisonment for life, however, in order to maintain the conviction under the Anti-Terrorism Act, prosecution was bound to prove that the appellant Tauseef has committed these offences

in such a mode and manner which may attract the definition of terrorism as provided under section 6 of The Anti-Terrorism Act, 1997. The said definition of terrorism being relevant is also reproduced hereunder:

> **6. Terrorism.**-(1) In this Act, "terrorism" means the use or threat of action where:-
> (a) the action falls within the meaning of sub-section (2);
> (b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect [or a foreign government or population or an international organization] or create a sense of fear or insecurity in society; or
> (c) …
> **(2)** An "action" shall fall within the meaning of sub-section (1), if it:-
> (a) involves the doing of anything that causes death;
> (b) ….
> (c) …
> (d) …
> (e) involves kidnapping for ransom, hostage-taking or hijacking.

The aforesaid definition of "Terrorism" would show that the offender while committing an offence of terrorism must have acted and with such a design so as to create a sense of fear and insecurity amongst the public/society. The phrase "use or threat is designed to coerce and intimidate or overawe the public or a section of the public or community or sect or create a sense of fear or insecurity in society" is of more

significance in the definition of “terrorism”. It manifestly indicates that the offences punishable under The Anti-Terrorism Act must be committed in such a mode and manner and with such a clear intention of the offender and with the sole object to create a sense of fear and insecurity in the society and thus the attending circumstances and mode and manner of the occurrence are to be considered so to attract and apply the provisions of The Anti-Terrorism Act, 1997. If the aforesaid yardstick is applied to the case of appellant Tauseef Ahmad then it is established on the face of record that he has committed both the offences behind the closed doors of his house as he has detained the kidnapee inside his house and the dead body was also concealed and kept on the rooftop of the house, which conduct on the part of the appellant Tauseef, prima facie, shows that his intention was not to create any fear or terror in the society but the offence was committed only to gain money, therefore, such conduct on the part of appellant Tauseef Ahmad would take his case out of the definition of terrorism and thus, he could not be convicted under sections 7(a) and 7(e) of The Anti-Terrorism Act. It is relevant to mention here

that in the recent past when different courts of law applied different yardsticks while dealing with the cases of terrorism qua the extent and scope of offence of terrorism then the Apex Court, keeping in view the divergent approaches of the courts of law, constituted a larger bench comprising of seven Honourable Judges of the Apex Court and heard a case titled **"Ghulam Hussain and others vs. The State and others"**, reported as **PLD 2020 Supreme Court 61**, where it was specifically held that mere heinousness of offence does not constitute the offence of terrorism, however, such offences are being made triable by the Anti-Terrorism Court only as they were included in Third Schedule of The Anti-Terrorism Act, 1997, therefore, while dealing with such offences which are though included in Third Schedule but when the elements to constitute the offence of terrorism are missing then the Anti-Terrorism Court has just to award punishment for those heinous offences which are find mention in the Schedule and could not pass any punishment under The Anti-Terrorism Act. The larger bench of the Apex Court has also observed that the definition as contained in section 6 of The Anti-Terrorism Act is too wide and

the legislature has included many actions, designs and purposes which have no nexus with the generally recognized concept of terrorism. Para No.13 of the said judgment being relevant is reproduced below:

> "A careful reading of the Third Schedule shows that an Anti-Terrorism Court has been conferred jurisdiction not only to try all those offences which attract the definition of terrorism provided by the Act but also some other specified cases involving heinous offences which do not fall in the said definition of terrorism. For such latter category of cases it was provided that although those offences may not constitute terrorism yet such offences may be tried by an Anti-Terrorism Court for speedy trial of such heinous offences. This distinction between cases of terrorism and cases of specified heinous offences not amounting to terrorism but triable by an Anti-Terrorism Court has already been recognized by this Court in the cases of Farooq Ahmed v. State and another (2020 SCMR 78), Amjad Ali and others v. The State (PLD 2017 SC 661) and Muhammad Bilal v. The State and others (2019 SCMR 1362). It has been clarified by this Court in those cases that such specified heinous offences are only to be tried by an Anti-Terrorism Court and that court can punish the person committing such specified heinous offences only for commission of those offences and not for committing terrorism because such offences do not constitute terrorism. For the purposes of further clarity on this issue it is explained for the benefit of all concerned that the cases of the offences specified in entry No. 4 of the Third Schedule to the Anti-Terrorism Act, 1997 are cases of those heinous offences which do not per se constitute the offence of terrorism but such cases are to be tried by an

Anti-Terrorism Court because of their inclusion in the Third Schedule. It is also clarified that in such cases of heinous offences mentioned in entry No. 4 of the said Schedule an Anti-Terrorism Court can pass a punishment for the said offence and not for committing the offence of terrorism. It may be pertinent to mention here that the offence of abduction or kidnapping for ransom under section 365-A, P.P.C. is included in entry No. 4 of the Third Schedule and kidnapping for ransom is also one of the actions specified in section 7(e) of the Anti-Terrorism Act, 1997. Abduction or kidnapping for ransom is a heinous offence but the scheme of the Anti-Terrorism Act, 1997 shows that an ordinary case of abduction or kidnapping for ransom under section 365-A, P.P.C. is merely triable by an Anti-Terrorism Court but if kidnapping for ransom is committed with the design or purpose mentioned in clauses (b) or (c) of subsection (1) of section 6 of the Anti-Terrorism Act, 1997 then such offence amounts to terrorism attracting section 7(e) of that Act. In the former case the convicted person is to be convicted and sentenced only for the offence under section 365-A, P.P.C. whereas in the latter case the convicted person is to be convicted both for the offence under section 365-A, P.P.C. as well as for the offence under section 7(e) of the Anti-Terrorism Act, 1997. The same may also be said about the other offences mentioned in entry No. 4 of the Third Schedule to the Act pertaining to "Use of firearms or explosives by any device, including bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby", "Firing or use of explosive by any device, including bomb blast in the court premises", "Hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance" and "Unlawful possession of an explosive substance or abetment for such an offence

> under the Explosive Substances Act, 1908 (VI of 1908)". Such distinction between cases of terrorism and other heinous offences by itself explains and recognizes that all heinous offences, howsoever serious, grave, brutal, gruesome, macabre or shocking, do not ipso facto constitute terrorism which is a species apart. Through an amendment of the Third Schedule any heinous offence not constituting terrorism may be added to the list of offences which may be tried by an Anti-Terrorism Court and it was in this context that the Preamble to the Act had mentioned "Whereas it is expedient to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences."

Again the aforesaid legal proposition was confirmed by the Apex Court in a recent case titled "**Nawab Siraj Ali and others vs. The State through A.G. Sindh"** reported as **2023 SCMR 16** where it was also observed that a bare reading of the Anti-Terrorism Act reveals that an Anti-Terrorism Court has been conferred jurisdiction not only to try all those offences which attract the definition of 'terrorism' provided by the Act but also some other cases, which have been specified in Third Schedule of the Act involving heinous offences which do not fall in the said definition of terrorism. The sole purpose of trying such offences by the Anti-Terrorism Court is for speedy trial

of such heinous offences irrespective of the fact that they do not fall within the ambit of 'terrorism'.

**24.** By applying the above stated yardstick as interpreted by the Apex Court, though the offences committed by appellant Tauseef were heinous in nature being kidnapping for ransom and murder, however, the mode and manner in which these offences were committed do not attract the definition of terrorism as the same lacks the required intention, purpose and design of the appellant which may create a sense of fear and insecurity in the society, therefore, he has wrongly been convicted under sections 7(a) and 7(e) of The Anti-Terrorism Act. As such, he is acquitted of the charges of terrorism.

**25.** As far as the conviction of appellant Tauseef under section 203 PPC is concerned, as discussed hereinabove that it was appellant Tauseef who detained the abductee in his house, called the relatives of the abductee and thereafter caused her murder and then concealed the dead body of the deceased as well as all of her belongings at the rooftop of his house, therefore, he has rightly been convicted and sentenced under this head and as such the same is maintained.

**26.** In view of the above discussions and expositions of law on the subject, criminal appeal No.91-A/2022 filed by appellant Hassan Ali is hereby allowed and his convictions and sentences recorded by the learned trial court vide impugned order and judgment dated 09.04.2022 are set aside and he is acquitted of all the charges levelled against him and he be set at liberty from the jail forthwith if not required in any other case; whereas, Criminal Appeal No.94-A/2022 filed by appellant Tauseef is hereby partially allowed and the convictions awarded to him under section 302(b) and section 365-A PPC by the learned trial court vide order and judgment dated 09.04.2022 are maintained, however, his sentences are reduced from death on two counts to the imprisonment for life on two counts (the former as Ta'zir). Whereas, convictions and sentences of death on two counts awarded to him under sections 7(a) and 7(e) of The Anti-Terrorism Act are set aside and he is acquitted of the charges of terrorism. The rest of the judgment of the learned trial court to his extent qua the payment of compensation amount of Rs.10,00,000/- to the legal heirs of deceased under section 544-A Cr.PC and conviction and sentence

recorded under section 203 PPC shall remain intact. All the sentences of imprisonment awarded to appellant Tauseef shall run concurrently and the benefit of section 382-B Cr.PC is also extended to him. Since we have acquitted one of the appellants and has reduced the sentences of second appellant from death to imprisonment for life on two counts, therefore, Murder Reference No.02-A/2022 sent by the trial court to this court qua both the appellants are answered in negative.

**ANNOUNCED**.

(Jamil)

**J U D G E**

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