

JUDGMENT SHEET  
IN THE PESHAWAR HIGH COURT,  
PESHAWAR  
(Judicial Department)

**Cr.Misc.BA No.1833-P/2015**

Date of hearing: \_\_\_\_\_

Petitioner (s) : \_\_\_\_\_

Respondent (s) : \_\_\_\_\_

**JUDGMENT**

**ASSADULLAH KHAN CHAMMKANI, J.-** Petitioners

**1. Gul Muhammad and 2. Maaz Ullah**, seek bail in case FIR No.395 dated 04.09.2014, registered under sections 302/324/452/34 PPC, in Police Station Tangi, District Charsadda, on the ground of compromise, arrived at between them and LRs of deceased Mst. Mehbooba. Earlier the petitioners was granted bail by learned Judicial Magistrate-I, Tangi, on merits, vide order dated 09.05.2015, but the same was subsequently re-called/ cancelled by learned Additional Sessions Judge, Charsaddat at Tangi, by accepting bail cancellation petition of complainant Hazrat Shah, vide order dated 04.06.2015. However, during pendency of trial, petitioners entered into a compromise with all the major LRs of the deceased except Mst. Mahida (one of the daughters of the deceased), consequent whereupon, the petitioners approached the learned Trial Court for bail on fresh ground

of compromise, but their request was turned down due to incomplete compromise, hence, this petition.

2. The prosecution case is that on 04.09.2014 at 10.45 hours, complainant Hazrat Shah, in company of dead body of his mother-in-law Mst. Mehbooba, reported to local police in casualty of Tangi hospital Charsadda, that on the fateful he alongwith his mother-in-law and relative PW Ihsan Ullah, was present in her house, when at 0.40 hours, both the petitioners alongwith absconding co-accused Gul Siyar and Inayat Ullah, duly armed with deadly weapons, entered her house and opened firing at them with the intention to do them away, resultantly, his mother-in-law got hit and died on the spot, while they luckily remained unscathed. In addition to him, the incident is stated to have been witnessed by PW Ihsan Ullah. A previous blood feud inter-se one Mehboob Ali Khan and the accused over landed property has been alleged as motive behind the incident, hence, this case.

3. Learned counsel for the petitioner argued that in the incident only Mst. Mehbooba wife of Akhtar Munir has lost her life while complainant Hazrat Shah and PW Ihsan Ullah has not sustained any injury; that all the major LRs of the deceased Mst. Mehbooba except one, have entered into a compromise with the petitioners and have pardoned them in the name of Almighty Allah by waiving

their rights of Qisas and Diyat while share of diyat of minor daughter of deceased, namely, Mst. Tasleem has been paid; that a proper compromise has been produced and joint statement of the LR's of the deceased has been recorded at the identification of the elders/Jirga members by the learned Trial Court; that only major LR (daughter) of deceased Mst. Mahida has not been entered into a compromise with the petitioners and in such eventualities, she would only be entitled to her share in Diyat within the meaning of section 309 PPC. He contended that no doubt, under section 311 PPC, where all the Walis do not waive or compound the right of Qisas or if the principle of fasad-fil-arz is attracted the Court may having regard to the facts and circumstances of the case, punish an offender against whom the right of qisas has been waived or compounded, with death or imprisonment for life or imprisonment of either description for a term which may extend to fourteen years but shall not be less than ten years as Ta'azir, however, learned counsel added that on one hand, the facts and circumstances required under section 311 PPC to warrant conviction of the petitioners under Tazir, are yet to be brought and determined by the learned Trial Court during trial, while on the other hand, by use of word **“may”** the matter of punishment under section 311 PPC, has been left on the discretions of the Court and such discretions

are always exercised by the Courts in the large interest of the society keeping in view the principles of substantial justice. He while referring to explanation to S.311 PPC, which says that for the purpose of section 311 PPC, the expression *fasad fil Arz* shall include the past conduct of the offender, or whether he has any previous conviction or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience or the offence relates to honour crime or if the offender is considered a potential danger to the community or if the offence has been committed in the name or on the pretext of honour, contended that no such evidence at the moment is on the record to bring the case of the petitioners within the ambit of explanation to S.311 PPC and contended that the ingredients of explanation to S.311 PPC, could only be determined after recording evidence by the learned Trial Court. He contended that admittedly, complainant and PW Ishan Ullah the alleged eyewitness have not entered into a compromise with the petitioners, but they are neither LRs of the deceased nor have sustained any injury in the incident. He added that in case of refusal of bail, if the prosecution fails to bring the facts and circumstances contemplated under section 311 there would be no proper justification for the unjustified incarceration of the petitioners while in case of release of the petitioners on

compromise, on one hand it would be in the large interest of the future relationship of the parties, while on the other hand, if the prosecution succeeds in bringing the facts and circumstances within the meaning of S.311, the Court may convict them at the end of trial. He contended refusal of bail to the petitioner would spoil the efforts conducted by elders in burying the hatchets of the parties, and the parties will once again resort to their previous position, which would be against the principles of substantial justice. He requested for release of the petitioners on bail.

4. Learned counsel for the complainant strongly opposed the contentions of learned counsel for the petitioners and contended that complainant and PW Ihsan Ullah, the eyewitnesses of the incident are still stuck to their stance and have not entered into any compromise with the petitioners; that the compromise is incomplete and a prima facie case still in light of statements of the eyewitnesses coupled with other corroborative pieces of evidence, still exists against the petitioners, punishment of which falls within the Prohibitory Clause of S.497 Cr.P.C., hence, the learned Trial Court has rightly refused bail to the petitioners by not considering the incomplete compromise.

4. Learned State counsel supported the arguments of learned counsel for the complainant.

5. I have heard the exhaustive submissions advanced from either side and perused the record carefully.

6. In this untoward incident Mst. Mehboob has been done to death with firearms, for which the petitioners and absconding co-accused Gul Siyar and Inayat Ullah, have been charged by complainant Hazrat Shah and PW Ihsan Ullah. The above named two PWs have also charged the accused for attempting at their lives by ineffective firing. The husband of Mst. Mehbooba deceased is already dead, while Abdur Rashid, Imran and Ziarat Gul (sons), Mst. Naheed and Mst. Parveen (daughters) of the deceased/ major LRs, have entered into a compromise with the petitioners, consequent whereupon, they have pardoned them in the name of Almighty Allah, by waving their rights of Qisas and Diayt. To this effect their joint statement has already been recorded by the learned Trial Court at the identification of Sartaj and Fazal Wahab (elders/Jirga members), who also acknowledged the compromise to be genuine, without any pressure and coercion. For minor LRs of deceased Mst. Tasleem Rs.2,20,000/- as her share in Diyat, has been deposited in National Saving Center Charsadda. The only major LR (daughter) of the deceased is Mst. Mahida, who has not yet entered into a compromise with the petitioners.

7. The moot questions for determination before me are that what could be the expected punishment in case of partial compromise under ta'zir, in case the prosecution succeeds in proving the guilt of the petitioners and that would be the impact of refusal of bail on the future relationship of the parties.

8. To clarify the legal position of the issue involved in the case, it would be advantageous to reproduced sections 309, 310, 311 PPC and 345 Cr.P.C. which are relevant in this regard.

**“S.309 PPC. Waiver-Afw of qisas in**

**qatl-i-and:-** (1) In the case of qatl-i-and an adult sane wali may, at any time and without any compensation, waive his right of qisas:

Provided that the right of qisas shall not be waived:

- (a) Where the Government is the wali; or
  - (b) Where the right of qisas vests in a minor or insane
- (2) Where a victim has more than one wali, any one of them may waive his right of qisas;

**Provided that the wali who does not waive the right of qisas shall be entitled to**

**his share of diyat. (the underline are for emphasis).**

**(3)** Where there are more than one victim, the waiver of right of qisas by the wali or one victim shall not affect the right of qisas of the wali or the other victim.

**(4)** Where there are more than one offenders, the waiver of right of qisas against one offender shall not affect the right of qisas against the other offender.

**S.310 PPC. Compounding of qisas (Sulh)**

**in qatl-i-amd:- (1)** In the case of qatl-i-amd, an adult san wali may, at any time on accepting badal-i-sulh, compound his right of qisas.

Provided that a female shall not be given in marriage or otherwise, in badal-i-sulh.

**(2)** Where a wali is a minor or an insane, the wali of such minor or insane wali may compound the right of qisas on behalf of such minor or insane wali.

Provided that the value of badal-i-sulah, shall not be less than the value of diyat.



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

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

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

### **3.11 PPC. Tazir after waiver or compounding of right of qisas in qatl-i-**

**amd:-** Notwithstanding anything containing in section 309 or section 310 PPC, where all the walis do not waive or compound the right of qisas, or if the principle of fasad-fil-arz is attracted the Court may, having regard to the facts and circumstances of the case, punish an offender against whom the right

of qisas has been waived or compounded with death or imprisonment for life or imprisonment of either description for a term which may extend to fourteen years as Ta'zir but shall not be less than ten years as Tazir.

Provided that if the offence has been committed in the name or on the pretext of honour the imprisonment shall not be less than ten years.

**Explanation:- For the purpose of this section, the expression fasad fil arz shall include the past conduct of the offender or whether he has any previous conviction or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience or if the offender is considered a potential danger to the community or if the offence has been committed in the name or on the pretext of honour.**

S.345 Cr.P.C. Compounding of offences:-

(1).....

2. The offences punishable under the sections of the Pakistan penal code specified in the first two column of the table next following may with the permission of the court before which any prosecution for such offence is pending be compounded by the persons mentioned in the third column of that table.

Offences	Sections of PPC applicable	Persons by whom offence may be compounded
Qatl-i-amd	302	By the heirs of the victims [other than the accused or the convict] if the offence has been committed by him in the name or on the pretext of karo kari, siyah kari or similar other customs or practices

S.309 PPC pertaining to waiver (Afw) and S.310 PPC pertaining to compounding (Sulh) in cases of murder are relevant only to cases of Qisas and not Tazir. In case of Ta’zir the matter of compromise between the parties is governed and regulated by the provisions of S.345 (2) Cr.P.C. read with section 338-E PPC. Since, the trial is in progress and the petitioners have not been awarded any punishment under ta’azir, therefore, at the moment, the case of the petitioner would not fall within the ambit of S.345 (2)

Cr.P.C. read with S.338-E PPC. If the petitioners had already been awarded punishment under Ta'azir and thereafter the LRs of the deceased entered into compromise with them, then their case would be seen and adjudged in light of provisions of S.345 (2) Cr.P.C. read with S.338-E PPC. At the moment, the compromise falls within the ambit of S.309 and 310 PPC. But since, Mst. Mahida one of the LR of the deceased has not compounded the offence or waived her right of Qisas, therefore, she would be entitled to share of her Diyat in light of provisions of section 309 PPC, which says that the wali who does not waive the right of qisas shall be entitled to his share of diyat. No doubt, under 311 PPC, the Court in its discretion despite waiver or compounding of right of qisas in qatl-i-amd, could inflict punishment of death or imprisonment for life or imprisonment of either description for a term which may extend to fourteen years but shall not be less than ten years. However, by use of word **“may”** in section 311 PPC, the discretion has been squarely left with the Court. Besides, under explanation to S.311 PPC, certain essential ingredients have been provided to be considered by the Court while inflicting punishment under Tazir in cases of compromise, which includes the past conduct of the offender, his previous conviction or the brutal or shocking manner in which the offence has been committed

which is outrageous to the public conscience or the offence relates to honour crime or if the offender is considered a potential danger to the community or if the offence has been committed in the name or on the pretext of honour. At the moment nothing is on the file to bring the case of the petitioners within the meaning of explanation attached to section 311 PPC. Rather, the facts and circumstances as well as the ingredients to warrant punishment of the petitioners under Ta'zir, are yet to be brought and proved during trial.

10. As stated earlier neither complainant nor PW Ishanullah has sustained any injury. All the major legal heirs of Mst. Mehbooba deceased except her daughter Mst. Mahida, have pardoned the petitioners in the name of Almighty Allah by waiving their rights of qisas and diyat. The share of minor LR in diyat has already been paid. The facts and circumstances or the ingredients of Fasad-fil-arz, are yet to be proved against the petitioners by the prosecution during trial. However, keeping in view the prospect of the compromise on future relationship of the parties, who have buried their hatchets, it would be in the large interest of the parties and justice to extend the concession of bail to the petitioners, otherwise, the entire efforts of compromise will prove spoil and the parties will again bring out their swords against each other. Besides, punishment to be awarded under

section 311 PPC, is the discretion of the Court and the Courts keeping in view the principles of substantial justice as well as the norms, customs, traditions of the society as well as the future apprehension of indulgence of the parties in enmity again, should exercise such discretions in a judicious manner. The complainant and PW Ihanullah have their own case and are still at liberty to prove their version, fate of which will be decided by the learned Trial Court at the conclusion of trial. The release of the petitioners on bail will not prejudice the case of the prosecution. It is settled law that bail may not be withheld as a punishment because a mistaken relief of bail can be repaired by convicting an accused, but no proper reparation could be offered to him for his unjustified incarceration, albeit, his acquittal in the long run.

11. In light of what has been discussed above, this petition is allowed. The petitioners are admitted to bail on the sole ground of compromise, provided each one of them furnishes bail bonds in the sum of Rs.3,00,000/- with two local, reliable and resourceful sureties each in the like amount to the satisfaction of learned Trial Court.

**Announced**  
03.11.2015

**J U D G E**









7. For what has been discussed above, Suo motu notice given to accused Shakir stands withdrawn. He is admitted to bail on already existing bail bonds, on merits. Since this court has already directed expeditious conclusion of trial while dealing with the bail petition of co-accused Farman, therefore, office is directed to send the record to the quarter concerned within two days, positively.

announced:  
19.10.2015

**J U D G E**



