

IN THE PESHAWAR HIGH COURT,
BANNU BENCH
(Judicial Department)

Criminal Appeal No.350-B of 2019
With Murder Reference No.09-B/2019

Wahidullah
Versus
The State etc

Date of hearing 18.01.2021

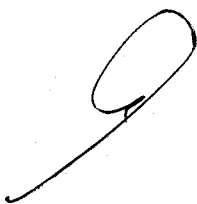
For Appellant: **Mr. Sawal Nazir Khan, Advocate:**

For the State: **Mr. Shahid Hameed Qureshi Addl: A.G.**

JUDGMENT

SAHIBZADA ASADULLAH, J.— This criminal appeal is directed against the judgment dated 31.10.2019 in Sessions Case No.27/VII of 2018-19, passed by learned Additional Sessions Judge-I/Judge MCTC Karak, whereby the appellant Wahid Ullah involved in case F.I.R No. 393 dated 13.9.2018 registered at Police Station Latamber, District Karak, was convicted under section 302(b) P.P.C read with section 338-C PPC and sentenced to death on two counts, and to pay a compensation Rs.2,00,000/-(two lac) under section 544-A Cr.P.C, to the legal heirs of the deceased, recoverable as

arrears of land revenue or in default thereof to suffer six months imprisonment. Murder Reference No.09-B of 2019 has also been sent by the learned trial Court under section 374 Cr.PC for its confirmation or otherwise, hence, we intend to decide both the matters through the one and the same judgment.



2. It is pertinent to mention that, at the time of arrest of the appellant a Kalashnikov alongwith a fitted magazine containing 10 live rounds of 7.62 bore, was recovered from his possession, in which respect case FIR No. FIR No.395 dated 14.09.2018, under section 15 AA, Police Station Latamber, District Karak, was registered. The case was put in court and on conclusion of the trial, the learned trial Court was pleased to convict the appellant vide judgment dated 31.10.2019, to three years R.I. Both the judgments were impugned before this court through the instant jail criminal appeal.

3. Brief facts of the prosecution case narrated in the FIR (Ex.P.A), are that on 13.09.2018 at 13:20 hours, complainant Awaz Gul brought the dead-body of his daughter Mst. Asia Bibi to the Police Station Latambar Karak, and reported the matter to the effect that he visited the house of his daughter Mst. Asia Bibi and was present there, when in the meanwhile, the deceased rushed to the outer gate on hearing

the fire shots, when she opened the gate the accused/appellant entered the house and fired at Mst. Asia Bibi, she got hit and died on the spot whereas, the accused after commission of offence decamped from the spot. The motive was stated to be a dispute over attending of funeral ceremony of one Mohib Khan. One Ghaus ur Rehman, verified the report as an eyewitness to the occurrence. Nazar Abbas SHO (PW-6) reduced the report in the shape of F.I.R, prepared injury sheet Ex.P.W.6/2 and inquest report Ex.P.W.6/3, of the deceased and sent the dead body to Women & Children Hospital, Karak, under the escort of Constable Nazeer Daad (PW-5), where Dr. Saira Nazneen (PW-01) conducted autopsy on dead body of the deceased. The investigation was conducted by Rasheed Ullah SI, who was examined as PW-8, on receipt of copy of F.I.R the Investigating Officer visited the spot, prepared site-plan (Ex: PB), secured blood stained earth from the place of deceased alongwith two empties of 7.62 bore and a spent bullet, which were taken into possession vide recovery memo Ex.PC/1. He also took into possession blood-stained garments of the deceased and sealed the same in Parcel No.4 (Ex.P4). The Investigating Officer, took into possession Kalashnikov alongwith a fit magazine vide recovery memo EXPC/2. He after recording statements of the witnesses and conducting further necessary investigation handed over the

case file to Mumtaz Khan SHO, Police Station Latamber (PW-03), for submission of complete challan, which was accordingly submitted. The formalities provided under section 265-C Cr.P.C were complied with. Charge was framed against the appellant on 29.11.2018, to which he pleaded 'not guilty' and claimed trial. The prosecution in order to prove guilt of the accused produced and examined as many as eleven (11) witnesses. On close of prosecution evidence statement of accused was recorded under section 342 Cr.P.C, wherein he professed his innocence, however, he did not wish to be examined on oath as provided under section 340(2) Cr.P.C, and also abstained from producing evidence in defence. After hearing arguments of learned counsel for the parties, the learned trial Court vide impugned judgment dated 31.10.2019 convicted and sentenced the appellant, as mentioned above.

4. Heard. Record perused.

5. It is pertinent to mention that the learned trial Court framed the charge against the appellant under three different heads:

- (i) U/s 449 PPC for house trespass in order to commit offence punishable with death;
- (ii) U/s 302 PPC for the murder of deceased and;

(iii) U/s 338-C PPC for Isqat-i-Janin.

6. The moot point for determination for this Court is to determine as to whether in the given circumstances of the case, the learned trial Court was justified in awarding conviction to the appellant under section 338-C PPC, as by the time when the deceased was done to death a cephalic foetus of 39 weeks was found in her womb, who too fell a victim to the fire shots. This Court is to see as what should be the appropriate sentence in the given circumstances of the case. There is no denial to the fact that the dead body of the deceased was shifted to the hospital where her postmortem examination was conducted which transpired that the deceased at the time of incident was pregnant and so abdominal ultrasonography (USG Abdomen/Pelvis) was conducted where a single dead cephalic foetus of 39 weeks was found.

7. We are confronted with a situation where a finding is needed to determine as to under which section of law the charge is to be framed whether it should be 338-C or 302 PPC. There is no denial to the fact that the learned trial Court convicted the appellant under section 338-C PPC instead section 302 PPC, but failed to advance any plausible reason. The learned trial Court while framing the charge did not take pains to apply its judicial mind to the facts and

circumstances of the case to apply the correct section of law, despite the fact that the post mortem report was present before him. In order to ascertain that what should be the correct law on the subject i.e. section 338-C or section 302 of the Pakistan Penal Code. To resolve the controversy we deem it appropriate to reproduce the relevant section of law i.e. 338-B PPC which defines the offence:

“338-B. Who ever, causes a woman with a child some of whose limbs or organs have been found, to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, is said to cause Isqat-i-Janin”.

If the offence falls within the ambit of section 338-B PPC then the punishment is provided under section 338-C PPC, which reads as follow:

“Whoever causes isqat-i-janin shall be liable to:-

- (a) one-twentieth of the diyat if the child is born dead;
- (b) full diyat if the child is born alive but dies as a result of any act of the offender; and
- (c) imprisonment of either description for a term which may extend to seven years as ta'zir:

Provided that, if there are more than one child in the womb of the woman, the offender shall be liable to

separate diyat or ta'zir, as the case may be/for every such child:

Provided further that if, as a result of isqat-i-janin, any hurt is caused to the woman or she dies, the offender shall also be liable to the punishment provided for such hurt or death, as the case may be”.

8. The language of section 338-B PPC is very much clear which refers to a child, some of whose limbs or organs have been formed, whereas, in the present case, according to the medical evidence, the child was cephalic foetus of 39 weeks. We, before dilating upon the merits of the case, feel it essential to determine the issue in hand as to whether a child in the womb of a mother can be called a person, we deem it essential to discussed different stages of birth of a child in the womb of a mother in view of the medical science as well as Islamic Law.

9. Technically, the term developing ovum is used for the first seven to ten days after conception i.e. until implantation occurs. It is called an 'embryo' from one week to the end of the second month and later it is called 'foetus'. It becomes an infant only when it is completely born. The life may enter immediately on the date of conception in the form of a small cell, which gets multiplied, but physically a mother can feel the movement of a child only, when the foetus turns

twenty weeks old i.e. five months, as the cell changes its structures and texture to become an eye, legs, bones, blood, head etc, and only when the child makes movements by touching the internal walls of the womb, then the actual life does take its physical form, therefore, there may be controversy as regards to the exact time of life entering the foetus but there is no controversy as regards the life of the unborn child if a woman is carrying seven months pregnancy, as in many instances premature delivery takes place after expiry of seven months of pregnancy and even then the child survives.

10. There is no controversy in holding that an unborn child whose existence in the mother's womb exceeds five months till its birth is treated no other but a child in existence, and the instant case is no exception, such a child can be called a "person". The word "person" has been defined in the Pakistan Penal Code, Chapter-II: General Explanation. Section-11 "person". – The word "person" includes any company or association, or body of person, whether incorporated or not.

There is no ambiguity that section 302 PPC provides punishment of *Qatl-i-amd*, whereas section 300 PPC defines *Qatl-i-amd*, which reads as follow:

Qatl-e-Amd: Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit *qatl-e-amd*.

11. We are to explain that how an unborn baby becomes a person. In the first place, foetus is another life in the woman and it transforms in to a baby in the course of time. Though foetus grows in the body of the woman, but cannot be equated to or considered to be a part of the body of the woman. In fact, loss of the foetus consequent upon the death of the pregnant woman is actually loss of a child in-the-offing for the husband of the woman. Admittedly, in this case, the cephalic foetus was found in the womb of the deceased aging 39 weeks, whereas, normally, a human pregnancy lasts for 40 weeks maximum. The death of the deceased led to the death of an unborn child in the womb of the deceased who was near to be delivered had she not been killed, and as such it had qualified to be called a person.

12. It is pertinent to mention that the doctor while preparing the postmortem report has referred the term

“Cephalic Foetus”. Medically, the cephalic refers to the position of foetus in mother’s uterus, as the end of the pregnancy approaches, the foetus starts to move and positions itself for birth. This typically involves flipping over so that the baby is head down in the womb and starts to move down in the uterus, preparing to go through birth canal culminating in the childbirth, when so, we lurk no doubt in our mind that at the time of death of the deceased the foetus was a complete child who too lost his life and his killing can only and only be taken as the killing of a person, whereas Section 338-C PPC refers to foetus whose some organs are developed and some to develop, so in this eventuality, the exact section of law should have been 302 PPC and not 338-C of the Pakistan Penal Code. To be more accurate, we would like to seek guidance from the Holy Quran.

13. It will be relevant to mention few of the Verses from Surah Al-Múminoön particularly Ayat No.12 to 14, which define the stages of life in the mother’s womb:

وَلَقَدْ خَلَقْنَا الْإِنْسَانَ مِنْ سُلَالَةٍ مِّنْ طِينٍ ۝ (١٢)

اور بے شک ہم نے آدمی کو چنی ہوئی مٹی سے بنایا

ثُمَّ جَعَلْنَاهُ نُطْفَةً فِي قَرَارٍ مَّكِينٍ
ص (۱۳)

پھر اس کو ایک مضبوط (اور محفوظ) جگہ میں نطفہ بنا کر رکھا

ثُمَّ خَلَقْنَا النُّطْفَةَ عَلَقَةً فَخَلَقْنَا الْعَلَقَةَ
مُضْغَةً فَخَلَقْنَا الْمُضْغَةَ عِظْمًا فَكَسَوْنَا
الْعِظْمَ لَحْمًا ثُمَّ أَنْشَأْنَاهُ خَلْقًا آخَرَ
فَتَبَارَكَ اللَّهُ أَحْسَنُ الْخَالِقِينَ (۱۴)

پھر نطفے کا لو تھڑا بنایا۔ پھر لو تھڑے کی بوٹی بنائی پھر بوٹی کی ہڈیاں بنائیں پھر
ہڈیوں پر گوشت (پوست) چڑھایا۔ پھر اس کو نئی صورت میں بنا دیا۔ تو خدا
جو سب سے بہتر بنانے والا بڑا بابرکت ہے۔

14. The Holy Quran Maintained that when a foetus reaches to the seventh stage then another creature comes into existence.

- i. Man We did create from a quintessence of clay;
- ii. Then We placed him as (a drop of) sperm (**nutf**) in a place of rest firmly fixed;
- iii. Then We made the sperm into a clot of congealed blood (**alaqa**);
- iv. Then of that clot We made a (foetus) lump (**mudgha**);
- v. Then We made out of that lump bones;
- vi. And clothed the bones with flesh;
- vii. Then We developed of it 'another creation' (**Khalqan' aakhar**).

15. Here at the seventh stage i.e. Khalqan Aakhar (خَلَقًا آخِرًا) refers to another creature in shape of a complete human being. In the present case too, the child was complete as it was the 39th week of his existence in the mother's womb, so undoubtedly, it was Khalqan Aakhar, at the final stage of human life. The Holy Quran further explains in Surah Ghafir, Ayat No.67, in the following words:

هُوَ الَّذِي خَلَقَكُمْ مِنْ ثَرَابٍ ثُمَّ مِنْ
نُطْفَةٍ ثُمَّ مِنْ عَلَقَةٍ ثُمَّ يُخْرِجُكُمْ طِفْلًا
ثُمَّ لِيَتَّبِعُوا أَسْدَكُمْ ثُمَّ لَتَكُونُوا شُيُوخًا
وَمِنْكُمْ مَنْ يُتَوَفَّى مِنْ قَبْلُ وَلِيَتَّبِعُوا
أَجَلًا مُّسَمًّى وَلَعَلَّكُمْ تَعْقِلُونَ

وہی تو ہے جس نے تم کو (پہلے) مٹی سے پیدا کیا۔ پھر نطفہ بنا کر پھر لو تھڑا
بنا کر پھر تم کو نکالتا ہے (کہ تم) بچے (ہوتے ہو) پھر تم اپنی جوانی کو پہنچتے
ہو۔ پھر بوڑھے ہو جاتے ہو۔ اور کوئی تم میں سے پہلے ہی مر جاتا ہے اور تم
(موت کے) وقت مقرر تک پہنچ جاتے ہو اور تاکہ تم سمجھو۔

16. As the Holy Quran provides a complete code of life and it tells the way that how human being comes into existence and that how it remains in the mother's womb and after its delivery sees the light of the day. The situation has beautifully been dealt with by Allah Almighty in Ayat No.5 of Surah-Al-Hajj, which reads as follow:

يَا أَيُّهَا النَّاسُ إِن كُنْتُمْ فِي رَيْبٍ مِّنَ
الْبَعْثِ فَإِنَّا خَلَقْنَاكُمْ مِّن تُّرَابٍ ثُمَّ مِّنْ
نُّطْفَةٍ ثُمَّ مِّنْ عَلَقَةٍ ثُمَّ مِّنْ مُّضْغَةٍ
مُّخَلَّقَةٍ وَغَيْرِ مُخَلَّقَةٍ لِّنُبَيِّنَ لَكُمْ وَنُقِرُّ
فِي الْأَرْحَامِ مَا نَشَاءُ إِلَىٰ آجَلٍ مُّسَمًّى
ثُمَّ نُخْرِجُكُمْ طِفْلًا۔

لوگو اگر تم کو مرنے کے بعد جی اٹھنے میں کچھ شک ہو تو ہم نے تم کو (پہلی بار
بھی تو) پیدا کیا تھا (یعنی ابتدا میں) مٹی سے پھر اس سے نطفہ بنا کر۔ پھر اس
سے خون کا لو تھڑا بنا کر۔ پھر اس سے بوٹی بنا کر جس کی بناوٹ کامل بھی ہوتی
ہے اور ناقص بھی تاکہ تم پر (اپنی خالقیت) ظاہر کر دیں۔ اور ہم جس کو
چاہتے ہیں ایک میعاد مقرر تک پیٹ میں ٹھہرائے رکھتے ہیں پھر تم کو بچہ بنا کر
نکالتے ہیں۔

17. According to Post-mortem report, the foetus had completed its stages of *Nutfa* and *Alaqa* etc in the womb and now it was a **cephalic foetus** which was positioning and preparing to go through the birth canal, and as such, it was a complete & separate soul inside the womb of the deceased, who too was done to death. Similar to all of the divinely revealed books, the Qur'an unequivocally sanctifies human life, killing of the children and any innocent person, irrespective of their age or religious orientation, is condemned in the firmest language in Ayat No.151 of Sura Al-Anaám:

قُلْ تَعَالَوْا أَنلِ مَا حَرَّمَ رَبُّكُمْ عَلَيْكُمْ أَلَّا
تُشْرِكُوا بِهِ شَيْئًا وَبِالْوَالِدَيْنِ إِحْسَانًا

وَلَا تَقْتُلُوا أَوْلَادَكُمْ مِمَّنْ إِمْلَاقٌ نَّحْنُ
نَرْزُقُكُمْ وَإِيَّاهُمْ وَلَا تَقْرَبُوا الْفَوَاحِشَ
مَا ظَهَرَ مِنْهَا وَمَا بَطْنٌ وَلَا تَقْتُلُوا
النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ ذَلِكُمْ
وَصَبَّحَكُمْ بِهِ لَعَلَّكُمْ تَعْقِلُونَ

کہہ کہ (لوگو) آؤ میں تمہیں وہ چیزیں پڑھ کر سناؤں جو تمہارے پروردگار
نے تم پر حرام کر دی ہیں (ان کی نسبت اس نے اس طرح ارشاد فرمایا ہے)
کہ کسی چیز کو خدا کا شریک نہ بنانا اور ماں باپ (سے بد سلوکی نہ کرنا بلکہ)
سلوک کرتے رہنا اور ناداری (کے اندیشے) سے اپنی اولاد کو قتل نہ کرنا
کیونکہ تم کو اور ان کو ہم ہی رزق دیتے ہیں اور بے حیائی کے کام ظاہر ہوں یا
پوشیدہ ان کے پاس نہ پھٹکنا اور کسی جان (والے) کو جس کے قتل کو خدا نے
حرام کر دیا ہے قتل نہ کرنا مگر جائز طور پر (یعنی جس کا شریعت حکم دے)
ان باتوں کا وہ تمہیں ارشاد فرماتا ہے تاکہ تم سمجھو۔

18. Similarly, one such example can be found in Ayat
No.31 of Surah, Al-Isra of the Holy Quran:

وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةً إِمْلَاقٍ نَّحْنُ
نَرْزُقُهُمْ وَإِيَّاكُمْ إِنَّ قَتْلَهُمْ كَانَ خِطَاً
كَبِيراً

اور اپنی اولاد کو مفلسی کے خوف سے قتل نہ کرنا۔ (کیونکہ) ان کو اور تم کو
ہم ہی رزق دیتے ہیں۔ کچھ شک نہیں کہ ان کا مار ڈالنا بڑا سخت گناہ ہے

19. In both Ayat No.31 of Surah-Al-Isra, and Ayat No.151
of Sura-Al-Anaám, the prohibition on killing of Children
means, killing of children before their birth. Hence, the above
Verses of the Holy Qurán left no ambiguity by calling a foetus

a Child. When tested in the light of what has been stated above, it can safely be hold that a foetus has been recognized as a child in the Holy Quran to which we cannot doubt, more particularly, when it has completed 39 weeks of its existence and as such it has a separate soul whose killing will invite punishment under section 302 PPC.

20. The matter does not end here rather we would like to travel a little longer in order to understand that when human being comes into existence. In the Books of Sahih-Ahadith this period is generally recognized as 120 days after conception, at which time, according to the Hadith, the process of 'ensoulment' occurs i.e. the time, in which, the soul (rūḥ) enters the foetus post-conception. In this respect reference can be made to Hadith No.549, Volume-IV, Book-55 of the Sahih Al-Bukhari, which guides us in the following manner:

"حَدَّثَنَا عُمَرُ بْنُ حَفْصٍ، حَدَّثَنَا أَبِي،
حَدَّثَنَا الْأَعْمَشُ، حَدَّثَنَا زَيْدُ بْنُ وَهَبٍ،
حَدَّثَنَا عَبْدُ اللَّهِ، حَدَّثَنَا رَسُولُ اللَّهِ ﷺ
وَهُوَ الصَّادِقُ الْمَصْدُوقُ " إِنَّ
أَحَدَكُمْ يُجْمَعُ فِي بَطْنِ أُمِّهِ أَرْبَعِينَ
يَوْمًا، ثُمَّ يَكُونُ عَلَقَةً مِثْلَ ذَلِكَ، ثُمَّ
يَكُونُ مُضْغَةً مِثْلَ ذَلِكَ، ثُمَّ يَبْعَثُ اللَّهُ
إِلَيْهِ مَلَكًا بِأَرْبَعِ كَلِمَاتٍ، فَيُكْتَبُ عَمَلُهُ

وَأَجَلُهُ وَرِزْقُهُ وَشَقِيٌّ أَوْ سَعِيدٌ، ثُمَّ
يُنْفَخُ فِيهِ الرُّوحُ، فَإِنَّ الرَّجُلَ لَيَعْمَلُ
بِعَمَلِ أَهْلِ النَّارِ حَتَّى مَا يَكُونُ بَيْنَهُ
وَبَيْنَهَا إِلَّا ذِرَاعٌ، فَيَسْبِقُ عَلَيْهِ الْكِتَابُ
فَيَعْمَلُ بِعَمَلِ أَهْلِ الْجَنَّةِ، فَيَدْخُلُ
الْجَنَّةَ، وَإِنَّ الرَّجُلَ لَيَعْمَلُ بِعَمَلِ أَهْلِ
الْجَنَّةِ، حَتَّى مَا يَكُونُ بَيْنَهُ وَبَيْنَهَا إِلَّا
ذِرَاعٌ فَيَسْبِقُ عَلَيْهِ الْكِتَابُ، فَيَعْمَلُ
بِعَمَلِ أَهْلِ النَّارِ فَيَدْخُلُ النَّارَ."

Narrated Abdullah: Allah's Apostle, the true and truly inspired said, "(as regards your creation), every one of you is collected in the womb of his mother for the first forty days, and then he becomes a clot for another forty days, and then a piece of flesh for another forty days. Then Allah sends an angel to write four words: He writes his deeds, time of his death, means of his livelihood, and whether he will be wretched or blessed (in religion). Then the soul is breathed into his body. So, a man may do deeds characteristic of the people of the (Hell) Fire, so much so that there is only the distance of a cubit between him and it, and then what has been written (by the angel) surpasses, and so he starts doing deeds characteristic of the people of Paradise and enters Paradise. Similarly, a person may do deeds characteristic of the people of Paradise, so much so that there is only the distance of a cubit between him and it, and then what has been written (by the

angel) surpasses, and he starts doing deeds of the people of the (Hell) Fire and enters the (Hell) Fire.

21. Similarly, the Hadith No.550 in the above-quoted book of Sahih-Al-Bukhari, further guides us to understand the life in the mother's womb:

حَدَّثَنَا أَبُو النُّعْمَانِ، حَدَّثَنَا حَمَّادُ بْنُ زَيْدٍ، عَنْ عُبَيْدِ اللَّهِ بْنِ أَبِي بَكْرٍ بْنِ أَنَسٍ، عَنْ أَنَسِ بْنِ مَالِكٍ - رَضِيَ اللَّهُ عَنْهُ - عَنِ النَّبِيِّ ﷺ قَالَ " إِنَّ اللَّهَ وَكَّلَ فِي الرَّحِمِ مَلَكًا فَيَقُولُ يَا رَبِّ نُطْفَةٌ، يَا رَبِّ عَلَقَةٌ، يَا رَبِّ مُضْغَةٌ، فَإِذَا أَرَادَ أَنْ يَخْلُقَهَا قَالَ يَا رَبِّ، أَذَكَرٌ أَمْ يَأُنْثَى يَا رَبِّ شَقِيٌّ أَمْ سَعِيدٌ فَمَا الرِّزْقُ فَمَا الْأَجَلُ فَيُكْتَبُ كَذَلِكَ فِي بَطْنِ أُمِّهِ " .

Narrated Anas bin Malik: The Prophet ﷺ said, "Allah has appointed an angel in the womb, and the angel says, 'O Lord! A drop of discharge (i.e. of semen), O Lord! a clot, O Lord! a piece of flesh.' And then, if Allah wishes to complete the child's creation, the angel will say. 'O Lord! A male or a female? O Lord! wretched or blessed (in religion)? What will his livelihood be? What will his age be?'

The angel writes all this while the child is in the womb of its mother."

22. From the above quoted versus of the Holy Qurán as well as Sahih Ahadith, we have no doubt left in our mind that after the stage of mudgha (مَضْغَةً), the Allah Almighty blesses soul in the foetus and also writes down his/her fate. From this stage onward, the development towards Khalqan Aakhir (خَلْقًا آخِرًا) starts. Hence, we are firm in our view that accused killed two innocent souls one the mother and second the child.

23. The matter came up for hearing before the worthy Sindh High Court, where the matter was heard at a considerable length and ultimately, the Learned High Court was pleased to hold that the trial Court went in error while resorting to section 338-C PPC. The observations were rendered in its reported judgement titled 'Hakim Ali Vs. The State' (2013 YLR 2169) had held that:

"Accused had committed double murder, of his wife and an unborn son of about 7/8 months in the brutal manner, which act of accused was highly condemnable and required strict punishment."

Similarly, the Lahore High Court, in the case of "Zaman Shah Vs. The State" (2015 MLD 795) held that:

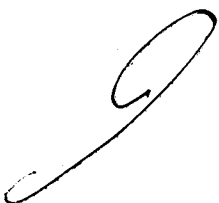
"In sequel to what has been discussed above this Court has arrived at an irresistible conclusion that during the occurrence not only Mst. Noor Bibi lost her life rather a male child of 7 months also met unnatural death and his death in the above scenario is beyond the provisions of section 338-C, P.P.C. Hence, conviction/sentence recorded by the learned trial court under section 338-C, P.P.C., is not maintainable in the eyes of law."

24. A bare perusal of Section 222(1) Cr.P.C. reveals that the charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged. In this regard the august Supreme Court of Pakistan has provided ample guidance in the case titled "S.A.K. Rehmani Vs. The State" (2005 SCMR 364) which runs as under:

"The whole object of framing a charge is to enable the defence to concentrate its attention on the case that he has to meet, and if the charge is framed in such a vague manner that the necessary ingredients of the offences with which the accused is convicted is not brought out in the charge, then the charge is defective".

The apex court in the above mentioned judgment further clarifies,

“In other words it can be said that the main object of framing of charge is to ensure that the accused had sufficient notice of the nature of accusation with which he was charged and secondly to make the Court concerned conscious regarding the real points in issue so that evidence could be confined to such points”.

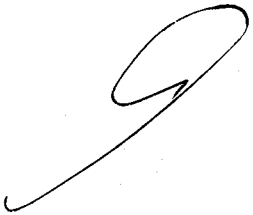


We would like to reproduce another Para of the above quoted judgment which resolves the controversy we are facing with, in the following words,

“Where a person is convicted of an offence and the Appellate Court is of the view that he has been misled in his defence by the absence of a charge or by an error in the charge, appropriate action can be taken including remand of the case with direction for making suitable amendment in the charge”.

While deriving wisdom from the guidance provided in the SAK Rehmani's case (supra), we are not hesitant to hold that the learned trial Court fell in error while framing the charge under section 338-C PPC, instead section 302 PPC, as a cephalic child comes within the definition of a person. Needless to mention that framing of the charge under

section 338-C PPC is a material error and the accused/appellant was thereby misled by such omission to defend himself and we cannot hold otherwise, but that the accused/appellant has been prejudiced.



25. For and in view of the above, the conviction awarded to the appellant under Section 338-C PPC is not maintainable, therefore, we allow the instant criminal appeal, set aside the impugned conviction and sentence awarded to the appellant vide judgment dated 31.10.2019, and remand the case back to the learned trial court for *de novo* trial after framing charge under Section 302 PPC instead of 338-C PPC to meet the ends of justice. Since the impugned judgment has been set aside, so the Murder Reference No.09-B of 2019 is answered in negative, and the appellant shall be treated as under-trial prisoner. We do expect that the learned trial Court may conclude the case within a period of four months after receiving the case-file.

26. So far as the appeal of appellant with regard to his conviction under Section 15-Arms Act is concerned, as the appellant has filed this single appeal from Jail, questioning his convictions in both the cases registered u/s 302 r/w 338-C PPC and 15-Arms Act, therefore, his appeal to the extent of conviction under section 15-AA, is adjourned till conclusion

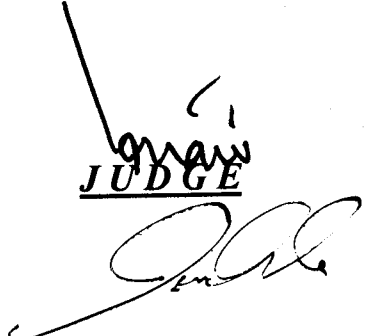
of the *de novo* trial in the instant case by the learned trial Court and the same would be restored at the proper time/stage through an application submitted by the either side.

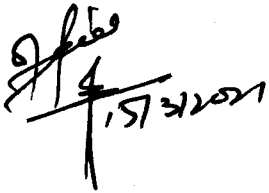
27. Above are the reasons of our short order of the even date.

Announced.

Dt: 18.01.2021

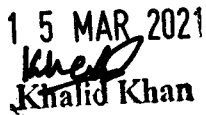
Azam/PS


JUDGE
JUDGE


15/1/2021

(D.B)
Hon'ble Ms. Justice Musarrat Hilali
Hon'ble Mr. Justice Sahibzada Asadullah

SCANNED

15 MAR 2021

Khalid Khan