

**Form No:HCJD/C-121**  
**ORDER SHEET**  
**LAHORE HIGH COURT**  
**RAWALPINDI BENCH, RAWALPINDI**  
**JUDICIAL DEPARTMENT**  
**Criminal Appeal No.356 of 2021**  
**Niaz Khan versus The State**  
**Criminal Revision No.134 of 2021**  
**Hussain Ahmad versus Niaz Khan**  
**J U D G M E N T**

Date of hearing	01.06.2022
Appellant (Niaz Khan) represented by:	Mr. Muhammad Suleman, Advocate at state expense.
The State by:	Khawaja Sohail Iqbal, District Public Prosecutor along with Azmat, S.I.
Complainant represented by:	Mr. Muhammad Bashir Paracha, Advocate .

**SARDAR AHMED NAEEM, J.-** *The appellant challenges the judgment dated 15.02.2021 rendered by learned Sessions Judge, Attock, in case F.I.R. No.88 dated 17.09.2018, under section 302, 311, P.P.C., registered at Police Station Rango, Attock.*

2. *The appellant was tried by the learned trial court, which held the appellant guilty under section 302(b), P.P.C., convicted and sentenced to imprisonment for life with compensation of Rs.1,00,000/- payable to the legal heirs of the deceased under section 544-A, Cr.P.C., in default whereof to further undergo simple imprisonment for six months. Benefit permissible under section 382-B, Cr.P.C. was also extended to him.*

3. *Niaz Khan convict/appellant has filed Criminal Appeal No.356 of 2021 against his conviction and sentences. The complainant also filed Criminal Revision No.134 of 2021 for enhancement of sentence awarded to Niaz Khan (respondent). This judgment will dispose of both the above mentioned matters.*

4. *Learned counsel for the appellant argued this appeal at some length. The crux of his arguments was that the appellant was incapable to face trial or to defend himself and*

*that the learned trial court was cognizant of this fact but could not determine this issue under the law, which caused miscarriage of justice, thus, the impugned judgment of conviction is not sustainable.*

5. *Learned District Public Prosecutor assisted by the learned counsel for the complainant opposed this appeal with vehemence and argued that the appellant committed Qatl-i-Amd of his wife, namely, Bibi Zainab in his own house; that the case of prosecution was supported by the ocular as well as medical evidence; that motive was also proved which gets further corroboration from the recovery of weapon i.e. 'churri'; that the prosecution witnesses firmly withstood the test of cross-examination and remained unshaken. Added that prosecution proved its case against the appellant to the hilt, thus, appeal deserves dismissal.*

6. *I have given anxious considerations to the arguments advanced by the learned counsel for the parties and perused the record with their able assistance.*

7. *The occurrence in this case took place on 17.09.2018 at 09:55 a.m. in the area of Tajak. During the occurrence Bibi Zainab wife of the appellant lost her life. The appellant was charge sheeted on 15.11.2018 under section 302, P.P.C. The case was posted for prosecution evidence. At trial, the prosecution produced as many as 11 witnesses.*

8. *The appellant was examined under section 342, Cr.P.C. He did not appear as his own witness under section 340(2), Cr.P.C. but tendered into evidence letter No.3556 dated 12.03.2019 (Exh.DA) and medical report of District Standing Medical Board (Exh.DB) suggesting his mental illness and closed defence evidence.*

9. *The learned trial court held the appellant guilty, convicted and sentenced as detailed above but the impugned judgment is totally silent about the mental illness of the appellant.*

10. The record divulged that on 21.12.2018, the appellant was produced before the trial court in custody. The Court observed that the appellant appeared to be abnormal. Then he was not represented by his counsel. However, the order of the learned trial Court dated 21.12.2018 can advantageously be reproduced hereunder:

**“From the physical appearance of the accused, apparently, he seems to be abnormal. Therefore, M.S DHQ Hospital Attock is directed to medically examine about his mental health condition through Medical Board and submit his report before this Court, on or before 07.01.2019. Superintendent, District Jail, Attock is directed to have liaison with M.S and make arrangements for production of accused before medical board.”**

On 27.09.2019, report of Medical Board was submitted along with the report of psychiatrist suggesting behavioural disorder/Schizophrenia but the learned trial court concluded that the appellant was fit to stand trial and on his request, Malik Zameer Abbas, Advocate was appointed as defence counsel at state expense.

11. The record further divulged that at the time of final arguments, the mental illness was pleaded by the learned defence counsel but the impugned judgment is totally silent about this aspect of the case. The appellant, as mentioned above, was husband of the deceased, who sustained 15 ‘Churri’ blows at his hand as suggested by the evidence available on record. Despite the fact that the learned trial court itself referred the appellant for evaluation of his capability to stand trial but concluded that the appellant was able to defend himself. No question, whatsoever, was put by the learned trial court for its satisfaction. Within the contemplation of section 84, P.P.C., whenever the plea is raised regarding the state of mind of accused at the time of commission of offence, the onus would be on the defence to

*prove such a plea as contemplated in Article 121 of the Qanun-e-Shahadat, 1984.*

*The learned trial court failed to determine the question regarding capability of the appellant to face trial. The record revealed that on 26.11.2019, an application was also filed by the defence counsel for summoning Dr. Tameez-ud-Din as CW., turned down by the learned trial court vide order dated 28.11.2019 with the observation that Dr. Tameez-ud-Din was neither the prosecution witness nor acquainted with the material facts in issue and thus concluded that the evidence of Dr. Tameez-ud-Din was not essential.*

12. A similar question came up for hearing before the apex Court in a recent judgment titled **(PLD 2021 SC 488)**, their lordships in para No.54 at page 521 observed as under:

**“54. Once the Court has formed a prima facie tentative opinion that the accused may be incapable of understanding the proceedings of trial or make his/her defence, it becomes obligatory upon the Court to embark upon conducting an inquiry to decide the issue of incapacity of the accused to face trial due to mental illness. Medical opinion is sine qua non in such an inquiry. For this purpose, the Court must get the accused examined by a Medical Board, to be notified by the Provincial Government, consisting a qualified medical experts in the field of mental health, to examine the accused person and opine whether accused is capable or otherwise to understand the proceedings of trial and make his/her defence. The report/opinion of the Medical Board must not be a mere diagnosis of a mental illness or absence thereof. It must be a detailed and structured report with specific reference to psychopathology (if any) in the mental functions of consciousness, intellect, thinking, mood, emotions, perceptions, cognition, judgment and insight. The head of the Medical Board shall then be examined as Court witness and such examination shall be reduced in writing. Both the prosecution and defence should be given an opportunity to cross-examine him in support of their respective stance. Thereafter, if the accused wishes to adduce any evidence in support of his/her claim, then he/she should be**

**allowed to produce such evidence, including expert opinion with the prosecution given an opportunity to cross-examine. Similarly, the prosecution may also be allowed to produce evidence which it deems relevant to this preliminary issue with opportunity given to the defence to cross-examine. It is upon the consideration of this evidence procured and adduced before the Court that a finding on this question of fact i.e. the capability of the accused to face trial within the contemplation of section 464 and 465, Cr.P.C. shall be recorded by the Court.”**

13. The reports of Psychiatrist and Medical Board are available on record as Exh.DA and Exh.DB. The appellant was diagnosed as patient of behavioural disorder and Schizophrenia. The reports were neither detailed nor comprehensive. The application moved by the learned counsel for the appellant was turned down by the learned trial court and, thus, head of the Medical Board could not enter the witness dock. The learned trial court have dealt with the case contrary to law declared by the apex Court in above mentioned judgment.

14. It is inalienable right of every citizen to be treated in accordance with law as envisaged by Article 4 of the Constitution and it is the duty and obligation of the public functionaries to act in accordance with law. Right to fair trial is also guaranteed under Article 10-A of Constitution of Islamic Republic of Pakistan, 1973.

15. Islam also gives a great deal of attention to all groups within the society; each has their own rights, including individuals with a disability. In order to understand the disabilities in Islamic text, based on some examples of physical conditions, such as blindness, deafness, lameness, mental retardation and leprosy. An example of such is in the Qur'an (48,17).

“There is not upon the blind any guilt or upon the lame any guilt or upon the ill any guilt. And whoever obeys Allah and His messenger-He will admit him to gardens

*beneath which rivers flow: but whoever turns away-He will punish him with a painful punishment”.*

16. *The generic term “disability” was not mentioned in the Qur’an; the term “disadvantaged people” was being used to refer to those with special needs. In fact, society’s civil responsibility is illustrated in the Qur’an, which stresses that society is responsible for taking care of such individual and is responsible for improving their conditions. Disadvantaged situations (lack of some physical, economic or social characteristic) are believed to be a result of barriers produced by society.*

17. *To us, prophet (SAW) was the earliest initiator/defender of disability right and 1400 years ago, way before the UN convention on the Rights of Persons with disability was enacted, he already worked hard to ensure that people with disabilities were catered for and were given their rights and privileges, including the right to a normal life just like anyone else.*

18. *The prophet (SAW) transformed the lives of the disabled people by teaching the society that there were no stigma or bad attitudes for those with disabilities. The Prophet reassured the disabled that their disabilities are not punishments but it is a means for their sins to be forgiven.*

*The Sunnah supports the notion of social responsibility towards the individuals. A few examples of this are found in the following two Hadith.*

*According to prophetic tradition, mentioned in Sahih Muslim, “the Similitude of believers in regard to mutual love, affection, feeling is that we are all one body; When any limb aches, the whole body aches, because of sleeplessness and fever.(32,6258). Another Hadith narration from Sunnan Al-Tirmidhi states “the person is not one of us, who is not mercifulness to our youth and respect to our elders.*

19. *Disadvantaged people's rights are mentioned in the text of the Qur'an on several occasions. For instance, their civil rights in terms of marriage and inheritance are clarified in the Qur'an: " And do not give the weak-minded your property, which Allah has made a means of sustenance for you, but provide for them with it and clothe them and speak to them words of appropriate kindness. (4,5):*

*"And test the orphans (in their abilities) until they reach marital age. Then if you perceive them to be of sound judgment, release their property to them And do not consume it excessively and quickly (anticipating) that they will grow up. And whoever(when acting as guardian), is self sufficient should refrain (from taking a fee); and whoever is poor-let him take according to what is acceptable. And then, when you release their property to them, bring witnesses upon them. And sufficient is Allah as accountant (4.6)"*

20. *Another Quranic verse in the same chapter tells us " And concerning the oppressed among children and that you maintain for orphans(their right) in justice" (4,127).*

21. *From the sources and texts mentioned above from the Qur'an, following can be deduced:*

- *First, "Weak minded" is generic term that could comprise several groups, such as very young children, mentally retarded and mentally ill-individuals and so forth;*
- *Second, the texts lay down the idea of guardianship for disadvantaged individual such as the weak minded or orphans;*
- *Third, this guardianship is subject to a sense of duty, fairness and kindness.*

22. *Islam views disability as challenge set by Allah. The Qur'an urges people to treat people with intellectual disabilities with kindness and to protect people with disabilities.*

23. *It is said in the Qur'an that "whosoever does an atom's weight of good will see it, and whosoever does an atom's*

*weight of evil will see it. (99,7-8). In-fact, several other Qur'an and Hadith narrations promises both those who are in a disadvantaged situation and those who are taking care of them, rewards, both, in this life and in the hereafter for their patience. Indeed, this promise usually motivates people to support the disadvantaged whether are strangers or close relations.*

*24. The inclusion is another example of Islam's concerns for those who are in a disadvantaged situation. The prophet used to visit sick, pray for them and console them instilling confidence in their souls and lifting their hearts.*

*25. The notion of disability and its existence in the Qur'an and Hadith has been mentioned above in which the idea of individuals being in disadvantaged situation has been clearly stated.*

*26. Reverting to the facts/merits of this case, it may be mentioned that every man is presumed to be sane and possessed of a sufficient decree of reasons to be responsible for his actions, until the contrary is proved. This clearly follows from Article 121 of the Qanun-i-Shahdat, 1984, which provides that burden of proving that the case of an accused person falls within an exception is on him.*

*27. There are 650 million individuals in the world, who are disabled as a result of mental, physical and sensory impairments. The medical and the legal standards of sanity are also not identical. Chapter XXXIV of the Criminal Procedure Code, 1898 provides mechanism for the trial and other related matters of the person, appear to the Court of unsound mind. The person of unsound is a person who from infirmity of mind is incapable of managing himself or his affairs. Dealing with a similar question in case titled Fauqul Bashar versus The State (1997 SCMR 239), the relevant observations of their lordships appearing in para-5 of the judgment read as under:*



*“5. In context of insanity, the state of mind of an accused person, firstly, at the time of occurrence and, secondly, at the time of inquiry of trial is a question of fact. When a Court is confronted with the question during an inquiry or trial, whether or not an accused is of unsound mind and incapable of understanding the proceedings against him, it has to take action under sections 464 and 465, Cr.P.C. according as one of other is attracted to the case.*

*. . . . .*

*In Ata Muhammad’s case supra, a fine comparison of the two provisions was drawn by this Court in paragraph 12 of the report which is as under:-*

***“In cases of trials before the Court of Session or a High Court, if it appears to the Court at the trial that an accused person is of unsound mind and consequently incapable of making his defence, the Court, in the first instance has to try the fact of such unsoundness and incapacity and the trial of this question shall be deemed to be a part of the trial under subsection (2) of section 465 of the Criminal Procedure Code. The legal position which emerges from the two sections is that under section 464 the Magistrate must have reason to believe that the accused person before him is of unsound mind and incapable of understanding the proceedings, and under section 465 it should appear to the Court at the trial that the accused person suffers from unsoundness of mind and thus is incapable of making his defence. In either case the action is to follow the subjective reaction of the Magistrate or the Court to the situation that arises before him. If, during the inquiry, nothing comes to the notice of a Magistrate to induce a belief in him that an accused person is of unsound mind and if at the trial before the Sessions Court it does not appear to the latter that the accused is of unsound mind and consequently incapable of making his defence, there is nothing for them to do except to proceed with the inquiry or the trial in the normal manner. The words appear to the Court are used in section 465 while the words has reason to believe are used in section 464, but it is clear that in practical effect they mean almost***

***the same thing. The phrase to appear in my judgment used in the context of section 465 in the meaning is nearest to the phrase to be in one's opinion as given in the Shorter Oxford Dictionary"..***

28. *The above mentioned formality/requirement of the law, in particular, in the instant case, are the reports of psychiatrist as well as the said medical board constituted for this purpose, have established that the appellant was suffering from behavioral disorder and schizophrenia. More so when the manner of committing the offence by the person of unsound mind is also falling squarely within the four corners of criminal responsibility, which include:*

- i. The personal history of the accused, who may be eccentric, melancholic, degenerate or neuroasthenic;*
- ii. Absence of motive, not only does a mentally ill person commit without any motive but also often kills his nearest and dearest relations;*
- iii. Absence of secrecy, because if the accused happens to be mentally ill does not try to conceal body of victim, nor does he attempt to evade law by destroying the evidence of his crime;*
- iv. The manner of committing occurrence;*
- v. Want of preparation or pre-arrangement, a mentally ill person does not make any prearranged plan to kill any body, but a sane person, in routine, makes all the necessary preparation prior to committing of crime; and*
- vi. A mentally ill person has no accomplice in the criminal act.*

29. *Now, it is to be seen whether there was any such material to call for enquiry in terms of section 465 Cr.P.C. The record reveals that his abnormality was observed by the Court itself and at some stage, an application was moved by the learned defence counsel for summoning Dr. Tameez Ud Din head of the special medical board as a witness, who opined that the appellant was suffering from schizophrenia. But strange is the fact that this application was rejected by*

*the learned trial Court without application of mind. I am unable to understand what was the haste on the part of the learned trial Court to deal with this aspect of the case in such a summary and slipshod manner notwithstanding the fact that this is a mandate of the statute itself. The learned trial Court did not realize altogether that if such plea or enquiry envisaged by the above mentioned provision is found false, it at its worst, would prolong trial for a month or so but if found true, it at its best, would save a person from verdict of guilt. When stakes in the latter case as compared to the former are far greater and far more damaging such enquiry should not be dispensed with so casually.*

*The learned trial Court failed to determine the issue of mental illness and proceeded with undue haste and decided the case contrary to the law/observations of their lordships, thus, judgment of conviction cannot be sustained.*

*30. For the foregoing reasons, this appeal is allowed . The impugned judgment 15.2.2021 is set aside and the case is remanded to the learned trial Court with the direction to obtain fresh, complete/comprehensive reports in view of observations of the apex Court referred to in para-10 of this judgment and then to determine the capability of the appellant to face trial within parameters of section 464 and 465 Cr.P.C. The appellant shall be kept as under trial prisoner till the conclusion of trial. The learned trial Court shall, thereafter proceed further and conclude the trial in the light of the above mentioned law declared by the apex Court.*

**(Sardar Ahmed Naeem)**  
**Judge**

*Irfan*

**APPROVED FOR REPORTING**

**JUDGE**