

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department]

J. Cr.A. No.1460-P/2019
With M.R. No.42 of 2019

Zahoor son of Atlas Khan,
r/o Bhaddni, Balu Akbarpura,
District Nowshera.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :-

M/S Sajeed Khan Afridi &
Muhammad Nauman Khan,
Advocates.

For State :-

Mr. Muhammad Nisar Khan AAG.

For complainant :

Nemo
Barrister Amirullah Khan Chamkani,
Amicus Curiae

Date of hearing:

05.10.2023

JUDGMENT

ISHTIAQ IBRAHIM, J.- This jail criminal appeal, filed by Zahoor son of Atlas Khan, the appellant, is directed against the judgment dated 12.11.2019 ("impugned judgment), passed by learned Additional Sessions Judge-VI Nowshera (*Trial Court*) whereby he having found the appellant guilty of committing murder of his father, namely, Atlas Khan, brother, namely, Faqir Hussain and minor nephew and niece, namely, Nisar Hussain and Mst. Manahil, respectively, and an attempt to commit *Qatl-e-Amd* of complainant Mst. Saira and other inmates of the house, has been convicted and sentenced, in case FIR No.117 dated 17.04.2017, registered under sections 302 and 324 PPC at Police Station Akbar Pura, as under:-

Under Section 302 (b) PPC:- To death on four counts as Ta'azir and to pay Rs.2,00,000/-, as compensation to legal heirs of each deceased and in default thereof to further undergo six months simple imprisonment.

Under Section 324 PPC. To undergo imprisonment for five years on three counts and to pay Rs.50,000/- as compensation to victims under section 544-A Cr.P.C. and in default thereof to further undergo six months simple imprisonment.

Benefit of Section 382-B Cr.P.C. has been extended to the appellant.

2. The learned trial Court has sent **Murder Reference No.42-P of 2019**, under section 374 Cr.P.C., for confirmation of death sentences of the convict. As both the matters are the outcome of one and the same judgment of the learned trial court, therefore, we propose to decide and answer the same through this common judgment.

3. The prosecution's case as per First Information Report ("**FIR**") Exh.PA is that on 17.04.2017 at 0300 hours Mst. Saira complainant (PW.6), in company of Mst. Bakht Zari, her mother-in-law, reported to Murad Khan ASI (PW.3), in DHQ Hospital Pabbi, to the effect that on the fateful night of 17.04.2017, she along with her mother-in-law, father-in-law, namely, Atlas Khan, husband, namely, Faqir Hussain, minor daughter Manahil, minor son

Nisar, brothers-in-law, namely, Arshad Khan (PW.7) and Zahoor (the appellant) was present in her house, situated in village Balu; that there was an oral altercation between appellant Zahoor and his father Atlas Khan over a house which the appellant was intending to sell and his father was preventing him; that at 0040 hours the appellant entered his room, picked up a Kalashnikov and opened fire at them, as a result, her father-in-law Atlas Khan, minor sons Nisar Hussain and daughter Manhil got hit and died at the spot whereas her husband Faqir Hussain sustained firearm injuries; that she, her mother-in-law Mst. Bakht Zari and brother-in-law, Arshad (PW.7), luckily remained unscathed; that her injured husband was shifted by Arshad (PW.7) to LRH Peshawar but he succumbed to injuries. Motive behind the occurrence was a dispute over a house which the appellant was intending to sell. Report of the complainant was reduced into writing by Murad Khan ASI (PW.3) in the shape of Murasila Exh.PA on the basis of which FIR Exh.PA was registered against the appellant. He prepared injury sheets and inquest reports of Atlas Khan, Nisar Hussan and Manahil deceased which are Exh.PW.5/1 to Exh.PW.5/6, respectively. He shifted the dead bodies of the deceased to the mortuary where Dr. Mian Saad Ahmed (PW.9), Dr. Asghar Ullah Khan

(PW.10) and Dr. Malghalara Khan (PW.11), conducted autopsy and opined the cause of death of the deceased due to firearm injuries.

4. Abdul Azeem Khan SI (PW.12) conducted investigation in the case, who on receipt of copy of FIR, proceeded to the spot and prepared site plan Exh.PW.12/1. During spot inspection he took into possession blood through cotton from the places of the four deceased through recovery memos Exh.PW.7/1 to Exh.PW.7/4. Vide recovery memo Exh.PW.7/5 he took into possession 22 empties of 7.62 bore from the place of the appellant Exh.P.5. Similarly, vide recovery memos Exh.PW.7/6 to Exh.PW.7/9 he took into possession the last worn bloodstained garments of the four deceased and sealed the same into parcel. He also took into possession one electric bulb of 100 volt Exh.P.10 from the crime spot. He sent the bloodstained clothes of the deceased along with blood secured from the spot to the FSL reports whereof are Exh.PW.12/3 to Exh.PW.12/10. Vide application Exh.PW.12/7 he sent 22 empties of 7.62 bore to the FSL. The appellant was arrested by SHO and handed over to Abdul Azeem Khan SI (PW.12), who obtained his physical remand from competent court and took into possession the Kalashnikov recovered from the appellant at the time of his arrest by SHO bearing No.EA.6397

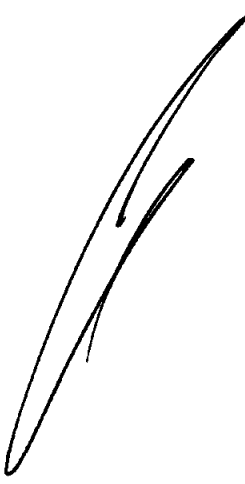
Exh.P.11 vide recovery memo Exh.PW.5/1. He sent the Kalashnikov and 22 empties of 7.62 bore to FSL for examination and produced PWs Mst. Bakht Zari and Arshad for recording their statements under section 164 Cr.P.C. before the Magistrate.

5. On completion of investigation challan was submitted against the appellant before the learned trial Court, where he was formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as twelve witnesses. After closure of the prosecution's evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution's allegation and professed his innocence. He, however, neither wished to be examined on oath under section 340(2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, the learned trial court, after hearing both the sides convicted and sentenced the appellant as mentioned in the initial paragraph of the judgment, hence, this appeal and Murder Reference.

6. We have heard the arguments of learned counsel for the parties and perused the evidence and record with their valuable assistance.

7. The untoward incident of murder of four persons of one and the same family has taken place on the night of 17.04.2017 at 0040 hours inside the house

of complainant Mst. Saria (PW.6), situated in village Balu, for which the appellant is directly and singularly charged in the FIR. It is borne out from the record that appellant was also residing in the same house jointly with the deceased because Atlas Khan deceased was father, Faqir Hussain deceased was brother and minor Nisar Hussain and Manahil deceased were the nephew and niece, respectively, of the appellant. The ocular account of this unfortunate incident has been furnished by complainant Mst. Saira who while appearing as PW.6 has deposed as under:-



“That deceased Atlas Khan was my father-in-law; deceased minor Nisar Hussain was my son and deceased Manahil was my daughter while deceased Faqir Hussain was my husband. Accused Zahoor is my husband’s brother while PW Arshad is also my husband’s brother. On the night of occurrence at about mid night, I along with my mother-in-law, namely, Mst. Bakht Zari, my father-in-law, namely, Atlas Khan, my husband Faqir Hussain, my children Nisar Hussan and Mst. Manahil as well Arshad Khan my husband’s brother were present in the house. Accused Zahoor made altercation with my deceased father-in-law and husband regarding the dispute over his share in the house. The accused brought a Kalashnikov at about 0040 hours (midnight) and made



indiscriminate firing at us, as a result of which my father-in-law Atlas Khan, my minor children Nisar Hussan and Manahil got hit and died on the spot while my husband got hit and received injuries while we escaped narrowly. We shifted the dead bodies to Pubbi hospital while my husband Faqir Hussain in injured condition was taken to LRH Peshawar who succumbed to injuries at LRH, Peshawar. The local police recorded my report in Pabbi hospital already Exh.PA while my mother-in-law Mst. Bakht Zari verified the report and thumb impressed the same. My report was read over to me and the Murasila Exh.PA correctly bears my thumb impression. Later on, police came to the spot and prepared the site plan at my pointation. I charge the accused for commission of offence.”

Similarly, Arshad Khan, who is the real brother of the appellant while appearing as PW.7 has also furnished ocular account of the incident in the following words:-

“That deceased Atlas Khan was my father, deceased minor Nisar Hussain was my nephew and deceased minor Manahil was my niece while deceased Faqir Hussain was my brother. Accused facing trial is also my brother while Mst. Saira (complainant) is the widow of my deceased brother Faqir Hussain. On the night of occurrence at about mid-night, I along with my mother, namely, Mst. Bakht Zari, my father, namely, Atlas Khan and brother, Faqir Hussain,

children Nisar Hussain and Mst. Manahil of my deceased brother, namely, Faqir Hussain and complainant Mst. Saira were present in the house. Accused facing trial made altercation with my deceased father and brother regarding the dispute over his share in the house and then the accused brought Kalashnikov at about 0040 hours (midnight) and made indiscriminate firing at us, as a result of which, my father Atlas Khan, minor children of my brother, namely, Nisar Hussain and Manahil got hit and died on the spot while my brother Faqir Hussain also got hit and received injuries while we escaped narrowly. We shifted the dead bodies to Pabbi hospital while I took my brother Faqir Hussain in injured condition to LRH Peshawar where he succumbed to injuries. The complainant had made report in Pabbi hospital regarding the occurrence. Afterward I also returned home along with dead body of my brother Faqir Hussain. In the meanwhile, the I.O. reached the spot and in my presence he recovered and took into possession some blood through cotton from the places of the deceased and sealed the same into parcels. ...”

8. Eyewitness Arshad (PW.7) is real brother of the appellant and Mst. Saira (PW.6), is his sister-in-law (*Bhabhi*). Both have been subjected to cross-examination, but nothing favourable to defence




or adverse to prosecution could be brought from their mouths. Both have furnished truthful ocular account of the occurrence and have proved their presence at the spot at the time of occurrence. Appellant and the eyewitnesses being inmates of one and the same house, their presence at the spot at the night of incident is quite natural and appealable to a prudent mind. Eyewitnesses and the appellant being members of one family coupled with altercation prior to the occurrence, question of mistaken identity does not arise. Nothing in black & white is available on file to remotely suggest false implication or substitution of the appellant. It does not appeal to a prudent mind that eyewitnesses who had already lost their four beloved will falsely implicate another innocent member of their own family, that too, for four murders. During spot inspection, the Investigation Officer has secured blood through cotton from the places of four deceased Exh.P.1 to Exh.P.4 vide recovery memo Exh.PW.7/1 to Exh.PW.7/4, respectively, in presence of marginal witnesses which along with the bloodstained garments of the deceased Exh.P.6 to Exh.P.9 were sent to the FSL, and in this regard Serologist Reports Exh.PW.12/19, Exhs.PW.12/2, Exh.PW.12/3 and Exh.PW.12/4 are in positive. This piece of circumstantial evidence strongly corroborate the ocular

account and confirms the crime spot to be the same as alleged by the eyewitnesses. Similarly, during spot inspection, the Investigating Officer has collected 22 crime empties of 7.62 bore Exh.P.5 vide recovery memo Exh.PW.7/5. On 17.04.2017, the appellant was arrested by Muhammad Fiaz Inspector (PW.1), and from his possession a Kalashnikov bearing No.6397 along with 16 live rounds of the same bore was recovered vide recovery memo Exh.Pw.1/1. In this regard he registered separate case FIR No.118 dated 17.04.2017 under section 15 KP Arms Act 2013 in Police Station Akbarpura against the appellant. The recovered Kalashnikov along with 22 empties of 7.62 bore were sent to the FSL and as per to FSL report Exh.PW.12/20, 22 empties taken from the spot, have fired from the same Kalashnikov. This strong piece of circumstantial evidence further corroborates the ocular account of the prosecution's case.

9. Medical evidence furnished by Dr. Mian Saad Ahmed (PW.9), Dr. Asghar Ullah Khan (PW.10) and Dr. Malghalara Khan (PW.11), who have conducted autopsy on the dead bodies of the four deceased also support the ocular account of the prosecution's case. According to statements of the Medical Officers, the four deceased met their unnatural death due to firearm injuries.

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10. In view of the above discussion, we have arrived at a conclusion that prosecution has proved guilt of the appellant through cogent, confidence inspiring and trustworthy ocular account corroborated by strong circumstantial evidence and supported by medical evidence. The learned trial court while appreciating the prosecution's evidence in its true perspective has arrived to a right conclusion by holding the appellant guilty of committing murder of his father, brother, minor nephew and niece with firearm. However, in view of the new development occurred before this court during pendency of the instant appeal sentence of the appellant under section 302(b) PPC requires consideration.



11. On 13.10.2020, learned counsel for the appellant apprised the court that compromise has been effected between the appellant and legal heirs of all the four deceased. Accordingly, record of the case was sent to the learned trial court with direction to record statements of legal heirs of the deceased and after fulfilling legal formalities of the compromise to submit compliance report. In compliance of the order (ibid), the learned trial court has submitted report, according to which major legal heirs of all the deceased have effected compromise with the appellant on their behalf as well as on behalf of the minor legal heirs, however,

appellant is unable to pay share in Diyat to the extent of Yahya minor son of Faqir Hussain deceased. On 07.06.2023, learned counsel for the appellant requested for time to make efforts for depositing share of minor Yahya and also to go through PLD 2019 Supreme Court 461. On 05.09.2023, learned counsel for the appellant pointed out that appellant being a destitute is unable to pay/deposit share of minor legal heir of Faqir Hussain deceased, however, requested for acquittal of the appellant on the basis of partial compromise. Keeping in view gravity of the offence wherein appellant is charged for committing murder of his father, brother and minor nephew and niece coupled with partial compromise, this court deemed it appropriate and in the interest of justice to hear learned counsel for the appellant and Mr. Jalal ud Din Akbar-e-Azam Khan Gara AAG on the point of partial compromise and its effect on the case of the appellant. Barrister Amir Khan Chamkani was appointed as Amicus Curiae to assist the court on the aforesaid legal point.

12. Arguments of learned counsel for the parties, worthy AAG for the State and learned Amicus Curiae, on the point of partial compromise and its effect on the case of the appellant heard and the

precedent law referred by the worthy Amicus Curiae gone through.

13. It is not disputed that this case is a case of punishment under *Ta'zir* and not *Qisas* because the proof required for a case of *Qisas* in terms of Section 304 PPC has not been produced before the trial court. The Hon'ble Supreme Court in case titled, "Muhammad Yousaf vs the State and others" (PLD 2019 Supreme Court 461) in paragraph No.7 of the judgment has held that "A criminal case becomes a case of *Qisas* when, after the case has reached the trial court, either the accused makes a confession before the trial court during trial or *Tazkiya tul Shahood* is undertaken by the trial court and unless either of the said two things happen before the trial court every criminal case is to be treated as a case of *Ta'azir* at every stage of the case including the stage of investigation. Compounding of offences in cases of *Ta'azir* is governed by section 345 Cr.P.C. and according to section 345(2) Cr.P.C. the offence of *qatl-i-amd* under section 302 PPC could be compounded with the permission of the relevant court. "By the heirs of the victim 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." The said legal provision was

amended on 21.10.2016 and it presently reads as “By the heirs of the victim subject to the provisions of section 311 PPC.” According to law in this country succession opens at the time of death of a person and upon his death his assets automatically stand devolved upon those who are entitled to inherit from him in specified shares in terms of his personal law and such inheriting persons are called the heirs of the deceased. There is thus, no confusion in our law that an heir is a person who is entitled to inherit from the deceased at the time of his death. In view of this settled and recognized principle when the law of the land provides that in a case of *Ta’azir* an offence of *Qatl-i-amd* under section 302 PPC may be compounded by the “heirs of the victim” and by section 345(2) Cr.P.C. is that only a person who can directly inherit from the victim is the person who can compound the offence of Qatl-e-Amd of the victim and none else. Similarly, in case of “Zahid Rehman vs the State” (PLD 2015 SC 77), the Hon’ble Apex court has dealt with the matter of compromise in cases of Qisas and Tazir. Relevant parts of the judgments are reproduced below:-

“There are certain other issues relevant to cases of Qisas and Tazir and I take this opportunity to clarify the legal position in respect of such issues as well. The matter of compromise in

cases of murder has also remained subject of some controversy before this court in the past but the legal position in that respect has now been settled and I would like to restate the settled legal position so as to remove all doubts. Sections 309, 310 and 338-E PPC and section 345 Cr.P.C are relevant in this respect and the same are reproduced below:-

.....

This court has already declared that section 309 PPC pertaining to waiver (Afw) and section 310 PPC pertaining to compounding (Sulh) in cases of murder are relevant only to cases of Qisas and not to cases of Ta'zir and a reference in this respect may be made to the case of Sh. Muhammad Aslam and another Vs Shaukat Ali alias Shaukat and others (1997 SCMR 1307), Niaz Ahmad Vs the State (PLD 2003 SC 635) and Abdul Jabbar vs the State and others (2007 SCMR 1496). *In the said cases it has also been clarified by this court that in cases of Ta'zir the matter of compromise between the parties is governed and regulated by the provisions of section 345(2) Cr.P.C. read with section 338-E PPC. In the same cases it has further been explained and clarified by this court that a partial compromise may be acceptable in cases of Qisas but a partial compromise is not acceptable in cases of Ta'azir.* The cases of Manzoor Hussain and 4 others vs the State (1994 SCMR 1327), Muhammad Saleem Vs the State (PLD 2003 SC 512), Muhammad Arshad alias Pappu vs Additional Sessions Judge, Lahore and 3 others (PLD 2003 SC 512), Muhammad Ahmad Vs the State (PLD 2003 SC 635), Riaz Ahmad Vs

the State (2003 SCMR 1067), Bashir Ahmad vs the State and another (2004 SCMR 236) and Khan Muhammad Vs the State (2005 SCMR 599) also throw sufficient light on such aspects relating to the matter of compromise. It may be true that compounding of an offence falling in chapter XVI of the Pakistan penal Code is permissible under some conditions both in cases of Qisas as well as Tazir, but at the same time it is equally true that such compounding is regulated by separate and distinct provisions and that such limited common ground between the two does not obliterate the clear distinction otherwise existing between the two separate legal regimes.”

14. As the instant case is a case of Ta'azir, where compromise has been effected between the appellant and legal heirs of the deceased, that too, during pendency of the appeal, therefore, in light of ratio of judgment (supra) the instant case is to be dealt with in light of the mandate of section 338-E PPC, which for the sake of convenience and ready reference is reproduced below:-

“338-E. Waiver or compounding of offences (1) Subject to the provision of this Chapter and section 345 of the Code of Criminal Procedure, 1989 (V of 1898) all offences under this Chapter may be waived or compounded and the provisions of sections 309, 310 and 311 shall, mutatis mutandis, apply to the waiver or compounding of such offences.

Provided that, where an offence has been waived or compounded, the court may in its discretion having regard to the

facts and circumstances of the case, acquit or award tazir to the offender according to the nature of the offence.

Provided further that where an offence under this Chapter has been committed and the principle of Fasad- fil-Arz is attracted, the court having regard to the facts and circumstances of the case shall punish an offender with imprisonment or fine as provided for that offence.

(2) All questions relating to waiver or compounding of an offence or awarding of punishment under section 310, whether before or after the passing of any sentence, shall be determined by the trial court.

Provided that where the sentence of Qisas or any other sentence is waived or compounded during the pendency of an appeal, such question may be determined by the Appellant Court.

Provided further that where qatl-i-amd or any other offence under this Chapter has been committed as an honour crime, such offence shall not be waived or compounded without consent of the court and subject to such conditions as the court may deem fit having regard to the facts and circumstances of the case.”

15. In light of the evidence discussed above, we have arrived at the conclusion that prosecution has proved that appellant has committed murder of his father, brother, minor nephew and niece, therefore, it is a case where the provision of 3rd proviso to section 338-E PPC (pertaining to *Fasad fil Arz*) are attracted. Resultantly, we are not convinced to acquit the

accused on the basis of partial compromise, rather are going to deal with his case under section 338-E PPC.

16. In case titled, "Muhammad Amin vs the State" (2016 SCMR 116), the Hon'ble Supreme Court while dealing with the matter of compromise in case of *Tazir*, has observed as under:-

"Leave to appeal had been granted in this case only to consider the question regarding quantum of appellant's sentence. After hearing the learned counsel for the parties and going through the record we have observed that according to FIR itself the appellant had not straightaway launched an assault upon Mst. Kalsoom Bibi deceased and the assault launched by him was preceded by an altercation and exchange of abuses at the spot which showed that the situation had taken an ugly turn at the spot in the absence of any premeditation on the part of the appellant. The record of the case further shows that Muhammad Mehboob complainant, husband of Mst. Kalsoom Bibi deceased was not an eyewitness of the occurrence and according to the FIR he had been informed about the incident in issue by Muhammad Yaqoob (CW1) but during trial the said Muhammad Yaqoob (CW1) had contradicted the complainant in that regard and had maintained that he had not seen the occurrence at all.

Another factor having some bearing upon the question of appellant's sentence is that the husband of the deceased, on his own behalf as well as on behalf of the minor children of the deceased, had forgiven the appellant and had entered into a compromise with him which compromise was not given effect by the courts below because the compromise was incomplete. *It has been clarified by this court in case of Abdul Ghaffar and others Vs the State (2015 SCMR 1064) that a partial compromise may not have any bearing upon conviction of an accused person in a case of Tazir but it may have, in circumstances of a given case, some relevance to the question of sentence in such a case. In the above mentioned circumstances of this case we have felt persuaded to reduce the appellant's sentence of death to imprisonment for life on the charge under section 302 (b) PPC.* This appeal is, therefore, dismissed to the extent of the appellant's conviction for an offence under section 302(b) PPC recorded and upheld by the courts below but the same is partly allowed to the extent of appellant's sentence which is reduced from death to imprisonment for life." (Bold and underlines are ours for emphasis).

In cases titled, *"Imran Shah Vs the State" (2003 P Cr. L J 760), and "Muhammad Ameer and another vs the*

State" (2006 P Cr LJ 1483), the worthy Lahore High Court, Lahore, has reduced/converted the sentence of death to imprisonment for life in cases of Tazir, on account of partial compromise.

17. Deriving wisdom from the judgments (supra) of the Hon'ble Supreme Court and the august Lahore High Court, Lahore and placing reliance thereon, in the instant case too, besides partial compromise the occurrence has taken place without premeditation. Admittedly, there was an oral altercation between the appellant and his father Atlas Khan deceased and brother Faqir Hussain deceased over selling of a house. During altercation the situation took an ugly turn and the appellant in a heat of passion rushed to his room, picked up a Kalashnikov and opened indiscriminate firing, as a result, not only his father and brother but also his minor nephew and niece got hit and lost their lives. Thus, while taking the partial compromise and mode and manner of the occurrence taken place without premeditation as a mitigating circumstance, dismiss this appeal to the extent of the appellant's conviction, however, reduce/convert his sentence from death on four counts, recorded by learned Addl. Sessions Judge-VI, Nowshera vide judgment dated 12.11.2019, to rigorous imprisonment for life on four counts. Conviction and

sentences of the appellant under section 324 PPC are maintained. The sentence of fine under sections 324 PPC and compensation amount under section 544-A Cr.P.C. and period of imprisonment in default of payment thereof as directed by the learned trial court are kept intact. All the substantive sentences of imprisonment shall run concurrently. Benefit of section 382-B Cr.P.C. is extended to the appellant. Accordingly, **Murder Reference No.42 of 2019** is answered in the **Negative**.

18. These are the reasons for our short order of even date, which is reproduced below:-

“For reasons to be recorded later, this Jail Criminal Appeal, filed by the Zahoor son of Atlas Khan, the appellant, stands dismissed in the terms that his conviction and sentences recorded under section 324 PPC by the learned Addl. Sessions Judge-VI, Nowshera vide judgment dated 12.11.2019, are maintained. Similarly, his conviction under section 302 (b) PPC is also maintained, however, his sentence under the said section of law is converted from death penalty on four counts to rigorous imprisonment for life on four counts. All the substantive sentences shall run concurrently. Accordingly, **Murder**

Reference No.42 of 2019 is answered in
the Negative.

Announced:
05.10.2023
M.Siraj Afridi CS



Senior Puisne Judge

JUDGE

DB of Hon'ble Mr. Justice Ishtiaq Ibrahim and
Hon'ble Mr. Justice Sahibzada Asadullah