

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUHAMMAD HASHIM KHAN KAKAR

MR. JUSTICE SALAHUDDIN PANHWAR

MR. JUSTICE ISHTIAQ IBRAHIM

Criminal Appeal No.28 of 2023

(On appeal against the judgment dated 31.01.2018 passed by the Peshawar High Court, Abbottabad Bench in CrI.A.No.132-A of 2013 with Murder Reference No.87-A of 2013)

Shabeer Ali

... Appellant(s)

VERSUS

The State

... Respondent(s)

For the Appellant(s) : Ms. Aisha Tasneem, ASC

For the State : Mr. Kausar Ali Shah, Addl. A.G.

For the Complainant : In person

Date of Hearing : 20.02.2025

JUDGMENT

Salahuddin Panhwar, J. This appeal arises from the verdict, *rendered* by the Peshawar High Court, Abbottabad Bench, (PHC) on 31.01.2018, whereby, Shabeer Ali's appeal (the appellant) was dismissed, and the death sentence *awarded* by the learned Additional Sessions Judge, Haripur, was maintained. The appellant was convicted on three counts under Section 302(b) of the Pakistan Penal Code (PPC) for the *Qatl-e-Amd* of Mst. Waheeda Bibi, Mst. Sabiha Bibi, and latter's *unborn* child respectively. Additionally, he was convicted U/Sections 324, 337-F(i), and 337-F(ii) PPC for causing *injuries* to Mst. Aneela Bibi and Mst. Noreen Bibi, as well as U/Section 452 PPC for *trespassing* into the complainant's house with intent to commit an offence. However, the leave to appeal was *granted* by this Court vide order dated 11.01.2023, in the following terms:-

"Through this petition leave to appeal has been sought on the ground that although the occurrence had taken place in the broad daylight, however, the subsequent facts surfaced on the record reflect that the dead bodies were evacuated to the Police Station by the complainant himself. The Investigating Officer had reached

the place of occurrence afterwards. Otherwise there are two persons who were done to death while two sustained serious injuries in mysterious circumstances which require detailed examination. Therefore, leave to appeal is granted to re-evaluate the entire evidence available on record in the interest of safe administration of criminal justice".

2. The prosecution case, as per the First Information Report (FIR) and the evidence on record, is that on 06.06.2009, the appellant, Shabeer Ali, armed with a pistol, *entered* the house of the complainant, Khursheed, and opened fire. As a result, Mst. Waheeda Bibi (*wife of the complainant*) and Mst. Sabiha Bibi (*sister-in-law of the complainant*) were killed, while Mst. Aneela Bibi and Mst. Noreen Bibi (*daughters of the complainant*) sustained serious injuries. The motive for the crime was stated to be a previous quarrel between the women of the complainant's and the appellant's *family*.

3. The trial Court convicted the appellant U/Section 302(b) PPC and *sentenced* him to death on three counts (*for the murder of Mst. Waheeda Bibi, Mst. Sabiha Bibi, and the unborn child*). He was also convicted u/Sections 324, 337-F(i), and 337-F(ii) PPC for causing injuries to Mst. Aneela Bibi and Mst. Noreen Bibi, and U/Section 452 PPC for trespassing. The High Court, after a detailed examination of the evidence, upheld the conviction and confirmed the death sentence.

4. The appellant aggrieved from verdict has *challenged* the judgment of the High Court, *primarily* on the grounds that the prosecution failed to prove the case beyond a reasonable doubt, that the confessional statement was involuntary, and that the death *sentence* is too harsh considering the mitigating circumstances of the case.

5. The learned counsel for the appellant has contended that the prosecution failed to establish the alleged motive, which it had *specifically* asserted. Additionally, she argued that the charge was *defective* as it did not include the death of the unborn child, thereby *prejudicing* the appellant's defense. Furthermore, she submitted that the imposition of the death sentence is *excessively* harsh, particularly in light of the mitigating factors, such as the fact that the incident stemmed from a quarrel between the women of the families and was not a *premeditated* act of murder. Finally, the learned counsel has

prayed for the conversion of the death sentence to life imprisonment, considering these mitigating circumstances.

6. The learned Additional Advocate General for the State supported the judgment of the High Court and mainly argued as follows:-

The prosecution proved its case beyond a reasonable doubt through the testimonies of eyewitnesses, medical evidence, and the recovery of the weapon used in the crime.

The confessional statement of the appellant was voluntary and corroborated by other evidence on record.

The charge was not defective, as the appellant was aware of the allegations against him, including the death of the unborn child, as it was mentioned in the post-mortem report and the statements of witnesses.

The death sentence is appropriate given the *gravity* of the crime, which involved the murder of two women and an unborn child, and the serious injuries caused to two other individuals.

Lastly, the learned AAG has prayed for dismissal of the present Criminal Appeal.

7. Upon a thorough examination of the case record, including the evidence led by the prosecution, the judgment of the trial court, and the impugned judgment of the High Court, the arguments advanced by both parties have been carefully considered. Based on this assessment, it is found that the prosecution has *established* its case beyond reasonable doubt, save as to the extent of the conviction recorded for the alleged murder of the unborn child. The testimonies of the *eyewitnesses*, including the complainant and his *daughters*, remained *consistent, credible*, and were duly corroborated by material evidence. Furthermore, the medical evidence is in *conformity* with the *version* put forth by the *prosecution*, while the admission made by the appellant, together with the recovery of the weapon used in the commission of the offence, lends further credence to the case against him. Accordingly, the case of the *prosecution*, to the extent delineated above, stands *conclusively* proven against the appellant beyond reasonable doubt.

8. It is observed that no charge was *framed* by the trial court in respect of the murder of the unborn child, nor does the High Court

judgment contain any *observation* or finding on this aspect. The effect of non-framing of charge merits consideration owing to following reason;-

Firstly; The right to a fair trial, as enshrined in Article 10-A of the Constitution of Pakistan, *mandates* that every accused person be afforded due process and a *fair opportunity* to defend themselves. This principle is further reinforced by Article 14(3)(a) of the International Covenant on Civil and Political Rights (ICCPR), which obligates states to ensure that an accused is *promptly* and *adequately* informed of the nature and cause of the charge against them. The framing of a charge is not a mere procedural *formality*, but an essential requirement to apprise the accused of the precise allegations against them, *enabling* to prepare a proper defense and ruling out any element of prejudice. The provisions of Chapter XIX of the Code of Criminal Procedure, 1898 (See Sections 221 to 240) delineate the mode and manner of framing a charge, *underscoring* its pivotal role in criminal trials.

Secondly; The failure to frame a charge, *particularly* in cases involving distinct offences, goes to the root of the trial and constitutes a material illegality, that cannot be cured U/Section 537 of the Code. This Court, in (M. Younus Habib, 2006)¹ *emphasized* that the rationale behind the *requirement* of framing a charge is to *ensure* that the accused is neither misled nor *deprived* of a fair opportunity to defend themselves. Likewise, in (Arbab Khan, 2010)² and (Khan Zado, 2015)³, it was held that *an omission to frame a charge is a fatal defect that results in miscarriage of justice and vitiates the trial.* The significance of this requirement is further highlighted in (Noor Muhammad Khatti, 2005)⁴, wherein it was observed that the *administration of justice must not be hindered by technicalities, but a failure that deprives the accused of their right to a fair trial cannot be disregarded.*

¹ M. Younus Habib v. The State (PLD 2006 SC 153)

² Arbab Khan v. The State (2010 SCMR 755)

³ Arbab Khan v. The State (2010 SCMR 755)

⁴ Noor Muhammad Khatti v. The State (2005 PCr.LJ 1889)

Thirdly; the distinction between a defective charge and a complete omission to frame a charge is of *paramount* importance, while former may not *necessarily* vitiate a trial if it does not cause prejudice to the accused, whereas the later is an *infringement* of a statutory *obligation*, rendering the trial *fundamentally* flawed. Provision 233 of the Code, *mandates* that every distinct offence requires a *separate* charge, and failure to frame such a charge *deprives* the accused of notice regarding the precise nature of the *accusation*. Similarly, Section 221 of the Code, envisages, that a charge must state the offence with which the accused is *charged*. When a trial *proceeds* without framing a charge for a distinct offence, it not only *violates* these statutory provisions, but also *impairs* the accused's ability to defend themselves, leading to a trial that cannot be sustained in law (Md. Mosaddar Hoque, 1958 SC)⁵.

Fourthly; Although Section 237 of the Code allows a conviction for a different offence than the one charged under certain circumstances, this provision is subject to Section 236, which applies only in cases of doubt as to which offence has been committed. It cannot be invoked to convict an accused for a distinct offence under a different penal statute, as held in (Zahid Shahzad, 1981)⁶. The principle, that a person cannot be *convicted* of an offence for which they have not been charged is well *established*, that a charge must be framed for every distinct offence to satisfy the requirements of a fair trial (Nemai Adak, 1965)⁷ & (Istahar Khondkar, 1936)⁸.

9. In light of these legal principles, it is evident that the omission to frame a charge for a distinct offence is a *substantial* illegality, rendering the trial a nullity. Such an omission is not a mere *irregularity*, that can be cured u/Section 537 of the Code; rather, it is a defect, that strikes at the root of the *proceedings*, *necessitating intervention* to prevent *miscarriage* of justice. Furthermore, the procedural *safeguard* U/Section 342, Cr.P.C. ensures that the accused

⁵ Md. Mosaddar Hoque v. The State (PLD 1958 SC 131).

⁶ Zahid Shahzad v. The State (1981 PCr.LJ 844)

⁷ Nemai Adak v. The State, (AIR 1965 Cal 89:)

⁸ Istahar Khondkar v. Emperor, (AIR 1936 Cal 796)

is *confronted* with all the incriminating evidence to afford them an opportunity to explain the *circumstances* against them. The omission to “frame a charge”, coupled with a failure to put a material accusation to the accused U/Section 342, Cr.P.C., is a grave procedural *irregularity* that cannot be remedied U/Section 537 of the Code, as it results in a *fundamental* breach of the right to a fair trial.

10. Applying this principle to the present case, the record *establishes* that the learned trial court *failed* to frame a charge against the appellant for the death of the unborn child (a 30/32-week-old *foetus*), despite evidence in the post-mortem report and witness statements indicating that Mst. Sabiha Bibi was *pregnant* at the time of the offence. While Question No.12 was *posed* to the appellant U/Section 342, Cr.P.C., it merely *inquired* about the deceased's pregnancy and did not *explicitly* assert his *culpability* for the death of the unborn child. Consequently, the appellant was not *afforded* a fair opportunity to respond to this distinct accusation, nor was he *formally* put to trial for this specific offence. The absence of a specific charge on this count and the failure to *properly* confront the appellant U/Section 342, Cr.P.C., constitute a material *illegality*, that cannot be ignored. Convicting and *sentencing* the appellant for an offence in respect of which no charge was framed and no *proper opportunity* for defence was provided is legally untenable. Such a conviction offends, the principle of natural justice, violates the *mandatory* procedural *safeguards* under the Code, and is, therefore, liable to be set aside to the extent of this charge.

11. We find merit in the *argument* presented by the appellant's counsel regarding the severity of the death sentence. While the *gravity* of the crime is *unquestionable*, it is essential to consider the mitigating factors. The incident appears to have been *triggered* by a sudden quarrel, with no evidence suggesting *premeditation* on the appellant's part. Moreover, the appellant has no prior criminal record, and the act occurred in the heat of the *moment* rather than as part of a deliberate plan to commit murder. Given these *circumstances*, if the offence resulted from a spontaneous altercation rather than a *premeditated* act, the death sentence should be *commuted* to life imprisonment. Additionally, the prosecution alleged a specific motive i.e. *an earlier dispute between the families*, but failed to substantiate it with credible evidence. In a similar context, this Court observed

in (Muhammad Akram, 2019)⁹ A thorough examination of the case reveals that the complainant alleged a specific motive behind the crime, claiming that the appellant, accompanied by acquaintances, had previously confronted the deceased, Muhammad Riaz, outside the complainant's residence. This purported altercation allegedly led to a threat and ultimately, the commission of the crime. However, during cross-examination, the complainant, Fiaz Ali, conceded that he had never reported these prior incidents to the police. Furthermore, there is no evidence on record to corroborate the occurrence of this altercation. The complainant also failed to disclose the identities of the appellant's associates. It appears that the true circumstances surrounding the incident remain unclear. In light of these findings, we conclude that the prosecution's alleged motive remains unproven.

12. It is a well-established principle that when the prosecution fails to substantiate its claims, the accused benefits from this failure. In this instance, the prosecution's inability to prove the motive undoubtedly favors the appellant. Similarly, in the case of (Ghulam Rasool, 2025)¹⁰, this Court, by majority decision, held that: ". The circumstances surrounding the case suggest that the incident was a spontaneous and impulsive act, devoid of premeditation. The altercation escalated into a free-for-all fight, with no clear evidence supporting the motive alleged in the FIR. The prosecution's case relies on the premise that all accused, including the appellant, opened fire on the deceased. However, it's challenging to distinguish the appellant's role from that of the others, especially since one of the co-accused, was acquitted by the trial court based on the same evidence. In light of these factors, it's unreasonable to single out the appellant and hold him solely responsible for the crime. Although the prosecution successfully proved the appellant's culpability under Section 302(b) read with Section 34 of the PPC, the circumstances don't justify the imposition of capital punishment. Instead, the courts below should have exercised their discretion to impose a lesser punishment, as provided under Section 302(2) of the PPC, in consideration of the mitigating circumstances.

13. Thusly, given the mitigating circumstances surrounding the case, the imposition of the maximum penalty is not warranted. The absence of a proven motive, coupled with the circumstances indicating

⁹ Muhammad Akram alias Akrai v. The State (2019 SCMR 610),

¹⁰ Ghulam Rasool v. The State (2025 SCMR 74)

the absence of premeditation, *necessitates* a reconsideration of the quantum of punishment. Accordingly, the appellant is entitled to a lesser sentence, as courts are obligated to ensure that the punishment awarded is proportionate to the facts and circumstances of the case.

14. In view of given circumstances, instant appeal is partly allowed in terms that the conviction of the appellant on two counts under Section 302(b) PPC is upheld; however, the death sentence is commuted to life imprisonment. The conviction U/Section 302(b) PPC for the alleged killing of the unborn child/foetus is set aside accordingly, in result thereof, the appellant is acquitted of the charge to that extent. The remaining sentences U/Sections 324, 337-F(i), 337-F(ii), and 452 PPC, along with the payment of compensation of Rs.100,000/- (*One Hundred Thousand Rupees*) each for the murder of Mst. Wahida Bibi and Mst. Sabiha Bibi under Section 544-A Cr.P.C., shall remain unaltered. All sentences shall run concurrently with the benefit of Section 382-B Cr.P.C. Accordingly, the appeal is disposed of in the above terms.

Judge

Judge

Judge

Announced in open Court on 07.03.2025 at Islamabad

Judge

B-VII
Islamabad, the
20.02.2025
"Approved for reporting"
Sarfraz Ahmad/-