

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Athar Minallah
Mr. Justice Irfan Saadat Khan
Mr. Justice Malik Shahzad Ahmad Khan

CRIMINAL APPEAL NO.530/2022

*Against the judgment dated 12.10.2022 of
the High Court of Sindh Circuit Court
Hyderabad passed in Crl. A. No.D-
118/2020*

Fida Hussain @ Saboo

Appellant

VERSUS

The State

Respondents

For the Appellant(s): Mr. Ghulam Sajjad Gopang, ASC
Qari Abdul Rasheed, ASC

For the complainant: Mr. Ghulam Shabbir Shar, ASC
(though video link from Karachi)

For the State: Mr. Saleem Akhtar, Addl. PG

Date of Hearing: 29.01.2025

ORDER

Athar Minallah, J.- Fida Hussain alias Saboo ('**appellant**') has challenged the judgment of the High Court, dated 12.10.2022, whereby the convictions handed down by the trial court were upheld and the sentence of life imprisonment was enhanced to death.

2. The appellant and other co accused were nominated in crime report No.38 of 2014 registered at Police Station Chhachro, District Tharparkar, Mlthi for committing offences under sections 302, 114 and 34 of the Pakistan Penal Code, 1860 ('**PPC**'). The appellant was alleged to have committed the murder of his wife Mst.Neelam ('**deceased**'). After completing the investigation, a report under section 173 of the Code of Criminal Procedure, 1898 ('**Cr.P.C.**') was filed followed by framing of the charge by the trial court on 25.02.2015. The appellant did not plead guilty and thus trial proceedings were commenced. The trial court, upon

conclusion of the trial, convicted the appellant under sections 302(b) and 34 PPC and sentenced him to life imprisonment as Tazir. He was further ordered to pay Rs.200,000/- as compensation under section 544-A Cr.P.C. to the legal heirs of the deceased. He was also convicted under section 23(1)(a) of the Sindh Arms Act 2013 and sentenced to seven years rigorous imprisonment and fine of Rs.100,000/- was imposed and, in default of payment thereof, to further undergo simple imprisonment of six months. The benefit under section 382-B- Cr.P.C was extended to the appellant.

3. It is noted that the trial court, after taking into consideration mitigating factors explicitly mentioned in its judgment, dated 03.5.2018, had sentenced the appellant to life imprisonment instead of death. Both the punishments are prescribed under section 302 (b) of the PPC. The convictions and sentences were assailed by the appellant before the High Court. The complainant, Sikandar Ali, PW-1 had sought enhancement of sentence from life imprisonment to that of death by filing criminal revision. The appeal filed by the appellant was dismissed by the High Court while the criminal revision seeking enhancement of the sentence was allowed. The sentence of life imprisonment handed down by the trial court was enhanced to the sentence of death. It was further directed by the High Court that the compensation amount of Rs.200,000/- awarded against the appellant under Section 544-A Cr.P.C. shall be recoverable as arrear of land revenue. The High Court was of the opinion that the trial court had not recorded reasons for handing down the sentence of life imprisonment and, therefore, the provisions of sub section 5 of section 367 Cr.P.C were violated. The appeal to the extent of the convictions and sentences of Fazal Mohammad, Nizamuddin alias Nizara Hussain and Naseer alias Ranjho was allowed by the High Court and they were acquitted of the charges framed against them.

4. We have heard the learned counsels for the appellant and the complainant and the learned Additional Prosecutor General has also assisted. With the assistance of the learned counsels, we have perused the record.

5. The appellant had fired at the victim twice from a firearm weapon. She was fatally injured and later lost her life. The deceased victim was the appellant's wife and the motive set up in the crime report was marital disputes and the filing of a civil suit by the deceased victim seeking dissolution of her marriage. The ocular account in this case was deposed by two witnesses i.e Sikandar Ali, PW-1 and Sohrab, PW-2. The medical evidence was brought on record by Dr. Salma who had entered the witness box as PW-3. The investigation in this case was initially conducted by Poonjo Mal, ASI, PW-7 and later it was entrusted to Dur Muhammad, SIP (PW-8) on 15.07.2014. The ocular account deposed by the two witnesses has been found to be consistent regarding all material facts. Their depositions were consistent, reliable, trustworthy and confidence inspiring. The ocular account was supported by the medical evidence. The two spent bullets were recovered from the crime scene by Poonjo Mal, ASI (PW-7) on 14.7.2014. The appellant was arrested on 16.07.2014 and he had led to the recovery of the firearm weapon on 17.07.2014. Dur Muhammad, SIP (PW-8), in his deposition, had stated that the spent bullets recovered from the crime scene and the firearm weapon were delivered to the Forensic Science Laboratory by Jowaro Mal, PW-9, on 23.07.2014. This was further confirmed by the report of the Forensic Science Laboratory, dated 28.07.2014. Since the spent bullets and the fire arm weapon were sent together, therefore, the reliability of the recovery had become questionable. However, even if the recovery of the fire arm weapon is not taken into consideration even then the prosecution had brought on record other reliable, trustworthy and confidence inspiring evidence to prove the guilt of the appellant.

The trial court had convicted the appellant and sentenced him to life imprisonment after taking into consideration the mitigating factors which were highlighted in its judgment dated 03.05.2018. The trial court had, inter alia, considered the young age of the appellant, having no criminal record and being a first offender as mitigating factors for awarding the alternate sentence of life imprisonment. The High Court, however, observed that the trial court had not recorded reasons for handing down the alternate sentence. The High Court, therefore enhanced the sentence from life imprisonment to death. As already noted, the prosecution had proved the guilt of the appellant beyond reasonable doubt and, therefore, we are of the opinion that the findings regarding the convictions are unexceptionable and do not require interference. However, the question raised before us is whether the High Court was justified in enhancing the sentence from life imprisonment to death when the trial court had recorded its reasons for awarding the alternate sentence. The High Court had relied on the provisions of section 367(5) of the Cr.P.C for enhancing the sentence from life imprisonment to death.

6. As already noted, in this case the trial court had convicted the appellant and sentenced him to life imprisonment because in the facts and circumstances of the case there were mitigating factors which did not justify handing down the sentence of death. The High Court appears to have ordered the enhancement on the assumption that reasons were not recorded for awarding the sentence of death and, therefore, the statutory provision of section 367(5) stood violated. The High Court was of the opinion that the sentence of death was the normal punishment prescribed under section 302(b) PPC and, therefore, it ought to have been awarded in this case. Before discussing the reasons recorded by the trial court for awarding the alternate sentence, it would be beneficial to examine the provisions of section 302 of the PPC and the precedent

law, so as to determine whether enhancement in this case was justified. The offence of Qatl-e-amd is described in section 300 of the PPC. Section 302 has specified three distinct punishments for committing the offence of qatl-i-amd i.e clause 'a' prescribes the punishment of death as qisas, clause 'b' provides that if the proof in either of the forms specified in section 304 is not available then the punishment prescribed is death or imprisonment as *tazir* having regard to the facts and circumstances of the case while under clause 'c', the punishment prescribed for *qat-i-amd* is imprisonment of either description for a term which may extend to 25 years, where according to the injunctions of Islam the punishment of *qisas* is not applicable. In the case before us, clause (b) of section 302 PPC is relevant because the other clauses are not attracted. It is noted that in case of clause (a) only one punishment has been prescribed i.e death. If the case falls under this clause, then the court has no discretion except to hand down the sentence of death. Clause (c) gives a wide discretion to the court to sentence a convict if it is a case where, according to the injunctions of Islam, the punishment of qisas is not applicable. However, if it is a case which falls under clause (b) of section 302 of the PPC then the legislature has prescribed two distinct punishments, death or life imprisonment. As would be discussed later, the expression 'having regard to the facts and circumstances of the case' is of significance in the context of exercising discretion by the court in handing down one of the afore mentioned prescribed punishments. It would also be relevant to refer to sub-section 5 of section 367 of the Cr.P.C. which provides that if the accused is convicted of an offence punishable with death and the court has sentenced him to any punishment other than death, then the reason why sentence of death was not passed has to be recorded in the judgment. The question for our consideration is whether the sentence of death is a normal or alternate sentence and how a court has to exercise its discretion while

handing down one of the legal sentences keeping in view the provisions of section 302(b) PPC read with section 367(5) of the Cr.P.C.

7. The concept of punishment prescribed by the legislature has been eloquently highlighted by this Court in Dadullah's case¹ and it has been observed that punishment handed down by a court to a convict accused is based on the notions of retribution, deterrence or reformation. It has been explained that the purpose is two-fold; to create an atmosphere that would serve as a deterrent for those who are inclined towards committing a crime and to work as a medium in reforming the offence. Deterrent punishment is not only to maintain a balance between a wrong done by a person but also to simultaneously make the latter an example for others so that it serves as a preventive measure to reform the society. The sentence of death creates deterrence in society. The courts must not hesitate in awarding the maximum punishment in such cases where it has been proved beyond any shadow of doubt that the accused was involved in the offence. This Court has emphasized that deterrence is a factor which ought to be taken into consideration while awarding a sentence, particularly the sentence of death. It has been observed that the courts must exercise a wide discretion in the matter of sentencing judiciously. This Court has, therefore, stressed that death sentence in a murder case is the normal penalty and that the courts, while diverting towards a lesser sentence, must give detailed reasons for their decision. In Khurram Malik's case², this Court has observed that justice is not for one but is for all. While examining the case of a convict, the court owes a duty to the legal heirs of the deceased and to the society that justice should be done to them as well. In this context, it has been further observed that the sentence should be such which would serve

¹*Dadullah and another v. The State* (2015 SCMR 856)

²*Khurram Malik and others v. The State and others* (PLD 2006 SC 354)

as a deterrence for like-minded persons. In Muhammad Aslam's case³, this Court has held that no doubt the normal penalty for an act of commission of *qat-i-amd* is death but since life imprisonment is also a legal sentence provided under the law for such an offence, it must also be kept in mind. If the facts and circumstances warrant mitigation of sentence then the legal sentence of life imprisonment must be taken into consideration. This Court has observed that no hard and fast rule can be applied in each and every case. In Ms. Najiba's case⁴, this Court has observed that recording of reasons for not awarding the normal penalty of death in cases of offences punishable with death is mandatory and that such an omission amounts to non-compliance of the legal provisions of section 367(5) of the Cr. P.C. It has been further observed that for the offences punishable with death the normal punishment prescribed by law is a death sentence. However, it has been further observed that in cases where there are mitigating or extenuating circumstances warranting lesser punishment, then the court, while awarding the lesser punishment, has to record reasons justifying the same. In Khalid Mehmood's case⁵, it was held that if the prosecution proves the case against an accused beyond a reasonable doubt, then the normal sentence is death. If the normal sentence is not to be awarded then the court has to make out a case for reduction of the sentence on the basis of mitigating factors. In Asad Mehmood's case⁶, this Court has observed that while considering mitigating circumstances, the principle of proportionality must not be ignored and there should be a semblance of proportion between the injury or insult given by the deceased. In Nadeem alias Nanha's case⁷, this Court has stressed that the question of sentence demands utmost care on the part

³*Muhammad Aslam and another v. The State* (2007 SCMR 1412)

⁴*Ms. Najiba and another v. Ahmed Sultan and others* (2001 SCMR 988)

⁵*Khalid Mehmood and others v. The State* (2011 SCMR 664)

⁶*Asad Mahmood v. Akhlaq Ahmed and another* (2010 SCMR 868)

⁷*Nadeem alias Nanha alias Billa Sher v. The State* (2010 SCMR 949)

of the court because it is dealing with the life and liberty of an accused person. The question regarding the nature of the two sentences prescribed under section 302(b) PPC and whether the sentence of death has preference over life imprisonment, particularly in the light of section 367(5) of the Cr.P.C, was examined by this Court in the ensuing cases.

8. In Dilawar Hussain's case⁸, a larger Bench of this Court has held that clause (b) of section 302 PPC empowers the court to hand down either death or life imprisonment as punishment when the latter sentence is justified. This Court has referred to the prescribed punishment under section 302(b) as two legal sentences and has held that the court has the discretion to award death sentence if the circumstances so permit. Likewise, the court also has to exercise discretion where the circumstances justify handing down the prescribed lesser punishment, keeping in view the value of life and liberty protected under Article 9 of the Constitution. In Hassan's⁹ case, this Court has elaborately examined this question, particularly in the context of sub-section 5 of section 367 of the Cr. P.C. and has held that there was nothing in the said provision which even hinted at the sentence of death being the normal sentence in a case under section 302(b) PPC. It was further elaborated that section 302(b) PPC clearly provides for two alternate sentences i.e. sentence of death or sentence of imprisonment for life for the offence of murder and that it does not state that anyone of those sentences are to be treated as the normal sentence. It has been explained that section 302(b) PPC itself mentions that one of the alternate sentences may be passed having regard to the facts and circumstances of the case. There could be cases wherein facts and circumstances may not warrant the sentence of death and what sub-section 5 of section 367 of the Cr. P.C. requires is that such facts and

⁸ *Dilawar Hussain v. The State (SCMR 2013 1582)*

⁹ *Hassan and others v. The State and others (PLD 2013 SC 793)*

circumstances of the case ought to be mentioned by the trial court in its judgment so the higher courts may straightaway become aware of the same while entertaining or deciding the challenge thrown against the trial court's judgment. This Court has observed that the true import of the provisions of section 367(5) Cr. P.C. has been misunderstood and misconceived. It was further enunciated that the requirements contemplated under sub-section 5 of section 367 Cr. P.C. were relevant only to a trial court and that they have no application to an appellate or revisional court. While referring to section 423(1)(b) Cr. P.C., this Court has observed that an appellate court seized of an appeal against conviction was empowered to reduce the sentence. This jurisprudence was further affirmed by this Court in Ghulam Mohyuddin's case¹⁰ wherein it was held that once the legislature has provided for awarding the alternate sentence of life imprisonment, then it could not be held that in all the cases of murder the death penalty is a normal one and shall ordinarily be awarded. The intent of the legislature was not to take away the discretion of the court, otherwise it would have omitted the alternative sentence of life imprisonment from clause (b) of section 302 PPC. It was, therefore, emphasized that the two sentences are alternate to one another and awarding one or the other sentence would depend upon the facts and circumstances of each case. This Court has further elaborated that there could be multiple factors to award the death sentence for the offence of murder and an equal number of factors which may weigh in favour of handing down life imprisonment. A single mitigating circumstance would be sufficient to put on guard the court not to award the penalty of death. However, it was observed that no clear guideline could be laid down because the facts and circumstances of each case are different. It is for the court to apply its judicial mind, and

¹⁰*Ghulam Mohyuddin alias Haji Babu and others v. The State (2014 SCMR 1034)*

the slightest doubt, though not sufficient for acquittal, must be considered in favour of awarding the alternate sentence of life imprisonment. As already noted, this Court has consistently held that awarding a death sentence prescribed under section 302(b) PPC may not be ordinarily justified if mitigating factors and extenuating circumstances exist in a particular case. It is noted that various factors have been treated as mitigating factors such as motive set up by the prosecution not having been established¹¹. An inconsequential recovery of firearm weapon, absence of premeditation, such as the occurrence taking place at the spur of the moment,¹² rule of life expectancy¹³, grave and sudden provocation¹⁴ or the age of the offender i.e. youthful tendencies of impulsiveness or acting under the influence of the elders have also been considered as mitigating factors¹⁵. However, an exhaustive list of mitigating factors cannot be set out because the sentence would depend on the facts and circumstances of each case. In the context of enhancement of a sentence, this Court, in Haji Muhammad Ellahi' s case,¹⁶ has held that a finding of fact would not be reversed in the case of enhancement or reversal of a sentence, if such sentence was awarded upon the finding of fact. There must be a gross misreading or non-reading of evidence or there must exist some substantial point or it must clearly appear to be a case of miscarriage of justice so as to justify interference. The power to enhance a sentence already awarded by a trial court should be sparingly exercised and the sentence should be enhanced only if the failure to do so would lead to a grave and serious miscarriage of justice. This Court has emphasized that the mere fact that the court considering enhancement of the

¹¹*Muhammad Asif v. Muhammad Akhtar* (2016 SCMR 2035)

¹²*Zafar Iqbal v. The State* (2017 SCMR 1721).

¹³*Hassan v. The State* (PLD 2013 SC 793)

¹⁴*Abdul Haque v. The State* (PLD 1996 SC 1)

¹⁵*Amjad Shah v. The State* (PLD 2017 SC 152)

¹⁶*Haji Muhammad Ilahi etc. v. Muhammad Altaf alias Tedi etc.* (2011 SCMR 513)

sentence may have imposed a harsher sentence would not be a sufficient reason for exercising the power to enhance an awarded sentence. It is obvious from the survey of the jurisprudence of this Court that the punishments prescribed under section 302(b) of PPC are two distinct legal sentences. They are alternate to each other and handing down either one of the sentences would depend on the facts and circumstances of each case. The trial court has to exercise its discretion regarding sentencing with care after taking multiple factors into consideration. Moreover, section 367(5) of the Cr.P.C requires that the facts and circumstances of the case leading to awarding a sentence other than death must be mentioned by the trial court in its judgment. The mitigating factors and extenuating circumstances would be relevant for exercising discretion in favour of handing down life imprisonment rather than death. The power of enhancement of a sentence awarded by a trial court must be sparingly exercised unless it would lead to a grave and serious miscarriage of justice.

9. In the case before us, the trial court had mentioned the facts and circumstances of the case and had explicitly referred to the mitigating circumstances which had led to handing down the sentence of life imprisonment instead of death. The evidence brought on record also did not show that the appellant had a criminal record before the commission of the offence in this case. He was of young age at the time of commission of the offence and the factor of being a first time offender also weighed in favour of sentencing the petitioner to life imprisonment. We have noted that the spent bullets collected from the crime scene were sent to the Forensic Science Laboratory with the firearm weapon on the same date and that too after the arrest of the appellant. Moreover, the motive, as set up in the crime report i.e a suit having been filed by the deceased against the appellant seeking dissolution of her marriage could not be proved. The witnesses, in their respective depositions, had

not referred to any other act or conduct of the petitioner as a motive for commission of the crime. Dur Muhammad, SIP (PW-8) had brought on record applications filed by the deceased. In his deposition he did not tender any evidence or document which could have established that proceedings were carried out in accordance with the law pursuant to the applications filed by the deceased. Sikandar Ali, PW-1, who was the deceased's father, had not stated anything in his deposition in this regard. No question was put to the appellant regarding this particular factum when his statement under section 342 Cr.P.C. was recorded. In our opinion, the factum of motive was not proved by the prosecution by bringing on record reliable and confidence inspiring evidence. All these mitigating factors justified not handing down the sentence of death. The trial court had explicitly mentioned the mitigating factors which had led to awarding the sentence of life imprisonment. The High Court had erroneously assumed that the trial court had not recorded reasons. Moreover, the High Court had enhanced the sentence because, in its opinion, a harsher sentence ought to have been awarded. We have noted that the prosecution had proved the guilt of the appellant beyond reasonable doubt and, therefore, the conviction upheld by the High Court being unexceptionable does not require any interference. The appeal to the extent of conviction is dismissed. However, it is partly allowed by setting-aside the judgment of the High Court to the extent of enhancing the sentence from life imprisonment to death. Consequently, the sentence of life imprisonment awarded by the trial court for the offence committed under section 302(b) PPC stands restored. The amount of compensation awarded under section 544-A Cr.P.C. shall remain intact and the said amount shall be recoverable as the arrears of land revenue. It is, however, directed that in case of non-recovery of the compensation amount, the appellant shall further undergo six months simple imprisonment. The conviction and sentence under

section 23(1)(a) of the Sindh Arms Act 2013, including the fine ordered by the trial court and upheld by the High Court and the sentence required to serve in default of fine, are maintained. All the sentences shall run concurrently. The benefit of section 382-B Cr.P.C. is extended to the appellant.

10. The High Court had allowed the appeal to the extent of and had consequently acquitted Fazal Muhammad, Nizamuddin alias Nizara Hussain and Naseer alia Ranjho. After reappraising the evidence, the High Court was of the opinion that no role was attributed to them nor was there any evidence to establish that they or any one of them had played an active role in the commission of the offence. The prosecution was not able to prove their guilt beyond reasonable doubt. It is settled law that the scope of interference with acquittal is narrow. There is a heavy burden on the prosecution because there is a presumption of double innocence. Nothing could be pointed out to persuade us that the findings of the High Court are perverse or passed in gross violation of law. We are, therefore, not inclined to interfere with the findings of the High Court, which have been found to be unexceptionable.

The above are the detailed reasons for our short order dated 29.01.2025.

Judge

Judge

Judge

ISLAMABAD THE

29th January 2025

"NOT APPROVED FOR REPORTING"

(Aamir Sh./Rameen Moin, LC)