IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Asif Saeed Khan Khosa, CJ
Mr. Justice Mushir Alam
Mr. Justice Maqbool Baqar
Mr. Justice Manzoor Ahmad Malik
Mr. Justice Sardar Tariq Masood
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Syed Mansoor Ali Shah

Criminal Appeal No. 137-L of 2010
(Against the judgment dated 06.10.2010 passed by the Lahore High Court, Multan Bench, Multan in Criminal Appeal No. 534 of 2005 and Murder Reference No. 547 of 2005)

Muhammad Yousaf

... Appellant

versus

The State, etc.

... Respondents

For the appellant:	Mr. Muhammad Akram Qureshi, ASC
For the State:	Rana Abdul Majeed, Additional Prosecutor-General, Punjab
For respondents No. 2 & 3:	Mr. Rashid Mehmood Sindhu, ASC Syed Rafaqat Hussain Shah, AOR with respondents No. 2 & 3 in person
Date of hearing:	25.10.2018

JUDGMENT

Asif Saeed Khan Khosa, CJ.: One Muhammad Aslam was murdered and another namely Ijaz Ahmad was injured in an occurrence taking place on 02.02.2005 in Chak No. 93/WB in the area of Police Station Thingi, District Vehari and in that regard respondents No. 2 and 3, brothers *inter se*, were booked in case

FIR No. 19 registered at the said Police Station on the same day at the instance of the present appellant/complainant. After a regular trial respondents No. 2 and 3 were convicted by the learned Additional Sessions Judge, Vehari on 19.07.2005 for the offences under sections 302(b) and 324 of the Pakistan Penal Code, 1860 (PPC) read with section 34, PPC. For the offence under section 302(b), PPC read with section 34, PPC respondent No. 2 was sentenced to death and respondent No. 3 was sentenced to imprisonment for life whereas for the offence under section 324, PPC read with section 34, PPC both the said respondents were sentenced to rigorous imprisonment for 10 years each. The said respondents were also ordered to pay a sum of Rs. 1,00,000/- each to the heirs of Muhammad Aslam deceased by way of compensation under section 544-A of the Code of Criminal Procedure, 1898 (Cr.P.C.), to pay a sum of Rs. 1,75,000/- jointly to the injured victim namely Ijaz Ahmad by way of *Arsh* being half of the amount of *Diyat* and to pay a sum of Rs. 50,000/- jointly to the said Ijaz Ahmad by way of *Daman*. It was ordered that in case of default in payment of the said amounts respondents No. 2 and 3 would undergo rigorous imprisonment for a period of 6 months each. The benefit under section 382-B, Cr.P.C. was extended to the said respondents.

2. Respondents No. 2 and 3 jointly challenged their convictions and sentences before the Lahore High Court, Multan Bench, Multan through Criminal Appeal No. 534 of 2005 which was to be heard by a learned Division Bench of the said Court along with Murder Reference No. 547 of 2005 seeking confirmation of the sentence of death passed by the trial court against respondent No. 2. During the pendency of that appeal Criminal Miscellaneous No. 102 of 2009 was filed before the High Court seeking acquittal of respondents No. 2 and 3 from the charge under section 302(b), PPC read with section 34, PPC on the basis of a compromise between the said respondents and the heirs of Muhammad Aslam deceased which matter was referred by the High Court to the

learned District & Sessions Judge, Vehari for its verification. The report dated 25.02.2009 submitted in that regard by the learned District & Sessions Judge, Vehari showed that Muhammad Aslam deceased was survived by his father namely Waryam, his widow namely Mst. Razia Bibi and his son namely Muhammad Akmal out of whom the father of the deceased had denied entering into any compromise with respondents No. 2 and 3 whereas the widow and the son of the deceased had confirmed that they had entered into a compromise with respondents No. 2 and 3, they had forgiven the said respondents in the name of Almighty Allah and they had no objection to acquittal of the said respondents from the charge of murder on the basis of the compromise. During the pendency of Criminal Miscellaneous No. 102 of 2009 Waryam, the father of Muhammad Aslam deceased, died and thereafter Criminal Miscellaneous No. 431-M of 2010 was filed before the High Court seeking acquittal of respondents No. 2 and 3 from the charge of murder because all the surviving heirs of Muhammad Aslam deceased were agreeable to a compromise with the said respondents. The matter of compromise was again referred by the High Court to the learned District & Sessions Judge, Vehari for its verification. The report dated 12.05.2010 submitted by the learned District & Sessions Judge, Vehari in that regard confirmed that the surviving heirs of Muhammad Aslam deceased, i.e. his widow and son had acknowledged their compromise with respondents No. 2 and 3, they had forgiven the said respondents in the name of Almighty Allah and they had no objection to the respondents' acquittal from the charge of murder on the basis of the compromise. The learned District & Sessions Judge, Vehari had, however, pointed out in that report that on an earlier occasion the father of Muhammad Aslam deceased, an heir of the said deceased, had denied entering into any compromise with respondents No. 2 and 3 and after his subsequent death his four sons namely Muhammad Yousaf, Muhammad Ashraf, Atta Ullah and Noor Ahmad, brothers of Muhammad Aslam deceased, were not agreeable to a compromise with respondents No. 2 and 3. The

learned District & Sessions Judge, Vehari was of the opinion that the said sons of Waryam and brothers of Muhammad Aslam deceased were not heirs of Muhammad Aslam deceased and, thus, their refusal to enter into a compromise with respondents No. 2 and 3 was irrelevant to the compromise voluntarily entered into by the surviving heirs of the deceased with respondents No. 2 and 3. According to the learned District & Sessions Judge, Vehari the acclaimed compromise between the surviving heirs of Muhammad Aslam deceased and respondents No. 2 and 3 was voluntary and complete. After perusal of the said report and after finding the compromise between the surviving heirs of Muhammad Aslam deceased and respondents No. 2 and 3 to be voluntary and complete a learned Division Bench of the Lahore High Court, Multan Bench, Multan accepted the compromise *vide* judgment dated 06.10.2010, partially allowed Criminal Appeal No. 534 of 2005 filed by respondents No. 2 and 3, acquitted the said respondents of the charge under section 302(b), PPC read with section 34, PPC on the basis of the compromise and dismissed the said appeal to the extent of the convictions and sentences of the said respondents for the offence under section 324, PPC read with section 34, PPC while answering the Murder Reference in the negative.

3. Aggrieved of the judgment passed by the Lahore High Court, Multan Bench, Multan on 06.10.2010 the appellant/complainant filed Criminal Petition for Leave to Appeal No. 1091-L of 2010 before this Court and on 24.12.2010 the said petition was allowed by this Court and leave to appeal was granted in the following terms:

> "Inter alia contends that the learned High Court has allowed compromise of the offence of murder on the application of two legal heirs namely Razia Bibi (wife of the deceased) and Muhammad Akmal (son of the deceased) notwithstanding the fact that the father of the deceased namely Waryam who was alive at the time of murder of Sajid [actually Muhammad Aslam] but died when the application for compounding the offence was made, his heirs were 'walis' and the offence could not have been compounded without their concurrence.

> 2. Having heard learned counsel for the petitioner at some length, leave is granted *inter alia* to consider whether the heir of an heir of the victim could be a 'wali' of the said victim and whether the law laid down by this Court [actually the Lahore High Court, Lahore] in Ahmed Nawaz Vs. State (PLD 2007 Lahore 121) would be attracted to the facts of the case in hand?"

On 05.06.2018 it was noticed by this Court that the view of the relevant law taken by the Lahore High Court, Lahore in the case of *Ahmad Nawaz alias Gogi v The State* (PLD 2007 Lahore 121) was based upon the definition of '*wali*' contained in section 305(a), PPC whereas a different view of the same law subsequently taken by a 5-member Bench of this Court in the case of *Abdul Rashid alias Teddi v The State and others* (2013 SCMR 1281) did not even refer to the definition of '*wali*' contained in section 305(a), PPC. In this background it was felt by this Court on that date of hearing that the issue involved in the present case required a fresh look so as to render an authoritative pronouncement on the subject and, thus, the office of this Court was directed to bring the matter to the notice of the then Hon'ble Chief Justice who was requested to consider advisability or otherwise of constitution of a Larger Bench of at least seven Hon'ble Judges of this Court in order to resolve the controversy noted above. It is in this backdrop that the present Larger Bench is now seized of the matter.

4. We have heard the learned counsel for the parties at some length and have gone through the record of this case with their assistance besides perusing the precedent cases referred to by them. It has been argued by the learned counsel for the appellant that in the case of *Abdul Rashid alias Teddi v The State and others* (2013 SCMR 1281) this Court has already declared that the right to compound an offence is a heritable right and upon the death of a *wali* of the victim his right devolves upon that *wali*'s heirs and, thus, in the present case upon the death of the appellant's father his capacity of being a *wali* of Muhammad Aslam deceased had devolved upon the appellant and his brothers and, therefore, compounding of the offence by the surviving heirs of Muhammad

Aslam deceased with respondents No. 2 and 3 could not materialize unless the appellant and his brothers had joined the compounding. He has also argued that the case in hand was a case of *Ta'zir* and by virtue of the law declared by this Court in the case of *Sh. Muhammad Aslam and another v Shaukat Ali @ Shauka and others* (1997 SCMR 1307) compounding of the offence of murder in the present case could not succeed unless all the heirs of Muhammad Aslam deceased, including the appellant and his brothers possessing the devolved status of *wali* upon the death of their father, had consented to the compromise. While referring to the case of *Zahid Rehman v The State* (PLD 2015 SC 77) the learned counsel for the appellant has maintained that the concept of compounding of an offence of murder is common to cases of *Qisas* as well as of *Ta'zir* and, therefore, the principles applicable to cases of *Qisas* in the matter of compounding of an offence ought to be read into cases of *Ta'zir* as well. He has, thus, prayed that the impugned judgment passed by the High Court may be set aside and the High Court may be required to decide the issue of compounding of the offence of Muhammad Aslam's murder afresh in accordance with the law. The learned Additional Prosecutor-General, Punjab appearing for the State has also submitted that the right to claim *Qisas* is a heritable right in Islamic law and the same stands recognized in the provisions of section 307, PPC and, therefore, the offence of murder of Muhammad Aslam in the present case could not have been compounded by some of the heirs of the victim in the absence of the appellant and his brothers on whom the right to claim *Qisas* had devolved on account of death of their father after the murder of Muhammad Aslam. The leaned Additional Prosecutor-General has also prayed for setting aside of the impugned judgment passed by the High Court and for remand of the matter to the High Court for a decision of the matter of compounding afresh. As against that the learned counsel for respondents No. 2 and 3 has contended that the principles applicable to compounding of an offence in cases of *Qisas* cannot be made applicable to cases of *Ta'zir* which cases are governed in

the matter by the provisions of section 345, Cr.P.C. and in terms of section 345(2), Cr.P.C. the appellant and his brothers were not heirs of the victim and, therefore, they had no recognized role to play in the matter of compounding of the offence of Muhammad Aslam's murder. He has, thus, prayed for upholding of the impugned judgment of the High Court and dismissal of the present appeal.

5. After hearing the learned counsel for the parties, perusing the record of the case with their assistance and going through the precedent cases referred to before us we have found it appropriate to refer to the relevant statutory provisions first and then to discuss the precedent cases on the subject. The Pakistan Penal Code, 1860 (PPC) provides for and recognizes two distinct and separate regimes in the criminal justice system of the country and they pertain to cases of *Qisas* and cases of *Ta'zir* depending primarily upon the standard of evidence required and produced in a criminal case. The distinction between the separate regimes of *Qisas* and *Ta'zir* cases was clearly elucidated by this Court in many cases including the cases of *Sh. Muhammad Aslam and another v Shaukat Ali @ Shauka and others* (1997 SCMR 1307) and *Zahid Rehman v The State* (PLD 2015 SC 77). It may be advantageous to begin the discussion with the relevant statutory provisions governing waiver (*Afw*) and compounding (*Sulh*) in cases of *Qisas* pertaining to the offence of *qatl-i-amd* (intentional murder) under section 302, PPC. Section 309(1), PPC provides that in a case of *qatl-i-amd* an adult sane *wali* may waive his right of *Qisas* without any compensation, section 310(1), PPC provides that in a case of *qatl-i-amd* an adult sane *wali* may compound his right of *Qisas* on accepting *badal-i-sulh* (compensation) and according to section 313(1), PPC the right of *Qisas* vests in the sole *wali* if there is only one and in each one of them if there are more than one. Section 305, PPC provides as follows:

> "**305. Wali.--** In case of qatl, the wali shall be-

> (a) the heirs of the victim, according to his personal law but shall not include the accused or the convict in case of qatl-i-amd if committed in the name or on the pretext of honour; and
>
> (b) the Government, if there is no heir."

Section 299(m), PPC defines *wali* in the following terms:

> " "wali" means a person entitled to claim qisas (other than the person who has murdered the victim)."

Section 307(1)(c), PPC provides as follows:

> "**307. Cases in which qisas for qatl-i-amd shall not be enforced.** (1) Qisas for qatl-i-amd shall not be enforced in the following cases, namely:
>
> (a) ----------
>
> (b) ----------
>
> (c) when the right of qisas devolves on the offender as a result of the death of the wali of the victim, or on the person who has no right of qisas against the offender.
>
> (2) ----------
>
> **Illustrations**
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> (i) A kills Z the maternal uncle of his son B. Z has no other wali except D the wife of A. D has the right of qisas from A. But if D dies, the right of qisas shall devolve on her son B who is also the son of the offender A. B cannot claim qisas against her father. Therefore, the qisas cannot be enforced.
>
> (ii) D kills Z, the brother of her husband A. Z has no heir except A. Heir A can claim qisas from his wife B. But if A dies, the right of qisas shall devolve on his son D who is also son of B, the qisas cannot be enforced against B."

According to this section the right of *Qisas* vesting in a *wali* devolves on his heirs as a result of death of the *wali*.

6. From the statutory provisions referred to and quoted above it emerges that in cases of *Qisas* the right of *Qisas* vests in each *wali* (section 313, PPC), a *wali* may waive his right of *Qisas* (section 309, PPC), a *wali* may compound his right of *Qisas* (section 310, PPC), the heirs of the victim are his *wali*, according to his personal law (section 305(a), PPC), a person entitled to claim *Qisas* is *wali* (section 299(m), PPC) and upon death of a *wali* his right of *Qisas* devolves on the heirs of the *wali* (section 307, PPC). It, thus, becomes evident that even an heir of an heir of a victim has a

(devolved) right of *Qisas* and he himself becomes a *wali* and in that devolved capacity of a *wali* he too can waive or compound the offence of *qatl-i-amd* in a case of *Qisas*. According to section 309(2), PPC and the *proviso* to the same if a *wali* (having the original or a devolved right of *Qisas*) does not waive his right of *Qisas* but the other *wali* waive their right of *Qisas* then the non-waiving *wali* is entitled to his share of *Diyat*. Therefore, had the case in hand been a case of *Qisas* then the appellant and his other brothers (who were not the heirs of Muhammad Aslam deceased but the right of *Qisas* possessed by the victim's father had devolved upon them upon the father's subsequent death and they had not waived their devolved right of *Qisas* against respondents No. 2 and 3) would have been entitled to their share of *Diyat* whereas the waiver would have been effective to the extent of all the other *wali* of the victim who had waived their right of *Qisas* against respondents No. 2 and 3.

7. It is not disputed that the case in hand is a case of *Ta'zir* and not of *Qisas* because the proof required for a case of *Qisas* in terms of section 304, PPC was not adduced in this case before the trial court. It may be clarified here that a criminal case becomes a cases of *Qisas* when, after the case has reached the trial court, either a confession is made by the accused person before the trial court during the trial or *Tazkiya-tul-shahood* (scrutiny of the witnesses before trial of the accused person) 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'zir* at every stage of the case including the stage of investigation. Compounding of offences in cases of *Ta'zir* is governed by section 345, Cr.P.C. and according to section 345(2), Cr.P.C. (as the said legal provision stood in the year 2005 when the offences in the present case had been committed) 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 the 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'zir* an offence of *qatl-i-amd* under section 302, PPC may be compounded by the "heirs of the victim" and when an heir of a victim is only a person who inherits directly from the victim then what is clearly meant 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-i-amd* of the victim and none else.

8. We note that the concept of *wali* relevant to a case of *Qisas* is not relevant to a case of *Ta'zir* which belongs to a different regime of criminal law and is governed by separate and distinct principles. It has to be understood very clearly that in cases of *Qisas* the term *wali* means the entire body or group of persons who are entitled to claim *Qisas* for a *qatl-i-amd* and such persons include those who are heirs of the victim entitled to inherit from him as well as those on whom the right of *Qisas* devolves upon death of an heir of the victim even if such heirs of the heir of the victim do not themselves inherit from the victim directly. In cases of *Ta'zir* the law has conferred the capacity to compound only upon the heirs of the victim and has not provided for devolving of the capacity to compound upon an heir of an heir of the victim as has been provided in cases of *Qisas*, as discussed above. It has been canvassed before us that for the purposes of harmonious construction the said principle applicable to cases of *Qisas* may be

read into cases of *Ta'zir* as well but we have not felt persuaded to venture into such an exercise of judicial legislation through the means of interpretation, particularly when this Court has already recognized and declared in some earlier cases that different principles apply to cases of *Qisas* and *Ta'zir* in the matter of compounding of an offence and such principles cannot be confused or mixed and, hence, an attempt to harmonize the two concepts or principles may amount to unwholesome judicial engineering offensive to the concepts themselves. In the case of *Sh. Muhammad Aslam and another v Shaukat Ali @ Shauka and others* (1997 SCMR 1307) the distinction between the principles applicable to cases of *Qisas* under sections 309 and 310, PPC and to cases of *Ta'zir* under section 345, Cr.P.C. had clearly been recognized and acknowledged by this Court. The said case was a case of *Ta'zir* wherein a partial compromise had been arrived at between the convict and some of the heirs of the victim. This Court had elaborately discussed the issue from diverse angles and had then concluded that a partial compromise was acceptable in a case of *Qisas* but the same was not acceptable in a case of *Ta'zir*. In many subsequent cases and particularly in the case of *Zahid Rehman v The State* (PLD 2015 SC 77) this Court had reiterated and categorically declared again that the principles regarding compounding of an offence applicable to a case of *Qisas* are not relevant or applicable to a case of *Ta'zir*. In that case it was observed by this Court as under:

> "This Court has already declared that section 309, P.P.C. pertaining to waiver (Afw) and section 310, P.P.C. 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 cases of *Sh. Muhammad Aslam and another v. Shaukat Ali alias Shauka and others* (1997 SCMR 1307), *Niaz Ahmad v. The State* (PLD 2003 SC 635) and *Abdul Jabbar v. The State and others* (2007 SCMR 1496). In the said cases it had 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, P.P.C. In the same cases it had 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'zir*. The cases of *Manzoor Hussain and 4 others v. The State* (1994 SCMR 1327), *Muhammad Saleem v. The*

> *State* (PLD 2003 SC 512), *Muhammad Arshad alias Pappu v. Additional Sessions Judge, Lahore and 3 others* (PLD 2003 SC 547), *Niaz Ahmad v. The State* (PLD 2003 SC 635), *Riaz Ahmad v. The State* (2003 SCMR 1067), *Bashir Ahmed v. The State and another* (2004 SCMR 236) and *Khan Muhammad v. 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 *Ta'zir* 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."

As if this were not enough, section 338-E(1), PPC clinches the issue by providing as follows:

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

This section makes it abundantly clear that the principles of waiver and compounding contained in sections 309 and 310, PPC and applicable to cases of *Qisas* are neither applicable to nor do they control the principles contained in section 345, Cr.P.C. pertaining to compounding of offences in cases of *Ta'zir*. In view of such clear statutory clarification and in view of the above mentioned repeated judicial enunciation there is hardly any scope left for any harmonious construction of the two distinct and separate concepts by us.

9. For the purpose of clarity of understanding we may explain why *Qisas* and *Ta'zir* are said to belong to separate legal regimes. To start with, the two concepts have different origins as the concept of *Qisas* has its origin in divine Islamic law and jurisprudence pertaining to offences in respect of human life and body whereas the origin of the concept of *Ta'zir* is secular and in our context it is derived mainly from Anglo-Saxon traditions. In the regime of *Qisas* the offence is committed against the victim whereas in the regime of *Ta'zir* the offence is committed against the

State and the society as a whole. Application of *Qisas* or *Ta'zir* to a criminal case requires different standards of proof and entails different punishments. In cases of *Qisas* the right of *Qisas* as well as the right to waive or compound the offence vest in the victim or his *wali* whereas in cases of *Ta'zir* the serious offences committed in respect of human life or body were originally not compoundable in our law but subsequently only a limited concession was made in that regard by the State by amending the law and providing for compounding of most of such offences by the victim or his heirs. Even while making such concession and providing for composition of such offences no right to compound was conferred on the victim or his heirs and any composition proposed by the parties was made subject to permission or leave of the relevant court which may refuse to grant the requisite permission or leave in the peculiar circumstances of a given case. Partial compromise is permissible in a case of *Qisas* but is not allowed in a case of *Ta'zir*. Devolving of a right of *Qisas*, waiver or compounding on the heir of a dead *wali* of the victim is recognized in cases of *Qisas* but is not permitted or recognized in cases of *Ta'zir*. Claiming *Qisas* is a right in Islamic dispensation whereas compounding in a case of *Ta'zir* is a concession subject to permission or leave of the relevant court in serious offences. A right in law ordinarily devolves upon an heir but a concession extended to a particular person is not to devolve on another unless the law expressly provides for the same. We entertain no manner of doubt that while expressly providing for some principles applicable to compounding of offences in cases of *Qisas* and while omitting to expressly provide for the said principles *vis-à-vis* cases of *Ta'zir* the legislature was conscious of the difference between the two concepts and their requirements. The silence of the legislature in this regard speaks, and speaks quite loudly, and we as a Court of law cannot ignore it or override it by transposing the principles applicable to one regime of law to the other. We cannot shut our eyes to the clear provisions of section 345(7), Cr.P.C. according to which in a case of *Ta'zir* "No offence shall be compounded except as provided by this section."

10. In the present case of *Ta'zir* the offence of murder of Muhammad Aslam could be compounded only by the heirs of the said victim and all the surviving heirs of that victim had voluntarily compounded the said offence with respondents No. 2 and 3. The High Court was, therefore, quite correct in holding that the appellant and his brothers, who were heirs of a subsequently dying heir of the victim, were not relevant to the matter of compounding of the offence.

11. The argument that in his lifetime Waryam, the father and one of the heirs of Muhammad Aslam deceased, had refused to join the compromise between the remaining heirs of the deceased and respondents No. 2 and 3 and, therefore, after the death of Waryam any compromise between the remaining heirs of Muhammad Aslam deceased and the said respondents could not be complete without the heirs of Waryam joining the same had failed to impress the High Court and we have also not felt persuaded to accept the same. As already observed above, the concept of devolving of the right of *Qisas* upon an heir of an heir/*wali* of the victim relevant to a case of *Qisas* is not applicable to cases of *Ta'zir*. In the absence of any devolving of the capacity to compound in a case of *Ta'zir* the capacity to compound possessed by an heir of the victim at the time of murder of the victim stands exhausted upon the subsequent death of that heir. Being the father and an heir of Muhammad Aslam deceased Waryam had a capacity to compound the relevant offence but he had not compounded the offence during his own lifetime and upon Waryam's death his capacity to compound stood exhausted and the same was not heritable as Waryam's heirs were not heirs of Muhammad Aslam deceased because they did not, and could not, inherit from him. After Waryam's death his heirs could not be treated as heirs of Muhammad Aslam deceased and the only heirs of Muhammad Aslam deceased left in the field at such stage were those surviving heirs of Muhammad Aslam deceased who could inherit directly

from him and they could compound the offence throughout their lifetime irrespective of timing of Waryam's death. In cases of *Ta'zir* section 345(2), Cr.P.C. does not specify any time when compounding of an offence may take place and the provisions of section 345(2), Cr.P.C. do not place any embargo upon compounding of the relevant offence by the surviving heirs of a victim at a time when one or more of the heirs of the victim has/have already died. Placing an embargo upon the surviving heirs of a victim in such a situation may amount to committing violence upon the provisions of section 345(2), Cr.P.C. which we are not ready to commit.

12. Another thing to be clearly understood in the present context is that there is a difference between devolving of a right of *Qisas* and devolving of the status of an heir. Section 307, PPC recognizes that the right of *Qisas* devolves on an heir of an heir of the victim and because of devolving of the right of *Qisas* on him an heir of an heir of the victim also becomes a *wali* of the victim and in that devolved capacity of *wali* such heir of an heir of the victim can also waive or compound the relevant offence. Section 307, PPC, however, does not provide or recognize that through such devolving of the right of *Qisas* on him an heir of an heir of the victim also becomes or is recognized as an heir of the victim. Such distinction between devolving of the right of *Qisas* and devolving of a right to inherit from the victim has to be clearly understood because the first is relevant to the concept of *Qisas* whereas the second is relevant to the concept of *Ta'zir*. It has already been observed by us above that in cases of *Qisas* the term *wali* means the entire body or group of persons who are entitled to claim *Qisas* for a *qatl-i-amd* and such persons include those who are heirs of the victim entitled to inherit from him as well as those on whom the right of *Qisas* devolves upon death of an heir of the victim even if such heirs of the heir of the victim do not themselves inherit from the victim directly. In *Qisas* the tie of blood with the victim is the governing consideration even if a *wali* in his devolved capacity is not in a

position to directly inherit from the victim whereas in *Ta'zir* the sole consideration for the capacity to compound is the capacity to inherit directly from the victim. The present case offers a classical example of such a distinction because by virtue of section 307, PPC the appellant and his brothers might have become *wali* of Muhammad Aslam deceased on account of possessing a devolved right of *Qisas* (relevant to a case of *Qisas*) but they are not the heirs of Muhammad Aslam deceased for the purposes of compounding of the offence under section 345(2), Cr.P.C. in this case of *Ta'zir*.

13. In the interim order passed in this case on 05.06.2018 it was noticed by this Court that the view regarding the issue at hand taken by the Lahore High Court, Lahore in the case of *Ahmad Nawaz @ Gogi v The State* (PLD 2007 Lahore 121) was in conflict with the view of this Court on the subject taken in the later case of *Abdul Rashid alias Teddi v. The State and others* (2013 SCMR 1281) but we note that in none of the said cases the all-important distinction between cases of *Qisas* and those of *Ta'zir* had come under discussion and the Courts were not properly assisted in those cases in this particular regard. In the case of *Ahmad Nawaz @ Gogi* (*supra*) the Lahore High Court, Lahore had observed on the issue as follows:

> "At the very outset, we may here reproduce section 305 PPC--
>
> > "305. WALI. ---In case of a qatl, the wali shall be
> >
> > (a) the heirs of the victim, according to his personal law but shall not include the accused or the convict in case of Qatl-e-Amd if committed in the name or on the pretext of honour; and
> >
> > (b) the Government, if there is no heir."
>
> A bare perusal of the above quoted section clearly states that in case of a qatl, the wali shall be the heirs of the victim, according to his personal law and the said provisions do not contemplate that the heirs of an heir of the victim shall also be wali of the victim. An heir of a person is understood to be a person who is entitled to inherit the property of the deceased at the time of his death. In the case in hand the inheritance of the victim automatically opened upon his death and at that time, the only heirs of the victim were his father and mother and thus the

> property of the deceased automatically devolved upon the said heirs of the victim. After devolving of the property of the victim upon the said heirs the inheritance of the victim had been exhausted and there was nothing left for anybody else to inherit from the victim. Keeping in view the spirit of the provisions of section 305(a) PPC the heirs of a victim are surely different from the heirs of a wali of the victim. In the present case, the consanguine sisters were to inherit from the father of the victim namely Maqbool Ahmad and not from Mohsin Raza victim himself and thus they were the heirs of Maqbool Ahmad not of the victim namely Mohsin Raza. It is not disputed that the said consanguine sisters had not and could not inherit the property of Mohsin Raza as they were not his heirs at the time of his murder. What the consanguine sisters are claiming before us is a right to effect or refuse a compromise with the appellant which right they claim to have inherited from Mohsin Raza's father namely Maqbool Ahmad and they are not claiming any right to inherit the property of Mohsin Raza directly. According to the spirit and rationale of the provisions of section 305(a), P.P.C. a wali of the victim is the person who is entitled to inherit the property of the victim and the interpretation of the said provisions cannot be stretched to include in the definition of wali a person who claims to have inherited the right of compromise possessed by the Wali. No legal provision has been produced nor any reference to the Islamic Jurisprudence has been made before us to support such a stretched interpretation of the provisions of section 305(a), P.P.C. Apart from that the spirit of the Qisas and Diyat laws is to quench the thirst of revenge of the immediate heirs of the victim and thus the right to enter into a compromise or otherwise cannot be extended to any other remote relative of the deceased who may not inherit the property from the deceased at the time of his murder but may at some subsequent stage become entitled to inherit some property from some heir of the deceased upon the death of such heir."

In the later case of *Abdul Rashid alias Teddi* (*supra*) this Court had extensively quoted from a judgment passed by the Lahore High Court, Lahore in the case of *Muhammad Jabbar v The State and 10 others* (2000 P.Cr.L.J. 1688) and had then concluded as under:

> "14. To put it in other words, Islam is a religion of peace and harmony. It has for the first time in the history of mankind introduced and encouraged the concept of *afw*, *darguzar*/condoning and compounding of offences, even those relating to heinous crimes. Particularly, the one which relate to disputes between two or more private parties and carry an element of revenge, thus, harming the peace and tranquility in the society at large. For this purpose, through the dictates of various verses from the Holy Qur'an and Sunna of our Holy Prophet Hazrat Muhammad (Peace be upon him), a workable and practicable scheme for compounding of offences has been outlined under the Islamic criminal law. The purpose behind it is to provide a respectable and fair mode, based on the principles of equality of all human beings, to reach some settlement/compromise in the larger interest of the civil society and to bury the hatchet of revenge once for all, so as to save other generations from facing the consequence of enmity amongst different segments of society, aimed for satisfaction of endless

> personal vendetta. On this account too, such provisions of law relating to compounding of criminal offences are to be interpreted and applied liberally for the benefit of society and the humanity at large, but at the same time as per injunctions of Islam.
>
> 15. Thus, after a careful reading of the provisions of section 345, Cr.P.C., other relevant guiding principles of Islamic jurisprudence in this regard and the cases cited at the Bar, we are of the opinion that not only the surviving legal heirs of the victim have legal authority to waive right of *qisas* and compound the offence with the appellant/convict upon payment of compensation of *diyat* or without payment in lieu of pleasure of God, but such right is equally inheritable by the successors of any legal heir of the victim, who during his life time had either not entered into compromise witch the appellant/convict or refused to enter into such compromise, as despite his earlier refusal he was competent to change his mind and to subsequently enter into such compromise with the appellant/convict, while the principle of estoppel was not attracted in such situation to debar his successor from exercising such right independently at their own free will."

It is obvious that in the said case, due to lack of proper assistance, the Islamic concept of *Qisas* and the principles applicable thereto in the matter of compounding of an offence were expressly referred to and were simply presumed to be applicable to the secular concept of *Ta'zir* and compounding of an offence under that concept. Apart from that while holding that "not only the surviving legal heirs of the victim have legal authority to waive right of *qisas* and compound the offence with the appellant/convict ---------- but such right is equally inheritable by the successors of any legal heir of the victim" no statutory provision or any source of Islamic jurisprudence had been referred to or relied upon by this Court. Both the above mentioned cases were cases of *Ta'zir* but on account of lack of proper assistance they were decided on the basis of principles applicable to cases of *Qisas*. We are, therefore, constrained to observe that the said cases may not to be approved or treated as good precedents on the subject.

14. In India the Islamic regime of *Qisas* in criminal cases is not recognized and originally the matter of compounding of an offence was governed in India by statutory provisions identical to the original provisions of section 345, Cr.P.C. in Pakistan recognizing no role of an heir of a person in the matter of compromise if the person competent to compound an offence is dead. In Pakistan

section 345(2), Cr.P.C. now provides that an offence of *qatl-i-amd* under section 302, PPC may be compounded by "the heirs of the victim" and does not provide for devolving of such capacity to compound on an heir of an heir of the victim but in India the legislature had introduced section 320(4)(b) of the Code of Criminal Procedure, 1973 which reads as follows:

> "When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908, of such person may, with the consent of the Court, compound such offence."

Introduction of this legal provision in India is by itself a legislative acknowledgment that the capacity to compound an offence is not automatically devolved upon an heir of a person possessing the capacity to compound unless the law expressly provides for the same. The omission in this respect in the original law was supplied in India by the legislature and we in this country would not like to embark upon judicial legislation by supplying the relevant omission in our law through the means of interpretation. Let this responsibility rest where it lies and we would not like to encroach upon the domain of the legislature in this regard. We, therefore, refer this aspect of the matter to the Secretary, Ministry of Law and Justice, Government of Pakistan, Islamabad so that the Federal Government may consider getting the relevant law amended by the Majlis-e-Shoora (Parliament) appropriately, if so advised.

15. As a result of the discussion made above we have not been able to take any legitimate exception to the impugned judgment passed by the Lahore High Court, Multan Bench, Multan. The case in hand was not a case of *Qisas* but was of *Ta'zir*. Under the Islamic law of inheritance the brothers of Muhammad Aslam deceased in this case did not inherit from the deceased directly and even when the father of Muhammad Aslam deceased, an heir of the said deceased, subsequently died the brothers of Muhammad Aslam deceased, including the present appellant, did

not become Muhammad Aslam deceased's heirs because they stood excluded by a surviving son of Muhammad Aslam deceased who was closer to the deceased in degree in the matter of inheritance. In this case of *Ta'zir* only the heirs of the deceased could compound the offence of murder and the appellant and his brothers, all brothers of Muhammad Aslam deceased, did not and could not inherit from Muhammad Aslam deceased either directly or through their father and, thus, they never qualified as "heirs of the victim" for the purposes of section 345(2), Cr.P.C. This appeal is, therefore, dismissed.

16. The office is directed to send a copy of this judgment to the Secretary, Ministry of Law and Justice, Government of Pakistan, Islamabad for his information and for appropriate action, if deemed warranted.

Chief Justice

Judge

Judge

Judge

Judge

Judge

I concur with the conclusion but for different reasons, which have been set out in my separate note.

Judge

Announced in open Court at Islamabad on 20.02.2019.

Chief Justice

Islamabad
February 20, 2019
Approved for reporting.
Arif

Syed Mansoor Ali Shah, J. - I have gone through the judgment authored by the Hon'ble Chief Justice (hereinafter referred to as the **"Judgment")**. I concur with the conclusion of the Judgment that the instant appeal merits dismissal. I, however, espouse views different from those expressed in the Judgment, regarding the meaning and determination of the *heirs of the victim or the wali of the victim* in the context of compoundability of the offence of *qatl-i-amd (interchangeably also referred to as compromise between the parties)* under the two regimes of *Qisas*[1] and *Ta'zir*[2].

2. The precise legal question before the Court is the scope and extent of the term "heirs of the victim" used in section 345 Cr.P.C. in order to determine who on behalf of the deceased victim is entitled to compound the offence of *qatl-i-amd* punishable as *ta'zir* under section 302, PPC. Additionally, whether the scheme of compoundability is different in case of *Qisas* where "*wali* of the victim" is to be determined?

3. In my view, Islamic Law of Inheritance goes to the root of the case and is central to the concept of compounding of the offence of *qatl-i-amd* under *Qisas* and *Ta'zir*, which in turn rests on the meaning of *heirs* and *walis* of the victim. It is essential to

[1] See sections 307(b), 309 and 310 PPC.
[2] Section 345(2) Cr.P.C

emphasize that the only law that can determine the heir(s) of a deceased (victim) for Muslims in Pakistan is their personal law i.e., the Islamic Law of Inheritance (similarly for non-Muslims its their personal law). According to Professor Coulson, Islamic Law of Inheritance *"is a solid technical achievement, and Muslim scholarship takes a justifiable pride in the mathematical precision with which the rights of the various heirs, in any given situation, can be calculated...Nowhere is the fundamental Islamic ideology of law as the manifestation of the divine will more clearly demonstrated than in the laws of the inheritance....From a sociological standpoint, the laws of inheritance reflect the structure of family ties and the accepted social values and responsibilities within the Islamic community*[3]." Under Islamic Law of Inheritance, rights of inheritance rest upon two principal grounds of marriage and blood relationship with the deceased and there are three kinds of heirs: Sharers, Residuries and Distant Kindred. Sharers are those who are entitled to a prescribed share of inheritance. Residuaries are those who take no prescribed shares but succeed to the residue after the claims of the sharers are satisfied. Distant Kindred are all those relations who are neither sharers nor residuaries. After ascertaining which of the heirs or descendants of the deceased (victim) are entitled to succeed, the next step is to distribute the estate among them.[4] It is true that the inheritance opens on the death of the victim and the heirs are identified according to the Islamic Law of Inheritance and the estate of the victim automatically devolves upon the said heirs. While the estate of the deceased devolves on the heirs, the concept of inheritance and heirship does not end. Devolution is neither one time nor does it freeze in time at the time of the death of the victim. As families grow and evolve, moving from generations to generations, the heirs also grow, replacing the earlier heirs yet maintaining their descent and lineage from the ancestors. The heirship or right to inheritance moves downwards, as well as, upwards, hence the

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[3] N.J.Coulson - *Succession in the Muslim Family.* Cambridge University Press (1971). p 3 - underlining supplied.
[4] see: D.F.Mulla's - *Principles of Mahomedan Law.*

term “descendants” and “ascendants.” The concept of “how low-so-ever” or “how-high-so-ever” under the Islamic Law of Inheritance marks the downward and upward flowing concept of succession and inheritance, resembling a running chain of blood ties and marriage. As a matter of illustration, if in the instant case it is discovered after say thirty years from the death of the victim that the State has decided to confer certain property on the victim for his meritorious services or some property has been discovered that belongs to the victim, and the surviving heirs at the time of death of the victim being dead by now, who then will inherit the property of the victim? or will the property escheat and revert to the State because the first line of heirs is dead ? Under the Islamic Law of Inheritance, heirship is a living and an evolving concept and therefore the property will vest in the heirs of the victim as they stand today and the meticulous Islamic Law of Inheritance can identify the heirs of the victim even after three decades. Therefore, at any given time, the heirs or descendants or ascendants of the victim can be identified with mathematical precision under the Islamic Law of Inheritance. Restricting the term “heirs of the victim” to only the surviving heirs of the victim at the time of the death of the victim, is an interpretation that might not sit well with the Islamic Law of Inheritance and public policy. The concept of genealogical tree (*shajrah nasab)* in our Land Revenue law is an example of this successional calculation. At this juncture I cannot lose sight of section 338-F of the PPC which provides that while interpreting the provisions of chapter XVI (of offences affecting the human body) the court shall be guided by the injunctions of Islam as laid down in the Holy Quran an Sunnah. One of the best showcases of these injunctions is the Islamic Law of Inheritance, itself.

4. Applying the principles of the Islamic Law of Inheritance, as discussed above, to the instant case on merits, I see that in the presence of the son and the widow, the brothers of the victim or sons of the deceased father Waryam stand excluded

from the line of succession. Hence the available heirs at the time of compromise are the son and the widow of the victim. The High Court confirmed the view taken in Report of the District & Sessions Judge, Vehari dated 12.05.2010. The relevant extract of the Report is as follows:

> "5. From the statements of Razia Bibi (widow) and Muhammed Akmal (son) legal heirs of the deceased , it is evident that compromise between the parties is genuine as they have no objection if the said convicts are acquitted. The legal heirs of the deceased Waryam who was father of Muhammed Aslam deceased are not now the legal heirs of Muhammed Aslam deceased of this case." *(emphasis supplied)*

The Appellants were excluded not because they were the heirs of the heirs of the victim but because they were not the heirs of the victim under the Islamic Law of Inheritance. The application for compromise was rightly allowed leading to the acquittal of respondents No. 2 and 3. The impugned judgment of the High Court upholding this view is, therefore, correct and the present appeal merits dismissal.

5. It is now settled that *Qisas* and *Ta'zir* are two separate regimes, having their own sets of rules as laid down in *Muhammad Aslam v. Shaukat Ali* (1997 SCMR 1307) and *Zahid Rehman v. State* (PLD 2015 SC 77). However, when it comes to the question of determining the heirs of the victim or *walis* of the victim, for the purposes of compoundability of the offence of *qatl-i-amd*, the two regimes converge and both take guidance from the Islamic Law of Inheritance to resolve this question. This is because the Islamic Law of Inheritance is the only law that provides for determination of heirs in the country. Even otherwise, Pakistan Penal Code, 1860 or the Criminal Procedure Code, 1898 do not provide a separate mode and manner of determining heirs of the victim and, thus, cannot possibly be considered as a parallel system of inheritance and succession. Reference to the terms "heirs of the victim" and "*wali* of the victim" under these Codes assumes outsourcing the answer to the Islamic Law of Inheritance, as these

Codes have no mechanism to resolve these questions. Therefore, both the regimes of *Qisas* and *Ta'zir* rely on the principles of Islamic Law of Inheritance uniformly to determine the heirs of the victim or the *wali* of the victim for the purposes of compounability in the cases of *qatl-i-amd.*

6. Under the regime of *Ta'zir*, the heirs of the victim can compound the offence of *qatl-i-amd* under Section 345(2), Cr.P.C. with the permission of the Court. The right vested in the "heirs of the victim" makes the right of compoundability under *Ta'zir* inheritable. In another sense this right is also an *actionable claim,*[5] hence inheritable. Section 345(2) Cr.P.C. has no time limit and can be invoked by the accused party at any stage after the offense is committed and before the sentence is executed. The purpose of this provision is understandably to encourage settlements between warring parties in order to protect family life and ensure a peaceful community. The heirs of the deceased victim can exercise this right. The first heirs of the victim are those who survive him immediately at the time of his death, but as explained above, the heirship of the victim continues in time and at any given time, when the heirs who survived at the time of death of the deceased are no more, there will still be heirs of the victim under the Islamic law of inheritance in the shape of sharers, residuaries or distant kindred. The heirship is based on blood and marriage and continues as the families evolve. So the available heirship is to be determined afresh when the right to compound is to be exercised irrespective of the time of death of the victim. It is emphasized that the available heirs of the victim and not heirs of the heirs are to be determined. In the instant case, the appellants are the heirs of the heir but are not the heirs of the victim under the Islamic law of inheritance, as they stand excluded by the son. A five member bench of this Court has upheld this view in *Abdul Rashid v. State* (2013 SCMR 1281), even though the distinction

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[5] see *The Compendium of Islamic Law* by All India Muslim Personal Law Board (AIMPLB)

between the two regimes of *Qisas* and *Ta'zir* was somewhat blurred in the said opinion.

7. *Qisas* means punishment by causing similar hurt to same part of the body of the convict as he has caused to the victim or by causing death if he has committed *qatl-i-amd* in exercise of the right of the victim or a *wali*[6]. Under section 299 (m) PPC, *wali* means a person entitled to claim *qisas.* Under section 305(a) PPC, *wali* in case of *qatl* means the *heirs of the victim*, according to his personal law. Section 306(c) provides that *qati-i-amd* shall not be liable to *qisas* when any *wali* of the victim is a direct descendant, how low-so-ever, of the offender. Section 307 (c) provides a situation when *qisas* for *qatl-i-amd* cannot be enforced i.e., "when" the right of *qisas* devolves on an offender as a result of the death of the *wali* of the victim. Section 307(c) PPC is actually about an offender not having a right of *qisas* and proceeds on an implied assumption that the right of *qisas* is inheritable. Section 307(c) is, therefore, not a specific provision mandating devolution of the right of *qisas*. In my view there is no requirement to state the obvious. *Wali* by definition is an heir of the victim[7]. Right to *qisas* is also akin to an *actionable claim* and is, therefore, inheritable under the Islamic Law of Inheritance.[8] The right of *qisas* held by the *wali* of the victim devolves on to the next *wali* of the victim, who is ofcourse an heir of the victim and not necessarily an heir of the heir or heir of the *wali*. As discussed above, section 307, PPC does not provide a scheme of inheritance that helps identify the next *wali* of the victim. Therefore, it is difficult to accept the view propounded in the Judgment that had the instant case been under *qisas*, the appellants would pass for *walis* (para 6 of the Judgment), being the heirs of the deceased *wali* (Waryam). The distinction between heirs of the victim i.e., *wali* under section 299(m) PPC and heirs of *wali* (Waryam), needs to be kept in mind. Under Islamic Law of Inheritance, the appellants (brothers of the

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[6] See section 299 (k) PPC

[7] section 305(a) PPC.

[8] see *The Compendium of Islamic Law* by All India Muslim Personal Law Board (AIMPLB)

victim) stand ousted in the presence of the son and cannot pass as *wali* of the victim even though they are the heirs of Waryam. So even if the instant case was under *qisas*, only *walis* would have been the son and the widow or else the principles of Islamic Law of Inheritance would stand violated.

8. Another dimension is sociological and rests on public policy. Why should an interpretation be encouraged that restricts the choice or option of the subsequent heirs of the victim to settle a feud and move towards a more harmonious and peaceful life. Why deprive the heirs of this right? This interpretation supports the protection of the family as envisaged in the Principles of Policy under article 35 of the Constitution. Any embargo on the exercise of the right to compound under section 345(2) Cr.P.C. by the subsequent heirs of the victim might not be in consonance with the Islamic Law of Inheritance.

9. Section 320 of the Indian Code of Criminal Procedure, 1973 does not provide for compounding of an offence in case of murder (*qatl-i-amd*). Further, in case the person who can compound the offences given under the said section dies a natural death, his or her *legal representative*, with the consent of the court, may compound the offence. Legal representative supports the purposive interpretation employed in this note, recognizing a more contemporary status of the heir of the victim, who is there at the point of time of compounding and is not frozen in history at the time of the death of the victim.

10. The Judgment has referred the matter to the Federal Government to consider the possibility of amending the law by the Parliament. I am sure these reasons will also assist the Federal Government in bringing about more clarity in the proposed amendment. I, therefore, concur with the said direction.

11. As a conclusion, these are my reasons for concurring with the Judgment to the extent of the dismissal of the instant appeal and the direction to the Federal Government as discussed above.

(Syed Mansoor Ali Shah)
Judge