

**THE HIGH COURT OF SINDH, CIRCUIT COURT
LARKANA**

Mr. Justice Shamsuddin Abbasi
Mr. Justice Amjad Ali Sahito
Referee: Mr. Justice Adnan Iqbal Chaudhry.

Criminal Acquittal Appeal No. D-32 of 2012

Appellant : Nisar Ahmed son of Noor Ahmed
in person, called absent.

Respondents 1,2,4,5&9 : Umed Ali, Abdul Lateef, Abdul
Fatah, Mehboob Ali and Nabidad,
through Mr. Muhammad Afzal
Jagirani, Advocate.

Respondent No.6 : SIP Mukhtiar Ahmed son of Ghulam
Nabi Soomro through Mr. Asif Ali
Abdul Razak Soomro, Advocate.

Respondents 3, 7 & 8 : Nemo.

The State : Through Mr. Ali Anwar Kandhro,
Additional Prosecutor General,
Sindh.

Criminal Appeal No. S-64 of 2012

Appellant : Khuda Bux son of Mohammad Bux
Panhwar, through Mr. Asif Ali
Abdul Razak Soomro, Advocate.

The State : Through Mr. Ali Anwar Kandhro,
Additional Prosecutor General,
Sindh.

Date of hearing : 16-03-2023

J U D G E M E N T

Adnan Iqbal Chaudhry J. - These appeals have been referred to me
as Referee Judge under the following circumstances:

- (i) Policemen Umed Ali, Abdul Latif, Mukhtiar Ahmed, Jamaldin, Sabir Hussain, Nabidad, Khuda Bux, Mehboob Ali and Abdul Fattah were charged with the offence punishable under section 302 PPC read with section 149 PPC for the qatl-i-amd of Abdul Ghaffar Shaikh [hereinafter '**the Deceased**']

while he was in custody at P.S. City Jacobabad on the night between 4th and 5th February, 2006. All of them pleaded not guilty.

(ii) By judgment dated 30-06-2012 passed in Sessions Case No. 113/2008, the Sessions Judge Jacobabad convicted Khuda Bux but acquitted the others as under :

“..... accused Khuda Bux is convicted u/s 302(b) PPC as Tazir and sentenced him to under(go) 10 years R.I and to pay compensation of Rs. 50,000 to the legal heirs of deceased Abdul Ghaffar, in case of default in payment of compensation accused Khuda Bux further undergo six months S.I with benefit of section 382 Cr.P.C. The mitigating circumstances and reasons for awarding the lesser punishment to accused Khuda Bux is concerned, there is no motive and direct evidence against accused Khuda Bux that he fired or inflicted any injury to deceased with intention to commit his murder under any motive but the deceased Abdul Ghaffar was tortured by him during interrogation and expired in Police custody. There is no direct evidence against remaining accused, therefore, accused, namely Umed Ali, Abdul Latif, Abdul Fattah, Mehboob Ali, Mukhtiar Ahmed, Jamaldin, Sabir Hussain and Nabidad are acquitted from the charge u/s 265H(1) Cr.P.C.”

(iii) Against conviction, Khuda Bux filed Cr. Appeal No. S-64/2012. Against acquittal of the others, the Complainant Nisar Ahmed filed Cr. Acquittal Appeal No. D-32/2012. Both appeals were heard together by a learned Division Bench of Justice Shamsuddin Abbasi and Justice Amjad Ali Sahito who differed in opinion.

(iv) Justice Amjad Ali Sahito is of the view that the death was caused by torture in police custody; that the chain of circumstantial evidence connects all the policemen so charged, and therefore he is inclined to allow Cr. Acquittal Appeal No. D-32/2012 to convict Umed Ali, Abdul Latif, Abdul Fattah, Mehboob Ali, Mukhtiar Ahmed, Jamaldin, Sabir Hussain and Nabidad for the offence punishable under section 302(b) PPC for imprisonment for life as tazir, with a direction to each to pay compensation of Rs. 200,000/- to the legal heirs of the Deceased under section 544-A CrPC, and in default thereof to suffer simple imprisonment of six months more.

Regards Cr. Appeal No. S-64/2012 filed by Khuda Bux against conviction, Justice Sahito is inclined to dismiss it while modifying the sentence to imprisonment for life, inasmuch as imprisonment of 10 years awarded by the trial court is contrary to section 302(b) PPC, and per Justice Sahito, that is a procedural error which can be corrected by the appellate court under section 537 CrPC. He is also inclined to enhance the compensation awarded by the trial court under section 544-A CrPC from Rs. 50,000/- to Rs. 200,000/-.

(v) On the other hand, Justice Shamsuddin Abbasi is of the view that neither the medical evidence establishes death due to torture, nor is there direct evidence against said policemen for committing said torture; and thus he is inclined to allow Khuda Bux's Cr. Appeal No. S-64/2012 and to acquit him, and to dismiss Cr. Acquittal Appeal No. D-32/2012 filed by the Complainant against the others.

Scope of Referee Judge in criminal appeals:

2. In appeals under the CrPC, the scope of a Referee Judge is set out in section 429 which reads :

"Section 429. Procedure where Judges of Court of Appeal are equally divided. When the Judges composing the Court of Appeal are equally divided in opinion, the case with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion."

3. In *Muzammil Niazi v. The State* (PLD 2003 Karachi 526), Justice Shabbir Ahmed, acting as Referee Judge in a bail matter had distinguished the scope of a Referee Judge in civil appeals and constitution petitions on the one hand, and in criminal appeals on the other. It was observed that in the former cases, the scope of reference is restricted to the points of law and fact over which there is a difference of opinion, that being the intent of section 98 CPC read with clause 26 of the Letters Patent of the Lahore High Court and Rule 5 of Chapter IV-N, Volume V of the High Court Rules, the latter as applicable to the Sindh High Court. The civil appeal or the

constitution petition is then decided as per the majority, i.e. of the members of the Bench who had heard it first and the Referee Judge. Whereas in criminal appeals, by virtue of sections 378 and 429 CrPC, the whole case of the accused over whom there is a difference of opinion is referred to the Referee Judge, who may or may not agree with either of the Judges who had first heard the appeal; he is to form his own opinion on an independent reappraisal of the evidence; and the judgment of the Bench then follows such opinion. To quote from *Muzammil Niazi*:

“Whereas in criminal appeal, on account of difference of opinion:

- (a) The whole case goes to the referee Judge with reference to the particular appellant.
- (b) The opinion of the referee Judge is binding on the Division Bench.
- (c) His opinion need not be in agreement or at variance with one of the Judges.
- (d) The opinion of the referee Judge should be based on independent assessment of the case including the question of sentence.
- (e) The referee Judge has to send his opinion to the Bench and the judgment would be based on such opinion.”

4. Since the learned Division Bench that had heard these appeals is divided over the very guilt of all the persons charged with the offence, the entire case was open before me as Referee Judge in terms of section 429 CrPC. Therefore, I was inclined to fix these appeals for a hearing and to reappraise the evidence independently.

Submissions of counsel:

5. Mr. Asif Razzak Soomro, learned counsel for the Appellant (Khuda Bux) in Cr. Appeal No. S-64/2012 submitted that the judgment of the trial Court was erroneous; that once the trial Court had concluded that there was no direct evidence or motive to kill the Deceased, conviction was unwarranted; that PW-4 (Muhammad Azeem) and PW-5 (Habibullah) did not implicate Khuda Bux; that PW-7 and PW-8 (Akbar Ali and Nazir Ahmed) the mashirs of the place of incident and of arrest of Umed Ali and Abdul Latif, did not support the prosecution; that none of the Court witnesses had implicated Khuda Bux by name, and none of them were eye-witnesses of the alleged torture and murder; and therefore that was sufficient to give benefit of doubt to Khuda Bux.

The Complainant Nisar Ahmed, who is the Appellant in Cr. Acquittal Appeal No. D-32/2012, and who was previously pursuing said appeal in person, remained absent. Mr. Muhammad Afzal Jagirani, learned counsel for some of the Respondent policemen in the acquittal appeal, relied on the judgment of the trial court to submit that there was no evidence to show that they had caused the death of the Deceased.

Learned APG Sindh submitted that the custody and death of the Deceased at the P.S. was not doubtful; that the medical evidence also supported the fact that the death was caused by torture and asphyxia; that the trial court committed an error in sentencing Khuda Bux to imprisonment for 10 years when section 302(b) PPC prescribes imprisonment for life.

6. Heard the learned counsel, the learned APG Sindh and reappraised the evidence with their assistance.

The incident :

7. The Deceased, 35 years of age, was said to be a cable-man. The FIR was lodged by his brother, Nisar Ahmed (Complainant, PW-3) who was a signal operator in the Police department. He reported that on 01-02-2006, HC Sabir Ali asked the Deceased to accompany him to repair the cable of SHO Mukhtiar Ahmed, but the Deceased was detained at the P.S. in connection with a kidnapping case; that on 03-02-2006, TPO Khuda Bux asked for a bribe to release the Deceased; that in the evening of 03-02-2006 when the Complainant saw the Deceased at the P.S., he was fine; that on 04-02-2006, when the Complainant along with Muhammad Azeem and Habibullah went to the P.S. around 10:00 hours with the Deceased's meal, they saw that HC Sabir Ali was tying the Deceased's arms while TPO Khuda Bux, SIP Mukhtiar Ahmed, SIP Jamaldin and PC Nabidad were standing around him; that Khuda Bux had a belt in his hand and asked the Complainant whether he had arranged the money; that when the Complainant said that he could not, Khuda Bux

turned them away; that at 4:00 a.m. the next day on 05-02-2006, the Complainant came to know that the Deceased's dead body had been brought to the Civil Hospital Jacobabad by the police; and when he saw the dead body it had marks of violence.

There was no inquiry under section 176 CrPC.

The medical evidence :

8. Post mortem was conducted on 05-02-2006. As per the initial report (Exhibit 8-A), there was cyanosis on the face, lips, ears, hands and nails of both hands, but there was no ligature mark nor injury on the thorax, abdomen or lower limbs, however there was a bruise on the left elbow joint. The findings and opinion in the final report of post mortem (Exhibit 8-B) were as follows:

"The external as well as internal Chemical and Histopathological examination of deceased Abdul Ghaffar s/o Noor Ahmed by caste Shaikh has been performed and following finding have been observed.

1. *There is cyanosis present on Face, Ears, Lips, both Hands and their Nails.*
2. *Post Mortem lividity is well developed on dependent parts.*
3. *The right side of Heart full of blood and left is empty.*
4. *Blackish spots present on both Lungs.*
5. *Larynx & Trachea were congested.*
6. *The carbon particles were present in Lungs tissue as per report of Pathologist.*
7. *Inflammatory changes in Bronchi as per report of Pathologist.*
8. *There is bruise measuring 10cmx3cm on the left elbow joint.*

So in the light of above findings, I am of the conclusion that death has been accord due to 'ASPHYXIA' and Observation No. 8 is caused by hard and blunt substance and anti-mortem in nature. The time between death and Post Mortem about ten hours."

Death by 'asphyxia' means death by deprivation of oxygen. 'Cyanosis' is a bluish discoloration of the skin due to inadequate oxygenation of the blood.¹ Per Modi's Medical Jurisprudence and Toxicology,² the external appearance of a body suffering from asphyxia shows 'cyanosis', whereas the internal appearance is a congested larynx and trachea, and dark fluid blood fills the right side of the heart with the left side empty.

¹ Concise Oxford Dictionary.

² Twenty-third Edition, pages 579-580.

9. The medical evidence discussed above was un rebutted. It was thus proved that the death was unnatural. Though the dead body did not bear a mark of strangulation or sign of emersion, the bruise on the left elbow joint which was ante-mortem and caused by a hard blunt substance, indicated that the Deceased had been held down by force and the cause of asphyxia was suffocation by human agency.

The place of death :

10. As per the Complainant (PW-3) and Muhammad Azeem (PW-4), the Deceased had been taken from the bazaar on 01-02-2006 and detained at the P.S. in connection with a kidnapping case. That case, viz. FIR No. 06/2006 was registered on 03-02-2006 when the father of 8 year old Hamza alleged that his son was kidnapped on 28-01-2006 and murdered on 01-02-2006 for non-payment of the balance ransom; and that the Deceased was amongst the persons to whom he had paid part of the ransom on 29-01-2006. Though the memo of the Deceased's arrest (Exhibit 18-A) purported that he was picked up near a railway crossing on 04-02-2006 at 20:00 hours, the deposition of CW Imdad Hussain who was also picked up for investigation in that case but later released, substantiated the version of PW-3 and PW-4 that the Deceased was in custody at the P.S. since 01-02-2006. However, the actual date of the Deceased's arrest is not as significant, for either ways it was an established fact that at the time of death he was in custody at the P.S. The mashirnama of the dead body (Exhibit 18-B)³ prepared by TPO Khuda Bux and witnessed by PCs Abdul Fatah and Mehboob Ali, and the inquest report prepared by Khuda Bux (Exhibit 18-C), both purported that around 00:45 hours on 05-02-2006 the Deceased was asleep in the police lockup when he suddenly got up and collapsed dead. Though such report was clearly false as discussed *infra*, it was nevertheless an acknowledgment of the fact by Khuda Bux, Abdul Fatah and Mehboob Ali that the Deceased was in custody at the P.S. when he died. Per the medical opinion also, the time of death was about 10 hours before post mortem i.e. around 1:00 a.m on 05-02-2006.

³ Produced by PW 10, SIO Ali Murad.

The ocular evidence :

11. There were two sets of eye-witnesses. The first set was the complainant party namely PW Nisar Ahmed (brother of the Deceased), PW Muhammad Azeem, PW Habibullah and PW Aijaz Ali, the latter two also relatives of the Deceased. The other set of eye-witnesses were court witnesses (CWs) who were present at the P.S. at or around the time of death.

12. The Complainant Nisar Ahmed (PW-3) deposed that in the evening of 03-02-2006 when he saw the Deceased at the P.S., he was fine; that on 04-02-2006 the Complainant, Muhammad Azeem and Habibullah had gone to the P.S. around 10:00 a.m. with the Deceased's meal when they saw that HC Sabir Ali was tying the Deceased's arms while TPO Khuda Bux, SIP Mukhtiar Ahmed, SIP Jamaldin and PC Nabidad were standing around him; that Khuda Bux had a belt in his hand and asked the Complainant whether he had arranged money for the Deceased's release; that when the Complainant said that he could not, Khuda Bux turned them away; and then at 4:00 a.m. the next day (05-06-2006) the Complainant came to know that the Deceased had died. But, Muhammad Azeem (PW-4) did not say that he had accompanied the Complainant to the P.S. on 04-02-2006. Before the trial court he identified only HC Sabir Ali as the one who had taken the Deceased on 01-02-2006 on the pretext of repairing the cable of the SHO, and stated that he did not know the others. On cross-examination he said that he did not see any of the policemen torturing the Deceased. Habibullah (PW-5) also did not say that he had accompanied the Complainant to the P.S. at any time to see the Deceased, rather he said that on 04-02-2006 when he was allowed inside the P.S. after 8:30 p.m. with the Deceased's meal, he saw that the Deceased was lying tied and four policemen were standing around him, and he went back and narrated the incident to the Complainant. However, he did not name or identify any of the such policemen.

Aijaz Ali (PW-6) deposed that on 04-02-2006 at around 11:00 a.m. he and the Complainant had gone to see the Deceased at the

P.S. where they saw Khuda Bux sitting on the chest of the Deceased, and who demanded money from them for releasing the Deceased; and that besides him were standing constables Abdul Latif, Umed Ali, Abdul Fattah and Mehboob Ali. But the Complainant had never said that Aijaz Ali had accompanied him to the P.S. on 04-02-2006, nor had he said that he had seen Khuda Bux sitting on the chest of the Deceased. Apart from Khuda Bux, the policemen named/identified by Aijaz Ali were different from the ones that were named/identified by the Complainant.

13. Therefore, firstly, the ocular account of the complainant party i.e PW-3, PW-4, PW-5 and PW-6 as to whom they saw and what they saw at the P.S. on 04-02-2006 was inconsistent with each other; and secondly, their ocular account of the events was much prior to the time of death.

14. It was the evidence of the second set of eye-witnesses *viz.* the court witnesses (CWs) that was crucial, as they claimed to be present at the P.S. at or around the time the Deceased passed away. CW Imdad Ali Memon claimed to be in the police lock-up on 04-02-2006 along side the Deceased. The other CWs were HC Ali Bux, PC Abdul Hadi, PC Tahir Hussain, WPC Anwar Ali and WPC Zulfiqar Ali who were on duty at the P.S. on 04-02-2006, and who had also recorded statements before the Magistrate under section 164 CrPC on 18-04-2006 as to the events that transpired at the P.S. on the night of 04-02-2006.

15. Imdad Ali Memon (CW-1) deposed that he and the Deceased were detained in different rooms of the lock-up; that first he was taken out of the lock-up and maltreated by policemen, and then the Deceased was taken out of the lock-up and maltreated by policemen; and that the next day he learnt that the Deceased had died. However, this witnesses did not pin point the policemen who had maltreated him or the Deceased.

16. HC Muhammad Anwar (CW-5) and night incharge HC Ali Bux (CW-8) both deposed that around 9:00 pm TPO Khuda Bux came to the P.S. along with his gunmen Abdul Fattah and Mehboob Ali and sat in the office of the SHO; that they were followed by PC Abdul Latif and PC Umed Ali of the Eagle Squad; thereafter, Abdul Fattah and Mehboob Ali took Shahzad Mughal out of the lock-up (co-accused in FIR No. 06/2006) to the office of the SHO for interrogation; after some time, Khuda Bux, Abdul Fattah, Mehboob Ali, Umed Ali and Abdul Latif came out of the office of the SHO and sat in the CIC office, where Abdul Fattah and Mehboob Ali first took Imdad Ali Memon from the lockup for interrogation and then the Deceased; that such interrogation was conducted behind a closed door; that around 11:30 pm Khuda Bux, Abdul Fattah, Mehboob Ali, Umed Ali and Abdul Latif came out of the CIC office and went to the night incharge HC Ali Bux, where Khuda Bux informed that the Deceased had become unconscious during interrogation and asked HC Ali Bux for a letter for his medical treatment; but Ali Bux refused to oblige; thereafter Khuda Bux, Abdul Fattah, Mehboob Ali, Umed Ali and Abdul Latif picked up the Deceased and took him to the police mobile for transporting him to the hospital. The same events up to the interrogation of Imdad Ali Memon were narrated by PC Abdul Hadi (CW-4) who was on sentry duty at the P.S. up till 10:00 p.m; and the events thereafter, including the interrogation of the Deceased, were narrated by PC Tahir Hussain (CW-6) who took up sentry after PC Abdul Hadi went off duty.

Opinion :

17. The testimony of HC Muhammad Anwar (CW-5), night incharge HC Ali Bux (CW-8), and sentry PC Tahir Hussain (CW-6) was consistent with each other and was corroborated by the testimony of Imdad Ali Memon (CW-1) and PC Abdul Hadi (CW-4). The presence of these CWs at the P.S. at the given time was not questioned during cross-examination. The evidence given by these CWs was that on 04-02-2006, some time after 10:30 p.m., the Deceased had been taken out of the lock-up for interrogation; that

behind the closed door of the CIC room were present Khuda Bux, Abdul Fattah Mehboob Ali, Umed Ali and Abdul Latif; that around 11:30 p.m. the Deceased was carried out of that room and was not moving, and Khuda Bux proclaimed that the Deceased had become unconscious during interrogation; that the Deceased was then picked up by Abdul Fattah, Mehboob Ali, Umed Ali and Abdul Latif and carried to the police mobile for the hospital. Given the time of death placed by the medical evidence, the Deceased was either dead when he was taken out of the interrogation room or he died en route the hospital. While recording statements under section 342 CrPC, Khuda Bux, Abdul Fattah, Mehboob Ali, Umed Ali and Abdul Latif were given an opportunity to explain how the Deceased passed away, however, they did not make an exculpatory statement nor did they lead any evidence in their defense.

18. It was proved beyond any doubt that at the time or just before the Deceased passed away, he was physically in the immediate custody and control of Khuda Bux, Abdul Fattah, Mehboob Ali, Umed Ali and Abdul Latif behind a closed door at the P.S. and was being interrogated by them jointly; and that, as supported by the medical evidence, it was during such interrogation that he was subjected to torture in the form of suffocation apparently to extract information to which he succumbed. Therefore, it was proved beyond reasonable doubt that not only Khuda Bux but also Abdul Fattah, Mehboob Ali, Umed Ali and Abdul Latif had caused the death of the Deceased. The acquittal of the latter policemen by the trial court for the same act and on the same evidence on which Khuda Bux was convicted is perverse, a result of a gross misreading of the evidence and culminates in miscarriage of justice.

19. Though the assembly of five policemen to interrogate the Deceased behind a closed door was apparently with the intention to intimidate him and to give him the third degree if need be, that is not enough to hold that their common object was also to commit his murder. There is no evidence of a preconcerted assembly to that end. The word 'knew' in the second part of section 149 PPC has to be

proved by some evidence, not from conjecture or speculation, and therefore it is not enough to say that the accused ought to have known or might have known that the common object of the unlawful assembly was to commit murder.⁴ In *Bashir Ahmad v. The State* (PLD 1988 SC 86), it was held that since section 149 PPC seeks conviction on vicarious liability only, it is not necessary to apply it where there is doubt about its applicability. A joint action by a number of persons is not necessarily an action performed with common object.⁵ In the circumstances of the present case, the applicability of section 149 PPC is not established.

20. Mr. Asif Razzak Soomro Advocate had pointed out that PW-7 and PW-8 who were witnesses to the mashirnama of the place of incident and the mashirnama of arrest of PC Umed Ali and PC Abdul Latif had denied the same. However, given the testimony of the court witnesses narrated above, nothing turned on the mashirnama of place of incident or on the time and place of arrest of PC Umed Ali and PC Abdul Latif.

21. Mr. Asif Razzak Soomro and Mr. Muhammad Afzal Jagirani had further submitted that none of the CWs had actually seen the said five policemen meting torture to the Deceased, and consequently the absence of such direct evidence should suffice to acquit them. That argument too has no force as the chain of circumstantial evidence tying them to the murder of Deceased remained unbroken. *Hashim Qasim v. The State* (2017 SCMR 986) reiterated that even in a case involving capital punishment, conviction can follow on circumstantial evidence where such evidence provides all links in an unbroken chain where one end of the chain touches the dead body and the other the neck of the accused. In *State of M.P. v. Shyamsunder Trivedi*, (1995) 4 SCC 262, also a case of death by torture in police custody, the acquittal of guilty policemen was reversed on circumstantial evidence. There, the Supreme Court of India observed that in such cases the appraisal of

⁴ *Muhammad Altaf v. The State* (2002 SCMR 189); and *Muqadar v. The State* (1987 SCMR 1015).

⁵ *Hamida Bano v. Ashiq Hussain* (PLD 1963 SC 109).

evidence should not be unrealistic or an over simplification of the circumstances; and that:

“The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture.”

22. Article 14(2) of the Constitution of Pakistan stipulates that “No person shall be subjected to torture for the purpose of extracting evidence”. Article 13(b) stipulates that “No person shall, when accused of an offence, be compelled to be a witness against himself.” Despite these fundamental rights guaranteed to every citizen, it is a reality that the preferred method of interrogation by the police continues to be torture in some form or the other. This, in my view, is also a reflection of the State’s failure to train policemen in the use of technology and scientific techniques for investigating crimes and to provide them with the requisite resources to do their job. In the pressure to deliver results, the untrained and ill-equipped police then resorts to the third degree to gather information.

23. In *D.K. Basu v. State of West Bengal* (AIR 1997 SC 610), the Supreme Court of India had laid down guidelines for curbing excesses committed in police custody and held that a citizen’s fundamental right to life is not shed-off on arrest; and that violation of such rights by Government functionaries breeds contempt for law and encourages lawlessness. The counterview, that a liberal enforcement of fundamental and human rights of dangerous and hardened criminals makes crime-detection difficult and puts the society at risk, was addressed by observing that along with the safety of the people the State was required to balance freedoms guaranteed to an individual, which could be managed by developing scientific methods of investigation and by training investigators to meet the challenge. Though Pakistan has recently

enacted the Torture and Custodial Death (Prevention and Punishment) Act, 2022 to classify “custodial death” as a specific offence punishable under section 302 PPC, the required balance would not be achieved until investigation techniques are given new life and the investigators the required resources. The said Act however is not relevant to these appeals.

24. As regards the other policemen charged with the offence, the court witnesses namely HC Ali Bux, PC Abdul Hadi, PC Tahir Hussain, WPC Anwar Ali and WPC Zulfiqar Ali had all deposed that on the night of 04-06-2006 when the Deceased was being interrogated, SHO Mukhtiar Ahmed, SIP Jamaldin, HC Sabir Hussain and PC Nabidad were not present at the P.S. HC Ali Bux explained that said personnel were on patrol duty at such time. Thus, the charge against Mukhtiar Ahmed, Jamaldin, Sabir Hussain and Nabidad had not been proved.

The sentence:

25. I advert now to the question raised by Justice Sahito as to the sentence handed down by the trial court to Khuda Bux as that has a bearing on the sentence to be passed against Abdul Fattah, Mehboob Ali, Umed Ali and Abdul Latif.

26. Section 302 PPC envisages three possible punishments for qatl-i-amd. Clause (a) of section 302 provides for punishment with death as qisas. But if proof in the form specified in section 304 PPC is not available, then the punishment prescribed is death or imprisonment for life as tazir under clause (b), ‘OR’, imprisonment for a term which may extend to twenty-five years under clause (c). In the circumstances of this case, the test of section 304 PPC and consequently the requirement of clause (a) of section 302 PPC was not met for a sentence of death as qisas. In convicting Khuda Bux the trial court had sentenced him to imprisonment for 10 years, but in doing so cited clause (b) of section 302 PPC which does not envisage imprisonment for a term less than life. Justice Sahito is of the view that since the trial court intended to pass a sentence of imprisonment

under clause (b) of section 302 PPC, the error can be corrected by this Court under section 537 CrPC to read 'imprisonment for life', and which would not amount to enhancing the sentence otherwise prohibited by section 423(1)(b) CrPC. But, it may well be that the error was not in saying 'imprisonment for 10 years', but in citing clause '(b)' instead of clause '(c)' of section 302 PPC for the latter provision does envisage a lesser sentence of imprisonment not exceeding twenty-five years and there is a world of difference between saying 'imprisonment for 10 years' and 'imprisonment for life'.

27. In my view, the intent of the trial court is to be gathered primarily from the sentence it has passed and the reason assigned for the same, and not as much from the provision cited. The trial court clearly stated that it was awarding a lesser punishment of 10 years imprisonment to Khuda Bux considering that since he was interrogating the Deceased in connection with an offence, he did not have any motive or intention to kill him. Therefore, it is clear that the sentence was intended to be passed under clause (c) of section 302 PPC and the mention of clause (b) was an error. Such an amendment in the judgment of the trial court can be made by the appellate court in exercise of powers under section 423(1)(d) CrPC. In any case, even if the trial had sentenced Khuda Bux to imprisonment for life under clause (b) of section 302 PPC, this Court while seized of an appeal against conviction is empowered by section 423(1)(b)(3) CrPC to alter the sentence in a fit case from clause (b) to clause (c) of section 302 PPC.

28. As to the type of cases that can be sentenced under clause (c) of section 302 PPC instead of clause (b) thereof, the leading case is that of *Ali Muhammad v. Ali Muhammad* (PLD 1996 SC 274), where it was held by the Supreme Court:

"Section 302 of the P.P.C. therefore, itself contemplates plainly clearly a category of cases which are within the definition of Qatl-i-Amd but for which the punishment can, under the Islamic Law, be one other than death or life imprisonment. As to what are the cases falling under clause (c) of section 302, the law-maker has left it to the Courts to decide on a case to case basis. But keeping in mind the majority view in Gul Hassan

case PLD 1989 SC 633, there should be no doubt that the cases covered by the Exceptions to the old section 300, P.P.C. read with the old section 304 thereof, are cases which were intended to be dealt with under clause (c) of the new section 302 of the P.P.C.”

The case of *Ali Muhammad* was then endorsed by a larger Bench of the Supreme Court in *Abdul Zahir v. The State* (2000 SCMR 406) as follows:

“We, therefore, endorse the view held by this Court in the case of *Ali Muhammad (supra)* (PLD 1996 SC 274) that class of cases to which clause (c) of section 302, PPC applies is different from class of cases enumerated in section 306 and punishable under section 308, PPC. Prima facie the cases covered by clause (c) of section 302, P.P.C. are of Qatl-i-Amd: (1) where according to the Injunctions of Islam the punishment of Qisas is not applicable but not falling within the ambit of section 306, P.P.C. punishable under section 308, P.P.C.; (2) Qatl-i-Amd to which clause (b) of section 302, P.P.C. is attracted, namely, Qatl-i-Amd wherein proof in either of forms specified in section 304, P.P.C. is not available is punishable with death or imprisonment for life, by way of Tazir. The use of the word 'or' at the end of clause (b) of section 302, P.P.C. reinforces this interpretation.”

29. The old section 300 of the PPC had provided five Exceptions as to when culpable homicide may not amount to murder, and consequently not punishable by death or imprisonment for life under the old section 302 PPC, but punishable under Part I of the old section 304 PPC with imprisonment for life OR a term extending to 10 years. Those Exceptions were cases where death was caused (I) under grave and sudden provocation; (II) while exercising the right of private defence; (III) by a public servant acting for the advancement of public justice; (IV) without premeditation in a sudden fight; (V) due to risk voluntarily taken by the deceased. However, apart from the said Exceptions, Part II of the old section 304 PPC had also provided for imprisonment of 10 years in cases where death was not intended. As per the case of *Ali Muhammad supra*, the Exceptions to the old section 300 PPC AND the cases that were dealt under the old section 304 PPC are now dealt with under clause (c) of section 302 PPC, and it is now left to the Courts to decide on a case to case basis the circumstances that may call for punishment under clause (c) of section 302 PPC. More recently, in *Bashir Ahmed v. State* (2022 SCMR 1187), circumstances that may attract clause (c) instead of clause (b), and the discretionary power of

the court to sentence under clause (c) have been discussed by the Supreme Court as follows:

“11. Provision of section 302(c), P.P.C. is somewhat similar to the erstwhile section 304, P.P.C. The provision of section 302(c) in the original text was an exception of section 302, P.P.C. while following the requirements of erstwhile section 304, P.P.C. This provision covers all those offences which were committed resulting into culpable homicide not amounting to murder and as such cannot be equated with the requirements for application of sentences as provided under section 302(a)(b), P.P.C. Any occurrence though resulted into an act of homicide but it was committed without element of mens rea, pre-meditation or ill design, would squarely attract the provision of section 302(c), P.P.C. The framers of the law while inserting the said provision provided sentence of imprisonment which may extend to 25 years. The sentence of 25 years is clothed with discretionary powers of the court contrary to sentences provided under section 302(a)(b), P.P.C. Broadly speaking this distinction qua the discretionary power to inflict sentence is based upon the fact that the law makers were conscious of the situations like free fight, case of two versions, undisclosed story, sudden affair, question of ghairat, absence of mens rea, self-defence and cases initiated due to the element of sudden provocation.

12. In United Kingdom almost in similar situation, the framers of the law enacted an Act called ‘Homicide Act, 1957’ in which they have dealt with such like situation under the dictum ‘diminished liability’. To evaluate such like situation, the mental faculty of the offender was to be gauged according to prevailing circumstances in which the offence was committed and as such it was given precedence over the already existing liability regarding culpable homicide amounting to murder. While drawing analogy from the said legislation, it can be safely assumed that the provisions of section 302(c), P.P.C. can also be equated/ adjudged keeping in view the state of mind of the offender, his surrounding circumstances and the mode of commission of the offence.”

30. Coming back to the case in hand, though it is not a case specifically falling in the five Exceptions that were part of the old section 300 PPC, but as observed in *Ali Muhammad and Bashir Ahmed supra*, those are not the only instances that may attract clause (c) of section 302 PPC, and which may be resorted to “keeping in view the state of mind of the offender, his surrounding circumstances and the mode of commission of the offence” as was previously done under the old section 304 PPC.

31. In sentencing Khuda Bux to imprisonment for 10 years the trial court was apparently of the view that in circumstances where he was interrogating the Deceased at the P.S. in connection with an FIR into the kidnapping and death of a minor, his state of mind was not to cause death but to extract information that was not

forthcoming, and thus the case did not call for capital punishment or imprisonment for life. Such sentencing by the trial court appears to be in line with *Ali Muhammad* and *Bashir Ahmed*. The act of torture though reprehensible, it would not be safe to put that in a straitjacket for the purposes of sentencing as the assessment of the state of mind or *mens rea* of the offender is usually an intricate exercise. Since there is no revision before this Court for enhancing the sentence of Khuda Bux, this is no occasion to further delve into that aspect.

32. Since Abdul Fattah, Mehboob Ali, Umed Ali and Abdul Latif are convicted herein for the same act as Khuda Bux and on the same evidence, their sentence cannot be different from his. However, the quantum of compensation payable by them under section 544-A CrPC, technically not a 'punishment', is being fixed keeping in view the present value of money.

33. In view of the foregoing, these appeals are disposed of as follows:

- (i) the sentence passed by the trial court against Khuda Bux is amended under section 423(1)(d) CrPC to read as having been passed under clause (c) of section 302 PPC. With that amendment in the judgment of the trial court, Cr. Appeal No. S-64/2012 filed by Khuda Bux is dismissed. His bail is cancelled and the surety discharged. He shall be taken into custody and remanded to prison to serve out the remainder of his sentence.
- (ii) Cr. Acquittal Appeal No. 32/2012 is allowed as against Respondents 1, 2, 4 and 5 i.e. Umed Ali, Abdul Latif, Abdul Fatah and Mehboob Ali who are hereby convicted for the offence punishable under clause (c) of section 302 PPC and sentenced to rigorous imprisonment for ten (10) years. They are also directed

under section 544-A CrPC to pay compensation of Rs. 200,000/- (Rupees Two Hundred Thousand only) each to the legal heirs of the Deceased, and in default of such payment or recovery under sub-section (2) thereof, they shall suffer simple imprisonment of six months more. The benefit of section 382-B CrPC is extended to them. They shall be taken into custody and remanded to prison to serve out the sentence.

- (iii) Cr. Acquittal Appeal No. 32/2012 is dismissed as against the Respondents 6 to 9 i.e. Mukhtiar Ahmed, Jamaldin, Sabir Hussain and Nabidad.

REFEREE JUDGE

Signed:

Announced by and

on: