

S. 308 (reduction from death to life) not applicable when husband kills wife despite leaving behind minor heirs

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## IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Naimatullah Phulpoto,

Mr. Justice Mohammad Karim Khan Agha

**Criminal Appeal No.126 of 2017  
Confirmation Case No.04 of 2017**

Appellant	Sher Mohammad through Mr. Ajab Khan Khatak, Advocate
Respondent	The State through Mr. Mohammad Iqbal Awan, Deputy Prosecutor General.
Date of hearing	03.04.2019
Date of Announcement	26.04.2019

### JUDGMENT

**MOHAMMAD KARIM KHAN AGHA, J:-** The appellant in the instant appeal has assailed the judgment dated 13.03.2017 passed by Vth Additional Sessions Judge, Karachi Central in a Sessions Case bearing No.362 of 2012 whereby the appellant was convicted under Section 302 (b) PPC and awarded death sentence subject to confirmation by this court and to pay fine of Rs.100,000/- and in default to undergo R.I. for one year. The appellant was also directed to pay Rs.2,00,000/- (Rupees Two Lac) as compensation, to be paid to the legal heirs of deceased (the impugned judgment)

2. The brief facts of the case are that on 24.05.2012 statement under Section 154 Cr. PC of the complainant Mohammad Baber was recorded which was incorporated in FIR No.128 of 2012, wherein he stated that marriage of his elder sister Mehnaz was solemnized with Sher Mohammad about 13/14 years ago. Out of the said wedlock there are two daughters and one son. Sher Muhammad used to maltreat his sister Mehnaz and had suspicions about her fidelity and on many occasions he tried to strangle her. Sher Muhammad did not accept his children as his own on account of his suspicions about his wife's infidelity and also used to beat the children. On 22.05.2012 when the complainant was on his duty,

Sher Muhammad informed him on mobile phone that his sister Mehnaz has committed suicide and her dead body is lying in Abbasi Shaheed Hospital. On receiving such information the complainant alongwith his family members reached at Abbasi Shaheed Hospital where they came to know that some poisonous substance was given to the children of Mehnaz namely Hasnain and Alishba who are under treatment while the dead body of his sister Mehnaz was lying in the mortuary. The wrists of Mehnaz were cut and there was mark of rope on her neck. Sher Muhammad was present, shedding false tears and told him that Mehnaz has committed suicide by hanging herself and also given some poisonous substance to her children. The complainant asked him that when she cut her wrists how can she hang herself to which Sher Mohammad had no satisfactory reply and escaped from Abbasi Shaheed Hospital. It is the complainant's case that Sher Mohammad gave poisonous medicine to the children, cut the wrists of his sister Mehnaz and after strangulation she was killed by hanging.

3. After completion of the usual investigation, investigating officer (IO) submitted challan against the accused in the concerned Additional Sessions Court, Karachi. The charge was framed against the accused to which he pleaded not guilty and claimed trial of the case.

4. The prosecution in order to prove its case examined 10 witnesses and exhibited numerous documents and other items. The statement of the accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. He declined to give evidence under oath and called one witness in support of his defense which was that he had not murdered his wife as his wife had died by committing suicide. After appreciating the evidence on record the learned trial court convicted and sentenced the appellant by the impugned judgment as earlier set out in this judgment. Hence, the appellant has filed this appeal against his conviction.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 13.03.2017 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. After the reading out of the evidence and the impugned judgment learned counsel for the appellant did not press his appeal on merits but instead prayed for reduction of the sentence from the death penalty to one of life imprisonment or to even the lesser sentence of 14 years imprisonment as his case fell within the purview of S.308 PPC based on the following mitigating circumstances (a) that the appellant was prepared to financially support his three young children and (b) that if sentenced to death there would be no parent for the young children and (c) that there was no brutality involved when he murdered his wife and (d) that the prosecution had failed to prove the motive for the murder. In support of his contentions he placed reliance on **Dil Bagh Hussain V State** (2001 SCMR 232) and **Muhammed Akram V State** (1995 P.C.R.LJ 110).
7. Learned DGP contended that based on the evidence on record the prosecution had proved its case against the appellant beyond a reasonable doubt and as such the impugned judgment did not require interference. When, however, he was asked by the court whether the mitigating circumstances raised by the appellant justified a reduction in sentence he conceded that they did justify a reduction in sentence **but only** from the death penalty to that of life imprisonment and not any lesser penalty than that.
8. We have carefully gone through the evidence on record and in our view based on the child eye witness evidence, other corroborative ocular evidence, medical evidence and recoveries we are fully satisfied that the prosecution has proved its case against the accused beyond a reasonable doubt and as such neither the impugned judgment nor conviction requires any interference.
9. The only remaining issue at hand is whether a reduction in sentence is justified from death to any other alternate sentence.
10. After considering the relevant case law we are of the view that S.306, 307 and 308 PPC are relevant only to a case of Qisas and **not** to that of Tazir and since this is a case of Tazir under S.302 PPC S.308 PPC which provides for the lesser sentence of 14 years imprisonment as a matter of

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law is not applicable to the case in hand. In this respect reliance is placed on **Zahid Rehman V The State** (PLD 2015 SC 77).

11. The next issue is whether there is sufficient mitigation to justify the reduction in sentence from death to that of life imprisonment which is the alternate sentence under S.302 PPC the potential resort to which has been made clear by the Supreme Court in the case of **Ghulam Mohy-Ud-Din V State** (2014 SCMR 1034)
12. In the case of **Khalid Mehmood V State** (2017 SCMR 201) which is a similar case as this whereby a husband was convicted of murdering his wife, her brother and injured three others and was awarded the death penalty and where the only plea was a reduction in sentence from death to life imprisonment the Supreme Court rejected such plea and upheld the death sentence mainly keeping in view the brutality and mercilessness of such murders. In this case the manner in which the appellant murdered his wife, namely by hanging her from a fan by comparison, is in our view not particularly brutal or merciless.
13. The appellant is also prepared to financially support his young children and in our view what is of particular significant in justifying a reduction in sentence from that of death to life imprisonment appears to be the fact that the prosecution has failed to prove the motive behind the appellant murdering his wife apart from allegations that he had suspicions about her fidelity. In fact the conduct of the appellant to his wife would have given her a greater motive to kill him rather than vice versa. It is settled law that if the prosecution asserts a motive and is unable to prove it or simply cannot prove a motive then this generally justifies the reduction of the death sentence to one of life imprisonment. In this respect reliance is placed on **Amjad Shah V State** (PLD SC 2017 P.152) and **Saeed Ahmed v State** (2015 SCMR 710)
14. Thus, taking into account all the above discussed mitigating factors we are of the view that the appellant has made out a case for the reduction in his sentence from that of death to imprisonment for life. Thus, the appellant's sentence is converted from the death sentence to imprisonment for life and the confirmation reference is answered in the negative. The appellant shall be given the benefit of S.382-B <sup>Cr. PC 142</sup> and apart

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from the above variation the other elements of the sentence contained in the impugned judgment shall remain in tact with slight modification, in case of default in payment of compensation, the appellant shall suffer SI for 6 months instead of RI for one year.

15. The appeal is disposed of in the above terms with the confirmation reference being answered in the negative

MAK/PS