

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI

**Crl. Appeal No. 205 of 2018.**

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Date

Order with signature of Judge  
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1. For hearing of main case.
2. For hearing of M.A. No. 2461 of 2018.

**18.04.2018**

Mr. Ajab Khan Khattak, Advocate for the Appellants.  
Ms. Seema Zaidi, Deputy P.G. Sindh.

**Salahuddin Panhwar-J.** At the outset, learned counsel for the appellants contends that during pendency of trial, parties entered into a compromise and preferred compromise application but trial Court awarded conviction to the appellant under Section 311, PPC. He contends that to award conviction under Section 311, PPC (“Fisad-fil-Arz”), trial Court was required to first frame the charge and record evidence on that particular aspect whereas such exercise was not undertaken. In support of this contention, he relied upon 2005 SCMR 599. Learned counsel further contends that in “Fisad-fil-Arz” cases conviction cannot be extended beyond 14 years; however, trial Court has awarded conviction for life imprisonment, hence impugned judgment, on the face of it, is not maintainable under the law.

2. The learned DPG, however, has not disputed the plea taken by the counsel for the appellants.

3. At the outset, I would say that by Criminal Law Amendment Act 2004 (Act I of 2005) awarding sentence of *death* or *imprisonment* for life stood inserted and now the provision reads as:-

**“311. Ta’zir after waiver or compounding or right of qisas in *qatl-i-amd*.** Notwithstanding

anything contained in section 309 or section 310 (where all the *walis* do not waive or compound the right of *qisas* or (if) the principle of *fasad-fil-arz* (is attracted)) the Court may, (\*\*\*) having regard to the facts and circumstances of the case, punish an offender against whom the right of *qisas* has been waived or compounded with **{death or imprisonment for life}** or) imprisonment of either description for a term-which may extent to (fourteen) as *ta'zir*.”

4. Since, the provision *itself* stood amended and the Court has been vested with jurisdiction to *inflict* punishment of **death** or **imprisonment for life**, therefore, I am not impressed with *plea* of the learned counsel for the appellants to the effect that the Court cannot pass conviction of **imprisonment for life** under section 311 PPC.

5. I would further add that there are *exceptions* where the punishment of *Qisas* cannot be enforced / inflicted and provision of section 311 PPC is another *example* that how in a case *otherwise* entailing punishment of *Qisas* the offender may be handed down the punishment of *Ta'zir*. Guidance is obtained from the case of Zahid Rehman v. State (PLD 2015 SC 77) wherein at Rel. P-97 it is observed as:-

“5. ....In other words a conviction for an offence entailing the punishment of *Qisas* must precede a punishment under section 308, P.P.C and such conviction can only be recorded if proof in either of the forms mentioned in section 304 P.P.C, is available before the trial court and not otherwise. The provisions of section 311, P.P.C, provide another example in this context showing how in a case otherwise entailing a punishment of *Qisas* the offender may be handed down a punishment of *Ta'zir* and the said section also falls in Chapter-XVI of the section 302(a) PPC.”

6. At this juncture, it would be relevant to refer the facts as per the FIR, registered on the basis of 154, Cr.P.C. statement of complainant, Nadir Ali son of Ghulam Haider. According to him about 3/4 days before the incident, there was a dispute between his son, Kamran Haider, and accused Ashiq Chandio, Manzoor Janwari and Nazeer Dewero, who threatened his son to leave Chakra Goth. The complainant further stated that on 13.06.2013 at about 1:30 p.m. while he was present in his house with his family, suddenly accused Ashiq Chandio alongwith his accomplices, Manzoor Janwari and Nazeer Dewero, forcibly entered into the house, Ashiq Chandio made straight fires on his son, Rizwan Haider, with intention to kill him, resultantly his son sustained bullet injuries and fell down, while the friend of his son, Najam Ali Kazi, managed to escape in order to save his life, but after some distance he fell down and accused Ashiq Chanio, Manzoor Janwari and Nazeer Duwero made straight fires on Najam Ali Kazi, who succumbed to his injuries on the spot and thereafter the accused persons fled away from the scene alongwith their accomplices making aerial firing.

7. The facts, *prima facie*, do not suggest the case to be one of "pretext of honour". It is also a matter of record that the learned trial Court recorded evidence and at later stage compromise application was preferred by the parties. Learned trial Judge while deciding such compromise application convicted appellant under Section 311, PPC by holding that two young boys were murdered in a "**brutal and shocking manner**". I would not hesitate in saying that an act of compounding by all or some of the legal heirs would not prejudice the authority of the Court to award punishment under section 311 PPC.

Reference may be made to the case of Khan Muhammad v. State 2005 SCMR 599 wherein at Rel. P-604 it is held so as:-

“9. ... .. , notwithstanding the fact that all the legal heirs of the deceased or some of them have compounded the offender but the Court is empowered to award such punishment to such an offender under section 311, P.P.C.”

8. Thus, it *prima facie* appears to be no more confusing that a Court may *competently* decline *permission* to parties to compound and a *conviction* may well be awarded under section 311 PPC. At this point, it is worth mentioning that an **explanation** has been provided beneath the section as:-

**“Explanation.---** For the purpose of this section, the expression *fasad-fil-arz* shall include the **past conduct of the offender**, or **whether he has any previous convictions**, or the **brutal or shocking manner** in which the offence has been committed which is **outrageous to the public conscience** (or the offence relates to honour crime), or if the offence is considered as potential danger to the community, (or if the offence has been committed in the name or on the pretext of honour)”.

9. From above *explanation*, it *prima facie* appears that punishment under such offence (311 PPC) is not person *specific* but relates to *certain situations* and *circumstances* wherein a murder is committed so was held in the case of Zahid Rehman v. State (PLD 2015 SC 77) at rel. p-113 as:

“30. .... According to my understanding the provisions of section 302(c), P.P.C are relevant to those acts of murder which are committed in situations and circumstances which do not attract the sentence of *Qisas* and I further understand that sections 306 and 307, P.P.C. are person specific **whereas section 302(c), P.P.C. relates to certain situations and circumstances wherein a murder is committed** and according to the Injunctions of Islam the punishment of *Qisas* is

not applicable to such situations and circumstances...”

10. The position, being so, would require *framing* of a charge against the accused for what (circumstances / situation wherein murder committed) the accused, in opinion of the Court, may be convicted else it may result in frustrating the *foundation* of Criminal Administration of Justice which is **‘fair-trial’**. It may well be made *easy* for understanding that punishment under section 311 PPC is not *specifically* for **‘murder’** but ***fasad-fil-Arz*** i.e circumstances and situation wherein the *murder* committed therefore, whenever the Court comes to such a *conclusion* then it (Court) would be required to alter the charge (frame the charge) from section 302 PPC to 311 PPC and to proceed with the *trial*. Any departure would mean that the accused would be convicted without *even* notice of the facts (*circumstances and situation*) on which he, *in opinion of court*, committed the murder which (murder) *otherwise* was waived by legal heirs. Such *illegality* shall be sufficient to render the *judgment* a nullity. Reference may be made to case of Muhammad Yar v. State 2005 YLR 1163 wherein at relevant page-1169 as:-

“9. ....However, question for determination before this Court is that notwithstanding the fact that Muhammad Sher the only legal heir has waived his right of Qisas. Whether the applicant can be convicted under section 311 P.P.C. on the basis of the facts and circumstances of the case and the fact that the applicant against whom the right of *Qisas* has been waived or compounded, because of the expression *Fasad-Fil-Arz* appearing in explanation to section 311, P.P.C. and whether the applicant is responsible for the murder in a brutal and shocking manner in which the accused has been convicted, which is outrageous to the public conscience, are questions which would be determined at the time of hearing

of the appeal and if we find so, the **charge can be amended from section 302 to 311 PPC by exercising jurisdiction under section 227 Cr.P.C.**”

11. Thus, the plea taken by the learned counsel that in “Fisad-fil-Arz” case, charge is to be framed first and thereafter the trial Court was required to proceed with the matter in accordance with law. Accordingly, impugned judgment is set-aside and the case is remanded back to the learned trial Court with direction to frame charge under Section 311, PPC, record evidence in the matter and pass fresh judgment after hearing the parties. At this juncture, learned counsel for the appellants contends that in view of the facts and circumstances of the case, the appellants are entitled for bail. The appellants would be at liberty to prefer bail application before the trial Court. However, in the interest of justice, this case is transferred to learned Ist Additional Sessions Judge, Karachi (East), who shall decide the case in accordance with law.

**J U D G E**