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## **Islamic punishment of death as Qisas and its Execution in Pakistan**

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### **Abstract**

*Underlying concept of punishment of qisas in Islam is to punish a miscreant in the same manner by which he inflicted death or injury to the victim of offence. Although under the process of Islamization of laws in Pakistan punishment of death as qisas was added into the law, in the year 1990, for the offence of qatl-i-amd but law is silent on the mode of its execution. In a few premeditated murder cases punishment of qisas is awarded by courts but it serves no useful purpose when execution thereof knows no other mode except hanging convict by neck till he dies. This research paper briefly discusses some aspects of the qisas and diyat law of Pakistan and suggests that the law relating to the execution of death punishment of qatl-i-amd awarded as qisas must be amended and brought in conformity with the injunctions of Islam.*

*Key Words: Qisas and Diyat Law, Qatl-i-Amd, Tazkiyah-al-Shahood, Injunctions of Islam, Execution of Death Punishment.*

### **Introduction**

Word 'qisas' is Arabic in its origin and its root word is 'qass' which has different literal meanings including 'to follow', 'to tell', 'to cut' or 'to relate'.<sup>1</sup> But under Islamic law this word is used in the meaning of retaliation or equality. Islamic qisas and diyat law is also known as *Al-Jinayaat*. It applies

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in cases of killing a human being or inflicting any hurt on human body. So *qisas* is a punishment wherein guilty person has to suffer from same injury he causes to victim. Hence, the bottom line of *qisas* punishment is based upon equality and similarity.<sup>2</sup> In Pakistan, through the Criminal Law (Second Amendment) Ordinance 1990, the erstwhile law of homicide, based on common law, was amended in order to bring it in conformity with the injunctions of Islam as laid down in the Holy *Qur'an* and the *Sunnah* of Prophet Muhammad (p.b.u.h.). The Islamised law under section 302 of the Pakistan Penal Code, 1860 (PPC) categorises punishment of *qatl-i-amd*, i.e. premeditated murder, into two types. First category is punishment of death as *qisas* under clause (a) of section 302 PPC and for awarding *qisas* criterion of testimony is provided under section 304 PPC. Provisions of section 304 PPC deal with two alternate types of evidence - either there should be voluntary as well as true confession of accused or evidence should be there as required under Article 17 of the *Qanun-e Shahadat* Order, 1984. Second category of punishment under sub-sections 302 (b) and 302 (c) PPC is *ta'zir*. As *ta'zir*, under sub-section 302 (b) PPC, there are two alternative punishments - death or imprisonment for life. Further, *ta'zir* punishment as imprisonment up to twenty five years is provided under sub-section (c) of section 302 PPC where according to the injunctions of Islam *qisas* is not applicable. Since this paper is about death punishment of *qatl-i-amd* by way of *qisas* and execution thereof so it deals with few important and relevant questions. First, when on the basis of admission of accused courts can award death punishment as *qisas*? Secondly, are there any requirements for satisfying the test of *Tazkiyah-al-Shahood* under Pakistani law? Lastly, whether mode of execution of death punishment passed under section 302 (a) PPC as *qisas* is different from the

mode of execution of death punishment awarded by way of *ta'zir* under section 302(b) PPC? There are some verses of the Holy *Qur'an* wherein law of *qisas* and has clearly been ordained.<sup>3</sup> Besides *Qur'anic* injunctions, narrations of the Prophet Muhammad (PBUH) add into and explain the law of *qisas*. Opinions of Muslim jurists relating to law of *qisas* differ on various aspects and to avoid contradictions under the Constitution of Islamic Republic of Pakistan, 1973 the term 'injunctions of Islam' was limited to two sources of Islamic law, i.e. the Holy *Qur'an* and the *Sunnah*. The offence of *qatl-i-amd* is punishable with death as *qisas* under section 302 (a) of the Pakistan Penal Code, 1860. As it is required under section 304 PPC that death punishment as *qisas* can only be awarded when there is either voluntary confession of accused or ocular evidence of witnesses as provided under article 17 of the *Qanun-e Shahadat* Order, 1984.

#### **Death Punishment as *Qisas* on the Basis of Confession**

Confession is a statement of accused wherein he admits his offence with his free will before a competent court of law. The Code of Criminal Procedure, 1898 provides various opportunities to an accused for recording his narrative.

At any of such stages accused has option to admit his guilt. In many cases term 'confession of accused' itself was understood by courts differently. One of the reasons of inconsistent decisions on the meaning of confession might be the ambiguity of law. It also added fuel to the fire when, in aid of power reposed to judges by legislature under section 338-F PPC, courts tried to seek guidance from injunctions of Islam as laid down in the holy *Qur'an* and the *Sunnah* of Prophet Muhammad (p.b.u.h.) for interpretation and application of *qisas* and *diyat* law. After promulgation of the Ordinance, 1990 trial courts in cases of *qatl-i-amd* frequently convicted offenders under section 302 (a) PPC and punished them with death by way of *qisas* on the basis of their confession.

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Intriguingly, trial courts had equated different statements of accused persons with confession hence convicted and punished them under section 302 (a) PPC. In many cases admission of accused about his offence recorded under sections 164 and 364 Cr.PC was made basis of conviction under section 302 (a) PPC and punishment of death as *qisas*. Nonetheless the higher judiciary in some cases did not agree with trial courts' decisions of such conviction and sentence even confessional statement was voluntary and free from all sorts of illegalities only due to subsequent retraction by accused during trial.<sup>4</sup> On the other hand, in exceptional cases, despite subsequent retraction from confession conviction under section 302(a) PPC and sentence of death as *qisas* on the basis of confession was maintained by all forums till the apex court.<sup>5</sup> Recently, for recording judicial confession a three member bench of the apex court in a case of kidnapping for ransom and *qatl-i-amd* observed that a Magistrate must follow all precautions laid down in the Lahore High Court Rules and Orders otherwise confession recorded by him will be of no legal effect.<sup>6</sup> Subsequently, another bench of the apex court of Pakistan, numerically of equal strength, in another case provided a list of requirements of recording judicial confession of accused and the bench as per their considered view observed that confessional statement whether recorded before the court of Magistrate or in front of trial court should not be on oath and for recording confessional statement safeguards of section 364 Cr.PC and procedure provided under High Court Rules and Orders must be followed.<sup>7</sup>

Similarly, pleading guilty by accused at the stage of framing formal charge was taken in some cases equivalent to confession. Trial courts convicted accused under section 302 (a) PPC and sentenced to death as *qisas* but appellate courts discouraged such practice.<sup>8</sup> As it has been mentioned

before that during trial of a criminal case when prosecution closes its evidence, accused under section 342 Cr.PC is given an opportunity to explain circumstances mentioned in prosecution evidence. After enforcement of the Ordinance, 1990, trial courts in various murder cases had taken statement of accused under section 342 Cr.PC at par with confessional statement and on the basis of such statement punished him to death as *qisas* under section 302 (a) PPC.<sup>9</sup> For instance, in the case of *Abdul Waheed*<sup>10</sup>, a three member bench of the Supreme Appellate Court heard an appeal from the decision of Special Court of Speedy Trials.<sup>11</sup> Before trial court, accused in his statement under section 342 Cr.PC took defence of sudden and grave provocation for he saw deceased and his sister in compromising position. Trial court, despite admission of accused in his statements under section 342 Cr.PC and under section 340 Cr.PC sentenced him under section 302(c) PPC, due to his defence of family honour and provocation. On appeal, appellate court observed, on the basis of *Gul Hasan Khan's* case<sup>12</sup>, that ground of provocation, of sudden as well as grave nature, is not an exception *per se* unless offence of *Zina* is proved by accused. Therefore, appellate court altered conviction to section 302 (a) PPC due to his confession and punished him with death as *qisas*. However, decision of this case was not followed in the case of *Ali Muhammad* wherein a single member bench of the Lahore High Court disposed of a criminal appeal of a murder case.<sup>13</sup> In this case accused could not prove his defence before the court even then he was given advantage of his defence unlike case of *Abdul Waheed*. On the other hand, in a triple murder case, trial court convicted and sentenced one of the accused persons with death as *qisas* under section 302(a) PPC.<sup>14</sup> All accused persons denied their guilt except Taj Muhammad, i.e. the appellant, who admitted his involvement in his statement under section 342 Cr.PC. But he, in his statement, stated that he had slapped

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Muhammad Yousaf, a prosecution witness, a day prior to the occurrence on a dispute of changing flow of irrigation water and complainant party including deceased, in order to take revenge, appeared at his residence; attacked on his family members; injured his wife who succumbed to injuries later and also injured his daughter. Trial court rejected defence version, accepted version of complainant party so convicted and sentenced accused Taj Muhammad with death as *qisas*, most probably due to admission on his part in his statement made under section 342 Cr.PC and prosecution evidence. On appeal the High Court held that offence of murder of three persons was not proved as required under the provisions of section 304 PPC so conviction and sentence was altered to under section 302(b) PPC. Again in the case of *Muhammad Nawaz* trial judge, after recording two different versions, accepted defence version correct and due to admission of accused in his statement under section 342 Cr.PC awarded him death sentence as *qisas*.<sup>15</sup> Trial court relied upon incriminating part of defence version while rejected plea of provocation. On appeal, court focused on the other part of defence of accused wherein he took plea that when he found deceased and his wife in objectionable position so he under grave and sudden provocation caused injuries to him. So, a division bench of the Lahore High Court altered sentence of death as *qisas* under section 302(a) PPC to sentence of seven years' rigorous imprisonment under section 302(c) PPC and observed that accused could not be sentenced to death as *qisas* for few reasons. First, that plea or defence of accused in his statement under section 342 Cr.PC did not amount to voluntary confession; secondly, evidence of case was not processed through the test of *Tazkiyah-al-Shahood* and third that deceased was not *masoom-ud-dam* as he was found engaged in an indecent act with the wife of accused. In the case of *Pervaiz alia Paiji*,<sup>16</sup>

accused was convicted under section 302 (a) PPC and sentenced with death as *qisas* on the basis of ocular evidence and Post Mortem Report. Accused during investigation and in his statement under section 342 Cr.PC took defence of grave and sudden provocation as his sister was under a danger of being outraged by the deceased. Appellate court accepted statement of accused under section 342 Cr.PC to be correct and relying on the precedent of *Ali Muhammad* case<sup>17</sup> convicted accused under section 302(c) PPC and punished him with ten years' rigorous imprisonment. Importantly, there was no proof of the defence plea of accused except his statement under section 342 Cr.PC. Similarly, the Lahore High Court in *Imam Bukhsh vs. The State*<sup>18</sup>, without referring any precedent case, had altered conviction and sentence of a convict in double murder case from section 302 (a) PPC to section 302 (c) PPC. Trial court on the basis of statement of accused before police during investigation, statement under section 342 Cr.PC and statement under section 340 (2) Cr.PC convicted him under section 302 (a) PPC and punished him with death as *qisas*. In his defence, accused took plea that when he saw both deceased persons in compromising position; he under sudden and grave provocation killed both. The High Court was not willing to consider statements of accused as confession therefore, taking his defence as a mitigating circumstance altered conviction and sentence. Again, in the case of *Talib Hussain vs The State*<sup>19</sup> accused was convicted under section 302 (a) PPC on the basis of his statement under section 342 Cr.PC and ocular evidence. In his statement under section 342 Cr.PC he took plea of self-defence as in his presence deceased was strangulating his father. Had he not given deceased a blow of stick he would have killed his father. The appellant gave no statement on oath under section 340 (2) Cr.PC. However, he produced a defence witness who deposed in his favour and supported the plea raised by the appellant. The

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High Court accepted appeal by reducing punishment from death as *qisas* under section 302 (a) PPC to ten years' rigorous imprisonment under section 302 (c) PPC for the reason that offence was committed unintentionally and appellant did not repeat blow of stick and occurrence took place at the spur of moment.

The controversy in the precedent cases was finally settled in the case of *Abdus Salam*<sup>20</sup> wherein accused admitted murder of his mother in his statement under section 342 Cr.PC before trial court. He also submitted his offence in his written arguments before trial court but he took defence that he was under grave cum sudden provocation and under the influence of drug. Close relatives of accused including father, sister and sister in law also deposed against him as prosecution witnesses. So Sessions Judge, Quetta convicted accused under section 302 (a) PPC, punished him with death as *qisas* and held that he be hanged by neck till he be dead. The High Court Balochistan also confirmed murder reference under section 374 Cr.PC. For considering some important questions a three member bench of the apex court recommended constitution of a larger bench to answer those questions. A larger bench of the Supreme Court on the point of value of statement of accused under section 342 Cr.PC observed that such statement does not amount to confession and evidence of prosecution was also not subjected to *Tazkiyah-al Shahood* as required under section 304 PPC so conviction under section 302 (b) PPC was required to be recorded rather under section 302 (a) PPC. Regarding punishment of accused it was held by the Supreme Court, in the light of evidence recorded, that both lower courts rightly punished accused with death. Law settled by a larger bench of the apex court in this case was followed in subsequent cases<sup>21</sup> and punishment of death as *qisas* under section



302 (a) PPC on the basis of statement of accused was altered.

In some cases even despite statement on oath the sentence of *qisas* was altered. For instance, in the case of *Nazir Ahmad*,<sup>22</sup> accused confessed his guilt of committing murder of his real brother and burying his dead body in courtyard of his house. His confession was made at three stages; first when charge was framed; secondly in his statement under section 342 Cr.PC and thirdly when in his statement on oath. Trial court convicted him and sentenced him to death as *qisas* under section 302 (a) PPC. However, in appeal the High Court substituted conviction to section 302 (c) PPC and sentenced accused with ten years' rigorous imprisonment for the reasons that it was a pre-planned murder. Similarly, in the case of *Pehlwan*, accused was charged for murders of his wife and her paramour.<sup>23</sup> In his statement under section 342 Cr.PC, accused admitted murder but took defence of sudden and grave provocation as he saw both of them in compromising position. Trial court on the basis of statement of accused sentenced him to death as *qisas*. On appeal, High Court did not consider it just to maintain his conviction and sentence due to his statement in absence of any substantive evidence. Consequently, his conviction was altered under section 302 (c) PPC and he was sentenced with twenty-five years' rigorous imprisonment. In the case of *Shera Masih*<sup>24</sup>, four persons were charged for the offence of murder and two of them admitted their guilt in their statements under section 342 Cr.PC but took plea of self-defence. Trial Court convicted *Shera Masih* under section 302 (a) PPC and sentenced him to death as *qisas*. A division bench of the High Court confirmed his conviction and maintained sentence. However, a three member bench of the apex court held that since accused appellants did not substantiate their plea of self-defence with evidence so their admission corroborates the version of prosecution case. The Supreme Court gave very strange decision while

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disposing of appeal by convicting and awarding *Shera Masih* sentence of life imprisonment without mentioning any reasons and justifications.

**Requirements of Testimony of Witnesses Qualifying the Test of *Tazkiyah-al-Shahood***

If there is no true and voluntary confession of accused even then on the basis of deposition of a witness qualifying the requirements of test of *Tazkiyah-al-Shahood* or purgation of witness as a proof of *qatl-i-amd* accused could be held liable to punishment of death as *qisas*. Procedural requirements and criterion of *Tazkiyah-al-Shahood* for a witness competent to depose in a case of *qatl-i-amd* for awarding punishment of death as *qisas* are not given by legislature under the Code of Criminal Procedure, 1898 and the *Qanun-e Shahadat* Order, 1984. So trial courts at district level were handicapped to examine a witness for determining his competence according to the test of *Tazkiyah-al-Shahood*. Resultantly, murder cases were being disposed of by trial courts haphazardly mere relying on arguments of counsels of parties and wisdom of judges. However, the Supreme Court of Pakistan as well as the Federal Shariat Court, in few cases relating to *hudood* offences tried to provide a guideline in this regarding pre-requisites of test of *Tazkiyah-al-Shahood* as required under *Hudood* laws, under section 304 PPC and under Article 17 of the *Qanun-e Shahadat* Order, 1984. First case on the subject is the case of *Ghulam Ali*<sup>25</sup> wherein the Shariat Appellate Bench of four members of the Supreme Court of Pakistan under the chairmanship of Justice Muhammad Afzal Zullah, discussed *Tazkiyah-al-Shahood* in a considerable detail. In this case the apex court identified the requirements of *Tazkiyah-al-Shahood* including open and secret modes of enquiry about truthfulness of witnesses, presence of *muzakki*<sup>26</sup>, i.e. a referee or the person who gives

evidence about truthfulness of a witness in court; questioning *muzakki* about his antecedents and character; conducting enquiry in *hadd* cases as condition precedent; framing a questionnaire by court for collecting information through *Muzakki* and examination of *Muzzaki* by court when he submits report. The concept of *Tazkiyah-al-Shahood* was subsequently discussed in the cases of *Mumtaz Ahmad*<sup>27</sup> and *Sanaullah*<sup>28</sup>. In *Sanaullah's* case Justice Tanzil-ur-Rahman authored the judgment and observed that judges of subordinate courts were not well aware of the requirements of *Tazkiyah-al-Shahood*.<sup>29</sup> Moreover, the word '*Tazkiyah*' was defined as follows:

“*Tazkiyah* means the mode of enquiry conducted by the Court in order to ascertain whether the evidence of the witness is accepted or not and for the purpose of declaring a witness [*adil*] (bearing good moral character) or *Ghair Adil*. Actually, *Tazkiyah* is the responsibility of the Court so that the *Qazi* may protect himself from the evidence of [*fasiq*] a sinful person.”<sup>30</sup>

Another important case of this category is *Amjad Javed vs. The State*<sup>31</sup> wherein the Supreme Court regarding *Tazkiyah-al-Shahood* relying on *Mumtaz Ahmad's* case further clarified the need of *Tazkiyah-al-Shahood* by observing that the test must be observed by courts in *hudood* and *qisas* cases whether any party objects credibility of any witness or not. But in other criminal cases it might be observed at the end of evidence or at appellate stage but when any of the parties of a criminal case questions the credibility of witness then *Tazkiyah-al-Shahood* becomes necessary.<sup>32</sup> The *ratio decidendi* of above discussed cases on the requirements of *Tazkiyah-al-Shahood* was followed in numerous subsequent cases.<sup>33</sup> Law settled in these cases has become the precedent law of Pakistan but in practice conducting enquiry or

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exercise of *Tazkiyah-al-Shahood* for determining veracity of a witness has never been observed by subordinate judiciary in cases of *qatl-i-amd*. Rather, presiding officers of trial courts, in murder cases, without exercising *Tazkiyah-al-Shahood* on witness record evidence. Other reason for not observing the test of *Tazkiyah-al-Shahood* in cases of *qatl-i-amd* might be that in absence of procedural law it would not be possible for trial courts to follow the guideline given in above discussed cases for observing test of *Tazkiyah-al-Shahood*.

### Sentence of Death as *Qisas* on the Basis of Ocular Evidence

Observance of test of *Tazkiyah-al-Shahood* in compliance with the provisions of section 304 PPC and article 17 QSO was quite confusing for criminal courts while trying cases of *qatl-i-amd* and *hudood*. However, few of such confusions were tried to be resolved by judiciary. For instance, in *Muddasar alias Jimmi's* case a bench of two judges of the apex court of Pakistan discussed the newly enacted law when a trial court failed to mention specifically that under what subsection of section 302 PPC accused was convicted and sentenced.<sup>34</sup> It was also held that if evidence fulfils criterion mentioned under section 304 PPC then accused might be convicted and sentence under section 302 (a) PPC but if not so then he might be convicted and punished to death under clause (b) of section 302 PPC by way of *ta'zir* or imprisonment for life. Similarly, in *Abdus Salam vs. The State*,<sup>35</sup> a three member bench of the Supreme Court recommended constitution of a larger bench for answering three questions. First, where *qatl-i-amd* cannot be punished as *qisas* under section 302 (a) PPC, is there any bar in awarding punishment of death under section 302 (b) PPC? Secondly, what is the standard of proof required under section 304 PPC for awarding punishment

of death as *qisas* under section 302 (a) PPC? Thirdly, what distinctive standard of proof would be required and guiding principles should be followed for awarding punishment of *ta'zir* under section 302 (b) PPC? Interestingly, the larger bench of the Supreme Court did not answer these questions in detail. However, in answer to first question it was observed that where punishment could not be awarded as *qisas* alternatively sentence under section 302 (b) as *ta'zir* can be awarded. In its answer to second question, the bench just approved its decision given in *Manzoor's* case.<sup>36</sup> However, the bench in its answer to the third question nowhere mentioned any distinctive standards or guiding principles for awarding punishment of death as *ta'zir* under section 302 (b) PPC except that normal sentence under section 302 (b) PPC is death and lesser sentence could only be awarded when there involves any of the mitigating circumstances.

After promulgation of Criminal Law (Amendment) Ordinance, 1990, in numerous murder cases trial courts recorded conviction for *qatl-i-amd* under section 302 (a) PPC where offence was proved by evidence other than confession of accused. Trial courts, however, while recording conviction under section 302 (a) PPC miserably failed to comply with the requirements of section 304 PPC and article 17 QSO. The ambiguities of law resulted into contradictory decisions of judiciary in cases of *qatl-i-amd*. There are only few reported cases wherein death sentence awarded under section 302 (a) PPC by trial court was maintained by appellate courts. The case of *Muhammad Yaqoob* is the first case of this category<sup>37</sup> wherein a three member bench of the Federal Shariat Court maintained the sentence of death under section 302 (a) PPC for *qatl-i-amd* awarded by trial court. Second case of this category is a double murder case of *Waris Shah* where three accused persons were nominated.<sup>38</sup> All accused professed innocence at the stage of framing charge.

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They stated that a false FIR was lodged against them and false evidence was fabricated. On conclusion of trial, all accused were convicted for *qatl-i-amd* under section 302(a) /34 PPC and were sentenced to death as *qisas*. The High Court on appeal neither discussed relevant law nor evaluated evidence recorded in trial and merely confirmed reference under section 374 Cr.PC and dismissed appeal by holding that case against appellants was proved beyond reasonable doubt. Third mind boggling decision of this category was given by the Lahore High Court in the case of *Nazir*.<sup>39</sup> In this case five accused were tried for committing murder of two persons on 12-02-1991 within a police station or immediately outside the police station, district Chiniot. Trial court on conclusion of trial acquitted four persons and convicted accused *Nazir* under section 302 PPC and punished him with death for committing both murders. Trial court in its decision did not mention the exact part of section 302 PPC for the conviction and sentence of accused. On appeal, the High Court without considering criterion of evidence as required under section 304 PPC clarified that conviction of accused due to brutal nature of offence fall under section 302 (a) PPC and his sentence was death by way of *qisas*. Importantly, no precedent case was relied upon by the High Court. Similarly, a fourth strange decision was given by the Lahore High Court in the case of *Muhammad Khan*<sup>40</sup> wherein trial court convicted accused under section 302(a) PPC and sentenced him to death as *qisas* on the basis of ocular and medical evidence. Witnesses were not subjected to the test of purgation. The High Court did not cite any precedent case on the subject. Even without discussing and observing provisions of section 304 PPC and Article 17 of the *Qanun-e Shahadat* Order, 1984 appellate court maintained conviction and punishment under section 302(a) PPC as *qisas*. In a fifth case, the apex court

had declined the leave to appeal of *Khalid Mehmood*<sup>41</sup> who sought leave by filing a petition under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973 challenging the judgment of the Lahore High Court, Rawalpindi Bench. The High Court maintained conviction of accused under section 302(a) PPC and confirmed sentence of death by way of *qisas*. There was no confession on the part of accused. However, in his statement under section 342 Cr.PC, he admitted murder but took defence of sudden and grave provocation when the deceased had called his name as a son of bitch. Before the apex court, counsel for accused alleged that proof of *qatl-i-amd* as required under section 304 PPC is absent so sentence of death as *qisas* is not justified. But the Supreme Court did not take notice of conviction in the light of requirement of proof of *qatl-i-amd* under section 304 PPC for awarding sentence of *qisas*. Even no precedent case law was referred or relied upon. Sixth milestone case of this category is *Nadeem vs. The State*<sup>42</sup> wherein victim was a seven years' old boy. Trial judge convicted accused on the basis of circumstantial evidence of well-connected and unbroken chain of events for offences of sodomy under section 12 of the *Zina* Ordinance, under section 377 PPC and for *qatl-i-amd* under section 302 (a) PPC. For *qatl-i-amd* accused was sentenced to death by way of *qisas* and there was no confession on the part of accused. He even refused his involvement under his statement under section 342 Cr.PC. The bench miserably failed to evaluate the quality of ocular evidence as required under section 304 PPC for awarding sentence of death by way of *qisas* and blindly confirmed conviction and death sentence under section 302 (a) PPC. Moreover, no case law was cited in judgment to justify the decision. Similarly, in the case of *Muhammad Ijaz* a three member bench of the Supreme Court of Pakistan dismissed leave to appeal.<sup>43</sup> In this case trial court convicted and sentenced accused under section 302 (a) PPC.

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On appeal, High Court confirmed murder reference and dismissed appeal. Interestingly, in the judgment of the apex court it was nowhere mentioned that whether High Court maintained conviction under section 302 (a) PPC or altered it under section 302(b) PPC. Another case of this category is Javed Iqbal's case who allegedly murdered one hundred children. He was convicted and sentenced by trial court under section 302 (a) PPC but before the execution of punishment of death as *qisas* he committed suicide.<sup>44</sup>

In numerous murder cases conviction and sentence awarded by trial courts under section 302 (a) PPC was substituted to conviction under section 302 (b) PPC and sentence of death as *ta'zir* for the reason of failure of courts exercising test of *Tazkiyah-al-Shahood* on witnesses.<sup>45</sup> Similarly, hundreds of decisions of trial courts of murder cases are there wherein accused was convicted and punished with death as *qisas* under section 302 (a) PPC on the basis of evidence of witnesses when assailed through appeals, conviction was altered to section 302 (b) PPC for the reason that requirements of the test of *Tazkiyah-al-Shahood* were not fulfilled. However, lesser punishment of imprisonment for life under section 302 (b) PPC was awarded due to involving some extenuating circumstance.<sup>46</sup> However, in some cases weak and vague justification was given by courts for awarding lesser sentence under section 302 (b) PPC. For instance, in *Noor Khan's* case<sup>47</sup> in the opinion of bench by awarding life imprisonment ends of justice would meet. Similarly, in *Muhammad Fayyaz vs. The State*<sup>48</sup> life imprisonment was awarded for the reasons that both parties had suppressed actual facts of the incident and that something must have happened between the parties compelling accused to do away with the deceased which was not brought on record. In the case of *Riasta alias Nanha*<sup>49</sup>, for the reasons of single shot, no previous enmity and motive



not proved, the High Court took lenient view and awarded punishment of life imprisonment. Another strange decision in the case of *Mahboob alias Booba*<sup>50</sup> is noted where the High Court observed that there was something behind the incident which both parties had, in fact, concealed from the court and due to concealment from both sides lenient view was taken and accused was sentenced to life imprisonment. Settled law that some extenuating circumstance justifies lenient view of punishment under section 302 (b) PPC is followed as precedent. However, extenuating circumstance had to identify by courts like sudden provocation and humiliation at public place<sup>51</sup>, using filthy language<sup>52</sup>, failing to prove alleged motive<sup>53</sup>, fire-arm injury not direct cause and death might have caused due to doctor's negligence<sup>54</sup> an unintended murder occurred after exchange of hot words between parties and accused followed a direction of his father to kill the deceased<sup>55</sup> sudden and unintended murder<sup>56</sup>, minority of accused<sup>57</sup> and many doubts in prosecution evidence<sup>58</sup>. In rare cases conviction and punishment awarded by trial court to accused in murder cases were altered to conviction and sentence under section 302 (c) PPC where maximum possible sentence is twenty-five years' imprisonment.<sup>59</sup> Last category of precedent cases on the topic is of those cases where conviction and sentence under section 302 (a) PPC were altered to acquittal by court of appeal.<sup>60</sup>

### **Law of Execution of Punishment of Death**

According to the provisions of section 368 of the Code of Criminal Procedure, 1898 hanging is the only legal method of execution of death punishment in Pakistan. Provisions of section 368 of the Code require the trial court that while giving judgment it must state that the convict be hanged by the neck till he is dead. These provisions do not create any difference between execution of death punishment either awarded by way of *qisas* or *ta'zir*.

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However, after promulgation of the *Qisas and Diyat Ordinance, 1990* discretionary power of giving direction about the manner of execution of death punishment as *qisas* was given to courts under section 314 PPC but courts in cases of *qatl-i-amd* rarely exercised the power. Moreover, chapter 14 of the Rules of the Superintendence and Management of Prisons in Pakistan, 1978 discuss in detail the procedure of treating persons condemned to death inside jails, their look after and execution of death punishment. Rules 361, 362 and 363 relate to the procedure of execution of death punishment and under these rules only method of execution of death punishment is hanging. Any person who is *wali*, i.e. legal heir, of the deceased has right to witness execution of death punishment of the convict. However, spectators who are respectable and male of twelve years of age may be permitted by the Superintendent of jail to witness such execution.<sup>61</sup> Though under section 314 PPC it is provided that the court has discretion to give direction to a state functionary about execution of death as *qisas* in cases of *qatl-i-amd* but in practice no other method of execution is adopted yet.<sup>62</sup> This point was also discussed by the apex court in *Zahid Rehman's* case wherein justice Dost Muhammad Khan was of the view that execution of death sentence in Pakistan is carried out in old fashion by hanging the offender on the gallows through his neck and no different method of execution of death punishment of *qisas* was there under the law.<sup>63</sup> Interestingly, in his judgment justice Dost Muhammad Khan suggested the government to amend section 302 (b) PPC for omitting therefrom punishment of death as *ta'zir* by keeping sole punishment of life imprisonment. Ironically, instead suggesting government to establish a functionary for the proper implementation of provisions of section 314 PPC for ensuring execution of death as *qisas*, the judge suggested

erosion of death punishment as *ta'zir* from section 302 (b) PPC.

### **Conclusion**

For eradicating the inconsistency of mode of execution of death punishment, awarded by way of *qisas* under section 302 (a) PPC, with the injunctions of Islam it is suggested that the mode of execution of death punishment by way of *qisas* awarded under section 302 (a) PPC should be different from that of *ta'zir* awarded under section 302 (b) PPC and it is necessary to amend the relevant provisions of section 368 Cr.PC and the Rules of the Superintendence and Management of Prisons in Pakistan, 1978 because until and unless a different mode of execution of death punishment as *qisas* is introduced, the law will remain inconsistent with the injunctions of Islam. It is further recommended that the government must create a functionary as mentioned under section 314 PPC for assuring the execution of death penalty as *qisas* in the mode directed by the court.

### **References**

<sup>1</sup> Mohamed Mahfodz, *The Concept of Qisas in Islamic Law*; Islamic Studies (Islamabad) 21:2 (1982)

<sup>2</sup> The Principle of similarity was adopted only for the punishments of hurts by the Legislature under the interpretation clause (k) of section 299 PPC wherein term '*qisas*' is defined exclusively as "*qisas* means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed *qatl-i-amd* in exercise of the right of the victim or a *wali*." Importantly, the legislature avoided mentioning expression 'by causing his similar death' for punishment of death as *qisas*.

<sup>3</sup> These verses include Chapter II (*Al-Baqara*) Verses 178, 179 and 194; Chapter IV (*Al-*

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*Nisa*) Verses 29, 92 and 93; Chapter V (*Al-Ma'idah*) Verses 32, 33 and 45; Chapter VI (*Al-An'aam*) Verse 151; Chapter XVII (*Al-Bni Israel / Al-Israa*) Verses 31 & 33; and Chapter XXV (*Al-Furqan*) Verse 28.

<sup>4</sup>See *Muhammad Asif vs. The State*, 2000 YLR 1778 Peshawar, *Muhammad Ali alias Muhammad vs. The State*, 2006 MLD 802 Karachi and *The State vs. Abdul Ghayas*, 2008 MLD 74 Quetta.

<sup>5</sup> *Allah Bakhsh vs. The State*, PLD 2006 SC 441.

<sup>6</sup> *Azeem Khan and another vs. Mujahid Khan and others*, 2016 SCMR 274.

<sup>7</sup> *Muhammad Ismail vs. The State*, 2017 SCMR 713.

<sup>8</sup> See the cases of *Tariq Mehamood vs. The State*, 2000 PCr.LJ 837 Pesh and [*Khalil Ahmad vs. The State*, 2006 MLD 685 Kar., also reported as 2006 YLR 351 Kar].

<sup>9</sup> In *Nasir Mehmood and another vs. The State*, 2015 SCMR 423, a three member bench of the Supreme Court split on the point of evidentiary value of statement of accused.

<sup>10</sup> *The State vs. Abdul Waheed alias Waheed and another*, 1992 PCr.LJ 1596.

<sup>11</sup> Courts constituted under the Special Courts for Speedy Trials Ordinance (XXXVIII of 1991).

<sup>12</sup> PLD 1989 SC 633.

<sup>13</sup> *Ali Muhammad vs. The State*, 1993 PCr.LJ 557 Lah.

<sup>14</sup> *Taj Muhammad and two others vs. The State*, 1993, PCr.LJ 1025 SAC.

<sup>15</sup> *Muhammad Nawaz vs. The State*, 1994 MLD 1704 Lah.

<sup>16</sup> *Pervaiz alia Paiju vs. The State*, 1999 PCr.LJ 1915 Lah.

<sup>17</sup> *Ali Muhammad vs. Ali Muhammad and another*, PLD 1996 SC 274.

<sup>18</sup> *Imam Bukhsh vs. The State*, 1999 YLR 19 Lah.

<sup>19</sup> PLD 1994 Lah. 43.

<sup>20</sup> *Abdul Salam vs. The State*, 1997 SCMR 29. Originally, a jail appeal from the judgment of the High Court Balochistan was filed and it was heard by a three member bench of the Supreme Court comprising of Justice Saleem Akhar, Justice Manzoor Hussain and Justice Mir Hazar Khan Khoso. Three member bench, however, raised three important questions and recommended a larger bench to answer those question. A larger bench of five members pronounced its judgment, reported as *Abdus Salam vs. The State*, 2000 SCMR 338.

<sup>21</sup> For instance, *Riaz vs. The State*, 2005 YLR 1058 Lahore, *Muhammad Imran vs. The State*, 2008 YLR 1290 Lahore, *Akbar vs. The State*, 1997 PCr.LJ 1887 and *Mir Hazar vs. The State*, 2002 PCr.LJ 270 Quetta.

- <sup>22</sup> *Nazir Ahmad vs. The State*, 2010 MLD 1684 Lah.
- <sup>23</sup> *Pehlwan and another vs. The State*, PLD 2001 Quetta 88.
- <sup>24</sup> *Shera Masih and another vs. The State*, PLD 2002 SC 643.
- <sup>25</sup> *Ghulam Ali vs. The State*, PLD 1986 SC 741.
- <sup>26</sup> See *ibid*, at p. 755.
- <sup>27</sup> PLD 1990 FSC 38, also reported as 1991 PSC 450 FSC.
- <sup>28</sup> *Sanaullah vs. The State*, PLD 1991 FSC 186.
- <sup>29</sup> See *ibid*, at pp. 213, 214. The court observed “It seems that the learned Sessions Judge or the subordinate judiciary, as a whole, particularly the Sessions / Additional Sessions Judges who try *Hudood* cases know very little about the concept, scope and the essentials of *Tazkiyah-al-Shahood*.”
- <sup>30</sup> See *ibid*, at p. 214.
- <sup>31</sup> 2002 SCMR 1247.
- <sup>32</sup> See *ibid*, at p. 1251.
- <sup>33</sup> For instance, *Manzoor and others vs. The State*, 1992 SCMR 2037; *Muhammad Asif vs. The State*, 2000 YLR 1778 Pesh.
- <sup>34</sup> *Muddassar alias Jimmi vs. The State*, 1996 SCMR 3.
- <sup>35</sup> 2000 SCMR 338.
- <sup>36</sup> 1992 SCMR 2307.
- <sup>37</sup> 1998 PCr.LJ 638 FSC.
- <sup>38</sup> *Waris Shah vs. The State*, 1999 MLD 375 Lah.
- <sup>39</sup> *Nazir vs. The State*, 2000 YLR 2638 Lah.
- <sup>40</sup> *Muhammad Khan vs. The State*, 2001 YLR 612 Lah.
- <sup>41</sup> *Khalid Mehmood vs. The State*, 2003 SCMR 914.
- <sup>42</sup> 2005 PCr.LJ 1010.
- <sup>43</sup> *Muhammad Ijaz vs. The State*, 2008 SCMR 819. In *Muhammad Anwar*'s case and in the case of *Muhammad Ejaz*, Justice Faqir Muhammad Khokhar was a member of the bench. He wrote judgment in latter case but even then two different approaches were adopted.
- <sup>44</sup> Wasti Tahir, *The Application of Criminal Law in Pakistan*, Brill (2009) at p. 175.
- <sup>45</sup> For instance, *Hakim Inayat Ullah Khan vs. The State*, 1993 PCr.LJ 1138, SAC; *Mahmood vs. The State*, 1993 PCr.LJ 1047 SAC; *Zia Ullah alias Jaji vs. The State*, 1999 PCr.LJ 1821 FSC; *Murid Hussain vs. The State*, 2000 YLR 1315 Lahore; *Amjad Javed vs. The State*, 2002 SCMR 1247.
- <sup>46</sup> For instance, *Atif Shahbaz vs. The State*, 1999 PCr.LJ 365 Lah. *Faiz*

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*Muhammad vs. The State*, 1999 YLR 1398 Lahore and *Muhammad Yousaf vs. The State*, PLD 2000 Kar. 94.

<sup>47</sup> *Noor Khan vs. The State*, 2001 MLD 771 Lah.

<sup>48</sup> 2001 PCr.LJ 453 Quetta.

<sup>49</sup> *Riasta alias Nanha vs. The State*, 2003 PCr.LJ 331 Lah.

<sup>50</sup> *Mahboob alias Booba vs. The State*, 2003 PCr.LJ 1002 Lah.

<sup>51</sup> *Munawar Ali vs. The State*, 2004 YLR 2085 Kar.

<sup>52</sup> *Muhammad Nawaz vs. The State*, PLD 2005 SC 40.

<sup>53</sup> *Aurangzeb alias Rangu vs. The State*, 2006 YLR 2423 Lah.

<sup>54</sup> *Muhammad Ashraf vs. The State*, 2006 YLR 2652 Lah.

<sup>55</sup> *Ala-ud-Din vs. The State*, 2008 PCr.LJ 424 Lah.

<sup>56</sup> *Muhammad Rafique alias Mango vs. The State*, 2008 YLR 2549 Lah.

<sup>57</sup> *Sohail Sajid vs. The State*, 2009 SCMR 356.

<sup>58</sup> *Jan Muhammad alias Janoo vs. The State*, 2016 YLR 2359 Sindh.

<sup>59</sup> For example, *Ghulam Haider vs. The State*, 1996 PCr.LJ 2021 Lahore and *Muhammad Yasin vs. The State*, 1999 PCr.LJ 633 Kar.

<sup>60</sup> See, *Muhammad Iqbal vs. The State*, 1996 PCr.LJ 1740 Lahore; *Seva and three others vs. The State*, 1997 MLD 1252 Lahore; *Muhammad Amin vs. The State*, 2000 YLR 1150 Lahore and *Qasim and others vs. The State*, 2004 PCr.LJ 181 Kar.

<sup>61</sup> See Rule 364 of the Superintendence and Management of Prisons in Pakistan, 1978.

<sup>62</sup> Discretion power of courts under section 314 PPC had been sparingly exercised by courts. For instance, in the case of '*The State vs. Javed Iqbal*', accused who allegedly murdered one hundred children was tried for offences of *qatl-i-amd*. On conclusion of trial, judge convicted him under section 302 (a) PPC and punished him with death on one hundred counts and it was ordered that he should be strangled through iron chain, his dead body be cut into one hundred pieces and those pieces be put into a drum containing acid. Though accused was convicted and sentenced by trial court under section 302 (a) PPC and method of execution of *qisas* punishment was also given by trial court under section 314 PPC but before execution of punishment of death as *qisas* he committed suicide. See 'The Application of Criminal Law in Pakistan, Brill (2009) by Tahir Wasti, at p. 175.

Similarly, discretion of court under section 314 PPC was exercised by trial court in *Muhammad Asif vs. The State*, 2000 YLR 1778 Pesh.

<sup>63</sup> *Zahid Rehman vs. The State*, PLD 2015 SC 77 at p. 132.