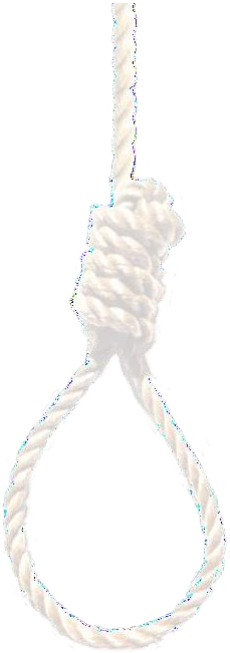
Handbook on

Murder Trial

(Revised Edition 2020)



Punjab Judicial Academy

Foreword

Punjab Judicial Academy is striving to impart training to the members of District Judiciary under the command of Honorable Chief Justice, Lahore High Court, Lahore.

Purpose and object is to improve the legal acumen and administrative qualities for expeditious disposal of cases and render judgments keeping in view the spirit of law.

The goal can only be achieved if concerted attempts are made to acquaint with the knowledge of law, procedural as well as substantive and precedents.

Conduct of murder trial is an important, delicate, privileged and responsible assignment delegated to Court of Sessions.

This revised edition of "Handbook on Murder Trial" has been compiled by Mr. Shazib Saeed District and Sessions Judge, keeping in view the common mistakes committed during the course of trial and recording judgments.

The book will surely enhance the capacity, legal knowledge of the Sessions Judges as well as Additional Sessions Judges and will be helpful to achieve the goal.

Hon'ble Mr. Justice® Mahmood Maqbool Bajwa

Review

The aim of this practical handbook is to explain the law and procedure relating to Murder Trial in a motion picture style so that the reader can master the subject in no time. All up-to-date relevant case law has been incorporated. It is very useful and indispensable publication brought out by the Punjab Judicial Academy, compiled by Mr. Shazib Saeed District and Sessions Judge. It would amply benefit the judiciary, public prosecutors, criminal lawyers and the police officers. The novel manner of treating the subject makes it easier to find out one's law on any point.

I have read the handbook with considerable care and am in a position to say that the Punjab Judicial Academy, as on the whole, acquitted very well indeed. Judicial authorities, having been stated in a clear, lucid and simple manners covering almost every point of the murder trial, can be found quickly.

Hon'ble Mr. Justice Faqir Muhammad Khokhar
Former Judge Supreme Court of Pakistan

Preface

Punjab Judicial Academy was established to impart pre-service and in-service training to Judicial Officers and staff of District Judiciary to illuminate their proficiency and skill. This practical handbook has been compiled by Mr. Shazib Saeed, District & Sessions Judge, in which all up-to-date relevant case law has been incorporated. This is the revised edition of first handbook prepared by the academy on Sessions Trial in 2017. It is one of the most useful and indispensable publications of Punjab Judicial Academy. It would equally be beneficial for the Judiciary, Public Prosecutors, Criminal Lawyers and Police Officials as it denotes the law and the procedure in eloquent manner for tackling different situation arising during a Murder Trial.

This handbook also provides reference solutions to the common problems usually faced by the Judges while dealing with Murder Trials.

I appreciate the efforts of the author of this valuable publication and at the same time welcome any feedback and comments.

Habib Ullah Amir
Director General, PJA,
January, 2020

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INTRODUCTION

"The instrument which our law presents to us for the ascertainment of truth or falsehood of a criminal charge is by trial. The trial is the process by which we endeavor to find out the truth"

Crompton J. in O Connel (1844) Ir.LR 312

This handbook is specially designed for guidance purposes to be used by Additional Sessions Judges for conducting murder trials keeping in view legal procedure and precedents. Judgments of Superior courts should be relied upon by the trial judges not merely to decorate their own judgments, but the principles laid down in the dicta of superior courts must be referred to for the better understanding of the written law and procedure to achieve the ends of justice. This handbook mainly provides quick references and solutions to the most common problems being faced by the Judges during course of murder trials. It is not a source of substantive law rather as provided earlier, the material has been collected and compiled from the celebrated judgments of Superior Courts. This book may also be used by magistrates to understand the matters pertaining to pre-reference proceedings, and their area of jurisdiction. The magistrates can also rely on the principles of procedural law discussed in this handbook as deduced by various judgments of Apex Courts, for their aid. It is expected that this book will enable the reader understand more accurately the true intention of legislature while applying the criminal procedural laws.

CHAPTER 1

COGNIZANCE

The word "cognizance" is a term of art implying application of judicial mind to the facts of the case in order to determine whether the facts disclosed constitute an offence.

Raja Khushbaktur Rehman V. State 1985 SCMR 1314

The question of jurisdiction is very important and fundamental in nature and if a forum has no jurisdiction, the same cannot be conferred upon it by consent of the parties. The question of jurisdiction is to be considered by the Court even though not raised by the parties. The court can enter into the question of competence of forum and to the extent of vires of section as held in ***PLD 1995 S.C 66.***

In ***2003 SCMR 472 and 1994 SCMR 717*** it was held that question of jurisdiction can be determined on the basis of FIR and other material produced by the prosecution at the time of presentation of the challan and the court on the basis of such material has to decide whether **cognizance** is to be taken or not. There may be instances where the jurisdiction of the court is ousted.

JURISDICTION IN CASES OF SERIOUS COERCION AGAINST PUBLIC SERVANT ETC.

When there is allegation of serious coercion, intimidation against public servant, police officers, army personnel, civil armed

forces or where any of such persons is murdered in performance of his official duty, then the jurisdiction of Special Court shall be attracted under section 6(1)(n) of Anti-Terrorism Act 1997.

JURISDICTION IN CASES INVOLVING ARMY PERSONNEL

In cases where the accused is army personnel, who has committed the offence of murder, seek guidance from ***PLD 2012 Lahore 194*.** It is a legal compulsion and settled legal law that as and when army person has committed a civil offence, the trial courts or the Magistrates are required to send reference under section 549 Cr.P.C. read with section 94 of the Pakistan Army Act, 1951 and if the prescribed officer formulates opinion for instituting a proceeding before Court Martial, then the ordinary criminal court would not be competent to try such army individual.

PROCEDURE WHEN COURT LACKS JURISDICTION TO HEAR THE CASE.

Pleas such as to jurisdiction and double jeopardy are preliminary and should be resolved before any further action is taken.

Akhter Ali Vs. Altaf-ur-Rehman PLD 1963 Lahore 390 FB

If at the time of taking cognizance, the court reaches a conclusion that jurisdiction is ousted then two options are available:

1. **Return the case to the prosecution or**
2. **Send reference** to the Sessions Judge for onward transmission to the court of competent jurisdiction.

While making reference always seek guidance from ***Fida Hussain case PLJ 2006 Lahore 1356***. In this case order of Sessions Judge referring case to the ATC court was challenged. The order was upheld.

REPORT UNDER SECTION 173 CR.P.C

After investigation, police submits challan against accused persons placing their names in different columns with different inks. Court takes cognizance of the case. If some of the accused persons are placed in column No.02 in red ink and the area magistrate has already issued non-bailable warrants and proclamation, the same must be available in the file with specific dates of proclamation. If 30 days mandatory period had already elapsed, and the proceedings are within the parameters of section 87 Cr.P.C, then there is no need to repeat the exercise. The court can adopt the proceedings of the area magistrate and may declare such accused persons as Proclaimed Offenders. Their case may be separated and the trial court may proceed against the rest of the accused persons.

ALL ACCUSED PERSONS IN COLUMN N0 02 IN RED INK

If all of the accused persons are placed in Column No.02 of report under section 173 Cr.P.C in red ink, then again the proceedings of magistrate falling within the parameters of section 87 Cr.P.C may be adopted or relied upon. The statements of material private

witnesses on priority basis should be recorded because in case of their subsequent non-availability, their secondary evidence cannot be recorded.

MAIN ACCUSED P.O AND CHALLAN AGAINST ACCUSED WITH ALLEGATION OF ABETMENT

If main accused is proclaimed offender and challan is submitted against an accused with role of abetment only, then his trial is non-proceed able. Reliance is placed on ***1986 P Cr. L J 2254*** wherein it was held that unless principal accused is prosecuted or convicted, the conviction of person sharing common intention/object, abettor, conspirator and vicariously liable was not possible under the law. Keeping in view this judgment, the case can be consigned till the arrest of main accused.

NAME OF THE ACCUSED NOT MENTIONED IN ANY OF THE COLUMN OF REPORT U/S 173 Cr.P.C.

If the name of accused is mentioned in the FIR and in the statements of witnesses but is neither written in any of columns of the report under section 173 Cr.P.C, nor are they declared as PO, in such a situation when their arrest is also required by the police, then seek guidance from ***PLD 2010 SC 585.*** It was held that for exercise of powers the magistrate should not act mechanically as he has to form an opinion whether it is a fit case to be sent up. In case of absconders shown in the challan, the magistrate is competent to issue process including warrant of arrest to procure their attendance as provided under section 204 Cr.P.C because magistrate has the

power to take cognizance in the matter. Further, evidence against the absconding accused may be recorded by the magistrate after declaring him absconder under section 512 Cr.P.C. It was held that magistrate has the power to initiate proceedings under section 87 and 88 Cr.P.C in a case triable by the Court of Sessions. If the proceedings under section 87 and 88 of the Code are completed at the level of magistrate before the case is sent up to the Court of Sessions, then the Sessions Court will be in a position to conduct the trial expeditiously and time consumed in issuing proclamation can be saved. It was also held that the magistrate should ensure that when a case is sent up to the Court of Sessions it should be complete in all respects enabling the Court of Sessions to start the trial immediately. If incomplete challan is sent up then the same can be sent back through Sessions Judge to the area magistrate with a direction to send up the same after completion of formalities.

SUMMONING ACCUSED IN COLUMN N0. 02

The accused persons of column N0. 2 of the report under section 173 Cr.P.C in blue ink may be summoned at the very initial stage, if sufficient incriminating material is available against them. It will be sheer wastage of time to commence trial without summoning them. If trial commences and charge is framed without summoning them, the witnesses appear and make statement against these accused then the whole exercise will be futile. In such a case

the accused will be summoned at that stage and proceedings will have to be conducted de-novo. However the accused discharged from the case during investigation should be summoned after framing of charge when some fresh incriminating material becomes available or is brought on record.

SUMMONING ACCUSED DISCHARGED DURING INVESTIGATION

Accused persons discharged during investigation may be summoned when some fresh incriminating evidence is recorded against them during trial. If the accused persons are placed in column no 2 or if they are discharged during investigation, they may be summoned to face trial. According to dictum laid down in ***2014 SCMR 1762*** those accused persons will submit bond under section 91 Cr.P.C. If warrants are issued against them to procure their attendance, then accused can file pre arrest bail application, if they choose, and that bail will be decided on merits of the case. Under section 204 Cr.P.C it is within the discretion of the court to issue summons even in warrant cases, therefore always issue summons at initial stage to procure the attendance of such accused persons.

The High Court Rules & Orders Vol. 3 Chap 24- B provides instructions for expeditious disposal of sessions cases. Sessions

Judges should reserve for each sessions case several days for trial, preferably in consultation with the prosecutor and the defense counsel. The trial of sessions cases must proceed from day to day and unless there are compelling reasons there should be no adjournment. To comply with this rule the trial court should not ordinarily take up the trial of another sessions case till the conclusion of the trial. It was held in ***2019 YLR 157*** that while dealing with a private compliant, at initial stage, court had only to see as to whether a prima facie case had been made out by the complainant for issuing further process in the matter or not. No detailed inquiry was warranted at such stage. In ***2019 PCr.LJ 665*** it was held that in certain cases, the court may summon only a few accused and refuse to summon certain other accused persons. Order passed under S. 203, Cr.P.C could not be held as autrefois or statutory acquittal. At the most, dismissal of the complaint as a whole or non-summoning of some of the persons complained against may have the effect of discharge.

Following are the grounds upon which a private complaint could be dismissed as a whole or to the extent of some persons on basis of it being frivolous, malicious and vexatious:

(i) Where the allegations made in the complaint, even if they were taken at their face value and accepted in their entirety, did not

prima facie constitute any offence or make out a case against the accused;

(ii) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same did not disclose the commission of any offence and make out a case against the accused;

(iii) Where the allegations made in the complaint were so absurd and inherently improbable on the basis of which no prudent person could ever reach a just conclusion that there was sufficient ground for proceeding against the accused;

(iv) Where there was an express legal bar engrafted in any of the provisions of the Criminal Procedure Code, 1898 ("the Code") or any other law (under which criminal proceedings were instituted) to the institution and continuance of the proceedings and/or where there was a specific provision in Cr.P.C. or the concerned Act providing efficacious redressal for the grievance of the aggrieved party;

(v) Where a criminal proceeding was manifestly tainted with mala fide and/or where the proceeding was maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge and it also had no sufficient material in support of allegations.

(vi) If the acts of accused or person complained against were protected by the Constitution or any other relevant law for the time being in force;

(vii) If the accused or person complained against discharged his legal duties and also obeyed the direction, command or order of his superior or any court, legal authority or tribunal.

(viii) Where the concerned court had fully satisfied itself after examining all material aspects that in all probability the complainant may not succeed in bringing charge home against the accused; and

(ix) Where the averments/contents of the complaints/allegations from any angle reflected the abuse of process of law.

CHAPTER 2

SUPPLY OF COPIES

Seven days before the framing of charge, the copies in terms of section 265-C Cr.P.C are to be supplied to the accused free of cost. Although, it is right of an accused yet the consent or waiver on the part of accused cannot cure the defect u/s 537 Cr.PC even though no prejudice is caused to him. The Federal Shariat Court has also in the case reported as ***Mst. Nusrat Mai and others vs. The State (1997 MLD 2879)*** held that the provisions of section 265-C Cr.PC are mandatory and non-compliance thereof vitiates the trial. In case of a private complaint, admitted for regular hearing, the copies in terms of section 265-C are to be filed within 03 days of the summoning order. The complaint, however, cannot be dismissed in case of failure to supply the copies. Moreover, the defence shall always have the right to ask for statement of any witness whose statement has been recorded in the shape of *DARYAFT or in Boiled shape*. Seek guidance from ***PLD 2003 Lahore 290(FB) and PLD 2017 Lahore 228*** wherein it is held that statements of all the persons examined by the police in connection with the case were to be supplied irrespective of the fact whether they had or had not been cited by the prosecution as witnesses and it was immaterial whether the investigating officer did or did not choose to say that he was recording the statement under section 161 Cr.P.C. Accused could not

be deprived of his right of having access to statements made by witnesses before police on hyper technicality that the I.O did not describe them as the statements under section 161 Cr.P.C.

ACCUSED REPRESENTED BY A COUNSEL

Before framing of charge always ensure that accused has engaged a counsel of his choice. If due to poverty or other reasons, accused cannot engage a counsel then the court has to appoint a counsel at state expense (section 340(1) Cr.P.C). Concept of fair trial includes the right of an accused person to be defended by a counsel of his own choice, if he can afford one.Right of counsel has been recognized under Article 10(1) of Constitution of Pakistan 1973. When this is an established right of an accused to be defended by counsel of his own choice, the court cannot impose an advocate upon the accused. Also, see Chapter 24C, High Court Rules and Orders Vol.III.

CHAPTER 3

FRAMING OF CHARGE

Every charge shall state the offence with which the accused is discharged (sec 221Cr.P.C). The law and the section of law against which the offence is said to have been committed shall be mentioned in the charge.

In case of separate offences, always frame charge in different heads. If charge is framed in major offence the conviction can be passed in minor offence but not vice versa.

In cases, where the deceased is a woman, always carefully peruse the post mortem report to see whether the deceased was pregnant or not. Seek guidance from ***2015 MLD 795.*** It is a DB case, wherein at the time of death, the deceased lady was pregnant by 28 weeks. While framing of charge, this fact remained unattended by the trial court. Trial court convicted the accused under section 302(b) PPC for the death of the deceased lady but to the extent of death of unborn fetus of 28 weeks, the trial court convicted the accused under section 338-B PPC which defined **Isqat-i-Janain**. Trial court was directed to amend the charge of death of fetus and to decide the matter afresh.

Before framing charge of death of fetus, an important step is to declare the fetus as a *"person*". Without declaring the fetus as a

person, charge cannot be amended. One un-reported judgment of the Hon'ble Lahore High Court, Lahore is titled ***"Sharafat VS THE State Cr. Appeal N0 747/2010*** where in the same scenario the case was remanded with direction to amended charge, to summon the doctor to determine the cause of death of fetus and then to decide the case qua the death of fetus. In the said case, the lady was carrying fetus of 6/7 months in her womb at the time of her death. Similarly, if it evinces from record that there was a previous conviction, case should be taken in adding the relevant offences (sec. 265-I Cr.P.C).

If accused pleads guilty to the charge of murder, it is settled law to record evidence and decide the case on its own merits. Seek guidance from ***2015 YLR 1448.*** Despite there being no bar on accepting plea of guilt, conviction normally should not be based on admission of charge in cases punishable with death or imprisonment of life. It was held in ***2019 P.Cr.L.J 1064*** that separate charge for each offence had also not been framed as required by law, however, since failure to do so based on the peculiar facts and circumstances of the case did not cause any prejudice to the appellant, therefore, case was not remanded to trial court for reframing of the charge and re-recording of evidence. ***In 2019 PCr.L.J 521*** it was held that when the charge was defective, the entire evidence recorded on the basis of such charge was useless and was to be discarded.

CHAPTER 4

RECORDING OF PROSEUTION EVIDENCE

Only relevant, admissible and material evidence is to be recorded. Seek guidance from ***Vol 111 Ch.1-E Part E of Rules and Orders of the Lahore High Court***, Lahore. If any objection is raised as to the admissibility of any evidence, that should be decided forthwith. The objection and decision should be clearly recorded. Also recording the demeanor of a witness while examining him is very important as it affects the credibility of a witness. See ***Muhammad Amir Vs. Khan Bahadur PLD 1996 SC 267***, in support of section 363 Cr.P.C.

CONFRONTATIONS 162, CR.P.C,

The purpose of the statement recorded under section 161 Cr.P.C is that when any witness is called for the prosecution in such inquiryor trial whose statement has been reduced into writing the court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 140 of QSO 1984. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross

examination.

Article 140 Qanun-e-Shahadat Order, 1984 provides that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

In ***PLD 2013 Lahore 8,*** the same principle was applied. In this case during trial, accused produced defence witness who had appeared before police during investigation and his statement was also recorded under S.161 Cr.P.C. During cross-examination, complainant was not allowed to confront said defense witness with his statement recorded earlier by Investigating Officer during investigation.

Similarly if accused appeared on oath as his own witness under section 340 sub-section 2 of Cr.P.C and complainant asked for copy of his first version on the ground that accused is now witness and his statement recorded by I.O is his previous statement, the complainant or prosecutor cannot confront accused with his first version. Seek guidance from ***PLD 2016 Lahore 482***. It was held that

provision of sub-section 2 of section 340 Cr.P.C is beneficial and accused centric enabling him to meet with the prosecution case halfway if he so desires; his failure in the witness box to disprove the charge against him or dislodge the prosecution case would not entail additional adverse consequences as it does not absolve the prosecution to prove its case on its own. Law declared in case of ***Mst. Ameer Khatoon VS Faiz Ahmad and others PLD 1991 SC 787*** confirms the above proposition. Further held that it was a statement of accused in custody of police hit by Article 39 of QSO 1984. The same view has been taken in Indian Jurisdiction in case of ***Sandeep Raj Singh VS State of M.P 1997 (1) CCR 47.*** In Amir Shahzad case judgment of Lahore High Court ***2001 P.CR.L.J 698*** was also discussed and court regretted inability to subscribe to the view taken in the judgment.

Witnesses during cross examination cannot be confronted with anything stated in examination in chief because that examination in chief is being subjected to cross examination and can only qualify the status of statement after completion of cross examination. Confrontation is to bring on record anything omitted or added from his previous statement. Without being confronted defence cannot take advantage unless and until witness is provided opportunity to explain. It is also important to note that prosecution cannot confront the statement recorded under section 161 Cr.P.C to

its witnesses who turns hostile.

SUPPLIMENTARY STATEMENT

Supplementary statement of complainant has no evidentiary value in the eye of law and is inadmissible in evidence. In ***2013 YLR 1587*** it was held that subsequent statement of complainant was merely a statement made under S. 161, Cr.P.C. which had no value in eyes of law and could not be equated with the first version made in the crime report.

DEATH OF A WITNESS DURING SUBSEQUENT TRIAL.

Provision of section 512 Cr.P.C covers those cases in which it is proved that the accused has absconded and there is no immediate prospect of the accused being apprehended that the Court becomes legally competent to try the accused in absentia and proceed to record deposition of witnesses. Such statement, recorded in the absence of accused person can be used against the accused, on his arrest, in any inquiry or trial for the offence with which he is charged, if the witness is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience. Before invoking this section, the court has to be judicially satisfied about the grounds that the accused charged therein had in fact absconded and there is no prospect of his arrest in the near future. The purpose of section 512 of the Code of Criminal Procedure, therefore, is to preserve the recorded evidence against the

accused. Article 47 of the Qanun-e-Shahadat Order, 1984 provides:-

> "**Relevancy of certain evidence for proving in subsequent proceeding, the truth of' facts therein stated**.- Evidence, given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the advance party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:
>
> Provided that the proceeding was between the same parties or their representatives-in- interest; the adverse party in the first proceeding had the right and opportunity to cross- examine; the question in issue were substantially the same in the first as in the second proceeding.
>
> Explanation.- A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this Article."

It is, therefore, abundantly clear that this provision refers to

another exception to the general rule as to the inadmissibility of indirect evidence. In ***2006 P.Cr.L.J 1436*** the provisions of section 512 Cr.P.C was exhaustively dealt with and held:-

> "Section 512, Cr.P.C. is meant for preservation of evidence for eventuality where statutory protection is given to deposition of such witnesses who may not be alive at the time when accused appear for trial or they have become incapable of giving evidence or their attendance cannot be procured without an amount of delay, expense or inconvenience. Section 512, Cr.P.C. has no nexus with taking of cognizance but it proceeds on its independent existence."

Section 512, Cr.P.C. appears under Chapter XLI of the Code which pertains **"Special rules of evidence".** This chapter comprises of four sections in all and it refers to certain exemptions and exceptions i-e under section 510, Cr.P.C. reports by certain examiners including Fire-arm Expert, Serologist and Finger Print Expert have been made admissible without expert being examined. Next is an exception which is under section 512, Cr.P.C. Section 512 Cr.P.C proceeds on its independent existence. Reliance can be placed on ***PLD 1997 Karachi 146*** wherein it was held that Article 47 of the QSO 1984 prescribes the conditions under which secondary evidence of the testimony of a witness in the former proceedings, civil or criminal, is admissible in subsequent

proceedings or in the later stage of the same proceedings is identical and where the witness is dead or cannot be found or is incapable of giving evidence but subject to certain conditions mentioned in the Article 47 QSO 1984. The second judgment on this point is ***2007 YLR 1046*** wherein it was held that statement of the complainant though was recorded in the absence of the accused but the same was subjected to cross examination by the acquitted co-accused. Such statement was duly transferred to the record of the present case and was relevant under Article 47 of QSO 1984. The statements of such witnesses are to be transferred, numbered accordingly and to be appreciated.

RE-EXAMINATION OF WITNESSES

It is also a settled principle of law that no witness should be summoned or re-examined merely to fill in the lacuna by either of the party viz. the prosecution or the defence. Reliance in this regard is placed on the cases of ***Saifullah Vs. The State 1994 PCr.LJ 1499 and Syed Hassan Abbas Rizvi v. The State 1993 PCr.LJ 1630***.

If such power is exercised as a routine, it would tantamount to open floodgates where the parties may start re-examining their witnesses to fill in lacunas in their evidence. Reliance in this regard

is placed on the cases of Rashid Ahmad v. Ibrahim and another ***1996 PCr.L.J 1439, Khalid Nawaz and another Vs. State 1995 PCr.LJ 1932, Abbas and another Vs. State 2003 PCr.LJ 624 and Tanveer Shahzad Vs. State 2003 PCr.LJ 751.***

In case ***2010 P Cr. LJ 541*** it was held that to appoint another counsel at the later stage is not a ground for affording him opportunity for cross-examination on the witnesses, who have already been examined as it will start an unending litigation resulting in overburdening the courts which are already crowded. It is settled law that the provisions of section 540, Cr.P.C. cannot be exercised just for filling up the lacunas. To provide opportunity for engaging counsel is the right of the accused, but the accused cannot be allowed to misuse the said concession and if he fails to engage the counsel, the trial cannot linger on. The Courts are competent to decide the matter after affording opportunity to engage a counsel at State expenses. It was further held that witnesses cannot be burdened to appear again and again in the Court for examination without any reason, who are already reluctant to become witnesses due to fear of the accused and the complexity of litigation itself. In ***2007 P Cr. L J 642*** it was held that no doubt under S.540, Cr.P.C. any Court at any stage of trial or inquiry may recall and re- examine any person already examined, but said power should be exercised on the basis of some judicial reasoning and not otherwise.

CHAPTER 5

ACCUSED ABSDCOND DURING TRIAL

If the accused after joining the trial or after framing of the charge absconds, there is no need to issue proclamation and to wait for 30 days period. The court can after securing the report of the process server on non bailable warrants, can declare him PO and may separate his case from the rest of the accused. Seek guidance from ***PLD 1978 SC 102***.

ABSCONDERS ARRESTED DURING TRIAL OF CO-ACCUSED

If the accused persons are placed in column No.02 of the challan in red ink and are declared P.Os, their case is to be separated from the rest of the accused persons. Court may proceed with the case, and may record statements of the witnesses in the case. At that stage if one of the P.Os is arrested and report under section 173 Cr.P.C is submitted, then seek guidance from ***PLD 2013 Sind 532*** wherein the impact of section 239 Cr.P.C was discussed that the person accused of same offence committed in the course of same transaction **may be** charged jointly. Words "may" denote that it is the discretion of the court. The court may proceed with the case and case of the P.O may be taken up subsequently.

TENDERING FORENSIC REPORTS

Reports of chemical examiner and serologist are per- se admissible in evidence. In ***2016 S C M R 274*** it was observed that DNA test report is not admissible piece of evidence as S. 510 Cr.P.C. did not mention the report of a biochemical expert or DNA (biochemist). The report of DNA is to be tendered in evidence by its author.

MEDICAL EVIDENCE

Besides section 509 and 510 Cr.P.C, see the instructions contained in Chap 18-A & 18-B of the High Court Rules and Order Vol III.

In ***2016 YLR 1123*** it was resolved that no doubt DNA report is per se admissible under section 9(3) of the PFSA Act VI of 2007 read with section 59 of the QSO 1984 within the contemplation of section 510 Cr.PC. Similarly, in ***2018 PCr.LJ 1319***, it was held that admissibility of forensic report without examining its author was challenged. Held that this report can be looked into without reservation in view of section 9(3) of PFSA Act 2007 read with section 164 QSO 1984.

CHAPTER 6

STATEMENT OF ACCUSED UNDER SECTION 342 AND 340(2) Cr.P.C

Section 342 is based on the maxim ***"audi alteram partem",*** that no one should be condemned unheard. It is divided into two parts. Its first part gives discretion to the Court whereas its second part is mandatory. Thus the examination of accused after the close of prosecution evidence is obligatory and cannot be dispensed with. It is clear that where a person is to be charged with any penal liability he should be made aware of all the facts and circumstances existing against him in order to enable him to give explanation in respect of those charges and evidence produced against him at the trial. Therefore, the accused should be heard not merely on what is prima facie proved but also on every circumstance appearing in evidence against him. The trial conducted without compliance of the above provisions of law shall be a mockery of law and would stand vitiated. It is not an empty formality and the same has to be carried out to afford an opportunity to accused, to explain his position on each aspect of the case and on each and every piece of evidence brought on record by the prosecution, if the same is to be used against him for the purpose of conviction. If such evidence is not put before the accused in the shape of questions while recording such statement then conviction on the basis of that evidence would be illegal. See ***Shabbir***

Ahmad Vs. State PLD 1995 SC 343.

SUGGESTION MADE BY ACCUSED DURING COSS EXAMINATION

In ***2014 PCr.LJ 11*****,** suggestions made by accused did not make case of admission by him and could not be termed as acceptance of occurrence by accused in the mode and manner alleged by prosecution. Accused was also not confronted with suggestions during his statement under S.342, Cr.P.C. which were made basis for conviction. Conviction was therefore set aside. In the said case it is also settled law that accused can take thousand pleas that can be mutually destructive. In ***2014 PCr.LJ 374*** principles to be followed in criminal cases were elaborated. It was held that prosecution was duty bound to prove its case on the strength of its own evidence, and accused was presumed to be innocent till he was proved guilty. Accused was considered a favorite child of law, and he could take any plea, however, absurd or false it could be, but he could not be punished for his flaws or falsity in his plea, or his failure to prove the plea taken by him.

CASES OF GRAVE AND SUDDEN PROVOCATION

Article 121 of Qanun-e-Shahadat Order, 1984 would be of relevance, which reads as under:-

"Burden of proving that case of accused comes within exceptions. When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Pakistan Penal Code (Act XLV of 1860), or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence, is upon him and the Court shall presume the absence of such circumstances."

Whether it was "Qatal Amd" liable to Qisas; Qatal Amd not liable to Oisas or Qatal Amd liable to Tazir. Qatal Amd liable to Qisas takes place only when the person murdered is not liable to be murdered and is Masoom-ud-Damm. To resolve this proposition legally it may be advantageous to reproduce above amended section 302, P.P.C. which reads as follows:-

"302. Punishment of Qatl-i-Amd.- whoever commits Qatl- Amd shall subject to the provisions of this Chapter, be-

(a) punished with death as Qisas;

(b) punished with death or imprisonment for life as Tazir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or

(c) Punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the Injunctions of Islam the punishmentof Qisas is not applicable"

Guidance can be sought from ***Abdul Haque v. The State and another (PLD 1996 SC 1)***

The ratio of the case of Abdul Haque is that if the offence of murder committed is punishable under Tazir and falls either under section 302(b) or 302(c), the Court can taken into consideration the mitigating, circumstances like grave and sudden provocation for award of lesser penalty.

The next judgment from which guidance can be sought is ***2009 SCMR 1192 Mohammad Akbar @ Akku Vs. State. Shariate Appellate Jurisdiction.***

> ***"The act of the petitioner amounts to culpable homicide not amounting to murder covered by Exception 4 of section 300 (old), P.P.C. The Exceptions given in section 300 (old), P.P.C. can be looked into by us. The judgment of this Court in the case of Ali Muhammad v. Ali Muhammad and another PLD 1996. SC 274 is referred to on this context....Section 302 of the P.P.C., therefore, itself contemplates p l a i n l y clearly a category of cases***

which are within the definition of Qatal-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, keeping in mind the majority view in Gul Hassan case PLD 1989 SC 633, there should be no doubt that the casescovered 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."

In ***2017 PCr.L.J 1221*** following principles were generalized in order to examine the plea of human killing on account of provocation:-

An act of one person towards another;

Such act may ignite rage, resentment or fury in the mind of another;

The act must be such, which may in the ordinary course of nature stir resentment in the mind of the others, forcing him to resort to violence;

The persons resorting to violence must not have a cool down period;

The retaliation should be in proportionate to provocation.

When offence is committed under grave and sudden provocation, no compensation u/s 544-A Cr.P.C is called for, Reliance is placed on

a) P L D 2003 Lahore 559 Ghulam Shabir Vs. State.

''In cases where accused acts under grave and sudden provocation when deceased is found to be indulging in immoral activities, such as sexual intercourse, normally compensation is not granted to legal heirs of the deceased. Therefore, I am not inclined to award compensation to the legal heirs of the deceased in this case"

b) PLD 2008 Lahore 32 Mohammad Amjad VS State

"We are also conscious of the fact that in a case of grave and sudden provocation, no compensation can be awarded to the convict, so, while relying on judgment of the august Supreme Court of Pakistan in Meraj Begums case ***PLJ 1982 SC 435****, the amount of compensation of Rs.2,.00,000 and imprisonment in default thereof, awarded to the appellant by the learned trial Court, is hereby set aside."*

c) 2008 YLR 2359 Mazhar Hussain Vs. State

"*Muhammad Ashraf, deceased was immoral of worst degree as he developed illicit intimacy with unmarried young daughter of his sister-in-law. His mother, Mst. Sahiban deceased contributed towards her own killing. She physically intervened to save the life of her immoral and characterless son Muhammad Ashraf. In the circumstances, the legal heirs of the deceased persons are not entitled to any compensation. We, therefore, set aside the order/direction of the trial Court in this regard."*

In ***2013 PC.L.J 1650*** wherein reference was made to another case reported as ***PLD 2008 SC 513,*** It was held that statement of the accused recorded under section 342 Cr.P.C is to be read in its entirety, accepted or rejected as a whole and reliance should not be placed on that portion of the statement which goes against the accused person. Reference was also made on the judgments of ***PLD 1995 SC 343, 1992 SCMR 2047*** and ***2006 SCMR 1139*** that prosecution is bound to establish the case independently instead of depending upon the weakness of the defence. In ***2013 SCMR 383*** it was held that if prosecution failed to prove the case against the accused beyond reasonable doubt he should have been acquitted even though he had taken the plea of even killing the deceased. In ***2017 PCRLJ 1377*** the same principle was followed.

Latest judgment on this point is ***2016 SCMR 171*** wherein it was held that the statement of the accused recorded under section 342 Cr.P.C is to be accepted or rejected in its entirety and where prosecution evidence is found to be reliable and exculpatory part of such statement has been established to be false and excluded from consideration then the inculpatory part of such statement might be read in support of the prosecution case.

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CHAPTER 7

COMPOUNDING OF OFFENCE

The Islam, per Article-2 of the Constitution is the State Religion of Pakistan which no-where gives power or authority to a person to decide the fate of women.

"And when the female (infant) buried alive is questioned, for what crime she was killed" (Noble Quran 81:8-9)

Section 302 PPC is compoundable but according to section 345 Cr.P.C in case of "Karo Kari" (Honor Killing) section 302 PPC has not been declared as compoundable. See ***2016 P.Cr.L.J 681.***

GUIDELINES BY THE HONBLE SUPERIOR COURTS

In ***PLD 1996 SC 178*** guidelines for subordinates courts were given in detail. It provided that all questions relating to waiver and compounding of offence shall be determined by the trial court including the question whether any person is a legal heir or not. It was held that this provision is similar to section 47 CPC.

In ***PLD 2009 Supreme Court 768*** following guidelines were provided to the subordinate courts.

> "What would be required to be done by a court on being informed of such a compromise would be

(a) to see whether all the heirs had joined in the compromise;

(b) to also see whether any of the "Wali" was a minor and if so, whether such a minor had also reached a compromise in accordance with the provision of section 313(2)(b) of the P.P.C. and if not then such a minor would have to be treated as a non-compromising "Wali";

(c) in cases of a compromise by all the heirs, to find out whether the case was one of "Fasad- fil-Arz" and thus, not a case of acquittal despite such a compromise and in fact a case of punishment under section 311, P.P.C.; and

(d) to find out also whether any facts or circumstances existed which could persuade the court not to allow the compromise in terms of section 345(2) of the Cr.P.C."

What, therefore, follows is that, on hearing of a compromise reached between the parties, the court should not rush blindly to record acquittal of the accused person but should hold an inquiry to determine the facts in the preceding paragraph mentioned and it should then be, as a result of such an exercise, that the court should decide whether to acquit the accused person on account of a compromise or not. Where a compromise is claimed after the evidence has been recorded at the trial, it will be easy for the court to find the facts relevant for section 311, P.P.C. and for the purposes of section

345(2) of the Cr.P.C. But where a compromise has been reached before recording of evidence, it may be advisable for the concerned court to postpone its decision about the acquittal or otherwise of the accused person; to discover all the facts and circumstances which could assist such a court to find out whether the case was not one of "Fasad-fil-Arz" or a case where the court should withhold its permission to the compounding of the offence and might even require leading of evidence for the purpose and it should be then, after application of its judicial mind, that the court should take its decision about the acquittal or otherwise of the accused person. It may be added that whatever decision is taken by the concerned court, either way, should be reflected through a speaking order giving reasons for such a decision."

In ***PLD 2012 Sind 277***, guidelines were also provided. In appropriate cases, where compromiser and offender is directly or indirectly beneficiary of crime; the offence is committed or is caused thereof, for an obvious object of grabbing the property of deceased by compromiser, through his offspring who mayultimately benefit himself (the offender) as well, the court may refuse to give an effect to such a deal, specially coupled with scenario when the offence is gruesome, brutal, cruel, appalling, odious, gross and repulsive which causes terror and sensation in the society. ***Naseem Akhtar v. State PLD 2010 SC 938*** quoted**.**

In ***2005 MLD 1545*** it was held that mechanism provided under S.311, P.P.C., had manifestly suggested that even after waiver or composition by the Walis/heirs of deceased, the Court was still empowered to convict accused and punish him to imprisonment which could be extended to 14 years by way of Tazir, if all the Walis had not compounded or waived the right of Qisas or accused came within the ambit of terms "Fisad-fil-Arz. In recent past the sentence has been enhanced through amendment. In' explanation appended to S.311, P.P.C. "Fisad-fil-Arz" had been defined to include the past conduct of offender as being a previous convict, habitual or professional criminal and brutal manner in which offence was committed.

In ***2008 SCMR 987*** it was held that offence of Qatl-i-Amd punishable with sentence of death or imprisonment for life as Tazir though can be compounded by all the legal heirs of the deceased under S 345(2), Cr.P.C. yet, its acceptance within the purview of S.345(2), Cr.P.C. is dependent upon permission of the Court which has to be accorded keeping in view attending circumstances of each case.

It was held in case reported as ***PLD 2018 SC 703*** that as a result of successful and complete compounding of a compoundable offence in a case of Ta'zir under section 345 Cr.P.C with permission or leave of the relevant court where required, an accused person or convict is to be acquitted by the relevant Court which acquittal shall

erase, efface, obliterate and wash away his alleged or already adjudged guilt in the matter apart from leading to setting aside of his sentence or punishment, if any.

Deviation was made from this view in case reported as ***PLD 2019 SC 43***, wherein majority of 2 to 1 Hon'ble Judges of Supreme Court of Pakistan observed that when the august Supreme Court of Pakistan accepted compromise it brought to an end the punishment of the offence, but it did not simultaneously result in the setting aside of the conviction and the acquittal of the convict by accepting the compromise it brought the sentence to an end, but the convict did not secure and automatic acquittal as a consequence thereof. Forgiveness or pardon did not erase or obliterate the crime, it simply withheld the punishment. Similar view was taken by the majority in ***PLD 2019 SC 570.***

RATE OF DIYAT WILL BE ACCORDING TO THE NOTIFIED AMOUNT AT THE TIME OF COMPROMISE FOR THAT FINANCIAL YEAR

In ***2012 SCMR 437*** dispute regarding Diyat amount arose between the parties after compromise of offence. It was held that amount of Diyat would be determined according to prevailing rate of Diyat at the time when compromise was effected because it was the accused who actually requested victim party to favour him and if, as a result, such favour was extended then payment of compensation should be determined and made at the rate prevailing at the time when

compromise was effected and executed by the court. Word "property", under explanation to S.310, P.P.C., included both movable and immovable property, therefore, compensation equal to Nisab prevailing at the time when compromise was affected after determining the value of moveable and immovable property could also be paid.

PAYMEMT OF DIYAT IN INSTALMENTS

In ***2009 PCr.LJ 1479*** accused was convicted under S.302 (b) P.P.C. and was sentenced to imprisonment for life. During pendency of appeal parties entered into compromise and accused wanted to pay Diyat money in instalments. It was held that courts were at liberty to determine amount of Diyat as they could deem fit but they were restricted by law not to award Diyat amount less than the value of ***30630*** grams of Silver. No maximum limit was prescribed, for quantum of Diyat. Courts could ascertain Diyat considering circumstances of the case, financial position of convict as well as that of legal heirs of victim. Conviction and sentence of accused was set aside by High Court on the basis of compromise effected between parties and acquitted him of the charge. High Court directed the accused to pay Diyat in equal monthly instalment of Rs.7657.50 for five years. High Court further directed that in case of default in payment of monthly instalment, accused would be remitted to custody as to suffer

simple imprisonment till payment of Diyat. ***Government of Punjab Vs. Abid Hussain and others PLD 2007 SC 315*** rel.

In ***PLJ 2006 FSC 87*** it was held that value of diyat had to be fixed by Court keeping in view financial position of convict as well as legal heirs of victim which could not be less than value of 30630 grams of silver and Federal Government had to declare same on first day of July each year or any subsequent date in terms of section 323 PPC. Amount of diyat had to be fixed by Court as per value of diyat declared by Federal Government at time of occurrence. S. 331 PPC provides that diyat could be made payable in lump sum or in installments spreading over stipulated period from date of final judgment and convict could be released on bail if he furnish surety equivalent to amount of diyat. Value of diyat payable to legal heirs of deceased, would be payable in equal monthly installments within period of three years.

LEGAL HEIRS CAN COMPOUND THE OFFENCE WITH PROCLAIMED OFFENDERS

In ***PLD 2012 Sind 35*** it was held that the wali can compound the offence not only with accused facing trial but also with proclaimed offenders. It was observed that under Islamic law there is no provision that in a case of compoundable offence the accused can be forgiven only when he agrees to be forgiven.

In this case ***1997 SCMR 951, PLD 2003 SC 547, PLD 2006 SC 53***

and PLD 1990 Kar 286 were referred.

In case where there are proclaimed offenders never give any finding about their role during occurrence. As far as possible, avoid disbelieving the presence of eye witnesses at the spot because if it is done the case of the prosecution will badly suffer when case of P.O is taken up subsequently.

PLJ 2013 Supreme Court 690

The right to compound the offence is inheritable. In ***PLD 2019 Supreme Court 461***, august Supreme Court held that the above mentioned case law was due to lack of proper assistance and may not prevent for treated as good precedent on the subject. It was held by the apex Court that in cases of Tazir the heir of the victim who had the capacity to compound the relevant offence but had not compounded the offence during his lifetime and upon his death his capacity to compound the said offence stood exhausted and the same was not inheritable as heirs because they were not the heirs of the victim and could not compound the offence.

THEORY OF MERGER NOT AVAILABLE NOW

Earlier in ***PLD 2008 Lahore 450*** and in another judgment reproduced below ***theory of merger*** was introduced. In situations where offences are both compoundable and non-compoundable, it was held that in given circumstances, the principle of merger would

be applicable which was to the effect that in case of a compromise between the parties in a criminal case, the minor offence even if not compoundable merges into the compoundable major offence and result would be that after acquittal of accused of the major offence of Qatl-e-Amd in terms of compromise the minor offence of house trespass would be deemed to have been compounded under the principle of merger**.** In ***PLJ 2009 Cr.C. (Lahore) 390 (DB)*** under Ss. 302(b) & 34 and section 7 Anti-Terrorism Act, 1997 conviction and sentence was recorded against accused by trial Court. Legal heirs of the deceased voluntarily and genuinely entered into compromise with accused after receiving land as badl-e-Sulh and for given them in the name of Almighty Allah. It was held that compromise will certainly promote harmonious living and maintain cordial relations between the parties. Conviction and sentence was set aside on the basis of compromise and appeal was allowed. It was further held that parties had entered into compromise in substantive/main offence of qatl-e-amd. Appellant was acquitted from the charge u/s. 7(i)(a) of Anti-Terrorism Act 1997 and compromise was allowed. This view is somewhat changed in recent judgment of the Hon'ble Supreme Court ***PLD 2014 Supreme Court 383*** wherein on the basis of compromise convict was acquitted in offence under section 302 PPC but compromise was not allowed in offence 7 ATA but the sentence in that offence was reduced to life imprisonment.

Under provisions of S.**338-E, P.P.C**., when no appeal is pending in any court, the trial court was competent to decide all questions relating to compounding of offence or waiver thereof. Seek reliance from ***2012 M L D 682. Baz Muhammad Vs. The State 2000 PCr.LJ 553.*** Pre-requisites i-e statement of convict of no pendency of appeal and report of superintendent jail in this regard may also be requisitioned.

Major legal heirs can forgive the accused in the name of Allah Almighty without receiving Badal-e-Sulah but the share of Diyat of minor legal heir is to be deposited in the name of the minor in the shape of Defense Saving Certificate with direction to In-charge of Centre not to en-cash he same till age of majority of the minor of order of Guardian Judge. If Badl-e-Sulah is in the shape of immovable property, ascertain the market value from revenue department, got it transferred and also pass restraining order of its alienation. If major legal heirs have compounded the offence but the interest of minor is not safeguarded then accused can be acquitted and sent to jail to serve out simple imprisonment till share of diyat is paid. For further insight in the compoundable offences, please see ***PLD 2015 SC 277***.

CHAPTER 8

APPROVER

In some cases application is submitted by complainant and accused under section 337-338 Cr.P.C for tendering pardon to an accused as an accomplice/approver. Application is to be supported by affidavit that accused seeking tender of pardon was in league with the other accused and committed the murder and now is ready to give full and true disclosure of the whole circumstances relating to the commission of the offence and the role of all other allies of offence. The application must be supported by affidavits of the legal heirs of the deceased giving consent for tendering pardon. Their statements are to be recorded in this regard. The list of legal heirs should also be requisitioned from the SHO and Tehsildar as in case of compromise.

Before proceeding further It is appropriate to reproduce the relevant provisions:-

337. Tender of pander to accomplice: (**1**) In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to ten years, or any offence punishable under Section 211 of the Pakistan Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Pakistan Penal Code, namely, Sections 216-A. 369. 401, 435

and 477-A, [officer incharge of the prosecution in the district] may, at any stage of investigation or inquiry into or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof:

Provided that no person shall be tendered pardon who is involved in an offence relating to hurt or qatl without permission of the victim or as the case may be of the heirs of the victim. {Added by Ordinance No. VII of 1990 and re-enacted by Criminal Law (Fifth Amendment) Ordinance, 1992.}

(**1-A**) Every Magistrate who tenders a pardon under sub-section (1) shall record his reasons, for so doing and shall on application made by the accused, furnish him with a copy of such record :

Provided that the accused all pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

(2) Every person accepting a tender under this section shall be examined as a witness in the subsequent trial, if any.

(**2-A**) In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be-

(3) Such person, unless he is already on bail, shall be detained in custody until the termination of the trial.

338. Power to grant tender of pardon: At any time before the judgment is passed the High Court or the Court of Session trying the case may, with theview of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the [officer- in-charge of the prosecution in thedistrict] to tender a pardon on the same condition to such person:

Provided that no person shall be tendered pardon who is involved in an offence relating to hurt or qatl; without permission of the victim or. as the base may be, of the heirs of the victim. {Proviso Substituted by Ordinance, XXXVII of 2001 dated 13.08.2001}. {Section was substituted by Law Reforms Ordinance, 1972 item no. 107}

From the bare perusal of section 337/338, Cr.P.C. it is apparent that a pardon may be granted at any stage of the case. In the case of ***Mumtaz Ahmad alias Taji and another Vs. State reported***

in P L D 1984 Lah. 48, the accused was allowed to turn approver during thecourse of trial, which question was examined by Hon'ble High Court and it was observed that there was nothing wrong with proceedings concerning tender of pardon during the trial.

Objection can be raised by the co-accused that extreme pressure has been exerted upon the accused to become approver. Reference can be made to section 343 Cr.P.C which is reproduced as under:-

> ***Sec 343. No influence to be used to induce disclosures:*** ***Except as provided in Sections 337 and 338*** *no influence, by means of any promise or threat or otherwise; shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.*

This provision makes it crystal clear that influence, by means of promise or threats or otherwise shall be used to an accused/accomplice to withhold or disclosed any matter within his knowledge Reliance is placed on ***2013 P Cr. L J 279*** wherein it was held that where accused is pardoned by the competent authority as an approver same could not be challenged by the co- accused as they would be at liberty to cross-examine the approver. In this case Judgment ***2005 YLR 1728*** was relied. Reliance can safely be placed on ***2005 YLR 1728*** wherein it was held that if approver/co-accused

had been given pardon by competent Authority, it could not be challenged by petitioner or other co-accused and they would be at liberty to cross-examine him.

This application is normally made in cases hinging upon circumstantial evidence. If the pre- requisites are fulfilled, after allowing the application, the statement of the approver will be recorded as prosecution witness. If accused is on bail he will remain on bail otherwise accused will remain in custody during trial.

It is held in ***2016 PCr.LJ 714*** that as a rule of prudence, statement of approver should not be accepted as gospel truth and such person could not be trusted who had betrayed his or her own comrades, for safe administration of justice, conviction should never be based on the sole testimony of an approver without independent corroboration. Under Art. 16 of Qanun-e-Shahadat, 1984, though conviction could be based on the sole statement of approver, but such was not advisable. Court had the discretion to pardon an accused and allow him to become an approver and in a case of hurt of qatl, if victim or legal heirs had no legal objection then co-accused could not challenge his pardon as he would be given ample opportunity to cross-examine the approver.

CHAPTER 9

JUVENILE

The provisions of Section 7 of the Juvenile Justice System Ordinance, 2000 require detail inquiry, which has to be carried out in letter and spirit. This plea is to be taken at the earliest opportunity. There is plethora of judgments of the Apex Court that plea taken at a belated stage has no legal sanctity. Guidance in this regard can be sought from the pronouncements of the august Supreme Court of Pakistan in the cases of ***Rehmat Ullah alias Raja Vs. Home Secretary, Punjab, Lahore and others (2004 SCMR 1861), Muhammad Jamil Vs. The State and 3 others (2004 SCMR 1871), Sarfraz alias Shaffa Vs. The State and 3 others (2007 SCMR 758) and Ahmed Nawaz Vs. The State (2009 SCMR 399).***

Juvenile Justice System Ordinance (XXII of 2000), had been promulgated for protection of children in criminal litigation and for their rehabilitation in the society. Ossification test is an important method to determine the age of a person. Through this methodology, estimation of one's age is done, based upon study of progress of ossification in the bones; it is generally regarded as a good method with a fair deal of accuracy, however, with limitations. To supplement the exercise, examination of teeth particularly growth of wisdom tooth is also taken into account.

If application is made by an accused for treating him juvenile then inquiry under above referred section is to be carried out. It can

be in the shape of ossification test by constituting a medical board.

It has been ruled in the case of Muhammad Akram reported as ***2002 PCr.L.J 633*** that ossification test could only give a clue as to the age, but could not be a conclusive proof and that such exercise had to be resorted to only when there was no other proof available like school leaving certificate or the birth certificate and the Court was in a quandary about the age of the accused. The relevant portion of the said judgment is reproduced below for the sake of convenience:-

> "When we speak of the medical evidence, it obviously means clinical and radiological examination or what is commonly called as the ossification test. It is a well-known fact that the ossification test can only give a clue as to the age but cannot be a conclusive proof and this exercise has to be resorted only when there is no other proof available like the school leaving certificate or the birth certificate and a Court is in a quandary about the age of an accused. Even where matters are referred for ossification test, a margin has to be given for doctor's opinion as it is not absolute. In this connection, reference is made to the following cases:-

If accused is declared juvenile after inquiry under section 7 of JJSO then if there are more accused then one requisition challan of the juvenile accused. Proceed with the cases side by side and record evidence in both the cases and decide.

The Juvenile Justice System Act, 2018, is meant to provide for criminal justice system and social integration of juveniles.

CHAPTER 10

CHILD WITNESS

The *Honourable Judges of Supreme Court of Azad Jammu & Kashmir in* ***Qadeer Hussain Vs. The State 1995 P.Cr.LJ. 803*** have observed that rule enunciated in Article 3 of The Qanun-e-Shahadat Order, 1984, is not an absolute or inflexible rule. It means that observing intellect of a child witness in shape of questions and answers is not the requirement of law. The Court was quite competent to give its observation with regard to the intellect of the witness. It would mean that only requirement is the satisfaction of the Court. There is no precise age which determines the question of competency of a person to give evidence. All that is required when a child witness appears for evidence before recording evidence certain question may be asked from him seeking rational answers to determine his or her competency as a competent witness. If the child is a witness of the occurrence, his/her testimony should be weighed with caution. However, if a child is victim, due regard must be given to his/her statement, ignoring minor discrepancies.

CHAPTER 11

LUNATIC

Section 465 CR.P.C provides that if any person before a court of sessions or a High Court appears to the court at his trial to be unsound mind and consequently in-capable of making his defence, the court shall in the first instance try the fact of such unsoundness and incapability and if the court is satisfied of the fact it shall record a finding to such effect and shall postpone the further proceedings in the case. The inquiry can be in the shape of examination of accused from Medical Board from mental hospital. If the opinion of the board is that accused is suffering from mental ailment and he is not in a position to make up his defense then further proceedings are to be postponed. The statement of the head of the medical board may be recorded. The accused in such like cases cannot be detained behind bars for an indefinite period and in suitable cases under sections 464, 465 & 466 Cr.P.C. they can be released on bail. It would be useful to reproduce the contents of Section 466 Cr.P.C. which are as under:-

> "Release of lunatic pending investigation or trial.
>
> (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance

when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

(2) Custody of lunatic. If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit and shall report the action taken to the Provincial Government.

Provided that no order for detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Provincial Government may have made under the Lunacy Act, 1912".

A plain reading of the above provisions of law clearly suggest that the trial Court has the power to release the accused on providing sufficient security in order to prevent him from doing injury to himself or to any other person. Alongside, the second part of the section also authorizes the Court to decline bail if considered appropriate in the circumstances of the case and to order the detention of accused in safe custody.

PLD 2019 Sindh 96 elaborates the ingredients requiring for bring the case within the purview of these provision i-e Commission of offence, unsoundness, incapacity of knowing the nature of offence and distinction between right and wrong. If accused takes a

plea of General Exception provided under section 84 PPC, the onus lies heavily on him. Seek guidance from ***2017 PCr.L.J 255-757.***

CHAPTER 12

PRODUCTION OF DOCUMENTS DURING TRIAL

For criminal trial procedure has been provided CR.P.C. In case of Magisterial trial under sections 241 to 247 of Cr.P.C. and if the trial is before the Sessions court the same would be conducted under sections 265- A to 265-H of Cr.P.C. Under section 265-F of Cr.P.C after deliveries of copies and after requisite period charge is framed and in case the accused does not plead guilty or the Court in its discretion does not convict him on his plea, the Court shall proceed to take all such evidence as may be produced in support of the prosecution. Article 2(c) of the Qanun-e-Shahadat Order, 1984 provides the definition of "evidence", which includes that all statements, which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry. In ***2002 SC MR 468*** Complainant while making his statement in his private complaint wanted to bring on record a number of documents, but the trial court returned the documents by observing that the same were not relevant. Complainant then filed an application in which 22 documents were listed which he wanted to be received in evidence. Trial Court dismissed the said application against which a revision petition filed by the complainant had also been dismissed by the High Court. View taken by Trial Court that the only provision in the Criminal Procedure Code as regards production of additional

evidence was S. 540, Cr.P.C. as such the documents could not be allowed to be produced, amounted to refusal to exercise jurisdiction otherwise vested in the Court. It was held that provisions of the Criminal Procedure Code such as S.241-A, Cr.P.C. under which the complainant could rely on documents, had been added through amendment in the year 1972 after the filing of the complaint, therefore it was unjust to hold that the complainant was debarred from producing documents at a subsequent stage, because when the complaint was filed the complainant was not required to attach all the documents along with it, therefore, his omission to file the same at that point of time could not by itself be used against him to hold him responsible for not producing the documents at the relevant time as required by law. It was further held that insertion of S.241-A, Cr.P.C. enabled the complainant to file documentary evidence with complaint with the only requirement that he would supply the copies of the same to the accused. Chapter VII of the Code of Criminal Procedure, particularly its S.94 had revealed that the Court was vested with the power to entertain and allow production of documentary evidence during the trial, inquiry etc., therefore it was not correct that the only provision in the Criminal Procedure Code empowering the Court to record additional evidence by recalling witness was S.540, Cr.P.C., which had resulted in failure of the Court to exercise jurisdiction vested in it under the law. Petition for

leave to appeal was converted into appeal in circumstances by the August Supreme Court and the aforesaid observation of the Trial Court and the impugned judgment of the High Court were set aside with the direction to the Trial Court to decide afresh the request of the complainant with regard to production in evidence of the documents in the light of the observations made by August Supreme Court and thereafter to proceed with the case.

In ***2012 PCr.L.J 73*** it was held that the admissibility of documents through the statement of Public Prosecutor acting under S.493, Cr.P.C., could not be questioned merely on the ground that the said documents were not produced by the prosecution under S.265-F, Cr.P.C. at the earlier stage of trial- Delay in production of documents, in circumstances, would not render the documents inadmissible. Owing to the difference between civil and criminal proceedings with regard to documentary evidence when the genuineness of the documents was not questioned by defense side, the court should not refuse to admit the documents in evidence even at the later stage of the trial if it considered it necessary for just conclusion of the controversy especially when the defense had an opportunity to rebut the said documents by producing defense evidence. Even after admitting the documents in evidence, the court had power to look into intrinsic value of those documents to take reliance thereon or not.

The duty of the trial court is to ascertain the truth for reaching at a proper conclusion of the case. The only requirement is that it should be material and evidence should be essential for just decision of the case. The object behind is intended to enable the Court to get at the truth and to arrive at a just decision. This power is not hedged by technicalities. Duty cannot be absolved merely on the basis of some technicality because the basic object of the enactment of law, the rules and creation of Courts is to administer justice and the justice could not be administered without ascertaining the truth. So if it comes to the knowledge of the Court that there is a witness or witnesses whose statements are necessary to lead towards the truth and to promote cause of justice in a particular case then the Court can order production of such witnesses. The investigating agency, the counsel, the parties and the witnesses are mere instrument for revealing the truth so that the Court should reach at a proper conclusion and just decision, in order to sift something which could not be brought on record either due to negligence of parties or due to their intentional act.

CHAPTER 13

PROCEUDURE VIZ-A-VIZ STATE AND COMPLAINT CASE

Law is by now well settled that if the same party lodges an F.I.R. and, after having remained dissatisfied with the investigation carried out by the police, files a private complaint in respect of the same allegations then in such a situation the complaint case is to be tried first and, if needed to, the, challan case is to be tried later. In this regard a reference may be made to the cases of ***Noor Elahi Vs. The State and 2 others PLD 1966 SC 708, Zulfiqar Ali Bhutto Vs. The State PLD 1979 SC 53, Syed Muhammad Hussain Shah Vs. Abdul Hamid and 5 others 1981 SCMR 361, Mumtaz and others Vs. Mansoor Ahmad and another 1984 SCMR 221, Rashid Ahmad Vs. Asghar Ali and others PLD 1986 SC 737 and Aziz-ur-Rehman Vs. The State PLD 1987 Lah. 245***.

A reference in this regard may be made to the cases of ***Muhammad Sadiq Vs. The State and another PLD 1971 SC 713, Abdul Rehman Bajwa Vs. Sultan and 9 others PLD 1981 SC 522 and Rashid Ahmad Vs. Asghar Ali and others PLD 1986 SC 737.***

However, the legal position is quite different if the challan

case and the complaint case have been filed by different parties contain different versions and are directed against different sets of accused persons and in such a situation the trial of the complaint case and the challan case are to be held simultaneously and side by side and not one after the other.

A reference in this regard may be made to the cases of ***Muhammad Sadiq Vs. The State and another PLD 1971 SC 713, Abdul Rehman Bajwa Vs. Sultan and 9 others PLD 1981 SC 522 and Rashid Ahmad Vs. Asghar Ali and others PLD 1986 SC 737.*** Reference may be safely made to ***2006 P Cr. L J 1709,*** the operative part is reproduced:-

> *"The grievance of the petitioner who lodged the complaint in the above said F.I.R. was that police with mala fide intention declared the accused mentioned in the F.I.R. as innocent and never arrested them so he felt the necessary to file the complaint before the learned trial Court and the learned trial Court after recording the preliminary evidence summoned the accused persons. The Court framed the charge as mentioned above and then statements of three P.Ws. were recorded. Thereafter the Court also summoned the challan case and on the application of the respondent started the proceedings in the challan case which have been challenged through this revision petition. The Investigating Officer who was mentioned as witness in*

the challan case figures nowhere in the complaint case. Now if the challan case is to be taken up first then the petitioner will have no right to cross- examine the Investigating Officer to bring the truth on the record because Investigating Officer had declared the respondents innocent without any material on the record. So I amof the considered opinion that the law laid down in Noor Elahi's case is totally applicable in the instant case result is that the impugned order, dated 11-11-2004 is set aside. Learned trial Court is directed to stop the proceedings in the challan case and to start the proceedings in the complaint case. All the witnesses mentioned in the complaint case shall be examined as P.Ws. while the remaining witnesses which are mentioned in the challan case shall be allowed to be examined as court-witnesses in order to bring the truth on the record. With these observations this petition stands disposed."

MODE OF TRIAL

In both state and complaint cases, after taking cognizance, secure attendance of accused, supply copies and at the time of framing of charge pass a detailed order while determining the mode of trial.

CHAPTER 14

FINAL ARGUMENTS

If defense is produced then defense will open arguments otherwise prosecution will sum up the case.

SENTENCING

Sentencing needs extra caution. In murder case normal penalty is death and if lesser punishment/sentence is awarded reasons have to be given which is a statutory requirement ***(section 367(5) CR.P.C)*** In case of death sentence, firstly find the accused guilty of offence, convict him and then sentence him. Elaborate that the convict shall be hanged by his neck till he is pronounced dead. The death sentence shall be subject to confirmation by the Hon'ble Lahore High Court, Lahore and a reference under section 374 of Cr. P.C be sent to the Hon'ble Lahore High Court, Lahore, in this regard. The convict be also apprised that he can file an appeal against his conviction within seven days and that copy of the judgment is supplied to him free of costs and his thumb impression be obtained on the margin of order sheet. He be also directed to pay compensation to the legal heirs of the deceased under section 544(a) of Cr.P.C and in default thereof he shall further undergo six month S.I. It was held in **2019 PCr.L.J 920** that Philosophies of sentencing accused enumerated.

There are the five philosophies of sentencing. The first one is retribution and the purpose is to emphasize taking revenge on a criminal, perpetrator or offenders. The next philosophy is incapacitation which means a way to reduce the chances of an offender committing another crime. Then is the deterrence in which a criminal is made to fear going back to jail or prison. Rehabilitation is also another philosophy of sentencing by which an effort is made to reform and rehabilitate a criminal, such as trying to give him a second chance. Reparation is the last of the five philosophies of sentencing in which effort is made to repay victim(s).

MITIGATING CIRCUMSTANCES

As far as the quantum of sentence is concerned it is an important question and it requires utmost care. After finding the accused guilty in offence, convict him and before sentencing, must see if there are mitigating circumstances. The sentence must be weight in golden scale and should be properly balanced to deter the rest of the society from the commission of crime without being unnecessary harsh. Where motive shrouded in mystery, evidence of the prosecution has enfeebled the basic motive of the crime and prosecution has not come with the whole truth, then the extreme penalty of death is not warranted and sentence would be reduced to

life imprisonment.. This view finds support from ***1983 SCMR 806***, ***1988 P.Cr.L.J 307, 1987 P.Cr.L.J 1689, 1987 P.Cr.L.J 1812***. Another example is that deceased was not **Masoom-Dum**, involved in different criminal cases. Seek reliance from ***2004 P.Cr.L.J 1915*** wherein it was held that Court while writing judgment has to ponder overall possible situations and probabilities for drawing just conclusions and in doing so it cannot act like resolving a mathematical proposition. Human affairs are complex whether in the shape of good or evil and daily new patterns of human behavior and new situation emerges. The balance in which the facts are weighed has to be kept even. Reliance can be also placed on ***2010 YLR 1656-1954.*** In a recent judgment of Hon'ble Supreme Court of Pakistan ***PLJ 2014 SC 1004*** referred a case of Apex Court ***Nawaz Khan v. Ghulam Shabbir and the State (NLR 1995 Criminal 17)***, wherein it was observed that the question of benefit of reasonable doubt is necessarily to be determined not only while deciding the question of guilt of an accused person but also while considering the question of sentence particularly in murder case. It was held that once legislature has provided for awarding alternative sentence of life imprisonment, it would be difficult to hold that in all cases of murder, death penalty is a normal one and shall ordinarily be awarded. It was held that if intent of legislature was to take away discretion of Court, then it would have omitted from clause (b) of Section 302, PPC alternative

sentence of life imprisonment. Supreme Court had no hesitation to hold that two sentences were alternative to one another; however, awarding one or other sentence would essentially depend upon facts and circumstances of each case. It was held that there may be multiple factors to award death sentence for offence of murder and equal number of factors would be there not to award same but instead a life imprisonment: it is a fundamental principle of Islamic Jurisprudence on criminal law to do justice with mercy, being attribute of Allah Almighty but on earth same has been delegated and bestowed upon Judges, administering justice in criminal cases, therefore, extra degree of care and caution is required to be observed by Judges while determining quantum of sentence, depending upon facts and circumstances of particular case/cases, if a single doubt or ground is available, creating reasonable doubt in mind of Court/Judge to award death penalty or life imprisonment, it would be sufficient circumstance to adopt alternative course by awarding life imprisonment instead of death sentence. In ***2019 MLD 746*** general principles in order to examine the plea of grave and sudden provocation were discussed.

Following principles can be generalized in order to examine the plea of human killing on account of provocation:

(i) An act of one person towards another;

(ii) Such act may ignite rage, resentment or fury in the mind of another;

(iii) In order to reduce the charge of murder to manslaughter, the act must be such, which may in the ordinary course of nature stir resentment in the mind of the others, forcing him to resort to violence;

(iv) The person resorting to violence must not have a cool down period;

(v) The retaliation should be in proportionate to provocation

CONCURRENT OR CONSECUTIVE SENTENCING

In case where different sentences of imprisonments have been passed, always make it concurrent otherwise sentences will be presumed to be consecutive. If the court wants the sentences to run consecutively, must give reasons. If convict is undergoing another sentence of imprisonment make it concurrent with the instant one**.** In ***2017 SCMR 307*** High Court did not declare the sentences to run concurrent Observation was made that in ***PLD 2009 SC 460*** it was already held that ordinarily more than one sentences of imprisonment for life passed against accused were to be ordered to run concurrently to each other. Supreme Court directed that all sentences of imprisonment passed against accused would run concurrently to each other. Supreme Court also directed to extend benefit of S. 382-B, Cr.P.C. to accused.

BENEFIT UNDER SECTION 382-B Cr.P.C.

It is mandatory requirement and if not extended give reasons. Reliance is placed on **2013 P.CR.L.J 305.**

Falsus in Uno Falsus in Omnibus

Hon'ble Supreme Court Pakistan in ***PLJ 2019 SC 527*** has revived the old principle of **Falsus in Uno Falsus in Omnibus** observed that truth is the foundation of justice and bedrock of a civilized society and thus any compromise on truth amounted to a compromise on a society's future as a just, fair and civilized society. It was held by the Hon'ble Supreme Court and directed that rule of **Falsus in Uno Falsus in Omnibus** shall henceforth be an integral part of the country's jurisprudence in criminal cases and shall be given effect to be followed and applied by all courts of th e country in its letter and spirit. Islamic perspective was also discussed that giving testimony is obligatory duty and those who stood firm in their testimonies were amongst the people of righteousness and faith. Among the necessities of faith was giving truthful testimony even if against oneself or a relative. Islam not only enjoined giving testimony it also forbade concealing it because concealing evidence was something that was disapproved in Islam and detested by its nature. Giving false evidence had many evils for it supported falsehood against truth and promoted injustice and aggression against justice. It also effaced fairness and

equity and posed danger to public safety and security. Corpus of traditions of the Holy Prophet (Peace be upon him) also provided that false testimony was one of the greater sin.

The august Supreme Court of Pakistan in case titled "Muhammad Faisal Abbas Vs State" ***PLJ 2019 SC (Cr.C) 449*** observed that co-accused has seemingly been acquitted on account of different role assigned to him by the witnesses and he was blamed to have architected the crime and his acquittal out of abundant caution, a recognized Juridical Principle by now well entrenched in our jurisprudence, does not adversely impact upon the prosecution case.

TEST IDENTIFICATION PARADE

Guidelines, requirements and safeguards necessary for holding a test identification parade in connection with criminal cases were stated in esteemed cases were reported as ***PLD 2019 SC 488***. It was also held in the case Ibid that evidence offered through identification proceedings was not a substantive piece of evidence but was only corroborative of the evidence given by the witnesses at the trial. It had no independent value of its own and could not as a rule, form a sufficient basis for conviction through the same way add some weight to the other evidence available on record.

In case, "Mian Sohail Ahmed and others Vs The State and others" ***2019 SCMR 95*** the august Supreme Court of Pakistan

provided non exhaustive list of **"Estimator Variables**" that negatively affect the memory process of witness of test identification parade. It was further observed that after the test identification parade, the Court must verify the credibility of the eye-witness by assessing the evidence on the basis of the factors or "Estimator Variables". "Estimator Variables" were the factors related to the witness like distance, lighting or stress, over which the legal system had no control.

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