

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

MR. JUSTICE GULZAR AHMED
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE YAHYA AFRIDI

Criminal Misc. Application No. 693 of 2018
(Compromise Application)

IN/AND

Jail Petition No. 427 of 2016

(Against the judgment dated 01.06.2016 of the Lahore High Court, Rawalpindi
Bench, Rawalpindi passed in Crl.A. No. 31-J/13 and M.R. No. 22/2013)

Shafqat @ Shafaat.

... Applicant/Petitioner

VERSUS

The State.

... Respondent

For the Petitioner : Mr. Arshad Ali Chaudhry, AOR
For the Complainant : Syed Rifaqat Hussain Shah, AOR.
For the State : Ch. M. Sarwar Sidhu, Addl.P.G., Punjab.
Date of Hearing : 30.07.2018.

J U D G M E N T

Qazi Faez Isa, J. The petitioner was convicted under section 302 (b) of the Pakistan Penal Code, 1860 ("**PPC**") as *ta'azir*, in a case arising out of FIR No. 198/2012 dated 14th July, 2012 which was registered at Police Station Kahuta, District Rawalpindi under sections 302 and 34 of the PPC for the murder of Zahir Mehmood (also known as Zahir Hussain) and sentenced to death vide judgment dated 28th March, 2013 of the Sessions Judge, Rawalpindi. The learned judges of the High Court vide impugned judgment dated 1st June, 2016 upheld the conviction but reduced the petitioner's sentence of death to imprisonment for life, whilst maintaining the compensation of one hundred thousand rupees payable

to the heirs of the deceased under section 544-A of the Code of Criminal Procedure, 1898 ("**the Code**").

2. An application (Criminal Miscellaneous Application No. 693 of 2018) ("**the Application**") was submitted by the complainant stating that "*compromise has been affected and the legal heirs of the deceased have forgiven the convict/accused in the name of Allah.*" The learned Sessions Judge, Rawalpindi, was asked to determine the veracity of the contents of the Application. He reports that the deceased was not married and was survived by a mother and father, his only legal heirs. Statements on oath of the deceased's mother and father were recorded who testified that they had forgiven the convict (the petitioner) in the name of Almighty Allah for the murder of their son. The learned Additional Prosecutor General, Punjab, representing the State, does not oppose the Application.

3. The petitioner has served more than six years and a half years of his sentence and the legal heirs of the deceased have forgiven the petitioner. The State does not oppose the Application and there is no reason for us not to accept the compromise. Accordingly, the compromise whereby the legal heirs of the deceased have forgiven the petitioner-convict is accepted. The question now arises whether, as a consequence of accepting the said compromise, the petitioner-convict's conviction is to be set aside and he be acquitted or instead without setting aside his conviction and acquitting him he is only saved from punishment.

4. The petitioner was convicted for *qatl-i-amd* (murder), as *ta'azir* by the Sessions Judge, and his conviction was upheld by the High Court, and these two judgments have been assailed in this petition. However,

before the grant of leave to appeal¹ the heirs of the murdered victim forgave the petitioner-convict and submitted the Application. Subsection (5) of section 345 of the Code stipulates that, when the accused has been convicted "*no composition for the offence shall be allowed without the leave of the Court*". And, subsection (6) of section 345 of the Code states that, "*The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded*". Significantly, it does not state that upon the acceptance of the composition (compromise) the conviction of the convict shall be set aside and or that he be acquitted. The "*effect of an acquittal*" does however bring to an immediate end the sentence of the convict.

5. We are aware that a practice has developed that upon accepting the compromise submitted under section 345 (6) of the Code the conviction is automatically set aside and the convict is "acquitted". This is done without hearing the case. One of us (Qazi Faez Isa, J) had reservations regarding this automatic-acquittal methodology, whilst considering a similar application, therefore he observed:

"7. Therefore, whilst I agree with the conclusion reached by my learned brother that the application for compounding the offences be accepted, I cannot agree that as a consequence the appellant/convict should be "acquitted of the charges" and thus completely exonerated. However, since section 345(6) of the Code has not been examined and interpreted in the aforesaid manner therefore the Hon'ble Chief Justice is requested to take notice of this matter under Article 184(3) of the Constitution as it is a question of public importance involving the enforcement of Fundamental Rights. The office is directed to place the matter before the Hon'ble Chief Justice of Pakistan for appropriate orders." ²

¹ Article 185 (3) Constitution of the Islamic Republic of Pakistan read with Rule XXXIII (1) of the Supreme Court Rules, 1980.

² Cr. M. A. No.185/2017.

6. The aforesaid note which is dated 31st March, 2017, resulted in Suo Moto Case No. 03 of 2017 ("**the SMC**"), which was heard during the summer vacations, on 27th June, 2018. However, the author of the note (Qazi Faez Isa, J) was not a member of the three-member Bench³ which heard the SMC. Our very distinguished and learned brethren decided the SMC⁴ in the following terms:

"(i) As provided by the provisions of section 338-E (1), PPC and the first proviso to the same and as already declared by this Court in the case of Chairman Agricultural Development Bank of Pakistan and another v. Mumtaz Khan (PLD 2010 SC 695) as a result of a 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."

"(ii) In the context of the provisions of section 345 (6), Cr.P.C. the effect of an acquittal recorded by a court on the basis of a successful and complete compounding of a compoundable offence shall include all the benefits and fruits of a lawful acquittal."⁵

The case of Chairman Agricultural Development Bank⁶ ("**the Bank case**"), referred to in the SMC judgment, was a service appeal assailing the decision of the Federal Service Tribunal. This Court in the Bank case had observed that the appeal, "*throws up an issue which has never been brought up before this Court earlier*"⁷. The question in the Bank case was whether an employee of the Agricultural Development Bank of Pakistan ("**the Bank**") who had been terminated from service, because he had been convicted for murder, should be reinstated after he had

³ Asif Saeed Khan Khosa, Ijaz ul Ahsan and Syed Mansoor Ali Shah, JJ., in Suo Moto Case No. 03 of 2017.

⁴ The judgment of the Court was authored by the very learned Asif Saeed Khan Khosa J.

⁵ Paragraph 17 of the judgment in SMC 03 of 2017.

⁶ Chairman Agricultural Development Bank of Pakistan v Mumtaz Khan, PLD 2010 SC 695.

⁷ *ibid.* paragraph 1, page 698.

compromised with the heirs of the murdered person. The Federal Service Tribunal, with a majority of two to one, decided that the sacked employee was entitled to be "*reinstated in service with all the back benefits*", that is, he was not only reinstated but also paid salary, etc., for the period he remained imprisoned and had not worked for the Bank. The Bank appealed. A two-member Bench of the Supreme Court⁸ dismissed the appeal. In dismissing the appeal it was held that, "*His conviction in the case of murder was the only ground on which he had been removed from service and the said ground had subsequently disappeared through his acquittal, making him re-emerge as a fit and proper person entitled to continue with his service.*"⁹ This conclusion was arrived at because, "*according to our humble understanding of the Islamic jurisprudence, Afw (waiver) of Sulh (compounding) in respect of an offence has the effect of purging the offender of the crime.*"¹⁰ However, before the determination of this important jurisprudential point assistance was not sought from the Attorney General of Pakistan and/or Advocate Generals, nor the views of the governments with regard thereto ascertained.

7. This Court had however issued notices in the SMC case to the law officers of the Federal and all four provincial governments and of the Islamabad Capital Territory. An Assistant Attorney General of Pakistan, the Additional Advocate Generals of the four provinces and the Advocate General of the Islamabad Capital Territory attended the hearing and all of them:

"... submitted in complete unison that in Islamic jurisprudence and in the system of administration of criminal justice in vogue in this country a composition of a compoundable offence leads to and results in

⁸ Asif Saeed Khan Khosa, J authored the judgment and Tassaduq Hussain Jilani J concurred.

⁹ *ibid.* paragraph 10H, page 704.

¹⁰ *ibid.* paragraph 10F, page 703.

acquittal of the accused person or convict concerned. They have also submitted that any confusion created by the words "effect of an acquittal" used in section 345 (6), Cr.P.C. now stands removed by the word "acquit" used in the subsequently introduced first proviso to section 338-E (1), PPC and its interpretation by this Court in the case of Chairman Agricultural Development Bank of Pakistan and another v. Mumtaz Khan (PLD 2010 SC 695)."¹¹

From the aforesaid it becomes apparent that proper assistance may not have been rendered during the hearing of the SMC because the relevant law was not cited and the applicable Islamic provisions not referred to. Therefore, in our opinion this issue needs a thorough reexamination. We have come to this conclusion after examining the relevant law, the applicable provisions of the Holy Qur'an, and the manner in which the law had been changed.

8. On 11th December 1996 a Presidential Ordinance¹² was enacted. Through this Ordinance large scale changes were made. As the validity of a Presidential Ordinance is only four months¹³, Parliament upon the expiry of four months, enacted the Criminal Law (Amendment) Act, 1997 (Act II of 1997)¹⁴ on 11th April, 1997. The Criminal Law (Amendment) Act, 1997 ("**the Amendment**") sustained the significant changes that had been made in the PPC and the Code by the said Ordinance. These changes were made with the stated objective of bringing the PPC and the Code, "*in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah.*"¹⁵

9. After the Amendment section 300 of the PPC, which defined the offence of *murder*, was amended and *murder* was designated as *qatl-i-*

¹¹ Paragraph 2 of the judgment in SMC No. 03 of 2017.

¹² Criminal Law (Fourth Amendment) Ordinance, 1996, Gazette of Pakistan, Extraordinary, Part I, 11th December, 1996; reproduced in PLD 1997 Central Statutes pages 165-198.

¹³ Article 89 of the Constitution of the Islamic Republic of Pakistan.

¹⁴ Criminal Law (Amendment) Act, 1997 (Act II of 1997), Gazette of Pakistan, Extraordinary, Part I, 11th April, 1997; reproduced in PLD 1997 Central Statutes pages 326-355.

¹⁵ Preamble to the Criminal Law (Amendment) Act, 1997, PLD 1997 Central Statutes, page 326.

amd. Section 302 (b) of the PPC prescribes the punishment for *qatl-i-amd* (murder) as *ta'azir*, to be death or imprisonment for life. Subsection (1) of section 345 of the Code states that, "*the offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table*"; the three columns of the table are respectively titled "*Offences*", "*Sections of Pakistan Penal Code applicable*" and "*Persons by whom offence may be compounded*". *Qatl-i-amd*, the punishment of which is prescribed in section 302 PPC, was added to the table under section 345 (1) of the Code and "*the heirs of the victim*" were empowered to forgive the accused/convict. This matter pertains to *qatl-i-amd* (murder) therefore the scope of its compounding also needs to be examined. Prior to the Amendment only non-serious offences attracting short sentences could be compromised/compounded; the offence of murder and other serious offences could not be compounded.

10. To further ensure that the criminal law of the country fully conforms to Islam, two new sections were added in the PPC. Section 338-F of the PPC, reproduced hereunder, mandates that Islamic injunctions will be the determining factor in the interpretation of these provisions:

"338-F. *Interpretation*. In the interpretation and application of the provisions of this Chapter, and in respect of matters ancillary or akin thereto, the Court shall be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah."

The "Chapter" referred to in section 338-F of PPC was to Chapter XVI of the PPC which pertains to "*Offences Affecting the Human Body*." The other new section which was added to PPC was section 338-G, which empowered the Government to make rules "*for carrying out the purposes*

of this Chapter" in "consultation with the Council of Islamic Ideology"¹⁶. The only rules made pursuant to section 338-G of the PPC are the '*Diyat, Arsh and Daman Fund Rules, 2007*'¹⁷. Rules have as yet not been made which may help determine the matter under consideration. It may be mentioned that the Constitution of the Islamic Republic of Pakistan also requires that all "*laws be brought in conformity with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah*"¹⁸.

11. Murder, in Islam, is an abominable crime. Almighty Allah abhors taking human life which He has made "*sacred*"¹⁹. "*If a man kills a believer intentionally, his recompense is Hell, to abide therein (for ever) and the wrath and the curse of Allah are upon him, and a dreadful penalty is prepared for him.*"²⁰ Almighty Allah, however, urges believers not to resort to revenge-killing. The Holy Qur'an sought to bring to an end the prevalent practice of endless blood feuds. It encouraged the victim's family to forgive. "*O you who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude; this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty.*"²¹ This verse, which pertains to murder, addresses the heirs of the victim and advises them that instead of avenging the crime they should earn the favour and Mercy of Almighty Allah by entering into a compromise. Another verse which says the same also adds a warning to judges: "*We*

¹⁶ Part IX, Islamic Provisions, of the Constitution of the Islamic Republic of Pakistan.

¹⁷ S.R.O. 1110(I)/2007 dated 14th November, 2007 published in the Gazette of Pakistan, Extraordinary, Part-II, 14th November, 2007.

¹⁸ Article 227 (1) of the Constitution of the Islamic Republic of Pakistan.

¹⁹ *Surah Al-Isra* (17) verse 33.

²⁰ *Surah An-Nisa'* (4) verse 93.

²¹ *Surah Al-Baqarah* (2) verse 178.

ordained therein for them: 'Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.' But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah has revealed, they are (no better than) wrongdoers."²² Almighty Allah does not favour excessive retributive punishment and encourages reconciliation: "The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from Allah: for (Allah) loves not those who do wrong."²³ These verses address the heirs of a murdered person and those who are injured. Forgiveness earns the Mercy and Reward of Almighty Allah. We have not been able to discover a single verse of the Holy Qur'an which states that if a person is forgiven/pardoned his/her crime is erased, effaced, obliterated or washed away.

12. The SMC case judgment refers to sections 309 and 310 of the PPC, highlights the words *afw* and *sulh* and explains what they mean. Section 309 PPC uses the Arabic word *afw* (comprising of the letters: *ayn fay waw*), translates it as *waiver*, and states that the victim or the victim's heir may "without [receipt of] any compensation, waive his right of *qisas*". Section 310 PPC uses the Arabic word *sulh*, translates it as *compounding*, and states that the victim or the victim's heir may "on accepting *badal-i-sulh*, compound his right of *qisas*". *Badal-i-sulh* is defined to mean "the mutually agreed compensation according to Shari'ah to be paid or given by the offender"²⁴.

²² *Surah Al-Ma'idah* (5) verse 45.

²³ *Surah Ash-Shura* (42) verse 40.

²⁴ Explanation to subsection (5) of section 310 Pakistan Penal Code.

13. The word *afw*, in its different forms occurs about thirty times in the Holy Qur'an but in none of the verses where it is used does it mean the erasure of the crime even though it has been forgiven. The word *afw*, and its derivatives, are used in the following verses of the Holy Qur'an:

<u>Surah and verse</u>	<u>Word</u>	<u>Translation</u>
<i>Al-Baqarah</i> (2), 52	<i>afawna</i>	"We [Allah] forgave"
<i>Al-Baqarah</i> (2), 109	<i>fa-ifu</i>	"so forgive"
<i>Al-Baqarah</i> (2), 178	<i>ufiya</i>	"is pardoned for it" [murder]
<i>Al-Baqarah</i> (2), 187	<i>wa'afa</i>	"and He [Allah] forgave you"
<i>Al-Baqarah</i> (2), 237	<i>ya'funa,</i> <i>yafuwa</i> <i>ta'fu</i>	(regarding dower) "they forego" (regarding dower) "forgoes" (regarding dower) "you forego"
<i>Al-Baqarah</i> (2), 286	<i>wa-u'fu</i>	"and (Almighty Allah) pardon us and forgive us and have mercy on us"
<i>Al-Imran</i> (3), 152	<i>'afa</i>	"He [Allah] forgave"
<i>Al-Imran</i> (3), 155	<i>'afa</i>	"Allah forgave"
<i>Al-Imran</i> (3), 159	<i>fa-u'fu</i>	"then pardon and ask forgiveness for them" (Almighty Allah addressing the Messenger, peace and blessings be upon him)
<i>An-Nisa</i> (4), 99	<i>ya'fuwa</i> <i>'Afuwan</i>	"Allah will pardon" "Allah is the Pardoner"
<i>An-Nisa</i> (4), 149	<i>ta'fu</i>	"pardon" and "surely Allah is ever pardoning"
<i>An-Nisa</i> (4), 153	<i>fa'afawna</i>	"so We [Allah] forgave them"
<i>Al-Maidah</i> (5), 13	<i>fa-u'fu</i>	"but forgive them"
<i>Al-Maidah</i> (5), 15	<i>waya'fu</i>	"you used to hide in the Book"
<i>Al-Maidah</i> (5), 95	<i>'afa</i>	"Allah forgives what is in the past, for repetition Allah will punish"
<i>Al-Maidah</i> (5), 101	<i>'afa</i>	"Allah will forgive"
<i>Al-A'raf</i> (7), 95	<i>'afaw</i>	"they increased"
<i>At-Tawbah</i> (9), 43	<i>'afa</i>	"Allah forgives"
<i>At-Tawbah</i> (9), 66	<i>na'fu</i>	"We [Allah] pardon"
<i>An-Nur</i> (24), 22	<i>walya'fu</i>	"and let them forgive"
<i>Ash-Shura</i> (42), 25	<i>waya'fu</i>	"and He [Allah] is the One that accepts repentance (<i>tawbah</i>) from His

		slaves and forgives”
<i>Ash-Shura</i> (42), 30	<i>waya’fu</i>	“and for many (a sin) He [Allah] grants forgiveness”
<i>Ash-Shura</i> (42), 34	<i>waya’fu</i>	“but much does He [Allah] pardon”
<i>Ash-Shura</i> (42), 40	<i>’afa</i>	“if a person forgives and makes reconciliation his reward is due from Allah”
<i>At-Taghabun</i> (64), 14:	<i>ta’fu</i> <i>watasfahu</i>	“but if you forgive (<i>ta’fu</i>) and overlook”

14. Forgiveness (*tawbah*) is premised upon seeking it. “*And He [Allah] is the One that accepts repentance (tawbah) from His slaves and forgives.*”²⁵ *Tawbah* is not sought for something not done. The wrongdoer may seek forgiveness from the person wronged. Forgiveness is not sought by the innocent. Forgiveness is premised on the acknowledgment of the wrong, which in a case of murder means admitting having committed the murder. It is our understanding that forgiveness or pardon does not erase or obliterate the crime, it simply withholds the punishment. The Qur’an negates the concept of obliteration of the crime, even if it has been forgiven, and its repetition attracts punishment - “*Allah forgives what is in the past, for repetition Allah will punish.*”²⁶ The record therefore remains intact. Sections 309 and 310 of the PPC respectively attend to the matter of *afw* (waiver) and *sulh* (compounding) but neither section states that *afw* or *sulh* results in the erasure of the crime from the record.

15. Section 338-E of the PPC enables certain offences to be “*waived or compounded and the provision of sections 309 and 310 shall, mutatis mutandis, apply to the waiver or compounding of such offences*”. However, this section commences by stating that it is “*subject to the provisions of*

²⁵ *Surah Ash-Shura* (42) verse 25.

²⁶ *Surah Al-Maidah* (5) verse 95.

this Chapter and section 345 of the Code". The proviso to this section further states that the court is not bound to accept the compromise and retains the "*discretion having regard to the facts and circumstances of the case, acquit or award taz'zir to the offender according to the nature of the offence.*"²⁷ Therefore, if the perpetrator of the crime, which has been waived/compounded, is to be acquitted this may only be done after the *facts and circumstances of the case* have been considered, that is, after hearing the case. The law does not state that the court has to acquit the accused-convict simply because the offence has been waived or compounded. We have not been able to discover any provision either in the PPC or the Code which explicitly, or impliedly, mandates that a convict's conviction shall be set aside when the compromise is accepted. Nor, in our opinion, can this be done by relying on subsection (6) of section 345, which states that the composition, "*shall have the effect of an acquittal*".

16. Section 345 of the Code is stated to provide "*the mechanism for such compounding*"²⁸. However, section 338-E of PPC is "*subject to the provisions of this Chapter (of the PPC) and section 345 of the Code.*" Section 338-F of the PPC stipulates that in the interpretation of these provisions the court "*shall be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah*"²⁹. The learned law officers who attended the hearing of the SMC case appear not to have rendered assistance, they did not refer to said sections of law, nor to a single verse of the Holy Qur'an and/or to the teachings of Prophet Muhammad (peace and blessings be upon him). The SMC judgment refers to the words *afw* and *sulh* and derives the meaning of the word *afw* from a dictionary

²⁷ Second proviso to section 338-E of the Pakistan Penal Code.

²⁸ Paragraph 7 of the judgment in SMC No. 03 of 2017.

²⁹ Section 338-F of the Pakistan Penal Code.

compiled by Thomas Patrick Huges³⁰. The quoted entry in Huges' dictionary mentions two verses which however do not state, that if a victim or a deceased victim's heir forgives (*afw*) or compounds (*sulh*) the crime is erased, effaced, obliterated and or washed away.

17. A judgment in a criminal case has two components; the determination, on the basis of the evidence, whether the accused has committed the crime, and if he has, the appropriate punishment to be given, that is, the *sentence*. Conviction and sentence are two distinct components of a judgment. Conviction for *qatl-i-amd* under section 302 (b) is a sentence of death or imprisonment for life.³¹ The Code at a number of places also clearly distinguishes between conviction and the sentence to be imposed if the crime is proved. Sentences of death and the manner in which they are to be executed are dealt with in two Chapters of the Code.³² A sentence of death is required to be confirmed by the High Court³³ and, after it is confirmed by the High Court³⁴, it is to be executed in terms of section 381 of the Code. The Amendment added an important proviso to section 381, as under:

"Provided that the sentence of death shall not be executed if the heirs of the deceased pardon the convict or enter into a compromise with him even at the last moment before execution of the sentence."

The sentence, which follows a conviction, can be brought to an end by the victim or by the victim's heirs by forgiving the convict and this may also be done by an executive pardon. However, neither individuals, who are entitled to compound, nor the executive, which has the power to pardon, can exercise judicial power by setting aside a conviction and or

³⁰ 'A Dictionary of Islam', The Unit Printing Press, Lahore, 1964, mentioned in paragraph 7 of the SMC 03 of 2017.

³¹ Section 302 of the Pakistan Penal Code.

³² Chapters XXVII and Chapter XXVIII respectively of the Code of Criminal Procedure.

³³ Section 374 of the Code of Criminal Procedure.

³⁴ Section 376 of the Code of Criminal Procedure.

acquit a convict. Section 345 (6) of the Code, in stating that a composition shall *have the effect of an acquittal* reiterates this principle.

18. The SMC judgment also refers to a number of old Indian precedents³⁵, a book of philosophy, English language and foreign law dictionaries. The concept of forgiving a murderer by his heirs, however, does not exist in the jurisdictions from which such material was gathered. In Pakistan this concept was introduced in the year 1996 when Chapter XVI of the PPC and section 345 of the Code were amended with the objective of bringing them into conformity with Islam. The victim of a crime can pardon/forgive the person who has wronged him/her. The dead however can neither pardon nor forgive. Pain and suffering is caused to the heirs of a murdered person and the Holy Qur'an empowered them to forgive the murderer. Forgiveness is premised on guilt having been established and or acknowledged. The Holy Qur'an does not state that if a murderer is pardoned/forgiven he stands exonerated or "acquitted" of the crime or to use the language of the SMC judgment, "*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.*" The SMC judgment further states that, "*compounding of the compoundable offence shall include all benefits and fruits of the lawful acquittal*". In our opinion neither Islam, nor the law, permits such largesse to be bestowed upon a murderer who has taken a sacred. It is more than a sufficient benefit when the murderer is no longer imprisoned and is set free.

19. If however the conviction of a murder is set aside and he is acquitted it means that he/she did not commit the crime, which creates

³⁵ Referred to in paragraph 9 of the judgment in SMC No. 03 of 2017.

a factual fiction. And, such factual fiction has repercussions. Applying for employment a pardoned convict need not disclose his conviction, including when seeking employment in respect of role model positions, of a teacher or in respect of sensitive jobs or where moral integrity is an employment prerequisite. An acquittal is also stated to be a “double presumption of innocence”.³⁶ It may be said that thieves and murderers do not serve society. Hiring or retaining a thief or a murderer as a cashier, teacher, policeman or judge would be irresponsible and dangerous.

20. Murder and serious offences can not be compounded in Commonwealth countries, in European countries and the United States of America (“USA”), countries of which legal precedents, in the absence of local precedents, are referred to by this Court. These countries have considered the scope and effect of a pardon by the executive (the Head of State or other designated authority), therefore, the analogous principles derived from the use of an executive pardon may be relevant. An old USA judgment stated that the pardon given to the offender also removes his guilt:³⁷

“A pardon reaches both the punishment prescribed for the offence and the guilt of the offender. . . . It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. . . . It removes the penalties and disabilities, and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity.”³⁸

³⁶ Muhammad Asghar v State, PLD 1994 Supreme Court 301, 307B; Jallan v Muhammad Riaz, PLD 2003 Supreme Court 644, 649E; Anwar Begum v Akhtar Hussain, 2017 SCMR 1710, 1713.

³⁷ Ex Parte A. H. Garland, 71 US 333, heard in the year 1861.

³⁸ *ibid* page 389.

A very strong rebuke of the aforesaid judgment was articulated by Samuel Williston, a Professor of Law at the Harvard Law School³⁹.

Steeped in sarcasm he commenced by stating:

“There is in the human mind a love of paradox which finds its expression in all professions. In the law there has been a vast deal of it and there is still too much. When it is said that “In the eye of the law the offender is as innocent as if he had never committed the offence,” we have something of the sort. It is asserted that the law regards as true what is inherently false. Everybody knows that the word “pardon” naturally connotes guilt as a matter of English. Everybody also knows that the vast majority of pardoned convicts were in fact guilty; and when it is said that in the eye of the law they are as innocent as if they had never committed an offence, the natural rejoinder is, then the eyesight of the law is very bad.”

21. Samuel Williston in his article⁴⁰ examined USA precedents on the question whether a pardon blots out guilt. With a view, “*to escape from the effect of the statement in Ex Parte Garland and similar statements to the effect that a pardoned convict is to be treated as if he were innocent*”, Williston referred to a number of other judgments, including the following:

“In an Arkansas case,⁴¹ it appeared that a probate judge had been convicted of felony and had appealed; while the appeal was pending, he received a pardon which he thereupon pleaded and was discharged. It was held on *quo warranto* proceeding that the unreversed conviction prevented him from exercising the office of a judge.⁴²”

Another case, *State v. Hawkins*⁴³, considered whether a person convicted of a crime should be removed from the police force. The Police Commissioners had appointed and promoted a policeman, who had been

³⁹ “Does a Pardon Blot Out Guilt”, Harvard Law Review, Vol. XXVIII, May, 1915, No. 7.

⁴⁰ *ibid.*

⁴¹ *State v. Carson*, 27 Ark. 469 (1872).

⁴² *Commonwealth v. Fugate*, 2 Leigh (Va.) 724 (1830).

⁴³ 44 Oh. St. 98, N.E. 228 (1886).

convicted of a criminal offence, as he had been pardoned. In the *quo warranto* proceedings, which challenged his appointment, the Police Commissioner relied upon the pardon which was stated to have "*blotted out*" and obliterated his offence, and this was also the view of a dissenting judge. Williston commented on the majority view of the Court:

"The majority of the court, however, did not allow their common sense to be impaired by judicial *dicta*, and said:

'Whatever the theory of the law may be as to the effect of a pardon, it cannot work such moral changes as to warrant the assertion that a pardoned convict is just as reliable as one who has constantly maintained the character of a good citizen.' "

Williston also referred to a US Supreme Court⁴⁴ decision which he paraphrased, as under:

"The Supreme Court, however, indulged in no fictitious belief in his guilt having been blotted out..."

22. To ascertain what a pardon implies and its nature Williston relied upon a number of cases. In a *New Jersey case*⁴⁵ it was held, that:

"Pardon implies guilt. If there be no guilt, there is no ground for forgiveness. It is an appeal to executive clemency. It is asked as a matter of favor to the guilty. It is granted not of *right* but of *grace*. A party is acquitted on the ground of innocence; he is pardoned through favor. And upon this very ground it is that the pardoning power is never vested in a judge."

He also quoted from a case of the Supreme Court of the State of Indiana⁴⁶, which had expressed similar views:

"An innocent man suffering from an illegal sentence, procured by fraud or extorted by violence,

⁴⁴ *Bradford v. United States*, 228 U. S. 446 (1913).

⁴⁵ *Cook v. Freeholders of Middlesex*, 2 Dutch. (N. J.) 326, 331, 333 (1857).

⁴⁶ *Sanders v. State*, 85 Ind. 318, 322 (1882).

may desire a trial and an acquittal which shall remove from his character the stain of guilt, and this the exercise of the pardoning power cannot do. To pardon is to exercise executive clemency; it is an act of mercy."

23. Soon after the publication of Samuel Williston's powerful rebuke of *Ex Parte Garland*⁴⁷ the US Supreme Court distanced itself from it. In *Burdick v. United States*⁴⁸, which was decided in the year 1915, the Court reaffirmed its earlier reasoning in the case of *United States v. Wilson*⁴⁹ which it had heard in the year 1833 and held, that there is a "*confession of guilt implied in the acceptance of a pardon.*" Pardon, the Court held, "*remits punishment*" whilst accepting guilt. In a more recent case,⁵⁰ decided in the year 1990, the Federal Appellate Court (US Court of Appeals, Third Circuit), accepted "*the view of the effect of a pardon propounded by Professor Williston in Does a Pardon Blot Out Guilt?*" The Court of Appeal was ruling on the issue whether the conviction of Gregory Paul Noonan, on his failure to submit for induction, which constituted a violation of the Military Selective Service Act, should be expunged from the record after his Presidential Pardon. It was urged on his behalf that by not removing the conviction it would be "*detrimental to Mr. Noonan's pursuit of employment or other goals beneficial to his family.*" The Court of Appeals held that Noonan was not so entitled, and concluded by quoting⁵¹ the latin dictum – "*Poena tolli potest, culpa perennis erit,*" which means, *the punishment can be removed, but the crime remains.* The Court refused to create any factual fiction, holding, that:

"The effect of the pardon was to remove the criminal element of the offense named in the pardon, but not

⁴⁷ *ibid.*

⁴⁸ *Burdick v. United States*, 236 U. S. 79.

⁴⁹ *United States v. Wilson* 32 U. S. 150.

⁵⁰ *United States v. Noonan*, 906 F.2d 952.

⁵¹ *Black's Law Dictionary*, 1040, 5th edition 1979.

to create any factual fiction, or to raise the inference that the person pardoned had not in fact committed the crime for which the pardon was granted."

The Court categorically held, that, "*the grant of a pardon does not wipe out the record of a conviction.*" The concept of a pardon, the power of the executive and that of a court were also examined:

"Pardon implies guilt. If there be no guilt, there is no ground for forgiveness. It is an appeal to executive clemency. It is asked as a matter of favor to the guilty. It is granted not of right but of grace. A party is acquitted on the ground of innocence; he is pardoned through favor. And upon this very ground is that the pardoning power is never vested in a judge."

24. The Court of Appeal of England and Wales in *Regina v. Foster*⁵² considered whether as a consequence of a pardon the conviction stands quashed and the guilt expunged. The Court after examining precedents from England and elsewhere determined that the pardon removes the penalties and punishments but does not eliminate the conviction itself. The Court of Appeal cited with approval a judgment of the Supreme Court of Tasmania⁵³ which considered the pardon given in a case involving corruption and held, that, "*the pardon granted was not the equivalent of an acquittal*". A case from the High Court (Full Court) at Auckland, New Zealand⁵⁴ was also cited with approval, which held, that:

"The effect of the pardon was to remove the criminal element of the offence named in the pardon, but not to create any factual fiction, or to raise the inference that the person pardoned had not in fact committed the crime for which the pardon was granted."

⁵² *Regina v. Foster*, [1984] Q. B. 115.

⁵³ *Rex v. Cosgrove*, [1984] Tas. S. R. 99.

⁵⁴ *In re Royal Commission on Thomas Case*, [1980] 1 N.Z.L.R. 602.

25. If consequent upon the acceptance of a compromise (compounding) the convict is acquitted and the crime is erased this can only be done by creating a factual fiction. Such a factual fiction may also negate the following provisions of the PPC and the Code which take into account the previous convictions and conduct of the offender. Section 75 of the PPC prescribes enhanced punishments for offenders with "*previous conviction*". Section 311 requires that the "*past conduct of the offender*" and "*whether he has any previous convictions*" be considered. Section 337-N of the PPC states that in cases of hurt the Court may in addition to the payment of *arsh* (compensation) also "*award ta'zir (punishment) to an offender who is a previous convict*" and or is a "*habitual*" criminal. Sections 221 (7), 265-I and 511 of the Code mention "*previous conviction*" and sections 348, 497 and 565 "*previously convicted*" offenders. Previous convictions are also relevant when considering sentencing; whether the maximum punishment be given or any lesser one is determined by taking into consideration the convict's conduct and previous convictions. Therefore, if the previous conviction/s are erased these legal provisions become redundant. We may also refer to the Holy Qur'an which declares life sacred⁵⁵ and which states that the murder of a single person is "*as if he [the murderer] has slain all of humanity*"⁵⁶ and that, "*if anyone saves a life, it is as if he saved all of humanity*"⁵⁷.

26. The question, whether the compounding of an offence results in the setting aside of the conviction and the automatic acquittal of the convict, has been considered from a number of different angles; by examining the PPC, the Code and the Holy Qur'an, by ascertaining the meaning of *afw* and by reading analogous foreign judgments. And,

⁵⁵ *Surah Al-Isra* (17) verse 33.

⁵⁶ *Surah Al-Ma'idah* (5) verse 32.

⁵⁷ *Surah Al-Ma'idah* (5) verse 32.

having done so we are of the view that when the compromise is accepted it brings to an end the punishment of the offence, but it does not simultaneously result in the setting aside of the conviction and the acquittal of the convict.

27. In our opinion a number of provisions referred to above were not considered by the learned Bench of this Court in the SMC case judgment, and most probably because the requisite assistance was not provided by the law officers. Whilst we agree that by accepting the compromise it brings the sentence to an end, we are of the view that the convict does not secure an automatic acquittal as a consequence thereof. We, however, are mindful of the principle of *stare decisis* and that if a bench of a Court which comprises of an equal number of judges does not concur with the views of the other bench a larger bench should be constituted to resolve the matter. In this regard reference may be made to the cases of Multiline Associates v Ardeshir Cowasjee (PLD 1995 Supreme Court 423), Ardeshir Cowasjee v Karachi Building Control Authority (KMC) (1999 SCMR 2883) and Atma Ram v State of Punjab (AIR 1959 Supreme Court 519). This is all the more important in this case because the determination of the issue in hand will affect a very large number of cases. Therefore, it is all the more important that every aspect of the matter is thoroughly examined and determined. Consequently, we refer this case to the Hon'ble Chief Justice for the constitution of a larger bench.

28. We are however cognizant of the fact that a compromise has been effected between the legal heirs of the deceased Zahir Mehmood (also known as Zahir Hussain) and the petitioner-convict, therefore it would be appropriate that till the determination of the question in hand, the

remaining sentence of imprisonment of the petitioner-convict (Shafqat alias Shafaat) is brought to an end, which we hereby do, and order that he be released forthwith unless required to be detained in any other case. The larger bench to be constituted will decide whether the petitioner-convict, as a consequence of accepting the compromise, is also to be acquitted.

JUDGE

JUDGE

JUDGE

Bench-III
Islamabad:
29.10.2018

Approved for Reporting
(M. Tauseef)

GULZAR AHMED, J.— I have gone through the very elaborate and erudite judgment of my learned brother Qazi Faez Isa, J. With all due deference and all the humility at my command, I could not make myself agree to the judgment of his lordship. The foremost reason that has prevailed with me is that there already exists a three members' bench judgment of this Court passed in Suo Motu Case No. 03 of 2017 [Regarding the issue as to whether compounding of an offence under section 345 Cr. P.C. amounts to acquittal of accused person or not], which is reported in PLD 2018 SC 703. The judgment has been rendered by his lordship Mr. Justice Asif Saeed Khan Khosa, which has been agreed and signed by their lordships Mr. Justice Ijaz ul Ahsan and Mr. Justice Syed Mansoor Ali Shah. This judgment, has discussed in great details the effect of compounding of an offence under section 345 Cr.P.C. and in doing so large number of case laws from our own as well as foreign jurisdiction have been taken into consideration, discussed and thorough opinion has been expressed that once an offence has been compounded under section 345 Cr.P.C. and it obviously means the offence, which is compoundable, such compounding of the offence results into obliteration, removal, pardoning and erasing of the offence resulting into acquittal of the accused or convict as the case may be. In doing so, the bench has dealt with the Islamic principles as laid down in the Holy Quran with particular reference to *Afw* as provided in section 309 PPC and *Sulh* as provided in section 310 PPC.

2. The question that is important and needs to be addressed at this juncture is the principle of Stare Decisis and is also known as established principle of precedent which is the hallmark of the legal jurisprudence historically as well as in contemporary modern times and it is adhered to by the Courts to maintain certainty and consistency in the view and opinion expressed by it for the society at large to follow and where the view and opinion is expressed or judgment delivered by Supreme Court of Pakistan, it has binding effect as provided in Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973 for that all Courts in Pakistan are required to follow the same. Certainly, the rule of precedent has its own principles and among them is the principle that if a view and opinion is expressed or judgment delivered by three members' bench of the Supreme Court of Pakistan, such judgment of three members' bench has the effect of binding-ness on

an equal three members' bench of the Supreme Court. The view expressed by a three members' bench of this Supreme Court could only be changed or deviated from by a larger bench for which the forum provided by law is to request the Chief Justice for constitution of a larger bench because there is disagreement with the view expressed by three members' bench of this Court. The rule of precedent on this point has been addressed by this Court and the most celebrated judgment in this regard is the case of **Multiline Associates v. Ardeshir Cowasjee & 2 others** [PLD 1995 SC 423] which is a three members' judgment of this Court wherein it has been observed as follows:

"18. In such circumstances, legal position which emerges is that the second Division Bench of the High Court should not have given finding contrary to the findings of the 1st Division Bench of the same Court on the same point and should have adopted the correct method by making a request for constitution of a larger Bench, if a contrary view had to be taken. In support reference can be made to the cases of the Province of East Pakistan v. Dr. Azizul Islam (PLD 1963 SC 296) and Sindheswar Ganguly v. State of West Bengal (PLD 1958 SC (Ind.) 337), which is a case of Indian jurisdiction, we, therefore, hold that the earlier judgment of equal Bench in the High Court on the same point is binding upon the second Bench and if a contrary view had to be taken, then request for constitution of larger Bench should have been made."

In another case of **Ardeshir Cowasjee & 10 others v. Karachi Building Control Authority (KMC), Karachi & 4 others** [1999 SCMR 2883] a five members' bench of this Court while considering the rule of precedent has observed as follows:

"19. Before concluding the above judgment, we may refer to the conflict of views between the two judgments of this Court in the case of Abdul Razak v. Karachi Building Control Authority and others (PLD 1994 SC 512) (supra) and Multiline Associates v. Ardeshir Cowasjee and others (PLD 1995 SC 423) (also reported in 1995 SCMR 362) (supra) noticed in the leave granting order which is to be resolved. The former case was decided on 31.-3-1994 by a Bench comprising Ajmal Mian, Sajjad Ali Shah and Saleem Akhtar, JJ. (as then they were), whereas in the latter

case judgment was rendered on 22-1-1995 by a Bench comprising Sajjad Ali Shah, C.J., Mir Hazar Khan Khoso and Muhammad Munir Khan, JJ. (as then they were). It appears that while deciding the latter case notice of the above earlier judgment of Abdul Razak was not taken though, according to Mr. Naimur Rehman, the same was cited. It may be pointed out that a Bench of the same number of Judges of the same High Court, or of the Supreme Court, cannot deviate from the view of an earlier Bench as rightly has been held in the case of Multiline Associates v. Ardsher Cowasjee and others (PLD 1995 SC 423) (supra) in relation to the High Court.

(emphasis supplied)

Yet another case from the Indian jurisdiction is that of **Atma Ram etc v. State of Punjab & others** [AIR 1959 Supreme Court 519] where rule of precedent has been considered and it was observed as follows:

"The later Full Bench case referred to above, was decided by three Judges, including Bhandari C.J., who agreed with the judgment of the Court delivered by Grover J. Perhaps, the better course would have been to constitute a larger Bench, when it was found that a Full Bench of three Judges was inclined to take a view contrary to that of another Full Bench of equal strength. Such a course becomes necessary in view of the fact that otherwise the subordinate courts are placed under the embarrassment of preferring one view to another, both equally binding upon them."

3. I may also note here the case of **Mureed Sultan & others v. The State through P.G. Punjab & another** [2018 SCMR 756] where too an application under section 345(6) Cr.P.C was made for compounding the offence of qatl-e-amd under section 302(b) PPC. The bench was comprised of Mr. Justice Ejaz Afzal Khan, Mr. Justice Qazi Faez Isa and Mr. Justice Ijaz ul Ahsan. By majority order of Mr. Justice Ejaz Afzal Khan and Mr. Justice Ijaz ul Ahsan, the application was allowed and conviction and sentence recorded against the applicants were set-aside and they were acquitted from the charge. My learned brother Qazi Faez Isa, J., however, wrote his own separate opinion in which he too allowed the application under section 345 Cr.P.C. but observed that this acceptance of application only acquits

the applicants and does not acquit them from charge of commission of murder. Similar view is expressed by my learned brother Qazi Faez Isa, J., in the present case also.

4. I may, however, note that I fully agree with the judgment of this Court delivered in **Suo Motu Case No.3 of 2017** [PLD 2018 SC 703] and thus it is not at all essential for me here to discuss the issue of compounding of offence, as it has already been done in the judgment in *Suo Motu Case (supra)*, even though I may have some other and additional reasons also to reach the same conclusion. Therefore, I allow Criminal Miscellaneous Application No.693 of 2018 as a result of which Jail Petition No.427 of 2016 is converted into appeal and is allowed. The conviction and sentence recorded against the applicant are set-aside and he is acquitted of the charge in terms of section 345 (6) of the Code of Criminal Procedure, 1898. The applicant shall be released forthwith if not required in any other custody case.

JUDGE