IN THE SUPREME APPELLATE COURT GILGIT–BALTISTAN
AT GILGIT.
Cr. P.L.A No. 09/2011.

Before: - Mr. Justice Muhammad Nawaz Abbasi,CJ

Mr. Justice Muhammad Yaqoob, J

Zahir Abbas S/o Azur Khan r/o Jalalabad District Gilgit.

Petitioner

Versus

The State **Respondent**

PETITION FOR LEAVE TO APPELLATE UNDER ARTICLE 60 OF (EMPOWERMENT & SELF GOVERNANCE ORDER) 2009 AGAINST THE ORDER / JUDGMENT DATED 17-05-2011, WHEREBY APPEAL FILED BY THE PETITION HAS BEEN DISMISSED UNDER REVISION FILED BY THE COMPLAINANT HAS BEEN ALLOWED AND SENTENCE OF 10 YEARS RIGOROUS IMPRISONMENT HAS BEEN ENHANCED TO DEATH.

Present: - Malik Haq Nawaz , Senior and Mr. Sharif Ahmed Advocates for the petitioner.
Advocate General Gilgit- Baltistan, for the state.

Date of hearing: - 13-09-2011.

JUDGMENT:-

Muhammad Yaqoob, J------ This criminal petition for leave to appeal under Article 60, of Gilgit-Baltistan (Empowerment Self Governance) Order 2009, has been directed against the impugned judgment/order dated 17-05-2011, passed by the learned Division Bench of Chief Court, Gilgit-Baltistan, in

criminal appeal No.30/2010, whereby the learned division Bench of Chief Court dismissed the above criminal appeal, by allowing criminal revision No.01/2011, and enhanced the sentence of petitioner/ Appellant from 10 years, rigorous imprisonment, to life imprisonment, vide judgment dated 17-05-2011, hence this petition for leave to appeal.

Preliminary arguments were heard by the Division bench of this august Court and admitted for regular hearing vide order dated 30-06-2011. Contents of order dated 30-06-2011 are hereby reproduced for clarification:-

"Heard. Contention raised by the learned counsel that in absence of (a) post mortem report for ascertainment of cause of death, (b) recovery of incriminating article on the pointation of the appellant, (c) reliable piece of ocular evidence it was a fit case for acquittal, added that even otherwise if prosecution story is believed, application of Section 302 P.P.C is un-warranted as the occurrence was not result of premeditation but it was result of sudden impulsion.

Points raised by learned counsel for the petitioner require consideration. Leave to appeal is, therefore, granted. Notice to state for a date in office."

Briefly, the facts of the case are that on 22-6-2008, complainant Sajjad Haider s/o Muhammad Hussain r/o Jalalabad Gilgit, submitted an application to the in-charge police Chowki Danyore Gilgit, alleging therein, that on the

above said date at about 1200 hours, accused Zahir Abbas and Jalaluddin , armed with knives and sotas assaulted upon his father Muhammad Hussain by abusing and threatening dire consequence and inflicted severe injuries by causing stone and sota blows on him, on receipt of information of the quarrel other relatives of the complainant also reached to the scene of occurrence and scarcely saved his father from the accused, otherwise, they would have killed his father. The motive stated was exchange of hard words of the accused with Mufaqir Abbas nephew of the complainant on 21-6-2008.

In the light of application submitted by Sajjad Haider, syed kamran. ASI, incharge Police Chowki, Danyore, sent Murasila Exh.PW-6/A to SHO Police Station Cantt Gilgit, for lodging FIR against the accused under section 506(2),500, 337(A) /34 P.P.C, while injured Muhammad Hussain was sent to Hospital with injury sheet for treatment. Unfortunately, the injured Muhammad Hussain, succumbed to injuries in DHQ Hospital Gilgit on 22-06-2008, at about 10 p.m. Thereafter, the charge was converted into section 302 P.P.C. After completion of investigation the Investigation officer handedover the case to SHO Polices Station Cantt Gilgit, who submitted challan in the Court against the accused under section 316 P.P.C.

At the commencement of the trial, charge against the Petitioner/ accused was framed under section 302, P.P.C in

compliance with the order of Chief Court , Gilgit–Baltistan, vide order dated 19-10-2009, accused pleaded not guilty and claimed trial .

The prosecution in order to prove his case produced 11 PW's including the complainant, (Sajjad Haider s/o deceased Muhammad Hussain), after closing prosecution evidence, accused was examined under section 342 Cr.P.C, wherein he stated, that all the PW's have falsely implicated him, otherwise, I have nothing to do with this case. However, neither the accused made statement on oath under section 340(2) Cr. P.C. nor opted to produce evidence in their favour.

On completion of trial accused Zahir Abbas, convicted under section 302 P.P.C and sentenced to (10) years rigorous imprisonment with benefit of section 382(B) Cr. P.C. while co-accused Jalaluddin, is acquitted giving benefit of doubt, against which, criminal appeal, No.30/2011, was preferred by the present petitioner, which has been dismissed. Whereas, criminal revision petition No.03/2011 filed by the complainant for enhancement of the sentence, has allowed and altered the conviction under section 302(C) P.P.C. into section 302(B) P.P.C and sentence is enhanced to life imprisonment.

Being aggrieved and dis-satisfied from the judgment passed by the learned Divison Bench of Chief Court, the accused/ petitioner has preferred this petition for leave to appeal before this apex Court.

We have heard arguments at a great length, the learned counsel for the petitioner, contended that about 70/80 Persons were present at the scene of occurrence, but no independent and impartial person was cited as PW. The so called eye witnesses are sons and close relatives of deceased, hence cannot be relied upon. He further contended, that the Post mortem of the deceased was not conducted despite of the advice by the concern doctors. Whereas, death certificate issued from DHQ Hospital Gilgit, is silent regarding cause of death. Moreover, the story initially mentioned by the complainant (real son of deceased) was improved at trial by nefarious design and just to make the petitioner/ appellant a scape goat to arrange the quarrel of preceding day, as evident from the record. The cause of death is not established but both the lower court below convicted the petitioner/appellant by searching his guilt, with the help of a microscope. But the sole right of appellant /petitioner to search his innocence and application of the golden rule of benefit of doubt, has been denied to him. All the PW's made contradictory statements about the occurrence, as such they cannot be truthful, and cannot be relied worthy. The learned counsel further strongly argued, that, there is nothing on record, to the effect that the death of accused was caused as a result of the stone blow or any other cause. Therefore, all the impugned judgments/

orders passed by the learned lower courts are the result of misconception, misunderstanding and misreading of the evidence available on record. Prosecution has failed to prove its case beyond any shadow of doubt, therefore, accused is entitled to be acquitted giving benefit of doubt.

In response, to the arguments advanced by the learned counsel for the petition/appellant, the learned Advocate-General strongly opposed the points raised by the cvounsel for the petitioner/appellant and submits, that the accused / petitioner is directly charged in the FIR, the matter was reported to the police soon after the occurrence. The occurrence took place in broad day light and was witnessed by the eye witnesses, who have fully supported the prosecution version. Motive is also proved, whereas weapon of offence (stone) was recovered from the spot of occurrence. He further contended that the un-natural death is proved by death certificate issued from DHQ Hospital Gilgit. Evidence of PW Muhammad Din, Sajjad Haider and Sher Alam, cannot be disbelieved merely on the ground of their relationship with the deceased. Counsel for the accused has been failed to shatter their evidence despite of lengthy cross examination. Prima facie, a strong Criminal case has been established by the prosecution, therefore, petitioner/ accused is liable for capital punishment.

We have carefully examined the respective contentions as agitated on behalf of appellant and for the state, in the light of relevant provisions of law and record of the case, the impugned judgments/orders passed by the learned lower courts below have been perused with care and caution. The entire evidence been thrashed out with the eminent assistance of both the learned counsel for the parties, which reveals that the impugned judgments/ orders passed by the learned lower courts below is the result of mis-conception, mis-understanding and misreading of the evidence available on record. It is an admitted fact, that both the learned lower courts based their conviction on statement of PW-4 and PW-5, but careful analysis of their deposition would reveal that both the PWs were present along with other people at the spot of occurrence. They were subjected to an exhaustive cross–examination, where in they did not depose, that the death of deceased Muhammad Hussain, was occurred due to stone blow effected by the petitioner/ accused. Whereas, the other PW's including complainant categorically stated in their statements that the quarrel took place between parties and pelted stones on each other, they further confirmed, that the occurrence took place during the day light and many people of village Jalalabad, had seen the occurrence. But none of them cited in the calendar of witnesses as ocular evidence. PW-5 Muhammad Din s/o Muhammad Hussain, stated in his cross examination, that at the time of occurrence PW Sajjad (FIR) lodger was not

present with me. However, he was standing at some distance, I had seen him. While PW Sajjad states, it is correct that I did not personally see the quarrel taken place on 21-06-2008, between Mufakir Abbas, and accused Zahir Abbas, again stated, that he has personally seen the previous occurrence. He furthe stated in his cross examination, that I have personally witnessed the occurrence. Which has been confronted with his own application Exh.PW-3 /A. where it is mentioned, that I had come to the scene of occurrence after hearing about the quarrel. From perusal of about statements it is crystal clear, that the statements of so called eye witnesses are not corroborative and there are glaring contradictions with each other as such, we are not inclined to declare such depositions as convincing, truthful and confidence inspiring.

It may not be out of place to mention here, that the FIR does not disclose the names and identification of eye witnesses on whom reliance can be made, on the other hand the very important and independent eye witness of the locality i.e PW-1 and PW-2, whose shops are adjacent to the place of occurrence do not support the prosecution version. As per prosecution record cause of death of the deceased (Muhammad Hussain), remains mystery, that there is nothing on record to the effect that the death of deceased was caused as a result of the stone blow or any other cause. The eye witnesses are sons and close relatives of deceased (Muhammad Hussain), hence cannot be relied upon.

Moreover, the post mortem was not conducted and death certificated issued from DHQ Hospital Gilgit, is totally silent regarding cause of death. Deceased is more than 82 years old and remained cardiac patient . The death might have been caused due to heart attack or any other natural cause.

In the light of above discussion, the question remains to be determined as to which offences committed by the petitioner, admitted facts are, that a free fight taken place between both the parties. They have pelted stones on each others, the process of stoning continuously remained for ten to twenty minutes, but the prosecution hopelessly failed to prove her case to the effect that the death of deceases was caused due to stoning of the appellant/petitioner(Zahir Abbas).

The next important question "whether the instant case in such like scenario falls under section 302 (b) and (c) P.P.C." the simple answer is in negative. As per record, both the parties pelted stones on each other and prosecution remained badly failed to establish that the present petitioner had badly failed to establish that the present petitioner had specifically intended to hit the deceased, thus death of the deceased might be caused either by "mistake of act" or by "mistake of fact" death of deceased was not result of pre-planned, deliberate, intentional or wanton act of petitioner/ appellant but the death of accused was an accidental. However, to ascertain the correct answer of the above

question here, it would be advantageous to have a glance of section 318 P.P.C which read as under:-

318 P.P.C.

" Whoever without any intention to cause the death of or cause harm to person, either mistake of act or mistake of fact, is said to commit " Qatl-e–khata".

And prescribes the punishment in section 319 P.P.C in the following words:-

"Whoever commit Qatl-e-Khata, shall be liable to Diyat. Provided that, where Qatl-e- khata, is committed by rash or negligent act, other than imprisonment of either description for a term which may extend to "five years" as "Tazir"

In a general sense, both the negligence recklessness are same species. However, while rashness is acting in the hope that no mischievous consequence will ensure though aware of the likelihood of such consequence, negligence is acting without the awareness that harmful or mischievous consequences will follow. For further elaboration, we quoted Black's Law Dictionary, wherein the word "recklessness defines as follows:-

" Rashness; heedlessness; wanton conduct, the state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though foreseeing such consequence, persist inspite of such knowledge . Recklessness is a stronger term then mere or

ordinary negligence and to be reckless, the conduct must be such as to evidence disregard of or indifference to consequences, under circumstances involving danger to life or safety of others , although no harm was intended.

Keeping in view the circumstances of the case and the background of the appellant/petitioner and the act that they have performed, we feel that he has committed the offence of Qatl-e-Khata. We convict them accordingly and sentence them to punishment for Qatl-e-Khata as prescribed in section 319 of the Pakistan Penal Code. Petitioner/Appellant is liable to pay Diyat subject to the injunction of Islam as laid down in the Holy "Quran and Sunnah". The Diyat amount as calculated on the day of occurrence, which comes to RS.7,54, 450/-as per notification No.S.R.O. 706 (1)/2007 dated 2-7-2007 for the purpose of sub section (1) _section 323 P.P.C. Moreover, the imprisonment for a period more then two years which he has already undergone satisfies the second portion of the punishment mentioned in section 319 P.P.C.

So far as, the Diyat amount is concerned the same shall be paid in lump sum or installments, according to section 331 P.P.C with in a period of (three years) from the date of pronouncement by this court, comprising of 36 equal monthly installments. The petitioner/ appellant, in the meantime admitted to bail on his furnishing surety in the sum of Rs. 8,00000/- (eight lac) with one surety and personal bonds in the like amount to the satisfaction of the learned

trial court with the undertaking to pay the amount of Diyat with in the prescribed period

In case of default in payment of the amount of Diyat by two consecutive installments, the surety bonds shall be forfeited and the outstanding amount shall become payable in lump sum. The amount of Diyat deposited by the convict/ appellant shall be paid by the learned trial court to the legal heirs of the deceased (Muhammad Hussain), in accordance with their legal shares to be determined by it.

The upshot of herein above discussion is that for the reason given above the punishment awarded to the present petitioner/ appellant by the learned Division Bench of Chief Court, Gilgit-Baltistan, under section 302(b) P.P.C. is converted into the sentence under section 319 P.P.C. for committing an offence of Qatl-e-khata. The accused/ petitioner herein is held liable to pay amount of Diyat mentioned herein above. Resultantly, the present petition for leave to appeal is converted into an appeal and disposed of accourdingly.

Announced.

13-09-2011 **CHIEF JUDGE**

JUDGE