IN THE SUPREME COURT OF PAKISTAN

(Review Jurisdiction)

PRESENT:

MR. JUSTICE MANZOOR AHMAD MALIK
MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL
MR. JUSTICE SYED MANSOOR ALI SHAH

Civil Review Petition No. 420 of 2016 in
Civil Petition No. 2990 of 2016

(To review the judgment dated 27.09.2016 passed by this Court in C.P. No. 2990 of 2016)

Mst. Safia Bano **Versus** *Home Department Govt. of Punjab through its Secretary and others*

Civil Review Petition No. 424 of 2016 in
Civil Petition No. 2990 of 2016

(To review the judgment dated 27.09.2016 passed by this Court in C.P. No. 2990 of 2016)

The Inspector General of Prisons Punjab **Versus** *Mst. Safia Bano & others*

Criminal Review Petition No. 170 of 2016 in
Criminal Appeal No. 619 of 2009

(To review the judgment of this Court dated 19.10.2015 passed by this Court in Crl. Appeal No. 619 of 2009)

The State **Versus** *Muhammad Ahmed Raza*

Human Rights Case No. 16514-P of 2018

(Matter regarding treatment of condemned prisoner, Kaneezan Bibi confined in Central Jail, Lahore)

Constitution Petition No. 09 of 2019

(Regarding suspension of death sentence of condemned prisoner Ghulam Abbas on the ground of mental illness)

Mst. Noor Jehan **Versus** *Home Deptt. Govt. of Punjab through Its Secretary & others*

For the Petitioner(s) Syed Iqbal Hussain Shah Gillani, ASC assisted by Ms. Zainab Mahboob, Barrister Hashim, Barrister Syeda

	Jugnoo Kazim and Maria Kazmi ***(in CRP No. 420 of 2016 & HRC No. 16514-P of 2018)***
	Mr. Qasim Ali Chohan, Addl. AG Punjab ***(in CRP No. 424 of 2016)***
	Ch. Muhammad Sarwar Sidhu, Addl. PG Dr. Faria Munawar, WMO (Adyala Jail, Rawalpindi) Zahid Bhatti, Assistant Superintendent Jail, DIG Prisons Office Rawalpindi Region & Tahir Shah, Dy. Superintendent. ***(in Crl. R.P. No. 170 of 2016)***
For the Complainant:	Mr. Sanaullah Zahid, ASC ***(in Crl.R.Ps No. 420 & 424 of 2016)***

On Court's Notice:

For the Federation:	Mr. Sajid Ilyas Bhatti, Addl. AGP
For the Province of Punjab:	Mr. Qasim Ali Chohan, Addl. AG Punjab
For the Province of Sindh:	Mr. Solat Rizvi, Addl. AG Sindh
For the Province of KPK:	Mr. Shumail Ahmad Butt, AG KPK Mr. Atif Ali Khan, Addl. AG KPK Mr. Zahid Yousaf Qureshi, Addl. AG KPK
For Province of Balochistan:	Mr. Arbab Muhammad Tahir, AG Balochistan Mr. Ayaz Muhammad Swati, Addl. AG Balochistan
For Islamabad:	Mr. Niaz Ullah Niazi, AG Islamabad
Amici Curiae:	Brigadier (Retd.) Professor Mowadat Hussain Rana, Professor of Psychiatry Barrister Haider Rasul Mirza, ASC

Date of Hearing 17.09.2020, 21.09.2020, 23.10.2018, 15.12.2020, 04.01.2021, 05.01.2021, 06.01.2021 & 07.01.2021

J U D G M E N T

Manzoor Ahmad Malik, J.- The mental health of a person is as important and significant as his physical health. Unfortunately, it is often not given the importance and seriousness it deserves. Because of certain misconceptions, the implications of mental illness are overlooked and the vulnerability or disability that it causes is not given due attention.

2. The Apex Court of the country has been called upon, through this Larger Bench, to determine questions relating to culpability, competence to face trial, and execution of sentence in case of those accused persons and convicts who are suffering from mental illness. These determinations need to be made while considering the latest jurisprudential, legislative and medical developments on this subject.

3. The facts relevant to the adjudication of the petitions relating to the case of each condemned prisoner i.e. Imdad Ali, Mst. Kaneezan Bibi and Ghulam Abbas are briefly discussed herein below:-

IMDAD ALI'S CASE

(Civil Review Petition (**C.R.P.)** No. 420 of 2016 & C.R.P. No. 424 of 2016 in Civil Petition No. 2990 of 2016 AND
Crl. Review Petition (**Crl.R.P.)** No. 170 of 2016 in Crl. Appeal No. 619 of 2009)

4. Imdad Ali (aged about 42 years at the time of commission of offence) was indicted by the learned Additional Sessions Judge, Burewala on 09.01.2002 for committing the murder of Hafiz Muhammad Abdullah on 21.01.2001 by firing shots with a

rifle 222 bore, in the area of Police Station (**P.S.**) City Burewala, District Vehari. Upon framing of charge, Imdad Ali pleaded not guilty. The record shows that no Advocate was appointed by him or his family to represent him before the trial Court rather an Advocate at State expense was appointed by the trial Court vide its order dated 29.01.2002 to conduct his case. The order of said date further reflects that earlier an Advocate was appointed by Court at State expense to represent Imdad Ali who later showed his unwillingness to represent the accused and in his stead another Advocate was appointed at State expense to represent him. It is manifest from the interim order of trial Court dated 09.02.2002 that learned defence counsel submitted an application under section 465 Code of Criminal Procedure, 1898 (**Cr.P.C.**) for holding an inquiry to determine the competence of Imdad Ali to face trial. On the said application, arguments were heard and vide order dated 12.03.2002, the learned trial Court disposed of the said application by observing that there is no reason to believe that Imdad Ali is of unsound mind, as referred to in section 465 Cr.P.C.

5. This order was challenged before the learned Lahore High Court, Multan Bench, Multan on behalf of Imdad Ali through Crl. Revision No. 91 of 2002 which was dismissed as not pressed upon the contention of his counsel that he intends to move an application before the learned trial Court to summon, as a Court witness, the Doctor who examined Imdad Ali, before the occurrence.

6. Thereafter, an application was moved before the trial Court on behalf of Imdad Ali for summoning Dr. Ihtisham ul Haq, Medical Officer, Services Hospital Lahore. The said application was dismissed by the trial Court vide order dated 07.05.2002.

7. This order of the learned trial Court dated 07.05.2002 was challenged before the learned Lahore High Court, Multan Bench Multan through Criminal Revision No. 185 of 2002. Vide order dated 14.05.2002, a report was called from the doctor posted at New Central Jail, Multan regarding the mental health condition of Imdad Ali. The doctor was also directed to specify the disease, if any, and to opine

whether the same was periodical or permanent. However, on 25.02.2002 when the case was taken up by the learned High Court, no one on behalf of convict Imdad Ali put in an appearance and the criminal revision was dismissed for non-prosecution. After the close of prosecution evidence, Imdad Ali was examined under section 342 Cr.P.C, as required under the law. Thereafter, his wife Mst. Safia Bano appeared as DW-1. She stated before the trial Court that 3-4 years prior to the occurrence, Imdad Ali occasionally talked about "supernatural beings" and "metaphysical elements" but "symptoms of abnormality" became usual one year prior to the occurrence. She further stated that prior to the occurrence, Imdad Ali was examined by Dr. Ihtisham ul Haq who recommended him for treatment at the Mental Hospital, Lahore.

8. On conclusion of the trial, Imdad Ali was convicted by the trial Court under section 302 Pakistan Penal Code, 1860 (**P.P.C.**) on 29.07.2002 and sentenced to death. The appeal filed by him was dismissed by a Division Bench of the learned Lahore High Court, Multan Bench, Multan on 07.11.2008 and murder reference was answered in the affirmative and his sentence of death was confirmed. Thereafter, he filed a jail petition before this Court wherein leave to appeal was granted on 13.11.2009, which culminated into Crl. Appeal No. 619 of 2009 and the same was also dismissed vide judgment dated 19.10.2015 and his death sentence was upheld. Imdad Ali did not file any review petition against the said judgment. However, he filed a mercy petition which was dismissed by the President of Pakistan on 17.11.2015. When black warrants were issued for execution of Imdad Ali on 26.07.2016, Mst. Safia Bano (wife of Imdad Ali) filed an application before the learned Sessions Judge, Vehari on 21.07.2016 praying therein that in order to examine the mental health condition of her husband (Imdad Ali), a Medical Board may be constituted and his execution may be stayed. The learned Additional Sessions Judge, Vehari dismissed the said application on 22.07.2016. Thereafter, Mst. Safia Bano filed a constitution petition (W.P. No. 10816 of 2016) before the Lahore High Court, Multan

Bench, Multan, against dismissal of application by the learned Additional Sessions Judge, Vehari. The High Court dismissed the writ petition on 25.07.2016, whereafter Mst. Safia Bano filed C.P. No. 2990 of 2016 before this Court assailing the order of the learned High Court, which was dismissed by this Court vide judgment dated 27.09.2016. Mst. Safia Bano has now filed C.R.P. No. 420 of 2016. Additionally, C.R.P. No. 424 of 2016 has been filed by the Inspector General of Prisons, Punjab, for review of the judgment of this Court dated 27.09.2016. Crl.R.P. No. 170 of 2016 has also been filed by the State through Prosecutor General Punjab, praying therein that judgment dated 19.10.2015 passed in Crl. Appeal No. 619 of 2009 may be reviewed and the sentence of death awarded to Imdad Ali be converted into imprisonment for life on account of his mental illness.

KANEEZAN BIBI'S CASE

(Human Rights Case (**H.R.C.**) No. 16514-P of 2018)

9. Mst. Kaneezan Bibi (aged about 24 years at the time of commission of offence) along with her co-convict Khan Muhammad was tried by the learned Additional Sessions Judge, Toba Tek Singh for committing murder of Mst. Maryam Bibi, Aslam, Shaukat, Liaqat, Mst. Razia and Mst. Safia on the night between 27/28.7.1989, in the area of P.S. Pir Mahal, Tehsil Kamalia, District Toba Tek Singh. On conclusion of trial, the said Court vide its judgment dated 07.01.1991 convicted her under section 302(b)/34 PPC and she was sentenced to death on six counts. A criminal jail appeal filed by her against her conviction and sentence was dismissed by the Lahore High Court, Lahore vide judgment dated 01.03.1994 and murder reference sent by the trial Court for confirmation or otherwise of her sentence of death was answered in the affirmative and her sentence of death on six counts was confirmed. Her criminal appeal was dismissed by this Court on 02.03.1999 without there being any alteration in her conviction and sentence. As reported by office, Mst. Kaneezan Bibi did not file any review petition against the judgment of this Court. The mercy petition filed by her was also dismissed by the President of

Pakistan on 19.01.2000. Thereafter, the convict Mst. Kaneezan Bibi filed CPLA No. 1925-L of 2010 against the dismissal of her writ petition by the learned Lahore High Court Lahore vide order dated 22.07.2010, for converting her sentence of death to imprisonment for life on the ground of mental ailment but the same was dismissed by this Court on 02.12.2010. Subsequently, her execution was stayed for three weeks by the President of Pakistan and she was referred to Punjab Institute of Mental Health (PIMH), where she was found to be suffering from schizophrenia. It is relevant to mention here that neither during trial nor before the learned High Court at the time of hearing of her appeal was the plea of mental ailment urged on her behalf. On 17.04.2018, the then Hon'ble Chief Justice after perusal of a report submitted by the Superintendent Central Jail, Lahore took *suo motu* notice and thereafter the instant case i.e. H.R.C. No. 16514-P of 2018 was ordered to be clubbed with C.R.P. No. 420 of 2016 (Imdad Ali's case).

GHULAM ABBAS'S CASE
(Constitution Petition No. 9 of 2019)

10. Ghulam Abbas (aged about 23 years at the time of commission of offence) was indicted by the learned Additional Sessions Judge, Rawalpindi on 04.04.2005 for committing murder of Wajid Ali and for murderous assault on Mst. Saima Bibi (wife of Wajid Ali) on 02.09.2004 in the area of P.S. R.A. Bazar Rawalpindi. On conclusion of trial, the said Court, vide its judgment dated 31.05.2006, convicted him under section 302(b) PPC and sentenced him to death. He was also convicted under sections 449 and 324 PPC and sentenced to different terms of imprisonment. The criminal appeal filed by him against his conviction and sentence was dismissed by the Lahore High Court, Rawalpindi Bench, Rawalpindi on 12.04.2010 and the murder reference was answered in the affirmative and his sentence of death was confirmed. His criminal appeal was also dismissed by this Court on 27.10.2016 and his conviction and sentence were maintained. The review petition filed by Ghulam Abbas against the said judgment of this Court was also dismissed on

18.07.2018. Same was the fate of his mercy petition filed before the President of Pakistan which was rejected on 22.04.2019.

11. Consequently, black warrants were issued, and his execution was fixed for 18.06.2019. In this backdrop, Mst. Noor Jehan (mother of Ghulam Abbas) filed the instant constitution petition No. 9 of 2019 under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 (**Constitution**) before this Court for staying the execution of black warrants on the grounds that Ghulam Abbas suffers from intellectual disability and mental illness which predate his confinement in jail; that he has severe learning disability since his childhood; that he is suffering from repeated seizures/fits; that he has a documented history of mental illness during his confinement in jail; that he has been prescribed antipsychotic medication. While pleading these circumstances, she has prayed for staying the execution of black warrants and assessment and evaluation of Ghulam Abbas by a Special Medical Board. While entertaining the petition, the then Hon'ble Chief Justice of Pakistan vide order dated 17.06.2019 stayed the execution of death sentence of Ghulam Abbas and directed the office to club the instant petition with C.R.P. No. 420 of 2016 (Imdad Ali's case).

12. In view of the facts narrated hereinabove, the important legal questions which emanate from these petitions are as under:-

(i) How should the trial Court deal with the plea of an accused that he/she was suffering from mental illness at the time of commission of offence?

(ii) How should the trial Court deal with the claim that due to mental illness, an accused is incapable of making his/her defence?

(iii) Whether a mentally ill condemned prisoner should be executed?

13. In view of serious and important legal questions involved in these petitions, notices were issued to the Advocates General of Provinces of Sindh, Khyber Pakhtunkhwa, Balochistan and Federal Capital Territory. No formal notices were required to be issued to the Government of the Punjab and the Federation since they already stood represented in C.R.P. No. 424 of 2016 and Crl. R.P. No. 170 of 2016.

14. Considering the sensitivity and significance of the issues involved, by order dated 17.09.2020, Brigadier (Retd) Professor Mowadat Hussain Rana, a renowned Professor of Psychiatry and Barrister Haider Rasul Mirza, Advocate Supreme Court of Pakistan (ASC) were asked to assist the Court as *amici curiae.*

ARGUMENTS

15. Learned counsel for the condemned prisoners Imdad Ali, Mst. Kaneezan Bibi and Ghulam Abbas has vehemently contended that these convicts are lodged in death cell for a considerably long period of time and they are suffering from acute mental illnesses. He stated that the Medical Board constituted by this Court has given a categoric opinion that Imdad Ali is suffering from Schizophrenia, Mst. Kaneezan Bibi has also been diagnosed with the same severe lifelong mental illness (Schizophrenia) and Ghulam Abbas suffers from cognitive/intellectual impairment. Learned counsel further contended that in the face of these mental illnesses, it is inhumane to execute the sentence of death of these condemned prisoners. While referring to certain provisions of the Prison Rules 1978 (**Rules**), learned counsel contended that from a wholistic reading of the referred Rules, it can safely be inferred that the condemned prisoners, because of their serious mental illness, are unable to understand and follow the mandatory procedures required to be followed before their execution. Therefore, learned counsel prayed that this Court may consider serious mental illness of the condemned

prisoners as a mitigating circumstance for converting their sentences of death into imprisonment for life.

16. However, learned counsel for the complainant (in the case of condemned prisoner Imdad Ali) opposed the prayer of the learned counsel for the condemned prisoner and argued that at the time of commission of crime, Imdad Ali was mentally fit and knew the consequences of his action. He further argued that at this belated stage, when he has virtually exhausted all the remedies available to him under the law, he is not entitled to any indulgence.

17. Brigadier (Retd.) Professor Dr. Mowadat Hussain Rana, learned *amicus,* apprised the Court about the concept and nature of different mental diseases. He stated that unlike physical illnesses, mental disorders are misunderstood by majority of the people. He elaborated that there are myths and misconceptions surrounding mental illnesses, their causes, consequences, and the way they influence human behavior and even the enlightened sections of the society consider mental illness a curse.

18. He was of the view that even in legal circles, mental illnesses are inadequately understood often raising suspicion and doubt. He expressed his view that many in the legal profession consider mental illnesses as abstract conditions that are more “in the air” or as spiritual and psychological conditions that people experience transiently as a result of tensions and stresses of life, rather than diseases of mind and brain with a scientific basis. They may believe that a mentally ill individual can be spotted easily by asking few questions to determine if he/she is ‘sane’ or otherwise.

19. He further elaborated that another common misconception is that mental illnesses can be very easily feigned in order to circumvent the law. He added that there is a wrong impression as well that there are no specific assessment methods, diagnostic laboratories, radiological tests, or known scientific,

structural and demonstrable means to determine or diagnose mental illnesses. He stressed that these notions, unfortunately, do not have a scientific basis because psychiatric disorders are like any other medical disorder. The diagnosis and objective determination of such disorders is a highly technical and a professional pursuit and like all other medical disorders, can only be assessed by Psychiatrists with the help of mental health professionals through rigorous clinical, psychometric and scientific electrophysiological and radiological tests and scans of functions of brain and mind. He also added that a mentally ill individual with disturbed higher mental functions of consciousness, thinking, mood, cognition and with impairment of judgment and insight cannot be treated at par with a normal criminal.

20. He apprised the Court that there are more than 160 recognized psychiatric disorders. Some of those disorders are Severe Mental Illnesses (SMIs), Personality Disorders, and Intellectual Disabilities (ID), and such disorders affect the capacity of an individual to fend for himself/herself in a court of law. He was of the opinion that forensic mental health assessment must, minimally, include an expert's opinion on the consciousness, thinking process, intellect, mood, emotions, perceptions, judgment and insight of the accused person. He also submitted that such assessment must include an evaluation of secondary functions of temperament, personality and the biological / physical state of the accused before a judgment can be passed on the existence or absence of mental illness. He went on to submit that in order to ensure a meaningful participation of an accused in a criminal trial, as provided by law, there are certain pre-requisites such as the accused must understand the nature of charge against him/her; he/she should have the ability to impart instructions to his/her counsel; he/she should be able to understand the difference between pleading guilty and not guilty; he/she must understand what is being said during the trial and what to do if he/she does not agree with what is being said; he/she must understand the evidence produced against him/her during trial and he/she must also be capable of leading evidence in his/her defence. He emphasized that without

taking assistance of experts in the field of mental health i.e. psychiatrists and psychologists, it cannot conclusively be determined by the Court whether the accused is suffering from mental illness or whether he/she can understand the charge or defend himself/herself in Court and give instructions to counsel.

21. While commenting on the issue of executing mentally ill convicts, the learned *amicus* stated that in case the condemned prisoner is suffering from a mental illness making him/her incapable of understanding the retributive rationale behind his/her execution, the execution will serve no purpose either to him/her or to the society. Elaborating the point, he stated that this does not mean that he/she must be set free, rather, if this Court comes to the conclusion that mental illness can be a mitigating factor in converting the sentence of such a condemned prisoner from death to imprisonment for life, specific instructions may be passed on to the respective Governments to shift such mentally ill prisoner to some mental health facility for proper treatment and rehabilitation. He also suggested that effective steps should be taken by the prison authorities to protect a prisoner's mental health, prevent mental illness, ensure early detection and provide prompt treatment and rehabilitation. He further suggested that proper training be provided to the prison staff to help them deal with their stressful and challenging atmosphere.

22. Learned *amicus curiae* Barrister Haider Rasul Mirza, ASC has also been heard at length. He referred to different provisions of domestic and foreign laws on the subject, Prison Rules, Jail Manuals, judgments, and other material from domestic and foreign jurisdictions, to contend that a serious approach is required to be adopted by the Courts if the issue of mental illness of an accused/convict is raised either at the time of trial, or while hearing an appeal against conviction and sentence of a convict. He, while highlighting different provisions of Prison Rules, stated that the death sentence cannot be executed in case of a condemned prisoner who is unable to take rational decisions and whose ability to understand the

rationale behind his/her punishment is substantially impaired due to a medically recognized mental illness.

23. He also argued that in circumstances where a condemned prisoner develops a post-conviction mental illness and because of that mental illness, his/her mental faculties are not appreciative of the reason behind the punishment imposed by the Court, the execution of sentence would serve no purpose. He amplified that the retributive idea behind punishment is that it should not only serve as a deterrent, but also make one realize that he /she committed a wrong which has resulted in punishment. In the absence of such realization, due to an involuntarily induced mental disorder or illness, execution of a sentence loses its significance and may fail the test of proportionality attached to retributive justice. The learned *amicus* also argued that it is not every mental illness which would qualify for an exemption. The prohibition on executing mentally ill prisoners may be applied only to those who are medically found to be suffering from mental illness, the severity of which permanently impairs their ability to appreciate the rationale behind the punishment which they are sentenced to undergo.

24. The learned Additional Attorney General for Pakistan, learned Law Officers of all the Provinces as well as learned Advocate General, Islamabad adopted the submissions and contentions of learned *amici* Barrister Haider Rasul Mirza, ASC and Brigadier (Retd.) Professor Dr. Mowadat Hussain Rana. In particular, the learned Law Officers principally agreed with the contention of the *amici curiae* that death sentence should not be executed in case of those condemned prisoners who, due to mental illness, are unable to take rational decisions and understand the rationale behind their punishment.

25. We have heard all in detail, have considered their respective submissions and examined the relevant provisions of law with their able assistance.

OPINION OF THE COURT

26. Before we embark upon to address the legal questions framed herein above, it is imperative to examine how the term "mental illness" has been defined in the domestic and foreign jurisdictions.

27. In our law, some terminologies/phrases/words such as "lunatic", "insane" and "unsound mind" have been used in the PPC, Cr.P.C and the Rules, regarding the mental health of an accused or a convict. But these terms have not been expressly defined in either of these Statutes/Rules.

28. In Pakistan, the Mental Health Ordinance, 2001 (VIII of 2001) (**Ordinance**) was promulgated in the year 2001 which defined the terms "mental disorder", "mental impairment", "severe personality disorder", "severe mental impairment" and "mentally disordered prisoner".

29. However, after the passage of 18th Amendment, 'Health' became a Provincial subject and respective Governments of Sindh, Punjab, Khyber Pakhtunkhwa and Balochistan promulgated their own Acts in this behalf. These laws also define the terms "mental disorder" and "mentally disordered prisoners". The Ordinance was adopted by the Province of the Punjab and amended through the Punjab Mental Health (Amendment) Act 2014. The Ordinance defines the terms 'mental disorder', 'mental impairment' 'mentally disordered prisoner' as under:-

> ***(m)*** *"**mental disorder"** means mental illness, including mental impairment, severe personality disorder, severe mental impairment and any other disorder or disability of mind and "mentally disordered" shall be construed accordingly and as explained hereunder:*
>
> ***(i) "mental impairment"*** *means a state of arrested or incomplete development of mind (not amounting to severe mental impairment) which includes significant*

> *impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and "mentally impaired" shall be construed accordingly;*
>
> ***(ii) "severe personality disorder"** means a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned;*
>
> ***(iii) "severe mental impairment"** means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and "severely mentally impaired" shall be construed accordingly;*
>
> ***(n) "mentally disordered prisoner"** means a person, who is a prisoner for whose detention in or removal to a psychiatric facility or other place of safety, an order has been made in accordance with the provisions of section 466 or section 471 of the Code of Criminal Procedure, 1898 (Act V of 1898), section 30 of the Prisoners Act, 1900 (III of 1900), section 130 of the Pakistan Army Act, 1952 (XXXIX of 1952), section 143 of the Pakistan Air Force Act, 1953 (VI of 1953) or section 123 of the Pakistan Navy Ordinance, 1961 (XXXV of 1961);"*

30. Almost similar definitions are also available in the Sindh Mental Health Act, 2013, the Khyber Pakhtunkhwa Mental Health Act, 2017 and the Balochistan Mental Health Act, 2019.

31. The definitions of mental illness available in these Provincial Laws led us to examine the definition of the term "mental illness" or "mental disorder" in other jurisdictions.

32. In the United Kingdom, the Mental Health Act, 1983 initially defined the term "mental disorder" to mean mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind. However, this definition has now been substituted with a less restrictive definition through the

Mental Health Act, 2007. The term "mental disorder" is now defined as *any disorder or disability of the mind*.

33. In India, the Mental Healthcare Act, 2017 (**Indian Law**) is the prevalent law which deals with providing health care and services for persons with mental illness. Section 2(1) (s) defines "mental illness" in the following terms:-

> *"mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterized by subnormality of intelligence;"*

34. Further more, section 3(1) of the Indian Law states as follows:-

> *3.(1) Mental illness shall be determined in accordance with such nationally or internationally accepted mental standards (including the latest edition of the International Classification of Disease of the World Health Organization) as may be notified by the Central Government. (2) No person or authority shall classify a person as a person with mental illness, except for purposes directly relating to the treatment of the mental illness or in other matters as covered under this Act or any other law for the time being in force. (3) Mental illness of a person shall not be determined on the basis of, -----(a) political, economic or social status or membership of a cultural, racial or religious group, or for any other reason not directly relevant to mental health status of the person; (b) non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person's community. (4) Past treatment or hospitalization in a mental health establishment though relevant, shall not by itself justify any present or future determination of the person's mental illness. (5) The determination of a person's mental illness shall alone not imply or be taken to mean that the person is of unsound mind unless he has been declared as such by a competent court.*

35. Perusal of section 3(1) of the Indian Law reveals that it appreciates the developing nature of medical science and incorporates the nationally and internationally accepted medical standards, including the latest edition of the International Classification of Disease (ICD) of the World Health Organization (WHO), for determination of mental illness. We have been apprised that ICD-10[1] is the current edition of a medical classification of disease issued by the WHO and is expected to be replaced by ICD-11 in 2021/2022. Chapter-V of ICD-10 classifies medically recognized mental and behavioral disorders. It has been pointed out that Pakistan currently follows the ICD-10. However, reference has been made to Chapter 6 of ICD-11 titled 'Mental, Behavioral or Neuro-developmental Disorders.' It defines psychiatric disorders as *'syndromes characterized by clinically significant disturbance in an individual's cognition, emotional regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes that underlie mental and behavioral functioning. These disturbances are usually associated with distress or impairment in personal, family, social, educational, occupational, or other important areas of functioning'.* This Chapter has 161 categories recognized as diseases of psychiatric origin. These categories are enlisted under twenty blocks. Some of the blocks which may be relevant to Forensic Mental Health in the context of criminal administration of justice are: Neuro-developmental disorders, Schizophrenia, Catatonia, Mood disorders, Anxiety or related fear disorders, Obsessive compulsive disorders, Disorders associated with stress, Dissociative disorders, Disorders due to substance use or addictive behaviors, Impulse control disorders, Disruptive behavior or dissocial disorders, Personality disorders, Paraphilic disorders, Factitious disorders, Neuro-cognitive disorders, Mental and behavioral disorders associated with pregnancy and puerperium, Secondary mental and behavioral disorders due to other diseases.

[1] https://icd.who.int/browse10/2019/en#V

36. The term "mental disorder" has also been defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) published in 2013, as under:-

> *"A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion Regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g. political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above."*

37. An examination of the definitions for mental illness provided for in the domestic and foreign laws establishes the fact that the terms "mental illness" or "mental disorder" are both used to refer to mental ailments and are defined by medical science. It is with the developing nature of medical science that scope of these terms may also evolve. Therefore, we are of the view that a limited definition of the terms "mental disorder" or "mental illness" should be avoided, and the Provincial Legislatures may, in order to better appreciate the evolving nature of medical science, consider to appropriately amend the relevant provisions of mental health laws to cater for medically recognized mental and behavioral disorders as notified by WHO through its latest edition of ICD. It has been noted that the evolution of medical science and human rights has sensitized the society to stigmatic labels such as "unsound mind", "lunatic" and "insane". Latest legislations all over the world do not use such terms. Therefore, we consider it appropriate to direct that the terms "unsoundness of mind" and "unsound mind" occurring in PPC, Cr.P.C. and the Prison Rules be substituted with term "mental disorder" or "mental illness". The term "lunatic" wherever occurs shall also be substituted appropriately.

38. We now proceed to address the question ***"How should the trial Court deal with the plea of an accused that he/she was suffering from mental illness at the time of commission of offence?"***

39. So far as our criminal law is concerned, the impact of mental illness on the act (commission of offence) of an accused person and his/her ability to comprehend the legal proceedings before the trial Court is dealt with by the PPC and Cr.P.C. There are certain Prison Rules as well which deal with the mental health of under trial prisoners and convicts.

40. In a criminal trial, two situations may possibly arise in relation to mental health of an accused: firstly, his/her state of mind at the time of commission of offence; and secondly, his/her mental condition before the commencement or during the course of trial. For the first situation i.e. mental condition at the time of commission of offence, section 84 of PPC is relevant. Whereas, for the second situation i.e. mental condition of accused before the commencement or during trial, Chapter XXXIV of Cr.P.C, particularly sections 464 and 465 are relevant.

41. Mental condition at the time of commission of offence is considered as an exception (where act though committed yet not treated as offence) under section 84 of PPC which is reproduced as under:-

> *"**84**. **Act of a person of unsound mind.** Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."*

42. The scope of section 84 PPC and the principles related thereto were discussed in detail by this Court in the case of **Khizar Hayat versus. The State**[2]. In this case, the Court was seized with a

[2] 2006 SCMR 1755

criminal appeal filed by convict against his conviction and sentence of death, with the plea that at the time of commission of the offence, he was insane and suffering from schizophrenia and his case was fully covered under section 84 PPC. This Court, while relying upon the interpretation of section 84 PPC in the case of **The State versus Balahari Das Sutradhar**[3]**,** rejected the plea of the convict and, while maintaining his conviction and sentence of death, observed that not every person who is mentally disturbed or is suffering from some mental illness(es) is, *ipso facto*, exempted from criminal liability. Any person who seeks the benefit of section 84 PPC must prove that at the time of committing the act, he was laboring under such defect of reason as not to know the nature and consequences of the act he was doing. The Court endorsed the principle that every man is presumed to be sane and assumed to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. We have carefully examined the law laid down in **Khizar Hayat** supra as well as in **Lal Khan versus The Crown**[4] and **Gholam Yousaf versus The Crown**[5] wherein the principles relating to a plea under section 84 PPC were dealt with in detail and it was unequivocally held by the Lahore High Court that in relation to a plea of an accused under section 84 PPC, the onus to prove the same is on the accused and the correctness or otherwise of the plea shall be decided after looking at the entire material/evidence available on the record.

43. Thus, within the contemplation of section 84 PPC, whenever the plea is raised regarding the state of mind of accused at the time of commission of offence, the onus-like all other exceptions in Chapter IV of PPC-will be on the defence (accused) to prove such a plea as contemplated in Article 121 of the Qanun-e-Shahadat Order, 1984 (**QSO**). As per Article 121 of QSO, the onus is on the accused to prove that when the alleged act was committed, he/she was suffering from a mental illness which made him/her incapable of knowing the

[3] PLD 1962 Dacca 467
[4] PLD 1952 Lahore 502
[5] PLD 1953 Lahore 213

nature of the act or that what he/she was doing was either wrong or contrary to law. While considering the case law referred to herein above, we hold that in the case of a special plea under section 84 PPC, the Courts should keep the following principles in view:-

(i) It is the basic duty of the prosecution to prove its case against the accused beyond reasonable doubt and the prosecution will not be absolved of this duty if the accused is unsuccessful in proving a plea raised on his/her behalf.

(ii) Where the accused raises any specific plea, permissible under the law, including a plea under section 84 PPC, the onus to prove such plea is on the accused. However, while proving such plea, the accused may get benefit from any material, oral or documentary, produced/relied upon by the prosecution.

44. Now we address the second question, ***"How should the trial Court deal with the claim that due to mental illness, an accused is incapable of making his/her defence?"***. To answer this question, reference to the relevant provisions of Cr.P.C. is essential which are being reproduced:-

> **464.** ***Procedure in case of accused being lunatic***. *(1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Provincial Government, directs and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing.*
>
> *(1A) Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of section 466.*
>
> *(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his*

defence he shall record a finding, to that effect and, shall postpone further proceedings in the case.

465. ***Procedure in case of person sent for trial before Court of Session or High Court being lunatic.*** *(1) If any person before a Court of Session or High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Court is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case.*

(2) The trial of the fact of unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

45. Section 464 Cr.P.C. is relevant for trial of an accused before a Magistrate, whereas section 465 Cr. P.C. deals with the trial of accused before a Court of Sessions or High Court. It is clear from the provision of section 464 Cr.P.C. that if a Magistrate holding an inquiry or a trial, has *reason to believe* that the accused is suffering from mental illness and is consequently incapable of making his/her defence, he shall inquire into the fact of such mental illness, and shall also cause such person to be examined by a Civil Surgeon of the District or such other medical officer as the Provincial Government directs. Thereafter, he shall examine such Surgeon or other officer as a witness and also shall reduce the examination in writing. Under the provision of section 465, Cr.P.C. if any person before a Court of Session or a High Court *appears to the Court* to be suffering from mental illness and is consequently incapable of making his/her defence, the Court shall, in the first instance, try the fact of such mental illness and resulting incapacity. If the Court is satisfied of this fact, it shall record a finding to that effect and shall postpone further proceedings in the case.

46. A bare reading of sections 464 and 465, Cr.P.C. led us to consider the ancillary question ***"Whether the trial Court can form a prima facie subjective view regarding the incapability of the accused***

to make his/her defence without seeking the opinion of the medical expert?"

47. To address these legal questions, our attention has been drawn to the precedent case law wherein sections 464 and 465 Cr.P.C. have been interpreted. The first case in line is **Ata Muhammad versus The State**[6]. In this case, a Division Bench of the High Court interpreted sections 464 & 465, Cr.P.C. in an appeal against conviction and sentence awarded to Ata Muhammad under section 302 PPC. The main thrust of arguments of learned counsel for convict Ata Muhammad was his mental condition at the time of commission of offence, inquiry and trial of the case. The relevant portion of the judgment regarding this issue is reproduced herein below:-

> *"12…… The legal position which emerges from the two sections is that under section 464 the Magistrate must have reason to believe that the accused person before him is of unsound mind and incapable of understanding the proceedings, and under section 465 it should appear to the Court at the trial that the accused person suffers from unsoundness of mind and thus is incapable of making his defence. In either case the action is to follow* ***the subjective reaction*** *of the Magistrate or the Court to the situation that arises before him. If, during the inquiry, nothing comes to the notice of a Magistrate to induce a belief in him that an accused person is of unsound mind and if at the trial before the Sessions Court it does not appear to the latter that the accused is of unsound mind and consequently incapable of making his defence, there is nothing for them to do except to proceed with the inquiry or the trial in the normal manner. The words "appear to the Court" are used in section 465 while the words "has reason to believe" are used in section 464, but it is clear that in practical effect they mean almost the same thing. The phrase "to appear" in my judgment used in the context of section 465 in its meaning is nearest to the phrase "to be in one's opinion" as given in the Shorter Oxford Dictionary.*

In **Sher Afzal versus The State**[7], learned High Court while deciding an appeal against conviction and sentence under section 302,

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[6]PLD 1960 (W.P.) Lahore 111
[7]PLD 1960 WP Peshawar 66

307 PPC addressed a technical objection regarding failure on the part of trial judge to comply with erstwhile provision of section 465[8] Cr.P.C. and observed as under:-

> *"4. It will be noticed that if the trial Court wants to satisfy itself about the mental state of the accused person and his capacity to make his defence, then it is bound to enquire into the question with the aid of assessors and not alone, and on this point the provision of section 465 is mandatory. In the present case, the learned trial Judge enquired into the question of whether the accused was or was not capable of understanding the proceedings of the trial, but he did it without the aid of assessors. The learned Additional Advocate-General concedes that non-compliance with the mandatory provision of section 465 vitiates the trial. In Santokh Singh v. Emperor (AIR 1926 Lah. 498) their Lordships held the same view and ordered retrial on similar ground."*

In the case of **Abdul Hamid versus the State[9]**, while dealing with an appeal against conviction and sentence of death under section 302 PPC, the learned High Court while interpreting erstwhile provision of section 465, Cr.P.C. made following observations:-

> *"16. ……. There are two stages in the section. The first stage is that it must appear to the Court that the accused, placed on trial before it, was of unsound mind and incapable of making his defence. The next stage is of trying the question of unsoundness of mind which has to follow the first stage, namely, when it appears to the Judge that the accused was of unsound mind and incapable of making his defence. Then starts an enquiry into the second question, which has to be tried by the Court as a preliminary proceeding with the aid of the assessors……..The question, therefore, that remains for determination is, whether the Court was bound to hold an enquiry and try the question, whether the appellant was of unsound mind or not. In our view the mere making of an application on behalf of a person, committed for trial, that*

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[8] 465 (1) if any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury, or the Court with the aid of assessors, shall, in the first instance, try the fact of such unsoundness and incapacity, and if the jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect, and shall postpone further proceedings in the case and the jury, if any, shall be discharged.
(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court."

[9] PLD 1962 (W.P.) Quetta 111

> *he was of unsound mind, is not sufficient to necessitate the holding of an enquiry. It must appear also to the Court that the accused may be of unsound mind and when it so appears, an enquiry is necessary and the question whether the accused is of unsound mind or not and incapable of making his defence, has to be decided with the aid of the assessors. The learned Sessions Judge, with a view to satisfy himself, put certain questions to the appellants and then came to the conclusion that he did not seem to be of unsound mind and incapable of making his defence. The examination of the accused was with a view to see if it appeared that he was of unsoundness of mind. The examination was in relation to the first stage and not the second stage. The learned counsel for the appellant argues that the examination of the appellant amounted to an enquiry in the second stage and the question of unsoundness of mind had to be determined with the aid of the assessors. We do not agree with this contention, as we consider that the examination related to the first stage with a view to see if it appeared to the Court that he was of unsound mind and consequently incapable of making his defence. In this view we are supported by the decisions in Emperor v. Durga Charan Singh (AIR 1938 Cal. 6), Emperor v. Bahadur (AIR 1928 Lah. 796) and Nabi Ahmad Khan v. Emperor (AIR 1932 Oudh 190)…..*

48. We may add that the afore-mentioned cases dealt with the erstwhile provision of section 465 Cr.P.C. which now stands substituted with the current provision through the Law Reforms Ordinance, 1972. Being relevant to the concept of fair trial, the existing provision of section 465 Cr.P.C. continued to enjoy the same attention as the erstwhile provision. The following cases are instances where sections 464 and 465 (after substitution) Cr.P.C. were once again subject of judicial interpretation.

49. In **Munshi Khan versus The State**[10], it was argued that despite issue of appellant's incapacity to face trial and making his defence, the learned trial Court failed to make requisite enquiries as envisaged in section 465, Cr.P.C. The Court observed as under:-

> *"6. The language used in the sections suggests that prima facie when there was some evidence to believe or*

[10]1982 P Cr. L J 778 [SC (A J & K)]

> *it so appeared, that an accused person was insane and consequently incapable of making his defence, it was enjoined upon the trial court to stop the trial and first hold independent inquiry into the question of such insanity. The words "has reason to believe" used in section 464 and the words "appears to the Court" used in section 465 are synonymous. In both the sections except that the forums are different, spirit of law is common. The discretion vested in the Magistrate or the Court has to be exercised in judicial fashion. The words "has reason to believe" "appears to the Court" are to be construed to suggest that there must be some tangible evidence of insanity of accused person. The belief of the Court must not rest on imaginative, speculative, hypothetical or arbitrary grounds. A tentative satisfaction of Court is a condition precedent to the inquiry in insanity. The trial Court is not obliged to stop trial and embark upon the inquiry or insanity merely on pointing out of defence counsel that accused was insane or when insanity was feigned. It should have its own satisfaction on the question."*

In **Abdul Wahid alias Wahdi versus the State**[11], the procedure laid down in sections 464 and 465, Cr.P.C. attracted the attention of this Court and while interpreting these provisions, it was observed as under:-

> *"…….Chapter XXXIV of the Criminal Procedure Code which contains sections 464 to 475 deals with the trial of a lunatic person. These provisions make it obligatory on the Court holding an inquiry or a trial, if it has reasons to believe that the accused in the case is of unsound mind and in consequence is incapable of making his defence, to first hold an inquiry into the facts of such unsoundness of mind of the accused and for that purpose to get the accused examined by the Civil Surgeon of the district or by such other Medical Officer as the Provincial Government may direct and then record the result of such examination in writing. Pending inquiry into the unsoundness of mind of the accused the trial before the Court is to remain suspended. If as a result of the inquiry into the unsoundness of mind of the accused, it is found that the accused is of unsound mind and consequently incapable of making his defence the trial or inquiry has to be adjourned until such time the accused regains from his mental illness. While adjourning the trial or inquiry the Court has discretion either to enlarge him on bail or*

[11] 1994 SCMR 1517

commit him in the safe custody as in the opinion of the Court may be necessary and report the matter to Provincial Government. The trial or inquiry so postponed could be resumed at any time by the Court if it is found that the accused is now in a position to make his defence in the case. However, if upon resumption of inquiry the accused once again is found to be incapable of making his defence, the inquiry and trial is again to be adjourned for such period the accused again recovers from his illness. Apart from obligation of the Court to hold an inquiry into the fact of unsoundness of the mind of the accused in the above-stated circumstances, the combined effect of sections 469 and 470, Cr.P.C. is that the Court shall also hold an inquiry, if it appears from the evidence produced before it, or if it has reasons to believe that the accused was incapable of understanding the nature of offence at the time he committed it for reasons of unsoundness of mind, into the fact of unsoundness of the mind of the accused at the time he committed the offence. If the Court reaches the conclusion after holding such inquiry, that the accused was incapable of understanding the nature of act constituting the offence for reasons of unsoundness of mind, the accused will be acquitted, but the Court shall give a specific finding whether he committed the act or not. The above finding by the Court is necessary as further action against the accused upon his acquittal in the case is to be taken by the Court under sections 471, 474 and 475, Cr.P.C.…."

In **Fauqual Bashar versus the State**[12], this Court examined the procedure laid down in sections 464 and 465, Cr.P.C. In this case, leave was granted by this Court in following terms:-

"Brother of the accused, who is facing trial on the charge of murder in the trial court, made an application in the trial court raising plea that his brother is mentally deranged and is unable to understand the nature of the proceedings. Application was dismissed and in the High Court revision application was filed which also has been dismissed. Learned counsel for the petitioner has filed documents which show that the accused remained in the mental hospital for treatment. Plea is rejected by the two Courts below on the ground that the accused does not claim to be insane and refuses to go for medical examination on the ground that he is normal. Question arises whether in such circumstances it was incumbent upon the Courts to have sent the accused for medical examination on the point whether he is insane or not or

[12]1997 SCMR 239

> *the Courts could decide this question on the basis of other attending circumstances of the case.*
>
> *2. Leave is granted to consider the above contention. Proceedings in the trial Court are stayed until further orders."*

It was held that:-

> *"5. In context of insanity, the state of mind of an accused person, firstly, at the time of occurrence and, secondly, at the time of inquiry or trial is a question of fact. When a Court is confronted with the question during an inquiry or trial, whether or not an accused is of unsound mind and incapable of understanding the proceedings against him, it has to take action under sections 464 and 465, Cr.P.C. according as one or other is attracted to the case…"*

While placing reliance upon the case of **Ata Muhammad** supra the Court concluded that:

> *"5.…Nonetheless, we are in no doubt that where it does not appear to the Court at all from its own observations or any other factor that the accused is because of unsoundness of mind incapable to make his defence, it is under no obligation to investigate the fact of unsoundness of mind."*

Next case in line is that of **Sirajuddin versus Afzal Khan and another**[13]. In this case, the provision of section 465, Cr.P.C. was once again interpreted by this Court. While declining to grant leave to appeal against the judgment passed by the learned Peshawar High Court, whereby conviction and sentence of the accused under section 302 PPC was set aside and the trial was held to be vitiated due to non-compliance with the procedure laid down under section 465, Cr.P.C., the Court made the following observations:-

> *"7. From perusal of the above it is clear that whenever question of insanity is brought to the notice of the Court the Court shall satisfy itself in the manner provided under the law; whether the person is capable of understanding the trial and defending himself. For such satisfaction medical evidence is of utmost importance.*

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[13]PLD 1997 SC 847

> *8. In the instant case, therefore, it is to be seen; whether, the fact of insanity of the accused/respondent was ever brought to the notice of the Court at the trial stage and as to whether the trial Court complied with the above provision of law, before entering into the trial……"*

50. The term "*reason to believe"* came under discussion in the case of **Chaudhry Shujaat Hussain versus The State**[14] where while referring to the interpretation of the term in the case of **Moulvi Fazlul Qader Choudhury versus Crown**[15] this Court held:-

> *"…The term "reason to believe" can be classified at a higher pedestal than mere suspicion and allegation but not equivalent to proved evidence. Even the strongest suspicion cannot transform in "reason to believe…."*

51. After a careful examination of the case law discussed above, we hold that the terms "*reason to believe"* and "*appears to the Court"* used in sections 464 and 465 Cr.P.C are synonymous and refer to a tentative opinion which has to be formed for the purpose of deciding whether or not to enquire into the issue of capability of the accused to face trial as a question of fact.

52. We further hold that whenever the trial Court is put to notice, either by express claim made on behalf of the accused or through Court's own observations, regarding the issue of incapability of accused to understand the proceedings of trial and to make his/her defence, the same shall be taken seriously while keeping in mind the importance of procedural fairness and due process guaranteed under the Constitution and the law.

53. The terms "*reason to believe"* and "*appears to the Court"* in the context of sections 464 and 465 Cr.P.C are to be interpreted as a *prima facie* tentative opinion of the Court, which is not a subjective view based on impressions but one which is based on an objective assessment of the material and information placed before the Court or already available on record in the police file and case file.

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[14] 1995 SCMR 1249
[15] PLD 1952 FC 19

While forming a *prima facie* tentative opinion, the Court may give due consideration to its own observations in relation to the conduct and demeanor of an accused person. Failure of the parties to raise such a claim, during trial, does not debar the Court from forming an opinion on its own regarding the capability of an accused person to face the proceedings of trial. In such a situation, the Court may rely on its own observations regarding the demeanor and conduct of the accused either before or at the time of taking a plea against the charge or at any later stage. The Court may take note whether he/she is being represented by Counsel or not and consider the material (if any) available on record which may persuade it to enquire into the capability of the accused to face trial. The Court may assess the mental health condition of an accused by asking him/her questions such as why he/she is attending the Court; whether he/she is able to understand the proceedings which are being conducted (trial); whether he/she is able to understand the role of people who are a part of the trial; the basic procedure may be explained to him/her to assess whether he/she is able to understand such procedure and whether he/she is able to retain information imparted to him/her; whether the accused is able to understand the act committed by him/her and what the witnesses are deposing about his/her act; and whether he/she is able to understand the evidence being produced by the prosecution against him/her. However, we would like to clarify that a *prima facie* tentative opinion cannot be formed by the Court only on the basis of such questions posed to the accused. The Court is required to objectively consider all the material available before it, including the material placed/relied upon by the prosecution.

54. Once the Court has formed a *prima facie* tentative opinion that the accused may be incapable of understanding the proceedings of trial or make his/her defence, it becomes obligatory upon the Court to embark upon conducting an inquiry to decide the issue of incapacity of the accused to face trial due to mental illness. Medical opinion is *sine qua non* in such an inquiry. For this purpose,

the Court must get the accused examined by a Medical Board, to be notified by the Provincial Government, consisting of qualified medical experts in the field of mental health, to examine the accused person and opine whether accused is capable or otherwise to understand the proceedings of trial and make his/her defence. The report/opinion of the Medical Board must not be a mere diagnosis of a mental illness or absence thereof. It must be a detailed and structured report with specific reference to psychopathology (if any) in the mental functions of consciousness, intellect, thinking, mood, emotions, perceptions, cognition, judgment and insight. The head of the Medical Board shall then be examined as Court witness and such examination shall be reduced in writing. Both the prosecution and defence should be given an opportunity to cross examine him in support of their respective stance. Thereafter, if the accused wishes to adduce any evidence in support of his/her claim, then he/she should be allowed to produce such evidence, including expert opinion with the prosecution given an opportunity to cross examine. Similarly, the prosecution may also be allowed to produce evidence which it deems relevant to this preliminary issue with opportunity given to the defence to cross examine. It is upon the consideration of this evidence procured and adduced before the Court that a finding on this question of fact i.e. the capability of the accused to face trial within the contemplation of sections 464 and 465 Cr.P.C. shall be recorded by the Court.

55. Therefore, in view of the foregoing, the question ***"How should the trial Court deal with the claim that due to mental illness, an accused is incapable of making his/her defence?"*** and the supplementary question **"*Whether the trial Court can form a prima facie subjective view regarding the incapability of the accused to make his/her defence without seeking the opinion of the medical expert?"*** are both answered in the above said terms.

56. We hold that words "Civil Surgeon" and "medical officer" used in Chapter XXXIV Cr.P.C. and Prison Rules be

substituted by the relevant Legislature with "Medical Board". The Medical Board shall comprise of qualified and experienced Psychologists and Psychiatrists. The concerned governments are directed to take immediate steps to do the needful.

57. Now we address the important legal question: ***"Whether a mentally ill condemned prisoner should be executed?"***

58. Our attention has been drawn to the fact that in Pakistan there is no express provision in any Statute or Rules, which places express restriction on the execution of a convict who is on death row and suffering from mental illness. However, reference has been made to certain provisions in the Prison Rules, which may be termed as implied safeguards against execution of mentally ill condemned prisoners. The relevant Rules to which our attention has been drawn are reproduced herein below:-

> ***Rule-107.-*** *The following instructions are laid down for the preparation and submission of mercy petition of condemned prisoners by the Superintendent of the prison:-*
>
> *(i) Each and every mercy petition submitted by a condemned prisoner shall simultaneously be addressed to the President of Pakistan, Islamabad and the Governor of the Province and should be in duplicate.*
>
> *(ii) If the petition is submitted in Urdu or any other language it shall be accompanied by a carefully prepared translation in English in duplicate, which to ensure its accuracy should be examined by the Superintendent. The documents shall be attested by the Superintendent.*
>
> *(iii) The mercy petition roll, in duplicate, shall also accompany the petition.*
>
> *(iv) In case where the condemned prisoner takes plea of young or old age, unsound mind or ill-health, two copies of the Medical report by the Medical Officer, of the prison shall also be submitted, stating therein the correct age, ailment, infirmity, etc., as the case may be.*
>
> *(v) If in the opinion of the Superintendent and the Medical Officer the prisoner was below 18 years of age*

on the date of occurrence of the crime or above 60 years on the date of submission of mercy petition, a copy of the birth certificate or particulars of birth viz date of birth of the prisoner and the name of the union council or committee and the district where the entry of birth was recorded may be obtained from the relatives of the prisoner and forwarded to Government.

(vi) All correspondence pertaining to condemned prisoner shall always be made in pink coloured envelopes inscribed. "Death case Immediate" standardized for use in all prisons.

Rule-362. *(i) The Superintendent and Deputy Superintendent will visit the condemned prisoner in his cell a few minutes before the hour fixed for execution. The Superintendent shall first identify the prisoner as the person named in the warrant and read out a translation of the warrant and sequence of rejection of appeal and mercy petitions in national or regional language to the prisoner in the presence of the Coordination Officer.* ***Any other document requiring signature by the prisoner, such as his will, shall thereafter be signed by him*** *and attested by the Coordination Officer. The Superintendent will then proceed to the scaffold; the prisoner remaining in his cell. In the presence of the Deputy Superintendent the hands of the prisoner will next be pinioned behind his back and his fetters (if any) removed."*

59. Rule 107 (iv) makes it obligatory upon the Superintendent of the prison to submit two copies of the medical report along with a mercy petition to the President of Pakistan and the Governor of the Province, in case where the condemned prisoner takes a plea of mental illness. Rule 362 read with the language used in the warrant, issued under section 381 Cr.P.C, shows that the purpose behind this rule is to convey to the condemned prisoner the reason behind his execution. Similarly, the purpose behind informing him that his appeal and mercy petition stand rejected is to make him aware that he has exhausted all the legal remedies against his/her conviction. With this understanding, Rule 362 provides the condemned prisoner an opportunity to write a will before being executed. Therefore, this Rule can be termed as an implied safeguard against execution of death sentence where a condemned prisoner, due to mental illness, has lost

his ability to reason and understand the rationale behind his/her punishment.

60. The issue of executing a mentally ill condemned prisoner has also been considered in other jurisdictions. In particular, the judicial opinions of the Supreme Courts of United States and India are relevant.

61. The question of mental illness and execution of death sentence was dealt with by the Supreme Court of United States in the case of **Ford v. Wainwright**[16]. It was held by a plurality opinion that the Eighth Amendment[17] prohibits a State from carrying out sentence of death upon a prisoner, who is insane. The reasons provided by the plurality judgment were (i) killing one who has no capacity to understand his/her crime or punishment offends humanity; (ii) lack of retributive value in executing a person who has no comprehension or awareness of penalty's existence and purpose.

62. The Supreme Court of United States clarified the scope of the category of accused persons exempt from execution in the case of **Pannetti v. Quarterman**[18] by setting a "standard for competency". This standard focuses on whether a condemned prisoner can reach a rational understanding of the reason for his/her execution. A clear pronouncement of the principles laid down by the Supreme Court of United States is found in the following passage of its judgment in the case of **Madison v. Alabama**[19]:-

> *".....This Court decided in Ford v. Wainwright, 477 U. S. 399 (1986), that the Eighth Amendment's ban on cruel and unusual punishments precludes executing a prisoner who has "lost his sanity" after sentencing. Id., at 406. While on death row, Alvin Ford was beset by "pervasive delusion[s]" associated with "[p]aranoid*

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[16]477 U. S. 399 (1986)
[17]Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
[18]551 U.S 930. (2007)
[19]586 U.S. ____(2019)

> *[s]chizophrenia." Id., at 402-403. Surveying both the common law and state statutes, the Court found a uniform practice against taking the life of such a prisoner. See id., at 406-409. Among the reasons for that time-honored bar, the Court explained, was a moral "intuition" that "killing one who has no capacity" to understand his crime or punishment "simply offends humanity." Id., at 407, 409; see id., at 409 (citing the "natural abhorrence civilized societies feel" at performing such an act). Another rationale rested on the lack of "retributive value" in executing a person who has no comprehension of the meaning of the community's judgment. Ibid.; see id., at 421 (Powell, J., concurring in part and concurring in judgment) (stating that the death penalty's "retributive force []depends on the defendant's awareness of the penalty's existence and purpose"). The resulting rule, now stated as a matter of constitutional law, held "a category of defendants defined by their mental state" incompetent to be executed. Id., at 419.*

63. Now, we refer to the decisions rendered by the Supreme Court of India with regard to the issue of prohibition of executing mentally ill death row convicts.

In the case of **Shatrughan Chauhan and another v. Union of India and others[20],** a number of convicts prayed for the issuance of a writ *inter alia* declaring that execution of a mentally ill/insane death row convict is unconstitutional. It was held:-

> *86 The above materials, particularly, the directions of the United Nations International Conventions, of which India is a party, clearly show that insanity/mental illness/schizophrenia is a crucial supervening circumstance, which should be considered by this Court in deciding whether in the facts and circumstances of the case death sentence could be commuted to life imprisonment. To put it clear, "insanity" is a relevant supervening factor for consideration by this Court.*
>
> *87. In addition, after it is established that the death convict is insane and it is duly certified by the competent doctor, undoubtedly, Article 21 protects him and such person cannot be executed without further clarification from the competent authority about his mental problems. It is also highlighted by relying on*

[20](2014)3 SCC1

> *commentaries from various countries that civilized countries have not executed death penalty on an insane person. The learned Counsel also relied on the United Nations Resolution against execution of death sentence, debate of the General Assembly, the decisions of International Court of Justice, Treaties, European Conventions, 8th amendment in the United States which prohibits execution of death sentence on an insane person. In view of the well-established laws both in the national as well as international sphere, we are inclined to consider insanity as one of the supervening circumstances that warrants for commutation of death sentence to life imprisonment.*

In **'X' v. State of Maharashtra**[21]**,** complex questions concerning the relationship between mental illness and crime were raised. While addressing the issues of mental illness and execution, the Court ruled: -

> *60. Moreover, Article 20 of the Constitution guarantees individuals the right not to be subjected to excessive criminal penalty. The right flows from the basic tenet of proportionality. By protecting even those convicted of heinous crimes, this right reaffirm the duty to respect the dignity of all persons. Therefore, our Constitution embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency against which penal measures have to be evaluated. In recognizing these civilized standards, we may refer to the aspirations of India in being a signatory to the Convention on Rights of Persons with Disabilities, which endorse prohibition of cruel, inhuman or degrading punishments with respect to disabled persons. Additionally, when the death penalty existed in England, there was a common law right barring execution of lunatic prisoners. Additionally, there is a strong international consensus against the execution of individuals with mental illness.*
>
> ……..
>
> *68. In line with the above discussion, we note that there appear to be no set disorders/disabilities for evaluating the severe mental illness, however a test of severity can be a guiding factor for recognizing those mental illnesses which qualify for an exemption. Therefore, the test envisaged herein predicates that the offender needs to have a severe*

[21](2019) 7 SCC 1 (also available at **2019 SCC OnLine SC 543**)

> *mental illness or disability, which simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment. These disorders generally include schizophrenia, other serious psychotic disorders, and dissociative disorders with schizophrenia.*

64. Reference is also made to international human rights law which we have found relevant. Rule 109 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) lays down that:-

> *1. Persons who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions, for whom staying in prison would mean an exacerbation of their condition, shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible.*
>
> *2. If necessary, other prisoners with mental disabilities and/or health conditions can be observed and treated in specialized facilities under the supervision of qualified health-care professionals.*
>
> *3. The health-care service shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.*

65. Our attention has also been drawn to the Resolution 2000/65 adopted by the United Nations Commission on Human Rights in the year 2000, whereby all the States who still sustain death penalty were urged *"not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person"*. Reference has also been made to the International Covenant on Civil and Political Rights (ICCPR) and the Convention on Rights of Persons with Disabilities (CRPD), both ratified by the Government of Pakistan, in support of the contention that cruel, inhuman or degrading punishment shall not be awarded.

66. After considering the material discussed herein above, we hold that if a condemned prisoner, due to mental illness, is found

to be unable to comprehend the rationale and reason behind his/her punishment, then carrying out the death sentence will not meet the ends of justice. However, it is clarified that not every mental illness shall automatically qualify for an exemption from carrying out the death sentence. This exemption will be applicable only in that case where a Medical Board consisting of mental health professionals, certifies after a thorough examination and evaluation that the condemned prisoner no longer has the higher mental functions to appreciate the rationale and reasons behind the sentence of death awarded to him/her. To determine whether a condemned prisoner suffers from such a mental illness, the Federal Government (for Islamabad Capital Territory) and each Provincial Government shall constitute and notify, a Medical Board comprising of qualified Psychiatrists and Psychologists from public sector hospitals.

67. After discussing legal aspects relevant for disposal of the issues in hand, we would now deal with the captioned petitions separately:

IMDAD ALI'S CASE

(Crl.R P. No. 170 of 2016 in
Crl. Appeal No. 619 of 2009)

68. The delay in filing Crl. Review Petition No. 170 of 2016 has already been condoned vide order of this Court dated 23.10.2018.

69. Further to the narration of facts in paragraphs 4 to 8 above, it is evident from a perusal of the record that to ascertain the mental health condition of convict Imdad Ali, the learned trial Court merely relied upon its own observation and after asking a few questions formed a subjective view on the matter without having recourse to the material annexed with the application filed on behalf of Imdad Ali or any argument advanced by the learned counsel in support of his contentions and grounds raised in the application filed under section 465 Cr.P.C. We do not appreciate such a slipshod

approach of the trial Court regarding a crucial legal issue and the same cannot be condoned.

70. We have also observed that the issue of mental illness of Imdad Ali was not even appreciated by the learned High Court in its true perspective. Perhaps this oversight was on account of lack of assistance on behalf of counsel for convict Imdad Ali. Our observation finds support from paragraph 2 of the judgment of learned High Court, which is reproduced as under:-

> *"2. Before proceeding further it may be noted that the learned counsel for the appellant had not turned up in this case on 4.11.2008 when the matter was adjourned to 5.11.2008 and on 5.11.2008 on account of the written request for adjournment the counsel being sick, the matter was adjourned for today with appointment of counsel for the appellant at State expense as an abundant caution, in case the learned counsel for the appellant still did not appear and today the position is that the learned counsel for the appellant has not bothered to enter appearance or intimate this Court any further, therefore, we have heard Sh. Imtiaz Ahmad, advocate, the learned counsel appointed for him at State expense and proceeded to dispose of the appeal and the Murder Reference."*

71. As earlier pointed out that during trial, a counsel at State expense was appointed to represent the condemned prisoner Imdad Ali and on unwillingness of the said counsel to conduct trial, another counsel was appointed also at State expense. Furthermore, when the original counsel for the convict Imdad Ali failed to appear before the learned High Court at the time of hearing of his criminal appeal along with Murder Reference, the learned High Court appointed some other counsel on his behalf to represent him in a rather hasty manner and he was asked to argue the case on the next day. This hasty approach cannot be appreciated because it was a matter of life and death for the convict Imdad Ali. After the learned High Court had appointed a counsel at State expense, he should have been given sufficient time to

prepare his brief and to take instructions from his client (the convict). The issue of mental illness of Imdad Ali has been dealt with by the learned High Court in the following manner:-

> *"……Since there is overwhelming evidence on record justifying the conviction……..in the absence of any solid material on the file regarding mental illness of the appellant, mere statement of wife of the appellant as DW1 would not create any room for the appellant for lesser sentence…."*

72. As already observed, after dismissal of his criminal appeal by the learned High Court, the condemned prisoner Imdad Ali filed a petition through jail, wherein leave to appeal was granted by this Court on 13.11.2009 culminating into Crl. Appeal No. 619 of 2009, which was dismissed vide judgment dated 19.10.2015. It would thus be seen that neither before the trial Court, learned High Court, nor before this Court was the issue of mental illness of Imdad Ali appreciated in terms of section 465 of Cr.P.C.

73. Another important aspect of the matter is that while hearing the subject petitions, a Medical Board was constituted to report about the mental health condition of the condemned prisoner Imdad Ali. The report of the Medical Board dated 19.09.2019 registered as CMA No. 8850 of 2019 has been placed on record, which is reproduced as under:-

> *"1. Imdad Ali S/O Muhammad Ismail was mentally re-examined by the Medical Board on 14th September 2016 at 1200 hrs in Adyala Jail Rawalpindi. It is the opinion of Medical Board, that accused Imdad Ali is suffering from chronic Schizophrenia (insanity) and the Board stands by its opinion previously given.*
>
> *2. After re-examination and reviewing the documents available and considering the present mental state of accused,* ***it is likely that illness had already started at the time of crime, and he might have committed murder under the delusional belief of persecutions (insanity).*** *Even, medical record available dated 10 November 2000 (prior to the act of crime) reveals that Imdad Ali was examined by a Medical Officer of Services Hospital Lahore.* ***In his opinion Imdad Ali, seemed to be suffering from Schizophrenia and he***

referred him to Mental Hospital for further management and evaluation."

74. In the circumstances of the case, and in view of what has been discussed above, coupled with the fact that convict Imdad Ali is behind bars for the last about 20 years and has served out substantive part of alternative sentence provided under section 302(b) PPC i.e. imprisonment for life, we do not feel it appropriate to remand the case for *denovo* trial. It is relevant to mention here that in this case, no review was filed by the convict Imdad Ali after dismissal of his appeal by this Court against his conviction and sentence. However, a review petition has been filed by the State, through Prosecutor General Punjab, with the prayer to review the judgment passed by this Court in Crl. Appeal No. 619 of 2009. The review is being sought on the ground that in the circumstances of the case and keeping in view the mental health condition of convict Imdad Ali, his sentence of death may be converted into imprisonment for life. Without touching the mental health condition of convict Imdad Ali, we have observed that there are sufficient reasons/circumstances available on record, which warrant conversion of his death sentence to imprisonment for life. Firstly, the motive set up by the prosecution was disbelieved by the trial Court in Para 25 of its judgment after assigning valid and convincing reasons. This fact was not considered by this Court while dismissing the appeal of Imdad Ali perhaps due to lack of proper assistance. This oversight qualifies as a ground for review and consequently converting the sentence of death to imprisonment for life. Secondly, as earlier pointed out, convict Imdad Ali has already served out about 20 years of his substantive sentence. Therefore, on the principle of legitimate expectancy of life recently considered by this Court in the case of **Sikandar Hayat and another versus the State and others**[22], he is entitled to conversion of death sentence to that of imprisonment for life. Resultantly, Criminal Review Petition No. 170 of 2016 is allowed. The judgment passed by this Court in Crl. Appeal No. 619 of 2009 is reviewed and recalled. Consequently, Crl.

[22]PLD 2020 SC 559

Appeal No. 619 of 2009 is partly allowed. The conviction of appellant Imdad Ali under section 302(b) PPC is maintained, however, his sentence of death is converted into imprisonment for life, with benefit of section 382-B, Cr.P.C. The amount of compensation and sentence in its default shall remain intact.

(C.R.P. Nos. 420 & 424 of 2016)

75. As already mentioned in Para 8 above, Mst. Safia Bano (wife of convict Imdad Ali) has filed C.R.P. No. 420 of 2016, whereas C.R.P. No. 424 of 2016 has been filed by the Inspector General of Prisons, Punjab seeking review of this Court's judgment in C.P. No. 2990 of 2016 dated 27.09.2016, which is reported as PLD 2017 SC 18, passed while placing reliance upon the view of the Supreme Court of India in the case of **Amrit Bhushan Gupta v. Union of Indian and others[23] and Ram Narain Gupta v. Smt. Rameshwari Gupta[24].** It appears that this Court was not properly assisted in the matter which led to a misplaced reliance upon the case of ***Ram Narain*** supra which in fact dealt with the question of mental illness with regard to the dissolution of marriage considering the provisions laid down in the Hindu Marriage Act, 1955. The case was not relevant to the distinguishable circumstances of the case of Imdad Ali. In this backdrop, Paragraphs 9 and 10 of the judgment rendered in the case of ***Ram Narain*** are being reproduced for ease of reference:-

> *"9. The point, however, to note is that S. 13(1)(iii) does not make the mere existence of a mental disorder of any degree sufficient in law to justify the dissolution of a marriage. Section 13 (1)(iii) provides:*
>
> > *"S.13. Divorce: (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either husband or the wife, be dissolved by a decree of divorce on the ground that the other party-*
> > *and (ii) omitted as unnecessary.*
> > *(iii) has been incurably of unsound mind, or has been suffering from continuously or intermittently from mental disorder of such a kind and to such an extent*

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[23]AIR 1977 SC 608
[24]AIR 1988 SC 2260

that the petitioner cannot reasonably be expected to live with the respondent.

Explanation: In this clause,

the expression mental disorder means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia."
Omitted as unnecessary.

10. The context in which the idea of unsoundness of 'mind' and 'mental disorder' occur in the section as grounds for dissolution of a marriage, require the assessment of the degree of 'mental-disorder'. Its degree must be such as that the spouse seeking relief cannot reasonably be expected to live with the other. All mental abnormalities are not recognized as grounds for grant of decree. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage few marriages would, indeed, survive in law."

76. It also appears that this Court was not apprised of the fact that the opinion of the Supreme Court of India in the case of ***Amrit Bhushan*** was revisited by a three Judge Bench in the case of **Shatrughan Chauhan and Another v. Union of India and Others**[25] which was followed by a larger (four Judge) Bench in the case of **Navneet Kaur v. State (NCT of Delhi) and another**[26]. These judgments were further relied upon in the case of '**X**' **v. The State of Maharashtra**[27] where the Court was called upon to decide how culpability should be assessed for sentencing those with mental illness and whether treatment is better suited than punishment. The following observation of the Supreme Court of India in the case of ***Accused 'X'*** merits to be once again cited being relevant to the questions posed before this Court:-

"68. In line with the above discussion, we note that there appear to be no set disorders/disabilities for evaluating the severe mental illness, however a test of severity can be a guiding factor for recognizing those mental illness which qualify for an exemption.

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[25] (2014) 3 SCC 1
[26] (2014) 7 SCC 264
[27] (2019) 7 SCC 1 (also available at 2019 SCC OnLine SC 543)

> *Therefore, the test envisaged herein predicates that the offender needs to have a severe mental illness or disability, which simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment. These disorders generally include schizophrenia, other serious psychotic disorders, and dissociative disorders with schizophrenia."*

77. Since we have already allowed the review petition filed by the State in the case of Imdad Ali by converting his sentence of death into imprisonment for life, so these review petitions have become infructuous and are disposed of accordingly. However, we hold that the observations of this Court in the judgment reported as PLD 2017 SC 18 are not relevant anymore and are of no legal effect.

KANEEZAN BIBI'S CASE
(H.R.C. No. 16514-P of 2018)

78. As discussed in Para 9 above, on 17.04.2018 the then Hon'ble Chief Justice after perusal of a report submitted by the Superintendent Central Jail Lahore directed the office to fix the instant case along with C.R.P. No. 420 of 2016. The case came up for hearing on 21.04.2018 and it was observed as under:-

> *"2. Let the same Medical Board, as has been constituted by this Court in the case of Sofia Bano, be constituted for the purpose of examining Kaneezan Bibi at Lahore. The Board shall examine her and submit a report to this Court. In the meanwhile, the order of her execution is suspended. She shall immediately be shifted to the Punjab Institute of Mental Health (PIMH) under the supervision of Dr. Tahir Pervaiz, Consultant Psychiatrist PIMH. She shall be provided the best available medical facilities."*

79. The report of Medical Board has since been received vide letter dated 19.09.2019, which has been placed on record as CMA No. 8851 of 2019. The relevant portion of the report of Medical Board is reproduced herein below:-

> *"1. Medical Board examined accused Kaneezan Bibi on 14 September 2019 at 1000 hrs in Adyala*

> *Jail Rawalpindi. Mental state examination revealed, a middle aged lady adequately kempt and fully aware of her surrounding and environment. She was electively mute (voluntary refusal to speak). There was no evidence of any psychotic illness (insanity) at the time of examination, she fully communicated through gestures of hands and head……..*
>
> *3. After going through the available documents it is obvious that Kaneezan Bibi was never referred to mental health services till 2000 when her co-accused Khan Muhammad was executed and her own execution was stayed. Medical Board is of the opinion that most likely Kaneezan Bibi developed Depression with psychotic symptoms due to stress of her impending execution for which she has been under treatment of mental health services ever since.*
>
> *4. Medical Board is of the opinion that it is likely the Kaneezan Bibi was not suffering from Schizophrenia (insanity) at the time of committing crime and for 11 years following that."*

80. When this case came up for hearing on 21.09.2020, after hearing the learned counsel for the convict and perusal of report of Medical Board, referred to above, it was observed that Mst. Kaneezan Bibi needed re-examination. Therefore, the Medical Board constituted for medical examination of condemned prisoner Ghulam Abbas was directed to also examine Mst. Kaneezan Bibi and submit its report. The report of Medical Board has been received which is placed on record through CMA No. 7386 of 2020. The findings of the Medical Board are as under:-

> *"It is assessed by panel that Ms. Kaniza is having Mutism (Not Speaking), unresponsive to commands, lack of eye contact, talking to herself, lack of warmth, socially inappropriate smile (smiling not in response to environment). On further assessment, she has Alogia (No Speech), Avolition (Lack of motivation), Anhedonia (complete lack of interest), Apathy (No Emotional Response, lack of Spontaneity) (lack of prompt action verbal, emotional and physical), slowness, negativism (Negative or opposite physical reaction), self-muttering (talking to herself in very low voice) and withdrawn emotionally (Isolated from environment)……..She has been diagnosed as having severe lifelong Mental illness*

"schizophrenia". She will need lifelong treatment Psychiatric tools could not be applied because of her mental status."

81. It has been observed by us that Mst. Kaneezan Bibi is behind bars for the last about 32 years meaning thereby that she has served out more than the alternate sentence provided under section 302(b) PPC i.e. imprisonment for life. On this score, it is a fit case where principle of legitimate expectancy of life can be invoked. The office has reported that after dismissal of her criminal appeal by this Court on 02.03.1999, she did not file any review petition. In the circumstances of the case, since no review petition has been filed by Mst. Kaneezan Bibi, we while exercising our *suo motu* jurisdiction to review coupled with the power available to this Court under Article 187 of the Constitution to do complete justice, review the judgment dated 02.03.1999 only to the extent of Crl. Appeal No. 415 of 1994 filed by Mst. Kaneezan Bibi. Consequently Crl. Appeal No. 415 of 1994 is partly allowed. The conviction of Mst. Kaneezan Bibi under section 302(b)/34 PPC on six counts is maintained, however, her sentence of death on six counts is converted into imprisonment for life on six counts. It has been observed by us that Mst. Kaneezan Bibi was also directed by the learned trial Court to pay fine of Rs.20,000/- and in default of payment of fine, she has to undergo 05 years RI, on each count, which sentence in default is otherwise against the relevant provisions of law. Therefore, she is directed to pay compensation of Rs.20,000/- under section 544-A Cr.P.C. to legal heirs of each deceased, in default whereof she will have to undergo SI for six months on each count. Benefit of section 382-B, Cr.P.C. is extended to her. All the sentences of imprisonment of Mst. Kaneezan Bibi shall run concurrently.

82. However, in view of the medical opinion placed on record regarding the mental health condition of convicts Imdad Ali and Mst. Kaneezan Bibi, we direct the Government of the Punjab to immediately shift them from prison to Punjab Institute of Mental Health, Lahore for treatment and rehabilitation in accordance with

provisions of Prison Rules. On the completion of their sentence, they shall be examined afresh by the Medical Board required to be notified by the Government of Punjab in pursuance of the directions issued in this judgment. They shall be released from the hospital as and when the said Medical Board opines that they are fit for themselves and for the society.

GHULAM ABBAS'S CASE
(Const. Petition No. 09 of 2019)

83. As discussed in Paras 10 and 11 above, the conviction and sentence of death awarded to Ghulam Abbas were maintained up to this Court and even the review petition filed by him stands dismissed.

84. A Medical Board constituted by this Court vide order dated 21.09.2020 was directed to examine Ghulam Abbas and submit a report whether he is suffering from any mental illness. The said report has since been received and placed on record as C.M.A. No. 7386 of 2020. The Medical Board has concluded in the said report as under:-

> *"**Conclusion:** On the basis of formal and informal assessment of Ghulam Abbas, it is concluded that though he was aware of his surroundings, i.e.; Jail or hospital but he was unable to understand and comprehend instructions for the tests administered on him. His performance shows the presence of neurological illness and impaired cognitive functioning which is further validated by his estimated IQ (<59) according to his performance on Benton Visual Retention Test (BVRT) and Standard Progressive Matrices (SPM). Thus, on the basis of his formal and informal assessments, it is concluded that Ghulam Abbas was having cognitive / intellectual impairment.*
>
> *At the time of testing and while admitted in the hospital, he was having psychotic symptoms as well, which affected his ability to comprehend tests instructions as well as performance on different tests administered on him. Therefore, it is suggested to keep him under observation and appropriate treatment be provided (for example: his behavior in the ward, interaction with other patients and doctors for a*

period of time.) till he is recovered from psychosis. Reassessment by a Board of Professionals is recommended after six months."

85. It has been observed by us that Ghulam Abbas has exhausted all the remedies available to him under the law. However, the plea taken by him that he is suffering from mental illness is endorsed by the report of the Medical Board constituted by this Court, alluded to in the preceding paragraph. Though, it has come on record that a mercy petition filed by condemned prisoner Ghulam Abbas was rejected by the President of Pakistan yet there is nothing on record to show whether the ground of mental illness was taken into consideration while dismissing the mercy petition. Keeping in view the judgment of this Court reported as **Moinuddin and others versus the State and others**[28], whereby a fresh mercy petition was directed to be submitted on behalf of condemned prisoners, and on consideration of the peculiar circumstances of the instant case, we direct the concerned Jail Superintendent to ensure that a fresh mercy petition is filed on behalf of condemned prisoner Ghulam Abbas. The mercy petition is to be prepared in accordance with relevant Prison Rules and submitted to the President of Pakistan mentioning therein the plea of mental illness taken by condemned prisoner Ghulam Abbas along with copies of his entire medical history/record, copies of report of Medical Board constituted by this Court on 21.09.2020 and a copy of this judgment. We expect that the mercy petition filed on behalf of condemned prisoner Ghulam Abbas shall be disposed of after taking into consideration all the circumstances including the observations made by this Court in the instant judgment. The instant Constitution Petition is disposed of in terms noted above.

86. Till the disposal of Mercy Petition, it is directed that condemned prisoner Ghulam Abbas shall be immediately shifted to Punjab Institute of Mental Health, Lahore in accordance with provisions of Prison Rules for his treatment and rehabilitation.

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[28]PLD 2019 SC 749

87. In view of the foregoing, we deem it appropriate to direct that:-

i. The Federal Government and all the Provincial Governments shall immediately make necessary amendments in the relevant laws and the rules in the light of observations given in this judgment, particularly those in Paras 37, 56 and 66 above.

ii. The Prison Rules shall be appropriately amended so as to bring the jail manuals of all the Provinces in harmony.

iii. The Federal Government (for Islamabad Capital Territory) and all the Provincial Governments shall immediately establish/create High Security Forensic Mental Health Facilities in the teaching and training institutions of mental health for assessment, treatment and rehabilitation of under trial prisoners and convicts who have developed mental ailments during their incarceration.

iv. The Federal Government (for Islamabad Capital Territory) and each Provincial Government, shall immediately constitute and notify a Medical Board comprising of three qualified and experienced Psychiatrists and two Psychologists from public sector hospitals for examination and evaluation of the condemned prisoners who are on death row and are suffering from mental illness to ensure that such mentally ill condemned prisoners who no longer have the higher mental functions to appreciate the rationale and reasons behind the sentence of death awarded to them are not executed.

v. The Federal Government (for Islamabad Capital Territory) and all the Provincial Governments shall immediately constitute and notify a Medical Board consisting of two qualified and experienced Psychiatrists and one Psychologist from public sector hospitals at Islamabad (in case of Federal Government) and at each Divisional Headquarter of the Provinces for examination, assessment and rehabilitation of the prisoners i.e. under-trial and convicts, if referred by the jail authorities. The said Medical Board shall also be authorized to examine those accused persons who are referred by the trial Court(s) for examination under the provisions of sections 464 and 465 Cr.P.C.

vi. The Federal Government (for Islamabad Capital Territory) and all the Provincial Governments shall immediately launch training programs and short certificate courses on forensic mental health assessment for psychiatrists, clinical psychologists, social workers, police and prison personnel.

vii. The Federal Judicial Academy, Islamabad and all the Provincial Judicial Academies shall also arrange courses for trial Court judges, prosecutors, lawyers and court staff on mental illness including forensic mental health assessment.

88. Office is directed to send copies of this judgment to the Federal Secretary, Ministry of Law & Justice, Federal Secretary, Ministry of Interior, Government of Pakistan, the Chief Secretaries of all the four provinces as well as the Federal and Provincial Judicial Academies for compliance.

89. Before parting with this judgment, we appreciate the assistance rendered by learned counsel for the condemned prisoners (in all the petitions), learned counsel for complainant (in C.R.P. Nos. 420, 424 & 170 of 2016), learned Additional Attorney General for Pakistan, learned Advocate General Islamabad and learned Law Officers of different provinces. We also commend and appreciate the assistance and efforts put in, and that too with alacrity, by the learned *amici curiae* Barrister Haider Rasul Mirza, ASC and renowned psychiatrist Brigadier (Retd.) Professor Mowadat Hussain Rana. It was a treat to hear them. The way Barrister Haider Rasul Mirza, ASC dug out the relevant law both from domestic and foreign jurisdictions and made submissions in his persuasive style was invaluable indeed. The way Professor Mowadat Hussain Rana articulated his viewpoint and highlighted different mental ailments in his suave and lucid style was equally commendable.