

Form No: HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

Criminal Appeal No.80/2013

Malik Sarfraz

Versus

The State & another

Appellants by : Mr Basharat Ullah Khan, ASC
State by : Majid Rashid Khan, State Counsel.
Complainant by : Rao Abdul Raheem, Advocate.
Date of Hearing : **08-06-2020.**

Athar Minallah, C.J.- Through this consolidated judgment, we will decide Crl. Appeal No.80/2013 titled '*Malik Sarfraz v. The State & another*', Crl. Appeal No.85/2013 titled '*Maqsood Ahmed v. Abdul Sattar & 2 others*' and Crl. Revision No. 43/2013 '*Maqsood Ahmed v. Malik Sarfraz, etc*'.

2. Abdul Rasheed, son of Kala Khan (*hereinafter referred to as the 'Complainant'*), had reported the alleged commission of the crime vide application (Exh.P-N) and, pursuant thereto, FIR No.145/2007, dated 19-07-2007 (Exh. P-N/1,) was registered. It was reported that on 19-07-2007, at about 11:45 a.m., the Complainant

was returning after attending a 'Chehlum' (religious ceremony after death). He was accompanied by his offspring, namely Muhammad Nisar and two close relatives, Muhammad Hanif and Muhammad Maqsood. When they reached near the house of Karam Elahi, they were stopped by Elahi Bukhsh, son of Karam Bukhsh, Malik Sarfraz, son of Muhammad Ameen, Abdul Jabbar and Abdul Sattar, sons of Fazal Elahi. They were armed with a 30 bore pistol, a single barrel 12 bore gun and dandas (clubs) respectively. Elahi Bukhsh shouted threateningly and told Muhammad Nisar that he was going to be revenged for forcibly taking possession of some land. He then fired from the 30 bore pistol in his possession which severely injured Mohammad Nisar. When Muhammad Maqsood tried to shield Muhammad Nisar, Malik Sarfraz attempted to fire at him with the firearm weapon in his possession but it misfired. However, after the misfire Malik Sarfraz hit Muhammad Maqsood on his forehead with the butt of the firearm weapon which he was carrying. It was alleged that Abdul Sattar had hit Muhammad Nisar with a club. After injuring Muhammad Nisar (*hereinafter referred to as the 'Deceased'*) and Muhammad Maqsood, the accused fled from the crime scene. The Complainant took the injured in a taxi to the Pakistan Institute of Medical Sciences (*hereinafter referred to as the 'Hospital'*). The Deceased breathed his last when he was being given emergency medical assistance. Pursuant to information received at the police station, Shaukat Hussain, S.I. (PW-8) (*hereinafter referred to as the 'I.O.'*) reached the Hospital along with other police officials but by

then the Deceased had passed away. He prepared an Inquest Report (Exh.P-G) and requested the medical officer to issue a medical report (Exh.P-L). Through application (Exh.P-Q) he requested that a postmortem be conducted. The postmortem was conducted by Dr. M. Farrukh Kamal (PW-3) and, pursuant thereto, the postmortem report (Exh.P-H) was later handed over to the I.O. The description of the injuries described in the postmortem report and the cause of death were as follows.-

"Injury No.1. .5 cm. circular inverted margins on the posterior axillary line, 8 inches below right axilla 7 inches from right nipple. This was wound of entry.

Injury No.2. 1.5 c.m. irregular anverted margins, 6 inches below the left nipple on the anterior axillary line. It was a wound of exit. Eyes and mouth were closed.

INTERNAL EXAMINATION.

Cranium and spinal cord examination.

All healthy.

Thorax examination.

Pleurae and walls, right lung and left lung were ruptured. All other organs were health.

Abdomen Examination.

Diaphragm and liver were ruptured. All other organs were healthy.

OPINION.

In my opinion, deceased died due to fire arm injury which caused rupture of right lung, left lung, liver and diaphragm which caused death. All injuries were anti-mortem in nature and sufficient to cause death in ordinary course of life."

3. After completing the formalities at the Hospital, the I.O went to the crime scene. The I.O was not able to find any blood because, according to his testimony, it was washed away due to rain. He also could not find any spent cartridge. He prepared the unscaled site plan (Exh.P-R). On 22-07-2007 the I.O. took the Draftsman, namely Amir Shahzad (PW-4), to the crime scene where the latter prepared the scaled site plan (Exh.P-M). On 02-08-2007 the accused Malik Sarfraz, Abdul Jabbar and Abdul Sattar were arrested after they had surrendered before the I.O. On 16-08-2007 Malik Sarfraz led the I.O to the recovery of a 12 bore firearm weapon (Exh.P-1) and the same was taken into possession vide recovery memo (Exh.P-B). According to the evidence brought on record, the recovered firearm weapon was in a rusted condition. Since Malik Sarfraz could not produce a valid licence, therefore FIR No.162/2007 was registered. Two clubs were recovered and taken into possession vide recovery memo (Exh.P-C) but they were not stained with blood. Elahi Bukhsh was not arrested and he was subsequently declared as a proclaimed offender. Elahi Bukhsh died while the trial was pending. The charge

was framed by the learned trial Court on 15-05-2009 and the three accused pleaded not guilty. The prosecution produced eight witnesses while the three accused preferred not to be examined under oath and, therefore, their respective statements were recorded under section 342 of the Code of Criminal Procedure, 1898 (*hereinafter referred to as 'Cr.P.C.'*). On conclusion of the trial the learned trial court convicted Malik Sarfraz under section 302(b) of the Pakistan Penal Code, 1860 (*hereinafter referred to as the 'PPC'*) for sharing common intention and he was sentenced to undergo life imprisonment. He was further directed to pay compensation to the legal heirs of the Deceased. Muhammad Jabbar and Abdul Sattar were acquitted because benefit of doubt was extended to them. The judgment of the learned trial court, dated 29-09-2010, was assailed before this Court. Criminal Appeal No.645/2010 and other connected appeals were allowed by a learned Division Bench of this Court vide judgment dated 26-03-2013. The operative part thereof is reproduced as follows.-

"Resultantly, this appeal is allowed and in consequence thereof, impugned judgment dated 29-09-2010 is set-aside and the case is remanded back to the learned trial court for decision afresh after re-examining PW-3 Dr. M. Farrukh Kamal to the extent of MLR, with right of cross-examination to the defence. The learned trial court shall also re-examine the IO, and to add a question to this effect in statement of accused under section 342 Cr.PC and to provide him an opportunity to produce defence

evidence relating to in rebuttal of medical evidence. Learned counsel for the parties are directed to appear before the learned trial court on 08.4.2013 for the purpose. The learned trial court is directed to decide the case within a period of one month after giving due audience to both the sides."

4. Pursuant to the above direction, Dr Farrukh Kamal was recalled as a witness and his statement regarding the MLR (Exh.P-U) was duly recorded. On the request of the prosecution, the I.O. (PW-8) was not re-examined. To the extent of MLR (Exh.P-U), the statement of Malik Sarfraz was recorded under section 342 of the Cr.P.C. On conclusion of the trial, Abdul Sattar and Abdul Jabbar were acquitted while Malik Sarfraz was convicted and sentenced by the learned trial court vide impugned judgment, dated 12-06-2013, in the following terms;

"However, accused Malik Sarfraz is held guilty for the commission of offences under section 302/324/337-A(ii)/34 PPC for causing murder of deceased Muhammad Nisar, and injuring Maqsood Ahmad PW. Therefore, he is hereby convicted under section 302(b)/34 PPC for sharing common intention for the commission of murder of Muhammad Nisar, and is sentenced to undergo life imprisonment along with compensation of Rs.2,00,000/- to be paid to the legal heirs of deceased Muhammad Nisar. He is convicted under section 324 PPC and is sentenced to undergo rigorous imprisonment of five years

aongwith fine of Rs.1,00,000/-. He is further convicted under section 337-A(ii) PPC, and is sentenced to rigorous imprisonment for five years, and arsh as 1/5 of the diyat. All the sentences shall run concurrently, with the benefit of section 382(b) Cr.PC extended to the accused."

5. The learned counsel for the appellant has contended that; no cogent or reliable evidence was brought on record so as to justify handing down the conviction and sentence; Elahi Bukhsh, who was alleged to have fired at the Deceased had passed away on 16-05-2010; the ocular and medical evidence are contradictory; the nature of injury described in the MLR (Exh.PU) was described by PW-3 as having been caused by a sharp edged weapon such as a knife; a rifle butt could not have caused such an injury; nothing was brought on record to prove the motive; no empties were found at the crime scene; the recovery of the fire arm weapon was planted; the recovered firearm weapon was in a rusted condition and was not sent for forensic examination; the prosecution had failed to prove the guilt of the appellant and the other accused beyond a reasonable doubt; reliance has been placed on the cases titled '*Dr Waqar Hameed v. The State and another*' [2020 SCMR 321], '*Haji Nawaz v. The State*' [2020 SCMR 687].

6. The learned counsel who has appeared on behalf of the Complainant has argued that; the ocular evidence is trustworthy and

its veracity remained unshaken despite lengthy cross examination; the prosecution had proved the guilt of the three accused beyond a reasonable doubt; the injury on the forehead of Muhammad Maqsood was caused by the butt of the firearm weapon; the injury described in the MLR (Exh.P-U) was of a nature that could have been caused by the butt of a firearm weapon; the accused were confronted with all the necessary details at the time of recording their respective statements under section 342 of the Cr.P.C.; reliance has been placed on the cases tiled '*Lal Mast v. The State*' [NLR 2006 Criminal 435], '*Musa v.The State*' [2008 SCMR 997], '*Mst. Nazakat v. Hazrat Jamal and another*' [PLJ 2008 SC 26], '*State and another v. Muhammad Ali and another*' [PLJ 2012 Cr.C. (Quetta) 629], '*AbdurRehman v. State*' [PLJ 1999 SC 86], '*Shoukat Ali v.The State*' [PLD 22007 SC 93], '*Muhammad Arif and others v.The State and others*' [2008 YLR 580 Shariat Court (AJ&K)], '*The State v. Moula Bakhsh alias Moulak*' [2005 P Cr. LJ 794], '*Ranmal Samat and others v. State of Gujarat*' [1993 SCMR 2227], '*Muhammad Yahya v.The State*' [PLD 1987 Lahore 155], '*Shafqat Ali and others*' v.*The State*' [PLD 2005 SC 288], '*Yasin and 3 others v.The State*' [2017 PCr.LJ 1550 Balochistan], '*Imran v.The State, etc.*' [NLR 1998 Criminal 260], '*Ghulam Mustafa and another v. State and others*' [PLJ 2010 Sh. C. (Aj&K) 34].

7. The learned State Counsel has contended that the prosecution had proved its case beyond a reasonable doubt and that

the impugned judgment is well reasoned and does not suffer from any misreading or non-reading of the evidence. Reliance has been placed on the cases titled '*Muhammad Siddique v. The State*' [1993 SCMR 2114], '*Pandurang and others v. State of Hyderabad*' [AIR 1955 S.C. 216].

8. The learned counsels have been heard and the record perused with their able assistance.

9. The Complainant had alleged in his complaint (Exh.P-N) that the Deceased was fired upon by Elahi Bukhsh. Elahi Bukhsh was not arrested and he passed away while the trial was pending. The Complainant had also alleged in the complaint that Abdul Sattar had hit the Deceased with a club. However, during his cross examination he had deposed otherwise and the assertion was also not supported by the postmortem report because no such injury was indicated therein. The prosecution had failed to prove beyond a reasonable doubt that the injury on the forehead, described in the MLR (Exh.P-U), was caused by the butt of a rifle. The testimony of Dr. Farrukh Kamal, Medico-Legal Officer (PW-3), did not support the version of the prosecution. The I.O i.e. Shaukat Hussain, Sub Inspector, had candidly conceded during his cross examination that the fire arm weapon which had been recovered on 06-08-2007 was in a rusted condition. He also admitted that no spent cartridge was recovered from the crime scene. The recovered firearm weapon was neither

sealed nor sent to an expert for forensic examination. He had also conceded that he had not collected any evidence to prove the motive. Neither blood nor any spent cartridge were found by the I.O at the crime scene. The justification given by the latter in his deposition was that the crime scene was on a busy road and that it had rained. However, no other witness had stated that it had rained on the day of occurrence. The Complainant, during cross examination, had deposed that the spent cartridge may have fallen in the watercourse near the crime scene. The prosecution in the circumstances had raised doubts regarding the exact location of the crime scene. The ocular account was deposed by Abdul Rasheed (PW-6) i.e the Complainant and Maqsood Ahmed (PW-7). Their testimonies are not consistent nor supported by the evidence brought on record. The Complainant had deposed that the motive was a dispute relating to land which was in possession of Maqsood's (PW 7) father. The latter, in his testimony, did not corroborate the stance. It is also a mystery as to why the Deceased alone was targeted because the evidence does not indicate that he had attempted to take possession of the disputed land and, moreover, according to the deposition of the Complainant the dispute was with him. The testimonies of PW 6 and PW 7 are not consistent with the scaled plan Ex PM. The distance shown between the place where the Deceased had received the firearm injury and where he fell is about 46 ft. The depositions regarding the ocular account are silent in this regard. The recovery of the firearm weapon, i.e the 12 bore rifle, is also shrouded in mystery. The I.O had conceded that it was in

a rusted and not in working condition. There is also no plausible explanation as to why it wasn't sealed and sent to an expert for forensic examination. The injury on the forehead of Maqsood (Pw 7) could also not be proven beyond reasonable doubt to have been caused by the accused Malik Sarfaraz. The testimonies of witnesses who had claimed that they had witnessed the commission of the offence are not confidence inspiring in order to uphold the conviction.

10. The Appellant has been convicted and sentenced on the basis of acts done by him in furtherance of common intention. Notwithstanding the above discussion, it would be beneficial to examine the precedent law regarding sustainability of a conviction on the ground of acts done in furtherance of common intention. The august Supreme Court in the case titled '*Khushi Muhammad and others v. The Crown*' [1969 SCMR 599] has observed and held that common intention is a mental condition and has to be gathered from the facts and surrounding circumstances of the case. It has been further observed that the likelihood of direct evidence is rare.

11. In the case titled '*Muhammad Akram v. The State and others*' [2007 SCMR 1539] the august Supreme Court has observed that it is settled law that ingredients of section 34 of the Pakistan Penal Code, 1860 (*hereinafter referred to as the 'PPC'*) embodies participation of an accused in some action with the common intention of committing a crime and once the factum of participation has been

established then the said provision is attracted. The apex court has further observed that it is also settled law that, in order to determine the intention of a person qua commission of an offence, it is a rare phenomena that one would expect to find positive affirmative evidence and that the intention was to be gathered from the conduct of the person and the attending circumstances.

12. In the case titled '*Muhammad Arshad and 2 others v. The State*' [PLJ 1996 SC 746] the august Supreme Court has observed as follows.-

"Section 34, P.P.C. which embodies the rule of vicarious liability contemplates an act done in furtherance of common intention of all. The essence of liability envisaged under this section lies in the existence of a common intention and to attract the application of this provision, it has to be shown that the criminal act complained of was done by one of the accused in furtherance of common intention of all. Now the intention is a state of mind which is not susceptible of direct proof and can only be inferred from the attendant circumstances of the crime. A priori, the existence of common intention which usually consists of motive, pre-concert and pre-arrangement cannot always be proved by direct evidence. In some cases, direct evidence such as

confessions or testimony of approver may be available to prove the common intention but in most of the cases, it has to be gathered from the facts disclosed in evidence and surrounding circumstances of the case."

13. In the case titled '*Shoukat Ali v. The State*' [PLD 2007 SC 93], the august Supreme Court has drawn a distinction between common intention and similar intention. It has been held that the main object for the enactment of section 34 is to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each one of them. It has been further observed that the reason why all the accused persons are deemed guilty in such cases is that the presence of accomplices gives encouragement, support and protection to the person actually committing the acts. It has been further observed as follows.-

"The nature of the offence committed by an accused depends upon the act done by him and the effect produced by it, and the sole object of this section is to lay down what act will be deemed to be done by the conspirators. This section is not a punitive section and does not enact a rule of evidence but enacts a common law principle of substantive law' 1935 Cr.LJ 1393, 1953 all. 214. "This section embodies the common-sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. If two or more persons combine in

injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of anyone of them to allege and perhaps prove that his individual act did not cause death, and that by his individual act he cannot be held to have intended death. Everyone must be taken to have intended the probable and natural results of the combination of acts in which he joined. All are guilty of the principal offence, not of obetment. But a party not cognizant of the intention of his companion to commit murder is not liable, thought in his company, to do an unlawful act." In re Basappa (Vol 51 Cr.LJ 1950). "common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. The leading feature of this section is the element of participation in action. It embodies a principle of joint liability in the doing of a criminal act and the essence of that liability is the existence of a common intention."

"Common intention' is an intention to commit the crime actually committed and each accused person can be convicted of that crime, only if he has participated in that common intention. The common intention contemplated by this section is anterior in time to the commission of the crime., and does not refer to the time when the act is committed."

"Same or similar intention must not. be confused with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if over looked, will result in

miscarriage of justice. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. Common intention does not mean similar intention of several persons. To constitute common intention it is necessary that the intention of each one of them be known to the rest of them and shared by them."

14. In the case titled '*Hayat v. The State*' [PLD 1957 SC (Pak) 204] the august Supreme Court has held that section 34 of the PPC was applicable because the facts in that case had conclusively proved that the assailant's intention was to kill.

15. Section 34 of the PPC has been elaborately interpreted by the august Supreme Court in the case titled '*Muhammad Akbar v. The State*' [PLD 1991 SC 923]. It has been observed and held that the mere presence of an accused at the place of incident with a co-accused who commits the offence may not be sufficient to accuse the former with vicarious liability, but there should be some strong circumstance manifesting a common intention. It has been further held and observed that common intention is generally, inter alia, preceded by some or all of the following elements, namely, common motive, pre-planned preparation and concert pursuant to such plan and that such common intention may develop even on the spur of the moment or during the commission of the offence. It has also been

held that common intention may also undergo change during the commission of the offence. It has been held as follows.-

"From the above-referred cases, it is evident that a joint action by a number of persons is not necessarily an action performed with a common object, but it may be performed on the spur of the moment as a reaction to some incident and such a case would fall within the ambit of section 34, P.P.C. However, it may be pointed out that section 34, P.P.C. contemplates an act in furtherance of common intention and not the common intention simpliciter and that there is a marked distinction between similar intention and common intention and between knowledge and common intention. It may also be observed that mere presence of an accused at the place of incident with a co-accused who commits offence may not be sufficient to visit the former with the vicarious liability, but there should be some Wong circumstance manifesting a common intention. Generally common intention inter alia precedes by some or all of the following elements, namely, common motive, pre-planned preparation and concert pursuant to such plan. However, common intention may develop even at the spur of moment or during the commission of offence as pointed out hereinabove. Conversely common intention may undergo change during the commission of offence."

16. In the case titled '*Muhammad Yaqoob, Sub-Inspector v. The State*' [PLD 2001 SC 378] the august Supreme Court has observed and held that section 34 of the PPC is neither a punitive

section nor does it enact a rule of evidence but mainly relates to the concept of joint liability. Common intention presupposes prior concert and requires prearranged planning before an accused can be vicariously convicted for the criminal act of another. The act must have been done in furtherance of the common intention of all of them. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference or the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". Section 34 is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was played by each of them.

17. We have carefully examined the facts and circumstances of the case in hand in the light of the above principles and law enunciated by the apex Court. We have not been able to persuade ourselves that the conviction handed down by the learned trial court is sustainable. The role and participation of the Appellant according to the prosecution story was an attempt to fire at Maqsood (PW 7) with the firearm weapon he was carrying and when it misfired, hit the latter with its butt. It was not alleged that the Appellant had made an attempt to harm the Deceased. The prosecution was also not able to

prove beyond a reasonable doubt that the injury on the forehead of Maqsood (PW 7) had been caused by hitting him with the butt of a firearm weapon. According to the testimony of the I.O, when the firearm weapon was recovered it was rusted and not in working condition. We have no reason to conclude beyond a reasonable doubt that the Appellant had either come to the crime scene with the common intention to kill the Deceased nor do the facts and circumstances raise an inference of an intent to commit the crime of taking an innocent life in furtherance of common intention. As discussed above, the prosecution was not even successful in establishing beyond a reasonable doubt the exact location of the crime scene and the presence of Maqsood (PW 7) when the offence was committed. We are, therefore, satisfied that the conviction on the basis of acts done in furtherance of common intention is not sustainable.

18. For the above reasons, we allow Crl. Appeal No.80/2013 titled '*Malik Sarfraz v. The State*', and consequently set aside the conviction and sentence of the Appellant vide the impugned judgment. We have no reason to interfere with the verdict of acquittals and, therefore, hold that Crl. Appeal No.85/2013 titled '*Maqsood Ahmed v. Abdul Sattar & 2 others*' and Crl. Revision No. 43/2013 titled '*Maqsood Ahmed v. Malik Sarfraz, etc*' are without merit and accordingly dismissed. The Appellant shall forthwith

be released if not required to be incarcerated in some other case.

(AAMER FAROOQ) (CHIEF JUSTICE)
JUDGE

Announced in the open Court **10-08-2021**.

JUDGE (CHIEF JUSTICE)

Approved for reporting.