JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, MINGORA BENCH
(*Judicial Department*)

1. Cr.A No. 98-M/2015

Said Wahab son of Muhammad Saeed, resident of Bar Gokand, Tehsil Daggar, District Buner

(Appellant)

Versus

(1) The State through Additional Advocate General, Khyber Pakhtunkhwa at Peshawar High Court Bench Mingora, Swat.
(2) Ahmad Zeb Khan son of Bahramand Khan
(3) Amir Dost Khan son of Dost Muhammad Khan
(4) Afsar Ali Khan son of Raidullah Khan all residents of Bar Gokand, Tehsil Daggar, District Buner.

(Respondents)

Present: ***M/S Razaullah and Barrister Dr. Adnan Khan, Advocates for the appellant.***

Mr. Rafiq Ahmad, Assistant Advocate General for State.

M/S Mian Fahim Akbar and Sher Muhammad Khan, Advocates for complainant.

2. Cr.R No. 23-M/2015

Ahmad Zeb Khan and 03 others

(Petitioners)

Versus

1) Said Wahab son of Muhammad Saeed, resident of Bar Gokand, Tehsil Daggar, District Buner
2) The State through A.A.G

(Respondents)

Present: ***Mr. Sher Muhammad Khan, Advocate for petitioner.***

Mr. Rafiq Ahmad, Assistant Advocate General for State.

M/S. Razaullah and Ashfaq Ali Buneri, Advocates for respondents/convicts.

Date of hearing: **11.12.2017**

JUDGMENT

ISHTIAQ IBRAHIM, J.- Appellant Said Wahab son of Muhammad Saeed was tried for the offences under Sections 302/324/147/148/ 149/337-D/337-F(iii) P.P.C for which he alongwith other co-accused were charged vide case F.I.R No. 491 registered on 10.09.2012 at Police Station Daggar, District Buner. The learned Additional Sessions Judge-II/Izafi Zilla Qazi, Buner, vide judgment dated 20.04.2015 convicted and sentenced him as under:-

(i) under Section 302(b) read with section 149 P.P.C to life imprisonment with payment of Rs.100,000/- as compensation under Section 544-A, Cr.P.C to legal heirs of the deceased Raidullah and in case of default to further undergo six months S.I.

(ii) under Sections 324/149 P.P.C three years R.I (on three counts) with fine of Rs.3000/-.

(iii) under Section 337-D P.P.C to one year R.I with payment of 1/3rd of *Diyat* as *Arsh* to injured Afsar Ali Khan.

(iv) under Section 337-F(iii) P.P.C to one year R.I with payment of Rs.5000/- as *Daman* for causing injuries to complainant Ahmad Zeb Khan.

(v) under Section 337-F(i) P.P.C to one year R.I with payment of Rs.5000/- as Daman and likewise under Section 337-F(iii) P.P.C to one year R.I with payment of Rs.5000/- as Daman for causing injuries to Amir Dost Khan.

(vi) under Section 148, P.P.C, to six months R.I.

(vii) The trial Court also directed the appellant to pay Rs.7000/- as compensation under Section 544-A, Cr.P.C to each of the three injured and in default thereof he would suffer further six months S.I. He was also directed to further undergo 15 days S.I in case of default in payment of fine. Benefit of Section 382-B, Cr.P.C was extended to him.

2. Complainant Ahmad Zeb Khan and other injured namely Amir Dost Khan and Afsar Ali Khan have filed the connected Cr.R No. 23-M/2015 for enhancement of the sentences awarded to the appellant which is

also intended to be decided by us through this single judgment.

3. Abstract of the prosecution case as set out in the F.I.R is that complainant Ahmad Zeb Khan (PW-1) made a report to local police on 10.09.2012 at 19:00 hours in casualty of hospital Daggar to the effect that on the same day at 17:00 hours he alongwith Amir Dost Khan, Raidullah Khan, Shakil Ahmad and Afsar Ali Khan were present on main road near Flour Machine situated at Bar Gokand when in the meanwhile Said Imran, Nizam, Mian Said Ali Shah, Said Wahab (appellant), Abdul Saeed, Zahoor and Abdul Wahab came over there duly armed and started altercation with them over the disputed jungle during which the accused party started firing at them. Raidullah was hit with the firing of Mian Said Imran, Afsar Ali was hit with the firing of Nizam, Shakil Ahmad with the firing of Mian Said Ali Shah, Amir Dost Khan was hit at the firing of Said Wahab whereas he himself was hit on his left ankle by

firing of Abdul Saeed and sustained injuries. The above named injured persons as well as Musharaf Khan, Humayun Khan and Wajid were cited as eye witnesses of the occurrence.

4. A dispute over the jungle of village Bar Gokand was stated to be the motive behind the occurrence regarding which a case between the parties is already pending before this Court.

5. Wakil Zada ASI (PW-8) recorded report of the complainant in the shape of *Murasila* (Ex.PA) the contents whereof were incorporated into formal F.I.R (Ex.PA) by Qamar Ali Shah ASI (PW-4). Injury sheets of all the injured namely Ahmad Zeb, Shakil Ahmad, Afsar Ali, Amir Dost Khan and Raidullah were prepared as Ex.PW-8/1 to Ex.PW-8/5, respectively.

6. The above named injured including the deceased then injured Raidullah were examined by Dr. Ibrar Khan C.M.O (PW-9) on the same day i.e 10.09.2012. The

detail of his reports and observations contained therein are as under:-

Ahmad Zeb son of Bahramand:

The medico-legal report is Ex.PM/5

1) A single entry wound about 0.5 c.m in diameter on the lateral side of Achilles tendon adjacent to left malleoli.
2) A single exit wound about 1 c.m in diameter at the medial aspect of the left malleoli.
3) Fresh bleeding from wound.
4) No charring marks observed.
5) X-Rays were taken and were normal.
6) The wound was probed.

Nature of injury: Fire arm injury (*Jurah-e-Ghaire Jaifa Mutalahima*)

Shakil Ahmad son of Bahramand

The medico-legal report is Ex.PM/4

1) 3 entry wounds caused by fire arm. One wound (entry) near the midline adjacent to right scapula. Two entry wounds below the right scapula.
2) Size of each wound was about 0.5 c.m in diameter. No charring marks were present.
3) X-Ray were done and wounds probed. The depth of wounds was about 4 c.m. There was no exit wound. There was fresh bleeding from the wound.

Nature of injuries: Fire arm (*Jurah-e-Jaifa*)

Afsar Ali son of Raidullah Khan

The medico-legal report is Ex.PM/3

1) A single entry wound about 0.5 c.m above the left iliac crest. A single exit wound at the back about the junction of the buttock. Size of the wound was about 1 c.m in diameter. No charring marks were present.

2) X-Rays were done.

Nature of inures: Fire arm (*Jurah-e-jaifa*)

Amir Dost son of Dost Muhammad Khan

The medico-legal report is Ex.PM/2

1) An entry wound on the back of right arm above the elbow. Size was about 0.5 c.m in diameter. No charring marks were present. Fresh bleeding from wound.

2) No exit wound.

3) Bruising of the left forearm lateral aspect.

X-Rays were taken. The wound was probed about 2 c.m deep.

Nature of injury: (*Jura-e-Ghair Jaifa mutalahima, jura ghair-e-jaifa damia*)

Raidullah Khan son of Dost Muhammad Khan

The medico-legal report is Ex.PM/1

1) An entry wound about 0.5 c.m in diameter on the right side of the back above the right iliac crest posteriorly. No charring marks were present. Fresh bleeding from wound. No exit wound.

2) Entry wound about 0.5 c.m at the medial side of the right arm. No exit wound was present. No charring marks were present. The wounds were probed.

   i. About 5 c.m deep

   ii. About 2 c.m deep

Nature of injuries: (*Jura-e-Jaifa*) (*Jura-e-ghair jaifa mutalahima*)

Note: Due to serious condition the injured was referred to LRH Peshawar.

7. Injured Raidullah Khan, being in serious condition, was referred to L.R.H Peshawar but he succumbed to his injuries in the way and the dead body was bsrought back to the Casualty of DHQ Hospital Daggar where his inquest report (Ex.PW-8/6) was prepared by PW-8 Wakil Zada ASI. The dead body was examined by Dr. Muhammad Farooq M.O (PW-10) on the same day at 11:00 P.M. who gave his report Ex.PM which is as under:-

1) **Fire arm entry wound on right side of back above the right iliac crest posteriorly. Size is about ½ c.m in diameter.**

2) **Fire arm entry wound on medial side of right arm. Size is about ½ c.m in diameter. Detail of the wound is on injury sheet, which is written by Dr. Ibrar CMO, D.H.Q Hospital, Daggar and attached with this report. Patient was referred by Dr. Ibrar Khan to Peshawar but he expired before reaching to Peshawar.**

Severe bleeding and trauma to internal vital organs.

Time since death: 1 to 1 ½ hours.

Weapon used: Fire Arm weapon.

8. Initially the appellant remained absconder and was proceeded against under Section 512, Cr.P.C. Investigation in the case

was conducted by Muslim Shah S.I (PW-12). He prepared site-plan Ex.PB and took into possession the blood stained garments of the injured and deceased vide Recovery Memo Ex.PW-5/1 attested by constable Noor-ul-Basar (PW-5) and head-constable Ainullah Khan (not produced). Blood was secured from the points of presence of deceased Raidullah and other injured vide Recovery Ex.PW-12/4. Nine crime empties of 7.62 bore, one empty of 30 bore and four empties of 32 bore were collected from the points of presence of accused and were taken into possession vide Recovery Memo Ex.PW-12/2. Eight crime empties of 7.62 bore alongwith two live rounds of 7 MM were recovered and secured vide Recovery Memo Ex.PW-12/3. Datsun No. 277/PSJ loaded with dry pine leaves (/) was taken into possession vide Recovery Memo Ex.PW-12/5. Hiace Van (Flying Coach) No. 1025/ PSMB having bullet marks alongwith broken glasses thereof was taken into possession vide Recovery Memo Ex.PW-

12/5. A 32 bore pistol allegedly recovered on pointation of co-accused Abdul Wahab which was taken into possession vide Recovery Memo Ex.PW-12/8 whereas a 30 bore pistol and a 7 MM rifle were recovered on pointation of co-accused Abdul Saeed and Mian Said Ali Shah which were taken into possession vide recovery Memo Ex.PW-12/19. The above recovery memos were attested by constable Shah Zaman F.C (PW-13) including other marginal witnesses who have not been examined by prosecution. F.S.L reports regarding blood-stained garments of the deceased and injured is Ex.PK whereas regarding arms the same reports are available on record as Ex.PW-PK/1 and Ex.PW-PK/2.

9. The appellant was arrested on 19.08.2014 whereafter the case was further investigated by Sher Muhammad Khan S.I (PW-11). According to him, the appellant made pointation of the place of occurrence and in this regard pointation memo (Ex.PW-6/1) was prepared and one of the marginal

witness thereof namely constable Muhammad Ali was examined as PW-6. Supplementary challan was submitted in Court where the appellant was formally indicted for the offences to which he pleaded not guilty and preferred to face the trial. Prosecution examined as many as 13 PWs in all and closed its evidence. Statement of the appellant under Section 342, Cr.P.C was recorded wherein he professed innocence and denied the allegations of prosecution but neither he produced any evidence in his defence nor wished to be examined on oath in terms of Section 340(2), Cr.P.C. After hearing the arguments, the learned trial Court vide judgment dated 19.12.2013 convicted and sentenced the appellant as discussed earlier, hence, this appeal and the connected revision petition.

10. Learned counsels for the appellant, *inter alia*, contended that the appellant is innocent and has been charged in a false case. They further contended that

prosecution has brought no trustworthy evidence against the appellant, as such, the learned trial Court erred in law while recording his conviction on very flimsy grounds. They added that the present case has collusively been made by complainant party as a counter-blast of the actual occurrence reported vide cross F.I.R No. 492 of the even date wherein the learned trial Court erroneously acquitted the complainant side who were charged as accused in that case. Learned counsels argued that neither the site plan nor the medical reports corroborate the prosecution case rather the same documents are inconsistent inter se and also not in line with the contents of the F.I.R. They maintained that though co-accused Mian Said Imran was specifically charged for committing murder of Raidullah but the learned trial Court, without proper appreciation of the evidence, illegally convicted the appellant under Section 302 (b) P.P.C read with Section 149, P.P.C. That conviction of the appellant under section 324 and other offence of hurts is

also illegal as no solid evidence has been produced by prosecution to prove the charge against him under the said offences. Learned counsels stressed that the evidence produced by prosecution is contradictory, doubtful and inconsistent, besides, the alleged recoveries have also not been proved, therefore, conviction of the appellant on the basis of such unreliable evidence is illegal and not maintainable. They lastly contended that the learned trial Court has not appraised the evidence in its true perspective rather wrong interpretation of the evidence has been made resulting into miscarriage of justice to appellant, therefore, the impugned judgment, being against law and evidence on record, be set aside and the appellant be acquitted of the charge.

11. Learned counsel for the complainant and other injured as well as learned A.A.G. appearing on behalf of State repelled the arguments of learned counsel for the appellant. They submitted that the

appellant alongwith his co-accused acted in furtherance of their common object and committed the death of one person and caused injuries several others and thereby attempted at their lives. They further submitted that the site-plan, medical reports of injured and deceased, recovery of blood and crime empties from the place of occurrence and the blood stained garments coupled with F.S.L repots fully corroborate the prosecution version. They added that prosecution witnesses have given a straightforward and honest account of the occurrence and their testimony could not be damaged by defence despite lengthy cross-examination. They further argued that prosecution has proved its case against the appellant through trustworthy and reliable evidence, therefore, this appeal be dismissed. They lastly submitted that lesser punishment has been awarded to the appellant by trial Court and no grounds for such mitigation have been mentioned in the impugned judgment, therefore, by accepting the connected revision petition, the sentences

awarded to the appellant be enhanced in the interest of justice.

12. Arguments heard and record perused.

13. Perusal of the record would reveal that while lodging the report, the complainant charged the appellant for causing firearm injuries to Amir Dost Khan but the trial Court held him vicariously liable for the murder of Raidullah Khan and likewise for the injuries sustained by complainant and other injured Afsar Ali Khan attributed to other co-accused. Whether the appellant acted in prosecution of common object of all the co-accused or not, the question being of utmost importance, therefore, needs due consideration by this Court. The learned trial Court has observed that the appellant and other co-accused constituted an unlawful assembly and the appellant being a member of that assembly and present on the spot, was not only responsible for his own overt acts but also liable for the roles played by other co-accused

in furtherance of the common object of the unlawful assembly. First we would like to reproduce Sections 141 of the Pakistan Penal Code which caters on the subject.

> "**141. Unlawful assembly**. An assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly is
>
> First.__ to overawe by criminal force, or show of criminal force, the central or any Provincial Government or Legislature, or any public servant in the exercise of lawful power of such public servant, OR
>
> Second___ to resist the execution of any law, or of any legal process; OR
>
> Third ___ to commit any mischief or criminal trespass or other offence.
>
> Fourth___ by means of criminal force, or show of criminal force to any person to take or obtain possession of any property or to deprive any person of the enjoyment of a right of way or the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; OR
>
> Fifth___ by means of criminal force, or show of criminal force, or to compel any person to do what he is not legally bound to do or to omit to do what he is legally entitled to do.
>
> Explanation: An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.

14. Although seven persons have been charged in this case but whether they all had the common object to commit the offences of murder or attempt of murder by

causing firearm injuries to injured and whether the alleged presence of all the accused on the spot was for that purpose within the meaning of Section 141, P.P.C or not, for resolving that controversy evidence on the record needs to be re-appraised in order to know the mode and manner of the alleged assemblage of the accused party and that of the complainant side as well. Similarly, real facts regarding the actual motive behind the occurrence also need to be dug out in order to reach at a just and fair conclusion. PW-2 Afsar Ali Khan stated in his cross examination that:-

ہمارے رہائشی مکانات جائے وقوعہ سے تقریباً سات / آٹھ سو میٹر کے فاصلے پر ہونگے۔۔۔۔جائے وقوعہ کے نزدیک ملزمان کے رہائشی مکانات موجود ہیں۔

From the above admissions of the witness it is very much clear that the place of occurrence is near the houses of accused party whereas the houses of complainant side are situated at a distance of 700/800 meters however their flour machine is situated in the same vicinity. Presence of the appellant and

other co-accused at the place of occurrence can be justified as their houses are situated there but assemblage of the complainant party near the houses of accused pricks our mind regarding the complainant's version that they all had come there firstly because their flour mill is situated near the place of occurrence and secondly; they had proceeded to the same place on outing as routine. To this effect complainant Ahmad Zeb Khan (PW-1) stated in his cross-examination that:-

جائے وقوعہ سیر و تفریح والی جگہ ہے اور ہم بھی بغرض سیر و تفریح جائے وقوعہ پر آئے تھے۔۔۔۔۔۔وقوعہ کے وقت ہمارے اور ملزمان کے علاوہ دیگر کوئی فرد موجود نہ تھا۔۔۔۔۔۔گواہ نے وضاحت کی کہ اس وقت مشین نہیں چل رہی تھی اس لیے مستری وغیرہ موجود نہیں تھے۔

Astonishingly no other person except the parties were present there at the time of occurrence though the spot is a a place for refreshment and the complainant and other injured had visited the flour mill which was not running at the relevant time. The explanation given by complainant and injured in their statements is not reasonable and it

appears that they have concealed the real facts regarding their presence on the spot of occurrence at the relevant time as the injured have termed the suggestion of defence incorrect that they all had come to the place of occurrence in the flying coach after getting knowledge regarding sale of pine leave by Shah Room, an injured of the accused party who lodged the cross F.I.R.

Second is the motive of the occurrence which has been mentioned by complainant in the F.I.R as a dispute over the jungle between the parties but on overall analysis of the prosecution evidence it comes to light that the instant motive behind the occurrence was sale of the pine leaves by accused party which were being carried through a pickup. The complainant admitted in his cross-examination that:-

وقوعہ کے وقت کوٹ والی سڑک پر برسے بھرا ہوا ایک ڈالسن آرہی تھی تاہم وہ جائے وقوعہ پر اُس وقت نہیں پہنچی تھی۔

PW-3 Amir Dost Khan admitted in his cross-examination that:-

ملزمان نے بر فروخت کیا تھا تاہم موقع پر موجود بر کی بھری ہوئی گاڑی نہیں دیکھی تھی۔ یہ تجویز کرنا غلط ہے کہ جائے وقوعہ پر برسے بھری ہوئی ڈاٹسن موجود تھی اور مذکورہ بر میاں شاہ روم نے اپنے جنگل سے فروخت کی تھی۔ گواہ نے وضاحت کی کہ میں نے گاڑی نہیں دیکھی تھی۔

But on the other hand the local police have taken into possession vide Recovery Memo Ex.PW-1/4 Datsun Pickup No. 277/PSJ loaded with pine leaves besides a bullets-ridden van has also been taken into possession. If statements of the eye-witnesses are believed then there appears no reason for taking into possession the Datsun loaded with pine leaves. An endeavor for concealment of real facts by complainant and other injured is floating on the surface of the record from which it can be inferred that the occurrence did not take place in the mode and manner as set up by prosecution. In addition to above, the injured complainant in the cross case registered vide F.I.R No. 492 alleged that they had sold the pine leaves of the disputed

jungle but the complainant party in this case made a demand for the sale price of the pine leaves from the Datsun drivers due to which first an altercation took place between the parties and then the incident occurred. It appears from the narrations in the F.I.R and statements of the witnesses that the complainant party after getting the knowledge about sale of pine leaves by accused party, rushed to the spot in their flying coach and after exchange of harsh words, the occurrence took place resulting into casualties of both the sides. Keeping in view the above stated position regarding the motive of the occurrence (sale of pine leaves), casualty of the opposite side and assemblage of the complainant party in front of the house of co-accused Abdul Wahab, there remains no doubt that the fight was initiated by complainant party whereafter a free fight started between the parties. In such situation it cannot be inferred that the appellants acted in prosecution of their common object rather they came out of their houses when the

complainant party had reached to the place of occurrence and stopped the Datsun loaded with pine leaves. Similarly, it cannot be ruled out that the complainant side first attacked Shah Room who sustained injuries at the firing of deceased Raidullah and thereafter the appellants proceeded to the spot and a fight was started, thus, it appears that the aggression was made by complainant and other injured. The version of prosecution regarding the alleged formation of unlawful assembly and their firing at the complainant party in prosecution of their common object can be believed only when the ocular account is considered true in its present form but keeping in view the deliberate concealment of the real facts, the ocular account is not believable, as such, the above version of prosecution is not real and true. There exists no legal justification on the basis of which the appellant could be vicariously held liable for the murder of Raidullah or injuries sustained by other injured persons at the alleged firing of other co-accused. Reliance in this regard is

placed on *"Ansar Mahmood Vs. The State"* ***(2011 SCMR 1524)*** wherein it is held that:-

> **"It is settled law that in a case of a free fight every accused person is liable only for the part played or the injury caused by him. In the present case no particular injury found on the body of Muhammad Aslam (P.W.15) had ever been attributed to the present appellant. In this view of the matter the then honourable Chief Justice of the Lahore High Court, Lahore has been found by us to be unjustified in upholding and maintaining the appellant's convictions and sentences on any head of the charge framed against him. After holding the case in hand to be a one of a free fight the appellant could not have been convicted for an offence under section 148, P.P.C. read with section 149, P.P.C. because there was no common object between the culprits. A charge in respect of an offence under section 324, P.P.C. read with section 149, P.P.C. could not stick against the appellant because he had not been attributed any specific injury in such a case of a free fight and for the same reason the appellant could also not have been convicted for offences under sections 337-A(ii) and 337-L(2), P.P.C. because it was never determined as to which particular injury, if all, had actually been caused by the appellant to the injured victim namely Muhammad Aslam (P.W.15)".**

15. The superior Courts have divided Section 149 P.P.C into two parts. It would be appropriate to first reproduce the said Section below.

> **"149. Every member of unlawful assembly guilty of offence committed in**

> **prosecution of common object.** If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the same assembly, is guilty of that offence".

The two parts of Section 149 P.P.C which appear from its bare reading are (i) offence committed by member of unlawful assembly in prosecution of common object of the assembly and (ii) offence which a member of the unlawful assembly knew to be likely to be committed in prosecution of common object. Admittedly, the role of firing at deceased Raidullah is attributed to co-accused Mian Said Imran but the learned trial Court has convicted the appellant under Section 302 (b) P.P.C read with second part of Section 149 P.P.C. This fact cannot be denied that first an altercation took place between the parties and thereafter a free fight started between them. Had the appellant and other co-accused the intention to kill all the members of the complainant party or attempt at their lives in

furtherance of their common object they would have attacked the complainant party from some hidden place and there was no need to exchange harsh words with them rather a sudden and free fight took place between them over pine leaves sold by accused side which resulted into the occurrence and casualties on both the sides. The above aspects of the case are not ignorable while deciding the question under consideration. There are some other factors which negate the existence of common object amongst all the accused. These factors include almost same size of injuries sustained by deceased and other injured persons, indicative of the fact that it was the job of a single man, and non-specification of the arms by eye witnesses allegedly used by the accused during the occurrence coupled with the fact that seven persons in the case have been charged with a view to hold them all vicariously liable. The burden was on the prosecution to prove that all the accused including the appellant had acted with the object to commit the murder of the deceased

and other injured persons but that onus has not been discharged by prosecution. In absence of solid evidence on the record to this effect, in our view, each accused was individually responsible for the role he played provided the same is proved in accordance with law, therefore, conviction of the appellant for the murder of Raidullah and injuries sustained by injured persons by attracting the provisions of Section 149 P.P.C would highly be unsafe as well as unjustified. Wisdom in this regard is derived from the judgment of the Hon'ble apex Court delivered in the case titled *"Muhammad Altaf and 5 others Vs. The State"* ***(2002 SCMR 189)*** wherein it has been held that:-

> **"The word "knew" occurring in the second part of section 149, P.P.C. requires that this must be proved by tangible and sufficient evidence and not from conjectures and speculations that the offence was committed in prosecution of the common object of the assembly. It would, therefore, not be sufficient to show that the accused ought to have known or might have known and that they had reason to believe that the common object of the unlawful assembly was to commit murder. In this background it is not just and proper to hold that to avenge a trivial and insignificant incident over pigeon, the grand-father, their son and**

their grand-son would form an unlawful assembly with the only object to commit murder. Therefore, in these circumstances section 149, P.P.C. cannot be made applicable and so every accused would be liable to punishment for the act committed by him during the attack".

We would also refer the judgment rendered by ***Supreme Court of India*** in the case titled *"Rambilas Singh and others Versus State Of Bihar"* **(1990 MLD 461)** wherein constructive liability of several accused has been discussed in the following words.

"Another important factor to be noticed is that the prosecution seems to have realised that the version of the occurrence given in the *fardbeyan* would not be enough for fastening constructive liability on the other accused for the overt act of Dinesh Singh and hence some overt acts must be attributed to them in order to make it appear that the attack on the deceased had been planned by all of them. It is obvious that with that end in view P.Ws. 1, 18 and 22 had tried to make out in their evidence that three of the accused had caught hold of P.W.1, four of the accused had caught hold of P.W.22, and four others had caught hold of the deceased and one of the accused had caught hold of the deceased's cycle. There is inter se discrepancy in the evidence of P.Ws. 1, 18 and 22 regarding the names of the accused who had caught hold of the deceased and the witnesses but even if the discrepancies arc overlooked, there remains the fact that there is no mention whatever in the *fardbeyan* about some of the accused persons catching hold of the deceased or the witnesses before Kumar Gopal Singh was stabbed by Dinesh Singh. There is

therefore room for genuine doubt whether P.Ws 1, 18 and 22 have purposely made embellishments in their evidence in order to make the other accused constructively liable for the offence committed by Dinesh Singh. The High Court has failed to take note of all these factors and has too readily acted on the assumption that since all the appellants and Dinesh Singh were present at the scene and Dinesh Singh had inflicted a stab injury on the deceased, it must necessarily be held that all the accused should have forged a common intention or arrived at a common object to commit the murder of Kumar Gopal Singh and in pursuance of it the murder was committed and hence all of them arc constructively liable under S.302 read with S.149/34, I.P.C. It is true that in order to convict persons vicariously under S.34 or S.149, I.P.C., it is not necessary to prove that each and everyone of them had indulged in overt acts. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly. In this case, such evidence is lacking and hence the appellants cannot be held liable for the individual act of Dinesh Singh".

16. The role attributed to appellant in this case is that he fired at Amir Dost Khan as a result whereof he sustained injury on the back of his right arm. Medico-legal report of the injured is available on record as Ex.PM/2 which is again reproduced herein below for ready reference.

1) An entry wound on the back of right arm above the elbow. Size was about

0.5 c.m in diameter. No charring marks were present. Fresh bleeding from wound.

2) No exit wound.

3) Bruising of the left forearm lateral aspect.

X-Rays were taken. The wound was probed about 2 c.m deep.

Nature of injury: (*Jura-e-Ghair Jaifa mutalahima, jura ghair-e-jaifa damia*)

The wound is of the same size i.e 0.5 c.m sustained by other injured though crime empties of different bores have been recovered from the spot. This fact creates a doubt that the firing was made by one person but several persons of the accused party were charged, hence, malafide on the part of the complainant cannot be excluded. It is also strange that the wound was 2 c.m deep with no exit wound but no bullet was taken out from his body. The statement of the concerned doctor (PW-9) is of too much importance. The relevant he made in his statement are replicated below.

وقوعہ کے دنوں میں 24 گھنٹے ڈیوٹی پر تھا۔۔۔ہماری کیجولٹی کے
روٹین کے مطابق اُس دن میں نے ڈبل ڈیوٹی سرانجام دی تھی۔
۔۔۔اِس وقت مجھے یاد نہ ہے کہ اُسی روز میں نے اپنی ڈیوٹی کے علاوہ

دوسرے کونسے ڈاکٹر کی ڈیوٹی کی تھی۔۔۔۔۔۔ یہ بھی غلط ہے کہ میں نے رشتہ داری کی بنیاد پر مستغیث فریق کے حق میں غلط اور خلاف واقعات رپورٹ ہائے مرتب کرنے کی غرض سے اپنے آپ کو ڈیوٹی پر موجود ہونا ظاہر کیا ہے۔۔۔۔۔ اُسی روز میں نے مخالف فریق کے مستغیث کا بھی کیجولٹی ہسپتال میں معائنہ کیا تھا۔ مذکورہ مجروح کے رپورٹ مد مقابل مقدمہ علت 492 میں مظہر شدہ Ex.PW 1/1 میں درج وقت 05:45 سے 07:45 بجے بنایا گیا ہے جو کہ قلمی غلطی کی تصحیح ہے۔۔۔۔ میری رپورٹ ہائے میں زخم واقع ہونے اور معائنہ کا دورانیہ درج نہ ہے۔۔۔۔ میں Designated Medico-legal Officer نہیں ہوں۔ ہمارے ڈگر میں کوئی مخصوص میڈیکولیگل افسر ماہر نہ ہے۔ یہ غلط ہے کہ ڈگر ہسپتال میں باقاعدہ میڈیکولیگل ڈاکٹرز موجود ہیں اور میں قصداً عمداً اِس حقیقت کو چھپا رہا ہوں۔۔۔۔ مجروحین کے جسم سے کوئی سکہ گولی برآمد نہ کی گئی ہے۔۔۔۔۔ میری رپورٹ ہائے میں سرجیکل وارڈ کو مجروحین کی shifting یا ریفر کرنے کا ذکر نہ ہے۔۔۔

سوال: کیا آپ نے اُس میں سے سکہ گولی بوجہ کم گہرائی برآمد کی تھی کیونکہ مذکورہ گہرائی سے بہ آسانی اگر سکہ گولی ہوتی تو برآمد کی جاسکتی تھی۔

جواب: میں نے مذکورہ گہرائی بوقت معائنہ کرنے کے حوالہ سے درج کی ہے۔ اگر کوئی سکہ گولی ہوتی تو اس حوالہ سے میں نے مجروحین کو سرجیکل وارڈ ارسال کیا تھا۔ متعلقہ سرجن کی رپورٹ ملاحظہ ہو۔۔

The performance of duty by this PW for 24 hours on that particular day without specification of the name of the doctor for whom he performed duty, correction in the time of examination of the injured in the cross case, examining the injured though not a designated medico-legal officer and non-

recovery of bullets from the body of the injured from 2 c.m deep wound are the facts which create a serious doubt regarding the genuineness of the medical report.

17. Record also reveals that the occurrence took place at 17:10 hours, the report was lodged at 19:10 hours while formal F.I.R was registered at 21:30 hours. Police station Daggar and hospital are situated in almost the same vicinity. It appears that registration of the F.I.R was willfully delayed and the complainant party was given time for consultation and deliberation whereafter *Murasila* was drafted and then the formal F.I.R was chalked out against the appellant and other co-accused. This aspect of the case reacts on the genuineness of the story set up by the prosecution. Reliance is placed on the case titled *"State through Advocate General N.W.F.P Peshawar Vs. Shah Jehan"* ***(PLD2003 SC 70)*** wherein it has been held that:-

> **"The delay in lodging the F.I.R. has not been explained plausibly, which shows**

that it was lodged after preliminary inquiry/investigation, deliberation and consultation, and the complainant (P.W.8) was called for from his village Dinpur, which was at a distance of about three miles from the house of the respondent".

18. Record further shows that at the time of examination the deceased was talking and was capable of giving statement but strange enough that his statement was not recorded by local police and instead another injured namely Ahmad Zeb Khan (complainant) lodged the report. This fact has been admitted by Dr. Ibrar Khan (PW-9) in his cross-examination by stating that:-

جملہ مجروحین بشمول ریداللہ خان کے ہوش و حواس بوقت معائنہ
درست تھے۔ از خود کہا کہ ریداللہ خان مجروحEPI ٹیکنیشن تھا اور
اُس نے مجھے بلڈ پریشر کم ہونے کی شکایت کی تھی۔

Keeping in view the above stated position, we are of the view that the situation would have altogether different if the most serious injured had lodged the report or at least he had signed the report already made by complainant. One more thing which is apparent from the record is that the deceased then injured after being initially examined,

was referred to LRH Peshawar. It pricks the mind of the Court that the matter was already reported at the time when the deceased was not available at hospital or he was not supporting the charge levelled by the complainant.

19. All the accused including the appellant who are seven in number have been charged for causing indiscriminate firing with sophisticated firearms at the complainant party but it is not believable that in such like circumstances the complainant saw each accused firing at a particular injured rather it is against the common sense that in such like situation the complainant and other eye witnesses noticed each and every moment of the occurrence with minute details. This aspect of the case also indicates that lodging of the FIR was purposely delayed for a considerable time to make the charge in line with the number of accused charged for causing firearm injuries to each accused.

20. We have also noticed that empties of three different calibers i.e 30, 32 and 7.62 bores were recovered from different places mentioned in the site-plan as well as in the recovery memos. Almost all the entry wounds on the injured and deceased carry the one and the same size. In such a situation, how the ocular account could be believed irrespective of the fact whether members of the complainant party were injured or not especially when they are inimical towards the accused party. It appears from the available record that it was the doing of one man but the charge was exaggerated and all the male members, seven in number, were charged by the complainant party. Reference is made to the judgment rendered in the case titled *"Farman Ali and 03 others Vs. The State"* ***(PLD 1980 Supreme Court 201)*** wherein it has been observed by the Hon'ble apex Court that:-

> **"The evidence of Doctor Muhammad Kamal, who had conducted autopsy on the dead body of Rashid Khan' is that**

the size of inlet of all the wounds suffered by him was the same meaning thereby that he had been shot from one or more than one weapon of the same caliber. It is in the evidence of the Ballistic Expert, however, that the- four empties sent to him for examination' were found to have been fired through 32 bore pistol which was also sent to: him by the Investigating Officer. It would therefore follow that Rashid Khan had been shot through a pistol and certainly not through a rifle with which Farman Ali is said to have been armed. It is true that according to the prosecution each one of the three appellant brothers was armed with a 32 bore pistol but the type of injuries suffered by Rashid Khan rather suggest that it was the work of one man. It is common knowledge that 32 bore pistol is an automatic weapon carrying in its charger seven bullets. The fact that the deceased was found to have suffered seven inlet wounds, three of them in his left Knee joint, one on his left elbow, two in his abdomen and one in backward direction to his right superior iliac spine, the inlet -size of all of which is said to be the same, would go a long way to show that this could as well be the work of a single person and not of the three appellants".

It has been mentioned in the F.I.R that the parties are in dispute over a jungle and the case in this regard is pending before this Court. Keeping in view the previous civil litigation between the parties, relationship of the eye witness with the complainant and roping in all the male members of the accused party in the case by complainant, it can easily be inferred that the eye witnesses were

interested. The doubt so arise is further reinforced by the fact that no independent witness was examined by prosecution. Wisdom is derived from the judgment in the case titled *"Sohni Vs. Bahaduri and 5 others and State"* ***(PLD 1965 SC 111)*** wherein it is held that:-

> **"Now an interested witness is undoubtedly a competent witness under the Evidence Act. The proposition that his testimony should be corroborated by independent evidence is however not of universal application. The question of his reliability must depend upon the circumstances of each case and the quality of his evidence. If his testimony is found reliable the Court may accept it even without any corroboration. But as a matter of prudence the Court insists on corroboration of his evidence when he is inimically disposed towards the accused and it will, therefore, be unsafe to base a conviction on his testimony alone.**
>
> **In this case the village where the occurrence took place was torn by faction and therefore, false implication of innocent persons cannot be altogether ruled out. Furthermore, according to Doctor Muhammad Yamin Khan out of the 9 injuries found one Maulo deceased 2 were contused wounds, 1 incised wound, 1 was abrasion and the rest were contusions. Death was due to the shock and compression of brain caused by blood clots due to fracture of skull which was caused by injuries Nos. 1 and 2 that were found on the deceased. Most of the remaining injuries were on the leg of the deceased. In view of the number and nature of injuries one may legitimately ask whether this could**

possibly have been the result of assault by 6 accused persons or that they could have been easily caused by two or three persons. Viewing all the circumstances we are satisfied that the High Court was right in insisting on some corroboration of the evidence of the eye-witnesses connecting the accused with the crime. As such corroboration was lacking, the High Court was justified in giving the benefit of doubt to the accused persons".

21. Undoubtedly, the presence of the injured witnesses is established on the spot and they sustained firearm injuries but that fact alone is not sufficient to confirm that they told the whole truth in their statements. Injuries on the persons of the eye witnesses may establish their presence on the spot but the same are not a guarantee and conclusive proof of their credibility especially when there is a cross version of this case as well wherein a person of the opposite party got injured. Wisdom is derived from the judgment of the Hon'ble apex Court in the case titled *"Said Ahmad Vs. Zamarud Hussain and 04 others"* ***(1981 SCMR 795)*** wherein it has held that:-

"It is correct that the two eye-witnesses are injured and the injuries on their persons do indicate that they were not

self-suffered. But that by itself would not show that they had, in view of the aforenoted circumstances, told the truth in the Court about the occurrence; particularly, also the role of the deceased and the eye-witnesses. It cannot be ignored that these two witnesses are closely related to the deceased while the two other eye-witnesses mentioned to the F. I. R., namely Abdur Rashid and Riasat were not examined at the trial. This furthers shows that the injured eye-witnesses wanted to withhold the material aspects of the case from the Court and the prosecution was apprehensive that if independent witnesses are examined, their depositions might support the plea of the accused".

22. It also needs to mention that neither the complainant in the F.I.R nor the eye witnesses in their statements have specified the weapons allegedly used by the accused. Even PW-3 Amir Dost Khan has admitted in his cross-examination that he can identify different arms but strangely he made no specification of the arms allegedly used by appellant and other co-accused in the occurrence. In his cross-examination the PW stated that:-

میں نے ملزمان کے ساتھ موجود اسلحہ کی شناخت نہیں کی تھی۔ ملزمان کے ساتھ اسلحہ جات دکھائی دے رہے تھے۔ ہم علاقہ کے خوانین اور صاحب جائیداد لوگ ہیں۔ میں پستول، کلاشنکوف، شارٹ گن اور

دیگر قسم کے رائفل جانتا ہوں تاہم میں نے ملزمان کے ساتھ موجود
اسلحہ کی شناخت نہیں کی تھی۔

This aspect of the case clearly indicates that the injured have willfully tried to conceal the real facts. Firearms are commonly kept by people in their houses for the purpose of self-defence especially in this area, therefore, ignorance of the eye witnesses about the commonly used firearms is strange. The irony is that the alleged eye witnesses noticed each accused firing at particular persons of the complainant party but were unable to identify the arms which were in the possession of the appellants and other co-accused. Non specification of the crime weapons by the complainant and eye witnesses has a negative impact on the prosecution case and creates a reasonable doubt. Reference is made to the case titled ***"Siraj V/s. The State and another" (2013 YLR 684)[Peshawar]*** wherein it has been held:-

> **"It is very strange on the part of the complainant that he has not specified the weapons of offence. The people of this area what to say of male even the female can identify the different calibre of weapons for the reason that this area is facing terrorism and because of prevalent terrorism in the area of Malakand Division, even their women are protecting their persons and property by using weapons at the time of need. So, in this background non-specification of weapon in the hands of appellant reflects doubt regarding the presence of complainant and eye-witnesses on the spot".**

23. The above mentioned major discrepancies and inconsistencies in the prosecution case create a reasonable doubt in our mind regarding the guilt of the appellant. It is well settled that if there exists a reasonable doubt, however single it may be, its benefit must go to the accused as of right. Wisdom in this regard is derived from the judgment in the case titled *"Hashim Qasim and another Vs. The State* ***(2017 SCMR 986)*** wherein the Hon'ble apex Court observed that:-

> **"20. Even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts is bedrock principle of justice. Reference may be made to the case of Riaz Masih**

@ Mithoo v. The State (1995 SCMR 1730)".

24. Learned counsel for the complainant and learned A.A.G. also contended that the appellant remained absconder soon after the occurrence which shows that he had actively participated the occurrence and being guilty conscious, he avoided his arrest by local police in this case. No doubt, abscondence of an accused can support other convincing evidence of prosecution as corroborative evidence but when we have disbelieved the ocular account and other circumstantial evidence on record, the appellant cannot be convicted on the sole ground that he remained absconder. Wisdom is derived from the judgment in the case titled *"Rohtas Khan Vs. The State" (2010 SCMR 566)* wherein it was held by the Hon'ble apex Court that:-

"12. The learned High Court gave importance to the abscondence of the appellant. No doubt it is a relevant fact but it can be used as a corroborative piece of evidence, which cannot be read in isolation but it has to be read along

with substantive piece of evidence. This Court in the case of Asadullah v. Muhammad Ali PLD 1971 SC 541 observed that both corroborative and ocular evidence are to be read together and not in isolation. As regards abscondence this Court in the case of Rasool Muhammad v. Asal Muhammad 1995 SCMR 1373 observed that abscondence is only a suspicion circumstance. In the case of Muhammad Sadiq v. Najeeb Ali 1995 SCMR 1632 this Court observed that abscondence itself has no value in the absence of any other evidence. It was also held in the case of Muhammad Khan v. State 1999 SCMR 1220) that abscondence of the accused can never remedy the defects in the prosecution case. In the case of Gul Khan v. State 1999 SCMR 304 it was observed that abscondence per se is not sufficient to prove the guilt but can be taken as a corroborative piece of evidence. In the cases of Muhammad Arshad v. Qasim Ali 1992 SCMR 814, Pir Badshah v. State 1985 SCMR 2070 and Amir Gul v. State 1981 SCMR 182 it was observed that conviction on abscondence alone cannot be sustained. In the present case, substantive piece of evidence in the shape of ocular account has been disbelieved, therefore, no conviction can be based on abscondence alone".

25. For what has been discussed above, this appeal is allowed, the impugned judgment is set aside and the appellant is acquitted of the charge leveled against him. He is on bail, so, his sureties are discharged from the liability of bail bonds. The connected

Cr.R No. 23-M/2015 is dismissed for having become infructuous.

Announced
11.12.2017

JUDGE

JUDGE

Office
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