JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

Cr.A No. 100-M/2018

(1) Tariq Hussain son of Dost Muhammad (Appellant).
Versus

(1) The State through A.A.G.
(2) Rahmat Ali son of Naeem-ul-Hadi
(3) Usman Ali son of Nameed-ul-Hadi
(Respondents)

Present: *M/S. Razaullah and Sahibzada Assadullah, Advocates.*

Mr. Rahim Shah, Astt: Advocate General for the State.

Mr. Rashid Ali Khan, Advocate for the complainant/respondents.

Cr.R No. 33-M/2018

(1) Rehmat Ali son of Naeem-ul-Hadi
(Petitioner)
Versus

(1) The State through A.A.G.
(2) Tariq Hussain son of Dost Muhammad Khan.
(Respondents)

Present: *Mr. Rashid Ali Khan, Advocate for the petitioner.*

Mr. Rahim Shah, Astt: Advocate General for the State.

M/S. Razaullah and Sahibzada Assadullah, Advocates for the respondent/convict.

Date of hearing:- **18.02.2019**

CONSOLIDATED JUDGMENT

SYED ARSHAD ALI, J.- Through this single judgment, we propose to decide this criminal appeal bearing No. 100-M/2018 as well as the connected Criminal Revision bearing No.

33-M/2018, as both these matters emanate from one and the same judgment dated 14.04.2018 handed down by the learned Additional Sessions Judge/Izafi Zila Qazi Khwaza Khela Swat, in case F.I.R No. 638 dated 08.11.2014 registered under sections 302,324,201,34 of the Pakistan Penal Code, 1860 (***"PPC"***) read with section 13 of Pakistan Arms Ordinance, 1965 (***"A.O"***) at Police Station Khurshid Khan Shaheed (Khwaza Khela), District Swat, whereby the appellant namely Tariq Hussain was convicted and sentenced under different sections of law in the following manner:-

- ***U/S 302 (b) PPC to life imprisonment alongwith payment of compensation of Rs. 200,000/- payable to the legal heirs of the deceased under section 544-A Cr.P.C, or in default thereof, shall further undergo 6 months simple imprisonment. The said compensation shall be recovered as arrears of land revenue from the person and Estate of the convict.***
- ***U/S 324 PPC to 5 years simple imprisonment for attempting at the life of injured Izaz alongwith fine of Rs. 50,000/-, or in default thereof, shall further suffer 6 months simple imprisonment.***
- ***U/S 201 PPC to 3 years simple imprisonment alongwith fine of Rs. 25,000/-, on in default thereof, shall***

further undergo 3 months simple imprisonment

- ***All the above-referred sentences shall run concurrently, however, the accused/appellant was extended the benefit of section 382-B Cr.P.C.***

2. As per prosecution story, the complainant, Rahmat Ali, PW-1 on 08.11.2014 at 19:35 hours reported the incident to Qibla Alam Khan, SI, PW-6 at Khwaza Khela hospital about the murder of his nephew Hasham Khan and causing injury through dagger blows upon the body of other injured Izaz by the present accused/appellant Tariq Hussain and other co-accused Arif Hussain. The motive behind the occurrence was disclosed to be that both the accused used to tease the deceased Hasham Khan. In view of the report of the complainant the *'Murasila'* Ex. PW-1/1 was drafted which culminated into FIR, Ex. PA being registered against the accused/appellant and other co-accused at PS concerned on 08.11.2014.

3. Investigation of the case was entrusted to Muhammad Umar, ASI, PW-13 who has stated that on 08.11.2014 at about

20:00 hours the *Muharir* of the police station concerned informed him in respect of the occurrence which took place in Khwaza Khela Bazar, therefore, he rushed to the Khwaza Khela hospital where Qibla Alam Khan, ASHO, PW-6 handed over to him the '*Murasila*'. During investigation, he has taken into possession blood stained garments of the deceased Hasham Khan having on front two corresponding cuts of dagger vide recovery memo Ex. PW-10/1, which was sealed in parcel No. 1 Ex. P-4. He has also taken into possession blood stained garments of the injured Izaz having dagger blows cuts on back side vide the said recovery memo Ex. PW-10/2. He has also prepared site plan Ex. PB on the pointation of the eye-witnesses. He has collected blood from the spot through *'Gatta'/* گتہ and white tissue paper from the places of the deceased and the injured vide recovery memos Ex. PW-8/1 and Ex. PW-8/2 alongwith one pair of a *Chappal* black colour of the deceased Hasham Khan vide recovery

memo Ex. PW-8/3. During investigation, on pointation of the accused Tariq Hussain the police recovered the weapon of offence i.e. blood stained dagger (Ex. P-9), which was taken into possession by the Investigation Officer and in this regard he prepared pointation memo Ex. PW-13/5 alongwith recovery sketch Ex. PW-13/6. The recovered articles were sent to FSL vide application Ex. PW-13/8. He has also prepared the list of legal heirs of the deceased Ex. PW-13/11 and as per opinion obtained from D.P.P concerned sections 201 PPC and 13 A.O. were added against the accused through addition memo Ex. PW-13/12. He has also placed on record the FSL report Ex. PW-13/13.Upon completion of the investigation, complete *challan* was forwarded to the SHO concerned for onward submission.

4. During the course of trial, the prosecution examined as many as 17 witnesses whose statements were recorded and placed on file. On closure of the prosecution

evidence, accused was examined under section 342, Cr.P.C, wherein he denied the charges, claimed innocence and stated to have falsely been implicated in the case.

5. On conclusion of the trial, the learned Additional Sessions Judge/ Izafi Zilla Qazi Khwaza Khela Swat, convicted and sentenced the accused/appellant, vide the judgment impugned herein, hence the present appeal.

6. The learned counsels appearing on behalf of the appellant have argued that the prosecution before the lodging of FIR has conducted a preliminary inquiry as allegedly the complainant Rahmat Ali, PW-1 was not the eye-witness of the occurrence and in the FIR the person who informed him about the occurrence i.e. Mohsin Khan, PW-2 was not mentioned. Furthermore, have argued that the allegations in the FIR made by the complainant was never endorsed either by PW-2 Mohsin Khan or the injured/witness Izaz Khan, PW-3. Next argued that the alleged

injured/witness Izaz Khan despite the fact that at the relevant he was conscious did not register the FIR in person and furthermore he has not mentioned the name of Mohsin Khan, PW-2, the alleged eye-witness of the occurrence in his examination-in-chief, therefore, he is not a truthful witness. They have further argued that the alleged independent witnesses i.e. shopkeepers of the Bazar were not examined by the prosecution and have further stated that the mode and manner of the offence was introduced later. They have also contested the arrest of the appellants and have also attacked the recovery of alleged dagger i.e. the weapon of offence being result of the joint pointation of both the accused having no independent corroboration. They have further drawn the attention of the Court to the overwriting on the '*Murasila*' as well as in the FIR and the medical report and have also argued that although it is mentioned that there were light, however, no attempt was made by the prosecution to place

on record the alleged source of light i.e. bulb. They have lastly argued that the mode and manner of the occurrence does not suggest that both the accused were allegedly sharing the common intention as the occurrence took place at the spur of the moment.

7. Conversely, the learned counsel appearing on behalf of the complainant has argued that the FIR is only meant to set in motion the law and the complainant who is not an eye-witness of the occurrence is not required to provide minute details of the incident in the FIR. He has further argued that the time, date, mode and manner of the offence were successfully established by the prosecution through an independent witness Mohsin Khan, PW-2 and the injured/witness Izaz Khan, PW-3 and despite lengthy cross-examination of the aforesaid witnesses by the defence there is no major discrepancy in their testimony to disbelieve them. He has further argued that indeed it is a quality of the evidence which is required for prosecution to

establish the guilt of the accused and not the quantity of the evidence.

The learned Astt: Advocate General appearing on behalf of the State has also supported the contentions of the learned counsel for the complainant.

8. We have heard arguments of the learned counsel for the accused/appellant, learned counsel for the complainant and learned Assistant Advocate General appearing on behalf of the State and have gone through the record of the case with their able assistance.

9. According to the prosecution story, the offence was committed at about 19:00 hours in a thickly populated area i.e. the market/Bazar of Khwaza Khela and in front of Anwar hotel. True, that the complainant Rahmat Ali, PW-1 is not the eye-witness to the occurrence and at the relevant time he was not available at the place of occurrence, however, he had lodged the FIR at Khwaza Khela hospital at 19:35 hours, where he did

not mention that on whose information he had narrated the mode and manner of the occurrence. He also did not mention the name of PW-2 Mohsin Khan in his first information report, however, in our humble view, this omission would not render the entire prosecution case doubtful for the reason that the complainant has frankly conceded that he was not an eye-witness to the occurrence. Therefore, he has only set the prosecution case in motion being the uncle of deceased Hasham and the injured/witness Izaz who at the relevant time were of the age 14 and 16 years respectively as per their injury sheets.

10. The mode and manner of the occurrence has been narrated by PW-2 Mohsin Khan and injured/eye-witness Izaz Khan, PW-3 to the effect that at the relevant time the deceased Hasham Khan and injured Izaz were going towards the house of their grandfather, however, at '*Isha Vela*' at about 7:00 P.M when they reached near Anwar hotel, there the convicts Arif and Tariq both sons of Dost

Muhammad Khan emerged and Tariq the convict got-hold of Hasham Khan and Arif Hussain had inflicted dagger blows at Hasham Khan. In order to save his brother, the injured Izaz got-hold of Arif, in the meanwhile, Tariq released Hasham deceased and took the dagger from Arif and had inflicted a dagger blow at his back (Izaz).

11. In support of the prosecution case, Izaz Khan appeared as PW-3 who has narrated the aforesaid story in his Court statement. Although, he has not mentioned about the presence of the eye-witness Mohsin Khan, PW-2 in his examination-in-chief, however, in cross-examination in response to a query of the defence he has fully explained the incident by mentioning Mohsin not only to have seen the occurrence but has stated that the said Mohsin and some other persons had taken him to the hospital. Furthermore, the presence of Mohsin at the spot is also established from the medical evidence which clearly mentions that the then injured now

deceased Hasham was brought by Mohsin and was identified by Qibla Alam, ASHO at 7:30 P.M. on 08.11.2014.

12. The said eye-witness Mohsin Khan appeared as PW-2 who has fully supported the case of prosecution. The said Mohsin Khan is not related to the complainant and works as police constable and has not only justified his presence at the spot but the medical report also established the presence of Mohsin to have brought the then injured now deceased Hasham to the hospital. Therefore, Mohsin Khan is indeed a natural and an independent eye-witness. The defence has not given even a remote suggestion to him regarding his interest in the prosecution of the appellants. Thus, in the circumstances, for the only reason that the complainant did not mention his name in the FIR will not lead to an inference that he was not available at the spot. In this regard, reliance is placed on the judgment of august Supreme Court of Pakistan titled ***"Muhammad Mushtaq v/s The***

State" (PLD 2001 Supreme Court 107)", wherein it was held by that:- ***"Eyewitness although was not named in the F.I.R, yet he was a natural witness to whom no enmity or ulterior motive was attributed for false involvement of accused in the commission of the offence and his deposition was found to be true."***

This view further reflects in the judgment of the august Supreme Court of Pakistan titled ***"Muhammad Basharat v/s The State" reported as 2003 SCMR 554"***, wherein it was observed that:- ***"Eye-witnesses were the natural witnesses of the occurrence and their testimony inspired confidence. Fact that the eye-witness had not been named in the F.I.R was not by itself sufficient to discard his testimony. Ocular evidence was corroborated by medical evidence. Leave to appeal was refused to accused accordingly."***

Even this Court in case law titled ***"Iftikhar Ali v/s The State (1998 P Cr. LJ 2022 Peshawar)"***, has held that:- ***"Non-***

mention of the names of eye-witnesses in the FIR and the site plan was not fatal as the FIR was not made by an eye-witness or relative of the deceased and the site plan was not a substantive piece of evidence."

Thus, there exist no occasion to disbelieve the evidence of PW-2 Mohsin Khan, more particularly in circumstances that despite the lengthy cross-examination by the defence he remained consistent and firm in his testimony. Even he has exactly mentioned the places where at the relevant time the complainant-party as well as the accused-appellants were present.

13. Izaz Khan, PW-3 the injured/eye-witness has also supported the prosecution case. Since he has sustained injury on his thigh and was immediately shifted to the hospital where his injury-sheet was prepared and was further shifted to Saidu Teaching Hospital for further treatment. Thus, the presence of this injured/PW at the spot is also established. In the circumstance, it cannot be

believed that the present appellant was substituted for the real culprits. In this regard, reliance is placed on the judgment of august Supreme Court of Pakistan titled ***"Abdul Rauf and others v/s Mehhi Hassan and others" (2006 SCMR 1106)"***, wherein it was held that:- ***"Presence of eye-witnesses who had received fire-arm injuries at the place of occurrence at the relevant time was not open to any doubt. None of the eye-witnesses was shown to have any motive or ill-will to maliciously implicate the accused in the case."***

This ratio has further been affirmed by the august Supreme Court of Pakistan in case titled ***"Muhammad Waris v/s The State (2008 SCMR 784)"***, wherein it was held that:- ***"Eye-witness had explained their presence at the place of occurrence at the relevant time and thus, they were natural and independent witnesses of the incident. Medical evidence was not destructive of the ocular testimony."***

14. The medical evidence furnished by Dr. Khairun Nabi, PW-11 is also in line with the prosecution case. According to the medical report, the then injured now deceased Hasham Khan in a critical condition was brought to the hospital on 7:30 P.M on 08.11.2014. According to the medical report, he has sustained the following injuries:-

- ***External Appearance:***
- ***Mark of ligature on neck and dissection:- Nill***
- ***Condition of subject: fresh***

1) 1 cut wound with sharp instrument across the chest over sternum (Bone). Cutting the sternum and 02 ribs and cutting the heart lower boarder (3.5" in length and deep to heart).

2) Cut wound on left side of chest near to apex 1-1/2" in length and 3 cm deep.

- ***Walls, Ribs and cartridges:- 2 ribs cut (6-7) right side.***
- ***Plura:- Left side cut.***
- ***Right lung:- cut***
- ***Pericardium and heart:- both cut.***
- ***Injury of chest:- 2 ribs and sternum cut.***
- ***Patient was brought to casualty before expiry. He died on the table of casualty.***
- ***Cause of death:- direct injury to heart internal and external bleeding.***

The cause of death of deceased Hasham Khan was also confirmed by the doctor.

15. Moving on further to the objection of the learned counsels for the appellant regarding overwriting on the *'Murasila'*, FIR and the medical report of the injured/eye-witness Izaz. According to the prosecution case, the offence was committed at 19:00 hours, whereas it was reported at 19:35 on the same day i.e. 08.11.2014 and the FIR was registered at 20:20 hours on the same date. Although, the overwriting appears on the *'Murasila'* relating to the time of occurrence and the time of report. This overwriting prima facie appears that probably initially the time of occurrence was written as 07:00 and the time of report as 07:35, later it was made as 19:00 and 19:35 to bring it in conformity with the conventional standard of mentioning the time in FIR. However, this overwriting does not effect the prosecution case, because the time of report and registration of FIR has been mentioned without any overwriting. Furthermore, the time of examination of the then injured now deceased Hasham also

appears in the medical report is 7:30 P.M. Therefore, this overwriting is inconsequential and does not appear to be the result of manipulation. Moreover, PW-6 Qibla Alam Khan, ASHO who has drafted the *'Murasila'* when was confronted with the same situation of overwriting who have fully explained the same in his cross-examination. Hence, this objection is also overruled.

16. The learned counsels for the appellant have also attacked on the recovery weapon of offence i.e. dagger, which was recovered vide recovery sketch memo Ex. PW-13/5 on the pointation of both the accused i.e. Tariq Hussan accused/appellant in the instant appeal and Arif Hussain accused/appellant in the connected appeal in presence of its marginal witnesses. The recovery has been conducted on the joint pointation, which prima facie is illegal, however, this recovery is only a corroborative piece of evidence and it is settled law that when the eye-witnesses remained firm and

straight-forward in their testimony before the Court then they do not require further corroboration from circumstantial evidence. In this regard, wisdom is derived from the judgment of the august Supreme Court of Pakistan titled ***"Shafqat Ali and others v/s The State" (PLD 2005 Supreme Court 288)"***, wherein it was observed that:- ***"If a witness has furnished wholly reliable evidence, It is bound to be accepted even without corroboration, whereas halfly reliable evidence needs strong corroboration for its acceptance."***

17. The learned counsels for the appellant have also referred to certain minor discrepancies in the evidence of prosecution witnesses, however, on the major point they remained consistent and with the passage of time it is very natural that the witnesses may not be unanimous on minor narrations.

18. As far as the objection of the learned counsels for the appellants that allegedly the occurrence has taken place at

7:00 P.M and the bulb i.e. source of light was not recovered by the Investigation Officer through recovery memo. However, it is a matter of record/evidence that the offence has committed in Bazar/market in front of a hotel and in the normal course of business in Bazar the presence of light i.e. bulb cannot be ruled out.

19. Lastly, moving on to the question as whether the present accused/appellant Tariq Hussain can also be held responsible for the dagger blows of co-convict Arif Hussain. The concept to award similar sentence in addition to the principal accused who had the common intention of killing the accused has been embodied in sections 34 and 149 of the Pakistan Penal Code (***"Code"***). The role of co-accused who were either present at the spot or had taken some steps in commission of offence alongwith the principal accused remained subject-matter before the superior Courts for awarding conviction to the said co-accused.

In ***''Muhammad Riaz alias Riasti and another vs the State 1987 SCMR 177***', in respect of the common intention the august Supreme Court of Pakistan has held:- ***''In the above case, one appellant inflicted dagger blow while the other appellant threw brickbat on the face of the fallen victim. It was urged before this Court that the accused who threw brickbat, did not know that the other co-accused was carrying knife or that he would stab deceased in abdomen and thus did not share common intention to murder. The above contention was repelled and it was held that from his throwing brickbat on the face of the deceased after he had been stabbed in the abdomen, it was evident that he shared intention with the co-accused on spot to murder the deceased. The appeal was dismissed and the judgments of the two Courts below were maintained.''***

In ***"Gheba & others vs the Crown PLD 1949 Lahore 453"*** the august Division Bench of the Lahore High Court has

observed:- ''***Common intention within the meaning of section 34 implies a prearranged plan. To convict the accused of an offence applying section 34 it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is no doubt difficult if not impossible to procure direct evidence to prove the intention of an individual; it has to be inferred from his act or conduct or other relevant circumstances of the case. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. The inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case."***

Lastly, the august Supreme Court of Pakistan in its celebrated judgment ***"Muhammad Akbar & 2 others vs The State PLD 1991 Supreme Court 923***, His Lordship

Mr. Ajmal Mian while referring to various pronouncements as cited above on the subject while speaking for the Court regarding the common intention in Para 12 of the judgment has held:- ***''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''.

In context of the present case, the mode and manner of the occurrence narrated by the prosecution witnesses, whereby the Tariq accused got-hold of Hasham deceased enabling the co-convict Arif to inflict dagger blows on the chest of Hasham and thereafter when the co-convict Arif was held by the injured Izaz and taking knife from him and injuring Izaz clearly shows that the present appellant Tariq was also sharing common intention with the Arif, co-convict.

20. In view of the above, we have come to un-escapable conclusion that the prosecution has established its case beyond

any shadow of doubt against the present appellant as well as the co-convict Arif Hussain and the conviction and sentence recorded by the learned trial Court through the impugned judgment is based on correct appreciation of evidence, which do not call for any interference.

21. In view of the above discussion, we do not find any merit in the appeal on the question of guilt of the accused/appellant, therefore, the judgment of conviction and sentence recorded by the learned trial Court is maintained and this appeal is dismissed accordingly.

22. Since the motive for the offence has not been established, therefore, the award of capital punishment of death is not warranted in the circumstances of the case, hence, the criminal revision for enhancement preferred by the complainant/petitioner is also dismissed being devoid of any merit.

Announced
18.02.2019

JUDGE

JU DGE

OTHie 04/03/2019 W/R

NAWAB/PS* DB: Mr. Justice Muhammad Ghazanfar Khan
Mr. Justice Syed Arshad Ali