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

Cr. A No. 282-M/2022

(Syed Farman Ali Shah Versus Mian Syed Wahab Bacha and another)

Present:

Mr. Astaghfirullah, Advocate for appellant/convict.

Syed Sultanat Khan, Assistant A.G. for State.

Mian Kausar Hussain, Advocate for complainant.

Date of hearing: **04.10.2023**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Through instant appeal under section 410, Cr.P.C., the appellant/convict has challenged the judgment of the learned Sessions Judge/Zilla Qazi, Buner at Daggar, dated 24.09.2022 in case FIR No. 165 dated 04.02.2018 u/s 302/34 PPC of P.S Pir Baba, District Buner, whereby he was convicted under section 302(b)/34 PPC and sentenced to undergo life imprisonment as *Ta'azir* with fine of Rs.500,000/- as compensation payable to LRs of the deceased in terms of section 544-A, Cr.P.C, or in case of default thereof to undergo further six months S.I. Benefit of section 382-B, Cr.P.C was extended to him.

2. Precise facts of the case are that complainant Mian Syed Wahab Bacha made a report to police on 04.02.2018 to the effect that, he along with his son Syed

Hussain Shah Bacha were present in their *Hujra* on 04.02.2018, the appellant Syed Farman Ali Shah along with his brother/absconding accused Syed Ali Shah came to their *Hujra* at about 17:30 hours and started altercation with his son for their share in the said Hujra and aimed to lock the main door of the *Hujra* on which a fight took place between them. During the quarrel, co-accused Syed Ali Shah took out his pistol and fired at Syed Hussain Shah Bacha as a result of which he got hit on his back. Motive for the occurrence was stated to be the property dispute. The injured later on succumbed to the injuries.

3. Initially, both the accused remained absconders, therefore, challan against them under section 512, Cr.P.C was submitted before the Court and they were declared as proclaimed offenders. The present appellant was arrested on 08.08.2020 and, after completion of post-arrest investigation, he was recommended for trial through submission of supplementary challan. Formal charge was framed against him to which he did not plead guilty and opted to face the trial. In order to further substantiate its case against the appellant, prosecution produced and examined as many as thirteen witnesses and closed the evidence. When examined under section 342, Cr.P.C. the appellant denied the charged, however, he neither recorded his own statement

on oath nor produced any evidence in his defence. On conclusion of trial, the learned trial Court vide impugned judgment convicted and sentenced him, the detail of which has been given in the earlier portion of this judgment, hence, instant appeal.

4. Arguments heard and record perused.

5. It is the version of prosecution, that the present appellant alongwith his absconding co-accused entered the *Hujura* of deceased and during altercation/scuffle with him and his father, the co-accused fired at the deceased with his pistol which subsequently caused his death. Admittedly, complainant in his initial report as well as in his statement before the learned trial Court has ascribed the role of firing upon the deceased to co-accused Said Ali Shah. The other eye-witness Shahab-ud-Din (PW-12) also recorded his statement in the same line. The learned trial Court has convicted and sentenced the present appellant for murder of the deceased on the ground of his common intention with his co-accused by holding that both the accused, having the common motive, had jointly entered the Hujra of deceased and during a scuffle with him, the co-accused fired at the deceased whereafter both of them jointly decamped from the spot. In order to know the conditions for holding an accused constructively liable for an offence under section 34 PPC

and the basic ingredients thereof, the provision is reproduced below for ready perusal.

> **34. Acts done by several persons in furtherance of common intention.** When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

Section 149 of the Pakistan Penal Code is also on the same subject but the same deals with vicarious liability of members of unlawful assembly in prosecution of their common object. Section 149, PPC reads as under:

> **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 the committing of that offence, is a member of the same assembly, is guilty of that offence.

The main differences between the two provisions are that the former deals with commission of a crime by accused less than five in number under their "common intention" whereas the latter deals with vicarious liability of members of unlawful assembly of five or more accused in furtherance of their "common object", however, constructive liability of the accused is the main theme of both the referred provisions under sections 34 and 149 of the Pakistan Penal Code. The learned trial Court has discussed vicarious liability of the appellant in Para 9 of the judgment wherein mainly the principles governing constructive liability of

accused have been discussed but no discussion was made that on what grounds the murder of deceased was an organized commission of the crime by the accused. The learned trial Court has also not clarified in light of evidence that whether the accused had come to *Hujra* of the deceased after a pre-concert between them or they had formed their common intention for the murder at spur of the moment. Criminal intention of an accused or pre-concert or pre-arrangement of several accused cannot be proved through direct evidence in each case, however, the same can be inferred from the facts disclosed in evidence and surrounding circumstances of the case. Since, co-accused of the appellant is still absconding, therefore, we would confine our discussion only to liability of the appellant under his common intention with his co-accused as alleged by prosecution and in this regard only the relevant evidence needs to be thrashed out.

6. Admittedly, complainant Mian Syed Wahab Bacha is real paternal uncle of the present appellant and his co-accused. According to the version of prosecution, the accused had entered the *Hujra*, appearing to be joint holding of the parties, and made a demand of their share in the said *Hujra* by disclosing their intention that they were going to close the main gate of the said building. Joint entry of both

the accused into *Hujra* cannot be denied in light of direct and circumstantial evidence, however, the moot question is whether entry of the appellant into the *Hujra* in the company of his co-accused in the mode and manner as reflecting from the evidence is sufficient to establish that he was sharing his intention with his co-accused for committing murder of the deceased? There is no evidence on record to suggest any previous bitterness of serious nature between the parties prior to the occurrence, therefore, in view of their close relationship with each other, mere joint entry of the accused in the *Hujra* cannot be viewed with suspicion that there was pre-concert or pre-arrangement between them for commission of the offence. No doubt, there was motive of dispute over share of the accused in the *Hujra* where the occurrence took place, however, the common motive of both the accused alone was not sufficient to prove that the appellant and his co-accused had entered the *Hujra* in furtherance of their common intention for committing the murder of deceased. There is no evidence on record to prove that any pre-consultation or pre-planning had taken place between both the accused before the occurrence nor the said elements can be inferred from the surrounding facts of the case. PW-12

admitted in his cross-examination that the appellant was not having any pistol at the time of occurrence. The fact that the appellant was empty handed at the relevant time suggests that neither any pre-planning had taken place between both the accused before the occurrence nor the appellant had the knowledge that his brother/co-accused was in possession of weapon nor he anticipated any quarrel with the complainant side culminating in murder of the deceased. It is a matter of common observation in this society that close relatives carry weapons with them on the occasions when they apprehend that a fight will likely take place with the other side. Had the appellant any intention of fight with the complainant or had he apprehended the same or had he the knowledge that his brother was carrying a pistol with him while going to the *Hujra*, he would have also carried some weapon with him at least for his self defence. In view of the above attending facts, prior concert of the appellant with his co-accused or his pre-arranged plan with him for murder of the deceased cannot be inferred from the evidence on record. The general rule governing the constructive liability of several accused for a crime is that there should be prior concert and pre-arranged plan because 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 them

all. In this regard we would refer the judgment of the apex Court in the case titled ***"Muhammad Yaqoob, Sub-Inspector Vs. The State"*** reported as ***PLD 2001 S.C 378***. It was further observed in the said judgment that all that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily led 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. Thus, mere joint entry of the appellant with his co-accused into the Hujra is not sufficient to establish that he had common intention with his co-accused for committing the murder of deceased especially when he was unarmed at the relevant time and no overt act was attributed to him during the fight.

7. We have in our mind the settled principle of law as observed by apex Court in the case titled ***"Ali Imran Vs. The State" (PLD 2006 S.C 87)*** that it is not necessary that evidence of pre-consultation or concert should be clearly brought on the record rather sometimes common intention may develop at the spur of the moment or during commission of offence. Learned counsel for the complainant stressed this point mainly on the ground of joint entry of both the accused in *Hujra* of the complainant and their scuffle with the complainant and deceased. According to

him, since the accused had common motive and they had made entry into the *Hujra* at the same time, therefore, the learned trial Court, while convicting the appellant for murder of the deceased, has rightly attracted section 34, PPC to the case of appellant. Each criminal case rests on its own facts and circumstances in light whereof guilt or innocence of an accused is to be determined with proper recourse to ocular account and incriminating recoveries. The version of prosecution qua the effective firing upon the deceased specifically attributed to co-accused Said Ali Shah is clear and unambiguous, therefore, appreciation of the evidence in the same line qua culpability of the present appellant is neither required nor warranted in view of the abscondence of the co-accuse. The question for resolution before this Court is whether any direct evidence or circumstances exist from which it can be inferred that common intention of the appellant with his co-accused had developed at spur of the moment or during commission of the offence? Complainant alleged that both the accused scuffled with him and his deceased son but except the above bald statement there is no evidence from which independent role of the appellant in the occurrence could be ascertained. Learned counsel for the complainant was of the view that for application of section 34, PPC, it is not necessary that the accused should perform

any act with his own hands. In this regard he relied upon ***"Rab Nawaz and others Vs. The State" (2015 P Cr. L J 1531 Sindh)*** and ***"Muhammad Arif and others Vs. The State and others" (2008 YLR 580 Shariat Court AJ & K)***. The rule emerging from the aforementioned dicta is that if several persons had the common intention of doing a particular criminal act and if, in furtherance of that common intention all of them joined together and aided or abetted each other in the commission of an act and one out of them did not do the act with his own hand but helped by his presence or by other act in the commission of an act, he would be held to have himself done that act within the meaning of section 34, PPC. The rule primarily speaks about doing of a criminal act by several accused in furtherance of their common intention, which must be proved through direct evidence and if direct evidence is not available then the same may be inferred from circumstances of the case. Complainant or PW-12 have not attributed even a single overt act to appellant in the present case during the fight to be considered for aiding or abetting his co-accused at the time of firing at the deceased. The ocular account, in respect of the present appellant, can only establish his presence on the spot but none of the PWs have explained his independent role or the manner he had aided or abetted the absconding

co-accused. Ratio of the judgments referred to by learned counsel for the complainant is that when common intention of several accused is established on the record then it is immaterial that who had played what role. The above rule is also reflecting from ***"Sh. Muhammad Abid Vs. The State" (2011 SCMR 1148)***, wherein it has been held that once it was found that accused persons had common intention to commit crime, it was immaterial as to what part was played by whom, as vicarious liability was that who had stood together, must have fallen together. The words 'once it was found' used by their lordships in the afore-referred judgment have great significance which implies that proof of common intention of several accused for committing a crime or inference thereof by Court from circumstances of the case is a condition precedent, as such, when the common intention is neither proved through evidence nor could be inferred from the circumstances then the accused could not be held vicariously liable for commission of the crime under section 34 PPC merely on the ground that he was present on the spot at the time of occurrence. Guidance is taken from ***"Hasan Din Vs. Muhammad Mushtaq and others" (1978 SCMR 49)*** wherein it has been held that mere presence of a person on the spot does not necessarily attract section 34, PPC. Thus, the judgments relied upon by learned counsel for the

complainant cannot be applied to the present case in view of its peculiar facts and circumstances.

8. Section 34, PPC is neither punitive, nor it enacts a rule of evidence but mainly relates to joint liability. Such vicarious liability of an accused could not be determined in vacuum rather the evidence on record requires to be analyzed with due care and caution so that an innocent person may not be punished for a crime he neither intended to commit himself nor aided or abetted the commission thereof in any manner nor he had the knowledge that his co-accused would commit the crime. In the case of ***Sadiq and two others vs. The State*** (**1990 SCMR 340**) the accused were acquitted by the Hon'ble Supreme Court on the ground that though the accused were present at the scene of occurrence but neither any role was attributed to them for causing injury to the deceased nor any of the prosecution witnesses. In the case of ***Abdul Rashid vs. The State*** (**1989 SCMR 144**) two brothers Abdul Rashid and Riaz Ahmad were charged for the murder of Muhammad Hanif. They were found guilty by the Additional Sessions Judge, Multan, vide his judgment dated 15th February, 1979. Abdul Rashid was sentenced to death and Riaz Ahmad to imprisonment for life. Abdul Rashid was also ordered to pay a fine of Rs.2,000 which on realization was ordered to be paid to the

heirs of Muhammad Hanif deceased. In appeal it was held by the High Court that section 34, P.P.C. was not attracted to his case and converted his conviction from one under section 302, P.P.C. read with section 34, P.P.C. to one under section 323, P.P.C. for causing hurt to Muhammad Hanif deceased and ordered that since the appellant Riaz Ahmad had already suffered sentence for more than one year which is the maximum sentence provided for an offence under section 323, P.P.C., no further sentence of imprisonment was required to be awarded to him. In appeal the hon'ble Supreme Court has held that:

> **Moreover, there is no evidence that Riaz Ahmad knew that Abdul Rashid was carrying any knife. Therefore, he could be saddled with his own act which was causing of simple injury to Muhammad Hanif.**

In the case of ***Hasan vs. The State*** (**1969 SCMR 454**) the accused was acquitted by Hon'ble Supreme Court by observing that proof of some overt act on part of each accused in furthermore of common intention necessary and mere presence of accused not-sufficient or conviction. In light of the afore-referred dicta, the learned trial Court has fallen in error by convicting the appellant for murder of the deceased under section 34 PPC without attending the evidence on record and circumstances of the case discussed above.

9. For what has been discussed above, this appeal is allowed, the impugned judgment is set aside and appellant Syed Farman Ali Shah son of Syed Barish Bacha is acquitted of the charge levelled against him in the present case. He be released forthwith from jail if not required in any other case.

10. Above are the reasons of our short orders of the even date.

Announced
Dt: 04.10.2023

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Office 15/11/2023 WR