JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, PESHAWAR

[JUDICIAL DEPARTMENT]

Crl Appeal No.372-P/2015

Afsar Ali……Vs…… The State.

PRESENT; -

For the appellant: - Mr. Ishfaq Afridi, Advocate.

For the State. - Muhammad Riaz, AAG.

For the complt: Mr. Ashtaghfirullah, Advocate.

Date of hearing:- **22.09.2020.**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- This criminal appeal is directed against the judgment dated 20.05.2015 passed by learned Additional Sessions Judge, Lahor (District Swabi), whereby Afsar Ali, the appellant, involved in case FIR No. 497 dated 14.04.2011 under sections 302/324/34 PPC of Police Station, Lahor (District Swabi), was convicted and sentenced as under: -

1. **Under section 302(b) r/w 34 PPC** to undergo life imprisonment, besides payment of Rs. 2,00,000/-, as compensation to the legal heirs of deceased, recoverable as arrears of land revenue or in default thereof shall undergo six months SI.
2. **Under section 324 r/w 34 PPC** to undergo seven years RI **(two counts for an attempt at the lives of complainant and PW Mukamil Khan)** each with fine of Rs. 20,000/- each or in default thereof to undergo further three months SI with benefit of section 382-B Cr.P.C. All the sentences were ordered to run concurrently.

2. The case of prosecution, as spelt out from the record, is that on 14.04.2011, complainant Majid Khan lodged a report in the company of his relatives by stating that they had a dispute with Afsar Ali and Amir Muhammad over a demolition of bridge and on the day of occurrence, he along with his brother Sajid, uncle Mukamil Khan and cousin Niaz Muhammad were on the way to their field when they, at 07.00 hours, reached near the field known as "Wand Urmar Land", in the meantime, Afsar Ali and Amir Muhammad emerged duly armed and started firing at them, due to which his brother Sajid was hit and died at the spot, while he, his uncle and cousin narrowly escaped from their firing. Both the accused, after commission of the offence, fled away from the spot. On the report of complainant, the present case FIR Exh.PA was registered against both the accused.

3. Bakht Afzal Khan SI (PW-6) after recording report of the complainant, preparing injury sheet and inquest report of the deceased, referred the corpus to the DHQ hospital, Swabi, where Dr. Asghar Ali Shah (PW-09) conducted autopsy and found the following on his person.

Wound:

1. Firearm entrance wound on the left side temporal area on skull size abut ½ x ½ cm.
2. Firearm exit wound on right side temporal area damaging the right ear size about 2 x 2 cm in length.

Cranium and spinal cord.

Scalp, skull, membranes and brain injured.

Abdomen.

All the abdominal organs found health with empty stomach.

Muscles, bones and joints.

Scalp muscles were injured.

Opinion.

In his opinion death occurred due to firearm injury to vital organs like brain, leading to hemorrhage, shock and death.

Probable time between injury and death.....instantaneous
Between death and postmortem within about 2- ½ hours.
The postmortem papers are Exh.PM/1 and Ex.PM/2.

4. Tariq Saeed Khan ASI (PW-4) was entrusted with investigation of the case. He visited the spot and prepared the site plan, Ex.PB. During spot inspection, he took into possession blood stained earth from the place of deceased, vide memo Ex.PW 4/1. He also collected two empties of 8 MM from the place of accused Afsar Ali and eight empties from the place of accused Amir Muhammad, vide memos Exh. PW 4/2 & Ex.PW 4/3, while blood stained garments of the deceased were taken vide memo Ex PW 4/4. He also sent blood stained garments of the deceased, eight empties of 7.62 bore and two empties of 8 MM to the FSL. He arrested accused Amir Muhammad in the case. Since accused Afsar Khan, the appellant, was avoiding his lawful arrest, therefore, he applied for issuance of warrant under section 204 and proclamation under section 87 Cr.P.C which were accordingly issued. After submission of challan before the court, accused Amir Muhammad was tried by the court of learned Additional Sessions Judge, Lahor, and after conclusion of trial, he was convicted and sentenced vide judgment dated 26.11.2011, which judgment was upheld till the apex Court, vide judgment dated 27.04.2017.

5. Since the present appellant, namely, Afsar Ali, was absconding and on his arrest on 11.03.2012, supplementary challan against him was submitted before the Court. Learned

trial Court after framing of charge, recording statements of prosecution witnesses and that of accused under section 342 Cr.P.C and hearing arguments, convicted and sentenced the appellant-convict, as stated above, hence, the instant appeal.

6. Learned counsel for the accused-appellant argued that the prosecution has failed to bring home the charge against the convict by producing trustworthy, reliable and convincing evidence. He further argued that the eye-account furnished by the complainant Majid Khan (PW-2) and PW Mukamil Khan (PW-3) are not in line to each other, therefore, the same could not be believed for maintaining the conviction and sentences. He next submitted that presence of PW-2 and PW-3 has not been established and they have falsely deposed against the appellant due to his close relationship with the deceased. According to him, recovery of two empties of 8 MM from the place of appellant is planted one and while concluding his arguments, he submitted that the trial Court has not examined the evidence of prosecution witnesses in accordance with recognized principles of appreciation of evidence available on record, therefore, the impugned judgment of conviction is against the law and without any cogent evidence, as such, the same is liable to be set aside and the appellant be acquitted of the charge.

7. As against that, learned AAG and counsel for the complainant argued that not only presence of the PWs has been proved from the evidence available on record but their presence was also established in the previous trial which

judgment has attained finality as it was maintained up to the apex Court. According to them, the incident took place in broad day light and the parties were also engaged in enmity, therefore, being known to each other, identification of the appellant is out of question. They submitted that not only the testimony furnished by the complainant and the eyewitness is straightforward, honest and reliable, but same has also been supported by the testimony of Investigating officer, medical evidence, recovery of blood-stained earth and crime empties from the spot as well as blood stained garments of the deceased coupled with motive and FSL report. They argued that the prosecution proved its case against the convict-appellant beyond any shadow of reasonable doubt and supported the impugned judgment.

8. We have heard learned counsel of the parties and gone through the record with their valuable assistance.

9. It appears from the record the report was lodged by complainant Majid Khan (PW-2), the brother of deceased Sajid, wherein he charged the present appellant Afsar Ali and the convicted accused Amir Muhammad for the killing of his brother and ineffective firing at him as well as PW Mukamil Khan. He reported the matter at 8.10 a.m while the occurrence was taken place at 07.00 a.m, i.e., after one hour of the occurrence, whereas the place of occurrence was situated at a distance of 6/7 k.m from the Police Station, thus, the report has promptly been lodged. In his report, the complainant has assigned role of indiscriminate firing to the present appellant as well as to the convicted accused.

In the previous trial, co-accused Amir Khan was convicted and sentenced to life imprisonment. His appeal against conviction was dismissed by this court and his conviction and sentences were also maintained by the apex Court, vide judgment dated 27.04.2017. During the trial of present appellant, both complainant and PW Mukamil Shah appeared as PW-2 and PW-3 respectively. Their testimony is consistent on material points. The presence of complainant and PW Mukamil Khan was established on the spot. They deposed the ocular testimony and supported the prosecution version. Despite that they were subjected to very lengthy cross examinations but nothing material could be brought out nor any dent could be created in their evidence. They stood firm and their veracity could not be shaken. Both the eyewitnesses, no doubt, are related to the deceased but mere relationship is no ground to discard their straightforward and confidence inspiring evidence especially when their presence on the spot has been established. The apex Court in number of cases has been held that statement of a witness cannot be disbelieved solely on the plea that he is related to the deceased. An interested witness is a person who has a motive to falsely implicate a person. Reliance: **Sharafat Ali v. The State, 1999 SCMR 329, Muhammad Afzal and 3 others vs. The State,1999 S C M R 1991 and Abdur Rauf vs. The State, 2003 S C M R 522.** Viewing the testimony of the witnesses in the light of aforesaid criteria, we do not find their testimony as tainted or they had any motive to falsely implicate the appellant. No plausible reason has been established by the

defence to indicate why the complainant would substitute the appellant by leaving real culprits. The testimony of complainant and Mukamil Khan are convincing one, hence, in our view, the evidence produced by the prosecution was rightly believed by the trial Court.

10. The unnatural death of Sajid deceased has also been proved rather not disputed as the perusal of Postmortem papers reveals that the injury on the person of the deceased was of firearm, therefore, medical evidence also supports the ocular account. Not only the occurrence is of day light but the parties were already known to each other, therefore, question of mis-identification does not arise. Again, the prosecution case has further been supported by the recovery two 8 mm empties from the place of appellant, blood stained earth and garments of the deceased. Apart from the above, the appellant just after the occurrence went into hiding with no plausible explanation. Abscondence per se is not sufficient to prove the guilt, but when it goes for a long time for which no reasonable explanation is given by an accused person coupled with other evidence on record would be the criteria to determine his guilt or innocence and, thus, is a corroborative piece of evidence, therefore, his conduct after the occurrence is indicative of his guilt when considered in juxtaposition with the other evidence produced by the prosecution.

11. Yes there is a single entry wound on the person of the deceased for which two persons, the present appellant and the convicted accused, are charged and there is no definite

opinion as to whose shot proved fatal but this doubt is not sufficient for acquittal of the appellant because the bare reading of section 34 PPC, which introduces the concept of vicarious or joint Criminal liability under the Penal System of our country, reveals that 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. Hon'able the apex court in **Sh. Muhammad Abid's case (2011 SCMR 1148),** has observed that:

> "Once it is found that the accused persons had common intention to commit the crime, it is immaterial as to what part was played by whom as law as to vicarious liability is that those who stand together, must fall together. The question what injuries were inflicted by a particular accused in cases to which section 34, P.P.C. applies is immaterial, the principle underlying the section being that where two or more persons acted with a common intention each is liable for the act committed as if it had been done by him alone."

Section 34 PPC, is neither a punitive nor does enact a rule of evidence but mainly relates to the concept of joint liability, it simply means that if two or more persons intentionally commit an offence jointly which amounts to as if each of them had committed it individually. Thus, for applicability of section 34 PPC, necessary ingredients of common intention are the prior meeting of minds of accused to form a pre-arranged plan and some evidence to prove that accused in pursuance of pre-arranged plan has committed the criminal act. The real concept of the section 34 of PPC is that

if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. One should not forget that section 34 does not speak “the common intentions of all” nor does it speak “an intention common to all”. Under the provisions of Section 34 the essence of the liability is to found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To prove the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be its pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. In the present case, it is established from the record that the appellant had arrived to the scene of occurrence with deadly weapon along with convicted co-accused and made firing at the deceased which fact has also been supported by the recovery of two empties of 8 mm from his point as shown in the site plan, thus, the *actus reus* “guilty act," and *mens rea*, "a guilty mind." which are the prerequisite for the constitution of criminal behavior, are proved against him.

12. Considering the case from all angles, we are fully convinced that the prosecution has been successful in proving its case against the appellant beyond any shadow of doubt,

therefore, this appeal is dismissed and conviction and sentence recorded by the trial court is maintained.

Announced.
22.09.2020 **CHIEF JUSTICE**
M.Zafral P.S

J U D G E

(DB Hon'able Mr. Justice Waqar Ahmad Seth,HCJ, and
Hon'able Mr. Justice Muhammad Naeem Anwar, J).