

**JUDGMENT SHEET
IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN.
(JUDICIAL DEPARTMENT)**

Murder Reference No.47 of 2018.

CRIMINAL APPEAL No.547-J of 2018.

Abdul Aziz vs The State

CRIMINAL APPEAL No.551-J/2018.

Muhammad Ahmad vs The State

CRIMINAL APPEAL No.546-J/2018.

Abdul Rasheed vs The State

JUDGMENT

DATE OF HEARING: 08.09.2022

APPELLANT BY: Malik Muhammad Saleem, advocate

STATE BY: Mr. Muhammad Ali Shahab, Deputy Prosecutor
General.

COMPLAINANT BY: Muhammad Usman Sharif Khosa, advocate.

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MUHAMMAD AMJAD RAFIQ, J:- Abdul Aziz, Muhammad Ahmad and Abdul Rasheed, appellants were prosecuted on the charges u/s 302/324/337-F(v)/34 PPC based on the information in a registered criminal case bearing FIR No.149 dated 22.03.2014, police station Gaddai, D.G. Khan. On conclusion of trial vide judgment dated 29.03.2018 handed down by learned Additional Sessions Judge, Dera Ghazi Khan they were convicted and sentenced as under: -

(Abdul Aziz, accused/appellant)

Sentenced to Death under section 302(b) PPC for qatl-i-amd of deceased Nazar Hussain with compensation of Rs. 200,000/- u/s 544-A Cr.P.C., in default to further undergo six months SI.

Sentenced to imprisonment for life under Section 302(b) PPC read with Section 34 PPC for sharing common intention with Muhammad Ahmad convict for causing qatl-i-amd of Muhammad Ali deceased.

Sentenced to rigorous imprisonment for ten years under section 324 PPC with fine of Rs.50,000/-, payable to Muhammad Imran injured, in default whereof to further undergo SI for six months.

Under Section 337-F(v) PPC to pay Daman of Rs.50,000/- to Muhammad Imran injured and sentenced to rigorous imprisonment for five years;

Sentenced to imprisonment for 10 years with fine of Rs. 50,000/- u/s 324 PPC for sharing common intention with Abdul Rasheed appellant for causing injury to Sajjid Hussain. In default to further undergo SI for six months.

(Muhammad Ahmed, accused/appellant)

Sentenced to Death as Ta'zir under section 302(b) PPC for qatl-i-amd of deceased Muhammad Ali; with compensation of Rs. 200,000/- u/s 544-A Cr.P.C., in default six months SI.

Sentenced to imprisonment for life under Section 302(b) PPC read with Section 34 PPC for sharing common intention with Abdul Aziz convict for causing qatl-i-amd of Nazar Hussain deceased;

Sentenced to imprisonment for 10 years with fine of Rs. 50,000/- u/s 324 PPC for sharing common intention with Abdul Rasheed appellant for causing injury to Sajjid Hussain. In default to further undergo SI for six months.

(Abdul Rasheed, accused/appellant)

Sentenced to imprisonment for life under Section 302(b) PPC read with Section 34 PPC for sharing common intention with convicts Muhammad Ahmad and Abdul Aziz convicts for causing qatl-i-amd of Nazar Hussain & Muhammad Ali deceased along with compensation of Rs. 200,000/- u/s 544-A Cr. P.C and in default to further undergo SI for six months.

Sentenced to rigorous imprisonment for ten years under section 324 PPC with fine of Rs.100,000/-, payable to Sajjid Hussain;

He was ordered to pay Arsh which shall be 15% of Diyat under section 337-A(iv) PPC to be paid to Sajjad Hussain injured along with rigorous imprisonment for 10 years.

All the sentences were ordered to run concurrently; yet no finding was given about extension of benefit u/s 382-B Cr. P.C.

Against above convictions and sentences the accused/appellants have preferred independent criminal appeals i.e. Crl. A. No.547-J of 2018, Crl. A. No.551-J of 2018 and Crl. A. No. 546-J of 2018 whereas, Murder Reference No.47 of 2018 has been sent by the learned trial court for confirmation of death sentence, or otherwise. All these matters are being decided through the instant judgment.

2. Three brothers burdened with pain of divorce to their sister by Nazar Hussain reacted upon his arrival to Pakistan after four years and staged a crime scene near to marriage venue of their cousin Akhtar Hussain for satiation of their vengeance; it was on 22.03.2014 at about 11.00 in the night when after the musical program Muhammad Azhar/complainant along with Nazar Hussain, Sajjid Hussain/brothers, Muhammad Ali/father and Muhammad Imran reportedly were going back to their home when halted just outside the marriage venue by the accused/appellants while hurling

lalkara for teaching lesson to Nazar Hussain. In the situation, Abdul Rasheed caught up the complainant; for his rescue, Nazar Hussain and Muhammad Ali stepped forward; Ahmad made a pistol shot which landed on right eye of Muhammad Ali whereas Abdul Aziz pistol fire shot hit Nazar Hussain on his chest (stands corrected on the same day as on the back); second fire of Abdul Aziz hit Imran on his left wrist. Abdul Rasheed made a fire shot which hit Sajid Hussain on his cheek. One Fiaz also inflicted injuries on the person of Muhammad Ali with a club. The whole Panorama alleged as stands on the crutches of common intention.

3. On receiving information about the occurrence, Kaleem Ullah Sub-Inspector (PW-8) reached DHQ Hospital D.G. Khan, recorded statement of the complainant (Ex.PC), prepared injury statements of deceased persons namely Muhammad Ali (Ex.PN) and Nazar Hussain (Ex.PO); prepared injury statements of injured persons namely Muhammad Imran Ex-PP and Sajid Hussain (Ex.PQ). Thereafter, he reached the place of occurrence and prepared rough site plan (Ex.PR), took into possession 13 crime empties P-14/1-13 through recovery memo Ex.PI. On 04.05.2014, Abdul Aziz was arrested who was riding on the motorcycle which was taken into possession under section 550 Cr.P.C., on 23.03.2014 he moved an application (Ex.PT) to the Revenue Officer for preparation of scaled site plan. Thereafter, the investigation was entrusted to Muhammad Nawaz SI (PW-9), who on 12.10.2014 arrested accused Ahmad and Abdul Rasheed and obtained their physical remand. He interrogated both the accused while on physical remand in the presence of Muhammad Sajjid and Muhammad Asif; Muhammad Ahmad accused disclosed that he could get the pistol 30 bore recovered with which he committed the occurrence; he led the police party including PWs and got recovered pistol 30 bore (P-12) along with three live bullets (P-13/1-3), sealed the same into parcel and took the same into possession through recovery memo (Ex.PF); Abdul Rasheed accused got recovered pistol 30 (P-10) along with two live bullets (P.11/1-2) which were made into sealed parcel and took the same into possession through recovery memo (Ex.PE). He recorded statements of PWs Muhammad Sajjid and Muhammad Imran

under Section 161 Cr.P.C. Ultimately, finding all three accused as guilty, report under section 173 Cr.P.C. was sent to court.

4. The accused persons were charge sheeted, to which they pleaded not guilty and claimed to be tried. During trial, to prove the ocular account the prosecution examined Muhammad Azhar complainant (PW-4), Sajjid Hussain (PW-5), Muhammad Akmal (PW-6) for ocular account and Kaleem Ullah SI/I.O Muhammad Nawaz SI/I.O (PW-8 and PW-9) investigating officers of the case; Dr. Muhammad Imran (PW-12) had conducted medical examination of Muhammad Imran and Sajjid Hussain injured and autopsy of Nazar Hussain and Muhammad Ali (deceased); the rest of the witnesses are almost formal in nature and their statements revolve around the functions which they performed during investigation. The learned ADPP closed the case for the prosecution by tendering some documents in evidence. On close of prosecution case, in the statements u/s 342 Cr. P.C. appellants alleged their nomination due to enmity yet through suggestions to PWs they tried to develop the argument that murders were committed due to firing made in jubilation by the complainant party and also a fact that one Ghulam Abass informed the police through a call to Rescue service 1122 and later filed a private complaint against the complainant party in which they were summoned by the court concerned, but on revision Honourable High Court set aside such summoning order, which was finally assailed before Honourable supreme court but met the same fate closing the chapter introduced by said Ghulam Abass. Accused /appellants opted not to appear in the witness box as required by section 340(2) Cr.P.C. however, produced certain documents and closed the case for the defence.

5. Learned counsel for the appellants in a low tone attempted to give a blow to prosecution case regarded it as lurking in conflict of medical evidence with respect to fire on the person of Nazar Hussain on one side and on the other he questioned the different memos, showing police proceedings, which do not carry the names of appellants against the word “Banam” telling it a blind occurrence. Whereas Prosecution case theory held by learned counsel for the complainant was porched on consistent testimony of injured PWs from the day one even with a touch of inline medical evidence and the

corrigendum of complainant on the same day with respect to locale of injury on the person of Nazar Hussain deceased; with a support of situation he relied on case reported as “*SAEEDULLAH KHAN versus THE STATE*” (1986 SCMR 1027). Learned Deputy Prosecutor General also stood firm beside the complainant’s counsel with respect to culpability of accused/appellants acclaiming the availability of standard proof i.e. proof beyond reasonable doubt against the appellants.

6. We have heard the arguments of proponent and the opponents and with their able assistance have gone into minute scrutiny of evidence on the touchstone of standards required for reappraisal of evidence.

7. Ocular account furnished by complainant PW-4 and Muhammad Akmal PW-6 supported by two injured witnesses Sajid Hussain PW-5, & Muhammad Imran PW-11 who stated the narrative of prosecution in consistent, coherent and confidence inspiring way while mapping all-necessary details encompassing the effective roles of the appellants in confirmity with prosecution story. The identity of accused in the dark night though was not disputed yet sufficient light was available near the crime scene due to marriage function and it was admitted position that parties were ascending or descending cousins, therefore, identity remained no issue throughout even to role of the accused/ appellants. Though all the witnesses were related to the deceased and injured, yet they cannot be termed as interested because their presence at the event of marriage of their cousin was natural. Question raised by learned counsel for the appellants about missing names of accused in different memos was also attended; it has been observed that names of accused/appellants are mentioned in inquest report as well as in unscaled site plan which were the primary documents prepared at the crime scene when police first visited in response to information of crime. It has been observed that even after joining the accused into process some of the documents also do not contain the name of accused against the word “Banam” which at the most could be regarded as slackness on the part of police; even otherwise Police Rules, 1934 does not specify a format of such memo for spot recoveries; therefore, it has no bearing or adverse impact on

the consistent prosecution evidence which is strong enough on the ocular side.

8. Medical evidence ran from the moment when the injuries viewed during the occurrence by the PWs stood verified through prompt medicolegal examination of two injured witnesses and the postmortem of two deceased by PW-12, Dr. Muhammad Imran. Though primarily one injury on the front of chest was wrongly spoken by the complainant for reporting the crime yet thorough second statement on the same day it was told as on the back whereas two witnesses remained firm in stating the role of accused/appellants since inception. Even otherwise in a state of panic it is not expected from a witness to state the roles of accused with such precision so as to expect a photographic narration. Reliance is on “SAEEDULLAH KHAN versus THE STATE” (1986 SCMR 1027). Doctor declared the injuries as result of firearm weapon and description stood matched with the inter se distance between the appellants and targeted victims as reflected from the explanatory evidence in the form of site plan. The distinguished roles of appellants have taken their roots in the opinion of doctor as well when he responded during cross examination like as under;

“It is correct that dimension of injuries on the injured persons namely Muhammad Imran and Sajjid Hussain are different interse.”

.....

“The dimensions of injuries on the persons of deceased Muhammad Ali and Nazar Hussain pertaining to entry wounds were different.”

Medical evidence lends support to ocular account to tile up the path to gallows for the responsible accused and concretes the prosecution case against the accused/appellants.

9. Weapon of offence told as pistols recovered on the lead of accused/appellants were used by the prosecution to obtain evidence of its matching with crime empties secured from the crime scene. The safe custody of such weapon and transmission chain remained intact up to Punjab Forensic Science Agency supported by the deposition of relevant PWs resulted in generation of expert report Exh. PZC showing the mechanical operating condition of pistols of all the accused/appellants and their

matching with some of the crime empties out of total 13 and it has created a big support to prosecution as corroborative piece of evidence.

10. Motive plays a vital role in determination of criminal liability of the perpetrators when they are claimed to have shared common intention, however, in this case no serious effort was made to throw light with more zeal on such part of the story; mere production of divorce certificate and passport of Nazar Hussain does not absolve the prosecution to bring on the record the relevant evidence through the witnesses. Therefore, despite there being a joint venture, something went missing to complete the picture on the basis of information suspected to be withheld by the parties. However, it is proved that accused/appellant came armed at the place of occurrence for doing something wrong. Accused/appellants did not prefer to adduce defence evidence despite their early effort to distort the facts that occurrence took place due to firing in jubilation and availability of a video film of marriage ceremony containing some facts contra to prosecution case, yet no such video was produced during the trial nor investigating officer PW-8 Kaleem Ullah SI was aware of such video. The claim of the defence that occurrence took place at the spur of the moment, therefore, appellants cannot be expected to have shared any common intention in commission of offence and they are liable for sentence on the basis of their individual roles if the case is proved against them. In the arena of common intention different parameter are in vogue which are applied and depending upon the facts of each case, principle of vicarious liability changes its meaning to outline an appropriate sentencing regime. It has been thrashed in depth in this case to see its proper application corresponding to claim and evidence of the parties.

11. Substantive criminal law bears 'Common intention syllogism' since century or so which boiled out from the factual inquiry in different criminal cases for determination of vicarious liability of accused in commission of an offence for the purpose of sentencing. Legal literature inbox of common law jurisdiction is replete with judicial precedents commenting upon the true interpretation of this principle. The principle up and down goes materialized to cover the purpose that no offence should go unchecked and no offender should go unpunished and that too with proportionate sentence. Our Judicial

system also experienced such kind of situations which were responded with philosophical attentions, scholarly discourse and, lo, the verdicts celebrated for many decades have created our own data base to rely on and apply in a particular case to catch the criminal liability rest on the communion of minds. Pakistan Penal Code, 1860 (PPC), the statute of general criminal law in Pakistan courageously explains the application of principle of common intention in different situations through Sections 34, 35, 36, 37 & 38 of PPC relevant to indicate the true spirit. Thorough search of judicial precedents reflects that these sections have been interpreted many a time to give it pleased meanings with different angles and connotation while keeping common intention apart from similar intention which is at variance and also differs to knowledge as well. An omnibus application for joint crime liability of all the accused in a venture irrespective of their roles is the very basis of section 34 of PPC whereas section 35, 36 & 37 with a subtle change diminishes or encompasses the joint liability with different tones though within the four wall of section 34 PPC whereas section 38 with a shift to the preceding sections ordains that if offenders concerned in criminal act commit different offences during an episode of crime, every person shall be liable for his sentence to the extent of his role. For reference section 38 of PPC is reproduced;

38. Persons concerned in criminal act may be guilty of different offences:
Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

This section has been referred in following judgment as an apt application:-

“Haji KHUDAI DOST and another Versus THE STATE” (2005 P Cr. L J 520 FSC)

“A plain reading of above provision would reveal that section 34, P.P.C would-be applicable to those cases only in which it may be difficult to distinguish between the acts of individual members of a party who acted in furtherance of common intention of all or to prove exactly what' part was played by each of them otherwise section 38, P.P.C. would come into play which provides; that "where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that "act". Since in the instant case, none of the prosecution witnesses have uttered a single word that there was preconceived plan at the part of the accused persons to commit the offence of robbery or they acted in furtherance of common intention of all, therefore, in the absence of requisite proof, in any view, section 34, P.P.C. could not have been applied to the instant case and the-appellants were liable for the acts done by them individually within the purview of section 38, P.P.C. It would be pertinent to mention here that in all those cases, in which occurrence takes place all of a sudden on account of chance and encounter between the parties, as it

appears in the instant case, the application of principle of vicarious criminal liability would be out of question. This view receives support from the following reported judgments: ---

(i) Khadim Hussain and three others v. The State 1991 PCr.LJ 2323; (ii) Sabuz Hussain Shah and others v. The State PLD 1987 Pesh. 164; (iii) Muhammad Sharif and two others v. The State PLD 1981 Lahore 191; (iv) Iqbal and others v. The State 1990 ALD 741(2) and (v) Misbahuddin and others v. The State 1983, PSC 72.”

In the precedent reported as “*Bhaba Nanda Sarma and others v. The State of Assam*” (AIR 1977 Supreme Court 2252), with respect to application of section 38 PPC; the citation AIR 1964 SC 1263 was referred as follows;

“With reference to S. 38 PPC, the learned Judge observed at p. 178 (of SCR) (at P. 1267 of AIR);

That is to say even though several persons may do a single criminal act, the responsibility may vary according to the degree of their participation. The illustration which is given clearly brings out that point.....

.....
Lastly S. 38 provides that the responsibility for the completed criminal act may be of different grades according to the share taken by the different accused in the completion of the criminal act, and this section does not mention anything about intention common or otherwise or knowledge.

On the basis of above observation, while judgment speaks as follows;

“Applying the principle of law under S. 38 of the Penal Code, therefore, the case of Bhaba Nanda can be separated from that of the other two. He can be held guilty only under S. 304, Part II as he had intentionally joined in the commission of an act with the knowledge that the assault on Shashi was likely to result in his death. The facts of this case indicate that Bhaba Nanda shared the common intention of his other two brothers for the commission of a lesser offence than murder. But while committing the act in furtherance of that common intention, Phanidhar and Harendra developed and shared the common intention of causing his murder.

7. For reasons stated above, the appeal of appellants Phanidhar and Bhaba Nanda is partly allowed. His conviction is altered from S. 302/34 to S. 304, Part II read with S. 34. The sentence of life imprisonment imposed on him is altered to rigorous imprisonment for 7 years only. The conviction of all the appellants under Ss. 323/34 is also maintained.

12. Section 38 of PPC is based on the principle that common intention does not mean the similar intention and it also differs to knowledge of act of co-accused. This principle has been defined as under:-

“*MUHAMMAD AKBAR and 2 others versus THE STATE*” (PLD 1991 Supreme Court 923)

“12. 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 strong 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.”

“State Of Maharashtra vs Prabhakar Pandurang Sangzgiri” (PLD 1965 SC (Ind.) 176)

To have same intention independently of each other is not to have common intention. Common intention requires a pre-arranged plan. There must be a prior meeting of minds. Several persons can simultaneously attack a man and each may have the same intention, namely the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention as there was no prior meeting of mind to form a pre-arranged plan. In a case like that each would be individually liable for whatever injury be caused but none could be convicted for the act of the other vicariously.

Gun was snatched from co-accused and fatal shot was made; co-accused not responsible because Knowledge is not same thing as intention; ***“ABDUL WAHEED and another versus THE STATE” (1988 P Cr. L J 645)***

The principle further takes support of interpretation:-

Section 34, P.P.C. not to be applied lightly; vicarious liability cannot be visited unless some strong circumstances exist showing common intention. Mere presence of a person on the spot does not attract the provision of section 34, P.P.C. ***“HASAN DIN versus MUHAMMAD MUSHTAQ” (1978 SCMR 49)***

No intention to kill on the part of the accused could be inferred from the evidence, who had disassociated himself after giving blow to the deceased. ***“PIRAN DITA versus THW STATE” (1993 SCMR 1934)*** Involved in beating but not stepped forward to commit murder, ***“BASHIR AHMAD and others versus THE STATE” (PLD1988 SC 68)***

Common intention to be judged from all the circumstances of the case and not from one fact only. The co-accused had caused the fatal blow before the appellant arrived. As the appellant caused only simple injuries on non-vital parts of body, he was convicted u/s 324, PPC only and awarded 3 years' R.I. ***“PERVAIZ AKHTAR versus THE STATE” (1985 SCMR 1422)***

13. Common intention can be shared at the spur of the moment and in such situation, sentence must correspond to individual act; the principle gets clarification through following precedents;

Common intention can be formed at the spur of the moment; ***“SHER ZAMAN AND 3 OTHERS versus THE STATE” (1973 SCMR 503)***. In sudden and free fight each participant would be liable for his own individual act. ***“MANZOOR MASIH versus STATE” (PLJ 1995 SC 311)***.

“BASHIR AHMAD and others versus THE STATE” (PLD 1988 Supreme Court 86):-

“And whenever there is doubt about application of Sections 34, 107 and 149 PPC it is always necessary not to apply either of these provisions, which seek conviction on vicarious liability only.....The motive for the crime was admittedly the bad character of the deceased. It can lead to an enlightened brother only chastising her while another more conscious and victim of his elementary instincts, might go to the extent of killing her, other shades of behaviour can also be visualized in individual cases. In this case, as would be presently, seen all the four brothers had commonly intended and decided to chastise her by giving her a good beating. They all having done so, only two, it appears, decided there and then during the occurrence to go further to kill her by strangulation, as they had made no earlier preparation for killing her. The others at that stage as held already stood aside and did not participate in the act of killing. If an intention, in common with others or otherwise, can develop during the occurrence, the reverse can also legitimately be assumed. Those who might have held an intention common with others before a crucial act, might change the mind/intention and stop at something lesser than what the others intend doing. In this case even if the remaining brothers had intended to kill the sister (though held otherwise), the fact that they stopped short of it and felt satisfied by giving a good beating, would negative further the intention to kill. The theory that in such a situation their failure to prevent the other from doing the crucial next act, would necessarily show their participating intention and thus enough to attract vicarious liability, is too philosophical to apply to situations where blood is boiling, rushing to limbs and needs more time to cool and settle to normal rhythm and temperature. When reflexes are in control, it is too much to expect a judge like composure and use of a golden scales by heart, head or hands. We are certain what motivated them to give good beating only to the sister would have, as **a reflex action prevented them from bothering** any more when some other wanted to go further. And above **all, law does** not punish mere reflexes, in such a case. We accordingly hold that none of the remaining three appellants are guilty by application of section 34, PPC, on alleged furtherance of their common intention with Bashir appellant whose conviction under section 302 has been upheld.”

Complainant party appeared at the scene by chance and altercation was neither anticipated nor pre-planned. Common intention could not be inferred. Simply because the accused were armed with a shot-gun, a spear and a sota premeditation could not be attributed to them. Each accused was liable for his own act; “SHER KHAN and others versus THE STATE” (1991 SCMR 241).

In sudden fight, question of furtherance of common intention does not arise. Although the appellants had chhuries in their dubbs not openly displaying at the occurrence and causing no serious injury to the opposite party. Held, appellants not liable u/s 34, PPC. “MISBAHUDDIN and Others versus THE STATE” (PLJ 1983 SC 104).

Accused attracted to the spot on the spur of the moment, taking part in free fight resulting in death of 2 on complainant side and injuries to P.Ws. Held the accused could not share common intention with each other. Sudden fight, each accused held liable for his own act. “HIDAYATULLAH AND others versus THE STATE” (1976 P Cr. L J 1067 LHR (DB)).

Sudden occurrence at the spur of the moment each accused is liable for his own individual act; accused inflicting fatal injury sentenced to imprisonment for life u/s 302, P.P.C. while accused inflicting simple injuries sentenced u/s 323, PPC. MANZOOR and 2 Others versus THE STATE (PLJ 1986 Cr.C. (Lah.) 460 (DB)).

Unexpected attack by one accused on deceased; no question arises of S. 34, each accused responsible for his own individual acts. “NAZAR HUSSAIN and others versus CROWN” (PLD 1951 Lah. 222 (DB))

In furtherance of common intention, accused had given a simple injury to the deceased, his acquittal was set aside and he was sentenced u/s 34 PPC and sentenced to 5 years imprisonment. “*MUHAMMAD SIDDIQUE versus THE STATE*” (1993 SCMR 2114).

“*HASAN DIN versus MUHAMMAD MUSHTAQ AND 2 OTHERS*”(1978 SCMR 49)

In view of the fore-going reasons and in the absence of any enmity between Muhammad Mushtaq respondent and the complainant, we are inclined to think that the **incident took place on the spur of moment** and, therefore, no fault can be found with the decision of the High Court to award the lesser penalty of imprisonment for life.

“*PERVAIZ AKHTAR versus THE STATE*” (1985 SCMR 1422) (Four Members ‘Bench)

The trial Court while assessing the role of the appellant in the crime held that Faiz Alam had died "as a result of injury sustained by him at the hands of accused Mahmud" while the appellant had only caused three such injuries "on the non-vital parts of the body" which were simple in nature. But on the question of his vicarious liability, the trial Court held that he had shared the **common intention on the spur of the moment**, but this conclusion could hardly be drawn upon the assumption of his role in the crime. The High Court also came to the same conclusion that it was Mahmud who was responsible for the deaths of the two deceased but failed to distinguish the case of the appellant on the ground of his sharing the common intention. Accordingly, we are of the view that the appellant is only guilty of the lesser offence under section 324, P.P.C. His conviction is, accordingly, altered from section 302, P.P.C. read with section 34, P.P.C. to section 324, P.P.C. and he is sentenced under this section to suffer three years' rigorous imprisonment and to pay a fine of Rs.5,000 or in default to undergo rigorous imprisonment for six months.

In the recent judgments of Honourable Supreme Court of Pakistan, the principle of common intention also came under discussion for the purpose of sentencing in murder cases in a situation where there is sudden occurrence at the spur of moment without premeditation; in such situation it was held that all the accused shall be liable for sentence u/s 302 (c) PPC; reliance is on “*GUL ZARIN and others versus KAMAL-UD-DIN and others*” (2022 SCMR 1085) & “*MUHAMMAD ASHRAF alias NIKKA versus The STATE*” (2022 SCMR 1328). Taking light from above judgments, it can safely be inferred that different accused can be sentenced variably ranging up to 25 years.

Similarly in case of grave and sudden provocation, Sec. 34 PPC would not apply. Conviction altered from Sec. 302 PPC to u/S. 304 (1) PPC. “*MUHAMMAD IQBAL and 3 others versus THE STATE*” (1992 SCMR 1517)

14. Section 38 PPC can also be looked into with another angle particularly when in primary legislation of Penal Code, 1860 the words “in furtherance of common intention of all” were not part of section 34 PPC which were

later introduced through an amendment by S.1 of Act XXVII of 1870; and thereby procured a meaningful expression of section 34 PPC; therefore, what common intention implies and why the words “in furtherance of common intention of all” are used in section 34 PPC has been attended with circumspection by Honourable Supreme Court of Pakistan. It has been settled that until the evidence of pre-concert or pre-arranged plan is available, the offenders shall be liable for individual act played during the crime venture; reliance is on judgment of Five Members’ Bench of Honourable supreme Court of Pakistan in a case reported as “*SHOUKAT ALI Versus THE STATE*” (PLD 2007 Supreme Court 93).

Common intention' within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most case it has to be inferred from his act or conduct or other relevant circumstances of the case. Same or similar intention must not. be confused with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked, will result in miscarriage of justice. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. Common intention does not mean similar intention of several persons. To constitute common intention, it is necessary that the intention of each one of them be known to the rest of them and shared by them. The common intention ought to be determined from such known facts and circumstances which existed before the commencement of the criminal act as the criminal act itself is committed in furtherance of that common intention.

Further;

Mahmood, J., in Dharma Rai's case said "this section was the subject of consideration impliedly in the case of Queen v. Gorachand Gopee. At p.456, Sir Barnes Peacock clearly laid down the rule of law that mere presence of persons at the scene of an offence is not, ipso facto, sufficient to render them liable to any rule such as S.34 enunciates, and that 'the furtherance of common design' was an essential condition before such a rule applied to the case of an individual person. It was probably in consequence of this expression of view from such a high authority that the Legislature by S.1 of Act XXVII of 1870, repealed the original S.34; and in substituting another section therefore, inserted the important word is 'in furtherance of the common intention of all,' as representing the condition precedent to each of such persons being held liable for the crime in the same manner as if it were committed by him alone. This change in the law is very significant, and it indicates to my mind that the original section having been found to be somewhat imperfectly worded, these additional words were introduced to draw a clear distinction that unpremeditated acts done by a particular individual, and which go beyond the object and intention of the original offence, should not implicate persons who take no part in that particular act. We have the opinion of an American jurist on the point, whom Mr. Mayne, in his Commentary on the Penal Code, quotes (Bishop, S.439) where that learned author, laying down the rule, goes on to say:-- 'But if the wrong done was a fresh and independent wrong, springing wholly from the mind of the doer, the other is not criminal therein, merely because when it was done he was intending to be a partaker with the doer in a different wrong.' This seems to me to be the right interpretation of the words 'in furtherance of the common intention of all, as they occur in S.34 of the Penal

Code" (in re Thipperudrappa (Vol. 55 1954 Cr.LJ 481). "The Supreme Court has held that it is well-established that a common intention pre-supposes prior concert. It requires a pre-arranged plan because before a man 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. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference or the circumstances of the case. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference or the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypotheses." (Poandurang v. State of Hyderabad (1955 Cr.LJ 572).

On the strength of above observations, Honourable Supreme Court has finally delineated the following prerequisites to understand the dogma of common intention for its application in the case in terms of section 34 PPC:-

- "(a) It must be proved that criminal act was done by various persons
- (b) The completion of criminal act must be in furtherance of common intention as they all intended to do so.
- (c) There must be a pre-arranged plan and criminal act should have been done in concert pursuant whereof.
- (d) Existence of strong circumstances (for which no yardstick can be fixed and each case will have to be discussed on its own merits) to show common intention.
- (e) The real and substantial distinction in between 'common intention' and 'similar intention' be kept in view:

15. In the light of above presentation, we conclude that vicarious liability stands apart from sentencing liability; both have different regime under the law, though principle of sentencing liability, based on commission of certain offences conjointly, are part of Pakistan Penal Code, 1860 as reflected from sections 394 & 396 wherein all the offenders are liable for the same sentence, yet sections of PPC dealing with common intention or common object do not envisage any such sentencing liability except liability of commission of offence; therefore, sentences of different accused would be determined on the basis of evidence of sharing common intention and the role played by them during the occurrence. if the evidence of common intention is not available to show pre-concert or pre-arranged plan or if it is not made out from the evidence, then the principle of similar intention would come into play and offenders shall be liable for sentences according to the role played by them during a crime episode on the principle that every person has different reflexes in doing a criminal act and they sometimes are disassociated before the act is completed, or they retaliate differently

compared to their co-accused sans knowledge to others, therefore, reflexes cannot be punished and the touch stone is material role played by them during the occurrence.

16. While taking light from judgments referred above and many others, we have tracked the role of all the accused/appellants; evidence speaks that accused/appellants nourished grudge against Nazar Hussain deceased who had reportedly divorced their sister four years back and went abroad; his arrival in Pakistan just some days before the occurrence has prompted them to commit his murder. This story at one side was requested to be believed only on production of divorce deed in evidence along with Passport of deceased Nazar Hussain, but without producing any evidence of rift between the parties long after such divorce who are related to each other as cousins, and on the other side without evidence of pre-concert or pre-arranged plan and that too in an engagement ceremony of another cousin. The expression of story is not convincing, as from the evidential fact-lead it is not clear that how the occurrence started, particularly when Abdul Rasheed/appellant though armed with pistol preferred to capture Muhammad Azhar/complainant (PW-4) against whom neither any motive was attributed nor he was the target of the accused/appellants, whereas occurrence inflated only when Nazar Hussain and his father Muhammad Ali stepped forward to rescue the complainant; all the appellants went frenzied and targeted with their pistol not only to Nazar Hussain, a baby of alleged motive but to his father Muhammad Ali who had no axe to grind against the appellants; similar was the situation of two injured in this respect. Every accused/appellant targeted their victim as per space available to them. The whole scenario depicts no communion of minds and no evidence of common intention is available on the record; therefore, on the basis of similar intention each accused/appellant is responsible for his individual acts played by them during the occurrence.

17. We have further noted that it is not a case of capital sentence for Abdul Aziz and Muhammad Ahmad appellants because they made only one fire shot at the person of deceased and that too in a situation not clearly stated through cogent evidence. As otherwise, the roles of Abdul Aziz and

Muhammad Ahmad (accused/appellants) of having caused individual injuries respectively on the persons of Nazar Hussain (deceased) and Muhammad Ali (deceased), stands established, therefore, their conviction under section 302(b) PPC for their individual roles, is upheld, however, while considering the quantum of their sentence, we will like to refer the cases reported as *“Muhammad Riaz and another v. The State and another”* (2007 SCMR 1413) and *“Muhammad Sharif v. The State”* (PLD 2009 Supreme Court 709), wherein, the Hon’ble Supreme Court of Pakistan has held that the imprisonment for life is also a legal sentence in the case of section 302(b) PPC. As discussed supra here in the instant case, the accused/appellants did not repeat the fires shot on two deceased persons and situation so depicts also rules out the common intention phenomena, which create mitigation to reconsider the quantum of sentence, recorded against the accused/appellants under section 302(b) PPC.

18. Keeping in view the individual role of accused/appellants, their conviction and sentences passed for sharing common intention for each other’s roles are set aside, their appeals are partly allowed and conviction and sentence are finally modified in following terms:-

Abdul Aziz appellant:

Death sentence altered to imprisonment for life u/s as Ta’zir 302 (b) PPC for causing qatl-i-amd of Nazar Hussain deceased along with compensation of Rs. 200,000/- u/s 544-A Cr.P.C. payable to legal heir of the deceased; in default further undergo SI for six months.

Imprisonment for a period of 10 years with fine of Rs. 50,000/- u/s 324 PPC for attempting to commit qatl-i-amd of Muhammad Imran along with imprisonment for five years u/s 337 F(v) PPC with Daman of Rs. 50, 000/- to be paid to injured Imran.

Conviction and sentence of imprisonment for life awarded to Abdul Aziz under section 302(b) PPC for the qatl-i-amd of Muhammad Ali (deceased) are however, set-aside.

Conviction and sentence of 10 years under section 324 PPC for Sajjid Hussain is set-aside.

All the sentences shall run concurrently and benefit of section 382-B Cr. P.C. is also extended.

Muhammad Ahmad appellant:

Death sentence is altered to imprisonment for life u/s 302 (b) PPC for causing qatl-i-amd of Muhammad Ali deceased along with compensation of Rs. 200,000/- u/s 544-A Cr.P.C. payable to legal heir of the deceased; in default further undergo SI for six months.

Conviction and sentence of imprisonment for life awarded to Muhammad Ahmad under section 302(b) PPC for the qatl-i-amd of Nazar Hussain (deceased) are however, set-aside.

Conviction and sentence of 10 years' rigorous imprisonment under section 324 PPC is set-aside.

Benefit of section 382-B Cr.P.C. is extended.

Abdul Rasheed appellant:

Sentenced to imprisonment for a period of 10 years with fine of Rs. 50,000/- u/s 324 PPC for attempting to commit qatl-i-amd of Sajjid Hussain along with imprisonment for 10 years u/s 337 A(iv) PPC with Arsh of an amount equivalent to 15% of diyat to be paid to injured Sajjid Hussain.

All the sentences shall run concurrently and benefit of section 382-B Cr. P.C. is also extended.

19. The case property, if any, shall be disposed of in accordance with law and the record of the learned trial court be sent back immediately.

Murder Reference is answered in the negative.

Sentence of death is not confirmed.

(Sadiq Mahmud Khurram)
Judge.

(Muhammad Amjad Rafiq)
Judge.

Approved for Reporting

Judge.

Judge.