

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CRIMINAL PETITION NOS. 1371 & 1651-L OF 2016 AND
CRIMINAL MISCELLANEOUS APPLICATION NO. 1704 OF 2017

(On appeal against the judgment dated 08.11.2016 passed by the Lahore High Court, Bahawalpur Bench in Criminal Appeal Nos. 470 & 471 of 2013 and Murder Reference No. 51 of 2013)

Bashir Ahmed and Munir Ahmed	(In Cr.P. 1371/2016 & Cr.M.A. 1704/2017)
Muhammad Ilyas	(In Cr.P. 1651-L/2016)
	... Petitioners/Applicants

VERSUS

The State	(In Cr.P. 1371/2016 & Cr.M.A. 1704/2017)
Munir Ahmed	(In Cr.P. 1651-L/2016)
	... Respondents

For the Petitioner: Syed Asim Ali Bukhari, ASC
(In Cr.P. 1371/2016 & Cr.M.A. 1704/2017)

Ch. Ghulam Murtaza Khan, ASC
(In Cr.P. 1651-L/2016)

For the State: Mirza Abid Majeed, DPG, Punjab

Date of Hearing: 26.11.2020

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Through this consolidated judgment, we intend to decide Cr. Petition No. 1371/16 filed by the petitioners/convicts against their conviction, Cr. Misc. Application No. 1704/17 for suspension of sentence and Cr. Petition No. 1651-L/16 filed by the complainant for enhancement of sentence awarded to the petitioner Munir Ahmed.

2. Munir Ahmad and Bashir @ Shada along with three others were tried in the case registered vide FIR No. 143/2011 dated 05.08.2011 under Sections 302, 324, 337-F(vi), 337-L(ii), 34/149 PPC at Police Station Marot, District Bahawalnagar for committing murder of Muhammad Ishaq, brother of the complainant, and for causing

injuries to complainant Muhammad Ilyas (PW-4) and Muhammad Shahid (PW-5).

3. *Brief facts as disclosed in the FIR are that the complainant was owner of land measuring 35 acres, which was under his cultivation. At the night preceding the occurrence, it was turn of the complainant to avail waters for his lands. At about 8.00 a.m, the level of the water decreased upon which the complainant along with Muhammad Shahid visited their watercourse and found that close to the lands belonging to Abdul Majeed Kamboh, a cut was made and the water was being stolen by the accused Munir, Naseer, Bashir @ Shada, Asif and Rashid and the same was breached for their own lands. When they were estopped to commit water theft, it infuriated the accused persons namely Bashir @ Shada who inflicted injuries on the person of the complainant and Muhammad Shahid with handle of the hatchet and did not allow them to have access to the watercourse. On the same day at 11.30 a.m another attempt was made by the complainant party to have access to the watercourse. Soon they reached near the lands of Abdul Majeed Kamboh, the deceased Muhammad Ishaq tried to repair the breach to continue with their share of water. Meanwhile in their presence, Bashir @ Shada raised lalkara to Munir accused to fire at Ishaq, upon which said Munir made straight fire with his rifle at Muhammad Ishaq, which hit on the right side of his neck. Due to the infliction of injury, he fell down. Thereafter co-accused Naseer and Bashir @ Shada made straight fires at the complainant and Shahid but they saved their lives by lying on the ground. The injured was being taken to hospital, however, Ishaq succumbed to the injuries on his way.*

4. *During the course of investigation carried out by the local police, the petitioners along with three others were found involved and as such their names were placed in coloumn No. 3 of the report submitted under Section 173 Cr.P.C., which was submitted to the Illaqa Magistrate and the same was en-routed to the learned Sessions Judge under Section 190(2) Cr.P.C. The learned Trial Court after taking cognizance of the offences framed charge vide order dated 03.02.2012. After completion of the trial, the learned Trial Court vide judgment dated 30.11.2013 convicted Munir Ahmed under Section 302(b) PPC and he was sentenced to death. He was also directed to pay*

Rs.300,000/- as compensation to the legal heirs of deceased Muhammad Ishaq as required under Section 544-A Cr.P.C. In case of default, it had to be realized as arrears of land revenue or in case of non-realization of said amount, he was to further undergo six months Sl. Bashir @ Shada was convicted by the Trial Court under Section 337-F(vi) PPC for causing injury on left hand of complainant, and was held liable to pay Rs.30,000/- as Daman to the victim Muhammad Ilyas (complainant). He was also convicted under Section 337-L(ii) for causing injury on the back side of chest of the complainant Muhammad Ilyas and was held liable to pay Rs.10,000/- as Daman to him. He was also convicted under Section 337-L(ii) PPC for causing injury on left forearm of Shahid and was held liable to pay Rs.10,000/- as Daman to him. Petitioner Bashir was directed to pay Daman to the victim or in case of failure, he was directed to be kept in jail and dealt within the same manners as if sentenced to simple imprisonment until amount of Daman was paid. However, the learned Trial Court acquitted the co-accused namely (i) Naseer Ahmed, (ii) Rashid and (iii) Muhammad Asif of the charge while extending them benefit of doubt.

5. *Cr. Appeal Nos. 470, 471/13 were preferred by the appellants before the Lahore High Court (Bahawalpur Bench), calling in question the judgment of the learned Trial Court dated 30.11.2013. The learned Trial Court sent Murder Reference under Section 374 Cr.P.C to High Court. Both Cr. Appeals and Murder Reference No. 51/13 were heard by a Division Bench of the High Court and vide judgment dated 08.11.2016, conviction recorded against both the appellants Munir Ahmed and Bashir Ahmed @ Shada was ordered to be upheld with alteration of sentence of death awarded to Munir Ahmed into imprisonment for life. Both the appellants were extended benefit of Section 382-B Cr.P.C.*

6. *Cr. Petition No. 1371/16 was filed before this Court challenging the legality of the judgments passed by the courts below dated 30.11.2013 and 08.11.2016 mainly on the ground that conviction and sentence recorded by both the courts is not sustainable in the eyes of law. During the course of proceedings before this Court, a query was made to the learned counsel for the petitioners qua the legality of sentence and conviction recorded by the Trial Court, which*

was maintained by the High Court, keeping in view the sentence inflicted to Munir Ahmed under Section 302(b) PPC and sentence inflicted to Bashir @ Shada under Section 337-F(vi), 337-L(ii) and 337-L(iii) PPC while ignoring this aspect of the case that the act of both petitioners was committed in furtherance of their common intention, especially when there was no such finding, which could be made basis that the element of common intention or common object was not established. The question whether in absence of any such finding, the aforesaid conviction and sentence recorded by the courts below was justified in law, (ii) whether when Munir is convicted under Section 302(b) PPC whereas Bashir @ Shada is convicted according to his individual role, both the sentences in all eventuality are in consonance with the spirit of Section 302/324/34 PPC (common intention) or if the number of accused are five or more under Section 302/148/149 PPC (common object), hence these were the moot points for consideration in this case. Learned counsel appearing for the parties have not controverted the query made by the Court and categorically stated that both the learned courts below had erred in law and have not decided the same in its true perspective according to the intent of the law.

7. *We have noticed on various occasions while dealing with the judgments of the courts below, agitated before us that the aforesaid legal requirements are being ignored by the courts while handing down judgments in murder cases. As this anomaly has arisen which is in violation of the intent of the law, therefore, we deem it necessary and in the fitness of things to resolve this legal issue while delivering an exhaustive/elaborative judgment for the future guidance. Perusal of the record in the instant case reflects that the learned Trial Court framed charge in the case on 03.02.2012 in the following terms:-*

"CHARGE SHEET

*I, Muhammad Anwar Butt, Additional Sessions Judge,
Bahawalnagar hereby charge you:-*

- 1. Muhammad Asif son of Shaukat Ali, aged 19 years;*
- 2. Rashid son of Nazir Ahmad, aged 20 years;
Both Sukhera by caste*
- 3. Munir Ahmad son of Nazir Ahmad, aged 44 years;*
- 4. Bashir Ahmad son of Nazir Ahmad, aged 44 years;*
- 5. Naseer Ahmad son of Nazir Ahmad, aged 42 years;*

*All Jat by caste, residents of Chak No. 298/HR
Tehsil Fortabbas District Bahawalnagar.*

as under:-

FIRST:

That on 05.08.2011 at 8.00 am in the area of Chak No. 297/HR Tehsil Fortabbas District Bahawalnagar you all the above named accused persons in prosecution of your common object caused injuries to Muhammad Ilyas complainant and Muhammad Shahid PW which were declared as Jurh Ghayr Jaifah Munaqillah and other hurts and thus you have committed an offence punishable u/s 337-F(v)/337-L(ii) read with Section 149 PPC which is within the cognizance of this court.

SECONDLY:

That on the same day and place at 11.30 am you Muhammad Munir, Naseer Ahmad and Muhammad Bashir while armed with fire arm weapons in furtherance of your common intention caused fire arm injuries on the person of Muhammad Ishaque brother of the complainant, as a result of which he died at the spot and thus you have committed an offence punishable u/s 302 read with Section 34 PPC which is within the cognizance of this Court.

And I hereby direct that you all be tried by this Court for the above charges."

8. *In response to the charge, the accused persons facing trial denied it in toto, hence claimed trial. The prosecution evidence was summoned by the court, which was recorded while providing ample opportunity of cross-examination. The legal attributes of "due process" were fully adhered to during proceedings before the trial court. The learned ADPP vide statement dated 21.11.2013 closed the prosecution evidence while giving up PWs Ahmed Raza, Shahid Imran, Mehmood ul Hassan and Liaqat Ali being unnecessary. He tendered in evidence report of Chemical Examiner as Ex.PQ, report of Serologist as Ex.PQ/1 and report of Forensic Science Agency as Ex.PR. On the conclusion of the prosecution case the statements of the accused persons were recorded under Section 342 Cr.P.C. In response to question 'why this case against you' they categorically denied the allegations leveled by the prosecution but did not opt to lead defence evidence. The learned Trial Court after conclusion of the proceedings before it, acquitted three co-accused, while conviction was recorded against petitioners Munir under Section 302 (b) PPC and Bashir @ Shada under Sections 337-F(vi) & 337-L(ii) PPC as narrated above. This judgment was upheld by the High Court. For the elaborative analysis qua the application of*

provision of Section 302 PPC, it would be advantageous to reproduce Section 300 PPC wherein 'qatl-e-amd', has been defined as under:-

Qatl-e-Amd: Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit qatl-e-amd.

It would also be in "fitness of things" to reproduce Section 302 PPC, which reads as under:-

"302. Punishment of qatl-i-amd : Whoever commits qatl-e-amd shall, subject to the provisions of this Chapter be:

- (a) punished with death as qisas;
- (b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in Section 304 is not available; or
- (c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the Injunctions of Islam the punishment of qisas is not applicable.

Provided that nothing in clause (c) shall apply where the principle of fasad-fil-arz is attracted and in such cases only clause (a) or clause (b) shall apply."

9. The provision of Section 302 PPC provides punishment for the commission of qatl-e-amd. The punishment of qatl-e-amd has been categorized under the heads "(a), (b), (c)". The provision of Section 302(a) PPC is reflection of punishment as provided in Islamic system by way of qisas. The word 'qisas' means return of evil for evil and it also denotes retaliation. Another word 'retribution' is also synonymous which means a punishment inflicted in return for the wrong and thus distinctively stresses the operation of the strict justice by administering merited punishment. The application of Section 302(a) PPC provides the return in the same coin persuading the offender to be done to death in the same manner he committed death of the fellow person. However, there are certain legal requirements for application of Section 302(a) PPC. Section 299 (k) PPC defines qisas in the following terms:-

"qisas" means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the

victim or by causing his death if he has committed qatl-iamd in exercise Of the right of the victim or a wali',

The Legislature has specifically laid down that the initiation of proceedings under Section 302(a) PPC is subject to qualifying prerequisites as laid down in Section 304 PPC. The same reads as under:-

“304. Proof of qatl-i-amd liable to qisas, etc.: (1) *Proof of qatl-i-amd shall be in any of the following forms, namely: -*

- (a) the accused makes before a Court competent to try the offence a voluntary and true confession of the commission of the offence; or*
- (b) by the evidence as provided in Article 17 of the Qanun-e-Shalladat, 1984 (P.O. No. 10 of 1984).*

(2) The provisions of sub-section (1) shall, mutatis, mutandis, apply to a hurt liable to qisas.

Bare perusal of the aforesaid provision broadly emphasis two fold conditions, (i) voluntary and true confession regarding the commission of the offence, (ii) qualifying the postulates of Article 17 of the Qanun-e-Shahadat Order, 1984. Article 17 of the Qanun-e-Shahadat Order, 1984, further emphasis the competence of a person qualifying it to be a truthful witness as required in accordance with the injunctions of Islam as laid down in Holy Quran and Sunnah. The primary/foremost qualification for a person to appear as a truthful witness in a case falling under ‘qisas’ is that he must fulfill the condition of tazkiya-tul-shahood. In ordinary meanings, it is an accepted rule of tazkiya-tul-shahood, that the credibility of the witness shall be examined through credible person of the same walk of life to which the witness belongs. Tazkiya-tul-shahood also entails an open and confidential inquiry regarding the conduct of the witness to ascertain whether the witness is credible or otherwise. The word ‘from the same walk of life’ is most essential attribute regarding this aspect. However, there are two modes provided to evaluate tazkiya-tul-shahood, (i) open, (ii) confidential. To ascertain the credibility of a witness on the touchstone of tazkiya-tul-shahood, the Judge is under obligation to inquire the credentials of the witness proposed to testify during the court proceedings to adjudge his truthfulness. Likewise, he can also adopt the way of secret

inquiry to further satisfy his conscience about the credibility of the witness for that he can delegate/appoint someone else to ascertain the truthfulness of the person claiming acquaintance with the facts and circumstances of the case. There is no constraint that with the changing situation in the advanced era, the modern devices/technical assistance can also be utilized to persuade the piousness of the witness to arrive at a conclusion which endorses the believability qua the character of the witness by the Presiding Officer.

10. *Section 302(b) PPC was made part of Section 302 PPC by the Legislature, which equates provision of Section 302(a) PPC regarding the infliction of sentence of death. In-fact there are two sentences provided under the head 302(b) i.e. death or imprisonment for life as Tazir. There is marked distinction qua consideration and application of sentence which is also based upon other considerations. The parameters are entirely on different benchmark wherein strict compliance of Section 304 PPC or applicability of Article 17 of the Qanun-e-Shahadat Order is not required. Likewise, the mode and manner of ascertaining the guilt and execution of the sentence is altogether different. The intention behind this was in-fact to meet the requirements of law and order situation prevailing in the society with an intent not to let any crime unattended/un-addressed and further not to let any criminal escape from the clutches of law. The insertion of the word 'tazir' under the head 302(b) PPC has a specific significance. The word 'tazir' is defined in Section 299(I) as under:-*

"299(I) *ta'zir" means punishment other than qisas, diyat, arsh, or daman"*

The literal meaning of word 'tazir' is chastisement. Undeniably the word 'tazir' means punishment inflicted by the Court other than 'qisas'. As the punishment of 'tazir' is not prescribed by the Holy Quran or Sunnah, therefore, it cannot be as stern and stringent as that of qisas. It includes punishment of imprisonment, forfeiture of property and fine. A discretion has been left with the court assigned with the matter to decide and

inflict either of the punishments commensurating with the overt act as surfaced according to facts and circumstances of the case. The Court of competent jurisdiction is fully justified to award sentence subject to assigning justiciable reasons to meet the ends of justice. The offence under Section 302(b) PPC is otherwise made compoundable by the application of Section 345(2) Cr.P.C, which in addition further qualifies that if all the legal heirs have compounded the offence, the Court is empowered to ensure that the parties may have buried the hatchets once for all.

11. *Provision of Section 302(c) PPC is somewhat similar to the erstwhile Section 304 PPC. The provision of Section 302(c) in the original text was an exception of Section 302 PPC while following the requirements of erstwhile Section 304 PPC. This provision covers all those offences which were committed resulting into culpable homicide not amounting to murder and as such cannot be equated with the requirements for application of sentences as provided under Section 302(a)(b) PPC. Any occurrence though resulted into an act of homicide but it was committed without element of mens rea, pre-meditation or ill design, would squarely attract the provision of Section 302(c) PPC. The framers of the law while inserting the said provision provided sentence of imprisonment which may extend to 25 years. The sentence of 25 years is clothed with discretionary powers of the court contrary to sentences provided under Section 302(a)(b) PPC. Broadly speaking this distinction qua the discretionary power to inflict sentence is based upon the fact that the law makers were conscious of the situations like free fight, case of two versions, undisclosed story, sudden affair, question of ghairat, absence of mens rea, self defence and cases initiated due to the element of sudden provocation. In ordinary speech, the meaning of 'provocation' is said to be incitement to anger or irritation. In English law it has a meaning based on anger but it is a word used to denote much more than ordinary anger. To extenuate the killing of a human being provocation has always needed to be of a special significance. Throughout in the proceedings of the cases it is seen to be something which incites immediate anger or "passion",*

which overcomes a person's self-control to such an extent as to overpower or swamp his reason. In other words provocation is when a person is considered to have committed a criminal act partly because of a preceding set of events that might cause a reasonable person to lose self control. Analyzing the concept of 'provocation in law under the Common Law of England, Lord Devlin, delivering the judgment of the Judicial Committee of the Privy council in Lee Chun-Chuen v. The Queen (1963 1 All ER 73) held as under:-

"Provocation in law consists mainly of three elements the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation."

So, it can be said that there are mainly four elements which need to be established to avail the defence of provocation i.e. (i) the provoking circumstances, (ii) the accused's loss of self-control resulting from the provoking circumstances, whether reasonable or not; (iii) whether the provocation could have caused the ordinary person to lose self-control, (iv) the retaliation was proportionate to the provocation. Whether the accused's loss of self-control was a result of the provoking circumstances is a subjective test. To prove the element of provocation, there are two more conditions i.e. (i) it should be prompt, and (ii) it was retaliated without inordinate delay. We have also noticed that apart from the circumstances narrated above inviting application of Section 302(c) PPC another situation has now erupted in the society having direct nexus with such like situations, i.e. a deliberate and malicious act intended to outrage religious feelings of any class of people by insulting its religion or religious rituals by use of derogatory remarks, which further extend the scope of cases falling under the ambit of sudden provocation.

12. *In United Kingdom almost in similar situation, the framers of the law enacted an Act called "Homicide Act, 1957" in which they have dealt with such like situation under the 'dictum,' 'diminished liability'. To evaluate such like situation, the mental faculty of the offender was to be gauged according to prevailing circumstances in which the offence was committed*

and as such it was given precedence over the already existing liability regarding culpable homicide amounting to murder. While drawing analogy from the said legislation, it can be safely assumed that the provisions of Section 302(c) PPC can also be equated/adjudged keeping in view the state of mind of the offender, his surrounding circumstances and the mode of commission of the offence. If those are adjudged conjointly, it would certainly imprint a better picture before the court of law to adjudicate the matter, which might commensurate with the allegation.

13. *A careful analysis of the aforesaid categories falling under the provision of Section 302 PPC abundantly makes it clear that the provision of Section 302(a) PPC is a distinct provision having different mode and manner of application with different considerations exclusively derived from the Islamic judicial system. The proceeding under the aforesaid provision is a rare phenomenon whereas the majority of the cases dealt with by the courts below fall under Section 302(b) PPC. As stated above, provision of Section 302(b) PPC provides two sentences i.e. death, (ii) imprisonment for life. Murder cases exclusively falling within the ambit of Section 302(b) PPC would be dealt with in a manner exclusively depending upon the number of assailants. Undeniably a single assailant can commit the aforesaid offence but if the number of assailants is more than one and the offence is committed in furtherance of common intention then the provision of Section 34 PPC would certainly attract. Similar to that if the tally of the accused is five or more and the offence is committed in furtherance of common object then the provision of Sections 148/149 PPC would be applicable. The learned Trial Court seized of the matter depending upon the number of accused has to render a definite finding qua the applicability of Section 34 PPC (common intention) or Sections 148/149 PPC (common object). These two legal aspects are to be addressed with the application of the aforesaid provision of Section 302(b) PPC depending upon the number of assailants. It is bounden duty of the courts below to ascertain the aspect of common intention or common object primarily at the time of*

framing of the charge on the basis of contents of FIR, statements under Sections 161 & 164 Cr.P.C, if any, final report under Section 173 Cr.P.C and other attending documents collected by the Investigating Officer during investigation. The Trial Court is equally responsible to give a definite finding qua the applicability of Section 34 PPC or Sections 148/149 PPC at the time of conclusion of the trial while handing down the judgment. Now advertent to the moot point which was raised during the proceedings that if anybody is found guilty of commission of offence attracting the provision of Section 302(b) PPC, the co-accused can be saddled with the responsibility on the basis of individual liability or the whole occurrence has to be decided keeping in view that the offence was committed in furtherance of their common intention and the provision of Section 302(b) PPC would be applied conjointly against the persons joining hands falling under either of the categories i.e. common intention or common object falling under Section 34 or 148/149 PPC depending upon the number of persons facing charge. We may observe that any judgment which concludes the commission of offence falling under Section 302(b) PPC in furtherance of common intention or common object but decides the lis on the basis of individual liability would be squarely in defiance of the intent and spirit of law on the subject.

14. *Section 302(c) PPC is an exception to the aforesaid provision under which in presence of a clear finding that the offence committed was not in furtherance of common intention or common object, however, the court otherwise comes to the conclusion that the prosecution has proved its case to the hilt against the accused, the Court is under legal obligation to record conviction and sentence according to the role of every assailant constituting a criminal act according to overt act ascribed to him. The framers of the law while inserting Section 302(c) PPC wisely provided sentence which might extend to 25 years. It was done with an intent to provide an opportunity to the court of law to inflict sentence proportionate to the act of the assailant according to the facts surfaced during the course of proceeding. It is not out of context to highlight that the Trial Court prior to proceeding with*

the matter as stated above has to render a definite finding qua the fact that the incident is not result of common intention or common object which has a substantial importance to attract the aforesaid provision. Any slackness on the part of the court to ignore this aspect might infringe the rights of either of the parties involved in the process of law which is an essential attribute of court proceedings, denial of which might create imbalance, resulting into chaos in the society. The concept of safe administration of criminal justice and maintaining equilibrium qua the protection of legal rights is attire of the judicial system. Any defiance to the said balance might frustrate the confidence of the public which has to be at the highest pith in a civilized society. The courts of law can gain the confidence by imparting fair, equitable and justiciable dispensation of justice eliminating any possibility of discrimination on the basis of gender, race, religion, colour, caste, creed, status and language etc. The Judges have to discharge this arduous task with utmost care and caution so that public confidence in judicial process is not shattered.

15. *For what has been discussed above, we are inclined to issue following guidelines to the courts below to follow in future:*

- i) that the Trial Court seized with the criminal trial is squarely required to adhere to the provision of Sections 265-C, 265-D Cr.P.C for the purpose of initiation of trial, before framing of charge as ordained to meet the spirit of the law of the land;*
- ii) that the Trial Court is under obligation to fulfill the requirement as stated above, thereafter to frame charge, while minutely looking into the contents of the crime report, statement of the prosecution witnesses under Section 161 Cr.P.C, report under Section 173 Cr.P.C and all other documents appended with the challan with an intent to evaluate whether the criminal act as disclosed has been*

committed in furtherance of joining hands, which attracts the ingredients of common intention (Section 34 PPC) or common object (Section 148/149 PPC read with the substantive offence), if so, the charge would be framed accordingly;

iii) that the Trial Court after recording of evidence, statement of the accused under Section 342 Cr.P.C would provide an opportunity to the accused to lead defence, if any, and further to appear under Section 340(2) Cr.P.C (if he intends to appear) & defence evidence, if any, thereafter, it is obligatory for the courts to give judgment with definite finding qua the element of common intention or common object with reference to the substantive offence;

iv) that the Court proceeding with the matter, if reaches to the conclusion that the offence committed is an individual liability then the provision of Section 302(c) PPC would be squarely applicable and each accused would be dealt with according to the gravity of allegation, if any?

Note: The Trial Court while rendering such finding has to disclose judicial reasoning.

16. As far as the matter before us is concerned, elaborate findings are clearly disclosed above. As a consequence, we convert Criminal Petition Nos. 1371 & 1651-L/2016 into appeals, allow them, set aside the impugned judgments of both courts below while remanding the matter to the Trial Court for a limited purpose to re-write the judgment on the basis of existing judicial record within two months strictly in accordance with law and the guidelines given above. A copy of this judgment shall also be sent to the Registrars of all High Courts for its onward circulation to the Hon'ble Judges for future guidance.

17. Since, the main petition filed by the petitioners-convicts has been converted into appeal, allowed and remanded, Criminal Miscellaneous Application No. 1704 of 2017 for suspension of sentence has become infructuous and is disposed of accordingly.

JUDGE

JUDGE

I am not in agreement with the findings of my learned brother for which I have recorded my own findings separately.

JUDGE

Islamabad, the
26th of November, 2020
Approved For Reporting
Khurram

MAZHAR ALAM KHAN MIANKHEL, J.-. I have the privilege to go through the judgment authored by my learned brother *Sayyed Mazahar Ali Akbar Naqvi, J.* The facts, circumstances, material and evidence, available on the record, do not appeal me to concur with the opinion given by my learned brother. Repetition of some facts would be necessary to express my mind.

2. As per the FIR, the incidence, before us, comprised of two episodes. The complainant Muhammad Ilyas (PW.4) and Muhammad Shahid (PW.5), on 05.08.2011 at 8:00 a.m. present in their fields to irrigate their lands on their notified time and turn, when noticed reduction in the flow of water, went on to check the same. They noticed a diversion of water to their own lands by Munir Ahmad etc. (all five in number, named in the FIR). When they were asked to remove the diversion and allow them to irrigate their lands. This interruption made them furious and the petitioner Bashir Ahmed alias Shada gave them blows with handle of a hatchet and stopped them to remove the breach and caused them injuries.

The second episode of the occurrence was at 11:30 a.m., the same day, when Muhammad Ishaq (deceased) going ahead of complainant Muhammad Ilyas (PW.4) and Muhammad Shahid (PW.5), his cousin, (both injured PWs), to mend the breach and to re-divert the water to their lands, whereupon, Munir Ahmed petitioner, armed with rifle, Naseer Ahmad and petitioner Bashir Ahmed alias Shada, both possessing firearm, present on the roof top of their 'Dera' confronted them from their 'Dera'. Munir Ahmed fired a straight shot at Muhammad Ishaq (deceased), hitting him on the right side of the clavicle whereas the witnesses escaped the straight fire shots by Naseer Ahmad and Bashir Ahmed alias Shada co-accused. The complainant (PW.4) was

medically examined. The medical officer found two bruises and one swelling on his person with a fracture of metacarpal bone. Muhammad Shahid (PW.5) was noted with a swelling with no bone lesion whereas the solitary fire shot attributed to the petitioner Munir Ahmed proved fatal to Muhammad Ishaq (deceased).

3. The learned trial Judge, after conclusion of the trial acquitted the accused Bashir Ahmed alias Shada and Naseer Ahmad from the charge of murder leveled against both of them by holding that no case of common intention or common object against them was made out and recorded conviction of Munir Ahmad, petitioner only, for the murder of Muhammad Ishaque and sentenced him to death. Whereas Bashir Ahmed alias Shada was convicted and sentenced for causing injuries to both the PWs, Muhammad Ilyas (PW-4) and Muhammad Shahid, (PW-5). Rest of the three accused Naseer Ahmad, Asif and Rashid were given clean chit of acquittal. The acquittal of the above named accused and acquittal of the two from the charge of murder for want of proof of common intention or common object was neither challenged by way of appeal by the State or the complainant. Even any appeal for enhancement of sentence of Bashir Ahmed alias Shada, petitioner, was also not filed. This aspect of the case reflects that State and complainant party was fully satisfied with the judgment of the trial court.

4. The High Court, on appeal, maintained the conviction of Munir Ahmed for the murder of Muhammad Ishaque, however, altered his sentence of death into imprisonment for life whereas the conviction and sentence of petitioner Bashir Ahmed alias Shada for causing injuries to PWs was maintained.

5. Both the convicts filed the instant petition for leave to appeal against their convictions. We had heard the

learned counsel for the petitioners as well as the learned D.P.G. Punjab for the State assisted by the learned counsel for the complainant and had gone through the available record.

The perusal of the judgment handed down by my learned brother reflects that the fate of the convicts, on the available evidence, has not been decided and the matter has been remitted back to the trial Court by setting aside the judgments and the convictions and sentences recorded by the trial Court and the High Court. So, I would also not like to express my mind regarding fate of the case and would try to confine myself to see as to whether remand of the case, in the given circumstances, is justified or not. It is worth to be noted that there were five accused in all, three of whom were acquitted (*specially the accused Naseer Ahmad with the similar role of firing*) by the trial Court and the present two petitioners were convicted. There was no appeal, as stated above, against the acquittal of the three accused and as such, the same has attained finality, which at present, cannot be called in question. The criminal jurisprudence so far established is that presumption of innocence is significantly added to the acquittal. The scope of interference with such presumption is very narrow specially when it has attained finality as in the present case. The complainant has only filed a criminal petition for leave to appeal (CrI.P.L.A. No.1651-L/2016) against alteration of sentence of Munir Ahmad from death to life imprisonment by the court of appeal and sought restoration of sentence of death awarded by the trial court. This judgment of remittance, as noted above, would be only to the extent of present petitioners. The perusal of the record would establish the fact that role of both the convicts qua the murder and the injuries to the PWs. is quite independent. The remand of the case of present two petitioners/convicts itself would be against the norms of justice when three other accused, specifically the accused Naseer Ahmad, with the similar role of firing on PWs

as attributed to Bashir Ahmed alias Shada, have been acquitted. The remand of the case has been ordered for considering the case of the petitioners on the touchstone of the common intention/common object of the accused party at the time of commission of the offence.

6. The purpose and application of the provisions of Sections 34 and 149 P.P.C., no doubt, has aptly been explained by my learned brother, which, with due respect, at the most can be considered as an academic discussion but as far as the material and evidence available before this Court is concerned, that does not attract the provisions of Section 34 P.P.C. For ready reference Sections 34 and 149 P.P.C. are reproduced herein below:-

"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.

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."

A look at the above quoted provisions of law makes it clear that if a criminal act is done by the several persons in furtherance of their common intention or the offence is committed by any member of an unlawful assembly in prosecution of the common object of that unlawful assembly, then in that case each of such person or any of the member of such assembly would be liable for the commission of criminal act or guilty of that offence. The alleged criminal act should be in furtherance of common intention and not the common

intention simpliciter. Mere presence of an accused with an accused who commits the crime would not constitute his common intention unless there is an evidence referring to the criminal act of that accused committed in furtherance of common intention with the other accused. The role of firing (criminal act) though was attributed to Naseer Ahmad and Bashir Ahmed alias Shada (one of the petitioner before us) but the trial Court not only acquitted both the said accused but also held that there was no evidence of common intention. This finding of trial Court has also attained finality. There becomes no legal or moral justification for remand of the case of one of them on matter which has already been decided and attained finality.

7. After perusal of the entire evidence, the factum of common intention under the provisions of Section 34 P.P.C. is not made out. In both of the episodes of the occurrence, it appears to be the individual acts of each accused which took place at the spur of the moment in a reaction of complainant party's request for mending the breach of water channel. Causing of injuries to the PWs and the murder of Muhammad Ishaque took place in two separate and independent episodes. In the first episode, the other accused did not commit any criminal act with their common intention and they did not cause any injury to PW.4 and PW.5, who, being empty handed, were at their mercy. No such overt act falling in the definition of criminal act was even attributed to them in the F.I.R. Similarly, single fire shot has been attributed to Munir Ahmed convict at the person of Muhammad Ishaq (deceased) whereas the other accused Naseer Ahmad and Bashir Ahmed alias Shada fired at complainant Muhammad Ilyas (PW.4) and Muhammad Shahid (PW.5) who miraculously escaped but such a story can hardly be believed. Had they having the common intention to commit the murder of the PWs. who were at their mercy and reportedly empty handed, could have

easily achieved their intention of the criminal act. The trial Court by not believing their version, has acquitted both Naseer Ahmad and Bashir Ahmed alias Shada from the charge of murder and as such there was no appeal by the complainant party against their said acquittal despite the fact that they had the legal advice available to them during the trial and thereafter. This very act of the complainant party further suggests that they were fully satisfied with the decision of the trial Court. The petitioner Bashir Ahmed alias Shada, as earlier said, was convicted for his criminal act of causing injuries to the PWs. and was convicted to that extent only. The trial Court, before whom the evidence is recorded and who also notices the demeanor of the witnesses, has categorically held "*there is no incriminating material to prove the factum of common object or common intention. Therefore, offence of committing murder against accused Bashir alias Shada and Naseer is not made out.*" Neither the prosecution nor the complainant has challenged this verdict of acquittal of charge of murder of the above two in appeal. Similar were the findings of the appellate Court.

8. The question of common intention and common object has been dilated upon by this Court and the High Courts in a number of cases and no aspect is left untouched. I would like to make reference to some of such important cases as to how the question was dealt with by our Courts.

"

(1994 S C M R 1327)

MANZOOR HUSSAIN and 4 others---Appellants

versus

THE STATE---Respondent

We are, therefore, of the opinion that the occurrence is not the result of pre-concert and premeditation but occurred on account of sudden flare up. In the case of Bashir Ahmad v.

The State (PLD 1988 SC 86), this Court observed that wherever there is doubt about application of sections 34, 107 and 149, P.P.C. it is always necessary not to apply either of these provisions which seek conviction on vicarious liability only. In another case *Misbahuddin v. The State* PLD 1983 SC 79 it was held that in case of sudden quarrel question of furtherance of common intention would not arise. Consequently, the provision of section 149, P.P.C. was not attracted to the facts of the present case or at least its application was not free from doubt. We are, therefore, not inclined to maintain conviction and sentence of Mumtaz Hussain, Mulazim Hussain and Manzoor Hussain under section 302/149, P.P.C., however, they are responsible for their individual acts for causing injuries to Muhammad Hussain P.W. 8 with their respective weapons of knives and daggers.

.....

(1992 S C M R 1983)

Ch. MUHAMMAD YAQOOB and others---Appellants
versus
THE STATE and others-Respondents

24. Mr. Munir Piracha, learned counsel for two of the appellants, adopted Mr. Abid Hassan Minto's arguments and, without prejudice to his contentions on merits, in the alternative, has vehemently urged that in the present case, the Courts below erred in pressing into service section 34 of the Pakistan Penal Code, as, on the basis of the evidence on record, common intention to commit the offence in question, cannot be attributed to the appellants/convicts. According to him the appellants/convicts had no knowledge of the factum that they would be forced to commit the offence till the time they were forced to kill the deceased at the place of Wardat, and as they were told at the police station that the deceased were to be shifted to Khipro Jail.

It is correct that the accused/convicts in their confessions, and the approver in his statement, have stated that they were told at the police station, that the deceased were to be taken to Khipro Jail, but common intention could be

formed at the spur of the moment, as had been held by this Court in the case of Muhammad Akbar and two others v. The State (PLD 1991 SC 923), wherein after referring to the relevant case-law on the above question, following conclusion was drawn:----

"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 could 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....

(P L D 1991 Supreme Court 923)

MUHAMMAD AKBAR and 2 others-- Appellants
versus
THE STATE-- Respondent

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.

.....

(P L D 1988 Supreme Court 86)

BASHIR AHMAD and others--Petitioners

versus

THE STATE--Respondent

.....

The next question regarding their common intention with Bashir and whosoever the other was with him in the strangulation, suffice it to state that the same also is not free from doubt. 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. Why it is in doubt in this case whether section 34 is applicable is not far to seek.....

.....

(1984 S C M R 1069)

SAEE AND OTHERS-Appellants

Versus

THE STATE-Respondent

.....

.....The learned Judges in the High Court have not created any such distinction in the two groups but have held that Muhammad Saeed alone had the intention of causing the death of Asghar Ali, fired at him and in fact caused the death of Asghar Ali. It was not in the prosecution of the common object of the unlawful assembly. Similarly, his four other companions who were found to have fired and injured

or given hatchet blows to the other witnesses were found not have done so in prosecution of the common object but with the common intention and for that reason their conviction was recorded under section 307/34, P. P. C. on four counts.....

.....

(P L D 1972 Lahore 19)

ATHAR KHAN AND 2 OTHERS-Appellants

versus

THE STATE-Respondent

.....

In Fazzo Khan and others v. Jatto Khan and another (1) Sir Gorge Clause Rankin, Kt. Chief Justice and Graham, J., held that :-

"To attract the operation of section 34, Penal Code, and fix constructive guilt on each of the several accused under that section, there must be participation in action, with a common intention, although the different accused might have taken different parts; and unlike under section 149 before any of them can be convicted for an offence read with section 34, the Court must arrive at a finding as to which of the accused took what part, if any, in furtherance of the common intention. A conviction without such finding is illegal."

.....

(1970 S C M R 780)

MUHAMMAD AZAD AND 6 OTHERS-Appellants

versus

THE STATE-Respondent

.....

.....The contention that these six persons can only be held responsible on the evidence, for the consequences of their individual acts is obviously untenable, since the

attacks upon Tikka Khan, Abdul Aziz and Bhag Ali are clearly proved to have been the concerted work of the persons who have been named above, acting in groups. The application of section 149, P. P. C. in the circumstance of the case may not be entirely appropriate, for, as has been seen already, the indications are that the injuries of the individual members of the complainant-party were not the result of a massed attack by four hundred persons on four hundred others, but the attacks on these persons were included in a number of sporadic assaults, and they cannot be regarded safely otherwise than in isolation from each other. But joint responsibility of the nature for which provision is made in section 34, P. P. C. clearly attaches to those who joined in the attack upon a particular individual, to the extent that his injuries were the reasonable and natural consequence of the attack.

.....

(1924) L.R. 52 I.A. 40)

Appellants: Barendra Kumar Ghosh

Vs.

Respondent: The King-Emperor

.....

.....There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of Section 34, is replaced in Section 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but Section 149 cannot at any rate relegate Section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all.

....."

9. By keeping in mind the evidence and the material available on the record and in view of the judgments, referred to above, would make it absolutely clear that element of common intention is not proved and the Courts below have properly dealt with the matter. Sending back the case of the petitioners after about ten years would, in my humble opinion, be nothing short of increasing their agonies and anguish. By sending their case back to dilate upon the same evidence and the issue, which has already been dealt with by the Courts below and the complainant party has also accepted the same and never raised such issue by questioning the verdicts of the Courts, would serve no purpose and not advisable under the law, specially, when the other three accused have earned an acquittal to its finality. Sending back the case of the two would also be against substantial justice. Besides the above, I am also unable to agree with issuance of guidelines/directions by my learned brother for circulation to all the Courts. No doubt this Court is the highest Court of appeal in the country and the law laid down by this Court is binding on all the Courts but issuance of directions to the subordinate Courts to follow a particular course of action in criminal matters is not the domain of this Court as this would be considered by the courts below to be binding as per the provisions of Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973 (the '*Constitution*'). In my opinion, every Judge is independent and autonomous within its allocated sphere of jurisdiction and such direction would amount to interference in their independence which is not permissible under the law. The Appellate Court indeed can uphold, modify or set aside the judgment of the lower fora but such guidelines/directions cannot be held as an "**act in aid**" of the Supreme Court as

contemplated in Article 190 of the *Constitution*. Such guidelines/directions being supervisory in nature would also amount to an encroachment upon the supervisory powers of the High Court vesting in it under Article 203 of the Constitution.

10. Since fate of the petitions, on the merits, have not been announced, so, in my humble opinion, the petitions be fixed for rehearing and be decided on the basis of available record and the law. The above were the reasons for my additional note.

Judge

ORDER OF THE COURT

By majority of two to one (Mazhar Alam Khan Miankhel, J dissenting), Criminal Petition Nos. 1371 & 1651-L of 2016 are converted into appeals, allowed and the impugned judgments of the learned High Court as of the learned Trial Court are set aside and the matter is remanded back to the learned Trial Court to conclude the trial in the light of this judgment within a period of two months whereas Criminal Miscellaneous Application No. 1704 of 2017 for suspension of sentence is disposed of as having become infructuous.

JUDGE

JUDGE

JUDGE