

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE MUNIB AKHTAR

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CRIMINAL APPEAL NOS. 531 & 532 OF 2019 AND
CRIMINAL PETITION NOS. 339-L & 361-L OF 2015

(On appeal against the judgment dated 19.02.2015 passed by the Lahore High Court, Lahore in Criminal Appeal Nos. 868, 876 & 1037/2010)

Muhammad Nawaz

(In Cr.A. 531/2019)

Muhammad Ilyas

(In Cr.A. 532/2019)

Irfan Ali (complainant)

(In Cr.Ps. 339-L & 361-L/2015)

... Appellants/Petitioner

VERSUS

The State through P.G. and others

(In all cases)

... Respondents

For the Appellants:

Ms. Asma Hamid, ASC

Ch. Akhtar Ali, AOR

(In Cr.As. 531 & 532/2019)

For the Petitioner:

Mir Sikandar Zulqarnain Saleem, ASC

(In Cr.Ps. 339-L & 361-L/2015)

For the State:

Mr. Muhammad Jaffar, DPG Punjab

Date of Hearing:

23.05.2022

JUDGMENT

CRIMINAL APPEAL NOS. 531 & 532/2019

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Appellants Muhammad Nawaz and Muhammad Ilyas along with eight co-accused were tried by the learned Anti Terrorism Court-III, Lahore, pursuant to a case registered vide FIR No. 400/2007 dated 23.05.2007 under Sections 302/324/148/149 PPC read with Section 7 of the Anti Terrorism Act, 1997, at Police Station Ferozwala, District Sheikhpura for committing murder of Ghulam Mustafa and Noor Muhammad and for causing injuries to Zeeshan, Ihsan, Rehmat Ali and Qamar Shah.

2. The facts as given in the judgment of the learned Trial Court are reproduced as under:-

“2. The FIR **Fx.PL** was lodged by P.W-10 Irfan Ali complainant on 23.05.2007 at 8:25 am on the allegations that he is the resident of Bhulay Banawal. His brother Ghulam Mustafa is councilor of locality. There was dispute of land between Ghulam Muhammad etc. and Noor etc. residents of village and a case was pending in the court. His brother Ghulam Mustafa was asked for settlement of dispute. On 23.05.2007 at 7:00 am he was present in his house when Imran came there and told that Ghulam Muhammad etc. was giving physical torture to his brother Ghulam Mustafa, whereby, he along with Rehmat Ali, Ehsan Ali, Zeeshan Ali and Imran rushed to the place of occurrence, where Ghulam Muhammad etc. while armed with weapons were giving physical torture to Ghulam Mustafa and Noor. Ilyas accused armed with pump action gun, Nawaz s/o Sultan armed with gun 12-bore, Riaz armed with gun 12-bore, Imtiaz armed with rifle 44-bore, Zafar armed with gun 12-bore, Altaf armed with gun 12-bore, Ghulam Muhammad armed with carbine, Ishaque armed with pistol 30-bore, Bukhsha armed with carbine, Nawaz s/o Khan armed with pistol 30-bore all residents of village along with four un-known persons were present there. Ghulam Muhammad raised lalkara that all of them should be killed, whereupon, Ilyas accused made fire with pump action gun which landed near the right flank of Ghulam Mustafa; Nawaz made fire with gun 12-bore which also landed near the right flank of Ghulam Mustafa; Ilyas accused again made fire with pump action gun which landed on the right thigh of Ghulam Mustafa; Zafar accused made fire with gun 12-bore on Zeeshan which landed on his lower abdomen; Altaf made fire with gun 12-bore which landed on the right thigh of Zeeshan. Rest of the accused also made firing with their respective firearms and the fires hit on different parts of bodies of Ehsan Ali, Noor and Qamar Shah, as a result of which they were seriously injured. He saved his live by laying on the ground. The accused persons made reckless firing with their weapons and while raising lalkaras fled away from the spot. Grave fear, harassment and terrorism was created in the locality. He shifted the injured persons to Mayo Hospital. His brother Ghulam Mustafa succumbed to the injuries in the way, whereas, rest of the injured persons were got admitted in the hospital. Apart from him Ehsan, Rehmat, Zeeshan, Noor Muhammad, Qamar Shah and Imran saw the occurrence.”

3. During the course of investigation carried out by the local police, the appellants along with other co-accused except Bukhsha were found guilty and as such a report under Section 173 Cr.P.C. was submitted before the Trial Court. The learned Trial Court seized of the matter framed charge against 10 accused under Sections 302/324/148/149 PPC read with Section 7(a)(c)(h) of the Anti Terrorism Act. The learned Trial Court while

framing the charge specifically mentioned that all the accused while forming an unlawful assembly in furtherance of their common object have committed the crime wherein two persons lost their lives while four sustained injuries and as such committed an offence falling under Section 149 PPC. The charge framed against all the accused reads as under:-

"MULTIPLE CHARGE

Trial #:

F.I.R. #: 400 Dated: 23.05.07

P.S: Feroz Wala, Distt. Sheikhpura.

I, **Shabbir Hussain Chattha**, Judge Anti-Terrorism Court No.3, Lahore considering the material, placed before me, hereby charge you:-

- 1: **Ghulam Muhammad** s/o Sher Muhammad. Caste: Kharyl. r/o Bhullay Banay Wal
- 2: **Imtiaz Ahmed** s/o Ghulam Muhammad. Caste: Kharyl. r/o Bhullay Banay Wal
- 3: **Muhammad Ilyas** s/o Ghulam Muhammad. Caste: Kharyl. r/o Bhullay Banay Wal
- 4: **Muhammad Nawaz** s/o Sultan Ahmed. Caste: Kharyl. r/o Bhullay Banay Wal
- 5: **Zafar Iqbal** s/o Sardar Ahmed. Caste: Kharyl. r/o Bhullay Banay Wal
- 6: **Sarfraz Ahmed** s/o Sultan Ahmed. Caste: Kharyl. r/o Muhammad Wala Thana Budhana, Distt. Jhang.
- 7: **Riaz Hussain** s/o Muhammad Sharif. Caste: Hashmi r/o Saddiqua Colony, Ravi Road, Near Girls College, Lahore.
- 8: **Altaf Hussain** s/o Sher Muhammad Caste: Kharyl. r/o Bhullay Banay Wal
- 9: **Mushtaq @ Eshaq** s/o Sher Muhammad Caste: Kharyl. r/o Bhullay Banay Wal
- 10: **Muhammad Nawaz** s/o Khan Muhammad. Caste: Kharyl. r/o Bhullay Banay Wal

(.....accused under trial)

on the following allegations:-

Firstly, that on 23.05.07 at about 7:00 am within the area of Bhullay Banay Wal, P.S. Ferozwala, Distt. Sheikhpura, you all the accused named above along with your co-accused Baksha (since P.O) and 3 other unknown co-accused while armed with firearm weapons with common object constituted an unlawful assembly, which is an

offence punishable u/s 148/149 PPC, which is within the cognizance of this court being allied offence.

Secondly, that on the same date, time and place you all the accused named above along with your co-accused Baksha (since P.O) and 3 other unknown co-accused while armed with firearm weapons with common object to kill and in the meanwhile you both the accused Ilyas & Nawaz s/o Sultan named above fired shots upon Ghulam Mustafa (since deceased) on different parts of his body as a result of which said Ghulam Mustafa died after some time of the occurrence and thus committed Qatl-e-Amd of Ghulam Mustafa which is an offence punishable u/s 302/149 PPC, which is within the cognizance of this court being allied offence.

Thirdly, that on the same date, time and place you all the accused named above along with your co-accused Baksha (since P.O) and 3 other unknown co-accused while armed with firearm weapons with common object to kill and in the meanwhile you both the accused Ilyas & Nawaz s/o Sultan named above fired shots upon Ghulam Mustafa (since deceased) on different parts of his body as a result of which said Ghulam Mustafa died after some time of the occurrence and thus committed Qatl-e-Amd of Ghulam Mustafa also committed an act of terrorism as fear and insecurity was created amongst the people of locality, which is an offence punishable u/s 7(a), ATA, 1997, which is within the cognizance of this court being scheduled offence.

Fourthly, that on the same date, time and place you all the accused named above along with your co-accused Baksha (since P.O) and 3 other unknown co-accused while armed with firearm weapons with common object to kill and in the meanwhile you both the accused Zafar & Altaf named above fired shots upon Zeeshan on different parts of his body, as a result of which said Zeeshan got injured, which is an offence punishable u/s 324/149 PPC, which is within the cognizance of this court being allied offence.

Fifthly, that on the same date, time and place you all the accused named above along with your co-accused Baksha (since P.O) and 3 other unknown co-accused while armed with firearm weapons with common object to kill and in the meanwhile you both the accused Zafar & Altaf named above fired shots upon Zeeshan on different parts of his body, as a result of which said Zeeshan got injured, and thus by seriously injuring said Zeeshan also committed an act of terrorism as fear and insecurity was created amongst the people of locality, which is an offence punishable u/s 7(c), ATA, 1997, which is within the cognizance of this court being scheduled offence.

Sixthly, that on the same date, time and place you all the accused named above along with your co-accused Baksha (since P.O) and 3 other unknown co-accused while armed with firearm weapons with common object to kill and in the meanwhile you both the accused Riaz & Sarfraz named above accused also fired shots upon Rehmat Ali, as a result of which said Rehmat Ali got injured, which is an offence punishable u/s 324/149 PPC, which is within the cognizance of this court being an allied offence.

Seventhly, that on the same date, time and place you all the accused named above along with your co-accused Baksha (since P.O) and 3 other unknown co-accused while armed with firearm weapons with common object to kill and in the meanwhile you both the accused Riaz & Sarfraz named above accused also fired shots upon Rehmat Ali as a result of which said Rehmat Ali got injured, and thus by injuring said Rehmat Ali also committed an act of terrorism as fear and insecurity was created amongst the people of locality, which is an offence punishable u/s 7(c), ATA, 1997, which is within the cognizance of this court being scheduled offence.

Eighthly, that on the same date, time and place you all the accused named above along with your co-accused Baksha (since P.O) and 3 other unknown co-accused while armed with firearm weapons with common object to kill and in the meanwhile you the accused Ghulam Muhammad named above fired shot upon Ehsan Elahi as a result of which said Ehsan Elahi got injured, which is an offence punishable u/s 324/149 PPC, which is within the cognizance of this court being an allied offence.

Ninthly, that on the same date, time and place you all the accused named above along with your co-accused Baksha (since P.O) and 3 other unknown co-accused while armed with firearm weapons with common object to kill and in the meanwhile you the accused Ghulam Muhammad named above fired shot upon Ehsan Elahi as a result of which said Ehsan Elahi got injured, and thus by injuring said Ehsan Elahi also committed an act of terrorism as fear and insecurity was created amongst the people of locality, which is an offence punishable u/s 7(c), ATA, 1997, which is within the cognizance of this court being scheduled offence.

Tenthly, that on the same date, time and place you all the accused named above along with your co-accused named above while armed with firearm weapons with common object to kill and in the meanwhile you all the accused Riaz, Sarfraz & Imtiaz named above made fire shots upon Noor Muhammad on different parts of his body as a result of which Noor Muhammad got injured and later expired in Mayo Hospital, Lahore on 24.05.07 and thus committed Qatl-e-Amd of said Noor Muhammad, which is an offence punishable u/s 302/149 PPC, which is within the cognizance of this court being allied offence.

Eleventhly, that on the same date, time and place you all the accused named above along with your co-accused named above while armed with firearm weapons with common object to kill and in the meanwhile you all the accused Riaz, Sarfraz & Imtiaz named above made fire shots upon Noor Muhammad on different parts of his body as a result of which Noor Muhammad got injured and later expired in Mayo Hospital, Lahore on 24.05.07 and thus committed Qatl-e-Amd of said Noor Muhammad, and thus committed an act of terrorism as fear and insecurity was created amongst the people of locality, which is an offence punishable u/s 7(a), ATA, 1997, which is within the cognizance of this court being scheduled offence.

Twelvethly, that on the same date, time and place you all the accused named above along with your co-accused named above while armed with firearm weapons with common object to kill & in the meanwhile your co-accused Baksha (since P.O) made a fire shot upon Qamar Shah as a result of which said Qamar Shah got injured, which is an offence punishable u/s 324/149 PPC, which is within the cognizance of this court being an allied offence.

Thirteenthly, that on the same date, time and place you all the accused named above along with your co-accused named above while armed with firearm weapons with common object to kill & in the meanwhile your co-accused Baksha (since P.O) made a fire shot upon Qamar Shah as a result of which said Qamar Shah got injured, and thus by injuring said Ehsan Elahi also committed an act of terrorism as fear and insecurity was created amongst the people of locality, which is an offence punishable u/s 7(c), ATA, 1997, which is within the cognizance of this court being scheduled offence.

Fourteenthly, that on the same date, time and place you all the accused named above along with your co-accused as mentioned above while armed with firearm weapons by making firing at the said place sent a wave of harassment amongst the people of locality, which is an offence punishable u/s 7(h) ATA, 1997, which is within the cognizance of this court being scheduled offence."

4. In order to prove its case, the prosecution produced as many as 18 witnesses whereas one court witness was also examined. On the conclusion of the prosecution case, the accused persons got recorded their statements under Section 342 Cr.P.C. wherein they denied the allegations leveled against them. However, they did not opt to appear as witness under Section 340(2) Cr.P.C to disprove the allegations as a witness but preferred to produce Muhammad Saleem as DW-1 and relied upon certain documents Ex.DA to Ex.DH. On conclusion of the trial, the learned Trial Court vide its judgment dated 30.03.2010 found the appellants Muhammad Nawaz, Muhammad Ilyas and co-accused Sarfraz Ahmed guilty and as such they were sentenced to death on two counts each under Section 302/34 PPC. They were also directed to pay compensation amounting to Rs.200,000/- each to the legal heirs of each deceased. The compensation if not paid was ordered to be recovered as arrears of land revenue. The compensation if neither paid nor recovered, the convicts were ordered to further suffer six months SI each. Co-accused Zafar Iqbal and Altaf Hussain were convicted and sentenced to 10 years RI each under Section 324/34 PPC with a fine of Rs.50,000/- each or in

default whereof to further undergo one year SI each. Sarfraz Ahmad, who was sentenced to death, was also convicted under Section 324/34 PPC and sentenced to 10 years RI with a fine of Rs.50,000/- or in default whereof to further suffer one year SI each. However, the learned Trial Court while convicting the appellants and co-accused, acquitted co-accused (i) Ghulam Muhammad, (ii) Imtiaz Ahmad, (iii) Riaz Hussain, (iv) Mushtaq @ Ishaque, and (v) Nawaz s/o Khan Muhammad on the basis that the charge against them was not proved.

5. The appellants and co-accused Sarfraz Ahmed filed appeals against their conviction before the learned High Court whereas the State also challenged the acquittal of five co-accused before the High Court. In appeal, the learned High Court while maintaining the conviction under Section 302/34 PPC, altered the sentence of death into imprisonment for life to the extent of appellants before us. The amount of compensation and the sentence in default thereof was also maintained. Benefit of Section 382-B Cr.P.C. was also extended to the appellants. However, the learned High Court while handing down the judgment surprisingly acquitted all the accused under Section 148 PPC although they were convicted under Section 148 PPC by the Trial Court and were sentenced to three years RI each. The learned High Court also set aside the conviction and sentences recorded by the learned Trial Court against the co-accused Sarfraz Ahmed. The appeal against acquittal of five co-accused was also dismissed. Being aggrieved by the impugned judgment, the appellants/convicts filed Criminal Petition Nos. 337-L & 338-L/2015, out of which have arisen Criminal Appeal Nos. 531 & 532/2019. The complainant has also challenged the impugned judgment by filing Criminal Petition Nos. 339-L & 361-L/2015 seeking enhancement of the sentence awarded to the appellants and the above-named co-accused.

6. During the course of proceedings before this Court, a query was made to the learned counsel for the appellants qua the legality of conviction and sentence recorded by the Trial Court. Although it is an admitted fact that the learned Trial Court while framing charge against the appellants and other co-accused had charged them for the offences of

'common object' falling under Sections 148/149 PPC but while deciding the *lis* each accused was dealt on the basis of 'individual liability' especially with reference to the injuries caused to PWs. The conviction was recorded against the appellants for the murder of two deceased persons. However, the applicability of Sections 148/149 PPC with reference to other co-accused was totally ignored and they were convicted on the basis of 'individual liability' without assigning a 'definite finding' regarding their participation as members of unlawful assembly and commission of offences in furtherance of their common intention falling under Sections 148/149 PPC. When the appellants and co-accused were specifically charged for having committed the crime in furtherance of their common object, the learned Trial Court ought to have given a definite finding regarding the applicability of Section 302/148/149 PPC to the co-accused qua the charge of murder. The learned courts below ignored the fact that all the accused committed their respective overt acts in furtherance of their common object, and as such they were part of the unlawful assembly, hence, the conviction and sentence recorded against the accused on the basis of individual liability in the absence of any "definite finding" to negate that the act of each individual was without premeditation, is beyond the scope of law. The act of each individual, if committed in furtherance of the common object, the facts are to be dealt conjointly to arrive at a conclusion in the spirit of law of the land. This query with reference to the facts and circumstances of the instant case could not be controverted by the learned counsel for the appellants. Even the learned Law Officer conceded that the learned Trial Court ought to have given a "definite finding" as to whether the occurrence was committed by the accused in furtherance of their common object or not.

7. This Court in a recent judgment dated 26.11.2020 passed in Criminal Petition Nos. 1371 & 1651-L of 2016 has given elaborative guidelines for the application of Section 302 PPC. It would be advantageous to reproduce the relevant portion of the judgment. The same reads as under:-

"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-i-amd 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 liability 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."

8. A bare perusal of the afore-referred judgment of this Court makes it clear that while dealing with murder cases falling within the ambit of Section 302 PPC, the Trial Court has to evaluate the act committed in the circumstances, which covers that it was committed in furtherance of common intention or on the basis of individual liability to press in the provision of Section 302(b) or 302(c) PPC and it has to give a definite finding qua the same. Any judgment which concludes that the offence falling under Section 302(b) PPC was committed in furtherance of common intention or common object but the sentence is inflicted on the basis of individual liability, the same would be squarely in defiance of the intent and spirit of law on the subject. However, if the Court comes to the conclusion that the elements of common intention and common object have not been established, then each accused would be dealt with, under the provisions of Section 302(c) PPC according to their own role and severity of allegations and would be sentenced

accordingly by the Court exercising its discretionary powers. This Court while holding so, has also given following guidelines to the Courts below:-

"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."

9. For what has been discussed above, these appeals are allowed and the impugned judgments of both courts are set aside. The matter is remanded back 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 in Criminal Petition Nos. 1371 & 1651-L of 2016. The appellants/accused would be dealt with as under trial prisoners before the Trial Court, during pendency of the /is before Trial Court.

CRIMINAL PETITION NOS. 339-L & 361-L OF 2015

10. In view of the order passed in the connected Criminal Appeals, these petitions have become infructuous and are disposed of accordingly.

11. The above are the detailed reasons of our short order of even date.

JUDGE

JUDGE

JUDGE

Islamabad, the
23rd of May, 2022
Approved For Reporting
Khurram