

SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Shariat Appellate Jurisdiction)

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.
Raja Saeed Akram Khan, J.

Criminal Appeal No.19 of 2019
(Filed on 27.03.2019)

1. Khalid Mehmood son of Khushal,
2. Kalsoom Begum widow,
3. Mazhar Hussain,
4. Zahid Hussain, sons,
5. Afreez Begum,
6. Faiza,
7. Shamaila, daughters of Akhter Hussain,
caste Malik, r/o Kajlani, Tehsil Charhoi,
District Kotli.

.... APPELLANTS

VERSUS

1. Nasir Iqbal,
2. Yasir Iqbal,

3. Sajid Iqbal, sons of Muhammad Sadiq, caste Malik, r/o Kajlani, Tehsil Charhoi, District Kotli.

.... RESPONDENTS

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 04.03.2019 in criminal appeals No.120 and 121 of 2018)

FOR THE APPELLANTS: Mr. Abdul Aziz Ratalvi, Advocate.

FOR THE RESPONDENTS: Mr. Mehboob Ellahi Ch., Advocate.

FOR THE STATE: Raja Saadat Ali Kiani, Additional Advocate-General.

Criminal Appeal No.23 of 2019
(Filed on 04.04.2019)

1. Yasir Iqbal,
2. Sajid Iqbal, sons of Muhammad Sadiq, caste Malik, r/o Kajlani, Tehsil Charhoi, District Kotli.

.... APPELLANTS

VERSUS

1. Khalid Mehmood son of Khushal, caste Malik, r/o Kaljani, Tehsil Charhoi, District Kotli.

....RESPONDENT

2. The State through Advocate-General Azad Jammu and Kashmir.

.... PROFORMA RESPONDENT

(On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 04.03.2019 in criminal appeals No.120 and 121 of 2018)

FOR THE APPELLANTS: Mr. Mehboob Ellahi Ch., Advocate.

FOR THE RESPONDENTS: Mr. Abdul Aziz Ratalvi, Advocate.

FOR THE STATE: Raja Saadat Ali Kiani, Additional Advocate-General.

Date of hearing: 27.01.2020

JUDGMENT:

Raja Saeed Akram Khan, J.— Through the appeals supra the common judgment of

the Shariat Appellate Bench of the High Court (High Court) dated 04.03.2019, has been called in question, whereby the appeal filed by the convict-appellants, *Yasir Iqbal and others*, has partly been accepted, whereas, the cross appeal filed by the complainant-appellants, *Khalid Mehmood and others*, has been dismissed. As both the appeals are outcome of one and the same judgment, hence, the same are being disposed of through this single judgment.

2. The succinct facts forming the background of the instant case are that on 09.04.2014, the complainant, Khalid Mehmood lodged an application at Police Station Nar for registration of the case against the convicts, Nasir Iqbal and others, stating therein, that the complainant and the accused are the inhabitants of one and the same village; belong to same tribe and theirs lands are also

adjacent to each other. On 08.04.2014, the accused started construction of a wall over the land owned by the father of the complainant, whereupon, he went at the spot and asked them to refrain from constructing the wall; ultimately it was decided that the matter shall be resolved by the notables of the locality. Later on, the accused again started construction, whereupon, the complainant brought this fact into the notice of the notables of the locality, i.e. Zulfiqar Ali son of Ali Asghar, Muhammad Bashir son of Sher Ahmed, Muhammad Sharif son of Sher Ali and Ghulam Haider son of Muhammad Sarwar. The complainant and his uncle, Muhammad Akhtar along with the aforesaid notables went at the spot where the convicts were raising the construction and it was decided that in the evening time a meeting shall be convened for settlement of the matter amicably. Thereafter,

when the complainant and his uncle along with the notables were returning to their homes, the accused attacked the complainant and his uncle to achieve the common intention. The accused, Nasir Iqbal, inflicted blow with iron rod blows at the posterior post of the head of the complainant's uncle while the accused, Yasir, inflicted a stick blow at his left hand. The accused sajid inflicted the blows with fists and kicks at the body of the complainant and his uncle. On the application/report of the complainant, a case was registered against the accused in the offences under sections 34, 341, 337-A to F and 504, APC, however, later on, the uncle of the complainant was succumbed to the injuries in hospital, whereupon, section 302, APC was also added. The police apprehended the accused and after completion of investigation presented the *challan* in the District Court of Criminal

Jurisdiction, Kotli. The trial Court on the conclusion of the trial awarded 25 years' rigorous imprisonment to the accused, Nasir Iqbal, under section 302, APC, 10/10 years' rigorous imprisonment to the accused Yasir Iqbal and Sajid Iqbal under section 34/302, APC. All the accused were also awarded 3 months each simple imprisonment under section 447, APC, 1 month each simple imprisonment under section 341, APC, and 2 years' each simple imprisonment under section 504, APC. The convicts were also ordered to pay Rs.5,00,000/each under section 544-A, Cr.P.C, as compensation to the heirs of the deceased. The trial Court also extended the benefit of section 382-B, Cr.P.C. to the convicts. The convict, Nasir Iqbal, had already been absconded during the course of trial of the case, therefore, to his extent the warrant was issued by the trial Court. Feeling

aggrieved from the judgment of the trial Court both the parties filed separate appeals. The complainant filed appeal for enhancement in the sentences awarded by the trial Court to the convicts, whereas, the convicts, appellants, herein, filed appeal for acquittal. The learned High Court after necessary proceedings acquitted the convicts, appellants, herein, of the charge to the extent of offences under sections 34, 302, 447 and 504, APC and also set aside the resolution of the trial Court to their extent for payment of compensation to the heirs of the deceased, however, the punishment awarded to them under section 341, APC was maintained and in addition one year simple imprisonment to the convict, Yasir Iqbal, under section 337-F(i) along with payment of Rs.20,000/- as daman was awarded. The learned High Court dismissed the cross appeal filed by the

complainant for enhancement in the sentences.

3. Mr. Abdul Aziz Ratalvi, Advocate, the learned counsel for the complainant-appellants argued that the impugned judgment is against law and the facts of the case. The trial Court after due appreciation of the evidence brought on record convicted the accused in the offences under section 34 and 302, APC, but the learned High Court without examining the evidence disturbed the well reasoned judgment of the trial Court. He submitted that all the convicts with common intention attacked the complainant and his uncle and actively participated in the commission of offence but the learned High Court failed to appreciate this aspect of the case in a legal manner. He added that the convicts are the real brothers and in spite of the fact that the matter was settled down on the intervention of

the notables of the locality, they attacked the complainant and his uncle when they were in the way to their home. He added that the main accused inflicted the blows with iron rod at the back part of the head of the deceased, whereas, the convicts, respondents, herein, also inflicted the injuries by stick, fists and kicks blows to the deceased. In such state of affairs, the learned High Court was not justified to exclude the application of section 34, APC from the case. He submitted that overwhelming evidence has been produced by the prosecution to prove the case; all the prosecution witnesses (PWs) despite lengthy cross examination remained consistent on the material points and defence failed to shake their credibility but the learned High Court overlooked this fact while handing down the judgment. He added that the presence of the convicts at the place of occurrence has not

been denied and there was no such previous enmity of the complainant with the convicts to falsely implicate them in the commission of offence. The learned counsel while referring to the statements of different PWs submitted that all the statements are in line with each other. He lastly submitted that the motive has been established and proved in the instant case and the prosecution fully proved the case beyond the reasonable doubt, hence, the convicts are liable to be awarded normal penalties provided under law. He referred to and relied upon the case law reported as *Tariq Aziz etc. v. The State* [1982 P Cr. LJ 396], *Azhar and 2 others v. The State* [1983 P Cr.LJ 2529], *Muhammad Arshad and 2 others v. The State* [PLD 1996 SC 122], *Abdul Wahid v. State* [PLJ 2003 SC 480] and *Sh. Muhammad Abid v. State* [PLJ 2011 SC 491].

4. On the other hand, Mr. Mehboob Ellahi Chaudhary, Advocate, the learned counsel for the convicts argued that mere presence of the convicts does not bring the case in the purview of section 34, APC as the prosecution has badly failed to prove the element of common intention. There are glaring contradictions in the statements of the PWs which create a serious dent in the prosecution story and it is settled principle of law that a single doubt is sufficient to acquit the accused of the charge. He contended that 4 witnesses have been cited in the calendar of witnesses as eyewitness, out of which, the prosecution only produced two witnesses and the witnesses abandoned by the prosecution later on appeared before the Court as defence witnesses. The said eyewitnesses categorically stated in their statements that they did not witness the convicts while doing any overt act. In such state of affairs the

whole case of the prosecution becomes doubtful. He added that an amazing aspect of the case is that no one from the heirs of the deceased came forward to pursue the matter rather only the nephew of the deceased participated in the proceedings and in this regard no reason whatsoever has come on the record. He lastly submitted that although, the punishment awarded to the convicts has already been served, however, as they did not participate in the occurrence and the prosecution failed to prove the case against them; therefore; they are liable to be acquitted of the charge. He referred to and relied upon the case law reported as *Abdul Majeed and 4 others v. Muhammad Latif and 3 others* [2016 SCR 1306], *Muhammad Asif v. The State* [2017 SCMR 486], *Waseem Hussain and 2 others v. Muhammad Rafique and another* [2017 SCR 428] and *Shahzad and 9*

others v. Rana Qamar and 5 others [2018 SCR 727].

5. Raja Saadat Ali Kiani, the learned Additional Advocate-General, while appearing on behalf of the State has also adopted the arguments advanced by the learned counsel for the complainant-appellants.

6. We have heard the arguments and gone through the record along with the impugned judgment and also considered the case law referred to by the learned counsel for the parties. The arguments advanced by the learned counsel for the complainant-appellants, in support of appeal, revolves around one and the sole point that all the convicts with common intention participated in the commission of offence, in the result of which an innocent person lost his life, therefore, the provisions of section 34, APC

are fully attracted. Thus, before ascertaining; whether in the case in hand the prosecution has proved the element of common intention against the convicts, appellants; we deem it proper to observe here that to bring the case in the purview of section 34, APC, some prerequisites are required to be available in the case as mere presence of an accused at the place of occurrence along with the co-accused, who committed the offence, is not sufficient to prove common intention. The superior Courts have defined the parameters for applicability of the provisions of section 34, APC, in a number of pronouncements. In the case reported as *Abdul Khaliq v. The State* [2006 SCMR 1886], the parameters for attraction of common intention have been defined in the following manners:

“6. After having gone through almost entire law qua the provisions

as contained in section 34, in our considered view the following are the prerequisites of the section 34 before it could be made applicable:-

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

Keeping in mind the prerequisites/parameters discussed in the referred pronouncement, we have minutely scrutinized the record. The perusal of the record shows that a single stick blow at the left hand of the deceased is attributed to the convict, Yasir Iqbal, whereas, the fists and kicks blows are attributed to the convict, Sajid. The cause of death of the deceased, according to the medico legal report, is blows inflicted with iron rod at the head of the deceased, which are attributed to the convict (absconder), Nasir Iqbal. Nothing is available on record to show that the convicts hatched any conspiracy in presence of any person and thereafter with common intention/object, to kill the deceased came at the place of occurrence. According to the prosecution story when the dispute initially arose, the notables of the locality while temporarily settling down the issue decided to

permanently resolve the same by convening a *pnachiat* in the evening and thereafter, within a short span of time when the complainant and his uncle along with the notables were in the way to home, the occurrence took place, which shows that the same maybe the result of sudden provocation. The injury with the stick blow at the left hand of the deceased attributed to the convict, Yasir Iqbal is corroborated by the medico legal report and as per prosecution story the alleged stick was also recovered on the pointation of the convict, Yasir Iqbal, however, the record also shows that the stick blow was not repeated. Moreover, it is an admitted position that at the time of occurrence the convict, Sajid was not armed with any weapon and the allegation leveled against him is that he along with the co-accused gave fists and kicks blows to the deceased, but these blows have not been

corroborated by the medical report. The deceased was not died at the spot and the eyewitnesses stated in their statements that the convicts after inflicting injuries to the deceased fled-away from the scene of occurrence and later on, he succumbed to the injuries in the hospital. In such state of affairs, non-inflicting the stick blow at the vital part of the deceased, non-repetition of the stick blow by the convict, Yasir Iqbal; non-appearance of any sign of fists and kicks blows at the body of the deceased during medical examination coupled with the fact that nothing is available on record to show that the convicts with the common intention to kill the deceased came at the spot, in our view, it is not safe to declare the convicts as guilty of offence under section 34, APC. In view of settled principle of law, strong circumstances showing common intention of the accused with the co-accused

must exist for making him vicariously liable for the commission of offence, which are missing in the instant case; thus, we are satisfied that the learned High Court has rightly held that the prosecution failed to prove that the convicts with the common intention to kill the deceased have committed the offence.

7. The learned counsel for the convicts forcefully argued that the prosecution in the calendar of witnesses cited 4 persons as eyewitnesses but abandoned two witnesses which later on, were produced by the defence, thus, it makes the whole prosecution story doubtful. It may be observed here that under law it is not mandatory for the prosecution to produce before the Court each and every witness cited in the calendar of witnesses. In the instant case, the record shows that the prosecution abandoned two eyewitnesses and later on, the said witnesses appeared before

the Court as defence witnesses and while recording their statements they not only testified the manner of occurrence but also stated that although, they did not know the names of the convicts, however, the people of the locality, present at the spot, had stated that the sons of Muhammad Sadiq (father of the convicts) injured the deceased. For better appreciation the relevant portions of the statement of the said witnesses are reproduced herein-below. The witness, Muhammad Sharif, stated as under:-

"یہ درست ھیکہ ہم نے یہی سنا تھا کہ اختر کو صادق کے لڑکوں نے مارا"

The other defence witness, Muhammad Shabir, while recording his statement deposed that:-

"مظہر کو پتہ نہ ہے کہ اختر کو کس نے مارا تھا۔ وہاں شور پڑا ہوا تھا کہ اختر کو صادق کے لڑکوں نے مار دیا"

After going through the statements of the defence witnesses, it becomes clear that they

almost supported the prosecution version. Thus, in such state of affairs, when the defence himself produced the witnesses abandoned by the prosecution and they supported the prosecution story, it cannot be said that their non-production by the prosecution makes the whole case doubtful.

8. The learned counsel for the convicts argued that the prosecution failed to prove the case against the convicts beyond reasonable doubt; therefore, they are entitled to be acquitted of the charge. The presence of the convicts at the place of occurrence and their participation in the occurrence is proved from the record and the recovery of stick, used in the occurrence, on the pointation of one of the convicts, further strengthens the prosecution story. The PWs fully support the prosecution version and the convicts failed to point out any material contradiction in their statements.

Even from the statements of the defence witnesses the presence of the convicts at the place of occurrence and their participation in the commission of offence is established, hence, the argument of the learned counsel for the convicts is not of worth consideration.

9. Before this Court both the parties had to point out the illegalities in the impugned judgment of the High Court, but they failed to point out any illegality. After examining the record, we have arrived at the conclusion that neither it is a case of vicarious liability nor of acquittal and the learned High Court after properly appreciating the evidence brought on record and relevant law on the subject, has passed a well reasoned judgment; thus, interference by this Court is not required under law.

In the light of forgoing discussion,
both the appeals being devoid of any force are
hereby dismissed.

Mirpur,
30.01.2020

JUDGE

CHIEF JUSTICE

Khalid Mehmood & others v. Nasir Iqbal and others
Yasir Iqbal and others v. Khalid Mehmood &
other

ORDER:-

The judgment has been signed. The same shall
be announced by the Addl. Registrar Branch Registry
Mirpur after notifying the learned counsel for the parties.

Mirpur,
30.01.2020

CHIEF JUSTICE

JUDGE