

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

PRESENT:

MR. JUSTICE KHAWAJA M. NASIM,
MR. JUSTICE RAZA ALI KHAN

CRIMINAL APPEAL NO. 09 OF 2023

(Against the judgment dated
24.11.2022 passed by the
Shariat Appellate Bench of
the High Court, in Crim.
Appeals No. 78 & 79 of 2017)

Afzan Ahmed /so Rehmat Khan caste Jaat r/o Dehra
situated in village Maghloora, Tehsil and District
Bhimber.

...Convict-Appellant

VERSUS

The State through Advocate-General of the State of
Jammu and Kashmir and 06 others.

...Respondents

Appearances:

For the convict/appellant: Mr. Rashid Nadeem
Butt, Advocate.

For the State: Ch. Shakeel Zaman,
Add. Advocate-
General.

For the Complainant/
respondents: Ch. Shoukat Ali
Ishaque, Advocate.

Date of hearing:

19.10.2023

ORDER

Raza Ali Khan, J:- The captioned appeal is the outcome of the judgment of the Shariat Appellate Bench of the High Court (*hereinafter to be referred as High Court*) dated 24.11.2022, whereby, the cross-appeals filed by the convict-appellant and the complainant-respondents have been dismissed.

2. The facts pertinent to the resolution of the aforementioned appeal are that a written application was submitted by Ameer Afzal to the Police Station City Bhimber, on 17.5.2011, against Ahmed Hussain, Afzan Hussain, Rehmat Khan, and two other unknown persons. The complainant, who is a resident of Dehra Maghloora, alleged a dispute concerning over a pathway that transpired between him and the aforementioned accused. These parties had allegedly extended recurrent threats leading up to the incident in question. On the fateful day on 17.5.2011, the complainant's brother, Muhammad Shakeel, was en-route to his shop, located on Maghloora Road Chowk, departing from Dehra Maghloora, at approximately 10:25 a.m., and when he approached a link road, he was accosted by the accused individuals, armed with a Kalashnikov. Ahmed Hussain, in particular, proceeded to discharge the weapon, directing the gunfire towards Muhammad Shakeel, resulting in to grievous injuries at his head, right, and left ribs. Tragically, Muhammad Shakeel succumbed to the injuries and met an untimely demise at the scene. The incident was purportedly witnessed by the complainant, Jamil Afzal and Muhammad Afzal.

3. Consequently, a First Information Report (FIR), bearing number 57/2011, was registered at Bhimber Police Station on 17.5.2011. This report lodged accusations against the accused parties in the offences under sections, 302, 341 and 34 of the Azad Penal Code (APC). Subsequently, the investigative agency completed its investigation and presented the challan under Section 173 of Code of Criminal Procedure, 1898 (Cr.PC), before the trial Court on 4.6.2011. The statements of the accused persons were recorded under Section 265-D Cr.PC, on 15.7.2011, wherein, they pleaded innocence, leading the prosecution to produce evidence in order to substantiate its version. After recording of the prosecution's evidence, the statements of the accused were once again recorded, under Section 342 Cr.PC but they reiterated again innocence and repudiated all allegations, abstaining from providing statements under Section 342(2) Cr.PC. The defense also produced Mirza Zahid Hussain, a Chief Security Officer/Superintendent of Police, as a witness. At the culmination of the trial, the learned trial Court found the accused guilty and sentence them through the impugned judgment dated 24.11.2022, in the following manner: -

"اس طرح ریکارڈ سے یہ واضح ہے کہ ملزمان رحمت، افضان اور احمد حسین کا مشترکہ تنازعہ تشکیل مقتول اور مستغیث پارٹی سے راستہ کا تھا اور اسی وجہ سے انھوں نے مشترکہ نیت سے یہ واقعہ کیا ہے اور ملزمان افضان اور رحمت کی بھی موقع پر موجودگی گواہان امر واقع سے پائی گئی ہے۔ اس طرح ہر دو ملزمان دفعہ APC/34 کے تحت دیگر ملزم احمد حسین کے ساتھ نیت مشترکہ میں شامل پائے جاتے ہیں۔ لہذا ہر دو ملزمان کو احمد حسین کے ساتھ جرم زیر دفعہ APC/302 کے دفعہ APC/34 کو ملا کر پڑھنے سے مشترکہ میں مجرم قرار دیا جاتا ہے مجرم رحمت حسین عمر رسیدہ اور آنکھوں کی نظر سے محروم ہے اور سزا کا مقصد مجرم کی اصلاح مقصد ہوتی ہے مگر درقریب المرگ ہے اس کے ساتھ نرمی کرتے ہوئے مقدمہ ہذا میں مذکور کی مدت حراست کو سزا قرار دیا جاتا ہے۔ جبکہ مجرم افضان نوجوان ہے اور قابل اصلاح ہے اور مقدمہ ہذا میں اصلی مجرم بھی نہ ہے اسے بھی نرمی کرتے ہوئے سات سال قید با مشقت کی سزا دی جاتی ہے مذکور کی بھی مقدمہ ہذا میں مدت حراست سزائے قید میں محسوب ہوگی۔ ہر دو مجرمان نے مقتول تشکیل کاراستہ روکا جس کی گواہان نے تصدیق کی ہے لہذا ہر دو مجرمان کو دفعہ APC/341 کے تحت مجرم قرار دیتے ہوئے اس کی پاداش میں ایک ایک ماہ قید محض کی سزا دی جاتی ہے۔ جملہ سزائیں بیک وقت شروع ہوگی اور 3/382 صرف کے تحت ان کو مدت حراست سزائے قید میں محسوب ہوگی۔ مسل ہذا تادیب سزا ملزم احمد حسین بعد بحمیل ضابطہ داخل دفتر ہو۔ حکم سنایا گیا۔"

4. Dissatisfied with this outcome, convict Afzan Ahmed filed an appeal No. 78/2017, seeking his acquittal. In parallel, a counter-appeal was filed by Safia Bibi and others, aiming to enhance the sentence imposed, before the High Court. In a judgment dated 24.11.2022, the learned High Court dismissed both appeals, thereby leading to the present legal recourse.

5. Mr. Rashid Naseem Butt, the learned counsel representing the convict-appellant presented a series of compelling arguments before this Court. He vehemently contended that material contradictions have been found in the statements recorded by the prosecution witnesses, particularly in relation to the allegations levelled against the convict-appellant. It is asserted that the High Court, inexplicably and in an anomalous fashion, disregarded these significant contradictions, resulting into unjust conviction of the accused. Furthermore, the learned Advocate has made a pertinent submission regarding the recovery of the weapon allegedly used in the offence. The argument posits that the said weapon was retrieved from accused Ahmed Hussain, while no such weapon was recovered from the possession or on the instance of the convict-appellant. Therefore, the notion of "common intention" (*assentio mentium*) is untenable in this context. Nonetheless, the trial Court proceeded to convict the appellant under Section 34 APC, which is a matter of grave concern. He argued that two unknown individuals in the First Information Report (FIR) were nominated, notwithstanding this nomination, the investigating process did not yield any subsequent information or identification pertaining to those individuals. This inherent lack of investigation casts a shadow of doubt over the veracity of the prosecution's version of events,

calling into question the credibility of the prosecution witnesses. The learned Advocate emphasized that these witnesses may be regarded as "interested witnesses," and, as such, a conviction based solely on their statements may be deemed incongruous with the principles of justice and fairness. He contended that Mirza Zahid, the Superintendent of Police, who was intricately involved in the investigating process, has testified as a defense witness. His testimony purportedly serves to undermine the prosecution's version of events. He added that in the light of these circumstances, it is earnestly urged that this case was ripe for an acquittal but the learned High Court, in its judgment, erred in disregarding the exculpatory evidence and proceeded with the conviction of the appellant. In support of his submissions, the learned Advocate placed reliance on the cases reported as *Asia Bibi and others vs. Ghazanfar Ali and others* [2005 SCR 1], *M. Yaqub vs. The State and another* [2007 SCR 332], *Arshad Mahmood vs. Raja M. Asghar and another* [2008 SCR 345], *Waqas Abid and others vs. Sajid Hussain and others* [2020 SCR 520], *Muhammad Jamroze vs. Raja M. Sabir and another* [2016 SCR 1150], *Falak Sher and another vs. The State and another* [2016 SCR 1467], and *Besharat Hussain vs. State and another* [2016 SCR 1176].

6. On one hand, Ch. Shoukat Ali Ashaq, the learned counsel for the complainant-respondents, argued that the judgment of the High Court is in line with law. He contended that three prosecution witnesses witnessed the incident and their testimony supports the prosecution's version. According to him, the convict played a significant role in the murder of an innocent person and should face the beep of death penalty. He also stated that the concept of "common

intention" is proved at the end of the trial, and in this case, all the eye-witnesses have provided strong and convincing evidence to establish the fact of common intention. He added that the convict is specifically nominated in the First Information Report (FIR) with additional accusations, so there's no basis for claiming false implication. Both the Courts below carefully appreciated the evidence and facts and reached the same conclusion in their verdicts. The learned Advocate cited the cases reported cases as *Ali Imran vs. The State* [PLD 2006 SC 87], *Muhammad Tahir Aziz vs. The State and another* [2009 SCR 71] and *Imam Bux vs. The State* [PLD 1983 SC 35] to support his contentions.

7. Ch. Shakeel Zaman, the learned Additional Advocate-General representing the State, supported the arguments advanced by the complainant-respondents' counsel. He stated that a motive for the offence was specifically alleged in the FIR and the same has been proved with solid evidence; both through statements of witnesses and documentary evidence. He emphasized that the convict actively participated in the murder, hence, he does not deserve any leniency.

8. We have heard the learned counsel for the parties and the learned Additional Advocate General at some length and with their assistance, we have attended to the factual and legal issues involved in this appeal as well as the case law available on the subject. We find two points emerging from the arguments of the learned counsel for the appellant, that need to be resolved, which are as follows: -

- I. Whether the learned trial Court as well as the appellate Court was justified to convict the appellant under section 34, APC in the light of evidence available on record?

II. Whether the prosecution succeeded to prove its case beyond the shadow of reasonable doubt against the convict-appellant?

As per contents of FIR, the complainant, who is the resident of Dehra Maghloora, had a dispute over a pathway with the accused. The accused persons had allegedly extended recurrent threats leading up to the incident in question. On 17.5.2011, the complainant's brother, Muhammad Shakeel, was en-route to his shop, located on Maghloora Road Chowk, departing from Dehra Maghloora at about 10:25 a.m., and when he approached a link road, he was accosted by the accused individuals, armed with a Kalashnikov. Ahmed Hussain, the principal accused (now fugitive from law) straight away fired at Muhammad Shakeel, causing grievous injuries at his head, right, and left ribs. The victim, Muhammad Shakeel succumbed to the injuries. The incident was purportedly witnessed by the complainant, Jamil Afzal and Muhammad Afzal. The role attributed to the convict-appellant is that he was present at the spot at the time of occurrence and in furtherance of common intention played an active role, however, in the FIR it is alleged that he was carrying a Kalashnikov, which was not recovered from him. The learned trial Court found the accused guilty, convicted and sentenced seven years' rigorous imprisonment under Section 34 APC, deeming him an accomplice to the principal accused, Ahmed Hussain. An additional sentence of one month simple imprisonment was also imposed for the offence under Section 341 APC. Dissatisfied from the conviction both the parties preferred cross appeals before the High Court, but the same have been dismissed through the impugned judgment.

9. The first point which needs resolution is that whether the learned trial Court as well as the appellate

Court, was justified to convict the appellant under section 34 APC on the basis of evidence brought on record? The learned counsel for the convict-appellant has taken the version that the convict-appellant has been awarded the sentence of 07 years' rigorous imprisonment under section 34 APC, whereas, the common intention of all the accused is not proved from the evidence produced by the prosecution. This crucial point has to be adjudged on the touchstone of available record and if the case does not fulfil the requirements of attraction of section 34 APC, definitely, the sentence could not be awarded.

10. For resolution of the question, whether section 34 APC is applicable to the case in hand or not? we have to go through the relevant statutory provision and analyze the same in light of the facts, the circumstances and the evidence of the instant case. For reference, the said statutory provision is reproduced hereunder for better appreciation: -

“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.”

11. The statutory provision (supra) addresses the acts committed by multiple individuals in furtherance of common intention. This provision establishes a fundamental legal principle in criminal law, which holds that when a criminal act is carried out by several persons, and each person holds a common intention to commit that act, every individual involved is held liable for that act as if they had committed it individually. This principle rests on the concept of joint

liability, meaning thereby that in situations where several individuals collaborate to commit a criminal act, they all are equally responsible for such act. This principle irrespective of the specific roles or levels of participation of each individual, treats each participant as if they alone had committed the entire criminal act, emphasizing equal culpability among all persons involved. To invoke Section 34 APC, there must be clear evidence of common intention. This implies that there must be a shared plan or understanding among the individuals participating in the criminal act. It is not enough for them to simply be present at the scene; but they must have a collective purpose to commit the crime. In legal proceedings, the prosecution bears the responsibility for proving the existence of common intention beyond a reasonable doubt. This may involve presenting evidence demonstrating the shared plan, premeditation, or a mutual understanding amongst the accused individuals. While elaborating section 34 APC, the Supreme Court of Pakistan in its latest judgment titled *Ahtisham Ali vs. The State*¹, has observed as under: -

“In order to constitute an offence under Section 34 PPC, it is not required that a person should necessarily perform any act by his own hand, rather the common intention presupposes prior concert and requires a prearranged plan. If several persons had the common intention of doing a particular criminal act and if, in furtherance of their common intention, all of them joined together and aided or abetted each other in the commission of an act, then one out of them could not actually with his own hand do the act, but if he helps by his presence or by other act in the commission of an act, he would be held to have himself

¹ [2023 SCMR 975]

done that act within the meaning of Section 34 PPC.”

In another case titled *Shoukat Ali vs. The State*², the Supreme Court of Pakistan, has passed an authoritative verdict, wherein, several other pronouncements of the superior Courts have been referred. The relevant portion of the judgment (supra) is reproduced hereunder for better appreciation: -

“We would like to discuss the import and objects of section 34, P.P.C. The main object for the enactment of section 34 is to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. The reason why all are deemed guilty in such cases is, that the presence of accomplices gives encouragement, support, and protection to the person actually committing the act. The nature of the offence committed by an accused depends upon the act done by him and the effect produced by it, and the sole object of this section is to lay down what act will be deemed to be done by the conspirators. This section is not a punitive section and does not enact a rule of evidence but enacts a common law principle of substantive law' 1935 Cr.LJ 1393, 1953 all. 214. "This section embodies the common-sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of anyone of them to allege and perhaps prove that his individual act did not cause death, and that by his individual act he cannot be held to have intended death. Everyone must be taken to have intended the probable and natural results of the combination of acts in which he joined. All are guilty of the principal offence, not of abetment. But a party not

² PLD 2007 SC 93]

cognizant of the intention of his companion to commit murder is not liable, though in his company, to do an unlawful act." In re Basappa (Vol 51 Cr.LJ 1950). "common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. The leading feature of this section is the element of participation in action. It embodies a principle of joint liability in the doing of a criminal act and the essence of that liability is the existence of a common intention." (Sitaram v. State (Vol. 59 1958 Cr.LJ 1380) Pandurang, Tukia and Bhillia v. The State of Hyderabad 1955 SCR 1083. It may not be out of place to mention here that "the section contemplates the case where more persons than one share in the doing of the act and it is necessary to bear in mind the definition of 'act' given in S.33 and also the provisions of Ss.35, 37 and 38. The term 'act' contemplates a series of done by several persons, some perhaps by one of those persons and some by another, but all in pursuance of a common intention. A criminal' act means that unity of criminal behavior which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence" NGA TUN BAW and another v. Emperor 1907 UBR (P.C.) Cr.LJ 205. "The words 'in furtherance of the common intention of all' have introduced, as an essential part of the section the element of a common intention prescribing the condition under which each might be criminally liable when there are several actors. 'Common intention' is an intention to commit the crime actually committed and each accused person can be convicted of that crime, only if he has participated in that common intention. The common intention contemplated by this section is anterior in time to the commission of the crime., and does not refer to the time when the act is committed.

It is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most case it has to be inferred from his act or conduct or other relevant

circumstances of the case. Same or similar intention must not be confused with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if over looked, will result in miscarriage of justice. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. Common intention does not mean similar intention of several persons. To constitute common intention it is necessary that the intention of each one of them be known to the rest of them and shared by them. The common intention ought to be determined from such known facts and circumstances which existed before the commencement of the criminal act as the criminal act itself is committed in furtherance of that common intention." Muklesure Rahman and another v. The King (Vol. 51 1950 Cr.LJ 945)

It must be proved that criminal act was done by various persons.

(b) The completion of criminal act must be in furtherance of common intention as they all intended to do so.

(c) There must be a pre-arranged plan and criminal act should have been done in concert pursuant whereof.

(d) Existence of strong circumstances (for which no yardstick can be fixed and each case will have to be discussed on its own merits) to show common intention.

(e) The real and substantial distinction in between 'common intention' and 'similar intention' be kept in view."

12. Section 34 APC has four main ingredients which are as follows: -

- i. A criminal act is done,
- ii. By several persons,
- iii. In furtherance of common intention of all,
- iv. Each of such person is liable for that act in the same manner as if it were done by him alone.

The first ingredient of the statutory provision is that act must be a criminal act under law. The second ingredient of section 34 APC is that the act is done by

several persons which means that act is to be done by more than one person. The third ingredient “*in furtherance of the common intention of all*’ is introduced as an essential part of section 34 APC, the element of common intention prescribing conditions under which each person might be criminally liable when there are several actors. For bringing the offence in the ambit of section 34 APC, it is necessary that the act done by several persons is proved in furtherance of common intention of all the persons involved. The Supreme Court of Pakistan while dealing with this ingredient of the statutory provision, has also authoritatively passed a judgment titled *Akhtar Khan and others vs. State*³ wherein, several other pronouncements have been discussed. The relevant portion of the same is reproduced hereunder for better appreciation: -

“17. The scope and implication of section 34, P. P. C. were also considered in case *Metho v. State* (PLD 1963 Kar. 1). It was held by their Lordships of the Division Bench that a bare reading of section 34 of the Penal Code, 1860, made it clear that it was the furtherance of the common intention and not the common intention of all the persons that made each of them liable. Where, therefore, the common intention of M and A was to commit robbery but in the course of committing that criminal act, murder was committed by M, it was held that although the common intention of both M and A was to commit robbery the murder committed by M was in furtherance of common intention of committing robbery and, therefore, A along with M was equally liable for the murder committed by M.

18. In *Nazir and others v. Emperor* (49 Cr. L J 271) an Allahabad case learned Judges of the D. B. Made some important observations which have a direct bearing on the case before us. In that case, the common intention of the accused was to abduct a woman and beat her husband with tabal and

³ [PLD 1972 SC 19]

lathi so as to disable him from successfully obstructing the intended abduction, and the beating resulted in the death of the husband. After discussing considerable case-law and particularly the conflict of the views on the point it was held that the use of tabal and lathis as weapons of attack should impute the knowledge of the likelihood of the causing of injuries which may be simple, grievous or such as be sufficient in the ordinary course of nature to cause death. As the common intention of the accused extended to give a good beating to the husband without any clear conception of the precise nature of the injuries which would be caused, all the accused persons were liable for the offence under section 302, P. P. C. In view of the provisions of section 34, P. P. C. And it was not necessary that the common intention must have been to cause death or such other intention as is mentioned in section 300, P. P. C. Regarding the existence of common intention, relying on A I R 1945 P C 118, it was held that the common intention ought to be determined from such known facts and circumstances which existed before the commencement of the criminal act as the criminal act itself is committed in furtherance of that common intention. Precise observations of their Lordships of Privy Council relied upon in this Allahabad case read as follows:--

"Section 34 lays down a principle of joint liability in the doing of a criminal Act. The section does not say 'the common intention of all' nor does it say" an intention common to all. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all. If this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the

section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."

Yet another observation made by their Lordships of the Privy Council in 52 Cal. 197 and relied upon- in the Allahabad Judgment may be advantageously reproduced :-

"Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in part I, because they refer to it.

As observation quoted in the Allahabad case of "Nazir and others" from (14 Lah. 814) is also relevant and may be reproduced with advantage:

"In the present instance, the common intention of the culprits was obviously to commit robbery and in furtherance of that intention different acts were committed by different persons. Sardara Singh had gone to fetch Kishan Singh for carrying out that common intention while Indar Singh shot down Kehr Singh in furtherance of the same. The decision to shoot Kehr Singh was taken by Indar Singh alone but there can be no doubt that it was taken in furtherance of the common intention. The object of Indar Singh apparently was to strike terror and disarm all opposition and in this he succeeded; for there was no attempt to offer any effective resistance to the robbers thereafter."

19. For the contrary view wherein a restricted interpretation was placed on section 34, P. P. C. By learned Judges of the Allahabad D. B. Reference was made to A I R 1935 Lab. 97 ; 50 I C 337, 19 Madras 483 and 8 Rang. 603 (F. B.). In the first of these cases which is a Lahore authority, was held by their Lordships :-

"In order to make a person constructively liable for murder under section 34, Penal Code, it must be proved that he had the intention of committing murder in common with the person or persons who actually committed it and who were his companions in the joint criminal act or enterprise."

In 50 I C 337, it was observed:-

"It is obvious that the mere fact a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under section 34, the former by itself is irrelevant to the section. It is only when a Court can with some judicial certitude hold that a particular accused must have pre-conceived or premediated the result which ensued, or acted in concert with others in order to bring about that result, that section 34 may be applied."

In the Rangoon case (Full Bench), the relevant observation reflecting the majority view was as follows :-

"The common intention referred to in section 34, 1. P. C. Is an intention to commit the crime actually committed and each accused person can be convicted of that crime only if he has participated in that common intention."

Reference was made to yet another

Full Bench authority of 13 Rang. 210. The question for determination before their Lordships was as follows

"When less than five people go out armed to commit robbery without any pre-arranged intention to commit murder, but in the course of the robbery one of the robbers liable to be convicted under section 302, read with section 34, 1, P. C. When there is no evidence to show that they committed any further act which would render them directly liable as abettors?"

It appears that no direct answer to the above question was given, Page C. J. And Mya Bu, J. However approved the following observations made in A I R 1924 Cal. 257 : --

"A common intention to carry out an unlawful design at all costs, even at the cost of overcoming resistance, or evading capture by taking life, is sufficient. Without mincing matters the presumption of a common

intention to add murder, if necessary, to robbery, is not easily avoided, when all, or some to the knowledge of the rest, of those engaged in the enterprise are proved to have carried fire-arms, and fire-arms have been used with fatal effect."

In I L R 14 Luck. 328 the view taken was that the common intention referred to in section 34 was an intention to commit the crime, which was actually committed. For this view reliance was placed on A I R 1935 Rang. 299 and I L R 8 Rang. 603. Reference was also made in this regard to the observations of Mahmood, J. In 1887 A W N 236 reproduced in the later part of this judgment.

21. Having considered the arguments for and against in the conflict of views referred to earlier their Lordships of the Allahabad High Court in the case 49 Cr. L J 271 subscribed to the first view and observed as follows :-

"We have to see what was the common intention before a person has commenced the criminal Act. It may be that to determine such a common intention we may not have the direct evidence of what passed between them before the commencement of the transaction and have to conclude that intention from their conduct. If so the conduct of all such persons has to be looked into. If the intention of the actual doer of the fatal act is to be determined from his conduct alone, the intention of the others will normally be gathered from their respective conduct and as they did not do the fatal act, their intentions will not ordinarily be determined to be the same as the intention of the actual doer of the fatal act. We have to determine the original common intention and then to see whether the actual doer of the fatal act acted in furtherance of that intention or acted quite suddenly and beyond the common intention. We have not to see the intention behind the commission of the fatal act only which alone is not the criminal act in view of what their Lordships of the Privy Council held in 52 Cal. 197 and surely the fatal act alone is not equivalent to the offence whose ingredients include the physical act, its consequence

and the intention or knowledge with which the physical act was performed. In our opinion, section 34 refers to a physical act only. Of course the physical act contemplated should be criminal, that is, should be what is considered a crime, which is not defined in the Code and should mean a thing which ought not to be done and which affects the State in addition to the individual against whom the act is done."

22. In 47 Cr. L J 1006, it was observed by a Division Bench of the Sind Chief Court as follows:--

"It is only when it is a fair inference from the evidence that a particular accused must have intended the result which ensued, and acted in concert with others in bringing about the result, that the section may properly be applied. Where it is clear that the common intention of the party of the accused was not to cause the death of the deceased or even to cause grievous hurt to him and that the common intention did not extend further than causing hurt to the men of the complainant's party, the accused ought to be convicted under section 323, read with section 34 and not under section 304(1) read with section 34."

13. The applicability of section 34 APC as any other provision depends upon the facts and circumstances of each case. No hard and fast rule can be laid down as to the applicability or non-applicability of section 34 APC. For attraction of the section 34 APC, it is not necessary that the acts of several persons charged with the commission of an offence jointly must be the same or identically similar. The acts may be different in character but must have been actuated by one and the same common intention in order to attract the provision, however, where an offence is found neither pre-planned nor premeditated, section 34 APC is not attracted. Before holding a person liable under section 34 APC for the act of another, the following has to be proved: -

- i. that there was a common intention or a pre-arranged plan between the two or more accused,
- ii. that the person had participated in some manner in the act constituting an offence, and;
- iii. that there was a criminal act done. Unless common intention and participation are both found present, section 34 APC cannot be made applicable.

14. Accordingly, in order to bring home the charge of common intention, the prosecution has to establish by evidence that there was plan or meeting of minds of all the accused persons to commit the offence. It may be pointed out that the intention to commit the crime can be gathered from the circumstances which may prevail at the spur of moment in re-action to the happening of some incident and except in a premeditated occurrence, it is difficult to procure direct evidence to prove intention of a person for committing crime rather the intention has to be inferred from his act and the conduct. The common intention within the meaning of section 34, APC can be proved through direct or circumstantial evidence or may also depend upon the nature of an act done or motive possessed and a joint action of more than one person itself, except where pre-meditation or pre-planning is already evident.

15. Heading towards the merits of the instant case, it has to be analyzed; whether in the light of above detailed discussion and the pronouncements referred to hereinabove, section 34 APC is applicable to the case in hand or not? The perusal of the statements of the witnesses reveal that almost all the eye-witnesses deposed the same story as narrated in the FIR and tried to establish the case on the ground that the convict-appellant was found to be present at the spot where the offence was committed and he waylaid the victim, in

furtherance of which, the principal accused shot him to death with a Kalashnikov. However, as to whether the incident was premeditated or done with a common intention, the statements of two witnesses i.e. Rtd. Subedar Muhammad Shafi s/o Fateh Ali Khan and Muhammad Razzaq (Rtd. Captain), s/o Muhammad Mahi, are very important. It is very amazing that soon after the occurrence of incident their statements under section 161, Cr.PC were recorded, however, they did not utter a single word regarding the role of convict-appellant and the pre-planning of the accused. Muhammad Shafi (pw) in his statement recorded in the Court also neither deposed a single word regarding the convict-appellant, Afzan Ahmed, nor he stated that prior the incident, any meeting of the accused was convened or act was pre-planned. Rather he emphasized on the previous enmity of the convicts with the victim and the complainant-respondents. For better appreciation, the relevant portion of his statement is reproduced hereunder: -

"اس کے علاوہ مورخہ 11.05.11 کو مظہر مسجد سے نماز پڑھ کر باہر نکلا تو پیچھے سے رحمت خان اور باغ علی جو کہ مظہر کا حقیقی تایا زاد بھائی ہے اس نے مظہر کو بلایا کہ اس کی بات سنیں اور اپنے گھر جانے کے لئے مظہر کو کہا مظہر نے اس کے گھر جانے سے انکار کیا تو رحمت خان مظہر کے ساتھ مظہر کے گھر چلا گیا مظہر نے اس سے آنے کی وجہ پوچھی تو اس نے کہا کہ آپ کو جو بیٹھے ہیں جن کے نام امیر افضل، شکیل، محمد افضل اور جمیل اس کو زمین سے گزرنے کا راستہ نہیں دیتے مظہر ان سے بات کرے اور راستہ لے کر دے ایسا نہ ہو کہ کوئی آدمی نقصان ہو جائے مظہر نے اس کو کہا کہ وہ پوری کوشش کرے گا تا کہ آپ کو وہ راستہ دے دیں۔ مظہر نے رحمت کو کہا کہ زمین آپ نے ہی لے کر دی ہے راستہ کا آپ کو پہلے علم ہونا چاہئے تھا بعد میں مظہر مسجد میں نماز پڑھنے کے بعد جاتا رہا مگر رحمت نے اس بارے میں کوئی بات نہ کی اس طرح مورخہ 13.05.201 کا واقعہ ہے کہ مظہر کسی کام کے سلسلے میں جا رہا تھا جو نہی مظہر جائے وقوعہ پر کیکر کے قریب سے گزرا تو احمد حسین ملزم کیکر کے نیچے بیٹھا ہوا تھا اور مظہر کو دیکھ کر اس نے ٹیلی فون کرنا شروع کر دیا۔"

16. The portion of the statement (supra) reveals that between the parties, there had been an enmity regarding the dispute over a pathway, since long in relation to which there had been a conversation between Muhammad Shafi (pw) and the accused Rahmat Khan. Muhammad Shafi (pw) in his cross-examination further deposed that:-

"مظہر نے دو دفعہ پولیس کو بیان دیا تھا ایک مضبوط اشیاء کی نسبت بیان ہوا تھا جو 17.05.2011 کو ہوا تھا اور دوسرا بیان 01.06.2011 کو ہوا تھا۔ SHO منیر نے مظہر سے 1.06.11 کو بیان لیا تھا۔ بیان تھا نہ پر قلمبند ہوا تھا۔ تین پارسل پولیس نے موقع پر بنائے تھے اور ایک پارسل جو کپڑوں کا تھا وہ ہسپتال میں بیان دیا تھا جب مظہر دوبارہ ہسپتال آیا تو پوسٹ مارٹم شروع نہ ہوا تھا چونکہ بجلی نہ تھی مظہر نے 1.06.11 کو جو بیان دیا تھا اس پر مظہر نے دستخط کئے تھے۔ 01.6.11 والے بیان پر پولیس آفیسر نے بھی دستخط کئے تھے۔ پولیس نے مظہر سے نہ پوچھا تھا اس لئے مظہر نے 01.06.2011 کے بیان سے پہلے پولیس کو کچھ نہ بتایا تھا پولیس نے مظہر سے جب پوچھا کہ اس عداوت کے بارے میں کوئی بات ہے تو بتائیں جس پر مظہر نے احمد حسین کا لیکر والی جگہ یعنی جائے وقوعہ پر ملزم کا کلاشنکوف لے کر بیٹھنا بیان کیا تھا۔"

17. Here, it is pertinent to mention that this witness (supra) has not stated anything about the convict-appellant in his entire statement, even when the Police asked him regarding the enmity between the parties, he specifically alleged that he saw Ahmed Hussain, sitting near the *Kikar*, (place of occurrence), who was carrying a Kalashnikov. It is also to be noted that in the entire statement, even while deposing regarding the previous longstanding enmity between the parties, he didn't disclose the name of the convict-appellant which is evidence of the fact that, had the convict-appellant been in the scenario, the p.w would have definitely mentioned his name or alleged something what he has specifically alleged for Ahmed Hussain. Likewise, Muhammad Razzaq (rtd.), (pw) also deposed nothing about the convict-appellant. He stated in his statement that: -

"وقوعہ سے تقریباً ایک سال قبل صبح سویرے چھ ساڑھے چھ بجے رحمت ملزم اور چوہدری فاضل کا بیٹا میرے گھر آئے چوہدری فاضل کے بیٹے نے مظہر سے کہا کہ اس کے والد نے صبح مظہر کو اپنے ڈیرے پر بلایا ہے مظہر نے دریافت کیا کہ کیوں بلایا ہے رحمت نے کہا کہ میں بتاتا ہوں میں اس لیے ساتھ آیا ہوں رحمت نے کہا کہ میں نے آپ کے بھانجوں تشکیل وغیرہ کو زمین لے کر دی ہے اس کے بیچے میری زمین ہے وہ مجھے راستہ نہیں دے رہے مظہر نے کہا کہ میں کوشش کروں گا کہ راستہ لے کر دوں دوسرے دن مظہر گھر سے چھ بجے نکلا کہ بھانجوں کو لے کر سات بجے چوہدری فاضل کے ڈیرے پر جاؤں جب مظہر اس جگہ پہنچا جہاں پر راستہ کا تنازعہ تھا وہاں پر مظہر کے تینوں بھانجے میرا فضل، شکیل اور جمیل اور ماموں خادم حسین موجود تھے مظہر نے پوچھا کہ آپ ادھر کیا کر رہے ہیں مظہر ان کے پاس جا رہا تھا تشکیل نے مظہر کو بتایا کہ کل رحمت ملزم کا بیٹا احمد حسین ملزم کلاشنکوف لے کر آیا تھا اور ہمیں ٹیلی فون کیا تھا کہ میں راستہ نکالنے لگا ہوں آکر روک لیں۔ تشکیل کی امی نے چوہدری فاضل سے ٹیلی فون پر بات کی کہ آپ کا بھانجا احمد کلاشنکوف لے کر اس جگہ پر آیا ہوا ہے اور اس کے بیٹوں کو ٹیلی فون کیا ہے کہ آکر راستہ روک لیں چوہدری فاضل نے تشکیل کی والدہ کو کہا کہ میں ابھی آکر ان کا علاج کرتا ہوں اور وہ خود آیا اور احمد حسین کو ساتھ لے گیا تشکیل نے مظہر کو کہا کہ اگر انہوں نے راستہ کلاشنکوف سے لینا ہے تو پھر مظہر نے کیا بات کرنی ہے"

18. In the whole story, neither the convict-appellant appears to have been specifically alleged to be involved in the commission of the offence nor he was shown to be present anywhere in the scene of conflict. We have also perused all the statements of witnesses but have found nothing in this regard that there was any pre-planning for the murder of the victim, specifically to the extent of the convict-appellant. A doubt emerges here that there might have been an independent intention of the principal accused (Ahmed Hussain) to kill the victim, who had been seen several times carrying Kalashnikov and had been seen armed at different times and who has allegedly shot the victim to death.. The only allegation levelled against the convict-appellant is that he was spotted by the eye-witness at the place of occurrence carrying a Kalashnikov in his hand, but no such recovery has been made from him to prove the same. The learned trial Court after analyzing the statements of these two prosecution witnesses observed in the manner indicated below: -

"ہر دو گواہان مذکوران محمد شفیق اور محمد رزاق دونوں پارٹیوں کے قریبی رشتہ دار ہیں اور واسطہ دار ہیں تو دونوں کے واسطہ دار ہیں جن کے بیانات سے ملزمان پارٹی کی منصوبہ بندی عداوت اور تنازعہ کی مستغیث پارٹی سے تصدیق ہوئی ہے۔
اس طرح ریکارڈ سے یہ واضح ہے کہ ملزمان رحمت، افضان اور احمد حسین کا مشترکہ تازہ تشکیل مقتول اور مستغیث پارٹی سے راستہ کا تھا اور اسی وجہ سے انہوں نے مشترکہ نیت سے یہ واقعہ کیا ہے۔"

19. The trial Court after discussing the statements of these two witnesses, has observed that all the three accused, with 'common intention', had committed the offence, whereas, it is amazing as discussed earlier that from the perusal of the statements of these two witness, we have found nothing that could prove pre-meditation or any pre-planning. When a person is to be convicted under under section 34 APC, it must, be satisfactorily proven by the prosecution that the person so convicted had common

intention of doing that particular act alongwith other accused persons. 'Common intention' should not be misunderstood with 'common object' under section 149 APC. Both are not in any way synonymous. Under section 149 APC a person who is a member of an Unlawful assembly is guilty of the offence committed by another member of an unlawful assembly, although he had no intention to do it, because it is done in the prosecution of the common object of the assembly of which they are members of. The dividing line between two is very thin, yet is very material and substantial. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his action or conduct or other relevant circumstances of the case. The Courts should always keep in mind the principles of criminal jurisprudence and administration of justice when dealing with such cases, the evidence should always be analyzed parallelly and side-by-side in order to join the series of chain which leads to offence being committed by the offender without any reasonable doubt. In the case in hand, no pre-planning or premeditation is proved from the record, thus, the learned trial Court erroneously applied section 34 APC in the instant case.

20. The most vital question in a criminal case is always as to whether the prosecution succeeded to prove the case beyond the shadow of reasonable doubt against the accused? We have already observed in the preceding paragraphs that at-least to the extent of convict-appellant no pre-planning or premeditation is proved from the record. It is also evident from the entire record that the convict-appellant was not mentioned anywhere while deposing about previous enmity and the

same was alleged only between the accused persons and the deceased. The only allegation to the extent of convict-appellant is his presence at the place of occurrence carrying a Kalashnikov which is not proven as no recovery was affected from him which again reminds us of the principle of reasonable doubt. In these circumstances, it was enjoined upon the learned trial Court to extend benefit of doubt in favour of the convict-appellant. It is already settled by the Courts time and again that for the purpose of giving benefit of doubt to an accused, more than one infirmity is not required, rather, a single infirmity creating reasonable doubt in the mind of a prudent person regarding the truth of the charge, makes the whole case doubtful. The rule of giving benefit of doubt to an accused person is essentially a rule of caution and prudence, and is deep rooted in our jurisprudence for the safe administration of criminal justice.

Reliance in this regard may be placed on the case reported as *Ghulam Rasool Shah vs. State & others*⁴, wherein, it has been observed as under: -

“... while under law, it was the bounded duty and moral obligation of the prosecution to prove its case beyond any doubt. The prosecution has to stand on its own legs and every benefit of doubt will go to the accused. It is well settled principle of law that surmises and conjectures cannot take the place of proof.”

21. In the instant case, the prosecution has not sufficiently proved its case against the convict-appellant beyond reasonable doubt, unequivocally favouring the convict-appellant. Under celebrated principle of administration of criminal justice, any doubt arising out in the prosecution story must go in

⁴ [2009 SCR 390]

favour of the accused. This view is fortified from the reported judgment of this Court titled *Tasawar Husain vs. The State & others*⁵, wherein, it has been held as under: -

“According to the universally settled and accepted principle of law of criminal administration of justice, benefit of doubt always goes to the accused.”

In another judgment of this Court reported as *Abid Hanif vs. Muhammad Afzal & 4 others*⁶, on the question of slightest doubt it has been held as under:

“From the perusal of hereinabove reproduced portion, it appears that the doctor negates the version of the prosecution which creates a doubt and it is settled principle of law that even a slightest doubt must go in favour of the accused. In this scenario when the ocular account is disbelieved by the trial Court being contradictory in nature, the other evidence which are only corroborative in nature cannot be given any weight and no preference can be given over the ocular account.

22. The rule which forms the backbone of criminal jurisprudence is that the guilt of the accused, in order to justify conviction, must be proved beyond the shadow of reasonable doubt. When contradictions are found in a criminal case, the story must be broken down into elements; more precisely; criminal elements and each element must be proved beyond reasonable doubt by the prosecution in order to form an unbroken chain which connects the accused with the guilt. The burden of proof always lies on the prosecution to prove the guilt of the accused which is a settled principle of law and requires no debate. In the case in hand, the learned High Court overlooked the above discussed

⁵ [2016 SCR 373]

⁶ [2014 SCR 983]

golden rules of criminal jurisprudence which led to the impugned judgment. Finding of guilt against an accused cannot be based merely on high probabilities that may be inferred, but solely and firmly on the deep perusal of each and every aspect of the case. Rule of benefit of doubt occupies a pivotal position in the Islamic law and is enforced rigorously, so where the prosecution fails to prove the case beyond reasonable doubt, benefit of doubt no matter how slight it may be, must go in favour of the accused.

25. In the light of above, while accepting this appeal, setting aside the judgment of the trial Court as well as the High Court to the extent of accused-appellant, herein, he is acquitted of the charges while extending him the benefit of doubt. He shall be released forthwith if not required in any other case.

JUDGE

JUDGE

Muzaffarabad.
03.11.2023.
Approved for reporting.