

JUDGMENT SHEET
IN THE HIGH COURT OF BALOCHISTAN, CIRCUIT BENCH
SIBI

Criminal Appeal No. (s) 11 of 2023
(CC# 100207600054)

Jam Shair
Versus
The State

JUDGMENT

Date of hearing: 22 March, 2023. Announced on 4th April, 2023.

Appellant: by Mr. Miraj Muhammad Marghzani, Advocate .

Respondent: by Mr. Jamil Akhtar Gajani, Additional Prosecutor General .

GUL HASSAN TAREEN J: - At a trial, held by the Court of Additional Sessions Judge, Dera Allah Yar ('Trial Court'), in case F.I.R. No. 266 dated 12 October, 2008 registered under section 302 (c) read with section 34, the Pakistan Penal Code, 1860 ('P.P.C.'), at Police Station Dera Allah Yar, the appellant was found guilty. He was convicted under section 302 (b) read with section 34, P.P.C and sentenced to suffer life imprisonment as *Ta'zir* for the murder of Ghulam Murtaza with Rs. 5,00,000/- as compensation to be paid to the legal heirs of the deceased or in default to pay, to further undergo six months (S.I.). Benefit of section 382-B, Criminal Procedure Code, 1898 ('Cr.P.C') was also extended.

2. As per fard-e-bayan (Ex: P/1-A), on 12 October, 2008 at 05:15 p.m., the complainant alongwith his son Ghulam Murtaza and nephew Rehmatullah were present at his house, when Abdul Aziz and Barkat Ali came, whom are their relatives and told his son Ghulam

Murtaza that his guest is standing outside who is calling him. His son went outside alongwith the said two. He heard noise. He alongwith his nephew rushed outsides, the accused Jam Shair was standing in the street armed with Kalashnikov. He aimed Kalashnikov at them and threatened not to move forward, otherwise, they will be killed whereas Abdul Aziz and Barkat Ali whom were armed with T.T. pistols holding caught Ghulam Murtaza. Meanwhile, Abdul Aziz made fire shot of T.T. pistol at Ghulam Murtaza. The bullet landed at the head of Ghulam Murtaza. He fell on the ground. Abdul Aziz shouted that he has declared Ghulam Murtaza as *Siakar* and then decamped towards west. They being empty handed could not exhibit any resistance. His son succumbed to the injuries at the spot.

3. On the fared-e-bayan, a formal F.I.R. was registered and investigation of the case was entrusted to Abdul Rasheed, who visited the scene of incident; recorded statements of eye witnesses; secured the blood stained earth and a crime empty shell of T.T. pistol from the venue and dispatched the dead body to the hospital. He took into possession the last worn clothes of deceased, obtained inquest report and serologist report. Due to absconsion of the accused, he prepared an incomplete challan under section 512, Cr.P.C and sent it to the Court. On 19 July, 2022, investigation of the case was entrusted to Khuda Bakhsh S.I. On 20 July, 2022, he arrested accused and recorded his disclosure and statements of witnesses of the disclosure memo. Having found the accused guilty, he prepared crime report under section 173, Cr.P.C and sent it to the Court.

4. On 29 September, 2022, the Trial Court framed a formal charge to which accused pleaded 'not guilty' and claimed trial. In order to prove guilt of the accused, the prosecution examined following evidence:

pw-1: Muhammad Umar, complainant. He was also an eye witness and produced fard-e-bayan as Ex: P/1-A;

pw-2: Rehmatullah, the eye witness. He deposed an eye account of the incident and tendered in evidence the site inspection memo, recovery memos of blood stained earth and one crime empty shell as Ex: P/2-A, Ex: P/2-B and Ex: P/2-C respectively;

pw-3: Saif-ur-Rehman A.S.I. He tendered in evidence the disclosure memo of accused as Ex: P/3-A;

pw-4: Dr. Muhammad Din Jakhrani, Medical Officer D.H.Q Hospital Dera Allah Yar. He had examined the corpus of the deceased & produced M.L.C. as Ex: P/4-A;

pw-5: Abdul Rasheed D.S.P. The I.O. He tendered in evidence, the FIR (Ex: P/5-A), inquest form (Ex: P/5-B), site map (Ex: P/5-C), recovery memo of clothes of deceased (Ex: P/5-D), challan (Ex: P/5-E), supplementary challan (Ex: P/5-F) and F.S.L. report (Ex: P/5-G); and

pw-6: Khuda Bakhsh (S.I.). He produced challan as Ex: P/6-A.

On completion of prosecution side, the Trial Court examined the accused under section 342, Cr.P.C wherein, the accused did not opt to make statement on oath nor opt to lead evidence in defence. On conclusion of Trial, the Trial Court found the accused guilty and, therefore, convicted and sentenced in the aforementioned terms.

5. Mr. Miraj Muhammad Marghzani Advocate, appearing on behalf of the appellant, states that role of firing was attributed to the principal accused Abdul Aziz, who is an absconder, whereas appellant was shown standing at the site holding a Kalashnikov. He states that only one empty shell of T.T. pistol was secured from the venue which has proved that the appellant has not committed the offence. He states that no recovery was effected from the appellant and the prosecution failed that he had shared intention with the principal accused. Finally, he states that the Trial Court should have extended benefit of doubt to the appellant.

6. Mr. Jameel Akhtar Gajani, Additional Prosecutor General supported the impugned judgment.

7. We have heard both sides at length and gone through the record.

8. The appellant, though, has not committed by his overt act the murder of the deceased, but the Trial Court sentenced him on the doctrine of vicarious liability as described by section 34, P.P.C, which reads as under:

‘When a criminal act is done by several persons, in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone’

The Trial Court has held that the appellant shared common intention with the principal accused for commission of the act of the murder of the deceased Ghulam Murtaza. Appellant’s counsel contention that the principal accused, to whom act of murder was attributed, is an absconder, whereas the appellant was attributed

mere role of presence at the scene of occurrence, as such Trial Court committed illegality, is not correct. It is true that mere presence of a person with principal accused at the scene of occurrence would not make him liable for the acts of principal accused but when his presence is not that of a spectator rather is coupled by some overt act which facilitates a principal accused to commit an offence, then it would be safe to fix joint liability on such person as well.

9. Common intention is not a physical/external fact like any other fact which may be perceived by any of five senses. Common intention is a state of mind which is a psychological fact. Article 2 (d), the Qanoon-e-Shahadat Order-X, 1984 ('Q.S.O') defines the term 'fact' as under:

(d) "fact" fact includes,

(i)

(ii) any mental condition of which any person is conscious.

In normal circumstances a physical fact may be proved by the evidence of a witness, however, psychological fact is a state of mind such as intention, knowledge, good faith etc. which cannot be proved by an evidence of a witness. Common intention is state of mind which may be proved in a case keeping in view the overall circumstances of a case. Therefore, any fact, showing the existence of any state of mind towards any particular person is a relevant fact when the existence of any such state of mind is in issue under Article 27, the Q.S.O

10. In the instant case whether appellant shared his intention with the principal accused for commission of the murder of the

deceased, the same can be gathered from the evidence of complainant and the eye witness of the incident. The complainant appeared as PW-1 and states that after hearing the noise, he alongwith his nephew (PW-2) came out of his house. The appellant was standing in front of the door of his house holding a Kalashnikov in his hands and threatened that in case they walked forward they would be murdered. At then, accused Barkat Ali and Abdul Aziz had caught holding his son and later Abdul Aziz fired at his son. The PW-2 also deposed in line with the PW-1. Both in straight forward and confidence inspiring manner proved that appellant was member of the conspiracy designed by the principal accused. Therefore, he shared common intention with the principal accused for commission of the said offence. The principal accused and the appellant are real brothers; therefore, such blood relation between them has confirmed that the appellant not only shared his intention for commission of the said offence rather committed overt act by standing upon the door of the house of the complainant with a lethal weapon. The appellant was not merely present at the site of occurrence rather threatened complainant and PW-2 for dire consequences from moving forward by show of criminal force and by aiming his fire arm at the complainant and the eye witnesses, as such, he facilitated his two brothers for commission of the alleged offence. They in furtherance of their common intention committed the murder of the deceased. In a case reported as The State v. Azhar Hussain and another, (1987 P.Cr.L.J 2532), it has been held as under:

“34. I have also given my anxious consideration to examine whether section 34, P.P.C. is applicable to Qamar-uz-Zaman accused in respect of the murder of Ata Muhammad deceased. The common intention is to be inferred from the facts and circumstances of each case. Qamar-uz-Zaman and Azhar Hussain accused were real brothers. They had come to the spot while armed with rifle and dagger. After the firing by Azhar Hussain, Qamar-uz-Zaman accused lifted 'the gun from the spot and had pointed the same towards the eye-witnesses, while Azhar Hussain accused had proclaimed that nobody should move from his place. These circumstances coupled with the subsequent conduct of Qamar-uz-Zaman accused leads to the irresistible conclusion that he was also sharing the intention of Azhar Hussain and the murder has been committed in furtherance of the common intention of both of them.

11. The evidence on record shows that appellant alongwith his brothers came at the scene of occurrence and that the act of firing by principal accused at the deceased was in furtherance of common intention shared by absconding accused and the appellant. He was, therefore, rightly held vicariously liable for the murder of Ghulam Murtaza (deceased); therefore, his conviction under section 302, 34 P.P.C is thus not open to any exception because common intention is equal to common liability.

12. For application of section 34, P.P.C it would make no difference whether the co-accused of principal accused has also performed an actual act of commission of offence rather his presence with overt acts is sufficient evidence for proof of common intention. The Supreme Court of Pakistan in the case reported as Hayat v. The State, PLD 1957 SC (Pak.) 207, has held as under:

‘On the finding that the assailants were actuated by a common intention to kill any one out of the complainants who came in their way, the application of section 34 to make them all liable for murder presents no difficulty. It is, however, contended on behalf of the appellant that he took no part in the assault on the deceased and that the common object of the assailants being to regain possession of the bough it could not be held that he shared the common intention of the other two persons who killed Natu. We are unable to accept this contention because the evidence shows that after their demand for the return of the bough was refused they armed themselves with lethal weapons like spears and sticks, went in a body to the behk of Jalloo, shouted that they had come to see how Naurang could retain possession of the bough, without making any attempt to remove the bough surrounded the three brothers, attacked all three of them when they were attempting to flee killing one of them on the spot and injuring the other two and then lifting the bough marched back triumphantly to their dera. These facts conclusively prove that the assailants' intention was to kill and then to take away the disputed bough. Section 34 was, therefore, clearly applicable to their case and though the appellant himself took no part in the assault on Natu deceased, the killing must be held to be in furtherance of the common intention of those who actually killed him and of the appellant. On this finding there is no ground for our interference and we dismiss the appeal.’

13. The complainant as well as eye witness proved the presence of the appellant at the scene of occurrence accompanied by his overt acts in relation to commission of the said offence. Nothing is available on record to show that complainant and the PW-2 have any motive to falsely rope the appellant in the murder of his deceased son. Substitution of real culprit for innocent is a real phenomenon. The prosecution fully discharged the burden of proof and mere relationship

with the deceased by itself does not affect credibility of above mentioned eye witnesses. The Supreme Court of Pakistan in the case reported as Muhammad Arshad and others v. The State, (1998 SCMR 2146) has held as under:

‘....Mere fact of relationship by itself does not affect credibility of abovementioned eye-witnesses. Their statement are independently supported by medical evidence showing fire-arm injuries on the bodies of deceased.....’

‘18. While parting, it may be observed that ocular evidence which has been believed by the Courts below, clearly suggests that were duly armed and in furtherance of their common intention had attacked complainant party. Apparently each of the accused became vicariously liable for the Acts or commission of others. It is normally not possible, to strictly prove common intention of concerned persons, but same can be conveniently gathered from set of circumstances brought forth in every case. This view finds support from observations in Khadim Hussain v. Javed Sarwar - PLD 1996 SC 122 (at 128 -paragraphs 11 and 12). In the instant case High Court while passing the impugned judgment has fallen in serious error by ignoring this aspect and relevant principle of law. Since State has not filed appeal, and on the above reasoning; conclusions are not materially affected, therefore, observations in this behalf are merely to state correct legal position.’

14. After discharge of burden of proof by the prosecution, the burden shifted upon the appellant to lead evidence in rebuttal. The appellant did not depose on oath under section 340(2), Cr.P.C regarding non-sharing of his intention for commission of the said offence and failed to discharge burden of proof; therefore, the learned Trial Court has rightly placed reliance upon section 34, P.P.C and made vicariously liable the appellant for the murder of deceased.

15. The incident occurred on 12 October, 2008 and the appellant was arrested on 20 July, 2022. After the incident, he absconded. His absconsion was also a relevant fact, however, the Trial Court has not asked circumstance of his absconsion in his statement under section 342 Cr.P.C, therefore, it is not discussed in this judgment.

What has been discussed above, we are not inclined to interfere with the impugned judgment. As such, instant criminal appeal fails and is dismissed.

Announced in open Court.
Dated: 4th April, 2023.

Judge

Judge