

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 288 of 2015

Appellant : Imam Bux
through M/s. M.A. Kazi and Irshad Ali Jatoi,
Advocates

Respondent : The State
through Mr. Muntazir Mehdi, Addl.P.G.

Date of hearing : 12th December, 2022

JUDGMENT

Omar Sial, J.: The case of the prosecution is that Ghulam Shabbir along with his 2 brothers, Mohammad Ameen and Mohammad Hassan as well as his cousin, Umar Khan, set out for some work on 2 motorcycles in the morning of 25.12.2009. At about 6:55 a.m. they were intercepted by 6 armed men. These armed men were identified as Bashir Ahmed Khusk holding a repeater, Meer Mohammad holding a repeater, Imam Buksh Khusk holding a Kalashnikov, Yousuf Khusk holding a double barrel shot gun, Ghulam Sarwar Khusk holding a shot gun and Maqbool Khusk holding a Kalashnikov. Upon the instigation of Imam Bux Khusk; Bashir Ahmed and Meer Mohammad both opened fire on the complainant party; however, it was only Mohammad Ameen who was hit at 2 different places on his body and succumbed to the injuries soon thereafter. The reason for the shooting was said to be an old enmity between the parties. Upon the foregoing information being provided to the police by Ghulam Shabbir, F.I.R. No. 123 of 2009 was registered under sections 302, 324, 147, 148, 149 and 114 P.P.C. at the Bhan police station.

2. Only Imam Bux Khusk was arrested and was charged with instigating the other accused to shoot at and kill Mohammad Ameen. He pleaded not guilty and claimed trial. **PW-1 Dr. Mukhtiar Ahmed** conducted the post mortem. **PW-2 Ghulam Shabbir** was the complainant. **PW-3 Mohammad Hassan** was an eye witness. **PW-4 Mohammad Khan Lashari** was the first police responder to the information of the incident as well as the first investigating officer of the case. **PW-5 Abdul Latif Khusk** witnessed the inspection of the dead body by the police,

seizure of the deceased's clothes by the police, inspection of the place of incident and recovery from that place. **PW-6 Dr. Mukhtar Ahmed**, who was examined earlier as PW-2, was examined again. **PW-7 S.I. Gul Mohammad** was the second investigating officer.

3. In his section 342 Cr.P.C. statement, Imam Bux professed innocence, denied any wrong doing and further stated that he was not even present on the spot and that he had been falsely roped into this case due to old enmity between the parties. The learned Sessions Judge, Jamshoro on 07.11.2015 convicted Imam Bux under section 302(b) P.P.C. as well as section 34 P.P.C. and sentenced him to a life in prison and further directed him to pay compensation of Rs. 200,000 to the legal heirs of the deceased or in default spend another 6 months in prison. It is this judgment that has been challenged through this appeal.

4. Learned counsel for the appellant has argued that neither did the complainant party have any enmity with Imam Bux, as according to their own version the dispute was between them and Bashir Ahmed and in any case it was not Imam Bux who shot at Mohammad Ameen but that the firing was attributed to Bashir Ahmed and Meer Mohammad. He submitted that the requirements of section 34 P.P.C. were also not fulfilled. The learned Addl. P.G. agreed that it was the role of instigation assigned to Imam Bux whereas common intention required the pre-meeting of minds, which evidence was not very clear from the proceedings. Nonetheless, he supported the impugned judgment. None effected an appearance on behalf of the complainant. I have heard the counsels and re-appraised the evidence. My findings and observations are as follows.

5. A puzzling aspect of the case is that without the persons said to have shot and killed Mohammad Ameen being arrested or facing trial and their case being put on the dormant file, the impugned judgment, a little pre-maturely may be, has held that they were guilty of the murder and as the allegation against Imam Bux was that he instigated the co-accused he too was liable for an offence under section 302(b) P.P.C because he shared a common intention with the co-accused. In essence, the impact of the judgment was that the co-accused were convicted and sentenced in absentia, without being represented at trial, and consequently Imam Bux was also held to be guilty. This was perhaps not the appropriate course to follow and gives rise to the argument as to whether Imam Bux could have

been convicted and sentenced on grounds of vicarious liability when the liability of the prime accused had not been established or proved.

6. There is a delay of 16 hours in the lodging of the F.I.R. In his testimony the complainant Ghulam Shabbir recorded that immediately after the incident, the police was informed and that it had come to the spot and inspected the dead body after which the body was taken to the hospital for post mortem and it was only after the burial of the deceased that he had gone to the police station and lodged the F.I.R. It appears that there was an element of discussion to throw the net wide as there appears little reason for the F.I.R. not to be registered immediately after the event keeping in view that the police was involved from the word go and that the complainant claimed that the details of the crime, the accused and the witnesses to the murder were all positively known and identified at that time. This delay is coupled with a delay in recording the section 161 Cr.P.C. statement of the alleged eye witness, PW-3 Mohammad Hassan. This witness acknowledged at trial that though the incident occurred on 25.12.2009 his statement was recorded by the police 4 days later i.e. on 29.12.2009. No reason for such a delay was given. The delay seems more unusual if one keeps in mind the admitted fact that Mohammad Hassan was throughout present during all proceedings conducted by the police as well as present at the police station along with the complainant when the complainant registered the F.I.R. In light of the foregoing throwing the net wide to include Imam Bux as an accused although assigning him the role of instigation only, cannot be completely ruled out. It is also pertinent to note that the other eye witness i.e. Umar Khan, albeit a cousin of the complainant did not record his evidence at trial and the reason given was that his evidence was the same as that of Mohammad Hassan. As noted above, Mohammad Khan's own evidence, recorded after 4 days of the incident without any cogent reason, itself is doubtful in light of the Honorable Supreme Court holding in a number of cases that the evidentiary value of delayed statements without a plausible reason will reduce its evidentiary value to zero. Reference in this regard may be made to **Sajid Hussain alias Jogi vs The State (PLD 2021 SC 898)**, **Noor Mohammad vs The State and another (2020 SCMR 1049)**, **Abdul Khaliq vs The State (1996 SCMR 1049)**.

7. I find it extremely hard to reconcile with the theory that a person who comes to kill another, though himself armed with a weapon, will shout clear

instructions to his colleagues to kill that other person while he himself stays a silent spectator. This in my mind, would not be the conduct of a killer or as a matter of fact, natural conduct. This court has noticed a substantially large number of F.I.Rs, especially in cases originating from rural areas, that this aspect of instigation is included in each F.I.R. This perhaps results from advice being provided to the complainant by the WHC who is in most cases the scribe of the F.I.R. It appears that including this loud intention of imminent killing and stating the reasons for the same in those very loud vocal pronouncements, seems to the WHC a sure shot way of conviction. To me, it appears to be a ploy to spread the net wide. At the end of the day it is the prosecution's case which is impacted.

8. It is an admitted position that the conviction given to Imam Bux was under section 34 P.P.C. The said section provides that *"when a criminal act is done by several persons, in furtherance of the common intention of all, each such person is liable for that act in the same manner as if it were done by him alone."* For being vicariously liable for the act of a primary accused, it is therefore a condition precedent that the persons being burdened with vicarious liability should have shared a common intention with the primary accused. Generally common intention, inter alia, precedes by some or all of the following elements, namely, common motive, pre-planned preparation and concert pursuant to such plan. Reference in this regard may be made to **Mohammad Akbar vs The State (PLD 1991 SC 923)**. It was also observed in the case of **Mohammad Yaqoob, Sub-Inspector vs The State (PLD 2001 SC 378)** that: "It was held a few decades earlier by this Court which still holds the fields that it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference or the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". In **Shoukat Ali vs The State (PLD 2007 SC 93)** it was held that *"..... 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 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."*

9. In the current case, as also mentioned above, the co-accused who fired and allegedly killed the deceased, have not been tried, and as a consequence, it is yet to be determined whether they were guilty of a crime. Without them having been held guilty, it would be pre-mature to conclude that the appellant is vicariously liable for their acts. As regards the requirement of a pre-arranged plan and that the criminal act should have been done in concert pursuant whereof; apart from the loud directions made by the appellant at the time of the incident, which conduct I have earlier found suspicious, there was no other evidence produced at trial to establish the same. It is also pertinent to note that in his examination-in-chief the complainant said that the reason for the shooting was an old enmity that the complainant had with Bashir Khusk. Apart from not naming the appellant specifically, what that enmity was and what was the bone of contention between the parties, was not explained, elaborated upon or proved.

10. In view of the foregoing observations, I am of the opinion, that it would be unsafe to convict the appellant for the safe administration of justice. The appeal is therefore allowed. The appellant who is on bail is acquitted of the charge. His bail bonds stand cancelled and surety discharged which may be returned to its depositor upon identification.

JUDGE