

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No. 268 of 2012

Appellant : Rizwanullah
through Mr. Irshad Ali Jatoy, Advocate.

Respondent : The State
through Mr. Talib Ali Memon, A.P.G.

Complainant : Mr. Tanveer-ul-Islam, Advocate

Date of hearing : 31st August, 2022

JUDGMENT

Omar Sial, J.: Rizwanullah and Shafqatullah, both sons of Nawab Khan, were accused of murdering Gul Daraz Khan on 14.04.2006 due to an old enmity they had with him. F.I.R. No. 48 of 2006 under sections 302 and 34 P.P.C. was registered against them on the complaint of Gul Akbar Marwat on 14.04.2006 at the Sharafi Goth police station. Shafqatullah absconded during the trial and was thus declared a proclaimed offender on 23.10.2010. Rizwanullah faced the trial. After a full dress trial, the learned 3rd Additional Sessions Judge, Malir on 14.06.2011 convicted Rizwanullah under section "302/34" P.P.C. to 10 years imprisonment and also directed him to pay a fine of Rs. 200,000 to the legal heirs of the deceased and if he did not he would have to spend another 2 months in prison. It was not clarified in the judgment as to whether Rizwanullah was convicted under section 302(b) or 302(c) P.P.C. but as he was sentenced for 10 years it appears that the intent was to convict him under section 302(c) P.P.C. The sentencing was flawed and will be elaborated upon later in this opinion.

2. The F.I.R. of the case records that at about 9:00 p.m. on 14.04.2006, the complainant Gul Akbar was walking on the road with his uncle Gul Daraz when 2 unknown boys came on a motorcycle and the boy sitting on the rear seat of the motorcycle fired 2 shots at Gul Daraz and made their escape good. Gul Daraz died.

3. Both the accused were arrested when they themselves surrendered to the police on 12.06.2006. They pleaded not guilty and claimed trial. At trial the prosecution examined 8 witnesses. **PW-1 Rafiullah Awan** testified that he had registered the F.I.R. against unknown persons on the complaint of Gul Akbar Marwat. **PW-2 Gul Akbar** was the complainant of the case. Apart from what he had narrated in the F.I.R, Gul Akbar also testified that 5 empties and 1 crown of a bullet were found from the place of incident. On 17.06.2006, he identified both Rizwanullah and Shafqatullah in an identification parade and had informed the magistrate that Shafqatullah was the person who had fired at his uncle and that Rizwanullah was driving the motorcycle. He further recorded that the accused ran a transport business by the name of Lucky Coach whereas he was affiliated with a similar business by the name of Marwat Coach. Both businesses had their offices in the Quaidabad area of Karachi. **PW-3 Munawar Marwat** was a cousin of the complainant and had reached the place of incident in its immediate aftermath. When he arrived on the scene the dead body had been taken inside the office of Marwat Coach. He admitted however in his cross examination that when his section 161 Cr.P.C. statement was recorded he had told the police that the dead body was lying in Mashera Colony. He witnessed the inspection of the dead body as well as the making of the Inquest Report. He had accompanied the dead body for post mortem and subsequent to that he was handed over the dead body for burial. **PW-4 S.I. Abdul Salam Arain** was the officer who first responded to the information that one person had been injured due to firing by unknown persons. Subsequently he was told by people where the incident had taken place that the injured person had died and that the dead body had been taken to the Marwat Coach office. He made the memo of inspection of the dead body and the Inquest Report and then sent the dead body to the hospital for post mortem. **PW-5 S.I. Muhammad Azam** was the first investigating officer of the case. Apart from other steps he took in the investigation, he testified that he had also recovered five empties and one crown of a bullet. He negated PW-4 S.I. Abdul Salam Arain's statement that Azam had collected blood samples from the place of incident. Azam clarified that he had not done so. **PW-6 Inspector Bashir Ahmed** testified that that both the accused had themselves come to the AVCC office and surrendered to Inspector Atiq-ur-Rehman on 12.06.2006, Shafqatullah also brought with him the crime weapon, a 0.30 bore pistol along with its licence, and that both accused had confessed that on 14.04.2006 they had shot and killed

Gul Daraz as revenge for the killing of their father Nawab Khan. Shafqatullah had then taken the Inspectors to their home where the motorcycle used in the crime was parked and Shafqatullah told the police that it was the same motorcycle on which they rode when they committed the murder of Gul Daraz. **PW-7 Inspector Atiq-ur-Rehman Arain** was the third investigating officer of the case. He too testified that on 12.06.2006 the 2 accused had come and surrendered themselves, Shafqatullah also surrendered the crime weapon – a 0.30 bore pistol and that the motorcycle used in the crime was also recovered from their home on the pointation of Shafqatullah. He told the court that on 17.06.2006 an identification parade was held in which the complainant identified both the accused whereas Eid Muhammad identified Rizwanullah. What was important about the testimony of this witness was that he categorically admitted that he recorded the section 161 Cr.P.C. statements of PW-2 Gul Akbar, the complainant, after 2 months of the incident. Similarly, he had recorded the statement on PW Gul Shereen after 2 months as well. He also confirmed that in the written complaint submitted by the complainant party to the DIG AVCC, they had shown their suspicion on 4 other persons apart from the 2 brothers. What is also important is though the PW-5 S.I. Muhammad Azam, the first responder categorically stated that he had not collected blood from the place of incident, Arain produced a Chemical Analyser's report dated 26.07.2006 which reflects that blood stained earth was sent for analysis. **PW-8 Dr. Syed Farhat Abbas** confirmed that the post mortem report was in the handwriting of Dr. Zeeshan and the signatures on the same were also that of Dr. Zeeshan. The doctor who conducted the post mortem i.e. Dr. Zeeshan had been transferred thus could not come and give evidence.

4. In his section 342 Cr.P.C. statement, Rizwanullah denied all wrong doing and attributed his false implication on a transport dispute that the parties had over route permits. He did not examine himself on oath nor did he produce any witness in his defence.

5. I have heard the learned counsel for the appellant who has argued that there is not an iota of evidence against the appellant. To the contrary the learned APG has fully supported the impugned judgment who is assisted by the learned counsel for the complainant. I have heard the counsels and re-appraised the evidence. My observations and findings are as follow.

Recovery

6. The record reflects that it is an admitted fact that firing at the deceased is attributed solely to Shafqatullah; the alleged crime weapon was also recovered from him; the motorcycle allegedly used in the crime was also recovered at the pointation of Shafqatullah. By all accounts Rizwanullah was allegedly driving the motorcycle.

Evidence against Rizwanullah

7. The evidence against Rizwanullah is his alleged confession before the police followed up by him being identified by the complainant in an identification parade.

Confession

8. Rizwanullah's alleged extra judicial confession was inadmissible in evidence under Article 38 and Article 39 of the Qanun-e-Shahadat Order, 1984. No recovery was made on the pointation of Rizwanullah subsequent to the confession which may have made his extra judicial confession relevant under Article 40 of the Order. I also find it rather unnatural that Rizwanullah would simply walk into the office of the AVCC and confess his crime when there is nothing on record to show as to what were the factors which made him confess. No evidentiary value can be attached to such a confession.

Identification Parade

9. It was a night time incident and, from what the complainant narrated, seems to be one which happened suddenly. No doubt, at best, the complainant got a fleeting look of the 2 boys on the motorcycle. A vague and to some extent meaningless description of the 2 boys was given by the complainant in the F.I.R. i.e. aged about 27/28 with a strong built. Needless to say a substantially large portion of the population could fall within the ambit of such a description. The fact that the complainant and the accused party both belonged to the same village and had rival businesses in the same area, I find it a little difficult to believe that the complainant did not recognize who they were. This seems even more surprising when one keeps in mind the fact that it was the complainant himself who had moved an application that the case be investigated by the AVCC and in that application (as admitted by the investigating officer but denied by the

complainant) he had cast suspicion on 6 individuals of the rival business company, which had also included the 2 appellants. The complainant was not questioned on these lines at trial, but when asked during appeal, he replied that when the incident occurred he had just come from the village and therefore did not recognize members of the rival group. Be that as it may I still find it difficult to believe that with an uncle murdered, by people who the complainant party named in their application to the AVCC, no effort was taken by them to show the 6 persons to the complainant to ask him if it was indeed any one of them. For nearly 2 months none of the complainant party people, with rival business interests in the same area, thought it necessary to do so. Nor did the investigating officers take any measures to question the suspected persons until out of the blue, all of a sudden and completely on their own accord, the 2 accused walked into the office of the AVCC and said that they had murdered the Gul Daraz and also produced the weapon and the motorcycle used in the crime.

10. 2 witnesses were said to have identified Rizwanullah in the identification parade. One was the complainant, PW-1 Gul Akbar, whereas the other was one person by the name of Eidullah, who was not examined by the prosecution as a witness. What strikes a person's attention immediately is the fact that the learned magistrate who was said to have conducted the identification parade was never called as a witness to testify. A record of the proceedings was exhibited at trial through PW-1 Gul Akbar. Article 78 of the Qanun-e-Shahadat Order, 1984 stipulates that if a document is alleged to be signed or to have been written wholly or in part by a person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved. The record of the identification parade, which is purportedly completely in the handwriting of the learned magistrate and is purportedly signed by her, could have been proved by either calling the learned magistrate herself to confirm that she prepared and signed it or in appropriate cases, where the maker of the document, for example dies, by calling a person in whose presence the same was written and signed by the maker. A handwriting expert, comparison by the Court of the signatures and handwriting of the maker with his known and admitted handwriting and signature, could also be made use of for this purpose. Regrettably for reasons best known to the prosecution, this was not done.

11. Apart from the above, the learned magistrate, it seems, paid no heed to the rules governing the holding of a test identification parade. The number and details of dummies, their parentage, address and occupation; the objections of the accused; precautions taken to ensure a safe and meaningful identification; whether the accused were in handcuffs or fetters; the certificate to be attached by the magistrate; were all requirements that were overlooked by the learned magistrate. The Supreme Court of Pakistan in *Kanwar Anwaar Ali*, Special Judge Magistrate, In the matter of (PLD 2019 SC 488) gave extensive guidelines on the conduct of an identification parade which were not complied with by the learned magistrate. The argument raised in this regard by the prosecution is that learned magistrate in the year 2006 did not have the benefit of the wisdom of the Supreme Court given in the *Kanwar Anwaar* judgment and thus the lapses on the part of the magistrate should be condoned. With much respect I do not agree with this stance. It is correct that the Supreme Court gave its judgment in *Kanwar Anwaar* 13 years later, however, there was sufficient guidance on the issue in the year 2006 as well. *Muhammad Yaqoob and another vs The State* (1989 P.Cr.L.J. 2227), which was reiterated and approved by the Hon'ble Supreme Court in the *Kanwar Anwaar* judgment, is just one such example. Apart from this and several other judgments, guidelines were also provided in Chapter V Part C of the Sindh Courts Criminal Circulars. No sanctity can be attached to such an identification parade for the purpose of upholding a conviction.

Common intention

12. Rizwanullah was convicted under section 34 P.P.C for the murder of Gul Daraz which was allegedly carried out by accused Shafqatullah. Section 34 P.P.C 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.

13. In **Mohammad Akbar vs The State (PLD 1991 SC 923)** it was held that *".....it is evident that a joint action by a number of persons is not necessarily an action performed with a common object, but it may be performed on the spur of the moment as a reaction to some incident and such a case would fall within the*

ambit of section 34, P.P.C. However, it may be pointed out that section 34, P.P.C. contemplates an act in furtherance of common intention and not the common intention simpliciter and that there is a marked distinction between similar intention and common intention and between knowledge and common intention. It may also be observed that mere presence of an accused at the place of incident with a co-accused who commits offence may not be sufficient to visit the former with the vicarious liability, but there should be some Wong circumstance manifesting a common intention. 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. However, common intention may develop even at the spur of moment or during the commission of offence as pointed out hereinabove. Conversely common intention may undergo change during the commission of offence.”

14. In **Mohammad Yaqoob, Sub-Inspector vs The State (PLD 2001 SC 378)** the Hon’ble Supreme Court observed “It was held a few decades earlier by this Court which still holds the fields that it is well established that a common intention pre-supposes 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”.

15. In **Shoukat Ali vs The State (PLD 2007 SC 93)** it was held that “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 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."

16. In the present case, no evidence was led to establish a pre-arranged plan. As it was a passing by shooting, it also seems unlikely that the plan to murder Gul Daraz had developed on the spot. It is also debatable whether Rizwanullah could be guilty of an offence under section 34 P.P.C. when the case against Shafqatullah (who allegedly was the sole person who fired upon Gul Daraz) was put on dormant file and ordered to be revitalized and proceeded with when Shafqatullah was arrested.

Sentencing

17. A somewhat confusing and unclear sentence has been passed by the learned trial court. It was Shafqatullah who allegedly shot and killed Gul Daraz. Rizwanullah allegedly was driving the motorcycle. It seems that he was convicted under section 34 P.P.C. The learned judge while sentencing stated that as Rizwanullah had not caused the fire, the quantum of sentence awarded to him is reduced and hence was sent to prison for 10 years. If Shafqatullah had caused the murder, and the learned judge was of the view that it is an offence under section 302(b) P.P.C. then the sentence given to Rizwanullah should also have been the same i.e. life imprisonment or death, as pursuant to section 34 P.P.C., 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. The sentence awarded seems to be under section 302(c) P.P.C. Apart from this ambiguity, it is also debatable whether Rizwanullah could be guilty of an offence under section 34 P.P.C. when the case against Shafqatullah was put on dormant file and ordered to be revitalized and proceeded with when Shafqatullah was arrested. In any case, I have observed above that no evidence was led at trial to show a pre-meeting of the minds.

Opinion of the court

18. For the reasons given above, I am of the view that the prosecution was unable to prove its case against Rizwanullah. The appeal is therefore allowed and appellant is acquitted of the charge. His acquittal however will have no bearing on the case against Shafqatullah whose case will be decided on merits and in light of the evidence on record against him. Rizwanullah is on bail. His bail bonds stand cancelled and surety discharged which may be returned to its depositor upon identification.

JUDGE