

PRIVY COUNCIL

Mahbub Shah

Vs.

Emperor

P.C.A.No.64 of 1944

(Lord Thankerton, Sir Madhavan Nair and Sir John Beaumont JJ.)

31.01.1945

JUDGMENT

SIR MADHAVAN NAIR J.

1. This is an appeal by special leave against a judgment of the High Court of Judicature at Lahore dated 14th March 1944, confirming on appeal the conviction of the appellant of the murder of one Allah Dad and the sentence of death passed on him by the Sessions Judge, Mianwali, on 20th December 1943. The appellant Mahbub Shah is aged 19. He has been convicted of murder under Section 302, read with Section 34, Penal Code, He was also convicted of the attempted murder of one Hamidullah Khan and sentenced to seven years' rigorous imprisonment; but that conviction has not been brought before the Board. The main question raised in this appeal is whether the appellant has been rightly convicted of murder upon the true construction of section 34 Penal Code. Section 34 runs as follows:

"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."

2. Along with the appellant, his cousin Ghulam Quassim Shah, aged 18, was also convicted under section 302/34, Penal Code, and sentenced to transportation for life. Ghulam was convicted under section 307/34 also, and was sentenced to five years rigorous imprisonment by the Sessions Judge, but his convictions and sentences have been set aside by the High Court. The deceased Allah Dad died as the result of gunshot wounds inflicted on him. One Wali Shah, who is said to have fired the shot, that killed the deceased, is a fugitive from justice and has not been so far wrested. His father Mohammad Hussain Shah, who was committed to the Sessions Court on a

charge of abetment of murder, was acquitted by the Sessions Judge. The following table given in the judgment of the High Court shows, the relationship between the appellant and the other persons who are alleged to have been concerned in this crime.

3. The prosecution case as accepted by the High Court may be briefly stated:-On 25th August 1943, at sunrise, Allah Dad, deceased, with and few others left their village Khanda Eel by boat for cutting reeds growing on the banks of the Indus river. When they had travelled for about a mile downstream, they saw Mohammad Shah, father of Wali Shah (absconder) bathing on the bank of the river. On being told that they were going to collect reeds, he warned them against collecting reeds from land belonging to him. Ignoring his warning they collected about 16 bundles of reeds, and then started for the return journey. While the boat was being pulled upstream by means of a rope, Ghulam Quasim Shah, nephew of Mohammad Huisain Shah-acquitted by the High Court-who was standing on the bank of the river asked Allah Dad to give him the reeds that had been collected from his uncle's land. He refused. What happened subsequently was spoken to by two boys Nur Hussain P.W.10, and Nur Mohammad P.W.11, whose version of the story has been accepted as true by the High Court and summarised as follows:

"Quasim Shah then caught the rope and tried to snatch it away. He then pushed Allah Dad and gave a blow to Allah Dad with a small stick but it was warded off on the rope. Allah Dad then picked up the, lari from the boat and struck Quadra Shah, Quasim Shah then shouted out for help and Wali Shah and Mahbub Shah came up. They had guns in their hands. When Allah Dad and Hamidullah tried to run away, Wali Shah and Mahbub Shah came in front of them and Wali Shah fired at Allah Dad who fell down dead and Mahbub Shah fired at Allah, causing injuries to him." [Lari is a bamboo pole for propelling the boat, about ten feet long and six inches thick."

4. On the above facts, the learned Judges of the High Court came to the conclusion that Ghulam Quasim was wrongly convicted of murder under section 302/34, Penal Code., on the following reasoning. Bhandari J., with whom Teja Singh J. concurred, first held that Ghulam Quasim had no common intention of killing any member of the complainant party when he went to the bank of the river in order to demand the bundles of reeds which had been collected from his uncle's lands. Then the learned Judge addressed himself to the question "whether a common intention" to commit the crime which was eventually committed by Mahbub Shah and Wali Shah came into being when Ghulam Quasim Shah shouted to his companions to come to his rescue

and both of them emerged from behind the bushes and fired their respective guns, and this he answered in the negative, holding that "so far as Quasim Shah was concerned he did no more than ask his companions to come to his assistance when he was knocked with a pole by the deceased" and that "he could not have been aware of the manner in which assistance was likely to be rendered to him or his friends were likely to shoot at and kill one man or injure another." In the result, he was acquitted of all offences. The learned Judge then proceeded, to examine the case of the appellant and Wali Shah. He stated that the case of Mahbub Shah, who was armed with a single barrelled gun, and of Wali Shah, who had a double barrelled gun, however stood on a different footing. He distinguished their case on the following ground :

"As soon as they ran to the assistance of Ghulam Quasim Shah, they fired simultaneously in the direction of the complainants killing Allah Dad on the spot and causing injuries on the person of Hamidullah Khan. It is difficult to believe that when they fired the shots they did not have the common intention of killing one or more of the complainant party. If so, both of them are guilty of murder notwithstanding the fact that the fatal shot was fired by only one of them, namely, Wali Shah, absconder."

5. It will be observed that according to the learned Judge a common intention to commit the crime came into being when appellant and Wali Shah fired the shots. Their Lordships will now proceed to consider whether the above reasoning is correct, and Section 34, Penal Code, has been rightly applied to the facts of the case. Attention has already been drawn to the words of the section. As it originally stood, the section was in the following terms:

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

6. In 1870, it was amended by the insertion of the words "in furtherance of the common intention of all" after the word "persons" and before the word "each," so as to make the object of the section clear. Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intentions 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 prearranged 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.

7. On careful consideration, it appears to their Lordships that in the present case there was no evidence and there were no circumstances from which it might be inferred that the appellant must have been acting in concert with Wali Shah in pursuance of a concerted plan when he along with him rushed to the rescue of Ghulam Quasim. The exaggerated circumstances alleged by the prosecution to invoke the aid of Section 34 Penal Code, have been found against by the High Court who have acted solely on the evidence of PW.10 and P. W. 11. There was no evidence to indicate that Ghulam Quasim was aware that the complainant party had been cutting reeds from his uncle's lands, or that the appellant and Wali Shah had been kept behind the bush to come and help him when called upon to do so. The evidence shows that Wali Shah "happened to be out shooting game" and when he and the appellant heard Ghulam's shouts for help they came up with their guns; the former shot the deceased, killing him outright, and the appellant shot at Hamidullah Khan inflicting injuries on his person. Indeed, the High Court negated the existence of a "common intention" at the commencement in the sense in which their Lordships have explained the term by stating - in considering the application of Section 34 Penal Code, to the case of Ghulam - what has been already quoted, viz.:

"that the sole point which requires consideration now is whether a common intention to commit the crime came into being when Ghulam shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired their respective guns."

8. Having answered the above question in the negative as regards Ghulam Quasim, the learned Judges thought, as Bhandari J., has expressly stated, that with respect to the appellant and Wali Shah, it must be held that the common intention of killing one or more of the members of the complainant party came into being later, when they fired the shots. Their Lordships cannot agree with this view. Their Lordships are prepared to accept that the appellant and Wali Shah had the same intention, viz., the intention to

rescue Quasim if need be by using the guns and that, in carrying out this intention, the appellant picked out Hamidullah for dealing with him and Wali Shah, the deceased, but where is the evidence of common intention to commit the criminal act complained against, in furtherance of such intention? Their Lordships find none. Evidence falls far short of showing that the appellant and Wali Shah ever entered into a premeditated concert to bring about the murder of Allah Dad in carrying out their intention of rescuing Quasim Shah. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. In their Lordships' view, the inference of common intention within the meaning of the term in Section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case. That cannot be said about the inference sought to be deduced from the facts relied on by the High Court in distinguishing the case of the appellant from that of Ghulam Quasim.

9. Mr. MacKenna, the learned counsel for the Crown, besides supporting the judgment of the High Court on the grounds mentioned in it, called their Lordships' attention to the following additional circumstance in further support of it, Reference was made to the concluding portion of the evidence of P. Ws. 10 and 11, where it is stated that "when Allah Dad and Hamidullah tried to run away, Wali Shah and Mahbub Shah came in front of them ..." and fired shots. This circumstance is stated more definitely in the evidence of PW. 6. He stated "... we then tried to run away but Mahbub Shah and Wali Shah coming in front of us and prevented our escape" and fired shots. It was argued that the attempt of the appellant and Wali Shah to prevent the escape of the complainant party shows that they were actuated by a common intention to commit the crime, and from that moment the Court is entitled to infer a common intention to commit the crime even though there was no pre-concerted plan to shoot till then. This additional circumstance does not, in their Lordships' view, advance the prosecution case any further, and, moreover, the learned Judges of the High Court do not rely on it. In the circumstances, their Lordships are not satisfied that the appellant was rightly convicted of the offence of murder under Section 302, Penal Code, read with Section 34. His conviction for murder and the sentence of death passed on him should, therefore, be quashed. In this view, the further question raised in the appeal whether, in the event of his conviction being confirmed, the sentence of death passed on him should not, having regard to the circumstances of the case and his age, be commuted to one of transportation for life does not arise for consideration. For the reasons indicated above, their Lordships have humbly advised His Majesty that the appellant

having succeeded in his appeal, his appeal should be allowed and his conviction for murder and the sentence of death set aside.

Appeal allowed.