

Sartaj Mohammad and ors. Vs. State

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Court : Allahabad

Decided On : Feb-16-2001

Reported in : 2001CriLJ2823

Judge : J.C. Gupta and ;M.A. Khan, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 300, 302, 323 and 324; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Cri. Appeal No. 1502 of 1980

Appellant : Sartaj Mohammad and ors.

Respondent : State

Advocate for Def. : G.S. Hajela, A.G.A.

Advocate for Pet/Ap. : N.P. Midha and ;Amar Saran, Advs.

Judgement :

1. This appeal is directed against the judgment and order dated 10-7-1980 passed by Sri V.K. Sircar, the then IV Additional Sessions Judge, Allahabad in Session Trial No. 286 of 1997, whereby appellant Sartaj Mohammad has been convicted and sentenced to life imprisonment under Section 302 I.P.C. Appellants Vakilwa, Lal Mohammad and Imamuddin have been convicted and sentenced to life imprisonment under Section 302 I.P.C. read with Section 34 I.P.C. Appellants

Sartaj Mohammad, Lal Mohammad and Imamuddin have also been convicted and sentenced to 2 years rigorous imprisonment and a fine of Rs. 300/- each under Section 324 read with Section 34 I.P.C. Appellant Vakilwa is further convicted and sentenced to 2 years rigorous imprisonment and a fine of Rs. 300/- under Section 324 I.P.C. Appellants Lal Mohammad and Imamuddin have further been convicted and sentenced to two years rigorous imprisonment under Section 323 read with 34 I.P.C. However, Sartaj Mohammad and Vakilwa have been acquitted for the offence punishable under Section 323 read with Section 34 I.P.C.

2. The wood-cut profile of the prosecution case is that appellants Sartaj Mohammad and Lal Mohammad are real brothers being sons of Yar Mohammad Appellant Imamuddin is uncle of appellant Vakilwa. They all belonged to one group.

3. Some time before the occurrence in question Anisuddin, brother of accused Vakilwa had been murdered. Shamim, maternal uncle of Aftab Ahmad, P.W. 2 was an accused in that case. Aftab Ahmad was doing pairvi for Shamim.

4. It is stated that on 27-5-79 at about 6.20 p.m. in day light Masroorul Haque, P.W. 1 alongwith Aftab Ahmad, P.W. 2 and Mazharul Haque, deceased of the present case were returning from School and proceeding towards Aftab's house and when they reached in the lane in front of the house of Matin, the four, appellants met them. Accused Vakilwa addressing and abusing Aftab Ahmad said that Aftab Ahmad's maternal uncle Shamim had murdered his brother Anisuddin and why Aftab was doing pairvi for him. Mazharul Haque took ill of these utterances and remonstrated accused Vakilwa saying that he should talk properly else it would not be good. If he was doing pairvi he was not doing any crime. Every person does pairvi for his family members. As soon as Mazharul Haque uttered these words, accused Lal Mohammad and Imamuddin alias Chottan exhorted whereupon accused Sartaj Mohammad fired upon Mazharul Haque while accused Vakilwa fired from his pistol on Aftab Ahmad. Mazharul Haque fell down on the ground while Aftab Ahmad sustained fire arm injuries on his left scapula. Masroorul Haque and some other persons who were attracted to the scene of occurrence challenged the accused persons whereupon accused turned back and

escaped towards south in the lane. Masroorul Haque, P.W. 1 chased the accused persons and when* he was near the south-west corner of the mosque, accused Imamuddin alias Chottan and Lal Mohammad assaulted him with lathis resulting in injuries on his forearm and shoulder. Both of them then managed to escape. The incident was also witnessed by Faizanul Haque, P.W. 4, Atiq Ahmad alias Attan and Afsar Ahmad. When Masroorul Haque returned at the place of occurrence he found Mazharul Haque dead.

5. On the dictation of Faizanul Haque, P.W. 4 Hifzur Rahman scribed the first information report, Ex. Ka. 2 and the same was lodged at Police Station Puramufti on the same night at 9.10 p.m. Case was registered and injured Aftab Ahmad and Masroorul Haque were sent to S.R.N. Hospital, Allahabad in the police escort for their medical examination. Dr. Udai Pratap Singh, P.W. 7 examined Aftab Ahmad at 1.40 a.m. and found following injuries :-

1. Lacerated wound over left fore arm 5' x 2-1/2', muscle deep and 2-1/2' below shoulder joint dorsum aspect, bleeding on cleaning, margin were irregular and blackening and charring present.

2. Multiple lacerated wound over lateral half of left scapula in an area of 4' x 3' with blackening and charring of wounds, margins bleeding on cleaning.

6. In the opinion of doctor injuries were caused within 24 hours. They were kept under observation and were suspected to be of fire-arm. Injury report of Aftab Ahmad is Ex. Ka. 4.

7. Masroorul Haque was medically examined in the same night at 1.50 a.m. and following injuries were found :-

1. Contusion 2' x 1' over apex of left shoulder.

2. Contusion 1-1/2' x 1/2' over left medial border of left forearm, 2' above the left wrist joint.

8. In the opinion of doctor both the injuries were caused by blunt object and were simple and caused within 24 hours. Injury report of Masroorul Haque is Ex, Ka. 3.

9. Dr. Ramesh Chand, P.W. 3 conducted the autopsy on the dead body of Mazharul Haque on 28-5-79 at 4.30 p.m. Deceased was aged about 18 years. Following ante mortem injuries were found :-

1. Five gun shot wounds of entry each measuring about 1 cm x 1/2 cm., margins black, in the area of 4' x 1-1/2' on the left side of chest, 2-V2' lateral and superior to the nipple, directed medially.

2. Abrasion 1/6' x 1/6' on the interior aspect of left shoulder.

3. Abraded contusion 1/4' x 1/4' on the left side of neck 4' below and posterior to the ear.

4. Lacerated wound 1-1/2 cm x 1 cm cavity deep on the right side of chest 3' above the lateral to the right nipple.

5. Lacerated wound 1 1/2 cm. x 1 cm. on the interior aspect of right shoulder.

10. In the internal examination 3rd & 4th ribs on left side were fractured, 3 pea sized pellets were recovered from right chest wall. Pleura and both lungs were lacerated, heart was empty and thoracic cavity was full of blood. In the stomach semi-degested food was found. The small intestines and large intestines were half full.

11. In the opinion of Medical Officer, death had occurred due to shock and hemorrhage. Dr. Ramesh Chand further opined that injuries No. 4 and 5 could be exit wounds of injury No. 1.

12. After case was registered, the same was investigated by Sri Dharam Vir Singh, P.W. 14, who was posted as Station Officer of Police Station Pura Mufti. The investigating officer on reaching the place of occurrence found the dead body of deceased Mzharul Haque lying in the lane near the house of Matin. Inquest was held by Sub-Inspector, D.C. Srivastava under the orders of investigating Officer. He also collected one empty cartridge lying by the side of the dead body and sealed the same in the presence of witnesses, vide memo Ex. Ka. 14. The investigating officer also prepared site plan, Ex. Ka. 19 and interrogated the

witnesses. On completion of investigation, he submitted charge sheet, Ex. Ka. 20 against all the accused persons.

13. Before the trial Court, prosecution examined 14 witnesses in all; of whom P.W. 1 Masroorul Haque, P.W. 2, Aftab Ahmad and P.W. 4, Faizanul Haque were witnesses of the fact. Both P.W. 1 Masroorul Haque and P.W. 2 Aftab Ahmad themselves suffered injuries in the course of incident.

14. In their statements recorded under Section 313 Cr. P.C. accused denied the prosecution allegations and stated of their false implication due to enmity. No witness was, however, examined in defence.

15. On an evaluation of evidence on record, the learned Sessions Judge found the appellants guilty and accordingly convicted and sentenced them as indicated above.

16. We have heard Sri G.S. Chaturvedi, Senior Advocate for the appellants and Sri K. C. Saxena, learned A. G. A. for the State.

17. Before us factum of death of Mazharul Haque due to ante mortem injuries has neither been challenged nor disputed. This fact is also otherwise fully established from the evidence of three eye witnesses and statement of Dr. Ramesh Chand, P.W. 3, who had performed autopsy on the dead body of Mazharul Haque.

18. As far as motive part is concerned the prosecution case is that one Anisuddin had been murdered prior to the present occurrence. Shamim, the maternal uncle of Aftab Ahmad, P.W. 2 was being prosecuted for the same. Aftab Ahmad was doing pairvi on behalf of Shamim. Anisuddin happened to be brother of accused Vakilwa. On the day of incident at about 6.30 p.m. when Masroorul Haque, P.W. 1 along with Aftab Ahmad, P.W. 2 and Mazharul Haque deceased were going from the school towards Aftab's house, the accused persons met them in the lane in front of the house of Matin. Accused Vakilwa had an altercation with Aftab Ahmad, P.W. 2 and he stated to him that 'SALE TERE MAMOON SHAMIM NE MERE BHAII ANISUDDIN KA QATAL KIYA HAI, TUM SALE AAJKAAL USKI BARI PAIRVI KAR RAHE HO AUR GOL BANAYE GHOMTE HO' Mazharul Haque took ill of

these utterances and protested saying that 'SALE ZABAN SANBHAL KAR BAT KARO VARNA THIK NAHIN HOGA? ISMEN YEH KAUN GUNAH KAR RAHE HAIN, GHAR KA HAR ADMI APNE ADMI KI PAIRVI KARTA HAT and it is stated that thereafter accused Sartaj Mohammad fired with his gun on Mazharul Haque and accused Vakilwa fired with his pistol on Aftab Ahmad, on the exhortation of Lal Mohammad and Chottan accused. It is thus, apparent from the prosecution evidence that accused Vakilwa was applying pressure on Aftab Ahmad not to do pairvi for Shamim, the killer of his brother Anisuddin. This was protested by deceased Mazharul Haque and thereafter accused Sartaj Mohammad and Vakilwa opened fire on Mazharul Haque and Aftab Ahmad respectively. The incident thus occurred at a spur of moment in a heat of passion and without any premeditation and in the said incident Mazharul Haque sustained fatal fire arm injuries while Aftab Ahmad suffered simple fire arm injuries and Masroorul Haque received simple blunt object injuries when he was chasing appellants Chottan alias Imamuddin and Lal Mohammad.

19. According to the prosecution case Mazharul Haque was fired upon by appellant Sartaj Mohammad from his gun and Aftab Ahmad was fired upon by appellant Vakilwa from his country made pistol and when Mazharul Haque had fallen on the ground appellants Chottan alias Imamuddin and Lal Mohammad started fleeing and when they were chased by Mazharul Haque, they assaulted him with lathi. To establish these allegations prosecution produced three witnesses before the trial Court namely P.W. 1 Masroorul Haque, P.W. 2 Aftab Ahmad and P.W. 4 Faizanul Haque. Both Masroorul Haque, P.W. 1 and Aftab Ahmad, P.W. 2 sustained injuries at the hands of the assailants in the same incident in which Mazharul Haque had received gun shot injuries. Dr. Ramesh Chand, P.W. 3 who had conducted autopsy on the dead body of the deceased Mazharul Haque has stated in the trial Court that the ante mortem injuries were of fire arm and probable time of death of the deceased was 6.30 p.m. on 27-5-79. A futile attempt was made by the defence counsel to challenge this opinion of the medical officer, but nothing concrete could be brought in his cross examination, which could demolish it in any manner whatsoever.

20. From the evidence of Dr. Udai Pratap Singh, P.W. 7 it is also fully established that Aftab Ahmad had also sustained fire arm injuries on his person. The injury report of Aftab Ahmad, Ex. Ka. 4 and the evidence of the eye witnesses leaves no room for doubt that Aftab Ahmad also sustained fire arm injuries in the course of the same incident in which deceased Mazharul Haque was fired upon. Injuries of Masroorul Haque were also examined on the same day and the doctor found 2 contusions one on the apex of left shoulder and the other on the left medial border of left forearm.

21. It is thus apparent that both Masroorul Haque and Aftab Ahmad suffered injuries in the same incident in which Mazharul Haque had received fatal fire arm injuries and their presence at the scene of occurrence is thus not open to doubt. Since the incident had occurred in broad daylight they could have easily seen the faces of the persons assaulting them and the deceased. In the circumstances they could not said to be interested in roping in innocent persons by shielding the real accused, who had asaulted them. Their evidence also gets full support from the statement of P.W. 4, Faizanul Haque, the first informant. According to him he had gone to perform Namaz in the mosque and when he sat down in the northern-western corner of the mosque to urinate his attention was attracted by verbal and heated altercation which ensued between the accused persons and Aftab Ahmad. He has also given a graphic account of the incident. His presence at the scene of occurrence also gets support from the fact that within a short period he got the first information report scribed from Hifzur Rahman and carried injured Masroorul Haque and Aftab Ahmad to Police Station and reached there on the same night as early as 9.10 p.m. after covering a distance of about 6 kms. The promptitude with which the F.I.R. was lodged lends support to the truthfulness of the prosecution version.

22. The place of ocurrence is also established not only from the ocular testimony of the witnesses, but also from the spot situation found by the investigating officer at the time of his inspection. The investigating officer had found one empty cartridge near the dead body and also blood of the deceased.

23. Therefore, we agree with the learned Sessions Judge that the incident occurred in the manner and at the time and place as (alleged by the prosecution and all the four appellants participated in the incident.

24. The next question that arises for consideration is as to for what offence the appellants could be held guilty? So far as Sartaj Mohammad is concerned, he is alleged to have caused fatal fire arm. injuries to the deceased Mazharul Haque. As already stated above, Dr. Ramesh Chand, P.W. 3 has stated in clear terms that ante mortem fire arm injuries of the deceased Mazharul Haque were sufficient to cause death in ordinary course of nature. The act of this accused was thus fully covered by clause Thirdly of Section 300 I.P.C.

25. Learned counsel for the appellants argued before us that since the incident had occurred in the course of exchange of hot words at a spur of moment and in a heat of passion, it would be reasonable to hold that accused Sartaj Mohammad was deprived of his self control due to grave and sudden provocation given to him by Mazharul Haque, who remonstrated accused Vakilwa and, therefore, the offence will be culpable homicide not amounting to murder due to applicability of Exception I of Section 300 I.P.C. It was further submitted that the mere fact that Sartaj Mohammad had not pleaded this Exception in his statement under Section 313 of the Cr. P.C., benefit of the same can not be denied to him if it otherwise looks probable from the prosecution evidence itself.

26. It is well settled law that though burden of proving an exception is on the accused, but the mere fact that the accused adopted defence of denial in his examination under Section 313 Cr. P.C. without referring to Exception I of Section 300, will not be enough to deny him the benefit of that Exception, if the Court can cull out material from the evidence pointing to the existence of circumstances leading to that Exception. It is not the law that failure to set up such a defence would foreclose the right, of the accused to rely on the Exception once and for all. (See Apex Court's decision in State of U.P. v. Kakshmi 1988 (1) JT (SC) 679 (sic).

27. Rule of pleadings of civil law does not apply to criminal cases. Unlike a civil case, it is open to a criminal Court to give benefit to the accused of a plea even if the same is not stated by him in his statement under Section 313 Cr. P.C. In a

given case even if the accused does not raise the plea of an exception, yet if it is found from the evidence brought on record from the prosecution side and from the circumstances appearing in the case that the accused acted within the confines of an Exception, benefit of that Exception cannot be denied to the accused. If from the evidence the circumstances, established on the test of preponderance of probabilities, bring the case within the four corners of any Exception, benefit of the same should be awarded to the accused and that benefit can not be denied merely for the reason that the accused has not pleaded the same in his statement recorded before the Court, or suggested to the prosecution witnesses during their cross examination.

28. Exception I of Section 300 I.P.C. reads as under :-

Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos :-

First - That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly-That the provocation is not given by anything done in the lawful exercise of the right of private defence.

29. From a combined reading of this provision alongwith First proviso it will follow that provocation should not only be grave and sudden, but it must be unexpected. If an accused plans in advance to receive a provocation in order to justify the subsequent homicide, the provocation can not be said to be sudden.

30. In the famous case of K.M. Nanavati : AIR 1962 SC605 the Apex Court held that in order to bring the case within Exception 1. the following conditions must be complied with :-

(i) that the deceased must have given provocation to the accused;

(ii) the provocation must be grave;

(iii) the provocation must be sudden;

(iv) the offender, by reason of the said provocation, shall have been deprived of the power of self-control;

(v) he should have killed the deceased during the continuance of deprivation of the power of self control; and

(vi) the offender must have caused the death of person who gave the provocation or that of any other person by mistake or accident.

31. Whether the provocation was grave and sudden enough to bring the case within this Exception is a question of fact. The Court has to apply an objective test for deciding whether the provocation was grave or not and the best test for deciding this question is whether a reasonable man belonging to the same class of society as the accused, placed in the situation in which the accused was placed, would be so provoked as to lose his self-control. The expression 'reasonable man' means a normal and average person. The concept of 'reasonable man' is a legal fiction which changes from time to time and from society to society. No abstract standard of reasonableness can be laid down.

32. In the light of the above principles, we now proceed to examine whether from the prosecution evidence and the circumstances appearing in the case, benefit of Exception I could be extended to appellant Sartaj Mohammad.

33. In the present case the prosecution evidence as furnished by the witnesses is to the effect that when Masroorul Haque P.W. 1, Aftab Ahmad, P.W. 2, Faizanul Haque, P.W. 4 along with deceased Mazharul Haque were returning from School towards the house of Aftab Ahmad, P.W. 2 all the four accused jumped from the

Dalan of Hafiz Kallan and had come into the lane. They were armed with firearm and lathi. Hot words were exchanged between Aftab Ahmad, P.W. 1 and accused Vakilwa. The altercation began when Vakilwa accused abused and asked Aftab Ahmad why he was doing pairvi for his maternal uncle Shamim, who had killed Anisuddin, brother of Vakilwa and thereby accused Vakilwa put a pressure on Aftab Ahmad not to do pairvi for Shamim. At this juncture Mazharul Haque who did not like the utterances of accused Vakilwa remonstrated him saying that he should have a control on his tongue and if Ahftab Ahmad was doing pairvi he was not committing any sin or crime. Every man does pairvi for his own family members. On this both appellants Sartaj Mohammad and Vakilwa opened fire from their respective weapons upon Mazharul Haque and Aftab Ahmad respectively. In this factual situation when accused Vakilwa himself was responsible in inviting provocation, subsequent act of Sartaj Mohammad and Vakilwa of firing upon Mazharual Haque and Aftab Ahmad can not be brought within the four corners of Exception 1.

34. It was argued by the learned counsel for the appellant that since Mazharul Haque had unnecessarily intervened and remonstrated accused Vakilwa and uttered abusive words the possibility of accused Sartaj Mohammad having been deprived of power of self-control on account of provocation which was grave and sudden cannot be ruled out. This submission of the learned counsel is devoid of any force. Accused Vakilwa had initiated the altercation by abusing Aaftab and asking him as to why he was doing pairvi for his maternal uncle Shamim, killer of his brother Anisuddin. Mazharul Hauqe then simply remonstrated and told Vakilwa that Aftab Ahmad was justified in doing pairvi of his maternal uncle Shamim. Since Vakilwa had himself initiated the altercation he was expected to receive a provocation from the person on victim side. The case is fully covered by First proviso of Exception I and therefore, no benefit of Exception 1 could be extended to Sartaj Mohammad for causing fatal fire arm injuries to Mazharul Haque.

35. It is now next to be seen what offence or offences have been committed by each of the appellants. Undisputedly Mazharual Haque sustained fire arm injuries at the hands of accused Sartaj Mohamad only. Cause of death was ante mortem fire arm injuries and those injuries were sufficient to cause death in ordinary

course of nature. The case is thus fully covered by Clause Thirdly of Section 300 I.P.C. which is punishable under Section 302 I.P.C. Accordingly the conviction and sentence of imprisonment for life of appellant Sartaj Mohammad under Section 302 I.P.C. for the murder of deceased Mazharul Haque are maintained.

36. Now coming to the case of other appellants we find that they have been found guilty under Section 302 I.P.C. with the aid of Section 34 I.P.C. for the murder of Mazharul Haque by co-accused Sartaj Mohammad. The question that arises for consideration is whether in the facts and circumstances of the case has it been proved beyond doubt that the murder of Mazharul Haque was committed by co-accused Sartaj Mohammad in furtherance of common intention of all the appellants ?

37. It is well settled that the constructive liability under Section 34 can arise only if the following conditions are fulfilled :-

1. There must be a common intention to commit a criminal act, and
2. There must be participation by all the accused persons in doing such act in furtherance of that intention.

38. The Privy Council in the famous case of Mahboob Shah observed.

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 34 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.

39. This pre-arranged plan and prior concert in a given case may even develop on the spot during the commission of offence, but the said plan must precede the act constituting the offence. Therefore the crucial test is whether the said plan preceded the actual act constituting the offence.

40. In the case of Ram Tahal v. State of U. P. : 1972 CriLJ227 it was held that the common intention should be anterior in time to the commission of the crime showing a pre-arranged plan and prior concert, and, it is difficult in most cases to prove the intention of an individual, it has to be inferred from the act or conduct or other relevant circumstances of the case. In other words totality of the circumstances must be taken into consideration in- arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be connected. The pre-arranged plan may develop on the spot during the course of commission of offence, but the crucial circumstance is that the said plan must precede the act constituting the offence.

41. It is also well settled that presumption of common intention is also subject to the same kind of restrictions as other presumptions and in no case it must take the form of conjecture, surmise or suspicion. Inference of common intention should never be drawn unless it is a necessary inference deducible from the circumstances of the case.

42. We now proceed to examine the question of applicability of Section 34 I.P.C. on the touch -stones of the principles which we have enumerated above. While dealing with motive part the learned Sessions Judge has himself recorded a categorical finding. 'However, the fact remains that there is no evidence from the side of the prosecution that any of the accused person had any prior enmity either with Mazharul Haque deceased or Masroorul Haque, P.W. 1. Aftab Ahmad, P.W. 2 has also admitted this fact in his statement.' This finding of the learned Sessions Judge is based on the evidence on record. It may further be pointed out that Aftab Ahmad, P.W. 2 also admitted in his statement that accused had no enmity with him. Even as per the prosecution case there is no evidence even to indicate that the accused persons had any pre-arranged plan to commit the murder of Mazharul Haque. The case is that all the four accused persons assembled to put pressure on Aftab Ahmad, P.W. 2 not to do pairvi for his maternal uncle Shamim, killer of Vakilwa's brother Anisuddin and for that purpose and with that intention they had come together and the accused Vakilwa asked Aftab Ahmad why he was doing pairvi for Shamim. This utterance of Vakilwa was not liked by deceased Mazharul Haque and he remonstrated accused Vakilwa where upon accused imamuddin

alias Chottan and Lal Mohammad exhorted their companion saying 'MARO SALON KO BAHUT AKAR KAR BAAT KARTE HAIN' and on this exhortation accused Sartaj Mohammad fired upon Mazharul Haque while accused Vakilwa fired on Aftab Ahmad. It is of common experience that allegation of exhortation is often made to make a person vicariously liable for the acts committed by the other accused. Unless evidence in support of the said allegation is clear, cogent and reliable it is not safe to fasten guilt of that person with the aid of Section 34 I.P.C. In the first information report of the present case it was stated that Lal Mohammad and Chottan exhorted saying 'SALE BARI AKAR KAR BAAT KARTE HAIN MARO SALON KO' and thereafter they uttered some filthy language. At the trial P.W. 1 Masroorul Haque stated that Lal Mohammad and Chottan exhorted saying 'MARO SALON KO BARI AKAR KAR BAAT KARTE HAIN', Faizanul Haque, P.W. 4 also stated likewise. However, none of the witnesses has specified as to what actual words were uttered by each accused. Their evidence indicates as if both these accused persons in chorus and in a parrot like manner uttered same words simultaneously which is beyond our comprehension. In any view of the matter all the accused persons had come with a plan to put a pressure on Aftab Ahmad for not doing pairvi for Shamim in the murder case of Anisuddin. These two persons are said to have given exhortation only to give a beating. The words 'MARO SALON KO' did not necessarily mean that they had asked their companion to kill Mazharul Haque or Aftab Ahmad. The very fact that only simple injuries were caused to Aftab Ahmad on account of firing made by Vakilwa lend support to our conclusion that even if we assume that accused Imamuddin and Lal Mohammad had exhorted their companions to make an assault on the victim, it would not necessarily follow that they had asked their companions to shoot and kill Mazharul Haque or Aftab Ahmad. Therefore, it may not be very safe to hold appellants Imamuddin alias Chottan and Lal Mohammad guilty under Section 302 with the aid of Section 34 I.P.C. for the offence of murder committed by accused Sartaj Mohammad. Similarly, we find it difficult to hold appellant Vakilwa guilty of the offence of murder with the aid 'of Section 34 I.P.C. As already pointed out above, the pre-arranged plan was only to put a pressure on Aftab Ahmad not to do pairvi for his maternal uncle Shamim, in the murder case of Anisuddin. With this end in view accused Vakilwa made utterances to Aftab Ahmad. Aftab Ahmad did not say

anything in reply, but Mazharul Haque intervened and remonstrated Vakilwa. There is nothing on record to indicate that accused persons had any plan to make assault on Mazharul Haque, but he abruptly came in between the altercation which accused Vakilwa was having with Aftab Ahmad. The other three accused persons, in such circumstances, could not have even a shost (sic) of ida that Mazharul Haque would intervene and raise protest using bad language. He did not ask nor excited accused Sartaj Mohammad to open fire on Mazharul Haque. It was an individual act of accused Sartaj Mohammad, which could not have been anticipated by accused Vakilwa. Therefore, conviction of appellant Vakilwa for the murder of Mazharul Haque at the hands of appellant Sartaj Mohammad with the aid of Section 34 I.P.C. can not be sustained.

43. Learned A.G.A. appearing for the State argued that accused Vakilwa fired upon Aftab Ahmad while Chottan and Lal Mohammad assaulted Masroorul Haque in the same course of incident and therefore, they facilitated commission of murder of Mazharul Haque by Sartaj Mohammad appellant and in this view of the mater all the appellants should be held guilty under Section 302 read with Section 34 I.P.C. We have already pointed out that there is no evidence, diect or indirect, that the murder of Mazharul Haque was committed by Sartaj Mohammad in furtherance of common intention of all accused persons under any pre-arranged plan.

44. The prosecution case further is that as soon as Mazharul Haque intervened and remonstrated accused Vakilwa, Sartaj Mohammad suddenly fired upon Mazharul Haque. It is true that the common intention may develop at the spot during the commission of offence, but it has to be further established that the said plan preceded the act constituting the actual offence. It was, therefore bounden duty of the prosecution to bring on record evidence or other circumstances from which it could conclusively be inferred that there was a prior concert or meeting of mind of all the accused persons for commission of murder of Mazharul Haque before the act of firing was done by accused Sartaj Mohammad. In the absence of any such evidence or circumstances, it would not be safe and proper to hold these three appellants guilty of the offence of murder with the aid of Section 34 I.P.C.

45. As far as the case that the two accused Chottan and Lal Mohammad assaulted Masroorul Haque when he was chasing them is concerned, it is suffice to state that we have already doubted the prosecution allegation that these two appellants had exhorted their companions to kill Mazharul Haque when Sartaj Mohammad opened fire upon Mazharul Haque. When on the ground after sustaining fire arm injuries it was natural for these two appellants to fire as they themselves might have been stunned to see the killing of Mazharul Haque at the hands of one of their companions. They could very well have apprehension that if they stayed back they might be apprehended and attacked by those, who were attracted to the scene of occurrence. Therefore, in such a situation their act of causing simple injuries to Masroorul Haque cannot be connected directly or indirectly with the commission of murder of Mazharul Haque at the hands of Sartaj Mohammad. In the facts and circumstance's appearing in the case there is a reasonable doubt that these accused persons shared the common intention with co-accused Sartaj Mohammad and it cannot be said with certainty that murder of Mazharul Haque was committed to furtherance of common intention of all the accused persons.

46. For the reasons assigned above, we find appellant Sartaj Mohammad guilty under Section 302, I.P.C. and we maintain his conviction and sentence if imprisonment for life there under. His conviction and sentence under Section 324 read with Section 34, I.P.C. for causing injuries to Aftab at the hands of accused Vakilwa are set aside. The appeal filed by Sartaj Mohammad is allowed to this extent.

47. Conviction and sentence of imprisonment for life under Section 302 read with Section 34, I.P.C. of appellant Vakilwa are set aside. His conviction under Section 324, I.P.C. for causing injuries to Aftab Ahmad is maintained but the sentence is reduced to R.I. for one year and a fine of Rs. 300/-. In default of payment of fine he shall undergo a further R.I for three months.

48. Conviction and sentence of life imprisonment under Section 302 read with Section 34, I.P.C. of appellants Lal Mohammad and Imamuddin as well as their conviction and sentence of 2 years rigorous imprisonment and a fine of Rs. 300/- each under Section 324, I.P.C. read with Section 34, I.P.C. are set aside. Their

conviction under Section 323, I.P.C. read with Section 34, I.P.C. is maintained. However the sentence is reduced to the period already undergone and a fine, of Rs. 500/- each. In default of payment of fine each of these appellants shall undergo R.I. for a period of three months. All the appellants are on bail. Appellants Sartaj Mohammad and Vakilwa shall surrender to their bail bonds to serve out their respective sentences as imposed by this Court. On their doing so their bail bonds shall stand cancelled. In case they do not comply with this order within fifteen days, the trial Court shall take prompt and appropriate steps for their arrest and shall put them back in jail for serving out their respective sentences as modified by this Court. Appellant Lal Mohammad and Immamuddin @ Chottan are allowed one month's time to deposit the fine imposed on them, failing which the trial Court shall take appropriate steps against them in accordance with law.

50. Compliance report shall be sent to this Court within two months.

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