

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

Mr. Justice Dr. Tanzilur-Rahman CHIEF JUSTICE

Mr. Justice Dr. Fida Muhammad Khan

Mr. Justice Abaid Ullah Khan

SHARIAT PETITION no.4/K of 1992

Sohail Hameed,
at Karachi

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Petitioner

Versus

The Federation of
Pakistan

--

Respondent

Counsel for the
petitioner

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Petitioner in person

Counsel for the
respondent

--

Mr. Iftikhar Hussain Ch.
Standing Counsel.

Date of institution

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3-5-1992

Date of hearing

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7-10-1992

Date of decision

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12-11-1992

JUDGMENT

DR. TANZILUR-RAHMAN, CHIEF JUSTICE.-- This Shariat

Petition challenges section 34 of the Pakistan Penal Code, on the ground of its being repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (ﷺ). The said section is reproduced as under:-

"S.34. 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."

According to section 34, 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. The contention of the petitioner is that in Islam there is no punishment for intention. Reliance has been placed on the following verse:-

« ولا تزر وازرة وزر اخرى »

"No bearer of the burden can bear the burden of others."

(Al-Qur'an 165:6).

It, however, seems relevant to also quote the following verses of the Holy Qur'an:-

« كل نفس بما كسبت رهينة »

"Every soul will be held in pledge for its deeds."

(Al-Qur'an 79:38).

« لها ما كسبت وعليها ما اكتسبت »

"In his favour shall be whatever good he does, and against him whatever evil he does" (Al-Qur'an 2:286).



"فان عاقبتهم فعاقبوا بمثل ما عوقبتهم به"

"If you have to respond to an attack (in argument) respond only to the extend of the attack levelled against you!"

(Al-Qur'an 16:126).

"ولا تكسب كل نفس الا عليها"

"And Whatever (wrong) any human being Commits rest upon himself alone." (Al-Qur'an 6:164)

3. According to the above verses of the Holy Qur'an the basic principle of Islamic criminal justice seems to be that the person who commits a crime, he alone, would be liable to punishment for the commission of the crime and no other person would be liable in his place.

4. As regards the contention of the petitioner that there is no punishment for mere intention, the following Ahadith (احاديث) seem to be relevant and are thus quoted below:-

i) "It is reported from the Holy Prophet (صلى الله عليه وسلم) to have said that -

"ان الله تجاوز لامتى عما وسوست او حدثت انفسهما ما لم يعمل به"

او تكلم" (الموطاء، امام مالك ج ٢ ص ٨٢٦)

"Allah Almighty has exempted their followers from any penalty for what is in their hearts unless it is translated into action"

ii) It is also reported from the Holy Prophet (صلى الله عليه وسلم) to have said that -

"من هم بحسنة فلم يفعلها كتب له حسنة ومن هم بسيئة فلم يفعلها"

لم يكتب شيئا" (مسلم، كتاب الايمان ٢٠٤)

"The person who intends to do any virtuous act but does not perform it, a reward shall be written in his account and the



person who intends to commit a crime but for some reason, does not act upon it in such circumstance, nothing shall be recorded against him."

5. Abu Zahra, a renowned jurist of Egypt in his Al-Jarima wal 'Uquba fil Shari'ah Al-Islamia (الجريمة والعقوبة في الشريعة الاسلامية) page 350 writes that -

"لا عقاب على النيات"

"Mere intention is not subject to punishment (unless it is done practically."

6. On account of this principle mere intention (نيت) not coupled with any preparation or attempt to translate the intention (نيت) into action is not liable for any punishment. Thus even after having an intention to commit a crime followed by preparation to commit it (التمهيد للجريمة), if a crime is not committed for some reason the mere intention or preparation is not liable to punishment specified for the crime itself, unless the preparation by itself is a crime.

7. The petitioner also submitted that " انما الاعمال بالنيات " the actions (liable to reward) go with intentions. This phrase is, in fact, a part of a long Hadith (حديث) of the Holy Prophet (صلى الله عليه وسلم) narrated from him by Hazrat Umar. This Hadith is narrated by Imam Bukhari in his Sahih (صحيح) as first Hadith under Kitab al-Wahi (كتاب الوحي) and is also mentioned in Al-Mishkat (المشكوة) as the first hadith under Kitab al-Iman (كتاب الايمان). After the above part of the Hadith the Holy Prophet (صلى الله عليه وسلم) said:



وانما لكل امرئ ما نوى

i.e. a human being will get (in result) what he intends for.

It was then stated by the Holy Prophet in the said Hadith that:

"فمن كانت هجرته الى الله ورسوله فعجرته الى الله ورسوله ومن كانت هجرته الى دينا يصيبها او امرأة يتزوجها فعجرته الى ما هاجر اليه ،

"i.e. who migrates with the intention to seek pleasure of Allah and His Apostle, his migration from Makka to Madina will be for the sake of Allah and His Apostle and who migrates (from Makka to Madina) for worldly gain or marrying with certain woman, his migration will be relatable to that intention with which he migrated."

Therefore, it can be inferred easily that if one performs a bad deed with good intention, the badness of that action will remain there, e.g. if a person steals another's property with the intention that he will help the poor with that stolen property (مال المسروقة), the mere intention will not render the theft as lawful. The theft will remain theft and he will be liable to punishment in accordance with law. No matter the intention of committing theft may be good.

8. In so far as the question of doing an act jointly in furtherance of common intention and its liability on each of them is concerned, it seems pertinent to refer to an incident occurred during the days of Umar, the second Caliph. It is narrated in Al-Musannaf Abi Shaibah (مصنف ابن ابي شيبة) Vol:IX page 347 that -

"ان امرأة بمدينة صنعاء غاب عنها زوجها وترك عندها ابنا له من غيرها ، فاتخذت لنفسها خليلا ، فقالت له : ان هذا الغلام يفضحنا فاقتله فاي فامتعت

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منه فطاوعها . فاجتمع على قتل الغلام خليل المرأة ورجل آخر والمرأة
وخادمها . فقطعوا اعضاءه والقوا به في البئر ثم ظهر الحادث و فشابين
الناس فاخذ امير اليمن خليل المرأة فاعترف ثم اعترف الباكون فكتب الى
عمر بن الخطاب فكتب اليه عمر ان اقتلهم جميعا . وقال "والله لو تما لايه
اهل صنعاء لقتلتهم جميعا" (مصنف ابن ابي شيبة ج ٩ ص ٣٤٧)

"The husband of a woman of a city San'a disappeared by leaving her step-son in the house. In his absence, the woman had illicit relation with a person and said to her friend that this child will nickname them by disclosing their relation and asked him to kill the child when he refused to do so she discontinued her illicit relation with him. Ultimately, the woman, her friend, her servant and another person jointly agreed to kill the child. After killing, they cut his body into pieces and then threw it into a well. When the incident came to the knowledge of the people the Governor of Yemen arrested the persons concerned. He and other culprits made confession before him. The Governor of Yemen brought the matter into the notice of Hazrat Umar. In reply, Hazrat Umar ordered him to kill all of them and said "By God, if all the inhabitants of San'a participated in committing this crime, I would have killed all of them."

9. The same incident has been stated in Al-Mufiqat by Imam Shatibi. It reads as under:-

"فقد قاد عمر من خمسة أو سبعة في رجل واحد قتلوه غيلة ، لانه رضى الله عنه أدرك جهة حفظ النفس بالقصاص وأنه لو لم يقتل الجماعة بالواحد لم يند باب القتل بحكم القصاص، وهذه قد يقف العقل دونها فيفهم أن قتل سبعة بشخص واحد ليس حفظا للنفس فهذا اجتهاد عمر حيث قال : (لو تما لايه أهل صنعاء لقتلتهم جميعا) لانه فهم جهة الحفظ التي قد يقف فيها غيره على أنه رضى الله عنه كان مترددا فيه حتى قال له على : أرايت لو اشترك جماعة في سرقة ، أكت تقطعهم ؟ قال : نعم قال : فكذا هنا . فحكم بالقتل .

"Hazrat Umar executed five or seven persons in retaliation of a single person, whom they had killed treacherously. Because Hazrat deemed it expedient for the protection and security of human lives. If several persons are not killed in retaliation of a single person, then the crime of human massacre will not be completely eradicated by the law of retribution. Here wisdom may hesitate, because it does not seem to be a protection of human lives to kill several persons in retaliation of a single person. It was an Ijtihad of Hazrat Umar to have said "If all inhabitants of San'a participated jointly in committing this crime, I would have killed all of them." The object of this declaration was the protection of human lives and to deter other from committing the crime. However, Hazrat Umar was not sure about the correctness of his decision until he asked Hazrat Ali that "if you apprehended several persons in committing a crime of theft, would you order amputation of their hands? Hazrat Ali said, yes! "the same principle would be applied here." Then, Hazrat Umar ordered to kill all of them." (Al-Mufiqat fi Asul al-Shari'ah, Labi Ishaque Al-Shatibi Vol.III page 11 Dar al-Ma'rafat Beirut Lebnon).

10. There is another incident that Hazrat Ali had also ordered the execution of three persons in retaliation of killing a single person.

It is thus so stated in " الجريمة والعقوبة في الشريعة الاسلامية "

as under:-


" ولقد قتل على بن ابي طالب الجماعة بالواحد ايضا ولقد اتبع "

جمهور الفقهاء الصحابه في ذلك "

"Likewise, Hazrat Ali also executed many persons in retaliation



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of one person. This precedent is followed by the majority of Jurists and Companions of the Holy Prophet).

11. Imam Malik, in Mu'atta () has also been quoted as saying that if a person catches hold of a person and another kills him and then it is found that he had caught hold of him for being killed, then both would be put to death: (Mu'atta: Imam Malik, Vol.II p. 873 Kitabul Aqul - Babul-Qisas filqatl). Its version in Arabic reads as under:-


وقال مالك في الرجل يمسك الرجل للرجل فيضربه فيموت مكانه: انه ان امسكه وهو يرى انه يريد قتله قتلا به جميعا وان امسكه وهو يرى انه انما يريد الضرب ما يضرب به الناس، لا يرى انه عمد لقتله، فانه يقتل القاتل ويعاقب الممسك اشد العقوبة،

12. Maulana Salamat Ali in his translation to Kitabul Ikhtiyar

(), known as Islami Faujdari Qanun ()

has also stated on the authority of Al-Kafi that if a group of persons kills a person, then the entire group involved in the murder would be put to death in qisas. (Article 560 p.194). The Arabic text is reproduced as under:-

” اذا قتل جماعة واحد يقتل الجماعة بالواحد ولو قتل واحد جماعة محضر اولياء القتلين قتل لجماعتهم ولا شئ لهم غير ذلك وان حضر واحد منهم وقتل له وسقط حق الباقيين،

13. In Fiqh terminology, two words Tawafuq () and

Tamalu" (تَمَالُوْ) are very common to denote such a situation. There is, however, a bit difference between the Hanafis and rest of the Jurists in determining the meaning of Tamalu' (تَمَالُوْ). According to Jumhoor (جمهور) Tamalu' is like Tawafuq (تَوَافُق) "to commit a crime jointly without having prior agreement or conspiracy, that is to say they just agree on the spot to commit a crime jointly without prior planning and agreement. While according to Maliki Jurists, Tamalu' (تَمَالُوْ) means to commit a crime jointly by several persons in furtherance of common intention and prior agreement. According to them, each member of the group shall be liable to punishment specified for the commission of the crime regardless their direct participation in the crime. Each of them would be considered as it was done individually.

14. In other words, according to Malikis, mere presence at the spot of occurrence of crime with an intention of such commission is sufficient to make a person liable to punishment for such crime irrespective of the nature of his participation and assistance (التعاون والاشتراك). According to Hanafis, however, all participants (مباشر) shall be punished with a punishment of Qisas in the case of murder (قتل عمد) and the person, who after agreement, merely assists at the place of occurrence, he will, however, be awarded Ta'zir punishment which may go to the extent of death punishment but only as Ta'zir, not as Qisas.

15. According to Shafis and Humbalis, all will be liable to the same punishment provided they all intended to commit the said crime and participate in the commission of the crime, even if other person or persons

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engage themselves in some minor act like beating with a stick etc. However, the preferred opinion " ارجع رائے " of the Jumhoor of the Fuqaha (multitude majority, overwhelming of the Jurists) is that if several persons participated in killing a single person, all of them shall be liable to death punishment. Their opinion is, in fact, based on the decision of Hazrat Umar who had executed seven persons, in retaliation of killing a single person and is reported to have said that "if all inhabitants of San'a (صنعاء) had participated in committing the said crime, I would have killed all of them, as referred to above.

16. It is reported that there seems to be consensus of opinion among the Companions (صحابه) of the Holy Prophet (صلى الله عليه وسلم) that if several persons commit an act of aggression against a single person in furtherance of common intention, all of them would be liable to punishment. It is, however, stated in Al-Muhalla (المحلى) by Imam Ibn Hazam Zahiri that the Companions of the Holy Prophet (صلى الله عليه وسلم) cannot be said to be unanimous as Ma'az bin Jabal, a prominent companion of the Holy Prophet (صلى الله عليه وسلم) is reported to have not agreed on the issue of joint liability (الالتزام) with Hazrat Umar and Hazrat Ali. This is so stated in Abu Zahra's book " الجرم والعقوبه " page 402 (ibid).

17. However, the jurists are of the opinion that if the concept of joint liability is ignored, then "Mischief in the land" (فساد في الارض) will spread on earth. The criminals will conspire to commit a crime jointly for the purpose of availing acquittal of some of the participants. Therefore, it is also in the interest of

keeping peace and harmony in the society, if the acts committed with common intention be made punishable for all and each of them for committing such crime.

18. It appears that this Court in exercise of its *quo moto* jurisdiction under Article 203D(1) of the Constitution, had issued public notice dated 30-8-1987 in S.S.M.No.41-A of 1987 to examine some of the provisions of the Pakistan Penal Code, 1860, including section 34, and had invited the opinions of lawyers, jurists and ulama etc. A public notice appeared in the National Dailies of Pakistan, both Urdu and English, and the Court started examination of the said section 34 along with certain other provisions of the Pakistan Penal Code from 17th to 21st January, 1988 at Islamabad and the matter was heard on different dates at Karachi, Lahore and Quetta during 1989 and 1990, but there appears to be no judgment written or pronounced in the said S.S.M.No.41-A of 1987, with the result that section 34 PPC, now under consideration, also remained un-decided.

19. It may, however, be mentioned that in response to the earlier publication of public notice in the Dailies of Pakistan, a number of Scholars submitted their comments on the different provisions of law in a general form. However, Professor Fazle Hadi Qasmi, of Peshawar, made his comments on certain sections of the Pakistan Penal Code as asked for. About section 34 his comments are reproduced as below:-

دفعہ ۳۳

یہ دفعہ تو حضرت عمر رضی اللہ عنہما کے اس قول "لو تمالا علیہ اهل صنعاً لتقتلہم" (ترجمہ) "اگر اس قتل میں تمام اصل صنعاء شریک (اور معاون) ہوتے

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سب کو قتل کرتا ہے۔ سعید بن مسیب سے روایت ہے کہ حضرت عمر رضی اللہ عنہ نے پانچ یا سات آدمیوں کو ایک شخص کے قتل کے جرم میں قتل کیا تھا اور مذکور الصدر قول فرمایا تھا۔

یہ بات قرین قیاس بھی ہے۔ اللہ کے جرم کے ارتکاب میں شرکت کرنے والے ہر ایک کا یہ ارادہ ہوتا ہے کہ ان جرم میں مجھے کامیابی ہو لیکن شرکاء میں سے کوئی ایک گواہ سبقت لے جاتا ہے تو باقی شرکاء بھی اپنے عزم (اور اقدام قتل) کی بناء پر اس جرم کے مرتکب قرار دیئے جاتے ہیں (موطاء امام محمد و مسند شافعی بحوالہ حاشیہ ۹ ہدایہ ج ۲ ص ۵۵۶ کتاب الجنایات)۔

20. Section 34, as reproduced supra, only enacts a rule of co-extensive culpability when offence is committed with common intention by more than one accused. Meeting of more than one mind in doing an act (intended or agreed) to an offence can be said to result in having common intention in doing it. That creates co-extensive criminal liability under this section. The principle which is embodied in section 34, is participation in some act with the common intention of committing a crime. If one such participation among more than one person is established section 34 is attracted. The Hon'ble Supreme Court of Pakistan in Inam Bux vs. the State (PLD 1983 SC 35) has thus held that:


"Section 34 of the Penal Code, 1860 is intended to meet a case in which it may be difficult to distinguish between the acts of individual members of a party who act in furtherance of the common intention of all. It does not create a distinct offence but merely enunciates a principle of joint liability for acts done in furtherance of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. Common intention usually consists of some or all of the following acts; common motive, pre-planned preparation and concert pursuant of such plan, common intention, however, may develop even at the spur of the moment or during the commission of the offence.

The principle enunciated is that if two or more persons intentionally do a thing jointly the position is just the same as if each of them had done it individually by himself."

21. To understand and appreciate the implications of section 34 it seems necessary to also refer to sections 35, 37 and 38 PPC. Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself. Section 35 in effect provides for a case where several persons join in an act which is not per se criminal, but is criminal only if it is done with a criminal knowledge or intention; in such a case each of those persons who joins in the act with that particular knowledge or intention will be liable for the whole act as if it were done by him alone with that knowledge or intention, and those who join in the act but have no such knowledge or intention will not be liable at all. Section 37, in effect, provides for a case where several persons co-operate in the commission of an offence by doing separate acts at different times or places, which acts, by reason of intervening intervals of time, may not be regarded as one act or which may not be necessarily committed with a common intention. Section 38 provides that if several persons are engaged or concerned in the commission of a criminal act, having been set in motion by different intentions, they may be guilty of different offences by means of that act. This section which is the converse of section 34, provides for different punishments for different offences where several persons are concerned

in the commission of a criminal act, whether such persons are actuated by the one intention or the other. The basic principle which runs through all these sections is that an entire act is to be attributed to a person who may have performed only a fractional part of it. Sections 35, 37 and 38 begin by accepting this proposition as axiomatic, and each of them then goes on to lay down a rule by which the criminal liability of the doer of a fractional part (who is to be taken as the doer of the entire act), is to be adjudged in different situations of mens rea. The axiom itself is laid down in section 34 in which emphasis is on the act. What has to be carefully noted is that in section 35 and in section 37 and in section 38 this axiom that the doer of the fractional act is the doer of the entire act is taken up as the basis of a further rule. Without the axiom these sections would not work, for it is the foundation on which they all stand. Reference may be made to Sultan v. Emperor, (AIR 1931 Lah.749(750) and Ibra Akanda v. Emperor (AIR 1944 Cal.339(358):45 Cr.L.J 771).

22. Mr. Iftikhar Hussain Chaudhary, learned counsel for the Federal Government submitted that the principle of collective responsibility is well established in history. The Holy Qur'an mentions extinction of the tribes of 'Ad and Thamud. These people had abandoned the worship of true god and lapsed into incorrigible idolatry. To 'Ad, Hazrat Hud was sent but they did not believe him and the tribe was obliterated from the face of the earth by a hot and suffocating wind that blew for seven nights and eight days without intermission and was accompanied by a terrible earth quake.



The idolatrous tribe of Thamud was bestowed with the presence of Hazrat Salih (a.s.) but the unbelievers persisted in their incorrigible impiety and a violent storm overtook them and they were found prostrate on their breasts in their abodes. Thus, groups, tribes, people or nations were given punishment for their collective wrongdoings and males, females and children were treated alike.

23. The above instances, as quoted by the learned Standing Counsel for the Federation, seem to be out of context as they relate to the law of creation/extinction (*قانون التكويني*) whereas we are at the moment concerned with the legislation (*قانون التشريعي*) as to the law of crime and punishment.

24. It may thus be stated that an individual involved in a criminal act may not be sufficiently motivated to execute his criminal design but aided, abetted, and encouraged by the presence and participation of others may provide him the sufficient tools to complete the offence. The culpability of all the accused in such cases is co-extensive and embraces the principal actor and his accessories to the act. All the participants with common intention deserve like treatment to be meted out to them in law.

25. We are, therefore, of the considered view that the above section 34 PPC, does not offend any injunction of Islam, laid down in the Holy Qur'an and Sunnah of the Holy Prophet (*صلى الله عليه وسلم*).

26. The petition is, therefore, dismissed being without merit.

Amrullah
to day
Justice No. 14/552
 (Dr. Tanzilur-Rahman)
 Chief Justice
 10.11.1992
Fida
 (Dr. Fida Muhammad Khan) (Abaid Ullah Khan)
 Judge Judge

Approved for reporting
[Signature]
 C.T.

Islamabad,
 the 10.11.1992
ABDUL RAHMAN /***