

Umer Daraz rushed towards Tomb of Kunda Pir. It was 10:15 P.M. At the spot Complainant noticed that his brother Malik Safeer was caught hold by accused Khalid Shah and Saleem Khadera, whereas Malik Riayasat, second brother of the complainant, was caught hold by accused Jehanzeb, while accused Imran was stabbing to Malik Safeer. On the arrival of the complainant and others, the accused persons fled away. Malik Safeer fell down having sustained dagger injuries at left side chest, upper side of heart and left side below ribs at abdomen and blood was oozing from the said injuries. The said injured was brought to Civil Hospital in rickshaw by the complainant and P.Ws but he succumbed to his injuries in the way to the hospital. This incident was also witnessed by other mohalla people. Complainant further stated that on inquiry, his brother Malik Riyasat disclosed that Jehanzeb had taken away mobile phone of deceased Malik Safeer and they both had gone to ask Jehanzeb to return the said mobile due to which fight took place.

4. After completing usual investigation, charge sheet was submitted in the competent Court of law, wherein accused Mohammad Imran, Jehanzeb and Saleem Khadera were shown to be in custody, whereas accused Khalid Shah was disclosed as being at large.

5. A formal charge was framed against the accused persons to which they denied the prosecution allegations and claimed to be tried. However, during the pendency of the trial, accused Khalid Shah was declared as proclaimed offender after completing necessary legal formalities, an amended Charge was framed against the accused persons to which they again pleaded not guilty and claimed to be tried.

6. In order to prove its case, prosecution examined P.W.1 Waseem Baig at Ex.09, Complainant Malik Shahzada was examined at Ex.10 who produced Inquest Report as Ex.10/A, memo of inspection of dead body as Ex.10/B, photographs of dead body of deceased Malik Safeer as Ex.10/C to 10/F, mashirnama of seizing the clothes of deceased as Ex.10/G, statement of the complainant under section 154 Cr.P.C. as Ex.10/H, receipt of handing over of dead body as Ex.10/I, mashirnama of site inspection as Ex.10/J, site sketch as Ex.10/K, photographs of the place of incident as Ex.10/L to 10/O

respectively. P.W. 3 Waseem Abbas was examined at Ex.11, whereas P.W. 4 Fazal Abbas was examined at Ex.12 and vide statement Ex.13 learned DDPP gave up P.W. Malik Ejaz Hussain P.W.5 P.C. Mohammad Azhar was examined at Ex.14, who produced mashirnama of arrest of accused Imran and Jehanzeb as Ex.14/A and mashirnama of arrest of accused Saleem Khadera as Ex.14/B. Again vide another statement Ex.15 learned DDPP gave up P.W. Mohammad Rashid. P.W. Dr. Zahir Ahmed, MLO, was examined at Ex.16 who produced M.L. Report No.3820 and Postmortem Report as Ex.16/A and Ex.16/B respectively, certificate of cause of death as Ex.16/C, letter addressed to him by the I.O. to certify the cause of death as Ex.16/D. Again P.W. Aatif was given up by learned DDPP vide his statement Ex.17 stating therein that he was not supporting the prosecution case. P.W. 7 ASI Mohammad Siddique was examined at Ex.8 who produced station diary entry No.56 as Ex.18/A, letter for permission to conduct the proceedings of 174 Cr.P.C. as Ex.18/B, F.I.R. as Ex.18/C, Roznamcha Registered Entry No.61 as Ex.18/D, entry got registered by accused Jehanzeb as Ex.8/E and memo of recovery of crime weapon as Ex.18/F. P.W. 8 Noor Elahi was examined at Ex.19. Once again DDPP vide his statement Ex.21 gave up P.W. ASI Mohammad Ishtiaq, while P.W. 9 Umer Daraz was examined at Ex.21. C.W. Mohammad Rafique was examined at Ex.22 who showed his inability to cause appearance of P.Ws Abid Hussain, Mohammad Rafique and Aurangzeb. C.W. Process Server Mir Kalam Khan was examined at Ex.23 who showed his inability to cause appearance of P.Ws Abid Hussain, Mohammad Hussain, Mohammad Rafique and Talat Amer. According to him, he directed Asif, Malik Tasweer and Gulistan to produce P.W. Malik Riasat but the latter was not produced. Lastly, prosecution examined P.W.10 SIP Mir Kalam Khan at Ex.24 being well conversant with the signature and handwriting of I.O. Inspector Aurangzeb Khan who due to his retirement from service had shifted to Khyber Pakhtoon Khawah and due to his ailing health was not in a position to attend the Court. P.W. 10 produced letter of said I.O. to the police Surgeon as Ex.24/1, photographs as Ex.24/2 to 24/5 respectively. Thereafter, DPPP closed prosecution side vide statement Ex.25.

7. Statements of accused persons under Section 342 Cr. P.C were recorded in which they denied the allegations of prosecution and

claimed to be innocent. Accused Imran further stated that on the day of the incident deceased and P.W. Riasat had attacked his house and had caused injury to his mother which incident was reported by accused Jehanzeb at P.S. Nabi Bux vide entry No.52. He further stated that deceased Malik Safeer was a criminal person, and so many cases were registered against him and was exterminated by other criminals. In support of such fact, accused Imran produced copy of Station Diary Entry No.52 as Ex.26/A, copy of M.L. Report No.3735 as Ex.26/B, copy of letter sent by ASI Mohammad Siddique as Ex.26/C, civil hospital slip as Ex.26/D, copy of FIR No.58/2002 as Ex.26/E. Accused Jehanzeb in his statement stated that he has been involved in this case because he had lodged report against deceased Malik Safeer and P.W. Malik Riyasat for attacking mother of accused Imran. Accused Saleem claimed that he has been involved in the case due to enmity. However, the accused persons neither examined themselves on oath under section 340(2) Cr. P.C. nor produced any other witness in their defense.

8. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing counsel for the parties, trial Court vide impugned judgment convicted and sentenced the appellants / accused, as stated above. Against the said judgment the appellants have preferred instant appeals.

9. I have heard learned counsel for the appellants as well as learned D.P.G. appearing for the State and perused the material available on the record.

10. Learned counsel for appellant Saleem Khadera contended that the appellant has been falsely involved in the present case. He further contended that the trial Judge has passed the impugned judgment without properly appreciating the evidence brought on the record and without applying his judicious mind to the factual and legal aspects of the case. According to him, the allegation against the said appellant/accused is that of only catching hold the deceased and admittedly there is no allegation against him to have caused any injury to the deceased. He further contended that it is settled principle of law that the accused against whom there is no allegation of causing any injury to the deceased cannot be convicted under Section 302 (b) PPC. In support of such assertion, he placed reliance

on the case law reported as *Shoukat Ali vs. The State (PLD 2007 SC 93)*, *Gul Naseeb vs. The State (2008 SCMR 670)* and *NLR 2007 Cr. L.J. 508*. He further contended that even in the circumstances of instant case, the ingredients of *common intention* as provided in Section 34 PPC are lacking in view of the guidelines provided by the Superior Courts. In support of this plea, learned counsel for the appellant Saleem Khadera placed reliance on the cases reported as *Hidayatullah and others vs. The State (1976 P.CR.L.J. 1067)*, *Athar Khan and 2 others vs. The State (PLD 1972 Lahore 19)*, *Hasan Din vs. Muhammad Mushtaq and 2 others (1978 SCMR 49)*, *Chutta and 2 others vs. The State (1995 P.CR.L.J. 755)*, *Shahadat Khan and another vs. Home Secretary to the Government of West Pakistan and others (PLD 1969 SC 158)* and *Muhammad Nawaz and others vs. the State (PLD 1967 Lahore 952)* and 2011 Criminal Law Journal 505. He prayed for allowing the appeal and setting aside the impugned judgment.

11. Learned counsel appearing for the appellants Mohammad Imran and Jehanzeb contended that the appellants have been falsely involved in the present case. He further contended that the impugned judgment is the result of misreading and non-reading of the evidence brought on the record. According to him, the trial Court has not properly appreciated the evidence and has passed the impugned judgment in a hasty and mechanical manner. He also submitted that the ingredients of common intention are not available in the present case as such accused Jehanzeb cannot be convicted against whom there is no allegation of causing any injury to the deceased. He further contended that the prosecution has also failed to prove its case against accused Mohammad Imran as there are material contradictions in the evidence of the prosecution witnesses as well as legal infirmities and flaws which create serious doubts in the prosecution case. He further contended that no crime weapon has been recovered from accused Mohammad Imran. According to him the prosecution witnesses are closely related to the complainant and deceased hence they are interested witnesses and their testimony cannot be relied upon without strong corroboration which is lacking in the instant case. He contended that there are serious doubts in the prosecution case benefit whereof must be extended to the accused. He also prayed for allowing the appeal and acquittal of the

appellants. In support of his contentions learned counsel for the appellants Mohammad Imran and Jehanzeb relied upon the case-law reported as *Muhammad Aamer Abbas and others vs. The State* (2002 YLR 3953), *Ghalib Pervaiz alias Ghaliba and another vs. The State* (1974 P. Cr.L.J. 420) and *2010 Muhammad Shah vs. The State* (SCMR 1009).

12. Conversely, learned D.P.G. appearing for the State, while supporting the conviction and sentence awarded to the appellants, contended that the impugned judgment has been passed in accordance with the law after considering each and every point involved in the case. She further contended that the testimony of related witnesses is also worth reliance and the same cannot be discarded merely for the reason that they have relations with complainant party. According to her, minor contradictions in the evidence of prosecution witnesses are ignorable and the same cannot be made basis for acquittal of the accused. She further contended that the appellants are involved in a heinous crime of causing murder as such they do not deserve any leniency. She prayed for dismissal of the appeals and upholding the impugned judgment.

13. I have given anxious considerations to the arguments advanced by the learned counsel for the parties and have gone through the material available on the record. From the perusal of the evidence of the prosecution witnesses it appears that on 10.08.2005 a quarrel had taken place between accused Jehanzeb and deceased Malik Safeer, thereafter accused Jehanzeb had gone towards his house. During the said quarrel mobile phone of deceased Malik Safeer had misplaced and it was alleged by the deceased that the same had been taken away by accused Jehanzeb. After having failed to search out the said mobile phone, deceased Malik Safeer alongwith P.W. Waseem Baig came at the house of accused Jehanzeb where they met with accused Imran and Saleem to whom they told that Jehanzeb had taken away the mobile, whereupon bickering took place between the deceased and accused Mohammad Imran and P.W. Waeem Baig tried to separate them, however, when he failed to do so he came on his motorcycle to younger brother deceased namely P.W. Malik Riyasat who was sitting alongwith Umer Daraz. Hearing this, both of them reached at the spot and noticed that deceased Malik Safeer was

being maltreated by the accused and on the intervention of Malik Riyasat he was also beaten. Facing such a situation, Umer Daraz arrived in running state at the house of the complainant Malik Shahzada who was sitting alongwith his friend Fazal Abbas and on coming to know about the incident through Umer Daraz, all the three persons reached at the scene of offence. The three alleged eye-witnesses have categorically deposed in their respective evidence that deceased Malik Safeer was being caught hold by accused Saleem and absconding accused Khalid Shah whereas accused Jehanzeb had caught hold of P.W. Malik Riyasat and accused Imran was inflicting danger/*churri* blows to deceased Malik Safeer. From the evidence of these witnesses it is clear that all the three alleged eye-witnesses have concurred on the point that the *churri* injuries were inflicted only by accused Imran and that no other accused had inflicted the injuries to the deceased either with *churri* or any other weapon. The allegation against appellants Saleem Khadera and Jehanzeb are only that of sharing common intention with accused Imran and facilitating him in the commission of the said offence.

14. So far as common intention is concerned, in the case reported as *Chutta and 2 others vs, The State (1995 P. CR.LJ 755)* a Division Bench provided following guidelines for attracting the provisions of 'common intention' as stipulated in Section 34 PPC:

- (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.*

15. Now examining the instant case in the light of aforesaid guidelines, it seems that a quarrel had taken place between accused Jehanzeb and deceased Malik Safeer and after departure of accused

Jehanzeb, deceased Malik Safeer alleged that his mobile phone had been taken away by Jehanzeb, therefore, he alongwith P.W. Waseem Baig came at the house of accused Jehanzeb where bickering took place between the deceased and accused Mohammad Imran at the spur of moment which ultimately resulted in the murder of deceased Malik Safeer. From these circumstances, it is crystal clear that there was no pre-arranged plan pursuant whereof all the accused sharing common intention with each other, had caused injuries to the deceased. So far as accused Jehanzeb is concerned, it is at all not deposed by any of the prosecution witnesses that even he had caught hold of deceased Malik Safeer, rather P.W. Umer Daraz has deposed in clear terms that accused Jehanzeb and P.W. Malik Riyasat were fighting separately with each other. There is also no allegation of hatching conspiracy or preparing pre-arranged plan against accused Saleem Khadera in connivance with accused Imran to commit the alleged offence.

16. It is also a settled principle of law that the accused who did not cause any injury to deceased cannot be convicted / sentenced under Sections 302 / 34 PPC. In this connection, reference can be made to the cases decided by this Court reported as *Fakir Mohammad Vs. State (2007 Cr.L.J. 508)* and *Shah Bali and another Vs. The State (2016 P. Cr. L.J.549)*. In the instant case, admittedly none of the prosecution witness has deposed that accused Saleem Khadera and Jehanzeb had cause any injury to deceased Malik Safeer.

17. Besides, there are various contradictions and discrepancies in the evidence of alleged eye-witnesses which may be summarized as under:

Complainant Malik Shahzada in his evidence deposed as under:

“When we reached there I saw that my brother Malik Safeer was caught hold from the back side by accused Khalid Shah and Saleem Khada whereas my other brother namely Riyasat was caught hold by accused Jehanzeb and accused Imran was holding dagger in his hand who was inflicting dagger blow to my brother namely Safeer.”

18. On the other hand, statement of P.W. Fazal Abbas, who also claims to have seen the incident, is contrary to the statement of the complainant. He deposed as under:

“Thereafter we reached there, where we saw so many persons were gathered there and saw that two persons were quarrelling with each other, one of them was Malik Riasat whereas the name of other person disclosed to me as Jehanzeb. There were also abusing each other. Malik Shahzad then inquired about his brother Malik Safeer from his brother Malik Riasat, as to where quarrel is going on with his brother Malik Safeer and at the same time I saw that Malik Safeer was lying on the ground in injured condition by putting his hand on his heart. Thereafter injured was taken to hospital in a rickshaw by Malik Shahzad and Malik Riasat.”

19. In his evidence there is, at all, no mention of catching hold of deceased Malik Safeer by accused Saleem Khadera as alleged by the complainant.

20. The third alleged eye-witness namely Umar Daraz in his deposition stated as under:

*“I alongwith Malik Shahzad, Fazal Abbas had rushed towards the place of incident through our motor cycle and we had observed that accused Khalid Shah and Saleem had caught hold to Malik Safeer whereas accused Imran was inflicting the churri blows to deceased Malik Safeer. **Jehanzeb and Malik Riasat were fighting with each other separately.**”*

21. Rather prior to this, he had made a unique statement in his examination-in-chief which was not stated by any other prosecution witness. He deposed:

*“We had appeared at scene within a minute where we observed that they were fighting with Malik Safeer i.e. Imran, Jehanzeb, Saleem and Khalid Shah. Khalid Shah having the **iron bar**, Jehenzeb was having the **iron bar** and Imran was having the **Churri**, and Saleem had caught-hold deceased Mohammad Safeer.”*

22. From above evidence I have noted that if the accused had iron bars in their hands then what prevented them not to use the same and instead of doing so, they threw the iron bars and preferred to

catch hold of the deceased Malik Safeer and P.W. Malik Riasat. Besides, no other witness has stated the fact of holding iron bars by accused Saleem Khadra and absconding accused Khalid Shah.

23. Another interesting point is that it is the allegation of prosecution that the crime weapon viz. *churri* was recovered at the pointation of accused Saleem Khadera and even one of the points formulated for determination by the trial Court was that:

“Whether accused Saleem voluntarily led the police party to the shrine of Kunda Pir and produced the crime weapon viz. blood stained churri / dagger hidden under iron tray meant for keeping lamps?”

24. Despite that, no question was put at all in the statement of this accused recorded under Section 342 Cr.P.C. regarding alleged recovery of the crime weapon on his pointation. It is well settled principle of law that all the incriminating pieces of evidence available on record in examination-in-chief, cross-examination or re-examination of witnesses are required to be put to the accused, if the same are against him, while recording his statement under Section 342 Cr.P.C. and in case any such incriminating piece of evidence is not put to the accused in his statement for his explanation then the same cannot be used against him for recording his conviction. In this connection reference may be made to the case of *Mohammad Shah Vs. The State* reported in 2010 SCMR 1009 wherein Honourable Supreme Court held as under:

“It is important to note that all incriminating pieces of evidence, available on the record, are required to be put to the accused, as provided under section 342, Cr. P.C. in which the words used are “For the purpose of enabling the accused to explain any circumstances appearing in evidence against him” which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief, cross-examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984.....It is well-settled that if any piece of evidence is not put to the accused in his statement under section 342 Cr. P.C. then the same cannot be used against him for his conviction.”

25. Yet there is another noteworthy point that it appears that almost right from the beginning P.W. Malik Riasat was alleged to be present alongwith deceased Malik Safeer, rather he was also allegedly maltreated by the accused and it has been alleged that he and accused Jehanzeb were fighting with each other separately. However, very strangely he has not been examined and has been given up by the prosecution. Not only he, but P.Ws Malik Ejaz Hussain, Mohammad Rashid, P.W. Atif, P.W. ASI Mohammad Ishtiaq were also given up by DDPP vide his statements Ex.13, Ex.15, Ex.17, Ex.21 respectively. Besides, P.Ws Abid Hussain, Mohammad Rafique, Mohammad Hussain, Mohammad Rafique and Talat Amer also could not be produced by the prosecution for their examination. I.O. of the case namely S.I. Aurangzeb also could not be examined as after his retirement he had shifted to Khybver Pakhtoon Khawah and due to his ailing health he could not attend the court for his evidence and instead P.W.10 SIP Mir Kalam Khan, who was well conversant with his handwriting, was examined. It is also worth-mentioning that in his statement whereby P.W. Atif was given up, learned DDPP had categorically stated that he was being given up because **he was not ready to support the prosecution case.**

26. It is settled principle of law that despite availability of disinterested witnesses, non-examination of such witnesses in the case gives inference, as envisaged under Article 129(g) of Qanoon-e-Shahadat Order 1984 that in case such witnesses had been examined, they would have deposed against the prosecution. In the case of *Bashir Ahmed alias Manu vs. the State reported in 1996 SCMR 308* it was held that despite presence of natural witnesses on the spot they were not produced in support of the occurrence and adverse inference under Article 129(g) of Qanun-e-Shahadat Order could easily be drawn that in case they were produced, they would have not supported the prosecution version. In another case reported as *Mohammad Shafi vs. Tahirur Rehman (1972 SCMR 144)* it was held that large number of persons had gathered at the place of occurrence but prosecution failing to produce single disinterested witness in support of its case, no implicit reliance could be placed on evidence of interested eye-witnesses.

27. The upshot of above discussion is that prosecution has succeeded in proving the case against the accused Mohammad Imran as ocular testimony is available that it was he who inflicted *churri*/ dagger blows to deceased Malik Safeer at his chest and such version of the prosecution has been established by medical evidence also, therefore, I am of the firm opinion that he was rightly convicted by the trial Court under Section 302(b) PPC, whereas, prosecution has failed to establish sharing the common intention in committing the alleged offence on the part of appellants Saleem Khadera and Jehanzeb. Therefore, by a short order dated 30.04.2018, Criminal Appeal No.309/2013 was allowed to the extent of Appellant Saleem Khadera and Criminal Appeal No.336/2013 was party allowed to the extent of Appellant Jehanzeb, while it was dismissed to the extent of appellant Mohammad Imran. Consequently, impugned judgment dated 30.10.2013 was partly maintained to the extent of appellant Imran and partly set-aside to the extent of the Appellants Saleem Khadera and Jehanzeb and they were acquitted of the charges and they were ordered to be released if their custody was no more required in any other criminal case. As far as absconding accused Khalid Shah is concerned, it was ordered that perpetual NBWs issued by the trial Court against him shall remain intact/in field till his arrest or surrender.

28. Above are the reasons for the said short order dated 30.4.2018.

JUDGE