2020 P Cr. L J 763

[Balochistan]

Before Jamal Khan Mandokhail and Rozi Khan Barrech, JJ

NAHIDA JABEEN---Appellant

Versus

AGHA MUHAMMAD and 6 others---Respondents

Criminal Acquittal Appeal No. 1 of 2019, decided on 26th September, 2019.

(a) Penal Code (XLV of 1860)---

----Ss. 302(b), 337-E, 337-F(iii), 337-L(ii), 147, 148, 149 & 34---Qatl-i-amd, ghayar-jaifah, causing mutalahima, causing hurt, rioting, rioting armed with deadly weapon, unlawful assembly, common intention---Appreciation of evidence---Appeal against acquittal---Delay of about two hours in lodging the FIR---Effect---Prosecution case was that the accused party while armed with rod and sticks assaulted on complainant party, due to which, complainant and her daughter and son sustained injuries while her husband died---First Information Report was lodged with delay of two hours---Facts remained that the area in which the occurrence took place was a remote area and it was also a B-area and it came within the jurisdiction of the Levies officials---Tehsildar was incharge of the Levies Thana---Levies official waited for Tehsildar and when Tehsildar came to the Thana, he lodged the report, therefore some delay had occurred in registration of the FIR and same was not fatal to the prosecution---Even otherwise the time of twenty minutes were spent during the occurrence and all the family members of the complainant were injured, who firstly went to Levies check post and thereafter to Levies Thana and kept waiting for Tehsildar to lodge the FIR, as such the FIR was deemed to have been lodged promptly as there was no possibility of cooking of false story within an hour and a half.

(b) Criminal Procedure Code (V of 1898)---

----S. 154---First Information Report---Delay in lodging FIR---Effect---If evidence inspired confidence, the delay in registration of case became a secondary factor and did not materially affect the veracity of prosecution.

(c) Penal Code (XLV of 1860)---

----Ss. 302(b), 337-E, 337-F(iii), 337-L(ii), 147, 148, 149 & 34---Qatl-i-amd, ghayar-jaifah, causing mutalahima, causing hurt, rioting, rioting armed with deadly weapon, unlawful assembly, common intention---Appreciation of evidence---Appeal against acquittal---Ocular account consisted of the statement of complainant, her son and one injured daughter---Complainant was wife of the deceased and other eye-witnesses were son and daughter of the

deceased---Presence of said witnesses at the place of occurrence along with the deceased appeared to be quite natural---Said witnesses also received injuries, which also established their presence at the place of occurrence---Injuries on the person of the injured witnesses and subsequent death of the deceased also indicated to the fact that the presence of such witnesses and deceased was natural one---Statements of the prosecution witnesses of ocular account reflected that they remained unanimous qua the date, time, mode and manner of occurrence---Occurrence took place during day light, hence there was no chance of mistaken identity or false implication, while the parties were well known to each other---All the three witnesses deposed about the scene of occurrence in line and their statements despite lengthy cross-examination were not shaken by the defence on material counts---Statements of said witnesses were corroborated with the evidence produced by Medical Officer and during course of examination, no contradiction was pointed out by the defence between the ocular account and medical evidence---According to the crime report and statement of the eye-witnesses as well as medical evidence, there was sufficient incriminating evidence available on record to connect the accused with the occurrence---Admittedly, no specific role to each of the accused/respondents was attributed by the witnesses who categorically stated that the accused being armed with sticks and iron rods, attacked upon them and deceased and they received injuries---Deceased received eight injuries on his person---Complainant and the other eye-witnesses also received injuries and there were also two other accused (absconding) at the scene of occurrence, as such conduct of the accused persons showed their common intention and pre-plan just to gather at the place of occurrence and to commit the offence---Circumstances established that the prosecution had proved its case against the respondents/accused beyond shadow of doubt, therefore, their acquittal had led to grave miscarriage of justice and while acquitting the accused/respondents the Trial Court had ignored the material evidence on record i.e. statements of injured eye-witnesses, medical and other material available on record---Prosecution produced confidence inspiring evidence to prove the guilt of the respondents/accused, as such the conclusion drawn by the Trial Court was perverse, arbitrary and based on misreading of the evidence on record calling for interference by the court---Evidence on record did not show as to who caused the fatal injuries---Accused, in circumstances, deserved imposition of lesser penalty; resultantly, appeal against acquittal was allowed and respondents/accused were convicted and sentenced for life, in circumstances.

Shamas-ud-Din v. Muhammad Shahbaz Qammar and 2 others 2009 SCMR 427; The State through Advocate General NWFP, Peshawar v. Humayoun and others 2007 SCMR 1417; (1) Amal Sherin (2) Zahir Gul v. The State through NWFP, Peshawar PLD 2004 SC 371; Muhammad Ali v. Muhammad Yaqoob and others 1998 SCMR 1814; and Ghulam Sikandar and another v. Mamaraz Khan and others PLD 1985 SC 11 and Ali Imran v. The State PLD 2006 SC 87 rel.

(d) Criminal trial---

----Related witness---Statement of related witness---Reliance---Scope---Mere close relationship of the witnesses with deceased could not be a reason to discard their testimony if

otherwise the same was trust worthy, confidence inspiring and appealing to reason and corroborated by independent circumstances.

(e) Penal Code (XLV of 1860)---

----Ss. 302(b), 337-E, 337-F(iii), 337-L(2), 147, 148, 149 & 34---Qatl-i-amd, ghayar-jaifah, causing mutalahima, causing hurt, rioting, rioting armed with deadly weapon, unlawful assembly, common intention---Appreciation of evidence---Non-recovery of incriminating articles---Effect---Prosecution case was that the accused party while armed with rod and sticks assaulted on complainant party, due to which, complainant and her daughter and son sustained injuries while her husband died---In the present case, no incriminating articles were recovered from the accused but the fact itself was not sufficient to prove otherwise as the accused persons were shown armed with sticks and iron rods not only in the crime report but also disclosed by all the three eye-witnesses---Failure to recover weapon of offence during the investigation for any reason by itself would not be sufficient to suggest that the accused were not armed---Recovery of incriminating material was not necessary to record conviction if ocular account was convincing and worthy of credit finding support from medical evidence.

(f) Criminal trial---

----Motive---Scope---Existence or non-existence of motive and its proving or non-proving by the prosecution was not fatal to the prosecution case---If the case was proved from ocular and medical evidence then the conviction could be passed.

(g) Penal Code (XLV of 1860)---

----Ss. 302(b), 337-E, 337-F(iii), 337-L(2), 147, 148, 149 & 34---Qatl-i-amd, ghayar-jaifah, causing mutalahima, causing hurt, rioting, rioting armed with deadly weapon, unlawful assembly, common intention---Appreciation of evidence---Non-recovery of blood stained earth---Scope---Non-taking of the blood-stained earth from the place of occurrence was of no avail to the defence.

(h) Criminal Procedure Code (V of 1898)---

----S. 417--- Appeal against acquittal--- Double presumption of innocence---Scope---Once acquittal had been recorded, presumption of innocence would become double in favour of accused---Such presumption would not be available if the findings rendered by the Trial Court were artificial and did not meet the principles of evaluation of material available on record.

Sohail Ahmed Rajpoot for Appellant.

Mukesh Nath Kohli and Jalila Haider for Respondents Nos. 1 to 4.

Date of hearing: 23rd July, 2019.

JUDGMENT

ROZI KHAN BARRECH, J.---The instant appeal has been filed by the appellant, Nahida Jabeen widow of Ghulam Muhammad Tareen under section 417, Cr.P.C. against the judgment dated 26.12.2018 (hereinafter the "impugned judgment") passed by learned Additional Sessions Judge-V, Quetta ("trial court") whereby, respondents Nos.1 to 6 were acquitted of the charge under sections 302, 337-ADF, 354, 147, 148 and 149, P.P.C. in FIR No. 13/2016 Levies Station Ziarat.

2. Relevant facts for disposal of the instant appeal are that on the report of the complainant/appellant FIR No. 13 of 2016 was lodged with Levies Station Ziarat on the allegation that on 16.09.2016 she along with her family members i.e. her husband Ghulam Muhammad (deceased), her son Tabish and daughter Mahwash and grandson Muhammad Absar were coming to Quetta from Duki in a vehicle. At about 5:30 p.m. when they reached at Ziarat Wacha Ghouski, a (125-CC) motorcycle and a Mehran car were parked on the road. The accused persons namely Noor Muhammad, Ajmal, Hussain, Agha Muhammad and Rehan, having sticks and rods were standing near the vehicle. The accused Feroz Khan was sitting on driver's seat along with accused Naseebullah and other muffled faced persons. On seeing the complainant's vehicle they intercepted the same with their vehicle and motorcycle; that the persons with masked faces opened the door of complainant's vehicle and pulled out her grandson. Meanwhile she and her daughter tried to rescue, when suddenly accused Agha Muhammad, Rehan, Feroz and Naseebullah approached and started beating the complainant and her daughter and outraged their modesty on a thoroughfare, due to which she and her daughter sustained injuries. When the complainant's husband (deceased) and son Tabish came to rescue them, the accused persons started beating them with rods and sticks, as a result whereof her husband sustained injuries on his head and other parts of the body. They started screaming on the spot due to which the accused persons left the crime scene and ran away. Hence the crime report. It may be noted that subsequently on 26.09.2016 the injured Ghulam Muhammad (deceased) husband of the complainant succumbed to injuries.

After completion of all legal formalities, the challan was submitted before the trial court. Charge was framed to which the respondents did not plead guilty and claimed trial, whereby the prosecution in order to prove its case against the respondents, produced six witnesses during the trial. On conclusion of prosecution evidence, the statements of the respondents were recorded under section 342, Cr.P.C., wherein they once again denied the allegations and professed their innocence. The respondents neither opted to be examined on oath nor produced defense witnesses except the respondent/accused Naseebullah who recorded his statement on oath as envisaged under section 340(2), Cr.P.C. and produced three witnesses in his defense. On conclusion the trial court vide impugned judgment dated 26.12.2018 acquitted the respondents of the charge. Hence this appeal.

3. We have heard the learned counsel for the parties and have gone through the available record with their able assistance.

4. It may be observed that the occurrence took place on 16.09.2016 at 5:30 p.m. and the FIR was lodged on 7:30 pm with delay of two hours. As far as the delay in lodging the FIR is

concerned that was fully explained by the prosecution witnesses. According to PW-2 Mahwash Gul, who is the eye-witness as well as the injured witness of the occurrence, after their vehicle was stopped by the accused, till their escape from the place of occurrence it took twenty minutes. According to complainant/PW-1 at first they went to the levies check post but the levies officials told them to go to levies Thana and later on they went to Levies Thana. According to PW-6 Noor Ahmed Tehsildar, who conducted the investigation of the case, on the day of occurrence, he was on routine gasht. At about 7:00 p.m. he received information about the occurrence through wireless set. On the said information he reached to the levies thana and on the complaint of PW-1, the FIR was lodged. Even in such like situations, late recording of the FIR is not fatal to the prosecution's case. The view taken in Tahir Hussain's case (1992 PCr.LJ 478) was that if the evidence inspires confidence, the delay in registration of the case becomes a secondary factor and does not materially affect the veracity of the prosecution.

5. Even otherwise it's a matter of common knowledge that the area in which the occurrence took place is a remote area and it was also a B-area and it comes within the jurisdiction of the levies officials. Tehsildar was incharge of the levies Thana. The levies official waited for Tehsildar and thereafter when Tehsildar came to Thana, he lodged the report, therefore some delay has occurred in registration of the FIR and same is not fatal to the prosecution. Even otherwise the time of twenty minutes were spent during the occurrence and all the family members of the complainant were injured, who firstly went to levies check-post and thereafter to levies thana and kept waiting for Tehsildar to lodge the FIR, as such the FIR is deemed to have been lodged promptly as there is no possibility of cooking of false story within an hour and a half. After the incident the complainant reached levies thana where on her statement the FIR was lodged wherein all the respondents were duly named with specific role. The prosecution in order to prove its case has led evidence qua the ocular accounts, medical evidence as well as investigation. The ocular account in this case consists of the statement of Nahida Jabeen PW-1/complainant, who was complainant of the case. Mahwash Gul, PW-2 was the eye-witness of the occurrence. Tabish Gul, PW-3 was the injured/eye-witness of the occurrence. All of them categorically stated that on 16.09.2016 at 5:30 p.m. they reached Wacha Ghouski Ziarat and there the accused stopped their vehicle armed with sticks and rods and tried to snatch grandson of the complainant. Upon their resistance at first the accused attacked upon PW-1/complainant and PW-2 namely Mahwash Gul and they received injuries, on which the deceased Ghulam Muhammad and PW-5 Tabish Gul resisted the same. After that the accused attacked upon Tabish Gul and the deceased Ghulam Muhammad, who also received injuries.

6. According to Dr. Noor Baloch, PW4, who produced the medical certificate of the injure Ex.P/4-B to Ex.P/4-D and the death certificate of the deceased as Ex.P/4-A. The nature of the injuries received by the injured witnesses and deceased cannot be said to be self-inflicted and even the defense has not disputed the same to be self-inflicted or the same were old injuries, as such legally the statements of the injured witnesses cannot be challenged. Reliance in this behalf is placed on the case of Farooq Khan v. The State (2008 SCMR 917) wherein it has been held as under:

> "7. We have heard learned counsel for the parties and have perused the available record with their assistance. There is no denying the fact that it was a broad-daylight

occurrence... Farooq Khan, appellant injured the deceased with Chhuri hitting him on the left side of his chest. The presence of the injured P.Ws. at the place of occurrence is intrinsic and could not be doubted because it was unchallenged. Statement of P.W.8 is consistent, straightforward and trustworthy with no cogent reason in evidence to disbelieve the same.

8. The defense has also not doubted or challenged the injuries sustained by the injured PW in cross-examination. The injuries sustained by PW-8 have been duly supported by medical evidence furnished by PW-10 Dr. Humayun Khan who ruled out that the injuries on person of Namoos Khan PW-8 were self-inflicting injuries."

7. As far as presence of the prosecution witnesses at the place of occurrence at the relevant time is concerned, the complainant is wife of the deceased and PW-2 and PW-5 are son and daughter of the deceased. Their presence at the place of occurrence along with the deceased being husband of PW-1 and father of PW-2 and PW-5 appears to be quite natural. All the above witnesses also received injuries, which also establishes their presence at the place of occurrence. All of them stated in categorical terms that the respondents/accused along with the absconding accused reached the place of occurrence while armed with sticks and rods and attacked them and the deceased Ghulam Muhammad, as a result whereof they received injuries.

8. The injuries on the person of the injured witnesses and subsequent death of the deceased Ghulam Muhammad also indicates to the fact that the presence of such witnesses and deceased is natural one.

Careful scrutiny of statements of the above prosecution witnesses of ocular account reflects that they remained unanimous qua the date, time, mode and manner of occurrence. The pen-picture of the occurrence coming out of statements of the prosecution witnesses of ocular account straightway rings true and seems to be next to natural. The most astonishing aspect of the case is that during the course of cross-examination not a single question was put to the prosecution witnesses regarding the salient features of the prosecution version in order to create any sort of dent in the credibility of their testimony.

Although learned counsel for the complainant had urged that prosecution witnesses are closely related to the deceased but it has been the consistent view of the superior courts of the country that mere close relationship of the witnesses with deceased would not discard their testimony if otherwise the same is trust worthy, confidence inspiring and appealing to reason while corroborated by independent circumstances as has happened in the case in hand. The objection of the defense that only interested witnesses have been produced, suffice to observe that it does not appeal to the logic that in front of blood relations, if one person is got murdered, his relatives by letting the actual culprit involve an innocent person. Even otherwise being closely related to the deceased the prosecution witnesses were coming along with the deceased from Duki to Quetta in one vehicle, coupled with the fact that the occurrence took place during day light, hence there was no chance of mistaken identity or false implication, while the parties were well known to each other. Respectful reliance in this regard is placed on the ratio decidendi of august Supreme Court of Pakistan in the cases of Ijaz Ahmad v. The State (2009 SCMR 99) and Talib Hussain and others v. The State and

others (2009 SCMR 825).

9. Presence of PW-1, PW-2 and PW-5 was proved and all the above three witnesses have corroborated each other on all material counts. Though certain discrepancies have been observed in their testimonies but such discrepancies would not thrash out or materially affect the prosecution on material counts. It is important to mention here that all three witnesses deposed about the scene of occurrence inline and their statements despite lengthy cross-examination were not shaken by the defense on material counts. Even the defense did not put a single question to any of the aforesaid three eye-witnesses with regard to their presence and false implication of the respondents/accused, in such circumstances the statements of the all three eye-witnesses remains firm.

10. As far as the medical evidence is concerned, PW-4 Dr. Noor Muhammad Baloch, conducted the post-mortem over the dead body of the deceased and observed eight injuries on his person i.e. different parts of his body and his head by means of blunt weapon. According to this witness on 16.09.2016 the injured namely Ghulam Muhammad, Naheeda Jabeen, Tabish Gul and Mahwar Gul were brought to Sundeman Provincial Hospital Quetta in injured condition. He examined the injured and referred the deceased Ghulam Muhammad to Bolan Medical Complex Hospital Quetta for C.T Scan but the injured was shifted to Akram Hospital for C.T Scan. He further deposed that on 26.09.2016 the deceased succumbed to the injuries and he conducted the post-mortem of the deceased. It is physically mentioned in the post-mortem report that the cause of death of the deceased is injuries to skull, brain, coma and death and same was caused by blunt means, homicidal in nature. The statements of PWs-1, 2 and 3 are corroborated with the medical evidence produced by PW-4, Ex.P/4-A, Ex.P/4-B, Ex.P/4-C and Ex.P/4-D and during course of examination no contradiction was pointed out by the learned counsel for respondents between the ocular account and medical evidence.

11. The record reveals that during cross-examination the defense has taken different stance such as giving first treatment to the deceased at Ziarat as well as on the way when they were coming from Ziarat to Quetta and due to negligence in treatment the deceased died. However they failed to prove their stance. It is also admitted fact that the deceased was not at first shifted to District Headquarter Hospital Ziarat rather he was brought to Sundeman Provincial Hospital Quetta directly. It takes almost two and a half hours to travel to Quetta from Ziarat. As stated earlier that Ziarat is a remote area and only a District Headquartter Hospital (DHQ) is situated there like a Basic Health Unit. Under such circumstances the deceased was not taken to DHQ. The deceased was brought to Sundeman Provincial Hospital Quetta and it is a prominent hospital of the province. According to PW-4 there was no facility of CT Scan in the said hospital therefore the injured/deceased Ghulam Muhammad was referred to BMC hospital Quetta for CT Scan. It is worthwhile to mention here that the relatives of the deceased thereafter shifted the injured to Akram Hospital Quetta for CT scan and later on admitted him to Heart and General Hospital Pvt, Ltd. and there was no facility of ventilation and then he was shifted to Quetta Hospital for further treatment, where on 26.09.2016 he died. It has also come on record that the levies authorities referred the deceased to Sundeman Provincial Hospital Quetta.

12. Although no incriminating articles were recovered from the respondent but the fact itself is not sufficient to prove otherwise as referred earlier that the respondents were shown armed with sticks and iron rods not only in the crime report but also disclosed by all the three eye-witnesses. Failure to recover weapon of offence during the investigation for any reason by itself would not be sufficient to suggest that the accused were not armed. Recovery of incriminating material is not necessary to record conviction if ocular account is convincing and worthy of credit as in the present case which also finds support from medical evidence.

13. As far as the ground of acquittal for non-proving the motive is concerned, it is well settled by now that existence or non-existence of motive, its proving or non-proving by the prosecution is not fatal to the prosecution case and if the case is proved from ocular and medical evidence, then the conviction can be passed. Reliance in this regard is placed on the case of Waris Khan v. The State (2001 SCMR 387).

As far as non-recovery of blood stained earth is concerned, the deceased and the other witnesses were injured at the time of occurrence and lodging the FIR. Mostly, the investigation agency except in murder cases do not take the same into possession, so non-taking of the blood stained earth from the pace of occurrence is of no avail to the defense.

As far as the defense of the accused/respondent namely Naseebullah produced three witnesses in his defense is concerned, he took the plea of alibi and produced certificate issued by DW-3 Muhabbat Khan. According to him on the date of occurrence i.e. 16.09.2016 the accused Naseebullah was present from morning to 6:00 pm on his duty and according to DW-1 DW-2 the accused Naseebullah was present at Sinjavi along with them. It is worthwhile to mention here that the place of occurrence is situated at a distance of about one or half hours from Sinjavi by travelling in a vehicle. The accused was arrested by the investigating agency on 30.01.2017 and he was absconding from 16.09.2016. At that time the trial court also issued non-bailable warrants of the accused Naseebullah. According to PW-6 a raid was also conducted on the house of the accused and at that time he was absconding. For the sake of arguments if it is presumed that at the time of occurrence he was not present at the place of occurrence, then why he did not surrender himself before the investigation officer, despite the fact that a raid was also conducted on his house and he knew about the occurrence. The accused neither produced any certificate about his absence from place of occurrence nor produced any defense witness to the investigation officer. During cross-examination the question was also not put to the eye-witnesses that at the time of occurrence the accused Naseebullah was present at Sinjavi BHU and at a belated stage the accused introduced plea, which is not plausible. Rest of the accused/respondents did not produce any defense witnesses and it is stated earlier that there is no serious enmity between the parties, therefore it is impossible to say that the eye-witnesses would implicate the accused in the instant case falsely.

14. The instant case is an appeal against acquittal. This court is conscious of the fact that the scope of interference in the judgment of acquittal is narrow one and ordinarily the superior courts do not interfere in the judgment of acquittal. It is a well established principle of law that once acquittal has been recorded presumption of innocence becomes double in favour of accused, however there is exception to this solitary principle, which has been

exercised by the superior courts so many times whenever they came to the definite conclusion that the findings rendered by the trial court are artificial and do not meet the principle evaluation of material available on record in the interest of justice and safe administration of justice. In the instant case, according to the crime report and statement of the eye-witnesses as well as medical evidence, as discussed above, there is sufficient incriminating evidence available on record to connect the respondent with the occurrence. Reliance is placed on the judgments rendered by the Hon' ble Supreme Court in the cases of Shamas-Ud-Din v. Muhammad Shahbaz Qammar and 2 others (2009 SCMR 427), The State through Advocate General NWFP, Peshawar v. Humayoun and others (2007 SCMR 1417), 1(1) Amal Sherin (2) Zahir Gul v. The State through NWFP, Peshawar (PLD 2004 SC 371), Muhammad Ali v. Muhammad Yaqoob and others (1998 SCMR 1814) and Ghulam Sikandar and another v. Mamaraz Khan and others (PLD 1985 Supreme Court 11).

15. It is admitted fact of the case that no specific role to each of the accused/respondents is attributed by the witnesses that who caused a fatal injury to the deceased and the witnesses categorically stated that the accused being armed with sticks and iron rods, attacked upon them and deceased and they received injuries. According to PW-4, the deceased received eight injuries on his person. The complainant and the other eye-witnesses also received injuries and there was also two other absconding accused at the scene of occurrence, as such all the aforesaid conduct of the accused persons shows their common intention and pre-plan just to gather at the place of occurrence and to commit the offence. Reliance in this regard is placed to the case of Ali Imran v. The State (PLD 2006 SC 87).

16. To have a further understanding and to elaborate the common intention, for convenience the provisions of section 34, P.P.C. (common intention) are hereby reproduced as under:

> "34. Acts done by several persons in furtherance of common intention.-- When a criminal act is done by several persons, in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone."

17. On bare reading of aforesaid provisions of section 34, P.P.C., the role of appellant has specifically fallen within the domain of section 34, P.P.C. In this regard reliance is placed on the case titled Muhammad Akram v. The State 2007 SCMR 1539. The relevant portion reads as follows:

> "4. ... It is a settled law that the ingredients of section 34, P.P.C. embodies his participation in some action with the common intention of committing a crime, once such participation is established, section 34 is at once attracted. See Shahadat Khan's case PLD 1969 SC 158, J.M. Desai's case AIR 1960 SC 889, Banwarilal's case AIR 1956 All. 341, Majeed's case 1971 SCMR 693, Imam Bakhsh's case PLD 1983 SC 35. It is an admitted fact that accused party had come at the spot along with their respective weapons. The respondent No.2 and principal accused Muhammad Asghar had inflicted injuries to the deceased with their respective weapons, therefore, section 34 is attracted in the case in hand in all respects. See Amir's case 1987 SCMR 270 and Mahbub Shah's case AIR 1945 PC 118. The learned High Court erred in law to

decide the case on wrong premises without adverting to the ingredients of section 34, P.P.C. and the facts of the case in hand and the law laid down by this Court in various pronouncements. See Hayat's case PLD 1957 SC (Pak). 207. It is a settled law that in order to determine the intention of a person qua the commission of offence, it is very rare phenomenon that one can expect to find positive affirmative evidence, generally speaking, the intention is to be gathered from the conduct of the person and the attending circumstances. See Bahar's case PLD 1954 FC 77. The evidence on record in the case in hand clearly depicts that all the accused came fully prepared and that common intention to take the revenge from the deceased. Therefore, they were held vicariously liable for the murder of Mukhtar deceased. See Seraj Mia's case 1969 SCMR 490, Muhammad Arshad's case PLD 1996 SC 122, Muhammad Siddiqui's case 1993 SCMR 2114 and Khushi Muhammad's case 1969 SCMR 599."

18. We are also fortified by the dictum laid down by the Hon'ble Supreme Court of Pakistan in the case of Afzal v. State, reported in 2017 SCMR 315, wherein it was held that was a case of vicarious liability and the individual role was not ascertainable. The relevant portion of the same is reproduced below:

"4. ... The petitioners and their co-accused having formed unlawful assembly armed with lethal weapons attacked at the complainant party and caused fire-arm injuries to the deceased and witnesses, therefore, notwithstanding the fact that who was individually responsible for causing specific injuries to the deceased and witnesses, the petitioners by virtue, of vicarious liability, would be equally responsible for the murder of deceased and causing injuries to the witnesses. However, the High Court having come to the conclusion that it was a case of vicarious liability and the individual role was not ascertainable, converted the sentence of death awarded to the petitioners into life imprisonment and we would not take any exception to the view of the matter taken by the High Court. It was a broad-daylight occurrence and eye-witnesses, including a minor girl, have consistently stated about the active participation of all the petitioners in the occurrence and nothing was brought on record to suggest even a slight doubt qua their guilt. Learned counsel for the petitioners has not been able to convince us that either the testimony of injured eye-witnesses was not reliable or the participation of the petitioners in the occurrence was doubtful and, we have not been able to find out any misreading or non-reading of the evidence either by the trial Court or High Court in coming to the conclusion regarding guilt of the petitioners or any other legal or factual infirmity in the judgment of the High Court calling for interference of this Court."

After having applied independent judicial mind, this court is of the considered view that as the prosecution has proved its case against the respondents/accused beyond shadow of doubt and the case of the accused/respondents is fully covered under the provision of sections 302(b), 337-F(iii), 337-E, 337-L(2), 147, 148, 149 and 34, P.P.C. therefore, their acquittal has led to grave miscarriage of justice and while acquitting the respondents the trial court has ignored the material evidence on record i.e. statements of injured eye-witnesses, medical and other material available on record. Pursuant to the above discussion we are convinced that the prosecution produced confidence inspiring evidence to prove the guilt of the respondents/accused, as such we are of the view that the conclusion drawn by the trial

court is perverse, arbitrary and based on misreading of the evidence on record calling for interference by this court.

As far as sentence is concerned, it is not clear from the evidence on record as to who caused fatal injuries. The number of injuries, however, make it clear that the accused had intended to cause the death of the victim of this case. So, therefore, as a matter of abundant caution we feel that on account of the uncertainty as to who caused the fatal injuries, the appellants deserve imposition of lesser penalty. Resultantly, we allow this appeal.

19. The respondents/accused Agha Muhammad son of Akhtar Muhammad, Rehan son of Noor Muhammad, Noor Muhammad son of Agha Muhammad, Aimal son of Agha Muhammad, Naseebullah son of Faqir Muhammad and Feroz Khan son of Kamal Khan are convicted and sentenced as follows:

(i) For an offence under section 302(b)/34, P.P.C. to suffer rigorous imprisonment for life each with fine of Rs.600,000/- as compensation payable to the legal heirs of the deceased Ghulam Muhammad in default whereof the respondents/accused shall further undergo simple imprisonment for six months each.

(ii) For an offence under section 147, P.P.C. to suffer RI for one year each and to pay fine of Rs.10,000/- in default whereof to further suffer SI for three months.

(iii) For an offence under section 148, P.P.C. to suffer RI for one year each with fine of Rs.10,000/- in default whereof to further suffer SI for three months each.

(iv) For an offence under section 337-F(iii), P.P.C. for causing injuries to injured Tabish Gul to suffer RI for one year each. They are also directed to pay Daman of Rs.5,000/- to injured Tabish Gul. In default of payment of Daman they shall further suffer two months' SI each.

(v) For an offence under section 337-E, P.P.C. to suffer two years' RI each. They are also directed to pay Daman of Rs.20,000/- to injured Tabish Gul. In default of payment of Daman they shall further suffer five months' SI each.

(vi) For an offence under section 337-L(2), P.P.C. for causing injuries to Mahwash Gul, Naheeda Jabeen and Tabish Gul, to suffer six months' RI each and to pay Daman of Rs.2,000/- each. In default of payment of Daman they shall further suffer one months' SI each.

All the sentences shall run concurrently. Benefit of section 382-B, Cr.P.C. is also extended in favour of the respondents/ accused. The respondents/convicts are not present in the court, their perpetual warrants be issued.

JK/102/Bal. Appeal accepted.