

P L D 1988 Lahore 149

Before Fazal Karim and Riaz Ahmad, JJ

FAIZ MUHAMMAD and another-- Appellants

versus

THE STATE--Respondent

Criminal Appeal No. 44 of 1984 and Murder Reference No. 91 of 1984, decided on 20th October, 1987.

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

--- S. 302/34-- Occurrence taking place in broad daylight on a public path -- Eye-witnesses present at spot with deceased when attack was launched and had seen occurrence-- Eye-witnesses even knew how many shots were fired and how many had hit deceased-- Fact that they had seen occurrence and were able to identify accused receiving support from a number of circumstances-- Evidence of eye-witnesses receiving support from medical testimony and recoveries effected- Empties recovered from accused found to have been fired from gun in possession of accused-- Accused real brothers and have a motive, as their father had been killed and deceased were tried for that murder but were acquitted just seven days before present occurrence-- No case of substitution of accused with real culprit made out-- Investigating Officer had been equally fair to point of view of defence and result of his investigation confirmed by another police officer-- Conviction and sentence maintained in circumstances.

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

--- S. 302/34-- Co-accused although remaining on physical remand for twenty-seven days yet no recovery effected from him-- Number of shots which killed deceased only two which could well be fired by one person from same gun-- Failure of police to recover any gun from co-accused, held, was a circumstance which showed that he was not a man possessed of gun-- Co-accused given benefit of doubt and acquitted.

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

--- S. 302 / 34-- Evidence- -Interested witness-- Presumption that interested witness was unworthy of credit repelled-- Held, it was neither a principle of law that an interested witness was unworthy of credit without corroboration nor it was correct that interest of a witness affected his credited, though it could be rightly said that interest might affect his credit, for, interest and truth might go together.- [Witness).

Niaz v. State P L D 1960 S C 387 and Nazir and others v. The State P L D 1962 S C 269 rel.

Sardar Faiz Mohammad Khosa for Appellant. Tassaduq Hussain Jilani A.A.-G. for the State. Sardar M. Sharif Khan Khosa for the Complainant.

Dates of hearing: 4th and 5th October, 1987.

JUDGMENT

FAZAL KARIM, J.-- The appellants Faiz Muhammad and Sawan

are real brothers. They along with four others named Bashir, Khuda Bakhsh, Gaman and Hayat were sent up to stand their trial for the murder of Lal and Karim Bakhsh, before the learned Additional Sessions Judge, Dera Ghazi Khan. By his judgment dated 19-2-1984, the learned Additional Sessions Judge acquitted Bashir, Khuda Bakhsh, Gaman and Hayat but convicted Faiz Muhammad and Sawan appellants on two counts under Section 302 read with Section 34 of the P.P.C. and sentenced each of them to death and to pay Rs.10,000/- as fine and in default to undergo rigorous imprisonment for two years and also to pay Rs.10,000/- as compensation to the heirs of the deceased persons and in default to undergo R.I. for six months on each count. The learned Additional Sessions Judge directed that the sentence of imprisonment in case of default of payment of fine should take effect only if the death sentence is not confirmed.

2. Faiz Muhammad and Sawan have appealed against their conviction and sentence. Kalu Khan, the first informant, has filed a revision under Section 439 of the Code of Criminal Procedure, being Criminal Revision No.100 of 1984, against the acquittal of Gaman, Bashir, Hayat and Khuda Bakhsh. The reference under Section 374 of the Code of Criminal Procedure is also before us. This will dispose of all these matters.

3. The facts, as they emerge from the prosecution evidence, are as follows: Some two years before the present incident, which occurred at 10-00 A.M. on 1-2-1981 at Band Sharmoon Wala in Mauza Choor Hatta, Jewan, father of Faiz Muhammad and Sawan, appellants, was killed. For his murder, were tried seven persons, namely, Lal, Karim Bakhsh (deceased persons in this case), Kaloo, Hassan, Mewa, Mithu and another. They were tried but were acquitted by the Sessions Court some seven days before the instant incident.

4. On the day of the incident, Kaloo (PW-9) and Wazir along with the two deceased persons Lal and Karim Bakhsh were on their way to Dera Ghazi Khan from their residential place in Basti Alyani, which was 21 miles from Dera Ghazi Khan. On the way they were joined by Siddique (PW-10), who was taking meals for his son to a tubewell near Wadoor Bridge. When they reached near Band Sharmoonwala in Mauza Choor Hatta, Faiz Muhammad and Sawan appellant armed with guns, Hayat and Bashir armed with Sotas and Gaman and Khuda Bakhsh armed with hatchets appeared from behind. Khuda Bakhsh and Bashir raised Lalkaras telling their co-accused that

they should kill Lal and Karim Bakhsh deceased to avenge the murder of Jewan. Kaloo, Siddique and Wazir ran for their lives towards the east. Karim Bakhsh and Lal deceased persons ran towards the north. Faiz Muhammad appellant fired at Lal hitting him on the back of his neck; he fell down. Sawan appellant fired at Karim Bakhsh hitting him on his left thigh; he also fell down. The appellants and their co-accused then ran towards Kaloo, Siddique and Wazir but they succeeded in running away. The appellants and their co-accused then left the spot.

5. Kaloo, Siddique and Wazir returned to the spot and found Lal dead. Karim Bakhsh deceased was alive. Leaving Siddique PW with the deadbody of Lal, Kaloo and Wazir immediately carried Karim Bakhsh to the hospital in Dera Ghazi Khan. As they reached the hospital, Karim Bakhsh also died. Kaloo PW left Wazir with the dead body of Karim Bakhsh and went to the Police Station and reported the incident to Ghulam Farid, Inspector, (PW-11), vide F.I.R. Exh.PJ. Ghulam Farid Inspector (PW-11) recorded the F.I.R. Exh. PJ and proceeded to the spot where he prepared inquest report Exh.PK and injury statement Exh.PL in respect of the deadbody of Lal deceased and sent it to the mortuary under the escort of Gul Muhammad Constable. He collected the blood-stained earth from the places where Lal deceased was killed and where Karim Bakhsh was injured and made them into parcels vide memos Exh. PF and EXh.PG: He then proceeded to the hospital where Karim Bakhsh lay dead, prepared his injury statement Exh.PM and inquest report Exh.PN and sent his deadbody to the mortuary under the escort of Gul Muhammad Constable.

6. He had the site-plan Exh.PB and its copies Exh.PB/1 and Exh.PB/2 prepared from the Patwari and gave his notes in red ink thereon.

7. He arrested Faiz Muhammad and Sawan appellants and their co-accused on 14-2-1981. Faiz Muhammad appellant led to the recovery of gun P.10 and two empty cartridges P.11/1-2 from his house. They were taken into possession and sealed into a parcel vide memo Exh. PH., He deposited the sealed parcels with the Moharrir.

8. Dr: Naseer Ahmad (PW-1) had examined Karim Bakhsh deceased as a private case at 11-30 A.M. on 1-2-1981 and had found the following injuries on his person:-

- (1) A circular wound with inverted margin 1/4"x 1/4" on front of left thigh, five inches above the knee. It was wound of entrance. There was a wound of exit on back of left thigh corresponding to the wound of the entrance .with averted margin.
- (2) A circular wound with inverted margin 1/4" x 1/4" on front of left thigh two inches below injury No.1. It was wound of entrance. There was corresponding exit wound on back of left thigh with averted margin.
- (3) A circular wound with inverted margin 1/4" x 1/4" on front of left knee joint over the patella. This wound was of entrance. Its corresponding exit wound was on the back of knee joint.
- (4) A circular wound with inverted margin on outer side of left thigh 1/4" x 1/4". It was a wound of entrance and was five inches above the knee joint. There was

corresponding exit wound on the posterolateral aspect of left thigh.

9. On probing, he had found that each entrance wound communicated with its corresponding exit wound. Karim Bakhsh was in dangerous condition and in extreme shock. His pulse was not palpable and his B.P. was not recordable. He was still in Casualty Department and was being given first aid when he expired at about 12-05 noon.

10. In the opinion of the doctor, the injuries were dangerous collectively and result of fire-arm and had been caused within the duration of about four hours. Exh. PA is the carbon copy of the medico-legal report. Vide Ruqqa Exh. PA/1, he informed the S.H.O. about the death of Karim Bakhsh. In answer to a question in cross-examination, Dr.Naseer Ahmad said that Karim Bakhsh was not fit to make statement. In his opinion, the distance between the assailants and the victim could be more than five feet. He added that Karim Bakhsh could have received the injuries from the front side as well as lateral side.

11. The autopsy on the dead bodies of Lal and Karim Bakhsh was performed by Dr.Muhammad Arshad (PW-5). He found the following injuries:-

- (1) Four circular wounds each measuring 1/4" x 1/4" on the front of left thigh within the range of five inches commencing from the knee. They were having inverted margins and were wounds of entrance.
- (2) There was corresponding wound having everted margins on the back of thigh. These were exit wounds.

12. In the opinion of the doctor, death was due to shock and haemorrhage "as a result of fire-arm injuries on the left thigh which had injured the femoral vessel. The injuries were ante-mortem and were sufficient to cause death in the ordinary course of nature. Probable time between injuries and death was within few hours and between death and post-mortem examination within three hours. Exh. PC is the copy of the post-mortem examination report and Exh.PC/1 is the diagram of the injuries.

13. On the deadbody of Lal was the following injury:-

A lacerated wound with inverted edges on the back of head, 7" x 9-" x brain matter missing from the cranial cavity and almost three-fourth of the vault of skull was missing. The edges on the upper and lateral sides were everted. Brain matter was carried separately.

14. The doctor did not find the membranes and brains present in the skull. He found the right and left lungs slightly congested.

15. In the opinion of the doctor, death was due to shock and haemorrhage "as a result of injury which was caused by fire-arm". The injury was sufficient to cause death in the ordinary course of nature. Time between injury and death was immediate and

between death and post-mortem examination six hours. Exh.PD is the carbon copy of the post-mortem examination report and Exh.PD/1 is the diagram of the injuries.

16. In cross-examination, the doctor said that the injuries of Karim Bakhsh "would have been fired at from his front side". The deceased might have been fired at from a distance of about 12 feet. He had not recovered any pellet from the deadbody of Karim Bakhsh. He had also not detected any blackening, scorching, tattooing or burning on the injury.

17. The doctor further stated that the direction of the injury on the person of Lal was from downward to upward. He was, however, unable to give the actual position of the victim when he was fired at, or whether at the time of fire his head was downward or upward. The doctor said that the injury on the head of LAI and on the thigh of Karim Bakhsh could be caused by one fire shot only if "Lal is concealing himself before the thigh of Karim Bakhsh and Karim Bakhsh is fired at from his front side on thigh".

18. In support of its case, the prosecution called 11 witnesses, including Dr. Naseer Ahmad (PW-1) and Dr. Muhammad Arshad (PW-5). The eye-witness account of the incident was given by Kaloo (PW-9) and Siddique (PW-10). Malhi alias Malhu (PW-8) had joined the investigation. He had witnessed the taking into possession of blood-stained earth from the place of incident vide memos Exh.PF and Exh.PG. He was also a witness to the recovery of gun P.10 and two empty cartridges P.11/1-2 from Faiz Muhammad, appellant, vide memo Exh. PH.

19. The evidence of the remaining PWs was of formal character and can be dealt with shortly. Ahmad Bakhsh, Head Constable, (PW-2) received two sealed parcels from Ghulam Shabbir, Naib Moharrir, on 7-2-1981 and had kept them in safe custody. On 14-2-1981, he received another sealed parcel from Ghulam Farid, Inspector. He kept these parcels in safe custody till he gave them to Gul Muhammad constable for being taken to the office of the Chemical Examiner and Forensic Science Laboratory, Lahore. Ghulam Shabbir, Head Constable, had also received two sealed parcels from Ghulam Farid, Inspector, and had kept them in safe custody till 7-2-1981, when he gave them to Ahmad Bakhsh, Head Constable. Ghulam Haider, Patwari, (PW-4) had prepared the site-plans Exh.PB, Exh.PB/1 and Exh. PB/2 in the scale of 20 Karams to an inch, at the pointing out of the witnesses and on being asked to do so by the police. The drawings and notes in black on the site-plans were in his hand. Gul Muhammad Constable (PW-6) had escorted the deadbody of Lal deceased from the place of incident to the mortuary. He had also escorted the deadbody of Karim Bakhsh from the District Headquarters Hospital, Dera Ghazi Khan, to the mortuary. After the post-mortem examination, he had given the last worn clothes of Lal deceased, viz chaddar P.1, shirt P.2, turban P.3, vest P.4 and that of Karim Bakhsh deceased, vide Chaddar P.5, shirt P.6 and two other chaddars P.7 and P.8 and a pair of shoes P.9/1-2 to the Inspector, vide memo. Exh.PE. On 17-2-1981, he took three sealed parcels relating to this case and delivered two at the office of the Chemical Examiner and one at the office of the Forensic Science Laboratory, Lahore. Mittiv (PW-7), a son of Siddique (PW-10), had identified the dead bodies of LAI and Karim Bakhsh at the time of post-mortem examination and then was witness to the memo Exh. PE, by which the last worn clothes of the deceased were taken into possession.

20. As observed above, Ghulam Farid, Inspector, (PW-11) had recorded the F.I.R. Exh. PJ and had then investigated the case. It was brought out in his cross-examination that besides him, Mr. Ejaz Akram, A.S. P., had partly investigated the case; he had also varified the investigation conducted by him. He and the A.S.P. had found that Sawan, Bashir, Khuda Bakhsh, Gaman and Hayat accused persons were innocent of the offence. He added that three persons named Nabi Bakhsh, Faqir Muhammad and Ahmad Bakhsh had appeared before him and claimed that they had eye-witnessed the incident.

21. The Chemical Examiner's report Exh.PO and the Serologist's report Exh.PQ are to the effect that the earth taken into possession) from the spot was stained with human blood and Exh.PR, which contains the opinion of the Forensic Science Laboratory, is to the effect that the empties recovered from Faiz Muhammad appellant ha been fired from the gun P.10.

22. The appellants as also their co-accused denied their participation in the commission of the crime. Faiz Muhammad appellant also denied the recovery of gun P.10 and the cartridges P.11/1-2 from his house. According to him, the deceased persons were killed by some unknown persons in the jungle and the complainant had falsely involved them because they had lest the case of murder against them, for which seven persons of the complainant party were challaned. He added that none of the eye-witnesses was present at the time of the occurrence; they were closely related inter se and were on inimical terms with them. He was a P.W. in the murder case against the complainant and the PWs. During the investigation, independent witnesses had appeared and had exonerated them.

23. Only Sawan appellant gave defence evidence. He examined Mr.Ejaz Akram, A.S.P., (DW-1) who, as noticed above, had partly investigated the case. According to Mr.Ejaz Akram, respectables of the locality had vouched for the innocence of the accused persons other than Faiz Muhammad but "as there was no solid evidence to declare Sawan, Bashir, Hayat, Gaman and Khuda Bakhsh accused as innocent, and place them in column No.2 of the challan", he directed all the accused to be challaned and the question of their guilt or innocence to be left to be decided by the Court.

24. He also tendered in evidence copy of plaint in a suit for possession titled "Esa Khan Vs. Atta" Exh.DA, certified copy of order in that case Exh.PB, certified copy of Part Nikah between Mst. Bakhtan and Kaloo Exh.DD, certified copy of Nikah Nama between Mst. Bakhtan and Ghulam Hassan Exh. DE, copy of a Magistrate's judgment dated 21-12-1985 in a case titled "Kaloo Vs. Jewan etc." Exh.DF and closed his evidence.

25. The learned Additional Sessions Judge found that Faiz Muhammad and Sawan appellants "whose father was murdered, had strong motive against the persons who were challaned for the murder but were acquitted by the Court seven days prior to this occurrence". As to the ocular evidence of Kaloo and Siddique PWs, the learned Additional Sessions Judge observed that "admittedly, the complainant party are closely related to each other and are also inimical towards the accused. So, the chances of false

implication are there". In his opinion, therefore, it was 'necessary to see "to what extent the version of eye-witnesses, namely, Kaloo (PW-9) and Siddique (PW-10) gets corroboration from the other facts and the circumstances". But, then he proceeded to observe, and if I may say so with respect somewhat inconsistently, that "if the presence of witnesses is proved beyond doubt and no other independent witness is available in the case, it would result in a grave miscarriage of justice to insist upon independent corroboration. It depends upon the facts of each case as to whether an independent corroboration was necessary or not". In his view, the evidence of Kaloo and Siddique PWs revealed that "excepting the presence of Khuda Bakhsh, Gaman, Hayat and Bashir, no other overt act is attracted to these accused in spite of the fact that they were armed with Sotas and hatchets but they did not try to inflict any injury to any witness or to the two deceased persons although they had come prepared for the said purpose". The learned Additional Sessions Judge thought that the role of Lalkara was ascribed to Khuda Bakhsh and Bashir accused "only to drag them in the case". In the opinion of the learned Additional Sessions Judge, the testimony of Kaloo and Siddique PWs was consistent on all material particulars and had received support from the medical evidence.

26. The learned Addl. Sessions Judge, however, did not attach any importance to the evidence of the recovery of gun and empties from Faiz Muhammad appellant.

27. In recording that finding, the learned Additional Sessions Judge gave three reasons; (1) that "there was a grave contradiction" between the statement of Malhi (PW-8) and that of Ghulam Farid, S.H.O., (PW-11); (2) that "there appears no fun to keep concealed the empties. it could be easily destroyed"; and (3) that assuming that the gun and the cartridge and empties were recovered from Faiz Muhammad appellant "even then it cannot be said these were the empties which were fired at on the deceased. So the recovery of the gun and the cartridges does not help the prosecution and is taken out of consideration". The learned Additional Sessions Judge, therefore, concluded that the report of the Forensic Science Laboratory "although in the positive yet of no consequence to the prosecution because the recovery has been disbelieved".

28. The contradiction noticed by the learned Additional Sessions Judge between the statement of Malhi (PW-8) and the statement of Ghulam Farid, Inspector, (PW-11) was that according to Malhi PW, he was in D . G . Khan City when he learnt that the S. H .O. was going along with Faiz Muhammad appellant on a wagon to his Basti, he followed them on his cycle and reached his Basti simultaneously with the police. In the opinion of the learned Additional Sessions Judge, it was highly unbelievable that he would reach on cycle simultaneously with the police who travelled by wagon, when according to Ghulam Farid, Inspector, the accused were produced before him by one Ghulam Sarwar Alyani on 14-2-1981 at Basti Alyani and thereafter Faiz Muhammad appellant led to the recovery of gun etc.

29. Malhi PW was a relative of the complainant party and he was, therefore, also an interested witness. The contradiction pointed out by the learned Additional Sessions Judge also showed that he had not witnessed the recovery of the gun etc. from Faiz Muhammad appellant. Therefore, it may well be that he had offered his services as a recovery witness, although he had not seen the recovery being effected because no

disinterested witness would involve himself in such a case. We, therefore, agree that the evidence of Malhi (PW-8) did not inspire confidence. But then the learned Additional Sessions Judge gave no reasons for not acting upon the testimony of Ghulam Farid, Inspector. Having perused the record, we are left with the B impression that in conducting the investigation, Ghulam Farid, Inspector, had been equally fair to the point of view of the accused persons and this should be clear from the fact that he had found five of the accused persons innocent of the offence. The result of his investigation was later confirmed by Mr. Ejaz Akram, A.S.P. It is also pertinent to notice in this behalf that no recovery was shown to have been effected from Sawan appellant, who too was alleged to have fired a shot during the course of the incident. We do not, therefore, think that the learned Addl. Sessions Judge was entitled to altogether exclude the recovery of gun from Faiz Muhammad appellant from consideration.

30. We, however, concur in the view taken by the learned. Additional Sessions Judge that the recovery of the gun and the empties in the absence of any proof that the gun was used in the commission of the offence and that the empties were the very empties which had been fired at the time of the incident, was not sufficient to connect Faiz Muhammad appellant with the offence. But nonetheless, this was a circumstance which lent support to the ocular evidence to this extent at least that Faiz Muhammad was in possession of a gun which he could use in the commission of the offence.

31. The main stay of the prosecution case was the testimony of Kaloo and Siddique PWs. They were interested witnesses in the accepted sense of that expression, that is to say, they had a motive for falsely implicating the appellants. The appellants are sons of Jewan, who, as noticed above, was killed some two years prior to the present incident. For his murder, Lal and Karim Bakhsh deceased persons, Kaloo (PW-9), Mithu (PW-7) alongwith Hassan and Mewa were tried. Siddique (PW-10) is the father of Mithu (PW-7). The eye-witnesses in the murder case of Jewan were Faiz Muhammad and Sawan, appellants, and Bashir, Khuda Bakhsh, Gaman and Hayat, who were all named as accused in this case. As regards the inter se relationship between the deceased persons and the PWs. Kaloo -PW is a brother of Lal deceased. Besides being a cousin of Lal deceased and Kaloo'PW, Karim Bakhsh deceased was married to a sister of Lal deceased and Kaloo PW and Lal deceased was married to a sister of Karim bakhsh deceased. Mithu (PW-7) is married to the daughter of Kaloo PW and Siddique (PW-10) is father of Mithu PW. Malhi PW is also a first cousin of Kaloo PW and Lal deceased.

32. Learned counsel for the appellants argued that besides being interested witnesses Kaloo and Siddique PWs were chance witnesses; that their evidence was inconsistent with the medical evidence, for the injuries of Karim Bakhsh deceased show that he was hit from the front side but the eye-witness account is that Karim Bakhsh was running and was fired at from behind. Learned counsel also tried to make capital of the fact that during the course of investigation, three independent witnesses named Ahmad Bakhsh, Faqir Muhammad and Nabi Bakhsh had appeared before the Investigating Officer but they were not cited as witnesses. As regards Sawan appellant, learned counsel maintained that no recovery had been effected and as regards the recovery from Faiz Muhammad appellant, his contention was that there is no evidence to

connect the gun and the empties allegedly recovered from Faiz Muhammad appellant with the commission of the crime and, therefore, the report of the Fire-arms Expert that the empties P.11/1-2 were fired from the gun P.10 is of no consequence and has, therefore, no corroborative value. According to the learned counsel, therefore, as regards Sawan appellant, there was no evidence to corroborate the testimony of the interested witnesses, namely, Kaloo and Siddique, and as regards Faiz Muhammad appellant, what was produced as a corroborative evidence could not serve as such.

33. The leading authority on the evidence of interested persons is *Niaz v . State* (P . L . D . 1960 S.C. 387) . I n that case was explained, for the guidance of Courts, the approach to the problem confronting them in appraising the evidence of such witnesses. It was held:

"Whenever interested persons claiming to be eye-witnesses of an occurrence charge persons against whom they have some motive for false implication, with the commission of the offence, the first question to be considered is whether in fact they saw the occurrence and were in a position to identify the culprits. If there be no reason to doubt that they in fact witnessed the occurrence and were in a position to identify the offenders, the further question arises as to whether they can be relied upon for convicting the accused without corroboration. In cases where such interested witnesses charge one person only with the commission of the offence, or where the number of persons whom they name does not exceed that which appears from independent evidence or from circumstances not open to doubt to be the true number of culprits, their evidence may, in the absence of anything making it unsafe to do so, be accepted without corroboration, for, substitution is a thing of rare occurrence and cannot be assumed, and he who sets up the plea of substitution has to lay the foundation for it. But if the Court finds that the number mentioned by interested persons may have been exaggerated their word cannot be made the basis of conviction and the Court will have to look for some additional circumstances which corroborates their testimony. This circumstances need not be such that it can of its own probative force bring home the charge to the accused. It should, however, be a circumstance which points to the inference that the particular accused whose case is being considered did participate in the commission of the offence. The force that such circumstances should possess in order that it may be sufficient as corroboration must depend on the particular circumstances of each case. However, the circumstance itself must be proved beyond all reasonable doubt."

34. The above observations were further elaborated in *Nazir and others Vs. The State* (P.L.D. 1962 S.C. 269) as follows:-

"It is possible to lay down a rule of law that a witness belonging to a particular category is to be presumed to be unworthy of credit without corroboration. In the case of an accomplice such a rule has already been accepted by the Courts. But we had no intention of laying down an inflexible rule that the statement of an interested witness (by which expression is meant a witness who has a motive for falsely implicating an accused person) can never be accepted without corroboration. There may be an interested witness whom the Court regards as incapable of falsely implicating an innocent person. But he will be an exceptional witness and, so far as an ordinary

interested witness is concerned, it cannot be said that it is safe to rely upon his testimony in respect of every person against whom he deposes. In order, therefore, to be satisfied that no innocent persons are being implicated alongwith the guilty the Court will in the case of an ordinary interested witness look for some circumstance that gives sufficient support to his statement so as to create that degree of probability which can be made story put forward by an interested witness. Corroboration may be afforded by anything in the circumstances of a case which tends sufficiently to satisfy the mind of the Court that the witness has spoken the truth. What circumstances will be sufficient as corroboration it is not possible to lay down. But, as the question before the Court would be whether some innocent person had not been implicated in addition to those who were guilty the circumstance relied upon must have a bearing on this question. In the case of an interested witness the corroboration need not be of the same probative force as in the case of an accomplice for the two do not stand on the same footing."

35. In Nazir Ahmad's case, nine persons including the appellants before the Supreme Court named Nazir Jat, Anwar, Nazir Dindar, Riaz Ahmad, Muhammad Ishaq alias Mushtaq and Ghulam Rasool were tried and convicted for the murder of six persons, who were the inmates of the house of Mst. Sardar Bibi. These killings took place during the night and, as here, were to avenge an earlier murder of one Sharif, for which Mst. Sardar Bibi and her three sons had been tried but acquitted. The ocular testimony was the testimony of interested witnesses; this was believed by the High Court: in doing so, the High Court relied upon two circumstances: (1) that the number of culprits mentioned was such as would be required for an attack of the kind which was the subject-matter of the case; and (2) that the persons named as culprits were such as would be expected to join in the attack. The Supreme Court agreed with the High Court that the number of culprits named was the probable number that would be required for such an attack and also that the second matter was not an irrelevant consideration. As regards Riaz Ahmad appellant, a son of Muhammad Sharif deceased person in the earlier case, who was at the time of the occurrence thirteen years of age, the learned Judges of the High Court were of the opinion that as the murder of Sharif, his father, was being avenged, he was likely to join the assailants in spite of his young age. The Supreme Court, however, gave him the benefit of doubt because "he was also not an unlikely person to be implicated because all the four young children of Sardar Bibi had been murdered".

36. Thus, there is no presumption that an interested witness is unworthy of credit; nor is it a principle of law that an interested witness is unworthy of credit without corroboration. It is, therefore, not correct to say that the interest of a witness affects his credit; the correct way to put it is that it may affect his credit, for: interest and truth may go together. A learned English Judge's reported to have said: "Interest is a great rascal but it is not an absolute reprobate and it is not obliged to commit perjury". In one word, and here we quote Hamoodur Rahman, J, (as he then was) from Ali Ahmad Vs. State (P.L.D. 1962 S.C. 102): "Prudence of course requires that the evidence of an interested witness should be scrutinized with care and conviction should not be based upon and Siddique PWs deserved implicit reliance thereon .

37. Before dealing with the question whether the evidence of Kaloo and Siddique PWs deserved implicit reliance and if not, whether there were circumstances supporting the participation of the appellant in the crime, it will be convenient to dispose of the remaining argument here. The so-called inconsistency between the medical and the ocular evidence, according to the appellant's counsel, was that when Karim Bakhsh was fired at by Sawan appellant, he was running and he could not, therefore, have been hit on the front of his thigh. For his contention, learned counsel sought to derive support from the evidence of Dr. Muhammad Arshad (PW-5) who in answer to a question in cross-examination said that the shot to Karim Bakhsh deceased "would have been fired at from his front side." No attempt appears to have been made to elucidate from Dr. Muhammad Arshad if the deceased could have been hit from a side. In this connection, reference has already been made to the evidence of Dr. Naseer Ahmad (PW-1) who had stated that the injuries of Karim Bakhsh deceased could have been caused "from the front side as well as lateral side". It is not without significance that this opinion was expressed by Dr. Naseer Ahmad in answer to a question in cross-examination and nothing was brought out to show that that opinion was open to doubt. It appears to us, therefore, that nothing should turn upon what Dr. Muhammad Arshad (PW-5) said, for, if we may say so with respect, the cross-examiner obtained an answer favourable to him and left it at that. As a different opinion in the evidence of Dr. Naseer Ahmad (PW-1) had already come, the fair course to adopt would have been to place that opinion before Dr. Muhammad Arshad (PW-5) and to obtain his answer in the light thereof. Reference was also made to the fact that no pellet was recovered from the deadbody of Karim Bakhsh deceased but then there were corresponding exit wounds the inference being that the pellets had pierced through the thigh of Karim Bakhsh deceased. Regarding the failure of the prosecution to cite Ahmad Bakhsh, Faqir Muhammad and Nabi Bakhsh as eye-witnesses, suffice it to say that Ghulam Farid, Inspector, (PW-11) himself explained that he was not satisfied from the statements of Ahmad Bakhsh, Faqir Muhammad and Nabi Bakhsh that they were present at the time of the incident and had seen it taking place. As to the police finding regarding the innocence of the accused person other than Faiz Muhammad appellant, indeed that finding was no binding upon the Court.

The incident occurred in broad daylight. It is evident that the deceased persons, Kaloo, Siddique PWs and Wazir lived in the same Haveli in Basti Alyani. The appellants and their co-accused also lived in the same Basti, the distance between the residents' houses of the accused party and the complainant party being 10 Karams. Basti Alyani was 2½ miles from Dera Ghazi Khan city. According to Kaloo, PW, he along with Lai and Karim Bakhsh deceased person and Wazir had left their Basti for Dera Ghazi Khan and Siddique PW had joined them on the way; he was taking meals to his son to tubewell at Wadoor Bridge. The place of incident was a public passage. There appears nothing improbable about Lai and Karim Bakhsh deceased persons, Kaloo PW and Wazir having left for Dera Ghazi Khan together or about Siddique PW having joined them on the way. In our view, therefore, there is nothing to doubt the veracity of the statements of Kaloo and Siddique PWs that they were with the deceased persons when the attack was launched. That Kaloo and Siddique PWs had seen the occurrence and were in a position to identify the culprit or culprits received support from a number of circumstances. In the first place, it was not disputed that the time of occurrence was about 10-00 A.M. The evidence is that Karim Bakhsh deceased was carried to the

District Headquarters Hospital, Dera Ghazi Khan, in injured condition and was examined by Dr. Naseer Ahmad (PW-1) at 11-30 A.M. It should be fairly obvious that keeping in view the distance between the place of incident and the District Headquarters Hospital, Dera Ghazi Khan, which was about 21 miles, Kaloo PW could not have been with Karim Bakhsh deceased at about 11-30 A.M. in the hospital. If he was not present at the time of the incident. According to Dr. Naseer Ahmad (PW-1), Karim Bakhsh breathed his last at 12-05; till then, Kaloo PW remained with him in the hospital, for, naturally his first anxiety must have been the life of Karim Bakhsh deceased. After the death of Karim Bakhsh which, as noticed above, occurred at 12-05 noon, Kaloo immediately proceeded to the Police Station and reported the incident to Ghulam Farid; Inspector, at 12-30 P.M. To some extent the evidence of Kaloo and Siddique PWs also received support from the medical evidence. If they had not seen the culprits firing at the deceased persons, they would not have, as lay-men, known how many shots were fired and how many shots had hit them. For the appellants, it was argued that the ocular evidence was belied by the seat of the injuries on the person of Karim Bakhsh deceased. In this behalf, we have already referred to the testimony of the Doctors. It may be added that the first shot was fired at Lal deceased and on hearing it, it would have been natural for Karim Bakhsh to turn round to see if he had been hit.

39. We are, therefore, of the opinion that Kaloo and Siddique PWs had seen the occurrence taking place and as it was a broad day-light occurrence, they had no difficulty in identifying the culprit or culprits. The appellants are real brothers; their father Jewan had been killed and the deceased persons and the PWs mentioned above were tried but acquitted. The acquittal had been pronounced just seven days before the present occurrence. Both the appellants were, therefore, persons who would have committed the offence. Learned counsel for the appellants, however, maintained that the deceased and the complainant party had other enemies also who could as well have committed the offence. In this connection, it was pointed out that Karim Bakhsh deceased sold his land to one Atta Muhammad and the sale was pre-empted by his son Isa; that Kaloo PW had two wives, namely, Mst. Bakhtan and Mst. Jantan; that Mst. Bakhtan had first married one Ghulam Hassan Alyani and Kaloo PW had abducted her and then obtained her divorce from Ghulam Hassan and thereafter married her; that one Murad Alyani had instituted a pre-emption suit against Karim Bakhsh and Lal deceased persons and Kaloo and Siddique PWs and the suit was decreed in favour of Murad and, therefore, Siddique was also an enemy of the complainant party; that Kaloo PW had instituted a criminal complaint against Hassan, Moosa and Allah Yar and they were acquitted; that a complaint under section 426 and 147 of the P.P.C. was instituted by Kaloo PW against Jewan deceased and five others, namely, Allah Dad, Sabaz Ali, Jallu, Ramzan and Massu and the last-named five person were also the enemies of the complainant party. This contention was also raised before the learned Additional Sessions Judge and was repelled and in our opinion for good reasons. The suit instituted by Isa against Atta Muhammad was pending at the time of the incident. The marriage of Kaloo PW with Mst. Bakhtan had taken place in the year 1960 and this is clear from the Nikah Nama Exh.D. There was nothing to show that during these years, anything untowards had happened on account of the marriage between Kaloo PW and Ghulam Hassan Alyani. The suit between Murad Alyani on the one hand and the deceased persons and Kaloo and Siddique PWs on the other was also pending

at the time of the incident and, in any case, it P5 nard to believe that on account of that litigation, Murad Alyani would kill Lax and Karim Bakhsh. As to the complaint tiled by Kaloo PW against Ghulam Hasan Alyani and Allah Yar, it was ire the evidence of Kaloo PW that the matter had been compromised and it was as a compromise that the accused persons "in that case were acquitted. There I:, then the private complaint under Sections 426 and 147 of the P.P.C. (Exh.DF) but this shows that the motive, if any, was against Kaloo PW and not against Karim Bakhsh and Lal deceased persons. The contention has otherwise no merit, for, -in our view, Kaloo and Siddique PWs had seen the incident taking place and had ample opportunity to identify the culprit or culprits. To countenance the contention of the learned counsel, therefore, would amount to countenancing the plea of substitution for which no foundation whatever has been laid.

40. The question, however, remains whether it is safe to hold both the appellants guilty of the offence. The number of the shots which killed the deceased persons was two and they could well be fired by one person from the sane gun. It is here that the fact that no gun could be recovered from Sawan appellant, though he had remained on physical remand for 27 days, assumes importance. The failure of the police to recover any gun from Sawan appellant is a circumstance which shows that he was not a wan possessed of a gun and this coupled with the fact that Sawan appellant is a son of Jewan and a real brother of Faiz Muhammad appellant should, in our view, entitle. him to the benefit of doubt.

41. For the above reasons, we would dismiss the appeal of Faiz Muhammad appellant and confirm his death sentence. The appeal of Sawan appellant is accepted and its conviction and sentence are set aside and he is acquitted. He shall be released forthwith, unless required in any other case. His death sentence is not confirmed. There being no merit in the revision petition, the same is dismissed.

M.Y.H./F-41/L Order accordingly.

are real brothers. They along with four others named Bashir, Khuda Bakhsh, Gaman and Hayat were sent up to stand their trial for the murder of Lal and Karim Bakhsh, before the learned Additional Sessions Judge, Dera Ghazi Khan. By his judgment dated 19-2-1984, the learned Additional Sessions Judge acquitted Bashir, Khuda Bakhsh, Gaman and Hayat but convicted Faiz Muhammad and Sawan appellants on two counts under Section 302 read with Section 34 of the P.P.C. and sentenced each of them to death and to pay Rs.10,000/- as fine and in default to undergo rigorous imprisonment for two years and also to pay Rs.10,000/- as compensation to the heirs of the deceased persons and in default to undergo R.I. for six months on each count. The learned Additional Sessions Judge directed that the sentence of imprisonment .in case of default of payment of fine should take effect only if the death sentence is not confirmed.

2. Faiz Muhammad and Sawan have appealed against their conviction and sentence. Kalu Khan, the first informant, has filed a revision under Section 439 of the Code of Criminal Procedure, being Criminal Revision No.100 of 1984, against the acquittal of Gaman, Bashir, Hayat and Khuda Bakhsh. The reference under Section 374 of the Code of Criminal Procedure is also before us. This will dispose of all these matters.

3. The facts, as they emerge from the prosecution evidence, are as follows: Some two years before the present incident, which occurred at 10-00 A.M. on 1-2-1981 at Band Sharmoon Wala in Mauza Choor Hatta, Jewan, father of Faiz Muhammad and Sawan, appellants, was killed. For his murder, were tried seven persons, namely, Lal, Karim Bakhsh (deceased persons in this case), Kaloo, Hassan, Mewa, Mithu and another. They were tried but were acquitted by the Sessions Court some seven days before the instant incident.

4. On the day of the incident, Kaloo (PW-9) and Wazir along with the two deceased persons Lal and Karim Bakhsh were on their way to Dera Ghazi Khan from their residential place in Basti Alyani, which was 21 miles from Dera Ghazi Khan. On the way they were joined by Siddique (PW-10), who was taking meals for his son to a tubewell near Wadoor Bridge. When they reached near Band Sharmoonwala in Mauza Choor Hatta, Faiz Muhammad and Sawan appellant armed with guns, Hayat and Bashir armed with Sotas and Gaman and Khuda Bakhsh armed with hatchets appeared from behind. Khuda Bakhsh and Bashir raised Lalkaras telling their co-accused that they should kill Lal and Karim Bakhsh deceased to avenge the murder of Jewan. Kaloo, Siddique and Wazir ran for their lives towards the east. Karim Bakhsh and Lal deceased persons ran towards the north. Faiz Muhammad appellant fired at Lal hitting him on the back of his neck; he fell down. Sawan appellant fired at Karim Bakhsh hitting him on his left thigh; he also fell down. The appellants and their co-accused then ran towards Kaloo, Siddique and Wazir but they succeeded in running away. The appellants and their co-accused then left the spot.

5. Kaloo, Siddique and Wazir returned to the spot and found Lal dead. Karim Bakhsh deceased was alive. Leaving Siddique PW with the deadbody of Lal, Kaloo and Wazir immediately carried Karim Bakhsh to the hospital in Dera Ghazi Khan. As they reached the hospital, Karim Bakhsh also died. Kaloo PW left Wazir with the dead body of Karim Bakhsh and went to the Police Station and reported the incident to Ghulam Farid, Inspector, (PW-11), vide F.I.R. Exh.PJ. Ghulam Farid Inspector (PW-11) recorded the F.I.R. Exh. PJ and proceeded to the spot where he prepared inquest report Exh.PK and injury statement Exh.PL in respect of the deadbody of Lal deceased and sent it to the mortuary under the escort of Gul Muhammad Constable. He collected the blood-stained earth from the places where Lal deceased was killed and where Karim Bakhsh was injured and made them into parcels vide memos Exh. PF and EXh.PG: He then proceeded to the hospital where Karim Bakhsh lay dead, prepared his injury statement Exh.PM and inquest report Exh.PN and sent his deadbody to the mortuary under the escort of Gul Muhammad Constable.

6. He had the site-plan Exh.PB and its copies Exh.PB/1 and Exh.PB/2 prepared from the Patwari and gave his notes in red ink thereon.

7. He arrested Faiz Muhammad and Sawan appellants and their co-accused on 14-2-1981. Faiz Muhammad appellant led to the recovery of gun P.10 and two empty cartridges P.11/1-2 from his house. They were taken into possession and sealed into a parcel vide memo Exh. PH., He deposited the sealed parcels with the Moharrir.

8. Dr: Naseer Ahmad (PW-1) had examined Karim Bakhsh deceased as a private case at 11-30 A.M. on 1-2-1981 and had found the following injuries on his person:-

- (1) A circular wound with inverted margin 1/4"x 1/4" on front of left thigh, five inches above the knee. It was wound of entrance. There was a wound of exit on back of left thigh corresponding to the wound of the entrance .with averted margin.
- (2) A circular wound with inverted margin 1/4" x 1/4" on front of left thigh two inches below injury No.1. It was wound of entrance. There was corresponding exit wound on back of left thigh with averted margin.
- (3) A circular wound with inverted margin 1/4" x 1/4" on front of left knee joint over the patella. This wound was of entrance. Its corresponding exit wound was on the back of knee joint.
- (4) A circular wound with inverted margin on outer side of left thigh 1/4" x 1/4". It was a wound of entrance and was five inches above the knee joint. There was corresponding exit wound on the posterolateral aspect of left thigh.

9. On probing, he had found that each entrance wound communicated with its corresponding exit wound. Karim Bakhsh was in dangerous condition and in extreme shock. His pulse was not palpable and his B.P. was not recordable. He was still in Casualty Department and was being given first aid when he expired at about 12-05 noon.

10. In the opinion of the doctor, the injuries were dangerous collectively and result of fire-arm and had been caused within the duration of about four hours. Exh. PA is the carbon copy of the medico-legal report. Vide Ruqqa Exh. PA/1, he informed the S.H.O. about the death of Karim Bakhsh. In answer to a question in cross-examination, Dr.Naseer Ahmad said that Karim Bakhsh was not fit to make statement. In his opinion, the distance between the assailants and the victim could be more than five feet. He added that Karim Bakhsh could have received the injuries from the front side as well as lateral side.

11. The autopsy on the dead bodies of Lal and Karim Bakhsh was performed by Dr.Muhammad Arshad (PW-5). He found the following injuries:-

- (1) Four circular wounds each measuring 1/4" x 1/4" on the front of left thigh within the range of five inches commencing from the knee. They were having inverted margins and were wounds of entrance.
- (2) There was corresponding wound having averted margins on the back of thigh. These were exit wounds.

12. In the opinion of the doctor, death was due to shock and haemorrhage "as a result of fire-arm injuries on the left thigh which had injured the femoral vessel. The injuries were ante-mortem and were sufficient to cause death in the ordinary course of nature. Probable time between injuries and death was within few hours and between death and

post-mortem examination within three hours. Exh. PC is the copy of the post-mortem examination report and Exh.PC/1 is the diagram of the injuries.

13. On the deadbody of Lal was the following injury:-

A lacerated wound with inverted edges on the back of head, 7" x 9-" x brain matter missing from the cranial cavity and almost three-fourth of the vault of skull was missing. The edges on the upper and lateral sides were everted. Brain matter was carried separately.

14. The doctor did not find the membranes and brains present in the skull. He found the right and left lungs slightly congested.

15. In the opinion of the doctor, death was due to shock and haemorrhage "as a result of injury which was caused by fire-arm". The injury was sufficient to cause death in the ordinary course of nature. Time between injury and death was immediate and between death and post-mortem examination six hours. Exh.PD is the carbon copy of the post-mortem examination report and Exh.PD/1 is the diagram of the injuries.

16. In cross-examination, the doctor said that the injuries of Karim Bakhsh "would have been fired at from his front side". The deceased might have been fired at from a distance of about 12 feet. He had not recovered any pellet from the deadbody of Karim Bakhsh. He had also not detected any blackening, scorching, tattooing or burning on the injury.

17. The doctor further stated that the direction of the injury on the person of Lal was from downward to upward. He was, however, unable to give the actual position of the victim when he was fired at, or whether at the time of fire his head was downward or upward. The doctor said that the injury on the head of LAI and on the thigh of Karim Bakhsh could be caused by one fire shot only if "Lal is concealing himself before the thigh of Karim Bakhsh and Karim Bakhsh is fired at from his front side on thigh".

18. In support of its case, the prosecution called 11 witnesses, including Dr. Naseer Ahmad (PW-1) and Dr. Muhammad Arshad (PW-5). The eye-witness account of the incident was given by Kaloo (PW-9) and Siddique (PW-10). Malhi alias Malhu (PW-8) had joined the investigation. He had witnessed the taking into possession of blood-stained earth from the place of incident vide memos Exh.PF and Exh.PG. He was also a witness to the recovery of gun P.10 and two empty cartridges P.11/1-2 from Faiz Muhammad, appellant, vide memo Exh. PH.

19. The evidence of the remaining PWs was of formal character and can be dealt with shortly. Ahmad Bakhsh, Head Constable, (PW-2) received two sealed parcels from Ghulam Shabbir, Naib Moharrir, on 7-2-1981 and had kept them in safe custody. On 14-2-1981, he received another sealed parcel from Ghulam Farid, Inspector. He kept these parcels in safe custody till he gave them to Gul Muhammad constable for being taken to the office of the Chemical Examiner and Forensic Science Laboratory, Lahore. Ghulam Shabbir, Head Constable, had also received two sealed parcels from Ghulam Farid, Inspector, and had kept them in safe custody till 7-2-1981, when he

gave them to Ahmad Bakhsh, Head Constable. Ghulam Haider, Patwari, (PW-4) had prepared the site-plans Exh.PB, Exh.PB/1 and Exh. PB/2 in the scale of 20 Karams to an inch, at the pointing out of the witnesses and on being asked to do so by the police. The drawings and notes in black on the site-plans were in his hand. Gul Muhammad Constable (PW-6) had escorted the deadbody of Lal deceased from the place of incident to the mortuary. He had also escorted the deadbody of Karim Bakhsh from the District Headquarters Hospital, Dera Ghazi Khan, to the mortuary. After the post-mortem examination, he had given the last worn clothes of Lal deceased, viz chaddar P.1, shirt P.2, turban P.3, vest P.4 and that of Karim Bakhsh deceased, vide Chaddar P.5, shirt P.6 and two other chaddars P.7 and P.8 and a pair of shoes P.9/1-2 to the Inspector, vide memo. Exh.PE. On 17-2-1981, he took three sealed parcels relating to this case and delivered two at the office of the Chemical Examiner and one at the office of the Forensic Science Laboratory, Lahore. Mittiv (PW-7), a son of Siddique (PW-10), had identified the dead bodies of LAI and Karim Bakhsh at the time of post-mortem examination and then was witness to the memo Exh. PE, by which the last worn clothes of the deceased were taken into possession.

20. As observed above, Ghulam Farid, Inspector, (PW-11) had recorded the F.I.R. Exh. PJ and had then investigated the case. It was brought out in his cross-examination that besides him, Mr. Ejaz Akram, A.S. P., had partly investigated the case; he had also varified the investigation conducted by him. He and the A.S.P. had found that Sawan, Bashir, Khuda Bakhsh, Gaman and Hayat accused persons were innocent of the offence. He added that three persons named Nabi Bakhsh, Faqir Muhammad and Ahmad Bakhsh had appeared before him and claimed that they had eye-witnessed the incident.

21. The Chemical Examiner's report Exh.PO and the Serologist's report Exh.PQ are to the effect that the earth taken into possession) from the spot was stained with human blood and Exh.PR, which contains the opinion of the Forensic Science Laboratory, is to the effect that the empties recovered from Faiz Muhammad appellant ha been fired from the gun P.10.

22. The appellants as also their co-accused denied their participation in the commission of the crime. Faiz Muhammad appellant also denied the recovery of gun P.10 and the cartridges P.11/1-2 from his house. According to him, the deceased persons were killed by some unknown persons in the jungle and the complainant had falsely involved them because they had lest the case of murder against them, for which seven persons of the complainant party were challaned. He added that none of the eye-witnesses was present at the time of the occurrence; they were closely related inter se and were on inimical terms with them. He was a P.W. in the murder case against the complainant and the PWs. During the investigation, independent witnesses had appeared and had exonerated them.

23. Only Sawan appellant gave defence evidence. He examined Mr.Ejaz Akram, A.S.P., (DW-1) who, as noticed above, had partly investigated the case. According to Mr.Ejaz Akram, respectables of the locality had vouched for the innocence of the accused persons other than Faiz Muhammad but "as there was no solid evidence to declare Sawan, Bashir, Hayat, Gaman and Khuda Bakhsh accused as innocent, and

place them in column No.2 of the challan", he directed all the accused to be challaned and the question of their guilt or innocence to be left to be decided by the Court.

24. He also tendered in evidence copy of plaint in a suit for possession titled "Esa Khan Vs. Atta" Exh.DA, certified copy of order in that case Exh.PB, certified copy of Part Nikah between Mst. Bakhtan and Kaloo Exh.DD, certified copy of Nikah Nama between Mst. Bakhtan and Ghulam Hassan Exh. DE, copy of a Magistrate's judgment dated 21-12-1985 in a case titled "Kaloo Vs. Jewan etc." Exh.DF and closed his evidence.

25. The learned Additional Sessions Judge found that Faiz Muhammad and Sawan appellants "whose father was murdered, had strong motive against the persons who were challaned for the murder but were acquitted by the Court seven days prior to this occurrence". As to the ocular evidence of Kaloo and Siddique PWs, the learned Additional Sessions Judge observed that "admittedly, the complainant party are closely related to each other and are also inimical towards the accused. So, the chances of false implication are there". In his opinion, therefore, it was 'necessary to see "to what extent the version of eye-witnesses, namely, Kaloo (PW-9) and Siddique (PW-10) gets corroboration from the other facts and the circumstances". But, then he proceeded to observe, and if I may say so with respect somewhat inconsistently, that "if the presence of witnesses is proved beyond doubt and no other independent witness is available in the case, it would result in a grave miscarriage of justice to insist upon independent corroboration. It depends upon the facts of each case as to whether an independent corroboration was necessary or not". In his view, the evidence of Kaloo and Siddique PWs revealed that "excepting the presence of Khuda Bakhsh, Gaman, Hayat and Bashir, no other overt act is attracted to these accused in spite of the fact that they were armed with Sotas and hatchets but they did not try to inflict any injury to any witness or to the two deceased persons although they had come prepared for the said purpose". The learned Additional Sessions Judge thought that the role of Lalkara was ascribed to Khuda Bakhsh and Bashir accused "only to drag them in the case". In the opinion of the learned Additional Sessions Judge, the testimony of Kaloo and Siddique PWs was consistent on all material particulars and had received support from the medical evidence.

26. The learned Addl. Sessions Judge, however, did not attach any importance to the evidence of the recovery of gun and empties from Faiz Muhammad appellant.

27. In recording that finding, the learned Additional Sessions Judge gave three reasons; (1) that "there was a grave contradiction" between the statement of Malhi (PW-8) and that of Ghulam Farid, S.H.O., (PW-11); (2) that "there appears no fun to keep concealed the empties. it could be easily destroyed"; and (3) that assuming that the gun and the cartridge and empties were recovered from Faiz Muhammad appellant "even then it cannot be said these were the empties which were fired at on the deceased. So the recovery of the gun and the cartridges does not help the prosecution and is taken out of consideration". The learned Additional Sessions Judge, therefore, concluded that the report of the Forensic Science Laboratory "although in the positive yet of no consequence to the prosecution because the recovery has been disbelieved".

28. The contradiction noticed by the learned Additional Sessions Judge between the statement of Malhi (PW-8) and the statement of Ghulam Farid, Inspector, (PW-11) was that according to Malhi PW, he was in D . G . Khan City when he learnt that the S. H .O. was going along with Faiz Muhammad appellant on a wagon to his Basti, he followed them on his cycle and reached his Basti simultaneously with the police. In the opinion of the learned Additional Sessions Judge, it was highly unbelievable that he would reach on cycle simultaneously with the police who travelled by wagon, when according to Ghulam Farid, Inspector, the accused were produced before him by one Ghulam Sarwar Alyani on 14-2-1981 at Basti Alyani and thereafter Faiz Muhammad appellant led to the recovery of gun etc.

29. Malhi PW was a relative of the complainant party and he was, therefore, also an interested witness. The contradiction pointed out by the learned Additional Sessions Judge also showed that he had not witnessed the recovery of the gun etc. from Faiz Muhammad appellant. Therefore, it may well be that he had offered his services as a recovery witness, although he had not seen the recovery being effected because no disinterested witness would involve himself in such a case. We, therefore, agree that the evidence of Malhi (PW-8) did not inspire confidence. But then the learned Additional Sessions Judge gave no reasons for not acting upon the testimony of Ghulam Farid, Inspector. Having perused the record, we are left with the B impression that in conducting the investigation, Ghulam Farid, Inspector, had been equally fair to the point of view of the accused persons and this should be clear from the fact that he had found five of the accused persons innocent of the offence. The result of his investigation was later confirmed by Mr. Ejaz Akram, A.S.P. It is also pertinent to notice in this behalf that no recovery was shown to have been effected from Sawan appellant, who too was alleged to have fired a shot during the course of the incident. We do not, therefore, think that the learned Addl. Sessions Judge .was entitled to altogether exclude the recovery of gun from Faiz Muhammad appellant from consideration.

30. We, however, concur in the view taken by the learned. Additional Sessions Judge that the recovery of the gun and the empties in the absence of any proof that the gun was used in the commission of the offence and that the empties were the very empties which had been fired at the time of the incident, was not sufficient to connect Faiz Muhammad appellant with the offence. But nonetheless, this was a circumstance which lent support to the ocular evidence to this extent at least that Faiz Muhammad was in possession of a gun which he could use in the commission of the offence.

31. The main stay of the prosecution case was the testimony of Kaloo and Siddique PWs. They were interested witnesses in the accepted sense of that expression, that is to say, they had a motive for falsely implicating the appellants. The appellants are sons of Jewan, who, as noticed above, was killed some two years prior to the present incident. For his murder, Lal and Karim Bakhsh deceased persons, Kaloo (PW-9), Mithu (PW-7) alongwith Hassan and Mewa were tried. Siddique (PW-10) is the father of Mithu (PW-7). The eye-witnesses in the murder case of Jewan were Faiz Muhammad and Sawan, appellants, and Bashir, Khuda Bakhsh, Gaman and Hayat, who were all named as accused in this case. As regards the inter se relationship between the deceased persons and the PWs. Kaloo -PW is a brother of Lal deceased. Besides being

a cousin of Lal deceased and Kaloo'PW, Karim Bakhsh deceased was married to a sister of Lal deceased and Kaloo PW and Lal deceased was married to a sister of Karim bakhsh deceased. Mithu (PW-7) is married to the daughter of Kaloo PW and Siddique (PW-10) is father of Mithu PW. Malhi PW is also a first cousin of Kaloo PW and Lal deceased.

32. Learned counsel for the appellants argued that besides being interested witnesses Kaloo and Siddique PWs were chance witnesses; that their evidence was inconsistent with the medical evidence, for the injuries of Karim Bakhsh deceased show that he was hit from the front side but the eye-witness account is that Karim Bakhsh was running and was fired at from behind. Learned counsel also tried to make capital of the fact that during the course of investigation, three independent witnesses named Ahmad Bakhsh, Faqir Muhammad and Nabi Bakhsh had appeared before the Investigating Officer but they were not cited as witnesses. As regards Sawan appellant, learned counsel maintained that no recovery had been effected and as regards the recovery from Faiz Muhammad appellant, his contention was that there is no evidence to connect the gun and the empties allegedly recovered from Faiz Muhammad appellant with the commission of the crime and, therefore, the report of the Fire-arms Expert that the empties P.11/1-2 were fired from the gun P.10 is of no consequence and has, therefore, no corroborative value. According to the learned counsel, therefore, as regards Sawan appellant, there was no evidence to corroborate the testimony of the interested witnesses, namely, Kaloo and Siddique, and as regards Faiz Muhammad appellant, what was produced as a corroborative evidence could not serve as such.

33. The leading authority on the evidence of interested persons is *Niaz v . State* (P . L . D . 1960 S.C. 387) . I n that case was explained, for the guidance of Courts, the approach to the problem confronting them in appraising the evidence of such witnesses. It was held:

"Whenever interested persons claiming to be eye-witnesses of an occurrence charge persons against whom they have some motive for false implication, with the commission of the offence, the first question to be considered is whether in fact they saw the occurrence and were in a position to identify the culprits. If there be no reason to doubt that they in fact witnessed the occurrence and were in a position to identify the offenders, the further question arises as to whether they can be relied upon for convicting the accused without corroboration. In cases where such interested witnesses charge one person only with the commission of the offence, or where the number of persons whom they name does not exceed that which appears from independent evidence or from circumstances not open to doubt to be the true number of culprits, their evidence may, in the absence of anything making it unsafe to do so, be accepted without corroboration, for, substitution is a thing of rare occurrence and cannot be assumed, and he who sets up the plea of substitution has to lay the foundation for it. But if the Court finds that the number mentioned by interested persons may have been exaggerated their word cannot be made the basis of conviction and the Court will have to look for some additional circumstances which corroborates their testimony. This circumstances need not be such that it can of its own probative force bring home the charge to the accused. It should, however, be a circumstance which points to the inference that the particular accused whose case is being considered did participate in

the commission of the offence. The force that such circumstances should possess in order that it may be sufficient as corroboration must depend on the particular circumstances of each case. However, the circumstance itself must be proved beyond all reasonable doubt."

34. The above observations were further elaborated in Nazir and others Vs. The State (P.L.D. 1962 S.C. 269) as follows:-

"It is possible to lay down a rule of law that a witness belonging to a particular category is to be presumed to be unworthy of credit without corroboration. In the case of an accomplice such a rule has already been accepted by the Courts. But we had no intention of laying down an inflexible rule that the statement of an interested witness (by which expression is meant a witness who has a motive for falsely implicating an accused person) can never be accepted without corroboration. There may be an interested witness whom the Court regards as incapable of falsely implicating an innocent person. But he will be an exceptional witness and, so far as an ordinary interested witness is concerned, it cannot be said that it is safe to rely upon his testimony in respect of every person against whom he deposes. In order, therefore, to be satisfied that no innocent persons are being implicated alongwith the guilty the Court will in the case of an ordinary interested witness look for some circumstance that gives sufficient support to his statement so as to create that degree of probability which can be made story put forward by an interested witness. Corroboration may be afforded by anything in the circumstances of a case which tends sufficiently to satisfy the mind of the Court that the witness has spoken the truth. What circumstances will be sufficient as corroboration it is not possible to lay down. But, as the question before the Court would be whether some innocent person had not been implicated in addition to those who were guilty the circumstance relied upon must have a bearing on this question. In the case of an interested witness the corroboration need not be of the same probative force as in the case of an accomplice for the two do not stand on the same footing."

35. In Nazir Ahmad's case, nine persons including the appellants before the Supreme Court named Nazir Jat, Anwar, Nazir Dindar, Riaz Ahmad, Muhammad Ishaq alias Mushtaq and Ghulam Rasool were tried and convicted for the murder of six persons, who were the inmates of the house of Mst. Sardar Bibi. These killings took place during the night and, as here, were to avenge an earlier murder of one Sharif, for which Mst. Sardar Bibi and her three sons had been tried but acquitted. The ocular testimony was the testimony of interested witnesses; this was believed by the High Court: in doing so, the High Court relied upon two circumstances: (1) that the number of culprits mentioned was such as would be required for an attack of the kind which was the subject-matter of the case; and (2) that the persons named as culprits were such as would be expected to join in the attack. The Supreme Court agreed with the High Court that the number of culprits named was the probable number that would be required for such an attack and also that the second matter was not an irrelevant consideration. As regards Riaz Ahmad appellant, a son of Muhammad Sharif deceased person in the earlier case, who was at the time of the occurrence thirteen years of age, the learned Judges of the High Court were of the opinion that as the murder of Sharif, his father, was being avenged, he was likely to join the assailants in spite of his young

age. The Supreme Court, however, gave him the benefit of doubt because "he was also not an unlikely person to be implicated because all the four young children of Sardar Bibi had been murdered".

36. Thus, there is no presumption that an interested witness is unworthy of credit; nor is it a principle of law that an interested witness is unworthy of credit without corroboration. It is, therefore, not correct to say that the interest of a witness affects his credit; the correct way to put it is that it may affect his credit, for: interest and truth may go together. A learned English Judge's reported to have said: "Interest is a great rascal but it is not an absolute reprobate and it is not obliged to commit perjury".

In one word, and here we quote Hamoodur Rahman, J, (as he then was) from *Ali Ahmad Vs. State* (P.L.D. 1962 S.C. 102): "Prudence of course requires that the evidence of an interested witness should be scrutinized with care and conviction should not be based upon and Siddique PWs deserved implicit reliance thereon .

37. Before dealing with the question whether the evidence of kaloo and Siddique PWs deserved implicit reliance and if not, whether there were circumstances supporting the participation of the appellant in the crime, it will be convenient to dispose of the remaining argument here. The so-called inconsistency between the medical and the ocular evidence, according to the appellant's counsel, was that when Karim Bakhsh was fired at by Sawan appellant, he was running and he could not, therefore, have been hit on the front of his thigh. In his contention, learned counsel sought to derive support from the evidence of Dr. Muhammad Arshad (PW-5) who in answer to a question in cross-examination said that the shot to Karim Bakhsh deceased "would have been fired at from his front side." No attempt appears to have been made to elucidate from Dr. Muhammad Arshad if the deceased could have been hit from a side. In this connection, reference has already been made to the evidence of Dr. Naseer Ahmad (PW-1) who had stated that the injuries of Karim Bakhsh deceased could have been caused "from the front side as well as lateral side". It is not without significance that this opinion was expressed by Dr. Naseer Ahmad in answer to a question in cross-examination and nothing was brought out to show that that opinion was open to doubt. It appears to us, therefore, that nothing should turn upon what Dr. Muhammad Arshad (PW-5) said, for, if we may say so with respect, the cross-examiner obtained an answer favourable to him and left it at that. As a different opinion in the evidence of Dr. Naseer Ahmad (PW-1) had already come, the fair course to adopt would have been to place that opinion before Dr. Muhammad Arshad (PW-5) and to obtain his answer in the light thereof. Reference was also made to the fact that no pellet was recovered from the deadbody of Karim Bakhsh deceased but then there were corresponding exit wounds the inference being that the pellets had pierced through the thigh of Karim Bakhsh deceased. Regarding the failure of the prosecution to cite Ahmad Bakhsh, Faqir Muhammad and Nabi Bakhsh as eye-witnesses, suffice it to say that Ghulam Farid, Inspector, (PW-11) himself explained that he was not satisfied from the statements of Ahmad Bakhsh, Faqir Muhammad and Nabi Bakhsh that they were present at the time of the incident and had seen it taking place. As to the police finding regarding the innocence of the accused person other than Faiz Muhammad appellant, indeed that finding was no binding upon the Court.

The incident occurred in broad daylight. It is in evident that the deceased persons, Kaloo, Siddique PWs and Wazir lived in the same Haveli in Basti Alyani. The appellants and their co-accuse also lived in the same Basti, the distance between the residenti: houses of the accused party and the complainant party being 10 Karams. Basti Alyani was 2J miles from Dera Ghazi Khan city. Accord to Kaloo, PW, he along with Lai and Karim Bakhsh deceased person and Wazir had left their Basti for Dera Ghazi Khan and Siddique P' had joined them on the way; he was taking meals to his son to tubewell at Wadoor Bridge. The place of incident was a public passage There appears nothing improbable about Lai and Karim Bakhsh decease persons, Kaloo PW and Wazir having left for Dera Ghazi Khan together or about Siddique PW having joined them on the way. In our view, therefore, there is nothing to doubt the veracity of the statements of Kaloo and Siddique PWs that they were with the deceased persons when the attack was launched. That Kaloo and Siddique PWs had seen the occurrence and were in a position to identify the culprit or culprits received support from a number of circumstances. In the first place, it was not disputed that the time of occurrence was about 10-00 A.M. The evidence is that Karim Bakhsh deceased was carried to the District Headquarters Hospital, Dera Ghazi Khan, in injured condition and was examined by Dr. Naseer Ahmad (PW-1) at 11-30 A.M. It should be fairly obvious that keeping in view the distance between the place of incident and the District Headquarters Hospital, Dera Ghazi Khan, which was about 21 miles, Kaloo PW could not have been with Karim Bakhsh deceased at about 11-30 A.M. in the hospital. If he was not present at the time of the incident. According to Dr. Naseer Ahmad (PW-1), Karim Bakhsh breathed his last at 12-05; till then, Kaloo PW remained with him in the hospital, for, naturally his first anxiety must have been the life of Karim Bakhsh deceased. After the death of Karim Bakhsh which, as noticed above, occurred at 12-05 noon, Kaloo immediately proceeded to the Police Station and reported the incident to Ghulam Farid; Inspector, at 12-30 P.M. To some extent the evidence of Kaloo and Siddique PWs also received support from the medical evidence. If they had not seen the culprits firing at the deceased persons, they would not have, as lay-men, known how many shots were fired and how many shots had hit them. For the appellants, it was argued that the ocular evidence was belied by the seat of the injuries on the person of Karim Bakhsh deceased. In this behalf, we have already referred to the testimony of the Doctors. It may be added that the first shot was fired at Lal deceased and on hearing it, it would have been natural for Karim Bakhsh to turn round to see if he had been hit.

39. We are, therefore, of the opinion that Kaloo and Siddique PWs had seen the occurrence taking place and as it was a broad day-light occurrence, they had no difficulty in identifying the culprit or culprits. The appellants are real brothers; their father Jewan had been killed and the deceased persons and the PWs mentioned above were tried but acquitted. The acquittal had been pronounced just seven days before the present occurrence. Both the appellants were, therefore, persons who would have committed the offence. Learned counsel for the appellants, however, maintained that the deceased and the complainant party had other enemies also who could as well have committed the offence. In this .connection, it was pointed out that Karim Bakhsh deceased sold his land to one Atta Muhammad and the sale was pre-empted by his son Isa; that Kaloo PW had two wives, namely, Mst. Bakhtan and Mst. Jantan; that Mst. Bakhtan had first married one Ghulam Hassan Alyani and Kaloo PW had abducted her

and then obtained her divorce from Ghulam Hassan and thereafter married her; that one Murad Alyani had instituted a pre-emption suit against Karim Bakhsh and Lal deceased persons and Kaloo and Siddique PWs and the suit was decreed in favour of Murad and, therefore, Siddique was also an enemy of the complainant party; that Kaloo PW had instituted a criminal complaint against Hassan, Moosa and Allah Yar and they were acquitted; that a complaint under section 426 and 147 of the P.P.C. was instituted by Kaloo PW against Jewan deceased and five others, namely, Allah Dad, Sabaz Ali, Jallu, Ramzan and Massu and the last-named five person were also the enemies of the complainant party. This contention was also raised before the learned Additional Sessions Judge and was repelled and in our opinion for good reasons. The suit instituted by Isa against Atta Muhammad was pending at the time of the incident. The marriage of Kaloo PW with Mst. Bakhtan had taken place in the year 1960 and this is clear from the Nikah Nama Exh.D. There was nothing to show that during these years, anything untowards had happened on account of the marriage between Kaloo PW and Ghulam Hassan Alyani. The suit between Murad Alyani on the one hand and the deceased persons and Kaloo and Siddique PWs on the other was also pending at the time of the incident and, in any case, it is hard to believe that on account of that litigation, Murad Alyani would kill Lax and Karim Bakhsh. As to the complaint filed by Kaloo PW against Ghulam Hassan Alyani and Allah Yar, it was the evidence of Kaloo PW that the matter had been compromised and it was as a compromise that the accused persons in that case were acquitted. There is, then, the private complaint under Sections 426 and 147 of the P.P.C. (Exh.DF) but this shows that the motive, if any, was against Kaloo PW and not against Karim Bakhsh and Lal deceased persons. The contention has otherwise no merit, for, in our view, Kaloo and Siddique PWs had seen the incident taking place and had ample opportunity to identify the culprit or culprits. To countenance the contention of the learned counsel, therefore, would amount to countenancing the plea of substitution for which no foundation whatever has been laid.

40. The question, however, remains whether it is safe to hold both the appellants guilty of the offence. The number of the shots which killed the deceased persons was two and they could well be fired by one person from the same gun. It is here that the fact that no gun could be recovered from Sawan appellant, though he had remained on physical remand for 27 days, assumes importance. The failure of the police to recover any gun from Sawan appellant is a circumstance which shows that he was not a man possessed of a gun and this coupled with the fact that Sawan appellant is a son of Jewan and a real brother of Faiz Muhammad appellant should, in our view, entitle him to the benefit of doubt.

41. For the above reasons, we would dismiss the appeal of Faiz Muhammad appellant and confirm his death sentence. The appeal of Sawan appellant is accepted and its conviction and sentence are set aside and he is acquitted. He shall be released forthwith, unless required in any other case. His death sentence is not confirmed. There being no merit in the revision petition, the same is dismissed.

M.Y.H./F-41/L Order accordingly.

