

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 454 of 2015**

1. Raza @ Raja Pathan S/o Yunus Pathan Aged About 28 Years R/o Mangali Bazaar Gourela P.S. Gaurela District Bilaspur, Chhattisgarh
2. Sharavan Sonker S/o Ramsanjeevan Sonkar Aged About 23 Years
3. Lalla Sonker S/o Kishore Sonker Aged About 21 Years

Both above 2 and 3 R/o Samta Nagar Gaurela P.S. Gaurela, District Bilaspur, Chhattisgarh

----Appellants**Versus**

- State Of Chhattisgarh Through Station House Officer, Pendra, District Bilaspur, Chhattisgarh

---- Respondent

For Appellant	:	Shri Rajesh Jain, Advocate
For Respondent/State	:	Ms. Madhunisha Singh, PL for the State

Hon'ble Shri Justice Goutam Bhaduri**Order On Board****10/08/2018**

1. This is an appeal against the judgment dated 23.02.2015 passed by the Additional Sessions Judge, Pendra Road, District Bilaspur in S.T. No.38/2012 whereby the **appellant No.1 Raza @ Raja Pathan** has been convicted under Sections 307/149 (twice), 148/149 & 506 (Part - 2) IPC & under Sections 25 (1) (1- B) (A) and 27 (2) of Arms Act and has been sentenced for 10 years RI under Section 307/149 IPC and a fine of Rs.500/- and in absence of payment of fine,

additional 2-2 months RI was ordered for, he has further been sentenced to 1 year R.I. under Section 148/149 IPC and fine of Rs.100/- and in absence of payment of fine, additional 1 month RI was ordered for, further has been sentenced to 1 year R.I. under Section 506 (part -2) IPC and fine of Rs.100/- and in absence of payment of fine, additional 1 month R.I. was ordered for, he has been sentenced to 1 years R.I. under Section 25 (1) (1-B) (A) of Arms Act and fine of Rs.100/- and in absence of payment of fine, additional 1 month R.I. was ordered for and lastly the appellant No.1 has been sentenced to 7 years R.I. under Section 27 (2) of Arms Act and fine of Rs.100/- and in absence of payment of fine, additional 1 month R.I. was ordered for. **The appellants No.2**

& 3 Sharavan Sonker and Lalla Sonker have been convicted under Sections 307/149 (twice), 148/149 & 506 (Part - 2) IPC and both of them have been sentenced for 10 years RI under Section 307/149 IPC and a fine of Rs.500/- and in absence of payment of fine, additional 2-2 months RI was ordered for and have further been sentenced to 1 year R.I. under Section 148/149 IPC and fine of Rs.100/- and in absence of payment of fine, additional 1 month RI was ordered for and lastly they have been sentenced to 1 year R.I. under Section 506 (part -2) IPC and fine of Rs.100/- and in absence of payment of fine, additional 1 month R.I. was ordered for.

2. Brief facts of this case are that on 05.06.2012, the complainant Rakesh Gupta made a report that on 04.06.2012 at about 9 pm while he was at his Dhaba, at that time Sharavan Sonker (A2) and his friends had their meal. Subsequently, at the time of payment, they entered into altercation with the manager namely

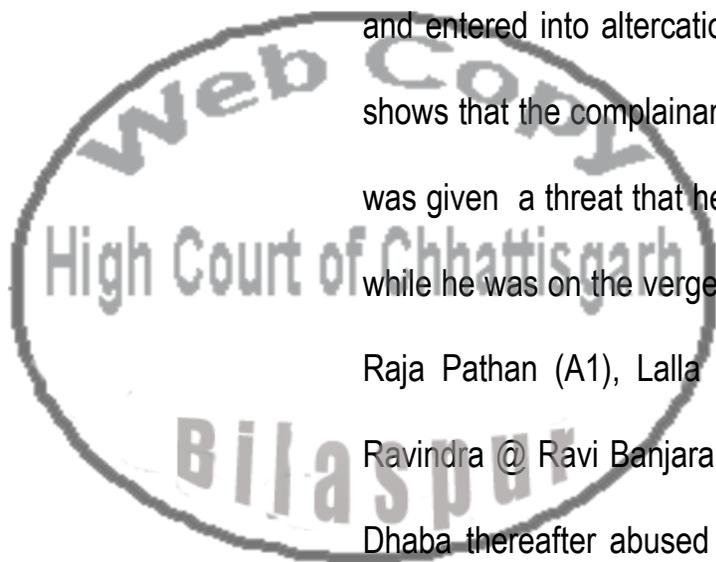
Peetamber. The complainant thereafter intervened and Shravan Sonker (A2) entered into altercation and gave threat that he will teach him a lesson. Subsequently, at about 11.30 pm Sharavan Sonker (A2), Raza @ Raja Pathan (A1), one Ravi, Lalla Sonker (A3), Nahid Ansari and Ravindra @ Ravi Banjara came back armed with Pistol, Gupti, sword and club and entered into the Dhaba. Thereafter with the allegation that he has taken more money caught hold of the complainant and Raza @ Raja Pathan (A1) took out a pistol and shot fire to the complainant which he tried to avert but he sustained bullet injury on his back. At that time, Sharavan Sonker and Lalla also started assaulting by way of Gupti and sword. Peetamber, the manager of the Dhaba was also assaulted. Thereafter, the appellants fled away.

3. The dehatinalisi was made by Ex. P-12 and thereafter the First Information Report was lodged vide Ex. P-22. Injured Rakesh Gupta and Peetamber were rushed to hospital and were subjected to medical examination and were admitted to the hospital. Subsequently, the appellants/accused were arrested and the air gun pistol, one sword, clubs and one Gupti were seized vide Ex. P-7, P-15, P-6 & P-19. The map of the place was prepared and the shirts with blood stains was also recovered. The air gun pistol so seized was sent for examination and the report having been received vide Ex. P-31. It was all sent for FSL. Subsequently, after receipt of the document, the charge-sheet was filed under Sections 147, 148, 149, 307, 294, 506 B and 25 & 27 of the Arms Act along with Sections 130 (3)/177, 3/181, 146/196 of the Motor Vehicle Act. The charge-sheet was filed before the JMFC, Pendra Road. Subsequently, the

case was sent before the Sessions Trial. Charges were framed under Sections 148, 307, 307/149, 323/142 (two counts), 294, 506 (Part-II) and Sections 25 (1) (1- B) (A) and 27 (2) of Arms Act.

4. During the course of trial, the appellants abjured the guilt and claimed to be tried. The prosecution on its behalf had examined as many as 14 witnesses and the Court below after evaluating the facts and evidence convicted the appellants as aforesaid. Hence this appeal.
5. Learned counsel for the appellants submits that the Court below failed to appreciate the fact that the appellants were not known to the victim and initially they were not named. It is stated that subsequently, the appellants have been falsely implicated in this case. He further submits that the incident the way it happened would show that all of a sudden over a payment of a bill in a hotel the altercation aggravated and the incident happened, therefore, there was no intention to kill or premeditation to attract the Section 307 IPC. It is further submitted that the nature of injury was aggravated by the prosecution which were not sufficient to kill and the conviction therefore, cannot be sustained and submits that the appellants are in jail since 06.06.2012.
6. Per contra, learned State counsel opposes the arguments advanced by the learned counsel for the appellants and submits that the order of the Court below is well merited which do not call for any interference.
7. I have heard learned counsel for the parties and perused the record of the Court below and the statements of the witnesses.

8. The complainant and the injured namely Rakesh Gupta and Peetamber are examined as (PW-6) & (PW-7) respectively. The dehatinalisi is marked as Ex. P-12, wherein the date of incident is shown as 04.06.2012 at about 11.30 pm at place Sargam Dhaba and the report was made on 05.06.2012 at about 12 am i.e. immediately after the incident. The report is made by Rakesh Gupta (PW-6). Perusal of the report shows that on 04.06.2012 it is stated that while he was in his Dhaba one Shraavan Sonker and two other persons had their meal in the Dhaba, thereafter, at the time of payment they objected to such amount of bill and entered into altercation with the manager Peetamber (PW-7). The report shows that the complainant intervened and asked them to leave at that time he was given a threat that he will see him later. Subsequently, at about 11.30 pm while he was on the verge of closing his Dhaba, Shraavan Sonker (A2), Raza @ Raja Pathan (A1), Lalla Sonker (A3) along with two other persons namely Ravindra @ Ravi Banjara and Nahid Ansari came armed and entered into the Dhaba thereafter abused him in the name of mother and caught hold of the complainant. Raza @ Raja Pathan at the same time took out his Katta and made a fire shot on him due to which he sustained bullet injury on his back on the left scapula region and Shraavan Sonker and Lalla Sonker started assaulting by way of Gupti and sword. He stated that Peetamber also was caught and he was also assaulted.
9. Reverting back to the statement of Rakesh Gupta (PW-6), he has identified the appellant Shraavan Sonker, Raja Pathan and Lalla in the Court and in respect of the two other accused namely Ravindra @ Ravi Banjara and Nahid Ansari the



identification was disowned. They were acquitted. Narrating the incident he stated that initially at about 8 – 8.30 pm Shraavan Sonker (A2) entered into the altercation with the manager of the Dhaba and he was asked to call his owner. Thereafter, he received the phone call from Shraavan Sonker and tried to intervene in such altercation. Thereafter, they paid the bill and extended threat that they will come back. The statement further shows that after one hour they came back and Shraavan Sonker, Raja Pathan and Lalla Sonker had alighted from an auto at that time Shraavan Sonker was holding a sword and Raja was holding a pistol and Lalla Sonker was holding a Gupti. They went inside the hotel and Lalla assaulted by Gupti to the Manager Peetamber. He thereafter immediately after the incident rushed to the hotel at that time Raja has pointed the gun on his head and thereafter abused in the name of mother. Shraavan Sonker further started assault by way of sword to him, which was stopped by hand as such he sustained injury on his palm and finger. He further stated that he had caught hold of sword and since was not leaving the sword Lalla Sonker (A3) also tried to take away the sword. Since he was not leaving the sword, the pistol was pointed to his head with a threat if he do not leave the sword, the fire arm shot would be made. Thereafter, Shraavan Sonker (A2) said what he is looking for and asked Raza to fire. Thereafter, Raja fired the gun shot and bullet peirced into his back shoulder. Thereafter, his grip over the sword became loose and they left the place by saying that he is now dead. Thereafter, he was admitted in the hospital.

10. In the defense, the witness was confronted with the statement given under

Section 161 Cr.P.C. (Ex.D-1). Perusal of Ex. D-1 except the elaboration of the fact made in the statement before the Court no contradiction and omission appears rather it has supported the fact that when the appellants came back they were armed and fired the gun shot whereby the bullet had hit him on the back and Shrawan Sonker had assaulted by sword to the victim. In the Court statement it is stated that two fire shots were made, however, in the 161 Cr.P.C. statement one fire shot has been stated. This omission will hardly come to any help of the accused as one gun shot even was enough to attract the guilt. The witness was constant on the statement that one bullet shot was made whereby he sustained the injury. The another aspect is that in the Court statement it has been stated that Peetamber was assaulted first, however, in the statement under Section 161 Cr.P.C. it is stated that he was assaulted first. These nature of omission would also not be of much help to the accused.

11. The statement of Peetamber (PW-7), who was the worker in the Dhaba is also of significance. This witness too has identified the three accused/appellants in the Court. He stated that he was working in the Dhaba and the owner is Rakesh Gupta (PW-6). Narrating the incident, he corroborated the fact that at about 8 'o clock in the evening Shrawan Sonker came along with his friends, had their meal then objected for the service and the quality of the food. After having the meal, he was given a bill of Rs.648/- which was objected by them, he refused to pay the bill and was going from the Dhaba, then at that moment he called up his owner Rakesh Gupta (PW-6) that these persons are not paying the bill, thereafter, at that moment, the owner Rakesh Gupta (PW-6) intervened

then Rs.600/- were given by some of the family members of Shrawan Sonker. While leaving the place, Shrawan Sonker abused and extended threat that they would be coming back to teach them a lesson. He further stated that thereafter at 11 pm all the accused again came back to Dhaba armed started abusing & entered into Dhaba. At that time Lalla Sonker assaulted him by way of Gupti on his chest and he fell down and lost his conscious. This witness was confronted with his statement given under Section 161 Cr.P.C. marked as Ex. D-2. Perusal of Ex. D-2 shows that the same incident is narrated that the appellants/accused had initially taken meal and refused to pay the bill so dispute arose initially for payment of bill. After some time again they came back at about 11.30 pm armed and thereafter assaulted. This witness in the Court statement has not made any statement of the fire shot though it was made by him in the statement given under Section 161 Cr.P.C. (Ex. D-2). The mentioning of fire shot to Rakesh Gupta (PW-6) would be of hardly significance as the injured Rakesh Gupta (PW-6) has asserted of such gun shot which is corroborated by injury report.

12. The incident is further corroborated by Deepu @ Deepak Kalra (PW-8) who is worker in the Dhaba. Narrating the same incident he stated that initially appellants came to Dhaba, there has been some altercation took place with the Manager about payment of bill. Thereafter, they came back armed at about 11.30 pm then Raja assaulted the Manager Peetamber by way of Gupti on his abdomen and three persons entered into Dhaba and assaulted the owner Rakesh Gupta by way of sword and fired shot. In the cross-examination of this

eye witness nothing incriminating facts came on record, on the other hand he has established the fact about the assault and incident. This witness was also confronted with the statement under Section 161 Cr.P.C. which is marked as Ex. D-3. Perusa of the Ex.D-3, the statement under Section 161 Cr.P.C. no major contradiction has come to fore, instead this fact has been stated that the fire shot was made on the owner Rakesh Gupta by gun and sword. The statement further shows when Manager Peetamber tried to intervene, he was assaulted by way of sword.

13. The examination of the Dehatinalisi Ex. P-12 lodged by Rakesh Gupta (PW-6) and the statement given to the police by Rakesh Gupta is marked as Ex. D-1, if are read together they do not show any major contradiction or omission. Further the record shows that the memorandum and the seizure witness have not supported the case of the prosecution.

14. With respect to the evidence of victim, the Supreme Court in Criminal Appeal Nos. 513-514 of 2014 decided on 09.01.2017 in case of **Baleshwar Mahto & Anr. v. State of Bihar & Anr.**, has reiterated the law laid down in case of **Abdul Sayeed v. State of Madhya Pradesh**, which was reported in **(2010) 10 SCC 259**, which reads as under :

28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of

his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Vide *Ramlagan Singh v. State of Bihar* [(1973) 3 SCC 881:1973 SCC (Cri) 563: AIR 1972 SC 2593], *Malkhan Singh v. State of U.P.* [(1975) 3 SCC 311 : 1974 SCC (Cri) 919 : AIR 1975 SC 12], *Machhi Singh v. State of Punjab* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681], *Appabhai v. State of Gujarat* [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696], *Bonkya v. State of Maharashtra* [(1995) 6 SCC 447 : 1995 SCC (Cri) 1113], *Bhag Singh* [(1997) 7 SCC 712 : 1997 SCC (Cri) 1163], *Mohar v. State of U.P.* [(2002) 7 SCC 606 : 2003 SCC (Cri) 121] (SCC p. 606 b-c), *Dinesh Kumar v. State of Rajasthan* [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472], *Vishnu v. State of Rajasthan* [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302], *Annareddy Sambasiva Reddy v. State of A.P.* [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630] and *Balraje v. State of Maharashtra* [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211]

29. While deciding this issue, a similar view was taken in *Jarnail Singh v. State of Punjab* [(2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107], where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

"28.....In *Shivalingappa Kallayanappa v. State of Karnataka* [1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694] this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In *State of U.P. v. Kishan Chand* [(2004) 7 SCC 629 : 2004 SCC (Cri) 2021] a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan v. State of Haryana* [(2006) 12 SCC 459 : (2007) 2 SCC (Cri) 214]). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.”

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.”

15. Therefore, if we translate the aforesaid principles in the facts of this case, it would show that the injured has named all the accused, therefore, the minor contradictions that who had inflicted the injury at what point of time alongwith fact that all the accused were very much present at the time of occurrence and have actively participated to cause injury to victim cannot be easily ignored.

16. With respect to seizure of weapons as per Suresh Tomar (PW-13) a gupti was seized from Shrawan Sonker and air gun was seized from Raza and sword was

seized from Lalla Sonker. According to this witness an auto was also seized from one of the other co-accused, who was acquitted namely Nahid Ansari. During the course of trial after seizure, the query was made and Dr. Smt. J.S. Lakda (PW-4) has said sthat as per Ex. P-11 this type of injury could have caused by way of sword, Gupti to Rakesh Gupta (PW-6) and Peetamber (PW-7) and not from the club.

17. The contradiction though appears about the injury which was made by different weapon, the same do not appears to be fatal only the contradiction appears in respect of the weapon used during incident qua by the different appellants. The incident how it happened has been narrated, what arms accused were holding has been narrated. So even if some contradiction if appears as to which accused was using a particular arm and was being used by the appellants the contradictions would be minor in nature and do not render the case of prosecution as doubtful. The appellants further tried to contradict the statement of injured Rakesh Gupta (PW-6) and Peetamber (PW-7) with their police statement and eyewitness Deepu @ Deepak Kalra (PW8). When the Court statement are compared with the police statements which are marked as Ex. D-1, Ex. D-2 & Ex. D-3 they do not point out any major contradiction to disbelieve the case of prosecution.

18. The Supreme Court in the case of State of ***Uttar Pradesh Versus Naresh and Others*** **{(2011) 4 SCC 324}** with respect to the contradiction, inconsistency and omissions has ruled out that the evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted.

19. The injured in this case is Rakesh Gupta (PW-6) & Peetamber (PW-7), have affirmed the incident, therefore, their statements cannot be doubted. The evidence of the injured are generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law.

The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence.

Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein.

20. The Supreme Court in **Naresh (supra)** further has held that the normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. In this case the witnesses have deposed that they were shot and also assault was made on the abdomen by way of Gupti, therefore, natural inference and circumstances would show that the terror and horror has taken over the entire atmosphere so the contradiction natural to the fact that Peetamber (PW-7) was attacked first and thereafter Rakesh Gupta (PW-6) was attacked or Rakesh Gupta (PW-6) was attacked and Peetamber (PW-7) in order to save him

entered into Dhaba is hardly significant. The Supreme Court in **Naresh (supra)** has held thus in para 30:-

“30. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

“9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.”

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: State v. Saravanan (AIR 2009 SC 152) ; Arumugam v. State (AIR 2009 SC 331); Mahendra Pratap Singh v. State of UP, {(2009) 11 SCC 334}; and Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra, JT 2010 (12) SC 287].

21. Further The Supreme Court in the case of **Mritunjoy Biswas Versus Pranab**

ALIAS KUTI BISWAS And Another {(2013) 12 SCC 796} in respect of the contradiction

and omission has held that the evidence is to be considered from the point of

view of trustworthiness. The test is whether the same inspires confidence in the mind of court. Further the Court has held thus in para 31:-

“31.It is to be kept in mind that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, heypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.”

In this case, the statement of the two injured witnesses Rakesh Gupta (PW-6) & Peetamber (PW-7) are eye witness Deepu @ Deepak Kalra (PW8) if they are read the cluster and together, the trustworthiness of the witnesses are established.

22. The prosecution to prove the nature of injury sustained by Rakesh Gupta (PW-6) and Peetamber (PW-7) had examined the Dr. Smt. J.S. Lakda (PW-4). According to her she had examined the injured on 04.06.2012. On examination of Rakesh Gupta (PW-6), she found the following injuries:-

- (1) Incised wound 4cm x0.5cmx1 cm between left and index finger.
- (2) Incised wound 2x0.5 cm over right side of forehead.
- (3) Firearm wound :- entry wound was circular, edges were inverted,

blackening burning around the wound.

According to the doctor injury number 1 & 2 were simple in nature, which were inflated by sharp edged weapon. Injury number 3 is was inflicted by air pistol gun. The doctor further stated that likewise she had examined Peetamber (PW-7), the injured, and gave her report vide Ex. P-9 and the injuries were as under:-

(1) Penetrating stab wound 3 cm x 0.5cm x 3 cm over the left side of the abdomen and severe bleeding was present.

According to the opinion of the doctor, the injury was dangerous to life of the patient caused by sharp cutting object.

23. In the cross-examination of this doctor Dr. Smt. J.S. Lakda (PW-4), she stated in the cross-examination that injury No.3 which was of pistol she cannot depose that from how much distance the same was inflicted and the suggestion given to her was accepted that the burnt part could have been caused by bullet having cartridge. Therefore, as such by the evidence of the Dr. Smt. J.S. Lakda (PW-4) this fact was established that the injury to Rakesh Gupta (PW-6) was inflicted by way of bullet shot. Though the query was not made whether the life of the patient could be in danger, but she after examining of her own has written the fact about the injury of Rakesh Gupta (PW-6) and referred him to higher medical centre by Ex. P-10.

24. The entire evidence when are examined, it shows that initially the appellants came to the Dhaba/hotel at about 8 pm along with others, some altercation took place while payment of bill and the complaint of the service and the appellants

refused to pay the amount, which aggravated and the appellants extended threat that they would be returning soon. Subsequently, the appellants came there with two other persons and one of the appellant Raza @ Raja Pathan (A1) was holding the pistol, Sharavan Sonker (A2) was holding a sword and Lalla Sonker (A3) was holding a Gupti and they assaulted the victims Rakesh Gupta (PW-6) & Peetamber (PW-7), therefore, they made the common object. The appellants though were convicted three but the statements have been made that other two persons were there, however, the persons namely Ravindra @ Ravi Banjara and Nahid Ansari who were tried but were not identified.

25. The Supreme Court in the case of ***Amerika Rai and others v. State of Bihar*** **{(2011) 4 SCC 677}** has held that the law on the vicarious liability under Section 149 IPC is crystal clear that even presence in unlawful assembly, but with an active mind, to achieve the common object, reiterated, makes such a person vicariously liable for the acts of unlawful assembly.

26. In this case the statements of Rakesh Gupta (PW-6), Peetamber (PW-7) and the eyewitness Deepu @ Deepak Kalra (PW-8), they have categorically stated the overt act committed by the appellants, therefore, there is no dispute about the formation of the unlawful assembly and its common object as the incident was not in the spur of moment, but the appellants first entered into altercation, went back, again came armed and the second time the assault was made. The nature of assault was by Gupti, sword and fire arm. Rakesh Gupta (PW-6) has stated that he at the last moment deviated his head thereby could avoid the

injury on his head. The injury inflicted on the witness was abated and was instigated by the other co-accused to entice to fire, which establishes the intention. The injury inflicted on Peetamber (PW-7) on his chest and abdomen by a Gupti which is corroborated by the statement of the Dr. Smt. J.S. Lakda (PW-4), therefore, the evidence would show that there was formation of unlawful assembly and the common object and the intention to kill. Consequently, the conviction made by the Court below under Sections 307 read with Section 149 and separately under Section 148, 149 & 506 (Part - 2) IPC to the appellants are upheld.

27. The appellant No.1 Raza @ Raja Pathan apart from the aforesaid sections is convicted under Sections 25 & 27 of the Arms Act. The entire perusal of the record shows that the prosecution has not produced any sanction for prosecution as required under Section 39 of the Arms Act, 1959. Section 39 of the Arms Act, 1959 purports that no prosecution shall be instituted against any person in respect of any offence under section 3 without the previous sanction of the district magistrate. Section 3 under chapter II of the Arms Act, 1959 purports the acquisition, possession, manufacture, sale, import, export and transport of arms and ammunition. The similar proposition is reiterated in the case of ***Sukhlal and another V. State of Madhya Pradesh {1998 CRI. L.J. 1366}*** which lays down that sanction is necessary to prosecute the persons under Section 25 & 27 of the Arms Act, 1959 and if the sanction is not given then in such case, the prosecution under Section 25 read with Section 27 of the Arms Act cannot be sustained. In a result, the conviction made under Sections

25 & 27 of the Arms Act in absence of sanction to the appellant No.1 is set aside.

28. Now with respect to the sentence part, the background under which it happened along with the conduct of the accused that after the first altercation they came back armed and assaulted the victims and the assault was to the extent of using fire arm and incidentally Rakesh Gupta (PW-6) escaped the bullet shot on the vital part on his body. Likewise, the assault was by way of Gupti on the abdomen/chesty of Peetamber (PW-7) cannot be ignored. In a result, this Court is not inclined to interfere in the sentence part. Accordingly, the same is maintained. In a result, the appeal fails as no interference is required in the order dated 23.02.2015 only to the modification to the above extent that conviction under Sections 25 & 27 of the Arms Act against appellant No.1 Raza @ Raja Pathan is set aside, however, since the main conviction under Sections 307 read with Section 149 and separately under Section 148, 149 & 506 (Part - 2) IPC are affirmed and the sentence is also upheld, therefore, the acquittal under Sections 25 & 27 of the Arms Act will not have any significance.

29. With such observation, the appeal stands disposed of.

Sd/-

Goutam Bhaduri
Judge

Ashu