

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on : May 30, 2016*
Judgment Delivered on : June 02, 2016

+ **CRL.A. 157/2015**

SURAJ PARKASH @ CHIKKA Appellant

Represented by: Mr.Ramesh Gupta, Sr.Advocate
instructed by Mr.Bharat Sharma,
Advocate

versus

STATE NCT OF DELHI Respondent

Represented by: Mr.Varun Goswami, APP

CRL.A. 236/2015

RAKESH Appellant

Represented by: Mr.N.Hariharan, Sr.Advocate
instructed by Mr.Varun Deswal,
Mr.Vaibhav Sharma and
Mr.Siddharth S.Yadav, Advocates

versus

STATE NCT OF DELHI Respondent

Represented by: Mr.Varun Goswami, APP

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

PRADEEP NANDRAJOG, J.

1. Sanjay @ Kala, Suraj Prakash @ Chikka and Rakesh; the latter two being the appellants because vide impugned judgment dated January 08, 2014 Suraj Prakash has been convicted for the offence punishable under

Section 323 IPC and for which vide order on sentence dated January 16, 2015 he has been sentenced to undergo RI for one year and Rakesh has been convicted for the offence punishable under Section 307 IPC as also Section 25/27 of the Arms Act and vide order on sentence of even date has been sentenced to undergo RI for 4 years and pay fine in sum of ₹2,000/-, in default to undergo SI for 15 days for the former offence and RI for a period of 3 years and pay fine in sum of ₹2,000/-, in default to undergo SI for 15 days for the latter offence. The sentences have been directed to run concurrently and benefit of Section 428 Cr.P.C. has been extended. It is obvious that Sanjay @ Kala has been acquitted and the reason is neither the victim Sunil Sherawat who appeared as PW-9 nor the two eye witnesses Dharmender Dabas PW-11 and Amit Kumar PW-13 identified him as the third person.

2. It all commenced when Amit Kumar PW-13, carrying on business of manufacturing surgical goods in partnership with Dharmender Dabas PW-11, was sleeping in the office at his factory in Kanjhawala and his sleep was broken when Sunil Sehrawat PW-9 came to his office with blood profusely oozing from the right side of his chest and an injury on his head. He informed him that Rakesh Rohidiya had fired at him. Amit Kumar rang up the police control room using a mobile phone having No.9212074240 and the police control room in turn passed on the information to PS Kanjhawala where the duty officer SI Ashwani Kumar recorded DD No.3A, Ex.PW-5/A, that a coach in a gym had been shot at Udai Vihar, Kanjhawala. Investigation was marked to ASI Narender Singh PW-20, who accompanied by Ct.Naresh Kumar PW-19 reached the spot and learnt that the injured had been removed to the hospital in a PCR van. Ct.Satish PW-17 was also

directed to proceed to the spot and on reaching there he met ASI Narender Singh and Ct.Naresh Kumar.

3. In the meanwhile the injured Sunil Sehrawat had been removed in a PCR Van to Maharishi Balmiki Hospital. Enroute, the police personnel in the PCR van kept on passing on information to the police control room which was duly recorded in the PCR form Ex.PW-1/A, duly proved at the trial by Ct.Prem Pal PW-1. It records that the PCR reached the spot at 1:18 hours and that the injured told the PCR personnel that one Rakesh had fired at him. The cryptic information recorded in the form is '*.... from – Kanjhawala Chowk 26.2.2011 at 1:18:28 ek injd. Hai goli lagi hai lekar hospital ja rahe hain, 26.2.2011 at 1:21:45 Libra 51 RCD 4 min., 26.2.2011 at 2:06:41 injd. Sunil S/o Shri Bhagwan R/o Singhu Gaon, age 26 years, bataya ki Kanjhawala Chowk se Ladpur ki taraf XXX naam se Gym chalta hai, gym khali karne ko lekar **Sanjay, Rakesh ur Cheta ne aa kar jhagra kiya aur Rakesh ne goli mari hai jo right kandhe se peeche side se mari hai jo chest ki taraf se nikli hai, jisko Balmiki Hospital Pooth Khurd me Dui Constable ke hawale hose me kiya complainant bata raha hai ek he goli chali hai, Addl. SHO Kanjhawala aur Night GO Outer District ACP Spl. Staff mauka par hain, doctor ne bataya ki baki details X-ray ke baad pata lagegi.***'

4. ASI Narender Singh learnt that the injured had been taken to Maharishi Balmiki Hospital and thus leaving the constable behind to guard the place of the occurrence he proceeded to the hospital where he found Sunil Sehrawat admitted in the casualty and had been treated by Dr.Ajay Keshari who drew up the MLC Ex.PW-18/A, proved at the trial by Dr.Yudhvir Singh because Dr.Ajay Keshari was not available and Dr.Yaduvir Singh was familiar with the writing and signatures of Dr.Ajay.

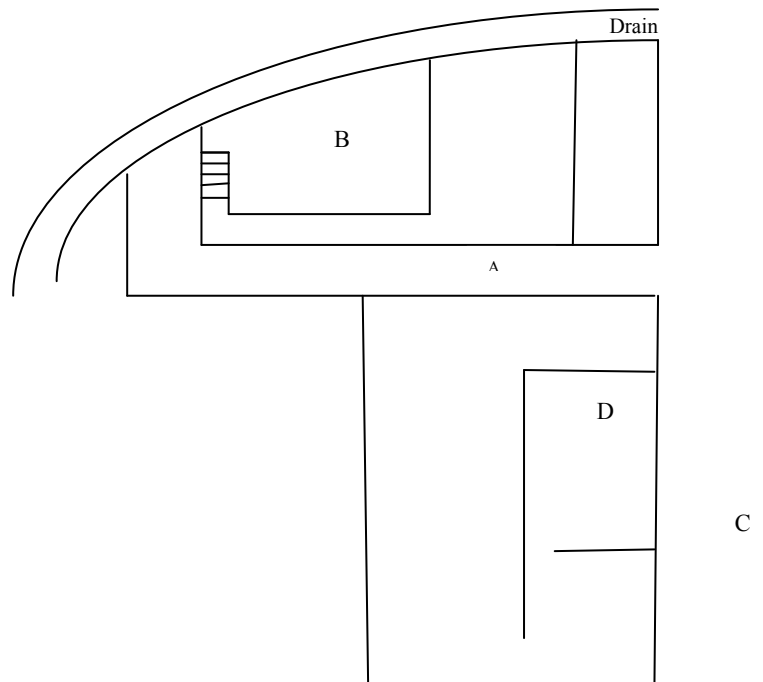
The MLC records that the patient had received a gunshot injury at the left nipple and interior axillary line of chest with blackening and tattooing and abraded callar of the entry wound and exit wound in the posterior axillary line of chest on right side, meaning thereby the assailant had fired a shot from proximate distance and was face to face with Sunil Sehrawat.

5. The FIR Ex.PW-5/C has been registered on the basis of the statement Ex.PW-9/A made by Sunil to ASI Narender Singh. In the statement Sunil said that due to a civil dispute pending the accused whom he knew from before, named Suraj, Sanjay and Rakesh came to the gym XXX run by him and on Sanjay exhorting to fire, Rakesh shot him in his chest and Suraj hit him on his head.

6. As recorded in seizure memos Ex.PW-17/A, Ex.PW-17/B and Ex.PW-17/D a country made pistol having a fired cartridge in its chamber, a lead bullet on the first floor where the injured was fired at, another fired cartridge outside gate of the surgical factory of Amit and one lead bullet from the office of the surgical factory of Amit were recovered and seized. The place wherefrom the seizure was effected has been marked at spots A, B, C and D in the site plan, to which I shall be making a reference to in the subsequent paragraphs.

7. The seized exhibits were deposited in the malkhana. The MLC Ex.PW-18/A was obtained along with a blood sample of Sunil, which also was deposited in the malkhana.

8. Rough site plan, Ex.PW-20/C was drawn by SI Ravi Kumar PW-21. Being relevant for discussing the arguments raised by learned counsel for the appellant Rakesh it would be useful for me to reproduce the same. It shows :-



Spot marked 'A' is from where the country made pistol lying on the street was recovered. Spot marked 'B' is on the first floor from where a lead of the bullet was recovered. Spot marked 'C' on the street from where a fired cartridge was recovered. Spot marked 'D' is the place wherefrom another lead bullet, in the office of Amit was recovered.

9. Since the appellants were named as the co-participants in the crime in Sunil's statement Ex.PW-9/A, the three were apprehended and no recoveries being made, no use to note their so-called disclosure statements which are confessional in nature.

10. Statements of Dharmender Dabas PW-11 and Amit Kumar PW-13 who were in the vicinity, the former claiming to be a witness and the latter who informed the police control room, were recorded under Section 161 Cr.P.C. Statements of one Sanjeev Chaudhary PW-15, the registered subscriber of mobile No.9212074240 and Jogender Dabas PW-16 the landlord of the building from where Sunil was running the gym were

recorded. TATA Teleservices, the service provider of mobile No.9212074240 were contacted and documents obtained to show that Sanjeev Chaudhary was the registered subscriber of the telephone No.9212074240.

11. The desi katta, two bullets and two cartridges seized were sent to the ballistic expert for opinion, and put in a tabular form the report Ex.PW-10/A opines as under:-

S. No.	Description of Article Recovered	Place of recovery of article	Memo vide which article seized	Opinion under FSL
1.	One country made pistol	From the lane abutting gym	Ex.PW17/A	In working order
2.	One (fired) cartridge case	Recovered from the chamber of the country made pistol	Ex.PW17/A	Fired from the pistol
3.	One bullet	Room on first floor where injured was fired at	Ex.PW-17/B	No opinion
4.	One (fired) cartridge case	Outside gate of surgical factory of Amit	Ex.PW-17/D	Fired from the pistol
5.	One bullet	From the office of the surgical factory of Amit	Ex.PW-17/D	No opinion

12. The investigating officer sought opinion from Dr.Munish Wadhawan PW-12 regarding the fire arm injury suffered by Sunil, and in particular whether it was possible for Sunil to have caused the injury himself. The

opinion given was that it was not possible for a person to self inflict the injury as per a report Ex.PW-12/A.

13. No argument being advanced regarding purity of the seizures of the exhibits, suffice it to note by me that the country made pistol Ex.P-1 has been opined by the ballistic expert to be in working order and the cartridge Ex.P-2 having been fired from the country made pistol Ex.P-1. The cartridge Ex.P-4 has also been opined as having been fired from the country made pistol Ex.P-1. No opinion regarding the bullets Ex.P-3 and Ex.P-5 having been fired from the country made pistol Ex.P-1 was given since insufficient striation marks were not found.

14. The three police officers : ASI Narender Singh, Ct.Naresh Kumar and Ct.Satish have deposed in sync at the trial concerning recoveries of the country made pistol Ex.P-1, the lead of the bullets Ex.P-3 and Ex.P-5 as also the fired cartridges Ex.P-2 and Ex.P-4 from the spot they were recovered and as shown in the site plan Ex.PW-20/C.

15. Gaganjeet Singh Sandhu PW-14 has proved that the mobile phone No.9212074240 was issued in the name of one Sanjeev Kumar. Said Sanjeev Kumar who appeared as PW-15 has deposed that he had given the mobile phone with the chip pertaining to the number 9212074240 to his brother-in-law Amit Kumar.

16. Amit Kumar PW-13 has deposed, in terms of the narratives hereinabove, with further addition that when he was comforting Sunil, he heard the sound of fire from the side of office of Dharmender and heard glass breaking. He saw the three accused abusing Sunil in filthy language and swearing in the name of his sister and thereafter running away. He saw a country made pistol lying on the street.

17. I am a little surprised, learned counsel for the accused, who had extensively cross-examined the other witnesses had not cross-examined the witness in spite of opportunity granted to do so.

18. Lethal evidence, that the three accused were abusing the injured and they ran away from the spot has therefore gone un rebutted.

19. Be that as it may, Dr.V.R.Anand PW-10, Assistant Director Ballistics proved the ballistic Report Ex.PW-10/A and identified the country made pistol Ex.P-1, the cartridges Ex.P-2 and Ex.P-4 and the bullets Ex.P-3 and Ex.P-5 as the ones he had examined.

20. Sunil Sehrawat PW-9 deposed that he was running the gym XXX from a building taken on rent from Jogender Singh, a fact corroborated by Jogender Singh who has deposed as PW-16, and that on January 26, 2011 he was sleeping in a room on the first floor of the gym. At around 1:00 AM, somebody knocked the door. He opened the door. Rakesh fired at him and he was hit on the chest. Suraj hit him with an iron rod on his head. When Rakesh fired at him there was a scuffle. He jumped on to the adjoining room which had a tin shed and realized that the country made pistol used by Rakesh was in his hand. He saw that the door of the adjoining surgical factory was open. He went inside and saw Amit sleeping. He woke him up. Amit raised an alarm at which Dharmender who was also sleeping got up. Amit informed the police control room. A PCR van came and took him to the hospital, where his statement Ex.PW-9/A was recorded. He deposed that the motive was a verbal altercation between the two in the evening. To the leading question put, he said that the glass of the room in which Dharmender was sleeping broke due to vibrations caused when a bullet was fired and that it was correct that Rakesh and Suraj were abusing. He did not support the prosecution fully, inasmuch as he denied Sanjay's

presence and said that he could not tell who the third person was because he had muffled his face. On a Court question being put, he admitted the contents of his statement Ex.PW-9/A, regarding which it has been observed by the Court, that Sanjay's name is not mentioned. The Court then confronted him with his statement recorded under Section 161 Cr.P.C. in which Sanjay's participation and presence has been noted, but he said that he never said so. He denied that he was deliberately not identifying Sanjay because he had been won over.

21. Cross-examined by learned counsel for Rakesh and Suraj he said that he had told the investigating officer that when Rakesh fired there was a scuffle between the two and was confronted with his statement Ex.PW-9/A wherein said fact was not recorded. Questioned as to how come he could jump from a height of 15 feet without receiving any injury, he explained that he first jumped on a tin roof which was at a height of 7 feet and therefrom on the road. He said that he was a sports man. He admitted that he was an accused in FIR No.213/2011 PS Kundli, District Sonapat Haryana for an offence punishable under Section 379/435 IPC. He admitted that he had a dispute with Sanjay, but denied that he had compromised the same with Sanjay. He denied that he had a property dealing with Rakesh and was demanding money from Rakesh. He denied that he threw the desi katta at the spot.

22. Dharmender Dabas PW-11 deposed that he was Amit's partner in surgical business at Kanjhawala and was present in the office and so was Amit, but at the time of the incident the two were in different rooms. His sleep was broken when he heard distress cries : *mar diya mar diya* of Sunil. The moment he got up he again heard a sound of fire. He saw Rakesh abusing Sunil in filthy language. He saw Rakesh with a country made pistol

in his hand. The glass of the door of their factory was broken. He also exchanged abuses with Rakesh who fled.

23. On being cross-examined he admitted that he was an accused in FIR No.242/13 PS Kanjhawala but claimed that it was a counter blast to a sting operation performed by him against traffic police personnel. He admitted that he was the complainant in FIR No.97/09 PS Kanjhawala, FIR No.116/2010 PS Shahbad Dairy and FIR No.235/13 PS Kanjhawala, but denied that his complaints were false and that he lodged them to extort money. He denied that he was a planted witness on account of he having family business with Sunil Sehrawat.

24. As noted above, vide impugned judgment dated January 08, 2014, acquitting Sanjay on account of Sunil Sehrawat, the victim, not identifying him; but overlooking the testimony of Amit Kumar, who as noted above, was not even cross-examined, which establishes that even Sanjay was present with Rakesh and Suraj and all three were abusing Sunil Sehrawat. Rakesh has been convicted for the offence punishable under Section 307 IPC and Suraj for the offence punishable under Section 323 IPC for the reason the MLC Ex.PW-18/A of Sunil evinces a non-grievous injury on the head capable of being caused by an iron rod. As noted above, Rakesh has also been convicted for the offence punishable under Section 25/27 Arms Act.

25. Pertaining to Rakesh being convicted for the offence punishable under Section 25/27 of the Arms Act, the relevant notification and the sanction being proved, learned Senior Counsel for Rakesh argued that if the country made pistol Ex.P-1 is linked to Rakesh, the conviction for said offence would be justified, but hasten to add that Rakesh possessing and using the country made pistol has not been proved. Thus, I do not note the

evidence concerning the charge for the offence under the Arms Act. Needless to state if the prosecution establishes that Rakesh used the country made pistol to cause the firearm injury to Sunil, the conviction for the offence under the Arms Act would stand.

26. In view of the evidence, the summarization by the learned Trial Judge is in paras 90 to 101 of the impugned judgment. It reads as under:-

“(90) This witness has not been cross examined at all. He also does not claim himself to be an eye witness. It is writ large that he is witness of four facts. First that he had seen Sunil Sherawat who had woken him up in an injured condition with blood oozing out from his chest on which he tied a bed sheet on his wound to stop his bleeding. Second that Sunil told him that he had been shot by Rakesh Rahodiya. Third that he had made a call at 100 number from his mobile phone no. 9212074240 which call has been confirmed by the PCR and last that he had seen a pistol lying on the gate of the factory (which was later sized by the police).

(91) He has very specifically stated that Sunil Sherawat had only told him the name of Rakesh but is not certain about his giving the name of Suraj and Sanjay stating that perhaps Sunil did not give him name of other associates of Rakesh. He has further confirmed that he had heard the noise of breaking of glass and heard the assailants abusing Sunil and Dharmender in filthy language and further noticed the pistol lying on the gate of the factory.

(92) At the very Outset I may state that in so far as Sunil Sherawat running the Gym at the spot in the name of XXX, there is no dispute as Jogender Dabas (PW16) the alleged owner of the plot has confirmed having given said portion to Sunil on rent and he has not been cross examined at all.

(93) Secondly the PCR form confirms that the call had been made from telephone number 9212074240 which is in the name of Sanjeev Chaudhary (PW15) which witness (Sanjeev Chaudhary) has confirmed that he had obtained the mobile

number 9212074240 from TATA Teleservices Ltd. and had given to his brother-in-law/sala Amit Kumar for use of the same. The electronic record proved by Gaganjit Singh Sidhu (PW14) confirms that vide Customer Application Form the number 9212074240 has been allotted in the name of Sanjeev Chaudhary who has confirmed that he had given the said number to Amit Kumar who had made a call to the PCR.

(94) Thirdly the PCR form has been duly proved by Ct. Prem Pal vide Ex.PW1/A and it reflects that when PCR first reached the spot they met the injured at 1:18 hours who had received gunshot injury and the injured told them that there was a dispute with regard to the tenanted premises and Sanjay and Rakesh or Chika had come to the spot after which Rakesh had fired at him from backside which bullet had entered from the back and came out from the chest. “..... from – Kanjhawala Chowk 26.2.2011 at 1:18:28 ek injd. Hai goli lagi hai lekar hospital ja rahe hain, 26.2.2011 at 1:21:45 Libra 51 RCD 4 min., 26.2.2011 at 2:06:41 injd. Sunil S/o Shri Bhagwan R/o Singhu Gaon, age 26 years, bataya ki Kanjhawala Chowk se Ladpur ki taraf XXX naam se Gym chalta hai, gym khali karne ko lekar Sanjay, Rakesh ur Cheta ne aa kar jhagra kiya aur Rakesh ne goli mari hai jo right kandhe se peeche side se mari hai jo chest ki taraf se nikli hai, jisko Balmiki Hospital Pooth Khurd me Duty Constable ke hawale hosh me kiya", The WT Message also shows that the complainant had informed them that only one round had been fired. “..... complainant bata raha hai ek he goli chali hai, Addl. SHO Kanjhawala aur Night GO Outer District ACP Spl. Staff mauka par hain, doctor ne bataya ki baki details Xray ke baad pata lagegi.". The fact that the injured was conscious at the time when the PCR came and at the first time named the accused lends credibility to the version given by him.

(95) Fourthly the medical evidence confirms that the injuries were not self inflicted. The injuries were on the backside and bullet came out from the chest a vital organ and the medical evidence confirms the same being a contact range firing which under no circumstances could have been self inflicted thereby lending credence to the oral testimony of the injured and demolishing the defence of the accused. I may also observe

that the testimony of an injured witness has its own efficacy and relevancy. The fact that the witness sustained firm arm injury on his body and on vital part confirms that he was present at the place of occurrence and had seen the occurrence by himself [Ref.: Mohar vs. State of UP reported in 2002 AIR (SC) 3279; 2002 Cri.L.J. 4310]. Evidence of injured eye witness cannot be discarded in toto on ground of criminal disposition towards accused or improbability of narrating the details of actual accident. More so, on perusal of evidence tested in light of broad probabilities it can be concluded that eyewitness are natural witnesses and they could not have concocted a baseless case against accused. Merely because injured eyewitnesses are members of one family and close relatives of the deceased there is no ground to reject their evidence. (Ref.: AIR 2003 SC 344). Further, in the case of State of Madhya Pradesh Vs. Mansingh & Ors. reported in 2003 (3) Cri.C.C. 559; 2003 (10) SCC 414 the Hon'ble Supreme Court of India held that evidence of injured witness has greater evidentiary value, unless compelling reasons exist to disbelieve same.

(96) Fifthly I may observe that though initially the injured had named Sanjay but thereafter when examined in the court he did not name or identify the accused Sanjay who was known to him previously and taken a turn from the earlier version put forth by the police and has explained that the third assailant was in a muffled face. It is for the first time that he came up with this version in the court though at first instance he had also named Sanjay when PCR officials made inquiries from him. Who was this Sanjay so named by him to the PCR officials the details are not specified in the said WT messages and I may observe that this Sanjay @ Kala who is the accused before this court has also not been identified by the other two witnesses i.e. Dharmender and Amit.

(97) Sixthly in so far as the accused Rakesh is concerned, the victim is very categorical. He has stated that Rakesh is the person who had given mother and sister abuses to him (victim) and thereafter fired upon him. The presence of Rakesh has also been confirmed by the neighbour Dharmender (PW11) and also by Amit who made a PCR call to the police and has

confirmed to this court that at the first instance when Sunil rushed in his office in an injured condition, he had confirmed that Rakesh Rohidiya had shot him which fact the victim also told the PCR officials who reached the spot within 45 minutes and then rushed him to the hospital. I may observe that in so far as Dharmender is concerned, his antecedents do not appear to be very clean as he is complainant in large number of cases but at the same time there can be no denying that Dharmender was running a Surgical Factory in front of the Gym / spot of incident with Amit Kumar as his partner and both of them were sleeping in their office (in different rooms) on which aspect they have both corroborated each other. There is no suggestion on behalf of the accused neither it is the case of the prosecution with the presence of Dharmender at the spot was not possible or that he was not running a factory in the area along with Amit. Rather, it is an admitted case that there Surgical Factory was situated in the same area next to the spot of incident and hence their presence in the area cannot be doubted, more so because it was Amit who had made the PCR call from his mobile phone as confirmed from the electronic evidence and the PCR form.

(98) Seventhly it is the case of the prosecution that in the scuffle which followed the firing, the fire arm had come into the hands of victim Sunil Sherawat and the country made pistol was recovered from the spot itself which was lying at the entrance of the factory. The victim has confirmed this fact and has stated that when he jumped from the roof on the tin set and then on the ground and then he realized that fire arm had come in his hands which he then threw on the ground. This aspect is also confirmed by Amit who has specifically stated that when he came out, he noticed a pistol lying on the gate of the factory. Various police officials who reached the spot first have confirmed that country made pistol was found there at the spot itself which was lifted and seized and the use of this country made pistol in this incident is also confirmed from the Ballistics Report (FSL) Ex.PW10/A.

(99) Eighthly I may observe that the version of Dharmender that he had noticed Rakesh standing outside with a country made pistol in his hand and there was a shot which broke the

glass of his door does not appear to be authentic. This is contrary to the claim of the injured Sunil and witness Amit that the pistol had come in the hand of Sunil which he threw and was found later at the gate. If the ballistic report confirms that the bullet which hit the glass door was fired through the same pistol and that pistol was already in the hand of Sunil which he then threw on the ground and was later found at the spot then it is not possible that Dharmender could have seen Rakesh with this pistol. Apparently in an enthusiasm to create evidence against Rakesh, the possibility of this version of second round of firing which broke the glass of the door, being incorporated later cannot be ruled out.

(100) Ninethly in so far as the apprehension and arrest of the accused persons is concerned, the same has not been disputed by the accused persons and the only dispute is on the disclosure statements which even otherwise are not inadmissible being hit by Section 25 of the Evidence Act there being no discovery of relevant fact.

(101) Lastly the defence offered by the accused is that Sunil along with Dharmender are extortionist in the area and have filed numerous cases against various persons on account of which they have falsely implicated the accused persons. In this regard they have placed their reliance upon the various complaints made by the victim Sunil and FIR registered on the complaint made by Sunil and Dharmender but I may observe that this argument operates both ways. No doubt there may be a possibility that Sunil wanted to falsely implicate the accused persons who according to the defence had been opposing to his illegal activities of extortion but at the same time this could also have been a reason that being highly aggrieved and agitated of by his illegal activities of extortion, the accused had taken this extreme step. Be that as it may, none can be allowed to take the law in their hands but in case anybody so aggrieved on illegal activities can always move to law enforcement agencies but under no circumstances can take the law into their hands.”

27. The argument of learned Senior Counsel for the appellants was that the PCR form Ex.PW-1/A used as the third circumstantial evidence in para 94 of the impugned judgment is sans the observation by the learned Trial Judge that written therein is that the fire arm injury is caused on the back and the bullet exited from the chest but the MLC Ex.PW-18/A of Sunil evinces the gunshot injury in the chest and the exit from the back.

28. Now, entries are made in the PCR form in long hand after the PCR operator hears what is conveyed from a Police Control Room van. The communication is through wireless. There is disturbance whenever messages are conveyed over the wireless system. Further, the recipient of the information recording the place of entry as that of the exit and vice-versa cannot be ruled out. This is what has happened. Thus, nothing turns on this aspect of the matter. The primary evidence is the MLC which shows that the bullet entered from the chest and made an exit from the back.

29. Attacking the observation and the finding in paragraph 99 concerning version of Dharmender, learned Senior Counsel argued that the learned Trial Judge has trivialized Dharmender's testimony by observing that it was a result of an enthusiasm to create evidence against Rakesh and the possibility of the version of the second round being fired which broke the glass of the door of the factory of Dharmender and Amit was incorporated by Dharmender later on. With reference to the site plan Ex.PW-20/C it was urged that if Sunil was shot in the room where the lead bullet was found at spot mark 'B', and if spot 'A' is the place wherefrom the country made pistol Ex.P-1 was recovered, it is impossible that a shot could be fired from the same country made pistol so as to a lead bullet being recovered at spot marked 'D'. Learned Senior Counsel further urged that one fired cartridge was found in the chamber of the country made pistol

and one from the spot marked 'C' on the street. It was urged that one lead bullet was obviously fired from the cartridge which was still inside the country made pistol. Learned Senior Counsel urged that the learned Trial Judge has nowhere discussed this aspect of the matter, which totally discredits the testimony of the injured Sunil, Dharmender Dabas and Amit Kumar, who had a motive to falsely implicate the accused because of the past enmity. It was urged that Sunil admitted that he was an accused in an offence punishable under Section 379/435 IPC. Dharmender Dabas also admitted that he was an accused in FIR No.242/20123 and admitted that he was a complainant in three FIRs. Learned Senior Counsel urged that Dharmender Dabas was an extortionist who used to lodge false FIRs.

30. It is settled law that testimony of a witness of a weak character is not worthless. A person who is an accused can be a credible witness. The only thing required is to scrutinize the testimony of such witness with care.

31. As noted hereinabove in paragraphs 15 and 16, Amit Kumar has not been cross-examined in spite of opportunity being granted and I find that the same lawyer was present for the accused when Amit Kumar deposed as the witness of the prosecution and in spite of opportunity granted did not cross examine Amit Kumar was the lawyer who cross-examined other witnesses at length. Amit Kumar's testimony that when he awoke from his slumber he saw the three accused abusing Sunil in filthy language, swearing in the name of his sister and running away has not been challenged. Now, three persons, named as an accused, are seen by a witness swearing at the injured and then running away is sufficient incriminating evidence by itself of a high degree to return a verdict of guilt.

32. The fact that the injured Sunil managed to reach the opposite building where Dharmender Dabas and Amit had a factory is corroborated from the

testimony of Amit, which has gone unchallenged. Amit corroborates Sunil by deposing that Sunil woke him up and he rang up the police control room through his mobile phone No.9212074240. Gaganjeet Singh Sandhu has proved that the registered subscriber of said number was Sanjeev Kumar who in turn as PW-15 has proved that he had given his mobile phone to Amit. I therefore find corroboration to the claim of Sunil that he managed to reach Amit to tell him what had happened and Amit informed the same to the police control room. Further corroboration is found in the first recording in the PCR form Ex.PW-1/A which records information received through an informer through mobile phone No.9212074240. The fact that at the very first instance to the first police officer, Sunil informed the names of Sanjay and Rakesh and one other person referred to as Chetan, lends assurance to the Court that Sunil, having no time, did not fabricate a version and falsely implicated the accused. Whilst it may be true that while deposing in Court Sunil saved Sanjay by claiming that the third person present with Rakesh and Suraj had his face muffled, but that does not mean that his entire testimony is discredited.

33. Two lead bullets, one from the room on the first floor where Sunil was sleeping in the night and the other from the room which was the office of Amit or probably Dharmender, but in the same building, proved that two shots were fired.

34. There is bound to be confusion amongst the witnesses regarding the second shot fired, and the reasoning of the learned Trial Judge that Dharmender has over exaggerated to implicate Rakesh is partly correct and partly incorrect. The learned Trial has overlooked the fact that Sunil deposed that after he was fired at, he grappled with Rakesh and jumped on the tin roof at a height of 7 ft from the road and therefrom to the road and

realized that he had the country made pistol in his hand. This testimony of Sunil shows the panic in which he was. He managed to snatch the pistol from the hands of Rakesh after he was injured. Obviously during jostling, and when he was hit on the head by Suraj, Rakesh managed to reload the pistol before it was snatched from his hand and at that time Sunil managed to snatch the same from his hand. One cartridge fell down and rolled down on to the road. As Sunil jumped on to the road and ran towards the factory of Amit and Dharmender, another shot got fired, with the bullet piercing through the glass door of the factory of Dharmender and Amit and thereafter the injured Sunil dropped the country made pistol. The first fired cartridge fell on to the road from where it was recovered, for the obvious reason the second fired cartridge was in the chamber of the country made pistol. Evidence relating to how all this happened would obviously be blurred and slurred. The firing took place in the dead of the night. The assailants were three. The witnesses were obviously in a state of panic. These blemishes are all explainable in the context of the situation in which the injured and the two eye witnesses found themselves. Removing these blemishes, which I find are explainable, the witnesses have corroborated each other. It is settled law that the testimony of an injured eye witness cannot be brushed aside easily and unless it is found extremely to be tainted, can be relied upon and especially when there is corroboration to be found.

35. I find that Dr.Munish Wadhawan PW-12 who had given an opinion on the MLC regarding whether the injury suffered by Sunil could be self inflicted has deposed in Court, giving good reasons, as to why the injury could not be self inflicted and I agree with the view taken by the learned Trial Judge that no person would, to create evidence to implicate an enemy,

shoot himself in the chest. The fact that the range of fire arm was contact, evidenced by fact that the entry wound was larger than the exit wound, also corroborates the testimony of Sunil that he was shot in the chest by Rakesh as he opened the door.

36. The learned Trial Judge, has rightly held that Amit Kumar and Dharmender are eye witnesses to the appellants running away after abusing Sunil in a filthy language. Their version regarding the second fire may not be correctly appreciated by the learned Trial Judge, but that does not mean that the witnesses are lying. I have dealt with aspect of the matter hereinabove and that would suffice.

37. Rakesh has therefore been rightly convicted for the offence of attempt to murder and offence under Section 25/27 of the Arms Act. Sentence to undergo RI for four years and three years respectively for the two offences is justified and I dismiss CrI.A.No.236/2015.

38. As regards the appeal filed by Suraj Prakash, I uphold his conviction, but I release him on probation of good conduct on his entering into a bond to maintain peace and good behaviour for three years upon the term mentioned in the bond that if he breaches the condition of the bond he shall suffer the sentence to undergo imprisonment for one year imposed by the learned Trial Judge. I clarify, that if the bond is breached the sentence to undergo imprisonment for one year imposed by the learned Trial Judge would stand. The bond shall be furnished by him to the learned Trial Judge within one month from today.

39. In view of CrI.A.No.236/2015 filed by Rakesh being dismissed, noting that Rakesh is in jail I direct that a copy of this decision be sent to the Superintendent Central Jail Tihar for updation of record and thereafter to be supplied to Rakesh.

40. TCR be returned immediately.

(PRADEEP NANDRAJOG)
JUDGE

JUNE 02, 2016
Mamta/skb