

In Chamber.

Case :- CRIMINAL APPEAL No. - 91 of 2001

Appellant :- Kailash

Respondent :- State of U.P.

Counsel for Appellant :- J.P.Yadav,Arvind Kumar
Shukla,Atul Verma,R.L.Yadav

Counsel for Respondent :- Govt.Advocate

Hon'ble Umesh Chandra Sharma, J.

1. Heard Sri Atul Verma, learned counsel for the appellant and Sri Rajesh Kumar and Sri Devansh Pratap Singh, Brief Holder for the State and perused the record.

2. This criminal appeal has been preferred against the order of conviction and sentencing passed by Additional Sessions Judge, Court No. 6, Unnao on 27.01.2001 in S.T. No. 8779 of 1995, under Section 307 I.P.C, Police Station Aasiwan, District Unnao, by which the accused-appellant was convicted and sentenced for seven years rigorous imprisonment.

3. The accused-appellant has taken ground that the prosecution has been completely failed in proving the prosecution case against the accused-appellant beyond reasonable doubt and has also erred by not giving benefit of doubt to the appellant. The Additional Sessions Judge has committed substantial illegality and mistake in passing the impugned judgment.

5. The learned trial court has sentenced the appellant without perusing the evidence of the prosecution, which is unfair, and illegal, from the fundamental and legal point of view. The above alleged incident was shown at 11:30 p.m.

on 08.09.1994, while the F.I.R of the alleged incident was lodged on 09.09.1994 at 5:30 p.m. despite the informant having sufficient time. It is also unfair and unjust from the judicial point of view that the above incident happened in the densely populated area, but none of the neighbour around the incident was the eye witness of the alleged incident. Even then the trial court punished the appellant relying on the statements of the informant and the alleged eye witnesses of his family.

6. Except the informant (the eye witnesses) P.W. 1 Ram Jeewan, and his nephew Ramesh (PW-2) and Mazroob Sushil Kumar (PW-3) injured, there are no other independent witness of the general public in support of the prosecution version.

7. According to the cross examination of P.W 1 and P.W 2, the accused-appellant had fired shot from a distance of 5 - 6 steps, while P.W. 4 Dr. Rajeev Khare, has deposed that the said injury was possible only if the injured was shot from within 6 feet. As per site plan, the appellant fired at the injured from place 'C', which is eight steps away from where it is not possible to cause the alleged injury to the victim by fire.

8. The presence of the informant and the eye witnesses of the scene of the alleged incident is doubtful. In this regard the trial court has committed an error by not giving the benefit of doubt to the appellant. There is no reference of existing enmity between the injured and the appellant. It is not said that the appellant had made second fire. Therefore, there was no justification for implication of the appellant for an offence to commit murder of the injured. When the injured was medically

examined at about 1:45 p.m. in the emergency room by the emergency medical doctor, Unnao. On 09.09.1994, the medical officer had not described the nature of the injuries. The injuries were simple in nature, therefore *prima-facie*, it was a case of Section 324 I.P.C, but by converting the offence under Section 307 I.P.C, the learned trial court has committed error. The injured Sushil Kumar is a criminal, against whom cases regarding *maar-peet* and rape had been lodged, due to which some unknown persons had fired upon him. Since the assailants were not recognized, hence the appellant has been falsely implicated in the present case. Hence the appeal be allowed and the impugned order of conviction and sentencing be set aside.

9. In brief, facts of the case are that the informant P.W-1 (father of the injured), Ram Jeewan lodged an F.I.R on 09.09.1994 at 5:30 o'clock stating that on 08.09.1994 at about 11:30 p.m, when a worship was going on at *Shiv Temple* and his son Sushil Kumar injured (P.W-3) was also present there, Kailash S/o Ram Ashrey of his village demanded money from his son. His son refused to give the same and due to a heated argument, Kailash with an intention to kill his son Sushil Kumar, fired upon him, which hit on the upper part of his right chick. Ramesh, Raj Kishore and other co-villagers ran towards the place of occurrence and the injured was saved by them. The injured was admitted in the hospital, he has come from Hospital, hence the F.I.R be lodged and necessary action be taken.

10. On the basis of above information an F.I.R was lodged, investigation was initiated and after conclusion, a charge-sheet was submitted under Section 307 I.P.C.

After hearing the accused a charge under Section 307 I.P.C was framed against the accused. The accused denied the charge and sought trial.

11. The following witnesses were examined by the prosecution case.

- a) P.W 1. - Ram Jeewan informant
- b) P.W 2. - Ramesh Kumar
- c) P.W 3. - Sushil Kumar (injured)
- d) P.W 4. - Dr. Rajeev Khare
- e) P.W 5. - Sipoy/constable Naimish Kumar Singh
- f) P.W 6. - Rajendra Prasad Awasthi.

12. Following documentary evidences were produced by the prosecution.

- a) Ex. K-1. Written complaint.
- b) Ex. K-2. Injury report.
- c) Ex. K-3. Chik F.I.R.
- d) Ex. K-4. Carbon copy Kaimi Case G.D.
- e) Ex. K-5. Map / Site Plan.
- f) Ex. K-6. Blood Stained and plain soil – Memo
- g) Ex. K-7. Charge-sheet.

13. For the purposes of this appeal in brief oral evidences of the witnesses are reproduced here-in-below :-

1. P.W. 1 Ram Jeewan, the first informant has deposed that Sushil Kumar, injured is his son.

Accused Kailash fired on the injured which hit his right chick. Accused Kailash is the resident of his village. Prior to this case, accused Kailash had also been convicted for the offence under Section 307 I.P.C for an offence committed by him in village Bhakahan Sarai, P.S. Safipur, District Unnao. He is a quarrelsome person and used to recover money forcefully from the people. He had reached at the temple at 11:00 p.m. At that time altercation was going on between Sushil and Kailash. After 10 - 15 minutes, Kailash fired upon Sushil, who fell on the ground. He had given statement to the I.O.

Kailash had fired at a distance of 5 - 6 steps, which hit Sushil, he fell down and became unconscious. Shrawan Kumar Gupta had written the complaint on his dictation. The witness denied that on account of enmity of opening the door by the accused in the garden of his brother Ayoddhya Prasad, this false case had been lodged.

2. P.W. 2 - Ramesh Kumar, an independent witness has deposed that on the date of occurrence at about 11:30 p.m. at the Shiv Ji Temple, *Kajri Teej* worship was going on. There was electric light and there was sufficient light in and around the temple, bulb of the houses were also on. Hearing the hue and cry of Sushil Kumar and others on the spot, Ram Kishore, Ram Jeewan and other persons had also reached there. He saw that accused Kailash with an intention to kill Sushil, fired upon him from his country made pistol, which hit the right chick of Sushil, thereafter accused Kailash ran away. Sushil was brought to Hospital at Unnao for his treatment.

In cross-examination, this witness has deposed that hearing the hue and cry and abusing, he again went to the temple where altercation was going on. His house was 2 - 3 houses away from the temple. When he reached, Ram Jeewan, Raj Kishore were also there and they were intervening. Kailash had fired underneath of porch (*Chabutra*) from the distance of 5 - 6 steps. He was standing 6 - 7 steps away from Sushil. None had tried to catch the accused. At that time Sushil was conscious and he had informed to him that Kailash had shot at him. The I.O. had recorded his statement.

P.W. 3 - Sushil Kumar (Injured), has deposed that on 08.09.1994 at about 11:30 p.m. *Kajree*, *Teej* and *Pujan* was going on at the Shiv Ji temple. His house is to the north of the temple, he went to the south side of the temple for urination. Kailash met to him on the road in front of the house of Suresh and asked about the money. Prior to that also he had demanded money. When he refused, an altercation started with the accused. Hearing the altercation and scuffle Ramesh, Raj Kishore, his father and several other persons reached there. There was sufficient light and in the mean time with an intention to kill him, Kailash fired upon him which hit his right chick. The accused was asking money forcefully. He was taken to Unnao for his treatment by his father. Kailash ran away to his house.

15. During the course of examination, this witness accepted that a case regarding *maar-peet* etc. and rape had been lodged against him, but the rape case was false. At the time of this incident only ladies were there, there

were no gents. He does not know from which bore it was fired.

16. The accused had come there from his house. He had fired from his right side. This witness denied that he had received injuries on the door of the house of Suresh. He denied that after being hit he had fallen down and had become unconscious there. He further deposed that before receiving the injuries, his brother and father had reached on the spot. After admitting him in hospital, his father had gone to lodge the F.I.R. The witness denied that accused Kailash had met to him at his door and started demanding money.

P.W - 4 Dr. Rajeev Khare has examined, the injured P.W 3 Sushil Kumar. He found following injuries on the person of the injured:-

1. Firearm entry wound 8 c.m x 7 c.m. on the right face with blackening in the area of 18 c.m x 17 c.m, there was scorching on and above the injuries. It was kept in observation and was referred for x-ray. The injury was fresh and was caused by firearm at about 11:30 P.M on 08.09.1994.

17. In cross examination, this witness deposed that such injuries may occur from firing within six feet. Such injury would not occur from a very close rang shot.

P.W 5 - Naimish Kumar Singh, Head Constable/ Court Muharrir has deposed that on 09.09.1994, he was posted in P.S. Asiwan, District Unnao as Constable / *Muharrir*. On that day at about 5:30 o'clock, a written complaint (*Ex.Ka-1*) was produced before him, on which basis he had prepared chik F.I.R (*Ex.Ka-3*) and it was endorsed in G.D. by H.M.

Raj Pal Singh, he been posted with him and he is well acquainted with his hand writing and signature. This witness has proved *Kaimi* case G.D (*Ex.Ka-4*) as secondary evidence.

In the cross examination this witness admitted that no date has been mentioned below the signature of the C.O Police, he had not prepared any injury letter as the injured was already hospitalized. This witness denied that he had lodged an anti timed F.I.R.

6. P.W - 6 - Rajendra Prasad Awasthi, S.O. has deposed that after lodging the F.I.R on 09.09.1994, he started investigation, copied *chik* F.I.R, Doctors' report, inspected the place of occurrence and prepared site plan (*Ex.Ka-5*). He had taken the Blood Stained and plain soil before the witnesses and a recovery memo (*Ex. Ka-6*) had been prepared by him, he recorded the statements of the witnesses and also statements of Ramesh Kumar and Raj Kishore. On 10.09.1994 at about 4:30a.m. he arrested accused - Kailash with a country made pistol of 12 bore alongwith two live cartridges of the same bore. The accused had confessed the commission of crime before him. After finding sufficient evidence he had submitted charge-sheet (*Ex.Ka-7*).

18. During the course of cross-examination this witness has deposed that on the day of occurrence he had not met to Sushil. On the pointing of informant, he had prepared the site plan. He could not remember about the presence of electric pole there and the same has not been shown in the site plan. This witness did not find empty cartridge on

the spot. He further deposed that on the basis of recovery of an illegal firearm, a case under Section 25 of the Arms Act was lodged by him against the accused. This witness deposed that witnesses Ramesh and Ram Jeewan had not stated to him that Kailash had fired upon Sushil before them on the temple.

19. After closure of the statement of the evidence, statement of the accused was recorded under Section 313 Cr.P.C, in which he denied the allegations, charge and evidences and has said that since he had not closed the door of his house which is opened towards the garden of the informant's brother, therefore he has been falsely implicated in this false case.

Heard and perused the record.

20. This appeal has been decided as under:

a). Learned counsel for the appellant argued that there is undue delay in lodging the F.I.R. According to the first informant the occurrence had occurred at 11:30 p.m. on 08.09.1994 and the F.I.R has been lodged at 5:30 on 09.09.1994. The distance between the place of occurrence and the police station is 12 k.m. First of all, the informant, father of the injured admitted the injured son in District Hospital, Unnao and thereafter he went to Police Station to lodge the F.I.R. The injured Sushil Kumar had been examined by the emergency Medical Officer in the night at 1:55 a.m. on 09.09.1994, thus, it cannot be said that there is any delay in lodging the F.I.R. In case of emergency when there is danger to the life generally a prudent person would go to the hospital first and thereafter shall lodge the F.I.R, thus, the argument

that there is undue delay in lodging the F.I.R. is, accordingly, rejected.

b). Motive, enmity and *mens rea*.

21. It has been argued by learned counsel for the appellant that in this case no motive or enmity between the accused and the injured has been proved and in absence of any proof of motive or enmity, the accused-appellant cannot be convicted:

There are following elements of crime:

- (i) there should be an overt act (actus) or omission;
- (ii) it should have been done with criminal intent (mens rea);
- (iii) the act or omission, as the case may be, should be a prohibited conduct under the existing law of crimes; and
- (iv) it should carry some kind of sanction by way of punishment.

So far the overt act or omission is concerned, mere intention or mens rea shall not by itself constitute a crime unless it is accompanied by external overt act. The criminal law not only holds the person who has committed a crime liable to be punished, an attempt to commit a crime is also an offence punishable under Sections 511 and 307 IPC.

So far the second ingredients is concerned, mens rea or guilty mind is an essential ingredient of a crime which may be direct, indirect or implied. The implied mens rea is also termed as constructive mens rea which imposes absolute liability on the offender. Irrespective of the fact whether he knew that what was doing was a crime or not. For instance, a person selling adulterated food or edible item shall be held guilty and cannot be escaped saying that the actual adulterator was his master.

In the context of mens rea, a distinction has to be drawn between intention and motive. Mens rea means guilty mind. What is relevant in deciding the guilt of the offender is

intention of doing with particular act i.e. crime and not the motive behind doing that act. An act to be treated as crime, should be prohibited or forbidden under the existing penal law.

As a general rule, the burden of proof in a criminal case lies on the prosecution because of the principle that an accused is presumed to be innocent until he is proved guilty. In case of any doubt regarding participation or involvement of the accused in the crime, he is entitled to the benefit of doubt and may be discharged or acquitted. Where two similar possibility of guilty of offence do not arise, the benefit shall go to the accused and he shall be acquitted.

The normal rule is that a person should be held liable for an act and no one can be penalized for the act of the other but there are exceptions that on the basis of collective responsibility another person participating slightly in the offence may be punished.

It is a case of direct evidence, in which there is no need to prove the motive or previous enmity existing between the parties. However, all the eye-witnesses of fact i.e. P.W 1, P.W 2 & P.W 3 have proved the motive behind the offence that the accused is so big scoundrel that he used to demand the money forcefully from the other persons at gun point.

P.W - 3. Sushil Kumar (injured) has proved that prior to this incident also the accused had demanded money from him. Even in the statement recorded under Section 313 Cr.P.C, the accused himself has admitted that there was dispute between both the parties regarding opening of door of the house of the accused towards the garden of injured's uncle P.W - 2 Ramesh Kumar. Thus the appellant is not in a position to argue that there was no intention, motive or enmity prior to the commission of the alleged crime/offence and also that accused had no *mens rea* to commit the alleged offence.

22. Third point that no independent witness has been examined by the prosecution to prove the prosecution case.

It has been argued by the learned counsel for the appellant that no witness of vicinity or any independent witness has been examined by the prosecution. Certainly, P.W. 1- first informant Ram Jeewan is the father of the injured Sushil Kumar and as per suggestions given by the accused side P.W. 2 – Ramesh Kumar is the uncle of the injured and P.W. 3 is the injured himself. As per the prosecution version the incident was also witnessed by Ramesh Kumar, Kishore and other co-villagers and none of them have been examined. According to this Court, now-a-days, the people avoid to be witness particularly in criminal cases and also in civil cases as it is taken adversely and an enmity arises on account of being witness in a case and sometimes it takes a danger turn. In this context following judicial precedents are cited, in which the Apex Court has held that even the evidence of relatives or family members of the victim of the offence cannot be discarded, if it is credible and the witnesses pass the test to be 'sterling witness'.

Similarly, only on account of enmity, the evidence of an inimical witness cannot be discarded. Sometimes, the independent witnesses are won over and they are terrorized by the accused, therefore, they do not come forward to testify themselves in favour of the prosecution. The relevant judicial precedents alongwith summery is given herein below:-

(V) Witnesses.

Relation witnesses & interested witnesses: The testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. In such a case, court has to adopt a careful approach in analysing the evidence of such witness and if the testimony of the related witness is otherwise found credible, accused can be convicted on

the basis of testimony of such related witness. (**see Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537; Dhari and others Vs. State of UP, AIR 2013 SC 308**).

Inimical witnesses: Enmity of the witnesses with the accused is not a ground to reject their testimony and if on proper scrutiny, the testimony of such witnesses is found reliable, the accused can be convicted. However, the possibility of falsely involving some persons in the crime or exaggerating the role of some of the accused by such witnesses should be kept in mind and ascertained on the facts of each case. (**see Dilawar Singh Vs. State of Haryana, (2015) 1 SCC 737; Ramesh Harijan Vs. State of UP, (2012) 5 SCC 777**).

Independent witnesses & effect of their non-examination: If a witness examined in the court is otherwise found reliable and trustworthy, the fact sought to be proved by that witness need not be further proved though there may be other witnesses available who could have been examined but were not examined. Non-examination of material witness is not a mathematical formula for discarding the weight of the testimony available on record however natural, trustworthy and convincing it may be. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of a sole witness even if he is relative of the deceased and non-examination of independent witness would not be fatal to the case of prosecution. (**see: Mukesh and another Vs. State (NCT of Delhi) and others, AIR 2017 SC 2161 (Three-Judge Bench); Sadhu Saran Singh Vs. State of UP and others, (2016) 4 SCC 357 and Avtar Singh Vs. State of Haryana, (2012) 9 SCC 432**).

When independent witness won over by the accused: Non-examination of independent eye witnesses is inconsequential if the witness was won over or terrorised by the accused. (**see Dharnidhar Vs. State of UP and others, (2010) 7 SCC 759; Dalbir Kaur and others Vs. State of Punjab, (1976) 4 SCC 158**).

Public prosecutor not bound to examine all witnesses:

Explaining the provisions of Sections 231, 311 CrPC and Sections 114, 134 of the Evidence Act, the Supreme Court had ruled that prosecution need not examine its all witnesses. Discretion lies with the prosecution whether to tender or not witness to prove its case. Adverse inference against prosecution can be drawn only if withholding of witness was with oblique motive. (*see Bhagwan Jagannath Markad (supra); Nand Kumar Vs. State of Chhatisgarh, (2015) 1 SCC 776; Rohtas Kumar Vs. State of Haryana, 2013 CrLJ 3183 SC*). Thus, non-examination of other witnesses is not fatal for the prosecution.

Witnesses when partly reliable & partly unreliable: Maxim "falsus in uno, falsus in omnibus" is not applicable in India. Principle of "false in one, false in all" cannot be applied in relation to the depositions of a witness who has been found lying on a particular fact and whose remaining part of testimony is otherwise truthful. Even if major portion of evidence of a witness is found deficient but residue is sufficient to prove the guilt of the accused, notwithstanding the acquittal of number of co-accused-conviction can be recorded. (*see Mani Vs. State, 2009 (67) ACC 526 (SC); Kalegura Padma Rao and another Vs. State of AP, AIR 2007 SC 1299; Kulvinder Singh Vs. State of Punjab, AIR 2007 SC 2868*).

Mode of Assessing reliability of a witness: In *Lallu Manjhi and another Vs. State of Jharkhand, AIR 2003 SC 854*, the Supreme Court has laid down certain factors to be kept in mind while assessing the testimony of a witness: "The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable, nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony,

direct or circumstantial, before acting upon testimony of a single witness”.

Eye witnesses and how to judge their credibility: If the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal or natural contradictions have appeared into his testimony. If the inconsistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are only normal and not material in nature, then the testimony of an eye-witness has to be accepted and acted upon. Distinctions between normal discrepancies and material discrepancies are that while normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (*see Ashok Kumar Chaudhary Vs. State of Bihar, 2008 (61) ACC 972 (SC); Dimple Gupta (minor) Vs. Rajiv Gupta, AIR 2008 SC 239*).

It is a night occurrence which had been occurred near the house of the informant, therefore, PWs-1, 2 and 3 are the real, truthful and natural witnesses and their testimony cannot be discarded.

23. Identification of accused by witnesses in poor light, no light or darkness: In criminal trials, argument by defence is often advanced that because of poor light, no light or darkness or night, the PWs could not have identified the accused. But in the cases noted below, the Supreme Court has clarified that a witness, who is accustomed to live in darkness, poor light or no light, can identify the accused even in such conditions.

24. It has been argued by the learned counsel for the appellant that there was no light on the spot, therefore, there was no occasion to recognise the accused. From the evidence of P.W 1, P.W 2 and P.W 3, it has been proved that at the time of incident, *Kazri, Teej* and worship was going on at the Shiv Jee Temple and for this proper arrangement of light has been made. Though the I.O. has not shown the electric pole in the site plan, but it is not denied that there was no electricity in the village and on the Shiv Jee Temple. No plea has been taken that the concerned feeder was not supplying the electric to the

concerned village. Therefore, according to this Court, this argument is not tenable and is rejected. However, in several cases the Apex Court has observed that a villager can identify a person even in a poor light and also in darkness and where no electric light is available, because they are accustomed to live in poor light or in country made lamp light.

In ***Shivraj Bapuray Jadhav and others Vs. State of Karnataka, 2003 6 S.C.C 392***); ***Ram Gulam Chowdhary Vs. State of Bihar, 2001 (2) J.I.C. 986, (SC)***; ***B. Subba Rao Vs. Public Prosecutor, High Court of Andhra Pradesh 1998 (1) J.I.C 63 SC***); ***Kalika Tewari Vs. State of Bihar J.T. 1997 (4), Supreme Court 405***); ***State of U.P. Vs. Sheo Lal, A.I.R 2009 SC 1912***); ***S. Sudershan Reddy Vs. State of Andhra Pradesh, A.I.R 2006, SC) 2716*** and in ***Durbal Vs. State of U.P. 2011 Cr.L.J 1106 S.C***), it has been held by the Apex Court that a villager, who used to live in the midst of nature and accustomed to live without light and who lives in poor light and used to work in lanterns is capable to recognise an accused, if he belongs to his village. In *Durbal (Supra)*, the Apex Court has held that a villager is capable to recognise the accused even in moonless light.

25. It has been argued by the learned counsel for the appellant that the presence of the informant P.W-1 and the eye-witness P.W-2 and the injured witness P.W-3 is doubtful. In this regard, it is noteworthy that though this ground has been taken by the appellant, but no iota, basis or evidence has been produced in this regard.

P.W. 1, P.W 2 and P.W 3 have not been examined on this point and they have not made any unwarranted admission in favour of the accused that they were not present on the spot at the time of occurrence.

P.W. 1 – First Informant has proved that he reached at the Temple of Shiv Jee at about 11:00 p.m. and at that time

altercation was going on between Sushil and Kailash and after 10 - 15 minutes of the altercation, Kailash fired upon Sushil, Kumar, who fell down.

P.W. 2 - Ramesh Kumar has also deposed that the occurrence has taken place at about 11:30 p.m. at the Shiv Jee Temple when the *Teej Kajri* worship was going on and there was sufficient electric light and bulbs of the houses were lighted there. This witness has also deposed that hearing the hue and cry of Sushil Kumar and others, he, Ram Kishore, Ram Jeewan and other persons had also reached there and he had seen the accused - Kailash, shooting the injured.

P.W. 3 - is an injured witness, the evidence of an injured witness is generally relied upon unless there are strong ground for rejection. Generally the presence of injured witnesses at the time and place of occurrence are not denied and admitted as he had received injuries during the course of incident. Even a conviction can be based on the testimony of a sole witness.

26. In ***Sudip Kr. Sen Vs. State Of W.B. & (2016) 3 S.C.C 26, State of U.P. Vs. Satveer, (2015) 9 SCC 44 in Prithipal Singh Vs. State Of Punjab 2012 (76) S.C.C 680 S.C, Jarnail Singh Vs. State Of Punjab, 2009 (1) Supreme 224***, it has been held that in a criminal trial quality of evidence matters and not the quantity matters. As per Section 134 of the Indian Evidence Act, no particular number of witnesses is required to prove any fact. Plurality of witness in a criminal trial is not the legislative intent. If the testimony of sole witness is found reliable on the touchstone of credibility, the accused can be convicted on the basis of such sole testimony.

According to this Court even if for the sake of argument, evidence of P.W 1 and P.W. 2 are reduced even then the sole testimony of the injured P.W. 3 Sushil Kumar is sufficient to prove the guilt of the accused.

Both the injured are the residents of same village and are neighbours. It has been proved that there was also light at the time of commission of crime and the accused was correctly recognized by the injured and the other witnesses. From the evidence of all the witnesses it has been proved that the incident had occurred after a hot talk and scuffle of about 10 - 15 minutes. It has not been proved that P.W. 1 and P.W 2 were in service or in business and were living somewhere else on the date and time of occurrence, hence their presence on the spot has been proved undoubtedly.

27. It has been argued by learned counsel for the appellant that since no second fire had been made on the injured and no supplementary medical report has been prepared and the same has not been submitted, therefore, this case does not fall under Section 307 I.P.C, maximum it can be said that it is a case under Section 324 I.P.C.

In this regard, the learned counsel for the appellant has relied on **Anuj Singh @ Ramanuj Singh @ Seth Singh Vs. The State of Bihar**, in which accused - Manoj Singh had fired a bullet shot on Kumar Nandan Singh, which hit his left foot, while the second shot fired by the accused Anuj Singh had hit the hand of the injured.

Considering the place of injuries, the Apex Court held that only charge under Section 324 I.P.C stands established in place of Section 307 of the I.P.C.

According to this Court this judicial precedent can not be applied in this case. In this case it has been proved that the accused had fired from firearm on the vital part of the injured, P.W. 3, which hit his right side of face with multiple firearm wound of entry in an area of 8 c.m x 7 c.m. with blackening and tattooing in an area of 18 x 17 c.m. alongwith scorching on and above the aforesaid injuries. The shot has also covered the right eyelid, whole of face and the right side in front of the neck.

According to this Court, considering the weapons used in commission of crime and that the shot was made from a close range distance from which blackening, tattooing and scorching had also occurred on the aforesaid vital part of the body of the injured, it can clearly be concluded that an attempt to commit murder was made by the accused. It has also been proved from the evidence of P.W. 1, P.W. 2 and P.W. 3 that convict appellant is a muscleman, who generally used to extort the money on the force of firearm.

According to this Court, the sole fire on such vital part was so conclusive, other persons were also present on the spot and there was also a apprehension of counter attack or arrest of the accused by the civilians, therefore the appellant could not load the country made pistol again, therefore this plea that no second fire was made by the accused and no supplementary medical report could be prepared or could be proved is immaterial for the purposes of this case.

According to this Court, illustration (a) and (c) of Section 307 I.P.C wholly covers this case.

28. Following citations are relevant for the just decision of this case, hence they are referred herein below.

Intention to cause death - For invoking the provisions of Section 307 the Court has to see whether the act, irrespective of its result, was done with intention or knowledge to cause death. The section does not insist that an injury must have been caused to a person on whom attempt to murder was made, though the nature of injury actually caused may be of considerable help to know the intention of the accused. The Supreme Court in ***Bipin Bihari v. State of Madhya Pradesh, (2006) 8 SCC 798*** ruled that the Court can ascertain intention from the facts and circumstances of the case even without reference to actual injuries caused.

In ***Liyakat Mian v. State of Bihar, AIR 1973 SC 807*** the accused shot a person from a very close range causing injuries on his abdomen and left arm. The Supreme Court held that under these

circumstances, the accused had the knowledge that his act would result in injuries which are likely to cause death and therefore, he was convicted under Section 307 of the Indian Penal Code.

In ***R. Prakash v. State of Karnataka, 2004 CrLJ 1391 (SC)*** the accused assaulted the victim hitting on his vital parts and non-vital parts of the body. As many as five persons tried to intervene and rescue the victim but despite that, the accused continued to assault and injure the helpless victim. The Court held that this act of the accused was enough to show that he wanted to kill the victim and therefore, he was rightly convicted under Section 307 of I.P.C. The Court in this case made it clear that the conviction of the accused under Section 307 should not be set aside merely on the ground that the injuries caused by him were simple.

The Supreme Court in ***Jage Ram v. State of Haryana, (2015) 11 SCC 366*** held that for the conviction of accused under Section 307, the prosecution has to prove :-

- (1) the intention to commit murder; and
- (2) that the act was done by the accused.

In order to justify conviction under this section, it is not essential that fatal injury capable of causing death should have been caused. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of body where the injury was caused and the nature and severity of the blows given etc.

29. It has also been argued that there are variations in the oral and the medical evidence about the distance where-from the fire was made.

In this regard the learned counsel for the appellant argued that according to cross examination of P.W. 1 and P.W. 2 the accused appellant had shot from the distance of five – six steps while according to P.W-4 Dr. Rajeev Khare, the said injuries was possible only from six feet, while as per the site plan

(*Ex.Ka-5*), the appellant fired at the injured from the place 'C' which is eight steps away from where it is not possible to cause the alleged injury to the victim by firearm.

In this regard it would be proper to look into the evidence available on record.

P.W. 1 - The First Informant has deposed that the appellant - Kailash had fired upon the injured at a distance of 5 - 6 steps. According to P.W. 2 - Ramesh Kumar, accused - Kailash shot Sushil Kumar from the distance of 5 - 6 steps, thus, there is no variation in the evidence of P.W. 1 and P.W. 2. No question has been asked from P.W. 3 injured Sushil Kumar regarding the distance of firing.

Considering the nature of injuries, it can clearly be said that it is not a very close range firing, generally blackening, tattooing and scorching occur, if a fire has been made from the distance of five to six feet.

P.W. 4 - Dr. Rajeev Khare has opined that such injuries may occur from a shot made within six feet.

P.W. 6 - I.O. Rajendra Prasad Awasthi has prepared the site plan (*Ex.Ka-5*) and has shown the distance of firing to be eight steps.

According to this Court when a person fires from a country made pistol or gun, about two feet long hand and barrel of the weapon also covers the distance and it reduces the distance. Therefore, it can safely be concluded that the fire of gunshot had been made from the distance of five to six feet.

In this case there is no inconsistency between the oral and the medical evidence. According to PWs, the appellant had fired gunshot from a close range upon P.W. 3 - Sushil Kumar and from the medical evidence it has been proved that it is a close range firing as there was blackening, tattooing and scorching on the firearm injury. Generally, following results are found in case of firing from the following distance:-

Five Arm Injuries

Distance from which shot was fired	Effects produced
1. Fire from a close range or within a few inches of the body.	Enters in one mass like single bullet making a large irregular wound with scorched and contused edges and is followed by the gases of discharged after the fire, the surrounding area of the injury in blackened and singed. The exit wound may also appear. The exits wound may show greater damage of Tissues than entrance wound, The margins are averted, but there is no sign of blackening or singing.
2. Firing from 1 to 4 feet	1. Shall make a single aperture with irregular and lacerated edges corresponding to the bore of the muzzle of the gun. 2. The shot after entering the body is scattered and causes greater damage to the internal tissues. 3. The skin surrounding the wound is blackened, scorched and tattooed.
3. Firing from 6 feet to 12 feet	1. The central aperture is surrounded by separate openings in an area of about 2 inches in diameter made by pellets of the shot. 2. The skin surrounding the aperture may not blackened or scorched but is tattooed to some extent.
4.Firing from about 12 feet	1. The change of the shot spreads widely and enters the body as individual pellets

	producing separate openings in an area of 5 to 8 inches in diameter. 2. No blackening. No scorching or tattooing on the surrounding skin.
5. Firing from about 50 feet	A pattern about 14 to 28 inches is produced.

In *Mohd. Mian v. State of U.P., (2011) 2 SCC (Cri) 694*, the Apex Court relied on Modi's Text Book "Medical Jurisprudence and Toxicology" of 23rd Edition Page 724 - 725 and quoted following paras:

"Direction from which the weapon was fired- The question regarding the direction of fire, whether from right to left or from front to back is of medico- legal importance. To ascertain this, it is necessary to know the position of the victim at the time of the discharge of the bullet, when a straight line drawn between the entrance and exit wounds and prolonged in front generally indicates the line of direction. In some cases, it is difficult to determine the direction as the bullet is so often deflected by the tissues that its course is very irregular, also when the bullet wobbles."

So relying on Modi's Text Book "Medical Jurisprudence and Toxicology" Apex Court held that in the present case country made pistol had been used, the performance of these weapons being unpredictable and uncertain the trajectory of the bullet alone would not be a safe guide for assessing the entire evidence more particularly as the projectiles could have been deflected from their true path by the bones or tissues that came along the way. Therefore submissions raised on behalf of the appellant was rejected and the conviction held to be proper.

30. Instead of the above, some suggestions given by the defence counsel is also fatal for the appellant. It is a case of denial by the convict appellant but a suggestion has been

given to injured P.W. 3 - Sushil Kumar at page 3 in cross-examination that it is wrong to say that the injuries had been caused to him at the door of Suresh. A question fatal to the appellant has also been asked to this witness and in response, he denied that at the time of incident he had gone to the door of accused Kailash. The witness has also denied the suggestion given by the accused's counsel that he had stated to the I.O that Kailash (appellant) had met to him at his door and started demanding of money.

31. Thus, on the basis of above discussions, it is concluded that neither there is any undue delay in lodging the F.I.R nor there is any discrepancy or weakness in the evidence of the witness and it cannot be said that such injury cannot occur from a shot made within five to six steps.

The presence of the witnesses have not been proved doubtful. It has also been proved that the accused had motive as prior enmity and had also an immediate cause of committing the alleged offence regarding extortion of the money.

Considering the nature of injury it may be concluded without any hesitation that a firearm injury on the right side of face like vital part of a living person was an attempt to commit murder. Though the injured P.W 3 has admitted that he was tried in a rape case regarding a girl of village Janela and also in a case of *Maar Peet* with Prithvi of village Pavadhiya but according to this court only because a victim has been accused in a criminal case, another person does not become entitled to cause such injury to him particularly when no offence had been caused by the victim P.W-3 to the accused appellant. It has also not been proved that except the appellant Kailash any other person had fired upon the injured.

32. Learned counsel for the appellant relying upon the judicial precedent in ***Criminal Appeal No. 2474 of 1982 - Kailash Vs. State of U.P decided on 17.09.2018 by Court No. 50*** of this Court, argued that in the aforesaid case

considering the long term pendency of the case, in which *Laathi, Farsa* were used in causing the injuries to the victim, the conviction under Section 307 I.P.C was set aside holding the appellant guilty under Section 324 I.P.C and the accused was accordingly sentenced with rigorous imprisonment for a period already undergone and a fine of Rs. 10,000/- was imposed with default stipulation.

33. According to this court, considering the different facts of both the cases and that in place of *Laathi, Farsa*, in this case firearm injury was caused on the vital part of the body of the injured with an intention to kill him does not permit to this court to convert the case from Section 307 I.P.C. to Section 324 I.P.C.

34. This Court is of the considered view that the prosecution has successfully proved the case under Section 307 I.P.C against the convict appellant beyond the reasonable doubt.

35. Therefore, no interference is warranted. Only seven years rigorous imprisonment without fine has been awarded by the trial court, which needs no interference. The criminal appeal is devoid of merit and is liable to be dismissed.

ORDER

36. The Criminal Appeal is dismissed. The order of conviction and sentencing dated 27th January, 2001 passed by the trial court in Session Trial No. 979 of 1995 (State Vs. Kailash), under Section 307 I.P.C, Police Station Aasiwan, district Unnao, is affirmed.

36. A copy of this order be sent to the Additional Sessions Judge - VI, Unnao, to ensure the compliance and also alongwith original record for consignment.

37. The convicted appellant Kailash shall surrender before the learned A.S.J 6th Unnao immediately, he shall be taken into custody and shall be sent to prison to serve the rest of the period of sentence.

Order Date :- 22.09.2023.
Vinod.

[Umesh Chandra Sharma, J.]