

Court No. - 86**Case :-** CRIMINAL APPEAL No. - 558 of 2003**Appellant :-** Kashmeer Singh**Respondent :-** State of U.P.**Counsel for Appellant :-** Sushil Shukla, Awadh Bihari Pandey, Vinod Kumar**Counsel for Respondent :-** A.G.A.**Hon'ble Nalin Kumar Srivastava, J.**

1. The instant criminal appeal has been preferred by the convict appellant Kashmeer Singh challenging the judgment and order of conviction and sentence, dated 7.2.2003, passed by the Special Judge, E.C. Act, District Kanpur Nagar in Session Trial No. 1202 and 1203 of 2000 arising out of Case Crime No. 550 of 1998 and Case Crime No. 551 of 1998, under Section 307 I.P.C. and Section 25 Arms Act Police Station- Chakeri, District- Kanpur Nagar, whereby he has been convicted under Section 307 I.P.C. and 25 Arms Act and has been sentenced for rigorous imprisonment for a period of 4 years and 6 months respectively and the sentences have been directed to run concurrently.

2. The prosecution case as unfolded in the FIR is that on 6.6.1998 at about 8.45 am in front of HAL gate, P.S. Chakeri, Kanpur Nagar, the informant/ injured Bhagwan Chand was caught hold by accused appellant Kashmir Singh, who opened fire upon him but the fire was missed and then an assault with the butt of the desi pistol was made by the accused upon the forehead of the injured, who sustained injury and on his noise security officer S.N. Tiwari and Mr. Sehgal came over there and the accused was caught along with desi pistol and cartridge. On the written report of the informant FIR was lodged and investigation started. The injured was medically examined by Dr. Shekhar Yadav on 6.6.1998 at KPM Hospital at 4.00 pm, who found one lacerated wound upon the

forehead of the injured and also complaint of pain in the left ear and prepared the medical report.

3. The matter was investigated by S.I. S.S. Solanki and after his transfer the remaining investigation was conducted by SI Vishwanath Singh, who recorded the evidence of witnesses, prepared the map after spot inspection and after collecting sufficient evidence submitted the charge sheet against the accused in the matter under Section 307 I.P.C. and under Section 25 Arms Act as well and also obtained prosecution sanction from the District Magistrate.

4. The accused appeared before the Court and the case being exclusively triable by the Sessions Court was committed to the Court of Sessions. Charges under Section 307 I.P.C. and 25 Arms Act were framed against the accused, who denied of the charges and claimed for trial.

5. In order to prove its case the prosecution has relied upon the oral testimony of P.W.1 Bhagwan Chand, injured/ informant, P.W.2 Warrant Officer V.K. Sehgal, witness, P.W.3 Constable Rajendra Singh, scribe, P.W.4 Dr. Shekhar Yadav and P.W.5 S.I. Vishwanath Singh, second Investigating Officer.

6. To corroborate the testimony of witnesses documentary evidence has also been relied upon by the prosecution. As documentary evidence written report Ex.Ka-1, seizure memo, desi pistol 315 bore along with khokha kartoos Ex.Ka-2, Chick FIR Ex.Ka-3, registration g.d. Ex.Ka-4, injury report Ex.Ka-5, map Ex.Ka-6 and charge sheet under Section 307 I.P.C. Ex.Ka-7, prosecution sanction order Ex.Ka-8 and charge sheet under Section 25 Arms Act Ex.Ka-9 have been produced.

7. The incriminating evidence and circumstances were put to the accused and in his statement under Section 313 Cr.P.C. the accused alleged that the whole prosecution evidence was false and concocted and due to the groupism in the office, he had been falsely implicated in this case but however, he refused to adduce any evidence.

8. P.W.1 Bhagwan Chand is the informant/ injured witness. In his testimony recorded before the Court, he has corroborated the prosecution version in his examination-in-chief. He has stated that on 6.6.1998 at about 8.45 am the accused Kashmir Singh caught him in front of the HAL gate and opened fire upon him with country made pistol, which missed and then an assault was made upon his forehead by the accused with the butt of the desi pistol and his forehead was torn. The security officer, HAL Sri S.N. Tiwari and Mr. Sehgal came over there and with their help the accused was caught with country made pistol and cartridge. The report was dictated by him to Shri S.N. Tiwari which was given at P.S. Chakeri and he was accompanied by the witnesses and the accused as well. The written report has been proved by this witness as Ex.Ka-1. He has also stated that the case property was also given by him at police station. The said case property as country made pistol and empty cartridge have also been proved by this witness as material Ex.Ka-1 and 2 and he has also narrated regarding his medical examination at hospital.

9. P.W.2, V.K. Sehgal is the witness of fact, who in his examination-in-chief has corroborated the factum of assault by butt of country made pistol over the head of the injured by accused. He has also stated the assailant was caught hold by him along with country made pistol, who told his name as Kashmir Singh. He has also corroborated the fact that he had accompanied the informant to the police station along with desi pistol and cartridge. He has identified the accused in the Court and the case property as well.

10. P.W.3, Constable Rajendra Singh is the scribe who has proved the chick FIR and registration G.D. as Ex.Ka-3 and Ex.Ka-4 respectively. The witness has further proved the seizure memo of one country made pistol 315 bore and one khokha kartoos as Ex.Ka-2.

11. P.W.4 Dr. Shekhar Yadav, medically examined the injured on 6.6.1998 at 4.00 pm at KPM Hospital and found following injuries:

(i) lacerated wound 1 x 0.2 cm on the right side of forehead and 2 cm above the eyebrow, clotting of blood also present.

(ii) Complaint of pain in left ear, no external mark of injury seen.

Injury no.1 was simple in nature and caused by hard and blunt object and duration about half day whereas no definite opinion can be given about the injury no.2.

12. P.W.4 has proved the injury report of the injured as Ex.Ka-5.

13. P.W.5 S.I. Vishwanath Singh, who is the second investigating officer of the case has deposed that the investigation of this case was handed over to him after transfer of the earlier I.O. S.S. Solanki. The proceeding of investigation have been affirmed by this witness, who recorded the statement of witnesses V.K. Sehgal and S.N. Tiwari and also prepared the sketch of the spot after inspecting the place of occurrence, obtained prosecution sanction and submitted charge sheet in both the matters. P.W.5 has proved map Ex.Ka-6, charge sheet under Section 307 I.P.C. Ex.Ka-7, prosecution sanction order Ex.Ka-8, charge sheet under Section 25 Arms Act Ex.Ka-9.

14. Relying upon the aforesaid documentary and oral evidence and after being heard the learned counsel for the parties upon the merit of the case, the trial Judge recorded the conviction of the accused appellant under Section 307 I.P.C. in Sessions Trial No. 1202 of 2000 and under Section 25 Arms Act in Sessions Trial No. 1203 of 2000 and also sentenced him as mentioned herein above.

15. Learned counsel for the appellant has made several submissions to hit the prosecution story and the impugned judgement as well. It is vehemently submitted that the trial Court at the very outset committed a grave and serious error in recording the conviction of the appellant under Section 307 I.P.C. as there was no evidence to the effect that the appellant had any intention to kill the injured. It has been submitted that no prosecution witness even the informant has never stated before the Court

that the appellant had any intention to kill him at any point of time during occurrence. It is further submitted that the whole prosecution story travels under the shadow of grave suspicion and no motive of assault has been assigned anywhere in the prosecution case. It is further submitted that there was no occasion for the appellant to make a sudden assault upon the injured without any reason. It is also submitted that the prosecution evidence is contradictory on the point of recovery of empty cartridges. The injured and eye-witness have narrated different stories of the occurrence in their depositions. There is no FSL report on record to show that the country made pistol by which a fire is alleged to have been made by the appellant at first was ever sent for forensic examination by any of the I.Os of this case. It is also submitted that the injured as well as the eye-witness are inimical to the appellant. Several other submissions have been made by the learned counsel for the appellant to shatter the grounds of conviction taken in the impugned judgement and order.

16. Per contra, learned A.G.A. has vehemently submitted that there is no factual or legal lacuna in the impugned judgement and order. This is a case based on eyewitness account. The injured of this case has proved the prosecution case in his testimony in clear terms, which has been well supported by the evidence of P.W.2. Place and time of occurrence, weapon used, manner of assault, nature of injury all these facts have been well proved by the prosecution which is fully supported by medical evidence. It is further submitted that there is no serious lacuna in the investigation of this case. The FIR is prompt and the prosecution is not under obligation to prove any motive of assault in a case based on eyewitness account.

17. Out of the several issues arising out of the submissions made by the learned counsel for the appellant absence of motive may be taken as a first limb of argument made by the learned counsel for the appellant. It is vehemently submitted that in the entire prosecution evidence there is no even an iota of evidence to the effect that at any point of time during the

occurrence the appellant had any motive to make an assault upon the informant with intention to kill him. It is further submitted that the informant/ injured Bhagwan Chand in his deposition makes no statement in respect of the motive of the incident. It is vehemently argued that the appellant has earned no criminal history to his credit and he is not a man of criminal character and hence, it was not plausible for him to open fire from the country made pistol upon the informant and after missing of the fire also to make an injury upon his forehead by the butt of the country made pistol. Learned counsel for the appellant has submitted that in the absence of motive of the case the appellant could not be convicted by the trial Court.

18. Motive as a mental element though plays a significant role in any criminal matter but it is not a universally acceptable rule. Motive has its relevance if a case is based upon circumstantial evidence but if the case rests upon eye-witness account and there is sufficient evidence of facts regarding the guilt of the accused, motive has no importance at all. It is true that no enmity between the parties has come to picture but it has always to be kept in mind that motive always exists in the mind of the assailant and the prosecution/ victim/ injured in any case can never be in a position to explain as to why the assailant made an assault upon the injured and the presence of motive can be gathered from the facts and circumstances of the case, manner of assault, weapon used, participation of accused in the crime etc.

19. Reliance has been placed upon **Bikau Pandey Vs. State of Bihar (2003) 12 SCC 616** by the learned AGA wherein it has been held that when the direct evidence establishes the crime, motive is of no significance and pales into insignificance.

20. There are catena of decisions on the point that in a case based upon the eye witness account, the motive loses its significance. In **Deepak**

Verma Vs. State of Himachal Pradesh (2011) 10 SCC 129 It has been held as under:

“...Proof of motive is not a sine qua non before a person can be held guilty of commission of crime. Motive being a matter of mind, is more often than not difficult to establish through evidence.”

21. Learned counsel for the appellant proceeded further to sharpen his argument with the plea that there was no intention to kill the injured on the part of the appellant in this case and the injury inflicted upon the body of the injured also corroborates the same. It is further argued that the prosecution has a specific case that once the fire made by the appellant upon the informant was missed he never made any second attempt to make fire from his desi pistol. The argument which has been put forth is that if he had an intention to kill the injured fire could have been made subsequent to the first missed fire by him but he did not make any such attempt. It is further submitted that if for the sake of argument it is supposed that an assault with the butt of the desi pistol was made by the appellant upon the forehead of the informant the injury received by him was not serious or grievous in nature. Moreover, only a single blow was inflicted upon the forehead of the injured which again affirms the lack of intention to kill on the part of the appellant.

22. Contending to that the learned State counsel has vehemently argued that to cause actual injury to the injured is not a must in a case under Section 307 I.P.C. and this is always the intention of the aggressor which is relevant to find out whether a case under Section 307 I.P.C. is made out or not. It is argued that the fire made by country made pistol by the appellant though missed but it was a fire made with an intention to kill the injured/ informant.

23. It is also submitted that after missing of the fire to make another assault with the butt of the country made pistol gives force to the intention on the part of the appellant to kill the informant. He has made an

emphasis upon the medical evidence and the deposition of P.W.4, doctor, who has supported the injury report Ex.Ka-5 and the injuries found upon the forehead of the injured/ informant has been explained by him in his deposition before the Court.

24. Mens rea in the form of intention to kill is undoubtedly an essential ingredient to constitute an offence under Section 307 I.P.C. It is always the intention which should be looked into to find out whether a case under Section 307 I.P.C. is made out or not. It is noteworthy that in the FIR Ex.Ka-3, lodged on the basis of the written report Ex.Ka-1, which was dictated by the informant/ injured to the scribe S.N. Tiwari himself, it has been clearly mentioned that the fire was made upon the informant with intention to kill, which was missed and subsequently assault was made upon the head of the injured with the help of butt of country made pistol but in his testimony recorded before the Court, Bhagwan Chand P.W.1, the injured, no where states that the fire was made upon him with intention to kill. It is relevant to see that the appellant as per FIR of this case had an intention to kill with the fire of his country made pistol but the prosecution case remains silent on this point that after missing of the fire whether the intention to kill the informant was still existing or not. The omission on the part of P.W.1 which draws the attention of this Court is that in the entire testimony of P.W.1, the injured/ informant no where states that the assault was made upon him with intention to kill.

25. P.W.2 who is a witness of fact also no where states that the assault upon the informant was made with intention to kill. Although the oral evidence speaks about the intoxicant condition of the appellant at the time of occurrence but it makes no difference so far as the presence of mens rea in the form of intention to kill on the part of appellant is concerned.

26. If act is done with the mens rea or guilty intention it is immaterial as to which of the injury was caused to the injured and the result of the guilty intention or knowledge is of no relevance if injury capable of how

causing ... has not been inflicted. It makes no difference as to oust the case from the purview of Section 307 I.P.C.

27. In the case of **State of M.P. v. Kanha, (2019) 3 SCC 605** it has been held that proof of grievous or life threatening hurt is not a sine qua non for offence under S. 307. Intention of accused can be ascertained from actual injury, if any, as well as from surrounding circumstances. Among other things, nature of weapon used and severity of blows inflicted, can be considered to infer intent.

28. So far as the present case is concerned P.W.1, the injured, in his statement has made a categorical statement that the fire was made by the appellant upon him which was missed and then an assault with the butt of the tamancha was made upon his forehead.

29. At this juncture I find force in the contention made by the learned counsel for the appellant that had the appellant any intention to kill the informant, he could have very well made another fire open him but he did not make any such attempt twice and only made an assault upon the forehead of the injured only with an intention to cause hurt to him and that is the point which raises a question upon the intent or knowledge on the part of the appellant to cause death of the injured. It is desirable to mark that causing hurt only and that too only once as stated by P.W.1 himself, was not an overt act coupled with the alleged intent to kill the injured.

30. The Hon'ble Supreme Court in **Hari Kishan and State of Haryana vs. Sukhbir Singh, AIR 1988 SC 2127** has held that the intention or knowledge of the accused must be such as is necessary to constitute murder. In **State of Madhya Pradesh vs. Harjeet Singh and another, AIR 2019 SC 1120**, it was reiterated that Section 307 IPC does not require that injury should be on vital part of the body. Merely causing hurt with intention or knowledge of causing death is sufficient to attract Section 307 IPC.

31. The silence of P.W.1 himself on the point that the assault was made upon him with intention or knowledge to kill is an important factor to denude the conviction of the appellant under Section 307 I.P.C. Since the guilty intention can always be inferred from the totality of the facts and circumstances, the evidence on record and the facts and circumstances do not permit this Court to sustain the conviction of the appellant under Section 307 I.P.C.

32. P.W.1 and P.W.2 are the witnesses of fact. P.W.1 the injured/ informant in his examination-in-chief has fully corroborated the prosecution version except the guilty intention on the part of the appellant to cause death of the informant/ injured and his evidence is trustworthy and reliable in another material terms. The desi pistol and khokha kaartoos were produced before him at the time of evidence and they were identified by him and were proved as material Ex.-1 and 2. The factum of lodging of the FIR, dictating the written report, medical examination, manner of assault, place of occurrence, weapon used etc. have been proved by him and there is nothing in this evidence which raises any genuine suspicion about the reliability of his testimony and his evidence may be treated as unblemished and reliable piece of evidence.

33. P.W.2 V.K. Sehgal is another witness of fact who has also corroborated the prosecution case in his testimony. Although fire from desi pistol was not made before him but he has seen the occurrence of assault by the butt of desi pistol by the appellant over the forehead of the injured and caught the appellant with the tamancha as well. He has also identified material Ex.-1 & 2 before the Court in his testimony. The appellant at the time of occurrence was in a drunken condition is also a material fact which has been clearly stated by P.W.2. The whole testimony of P.W.2 is innocent and without any blemish. He is not an interested witness and since he was a warrant officer and was travelling from Airforce station to HAL his presence over the HAL gate where the occurrence happened was natural and plausible.

34. The FIR of this case was lodged promptly and without any delay. P.W.3 has proved chick FIR and registration G.D. as Ex.Ka-3 and 4 and has also affirmed the fact that accused Kashmir Singh along with a desi pistol 315 bore and one khokha kaartoos was brought to the police station by the informant Bhagwan Chand. The desi pistol and khokha kartoos were taken into possession and a memo was prepared which has been proved as Ex.Ka-2 by P.W.3. The incident occurred on 6.6.1998 at 8.45 am and the FIR was lodged the same day 15.05 pm, hence there is no delay in lodging of the FIR and a prompt FIR is always taken as a supportive evidence to prove the genuineness and truthfulness of the prosecution case.

35. P.W.5 S.I. Vishwanath Singh is the second I.O. of the case and he has proved the map, charge sheet and prosecution sanction for initiation of prosecution under the arms act as Ex.Ka-8, charge sheet under Section 25 Arms Act has also been proved by him as Ex.Ka-9. This witness has been cross-examined on the point of place of occurrence but the prosecution case is never fluctuating and is certain on the point of place of occurrence that the incident happened at the gate of HAL and Ex.Ka-6 the map exactly corroborates the same. Investigation made by the I.O. of this case is innocent and no material irregularity is found in the investigation of this case.

36. Another limb of argument made on behalf of the appellant is that story of recovery of fire arm allegedly used in the commission of crime is completely false and concocted. In the FIR of this case it has been mentioned that the accused was caught with the country made pistol when he was trying to flee from the place of occurrence. P.W.2 has made a categorical statement in his examination in chief that he himself had caught hold the appellant who told his name as Kashmir Singh and further stated that he had taken the accused along with desi pitol and khoka kartoos to Anirua Chowk, police Chowki. P.W.1 has also narrated the story as to when the accused was trying to flee he was caught in the

western side of HAL gate and the empty cartridge was missed somewhere when they were trying to catch hold the accused.

37. The prosecution case on the basis of the evidence of fact and formal evidence of P.W.3 and 5 as discussed above is successfully proved but the fact which draws attention of this Court notably is the conviction of the appellant under Section 307 I.P.C. by the trial Court, which needs a close scrutiny on the legal and factual point. It has been already held that the prosecution has miserably failed to prove any intention to kill on the part of the appellant which was a *sine qua non* to establish a crime under Section 307 I.P.C. but at the same time injury has been caused to the informant/ injured of this case. The prosecution claims that the injury inflicted upon the forehead of the informant was a result of an assault made by the appellant with the butt of the desi pistol.

38. P.W.4, doctor, who had medically examined the injured found two injuries over his body. The first out of the two is a lacerated wound over the forehead of the injured which was simple measuring 1 x .2 cm and the second was complaint of pain only in the left ear, and no other external injury. P.W.4 has opined that injury no.1 was caused by any hard and blunt object. It was a single injury and no opinion could be drawn about injury no.2. The injury report has been proved by the P.W.4. as Ext. Ka.5 There is nothing in the whole testimony of P.W.4 to infer that in any case the injury of the injured could travel beyond an offence under Section 324 I.P.C. It is significant to note here that there is no x-ray or radiologist report on record and the injured was not referred for further treatment or x-ray.

39. The provisions of Section 324 I.P.C. are extracted herein below:

324. Voluntarily causing hurt by dangerous weapons or means.—

Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which,

used as weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

40. The aforesaid discussion made by this Court clearly draws this case within the purview of Section 324 I.P.C. the ingredients of which are totally applicable in the facts and circumstances and the prosecution case does not in any case travel beyond Section 324 I.P.C. The injury inflicted upon the forehead of the injured with the butt of desi pistol was voluntarily caused by the appellant and it was found simple as well by the doctor, who conducted the medical examination of injured.

41. In the facts and circumstances of the case, we find that the offence committed by the appellants in respect of injured falls in the category of offence under Section 324 IPC and not in the category of Section 307 IPC.

42. A case of false implication on the ground of animosity has been put forth from the defence side before the trial Court during cross examination of P.W.1. P.W.1 has suggested that some Arun Kumar etc. were entangled in a criminal case lodged by the P.W.1 and in the incident of that case fracture of leg of the informant was caused. The present accused appellant Kashmir Singh was residing in the same area where the Arun Kumar was residing and that was the cause of animosity between the informant and the accused and further the accused has arranged sureties for the accused persons in that case.

43. However, in the facts and circumstances, this defence taken by the accused before the trial Court can not be permitted to overcome as the suggestion was specifically denied by P.W.1 Bhagwan Chand and moreover no defence evidence has been adduced in support of the

suggestive defence of the case by the accused appellant. Another defence regarding the groupism in the office has also been put forward by the defence during recording the evidence of P.W.1 but that also gets the same fate.

44. The evidence of PW-1 and PW-2 is wholly reliable and cogent and they fall into the category of wholly reliable witness. The date, time and place of occurrence, the manner of assault, the names of assailants all these factors have been fully proved by the ocular evidence which finds support from the medical evidence. F.I.R. of the case is also prompt. I am, therefore, of the considered opinion that the prosecution has failed to prove charge under Section 307 IPC on the basis of evidence on record, instead, charge under Section 324 IPC is proved against the present appellant beyond reasonable doubt.

45. The learned A.G.A. has made it another limb of argument that the conviction of the accused appellant has been recorded under Section 25 Arms Act as well. He has been found in possession of a country made pistol 315 bore without licence and has been arrested on spot by the eye-witness of this case. Fire was made by the said pistol by the accused appellant upon the informant/ injured although it missed and there is cogent evidence on record in respect of the said crime. It is further submitted that the country made pistol and khokha kartoos recovered from his pocket have been proved as material Ex.1 and 2, which has been affirmed in his deposition by the P.W.2 the witness of fact as well. It is further submitted that P.W.5, the I.O. of the case has also proved the site plan of the recovery of country made pistol and empty cartridge as Ex.Ka-6, charge sheet under Section 25 Arms Act as Ex.Ka-9 and the prosecution sanction given by the District Magistrate as Ex.Ka-8 after perusing the case diary, desi pistol and empty cartridge as well.

46. Per contra, learned counsel for the accused appellant has vehemently argued that the factum of fire made with the country made pistol has not been proved by any cogent and reliable evidence and no fire

arm injury has been found upon the body of the injured and moreover there is no FSL report on record to show that the country made pistol was in working condition and any fire could be made by use of it. It is further submitted that in absence of the FSL report the prosecution case that fire was made by the aforesaid desi pistol cannot be sustained. It is further submitted that the prosecution sanction order Ex.Ka-8 is vague and not tenable under law. The said sanction order nowhere speaks that as to whether the country made pistol 315 bore at the time of granting prosecution sanction any fire could be made by the said pistol or not. Nowhere it is mentioned in Ex.Ka-8 that the country made pistol was in working condition. On these grounds the conviction under Section 25 Arms Act has been assailed.

47. It is to be added at this juncture that P.W.5, the I.O. of this case nowhere states that the desi pistol of 315 bore was sent for forensic test by him.

48. This Court has an occasion to peruse the entire record of this case and finds that no FSL report is available on record to show that any fire was made by use of aforesaid country made pistol, material Ex.1 and this fact again strengthens the conclusion arrived at by this Court earlier that the fire was not made upon the informant with intention to kill and it is under cloud of suspicion that the country made pistol was in live condition or not and if it is so how it can be said that the fire was made by the appellant upon the informant with intention to kill him. The recovery of khoka kartoos is also a suspicious piece of evidence which is said to be recovered from the pocket of the accused appellant. The evidence of fact as adduced by P.W.1 and 2 shows that on the point of recovery of empty cartridge there are material contradictions in their evidence. In his examination-in-chief P.W.1 states that the empty cartridge was recovered from the possession of the accused and subsequently in the same portion of evidence he states that empty cartridge was recovered from the pocket of the accused which is wholly unreliable statement because since the

alleged recovery was in the sequence of incident, it was not plausible for the accused to make a fire upon the injured and then keep the empty cartridge in his pocket. The evidence recorded by P.W.1 and 2 shows that the whole incident happened quickly in a continuance and appellant accused had no time to put the empty cartridge after the missed fire in his pocket. On the contrary P.W.2 states that empty cartridge was lying on the ground and he nowhere states that it was recovered from the pocket of the accused, hence the recovery of empty cartridge cannot be said to be proved in view of the aforesaid material contradiction occurred in the testimony of P.W.1 and P.W.2.

49. It is notable that the prosecution sanction order is not a valid order. Since the District Magistrate did not satisfy himself as to whether the desi pistol produced by the I.O. was in working condition or not he was never in position to record his satisfaction as to the working condition of the aforesaid country made pistol. Whether prior to produce the pistol before the District Magistrate it was brought into a sealed condition and whether after obtaining the prosecution sanction it was again sealed and kept into the malkhana of the police station and was produced before the court in the same seal is another point of consideration and virtually nowhere the aforesaid facts are mentioned in any evidence. It appears that at the time of filing of the charge sheet no care was taken by the investigating officer that the prosecution sanction order is defective because it lacks the subjective satisfaction of the District Magistrate to the effect as to whether the desi pistol was in working condition or not. Hence proper evidence to prove the requirements of Section 25 and section 39 Arms Act are missing in this case. Since the recovery of empty cartridge is found to be suspicious in the light of the evidence before this Court no khoka kartoos could be produced before the District Magistrate at the time of obtaining the prosecution sanction by the I.O. and this fact again hits the prosecution theory on the point of prosecution sanction.

50. The Hon'ble Apex Court in the **State of NCT of Delhi Vs. Raj Kumar @ Lovepreet @ Lovely 2024 (2) SCC 632** has categorically held that the sanction under Section 39 of the Arms Act has to be obtained after the result from the FSL received. Since this primary part is missing in this case, the prosecution sanction Ex.Ka-8 cannot be held to be a valid sanction in the eyes of law.

51. Virtually no prosecution can be initiated under the Arms Act without obtaining the previous sanction of District Magistrate and it is trite law that the said sanction should be based upon the satisfaction of the District Magistrate and after application of mind and since it is a judicial act because it permits the prosecution to initiate a proceedings under the said Act against a person, the application of mind and subjective satisfaction of the District Magistrate must be judicious and it should not be done in haste or arbitrary manner but unfortunately in this case it appears that the District Magistrate has not applied his mind while granting the prosecution sanction under Section 39 of the Arms Act.

52. In these circumstances it can be safely held that the prosecution has miserably failed to prove the charge under Section 25 Arms Act against the appellant and even the prosecution could not be initiated against him for the offence under Arms Act. However it is always to be kept in mind that although fire was not made with the country made pistol by the appellant but desi pistol was used as a weapon to cause hurt to the informant of this case by making assault upon his forehead with the butt of the said pistol. The prosecution has successfully proved the possession of country made pistol without licence from the appellant but for want of valid prosecution sanction, offence under section 25 Arms Act can not said to be proved beyond reasonable doubt.

53. The matter can be summed up in the manner that the conviction of the accused appellant under Section 307 I.P.C. is not tenable but he is liable to be convicted under section 324 I.P.C.

54. Resultantly, appeal is partly **allowed** in the aforesaid terms. The conviction and sentence under Section 307 I.P.C. is converted into Section 324 IPC. The object of the justice may be obtained if the conviction of the appellant is modified from Section 307 I.P.C. to Section 324 I.P.C. and instead of recording a sentence for rigorous imprisonment for 4 years he may be sentenced for rigorous imprisonment for a period of 1 year. The period already undergone by the appellant shall be adjusted in the aforesaid period of sentence. The appellant is acquitted of the charge under section 25 Arms Act.

55. Let the lower Court record be sent back along with the certified copy of this judgement for information and necessary compliance.

Order Date :- 9.7.2024

Fhd