

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.415 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- BEGUSARAI

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1. Md. Sanjad @ Sajjad
 2. Md. Sahadat @ Chamru
 3. Md. Noor Alam, all sons of Late Mir Samid
 4. Md. Sabbir Alam
 5. Md. Kamru Jama, both sons of Late Abdul Rahman
 6. Md. Kasim, son of Md. Samad
 7. Md. Faiyaj @ Budho, son of Md. Jan Alam
 8. Md. Harif @ Budho @ Habif, son of Late Mir Majid, all residents of village Saidpur, P.S. Matihani, District Begusarai

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Akhileshwar Prasad Singh, Sr. Advocate
with Ms. Anita Kumari Singh, Advocate

For the Respondent/s : Mr. Abhay Kumar, APP

For the Informant : M/S Aaruni Singh, Rai Mukesh Sharma,
Advocates.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

CAV JUDGMENT

Date: 08-08-2018

There are eight appellants in this case, out of them Md. Sajjat, Chamaru @ Sahadat, Md. Kashim, Md. Faiyaj @ Budho, Md. Harif @ Budho, Md. Kamaru Jama, Md. Sabbir Alam and Md. Noor Alam were convicted under Sections 307/149 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for seven years with a fine of Rs.1000/- each with default clause. Further appellants Md. Sajjad, Chamaru @ Sahadat, Md. Kashim, Md. Faiyaj @ Budho and Md. Harif @ Budho were convicted under Section 27 of the Arms Act and sentenced them to undergo rigorous



imprisonment for three years with fine of Rs.500/- each with default clause by the judgment and order dated 16.8.2003 and 18.8.2003 respectively passed by Sri Shashi Bhushan Choudhary, the then 3rd Additional Sessions Judge, Begusarai in Sessions Trial No. 7 of 1989.

2. Prosecution case as per fardbeyan of PW 4 Abbu Daud recorded at the Referral Hospital, Matihani, in short, is that he along with Md. Ale Nawi, Md. Imam Ali, Md. Raza Shah, Md. Mazrul was sleeping in his “dera” in the preceding night, i.e., 17.4.1987 and at about 1.30 A.M. he received injury on his head by firing, as a result of which he woke up and identified Md. Sazzad, Chamaru @ Sahadat, Md. Kashim and Faiyaj @ Budho, who were armed with pistols, Harif armed with rifle, Md. Kamru Jawan, Md. Sabbir Alam, Md. Noor Alam, Md. Ezaz and 3-4 unknown persons in the moon lit light and lantern. Further prosecution case is that after receiving fire arm injury, the informant fled away towards his village and fell down at a distance of 75 yards and thereafter the aforesaid accused persons uttering to assault indulged in firing and came near him and assaulted him with the butt portion of rifle and pistol on his mouth, eye, nose, chest, etc. At the time of their retreat, they also indulged in firing causing injury on his head. It is also the case of prosecution that appellants Md. Sazzad, Md. Chamaru and Md. Sabbir stated that the informant was dead and at that time informant raised alarm and then large number of persons, including the persons who were sleeping



with him came there and accused persons fled away. The motive behind the occurrence was brother of informant was murdered and he was the informant in that case and in another murder case he was a witness and accused persons were asking him to settle the matter, otherwise he would be killed, for that the present occurrence took place.

3. On the basis of aforesaid fardbeyan, Matihani P.S. Case No. 28 of 1987 was registered and police after investigation submitted charge sheet against the appellants, cognizance was taken and after commitment the case traveled to the file of Sri Shashi Bhushan Choudhary, the then 3rd Additional District and Sessions Judge, Begusarai for trial and disposal.

4. In this case charges were framed under Sections 307/149 and other sections of the Indian Penal Code against the appellants and charge under Section 27 of the Arms Act was framed against appellants Sajjad, Chamru, Kashim, Faiyaj and Md. Harif.

5. In order to establish its case the prosecution has examined altogether six witnesses, they are PW 1 Md. Raza Shah, PW 2 Md. Imam Ali, PW 3 Syed Md. Ataur Rahman, PW 4 Abu Daud, the informant and injured, PW 5 Dr. Shashi Bhushan Pd. Sharma, who has examined the informant and PW 6 Dilip Jha is a formal witness.

6. Apart from that the following documents have been brought on record as Exhibits, they are Ext.1-signature of witness on



fardbeyan, Ext.1/1- signature of witness on the seizure list, Ext.2- injury report of Abu Daud, informant, Ext.3-fardbeyan and Ext.4-FIR.

7. On behalf of defence no ocular evidence has been adduced. However, defence has brought on record certain documents, which are Ext.A- judgment of G.R.No. 447 of 1984, Ext.B-judgment of Cr.Appeal No. 38 of 1993/83 of 1993 and Ext.B/1-judgment of G.R.No. 402 of 1985/Trial No. 175 of 2000 in order to show that earlier also cases were lodged against some of the the appellants and in all the cases the appellants were acquitted by trial court or appellate court, in order to show there was enmity between the parties from before.

8. Learned trial court, on conclusion of trial has convicted all the appellants under Sections 307/149 IPC and further convicted appellants Md. Sajjad, Chamaru @ Sahadat, Md. Kashim, Md. Faiyaj @ Budho and Md. Harif @ Budho under Section 27 of the Arms Act and sentenced them as stated above.

9. Learned Sr.Counsel appearing on behalf of the appellants has assailed the judgment on the ground that learned trial court has failed to consider the fact that enmity is admitted between the parties from before and occurrence took place in the dead of night and in such a situation the identification of the appellants is itself doubtful though prosecution has come with a case that they had identified the appellants in the light of lantern and also light of moon lit and it has



come that lantern was seized but I.O. has not been examined and lantern was not produced and that makes the prosecution case doubtful.

10. Further submission of learned counsel is that contradictions in the evidence of witnesses have been taken from their earlier statements made before police and those contradictions are not minor but they are vital contradictions and that goes into the root of the case and in such a situation, non-examination of I.O. has caused serious prejudice to the defence. Further submission is that though blood stained earth was seized but there is nothing on record to show that they have been sent for chemical examination. Further submission is that evidence of PWs 1 to 3 disclosed that the informant was first taken to the Police Station and evidence of PW 1 discloses that at Police Station statement of Md.Raza Shah (PW 1) was recorded but that statement, which was the earliest version, has not been brought on record and that shows that prosecution is suppressing the material facts. Further submission is that evidence itself shows that PWs 1, 2 and 3 are not eye-witnesses to the occurrence and PW 3 has though identified appellant Md. Noor Alam, Sabbir Alam, Kamru Jawan, who were present at the dock for examination but in cross examination paragraph-4 he has stated that “Aaj jo mudalaya dock me khare hai unhen mai nahi pahchana tha” (the accused who were showing in dock, he had not identified them). The above evidence



falsified the participation of Noor Alam, Shabbir Alam. It has also been submitted that in this case Doctor (PW 5) has been examined by prosecution and in his evidence he has stated that he found two injuries grievous in nature but there is nothing on record to show as to what was the basis for coming to conclusion that those injuries were grievous as there is no X-ray plate or bed head ticket available on record and though injured informant was referred to P.M.C.H. but no report of P.M.C.H. was made available and that also creates serious doubt about the finding of the Doctor. It has also been submitted by learned counsel that if prosecution case is to be believed, it is the case of prosecution that at first injured informant received gun shot injury in hand, he woke up and started fleeing and thereafter he was assaulted by butt portion of pistol and rifle on eye, nose and chest and while appellants were fleeing they fired which caused injury near the eye brow and had it been the intention of the appellants to kill the informant injured, they could have shot him dead but evidence does not disclose so, in such a situation, the conviction of the appellants under Section 307 IPC with the aid of Section 149 IPC is not sustainable in the eye of law. However, learned trial court in spite of the aforesaid inconsistencies and improbabilities has convicted the appellants under Sections 307/149 IPC as well as under Section 27 of the Arms Act which is not sustainable in the eye of law.

11. Contrary to that, learned counsel for the State and learned



counsel for the informant have submitted that the evidence of PW 4 clearly shows that he has identified all the appellants and further identified the appellants Md. Sazzad, Chamaru @ Sahadat, Md. Kashim, Faiyaj @ Budho were armed with pistols and Md Arif was armed with rifle and rests were having armed with lathi and they have assaulted by butt portion of pistol and rifle to him and fired on him and the Doctor has also found several injuries on the person of informant, including two fire arm injuries and appellants were uttering that the injured has died and that shows intention of the appellants to kill the informant. Furthermore, there is ample evidence available on record that the informant (PW 4) was also informant in a murder case of his brother against the appellants and a witness in another case and as such he has been assaulted and that shows the prosecution has been able to prove the manner of occurrence, genesis of occurrence and place of occurrence. Hence, conviction of the appellants appears to be just and proper does not require any interference by this Court.

12. In the background of rival submission, this Court is going to examine evidence available on record. First of all it appears that the I.O. has not been examined in this case. It further appears that the witnesses have stated that they were sleeping in the “dera” of Md.Aslim and that Aslim has also not been examined by the prosecution.

13. PW 5 is Doctor in this case and he has found six injuries



on the person of informant which are as follows :

(I) A sharp cut wound 2" x ½" x scalp with bleeding over left supra ciliary region.

(II) Multiple lacerated cut in an area of 4" over central part of skull with bleeding surface.

(III) A fire arm wound over right side of head nearly 3" x 1"x scalp in parietal occipital region with tattooing of surrounding skin and seining of hairs with black base and bleeding surface.

(IV) A punctured wound in right forearm just above wrist joint with break of bone.

(V) a lacerated cut of upper part of left ear.

(VI) Unable to move right upper and lower limbs (even the toes and fingers).

And the Doctor has opined that injury No.1 was caused by sharp cutting weapon, Injury Nos. 2 and 5 were caused by hard and blunt substance and injury Nos. 3 and 4 were caused by fire arm weapon, may be by rifle or pistol and injury No.6 is the sequel of injury Nos. 1, 2 and 3 and injury Nos. 1 and 5 were simple in nature and injury Nos. 3, 4 and 6 were grievous in nature. In his cross examination the Doctor has stated that it is not mentioned in the injury report that for how many hours the injured remained under his supervision and treatment. Further he has stated that injuries which he has found, cannot be manufactured by person himself.



13. PW 4 is the informant in this case and his evidence disclosed that he was sleeping in the dera of Md. Taslim (somewhere it is mentioned as Md. Aslim) and with him Md. Raza Shah (PW 1), Md. Imam Ali (PW 2), Md. Ale Nabi, Md. Majrul and Md. Aslim were also sleeping and lantern was burning and it was moon lit night. He received gun shot injury on his hand and woke up and saw Md. Sajjad, Md. Chamaru @ Sahadat, Md. Kashim, Md. Budhan @ Harif, Md. Azam, Md. Faiyaj @ Budhan, Md. Sabbir Alam, Md. Noor Alam, Md. Kamaru Jaman and 3-4 others and he identified Sajjad, Kashim, Sahadat, Faiyaj were armed with pistols and Harif @ Budhan was armed with rifle and others were armed with lathi. He started fleeing and accused persons were chasing him and firing. He has further stated that after 70-75 yards running, he fell down near "Simar" tree and all the appellants started assaulting by butt portion of pistol an rifle and also assaulted him by lathi and they said that considering him dead, they fled away from the place of occurrence. The motive behind the occurrence was that his brother Nadir Shah was killed by accused persons and in that case he was the informant and in another murder case in which Kamaru Jaman, Shabbir Alam and others had murdered Md. Murtuja, he was a witness and due to that they wanted to kill him. His evidence also disclosed that Md. Ataur Rahman, Md. Alam, Md. Raja Shah, Md. Imam Ali, Md. Ale Nabi, Md. Mazrur and Md. Aslim were the witnesses to the



occurrence and they brought him to the hospital. He claims to identify the accused persons in the light of lantern and moon lit. In his cross examination this witness has stated that PW 1 Md. Raza Shah is his brother. His evidence in cross examination also disclosed that after receiving gun shot injury he started shouting and saw the accused persons. His cross examination further disclosed that he could not say as to whether other persons were sleeping there or not. His cross examination also disclosed that he was groaning with pain and when villagers came, accused persons fled away. Again he has stated that at first he saw Imam Ali, Raza Sah, Mazrul Alam and Ataur Rahman. His evidence in cross examination further discloses that he was taken to hospital. His attention has been drawn towards his re-statement made before police and also stated that he disclosed the police that Kashim, Sahadat and Faiyaj were armed with pistols and Arif was armed with rifle in his hand and rest accused persons were armed with lathi in their hands and in his re-statement he has stated that those accused persons were chasing him and they were firing and near Simar tree he fell down and also started assaulting him with butt portion of pistol and rifle and he has also stated in his fardbeyan that at the time of retreating the appellants fired which hit on the above left eye brow and at the time of retreating the accused fired that hit him above left eyebrow. I.O. has not been examined and he could not be confronted with the above attentions which were drawn of this



witness from the earlier statement. Moreover, in his evidence in court he has not stated as to on which part of the body he was assaulted though in FIR he has stated on head, eye, nose and chest he was assaulted and he has also stated before police that Md. Ataur Rahman, Md. Alam, Md. Raja Shah, Md. Imam Ali, Md. Ale Nabi, Md. Majrur and Md. Aslim had witnessed the occurrence. Further his attention has been drawn towards his re-statement before police in paragraph-12 of his evidence and he has stated that he disclosed before police the name of all accused persons and he has stated before the police in his restatement that he was sleeping at the “dera” of Aslim and Raza Sah, Md. Imam Ali, Ale Nabi, Mazrul and Aslim were sleeping with him, who stated that he was shot at hand and he started fleeing and he identified the appellants (specifically named all) and Faiyaz, Sahadat, Kashim and Sazzad having pistols and Budhan had lathi and rests were having lathi and after fleeing for 70-75 yards, he fell down near Semar tree and all the above accused fired on him.

14. PW 1, who according to his evidence, is brother of PW 4 the informant and has stated in his evidence that he was sleeping at his “dera” and Abu Daud was also sleeping there and there was moon lit night and lantern was burning and on hearing of sound of firing he woke up and saw the informant fleeing and Sajjat, Chamaru, Faiyaj, Izaz, Kashim, Noor Alam, Sabbir Alam and Kamrujaman were chasing his brother Daud and after some distance he fell down and



accused persons started assaulting him by butt portion of pistol and rifle. He also disclosed that accused Arif @ Budho, Izaz, Faiyaj, Noor Alam were also assaulting him with butt of pistol and he further stated that accused Arif @ Budho, Izaz, Faiyaj, Noor Alam were also assaulting him with butt of pistol and he has again stated that Sajjad, Chamaru, Kashim, Izaz and Faiyaj were assaulting to his brother Daud with butt of pistol and Arif was assaulting his brother with butt portion of rifle. His evidence also disclosed that the witnesses arrived and uttering that Daud died, the accused persons fled away by making firing. His evidence further discloses that thereafter he has taken his brother to Matihani Police Station and from there he was taken to Matihani Referral Hospital. He has also stated about the motive of occurrence, as alleged by PW 4. In his cross examination in paragraph-4 he has stated that on the day of occurrence at about 4-5 A.M. he has taken his brother to the Police Station but he has not given any statement to the Darogaji. Abu Daud (PW 4) has narrated everything and he has not stated anything to the villagers. His cross examination in para 8 further disclosed that he disclosed about occurrence to the Darogaji and after writing the same his L.T.I. was taken, but the same was not read over to him. His cross examination also discloses that in the morning his brother was referred to Patna. His cross examination also discloses that after coming from Patna, statement of PW 4 was recorded by Darogaji. He has admitted in his



cross examination in paragraph-7 that who has assaulted and where he could not say as he was standing 10-12 hands away from them and all the accused persons assaulted with pistols and rifle and Noor Alam, Kamruzan and Shabir assaulted by lathi. His attention has also been drawn towards the statement made before police in paragraph-9 of his evidence and he has stated that he disclosed before the police that when he woke up he saw the appellants (named all) chasing his brother Daud and afterwards Daud fell down and the appellants assaulted with butt portion of rifle and pistol and lathi but he did not see as to whether that hit him or not. He has also named accused persons assaulted with butt portion of rifle and pistol and lathi and occurrence was witnessed by Imam Ali, Ale Nabi and others. He has also stated that he could not recollect as to whether he has stated before the police that on the sound of firing, appellants fled away and they reached at the place of occurrence and found Daud badly bleeding.

15. PW 2 Md. Imam Ali has also stated that he was at the dera of Md. Aslim and along with him Ale Nabi and Raza Sah were also sleeping there. However, it appears that PW 1 has not stated that PW 2 was also sleeping in the dera of Md. Aslim. He has supported the prosecution case so far manner of occurrence is concerned and has stated that people assembled and accused persons fled away and Daud was brought to the police station. His evidence in cross examination



disclosed that where Abu fell down he reached immediately and he disclosed that Abu disclosed that Sajjad, Faiyad, Ezaz, Kashim, Imam, Arif and Noor Alam had assaulted him. He also claimed that he had also seen the occurrence. On the other hand, on close scrutiny of evidence of PW 4, para-8, it appears that he has stated that he did not disclose about the occurrence to any one as they had seen the occurrence. Evidence of PW 2 further disclosed in paragraph-7 that after the occurrence the informant injured was taken Police Station first and from Police Station they had gone to place of occurrence where his statement was recorded and thumb impression was taken. His evidence further disclosed that statement of Md. Abu Daud was recorded after his return. His evidence also disclosed that he identified Md. Sabbir, Md. Noor Alam and Kamru Jaman, who were present at the dock in court but in his cross examination he has stated that he has not identified accused persons standing in dock at the time of occurrence (unhein mai nahin pahchana tha) .

16. According to PW 3 Md. Ataur Rahman, he was sleeping at his “dera” and upon hearing sound of firing he rushed to the place and saw the informant Abu Daud fallen on the road and all the accused persons were assaulting him by butt portion of pistols and rifle. He identified them in moon lit light. His evidence in paragraph-4 also shows that they have taken Abu Daud first to the Police Station and from there he was taken to hospital and in the hospital at the time



of recording statement of Abu Daud he was also present and he has also put his signature in the fardbeyan. He identified his signature as Ext.1. This witness has also stated that Darogaji has seized blood stained earth, grass and stones and three cartridges and lantern and seizure list was prepared and he has proved the signature on the seizure list as Ext.1/1 and 1/2. He has also stated about the motive of the occurrence as stated by the informant and evidence in cross examination disclosed that in the night of occurrence he had not gone to the “dera” of Abu Daud and he had not gone to Aslim. Though he has further stated that he does not recollect that place where he was sleeping, the place of occurrence was 50 yards south and when he reached there Abu Daud was fallen on the ground and he could not recollect as to whether he was wring with pain. He has also stated that he cannot recollect as to whether informant disclosed the name of any of the accused persons. Further in his cross examination he has stated that when he reached Abu Daud was fallen on the ground and blood was coming out from his hand, ear, head and nose caused by butt portion of pistols and rifle. He has also disclosed in paragraph-10 of his cross examination that accused persons were acquitted in the appeal from the court of 1st Additional Sessions Judge and there was also title suit pending between the parties in which his mother and others were the defendants. Further Matihani P.S.Case No. 9 of 1989 was lodged by his brother against the accused persons and his brother



has deposed against them. In his evidence in paragraph 10 he has stated that there was enmity between the parties and cases are going on between them. His attention has also been drawn towards the earlier statement made before the police and he has stated that he has stated before the Darogaji that Abu Daud was assaulted by the appellants by butt portion of pistols and rifle and he has also stated that it was moon lit night and lantern was burning and he identified the appellants and he has also stated that accused persons have fired twice.

17. From the discussions made above it appears that PW 4, who is informant and injured in this case, has supported the prosecution case in his evidence stating that he woke up on receiving firearm injury in his hand and while he was fleeing accused persons chased him and assaulted with butt portion of pistol and rifle and while accused persons retreating, fired, causing injury to him. PW 5 is Doctor and he has found one sharp cutting wound on the scalp but evidence of PW 4 does disclose that he was assaulted by accused persons with any sharp cutting weapon nor the evidence of any other witness discloses that any of the appellants were armed with any sharp cutting weapon. Doctor has also found multiple lacerated cut in an area of 4" over central part of skull and that injury could be due to assault by butt portion of pistol and rifle. Doctor has also found fire arm injury in parietal occipital region and he has found tattooing mark



of surrounding skin and seizing of hairs. Doctor has also found punctured wound in right forearm just above wrist joint which supports the evidence of PW 4 as he has stated that firing hit on hand and he woke up. Doctor has also found a lacerated cut of upper part of left ear that may be due to the assault by butt portion of pistol and rifle. Injury No.6 is sequel to injury Nos. 1, 2 and 3. As such, the medical evidence corroborates the evidence of PW 4 so far manner of assault is concerned except one sharp cutting weapon, that may be due to the fact that occurrence is of night. However, evidences disclosed the firing and assault by butt portion of pistol and rifle and no specific evidence is about assault by lathi. Further on close scrutiny, it appears that evidence of PW 4 further disclosed that Sajjad, Kashim, Sahadat and Faiyaj were armed with pistols, Harif was armed with rifle and others were armed with lathi. Evidence of PW 1 though disclosed that Arif, Izaz, Faiyaj, Noor Alam were assaulting him with butt of pistol but later on he has stated that Sajjad, Chamaru, Kashim, Izaz and Faiyaj were assaulting the brother of informant by butt portion of pistol. Evidence of PW 2 disclosed that when Abu Daud fell down he reached immediately and Abu Daud disclosed Sajjad, Faiyad, Ezaz, Kashim, Imam, Arif and Noor Alam had assaulted him but evidence of PW 4 does not disclose that he has named anybody about his assault. PW 3 has stated that he heard sound of firing and rushed to the place and saw the informant Abu Daud fallen on the road. As



such, so far PWs 2 and 3 are concerned, they did not appear to be eye-witnesses to the occurrence. Even the fardbeyan disclosed that Md. Sazzad, Chamaru, Md. Kashim and Faiyaj were armed with pistol and Harif was armed with rifle. The aforesaid evidence shows that all the witnesses have named the appellants and their statement disclosed that Sazzad, Chamaru, Kashim and Faiyaj were armed with pistol and Harif was armed with rifle. Evidence as discussed above discloses that PWs 1 and 4 had stated about firearm injuries and assault by butt portion of pistol and rifle and their evidence is not specific by assault by lathi and appellants Noor Alam, Kamrujaman and Sabbir Alam are said to be armed with lathi. Evidence of Doctor (PW 5) discloses one sharp cutting weapon also but no witness has stated that any of the appellants was armed with sharp cutting weapon. However, as the occurrence is of night, it may be possible that witnesses could not see injury caused by sharp cutting weapon. Apart from the above, it appears that it was night time and witnesses claim to have identified appellants in the moon lit and in the light of lantern but according to witnesses lantern was burning at “dera” and when other witnesses woke up they saw accused persons were chasing the injured informant and in such a situation, the claims that they have identified them in the lantern cannot be accepted but at the same time PWs. claim to have identified in moon lit and PW 4 is injured and his evidence is always considered in high pedestal than other witnesses. PW 1 also claims to



be eye-witness and evidences of PWs. 2 and 3 also disclose that they saw the informant in injured condition. It is well settled that when there is contradiction between ocular evidence and medical evidence, ocular evidence shall prevail, moreover in the present case, medical evidence by and large corroborates the ocular evidence.

18. PW 4 is the informant injured in this case and he has named all the appellants and his evidence disclosed that he was assaulted by butt portion of pistol and rifle and also by lathi and while retreating they have fired at him, causing injury. However, so far assault by lathi is concerned, evidence is not consistent. Evidence of Doctor (PW 5) disclosed that he has found altogether six injuries and injury No.6 is sequel to injury Nos. 1, 2 and 3 and that in itself is not an injury, as such he has found only five injuries on the person of PW 4. Above evidence further discloses that both the parties are in inimical terms and cases were going on between them. Submission of learned counsel for the appellants is that in such a situation false implication cannot be ruled out especially on the fact that evidence of PW 2 discloses that he had not identified Noor Alam, Kamruzaman and Shabir Alam (at the time of occurrence).

19. Appellants had vehemently argued that evidences of PW 1 disclosed that the injured was first taken to police station and evidence of PW 1 also discloses that his statement was recorded by police but the same has not been brought on record and that shows



that prosecution is suppressing the material facts and in such a situation, non-examination of I.O. has caused great prejudice to the defence. No doubt, I.O. has not been examined in this case, but PW 1 has supported the prosecution case and even in spite of detailed cross examination, there is nothing in his evidence to doubt the prosecution case, except some contradictions, as such due to non-examination of I.O., prosecution evidence cannot be brushed aside. Learned counsel for the appellants has also drawn my attention towards contradictions in the evidence of the witnesses from their earliest statement made before police and as such non-examination of I.O. has caused prejudice to the appellants. However, PW 4 is the injured in this case and he has supported the prosecution case and his presence also cannot be doubted and his evidence is corroborated by fardbeyan/FIR (Exts. 3 & 4). Further the presence of PW 1 is also quite natural and he also supported the prosecution case, no doubt there is some contradiction from his earlier statement made before police and due to non-examination of the I.O., he could not be controverted with the above contradiction but he has found PW 4 in injured condition and PWs. 2 and 3 had also found the PW 4 in injured condition, as such the evidence of PW 4 that he received injury and PWs 1 to 3 that they had seen him in injured condition, cannot be washed out on that score.

20. As discussed above, evidence of Doctor shows only five injuries over the person of injured. Evidence of PWs are not



consistent so far assault by lathi and evidence PW 2 also disclosed that he has not identified Kamruzama, Shabbir and Noor Alam, who were on the dock, at the time of occurrence and if the same is considered in the background of enmity between the parties the participation of appellant Noor Alam, Shabbir alam and Kamruzama does not appear to be free from reasonable doubt.

21. Learned trial court has convicted all the appellants under Sections 307/149 IPC and appellants Md. Sajad, Md. Sahadat, Md. Kashim, Md Faiyaz and Md. Harif under Section 27 of the Arms Act. However, so far participation of appellants Noor Alam, Shabbir Alam and Kamruzama is concerned, I have already held that it is not free from reasonable doubt. Furthermore, the evidence available on record though shows that firing was also made, one of them hit the hand of PW 4 and another hit on above eyebrow (while appellants were retreating) and appellants assaulted by butt portion of pistol and rifle, had it been intention of appellants to kill PW 4, they would have easily shot him dead, but instead they have assaulted by butt portion of pistol and rifle. So far evidence that considering PW 4 dead, appellants fled away is concerned, their intention does not appear to kill him, as had it been their intention, they would have shot him dead at “dera” itself, as such prosecution evidence that PW 4 was assaulted with intention to kill him does not inspire confidence. No doubt, Doctor (PW 5) has found injury Nos. 3, 4 & 6 as grievous, but there is



nothing on the record to disclose what was the basis for declaring them grievous injuries, no bed head ticket or X-ray plate was brought on record and even nothing has been brought on record to show that they were treated at PMCH.

22. Considering the discussions made above so far conviction of appellants Noor Alam, Shabbir Alam and Kamruzama under Sections 307/149 IPC is concerned, prosecution has not been able to establish the same beyond all reasonable doubt, hence their conviction under Sections 307/149 IPC is not sustainable in the eye of law. Sp far conviction of other appellants under Sections 307/149 IPC is concerned, at best they can be held guilty under Sections 324/149 IPC and under Section 27 of the Arms Act.

23. Accordingly, conviction and sentence of appellants Noor Alam, Shabbir Alam and Kamruzama under Sections 307/149 IPC is set aside, as they are on bail, they are directed to be discharged from the liabilities of their bail bonds.

24. Conviction of appellant No.1 Md. Sajjad, appellant No.2 Md. Sahadat, appellant No.6 Md. Kashim, appellant No.7 Md. Faiyaj and appellant No.8 Md. Harif under Sections 307/149 IPC is modified to conviction under Section 324/149 IPC and conviction under Section 27 of the Arms Act is affirmed.

25. Appellant Nos. 1, 2, 6, 7 and 8 had been sentenced to undergo R.I. for seven years and fine of Rs.1000/- with default clause



and R.I. for three years under Section 27 of the Arms Act. Submission of learned counsel for the appellants is that they had remained in custody for about one year nine months during pendency of appeal, occurrence is of 1987, as such a lenient view may be taken and their sentence may be reduced to the period already undergone in custody.

26. On perusal of record it appears that occurrence is of 1987, almost more than 30 years ago and appellant Nos. 1, 2, 6, 7 & 8 have remained in custody for about 1 year 9 months, and also suffered the agony, pain and harassment of trial for 30 long years, as such taking a lenient view, their sentence under Sections 324/149 IPC is reduced only to the extent of period already undergone in custody and their sentence under Section 27 of the Arms Act is also reduced to the period already undergone in custody. As directed earlier, both the sentences shall run concurrently.

27. With the above modification in conviction and sentence, this appeal is disposed of.

(Vinod Kumar Sinha, J)

spa/-

AFR/NAFR	
CAV DATE	20.7.2018
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