

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 638 of 2005**

1. Md. Akram, S/o Wali Mohammad, aged about 28 years.
2. Md. Aslam, S/o Wali Mohammad, aged about 30 years.

Both resident of Kali Nagar, Pandri, Police Station Civil Line,
Raipur (C.G.)

---- Appellant.**Versus**

- State of Chhattisgarh Through : District Magistrate, District Raipur (C.G.)

---- Respondent**And****CRR No. 60 of 2007**

- Usman Khan S/o Israiel Khan, aged about 27 years, R/o Kali Nagar, Pandari, Raipur, P.S. Civil Lines, Raipur, District Raipur (C.G.)

---- Revisioner/Complainant.**Versus**

1. Mohammad Akaram S/o Wali Mohammad, aged about 35 years.
2. Mohammad Asalam S/o Wali Mohammad, aged about 37 years.
3. Wali Mohammad @ Ghaseeta S/o Nabi Baksh, aged 63 years.
4. Mohammad Asif S/o Wali Mohammad, aged about 25 years.
5. Mohammad Asaraf S/o Wali Mohammad, aged about 32 years

All accused No.1 to 5 are R/o Kali Nagar, Pandari, P.S. Civil Lines,
Raipur (C.G.)

6. State of Chhattisgarh Through : Its Collector, Raipur

---- Respondents

For Appellants in CRA No.638/2005 :	Shri Vivek Sharma, Adv.
For Complainant in CRR No.60/2007:	Shri Akhtar Hussain, Adv.
For Respondent/State :	Shri Subhash Yadav, Dy. G.A.

**D.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava &
Hon'ble Smt Justice Rajani Dubey**

Judgment On Board

17.01.2019

Per Manindra Mohan Shrivastava, J

This order shall govern disposal of CRA No.638/2005 and CRR No.60/2007.

02. The criminal appeal filed by Md. Akram and Md. Aslam arises out of the judgment of conviction and order of sentence dated 29.07.2005 passed by 8th Additional Sessions Judge, Raipur, in Sessions Trial No.64/2000 whereby and whereunder, these two appellants have been held guilty of commission of offences and sentenced as described below:-

Conviction	Sentence
Under Section 307 IPC	R.I. for three years and fine of Rs.10,000/- each. In default of fine to further undergo additional R.I. for six months.
Under Section 25 of Arms Act	R.I. for three years and fine of Rs.1,000/- each. In default of fine to further undergo additional R.I. for one month.
Under Section 27 of Arms Act	R.I. for three years and fine of Rs.1,000/- each. In default of fine to further undergo additional R.I. for one month.

By the aforesaid judgment, other accused namely Wali Mohammad, Mohammad Asif and Mohammad Asaraf were acquitted. The connected criminal revision has been filed by victim Usman Khan being aggrieved by acquittal of Wali Mohammad, Mohammad Asif and Mohammad Asaraf, as also praying for enhancement of sentence

awarded to Mohammad Akram and Mohammad Aslam. The aforesaid two cases are being disposed of together as they arise out of the same judgment.

03. The prosecution story as unfolded from the records of the case is that on 23.05.1999, Mohammad Asif came to the house of victim Usman Khan and it is alleged that he was insisted to go along with Asif to which, he refused and at the spot abuses were hurled. Further case of the prosecution is that, thereafter, other accused which included Akram and Aslam also arrived at the spot and then, it is said, that the accused persons armed with sword, rod and club assaulted Usman and other members of his family namely Jamila Begum (PW/2), Jibrail (PW/10) and Israil (PW/11). According to the prosecution, when the neighbours also came to the spot and attempted to pacify the dispute, one of them, namely Raju @ Asgar Ali (PW/9) also sustained some injuries. According to the prosecution, Sabra Begum (PW/3), Bakku Ali (PW/4) and Sabbir Ali (PW/16) had also witnessed the incident of assault. FIR in Ex.P/1 was lodged by Jamila Begum (PW/2). Injured persons namely Jamila Begum (PW/2), Raju @ Asgar Ali (PW/9), Jibrail (PW/10), Israil (PW/11) and Usman Khan (PW/12) all were sent for MLC and Dr. (Smt.) C.M. Pandey (PW/17) conducted their medical examination and gave report, in which, except Israil (PW/11) and Usman Khan (PW/12), all other injured witnesses namely Jamila Begum (PW/2), Raju @ Asgar Ali (PW/9) and Jibrail (PW/10) were found having sustained simple injuries. As far as Usman Khan (PW/12) is concerned, according to the opinion of Dr. (Smt.) C.M. Pandey (PW/17), he had sustained grievous hurt caused by sharp

weapon and three fingers were almost cut. A sword injury on the back of Israil (PW/11) was also found. He had also sustained cut injury in his palm. The two appellants herein and other accused who have been acquitted, were charge sheeted for alleged commission of offences under Sections 307, 323, 324/34, 506(B) 294 IPC and 25 and 27 of Arms Act and were tried. The learned trial Court, relying upon the evidence of injured witnesses Jamila Begum (PW/2), Raju @ Asgar Ali (PW/9), Jibrail (PW/10), Israil (PW/11), Usman Khan (PW/12) and three other witnesses, Sabra Begum (PW/3), Bakku Ali (PW/4) and Sabbir Ali (PW/16), held that as far as appellants Akram and Aslam are concerned, they were holding sword in their hands and with this sword they assaulted Israil (PW/11) and Usman Khan (PW/12), and other persons who sustained simple injuries. However, the learned trial Court found that the prosecution failed to establish beyond reasonable doubt that other three accused namely Wali Mohammad, Asif and Asraf had also given assault on any of the injured witnesses, and consequently, all of them were acquitted by giving them benefit of doubt.

04. Learned counsel for the appellants Mohd. Akram and Mohd. Aslam would argue that in the prosecution story, as stated by Jamila Begum (PW/2), Jibrail (PW/10), Israil (PW/11) and Usman Khan (PW/12), who are members of the same family of Usman, they have suppressed the genesis of dispute between the parties and have otherwise made exaggerated statements in their evidence. According to him, the independent witnesses Sabra Begum (PW/3), Bakku Ali (PW/4), Raju @ Asgar Ali (PW/9) and Sabbir Ali (PW/16) have stated

that the aggressor party have gathered on the road and it was a case of free fight. He would argue that the case of the appellants is that Usman Khan (PW/12) and his family members were the aggressors and they might have received some injuries during the course of fight when the present appellants sought to save themselves. It is next argued that the evidence of Usman Khan (PW/12) who is said to have sustained grievous injuries is exaggerated because he has admitted in his cross-examination that he did not know the name of the person who had given assault on him. It is argued that if it be a case of free fight, the evidence of witnesses, upon close scrutiny, only reveals that nobody could definitely state before the Court as to who assaulted whom. As Wali Mohd. has been acquitted, the prosecution story that at the instance of Wali Mohd. the assaults were given by the appellant with an intention to cause death itself falls to the ground and, under no circumstance, it could be said to be a case of Section 307 IPC because apart from the manner in which the dispute arose and assaults were given by the rival party to each other, as stated by the prosecution witnesses, Dr. Sunil Khemka (PW/18) also could not give definite opinion that the injuries caused to Usman Khan (PW/12), in ordinary course of nature, was likely to cause death. Therefore, it is argued that under no circumstance conviction could be sustained under Section 307 IPC.

As an alternative submission, learned counsel for the appellants advanced that even if it is held that during free fight between the two groups, some injuries were sustained by Usman Khan (PW/12) and other family members or even by some independent persons, the

alleged overt act of the appellants, would not travel beyond commission of offence under Section 326 IPC. Relying upon the Supreme Court decision in the case of **Neelam Bahal and another v. State of Uttarakhan**¹, he would submit that under these circumstances of the case, where the main injury said to be suffered by Usman Khan (PW/12) and amputation of three fingers in left hand, the period of sentence may be reduced to the period already undergone by the appellants. He would submit that the appellants have almost undergone a month's imprisonment before they were granted bail by this Court.

05. On the other hand, learned State counsel argued that the prosecution case of Aslam and Akram, holding sword in their hands and giving assault to Usman Khan (PW/12) and Israil (PW/11) is proved from the abundance of evidence of as many as eight eye-witnesses including five injured witnesses and, therefore, there is no escape from the criminal liability of two appellants. He would further argue that the prosecution evidence shows that the appellants were the aggressor because it is said that their (appellants') brother Asif had first come to the house and, thereafter, these appellants came there and they were holding sword in their hands, followed by criminal overt act of assault resulting in amputation of three fingers of Usman Khan (PW/12) and a sword injury on the back of Israil (PW/11). These overt act of these two appellants, use of sword as weapon prominently manifest the intention of causing death and, therefore, their conviction under Section 307 IPC does not warrant any interference. He would

1 (2010) 2 SCC 229

also submit that looking to the nature and extent of injuries, which were grievous in nature, resulting amputation of fingers, even the sentence part may not warrant any interference.

06. As far as the revision petition is concerned, learned counsel for the revision petitioner would argue that the learned trial Court has committed gross illegality in acquitting Wali Mohammad, Mohd. Asif and Mohd. Asraf only on certain minor contradictions and omissions whereas, the witnesses have clearly stated that Wali Mohammad had arrived at the spot and had provoked appellant Aslam and Akram to assault Usman Khan (PW/12) and other family members with a clear direction to kill them. Therefore, even if there is no specific criminal overt act, he is also involved in alleged commission of offence and shared common intention. According to him, Mohd. Asif was the first aggressor who had come to the house, followed by Mohd. Asraf and all of them joined appellant Mohd. Akram and Mohd. Aslam and assault was given. They were also possessed of rod and club and as many as five persons have sustained injuries, therefore, it is clear that each of them had shared common intention and the injuries sustained by Usman Khan (PW/12) and all other are attributable to the criminal overt act of each of the acquitted accused with the aid of Section 34 IPC.

Learned counsel for the revision petitioner has also prayed for enhancement of sentence awarded to appellant Mohd. Akram and Mohd. Aslam by submitting that the manner in which these two appellants entered the house and assaulted with sword resulting in amputation of three fingers of the left hand of Usman Khan (PW/12) and sword injury on the back of victim Israil (PW/11) and all other

persons sustaining one or the other injuries is an aggravating circumstance. The award of sentence of three years was, therefore, wholly inadequate. At the last, he would argue that the acquittal of three accused Wali Mohd., Mohd. Asif and Mohd. Asraf be set aside and they be also convicted along with appellant Akram and Aslam with life imprisonment for commission of offence under Section 307 IPC.

07. We have heard learned counsel for the parties and perused the records of the case.

08. In order to prove the criminal overt act of the appellants Mohd. Akram and Mohd. Aslam, the prosecution has come out with as many as eight eye-witnesses namely Jamila Begum (PW/2), Sabra Begum (PW/3) Bakku Ali (PW/4), Raju @ Asgar Ali (PW/9), Jibrail (PW/10), Israil (PW/11), Usman Khan (PW/12) and Sabbir Ali (PW/16). Out of these, PW/2, PW/9, PW/10, PW/11 and PW/12 are the eye-witnesses. Further, except PW/9, PW/2, PW/10, PW/11 and PW/12 belong to the one family. Jamila Begum (PW/2) is one of the injured witness who lodged FIR in Ex.P/1. She has proved having lodged FIR in her court statement. The prosecution story as is divulged from the contents of the FIR is that when she was about to take meals in the house of her Aunt, along with Israil, Jibrail and Usman, Asif came and asked them to meet his brother saying that they are being called by him. When Jamila and others refused, appellants Aslam and Akram along with others came in, hurling abuses and held out threat of life. Usman and Israil were dragged and it is said that Ghasita @ Wali Mohammad handed over sword to his sons Aslam and Akram. The allegation is that the sword was used by Aslam and Akram to inflict injuries on Israil and

Usman. Others are alleged to have assaulted with club. It was also stated in the FIR that while pacifying the dispute, Raju @ Asgar Ali (PW/9) also sustained some injuries. Therefore, from the beginning, the prosecution story has been that appellants Aslam and Akram assaulted Usman (PW/12) and Israil (PW/11) with the help of sword. On others, the allegation was of using club. The allegation against Ghasita (who later on turned out to be Wali Mohammad) is that he gave sword to his two sons Aslam and Akram.

09. Jamila Begum (PW/2) has deposed in her evidence before the Court that while she along with Israil (PW/11), Jibrail (PW/10) and Usman Khan (PW/12) were sitting in her aunt's house for taking breakfast, second elder son of Wali Mohammad came in and dragged Israil, Usman and Jibrail by holding their collar. She has specifically named Akram and Aslam and also Asraf. According to her, thereafter, Wali Mohammad came from behind, handed over sword to his sons and commanded them to kill and then fight started. She states that she was also dragged and she was also assaulted. She has stated about injuries on the right hand of Israil and sword injury on his back. She has also deposed that fingers of left hand of Usman Khan were cut and were almost removed. In the cross-examination, it is elicited that a day before the incident, in the evening, a dispute between two families had cropped up on a trivial issue of urination by some of the labourers and spoiling the surrounding. From her evidence, there is specific overt act said to have been committed by appellants Aslam and Akram that they assaulted Usman Khan and Israil with the help of sword. While Asraf and Asif are concerned, the allegation against

them is not very specific except that they had come at the initial stages. The overt act alleged against Wali Mohammad @ Ghasita is that he had handed over sword to his sons and commanded them to kill.

10. Jibrail (PW/10), the other family member, has deposed regarding Usman being dragged out from the house by Akram, Aslam, Wali Mohammad, Ashraf and Asif and sword given by Wali Mohammad to appellants Akram and Aslam and club given to Asif and Asraf. The allegation of assault by sword is on Akram and Aslam. He (this witness) also sustained injuries.

11. The other two important witnesses of the prosecution are Israil (PW/11) and Usman Khan (PW/12). These are two witnesses who are said to be assaulted and sustained sword injury. Israil (PW/11) has deposed regarding Asif coming to their house followed by arrival of Aslam, Akram and Ashraf and then assault by sword given to Aslam and Akram, rod and club given to Ashraf and Asif and then command by him (Wali Mohammad) to his sons to kill. This witness has stated regarding assault by sword given to him and to Usman due to which he sustained injuries on his palm, back and Usman having sustained injuries on his fingers.

12. Usman Khan (PW/12), who has suffered grievous injuries, has also stated regarding the incident. While he has made allegation of having been assaulted by appellants Aslam and Akram with the help of sword, resulting in injuries to him and Israil and his fingers having been cut, he does not say that Wali Mohammad brought sword and gave it to Aslam and Akram. According to this witness, he (Wali Mohammad)

gave club and rod to Asif and Asraf and commanded all of them to kill. In his cross-examination, he has been given suggestions that when he went to the police station, he did not know as to who assaulted Israil, Jibrail and Jamila and he himself. He then says that he knew them by name also and then also admits that twice he has already stated that he has not disclosed the name. The omission with regard to the role of Wali Mohammad has also been elicited in the cross-examination.

13. Apart from the family members of Usman Khan, who have suffered injuries and have stated regarding the incident, as has been discussed herein above, there are four independent witnesses of the incident, one of them is Raju @ Asgar Ali (PW/9), who has also sustained injuries. He has deposed in his evidence that when he was standing outside his house, he saw that fight was going on between Aslam, Akram, Asif, Ashraf and Ajar Ali, Jibrail, Israil, Usman and Jamila Begum. He has deposed that Akram and Aslam were assaulting Usman. He has further deposed that their father Wali Mohammad brought sword, gave it to Aslam and Akram and commanded them to kill. He has stated regarding injuries received by Usman and Jibrail. In cross-examination, he states that when he reached the spot, fight was going on and about 20-25 persons were present at the spot and saw that Usman, Israil and Jibrail had sustained injuries. He admits that the two groups were assaulting each other but could not say as to who assaulted whom. He further states that after 15-20 minutes, fight came to an end and the appellants left the spot. When he reached the spot, he found fingers of Usman Khan injured. In the cross-examination, it has been elicited that in his police

statement, he could not state regarding the fact of Akram and Ashraf assaulting Usman Khan because at that moment, he was not there and an omission has also been elicited that in his police statement he had not disclosed that Wali Mohammad had given sword to Akram and Aslam and commanded them to kill.

14. Sabra Begum (PW/3) is also an independent witness of the incident who has stated that the appellants were quarreling with Usman Khan, Israil and Jibrail and she saw the incident from the doorstep of her house and that her husband Raju @ Asgar Ali rushed towards the spot to end the dispute and she followed him. She then states that while her husband was attempting to pacify the parties, he sustained injuries. She was also making attempt to pacify the dispute and then she says that Akram threw her aside and he assaulted in the hand of Usman Khan. She admits in her cross-examination that a fight was going on between the two groups and after some time, the fight came to an end and then Israil, Jibrail and Usman were taken to hospital.

15. Bakku Ali (PW/4) is also an independent witness of the incident. He states that when he reached the spot, he saw that fight of Israil, Jibrail and Usman was going with the appellants and other accused and Aslam and Akram were holding sword whereas, Wali Mohammad had a club and a rod. In his cross-examination, he admits that he does not know what was the genesis of dispute and who was the aggressor.

16. Sabbir Ali (PW/16), another independent witness of the incident, who was not related to either of the parties, has stated that fight was

going on in front of his house between Aslam and Usman and when dispute got aggravated, they started beating each other and then appellant Aslam and Akram came out with the sword and others came out with club and assaulted Isrial, Jibrail and Usman. According to him, Aslam assaulted Usman with the help of sword resulting in cut injury. At the same time, when Jibrail and Israil came, Israil also sustained sword injury and Jibrail sustained injury on his back. This person appears to be of criminal antecedent and says that he was supported by the mother of Usman for getting bail. He deposed that the dispute was mainly between Aslam and Usman.

17. The evidence of these witnesses both injured and independent, proves that initially, Asif had come to the house of Usman and asked him to come out to meet his brother, which was refused and then it is said that at the spot, Akram, Aslam and Asif and their father Wali Mohammad arrived. Moreover, from the evidence of these eight witnesses, as far as appellant Akram and Aslam are concerned, all the witnesses have stated regarding these two accused having assaulted Usman (PW/12) and Israil (PW/11) with the help of sword. However, in so far as other three accused are concerned, namely Wali Mohammad, Asif and Ashraf, the version of the prosecution witnesses with regard to the role played by these three persons is not only contradictory but some of the witnesses have not alleged any specific overt act. With regard to the role played by Wali Mohammad that he brought the offensive weapon and distributed to his sons and gave command, there are contradictions and omissions as well and the witnesses have not remained coherent in this regard.

18. After the incident, injured witnesses namely Jamila Begum (PW/2), Raju @ Asgar Ali (PW/9), Jibrail (PW/10), Israil (PW/11) and Usman Khan (PW/12) were examined by Dr. (Smt.) C.M. Pandey (PW/17). While Jamila Begum (PW/2), Raju @ Asgar Ali (PW/9) and Jibrail (PW/10) have been found to have sustained simple injuries, according to this Doctor, the injuries sustained by Israil (PW/11) and Usman Khan (PW/12) were grievous in nature. This is so because Israil (PW/11) had sustained sword injury on his back and palm whereas, the other injured Usman Khan (PW/12) had suffered a grievous injury in which because of the assault by sharp edged weapon, his three fingers of the left hand were chopped off.

Dr. Sunil Khemka (PW/18), who examined injuries of Israil (PW/11) and Usman (PW/12), could not give a definite opinion that the injuries sustained by them was of such a nature which, in all probability, was likely to cause death.

19. The evidence of the prosecution witnesses, particularly that of the independent witnesses of the incident shows that the dispute arose and fight took place all of a sudden, because some kind of quarrel had taken place a day before in the evening on a trivial issue. The prosecution story that assault by appellant Aslam and Akram was followed upon a command given by their father Wali Mohammad to kill all, appears to be doubtful because of contradictions and omissions with regard to this aspect of the prosecution case and role played by Wali Mohammad is concerned. What is important is that after initial assault given with sword by appellant Aslam and Akram to Usman Khan (PW/12) and Israil (PW/11), in which they sustained certain

injuries, the fight stopped and the appellants withdrew from the site. Evidence has come that Asif and Ashraf had gone to the police station also. Certainly had there been an intention on the part of the appellants to kill Usman (PW/12) or any other member of his family, they would not have stopped and continued assault propagating to other parts of the body including vital part which, actually, did not happen. Moreover, we do not find that the sword was used to give assault on the head or chest or any such vital part so as to conclusively hold that both appellants Akram and Aslam had intention to kill Usman Khan (PW/12) or Israil (PW/11) or any other member of their family. In the background of the genesis of dispute and that after some time, the dispute came to an end and parties had withdrawn, and further taking into consideration the nature of injuries and the opinion of Dr. Sunil Khemka (PW/18), we find ourself unable to hold that there was an intention to commit murder.

20. Nevertheless, the injuries sustained by Israil (PW/11) and Usman Khan (PW/12) are apparently grievous in nature because of dismembering and amputation of three fingers and long hospitalization.

21. Our analysis of evidence on record leads to rejection of the contention of learned counsel for the revision petitioner in so far as finding of acquittal of Wali Mohammad, Mohd. Asif and Mohd. Asaraf is concerned.

22. On the aspect of sentence awarded to appellants Akram and Aslam, while learned counsel for the appellants submits that in these circumstances of the case, background of dispute, nature and extent of

injuries and that present in instance of old episode of twenty years before and two appellants are in Central Government services, their sentence may be reduced to the period already undergone by them. Learned counsel for the revision petitioner, relying upon the Supreme Court decision in the case of **State of Madhya Pradesh v. Saleem alias Chamaru and another**² submits that their sentences be enhanced.

23. In the proved background of the incident, we have no hesitation to hold that present was a case of sudden dispute and quarrel between the parties, and in view of our finding as above, appellants Akram and Aslam, in order to assault, used a dangerous weapon like a sword. This certainly would be an aggravating factor. Usman Khan (PW/12) sustained grievous injuries in as much as he lost three fingers of left hand. The other victim Israil (PW/11) sustained a cut injury in his palm and back and had remained admitted in the hospital. The nature and extent of grievous hurt sustained by Usman Khan (PW/12) must justify imposition of sentence of three years on appellants Mohd. Akram and Mohd. Aslam, if not more, in view of what has been observed by their Lordships in the Supreme Court in case of **State of M.P. (Supra)** in paragraph 8, 10 and 13 held as below:-

“8. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the

2 2005 CRI.L.J. 3435

society and the sentencing process has to be stern where it should be.”

“10. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should “respond to the society's cry for justice against the criminal.”

“13 It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.”

24. Though, learned counsel for the appellants vehemently urged

before us that as this is an old matter and the appellants are in government service, the sentences may be reduced to the period already undergone or it may be reduced to a lesser sentence than what has been awarded, looking to the criminal overt act and nature of weapon used and injury suffered by Usman Khan (PW/12), having lost three fingers, reduction of punishment on such consideration will not meet the ends of justice and will send a wrong message.

25. In the result, the appeal as well as revision petition both are dismissed. The appellants are reported to be on bail. Their bail bonds shall stand cancelled and they shall surrender before the trial Court forthwith for being sent to jail for serving remaining period of their jail sentence.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge