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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.256 OF 2012

Lalit Timothy D'souza	]	
Age : 42 years,	]	
R/o 17 Gunbow Street, Fort,	]	
Mumbai – 400 001.	]	.. Appellant

vs.

1. The State of Maharashtra	]	
At the instance of Senior Inspector	]	
of Police, Cuffe Parade Police Station	]	
Vide their FIR No.181 of 2007.	]	
2. Ms. Lorna Timoti D'souza	]	
Age : 46 years,	]	
R/o 71, Sainara, 17 Cuffe Parade,	]	
Mumbai – 400 005.	]	.. Respondents

WITH

CRIMINAL APPEAL NO.740 OF 2012

The State of Maharashtra	]	
(Through Cuffe Parade Police Station	]	
CR No.181 of 2007)	]	.. Appellant

vs.

Lalit Timothy D'souza	]	
R/o 17 Gunbow Street, Fort,	]	
Mumbai – 400 001.	]	.. Respondent

WITH

CRIMINAL APPEAL NO.741 OF 2012

Ms.Lorna daughter of Timothy D'souza	]	
presently 45 years, residing at	]	
71, Sainara, 17, Cuffe Parade,	]	
Mumbai – 400 005.	]	..Appellant

vs.

1. Lalit s/o Timothy D'souza,]
Presently 42 years, having place of]
business and also his place of]
residence at 17, Gunbow Street,]
Fort, Mumbai – 400 001.]
Presently on bail, pursuant to order]
dated 13.3.2012 passed in Criminal]
Application no.354 of 2012 in] ..Respondent NO.1
Criminal Appeal No.256 of 2012] (Org. Accused)
2. The State of Maharashtra]
(Through Inspector of Police,]
Cuffe Parade Police station] ..Respondent No.2
pursuant to registration of CR No.181/2007)](Org.Complainant)

WITH

SUO-MOTU PETITION NO.1 OF 2021

High Court On Its Own Motion] .. Petitioner

vs.

Lalit Timoti D'souza] .. Respondents

Mr.Sudip Pasbola a/w Mr. Rahul Arote for Appellant in Criminal Appeal No.256/2012 and for respondent in all connected appeals.

Mr. Ashok Bhatia a/w Mr. Narayan Kumar for respondent No.2 in Criminal Appeal No.256/2012 and for Appellant in Criminal Appeal No.741/2012.

Mrs.Geeta Mulekar, APP for State/Respondent NO.1 in Criminal Appeal No.256/2012 and for Appellant in Criminal Appeal No. 740/2012.

**CORAM : PRASANNA B. VARALE &
N.R.BORKAR, JJ.**

**RESERVED ON : 16.08.2021
PRONOUNCED ON : 13.09.2021**

COMMON JUDGMENT : (PER : N.R.BORKAR, J)

1] The Appellant in Criminal Appeal No.256/2012 was an accused before the trial Court in Sessions Case No.140 of 2008. In the said Sessions Case, the accused was tried for the offence punishable under Section 307 of the Indian Penal Code (for short "IPC") and Section 30 of the Indian Arms Act (for short "Arms Act"). By the Judgment and order dated 1st February, 2012, the trial Court acquitted the accused of the offences punishable under Section 307 of the IPC and under Section 30 of the Arms Act. The trial Court instead convicted the accused for the offence punishable under Section 326 of the Indian Penal Code and sentenced him to suffer Rigorous Imprisonment for three years and to pay fine of Rs.1 Lakh and in default of payment of fine to suffer further imprisonment of six months.

2] Criminal Appeal No.256 of 2012 is filed by the accused challenging his conviction for the offence punishable under Section 326 of the IPC. Whereas, Criminal Appeal No.740/2012 and 741/2012 are filed by the State and victim respectively against acquittal of the accused for the offence punishable under Section 307 of the IPC and under Section 30 of the Arms Act.

3] This court, while admitting the Appeal filed by the accused has passed the following order on 13th March, 2012 :

"Considering the nature of the offence and the manner in which it is committed, I am of the considered opinion that, the sentence of three years rigorous imprisonment imposed on the appellant for the offence punishable under Section 326 of I.P.C. is grossly inadequate. Therefore, the appellant is called upon to show cause as to why the substantive sentence imposed on him should not be enhanced."

4] Suo Motu Petition No.1 of 2021 came to be registered pursuant to above said order of this Court.

5] Considering the fact that all the matters take exception to one and the same Judgment, they were heard together and are being disposed of by this common Judgment.

6] The allegations against the accused are that he fired six gun shots at his elder sister PW 1 Ms. Lorna D'souza and attempted to kill her.

7] The accused and PW 1, were though residing in the same flat i.e. Flat No.71, Sayonara Building, Cuffe Parade, Mumbai, however, they were residing separately as their relations were strained due to property dispute. The incident took place in the intervening night of 27.10.2007 and 28.10.2007 at about 3.00 to 3.30 a.m.

8] According to PW 1 on 27.10.2007 she alongwith her younger sister PW 4 – Laura and daughter of PW 4, who were residing with her, had gone to Copper Chimney restaurant for dinner. At about 12.00 a.m. they finished their dinner and then her younger sister PW 4 Laura dropped her at Hotel Indus, Colaba at about 12.30 a.m. and then she went home.

9] According to PW 1 approximately at about 3.00 a.m. she came home by taxi and saw that her Maruti Swift car was parked outside of

the building on the road. She then went to the parking area and saw that another Maruti Car was parked at the place where she used to park her car. She, therefore, enquired with PW 2 Rajkishor Rawat – watchman of the building as to who had parked the car at the place of her car parking. On inquiry PW 2 told her that the said car is of accused's friend Nitasha. She told PW 2 to ask the accused to remove the said car from the parking area. According to PW 1 after 10 minutes, the accused came to the parking place and started abusing her in filthy language. The accused, thereafter, hit her by his head and started pushing her. The accused had then asked PW 2 to call police. Accordingly, PW 2 went to make phone call to the police. According to PW 1 as the accused was still abusing her, she got scared and started going away from that place. According to PW 1, at that juncture, the accused fired six gun shots at her from the revolver, which he was carrying. Due to gun shots, she sustained injuries to her chest and right hand and fell down. According to PW 1 inspite of that the accused kept pulling the trigger of the revolver. She, then made phone call to her younger sister PW 4 Laura and intimated her that the accused shot her. PW 4 Laura came to the place of incident and she took her to Bombay Hospital. According to PW 1 she was in the hospital for about 19 days.

10] PW 1 has admitted in her cross-examination that she had filed civil suit in the year 2003 against the accused for administration of properties left by her father. She has admitted that the properties left by her father are worth crores of rupees and there is dispute between them in relation to the said properties. She has admitted that accused was not giving her share and the share of her sisters in the properties.

11] The accused has not disputed the incident in question. According to the accused, he fired the gun shots in self defence. The accused in order to prove his defence examined himself as DW 1.

12] According to the accused, on 27th he was invited by his friend Anil Barwani from Cameroon and his fiancée Ms. Nitasha Shiobroo. He went to Radio Club at about 9.30 p.m. for drinks and dinner. From there, he alongwith his friend Anil Barwani and his fiancée Nitasha went to Khyber Hotel in pub Red Light for Photo Album. According to the accused, at about 2.30 to 2.45 am they decided that his driver Krishna will drop his friend Anil Barwani at Altamount Road and his fiancée would drop him at his house, as she stays near his house. The Polaroid photo was in his possession. Nitasha wanted the photo and hence they decided to scan the photo. They reached home. Nitasha had parked the car in the driveway opposite Vijaya Bank Parking. As it was for a short time, he made her park there. The drive way where Nitasha parked her car was not allotted parking space of anyone.

13] According to the accused, at about 3.16 a.m. when he was with Nitasha in his house, he received call from PW 2 Rajkishor and he told him in Hindi that “Didi (PW 1) Hamhe pareshan kar rahi hai”. He asked him why and PW 2 told him that in the afternoon PW 1 had parked her car at the place where Nitasha’s car is parked at present and at that time Mrs.Johar created a scene and forced her to remove the car from the said place. PW 2 further told him that PW 1 is threatening that if the Nitasha’s car is not removed immediately, she would park her car in such a way that no one would be able to come in or go out of the building. He thus took keys from Nitasha of her car and to avoid confrontation he came down to remove the car. When he came down,

he found that behind Nitasha's car, car of PW 1 was parked and the parking space allotted to flat No.71 was vacant and access to it was also open. He shouted at PW 2 in Hindi "Didiko parking hai to tum hamhe pareshan kyo kar rahe ho". According to the accused at that time, PW 1 came in between him and PW 2 and started abusing. PW 1 called him a coward and asked him to talk with her and not with PW 2.

14] According to the accused, PW 1 threatened him using the names of gangsters Suresh Bhandari and Bala Shetty. PW 1 told him that "You are standing at the same place where our father was shot and I am going to make your state like him". According to the accused, at that time, PW 1 was drunk and also aggressive and he thus got scared thinking that, she had more people with her. He took out the mobile phone and dialed No.100 eight times. The said call was forwarded in voice recording. Since he failed to connect No.100 he called up Cuffe Parade Police Station. The phone rang but no one picked up the phone. PW 2 was standing next to him and he told PW 2 to use the landline to call the police. Seeing PW 1 aggressive, PW 2 rushed to call the police. On seeing PW 2 going to call the police, PW 1 stated "nothing is going to happen".

15] According to the accused, taking advantage that he was trying to call on phone and his one hand was engaged in it, PW 1 came with full force and with all her body force pushed him. She looked around and picked up the pipe. He then took out his license revolver and fired one round in the air to deter her. She raised her hand with the iron pipe and charged towards him. He lost his balance slightly. He fired presumably two rounds on the right hand, but iron pipe was still in her hand. He continued to lose his balance and falling behind and at that time he

fired other rounds at her right hand. The incident occurred very fast and at close proximity. PW 1 still had pipe in her hand and was standing. He moved towards the entrance of the building and PW 1 went towards the compound entrance towards the opposite side. At that place, she dropped or threw the iron pipe. He thought of taking her to hospital, but he got scared thinking that if anything happens to her in his car he would be blamed for it. Since he failed to get in touch with the police earlier, he went to Cuffe Parade Police Station. Police Officer by name Shri Burud was present there. He narrated whole incident to him. He was then taken into custody.

16] The learned counsel for the appellant/accused has submitted that the evidence on record will show that, the relations of the accused and PW 1 were strained due to property dispute. It is submitted that PW 1 and PW 4 used to threaten the accused with their gangster connection and inspite of lodging of the complaint in that respect by the accused, no action was taken by the police against PW 1 and PW 4. It is submitted that the accused was thus living in a state of fear of his sisters. It is submitted that the father of the accused was shot by extortionist. However, luckily he survived the attack, but was permanently disabled below the waist. It is submitted that at the time of alleged incident, similar threat was given by PW 1 to accused. It is submitted that the incident in question will have to be thus appreciated in the light of all these circumstances. It is submitted that as regards law on the right of private defence it is well settled that a mere reasonable apprehension is enough to put the right of private defence in operation. It is submitted that considering the facts and circumstances of the case, it will have to be held that the accused fired the gun shots at PW 1 to save himself from impending danger. It is

submitted that the accused thus needs to be acquitted of all the charges. In support of submission, the learned counsel for the appellant/accused has relied upon the following Judgments.

- 1] (2017) 2 SCC 737
Suresh Singhal vs. State (Delhi Administration)
- 2] 2004 SCC (Cri) 487
James Martin vs. State of Kerala
- 3] 1991 SCC (Cri) 494
Buta Singh vs. State of Punjab
- 4] 1980 SCC (Cri) 907
Mohd. Ramzani vs. State of Delhi
- 5] (2010) 2 SCC (Cri) 1037
Darshan Singh vs. State of Punjab & Another
- 6] 1971 SCC (Cr) 469
Vidhya Singh vs. State of Madhya Pradesh
- 7] 1975 SCC (Cri) 608
Puran Singh and others vs. The State of Punjab.
- 8] 1996 SCC (Cri) 88
State of Punjab vs. Gurbux Singh and others

17] On the other hand, the learned APP for the State has submitted that the alleged events which took place prior to the incident in question are of no consequence to determine the issue of right of private defence. It is submitted that according to the accused, he fired the gun shots at PW 1 as she picked up the iron pipe and charged towards him. It is submitted that there is, however, no evidence on record to that effect and on the contrary in the first information report lodged by the accused, there is no reference to iron pipe. It is submitted that even otherwise, it is well settled that in right of private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for the protection. It is submitted that in the present case the accused has fired six gun shots at PW 1. It is submitted that considering the facts and circumstances of the case, the defence of the accused needs to be rejected.

18] As the only issue is of right of private defence, before adverting to the merits of the matter, we would first like to refer to the Judgments on that point cited by the parties.

19] The Hon'ble Supreme Court in the case of **Darshan Singh vs. State of Punjab & Another** (*supra*) has observed :

“34. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose.

35. This Court in number of cases has laid down that when a person is exercising his right of private defence, it is not possible to weigh the force with which the right is exercised. The principle is common to all civilised jurisprudence. In *Brown v. United States*, it was observed that a person in fear of his life is not expected to modulate his defence step by step or tier by tier. Holmes, J. in the aforementioned case aptly observed : (L Ed p. 963) “Detached reflection cannot be demanded in the presence of an uplifted knife.”

It is further observed :

57. In *Buta Singh vs. State of Punjab*, the court noted that :

“10..... a person who is apprehending death or bodily injury cannot weigh in golden scales on the spur of the moment and in the heat [of circumstances], the number of injuries required to disarm the assailants who were armed with

weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use [exactly] only so much force in retaliation.... commensurate with the danger apprehended to [him] where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private defence commences as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hypertechnical approach has to be avoided in considering what happens on the spur or the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of the right of private defence can legitimately be negated. The court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially [,as noted above,] a finding of fact”.

58. The following principles emerge on scrutiny of the judgments:

- (i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.
- (ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.
- (iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.
- (iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) [The Indian Penal Code](#) confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

20] The Hon'ble Supreme Court has however observed that question whether apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case and no straitjacket formula can be prescribed in this regard. In view of this we do not propose to refer to other Judgments cited before us on the point of right of private defence.

21] According to the prosecution at the time of incident of firing PW 1 was unarmed, whereas according to the accused PW 1 tried to assault him by iron pipe. In this context, the evidence of PW 2, who even according to the accused, was present at the time of incident would be crucial.

22] According to PW 2, on 27.10.2007 he was on night duty. At about 2.30 am the accused came home alongwith his girlfriend by

Swift Maruti white colour car. The girlfriend of the accused parked her Swift Maruti car inside the compound. At about 3.00 a.m. PW 1 came home and since she saw white Maruti car, she inquired about the owner of the said car. He disclosed to her that the said car is of friend of the accused. PW 1 told him to give call to the accused. He replied to PW 1 that the friend of the accused may go within 10-15 minutes. According to PW 2, PW 1 threatened to park her car in front of the gate. PW 2, therefore contacted the accused on intercom. Thereafter, the accused came down. In the meantime, PW 1 parked her car behind the car of friend of accused. According to PW 2 exchange of words took place between the accused and PW 1. At that time, the accused told him to go to the counter and inform to the police. According to PW 2, when he was trying to contact the police, at that time he heard sound like bursting of crackers. Therefore, he immediately went towards the gate. There he saw PW 1 in injured condition.

23] There is absolutely no reference in the evidence of PW 2 of iron pipe. According to the accused, PW 1 after she was shot, went towards the compound entrance and at that place dropped or threw the iron pipe there. The accused in his evidence is conspicuously silent about the length and width of the iron pipe. However, considering the defence of the accused, we would assume that length and width of the said iron pipe was such that by the said iron pipe, it was possible for PW 1 to cause either grievous hurt or death of the accused. If this is so, then it is difficult to accept that, PW 1 after she was hit by two gun shots would be able to throw it away. If really, there would have been iron pipe either in the hand of PW 1 or lying near her, then PW 2 would have certainly stated so in his evidence. Assuming that PW 2

skipped to state the said fact in his examination in chief still it was possible to ask the questions in that respect in the cross-examination or at least it was necessary to give suggestions to PW 2 in that respect. However, there is no suggestion to that effect.

24] Learned counsel for the accused has submitted that PW 3 Bhaichand Banwari Parcha, the Panch witness on the spot panchanama has admitted that pipe was lying at the place of incident. We have perused the evidence of PW 3. According to him on the place of occurrence some articles were lying near the car parking place i.e. GI Pipe, soil, earth, pieces of tiles etc. PW 3 has, however, not stated that it was iron pipe. Apart from it, according to the accused, PW 1 went towards the entrance gate and at that place she dropped or threw the iron pipe and not at the parking place.

25] Apart from it, admittedly, after the incident, the accused went to the police station and lodged the report. The said report is at Exhibit 104. In the said report the accused has stated that PW 1 rushed on his person and pushed him forcefully. In the said report, there is no reference at all of iron pipe.

26] The learned counsel for the appellant/accused has submitted that the report at Exhibit 104 is inadmissible in evidence and the same cannot be used for any purpose.

27] On the other hand, learned APP has submitted that in the present case accused has examined himself as DW 1. Thus, the FIR lodged by him can be read in evidence. In support of the submission, learned APP has relied upon the Judgment reported in **1996 DGLS (SC) 1509 in the case of Bandlamuddi Atchuta Ramaiah vs. State of A.P.**

28] The Hon'ble Supreme Court in the case of **Bandlamuddi Atchuta Ramaiah vs. State of A.P.** (supra) has held :

(17) THE legal position, therefore, is this: A statement contained in the FIR furnished by one of the accused in the case cannot, in any manner, be used against another accused. Even as against the accused who made it, the statement cannot be used if it is inculpatory in nature nor can it be used for the purpose of corroboration or contradiction unless its maker offers himself as a witness in the trial. The very limited use of it is as an admission under [Section 21](#) of the Evidence Act against its maker alone unless the admission does not amount to confession.

29] In the present case, admittedly the accused has examined himself as DW 1. Thus said report at Exhibit 104 can be read to the extent of admission therein that PW 1 just gave push to the accused and at that time she was not armed with iron pipe. Considering these facts and circumstances, the defence of the accused that PW 1 picked up the iron pipe which according to the accused was lying at the place of incident and charged towards him to assault him does not appear to be probable.

30] Even otherwise according to us the accused exceeded the right of private defence. According to PW 1 the accused fired six gun shots at her. The evidence of PW 1 is corroborated by the evidence of her treating doctor PW 12 Dr. Manmal Begani.

31] PW 12 has stated in his evidence that on 28.10.2007 PW 1 was admitted in Bombay Hospital in ICU ward due to injuries sustained by her at her right upper arm, fore arm, chest wall and the back. He attended PW 1 at 6.30 a.m. of 28.10.2007. He has stated that his assistant Dr. Rishikesh had examined PW 1 and noticed following injuries :

- i. Two entry wounds on right arm.
- ii. Two entry wounds on right side of the chest arm.
- iii. One entry wound on right breast.
- iv. One entry wound on middle of the back.

32] According to PW 12 he personally alongwith his associates conducted surgery/operation on PW 1 and retrieved two bullets from the body of PW 1. He has stated that the x-rays were showing blood collection in both the lungs and collection of blood in the abdomen. During the course of operation they inserted a tube to get the blood out from the lungs for better ventilation and breathing. Thereafter, they opened the abdomen and washed the clot of blood. There was perforation in the stomach and one bullet had entered the stomach and there was no exit wound in the stomach. The size of the stomach puncture was 2x1 cm. and the bullet was not felt in the stomach. Later on the said bullet passed through stools after a few days. The stomach was repaired. They noticed one injury at the laceration or tear on right side of the liver, due to which blood had collected in abdomen. Thereafter, they removed two bullets from left breast and axilla of PW 1. Thereafter, wounds were cleaned and stitched. According to PW 12 one bullet is still lying in the right chest wall of PW 1 and said bullet could not be removed as the said bullet was not accessible while operating PW 1 in emergency. He has stated that PW 1 was put on ventilator for the period of 12 days.

33] The learned counsel for accused has submitted that x-rays at Exhibit 79 to 87 do not support the version of PW 12 that PW 1 was shot on back as no such injury was noticed in x-rays, nor it is mentioned in the injury certificate. It is submitted that according to Ballistic expert also there was no hole on the backside of the T-

shirt which PW 1 was wearing at the time of incident. Though the x-rays were shown to PW 12, during the cross-examination, however, there is no cross-examination on this aspect. In absence of any specific admission to that effect on record, we are constrained to reject this submission.

34] Considering the medical evidence, the defence of the accused that he fired the first shot in the air also does not appear to be probable.

35] Considering the fact that accused has fired six gun shots at PW 1 we have no hesitation to hold that the accused has exceeded his right of private defence. The defence of the accused that he fired gun shots at PW 1 in self defence, is thus rejected.

36] Learned counsel for the accused in the alternative has submitted that incident had occurred without any premeditation and upon sudden quarrel. It is submitted that the intention of the accused was never to kill PW 1. It is submitted that considering these facts and circumstances, the accused at the most can be said to have committed an offence punishable under Section 308 of the IPC. It is submitted that considering these facts the trial Court has rightly acquitted the accused of the offence punishable under Section 307 of the IPC, however, erred in convicting the accused for the offence punishable under Section 326 of the IPC. In support of submission the learned counsel for the accused has relied upon the following judgments :

- i] 2009(1) SCC 259 Bishan Singh vs. State
- ii] 2010(2) SCC 532 Jameel vs. State of U.P.
- iii] 1992 Supp (2) SCC 163 Abrar Ali vs. State of U.P.

37] On the other hand, learned APP has submitted that the incident was not premeditated by that itself is not sufficient to attract exception 4 to Section 300. It is submitted that further requirement of the said exception is accused should not act in cruel manner. It is submitted that the very fact that accused fired six gun shots at PW 1 will show that accused acted in cruel manner and the intention of the accused was to kill PW 1. It is submitted that the act of the accused would thus squarely constitute the offence punishable under Section 307 of the IPC.

38] As regards the conviction of accused for the offence punishable under Section 326 of the IPC, the learned APP has submitted that, it would be travesty of justice if the order of trial Court is allowed to stand.

39] The only distinction between Sections 307 and 308 of the IPC is that if an accused does any act with such intention or knowledge and under such circumstances that if by that act caused death and if he would be guilty of murder, it would constitute the offence punishable under Section 307 of the IPC, but if he would be guilty of culpable homicide not amounting to murder then it would constitute the offence punishable under Section 308 of the IPC.

40] Culpable homicide does not amount to murder, if the act is done, though with intention and knowledge referred to in Section 300 of IPC, but is covered by exceptions mentioned in that Section and if the act is done with intention and knowledge referred to in Section 299 of the IPC, but not falling under clauses I to IV of Section 300 of the IPC.

41] In the present case, the accused had fired six gun shots at

PW 1 who was unarmed and thus acted in cruel and unusual manner. The accused is, thus, not entitled to benefit of exception 4 to Section 300 of the IPC. The act of the accused is thus neither covered by exceptions to Section 300 of the IPC nor considering the facts and circumstances of the case clauses I to IV can be said to be not attracted in the present matter.

42] The submission that the accused at the most can be said to have committed the offence punishable under Section 308 of the IPC can not be accepted. The judgments relied in support of this submission are based on entirely different set of facts and thus we have not referred to them.

43] The only question which now remains is whether the trial Court was justified in convicting the accused for the offence punishable under Section 326 of the IPC instead of 307 of the IPC.

44] In this context we have perused the findings of the trial Court. In our view the learned trial Court while acquitting the accused for the offence punishable under Section 307 of the IPC and convicting the accused for the offence punishable under Section 326 of the IPC has ignored the well settled legal position that determinative factor for constituting offence punishable under section 307 of the IPC is intention and not injury.

45] Considering the facts and circumstances of the case, we have no slightest doubt in our mind that the intention of the accused was to kill PW 1. The accused is thus held guilty for the offence punishable under Section 307 of the IPC.

46] In Section 307 of the IPC, the punishment in case hurt is caused is upto the life imprisonment. However, considering the

fact that the incident was not premeditated and it is of the year 2007, in our view, the ends of justice would be met by directing the accused to suffer rigorous imprisonment for 10 years.

47] The learned APP has not made any submission questioning the acquittal of the accused for the offence punishable under Section 30 of the Arms Act. We have, therefore, no option except to maintain the acquittal of accused for the said offence. In the result, following order is passed :

ORDER

- 1] Criminal Appeal No.256 of 2012 is dismissed.
- 2] Criminal Appeal Nos.740 of 2012 and 741 of 2012 are partly allowed.
- 3] The impugned Judgment and order to the extent of acquitting the accused of the offence punishable under Section 307 of the IPC is set aside.
- 4] The accused is convicted for the offence punishable under Section 307 of the IPC and sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.1 Lakh, out of which, Rs.50,000/- (Rs.Fifty Thousand only) be paid to PW 1 as compensation and in default of payment of fine, to suffer further imprisonment of six months.
- 5] The accused is granted four weeks time to surrender before the concerned Court to serve the sentence. In case the accused fails to surrender, then the concerned Court shall issue Non Bailable Warrant against the accused and commit him to prison.
- 6] Needless to mention that as we have convicted the accused for the offence punishable under Section 307 of the IPC,

his conviction and sentence for the offence punishable under Section 326 of the IPC stands set aside.

7] The acquittal of the accused for the offence punishable under Section 30 of the Arms Act is maintained.

8] As we have allowed Criminal Appeal Nos.740 of 2012 and 741 of 2012, Suo Motu Petition No.1 of 2021, which is for enhancement of the sentence does not survive and same is disposed of.

[N.R.BORKAR, J]

[PRASANNA B. VARALE, J]