

**IN THE HIGH COURT AT CALCUTTA  
CRIMINAL APPELLATE JURISDICTION  
APPELLATE SIDE**

**Present:**

**The Hon'ble Justice Ananya Bandyopadhyay**

**C.R.A. 729 of 2009**

**Ramgopal Sikdar  
-Vs-  
The State of West Bengal**

For the Appellant : Mr. Sekhar Basu  
Mr. Kushal Paul

For the State : Ms. Faria Hossain  
Mr. Anand Keshari

Heard on : 18.01.2023, 30.01.2023, 17.02.2023.

Judgment on : 03.07.2023

**Ananya Bandyopadhyay, J.:-**

1. This instant criminal appeal is preferred against an Order and Judgment dated 30.10.2009 passed by Additional Sessions Judge, Fast Track Court No. 3, Barrackpore, 24-Parganas (North), convicting the appellant under Sections 326/307 of the Indian Penal Code and sentencing the appellant under Section 326 of the Indian Penal code to suffer rigorous imprisonment for five years and to pay fine of Rs. 2000/- in default to suffer rigorous imprisonment for four months and sentencing the appellant under Section 307 of the Indian Penal Code to suffer rigorous imprisonment for seven years and to pay fine of Rs. 4000/- in default to suffer rigorous imprisonment for

eight months and all the sentences would run concurrently in ST 13 (4) 2006, SC 26 (3) 2005.

2. The prosecution case emanated from the complaint filed by the de-facto complainant Prosanta Mondal, precisely stating to be a rickshaw puller by profession plying from Dunlop to Bandel C. Road in the district of Hooghly, that on 05.07.2005 at about 1:30 P.M. he came to Naihati from Dunlop Ghat by a rickshaw boarding a person along with his associate female co-passenger. At about 12:30 P.M. the said passengers got down at the Maruti Stand near Naihati Godown. The person booked a Maruti Van for going to Sodepur. At that time the victim girl wanted to say something. Being unable to understand her speech, he called her and when the said girl approached him, the said person followed her with a bag in his hand. He forbade the said person to accompany the victim, but disregarding his instruction the said person continued following the victim and when the said girl came near him the said person took out the dagger from his bag and wounded the girl at her head. Then the said girl shouted by saying save me. The said person again attempted to injure her, and the de-facto complainant caught his right hand along with dagger and immediately the local by-standers rushed to the spot and caught the said person tightly. The girl was injured having been smeared with blood behind her head on the right side and also at her neck. Then the girl was brought to the Naihati Hospital by his auto with the assistance of the local persons. He came to know that the name of the girl as Tapashi Das residing at Bansberia, Khamarpara, Beltala and the girl disclosed the name of the accused as Ramgopal Sikdar residing at Sodepur. The said girl was admitted in the hospital. If not resisted the said person

would have murdered the girl. Therefore, the de-facto complainant requested to take legal steps against the person who caused such injury.

3. Based on the aforesaid written complaint, Naihati P.S. Case No. 125/5 dated 5.7.05 under Sections 326/307 of the Indian Penal Code was instituted. Investigation ensued culminating in submission of charge-sheet. Charges were framed against the appellant under Sections 326/307 of the Indian Penal Code to which he pleaded not guilty and claimed to be tried.
4. The prosecution in order to prove its case exhibited 11 witnesses and exhibited certain documents. The defence had examined one witness.
5. The Learned Advocate on behalf of the appellant submitted that –
  - i. The cross-examination of the investigating officer (PW 11) would unequivocally point to the fact that at the time of the incident, the appellant was an employee of the Indian Armed Forces, i.e. he was employed with the Indian Air Force. Records of the Learned Trial Court would further indicate that the appellant was in active service of the Indian Air Force and such fact was clearly mentioned in the forwarding report presented before the jurisdictional Magistrate at the time of first production of the present appellant. Being a member of the armed forces would consequentially entail application of military laws instead of general criminal law relating to trial of an accused. Section 475 of the Code of Criminal Procedure, 1973 may be profitably referred to in this regard. The same reads as :-

*“475. Delivery to commanding officers of persons liable to be tried by Court- martial.*

(1) The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957 ), and the Air Force Act, 1950 (45 of 1950 ), and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court- martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court- martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court- martial. Explanation.- In this section-

(a) " unit" includes a regiment, corps, ship, detachment, group, battalion or company,

(b) "Court- martial" includes any tribunal with the powers similar to those of a Court- martial constituted under the relevant law applicable to the Armed Forces of the Union.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court- martial for trial or to be examined touching any matter pending before the Court- martial."

- ii. The said provision is supplemented by the Rules framed by the Government of India under Section 475(1), Criminal Procedure Code, 1973 for the trial of the persons subjected to Military, Navals, Air Force or Coast Guard Laws. The said rules read as follows :-

*“In exercise of the powers conferred by sub-section (1) of Section 475 of the Code of Criminal Procedure, 1973 (2 of 1974), and in supersession of the Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952, the Central Government hereby makes the following rules for the trial of the persons subject to military, naval or air force law, or any other law relating to the Armed Forces of the Union by a Court to which the said Code applies, or by a Court-martial, namely:-*

*[1. These rules may be called the Trial of persons subject to Armed Forces Laws of the Union (Exercise of Jurisdiction) Rules, 1978]*

*2. In these rules, unless the context otherwise required-*

*(a) “commanding officer”-*

*(i) in relation to a person subject to military law, means the Officer Commanding the unit to which such person belongs or is attached;*

*(ii) in relation to a person subject to naval law, means the Commanding Officer of the ship or naval establishment or unit to which such person belongs or is attached;]*

*(iii) in relation to a person subject to air force law, means the officer for the time being in command of the unit to which such person belongs or is attached; and*

*(iv) in relation to a person subject to the Coast Guard Law, means the Commanding Officer of the Coast Guard ship or establishment or unit to which such person belongs or is attached;]*

*(b) “competent air force authority” means the Chief of the Air Staff, the air or other officer commanding any command,*

*group, wing or station in which the accused person is serving or where such person is serving in a field area, the Officer Commanding the forces or the air force in the field;*

*(c) "competent military authority" means the Chief of Army Staff or Officer Commanding the army, army corps, division, area, sub-area or independent brigade in which the accused person is serving, and, except or station in which the accused person is serving, and except in cases falling under section 69 of the Army Act, 1950 (46 of 1950) in which death has resulted, the officer commanding the brigade or sub-area or station in which the accused person is serving;*

*(d) "competent naval authority" means the Chief of the Naval Staff or the Flag Officer Commanding-in-Chief, Western Naval Command, Bombay or the Flag Officer Commanding-in-Chief, Eastern Naval Command Vishakhapatnam or the Flag Officer Commanding Southern Naval Area, Cochin or the Flag Officer Commanding, Western Fleet or the Flag Officer Commanding, Eastern Fleet or Senior Naval Officer where the accused person is serving;*

*(e) competent coast guard authority means the Director General or Inspector General or Deputy Inspector General without whose command the accused person is serving.*

*3. Where a person subject to military, naval, air force or coast guard law, or any other law relating to the Armed Forces of the Union for the time being in force is brought before a Magistrate and charged with an offence for which he is also liable to be tried by a Court-martial, or Coast guard court, as the case may be such Magistrate shall not proceed to try such person or to commit the case to the Court of Session, unless-*

*(a) he is moved thereto by a competent military, naval or air force or coast guard authority; or*

*(b) he is of opinion, for reasons to be recorded, that he should so proceed or to commit without being moved thereto by such authority.*

*4. Before proceeding under clause (b) of Rule 3, the Magistrate shall give a written notice to the Commanding officer or the competent military, naval, air force or coast guard authority, as the case may be, of the accused and until the expiry of a period of fifteen days from the date of service of the notice he shall not-*

*(a) convict or acquit the accused under Section 252, sub-sections (1) and (2) of section 255, sub-section (1) of section 256 or section 257 of the Code of Criminal Procedure, 1973 (2 of 1974), or hear him in his defence under section 254 of the said Code; or*

*(b) frame in writing a charge against the accused under section 240 or sub-section (1) of section 246 of the said Code; or*

*(c) make an order committing the accused for trial to the Court of Session under section 209 of the said Code; or*

*(d) make over the case for inquiry or trial under section 192 of the said Code.*

*5. Where a Magistrate has been moved by the competent military, naval, air force or coast guard authority, as the case may be, under clause (a) of Rule 3, and such authority subsequently gives notice to such Magistrate that, in the opinion of such authority, the accused should be tried by a Court-martial or Coast guard court as the case may be, such Magistrate if he has not taken any action or made any order under rule 4, before receiving the notice shall stay the proceedings and, if the accused is in his power or under his control, shall deliver him together with the statement referred to in sub-section (1) of section 475 of the said Code to the officer specified in the said sub-section.*

*6. Where within the period of fifteen days mentioned in rule 4, or at any time thereafter but before the Magistrate takes any action or*

*makes any order referred to in that rule, the commanding officer of the accused or the competent military, naval, air force or coast guard authority, as the case may be, gives notice to the Magistrate that in the opinion of such officer or authority, the accused should be tried by a Court-martial or Coast guard court, as the case may be, the Magistrate shall stay the proceedings, and if the accused is in his power or under his control, shall deliver him together with the statement referred to in sub-section (1) of section 475 of the said Code to the officer specified in the said sub-section.*

*7. (1) When an accused has been delivered by the Magistrate under rule 5 or rule 6, the commanding officer of the accused or the competent military, naval, air force or coast guard authority, as the case may be, shall, as soon as may be, inform the Magistrate whether the accused has been tried by a Court-martial or Coast guard court, as the case may be, or other effectual proceedings have been taken or ordered to be taken against him.*

*(2) When the Magistrate has been informed under sub-rule (1) that the accused has not been tried or other effectual proceedings have not been taken or ordered to be taken against him, the Magistrate shall report the circumstances to the State Government which may, in consultation with the Central Government, take appropriate steps to ensure that the accused person is dealt with in accordance with law.*

*(8) Notwithstanding anything in the foregoing rules, where it comes to the notice of a Magistrate that a person subject to military, naval, air force or coast guard law, or any other law relating to the Armed Forces of the Union for the time being in force has committed an offence, proceedings in respect of which ought to be instituted before him and that the presence of such person cannot be procured except through military, naval, air force or coast guard authorities, the Magistrate may by a written notice require the commanding officer of such person either to deliver such person to a Magistrate to be named in the said notice for being proceeded against according to*

*law, or to stay the proceedings against such person before the Court-martial or the coast guard court, as the case may be, if since instituted, and to make a reference to the Central Government for determination as to the Court before which proceedings should be instituted.*

*9. Where a person subject to military, naval, air force or coast guard law, or any other law relating to the Armed Forces of the Union for the time being in force has committed an offence which in the opinion of competent military naval, air force or coast guard authority, as the case may be, ought to be tried by a Magistrate in accordance with the civil law in force or where the Central Government has, on a reference mentioned in rule 8, decided that proceedings against such person should be instituted before a Magistrate, the commanding officer of such person shall after giving a written notice to the Magistrate concerned, deliver such person under proper escort to that Magistrate."*

- iii. It was further submitted that an analogous reading of the aforementioned section and the rules framed thereunder would indicate that when a person is subject to military, naval, or air force law is brought before the Learned Magistrate on the accusation of committing an offence for which he is liable to be tried by a court martial also, the Magistrate shall not proceed with the case unless he is requested to do so by an appropriate military authority. Conjoint reading of Sub-Rules (3), (4), and (6) will indicate that a duty is cast upon the Learned Magistrate to send a written notice to the Commanding Officer and is not to proceed with trial of the case against the accused until the expiry of 14 days from the service of such notice. It is trite law and no longer res integra that the said provisions are mandatory

and need to be complied with before an accused, who is subjected to military or naval or air force law, can be tried by an ordinary criminal court. The very essence of the aforesaid provisions of law will lead to the irresistible conclusion that failure to adhere to the said mandatory provision will render a trial held by an ordinary criminal court, held without complying with the said provisions of law, to be null and void on the ground of lack of jurisdiction of such ordinary criminal court. It is pristine that the said provision is mandatory and cannot be given a go-by under any circumstance. The statutory words which have been consciously used by the Parliament not only under section 475(1) as also the rules framed thereunder referred to the word "Magistrate". Thus, a logical conclusion would be that such exercise is to be resorted to at the very first instance (i.e. at the pre-committal stage) by the magistrate (or a special court having original jurisdiction and created by a special statute) having jurisdiction to remand on production of an accused before it subsequent to his arrest.

- iv. It was further contended that if one referred to Rule (6) then it would be further evident that the power to try an accused as a primary option lies with the military authorities and not the ordinary criminal court. In this regard, reference was made to the judgement of this Hon'ble Court passed in the case of Captain U.R. Roy Choudhury v. State, reported in 1976 CrLJ 796 (Cal), where the similar issue had cropped up and the Division Bench of this Hon'ble Court, after dealing with the said provisions of law, was pleased to hold that

proceedings initiated in the ordinary criminal court in violation of such mandatory provision was completely without jurisdiction and non-est in the eyes of law and was further pleased to set aside the entire proceedings. The said decision fell for consideration on an appeal being preferred by the State of West Bengal before the Hon'ble Apex Court and the Hon'ble Apex court, on its part, after considering the relevant provisions of law, was pleased to uphold the decision passed by the Division Bench of this Hon'ble Court. The said order of the Hon'ble Apex Court is reported in AIR 1986 SC 1655 (Superintendent and Remembrancer of Legal Affairs, West Bengal v. Usha Ranjan Roy Choudhury & Anr.). It was further submitted that from a plain reading of the said judgment of the Hon'ble Apex Court, it is abundantly clear that the procedure as referred to hereinabove is mandatory in nature and cannot be brushed aside lightly. A similar view has also been expressed in the case of Delhi Special Police Establishment, New Delhi v. Lt. Col. S.K. Loraiya, reported in AIR 1972 SC 2548. In the said case, the Hon'ble Apex Court, after referring to section 475 and the rules framed thereunder vis-a-vis the relevant provisions of military laws, was pleased to hold that charges, framed in violation of the provisions indicated hereinabove, cannot be sustained and the same are liable to be quashed. Such explanation of the legal provision has also been accepted by the Hon'ble Allahabad High Court in the case of S.R. Tripathi v. State & Anr., reported in AIR 1964 All 371.

- v. Further attention was drawn to the provision engrafted under the Airforce Act, 1950 in relation to "civil offences". Sections 71 and 71 of the Airforce Act, 1950 may be referred to in this context. The said sections read as follows:-

*“71. Civil offences-Subject to the provisions of section 72, any person subject to this Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall be liable to be tried by a court- martial and, on conviction, be punishable as follows that is to say,-*

*(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and*

*(b) in any other case, he shall be liable to suffer any punishment other than whipping "assigned for the offence by any law in force in India, or imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.*

*72. Civil offences not triable by court-martial.-A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences-*

*(a) while on active service, or (b) at any place outside India, or (c) at a frontier post specified by the said Government by notification in this behalf."*

- vi. A plain reading of the aforesaid sections would indicate that apart from the offences, of murder and culpable homicide not amounting to murder and rape, all other offences have been classified as civil offences and are not tried by court martial law unless such offences are committed by the delinquent "while on active service" as stipulated under clause (a) of section 72. The words "active service" have received judicial interpretation from this Hon'ble Court as well as the Hon'ble Apex court and it has been held that any person who is employed with military and para-military forces even while he is on 'casual leave' remains on active service. Reference was made in this regard to the judgments of Balbir Singh & Anr. v State of Punjab, reported in (1995) 1 SCC 90 (Reference paragraphs No. 14-16). It has been further held in this judgment that even the person who is/was on active service shall be subject to the provisions of section 475 of the Code of Criminal Procedure, 1973 and the rules framed thereunder. In the instant case, the allegations revolve around commission of offence allegedly punishable under sections 326 and 307 of the Indian Penal Code, 1860 and are not designated offences which are not to be tried by court martial as envisaged under section 72 of the Airforce Act, 1950. Thus, a wholesome conspectus of the provision contained in section 475 of the Code of Criminal Procedure, 1973 and the rules framed thereunder qua the provisions as engrafted under the Airforce Act, 1950 would clearly indicate that it was an obligatory duty on the part of the Learned Magistrate to comply with the mandatory provisions as indicated hereinabove and

the appellant (as in this case) could not have been directly tried by any ordinary criminal court without any reference to the commanding officer. Such a procedure is wholly prejudicial and in fact is de hors the jurisdiction of the Learned Court to proceed with the matter far less to record an order of conviction subsequently.

- vii. It was further argued that the appellant had been convicted for commission of offences punishable under sections 326/307 of the Indian Penal Code, 1860. A plain reading of the said two sections would indicate that the offences are cognate in nature and conviction on both counts was not proper or rather illegal in as much as a person at the same time cannot commit both the offences punishable under sections 326 and 307 on the same victim. It is trite law that where a particular fact in issue or a given set of facts may be so interconnected with other facts that at the stage of framing charges, it is not clear to the court as to which of the offences was committed and, thus, the law permits the Learned Court to frame alternative charges in this regard for the court to finally reach a logical conclusion. However, at the end of the trial, the court cannot convict the accused for both the charges so framed alternately against him. Framing of charge is permissible but conviction on all counts of alternative charges is not permissible in law. Such a course of action not only derails the theory of free and fair trial but also seeks to punish an accused on two or more counts for the same offence. This is precisely what has happened in the instant case. Law in this regard has been explained by this Hon'ble Court in the judgment of

Sunil Kumar Ghash & Ors. v State of West Bengal, reported in (2016) 3 CCLR (Cal) 505 and the appellant would like to beseech this Hon'ble Court to consider Paragraph No. 25 of the said judgment in this regard.

- viii. Another important issue argued was the stage when violation of a mandatory provision can be brought before the Hon'ble Court. The law in this regard was clear and there was no element of confusion that a pure question of law can be raised at any stage of the proceedings, which would mean investigation, enquiry, and/or appeal inasmuch as an appeal is the continuation of the trial. There can be principles of res judicata and/or constructive res judicata and/or waiver may have some application qua the facts of a particular case, but when the question of applicability of a particular provision of law is concerned, there can be no estoppel to such provision receiving attention of the Hon'ble Court. Any law which even attempts to throttle legal issues on the ground of same not being argued earlier is de hors the constitutional mandate of Article 21 and cannot be deemed to be fair, just, and/or equitable in its true sense. Such proposition has been succinctly dealt with by the Hon'ble Apex Court in the case of B.C. Goswami v Delhi Administration, reported in AIR 1973 SC 1457. In the said case, it has been held that in respect of a question of law, which goes to the root of the matter relating to the conviction of an appellant, even the Hon'ble Supreme Court/Appellate Court can appreciate all the arguments that can be advanced in law. Similarly in the case of Isabella Johnson v M.S.

Susai, reported in AIR 1991 SC 993 it has been held that a court cannot be tied down by jurisdiction in law and the principles of res judicata cannot be made applicable when a pure question of law is advanced and the same cannot be dispelled on the ground of estoppel.

- ix. The legal issues involved with respect of section 475 of the Code of Criminal Procedure, 1973 and the rules framed thereunder qua the conviction of the appellant, the proceedings were wholly without jurisdiction and non-est in the eyes of law.

6. The Learned Advocate for the State submitted that-

- i. The very fact that the appellant was in active service of the Indian armed forces has not been argued before the Learned Trial Judge before whom the trial was conducted at any point of time. Although it was true that an appeal was a continuation of the proceedings before Learned Trial Judge, but it was the bounden duty of the appellant to inform the Learned Magistrate before whom he was produced on the very first day that he was a member of the Indian Arms Forces and that he was in active service.
- ii. The appellant miserably failed and neglected to bring the fact of his being a member of the Indian Arms Forces before the Learned Magistrate for his enquiry and or necessary actions being taken in compliance of the provisions of sec 475 of Cr.P.C. and the rules framed there under for the applicability of sec 475 of the Cr.P.C. it was imperative on the part of the appellant to intimate the Learned Magistrate the fact that he was a member of the Indian Arms Forces,

and that he was in active service at the time of commission of the offence since the appellant has failed to bring this fact which was his special knowledge to the notice of the Learned Magistrate before whom he was produced, it is impossible for the Learned Magistrate to infer such knowledge only on the basis of the statement given by the I.O before him.

- iii. It is apparent from the record that the appellant has raised this issue at the belated stage and is trying to take advantage of a provision which has been incorporated by the legislature at the wisdom to avoid conflict of decisions of the competent tribunal under the Indian Army Act and the Learned Magistrate's court under code of criminal procedure. The only intention of the legislature for incorporation of this section in the code is to avoid any conflict of decision and or multiplicity of judgements. The cardinal principal on which this section revolves is to avoid a person who is a member of any arm forces govern by the Indian Army Act to be convicted twice. The appellant was at liberty to intimate the Learned Magistrate about his being in active service at the time of commission of the offence to enable him to take recourse of sec 475 of the code and intimate his superiors to know as to whether the superiors intend to take action against the offenders or they intend the Learned Magistrate to proceed with the trial. Since the appellant has intentionally avoided passing on the information to the Learned Magistrate, it should be construed to be a waiver of his rights.

- iv. On the basis of the arguments made above. It is quite clear that the appellant has not shown any conduct on his part to intimate the Learned Magistrate about his being in active service with Indian Arms Forces and hence it was beyond the power of the Learned Magistrate to even contemplate or conduct any enquiry that weather the appellant was in fact a member of the Arm Forces or not or weather he was in active service at the time of commission of the offence. Since the appellant had waived his right at the time of the trial, the Trial Judge or the Learned Magistrate who were not in a position to apply the provisions of Section 475 of code and also to appreciate the rules framed there under along with Section 71, 72 of the Airforce Act, 1950.
- v. The arguments advanced on behalf of the defence and the judgements relied there on have no manner of application whatsoever in the facts in circumstances of this present case. This arguments could have been substantiated if the appellant would have intimated the fact of his being the members of the Indian Arms Forces or the Indian Air force to the Learned Magistrate for enquiry and on any further actions in compliance of sec 475 of the code of criminal procedure.
- vi. The evidence of the injured victim and the other witnesses along with the exhibited medical documents prove the prosecution case beyond all reasonable doubts. On perusal of the depositions and the exhibit. It is clear that the appellant had in fact committed the offence an

alleged by the prosecution, Hence the judgment and order of conviction so passed should be upheld by the Hon'ble Court.

7. At the outset, whether the appellant is to be tried by a Court-martial as envisaged in Section 475 of the Criminal Procedure Code requires consideration. Reference in the above context can be reckoned to the Order passed in S.T. 13 (4) 06 as replicated hereunder:

S. T. 13 (4) 06

*“Accused on bail is present.*

*Ld. P. P. is present.*

*The petitions dated 29.4.09, 4.5.09 and 5.5.09 filed by the witnesses praying for recall the order of the Court passed on 3.2.09 on the grounds as stated in the petition is taken up for hearing.*

*Heard the Ld. P.P. and the accused person.*

*On perusing the record I find that the accused person has called Air Chief Marshal S.P. Tyagi, Air Chief Marshal F.H. Major, Air Commodore S.P.S. Virk, Group captain M.B. Krishna, A.R.S. 1, 3 Base repair depot, Squadron Leader S.K. Saha, Flying Officer Naresh Goyel, Group Captain Urmi krishnan, Defence Secretary, Ministry of defence Joint Secretary, Ministry of Law and Justice and Deputy Director of the Staff Selection Commission as the defence witnesses in this case on perusing the materials on record I find that the above witnesses cannot have any connection with the incident of this case.*

*On being asked the accused person submits that for his service matter the examination of the above witnesses as the defence witnesses is necessary. But this case is not concerned with the service matter of the accused person and for proper adjudication of this case, the examination of the above defence witnesses not necessary and the accused person may examine the above witnesses in the case relating to his service matter.*

*So on perusing the entire materials on record I hold that examination of the above witnesses as the defence witnesses is not required for proper adjudication of this case. Hence, the above witnesses are discharged without examination and they need not attend the Court on the dates fixed in the summons.*

*The D.W. 1 Rupa Nath is examined and cross examined and discharged.*

*The accused person orally submits that he will not examine any other defence witness in this case. Hence the defence case is closed. The schedule fixed earlier for the examination of the defence witnesses is cancelled today.*

*To 26.5.09 for hearing the argument.*

*D/C by me*

*Addl. S.J.*

*Addl.S.J., F.T.C. III. BKP,*

*North 24 Pgs.”*

8. The petitions dated 29.04.2009, 04.05.2009 and 05.05.2009 state as follows respectively:

**Letter dated 29.04.2009.**

*“Most respectfully showeth:*

- 1. That the applicant has received a witness summon from the learned court to appear on or after 08.05.2009. Xerox copy of the same is filed herewith.*
- 2. That the accused Ramgopal Sikder had been discharged from the Air Force under the provisions of Rule 15 (2) g (i) of Air Force Rules, 1969 as he was a habitual offender and repeatedly remained absent from duty without prior permission /leave.*
- 3. He was discharged from service with effect from 18.06.2006 and officially all steps had been taken in this regard as required under departmental rules/law and as per principles of natural justice and equity. It is submitted that the above*

*mentioned case has got nothing to do with the service of Air Force and same in absence of clarification and /or particulars about the matter.*

*4. That since the witnesses summoned namely Group Captain. Station Commander, 6 Wing. Air Force along with D/W 9, 10, 11, 12, 13, 14, 15 and 22 are acting under the official capacity and put-up at different places, it becomes very difficult, if not impossible for them to appear personally in the court specially when they are completely ignorant and irrelevant to the peculiar facts and circumstances of the present case.*

*5. The present case was absolutely a personal prerogative of the accused in his individual capacity and he himself is responsible for his act of alleged offence and has no relation whatsoever with Air Force service.*

*6. That on the day of incident i.e. on 05.07.2005 Shri Ramgopal Sikder was neither on the duty of Air Force nor he was carrying out any lawful orders of any superior officer. On the very day he was not even discharging any kind of duty whatsoever linked to Air Force or Air Force Authorities as he was on annual leave and the leave was from 26 June to 10 July 2005. Even, the Air Force authorities had no knowledge of the incident till 07 Jul 2005 when West Bengal Police informed Air Force about the arrest of the accused Shri Ramgopal Sikder.*

*7. That the applicant along with D/W 9. 10. 11. 12. 13. 14, 15 and 22 have no role whatsoever linked to the instant case and have nothing to depose relating to the assault complaint of State Vs Ramgopal Sikder. The above said defence witnesses cannot be relevant in any manner to the case filed by the state against the accused. It is also respectfully submitted that accused was not discharging any kind of duty relating to Air Force as he was on annual leave much prior to the day of incident and was residing at his home town beyond the limits of Air Force jurisdiction at the time of alleged offence. In regard to his discharge from service it is further submitted that he was given discharge from service as his service was no longer required and he was unsuitable for retention in service because of his repeated offence of absence from duty without any prior*

permission authorized leave. He was not amenable to service discipline as even after giving sufficient opportunity and cautionary warning he continued to be absent from duty and preferred to carryout in disciplinary activities. Copy of the warning letter dated 26 June 2004 is hereby annexed and marked as Annexure- 'A. Accordingly, he was issued with show cause notice as per rules and was given proper opportunity to present his case prior to his discharge from service. In this manner he could not complete the minimum qualifying service to earn service pension. It is absolutely the fault of accused which resulted in his unscheduled discharge from service without any pensionary benefits. However, in regard to terminal benefits if any accrued to him, he has to approach the appropriate authorities in prescribed manner. In case of any grievance, the accused herein has alternate remedy by way of appealing to the concerned authorities. However instead of availing the same, he intended to harass the authorities in all manners and tried to bring down the image of Air Force. He kept sending threatening letters wherein he did not hesitate to use obscene languages. His malicious intention and low moral character can be revealed from the letter dated 10.09 2007 sent by him to the applicant herein. A copy of the said letter is annexed herewith and marked as annexure- 'B'. It is evident from the activities of Shri Ramgopal Sikder that he intended to blame the esteemed organization of defence without accepting his own fault.

8. Since the instant case has no direct or indirect connection to the Air Force service, the various officials of defence services would not be helpful to the Hon'ble Court as defence witnesses. The officials have no clue of the incident and they will not be able to depose any substance in the instant case.

9. Therefore, in this peculiar circumstances your petitioner prays that your honour would graciously be pleased to consider that your petitioner and D/Ws numbering 9, 10, 11,12,13,14,15 and 22 namely –

(a) Air Chief Marshal SP Tyagi (Retd)

(b) Air Chief Marshal FH Major (Present Chief)

(c) Air Commodore SPS Virk (Air Officer Commanding 3 Base Repair

*Depot)*

*(d) Group Captain MB Krishna ARS-1 3 Base Repair Depot*

*(e) Squadron Leader SK Saha*

*(f) Flying Officer Naresh Goel*

*(g) Group Captain Unnikrishanan( former Station Commander 6 wing Force, Barrackpore)*

*(h) Defence Secretary, Ministry of Defence are nowhere concerned with the facts and circumstances of the instant case and he along with D/W 9, 10, 11, 12, 13, 14,15 and 22 may please be exonerated and released from appearing before your Hon'our by recalling the order of Hon'ble Court passed on 03.02.2009 and to pass any such order or orders as your honour may deem fit and proper and your petitioner as in duty bound shall ever pray."*

**Letter dated 04.05.2009**

*"Most respectfully sheweth :-*

*1) That a Summon has been issued through the Learned Court to Joint Secretary, Ministry of Law & Justice for Deposition as Defence Witness in connection with the above noted case.*

*(Xerox copy of the Some filed here with.)*

*2) That the Learned Counsel has been appointed in this regard for taking necessary steps and after going through the Record and/or after inspection of the Record, it appears that Summon in question had/has not been duly issued to the Defence Witness.*

*3) That there is none as Joint Secretary, Ministry of Law & Justice and the Applicant, Sr. Govt. Advocate, namely, Sm. Sarmistha Bhattacharyya, at present is working as In-Charge of the Branch Secretariat of Ministry of Law & Justice.*

4) That the Applicant has no way connection with the instant case and has nothing to depose relating to the assaulting or alleged offence committed by the Accused.

5) That the present case was/is absolutely prerogative of the Accused in his individual capacity and he himself is responsible for his act of alleged offence.

6) That the Applicant, a responsible Office having no knowledge or information nor even the Applicant was/is connected in this matter in any manner whatsoever and thus the Applicant's appearance in the Court as Witness has got no relevancy and it will not be improved the case of any one of the either party nor it will help to the Learned Court came to any rightful decision in any way whatsoever, so the Applicant's name may kindly be expunged from the List of the Defence Witness. Perhaps same has been added through mistake.

In this circumstances stated above, it is therefore prayed that Your Honour may be graciously pleased to pass necessary order by re-calling the Order dated 03.02.2009 as Your Honour may deem fit and proper.

And your Petitioner, as in duty bound, shall ever pray.”

### **Letter dated 05.05.2009**

“Most respectfully sheweth :-

1. That a summon has been issued through the Learned Court to Deputy Director of Staff Selection Commission for deposition as defence witness on 16.5.2009 before your Honour's Court in connection with the above mentioned case.(Xerox copy of the summon filed herewith.)

2. That learned Council is appointed by Ministry of Law for taking necessary steps in this regard.

3. That applicant has no way connection with the instant case and has nothing to depose relating to the assaultation or alleged offence committed by the accused.

4. That the applicant a responsible official having no knowledge nor even the applicant was/is connected in this matter in any manner whatsoever and thus the applicant's appearance in the court as witness has got no relevancy and it will not improved the case of any one of the either party nor it will help the learned court to come to any rightful decision. So the applicant's name may kindly be expunge from the list of the defence witness.

*In this circumstances stated above it is therefore prayed that your Honour may be graciously pleased to expunge the name of Deputy Director of Staff Selection Commission as defence witness by recalling the order dated 3.2.2009 and pass such other order or orders as your Honour may deem fit and proper.*

*And your petitioner as in duty bound, shall ever pray.”*

9. In the case of ***The State of Sikkim Vs. Jasbir Singh & Anr.***<sup>1</sup>, the Hon’ble Supreme Court observed as follows:

*“14 Chapter VI of the Army Act deals with offences. The expression ‘civil offences’ is defined in Section 3(ii) to mean “an offence which is triable by a criminal court”. Section 69<sup>2</sup> deals with civil offences. Section 70<sup>3</sup> deals with civil offences which are not triable by a court-martial.*

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<sup>1</sup> Criminal Appeal No. 85 of 2022

<sup>2</sup> **“69. Civil offences.** Subject to the provisions of section 70, any person subject to this Act who at any place in or beyond India, commits any civil offence, shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say,--

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

**15** *Section 1254 deals with a situation where both a criminal court and a court-martial have jurisdiction in respect of an offence. In such a case, it is the discretion of the Commanding Officer of the unit where the accused person is serving to decide before which court the proceedings shall be instituted, and if that officer decides that the proceedings should be instituted before a court-martial, he may direct that the accused be retained in military custody. Section 125, in other words, confers the discretion on the designated officer to decide whether the accused should be tried by a court martial or by the regular criminal court.*

**16** *Section 126, as the marginal note indicates, deals with the powers of the criminal court “to require delivery of offender”. Section 126 provides that when a criminal court having jurisdiction is of the opinion that the proceedings should be instituted before itself in respect of “any alleged offence”, it may by written notice require the officer referred to in Section 125 to either deliver over the offender to the nearest magistrate to be dealt with in accordance with law or in the alternative to postpone the proceedings, pending a reference to the Central Government. Under Section 126, the designated officer has two courses of action open: (i) deliver the offender in compliance with the requisition of the criminal court; or (ii) refer the question to the Central Government for determining the court before*

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(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned.”

<sup>3</sup> **“70. Civil offence not triable by court-martial.** A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court- martial, unless he commits any of the said offences-

(a) while on active service, or

(b) at any place outside India, or

(c) at a frontier post specified by the Central Government by notification in this behalf.”

<sup>4</sup> **“125. Choice between criminal court and court- martial.** When a criminal court and a court- martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court- martial, to direct that the accused person shall be detained in military custody.”

*which the proceedings are to be instituted. The determination by the Central Government is to be final.*

**17** *Sections 125 and 126 operate in different domains. Section 125 envisages that there is a discretion in the designated officer to determine as to whether the accused should be tried by a court-martial or by the competent criminal court. Section 126 on the other hand recognises that the criminal court may require the officer designated in Section 125 by a written notice, to deliver the offender to the nearest magistrate to be proceeded with in accordance with law. Upon the issuance of such a written notice, the designated officer has the discretion either to accept the decision of the criminal court by delivering the offender or the officer may decide to refer the matter to the Central Government for its decision. Section 126 explicitly recognises that in the event of a difference of view between the officer designated under Section 125 and the criminal court under Section 126, the matter has to be referred to the Central Government for resolution, finality being attached to the decision of the Central Government. Section 126, in other words, has provided the modalities for resolving a situation where a criminal court decides to proceed against the accused, while on the other hand the designated officer under Section 125 decides to have the accused tried by a court-martial. It is to resolve a situation of this nature that a reference is envisaged to the Central Government.*

**18** *Section 475<sup>5</sup> of the CrPC has empowered the Central Government to make rules consistent with the CrPC and the Army Act, Navy Act 1957 and*

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<sup>5</sup> **“475. Delivery to commanding officers of persons liable to be tried by Court-martial-** (1) The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 1950), and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, navel or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air-force station, as the case may be, for purpose of being tried by a Court-martial.

Explanation.—In this section—

*the Air Force Act 1950 and any other law relating to the Armed Forces of the Union, as regards the cases in which persons subject to military, naval or air force law or such other law, shall be tried by a court to which the CrPC applies or by a court-martial. The first part of Section 475(1) recognizes the rule making power of the Central Government. The latter part of Section 475(1) contemplates an eventuality in which a person is brought before a Magistrate and is charged with offences for which that person is liable to be tried either by a court to which the CrPC applies or by a court-martial. In such a situation, the Magistrate is to have regard to the rules and shall in proper cases deliver the person together with a statement of the offences of which he is accused to the Commanding Officer of the unit of the nearest military, naval or air force station, for the purpose of being tried by a court-martial.*

**19** *In exercise of the powers which have been conferred by Section 475 of the CrPC, the Central Government framed the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 1952 which were notified and published in the Gazette of India on 26 April 1952. These Rules were superseded by the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules 1978. Rules 3, 4, and 5 of the 1978 Rules are extracted below:*

*“3. Where a person subject to military, naval or air force law, or any other law relating to the Armed Forces of the Union for the time being in force is brought before a Magistrate and charged with an offence for which he is also liable to be tried by a Court-martial, such Magistrate shall not proceed to try such person or to commit the case to the Court of Session, unless—*

*(a) he is moved thereto by a competent military, naval or air force authority; or*

*(b) he is of opinion, for reasons to be recorded, that he should so proceed or to commit without being moved thereto by such authority.*

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(a) "unit" includes a regiment, corps, ship, detachment, group, battalion or company.

(b) "Court-martial" includes any tribunal with the powers similar to those of a Court-martial constituted under the relevant law applicable to the Armed Forces of the Union.

(2) Every Magistrate shall, on receiving a written application for that purposes by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Court-martial.”

4. Before proceeding under clause (b) of rule 3, the Magistrate shall give a written notice to the Commanding Officer or the competent military, naval or air force authority, as the case may be, of the accused and until the expiry of a period of fifteen days from the date of service of the notice he shall not-

(a) convict or acquit the accused under section 252, sub-sections (1) and (2) of section 255 sub-section (1) of section 256 or section 257 of the Code of Criminal Procedure, 1973 (2 of 1974), or hear him in his defence under section 254 of the said Code; or

(b) frame in writing a charge against the accused under section 240 or sub-section (1) of section 246 of the said Code; or

(c) make an order committing the accused for trial to the Court of Session under section 209 of the said Code; or

(d) make over the case for inquiry or trial under section 192 of the said Code.

5. Where a Magistrate has been moved by the competent military, naval or air force authority, as the case may be, under clause (a) of rule 3, and the commanding officer of the accused or the competent military, naval or air force authority, as the case may be, subsequently gives notice to such Magistrate that, in the opinion of such officer or authority, the accused should be tried by a Court-martial, such Magistrate if he has not taken any action or made any order referred to in clauses (a), (b), (c) or (d) of rule 4, before receiving the notice shall stay the proceedings and, if the accused is in his power or under his control, shall deliver him together with the statement referred to in sub-section (1) of section 475 of the said Code to the officer specified in the said sub-section."

**20** Under Rule 3, where a person who is subject to military, naval or air force law, (or any other law relating to the Armed Forces of the Union) is brought before a Magistrate and is charged with an offence liable to be tried by a court-martial, the Magistrate cannot proceed to try such a person or commit the case to the Court of Session, except in one of the two eventualities specified in clauses (a) and (b). Clause (a) envisages a situation where the Magistrate is moved by a competent military, naval, or air force authority. Clause (b) envisages a situation where the Magistrate is of the opinion that the person should be tried by him or that the case should be committed to the Court of Session.

**21** Rule 4(c) provides that before proceeding under clause (b) of Rule 3, the Magistrate has to give a written notice to the Commanding Officer or the competent authority of the accused and until the expiry of fifteen days, the Magistrate cannot make an order committing the accused for trial to the Court of Session under Section 209 of the CrPC. Rule 5 deals with a

situation where the Magistrate has been moved by the competent military, naval or air force authority under clause (a) of Rule 3 and subsequently, the Commanding Officer or competent authority gives notice to the Magistrate that in the opinion of the officer, the accused should be tried by a court-martial.

**22** The purpose underlying Rule 3 and Rule 4 is that unless the Magistrate has been moved by a competent military, naval or air force authority, the Magistrate must furnish a written notice to the Commanding Officer or the competent authority, if he is of the opinion that either the trial should proceed before the Magistrate or an order of committal of the case to the Court of Sessions should be passed against the accused held liable to be tried by a court-martial. The object and purpose of giving the notice is to facilitate an exercise of discretion by the designated officer to determine whether the accused should be tried by a court-martial or in the alternative, should be proceeded with before the ordinary criminal court. The above provisions have been interpreted in several decisions of this Court.

**23** In **Ram Sarup v. Union of India and another**<sup>6</sup>, the petitioner, who was a sepoy subject to the Army Act, was charged under Section 69 of the Army Act read with Section 302 of the IPC. The petitioner was tried by the General Court-Martial for having shot dead two sepoys, and was found guilty and sentenced to death. The Central Government confirmed the findings and the sentence awarded by the General Court-Martial. The petitioner inter alia challenged the provisions of Section 125 of the Army Act on the ground that they were in violation of Article 14 of the Constitution. While dealing with the constitutional challenge, Justice Raghubar Dayal, speaking for the Constitution Bench observed as follows:

“17. Section 69 provides for the punishment which can be imposed on a person tried for committing any civil offence at any place in or beyond India, if charged under Section 69 and convicted by a Court Martial. Section 70 provides for certain persons who cannot be tried by Court Martial, except in certain circumstances. Such persons are those who commit an offence of murder, culpable homicide not amounting to murder or of rape, against a person not subject to Military, Naval or

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<sup>6</sup> (1964) 4 SCR 931

*Air-Force law. They can be tried by Court Martial of any of those three offences if the offence is committed while on active service or at any place outside India or at a frontier post specified by the Central Government by notification in that behalf. This much therefore is clear that persons committing other offences over which both the Court Martial and ordinary criminal courts have jurisdiction can and must be tried by Courts-Martial if the offences are committed while the accused be on active service or at any place out-side India or at a frontier post. This indication of the circumstances in which it would be better exercise of discretion to have a trial by Court Martial, is an index as to what considerations should guide the decision of the officer concerned about the trial being by a Court Martial or by an ordinary Court. Such considerations can be based on grounds of [maintenance] of discipline in the army, the persons against whom the offences are committed and the nature of the offences. It may be considered better for the purpose of discipline that offences which are not of a serious type be ordinarily tried by a Court Martial, which is empowered under Section 69 to award a punishment provided by the ordinary law and also such less punishment as be mentioned in the Act. Chapter VII mentions the various punishments which can be awarded by Court Martial and Section 72 provides that subject to the provisions of the Act a Court Martial may, on convicting a person of any of the offences specified in Sections 31 to 68 inclusive, award either the particular punishment with which the offence is stated in the said sections to be punishable or in lieu thereof any one of the punishments lower in the scale set out in Section 71, regard being had to the nature and degree of the offence.”*

**24** *In the above extract, the Court dealt with the considerations which would ultimately weigh in determining as to whether a trial by a court-martial should be convened. In that backdrop, the Court noted :*

***“21. In short, it is clear that there could be a variety of circumstances which may influence the decision as to whether the offender be tried by a Court Martial or by an ordinary criminal court, and therefore it becomes inevitable that the discretion to make the choice as to which Court should try the accused be left to responsible military officers under whom the accused be serving. Those officers are to be guided by considerations of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence is committed.”***

***(emphasis supplied)***

**25** *Hence in the view of the Constitution Bench, there are a wide variety of circumstances which may be relevant in deciding whether an accused should be tried by a court-martial or by an ordinary criminal court. Due to this, the choice of making this decision is entrusted to the military officer under whom the accused was serving. The Court also noted that under*

Section 549 of the Code of Criminal Procedure 1898 (equivalent to Section 475 of the CrPC), the final choice about the forum of the trial of a person accused of a 'civil offence' rests with the Central Government, whenever there is a difference of opinion between a criminal court and the military authority.

**26 In *Som Datt Datta v. Union of India*<sup>7</sup>**, the Constitution Bench considered a challenge under Article 32 to the proceedings before a General Court-Martial, pursuant to which the petitioner had been found guilty of charges under Section 304 and Section 149 of the IPC and sentenced to rigorous imprisonment of six years and cashiering. The first question which was considered by the Constitution Bench was whether the Court-Martial had jurisdiction to try and convict the petitioner for the offences. Justice V Ramaswami, speaking for the Constitution Bench, elaborated that under Chapter VI of the Army Act, Sections 34 to 68 define the offences against the Act which are triable by a court-martial. After alluding to Sections 69 and 70, the Court observed:

"4. [...] Shortly stated, under this Chapter there are three categories of offences, namely, (1) offences committed by a person subject to the Act triable by a Court Martial in respect whereof specific punishments have been assigned; (2) civil offences committed by the said person at any place in or beyond India, but deemed to be offences committed under the Act and, if charged under Section 69 of the Act, triable by a Court Martial; and (3) offences of murder and culpable homicide not amounting to murder or rape committed by a person subject to the Act against a person not subject to the military law. Subject to a few exceptions, they are not triable by Court Martial, but are triable only by ordinary criminal courts. The legal position therefore is that when an offence is for the first time created by the Army Act, such as those created by Sections 34, 35, 36, 37 etc., it would be exclusively triable by a Court Martial; but where a civil offence is also an offence under the Act or deemed to be an offence under the Act, both an ordinary Criminal Court as well as a Court Martial would have jurisdiction to try the person committing the offence. Such a situation is visualized and provision is made for resolving the conflict under Sections 125 and 126 of the Army Act."

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<sup>7</sup> (1969) 2 SCR 177

**27** The Court noted that where a civil offence is also an offence under the Army Act or is deemed to be an offence under the Act, both the ordinary criminal court as well as the court-martial have jurisdiction to try the accused committing the offence. In that case, the petitioner argued that the Commanding Officer had not furnished a notice under Rule 5 to the Magistrate that the petitioner should be tried by a court-martial and hence the criminal court alone had jurisdiction. This submission was held to be misconceived for the following reasons:

“7. It was argued on behalf of the petitioner that there was no notice given by the Commanding Officer to the Magistrate under Rule 5 that the petitioner should be tried by a Court Martial and hence the criminal court alone had jurisdiction under Rule 3 to conduct proceedings against the petitioner for the offences charged. In our opinion, the argument on behalf of the petitioner is misconceived. The Rules framed by the Central Government under Section 549 of the Criminal Procedure Code apply to a case where the proceedings against the petitioner have already been instituted in an ordinary Criminal Court having jurisdiction to try the matter and not at a stage where such proceedings have not been instituted. **It is clear from the affidavits filed in the present case that the petitioner was not brought before the Magistrate and charged with the offences for which he was liable to be tried by the Court Martial within the meaning of Rule 3 and so the situation contemplated by Rule 5 has not arisen and the requirements of that Rule are therefore not attracted.** It was pointed out by Mr Dutta that after the first information report was lodged at Pallavaran police station a copy thereof should have been sent to the Magistrate. But that does not mean that the petitioner “was brought before the Magistrate and charged with the offences” within the meaning of Rule 3. **It is manifest that Rule 3 only applies to a case where the police had completed investigation and the accused is brought before the Magistrate after submission of a charge-sheet. The 24 provisions of this Rule cannot be invoked in a case where the police had merely started investigation against a person subject to military, naval or air force law.** With regard to the holding of the inquest of the dead-body of Spr. Bishwanath Singh it was pointed out by the Attorney-General that Regulation 527 of the Defence Services Regulations has itself provided that in cases of unnatural death that is death due to suicide, violence or under suspicious circumstances information should be given under Section 174 of the Criminal Procedure Code to the civil authorities, and the conduct of Maj. Agarwal in sending information to the civil police was merely in accordance with the provisions of this particular regulation. For these reasons we hold that counsel for the petitioner is unable to make good his argument on this aspect of the case.” **(emphasis supplied)**

**28** From the above extract, it is evident that the Constitution Bench held that the Rules applied in a situation where proceedings had already been instituted in an ordinary criminal court. In that case, the petitioner was not brought before the Magistrate and charged with an offence for which he was liable to be tried by the court-martial. Rule 3 only applied, as the Court noted, where the police had completed the investigation and the accused was brought before the Magistrate after the submission of the charge-sheet. The decision in **Som Datt Datta (supra)**, in other words, dealt with a situation where the offender had been tried by a court-martial. The argument that the Rules applied but had not been followed by the competent officer was rejected.

**29** In **Joginder Singh v. State of Himachal Pradesh**<sup>8</sup>, a two-judge Bench of this Court dealt with a case where the appellant, who was governed by the Army Act, challenged the legality of his trial and conviction for committing the offence under Section 376 of the IPC by the Assistant Sessions Judge, Nahan. Unlike the situation before the Constitution Bench in **Som Datt Datta (supra)** (where the accused had been tried by a court-martial), in **Joginder Singh (supra)** the accused had been tried and convicted by the Sessions Court. In that case, the appellant who was subject to the Army Act was alleged to have committed rape in relation to a person who was not subject to military, naval or air force law and hence under Section 70, the accused could normally be tried by an ordinary criminal court. However, since the appellant was in active service at the time of the alleged offence, the court-martial also had the jurisdiction to try him and the case involved a situation where both the court-martial and the ordinary criminal court had concurrent jurisdiction. After considering the earlier judgments of this Court in **Major EG Barsay v. State of Bombay**<sup>9</sup>, **Ram Sarup (supra)** and **Som Datt Datta (supra)**, the Court observed:

“22. It is further clear that in respect of an offence which could be tried both by a criminal court as well as a Court-martial Sections 125, 126 and

<sup>8</sup> (1971) 3 SCC 86

<sup>9</sup> (1962) 2 SCR 195

*the Rules, have made suitable provisions to avoid a conflict of jurisdiction between the ordinary criminal courts and the Court-martial. But it is to be noted that in the first instance, discretion is left to the officer mentioned in Section 125 to decide before which court the proceedings should be instituted. Hence the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed will have to exercise his discretion and decide under Section 125 in which court the proceedings shall be instituted. **It is only when he so exercises his discretion and decides that the proceedings should be instituted before a Court-martial, that the provisions of Section 126 (1) come into operation. If the designated officer does not exercise his discretion and decides that the proceedings should be instituted before a Court-martial, the Army Act would not obviously be in the way of a criminal court exercising its ordinary jurisdiction in the manner provided by law.*** (emphasis supplied)

**30** *In the above observation, the Court clarified that Sections 125 and 126 have made provisions to avoid a conflict of jurisdiction between ordinary criminal courts and a court-martial in respect of an offence which could be tried by both the criminal court and by a court-martial. The Court observed that Section 125 leaves the discretion, in the first instance, with the competent officer and it is only when he so exercises the discretion and decides that the proceedings should be instituted before a court-martial that Section 126 would come into operation. If the designated officer does not exercise this discretion to institute proceedings before a court-martial, the Army Act would not interdict the exercise of jurisdiction by the ordinary criminal court. After adverting to the provisions of the Rules, the Court noted:*

*“29. Rule 4 is related to clause (a) of Rule 3 and will be attracted only when the Magistrate proceeds to conduct the trial without having been moved by the competent military authority. **It is no doubt true that in this case the Assistant Sessions Judge has not given a written notice to the Commanding Officer as envisaged under Rule 4. But, in our view, that was unnecessary. When the competent military authorities, knowing full well the nature of the offence alleged against the appellant, had released him from military custody and handed him over to the civil authorities, the Magistrate was justified in proceeding on the basis that the military authorities***

***had decided that the appellant need not be tried by the Court-martial and that he could be tried by the ordinary criminal court.”***

**31** In **Joginder Singh (supra)** therefore the Court noted that the absence of a written notice to the competent officer under Rule 4 was unnecessary where the competent military authorities, knowing about the nature of the offence alleged against the appellant, released him from military custody and handed him over to the civil authorities. In such a situation, it was held that the Magistrate was justified in proceeding on the basis that the military authorities had decided that the appellant need not be tried by a court-martial and that he should be tried by the ordinary criminal court.

[.....]

**35** In **Extra-Judicial Execution Victim Families Association and Another v. Union of India**<sup>10</sup>, a submission was urged on behalf of the Union of India that an offence committed by a member of the Armed Forces must be tried under the provisions of the Army Act through a court-martial and not under the CrPC. Justice Madan B Lokur, speaking for the two-judge Bench, inter alia adverted to the decisions of the Constitution Benches in **Ram Sarup (supra)** and **Som Datt Datta (supra)**. The Court also referred to the following extract from the decision in **Balbir Singh and Another v. State of Punjab**<sup>11</sup>:

“240. In para 17 of the Report in Balbir Singh case [Balbir Singh v. State of Punjab, (1995) 1 SCC 90 : 1995 SCC (Cri) 202] , this was held as follows : (SCC pp. 99-100)

“17. A conjoint reading of the above provisions shows that when a criminal court and court martial each have jurisdiction in respect of the trial of the offence, it shall be in the discretion of the officer commanding the group, wing or station in which the accused is serving or such other officer as may be prescribed, in the first instance, to decide before which court the proceedings shall be instituted and if that officer decides that they should be instituted before a “court martial”, to direct that the accused persons shall be detained in air force custody. Thus, the option to try a person subject to the Air Force Act who commits an offence while on “active service” is in the first instance with the Air Force Authorities.

**The criminal court, when such an accused is brought before it shall**

<sup>10</sup> (2016) 14 SCC 536

<sup>11</sup> (1995) 1 SCC 90

not proceed to try such a person or to inquire with a view to his commitment for trial and shall give a notice to the Commanding Officer of the accused, to decide whether they would like to try the accused by a court martial or allow the criminal court to proceed with the trial. In case, the Air Force Authorities decide either not to try such a person by a court martial or fail to exercise the option when intimated by the criminal court within the period prescribed by Rule 4 of the 1952 Rules (supra), the accused can be tried by the ordinary criminal court in accordance with the Code of Criminal Procedure. On the other hand if the Authorities under the Act opt to try the accused by the “court martial”, the criminal court shall direct delivery of the custody of the accused to the Authorities under the Act and to forward to the Authorities a statement of the offence of which he is accused. It is explicit that the option to try the accused subject to the Act by a court martial is with the Air Force Authorities and the accused person has no option or right to claim trial by a particular forum. ...

... However, in the event the criminal court is of the opinion, for reasons to be recorded, that instead of giving option to the Authorities under the Act, the said court should proceed with the trial of the accused, without being moved by the competent authority under the Act and the Authorities under the Act decide to the contrary, the conflict of jurisdiction shall be resolved by the Central Government under Section 125(2) of the Act and the decision as to the forum of trial by the Central Government in that eventuality shall be final.” (emphasis supplied)

**36** *The Court also adverted to the following extract from the decision in the Additional Director General, Army Headquarters v. Central Bureau of Investigation*<sup>12</sup>:

“244. This Court in Army Headquarters case [Army Headquarters v. CBI, (2012) 6 SCC 228 : (2012) 3 SCC (Cri) 88] then recorded its conclusions in para 95 of the Report and they read as follows : (SCC p. 264)

“95. To sum up:

95.1. The conjoint reading of the relevant statutory provisions and Rules make it clear that the term “institution” contained in Section 7 of the 1990 Act means taking cognizance of the offence and not mere presentation of the charge-sheet by the investigating agency.

95.2. The competent army authority has to exercise his discretion to opt as to whether the trial could be by a court martial or criminal court after filing of the charge-sheet and not after the cognizance of the offence is taken by the court.

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<sup>12</sup> (2012) 6 SCC 228

95.3. Facts of this case require sanction of the Central Government to proceed with the criminal prosecution/trial. 95.4. In case option is made to try the accused by a court martial, sanction of the Central Government is not required.”

**37** In this backdrop, the Court held that if an offence is committed even by Army personnel, there was no concept of absolutely immunity from trial by the criminal court constituted under the CrPC. Rejecting the submission of the Union of India, the Court observed:

“246. The result of the interplay between Section 4 and Section 5 CrPC and Sections 125 and 126 of the Army Act makes it quite clear that the decision to try a person who has committed an offence punishable under the Army Act and who is subject to the provisions of the Army Act does not always or necessarily lie only with the Army — the criminal court under CrPC could also try the alleged offender in certain circumstances in accordance with the procedure laid down by CrPC.”

[.....]

**41** Broadly speaking there are three categories of offences. First, the provisions of Chapter VI of the Army Act indicate that where an offence is created by the Act itself it would be exclusively triable by a court-martial. Second, where a ‘civil offence’ is also an offence under the Army Act or is deemed to be an offence under the Act, both the ordinary criminal court as well as court-martial would have jurisdiction to try the person committing the offence. The third category (referred to in Section 70) consists of the offences of murder, culpable homicide not amounting to murder or rape committed by a person subject to the Army Act against a person who is not subject to military, naval or air force law. Subject to the three exceptions which are set out in Section 70, such offences are not triable by a court-martial but by an ordinary criminal court.

**42** The offence in the present case does not fall in the category of those offences which are triable exclusively by a court-martial (Section 34 to 68) or those offences which cannot be tried by a court-martial (under Section 70). The offence with which the respondent-accused is charged falls in the category where there is a concurrent jurisdiction between the court-martial and the ordinary criminal court. Hence, it needs to be underscored that

*there is no inherent lack of jurisdiction in the ordinary criminal court to conduct a trial in accordance with the procedure envisaged in the CrPC.*

**43** *Section 69 provides when a person who is subject to the Act shall be deemed to be guilty of an offence against the Act. Section 69 of the Army Act has been made subject to the provisions of Section 70. When a provision of a statute is made subject to another provision by the legislature, this evinces an intent that where the latter provision is attracted, the former would give way. Where the conditions requisite for the application of Section 70 exist, Section 69 would give way to Section 70. Section 70 provides for the conditions in which a person who is subject to the Army Act shall not be deemed to be guilty of an offence under the Act and shall not be tried by a court-martial. In other words, Section 70 of the Army Act provides for where the court-martial would not exercise jurisdiction (unless the case falls under the exceptions to Section 70). When the provisions of Section 70 apply, a person who is subject to the Army Act is not deemed to be guilty of an offence under the Act if the ingredients of that provision are fulfilled. The ingredients of Section 70 are:*

- (i) The offence must be committed by a person subject to the Army Act;*
- (ii) The offence must be committed against a person who is not subject to military, naval or air force law; and*
- (iii) The offence must be of murder, culpable homicide not amounting to murder or rape.*

*Where these conditions apply, the person is not deemed to be guilty of an offence under the Act and is not to be tried by a court-martial unless the three exceptions which are carved out in clauses (a), (b) and (c) of Section 70 are attracted.*

**44** *In the present case, the conditions requisite for the application under Section 70 do not stand attracted for the reason that the offence in the present case was committed against a person who was subject to military law and in any event, the offence was committed by the respondent while on active service in Sikkim. Since Section 70 has no application, the*

*respondent who is alleged to have committed a 'civil offence' in India would be subject to the provisions of the Army Act as provided by Section 69. The crucial words of Section 69 however are that an accused "shall be deemed to be guilty of an offence against this Act" and "if charged therewith under this section, shall be liable to be tried by a court-martial". The liability to be tried by a court-martial arises if the person is charged with an offence under "this section", that is Section 69. The language of Section 69 is a clear indicator that it does not ipso jure oust the jurisdiction of the ordinary criminal court. Where there exists concurrent jurisdiction in the court-martial and in the ordinary criminal court, primarily the discretion of conducting the court-martial in preference to a trial by the ordinary criminal court is entrusted to the designated officer under Section 125. The designated officer has been conferred with the discretion "to decide before which court the proceedings shall be instituted". Moreover, Section 125 has a conjunctive requirement which is amplified by the expression "and, if that officer decides that they should be instituted before a court-martial". Thus, the conjunctive requirement under Section 125 is that the competent officer has the discretion to decide before which court the proceedings shall be instituted and if the officer exercises that discretion to institute proceedings before a court-martial, then the officer will direct that the accused be detained in military custody. Section 125, in other words, not only recognizes that an element of discretion has been vested in the designated officer, but it also postulates that the designated officer should have decided that the proceedings be instituted by the court-martial in which event the court-martial would take place."*

10. In the petition dated 29.04.2009, the group Captain, Station Commander, 6 Wing Air Force stated the incident of 05.07.2005 was brought to the knowledge of the Air Force Authorities on 7<sup>th</sup> July, 2005 by the West Bengal Police informing the arrest of the appellant. It was further stated that the appellant was discharged from service with effect from 18.06.2006. It was further stated

that the appellant was neither on the duty of the Air Force nor he was carrying out any lawful orders of any superior officer. On the relevant day he was not even discharging any kind of duty whatsoever linked to Air Force or Air Force Authorities as he was on annual leave which was from 26<sup>th</sup> June to 10<sup>th</sup> July 2005.

11. On 7<sup>th</sup> July, 2005, the Air Force authorities were aware of the offence committed by the appellant but refrained to interfere with further proceedings without claiming the appellant to be tried by such authorities. Moreover, the aforesaid authorities stated to have initiated disciplinary proceedings against the appellant prior to the date of his commission of the offence. The Air Force authorities relinquished their obligations to consider and try the offender as inferred through their actions. The said Authority did not indicate their intention or course of action to try the offender either to the police or to the Magistrate. By the time the trial was initiated the appellant was discharged from his service already.
12. Relying on the observation of the Hon'ble Supreme Court in the decision cited above and the fact of refusal on the part of the Air Force Authorities to deal with the appellant as enumerated above, the Learned Trial Court has rightly dealt with the Sessions Trial accordingly.
13. A circumspection of the evidence of the prosecution witnesses reveal as follows:

P.W.- 1 in his deposition stated as follows:

He was an auto driver of the route from Dunlop to the Bandel station.

Incident happened at about 1:30 p.m. on a day about one year and three

months back. At that time he was at Dunlop Ghat auto stand one gentleman and one lady came there and hired his auto to carrying them to Naihati Maruti van stand near Malgoodam. He carried both persons to that place. After getting down from the auto, they hired a Maruti van for going to Sodepur. At the time getting down from the auto the lady told him something. Then he asked the lady as to what she was going to tell him. The gentle who was with her then turned back and taking out a 'Dao' from the bag with him made hit on that lady from the back. Then he caught hold of that person in order to save the lady. As a result of assault that lady sustained bleeding injury from her head. Then the local people came and they apprehended the particular person. He took the injured lady to Naihati Hospital with the help of local people and she was admitted to hospital. He then lodged a complaint Naihati P.S. at the request of the police. The said written complaint, written and signed by him, was marked as Ext. 1. The carbon impression of his signature on carbon copy of the seizure list was marked as Ext. 2. He was able to identify the said injured lady, who came to his house on one occasion after the incident in the Court, who was assaulted i.e. PW-2. The person who assaulted the said lady is present in court today. PW-1 identified the appellant in the Court.

P.W. 2 in her deposition stated as follows:

She knew Ramgopal Sikdar. At the relevant time she was a graduate. Her father was not alive. She resided with her widow mother at Khamarpara Beltala under P.S. Chinsura. Her mother earned through knitting machine. In the daily Ananda Bazar dt. 13<sup>th</sup> March 2005 the appellant advertised for

an alliance. In response to such advertisement her mother sent a communication to the appellant, proposing her marriage with him. After negotiation Ramgopal Sikdar selected her and it was decided the marriage will be held under Special Marriage Act. On 1<sup>st</sup> July 2005 notice for such proposed marriage was issued under Special Marriage Act. Ramgopal used to visit her house while negotiation of such marriage was going on and prior to 1<sup>st</sup> July 2005. It was decided that marriage will held under Special Marriage Act on 6<sup>th</sup> August '05. It was settled that on 5<sup>th</sup> July 2005 Ramgopal would come to her house with one of his friends, one neighbor and his uncle. Ramgopal Sikdar informed this schedule of visit on 05.07.2005 over phone in the morning. However, in between 12 clock to 12.30 on 05.07.2005 Ramgopal alone came to our house. He was having a side bag with him. When Ramgopal Sikdar entered their house, her mother was in the bathroom for taking bath. Beside herself and her mother there was nobody else in the house on that date. As soon as Ramgopal entered in to the room, her mother came out of bathroom and entered into the said room. She also was in the said room. Then Ramgopal closed the door of the room from inside with the latch and insisted to take her to his house at Sodepore. PW-2 and her mother objected to such proposal as prior to registration of marriage, she was not willing to go the house of Ramgopal at Sodepore. Then Ramgopal going near the door of the room took out a 'Dao' from his bag and put it on the neck of her mother. PW-2 then tried to resist Ramgopal but he kicked her several times and when her mother implored by touching his legs, she also was kicked by Ramgopal. Romgopal had threatened to kill PW-2 and her mother and asked PW-2 to get prepared for

going to his house. Ramgopal did not allow her to go to other room for changing her dress and asked her to change her dress in that room. Being constantly threatened PW-2 she had to change her dress in that room in his presence. Ramgopal Sikdar then took her out of the room under the threat of the 'Dao' by keeping the 'Dao' inside the side bag in such a way that nobody else could see the said 'Dao' and he took her to main road at Banshberia and he boarded her in an auto at Banshberia Beltala and held that 'Dao' behind her. They got down at Dunlop Ghat, she could not raise a cry as Ramgopal threatened to murder her.

At Dunlop Ghat, Ramgopal reserved an auto for going to Bandel Railway station. At that time, she could not raise cry as Ramgopal was still holding the 'Dao' touching her body. After going some distance, Ramgopal ordered the auto driver to go to Sodepore. As per direction of Ramgopal Sikdar the auto came to Maruti stand at Naihati near Malgodam along Iswargupta Setu. During the journey from Bandel station to Naihati she tried to shout and express something by gesture to the auto driver in order to save herself but he could not understand her indication. Near Naihati Malgudum after getting down from the auto, the auto driver asked her something and when she was going to talk with auto driver Ramgopal came there, following her. Auto driver then told Ramgopal to leave the place so that he would talk to PW-2 but Ramgopal refused to go and stated the to converse in his presence. When she was getting down from the auto she told the auto driver to inform the incident to P.S. but he could not understand her indication. When she was about to talk to auto driver, Ramgopal came there following her and hit on her head, neck, ears with the 'Dao'. When Ramgopal was about to hit

her for the second time with the 'Dao', the auto driver caught hold of his hands and she shouted 'Save me, Save me'. As a result of the assault she sustained bleeding injury and she placed a piece of red cloth on the place of injury. She was able to identify the said cloth, marked as Mat Ext. I. She was able to identify the said 'Dao' with which assault was made, marked as Mat Ext. II. She was able to identify the said side bag of Ramgopal Sikdar, marked as Mat Ext. III. She was taken to hospital by the said auto driver by his auto with the help of local people. Some local people caught the Ramgopal. She was admitted in hospital. Police came to her in that hospital twice on that date and she made statement to police. She was discharged from the hospital on the 16<sup>th</sup> day. After being discharged from the hospital she came to court and made statement before the Learned Magistrate.

PW-2 identified her signatures on the statement recorded by Ld. Magistrate, collectively marked as Ext. 3/1. PW-2 identified the appellant in Court.

14. The evidence of PW-1 and PW- 2, the eyewitness and the injured witness respectively was corroborated by independent, disinterested witnesses namely, PW-5 who in his deposition stated to have witnessed the incident on 5.7.05 at about 14.30 hrs. in front of Naihati Railway Goodam on his way to return home accompanied by Raju Saha and Binod Ray. PW-5 saw one person to assault one woman wearing a yellow "churidar" with a "dao" on the back of her head. He had also seen that person to take out the said "dao" from one black recksin bag. He rushed to that place and caught hold of that person who tried to assault the woman once again by the offending weapon. The said person was caught by him and his companions. While the pleaded to save her from that person. PW-5 further stated that *"that woman*

*told me by embracing me 'kaku kaku amaka bachow' 'oi lok ta mere phelbe'. Blood was coming out heavily from the back side of her head. Then by auto I took that lady to the Naihati State General Hospital and at that time I took away the said dao and black recksin bag from that person with me. The said dao had some blood on it. I would be able to identify that said dao if produced in court. In the hospital I came to know the name of that woman as Tapasi Das of Khamarpara, Bansberia. I also came to know from the hospital that the name of that person who assaulted the said woman is Ramgopal Sikdar and the marriage between him and that woman was registered but no marriage was solemnised by registration or ceremony. Inside the said black recksin bag, there was a Yashika Camera and the identity card of said Ramgopal Sikdar issued by Indian Arms Force. I saw cut injury on her left ear, neck and back portion of the head."*

15. During the cross-examination PW-5 stated to have seen the accused person to assault the victim from the back with the offending weapon. The signature of the PW-5 on the injury report of the victim marked as Exhibit-5.
16. PW-6 in his evidence stated to have seen bleeding injury on the back side of the head of a lady wearing a yellow "churidar" and also saw one person standing there with a "dao" who was caught by the police and was taken to the police station.
17. PW-7 deposed that *"On 5.7.05 at about 14.30 hrs myself along with Anjan Dasgupta and Binod Ray was returning to our hose by the side of the Ramkrishna Cinema Hall. At that time I saw a gathering in front of the taxi stand. I went there and saw Ramgopal Sikdar to assault with a daa on the*

*right side of a woman and blood was coming out from that portion. The local people caught that person with the said daa. We took that woman by one Auto to the hospital. On being asked by the public that person disclosed his name as Ramgopal Sikdar and then I came to know the said name. Police seized one bag, one daa, and the churidar of that lady in my presence and prepared one seizure list and I signed on that seizure list. This is my signature on that seizure list. This signature is marked as Ext. 4/1. Said Ramgopal Sikdar is present in court today (identified)."*

18. PW-8 in his deposition stated *"On 5.7.05 at about 14.00 hrs myself along with Anil Shaw and Anjan Dasgupta was returning to our house from the Municipal office. We were returning by the side of Ramkrishna cinema hall. At that time in front of the taxi stand near the godown I saw one person to run after a lady with a daa and I saw blood coming out from the back of her head. Thereafter some local persons caught that person from behind. The said woman was shouting by saying 'bacho bacho'. Then we took that lady by auto to the hospital. Thereafter police took that person to the P.S. That person is present in court today (identified). The name of the lady was Tapasi. We purchased one nighty and gave it to that lady in the hospital. This is my signature on the seizure list. Police seized one daa, one bag, and blood stained wearing apparels of the victim. This is my signature on the seizure list. This signature is marked as Ext. 2/1."*

19. PW-9 in his deposition stated *"On 5.7.05 at about 14.00 hrs I was going to Municipal Office and at that time I saw a trouble in front of the Naihati Rly godown in front of the Auto stand. I went to that place and many persons assembled there and those persons caught that person. Thereafter we took*

*that lady to the Naihati General Hospital by a Auto. I saw bleeding injury on the right side of her head, neck, and ear. She was admitted in the hospital. Police showed us the wearing apparels of the lady and seized the same and asked me to sign on the seizure list. Thereafter I signed on the seizure list. This is my signature on the seizure list. This signature is marked as Ext. 4/2. That person who assaulted that lady is present in court today (identified). I can identify the said daa if produced before me.”*

20. PW-10 in his deposition stated *“On 5.7.05 used to drive Maruti car and the said car stand was near the Naihati Rly godown. On 5.7.05 at about 14.30 hrs in the maruti stand I was there and saw one person and one lady to come out of a auto. I saw one large bag of leather in the hand of that person. Thereafter I saw that the male person suddenly took out one daa from his bag and he assaulted with that daa on the neck of that lady. Thereafter that woman I fled away by saying ‘bacho bacho’ and we caught hold of that person. Then the said person again tried to assault the lady with that daa. Then the driver of the auto caught his hand. Then we also caught the said person and we snatched that daa from his hand. I will be able to identify the said daa if produced before me in court. At that time said lady wore yellow churidar. After the incident she was taken to the hospital by one person by one auto and at that time that person took the said daa and the bag of the accd person with him. That person who assaulted the victim is present in court today (identified).”*

21. Injury report marked as Exhibit-5 in serial no. 9 states as follows:

**“9. Short history of the case as stated by the patient**

*Physical assault by some Ramgopal Sikdar of Sodepur, 24 Parganas by a 'Da.'"*

22. The signature/LTI of the patient party was that of PW-5, Anjan Dasgupta whose signature was marked as Exhibit-5. The Exhibit marked as 9 and 10 collectively establish the injury sustained by the victim and her subsequent hospitalization. The offending weapon i.e. "dao" was recovered from the appellant in the presence of the eyewitnesses and sent to the Forensic Science Laboratory through a challan marked Exhibit-7 along with the wearing apparel of the victim. The wearing apparel of the victim was seized under the seizure list marked Exhibit 4 with objection bearing the signatures of seizure witnesses, Bimal Das and Anil Shaw. The signature of the Anil Shaw i.e. PW-7 was marked as Exhibit- 4/1. The seizure of the offending weapon i.e. the "dao", a black recksin bag, a camera, and an identity card of Indian Arms Force were seized under the seizure list bearing the signature of the Prasanta Mondal, PW-1, the de-facto complainant and the signature of Binod Ray, PW-8 Marked as Exhibit 2/1.
23. The statement of the victim recorded under Section 164 of the Cr.P.C. corroborated with her statement before the Court in entirety without any deviation.
24. The corroborative statement of the eyewitnesses in unison established the offence committed by the appellant which is independent, impartial, disinterested, without any malice, threat, coercion, subjugation, self-interest and motive. The veracity of the same and its trustworthiness is to be credited and incredibly relied upon without an iota of suspicion or

hesitation. The offending weapon was recovered and was sent to the FSL for examination along with the wearing apparels of the victim. However, the examination report was not collected. Such lapse on the part of the investigating agency will not affect the prosecution case where substantial evidence of credibility fortify the prosecution case based on direct evidence of eyewitnesses and the injured witness.

25. In the case of **Karan Singh Vs. State of Uttar Pradesh & Ors.**<sup>13</sup> the Hon'ble Supreme Court held as follows:

*"40. In **Kuriya v. State of Rajasthan**<sup>14</sup>, this Court held: (SCC pp. 447-48, paras 30-32)*

*"30. This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened*

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<sup>13</sup> (2022) 6 SCC 52

<sup>14</sup> (2012) 10 SCC 433 : (2013) 1 SCC (Cri) 202

*with reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in Kathi Bharat Vajsur v. State of Gujarat<sup>15</sup>, Narayan Chetanram Chaudhary v. State of Maharashtra<sup>16</sup>, Gura Singh v. State of Rajasthan<sup>17</sup> and Sukhchain Singh v. State of Haryana<sup>18</sup>.*

*31. What is to be seen next is whether the version presented in the Court was substantially similar to what was said during the investigation. It is only when exaggeration fundamentally changes the nature of the case. The Court has to consider whether the witness was stating the truth or not. [Ref. Sunil Kumar v. State (NCT of Delhi)<sup>19</sup>.*

*32. These are variations which would not amount to any serious consequences. The Court has to accept the normal conduct of a person. The witness who is watching the murder of a person being brutally beaten by 15 persons can hardly be expected to state a minute by minute description of the event. Everybody, and more particularly a person who is known to or is related to the deceased, would give all his attention to take steps to prevent the assault on the victim and then to make every effort to provide him with the medical aid and inform the police. The statements which are recorded immediately upon the incident would have to be given a little leeway with regard to the statements being made and recorded with utmost exactitude. It is a settled principle of law that every improvement or variation cannot be treated as an attempt to falsely implicate the accused by the witness. The approach of the court has to be reasonable and practicable. Reference in this regard can be made to Ashok Kumar v. State of Haryana<sup>20</sup> and Shivilal v. State of Chhattisgarh<sup>21</sup>.”*

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<sup>15</sup> (2012) 5 SCC 724 : (2012) 2 SCC (Cri) 740

<sup>16</sup> (2000) 8 SCC 457 : (2000) SCC (Cri) 1546

<sup>17</sup> (2001) 2 SCC 205 : 2001 SCC (Cri) 323

<sup>18</sup> (2002) 5 SCC 100 : 2002 SCC (Cri) 961

<sup>19</sup> (2003) 11 SCC 367 : 2004 SCC (Cri) 1055

<sup>20</sup> (2010) 12 SCC 350

<sup>21</sup> (2011) 9 SCC 561

41. In **Shyamal Ghosh v. State of W.B**<sup>22</sup>, the Hon'ble Supreme Court held: (SCC pp. 666-67, paras 46 & 49)

*"46. Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses inasmuch as these witnesses have given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused.*

*... Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution."*

*[.....]*

42. In **Rohtash Kumar v. State of Haryana**<sup>23</sup>, the Hon'ble Supreme Court held : (SCC p. 446, para 24)

*"24.... The court has to examine whether evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken, as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness."*

26. In the case of **Abdul Sayeed Vs. State of Madhya Pradesh**<sup>24</sup> the Hon'ble Supreme Court held as follows:

*"26. In **Bhag Singh v. State of Punjab**<sup>25</sup>, while dealing with a similar contention, the Hon'ble Supreme Court observed: (SCC p. 715, para 10)*

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<sup>22</sup> (2012) 7 SCC 646 : (2012) 3 SCC (Cri) 685

<sup>23</sup> (2013) 14 SCC 434 : (2014) 4 SCC (Cri) 238

<sup>24</sup> (2010) 10 SCC 259

*"10. It is a general handicap attached to all eyewitnesses, if they fail to speak with precision their evidence would be assailed as vague and evasive, on the contrary if they speak to all the events very well and correctly their evidence becomes vulnerable to be attacked as tutored. Both approaches are dogmatic and fraught with lack of pragmatism. The testimony of a witness should be viewed from broad angles. It should not be weighed in golden scales, but with cogent standards. In a particular case an eyewitness may be able to narrate the incident with all details without mistake if the occurrence had made an imprint on the canvas of his mind in the sequence in which it occurred. He may be a person whose capacity for absorption and retention of events is stronger than another person. It should be remembered that what he witnessed was not something that happens usually but a very exceptional one so far as he is concerned. If he reproduces it in the same sequence as it registered in his mind the testimony cannot be dubbed as artificial on that score alone."*

*27. In the instant case, a very large number of assailants attacked Chand Khan and Shabir (the deceased), caused injuries with deadly weapons to them. The incident stood concluded within few minutes. Thus, it is natural that the exact version of the incident revealing every minute detail ie, a meticulous exactitude of individual acts cannot be given by the eyewitnesses.*

*28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone, "Convincing evidence is required to discredit an injured witness." [Vide Ramlagan Singh v. State of Bihar, Malkhan Singh v. State of U.P., Machhi Singh v. State of Punjab, Appabhai v. State of Gujarat. Bonkya v. State of Maharashtra", Bhag Singh, Mohar v. State of U.P. (SCC p. 606b-c). Dinesh Kumar v. State of Rajasthan, Vishnu v. State of Rajasthan, Annareddy Sambasiva Reddy v. State of A.P. and Balraje v. State of Maharashtra].*

*29. While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab, where this Court reiterated the special evidentiary status*

accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27. paras 28-29)

“28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In *Shivalingappa Kallayanappa v. State of Karnataka*<sup>26</sup> this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.”

29. In *State of U.P. v. Kishan Chand* a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan v. State of Haryana*). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.”

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

[...]

### **Medical evidence versus ocular evidence**

32. In ***Ram Narain Singh v. State of Punjab***<sup>27</sup> the Hon'ble Supreme Court held that where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the

<sup>26</sup> 1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694

<sup>27</sup> (1975) 4 SCC 497 : 1975 SCC (Cri) 571 :AIR 1975 SC 1727

*ballistics expert, it amounts to a fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case.*

33. In **State of Haryana v. Bhagirath**<sup>28</sup> it was held as follows: (SCC p. 101, para 15)

*"15. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject." (emphasis added)*

34. Drawing on Bhagirath case, this Court has held that where the medical evidence is at variance with ocular evidence,

*"it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the 'variable keeping the medical evidence as the 'constant'"*

35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility

*"21.. The evidence must be tested for its inherent consistency and the inherent probability of the story: consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the 'credit' of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."*

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<sup>28</sup> (1999) 5 SCC 96 : 1999 SCC (Cri) 658

*[Vide Thaman Kumar v. State (UT of Chandigarh and Krishnan v. State?? at SCC pp. 62-63, para 21.1]*

36. In *Solanki Chimanbhai Ukabhai v. State of Gujarat* this Court observed: (SCC p. 180, para 13) "

"13. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence"

37. A similar view has been taken in *Mani Ram v. State of U.P Khambam Raja Reddy v. Public Prosecutors and State of U.P. v. Dinesh*.

38. In **State of U.P. v. Hari Chand**<sup>29</sup> the Hon'ble Supreme Court reiterated the aforementioned position of law and stated that: (SCC p. 545, para 13)

"13.... In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy."

39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.

40. In the instant case as referred to hereinabove, a very large number of assailants attacked one person, thus the witnesses cannot be able to state as how many injuries and in what manner the same had been caused by the accused. In such a fact situation, discrepancy in medical evidence and ocular evidence is bound to occur. However, it cannot tilt the balance in favour of the appellants."

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<sup>29</sup> (2009) 13 SCC 542

27. In **Lakshman Singh v. State of Bihar (now Jharkhand)**<sup>30</sup>, the Hon'ble

Supreme Court observed that :-

*“7. In the present case, while convicting the accused, the learned trial court has heavily relied upon the deposition of PW 1, PW 3 and PW 4, who are the independent witnesses and PW 5, PW 8 & PW 10, who are the injured witnesses. The presence of the independent witnesses and even the injured witnesses at the place of the incident is natural. PW 1, PW 3 & PW 4, all of whom were the residents of the village and they came there to cast their votes and witnessed the incident. All the witnesses, PW 1, PW 3 & PW 4 have identified all the accused persons and supported the case of the prosecution fully. PW 5, PW 8, PW 10 and even PW 12 are injured eyewitnesses. Injuries on PW 5, PW 10 & PW 12 have been established and proved by the prosecution by examining Dr Jawahar Lal (PW 7), who examined the above injured witnesses. Their injury reports are placed on record by way of Exts. 1, 1/1 and 1/2. All the witnesses have unequivocally and in the same voice have stated that at the relevant time when the voting was going on for the Lok Sabha constituency and at that time PW 8 Rajiv Ranjan Tiwari was giving slips to the voters and at that time at about 10.40 a.m. all the accused persons belonging to another village came there and asked him to stop giving slips and to hand over the voter list and on refusal the accused persons assaulted him with fists, slaps and lathis and he sustained injuries. Meanwhile, his brother Priya Ranjan Tiwari came for his rescue and at that time one Dinanath Singh took out his country made pistol and fired upon him causing several firearm injuries. All the accused persons were named right from the very beginning of lodging the FIR and all the accused persons were specifically named by all the witnesses and/or fully supported the case of the prosecution.”*

[...]

*“9. In Mansingh<sup>31</sup>, it is observed and held by this Court that "the evidence of injured witnesses has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly". It is further observed in the said decision that "minor discrepancies do not corrode the credibility of an otherwise acceptable evidence". It is further observed that "mere non-mention*

<sup>30</sup> (2021) 9 SCC 191

<sup>31</sup> (2003) 10 SCC 414

*of the name of an eyewitness does not render the prosecution version fragile".*

9.1 A similar view has been expressed by this Court in the subsequent decision in *Abdul Sayeed*. It was the case of identification by witnesses in a crowd of assailants. It is held that "in cases where there are large number of assailants, it can be difficult for witnesses to identify each assailant and attribute specific role to him". It is further observed that "when incident stood concluded within few minutes, it is natural that exact version of incident revealing every minute detail i.e. meticulous exactitude of individual acts, cannot be given by eyewitnesses". It is further observed that "where witness to occurrence was himself injured in the incident, testimony of such witness is generally considered to be very reliable, as he is a witness that comes with an inbuilt guarantee of his presence at the scene of crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone". It is further observed that "thus, deposition of injured witness should be relied upon unless there are strong grounds for rejection of his evidence on basis of major contradictions and discrepancies therein".

9.2 The aforesaid principle of law has been reiterated again by the Hon'ble Supreme Court in *Ramvilas* and it is held that "evidence of injured witnesses is entitled to a great weight and very cogent and convincing grounds are required to discard their evidence". It is further observed that "being injured witnesses, their presence at the time and place of occurrence cannot be doubted."

28. In ***Ramvilas vs. State of Madhya Pradesh***<sup>32</sup>, the Hon'ble Supreme Court

held:

*"All the eyewitnesses have consistently spoken about the occurrence and the overt acts of the accused including the appellant Ramvilas. The courts below have recorded the concurrent findings of fact observing that the testimony of eyewitnesses is credible and trustworthy. Deceased Bansilal had sustained as many as twenty-six injuries. Evidence of eyewitnesses is amply corroborated by medical evidence. By perusal of the records, no cogent reasons are forthcoming to disbelieve the testimony of the eyewitnesses and we find no reason to interfere with the concurrent findings recorded by the courts accepting the evidence of eyewitnesses as trustworthy."*

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<sup>32</sup> (2016) 16 SCC 316

29. In **M. Nageswara Reddy vs. State of Andhra Pradesh and Ors.**<sup>33</sup>, the Hon'ble Supreme Court held:

*"19. Having gone through the reasoning given by the High Court, we are of the opinion that the High Court has unnecessarily given weightage to some minor contradictions. The contradictions, if any, are not material contradictions which can affect the case of the prosecution as a whole. PW 6 was an injured eyewitness and therefore his presence ought not to have been doubted and being an injured eyewitness, as per the settled proposition of law laid down by this Court in catena of decisions, his deposition has a greater reliability and credibility."*

30. In **Balu Sudam Khalde and Anr. vs. State of Maharashtra**<sup>34</sup>, the Hon'ble Supreme Court observed as follows:-

#### **"APPRECIATION OF ORAL EVIDENCE"**

*25. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:*

*"I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.*

*II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to*

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<sup>33</sup> (2022) 5 SCC 791

<sup>34</sup> 2023 SCC OnLine SC 355

*reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.*

*III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.*

*IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.*

*V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.*

*VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

*VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

*VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.*

*IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.*

*X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very*

*precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.*

*XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.*

*XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.*

*XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount contradiction. Unless the former statement has the potency to to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness."*

*[See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 Cri LJ 1096 : ((1983) 3 SCC 217: AIR 1983 SC 753) Leela Ram v. State of Haryana, (1999) 9 SCC 525 : AIR 1999 SC 3717 and Tahsildar Singh v. State of UP (AIR 1959 SC 1012)]*

**26.** *When the evidence of an injured eye-witness is to be appreciated, the under-noted legal principles enunciated by the Courts :-*

*(a) The presence of an injured eye-witness at the time and place of cannot be doubted unless there are material contradictions in his deposition.*

*(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.*

*(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.*

(d) *The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.*

(e) *If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence*

(f) *The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.*

27. *In assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or put forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence.”*

31. In ***State of M.P. vs. Manshingh and Ors.***<sup>35</sup>, the Hon’ble Supreme Court held:

*“8. In our considered opinion, the High Court judgment is indefensible for more reasons than one. It has not been indicated as to why and how the High Court came to the conclusion about non-compliance with the requirements of Section 157 Cr.P.C. It was only stated that there was no proof of compliance with Section 157 Cr.P.C. It has not been indicated as to what is the requirement and*

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<sup>35</sup> (2003) 10 SCC 414

*what proof was required to be adduced. Similar importance does not appear to have been attached to the evidence of injured witnesses PWs 4 and 7, on the ground that their statements were recorded under Section 164 Cr.P.C. In a catena of decisions this Court has held that evidence of witnesses cannot be discarded merely because their statements were recorded under Section 164 of the Code (see **Balak Ram v. State of U.P.**<sup>36</sup> and **Ram Charan v. State of U.P.**<sup>37</sup>). All that is required as a matter of caution is a careful analysis of the evidence.*

*9. The evidence of injured witnesses has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly. Merely because there was no mention of a knife in the first information report, that does not wash away the effect of the evidence tendered by the injured witnesses PWs 4 and 7. Minor discrepancies do not corrode the credibility of otherwise acceptable evidence. The circumstances highlighted by the High Court to attach vulnerability to the evidence of the injured witnesses are clearly inconsequential. It is fairly conceded by the learned counsel for the accused that though mere non-mention of the assailants' names in the requisition memo of injury is not sufficient to discard the prosecution version in entirety, according to him it is a doubtful circumstance and forms a vital link to determine whether the prosecution version is credible. It is a settled position in law that omission to mention the name of the assailants in the requisition memo perforce does not render the prosecution version brittle.*

32. The Learned Advocate for the appellant further argued that the appellant could not be convicted under Section 307 and 326 of Indian Penal Code in respect of the same grievous hurt.

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<sup>36</sup> (1975) 3 SCC 219 : 1974 SCC (Cri) LJ 1473

<sup>37</sup> AIR 1968 SC 1270 : 1968 Cri LJ 1473

33. In **Suresh vs. State of Haryana**<sup>38</sup>, the Hon'ble Apex Court observed as follows:

*"11. Before the High Court, the stand taken was that no offence under Sections 307, 326 read with Section 34 IPC has been made out and the prosecution has failed to prove the specific injuries alleged to have been caused by the accused to the injured. On the other hand, the State supported the judgment. The High Court after referring to the evidence of the witnesses held (sic upheld) the eyewitnesses' version that the accused persons were armed with chain, gandasa and hockey sticks and that they stopped the tempo and started causing injuries to the injured. Injuries on Ram Singh and his two sons, namely, Nakul and Sehdev have been clearly established. Accordingly, the conviction was maintained.*

*12. The High Court noted that the injured persons were given a large number of injuries with sharp-edged weapons and blunt weapons like hockey sticks. They were mercilessly beaten and the attack was also so severe that all the other passengers sitting on the tempo ran away from the spot and none came forward to save the injured. It was also noticed that the injuries caused on Nakul and Ram Sarup were definitely dangerous to life. Therefore, the conviction was maintained, but the sentence was reduced to 7 years.*

*13. In support of the appeal, the learned counsel for the appellant submitted that the witnesses have not specifically indicated about what acts attracted under Section 307, if any. The sentence in respect of Section 307 was also characterised to be heavy. Learned counsel for the respondent State on the other hand submitted that the injury on Ram Singh was so severe that he lost his memory due to the injuries caused to him. The other injured witnesses PWs 6 and 8 who suffered serious injuries were examined.*

*14. In view of the cogent and credible evidence of the injured witnesses there is no scope for interference in these appeals. Though false implication*

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<sup>38</sup> (2009) 13 SCC 538

*was pleaded, the same is without any foundation. Clearly, all the persons who have suffered injuries would not shield the actual culprit and implicate an innocent person when false implication is pleaded. The foundation has to be laid on the same. In the instant case that has not been done.*

*15. The appeals are without merit and deserve dismissal which we direct.”*

34. Thus the prosecution, from the testimonies of injured witness and the testimonies of other eye witnesses had established the case beyond reasonable doubt and the Trial Court, on a proper appreciation of oral and documentary evidence, including the medical record i.e. injury report marked Ext.-5, bearing the signature of PW-5 authenticating his presence at the hospital when the injured victim was treated and thereafter admitted, has rightly found the appellant/accused guilty under Sections 307 r/w 326 of I.P.C. The defence did not object to the same at the time of its identification to be marked as Exhibit and therefore remains uncontroverted.

35. In the result, the Criminal Appeal is dismissed confirming the conviction of the appellant/accused under Sections 307 and 326 of I.P.C. awarded by the Trial Court, vide the impugned judgment dated 30.10.2009 in ST 13(4) 2006, SC 26(3) 2005.

36. However, the sentence and imprisonment of 7 years awarded under Section 307 of I.P.C. is modified to one of 4 years rigorous imprisonment and the sentence of imprisonment of 5 years awarded under Section 326 of I.P.C. is modified to one of 3 years rigorous imprisonment, and both the sentences shall run concurrently.

37. Set-off is also ordered under Section 428 of Cr.P.C. The sentence of fine and default sentence awarded by the Trial Court is maintained. Bail bonds have

been cancelled and the respondent is directed to take necessary and urgent steps to secure the appellant/accused to undergo the remaining part of the sentence.

38. The appeal, is accordingly, dismissed.

39. Accordingly, the instant Criminal Appeal being CRA 729 of 2009 is disposed of.

Connected application, if there be any, is also stands disposed of.

40. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

41. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

**(Ananya Bandyopadhyay, J.)**