
(2015) 10 GUJ CK 0009
In the Gujarat High Court
Case No : Criminal Appeal No. 515 of 2012

Jotibhai Kalubhai Parmar

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 27-10-2015

Acts Referred:

Arms Act, 1959 — Section 25, 25(1)(a)(b)
Criminal Procedure Code, 1973 (CrPC) — Section 303, 374
Penal Code, 1860 (IPC) — Section 114, 307, 319, 320, 504

Citation : (2015) 10 GUJ CK 0009

Hon'ble Judges : K.M. Thaker, J.

Bench : Single Bench

Advocate : M.A. Kharadi, Advocate, for the Appellant; L.B. Dabhi, APP, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Thaker, J.—This Appeal under Section 374 of the Code of Criminal Procedure is directed against the judgment and order dated 12.4.2012 passed by learned Sessions Judge, Dahod, in Sessions Case No. 129 of 2012.

2. The said sessions case was registered against two accused persons. The accused No. 2 was charged with offence punishable under Sections 307 and 114 of Indian Penal Code whereas the accused No. 1 was charged with offence punishable under Sections 307 and 504 of Indian Penal Code and under Section 25(1)(a)(b) of the Arms Act.

3. By the judgment and order, which is challenged in present criminal appeal, the accused No. 2 is acquitted from the charge for the offence punishable under Sections 307 and 114 of Indian Penal Code whereas the accused No. 1 is held guilty, and he is convicted, for the offence punishable under Sections 307 and 504 of Indian Penal Code and under Section 25 of the Arms Act and he is sentenced to suffer rigorous imprisonment for 7 years for offence punishable under Section 307 and is also ordered to pay fine in sum of Rs. 1,000/- and in

default to undergo rigorous imprisonment for one year and for offence punishable under Section 504 , he is sentenced to suffer rigorous imprisonment for one year and pay fine of Rs. 100 and in default rigorous imprisonment for 3 months and for the offence punishable under Section 25 of the Arms Act, he is sentenced to suffer rigorous imprisonment for 3 years and fine of Rs. 500 and in default rigorous imprisonment for 6 months. Learned trial Court has directed that all sentences shall run concurrently.

4. According to the FIR, which was registered on 26.3.2010 and according to the case of prosecution, one Mr. K.C. Baria had dashed his motorcycle with one Mr. R.K. Hathila, father of the complainant, and on account of the said injury which complainant's father sustained, he succumbed to the injury and died, for which an FIR was lodged. The complainant, in his complaint filed on 26.3.2010, alleged that his family tried for amicable settlement with said Mr. Baria and had also requested sarpanch of village Simalia to intervene and act as a mediator, but any reply or response was not received from said Mr. Baria. According to the case of prosecution, on 26.3.2010 when the complainant alongwith his cousin Mr. V.D. Hathila and his brother Mr. Rajendra and one Mr. Ajitkumar was standing near house of his uncle, Mr. Jyotibhai K. Parmar (i.e. appellant) of village Bhiloi came on his motorcycle at about 8:00 p.m. and asked the complainant as to why he was deputing persons asking for money for settling the matter of the accident suffered by his father. According to the complainant, said Mr. Jyotibhai Parmar i.e. the appellant - accused started abusing the complainant and took out a fire arm (pistol) and fired gunshot. On account of the gunshot, the complainant was hit on the left side of his chest, left hand and left thigh. The pellets also hit Mr. Ajitkumar (who was standing with the complainant) on his hip and right hand and his cousin Mr. V.D. Hathila was also hit by the pellets. According to the prosecution's case, brother of the complainant i.e. Mr. Rajendra who was also with them tried to catch the accused/appellant, but he fled on his motorcycle towards Garbada cross road. The prosecution's further case is that ambulance was called and three injured persons were removed to hospital where they were treated. The said FIR was registered as I Cr. No. 44 of 2010 at Garbada police station.

5. During investigation, the I.O. gathered sufficient material (including injury certificate, statement of witnesses, panchnama of recovery of fire arm, panchnama of the place of incident and empty box of pellets as well as motorcycle) which was sufficient to file charge sheet. Accordingly, the charge sheet for the offence punishable under Sections. 307 , 504 and 114 of Indian Penal Code and under Section 25 of Arms Act came to be filed against the accused No. 1 and accused No. 2 was charged for abetting the offence committed by the accused No. 1.

6. Since the case would be triable by the Sessions Court, learned Magistrate committed the case to the Sessions Court, Dahod. The case has been registered as Sessions Case No. 129 of 2012. The learned trial Court recorded the

statement of the accused. The accused pleaded not guilty and claimed to be tried. The learned trial Court framed the charge against the accused at Exh. 2. Thereafter, the learned trial Court conducted trial against the accused persons. During the proceedings, the prosecution examined 12 witnesses and placed on record 16 documents.

6.1 On conclusion of the evidence, further statement of the accused was recorded under Section 303 of the Code of Criminal Procedure. All incriminating evidence and circumstances against the accused were informed. The accused claimed that the case is false and he has no knowledge of the incident. The accused claimed in his further statement that because of enmity of villagers of village Bhilol, a false complainant involving him had been filed.

7. After considering the evidence on record and hearing the submissions by learned counsel for the accused persons and learned Public Prosecutor, the learned trial Court held accused No. 1 guilty of the charge and convicted him for the offence mentioned hereinabove and also ordered the accused to undergo the sentence as mentioned earlier.

7.1 So far as accused No. 2 is concerned, learned trial Court held that offence punishable under Section 307 and 114 of the Code of Criminal Procedure is not proved against the said accused and that therefore, acquitted him. The accused No. 1 feeling aggrieved by the judgment and order has taken out this appeal.

8. Mr. Mansuri, learned advocate appeared for the appellant and assailed the judgment and order and submitted that one round was fired from the fire arm and if the number of pellets as mentioned by the complainant and the prosecution witness are taken into account, then, it would appear that from single shot and single bullet firing of so many pellets could not have been fired. Learned counsel for the appellant further submitted that according to the prosecution's case and also according to the complainant, the time at which the incident occurred was around 8:00 p.m. and that therefore, due to darkness, it would not be possible for the complainant and the prosecution witnesses to identify the persons. Learned counsel for the appellant also submitted that near the place where the incident occurred, there are several houses where people stay and even according to the case of prosecution, some persons had gathered at the place of incident after the gunshot was fired, however, any independent witness is not examined and there is no evidence from any independent witness. Learned counsel for the appellant also submitted that the injury to the complainant and other two persons make it clear that there was no intention to kill any one and the prosecution has failed to establish any motive. Section 307 is not attracted and the learned trial Court has committed error in holding appellant guilty for offence punishable under Section 307 of the Code of Criminal Procedure and convicting him for the said offence. According to learned counsel for the appellant, there are contradictions so far as the distances from where the shot was fired. According to the learned counsel for the appellant, intention and motive are not proved.

9. Mr. Dabhi, learned APP, has opposed the appeal as well as the submissions by learned counsel for the appellant. Learned APP submitted that in this case, there is direct evidence of injured persons and that all three injured persons have, in their deposition, specifically named the appellant and identified the accused who fired the shot. Learned APP submitted that reference of distance at which the shot was fired may vary from person to person, however, merely because there is some difference in mentioning the distances wherefrom the shot was fired, does not wipe out the case of the prosecution and such difference in mentioning the distances is not fatal to the case of the prosecution. Learned APP submitted that the reliance placed by the appellant on the view expressed by the doctor about the distance from where the shot might have been fired is unsustainable, inasmuch as doctor who examined the witness is not ballistic expert and that therefore, he would not be competent expert witness to give evidence about the distance from where the shot was fired. Therefore, doctor's evidence as to the distance cannot be considered conclusive. Learned APP submitted that when direct evidence of the injured person is available on record, then, it is not necessary for the prosecution to prove motive. Learned APP also submitted that the mudamal weapon was recovered at the behest of the appellant and the said fire arm (pistol) is registered and licenced fire arm and the said mudamal firearm (pistol) is registered in name of appellant's father. Learned APP submitted that the fire arm is actually a shotgun from which capsule/cartridge is fired and the cartridge would sprinkle several pellets. According to the prosecution, the shot was fired from the said shotgun and the capsule - cartridge was also recovered. Learned APP also submitted that there is no ambiguity or contradiction as regards the identity of the appellant as the person who fired the shot. The learned counsel for the appellant submitted that the panch witnesses did not support the case of the prosecution and the panch witnesses were declared hostile and the panchnama including recovery panchnama are not proved.

10. I have heard learned advocate for the appellant and learned APP and I have considered the submissions and evidence on record. In light of the said evidence, the only question which arises for consideration is whether the learned trial Court has committed error in recording conviction against present appellant on the strength of the said evidence.

11. On the basis of and upon proper consideration and evaluation of evidence on record, the learned trial Court has reached to and recorded the conclusion. So as to appreciate and consider the appellant's challenge against the findings and decision by learned trial Court, it would be appropriate to take a re-look at the evidence on record.

11.1 The prosecution had examined one Dr. Y.M. Bharpoda, as PW No. 1. His evidence is recorded at Exh. 7. The PW No. 1 runs a surgical hospital and practices as general surgeon. According to the evidence of PW No. 1, at about 9:00 p.m. on 26.3.2010, one Mr. A.J. Hathila, who was injured by shot fire from fire arm was brought for treatment in his hospital. PW No. 1 has mentioned in his

evidence that on examining said Mr. A.J. Hathila, he found that he had suffered injuries over his hips. The injuries were caused due to shot from fire arm and the size of injury mark were about 2 mm diameter. The PW No. 1 had asked the injured person to undergo x-ray. According to the PW No. 1, the x-ray reflected that there were more than one pellets in the body of the injured person. He had removed the pellets and handed over the x-ray as well as pellets to the police. According to the opinion of the doctor, it would take about two months time for the injured person to recover. The said injured person was discharged from the hospital on 6.4.2010. The PW No. 1 was shown the mudamal fire arm (Exh. 19) and the PW No. 1 has also said in his deposition that shot fired from the said fire arm would cause type of injuries which the said injured person had suffered. The PW No. 1 was also shown the pellets and he identified the pellets as those which were removed by him from the said injured person. The PW No. 1 was also shown the mudamal trouser and the PW No. 1 mentioned that the holes are caused by the pellets.

11.2 The PW No. 1 mentioned that on the same date, i.e. on 26.3.2010, another injured person named Mr. Hiteshkumar Hathila was also brought to his hospital. He had also suffered multiple wounds/injuries on account of shot from fire arm. The size of the injury suffered by the said second injured person was of 2 mm and that the said second injured person had suffered pellet injuries on his chest, left arm and above navel as well as on left thigh. The PW No. 1 has also mentioned in his evidence that the injuries suffered by the said injured person were grievous injuries and sufficient to result into and cause death. The PW No. 1 mentioned that he removed seven pellets from body of the second injured person. The PW No. 1 mentioned in his deposition that the type of injury suffered by the said second injured person was serious and sufficient to cause death.

11.3 The PW No. 1 also mentioned in his evidence that on the same day, third injured person named Mr. Vipul Hathila was also brought in his hospital and the said third injured person had suffered multiple wounds/injury on his right arm and right part of his chest on account of shot fired from the fire arm. The PW No. 1 has also mentioned in his evidence that the injuries suffered by the said injured person were grievous injuries and sufficient to result into and cause death. On examination of x-ray, presence of pellets on the right upper part of abdomen, right arm and that type of injuries were such which would be caused on account of gunshot. The PW No. 1 denied the suggestion put to him in his cross-examination that the injury suffered by the third injured witness were not caused by firing from the same fire arm/shotgun. He mentioned that the shot could have been fired from the distance of about 40 to 50 feet. He also mentioned in cross-examination that three injured persons were brought in his hospital and they were conscious. The PW No. 1 also mentioned in his evidence/cross-examination that while mentioning the history of the incident, the said three injured persons, had not mentioned the name of the person who fired the shot.

11.4 The PW No. 2 is one of the injured persons and he is also the complainant i.e. Mr. Hiteshkumar Hathila. His evidence is recorded at Exh. 16. The said injured person (PW No. 2) has mentioned in his evidence that on 26.3.2010, he was standing outside his uncle's house alongwith Mr. Ajit, Mr. Vipul and his brother Rajesh. When four of them were standing and chatting, the appellant came on the motorcycle from Dahod side of the road. At that time, it was around 8:00 p.m. and he stopped his motorcycle and started abusing him i.e. PW No. 2. The said injured person/witness, who is the complainant, also mentioned in his evidence that before firing the shot the appellant asked that why he was deputing persons to discuss settlement in case of his father's death and he also uttered abuses and then, he fired shot from his pistol. The PW No. 2 has mentioned in his complaint that on account of the said shot from the fire arm he suffered injury on his left arm and left part of his chest and left shoulder and above naval and left thigh. He was hit by pellets and in his deposition also he described/mentioned his injuries. According to PW No. 2, Mr. Vipul also suffered injury on account of pellets/shot fired by the appellant on his right hand and elbow and similarly, Mr. Ajitbhai also was hit by pellets/shot fired by the appellant. The PW No. 2 identified the accused/appellant in the Court room as the person who had fired shot on 26.3.2010. When the mudamal fire arm was shown, the PW No. 2 identified it as the fire arm which was used by the appellant. He also mentioned the reason/motive behind the incident. The PW No. 2, during his deposition, identified the accused - appellant, who was present in the Court as the person who had fired gunshot. He also identified his clothes which were shown to him as mudamal. In his cross-examination, the PW No. 2 admitted that he had not mentioned description of the fire arm which was used in the incident. In his cross-examination, the PW No. 2 also mentioned that the appellant is not relative of Mr. Kamlesh Baria who, allegedly, had dashed the motorcycle with father of the complainant which resulted into death of complainant's father. He also mentioned that house of the appellant and house of said Mr. Kamlesh Baria are in the same lane. The PW No. 2 denied the suggestion that the incident occurred at night and there was darkness. The PW No. 2 specifically mentioned that there was tube light at the place of the incident. In his cross-examination, the PW No. 2 also mentioned that there was no movement of other persons on the road. In his cross-examination, the PW No. 2 also mentioned that his village and village Bhiloi are at a short distance i.e. about 3 kms. and that therefore, he and the other injured persons knew that the appellant is resident of said village Bhiloi and that appellant's house is in the same lane where the person whose motorcycle had hit his father, stays. In his deposition/cross-examination, he denied the suggestion that the accused was not present at the place of incident. He also denied in his cross-examination that there is any inimical or animosity between him and the appellant. In his cross-examination, the PW No. 2 mentioned that the shot was fired at a distance of about 25 ft. to 30 ft. The PW No. 2 was asked about the registration number of the motorcycle and in reply, the PW No. 2 stated that the motorcycle did not have any registration number and therefore, he had not mentioned the number

of the motorcycle in his statement.

11.5 The prosecution examined Mr. Ajitbhai Hathila, the second injured witness as PW No. 3 and his evidence is recorded at Exh. 18. In his evidence, the PW No. 3 also mentioned name of the appellant as the person who fired the gunshot. The PW No. 3 in his evidence also mentioned that before firing the shot the appellant had asked him as to why were they demanding money/compensation in the matter of accident. He mentioned that due to gunshot, he received injuries and he was hit by pellets on his right hip and near his abdomen and waist. The PW No. 3 also mentioned that the other two persons also received injuries due to the pellets which were sprinkled by the gunshot fired by the appellant. The PW No. 3 also mentioned that according to the x-ray some of the pellets are not removed and are still in his body. In his cross-examination, the PW No. 3 mentioned that the incident occurred at around 8:30 p.m. and there was light darkness when the appellant came on motorcycle and when he fired the gunshot. According to the PW No. 3, the gunshot was fired from distance of around 10 feet. The PW No. 3 also mentioned in his cross-examination that he does not have any inimical relation with the appellant and neither he nor his family have any animosity with the appellant. The PW No. 3 also mentioned in his cross-examination that after the shot was fired and after he was hit by the pellets fired by the gunshot, he was became unconscious. In his cross-examination, the PW No. 3 denied the suggestion that the accused was not present at the place of incident.

11.6 The deposition of the PW No. 3 is similar to the deposition by PW No. 2 and there are no contradictions between the said two depositions/evidence. Both witnesses have described the incident in similar manner and both identified the appellant in the Court as the person who fired the gunshot. Both witnesses i.e. PW No. 2 and PW No. 3 have also given similar narration about what the appellant had said before firing the gunshot. The only difference in two depositions which could be pointed out and emphasized from the evidence of PW No. 2 and PW No. 3 is the difference in mentioning the distance from which the gunshot was fired. Except the said difference, there is hardly any contradiction between the said two depositions/evidence. The PW No. 3, one of the injured persons, specifically denied that their eyes were dazed or blinded by the light from the head light of the motorcycle. He also denied the suggestion that he had not seen the person who fired the gunshot.

11.7 Likewise, the deposition by third injured person i.e. PW No. 4 whose evidence is recorded at Exh. 19 is on similar line and the details mentioned by PW No. 4 in his evidence at Exh. 19 are similar with only difference in the evidence with reference to the distance from which the gunshot was fired. The PW No. 4 also mentioned in his deposition that the appellant came on motorcycle and he stopped the motorcycle where he was standing with Mr. Hitesh, Mr. Rajendra and Mr. Ajit and then, the appellant abused them and asked why attempts were made for demanding money by way of settlement in connection

with the case concerning father of the complainant who died upon being hit by Mr. Kamlesh Baria's motorcycle. During his deposition, PW No. 4 also identified the appellant in the Court as the person who had fired the gunshot. The PW No. 4 identified the gun which was used by the appellant. In his cross-examination, the PW No. 4 denied that there was darkness at the place of incident. The PW No. 4 mentioned in his cross-examination that the gunshot was fired from distance of about 10 feet. The said PW No. 4 also denied the suggestion during his cross-examination that the appellant had not fired the gunshot but some other and unknown person had fired the gunshot. He also denied the suggestion in his cross-examination that due to strained relation with the appellant, he is giving incorrect evidence.

11.8 The prosecution examined fourth person who was standing with the complainant and other two injured persons on the date of the incident as PW No. 5 and his evidence is recorded at Exh. 20. The said PW No. 5 is brother of the complainant/injured person i.e. PW No. 2. In his deposition, the PW No. 5 has also, described the incident in similar manner as PW Nos. 2, 3 and 4. He also identified the appellant - accused as the person who fired the shot. The PW No. 5 mentioned that the appellant fired the gunshot from distance of about 15 feet. and that he tried to catch hold of the appellant and ran behind the motorcycle but the appellant managed to escape.

11.9 The panch witness for the place of incident is examined as PW No. 6 and his evidence is recorded at Exh. 22. In his evidence, he has mentioned that on 27.3.2010, he was called to be panch witness and he was also taken to the place of incident where he saw some pellets scattered on the ground and the IO collected the sample of the mud/earth on which there were blood spots and that the cloths of the injured persons were recovered by IO in his presence. The PW No. 6 identified his signature on the panchnama. Any contradictions are not established from his cross examination.

11.10 The other panch witness whose evidence is recorded at Exh. 25 i.e. PW No. 7 was declared hostile. The other panch witness for recovery/discovery panchnama was also declared hostile.

11.11 The IO is examined. In his evidence, the IO has mentioned that the panchnama were drawn in presence of the panch witnesses who had signed the panchnama. He has mentioned that the gun and empty cartridge were recovered. In his cross-examination, he accepted that the injured persons had not mentioned the registration number of the motorcycle and had also not described the gun used in the incident. The I.O. had forwarded the cartridge (sample-E) and the gun (sample-A) for forensic test. The report of the FSL was placed on record before the learned trial Court. The FSL tested/examined the fire arm discharge. The FSL report mentioned that the gun was in working condition and test fire was successful. The forensic test also revealed that the gun was recently used/fired and shot was fired from the gun.

11.12 The gun/fire arm which was used in the incident was recovered/seized and was sent for examination/test to the FSL. The said gun is described as "standard single barrel breach loading shotgun No. BE 1699-2000".

11.13 The said fire arm was test fired in FSL (to ascertain as to whether the said gun was used and any shot was fired therefrom or not), the FSL report mentions that on examination test of the "fire arm discharge", nitrate and led were found and the report also states that the said gun was used/fired before it was received in the laboratory.

11.14 On examination of "sample - E" (i.e. the cartridge), the FSL has certified that the markings on the cartridge show that the said sample E cartridge was fired from sample A shotgun and that the sample E (the cartridge/capsule) reflected special identification marks and the firing pin marks on "sample A" matched with the special identification marks of the sample A (i.e. the muddamal gun).

12. In the backdrop of evidence, the contention may be considered.

12.1 So far as the contention on the ground of identification is concerned, it is challenged on the ground that the incident is said to have occurred at around 8.00 p.m. The learned counsel for the appellant has emphasized the darkness factor.

12.2 It is pertinent that not one but all three injured persons and even the fourth person who was also present at the time and place of incident, have individually and specifically and separately and unmistakably identified the appellant and named the appellant - during their respective deposition in the Court - as the person who asked why they were demanding settlement/money for other incident and as the person who thereafter abused them and then fired the gunshot.

12.3 Moreover, during the cross-examination, the said three injured persons have, in response to the suggestion put to them during cross-examination, categorically mentioned that none of them had any inimical relation with the accused - appellant and none of them have any dispute with and/or strained or inimical relation with the accused - appellant or none of them have any animosity with the accused - appellant. In this view of the matter appellant's identification by the injured persons does not leave any room for doubt.

12.4 The three injured persons and the fourth person do not have any reason to implicate wrong person i.e. to implicate a person who did not cause the attack and/or did not cause the injury and/or to implicate the appellant in false case and let the real culprit escape and go free. The injured person is not likely to shield the real culprit and implicate wrong person.

12.5 On this count, it is relevant to note that before firing the shot, the appellant had asked as to why they were sending their representatives for demanding money and for the settlement in the matter of death of the complainant's father

and had thereafter fired the gunshot and that therefore, there was sufficient time to recognize the accused, more particularly because he was not completely unknown or stranger to them and the injured persons knew him as resident of adjoining village (about 3 km. distance) and also as the person whose house is in the same lane where the house of the person whose motorcycle allegedly hit complainant's father is situate.

12.6 In this view of the matter appellant's identification by the injured persons does not leave any room for doubt.

12.7 On this count, it is also relevant that the muddamal gun is identified as the fire arm from which the shots were fired and the said muddamal gun is registered in the name of father of the appellant. When the said aspect - issue is considered, it emerges from the record that the complainant (who, himself, is injured person) as well as other two injured persons identified the appellant in the Court, during their respective deposition.

12.8 Another relevant aspect is that the shot was not fired in fraction of a second or from moving vehicle. It is neither the case of the prosecution nor of the appellant that the shot was fired from moving vehicle which fled away. It is also not the case that within fraction of a second the assailant fired the shot and fled from the place even before any one could realize as to what happened and before anyone can recognize the person/assailant.

12.9 Actually according to the evidence which is available on record, it has emerged that the accused-appellant came on a motorcycle, he stopped the motorcycle and then, for some time, he abused the complainant/injured persons and also asked why were they deputing representative for settling the dispute and asking for money for settlement. Thus, there was sufficient time and opportunity for the injured persons to recognize and identify the person who abused them and fired the shot.

12.10 On overall consideration of entire evidence of all injured person and the witnesses in totality, it emerges and it becomes clear that the contention on ground of identification and/or the attempt on the part of the appellant to raise doubts as regards the identification of the person who fired the gunshot, has no substance. The conclusion recorded by the learned trial Court on this count cannot be faulted. The matter identification of the appellant by three injured person in the Court during the proceedings - trial is substantive evidence and any ground to discard or not believe the identification is not made out.

13. The appellant's next contention that if the number of pellets said to have been sprinkled on account of the gunshot are taken into account, then, the appellant's contention that such injuries by a gunshot is improbable, inasmuch as from one round (of firing) so many pellets cannot be fired, gets support.

13.1 In this context, it is pertinent to note that the fact cannot be lost sight of that the three injured persons themselves did not count the pellets. The number

of pellets said to have been fired is mentioned by them on the basis of x-ray and on the basis of the details informed by the doctor and it is an approximate or an understanding formed on the basis of what doctor told them and what they found - understood from the x-ray and other report - material and information supplied to them.

13.2 The number of pellets which have been mentioned by the three injured persons are approximate number which the injured persons have mentioned on the basis of x-ray and on the basis of what was informed to them by the Doctor who treated them and removed the pellets and on the basis of the certificate/report of the doctor who mentioned that certain pellets are still in the body of the injured person/s and also on the basis of what the doctor (who treated them) informed them about the pellets taken out and merely because the number of pellets said to have been sprinkled from the gunshot seem to be more than the number of pellets which would be ordinarily sprinkled from one round (of firing) from the muddamal gun does not in any manner wipe out the fact that gunshot was fired by the appellant and three persons were injured. Only because there is some miscalculation in counting or mentioning number of pellets, the case of the prosecution cannot be thrown out or doubts cannot be raised, more so when there is sufficient corroborating evidence on record, more particularly independent evidence in form of deposition of the doctor, who examined and treated the three injured persons and the certificate issued by the doctor.

13.3 The number of pellets mentioned by the injured persons on the basis of information given by the doctor and other material e.g. x-ray or the certificate cannot be the ground for holding that any shot was not fired or such incident did not take place.

13.4 The appellant's attempt to cast shadow of doubt over the incident and to claim, merely on the basis of number of pellets said to have been sprinkled from the gunshot are more than number of pellets which could be fired from a round of firing, that any shot was not fired or that such incident did not take place is not tenable and cannot be sustained.

13.5 The certificate issued by the doctor who treated the injured persons supports and corroborates the case of the prosecution and also supports and corroborates the evidence of the three injured persons that gun shot was fired and they were injured by the gunshot.

13.6 In the evidence, the PW No. 1 has clearly mentioned that the injuries were caused due to shot/pellets fired from the fire arm. In his evidence, the PW No. 1 also mentioned that the injury suffered by the injured persons were grievous and sufficient to cause and result into death. The evidence by the three injured persons is supported and corroborated by the deposition by the PW No. 1 and in light of the medical/injury certificate issued by the PW No. 1.

14. Other contention is raised in light of the details mentioned by the witnesses in respect of the distance from where the shot was fired. The contention is raised

in view of the fact there is difference in respect of distance mentioned by the doctor - surgeon who examined and treated the injured persons at the hospital and the distance by the injured person.

14.1 Merely because of one difference, which is sought to be presented as contradiction in the evidence of three injured persons viz. about the distance from where the shot was fired, neither the evidence of the said three injured persons can be discarded nor the case of prosecution be rejected.

14.2 Besides this, the appellant's attempt to rely on the statement/opinion of the surgeon - Doctor (medical practitioner) with regard to the distance is misconceived.

14.3 It is pertinent that the Doctor's statement - opinion cannot be treated or considered as expert's opinion because said Doctor - PW No. 1 - is medical practitioner/a surgeon and not ballistic expert.

14.4 The perception with regard to distance would defer from person to person and merely because there is difference between the distance mentioned by the doctor/surgeon and the distance mentioned by the injured persons neither discredits their evidence nor does it affect the case of the prosecution.

14.5 In light of the facts of the case, the difference in mentioning the distances from where the gun shot were fired cannot be treated as substantial or major contradiction on account of which the case of the prosecution should fail.

15. From the fact that some pellets were found at the place of incident when panchnama was prepared and from the FSL report, the fact that gunshot was fired is established and from the Doctor's evidence and the injury certificate it is also established that injuries to the injured persons were caused on account of the gunshot.

16. At this stage, it is relevant to recall and refer to the evidence by PW No. 6, i.e. one of the panch witnesses. The PW No. 6 has mentioned that on 27.3.2012, he was called by the police to be panch witness and was taken to the place of incident and the panchnama was drawn in his presence and that the panchnama i.e. Exh. 23 bears his signature. Besides this, it is pertinent that even in the panchnama it is recorded and the PW No. 6 has also mentioned in his deposition that some pellets were found at the place of incident and the presence of blood was also found on the mud at the place of incident which the I.O. had collected as sample. On this count, the prosecution also examined another witness i.e. PW No. 12 who has also mentioned in his deposition that he had written the panchnama as dictated by the panchas and it bears his signature. He also mentioned that the clothes of the three injured persons were collected/seized by I.O. in his presence. The said evidence by PW No. 6 and PW No. 12 corroborate the deposition by the three injured persons.

17. On overall consideration of the facts and in light of totality of evidence, presence of the accused - appellant at the place of incident is established.

17.1 The incident and the firing of the gunshot and the injury to the victims by shot/pellets fired from the gun are established and proved.

17.2 The weapon used in the incident was recovered/seized and was identified. The cartridge was also recovered and examined by FSL and they are found to be the firearm and cartridge used in the incident.

17.3 By the forensic report, it is established that the cartridge/pellets were fired from the gun (sample-A) recovered by the police.

17.4 Further, it is also established that the licence for the gun recovered by the police and tested by FSL is issued in the name of appellant's father.

18. The learned counsel also assailed the judgment on the ground that any independent person/witness is not examined.

18.1 However, in view of the fact that the prosecution examined three injured witnesses and considering the fact that there are no material and/or substantial contradictions or difference in the evidence of the said three injured witnesses and also considering the fact that their evidence is corroborated by the evidence of independent person viz. the doctor (PW No. 1) as well as by the report from FSL and other physical evidence, the case of the prosecution, cannot be rejected and thrown out merely on the ground that the prosecution did not examine any other independent person as witness.

18.2 In this context, it is relevant to note that actually the learned trial Court has also taken into account independent evidence viz. FSL Report, other physical evidence and evidence of independent witness i.e. doctor (PW No. 1) who examined the three injured persons and mentioned in his deposition that the injuries to Mr. A.J. Hathila were caused by gun shot and they were grievous and sufficient to cause death. With reference to the injuries to the second injured person i.e. Mr. H.R. Hathila also the PW No. 1 mentioned that the injuries were caused due to gunshot and were of grievous nature and sufficient to cause death.

18.3 Thus, the findings and conclusions reached and recorded by the learned trial Court are based on other physical evidence available on record including the independent evidence of the doctor (PW No. 1). Therefore, the said contention is, even otherwise, without merits.

19. As his last contention, learned advocate for the appellant submitted that motive is not established and that therefore the conviction for offence under Section 307 of Indian Penal Code is not proper.

19.1 So far as the contention that motive was not to kill is concerned, it is relevant to mention that Section 307 of Indian Penal Code contemplates and provides that if the act is done by a person "with knowledge" that by his act he might cause death, then, such act with such knowledge is sufficient to attract Section 307 of Indian Penal Code. Section 307 postulates that any act which is done "with such intention or knowledge and under such circumstances that if by

that act death is caused, the person would be guilty of murder then Section 307 will be applicable. Thus, "knowledge" that the act might cause death, is sufficient to attract said provision.

19.2 In present case, the utterance by the appellant before firing the shot made it clear that the complainant's action of demanding money and deputing representative for settlement in connection with the matter related to death of his father (i.e. father of the complainant) was the cause and reason and motive for the attack. The attempt by the complainant of demanding money and settlement in the matter of his father's death was in the background or was the reason for the attack. This fact or this aspect emerges, and becomes clear, from what the appellant spoke and uttered before firing the shot and those utterance by the appellant brings out and establishes the motive for the attack/incident.

19.3 In this context, it is pertinent that the intention can be gathered also from the nature of the weapon selected and used for the attack.

19.4 The above discussed fact coupled with the selection of weapon inasmuch as the attack was made with a fire-arm (a gun) brings out and establishes the intention. It is pertinent that the abovementioned facts (viz. appellant addressing the complainant and his brother and other two friends and asking that why money and settlement in the matter of complainant's father was demanded and why were representatives deputed for that purpose) - are immediately followed by the action i.e. firing gun-shot which is coupled with the fact that the shot was fired at the complainant's chest - (which aspect has come out from the doctor's evidence). Meaning thereby, the "motive" and the "knowledge" were followed by actual action.

19.5 These aspects viz. the reason behind the action, the selection of the weapon (i.e. a shotgun which fires cartridge which would sprinkle several pellets) and the utterances by the appellant before firing the shot, the multiple wounds - injuries caused to the complainant and other two injured persons and the vital parts of body where injuries were caused and the cumulative effect of these aspects satisfy and establish or bring out the motive behind the action and also establish that the motive was to kill and the fact that the appellant had the "knowledge" that his action will/might cause death, is also established. Differently put, the aforesaid facts and aspects establish that all ingredients, required to attract Section 307 , are present in this case.

19.6 Thus, from the foregoing discussion, it follows that in present case, the intention and motive for and behind the incident have emerged from the selection of weapon and the utterance by the accused before he fired the gunshot. It becomes clear that the attempts by the complainant and others viz. demanding settlement and amount in respect of the death of complainant's father was the point of objection and the said attempts triggered the incident. This aspect emerges from what the accused appellant spoke before firing the gunshot (i.e. why persons were deputed for demanding settlement and money in the case

of death of complainant's father). So as to realise and achieve the object - motive the appellant consciously selected the weapon. Then followed actual action viz. firing the gunshot. The selection of weapon and actual action of firing the gunshot and the fact that the gunshot caused injuries at the complainant's chest and other vital parts of his body and other injured persons as well, establish that the motive was to kill. After having said so, the accused fired the gunshot. Thus, the intention and motive are followed by actual action.

19.7 The complainant received injury from the gunshot on the right chest wall. The complainant and other injured persons have received multiple wounds from the pellets which were sprinkled from the gunshot which was fired by the accused. All these aspects cumulatively establish the motive and the knowledge. This is sufficient to attract Section 307 . In present case, the said knowledge is coupled with further action (i.e. firing the gunshot at the complainant and other injured persons) by which the three injured persons received multiple wounds and some injury/wounds at the vital part of the body i.e. the chest.

20. For attracting the said provision, the knowledge that the act might cause death is sufficient and it is not necessary that injury should be on the vital part of the body.

20.1 In this context, it would be appropriate to refer to the observations by Hon"ble Apex Court in the decision in case of State of M.P. Vs. Mohan and Others, , wherein Hon"ble Apex Court has observed that:-

"14. The High Court was of opinion that injuries has not been caused on vital parts of the body. In order to attract Section 307 , the injury need not be on the vital parts of the body. In order to attract Section 307 , causing of hurt is sufficient. If anybody does any act with intention or knowledge that by his act he might cause death and hurt is caused, that is sufficient to attract life imprisonment. Section 307 uses the word "hurt" which has been explained in Section 319 , IPC and not "grievous hurt" within the meaning of Section 320 , IPC. Therefore, in order to attract Section 307 , the injury need not be on the vital part of the body. A gun shot, as in the present case, may miss the vital part of the body, may result in a lacerated wound, that itself is sufficient to attract Section 307 . High Court is, therefore, in error in reducing the sentence, holding that the injury was not on the vital part of the body. Period undergone by way of sentence also in our view is not commensurate with the guilt established."

20.2 It would also be appropriate to refer to the observations by Hon"ble Apex Court in the decision in case of State of M.P. Vs. Kashiram and Others, , wherein Hon"ble Apex Court has observed that:-

"12. "11. ...Section 307 relates to attempt to murder. It reads as follows:

307.

12. To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of

injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

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

15. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 IPC. The determinative question is intention or knowledge, as the case may be, and not nature of the injury."

20.3 It would also be appropriate to refer to the observations by Hon"ble Apex Court in the decision in case of Girija Shankar Vs. State of U.P., , wherein Hon"ble Apex Court has observed that:-

"13. To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with

the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof."

21. The picture which emerges from the foregoing discussion is that:-

[a] the medical/doctor's evidence corroborates the deposition by the three injured persons;

[b] the deposition by the doctors also corroborates the case (of the prosecution and the three injured persons) that the injured persons received the injuries on account of the shot fired from the gun;

[c] the evidence by the doctor has also brought out that the injury suffered by the complainant and other two persons were grievous and sufficient to cause death;

[d] there are no contradictions in the deposition - testimony and statements of the three injured persons, except with regard to the distance from where the appellant fired the shot. The difference in mentioning the distance - perceived by three injured person and the surgeon/doctor who treated the persons in his hospital (and who is not a ballistic expert) does not invalidate or render worthless entire evidence - deposition by three injured persons (including the complainant) and for such reason entire evidence - which is otherwise corroborated-cannot be ignored or discarded. Moreover, the difference (in mentioning the distance) is not so wide or large which would cast doubt on the deposition of the three injured persons;

[e] the panchnama of the place of incident corroborates the deposition of the three injured persons;

[f] the gun/fire arm from which the gunshot was fired was recovered and the FSL report established that the gun was fired before it was brought to FSL.

[g] The "fire arm discharge and traces of nitrate and led" were found on the recovered/muddamal gun and that the muddamal gun is registered in the name of appellant's father;

[h] on examination of cartridge, FSL also reported that specific and unique marks on the cartridge matched with those of the gun and the said the report also certified that the cartridge/capsule was fired from the sample A (i.e. the mudamal) gun;

[i] in the matter of identification of the appellant, the three injured persons and the fourth witness (who was present at the time and place of incident) have given consistent evidence and all four persons have individually and separately identified the appellant as the person who fired the gunshot and that such identification is done (during their deposition).

[j] the three injured persons knew the appellant as the resident of village Bhiloi which is at a distance of about 3 kms. and the injured persons also knew that the appellant's house is in the same lane where the person whose motorcycle had hit the father of one of the injured persons, stays (about which fact the appellant had made reference/utterance before he fired the shot) and that, he (i.e. the appellant was not unknown/stranger to the injured persons. Thus, it was not impossible for the injured person to recognize and identify the assailant - appellant;

[k] it has also emerged from the evidence on record, particularly the deposition by the three injured persons that there was no animosity between the appellant and the three injured persons or any one of them. Any ill-intention on the part of the complainant and other injured persons or any cause for strained relation between the appellant and the complainant and the other injured persons is not shown. The attempt by the complainant to settle the matter of his father's death with Mr. Kamlesh C. Baria, was not liked by said Mr. Kamlesh C. Baria. The said attempts by the complainant triggered the incident.

[l] it is pertinent that the injured person would not let the real culprit escape the sentence by involving wrong person.

[m] by identifying the appellant as the culprit/assailant, the complainant and other injured person will not implicate wrong person and/or will not implicate the appellant in false case which would help the real culprit escape the sentence.

[n] the injured persons do not stand to gain anything by identifying wrong person.

[o] The FSL report, medical evidence/doctor's deposition, the certificates issued by the doctor, the marks and holes on the clothes of the injured persons, corroborate the deposition of the injured persons and the fourth witness.

[p] The fact that injuries were grievous and sufficient to cause death is established from the deposition of the doctor i.e. PW No. 1.

22. In this view of the matter, the conclusion by the learned trial Court that Section 307 of Indian Penal Code is attracted and the offence is made out and is conclusively established beyond reasonable doubt, cannot be faulted.

23. In backdrop of such material and evidence on record and in light of the facts which are established by the evidence on record, the conclusion and finding by the learned trial Court that the charge of commission of offence by the appellant is proved, cannot be faulted.

23.1 The learned trial Court has considered and dealt with the contentions raised by the accused and after evaluating entire evidence reached to the conclusion that the evidence by the injured three witnesses and fourth witness i.e. the brother of the complainant is, reliable and trustworthy and the said evidence is corroborated by the deposition of PW No. 1 (Doctor) and other physical evidence

brought on record by the prosecution.

23.2 Accordingly, the learned trial Court has recorded the conclusion holding the accused guilty of the offence and that the prosecution has proved the case and charge of offence against the accused beyond reasonable doubt.

23.3 The learned trial Court has recorded sufficient and satisfactory reasons after having considered the scope of Section 307 and Section 504 of Indian Penal Code.

23.4 Upon appreciation of evidence available on record and upon consideration and examination of the judgment impugned in present petition, any material or substantial error is not found.

24. For the foregoing reasons, this court agrees with the decision by learned trial Court and confirms the conviction and also the sentence awarded by the learned trial Court by virtue of the judgment impugned in present appeal. There is no reason to interfere with the impugned judgment. The Court does not find any substance in the appeal. The judgment and order passed by the learned trial Court is hereby confirmed. The appeal is dismissed.

The Court is informed that the appellant is in jail. Therefore, any order is not required to be made.

In the circumstances, present appeal deserves to be dismissed and accordingly stands dismissed.

The Record & Proceedings be sent back to the learned trial Court forthwith.