
(2006) 05 RAJ CK 0040
In the Rajasthan High Court
Case No : Criminal Appeal No. 144 of 2001

Raju @ Rajkumar and Others	Vs	APPELLANT
State of Rajasthan and Others		RESPONDENT

Date of Decision : 17-05-2006

Acts Referred:

Arms Act, 1959 — Section 25, 27, 3
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 157, 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 300, 302

Citation : (2006) 4 RLW 2957 : (2007) 1 RLW 604

Hon'ble Judges : Shiv Kumar Sharma, J; Prem Shankar Asopa, J

Bench : Division Bench

Advocate : S.R. Bajwa and V.R. Bajwa, for Khuma Ram, Bhanwar Lal Sharma and Manoj Sharma, for Raju and Anoop Dhand, for the Appellant; R.P. Kuldeep, Public Prosecutor, for the Respondent

Judgement

Shiv Kumar Sharma, J.—Raju @ Raj Kumar and Khuma Ram, the appellants in these two appeals, and eleven others were found involved in the incident that occurred on November 25, 1998. Since appellant Khuma Ram absconded, appellant Raju and others were tried in Sessions Case No. 34/1999 before the learned Additional Sessions Judge No. 2, Sikar. After appellant Khuma Ram surrendered, he was also tried in Sessions Case No. 33/2002 (34/1999). Learned trial Judge vide judgments dated January 04, 2001 and March 15, 2004 convicted and sentenced the appellants Raju @ Raj Kumar and Khuma Ram as under:

Raju @ Rajkumar:

Under Section 302 IPC:

To suffer imprisonment for life and fine Rs. 1,000/-, in default to further suffer one month rigorous imprisonment.

Under Section 323/149 IPC:

Fine of Rs. 1000/- in default to suffer one month rigorous imprisonment.

Under Section 147 IPC:

Fine of Rs. 1000/- in default to suffer one month rigorous imprisonment.

Under Section 3/25 Arms Act:

To suffer rigorous imprisonment for one year.

Under Section 3/27 Arms Act:

To suffer rigorous imprisonment for one year. Khuma Ram:

Under Section 302 IPC:

To suffer imprisonment for life and fine Rs. 1000, in default to further suffer one month rigorous imprisonment.

Under Section 323/149 IPC:

Fine of Rs. 1000/- in default to suffer one month rigorous imprisonment.

Under Section 147 IPC:

Fine of Rs. 1,000/- in default to suffer one month rigorous imprisonment.

Under Section 3/25 Arms Act:

To suffer rigorous imprisonment for one year and fine Rs. 500/-in default to further suffer fifteen days imprisonment.

Under Section 3/27 Arms Act:

To suffer rigorous imprisonment for one year and fine Rs. 500/-in default to further suffer fifteen days imprisonment.

Sentences were ordered to run concurrently.

2. It is the prosecution case that on November 25, 1998 appellants Rajkumar and Khuma Ram along with co-accused persons came in two-three jeeps at the house of the complainant party and started hurling stones. Pooran Mal, Mohan Lal and others came to save them. Then Raj Kumar entered in the house of Shanker Lal (father of Raj Kumar) and brought a gun and opened two fires, one of which hit Pooran Mal. Khuma Ram then snatched the gun from Raj Kumar and opened fire which hit Mohan Lal. The injured persons were removed to the hospital. When SHO Laxmangarh reached to the spot; written report (Ex. P. 1) was handed over to him by Chothu Ram and Shyam Lal. Case under Sections 147, 148, 448, 307, 323 and 336 1PC was registered. After Puran Mal and Mohan Lal succumbed to injuries Section 302 was added. On completion of investigation charge sheet was filed against Raj Kumar and co- accused persons. In due course the case came up for trial. In both the trials against the appellants charges under Sections 302, 302/149, 323/149, 448, 147 IPC and 3/25 and 3/27

Arms Act were framed, who denied the charges and claimed trial. Eye witnesses viz. Chothu Ram, Bheru Ram Munidhar, Bidami, Shyam Lal, Sanwar Mal, Raghunath and Rameshwar Lal were examined by the prosecution. In the explanation u/s 313 Cr.P.C, the appellants claimed innocence. No witness in defence was examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated above.

3. We have heard the learned Counsel for the parties and with their assistance scrutinised the material on record.

4. Death of Puran Mal and Mohan Lal was indisputably homicidal and caused by gun shot injuries. Post Mortem Report (Ex.P.43) reveals following antemortem injuries on the dead body of Puran Mal:

There are multiple lacerated wounds of even size of rounded shape having their inverted margins & slightly scortched skin around these wounds. The size of all wounds is approximately 1 -2 cm diameter and uneven depth covering area on It. side of chest, infront of neck and Lt. upper shoulder region.

In the opinion of Dr. T.S. Choudhary (PW. 15), who performed autopsy on the dead body, the cause of death was shock due to excessive hemorrhage from the vital organs.

Deceased Mohan Lal as per post mortem report (Ex. P. 44) received following antemortem injuries:

There are multiple lacerated wounds of even size of rounded shape having inverted margins & surrounded by slight scortched skin on infront of chest more on Lt. side, Lt. side of upper abdomen and infront of left shoulder region. The size of the wounds is approxi mately 1/2 - 3/4 cm in diameter and uneven depth.

In the opinion of Autopsy Surgeon Dr. T.S. Choudhary (PW. 15) the cause of death was shock due to excessive hemorrhage from the vital organs.

Injured Chothu Ram, Murlidhar, Rameshwar, Bheru Ram, Bidami and Shyam Lai also sustained injuries in the form of contusions and lacerated wounds.

5. It will be appropriate at this juncture to consider the injuries sustained by the accused party.

Appellant Raju @ Rajkumar vide injury report (Ex. D.13) received following injuries:

1. Contusion 5 cm x 5 cm fore head
2. Contusion 2 cm x 1 cm Rt. index finger
3. Abrasion .5cm x .5 cm Rt. middle finger
4. Contusion 2 cm x 2 cm Rt. shoulder
5. Contusion 2 cm x 2 cm Neck (Lt.)

Injuries received by accused Hari Parsad vide injury report (Ex. D. 14) are as under:

1. Contusion 3 cm x 3 cm Rt. shoulder
2. Contusion 3 cm x 3 cm Lt. shoulder
3. Laceration 2 cm x .5cm x .5 cm scalp vertex

Mishri Lal @ Parmeshwar also received injuries vide injury report (Ex. D. 15) thus:

1. Abrasion 1 cm x 1 cm Rt. knee Antr.
2. Abrasion 1.5 cm x 1.5 cm Rt. leg Antr. upper part
3. Laceration 1.5 cm x .3cm x .3 cm Rt. eye brow

Dwarka Prasad vide injury report Ex, D.I6 received one contusion 2 cm x 2 cm at Rt. thigh Lat.

Madan Lal vide injury report Ex. D. 17 received one laceration 3" x 1/6" x 1/6" Scalp Rt. Parietal area.

Babu lal vide injury report Ex. D. 18 received one laceration 3/4" x 1/6" x 1/6" left parietal area scalp.

6. The gun (12 Bore SBBL) allegedly used in commission of offence got recovered at the instance of appellant Raj Kumar vide recovery memo (Ex. P. 27). A look at FSL report (Ex. P. 67) goes to show that the said gun had been fired.

7. Learned Counsel for the appellants canvassed that none of the so called eight eye witnesses, produced by the prosecution, have made true version. They have conspired to implicate the appellants falsely. Every one of them has freely indulged in making material improvements upon earlier version. There are intra contradictions on material aspects in the statements of eye witnesses. Version set out by them suffers from glaring improbabilities. None of them should have been relied upon by the learned trial Judge. Ocular testimony stands falsified by scientifically acclaimed principles of ballistic science. The eye witnesses have willfully changed the place of occurrence. In fact the complainant party was aggressor and the accused party acted in self defence. No one from the neighbourhood was examined by the prosecution and only interested witnesses and partisan witnesses were produced. The trial judge failed to appreciate the inter play of issue estoppel and the same resulted in gross failure of justice. Neither the genesis nor motive has been spelt out. Appellants had no motive to commit murder of Mohan and Puran Mal. The trial Judge failed to consider the effect of mis-joinder of charges. No recovery of gun, cartridge or empty was made from the appellant Khuma Ram. The investigation was not fair and it was partisan. In fact it was a case of single fire and the medical witness admits this possibility. The appellants have been implicated because of political affiliation.

8. Per contra, learned Public Prosecutor and learned Counsel for the complainant supported the impugned judgments and urged that the appellants have been rightly convicted and sentenced. According to learned Counsel for the complainant the act of appellants was covered in Clause 4thly of Section 300 IPC since both the appellants knew that their act was imminently dangerous that it might in all probability, cause death or such bodily injury as could likely to cause death. Appellants Khuma Ram and Raj Kumar came with the intention to commit murder. After Khuma Ram said "kill them", all the accused started given beating the complainant party, then Raj Kumar brought the gun and opened fire that killed Puran Mal. Khuma Ram then snatched the gun and fired a shot that killed Mohan Lal. Reliance is placed on State of Madhya Pradesh Vs. Ram Prasad, .

9. In Kanhiyalal and Others Vs. State of Rajasthan, on which reliance is placed by learned Counsel for the complainant the Hon"ble Supreme Court observed that the injuries received by accused were of simple nature as against those suffered by deceased persons. The accused not permitted a witness to take the victim to hospital even after incident. The accused were aggressors and were not entitled to right of private defence.

10. In State of Jammu and Kashmir Vs. Hazara Singh and Another, the Apex Court held that the gun firing at the deceased who at the relevant time was not carrying any arms or stone. The gun shot by the accused cannot be said to be an act done in exercise of right of private defence.

11. In Bharat Singh Vs. State of Uttar Pradesh, the Apex Court observed that absence of scorching, blackening, tattooing injuries will not discredit eye witness account in the absence of positive opinion from the doctor and testimony on distance of firing.

12. In Bhagwan Tana Patil Vs. The State of Maharashtra, the Hon"ble Supreme Court held that there is no hard and fast rule that simply because the prosecution witnesses did not explain the injuries on the person of the accused, their entire evidence should be discarded. Bankey Lal and Others Vs. State of U.P., relied on.

13. In Karnail Singh and Others Vs. State of Punjab, the Apex Court observed that where it is proved beyond doubt from the direct evidence of the eye witnesses that the accused committed murder by firing gunshots, the inconsistency between the opinion of expert and the prosecution story relating to distance from which gunshots were fired carries no weight.

14. In State of Uttar Pradesh Vs. Sughar Singh and Others, the Apex Court observed that on death by gunshot, direct evidence of eye witness available the inconsistency relating to distance from which gun shots were fired, between medical evidence and eye witness is of no significance.

15. In Jangeer Singh v. State 1987 RCC 169 it was held that simply because the pellets were not found on the place on next morning cannot render the testimony

of eye witness unreliable. The testimony of eye witness is reliable therefore non production of ballistic expert report and non sealing of blood stained soil does not help the accused in any manner.

16. In *Mrs. Satiama v. State* 1979 WLN (UC) 238 it was held that if FIR not sent for formal registration and investigation started the investigation is not unfair.

17. In *Vishvas Aba Kurane v. State of Maharashtra* 1978 Cr.L.R. SC 59 the Apex Court held that in case of free fight no one has right of private defence.

18. In *State of Punjab Vs. Gurmit Singh and Others*, the Apex Court held if Investigating Agency not conducted investigation properly or was negligent, cannot be a ground to discredit testimony of prosecutrix.

19. In *Leela Ram (Dead) Through Duli Chand Vs. State of Haryana and Another*, it was held that any irregularity or even an illegality during investigation should not be treated as a ground to reject prosecution case.

20. In *Allar Khan K. Mansuri v. State of Gujarat* 2002 RCC (SC) 314 : RLW 2002 (3) SC 432 it was held that defective investigation by itself cannot be a ground for acquittal.

21. In order to properly appreciate the testimony of eye witnesses, we deem it necessary to scan the site plan of the place of incident. A look at the site plan (Ex. P. 2) reveals that informant Chouthu Ram and accused Shanker Lal (father of appellant Raj Kumar) were neighbours. In front of house of Shanker Lal many stones were found lying. House of Shanker Lal is shown at point No. 6 of site plan, which reads, thus:

6- LFkku ij edku vkjksih Jh "kadj yky ds n"kkZ, gSaA ftlesa vkjksih Nqi dj ,DI4 LFkku ls cUnqd ls Qk;j djuk eqLrxhl crkrk gSa rFkk mDr edku ds ckgj QSads gq, iRFkj n"kkZ, gSa A

(At point No. 6 house of accused Shanker Lal is shown. According to complainant the accused got himself hidden at place X4 and opened fire and out side the house the stones that were thrown are shown lying.)

A further look at the site plan demonstrates that Puran Mal was standing at place XI and Mohan Lal was standing just near by at place X3 when gun fire hit them. Fire got open from place shown as X4. The distance between X4, X1 and X3 was about 60-70 ft.

22. Super structure of the prosecution case is founded on the testimony of Chothu Ram (PW. 4), Bheru Ram (PW. 5), Murlidhar (PW. 6), Bidami (PW. 7), Shyam Lal (PW. 8) and Rameshwar Lal (PW. 14), who have been examined as injured eye witnesses. Testimony of these witnesses has been supported by Shiv Ram (PW. 9) and Raghunath (PW. 10), who have been examined as independent eye witnesses. Inform-ant Chothu Ram (PW. 4) in his deposition stated that around 5.30 PM while he along with his father and son was sitting on the platform of his house and puffing Chulam, Khuma Ram, Shanker Lal, Hari Prasad,

Raju, Vinod, Madan Lal, Babula, Dalu Ram, Sukhdeva Ram, elder son of Sukhdevaram, Murari Brahmin, Mishri Lal, Dwarka Praka etc. came in 2-3 jeeps. After alighting from the jeep Khuma Ram exhorted others to kill Kumhars and thereafter Hari Prasad inflicted lathi blow on the head of informant, Vinod gave lathi blow on head of his father, Babu Lal gave stone blow on back of informant and others started given beating by stones and lathis. On hearing hue and cry Raghunath Gurjar, Murlidhar Sharma, Puran Mal Kumawat, Sanwar Lal, Rameshwar Gurjar came to save informant but they were also beaten up. When more persons gathered, Khuma Ram and Raju entered in the house of Shanker Lal and Raju came out with a gun and opened fire that hit the chest of Puran Mal and Puran Mal fell down. Raju opened another fire but it was missed. Thereafter Khuma Ram took the gun from Raju and opened fire that hit the chest of Mohan Lal, who fell down. The accused then entered in their houses and escaped in the jeeps. The incident occurred because of enmity of elections. On the day of election Raju came to the house of informant and told his father to vote for BJP but his father in turn said that it was his discretion to vote, thereafter altercations exchanged and because of that enmity the complainant party was assaulted. In the cross examination Chothu Ram however stated that he and his father had no enmity with Khuma Ram. He further stated that his father was not allowed to caste the vote on that day. He denied to have hurled stones at the house of Shanker Lal. He denied the suggestion that original report was changed in connivance with the police officials. He further stated that Khuma Ram did not inflict injury aiming his father and his son. He also stated that when Raju aimed gun at them he did not make any effort to escape. He further stated that he did not see any injury on the person of accused. He admitted that cross case was registered against them.

23. Sohan Singh (PW. 19) who conducted investigation of the case, in his deposition stated that on November 25, 1998 he was posted as SHO Laxmangarh. Around 6.30 PM he received information through telephone that gun was fired in village Tiba Ki Dhani. After recording the information in Rojnamcha he proceeded to the place of incident, where Chothu Ram gave a written report (Ex. P. 1) to him. In the cross examination he stated that he was informed on telephone that two parties fought together in Tiba Ki Dhani and gun was fired. He admitted that in regard to the same incident Bhanwari Devi (mother of appellant Raju) filed complaint in the court of Laxmangarh which was forwarded for investigation to the police station u/s 156(3) CrPC and cross case bearing FIR No. 305/98 (Ex. D. 10) was registered. During investigation of the cross case Raj Kumar, Hari Prasad, Mishri Lal @ Parmeshwar, Dwarka Prasad, Madan Lal and Babu Lal were got examined by the doctor and their injury reports were drawn. He denied to have knowledge about cognizance under Sections 147,324,452,333 and 149 IPC against the accused of cross case viz. Murlidhar, Srikishan, Deendayal, Bheru Ram, Chothu Raj, Ratan Lal, Sanwar Mal, Bhima Ram, Radhey Shyam, Rameshwar and Raghunath. He also admitted that he got photographed the place of incident. He further admitted that since the accused

did not come in jeeps, therefore he did not make investigation regarding the jeeps. He did not recover the blood stained stones or lathi. He admitted that in the site plan Ex. P. 2 at the place XY the stones lying in front of the house of Shanker Lal were shown. He further admitted that the distance between places X1 and X4 was 60-70 ft. He also admitted that on the place of incident no blood was found. He further admitted that in site plan Ex. P. 2 no marks of jeeps were shown by him. He further admitted that in his investigation he did not find that there was enmity between accused and complainant party. He also admitted that he did not lift finger prints from the gun. He did not find pellets on the place of incident. He did not prepare any memo for the search of pellets. He further deposed that the FIR was sent to the court of Magistrate through the constable in the morning and it reached to the Court at 3.30 PM. He however admitted that the distance of the court from the police station was 2-3 Km. He denied the suggestion that original FIR was replaced by new one. He did not recover blood stained clothes of the injured. He did not find any Chilam on the place of incident. He did not find stones in the Guwari (chowk) of complainant party. He denied the suggestion that because of local political pressure he introduced those witnesses who had enmity with the accused persons.

24. Dr. T.S. Chaudhary (PW. 5) who conducted autopsy on the dead bodies and drew that post mortem reports, in his cross examination deposed thus:

;g laHko gS fd ;fn pksV yxrs le; nksuksa e`rd ,d nqljs ds ikl ikl vkxs ihNs IV dj [kM+s gks rks ,d gh fMLpktZ ls mYysf[kr pksV vk ldrh gS A ;kfu ,d gh Qk;j ls nksuksa ds pksV vkus dh lHkkouk gks ldrh gSA

(It is possible that one discharge could hit two deceased, if they stood adjacent to each other. One fire could possibly cause injuries to two persons).

He further stated that pellets if discharged at a distance of more than 12 ft. could not cause scorching on the wound.

25. Bheru Ram (PW. 5) in his cross examination stated thus:

iwj.k ds xksyh rc mlds ihNs eksgu rhu QhV dh nwjh ij [kM+k gqvk Fkka

(When gunshot hit Puran, Mohan was standing behind him at a distance of three feet).

Murli (PW. 6) in his cross examination deposed thus:

eSusa eqyfteku ds ckn esa pksVsa yxh gqbZ ns[kh Fkha tks xkao okyksa us iRFkj QSadus ds dkj.k vkbZ Fkh A xkWo okys ikap lky feuV rd iRFkj QSadrs jgs FksA

(I had seen the injuries sustained by the accused which were caused by the stones pelted by the villagers. The villagers had hurled the stones for five seven minutes.)

26. Factual situation emerges from the material on record may be deduced thus:

(i) Informant Chothu Ram and Shanker LaL (father of appellant Raj Kumar)

resided in the vicinity of each other.

(ii) Appellant Khuma Ram was not the inhabitant of village Tipa ki Dhani.

(iii) in the FIR it was alleged that the appellant Khuma Ram and Raj Kumar came in two three jeeps, but Sohan Singh, 10 (PW. 19) deposed that the accused did not come in jeeps, therefore he did not make investigation regarding the jeeps.

(iv) Cross case was registered against the complainant party and the accused party including the appellant Raj Kumar sustained injuries.

(v) From the site plan (Ex. P. 2) it appears that stones were hurled at the house of Shanker LaL.

(vi) From the testimony of Bheru Ram (PW. 5) it is evident that when the gunshot hit Puran, Mohan was standing just 3 ft. behind him.

(vii) Dr. T.S. Chaudhary, Autopsy Surgeon (PW. 15) deposed that one gunshot could hit two persons if they stood adjacent to each other.

(viii) Sohan Singh, 10 (PW. 19) admitted that the court of Magistrate was at a distance of 2-3 Kms. from the police station but the FIR sent through the Constable in the morning reached to the court of Magistrate at 3.30 PM. Sohan Singh also admitted that he did not lift finger prints from the gun.

(ix) The prosecution version that Khuma Ram exhorted other assailants to kill Kumhars did not find place in the FIR.

(x) According to Murli (PW. 6) the injuries sustained by the accused were caused by stones pelted by the villagers.

(xi) The version of prosecution indicates that the gun was fired from a distance of 70-80 ft., but as per post mortem report the wounds sustained by the deceased were having marks of blackening and scorching. Autopsy Surgeon however deposed that the pellets if discharge from more than 10 ft. could not cause scorching on the wounds.

(xii) According to prosecution version three shots were fired, out of which one got missed, whereas only two empties got recovered by the Investigating Officer from the place of incident.

27. Having closely scanned the material on record we find that testimony of Sohan Singh IO (PW. 19) falsifies the version given in the FIR that the appellants along with other accused came in the jeeps. Sohan Singh in his deposition categorically stated that the accused did not come in jeeps, therefore he did not make investigation regarding jeeps. In our opinion even the origin of FIR is doubtful. The reasons are:

(i) According to Chothu Ram (PW. 2) the report was directed by him to Shyam Lal (PW. 3) who wrote the report and gave it to the police when police arrived. But a bare reading of the report reveals that it was not written on the dictation of

Chothu Ram, since-in the report "myself, my father Chothu Ram, grand father Bheru Ram" words have been used. Chothu Ram also deposed that Shyam Lai put his signatures on the report whereas written report Ex. P.I did not bear the signatures of Shyam Lal.

(ii) If the report was written in the house of Chothu Ram and handed over to the police at the place of incident then is it coincidence only that size, quality and colour of paper of the formal report drawn at the police station and that of written report are alike.

(iii) Court of Magistrate was only 2-3 Kms away from the police station but the report that proceeded in the morning from the police station reached to the Court at 3.30 PM.

28. It is trite that delay in sending the report maybe itself be of no consequence, but when coupled with the suspicion or other infirmities attaching to the recording of the report, or the conduct of the investigation, thereafter, it must have a very telling effect on the prosecution. The use of the word "forthwith" in Section 157 Cr.PC. is not without significance and the delay in sending the report to the Magistrate gains importance and creates doubts on the version of the case of the prosecution. The delay in sending the FIR is a circumstance which provides a legitimate basis for suspecting that the FIR was recorded much later than the stated hour, affording sufficient time to the prosecution to introduce improvements and the embellishments and set up a distorted version, of the occurrence.

29. As already noticed the version of prosecution indicate that Khuma Ram exhorted other accused to kill Kumhars but it did not find support from FIR. Another allegation against Khuma Ram was that after Raj Kumar opened fire twice, Khuma Ram snatched gun from the hands of Raj Kumar fired shot at Mohan and killed him. Since two empties got recovered from the place of occurrence by the IO, probabilities are that only two shots were fired from a distance of 70-80 ft. and both the shots have been attributed to appellant Raj Kumar. Dr. T.S. Chaudhary (PW. 15) who conducted autopsy on the dead bodies, deposed that one fire from the gun could possibly cause injuries to two persons. Bheru Ram (PW. 5) supported this fact that Mohan was standing three feet behind Puran when gunshot hit Puran. Appellant Khuma Ram was not the inhabitant of Tiba ki dhani and he did not sustain any injury too.

30. While what happened cannot be determined with certainty, we feel that this is a case in which the appellant Khuma Ram is entitled to benefit of doubt. Possibility of over implication of appellant Khuma Ram in the instance case cannot be ruled out. We find it difficult to believe that even after gunshot hit Puran, the witnesses would not have scared and without caring of their life they were busy in looking at the assailants who were carrying the guns. Like a video camera the witnesses recorded every minute details of the incident which according to us was not possible in the facts and circumstances of the case.

31. That takes us to the allegations levelled against appellant Raj Kumar. From the prosecution evidence it is established that Shanker Lal father of Raj Kumar, was the neighbour of informant Chothu Ram and the stones were pelted at the house of Shanker Lal by the complainant party. Murli (PW. 6) admitted that the villagers had pelted stones for five-seven minutes at the accused. From medical injury reports it is evident that members of the accused party viz. Madan Lal, Babu Lal, Hari Prasad and Mishri Lal @ Parmeshwar had sustained lacerated wounds on head and eye brow. Appellant Raj Kumar also received contusion on the forehead. It appears that in order to save himself and his father from the shower of stones appellant Raj Kumar opened fire. Since gun was shot from a distance the possibility of spreading of pellets cannot be ruled out. In our opinion clause Fourthly to Section 300 IPC is not attracted in the facts and circumstances of the case. Clause Fourthly of Section 300 provides that if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. The expression "without any excuse" means without any exculpatory circumstances other than those mentioned in five exceptions to Section 300 IPC. The word "excuse" here means something which is a justification of the act and does not merely mitigate the crime. In assessing what is excuse and what is not, the court has to consider the state of mind of the accused was in when he committed the act.

32. Right of private defence arises when the person has to face assailants who can reasonably be apprehended to cause grievous hurt to him. The second exception to Section 300 IPC deals with the case where a person exceeds the right of private defence. If the excess is intentional, the offence is murder, if unintentional it is culpable homicide not amounting to murder. In *Chuhar Singh v. State of Punjab* 1992 UP Cr.R. 183 the accused had exceeded his right of private defence of his body when causing the death of the deceased by using the dangerous weapon, namely the gun and hence he was not found entitled for complete acquittal but would be liable to be convicted u/s 304 Part I IPC. Therefore he was sentenced to undergo imprisonment for a period of Five years.

33. In the case on hand we are of the opinion that appellant Raj Kumar had right of private defence but by using gun he exceeded it therefore he is guilty u/s 304 Part I IPC. We find no substance in the submission of learned Counsel for Raj Kumar that it was one Sanwal Ram who was actual culprit. Inferences cannot be drawn on the basis of surmises and conjectures. Defective investigation cannot be a ground to reject the prosecution case.

34. As a result of the above discussion we dispose of the instant appeals in the following terms:

(i) We allow the appeal of appellant Khuma Ram and set aside the conviction and sentence awarded to him. We acquit him of the charges under Sections 302, 323/149, 147 IPC and 3/25 and 3/27 Arms Act. Appellant Khuma Ram, who is in

jail shall be set at liberty forthwith if not required to be detained in any other case.

(ii) We partly allow the appeal of appellant Raju @ Raj Kumar and instead of Section 302, we convict him u/s 304 Part I IPC. Looking to the fact that Raju @ Raj Kumar has undergone confinement for a period of more than seven years the ends of justice would be met in sentencing him to the period already undergone by him in confinement. While acquitting him under Sections 323/149 and 147 IPC, we confirm his conviction under Sections 3/25 and 3/27 Arms Act. Appellant Raju @ Raj Kumar, who has undergone the sentence awarded to him under Sections 3/25 and 3/27 Arms Act and who is in jail, shall be set at liberty forthwith if not required to be detained in any other case.

(iii) The impugned judgment stands modified as indicated above.