

(2011) 07 BOM CK 0064
In the Bombay High Court
Case No : Criminal Appeal No. 166 of 2010

Ritesh Sauda

APPELLANT

Vs

The State of Maharashtra and Pruthvi Dharamsingh Pival

RESPONDENT

Date of Decision : 29-07-2011

Acts Referred:

Arms Act, 1959 — Section 25(1B), 27(1)
Criminal Procedure Code, 1973 (CrPC) — Section 428
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 307, 324, 34

Citation : (2011) 07 BOM CK 0064

Hon'ble Judges : Shrihari P. Davare, J

Bench : Single Bench

Advocate : S.S. Jadhav, for the Appellant; D.R. Korde, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Shrihari P. Davare, J.—The challenge in the present appeal is to the conviction and sentence imposed upon the Appellant, namely, Ritesh s/o. Balveersing Sauda, by way of judgment and order dated 30th March 2010, rendered by the learned Additional Sessions Judge-I, Beed, in Sessions Case No. 91/2009, thereby convicting the Appellant (original accused) for the offence punishable u/s 307 of Indian Penal Code, and sentencing him to undergo rigorous imprisonment for 4 years and to pay fine of Rs. 20,000/-, in default of payment of fine, to undergo further rigorous imprisonment for one year, and also, convicting him for the offence punishable u/s 27(1) of the Arms Act, and sentencing him to undergo rigorous imprisonment for 3 years and to pay fine of Rs. 1,000/-, in default of payment of fine, to undergo further rigorous imprisonment for 6 months, and also directing that out of the said fine amount, an amount of Rs. 15,000/-be paid to the (3) complainant, namely, Pruthvi s/o. Dharamsing Pival, by way of compensation, as well as, further directing that both the substantive sentences to run concurrently, and also directing that the Appellant was entitled for set off

as per provisions of Section 428 of Code of Criminal Procedure for the period under custody, whereas, he was acquitted for the offence punishable u/s 25(1-B) of the Arms Act.

2. The factual matrix of the prosecution case, and facts and events leading to the present appeal are as follows:

(a) The complainant, namely, Pruthvi s/o. Dharamsing Pival, who is the victim in the present matter, was admitted in Civil Hospital, Beed, on 11-4-2009, in injured condition and his statement was recorded by P.S.O. of Police outpost in Civil Hospital, Beed, and on that basis, Crime No. 39/2009 was registered by Police Inspector, Angad Sudke (PW 11) who was attached to Police Station, Peth, Beed, on the relevant day.

(b) According to the said complainant, he resides at Balbhimnagar, Beed, along with his mother and three brothers, and carries out the business of selling pig flesh. The Appellant (original accused), namely, Ritesh s/o. Balveersing Sauda, is also resident of Balbhimnagar, Beed, and he used to purchase pig flesh on credit. It is also alleged that on 11-4-2009, at about 8 to 8.30 a.m., complainant Pruthvi approached the accused to recover his amount of sale of pig flesh and demanded the said amount due from the accused. However, the accused questioned the said dues and refused to pay the same and also abused the complainant. Moreover, it is also alleged that the accused took out a country made revolver and fired a bullet on the person of complainant Pruthvi, and thereby, he sustained injury on his nose, as well as, the brother of accused, namely, Deepak Balvirsing Sauda, caught hold of the complainant and assaulted him with kicks and blows. On receiving the bullet injury, the complainant fell down and there was bleeding. At this juncture, the complainant's brother, namely, Rohatas Dharamsing Pival, and neighbours came there and intervened and took the complainant immediately to the Civil Hospital, Beed, in injured condition, and his statement i.e. complaint was recorded as mentioned herein above, and on its basis, offence came to be registered against the accused under C.R. No. 39/2009 at Police Station, Peth, Beed, on 11-4-2009, at about 01.15 p.m. for the offence punishable u/s 307 read with Section 34 of Indian Penal Code, 1860, and also u/s 27(1) of the Arms Act.

(c) It is alleged that P.I. Angad Sudke (PW 11) visited the place of incident and recorded panchanama of place of incident, Exhibit 20, in the presence of Panchas and seized simple mud and blood stained mud at the place of incident, as well as, recorded statements of witnesses.

(d) Besides, the complainant Pruthvi was referred to Apex Hospital at Aurangabad. Hence, P.I. Angad Sudke (PW 11) issued request letter to Jinsi Police Station, Aurangabad, to record dying declaration of the complainant, as well as, sent Police Head Constable Shri Deshmukh to Aurangabad to seize blood stained clothes of the complainant and accordingly, Police Head Constable Shri Deshmukh seized blood stained clothes of the complainant at Aurangabad and

brought the clothes seized along with the dying declaration of the complainant. Moreover, P.H.C. Shri Deshmukh also seized the part of the bullet taken out from nose of the complainant after operation, and brought it to the Police Station. Accordingly P.I. Angad Sudke (PW 11) arrested the accused on 24-4-2009 under the arrest panchanama Exhibit 60.

(e) It is further alleged that on 25-4-2009, accused made voluntary statement to show the place where revolver and clothes were concealed and the said statement was recorded under memorandum Exhibit 55, and he led the Police personnel and Panchas to a ditch in front of Kesapuri Camp at Majalgaon and one pant, shirt and plastic carry bag were discovered from the ditch in the presence of Panchas and the same were seized under Panchanama Exhibit 56. Again on 1-5-2009, accused made voluntary statement in the presence of Panchas to show the place where revolver was concealed and accordingly, said statement was recorded under memorandum Exhibit 57, and the accused led the Police personnel and Panchas to a heap of sand near his father's house near Pathak Mangal Karyalaya and took out the revolver underneath heap of the sand and the same was seized under Panchanama Exhibit 58.

(f) P.I. Angad Sudke (PW 11) obtained blood sample of the accused and the blood sample of the complainant. Thereafter, he sent all seized articles to Chemical Analyser's office at Mumbai for analysis purpose along with forwarding letter Exhibit 51. However, the piece of bullet was returned by the Chemical Analyser's office with some inquiries and the said letter is marked as Exhibit 53, and the said queries were replied.

(g) It is also alleged that P.I. Angad Sudke (PW 11) recorded statements of witnesses, namely, Rohataj Dharamsing Pival and Digamber Asaram Gaikwad i.e. eye witnesses. Moreover, M.L.C. in respect of injuries sustained by complainant Pruthvi was also obtained and the nature of injuries sustained by him were grievous, and Dr. Simit Shah (PW 12) performed the operation on complainant Pruthvi and he was admitted in the Apex Hospital at Aurangabad from 11-4-2009 to 20-4-2009, and the said Medical Officer opined that the injuries sustained by complainant Pruthvi were sufficient in ordinary course of nature to cause his death, if timely treatment was not given to him.

(h) Pursuant to the seized articles sent to the Chemical Analyser's office, C.A. report regarding blood stained mud and clothes of the accused and the complainant were received and it was disclosed that blood of "B" group was noticed on the articles seized. Moreover, report of the Ballistic Expert was also received and the Ballistic Expert opined that the revolver pistol seized in the crime was in working condition and capable of firing 7.65 mm pistol cartridges and the same was used before testing. It was also found that the piece of bullet seized from nose of the complainant was piece of pistol bullet.

(i) After completion of investigation, it transpired in the investigation, that the accused fired bullet on the person of complainant Pruthvi, from a revolver /

pistol, who came to house of the accused for demanding dues of pig flesh, and brother of the accused, Deepak, also assaulted him with kicks and blows, and accordingly, both of them attempted to kill complainant Pruthvi, and accused / Appellant, Ritesh, was found in possession of revolver, without license, which was used for committing the crime. However, said Deepak i.e. brother of the accused ran away from the place of incident and he was absconding till filing of charge sheet.

3. Accordingly, charge sheet came to be filed against the accused only and case under R.C.C. No. 467/2009 was registered in the court of Judicial Magistrate (First Class), Beed. Since charge u/s 307 of Indian Penal Code, 1860 levelled against the accused was exclusively triable by the Court of Sessions, learned Judicial Magistrate (F.C.), Beed, committed the said case to the Court of Sessions at Beed, by order dated 30-7-2009.

4. Accordingly, charge was framed against the accused on 16-10-2009, Exhibit 4, for the offences punishable u/s 307 of Indian Penal Code, 1860, and Sections 25(1-B) and Section 27(1) of the Arms Act. The accused pleaded not guilty to the said charges and claimed to be tried.

5. To substantiate the charges levelled against the accused, the prosecution examined as many as 14 witnesses as mentioned below:

(1)

KakasahebGadhe (PW 1) -

Panch witness to seizure of revolver and cartridges, Exhibit 18.

(2)

SatyawanDaka (PW 2) -

Panch witness to spot panchanama, Exhibit 20.

(3)

PruthviPiwal (PW 3) -

Victim / injured / complainant.

(4)

Pal Chavan (PW 4) -

Panch to seizure panchanama of the clothes of complainant, Exhibit 24.

(5)

Dr. PramodShinde (PW 5) -

Medical Officer at Civil Hospital , Beed, who examined the complainant and issued injury certificate Exhibit 27.

(6)

RohtajPiwal (PW 6) -

Brother of complainant Pruthvi.

(7)

DigambarGaikwad (PW 7) -

Eye witness.

(8)

RameshwarTaat , API, (PW 8) -

Who filed the charge sheet.

(9)

VasudeoPatil (PW 9) -

Ballastic Expert.

(10)

SyedImtiyajSyedIqbal

Panch to memorandum and panchanama (Turned hostile).

(11)

AngadSudke , P.I., (PW 11) -

Investigating Officer.

(12)

Dr. SimitShaha (PW 12) -

Surgeon at Apex Hospital at Aurangabad, who performed surgery upon nose of the victim.

(13)

KisanShingne , P.S.I., (PW 13) -

Second Investigating Officer.

(14)

RameshKayande (PW 14) -

Resident Deputy Collector at Beed.

6. The defence of the accused is of total denial and he stated that he has been implicated in this case falsely and claimed to be innocent. He also gave short statement and tried to explain the incident, and according to him, on 14-4-2009,

Pruthvi came outside his house and called him, and one unknown person was with Pruthvi, and both of them dragged him out on the road and assaulted him, and thereby he sustained bleeding injury on his mouth and the said blood fell on his shirt and pant, and his blood group is "B", and the unknown person with the accused instigated Pruthvi saying that, "Mar, Mar", whereas he was trying to rescue himself from Pruthvi. He has also stated that unknown person fired a shot of shot gun (Charra) on him, but it strike against Pruthvi, and as such, Pruthvi sustained injury and due to old enmity, Pruthvi implicated the accused in this case falsely. Accused has further stated that the complainant Pruthvi and one municipal councillor filed criminal case against him earlier also.

7. After considering the oral, documentary and medical evidence, as well as, submissions advanced by the learned Counsel for parties, learned Trial Court convicted and sentenced the accused as afore stated. Being aggrieved and dissatisfied by the said order of conviction and sentence, the Appellant has preferred the present appeal challenging the same and prayed for quashment thereof.

8. Before adverting to the submissions advanced by the learned Counsel for parties effectively, it is necessary to deal with the material evidence adduced and produced by the prosecution, and in the said context, testimonies of Pruthvi (PW 3) i.e. victim; Rohtaj (PW 6) i.e. brother of the complainant; Digambar (PW 7), eye witness; Dr. Pramod Shinde (PW 5), Medical Officer at Civil Hospital, Beed, and Dr. Simit Shaha (PW 12), and Vasudeo Patil (PW 9), Ballistic Expert, are important, and coming to the deposition of Pruthvi (PW 3), who has stated that he knows accused Ritesh who belongs to his caste and he used to purchase mutton, whereas Pruthvi (PW 3) used to deal with sale of pig mutton. He has stated that the incident occurred on 11-4-2009 at about 8.30 a.m. and he had been to the house of accused which was situated at about 200 to 250 feet from his house, since he wanted to recover money of flesh purchased by accused from him. Accordingly, Pruthvi (PW 3) called the accused outside the house and thereupon accused Ritesh came out of his house, and Pruthvi (PW 3) asked him for the amount of flesh which he had purchased from him. Thereupon, Ritesh asked Pruthvi (PW 3), as to what money (Kashache Paise), and he told that he would not pay the amount. Moreover, accused abused Pruthvi (PW 3) and also manhandled him. Moreover, his brother Deepak also came there, who assaulted Pruthvi (PW 3) with kick blows. He has further stated that accused Ritesh took out revolver and fired at him, and thereby he received said blow on left side of his nose and fell down. Rohtaj i.e. PW 6 and Kisan Piwal came there and took Pruthvi to Civil Hospital, Beed. He has further stated that his statement was recorded by Police personnel as per his narration and the same was treated as complaint Exhibit 22. He has also stated that from Civil Hospital, Beed, he was referred to Apex Hospital at Aurangabad and he was admitted there for about 3 to 4 weeks. He has further stated that his clothes were blood stained and Police personnel seized the said clothes. According to him, prior to 10 to 12 years of the incident, accused Ritesh and his brother Deepak assaulted his brother Rohtaj

and Naresh with sword, and Deepak was convicted in the said case, whereas accused Ritesh was acquitted. He also identified the revolver used by the accused during occurrence of the incident.

9. During cross examination, Pruthvi (PW 3) has admitted that he does not have license of mutton shop. He has also stated that one case is pending against him for assaulting one Ashok Waghmare. A suggestion was given to him, that he lodged false complaint against the accused to extract money from him, but the same was denied by him. He has stated that there is one Maruti Mandir at a distance of about 400 feet on the western side of his house. However, he has stated that he did not go to said Mandir before going to the house of the accused. It was suggested to him that there are number of houses adjacent to each other by both the sides of the road going to the said Mandir from the house of Lahot, but the same was denied by him. As regards the incident, he has stated that nobody met him when he went to the house of the accused. He gave call to the accused from a distance of 10 to 15 feet and thereupon accused came out immediately. He has also stated that he did not feel frightened when he went to the house of accused. He has further stated that he did not see revolver in the hand of accused when he saw him first. He has further stated that he did not try to run away after seeing accused and his brother. He has denied that revolver was fired in the open space opposite house of the accused. He has further stated that the distance between Nali at the place of incident and that of house of the accused was about 40 feet. He has further stated that he did not cry for help after revolver shot. He also did not hear anybody crying for help. He has further stated that the entire incident might have taken place within 3 minutes. He has further stated that Deepak followed accused after he gave call to the accused. He has also stated that he fell down on the shoulder after receiving the shot. He did not receive any injury on the shoulder but still it gave pain. He has further stated that none of the neighbourers came at the spot at that time. He has also stated that he did not hear revolver shot twice. He also did not try to run away after he saw revolver and he never thought that accused would fire at him. He has further stated that accused might have fired shot from revolver at a distance of 7 -8 feet. According to him, the bullet was fired by the accused when he was opposite to him.

10. He has further stated that he did not state to the Police personnel that his brother Rohtaj intervened into the quarrel. Moreover, he did not state to the Police personnel that he received bullet on his eye, and denied the contents of portion mark "A" amounting to contradiction between his statement and his testimony. He has further deposed that he stated to the Special Judicial Magistrate that accused Ritesh fired bullet from revolver on his eye. He has also denied that the article which entered into his nose was not a bullet, but a metal bid (Chharra). He has further denied that he made allegations against accused to extract money and because of enmity with him.

11. That takes me to the deposition of Rohtaj (PW 6) i.e. brother of victim

Pruthvi, who stated that Pruthvi is his younger brother and he knows accused Ritesh. Pruthvi used to sell pig mutton, and accused Ritesh used to purchase pig mutton from him. Pruthvi was to recover money for such mutton from the accused. The incident occurred on 11-4-2009 when Pruthvi had been to the house of the accused for recovery of money for flesh. At about 8.30 a.m., he suspected that Pruthvi may be assaulted, and therefore, he followed him, and gave reason for said suspicion that there was quarrel between them prior to about 10 to 12 years, wherein he lost his small finger since he was assaulted with sword and Deepak, brother of accused, was convicted therefore. He has also stated that Pruthvi (PW 3) was assaulted by kicks and blows by Deepak and accused Ritesh fired bullet shot on Pruthvi and thereby he sustained bullet shot on his nose and it was bleeding. He has further stated that he himself, Digambar Gaikwad, Narsing, Vijay Piwal, Baban etc. took Pruthvi to Civil Hospital by auto rickshaw, and thereafter, Pruthvi was shifted to Apex Hospital at Aurangabad, as per advise of the Doctor. He has further stated that he showed the place of incident to Police personnel when they came for inquiry. Accordingly, his statement was recorded by Police personnel on the very day. He identified Ritesh also.

12. In the cross examination, Rohtaj (PW 6) has stated that he a Sweeper in Nagar Parishad and on the date of incident, he had been on duty early in the morning and came back before incident and Nagar Parishad office is situated about 20 minutes walking distance from his house. As regards the incident, he has stated that after taking Darshan in Mandir, Pruthvi (PW 3) was going towards house of the accused, and he was aware that Pruthvi was to bring money from the accused since he told the same to him at about 8.00 a.m. He did not advise Pruthvi not to go house of the accused. He was at a long distance when Pruthvi called accused Ritesh. He has also stated that one has to cross the open space opposite to the house of accused, in order to approach house of the accused. He has further stated that he was standing on road when Pruthvi gave call to accused. Accused and his brother Deepak came out of the house after Pruthvi gave a call. Thereafter, Deepak started assaulting his brother Pruthvi by kicks and blows. He has further stated that Deepak first came out and accused Ritesh followed him. He was at a distance of 40 feet but he did not intervene when Deepak assaulted his brother. He has also admitted that he is stronger than the accused. He has further stated that he did not think of calling the people from Mandir to save his brother who fell down after receiving bullet shot since he felt fainted. He has further stated that there were blood stains on the clothes of his brother Pruthvi, but there were No. stains of blood on his shirt. The accused persons ran away immediately. A suggestion was given to him that the relations between family of the accused and his family were not good, but the same was denied by him. He volunteered that they were on talking terms, but there is No. cross examination for the said voluntary statement. It was also suggested to him that their relations became more strained as he teased the family members of the accused, but the same was denied by him. A suggestion was given to him

that there was scuffle between accused Ritesh and Pruthvi (PW 3), but the same was denied by him. It was also suggested to him that Pruthvi asked his friend to fire a shot with revolver and his friend accordingly fired a shot and the said revolver shot was received by Pruthvi inadvertently, but the same was denied by him. He has further denied that he was working on duty in Nagar Parishad at the time of incident.

13. Coming to the testimony of eye witness Digambar (PW 7), who has stated that he knows Pruthvi (PW 3) and his brothers Rohtaj and (PW 6) and Kisan, as well as, he knows accused Ritesh and his brother. He has stated that the incident occurred on 11-4-2009 and it was Saturday, and the time might be between 8.00 to 8.45 a.m., when he himself, Narsing Piwal, Vijay Piwal and Ramdas Vitkar were sitting on the lap in front of house of Pratap Lahot. The house of accused Ritesh is opposite to the house of Pratap Lahoti. Pruthvi (PW 3) came nearby the road near Nali and gave call to accused Ritesh. Thereupon, accused Ritesh came out and there was altercation between them on account of money for flesh since Pruthvi was to recover money for flesh sold to the accused. At this juncture, brother of the accused, namely, Deepak came there and he started assaulting Pruthvi (PW 3) with kick blows. In the meantime, accused Ritesh took out revolver and fired it towards Pruthvi. He has further stated that the brothers of Pruthvi, namely, Rohtaj and Kisan, also came there, and the accused and his brother ran away. Pruthvi received bullet shot on his nose and fell down, and hence, auto rickshaw of Sakharam was brought and Pruthvi was removed to Civil Hospital by auto rickshaw, and thereafter Police personnel recorded his statement.

14. During cross examination, Digambar (PW 7) has admitted that accused had filed one complaint against him and one Ramsing Tak on the allegations that he assaulted him at his house.

15. As regards topography, he has stated that the lap in front of the house of Pratapsing is on southern side adjacent to the road. Moreover, there is Nali on the northern side of the road and thereafter there is open space and house of the accused, and distance between Nali and house of the accused is about 40 feet. He has also stated that the distance between him and Pruthvi was about 15 feet when Pruthvi gave call to the accused. He has further stated that the incident took place adjacent to Nali on road, and initially abuses were going on when accused Ritesh was standing at a distance of 4 -5 feet on the northern side of Nali. He has also stated that he did not ask him not to abuse. He has further stated that the entire incident occurred within No. time or it might have taken place within 7 to 8 minutes, but the altercation and abuses might have taken place for about 10 to 15 minutes. He has further stated that the persons in the temple did not come there during abuses and even nobody from the house of the accused, except accused Ritesh and Deepak, came there. Deepak followed accused Ritesh after Ritesh came out. He has admitted that the accused and his brother did not assault Pruthvi with fist blows on his nose. He has further stated

that he did not intervene as Pruthvi's brother, Rohtaj came there, followed by Kisan. He has further stated that Rohtaj did not intervene as the incident was already over till that time. He has further stated that they were chitchating on the lap when abuses and scuffle between accused, his brother and Pruthvi were going on since it was a routine.

16. Digambar (PW 7) has also stated that Pruthvi fell down on the ground after receiving revolver shot within No. time, but he cannot state the manner in which he fell down. He has admitted that they went there after they heard shot of revolver and Pruthvi fell down. He has volunteered that he immediately went to auto rickshaw. According to him, while lifting Pruthvi in auto rickshaw, blood stains on the clothes of Pruthvi did not fall on him, but some blood stains were seen on the road where the incident occurred. A suggestion was given to him that No. incident had taken place as narrated by him, but the same was denied by him.

17. Turning to the medical evidence, Dr. Pramod Shinde (PW 5) has stated that he was serving as Medical Officer at Civil Hospital, Beed, from July 2006 and he is a Orthopedic Surgeon, and he was on duty from 9.00 p.m. on 10-4-2009 to 9.00 a.m. on 11-4-2009. He has stated that Pruthvi Piwal was brought by one Kisan Piwal, brother of the patient. He examined Pruthvi and on examination, he found following injuries on his person:

(1) CLW with irregular margin with nasal bleeding, with charring of edges, sight over nose 2 X 1 cm. bone deep. The age of injury was within 24 hours.

(2) CLW on nose 1 X 1 cm. bone deep.

(3) Fracture of nasal bone.

He has stated that all the three injuries were caused within 24 hours by hard and blunt object and the same were grievous in nature. He has further stated that the patient was admitted for indoor treatment, and opinion of E.N.T. surgeon was taken, and X-ray was taken which confirmed fracture and radioopaque shadow. The injury was bullet injury. The E.N.T. surgeon referred the patient to higher centre at Aurangabad for further treatment. He has further stated that he issued injury certificate and before issuing injury certificate, he received final report from Apex Hospital, Aurangabad, from which it was confirmed that the bullet was removed after surgery at Aurangabad. Accordingly, he issued M.L.C. certificate which is at Exhibit 27. He has also produced X-ray plates at Exhibits 28 to 30, respectively. He has also produced case papers at Exhibit 31.

18. During cross examination, Dr. Pramod Shinde (PW 5) has stated that he is not ballistic expert and he cannot state the exact size of the bullet, and ballistic expert can only state whether the piece of metal is of bullet or not. He has admitted that he did not mention the direction of the bullet about the injury, and also admitted that he has not mentioned that the injury was the bullet injury in the case papers at the time of admission. He has further stated that the

possibility of a person's death cannot be ruled out, if a bullet shot is fired with revolver, from a distance of 6 to 7 feet. He has denied that he gave false opinion about the injuries sustained by Pruthvi.

19. Coming to the deposition of Dr. Simit Shaha (PW 12), who has stated in his deposition, that he is partner in Apex Hospital at Aurangabad, and he is Maxillofacial Surgeon since 9 years. He has also stated that on 11-4-2009, one Pruthvi Dharamsing Pival was admitted in his hospital, who was referred by Civil Hospital, Beed, and Hedgewar Hospital for having received gun shot by him. He has further stated that considering the condition of the patient, he decided to operate him immediately, and informed Jinsi Police Station accordingly. A copy of the said letter is produced at Exhibit 63. He has also stated that he operated the said patient personally and found that there was wound of entry on the lateral side of nose on left side and it was switared in Civil Hospital, Beed. The C.T. scan of the injury was taken in Hedgewar Hospital, and he used the said C.T. scan. He has further stated that in the C.T. scan, there was evidence of foreign body in left forbital cavity on left maxillary sinus, and there was bleeding in the nose, sinuses, paropharynx and nasopharynx. He took out that body by operating Pruthvi, which was two pieces of bullet retrieved from the left side of the retrovular region of the orbit. He has further stated that during operation, one small piece of bullet was lost during suction of blood and other part was taken out, and he identified the same in the court, and stated that he handed said part of bullet along with the letter to Police of Beed. Copy thereof is at Exhibit 15. He also produced original case papers at Exhibit 65.

20. According to Dr. Simit Shaha (PW 12), Pruthvi was admitted in the hospital from 11-4-2009 to 20-4-2009. He has also stated that the injury sustained by Pruthvi was caused by bullet and it was sufficient in ordinary course of nature to cause death, had timely treatment was not given to him. He has further stated that Pruthvi has lost left side vision partially.

21. During cross examination, Dr. Simit Shaha (PW 12) has stated that he agreed with the proposition in Medical Jurisprudence by Modi, that irregular missiles, such as, pieces of stone, iron, conkar, bids of brass or nickle ankles or wristless seeds, etc. used in muscle loading gun produce several irregular lacerated wound. He has also stated that he agreed with the proposition that traveling at high velocity produces clean and circular wound. Blackening may be found if discharged from the distance of more than 3 feet, and revolver or pistol discharged about 2 feet. He has further agreed that as the small shot enters as one mass, but are scattered after entering the wound and causes grave damage to the internal tissues. He denied the suggestion that if patient got irritated, he always speaks irrelevant. He has further stated that he cannot tell as to which type of gun bullet was shot. However, ther was No. intrafanial damage. He has also stated that bullet was hit on the bony part of the nose, but denied that it was soft bone. He has agreed that death would not have caused due to injury to nerves but it may have caused due to bleeding. He denied that injury caused was

not in ordinary course of nature to cause death.

22. That takes me to the testimony of Ballistic Expert, Vasudeo Patil (PW 9), who stated that he has been serving as Assistant Chemical Analyzer since last 5 years. On 17-6-2009, he received 8 sealed articles in Crime No. 39/2009 from Police Station, Peth, Beed. The said articles includes 6 chambered country made revolver, one country made pistol with magazine, two intact pistol cartridge K-49, 16.69 mm., one full pant, one half T-shirt, another full pant, half open shirt and two samples of earth, and the said articles were sealed and the seals were intact. He has also stated that on 3rd July 2009, he received one sealed envelope from Police Station, Peth, Beed, in Crime No. 39/2009. The said article was one highly decomposed piece of copper jacket put in sealed envelope.

23. Vasudeo Patil (PW 9) has further stated that he examined all the aforesaid articles excluding sample of earth, and as regards Exhibit 1 i.e. 6 chambered country made revolver, he found it in working condition, and it was capable of chamber in firing .32" revolver cartridges, 7.6 mm. pistol cartridges. Residue of fired animation tried was detected in the barrel washing of revolver in the said article, indicating that it was used for firing prior to receiving article in the laboratory, and he identified the said revolver when shown to him. He has further stated that after physical and chemical examination, he had done test firing from the said revolver. As regards Exhibit 7, he found that the said revolver was capable of firing revolver as well as pistol cartridges.

24. As regards Exhibit 2, a country made pistol, he has stated that it was in working condition and it is capable of firing 7.65 mm. pistol cartridges, and residue of fired animation nitrite was detected in the barrel washing of pistol, showing that it was used for firing prior to its receipt in the laboratory.. On testing, he found that said pistol was capable of firing 7.65 mm. pistol cartridges. He has also stated that No. short whole was noticed on clothes i.e. Exhibits 3, 4 and 6, and he identified the said pistol when shown to him, and also identified clothes i.e. article Nos. 3, 4, 8 and 9. He has further stated that he issued the report Exhibit 42 accordingly. Moreover, two KF 7.65 mm. pistol cartridges were shown to him, and he stated that the same were used for testing, and the said cartridges were in the magazine along with article No. 6 pistol and were used for testing.

25. Vasudeo Patil (PW 9) has further stated that he examined highly decomposed piece of copper jacket, and found that it was a fired piece of pistol bullet. Accordingly, he issued report of analysis which is produced at Exhibit 43. The highly decomposed piece of copper jacket is Article No. 5 and he stated that it is the piece of 7.65 mm. pistol cartridges and it can be fired through revolver as well as pistol. He has further stated that the cartridges which were used by him for test firing from the magazine of article 6 are also 7.65 mm. pistol cartridges.

26. In the cross examination, Vasudeo Patil (PW 9) has stated that he cannot state whether article No. 5 was fired from the same revolver i.e. article Nos. 6

and 7, and he volunteered that it was because of absence of raffling mark. Hence, suggestion was given to him, that said piece of cartridge is from shot gun, but the same was denied by him. It was also suggested to him that the piece of metal, as mentioned in question No. 11 of Exhibit 51 was piece of Chhara (metal bid), but the same was denied by him. A suggestion was also given to him that the said Chhara was replaced later on in article No. 5 through Shri Sudke, but the same was denied by him. It was further suggested to him that the piece of bullet examined by him was not fired from fired cartridge as it does not bear raffling mark, but the same was also denied by him.

27. As regards, question No. 11 in Exhibit 51, learned APP conducted re-examination of the said witness and on verifying the letter, he stated that the article mentioned in question No. 11 at Exhibit 51 was sent back by him in sealed condition. He has also stated that since there was No. covering letter of the Police Station, the article was taken out from private hospital and said reason was mentioned in the letter dated 16-6-2009, and he produced copy of the said letter at Exhibit 53. During the cross examination, after the said re-examination by learned APP, he denied that Exhibit 51 was the covering letter, and therefore, there was No. need for sending covering letter as mentioned by him in Exhibit 53. He has also denied that there was No. need to ask for medical report and the other documents. He has stated that as per Exhibit 53, he also asked for bullet piece if found in the body of the victim, and he volunteered that it was printed form, and therefore, it was mentioned. He has also stated that he marked cross against the clothes of the victim as it were already received, and he tick marked against serial Nos. 1 to 4 as the said articles were not received.

28. On the background of the aforesaid material evidence, Smt. S.S. Jadhav, learned Counsel for the Appellant, canvassed that there is variance between the testimony of the very victim Pruthvi (PW 3) and testimony of his brother Rohtaj (PW 6) who allegedly carried the victim to the hospital, and therefore, question arises whether victim had really gone to the house of the accused and called accused, considering the evidence of said injured victim Pruthvi (PW 3), his brother Rohtaj (PW 6) and eye witness Digambar (PW 7). It is also canvassed that it is amply clear from the testimonies of the three witnesses i.e. injured Pruthvi (PW 3), his brother Rohtaj (PW 6) and Digambar (PW 7), that there was No. premeditation and there was No. intention on the part of the Appellant / accused and he has not taken disadvantage of the situation. It is further canvassed that the very purpose for which complainant Pruthvi (PW 3) went to the house of the accused has not been established by the prosecution since there are No. particulars, at which point of time flesh was purchased by the Appellant and No. dates thereof have been given, and even what was the amount due from the accused to Pruthvi (PW 3) has not come in evidence of the prosecution witnesses, and therefore, it is submitted that the theory advanced by the prosecution in that respect is not conceivable.

29. According to the learned Counsel for the Appellant, Digambar (PW 7) cannot

be construed as eye witness to the occurrence of the incident since entire incident did not occur in front of the house of the accused and since Digambar (PW 7) arrived on the spot after hearing the sound of bullet. Moreover, Digambar (PW 7) also admitted in his cross examination that accused has filed one complaint against him and one Ramsing Tak on the allegation that they assaulted the accused at his house, and therefore, possibility of deposing falsely by Digambar (PW 7) against the accused cannot be ruled out.

30. Learned Counsel for the Appellant has further canvassed that the incident occurred on the spur of the moment and Digambar (PW 7) categorically stated in his deposition that he did not intervene as it was a routine quarrel between Pruthvi (PW 3) and the Appellant / accused. Learned Counsel for the Appellant further canvassed that even Rohtaj (PW 6) also came on the spot after the incident was over, and there is No. eye witness as to the scuffle and when the shot of bullet was fired allegedly by the Appellant towards the victim Pruthvi, and therefore, he submitted that suspicion is created in respect of the very occurrence of the incident considering the evidence on record.

31. Learned Counsel for the Appellant has further canvassed that the victim injured was admitted in the hospital from 11-4-2009 to 20-4-2009 i.e. for 9 days, and the hospitalization was below 20 days, and hence, it is submitted that the alleged offence was out of the purview of Section 307 of Indian Penal Code, 1860. It is also canvassed that if it appears that injuries sustained by the victim are at the hands of the Appellant / accused, at the most, the offence would have been u/s 324 of Indian Penal Code, 1860, and therefore, it is canvassed that the substantive sentence of 4 years" rigorous imprisonment awarded to the Appellant is disproportionate.

32. It was argued by the learned Counsel for the Appellant, that the recovery of revolver cannot be construed as a discovery u/s 27 of the Evidence Act at the instance of the Appellant since it was found in abandoned condition in Nali, that too, after three weeks and hence, this piece of evidence cannot be construed as incriminating against the Appellant herein. Accordingly, learned Counsel for the Appellant submitted that the prosecution has suppressed genesis of the incident and the alleged recovery of the revolver has been foisted upon the Appellant. Moreover, it is submitted that there was recovery of two revolvers, and therefore, question arises, which revolver was used by the Appellant and from which revolver the bullet was fired by the Appellant towards victim, is under suspicion. Moreover, it is further canvassed that the very distance from which the said bullet alleged fired assumes importance since it would indicate the intention of the Appellant and the prosecution case is ambiguous on that aspect. Accordingly, learned Counsel for the Appellant urged that there are infirmities, discrepancies and deformities in the prosecution case, and it does not inspire any confidence to award the conviction on that basis against the Appellant, and hence, present appeal deserves to be allowed.

33. Alternatively, learned Counsel for the Appellant submitted that the

substantive sentence of 4 years" rigorous imprisonment has been awarded against the Appellant, out of which, he has undergone about 2 years and 3 months approximately, and considering the position that the Appellant is only earning member in the family, even if conviction is confirmed, the substantive sentence be modified and it be reduced to the period already undergone by the Appellant, since he has undergone more than half the sentence awarded to him.

34. Learned Counsel for the Appellant has placed reliance on the judicial pronouncement of Patna High Court, in the case of Bhutto Paswan v. State of Bihar reported at 2002 (3) Crimes 675, wherein the Court has observed thus:

The finding of guilt recorded by the trial Court, based on meticulous appreciation of evidences of witnesses, cannot be said to be contrary to the weight of mass of evidence which is accordingly upheld. However, so far as imposition of sentence against the Appellant was concerned, he had suffered ordeal of protracted prosecution for about 24 years, and it is brought to my notice by the learned Counsel for the Appellant that both as under-trial prisoner and also during post conviction period, the Appellant has remained in custody for about 3 and 1/2 months and on consideration of these mitigating circumstances, while upholding the conviction recorded by the trial Court, as stated above, and setting aside the sentence imposed against the Appellant, he is sentenced to the period already undergone by him. In addition to that, he is sentenced to pay a fine of Rs. 1000/- (One thousand), in default of which he would suffer rigorous imprisonment for a term of six months and with this modification in sentence, this appeal is dismissed. The amount of fine must be deposited within two months of receipt / prosecution of order.

35. Smt. Y.M. Kshirsagar, learned APP for Respondent No. 1 / State, countered the said arguments vehemently and submitted that the ocular evidence adduced by the prosecution, more particularly, testimonies of Pruthvi i.e. victim, Rohtaj (PW 6), brother of victim i.e. eye witness, and Digambar (PW 7) i.e. eye witness, categorically connects the Appellant with the crime. It is also canvassed that the medical evidence adduced and produced by the prosecution through Dr. Pramod Shinde (PW 5) and Dr. Simit Shaha (PW 12), and the injury certificates on record are in consonance with the aforesaid ocular evidence and the ocular evidence coupled with the medical evidence proves the offence against the Appellant beyond reasonable doubt and the evidence of Ballistic Expert, Vasudeo Patil (PW 9) is the clinching evidence which connects the Appellant with the crime. It is further canvassed that the aforesaid ocular and medical evidence is consistent and same has not been impeached in the respective cross examinations of prosecution witnesses, and learned Trial Court has rightly relied upon the same and convicted the Appellant, and No. interference is warranted in the appellate jurisdiction.

36. Accordingly, learned APP supported the impugned judgment dated 30th March 2010 and submitted that there are No. infirmities and deformities in the prosecution evidence, and the same has not been shaken in the cross

examination, and hence, same is required to be construed as trustworthy evidence, and the same has been accepted and believed by the learned Trial Court rightly. Besides, it is pointed out that the victim Pruthvi has lost his left eye partially, and he is survived only because he got timely medical treatment, and considering the said aspects, present appeal bears No. substance and the same is devoid of any merits, and therefore, urged that it be dismissed.

37. I have perused the ocular, documentary and medical evidence adduced and produced by the prosecution, as well as, considered submissions advanced by the learned Counsel for parties, anxiously, and also perused the judicial pronouncement cited by the learned Counsel for the Appellant, carefully, and it is amply clear that the evidence adduced by the prosecution is meticulous and testimony of victim i.e. Pruthvi (PW 3) categorically connects the Appellant with the crime since he has narrated the occurrence of the incident in detail, as well as, he has attributed specific role and gave overt act of the Appellant in the said narration of the incident, whereby he sustained grievous injuries by way of deadly weapon i.e. revolver at the hands of the Appellant herein and consequently, lost his eye sight of left eye partially, and he was hospitalized for a period of about 3 -4 weeks. True it is, that there is minor contradiction in his testimony and FIR lodged by him in respect of receiving bullet on his eye, but the said contradiction does not go to the root of the matter and does not diminish credibility of his testimony. Moreover, there are No. omissions in his complaint and improvement in his testimony. Hence, the deposition of Pruthvi (PW 3) has not been shaken in the cross examination, and since the said testimony is prime piece of evidence, as he has categorically stated therein that how Appellant herein manhandled him and in what manner attacked on him and shot bullet through revolver on him, and therefore, it is the direct evidence against the Appellant which is unimpeached in the cross examination, and hence, same deserves to be accepted and consequently, required to be believed to base the conviction against the Appellant, which has been rightly done by the learned trial court.

38. As regards the testimony of Rohtaj (PW 6), who is the brother of Pruthvi (PW 3), and eye witness to the occurrence of incident, and also sustained injuries and lost his small finger during the occurrence of incident, due to the assault with sword by brother of accused, namely, Deepak, he has also stated in his deposition that the Appellant Ritesh fired bullet shot on Pruthvi and thereby he sustained bullet shot on his nose and it was bleeding. Moreover, during cross examination, nothing beneficial to the case of the defence could be elicited and his testimony has not been shattered in the cross examination, and therefore, implicit reliance is required to be placed on the said testimony, and same is required to be accepted as eye witness account to the occurrence of incident, and consequently, same is required to be believed which connects the Appellant with the crime. Besides, as regards another testimony of Digamber (PW 7), who is eye witness to the occurrence of incident, he has also narrated the occurrence of the incident in detail, how the Appellant and his brother Deepak manhandled

the victim Pruthvi and in what manner Appellant Ritesh took out the revolver and fired towards Pruthvi, and further stated that the victim i.e. Pruthvi (PW 3) sustained bullet shot on his nose and fell down, and he has also stated that Rohtaj (PW 6) was present during the occurrence of the incident. He has sustained with the searching cross examination and his testimony was not demolished therein, and hence, same is required to be construed as trustworthy testimony as eye witness account to the occurrence of incident, consequently, to connect the Appellant with the crime.

39. As regards the argument canvassed by the learned Counsel for the Appellant, that there was No. premeditation and there was No. intention on the part of the Appellant to fire the bullet upon the victim Pruthvi, considering the ocular evidence on record, and also considering the circumstances which have been brought by the prosecution on record, it is amply clear that there is No. substance in the said argument, since it has come on record that when victim went to the house of the Appellant, and gave call to him, and thereupon Appellant came outside the house and after exchange of words the altercation took place between them, and by this time, brother of the Appellant, namely, Deepak, also came there and Rohtaj (PW 6), brother of victim, also came there, and both Appellant and his brother manhandled them, and thereafter the Appellant took out revolver and fired shot on the face of the victim Pruthvi, and thereby he sustained injury on his nose, itself indicates that the Appellant came out of the house armed with the revolver and shot fire on the victim during occurrence of the incident, and hence, it is amply clear that the Appellant came out of the house with premeditation along with dangerous weapon i.e. revolver which was used against the victim during occurrence of the incident, and accordingly, there is No. substance in the argument canvassed by the learned Counsel for the Appellant, in that respect. Besides, the argument canvassed by the learned Counsel for the Appellant, that Digambar (PW 7) cannot be construed as eye witness, also cannot be accepted only for the simple reason that the testimony of Digambar (PW 7) is self-explicit which reflects that he has witnessed occurrence of the incident and narrated the same explicitly attributing overt act and assigning specific role to the Appellant therein.

40. Besides, the submission made by the learned Counsel for the Appellant, that the incident occurred on the spur of the moment, and Rohtaj (PW 6) and Digambar (PW 7) came on the spot later on, and they cannot be construed as eye witnesses, considering the oral evidence brought by the prosecution on record through testimonies of Pruthvi (PW 3), Rohtaj (PW 6) and Digambar (PW 7), it is amply clear that the said incident did not take place on the spur of the moment and Rohtaj (PW 6) and Digambar (PW 7) are the eye witnesses and even Rohtaj (PW 6) sustained injury i.e. his finger was broken at the hands of Deepak, and Digambar (PW 7) also witnessed occurrence of the incident since beginning, and hence, there is No. substance in the argument canvassed by the learned Counsel for the Appellant. Moreover, there is No. variance in the testimonies of the victim Pruthvi (PW 3), Rohtaj (PW 6) and Digambar (PW 7), as

argued by the learned Counsel for the Appellant, and the said testimonies corroborate with each other meticulously, and therefore, the argument canvassed by the learned Counsel for the Appellant, that the question arises, whether victim had really gone to the house of the Appellant and called him, bears No. substance.

41. Besides, as regards the argument of the learned Counsel for the Appellant, that discovery of revolver at the instance of the Appellant u/s 27 of the Evidence Act cannot be construed an incriminating evidence against him, the said argument is not acceptable since very discovery of revolver was made at the instance of the Appellant herein and Appellant herein took out the same from the place where he had concealed it, i.e. below the heap of sand near his father's house, and there is No. question of foisting of the said revolver upon him.

42. Apart from that, the medical evidence adduced by the prosecution, through Dr. Pramod Shinde (PW 5) and Dr. Simit Shaha (PW 12) categorically disclose that the victim had sustained grievous injuries and Dr. Simit Shaha (PW 12) performed the operation upon nose of the victim Pruthvi and retrieved two pieces of bullet there from, out of which one piece of bullet was lost during suction of blood and other part of bullet could be taken out and he identified the same before the court, as well as, he opined that the injuries sustained by victim Pruthvi were sufficient in the ordinary course of nature to cause his death, if timely treatment was not given to him, and the testimonies of the said Doctors have not been shaken in the cross examination and the said medical evidence supports and corroborates with the oral evidence adduced by the prosecution.

43. Moreover, the evidence of Ballistic Expert i.e. Vasudeo Patil (PW 9) also discloses that the revolver seized from the Appellant herein was in working condition and it was capable of firing and it indicated that it was used for firing prior to receiving in the laboratory, and as regards Exhibit 7, he found that the said revolver was capable of firing revolver as well as pistol cartridges. As regards Exhibit 2 i.e. country made pistol, he has stated that it was in working condition and it was capable of firing 7.65 mm. pistol cartridges, and it was used for firing prior to its receipt in laboratory. On testing, he found that the said pistol was capable of firing 7.65 mm. pistol cartridges, and when KF7.65 mm. pistol cartridges were shown to him, he stated that same were used for testing, and said cartridges were in the magazine, along with article No. 6 pistol and were used for testing.

44. Besides, as regards highly decomposed piece of copper jacket retrieved from the nose of the victim, he stated that it was a fired piece of pistol bullet, and accordingly, the evidence of Ballistic Expert is a corroborative piece of evidence to the above discussed ocular, as well as, medical evidence, and connects the Appellant with the crime clinchingly.

45. In the circumstances, I am not inclined to accept the (41) submissions advanced by the learned Counsel for the Appellant, and therefore, present appeal

deserves to be dismissed. However, apparently, there is substance in the alternate submission made by the learned Counsel for the Appellant, that the substantive sentence of 4 years" rigorous imprisonment has been awarded to the Appellant, out of which, he has undergone about 2 years and 3 months approximately, and considering the said position, and also considering the position that the Appellant is the only earning member in the family, while upholding the conviction against the Appellant, as well as, maintaining and confirming the sentence of fine against him, the substantive sentence awarded to him deserves to be set aside, and is required to be modified by sentencing him for the period already undergone by him in the jail. However, while doing so, additional fine amount of Rs. 15,000/-deserves to be imposed upon him to be paid by him within a reasonable period, and out of the said fine, if recovered, amount of Rs. 10,000/-is required to be awarded to the victim i.e. complainant Pruthvi (PW 3), by way of additional compensation which would meet the ends of justice.

46. In the result, present appeal is allowed partly, and the conviction and sentence of fine recorded against the Appellant, u/s 307 of Indian Penal Code, 1860, as well as, conviction and sentence of fine recorded against the Appellant, u/s 27(1) of the Arms Act, stands upheld and confirmed, but the substantive sentence imposed upon the Appellant under the said offences, stand set aside, and is modified, and he is sentenced to the period already undergone by him in the jail, but in addition to that, he is sentenced to pay fine of Rs. 15,000/- (Rupees Fifteen Thousand) to be deposited before learned Trial Court within a period of six weeks from today, in default of payment of said fine, he would suffer rigorous imprisonment for six months, and out of the said additional fine amount, if recovered, an amount of Rs. 10,000/-(Rupees Ten Thousand) be paid to the complainant, namely, Pruthvi s/o. Dharamsing Pival, by way of additional compensation.

47. The Appellant is in jail and he be released, after payment of aforesaid additional fine, if paid within the aforesaid stipulated period, provided he is not required in any other case.