
(2014) 07 SHI CK 0153
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 149/2013

Shamsher Singh

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 14-07-2014

Acts Referred:

Arms Act, 1959 — Section 27, 5, 7
Criminal Procedure Code, 1973 (CrPC) — Section 154, 313
Penal Code, 1860 (IPC) — Section 149, 300, 307, 324, 326

Citation : (2015) CriLJ 1203

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Anoop Chitkara, Advocate for the Appellant; Parmod Thakur, Addl. A.G., M.A. Khan, Addl. A.G. and Neeraj Sharma, Dy. A.G, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

Rajiv Sharma, J.—This appeal is directed against the judgment dated 20.3.2013 passed by the learned Additional Sessions Judge, Fast Track Court, Chamba in Sessions Trial No. 6/12/11 whereby the appellant-accused, who was charged with and tried for offences punishable u/s 307 of the Indian Penal Code and 27 of the Arms Act, 1959 has been convicted and sentenced to undergo rigorous imprisonment for seven years u/s 307 of the Indian Penal Code and to pay a fine of Rs. 20,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year. He has also been sentenced to undergo two years rigorous imprisonment for offence u/s 27 of the Arms Act, 1959 with a fine of Rs. 5,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for three months. Both the sentences were ordered to run concurrently.

2. Case of the prosecution, in a nutshell, is that in the month of June, 2009 Head Constable Sanjeet Singh was posted at Company Head Quarters, 2nd Indian

Reserve Battalion in District Chamba. Accused, who was posted at O.C.P. Nodal Dhar, was shifted to Company Head Quarter, Tarela alongwith other police constables on 25.10.2010. PW-3 Head Constable Sarwan Kumar and PW-4 Head Constable Satpal were also posted at Company Head Quarter, 2nd Indian Reserve Battalion, Tarela. On 5.11.2010, accused had performed his duty as Guard at Company Head Quarter, Tarela from 6.00 P.M. to 9.00 P.M. Thereafter, PW-9 Constable Ajeeb Kumar replaced accused to perform duty from 9.00 P.M. to 12.00 mid night. Accused had raised objection with regard to standard of food in Mess. PW-2 Sanjeet Kumar advised accused that since Incharge of Mess was out of station, on his arrival meeting would be convened and the problem of quality of food in the Mess would be sorted out. However, the accused in aggressive manner replied that he would settle the score and things on his own. On 5.11.2010 before 9.00 P.M., Constables Ashok Kumar and Vivek Garg were bursting crackers, upon which accused felt annoyed and asked them to stop bursting crackers, failing which he would fire with his rifle having ammunition in chamber. On 5.11.2010 on the day of Diwali festival at about 9.00 P.M. after having dinner, PW-2 Sanjeet Kumar alongwith his colleagues Sunil Kumar, Wireless Operator and PW-7 Vivek Garg went to urinate in the open after getting down from the stairs. While returning back PW-9 Ajeeb Kumar, who was performing his duty as Guard at Company Head Quarter, Tarela from 9.00 P.M. to 12.00 mid night told Sunil Kumar and PW-7 Vivek Garg that he was feeling cold. PW-7 Vivek Garg, PW-2 Sanjeet Kumar and Sunil Kumar told PW-9 Ajeeb Kumar that charcoal was not available and it would be better to utilize fuel wood. They also advised him to perform his duties attentively. All of them climbed the stairs to return to their dormitory. Accused who finished his duty at 9.00 P.M. followed three personnel while climbing the stairs and opened fire on them with his AK 47 rifle. PW-2 Sanjeet Kumar was hit by bullet and all of them rushed to dormitory. He sustained injury in his upper thigh. On reaching entrance of dormitory accused was again noticed chasing them armed with his AK 47 rifle. Accused again opened fire but fortunately no one was hit. Accused arrived in the dormitory. Head Constable Kulwant Kumar and Constable Ashok were already present inside the dormitory, who on seeing accused armed with AK 47 rifle with the help of Constable Sunil Kumar and PW-7 Vivek Garg nabbed him and snatched AK 47 rifle. PW-6 Head Constable Kulwant Kumar took out magazine. Clothes of PW-2 Sanjeet Kumar were smeared with blood. PW-6 Kulwant Kumar informed Company Head Quarter, Tissa on his mobile and thereafter Rapat No. 23(A) Ex. PW-10/A was entered in Police Station, Tissa. On 5.11.2010, late in the night, at about 10.30 P.M. to 11.00 P.M., on receipt of information, PW-15 Sub Inspector Mahinder Singh reached the spot. PW-6 Kulwant Singh handed over AK 47 rifle and magazine loaded with 13 live cartridges to Satpal for custody. PW-2 Sanjeet Kumar was bleeding profusely from his thigh. He was taken to hospital for medical examination. After giving first aid at Hospital, Tissa, he was referred for further medical treatment to R.P.G.M.C. Tanda. Statement of PW-2 Sanjeet Kumar was recorded. Rukka was sent to the Police Station, on the basis of which FIR Ex. PW-11/A was registered. PW-2 Sanjeet Kumar was medically examined

by PW-1 Dr. Ashish Kumar vide MLC Ex. PW-1/B. He gave his opinion Ex. PW-1/C. According to him, injury sustained by PW-2 Sanjeet Kumar was found to be bullet injury. PW-2 Sanjeet Kumar was admitted in R.P.G.M.C. Tanda on 6.11.2010 and discharged on 8.12.2010. Clothes worn by Sanjeet Kumar were taken into possession. These were sent to Regional Forensic Science Laboratory, Dharamshala for chemical analysis. Accused was arrested vide memo Ex. PW-15/E. Seven empty cartridges lying at different places on the spot were taken into possession. According to report Ex. PY, discharge residue has been detected in the barrel of AK-47 rifle. The investigation was completed and the challan was put up in the court after completing all the codal formalities.

3. Prosecution examined as many as 16 witnesses in all to prove its case against the accused. Statement of accused was also recorded u/s 313 of the Code of Criminal Procedure. According to him, he was falsely implicated. He has also examined DW-1 Dr. Navneet Sharma to prove injury sustained by him. Additional Sessions Judge, Fast Track Court, Chamba convicted and sentenced the accused, as noticed hereinabove.

4. Mr. Anoop Chitkara has vehemently argued that the prosecution has failed to prove its case against accused.

5. Mr. Parmod Thakur, learned Additional Advocate General has supported the judgment passed by the learned Additional Sessions Judge, Fast Track Court.

6. I have heard the learned counsel for the parties and have gone through the record carefully.

7. PW-1 Dr. Ashish Kumar has noticed the following injuries on the person of Sanjeet Kumar:

1. In right thigh there was 1 x 2 cm oval shaped with irregular margins on the posterior lateral aspect. The wound depth could not be ascertained.

2. There was injury in the right thigh measuring 1 x 1 cm circular in shape with regular margins on the posterior medial aspect. Wound depth could not be ascertained.

3. There was injury in left thigh measuring 2 x 5 cm on the interior medial aspect and was about 2 mm in depth.

4. There was injury in left thigh measuring 1 x 1 cm on the anterior aspect of thigh.

Patient was advised to undergo X-ray. The patient was also advised to have surgical opinion. According to his opinion, probable duration of injuries was 2 to 4 hours prior to the time of examination. According to PW-1 Dr. Ashish Kumar, the injuries were grievous in nature since the patient remained admitted in the hospital as indoor patient with effect from 6.11.2010 to 8.12.2010, i.e. for a period of more than 20 days. Patient was discharged on 8.12.2010. He received communication from S.H.O. Police Station, Tissa seeking his opinion whether

injuries on the person of patient were dangerous to life. According to his opinion, the injuries were not found dangerous to life of patient since bullet injury was not found to have hit on the major vessel in the thigh, though he admitted that had the bullet hit in the major vessel of thigh it would have been dangerous to life. In his cross-examination, he has deposed that neither it was a close range shot nor it was point blank shot.

8. PW-2 Head Constable Sanjeet Kumar has deposed that on 5.11.2010, on the day of Diwali festival at about 9.00 P.M. after having dinner, he alongwith his colleagues constable Sunil Kumar, Wireless Operator and constable Vivek Garg went to urinate in the open after getting down from the stairs. While returning back, constable Ajeeb Kumar, performing his duty as Guard at Company Head Quarter, Tarela, had replaced accused from 9.00 P.M. to 12.00 P.M. came across them. He told that he was feeling cold. He told him that since charcoal was not available, he advised him to utilize fuel wood. He also advised him to perform his duties attentively. Thereafter, all of them started climbing on the stairs to the dormitory. Accused who had finished his duties at about 9.00 P.M. came behind them and opened fire on them with his AK-47 rifle. He felt as if he had been hit by bullet. All of them rushed to dormitory. He sustained injuries in his right upper thigh. When they reached on the entrance of dormitory, accused was seen chasing them while armed with his AK-47 rifle. Accused again fired but fortunately, it did not hit any one. Accused had also arrived on the door of dormitory. On seeing the accused armed with AK-47 rifle, Head Constable Kulwant Singh with the help of Constable Ashok Kumar, Constable Sunil Kumar and Vivek Kumar immediately nabbed the accused and after snatching AK-47 rifle, Head Constable Kulwant Singh took out the magazine. Due to ensuing winter season, accused had been shifted to Company Head Quarter, Tarela alongwith entire OCP. Accused on arrival at Company Head Quarter, Tarela after shifting had also raised objection with regard to standard of food in the Mess. He was advised that since Inspector, who was Incharge, was out of station, on his arrival a meeting would be convened and all the problems would be sorted out. He in aggressive manner replied that he would settle the score and things on his own. He also came to know from Constable Ashok and Vivek that an hour prior to incident, when they were bursting crackers, accused felt annoyed and asked them to stop bursting crackers, failing which he would fire at them with his rifle having ammunition in its chamber. He believed that due to the incident with regard to quality of food in the Mess, accused entertained grudge against him and made murderous assault on him. His statement u/s 154 of the Code of Criminal Procedure Ex. PW-2/A was recorded by the Police. He was taken to C.H.C. Tissa for medical treatment. Thereafter, he was referred to Rajindera Prashad Government Medical College, Tanda. He handed over the clothes worn by him at the time of bullet shot to the Investigating Officer Mahinder Singh on 12.11.2010. He remained under treatment as indoor patient in R.P.G.M.C. Tanda with effect from 6.11.2010 to 8.12.2010. He was discharged on 8.12.2010. In his cross-examination, he has deposed that there was only one approach from

ground floor to the first floor. Accused did not meet them since his duty was over. He has admitted in his cross-examination that on the date of incident, some of the constables had burst crackers. He has denied the suggestion that accused sustained injuries as a result of beatings given by them. He has stated that accused had replied in aggressive manner that he would settle the score and things on his own on the issue of quality of food in the Mess. Confronted with statement Ex. PW-2/A wherein it was not recorded that accused had replied in aggressive manner. He has also admitted that accused had not complained to him after 25th/26th October about the quality of food in the Mess.

9. PW-3 Head Constable Sarwan Kumar has deposed that at about 9.15 P.M. on 5.11.2010, he heard some noise. He was inside the room on 2nd floor. He came out in the balcony where other police officials had already gathered. He came to know that accused has fired bullet shots from his AK-47 rifle on Head Constable Sanjeet Kumar as a result of which Sanjeet Kumar has sustained injuries on his both the legs. Sanjeet Kumar was made to lie on the cot and was lifted to the roadside where they had arranged a private vehicle to take him to C.H.C. Tissa for his medical examination. He stayed back in his room. Police came to inspect the spot. Police took into possession empty bullet cases from the spot. The recovered empty bullet cases were sealed with three seals of seal impression "G". Blood found on the spot was also lifted with the help of cotton. 13 live cartridges alongwith magazine of AK-47 rifle were taken into possession from Satpal to whom Head Constable Kulwant had handed over AK-47 rifle and magazine. In his cross-examination, he has deposed that he has not seen bullet injuries on the leg of Sanjeet Kumar. Head Constable Kulwant informed him that Sanjeet Kumar has sustained bullet injuries on his both the legs.

10. PW-4 Head Constable Satpal has corroborated the statement of PW-3 Sarwan Kumar. Neither PW-3 Sarwan Kumar nor PW-4 Satpal has seen the accused firing at Sanjeet Kumar.

11. PW-5 Ashish Kumar has only arranged the cot.

12. PW-6 Kulwant Kumar has deposed that he alongwith Head Constable Satpal and Constable Ashok Kumar was present in his room on 2nd floor. Head Constable Sanjeet Kumar entered the room. He told them that he was shot by the accused. His clothes were smeared with blood. Two other constables, Vivek Garg and Sunil Kumar also entered the room alongwith Sanjeet Kumar. In the meantime, accused armed with AK-47 rifle also entered the room and fired 1-2 bullet shots, but fortunately none sustained injuries. Bullet shots were fired in the ceiling of the room. He alongwith other police officials overpowered the accused but could not snatch AK-47 rifle. He successfully removed magazine from AK-47 and took the same in his possession. Thereafter, he also snatched AK-47 rifle from the accused. Sanjeet Kumar was shifted to hospital. He told him that a few days back on 25th or 26.10.2010 there was altercation between him and accused with regard to quality of food. He told him that he was fired by the accused on this account.

13. PW-7 Constable Vivek Garg has deposed that on 5.11.2010, he had dinner in the evening in the room of Head Constable Kulwant and Head Constable Sanjeet in the 1st floor of the building of Company Head Quarter, Tarela. He alongwith Head Constable Sanjeet Kumar and Constable Sunil Kumar came down to urinate. While climbing the stairs accused fired bullet shots from his AK-47 rifle. Head Constable Sanjeet Kumar sustained injuries. They got frightened and rushed to the room of Sanjeet and Kulwant. Accused chased them and entered the room armed with his rifle. He also fired bullet shots which hit upper portion of the frame of door. The accused was overpowered by them. Sanjeet Kumar was taken to the hospital. He has admitted that he burst crackers on 5.11.2010, i.e. on the day of Diwali festival. He has also admitted that Constable Ashok had also joined him while bursting crackers. He has also admitted that accused had asked them not to burst crackers since the rifle carried by him was loaded. According to him, on 25/26.10.2010, he was holding charge of Mess. He was Mess Manager also. Accused had complained before him about the quality of food in the Mess. He called Head Constable Sanjeet Kumar. Head Constable Sanjeet had told accused that since Incharge was out of station, on his return meeting would be convened and problem would be sorted out.

14. PW-8 Ram Dayal has deposed that on 5.11.2010 he was called by the police in Police Post, Tarela. AK-47 rifle and magazine were taken into possession. Blood was also lifted from the spot with the help of cotton lying on the 1st floor of the building. 13 live cartridges were also taken in possession and parceled in a piece of cloth. All the parcels were taken into possession vide memo Ex. PW-3/A. In his cross-examination, he has admitted that he had seen the accused on that day. Blood was oozing out of his nose. Accused was seen wiping blood with his hands and his entire face was smeared with blood.

15. PW-9 Constable Ajeeb Kumar has testified that on 5.11.2010 he was put on Guard duty in Company Head Quarter, Tarela building from 9.00 P.M. till 12.00 mid night. Accused Shamsher had performed his duty from 6.00 P.M. to 9.00 P.M. He relieved accused from his duty at 9.00 P.M. on 5.11.2010. Head Constable Sanjeet Kumar, Constable Vivek and Constable Sunil came there to urinate. While returning Head Constable Sanjeet came to him and told him that since charcoal was not available, he should use fuel wood. He picked up "Angithi" and went to the Mess behind the building. In the meanwhile, he heard sound of bullet shots. On hearing sound of bullet shots, he went to the spot. Head Constable Kulwant, Constable Ashok and Head constable Sanjeet were seen there. Head Constable Sanjeet was lying on the cot while accused Shamsher was on the floor and blood was oozing out from his nose. On his asking, Constable Vivek Garg told him that accused Shamsher has fired bullet shots and Head Constable Sanjeet has sustained injuries in his thighs. He lifted accused and asked him to come alongwith him to the ground floor. He made the accused to sit in the room on the ground floor and he remained outside the room while performing his duty.

16. Statements of PW-10 Constable Ajay Kumar and PW-11 Sanjeet Kumar are formal in nature.

17. PW-12 Inspector Brij Mohan Sharma has deposed that he received call on his mobile phone from Wireless Operator Balbir Singh, Company Head Quarters, Jhahhakothi camp at Tissa that in Company Head Quarter, Tarela, Ex-serviceman Shamsheer Singh has fired bullet shots on Head Constable Sanjeet Kumar. He sent Addl. S.H.O. Mahinder Singh alongwith staff in official vehicle to Company Head Quarter, Tarela. He went to C.H.C. Tissa to arrange for the doctor in order to facilitate medical first aid to Head Constable Sanjeet Kumar. He recorded statement of Head Constable Sanjeet Kumar u/s 154 of the Code of Criminal Procedure vide Ex. PW-2/A. Thereafter, rukka Ex. PW-2/A was sent to Police Station, Tissa through Constable Jeewan Singh for registration of case. In his cross-examination, he has admitted that as per MLC mark "Y", injuries were found on right eye and nose of Constable Shamsheer Singh.

18. Statements of PW-13 Head Constable Rajinder Singh and PW-14 Head Constable Ajay Kumar are formal in nature.

19. PW-15 Sub Inspector Mahinder Singh has deposed that he was posted as Addl. S.H.O., Police Station, Tissa with effect from 28.6.2010 to 16.4.2012. He went to the spot. He found two empty cartridges lying on the stairs and three empty cartridges on Verandah, i.e. on 1st floor of the building. Another two empty cartridges were found inside the room of Head Constable Sanjeet Kumar. He noticed blood stains on the floor. All the seven cartridges were put in a parcel and sealed with three seal impression of seal "G". Blood stains were also lifted with the help of cotton. Head Constable Satpal produced AK-47 rifle alongwith magazine before him which were also parcelled and sealed by affixing three impressions of seal "G". 13 live cartridges were also handed over to him by Constable Satpal which were also parcelled and sealed by affixing three seals of seal "G". The parcels were taken into possession vide memo Ex. PW-3/A. He prepared spot map Ex. PW-15/D. Statements of accused were recorded. Accused was interrogated. He was having injuries on his face and nose. He disclosed that injuries were caused to him when AK-47 rifle and magazine were snatched from him. He obtained MLC of the accused. In his cross-examination, he has admitted that blood was seen on the face and scalp of accused. He has also admitted that accused was wearing uniform and the uniform had blood stains.

20. PW-16 Dr. Amit Joshi has examined Sanjeet Kumar on 6.11.2010 with alleged history of bullet injury on the thigh after being accidentally fired by constable Shamsheer Singh. There was no fracture of under lying bone. Patient was discharged on 8.12.2010.

21. DW-1 Dr. Navneet Sharma found the following injuries on the person of accused:

1. Laceration present over right eye.

2. Contusion of 2 x 3 cm below right eye.

3. Swelling of nose with no difficulty in breathing,

According to final opinion, the injuries were caused by blunt weapon. He has also admitted that the injuries mentioned in MLC could be sustained by beating.

22. According to the prosecution, accused was bearing grudge against PW-2 Sanjeet Kumar. Accused has protested against quality of food. PW-2 Sanjeet Kumar has deposed that accused had raised objection with regard to standard of food in Mess. He advised accused that since Incharge of Mess was out of station, on his arrival meeting would be convened and the problem of quality of food in the Mess would be sorted out. However, the accused in aggressive manner replied that he would settle the score and things on his own. In his cross-examination, he has deposed that on 25th and 26th October, 2010, charge of Mess was with Constable Vivek. When accused had objected regarding quality of food in the Mess on 25th/26th October, Constable Vivek was also present. Accused had no conversation with Constable Vivek. In his statement before the police, he has deposed that accused replied in aggressive manner. He was confronted with his previous statement. He has not stated so in his statement. He has also admitted that accused had not complained to him after 25th/26th October about the quality of food in the Mess. PW-6 Kulwant Kumar has deposed that when he was taking Head Constable Sanjeet to hospital, he told that a few days back on 25th or 26th October, 2010, there was altercation between him and accused Shamsher Singh with regard to quality of food. He told him that he was fired by the accused on this account. PW-7 Constable Vivek Garg in his cross-examination has deposed that on 25th or 26th October, 2010, he was holding the charge of Mess. He was Mess Manager also. Accused had complained before him about the quality of food in the Mess, upon which he called Head Constable Sanjeet. Head Constable Sanjeet told that since Incharge was out of station, on his return meeting would be convened and problems would be sorted out. According to the statement of PW-2 Sanjeet Kumar and PW-7 Vivek Garg, accused had complained about the quality of food on 25th or 26th October, 2010. According to PW-2 Sanjeet, accused was told that the matter would be sorted out when the Inspector would come back. However, the accused, according to PW-2 Sanjeet answered in very aggressive manner. But he has not stated so in his statement recorded by the police. The incident has taken place on 5.11.2010. The prosecution has failed to prove any connection with alleged complaint of the accused with regard to quality of food on 25th or 26th October, 2010 with the date of incident, i.e. 5.11.2010. Though PW-2 Sanjeet has deposed that due to quality of food accused had entertained grudge against him and assaulted him. PW-2 Sanjeet has admitted that after 25th or 26th October, 2010, accused has never discussed the matter with regard to quality of food. In his cross-examination-in-chief, PW-2 Sanjeet has deposed that he came to know from Constable Ashok and Constable Vivek that an hour prior to the incident when they were bursting crackers, accused felt annoyed and asked them to stop

bursting crackers, failing which he would fire at them with his rifle having ammunition in its chamber. In his cross-examination, PW-2 has admitted that on the date of incident, some of the Constables had burst crackers. PW-7 Constable Vivek Garg has deposed that he had burst crackers on 5.11.2010. He has also admitted that accused had asked not to burst crackers since his rifle was loaded. PW-2 Constable Sanjeet has received injuries, as noticed hereinabove. Accused has also received injuries, as per the statement of DW-1 Dr. Navneet Sharma. DW-1 Dr. Navneet Sharma has admitted in his cross-examination that injuries referred in MLC could be sustained by beating. Prosecution has not examined Constable Sunil Kumar, who was in the company of PW-2 Sanjeet Kumar and Constable Vivek Kumar.

23. Accused was carrying weapon being on Guard duty on 5.11.2010. He was carrying the gun in the discharge of his duty. In order to discharge his duty diligently and to avoid untoward incident, he requested his colleagues not to burst crackers near his vicinity. His colleagues insisted and kept on bursting crackers, which led to brawl and shooting on his colleagues by the accused to frighten them.

24. PW-2 Sanjeet Kumar was hit on thigh. He was taken to the hospital, Tissa and thereafter he was referred to R.P.G.M.C. Tanda. He remained admitted in the hospital for more than 20 days. According to the opinion of PW-1 Dr. Ashish Kumar, the injury was not found dangerous to life of patient since bullet injury was not found to have hit on the major vessel in the thigh. It has also come in his cross-examination that he could not say whether it was close range shot or it was point blank shot. According to prosecution, accused after fire on PW-2 Sanjeet Kumar also chased them and entered the dormitory and again fired on them. Accused is an ex-serviceman and fully trained to use weapons, including AK-47 rifle. If he had intention and knowledge to kill PW-2 Sanjeet Kumar he would have fired on his vital organs and not on his thigh. He had also an opportunity to shot PW-2 Sanjeet Kumar when accused entered the dormitory. The accused also received injuries, as noticed hereinabove. It cannot be said that accused was carrying unauthorized weapon at the time of incident. The conviction of the accused u/s 27 of the Arms Act could be recorded only if the arm was used in contravention of sections 5 and 7 of the Arms Act and if any prohibited arm or prohibited ammunition was used. Prosecution has failed to prove in what manner the accused has contravened sections 5 and 7 of the Arms Act. He had no intention or knowledge to kill PW-2 Sanjeet Kumar. However, the fact of the matter is that PW-2 was grievously hurt by a dangerous weapon. He remained admitted in hospital for more than 20 days.

25. Their Lordships of the Hon'ble Supreme Court in Sarju Prasad Vs. State of Bihar, have held that in order to bring offence u/s 307 of the Indian Penal Code, prosecution must establish that his intention was one of the three kinds mentioned in section 300 of the Indian Penal Code. State of mind of accused has to be deduced from surrounding circumstances and motive would be a relevant

circumstance. Their Lordships have held as under:

6. All these decisions were considered by this Court in *Om Prakash v. State of Punjab*, and though Cassidy's case, 4 Bom HC (Cr.) 17 was not expressly dissented from the actual view taken by this Court is more in consonance with the view taken by Beaumont C.J. in *Emperor Vs. Vasudeo Balwant Gogte*, and the view taken by the Allahabad High Court in *Niddha's Case*, ILR 14 All 38 than that taken in Cassidy's case, 4 Bom HC (Cr.) 17. In *Emperor Vs. Vasudeo Balwant Gogte*, no injury was in fact occasioned to the victim Sir Earnest Hotson, the then acting Governor, due to a certain obstruction. Even so, the assailant Gogte was held by the court to be jointly (sic) u/s 307 because his act of firing a shot was committed with a guilty intention and knowledge and in such circumstances that but for the intervening fact it would have amounted to murder in the normal course of events. This view was approved by this Court. Therefore, the mere fact that the injury actually inflicted by the appellant did not cut any vital organ of Shankar Prasad is not by itself sufficient to take the act out of the purview of Section 307.

7. Having said all this we must point out that the burden is still upon the prosecution to establish that the intention of the appellant in causing the particular injury to Shankar Prasad was of any of the three kinds referred to in Section 300, Indian Penal Code. For, unless the prosecution discharges the burden the offence u/s 307, I.P.C. cannot possibly be brought home to the appellant. The state of the appellant's mind has to be deduced from the surrounding circumstances and as Mr. Kohli rightly says the existence of a motive to cause the death of Shankar Prasad would have been a relevant circumstance. Here, the prosecution has led no evidence from which it could be inferred that the appellant had a motive to kill the victim of his attack. On the other hand he points out that as the appellant had no enmity with Shankar Prasad that neither of them even knew each other and that as the appellant inflicted the injury on Shankar Prasad only to make him release the wrist of Sushil while Sushil was in the act of stabbing Madan Mohan he cannot be said to have had the motive to kill Shankar Prasad and, therefore, no intention to cause murder or to cause any injury which may result in death could be inferred. Now, it is the prosecution case that about a week before the incident Sushil, for certain reasons, had given a threat to Madan Mohan to the effect that he would be taught a lesson and according to the prosecution Sushil and the appellant Sarju were lying in wait for Madan, Mohan in the chowk on the day in question with chhuras with the intention of murdering him. The prosecution wants us to infer that these two persons also had the intention of murdering any one who went to the rescue of Madan Mohan. It seems to us that from the facts established it cannot be said that the appellant had the intention of causing the death of Shankar Prasad or of any one who went to Madan Mohan's rescue. If such were his intention then another significant fact would have possibly, though not necessarily, deterred him and that is that Madan Mohan and Shankar Prasad were not the only persons there at that time but were accompanied by some other persons. Moreover the

incident occurred in broad day light in a chowk which must be a well-frequented area. It is not easy to assume that in such circumstances the appellant could have intended to commit a crime for which the law has provided capital punishment.

10. In this state of the evidence we must hold that the prosecution has not established that the offence committed by the appellant falls squarely u/s 307, I.P.C. In our opinion, it amounts only to an offence u/s 324, I.P.C.

26. Their Lordships of the Hon"ble Supreme Court in Hari Kishan Vs. Sukhbir Singh and Others, have held that u/s 307 of the Indian Penal Code, what the Court has to see is whether the act irrespective of its result was done with the intention or knowledge and the intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder". u/s 307, the intention precedes the act attributed to accused. The intention has to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it was used, motive for the crime, severity of the blow, the part of the body where the injury was inflicted are some of the factors that may be taken into consideration to determine the intention. Their Lordships have held as under:

7. On the first question as to acquittal of the accused under s. 307/149 IPC, some significant aspects may be borne in mind. Under s. 307 IPC 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 that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder". Under s. 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention.

In this case, two parties in the course of a fight inflicted on each other injuries both serious and minor. The accused though armed with ballam never used the sharp edge of it. They used only the blunt side of it despite they being attacked by the other side. They suffered injuries but not provoked or tempted to use the cutting edge of the weapon. It is very significant. It seems to us that they had no intention to commit murder. They had no motive either. The fight as the High Court has observed, might have been a sudden flare up. Where the fight is accidental owing to a sudden quarrel, the conviction under s. 307 is generally not called for. We, therefore, see no reason to disturb the acquittal of accused under s. 307 IPC.

27. Accordingly, in view of the analysis and discussion made hereinabove, appeal

is partly allowed. Conviction recorded for the commission of offence u/s 307 of the Indian Penal Code and u/s 27 of the Arms Act, 1959 is set aside. However, accused is held guilty for the commission of offence u/s 326 of the Indian Penal Code. Let the accused be heard on the quantum of sentence. He be produced in the Court on 28.7.2014.