(2016) 3 JKJ 78

Jammu & Kashmir High Court

Case No: Criminal Appeal No. 17-A of 2003, MP No. 84 of 2009 c/w Criminal Appeal No. 18-A of 2003

Mukesh Gupta		APPELLANT
	Vs	
State of J&K		RESPONDENT

Date of Decision: March 17, 2016

Acts Referred:

- Arms Act, 1959 - Section 27, Section 7
- Ranbir Penal Code, 1989 - Section 307, Section 323, Section 34, Section 452

Citation: (2016) 3 JKJ 78

Hon'ble Judges: Mr. Janak Raj Kotwal, J.

Bench: Single Bench

Advocate: Mr. Sunil Sethi, Sr. Advocate With Mr. Sumit Nayyar, Advocate, for the Petitioner; Mr. L.K. Moza, AAG, for the Respondent

Final Decision: Partly Allowed

Judgement

Janak Raj Kotwal, J. - These are two appeals against judgment of learned Sessions Judge, Udhampur dated 18.12.2003 whereby appellant,

Mukesh Gupta alias Sohnu (hereinafter referred to as A-l) Moin Din alias Tickoo and Sumeet Singh Jaswal alias Goldi (hereinafter referred to as

A-2 and A-3) have been convicted under Sections 307,452,323/34 RPC and 7/27 Arms Act and order dated 20.12.2003 whereby each one of

them has been sentenced to rigorous imprisonment for three years and payment of fine of Rs. 1000/- under Section 307 RPC, rigorous

imprisonment for one year and fine of Rs. 1000/- under Section 452 RPC, fine of Rs. 700/- under Section 323 RPC and to rigorous imprisonment

for seven years and fine of Rs. 1000/- under Section 7/27 Arms Act. Criminal Appeal No. 17-A/2003 has been filed by A-l and Criminal Appeal

No. 18-A/2003 by A-2 and A-3.

2. Heard. I have perused the record.

3. Prosecution case is that on 22.01.2000 at 12.00 noon Sanjay Kumar (PW-1) was sitting inside the shop of a barber, Sohan Lal (PW-2) at

Talab Sailan, Udhampur for getting haircut. The appellants entered the shop with common intention of committing murder of PW-1 because of old

enmity with him. A-1 was armed with a 'khokri'. A-2 and A-3 caught hold of and overcame PW-1 and A-1 inflicted blow with the 'khokri' in his

chest with the intention of committing his murder. PW-2 tried to intervene but the appellants attacked and caused him injuries too. Police Station,

Udhampur received source information about the incident. On this information police registered FIR No. 30/2000 under Sections 307, 323,

452/34 RPC and 4/27 Arms Act. Investigation was entrusted to Jagdish Singh, ASI (PW-14). In the course of investigation all the three appellants

were arrested on 08.02.2000. The weapon of offence was recovered on the basis of a disclosure statement of A-1. After complying with the

formality of investigation police preferred charge-sheet against the appellants under Sections 452, 307, 323/34 RPC and 4/25 Arms Act in the

committal court. After committal the case came up for trial before learned Sessions Judge, Udhampur.

4. Learned trial court after examining the charge-sheet and record of the case, frame charges under Sections 452,307,323/34 RPC and 7/27

Arms Act against the appellants. All of them denied the charges and claimed to be tried. Prosecution, thus, entered its evidence and examined

Sanjay Kumar (PW-1), Sohan Lal (PW-2), Kulbhushan Kumar (PW-3), Mohd. Saleem (PW-4), Sanjeev Sharma, ASI (PW-5), Mohd. Sadiq

(PW-6), Bishan Dutt (PW-7), Dr. Rajinder Prashad (PW-8), Mohd. Iqbal (PW-9), Rakesh Kumar (PW-10) and Jagdish Singh, ASI (PW-11).

Learned trial court recorded statements of the appellants under Section 342 Cr.P.C. who in turn produced one witness, namely, Jagtar Singh in

their defence.

5. Learned trial court on appreciation of the evidence and record of the case arrived at a conclusion that the appellants in furtherance of a common

intention and after proper preparation entered the shop of PW-2 at Battal Ballian Road, Sailan Talab, A-1 who was armed with 'khokri' inflicted a

very serious injury in the chest of PW-1 which nearly took his life. The appellants also attacked PW-2 with a common object when he had tried to

save PW-1. Learned trial court, therefore, convicted and sentenced the appellants.

6. Appellants assail their conviction and sentence on the grounds that the trial court has not properly evaluated the evidence of the prosecution. The

fact that there was absolutely no enmity of the appellants towards PW-1 has not been appreciated as also non production of important witnesses

has not been appreciated.

7. It be noticed that, besides PW-1, who is victim of the alleged assault, PW-2 and PW-9 have been cited as eye-witnesses of the occurrence. I

may before taking up the submissions made at bar give a brief resume of the depositions of these three eye-witnesses about the occurrence,

however, shorn of what I feel is totally unessential. I will also give a brief resume of PW-3, Kulbushan, who is real brother of PW-1 and claims to

have evacuated him to the hospital from the place of incident.

8. Sanjay Kumar (PW-1) has stated that on 22.01.2000 he was coming out of the shop of Sohan Lal at Talab Sailan after having a shave. He was

yet inside the shop when all the appellants (accused) came there. A-2 and A-3 caught hold of his arms whereas A-I attacked him with a 'khokri'

and inflicted a severe injury in his chest. PW Sohan Lal tried to come to his rescue but A-1 attacked him to and inflicted injury on his eye. He

became unconscious within 2/3 seconds of the infliction of injury and on regaining consciousness he found himself in Medical College, Jammu. As

the doctors in the Medical College were on strike, he was referred to Batra Hospital, where he remained admitted for 17/18 days. Police had

recorded his statement (Ex. PW-SS-1) at Batra Hospital. He had an altercation with A-3 prior to the occurrence which may be the cause of

attack on him. The appellants had attempted to attack him about three months back also but some elderly persons had intervened. In cross-

examination he stated that during those days he was working as a commission agent in Sabzi Mandi. He had no enmity with the appellants. There

were 15/16 shops around the place of occurrence and the Matador Stand is at a distance of 200 ft. There was no other customer on the shop at

that time. There is a pucca road outside the shop and floor of the shop was also pucca. A-2 had punched PW Sohan Lal. He had seen A-3, 3/4

days prior to the occurrence and after that in the court at the time of giving evidence and had not seen him earlier. House of A-1 falls at a distance

of half a kilometre from his house A-2 resides in the mohallah of A-1. He had no acquaintance with the appellants. Police had recorded his

statement on 30th January in the hospital at Jammu. Distance between Sabzi Mandi and Talab Sailan is about one and a half kilometres. He had

suffered only one injury in his chest. It is not correct that he had sustained injury by falling on angle-iron outside the shop of Sohan Lal.

9. Sohan Lal (PW-2) has stated that on 22.01.2000 he was performing hair-cut of a customer in his shop at Talab Sailan. Sanjay Kumar came in

his shop and said that he wants to have a shave. He asked him to take seat. In the meantime, appellants (accused) entered his shop. Immediately

on entering the shop, Sumeet (A-3) and Moin Din (A-2) caught hold of Sanjay Kumar from his arms and Mukesh (A-1) inflicted blow with a

'khokri' in his abdomen. Sanjay Kumar suffered a serious injury and fell down. He (witness) raised alarm but A-2 inflicted fist blow above his eye.

A-1 pulled out the 'khokri' and started waiving the same to create horror. Bhushan and Iqbal came on spot when the appellants were running

away. We tried to catch the appellants but they ran away. He, Bhushan and Iqbal brought the injured to the Hospital by a van. In cross-

examination he has stated that Sanjay Kumar was known to him as he is his friend. There was only customer in his shop when Sanjay Kumar had

come there. Name or whereabouts of that customer were not known to him. Numbers of persons were walking by the road. There are 7/8 houses

near his shop. Incident was completed within about two seconds. Number of persons had come on spot after alarm was raised by him. When

Bhushan and Iqbal reached on spot, the injured was lying in a pool of blood. He had seen Bhushan and Iqbal when they entered the shop and

appellants by that time had reached outside the shop and were running away. Police had reached in the hospital after about ten minutes. He had

informed the police from the hospital. He works at the shop of one Majeeda. The shop had remained open after he left for hospital. The owner

had closed the shutter after he left for the hospital. He returned to his shop at about 3:00 PM. Police had come at the shop after that. He keeps on

visiting house of Sanjay Kumar which is located near his shop. Appellants Mukesh and Moin Din reside in his mohallah whereas appellant Sumeet

resides at Chopra shop. His clothes were stained with blood while lifting the injured.

10. Mohd. Iqbal (PW-9) has not supported the prosecution case and in his chief-examination has expressed ignorance about the incident.

Prosecution has declared him as hostile witness.

11. PW Kulbushan has stated that on 22.01.2000 at 12:00 noon he was going to his house for having meals. He heard noise on reaching near the

shop of Sohan Lal and saw his brother lying outside the shop. He had suffered injury in his chest and was bleeding. Appellants were running away.

He evacuated his brother to hospital at Udhampur. Number of persons have collected on spot who also accompanied him. His brother was

operated in the hospital and he remain there for about four hours. His brother was then shifted to Military Hospital where he was kept for three

hours and was referred to Medical College, Jammu. He remained admitted in the Medical College during the night. The next day he was shifted to

Batra Hospital where operation was performed on him and one of his lungs was removed. He remained admitted there and was discharged after

he recovered after twenty days. He had seen the appellants only when they were running away and not while inflicting the blow to his brother. He

had seen a 'khokri' in possession of accused Mukesh when the appellants were running away. In cross-examination he has stated that he runs his

shop at general bus stand and Talab Sailan falls at a distance of one and a half kilometres from that place. Number of persons had collected on

spot. Bus stand, Auto stand and shops are located near the occurrence. His brother had suffered injury only in the chest. He had attempted to

catch hold of the appellants but they ran away. PW Sohan Lal had also caught hold of them.

12. It is also in place to refer to the medical evidence comprising of the deposition Dr. Rajinder Prasad (PW-8) and the medical certificates (Ex.

PW-RP and Ex. PW-RP/1) issued by him which he proved before the trial court. Ex. PW-RP relates to medical examination of Sohan Lal (PW-

2) and Ex. RP/1 relates to Sanjay Kumar (PW-1). According to the doctor PWs 1 and 2 were examined by him on 22.01.2000 at District

Hospital, Udhampur where he was posted as Assistant Surgeon. One injury was found in the chest of PW-1 which was;

a incised penetrating wound 5 cm x 2 cm cavity deep, elitctripictal, shape in the 6th intercostal space in the interior axillary line on left chest.

Bleeding profusely"".

Three injuries were found on the person of PW-2 which were:-

1. A lacerated wound 3 cm 0.5 cm deep to skin over right lower lid near external angle of eye bleeding with edema around it and extending upto

right cheek.

2. Abrasion over left upper arm anteriorly bleeding.

3. Abrasion over the front of neck bleeding.

13. Besides, evidence of PW-8 shows that 'thoracotomy' was immediately done on PW-1 under high risk of surgery and anaesthesia as a life

saving procedure. Rib was found cut with stab wound puncturing left lower lob of lung with active bleeding. Chest cavity was full of blood. Cardiac

message was required and blood transfusion was given. The tear in the lung was repaired. Since the patient did not show much recovery after

operation, he was referred to Medical College, Jammu from where he was taken to Acharya Shri Chander College of Medical Sciences and

Hospital, Sidhra, Jammu. In the opinion of the Doctor, injury found on the person of PW-1 was grievous in nature caused by a sharp edged

weapon and was of fresh duration. The Doctor categorically stated in his cross-examination that such injury could not to have been caused by a fall

on a sharp object because if a person falls on a sharp object, the direction of injury gets changed.

14. Submissions of Mr. Sunil Sethi, learned Senior Advocate, appearing the learned counsel for the appellants were in two folds. He argued,

firstly, that learned trial court has fallen in error in appreciating the evidence and recording conviction against the appellants and secondly, that

recovery of the weapon said to be the weapon of offence has not been proved so conviction for any offence much less offence under Section 7/27

Arms Act could not have been recorded.

15. Learned counsel argued that PWs-1 and 2 are interested and partisan witnesses. PW-1 is the injured and PW-2 is his friend. Learned trial

court has not applied recognised principles while appreciating evidence of PWs 1 and 2 inasmuch as serious contradictions in their depositions

have been ignored and not duly appreciated even though they go to the root of the case and make the entire prosecution case highly doubtful. Mr.

Sethi pointed out that according to PW-1 (injured), he was attached at the time when he was coming out of the shop of PW-2 after having got the

shave done, whereas according to PW-2 the incident occurred at a time when he was performing shave on another customer and had asked PW-

1 to wait for his turn. Further, it was pointed out that according to PW-1, blow was inflicted in the chest, whereas according to PW-2 it was

inflicted in the abdomen. Contextually, Mr. Sethi sought to make out that PW-2 was deliberately introduced as a witness to support the

prosecution case as he admittedly is a friend of PW-1 even though he was not present nor had witnessed any incident. Learned counsel sought to

support this argument by pointing out that according to PW-2 only one blow was inflicted to him which had hit him above his eye but at the time of

his examination doctor had found three injuries on his person, which is not explained if the version given by him is accepted. Mr. Sethi sought to

raise a doubt about the incident having taken place at the place of alleged occurrence by pointing out that according to prosecution case plain and

blood stained earth was recovered from the crime scene on the day of occurrence whereas according to PW-2 the floor of the shop and road

outside the shop were pucca so there could have been no possibility of such seizures from that place.

16. In regard to recovery of the weapon learned counsel pointed out that PW Kulbhushan Kumar, who is witness to the recovery, has very clearly

stated that he did not enter the house of A-l from where 'khokri' was brought out by the Police.

17. PW-1 is the victim of the offence. He sustained an injury, the gravity and life threatening aftermath whereof stands explained in evidence of the

doctor (PW-8). In that PW-1 certainly has stake and interest in success of the prosecution case. But such stake and interest of victim of an offence

is rather the assurance of the reality of his evidence because a victim of offence, in particular a person injured in a criminal act, normally would

endeavour to see his assailant convicted rather than to implicate innocent person(s) at the cost of screening the real culprit. As a settled principle of

law the evidence of an injured witness is considered to be more reliable also for the reason that sustaining of injury by him guarantees his presence

on spot. Defence has to make out a very strong case to falsify or make doubtful his presence on spot and having sustained injuries in the

occurrence. His evidence can neither be disbelieved nor discredited simply by branding him as an interested witness. Supreme Court in Jodhan v.

State of Madhya Pradesh, 2015 CRI. L.J. 3291 (Supreme Court) has observed in para 21 of the judgment:

21....A testimony of an injured witness stands on a higher pedestal than other witnesses. In Abdul Sayeed v. State of M.P., (2010) 10 SCC

259, it has been observed that the question of weight to be attached to the evidence of a witness that was himself injured in the course of the

occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony

of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of

the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. It has been also reiterated that convincing evidence is

required to discredit an injured witness.....

18. It is nobody's case that PW-1 did not sustain aforementioned injury in a criminal act. On reading the evidence on the file, I could find nothing to

suggest, much less to show convincingly, that PW-1 had a reason to falsely implicate the appellants even at the cost of screening his real

assailant(s). I rather find no reason for not believing in what PW-1 has stated and accepting it as sufficient evidence in itself to prove the

occurrence and the involvement of the appellants in the attack on and causing injury to him. I find no substance in the assail of learned counsel for

the appellants to the prosecution evidence in general and evidence of PW-1 in particular though hereafter I would be taking up the important

submissions made by learned counsel for appellants at bar.

19. Besides PW-1, PW-2 is the other eye witness who has supported the prosecution case and provided direct evidence of the occurrence. PW-

9, whom prosecution has cited as third eye witness, however, did not support the prosecution case and was declared as hostile witness. PW-2 as

per his evidence and that of PW-1 is the barber at whose shop PW-1 had gone for having a hair-cut/shave. His evidence is sought to be

discredited on the grounds that he is friend of PW-1, which he has admitted in his cross-examination and that he states to have been inflicted one

fist blow by A-2 on his raising alarm but the doctor as per his evidence had found three injuries on his person.

20. It may be stated that evidence of a witness cannot be discarded or discredited only for the reason that he is friend of the victim of the offence

unless it is shown or appears that he would not seen the occurrence or has a reason to implicate the accused even at the cost of screening the real

culprit. Correct it is that PW-2 has stated that A-2 gave a fist blow to him when he raised alarm. Contextually, PW-1 has also stated that PW-2

had tried to come to his rescue but A-1 attacked him too and inflicted injury on his eye. As per the evidence of the doctor, however, besides a

lacerated wound over lower lid of his right eye near external angle, two abrasions were noticed on his body, one over left upper arm and the other

in front of neck. The role of PW-2 needs to be visualised in context of the entire scenario inside the shop. In the millie as it was presence of two

abrasions on his body cannot be given that importance so as to entertain a doubt about his presence on spot, much less to discard his evidence on

that score only. It was a sudden and gruesome attack inside a barber's shop in which the victim was attacked and brutally stabbed in his chest. In

such a situation neither the victim nor the barber can be reasonably expected to have taken note of the abrasions suffered by the barber in his

meagre attempt to intervene or raise alarm.

21. An argument of learned counsel for the appellants relates to what he emphasised as inter se contradictions in the evidence of PWs-1 and 2 and

contradiction in the evidence of PWs 1 and 2 on one hand and PW-3 on the other. It is pointed out and rightly so that according to PW-1 he was

attacked when he was coming out of the shop of PW-2 after having had the shave to him whereas according to evidence of PW-2 he was

performing hair-cut on another customer in his shop and had asked PW-1 to take the seat where he was attacked. The other contradiction pointed

out is that according to PW-1, A-1 had stabbed him with the 'khokri' in his chest whereas according to PW-2 injury was inflicted in the abdomen.

It was pointed out also that as per PWs 1 and 2 occurrence took place inside the shop of PW-2 whereas according to PW-3, who is real brother

of PW-1, he had seen the injured (PW-1) lying outside the shop.

22. It is a settled proposition of law that only those contradictions in depositions of the eye witnesses that affect the core of the case are material

and may lead to discarding of the entire evidence. Contradictions that do not touch the core of the case and relate to ancillary matters, however,

cannot prompt the court to discard the evidence of the eye witnesses altogether. Core of the prosecution case here is the attack on and stabbing of

PW-1 at the shop of a barber run by PW-2. Both these witnesses are unanimous and firm in their evidence to that extent. It is of little importance

as to whether the victim was attacked while entering the shop or while leaving the shop or sitting inside the shop. No contradiction in the evidence

on this aspect can be taken as a material contradiction sufficient to disbelieve or discredit the whole evidence. Likewise, pointing out difference

between chest and abdomen in relation to site of the injury or contradiction in regard to physical location of the injured after the occurrence, to say

the least, have no substance and deserve no comment. It, however, may be noticed that according to PW-3 he had seen the injured lying outside

the shop which can be justified because the injured cannot be expected not to have shifted his position at all after infliction of the injury.

23. It has come in the evidence of PW-2 that there was another customer in his shop at the time when PW-1 had come there and he had asked

PW-1 to take a seat. In this backdrop it was argued by learned counsel for appellants that prosecution has deliberately kept out of picture the said

customer who was the independent witness of the occurrence. Contextually, it was argued also that as per evidence of PW-2 the shop on which

he works was owned by one Majeeda, who had closed the shop after the occurrence but the said owner too has been kept out of picture. It was

argued also that no shopkeeper of the vicinity was cited as witness. There is no indication in the deposition of the I.O. (PW-11) recorded by the

trial court that presence of any other customer in the shop was noticed by him during investigation or any attempt was made to trace him. But I find

no reason for believing that there was any deliberation in not tracing out such a customer or citing him as prosecution witness. There is nothing to

suggest that he would not have supported the prosecution case or would have narrated truth that was other than what has been projected by PWs

1 and 2. Prosecution case cannot fail merely for the reason that someone else having seen the incident too was not cited as prosecution witness

unless it is indicated or there is reason to believe that he would have given a version of the occurrence other than that projected by the prosecution.

I rather agree with the view taken by the learned trial court that prosecution cannot be blamed if that unknown customer had managed to slip away

and the said customer cannot be characterised as an important witness to have been left out. Likewise, it cannot be said that the owner of the

shop, who in any case was not eye witness of the occurrence, or adjoining shopkeepers were deliberately held back. It needs to be noticed that

occurrence had taken place inside the shop, according to PW-2 it was completed within about two seconds and PWs-3 and 9 had come on spot

at the time when appellants were running away. There is nothing in the evidence to indicate that shopkeepers of the adjoining shops could have also

witnessed the occurrence and would have given better evidence. Such being the scenario on spot, prosecution, after having cited PWs 3 and 9,

cannot be said to have deliberately held back any other person having seen the occurrence.

24. PW-2 has stated that PWs 3 and 9 had come on spot at the time when the appellants were running away. PW-9, however, has not supported

prosecution case. He has expressed his ignorance about the occurrence and has not even stated anything contrary to prosecution case. PW-3,

who is the real brother of PW-1, as per his own admission, runs a shop at general bus stand falling at a distance of one and a half kilometres from

the place of occurrence. His evidence is that he was going to his house for having meals. On reaching near shop of PW-2 he heard noise and saw

his brother lying outside that shop having sustained injury in his chest and the appellants running away. His evidence provides useful corroborative

support to the evidence of PWs 1 and 2 both on the point of cause of injury to PW-1 and the appellants being the assailants. His evidence,

however, has been assailed by the learned counsel for appellants on the grounds that he is a chance witness as also a partisan witness being real

brother of PW-1.

25. Correct it is that PW-3 is the real brother of PW-1. He runs a shop at a distance of about one and a half kilometres from the place of

occurrence. In that defence has a point calling him a partisan or chance witness. His evidence, however, cannot be disbelieved or discarded only

on that score though it calls for close scrutiny to ascertain whether he has spoken truth or has given false evidence to strengthen the prosecution

case against the appellants.

26. A chance witness is the one who should not normally be where and when he professes to have been. It is indisputable that PWs 1 and 3 are

residents of Talab Sailan, that is, the locality in which the occurrence had taken place. PW-3 has stated that he was coming to his house for having

his meals. His passing by and presence at the place of occurrence is thus fully explained so he cannot be called a chance witness.

27. It has quite often been pointed out in various decisions of the Supreme Court and the High Courts and has rather developed as a settled

principle that close relatives of the victim of an offence generally would not screen the real culprit and drag in innocent persons. Generally the close

relatives of the victim of a heinous offence like attempt to murder have an urge to see that the real culprit is arrested and brought to justice. The

theory that the close relatives of the victim of an offence are partisan witness has been repelled by the Supreme Court as early as in Dalip Singh

and Ors. v. State of Punjab, AIR 1953 SC 364. It has been laid down as under:

A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means

unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to

screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is

a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism

and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping

generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before

us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

This is not to say that in a given case a Judge for reasons special to that case and to that witness cannot say that he is not prepared to believe the

witness because of his general unreliability, or for other reasons, unless he is corroborated. Of course, that can be done. But the basis for such a

conclusion must rest on facts special to the particular instance and cannot be grounded on a supposedly general rule of prudence enjoined by law

as in the case of accomplices.

28. Recently in Nagappan v. State, Inspector of Police, Cr. Appeal No. 1533 of 2009 the Supreme Court after surveying a series of decisions

on the point including that in Dalip Singh's case has in the judgement dated 17 July, 2013, held as under:

As regards the first contention about the admissibility of the evidence of PW-1 and PW-3 being closely related to each other and the deceased,

first of all, there is no bar in considering the evidence of relatives. It is true that in the case on hand, other witnesses turned hostile and not

supported the case of the prosecution. The prosecution heavily relied on the evidence of PW-1, PW-3 and PW-10. The trial Court and the High

Court, in view of their relationship, closely analysed their statements and ultimately found that their evidence is clear, cogent and without

considerable contradiction as claimed by their counsel. This Court, in series of decisions, has held that where the evidence of ""interested witnesses

is consistent and duly corroborated by medical evidence, it is not possible to discard the same merely on the ground that they were interested

witnesses. In other words, relationship is not a factor to affect credibility of a witness, [vide Dalip Singh & Ors. v. State of Punjab, AIR 1953

SC 364, Guli Chand & Ors. v. State of Rajasthan, (1974) 3 SCC 698, Vadivelu Thevar v. The State of Madras, AIR 1957 SC 614,

Masalti & Ors. v. The State of U.P., AIR 1965 SC 202, The State of Punjab v. Jagir Singh & Ors. (1974) 3 SCC 277 : AIR 1973 SC

2407, Lehna v. State of Haryana, (2002) 3 SCC 76, Sucha Singh & Anr. v. State of Punjab, (2003) 7 SCC 643 : 2003(6) JT SC 348,

Israr v. State of U.P., (2005) 9 SCC 616, S. Sudershan Reddy & Ors. v. State of A.P., (2006) 10 SCC 163 : AIR 2006 SC 2716 and

Abdul Rashid Abdul Rahiman Patel & Ors. v. State of Maharashtra JT 2007 (9) SC 194, Waman and Others v. State of

Maharashtra, (2011) 7 SCC 295, State of Haryana v. Shakuntla and Others, (2012) 5 SCC 171, Raju @ Balachandran & Ors. v.

State of Tamil Nadu, 2012 (11) Scale 357, Subal Ghorai & Ors. v. State of West Bengal, (2013) 4 SCC 607].

29. Plea of false implication by close relatives of the victim of offence, therefore, cannot be entertained unless a strong and convincing indication in

this regard is available from their evidence or the record of the case. Near relationship of an eye-witness of an offence with victim of the offence

per se is not a ground for branding him as interested or partisan witness and discarding or giving less importance to his evidence on that score

alone. What is required, however, is that evidence of close relatives of the victim is scrutinised and considered with great care and caution to rule

out any impression of false implication. The basic question to be determined by the court while dealing with the evidence of a close relative of

victim of a heinous offence when produced as eye-witness of the occurrence would be whether the witness is reliable and trustworthy. The witness

must inspire the confidence of the court. The court, having regard to facts and circumstances of the case and other evidence, must feel satisfied that

the witness was actually present at the scene and could have and had seen the occurrence in the manner and to the extent as stated by him in his

deposition before the court and rule out the possibility of the witness having been implanted for proving or supporting the case. If such a witness is

found reliable and trustworthy his evidence can be safely relied upon and made basis of conviction of the accused.

30. A bare look at the evidence of PW-3 would show that there had been no intention on his part to state what he would not have seen. Had the

intention been to falsely implicate the appellants, he might have stated about having seen them attacking and assaulting his brother. His say that he

had seen his brother lying outside shop of PW-2 and the appellants running away inspires confidence and his evidence cannot be discredited much

less discarded merely for the reason that he is real brother of the injured.

31. Argument of learned counsel for the appellants that plain and blood stained earth could not have been seized from the place of occurrence as

according to PW-2 the floor of the shop and road outside were pucca does not deserve any consideration for the simple reason that possibility of

lifting and seizing any earth from such a physical situation cannot be ruled out. It cannot be said that pucca road outside the shop was in continuity

with pucca floor of that shop. Argument in regard to absence of proof of motive too cannot sustain in face of the direct evidence of the occurrence.

Motive loses importance as there is direct evidence about attack on and causing injury to PW-1 by the appellants.

32. Having discussed all aspects of prosecution evidence in backdrop of the submissions made by learned counsel for appellants and after

comparing the evidence of sole defence witness, Jagtar Singh, with the prosecution evidence, I find no error in the impugned judgement in

appreciating the evidence by the learned trial court in regard to the manner in which the occurrence had taken place and the involvement of the

appellants in attack and causing injury to PW-1. Evidence proves beyond any shadow of doubt that appellants had attacked PW-1 inside the shop

of PW-2, A-2 and A-3 had caught hold of PW-1 from his arms and A-1 stabbed him in his chest with a weapon called 'khokri'. Nature and

aftermath of the injury so inflicted is explained in detail in the evidence of the doctor, PW-8. To say precisely, however, the injury was in the shape

of incised penetrating wound 5 cm x 2 cm, cavity deep, on left chest, the injured was operated upon under high risk of surgery, the stab injury had

punctured left lower lobe of lung and the chest cavity was full of blood. In the opinion of doctor, the injury was grievous in nature and caused by a

sharp edged weapon. The doctor has also ruled out the defence suggestion that injury could have been caused by fall on a sharp object explaining

as to how that was not possible. It is also proved that in the course of the occurrence A-2 had inflicted a blow on the face of PW-2 too near his

right eye.

33. Argument in regard to recovery of the weapon of offence is important in relation to conviction and sentence under Section 7/27 of the Arms

Act, 1959 recorded by the trial court. Argument is that recovery of weapon of offence on the basis of disclosure statement of A-1 has not been

sufficiently proved so offence under Section 7/27 Arms Act has not been proved. It is pointed out that PW-3, who is marginal witness to the

recovery memo (Ex. PW-BD-1) has clearly stated that he did not enter the house from where recovery was made.

34. It has been noticed that question in regard to recovery of the weapon of offence came up for consideration of the trial court also. It, however,

can be said that learned trial judge did not give due importance to this aspect and did not accord consideration thereto in context of offence under

Section 7/27 Arms Act. Learned trial judge, while observing at page 14 of the judgment that 'this is a circumstance which may no doubt, do no

good to the cause of the prosecution', took the view that case does not totally hinge upon circumstantial evidence and that use of 'khokri' stands

amply proved and it was identified by PWs 1 and 2.

35. It is important to note that in regard to possession/use of the, 'khokri' in the commission of offence police had charge-sheeted the appellants for

offence under Section 4/25 of the Arms Act and in support had produced a copy of SRO Notification No. 175, dated 23.04.sic that extends

Section 4 to the State of Jammu and Kashmir in regard inter alia to possession of sharp edged weapon with blade, 6 inches long or 2 inches wide.

Possession of a weapon in contravention of the Notification under Section 4 is punishable under Section 25(IB) (b). Police seems to have charge-

sheeted the appellants under Section 4/25 for possession of and using a 'khokri' having blade 9.25 inches long and 1.5 inches wide. Learned trial

court vide its order dated 01.07.2000, however, framed charge for commission of offence under Section 7/27 Arms Act against the appellants

without stating as to how it was a prima facie a case under Section 7/27 and not under Section 4/25. Impugned judgement too sans consideration

as to how possession or use of a weapon called 'khokri' falls within the ambit Section 7 and constitutes offence under Section 7/27.

36. Well, use of a weapon called 'khokri' by appellant No. 1 in inflicting injury to PW-1 is sufficiently proved from the evidence of PWs 1 and 2

read with the evidence of the doctor but an offence under Section 7/27 of the Arms Act involves use of any 'prohibited arm' or prohibited

ammunition' by any person in contravention of Section 7, that is, unless he has been specifically authorised by the Central Government in this

behalf. Meaning of 'prohibited ammunition' is given in Section 2 (h) of the Arms Act and meaning of 'prohibited arms' is given in Section 2 (i),

which read:

2(h) 'prohibited ammunition' means any ammunition containing or designed or adapted to contain, any noxious liquid, gas or other such thing, and

includes rockets, bombs, grenades, shells, [missiles,] articles designed for torpedo service and submarine mining and such other articles as the

Central Government may, by notification in the Official Gazette, specify to be prohibited ammunition

2(i) 'prohibited arms' means (i) firearms so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until

pressure is removed from the trigger or the magazine containing the missiles is empty, or

(ii) weapons of any description designed or adapted for the discharge of any noxious liquid, gas or other such thing, and includes artillery, anti-

aircraft and anti-tank firearms and such other arms as the Central Government may, by notification in the Official Gazette, specify to be prohibited

arms.

37. On its plain reading, Section 7 of the Arms Act deals with acquisition, possession or carrying 'prohibited arms' and 'prohibited ammunition'.

'Prohibited Arms' as per their meaning given under Section 2(i) comprise of, what may be called, the automatic fire arms and the weapons

designed or adopted for discharge of any noxious liquid, gas or other such things. The 'khokri' used by A-l is a weapon having a blade, which

cannot be said to be a 'prohibited arm' as contemplated under Section 7 so offence under Section 7/27 is not made out and to that extent the

learned trial court has fallen in error in recording the conviction and sentence against the appellants. Nonetheless, question arises whether there is

sufficient evidence to prove commission of offence under Section 4/25 of the Arms Act and conviction and sentence under that section can be

imposed?

38. To prove the commission of offence under Section 4/25 of the Arms Act prosecution was required to prove that the blade of the 'khokri' used

by A-l in inflicting injury to PW-1 was six inches long or more. For proving this fact, prosecution was first required to prove that the 'khokri' used

in commission of offence was recovered on the basis of disclosure statement of A-1. In that the proof of recovery assumes importance.

Prosecution case is that the 'khokri' was recovered on the basis of the disclosure statement (Ex. PW-BD) made by A-l on 08.02.2000. The

recovery was effected on the same day vide Ex. PW-BD/1. PWs 3,7 and 10 are witnesses to the recovery memo.

39. There is nothing much useful in the evidence of PW-7, Bishan Dutt, who is a police personnel, in regard to recovery of the weapon. He in his

chief examination has simply proved the contents of the disclosure statement and the recovery memo without explaining the manner in which and

the place from where the recovery was effected. However, with the courtesy of defence, in cross-examination he has stated that he had entered

the house from which the recovery was made. Mother of the accused and 2-3 other persons were present there. Recovery was effected from the

store. PW-10 Rakesh Kumar, who in the recovery memo seems to have been named as Rajesh, while admitting his signature on the recovery

memo, has expressed ignorance about its contents and in cross-examination by PP has expressed ignorance about the recovery and stated that his

signature was obtained by the police at his shop.

40. The useful and reliable evidence in regard to recovery of the weapon is the deposition of PW-3, Kulbhushan Kumar, the real brother of PW-

1. In chief-examination he has stated that after making the disclosure statement, police had taken A-1 to the spot where A-1 brought a 'khokri'

from inside and produced it before the police which was seized vide memo Ex. PW-BD/1. In cross-examination he, however, has stated that A-1

was taken for recovery. He (witness) did not enter the house and kept standing outside. Police and A-1 entered the house and 'khokri' was

brought out. Contextually, it is important to refer to the evidence of I.O.(PW-11). In chief-examination he simply has proved the contents of

recovery memo (Ex. PW-BD/1) without explaining the manner in which and the place from where the recovery was effected. In cross-

examination, however, he has explained that recovery was effected from the house of A-1. No other member of the family was present in that

house as it was a newly constructed house in which accommodation had not yet started though households goods were kept there. No local

person was associated with the recovery. There is nothing in his evidence that two civilians, that is, PWs 3 and 10 had also entered the house and

witnessed the process of recovery of the weapon. As PW-3 had earlier clearly stated that he had not entered the house and PW-10 has denied

any knowledge about the recovery of the weapon, it was expected of the I.O. to give sufficient detail about the manner in which recovery was

effect and role of PWs 3 and 10 in this regard.

41. It is thus clear that the deposition of PW-3, whose evidence has been found reliable, does not provide any evidence in support of the factum

that the weapon 'khokri' seized by the police was recovered from the place identified by A-1 or was produced by him. PW-10 has not supported

the factum of recovery at all and PWs 7 and 11, the two police personnel have not given sufficient detail about the factum of recovery. On the

basis of such evidence, the prosecution cannot be said to have proved satisfactory and beyond doubt that the weapon that was seized and

produced before the court as the weapon of offence was the same 'khokri' that was used by A-1 in inflicting injury to PW-1 and in that

commission of offence even under Section 4/25 is not sufficiently and satisfactorily proved. Even otherwise conviction under Section 4/25 would

not have been possible for the reason the dimensions of the weapon is not given in the charge framed by the trial court. Non-proof of the recovery

of the weapon of offence, however, will have no adverse effect on proof of the occurrence in the shop as the same has been sufficiently proved

from direct evidence of PWs 1 and 2, corroborated by evidence of PW 3.

42. For all that said and discussed above, I find no merit in the grounds on which the appellants have assailed the impugned judgment to the extent

of their conviction and sentence under Sections 307, 452 and 323/34 RPC and appeals to that extent are dismissed. Appeals, however, have

merit insofar as impugned judgment and order relates to conviction and sentence under Section 7/27 Arms Act are allowed. Conviction and

sentence under Section 7/27 Arms Act are set aside.

43. Appellants, who are on bail shall surrender before the trial court on or before 30.03.2016 and trial court shall take steps to execute the

sentence imposed by it except that under Section 7/27 of the Arms Act. Their bail bonds shall stand discharged before the trial court.

44. Registry shall send a certified copy of this judgment to the trial Court along with record of the case for follow up action.