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HARI KISHAN

v.

STATE OF HARYANA

(Criminal Appeal Nos.133-134 of 2009)

B

JANUARY 6, 2010

[AFTAB ALAM AND DR. B.S. CHAUHAN, JJ.]

Penal Code, 1860:

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ss.302 and 324 – Conviction of one of the seven accused u/ss 302 and 324 and three others u/s 323 - Testimony of the witness who claimed to have received injuries in the same incident in which deceased was killed –

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***Held:** Trial court has observed about the witness that he did not seem to have particular respect for truth and that he had mixed up falsehood with truth – Assumption drawn by trial court and High Court that the witness had received injuries in the occurrence is not borne out by evidence on record – A substantial part of prosecution story has been disbelieved by trial court – Presence of three of the accused and two other eye witnesses at the place of occurrence was doubted by trial court – Medical evidence at clear variance with ocular vision – In such a situation, it would be highly unsafe to uphold and sustain appellant's conviction – Accordingly, he is acquitted giving him benefit of doubt – Evidence – Credibility of eye witness – Medical evidence at variance with ocular vision – Effect.*

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The appellant along with six others was prosecuted for commission of offences punishable u/ss 148, 302,324,323 read with s.149 and s.506 IPC. The prosecution case, based on the statement made by PW-2 to the police in the hospital where he had taken the dead body of his younger brother 'D' (deceased) at 7.20 A.M. on 24.6.1995, was that at about 6.15 A.M. the

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appellant and other accused attacked 'D'; two of the accused gave lathi blows on his back and as he fell down, the appellant gave a knife blow on left side of his chest; that accused 'R' also gave knife blows to him. PW-2 further stated that when he and his uncle tried to save 'D', accused 'R' gave a knife blow on his left hand thumb and two other accused gave him 4-5 lathi blows. His uncle was also stated to have received a lathi blow on his head. As to the cause of the incident, PW-2 stated that as his other brother, PW-6, who had been elected as Village Sarpanch, did not pay any heed to unreasonable demands of accused persons, an altercation took place between both the sides the previous evening, but the matter was then patched up. The post-mortem examination of the body of 'D', which was conducted at 12.45 p.m. on 24.6.1995, indicated one stab wound on the left side of the chest as the cause of death, and the 3 other injuries as post-mortem in nature. The trial court convicted and sentenced the appellant u/ss 302 and 324 IPC. Three other accused were convicted and sentenced u/s 323 IPC. The remaining three were acquitted of all the charges. By a separate judgment, the appellant was also convicted u/s 25 of the Arms Act and was sentenced to the period already undergone. The High Court upheld the judgments of the trial court. Aggrieved, the appellant filed Crl. Appeal No.133/2009 challenging his conviction and sentence u/ss 302 and 324 IPC and Crl. Appeal No.134/2009 challenging his conviction u/s 25 Arms Act.

Allowing Crl.A.No.133/2009, and dismissing Crl.A.No.134/2009 as not pressed, the Court

HELD: 1.1. The trial court doubted the presence of PW-4 and PW-6 at the place of occurrence and did not accept their testimonies as eye witnesses. According to the prosecution, the occurrence in which the deceased was killed took place shortly after 6.15 in the morning of

A June 24, 1995. PW-2 was medically examined at 7.10 and
his companion at 7.15 am, that is to say, within an hour
when the wounds/injuries on their person would be very
fresh. But, according to the medical evidence, injuries on
PW-2 were caused on the evening previous to the
B morning of June 24. This takes away the basis on which
he was accepted by the trial court and the High Court as
an eyewitness notwithstanding his proclivity to mix up
falsehood with truth. A substantial part of the prosecution
story has been disbelieved and the conviction of the
C appellant rests solely on the testimony of PW-2 who, as
observed by the trial court, does not seem to have
particular respect for truth and had mixed up falsehood
with truth. His credibility as an eye witness lay only in that
the trial court and the High Court assumed that he had
D received injuries in the same occurrence in which the
deceased was killed. That assumption does not appear
to be very sound and is not borne out by the evidences
on record. [Para 23, 24, 26 and 30] [145-D-E; 145-H; 147-
A-B; 148-A-C]

E 1.2. The defence plea that PW-2 had received the
injuries on the evening of June 23 and not in the morning
of June, 24 gains credence from the fact that an incident
between the two sides had admittedly taken place on the
evening of June 23, 1995. In the face of this admitted
F position and the medical evidence, it is difficult to accept
that the injuries found on the person of PW-2 were
received by him in the morning of June 24. From this,
either of two inferences would logically follow – one, PW-
2 was not present at the occurrence in which the
G deceased was killed in the morning of June 24; or the
other, the occurrence in which the deceased was killed
did not take place in the morning of June 24 and he was
not killed in the manner as suggested by the prosecution.
Both the inferences are equally damaging to the
H prosecution case. [Para 27 and 29] [147-B-C; 147-F-H]

1.3. In view of the facts and the circumstances, it would be highly unsafe to uphold and sustain the appellant's conviction for the offence of murder, and the prudent and safe course would be to give him the benefit of doubt. Accordingly, he is acquitted of the charges u/s 302 and 324 IPC. [Para 30] [148-C-D-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos.133-134 of 2009.

From the Judgment & Order dated 8.1.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal Nos. 206-DB and 207-DB of 1998.

J.L. Gupta, Nidhi Gupta, S. Janani for the Appellant.

Alok Sangwan, Devashish Bharuka, Lokinder Singh, Rishad Choudhary for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. These appeals are directed against the judgment of the Punjab and Haryana High Court dated January 8, 2008 in Criminal Appeals Nos. 206 & 207-DB of 1998, confirming the appellant's conviction under section 302 of the penal code and the sentence of life imprisonment awarded to him by the trial court for having committed the murder of one Dinesh.

2. The case of the prosecution that led to the sentencing of the appellant is based on the statement of Harkesh (PW-2), one of the brothers of Dinesh, made before Bhup Singh SI/SHO of Sadar Palwal PS (PW-8) at 7.20 am on June 24, 1995 at Palwal hospital where he had brought the dead body of Dinesh.

3. In his statement before the police Harkesh said that at about 6.15 in the morning he along with his two younger brothers, Suresh Kumar (PW-6) and Dinesh (the deceased)

A was sitting on the chabutra of their baithak in village Gailpur, when Dinesh proceeded for his house to bring the clothes for getting ready to go to Faridabad, where he was due to appear in the B. Ed examination. As he reached the chaupal, where the lane turned, he was waylaid by the accused Hari Kishan B (the appellant) and Rambir who were armed with knives, Shyam Lal armed with gun, Nain Pal and Kanwar Pal armed with lathis and Roshan and Nathi son of Gurdayal who were empty handed. Roshan and Nathi exhorted the other accused to kill Dinesh, saying that they would face the consequences. Hearing C this, Harkesh and Suresh ran to save Dinesh. Bhim Singh (PW-4) also came there on hearing the noise. Even before Harkesh or his uncle Kanti Prakash reached the spot, Nain Pal and Kanwar Pal struck Dinesh on his back with lathis causing him to fall to the ground. As he lay on the ground, the appellant gave D knife blow on the left side of his chest. Rambir too gave knife D blows to Dinesh. When Harkesh and Kanti Parkash tried to save Dinesh, Rambir gave a knife blow to Harkesh that hit him on the thumb of the left hand. Nain Pal and Kanwar Pal gave Harkesh 4/5 lathi blows. Nain Pal also gave one lathi blow on the head of Kanti Parkash. When Harkesh tried to save Kanti E Prakash, Shyam Lal hit him on the shoulder by the butt of his gun. He also shouted that anyone coming to their victim's rescue would be shot dead.

4. As to the cause of the incident Harkesh stated that F shortly before the occurrence his younger brother Suresh was elected as the village Sarpanch. He did not pay any heed to the unreasonable demands of the accused and this greatly annoyed them as they thought of themselves as the Choudhary of the village. This had led to an altercation and an exchange G of hot words between the two sides on the previous evening but the matter was then patched up by discussion. He finally stated that the accused in league with one another had killed his brother Dinesh by giving him knife and lathi blows.

H 5. After the occurrence he brought Dinesh to the civil

hospital, Palwal where he was declared 'brought dead'. Dr. Krishna Kumar (PW-3) who was in the hospital on duty sent information in that regard to the SHO, PS Sadar Palwal whereupon PW-8 came to the hospital and took down the statement of Harkesh. He read his statement as recorded by PW-8 (the SI police) and finding it to be correctly recorded put his signature at the bottom. The statement of Harkesh, as recorded by PW-8, was incorporated in a formal First Information Report (FIR no. 286) drawn up at PS Sadar Palwal at 9.30 a.m. on the same day for offences under sections 148, 149, 506 & 302 of the Penal Code. The FIR was delivered at the residence of the area Magistrate on the same day at 12.20 p.m. through a special messenger, namely, constable Chander Bhan.

6. Harkesh and Kanti Prakash, who, according to the statement made in the FIR, had received injuries while trying to save Dinesh were medically examined by Dr. Krishna Kumar (PW-3) at 7.10 and 7.15 a.m. respectively on June 24, 1995. The post-mortem examination on the dead body of Dinesh was conducted on the same day at 12.45 p.m. by a team of three doctors of which Dr. Chandrika Malik (PW-5) was also a member. The post-mortem report noted the following injuries on the person of the deceased:

"1. Stab wound on left side of chest, measuring 3.5 cm medial to the left nipple in the 5th intercostal space. Size 2.5 cm x 1 cm margins - upper marginal lacerated, lower margins (angled) obliquely placed; on following the path of injuries upper border of rib (6th) is cut and then piercing pericardium and entering the apex of the ventricle anteriorly (size 2.3 cm.) passing through cavity of the left ventricle and then going through the posterior wall(size 2 cm) and entering the left lung.

2. Incised wound on left arm, middle part on lateral aspect, 1.5 cm x 0.25 cm, margins inverted, skin deep.

A 3. Incised wound 1.5 cm x 0.25 cm on the left forearm on lateral aspect on upper part 3 cm below elbow, skin deep, margins inverted.

B 4. Incised wound 4 cm x 0.50 cm on middle part of thigh, lateral aspect. Skin deep, margins inverted.”

C 7. According to the post-mortem report, death was caused due to shock and hemorrhage as a result of injury no. 1 which was ante-mortem in nature and was sufficient to cause death in ordinary course of nature. *Injuries Nos. 2, 3, 4 were found to be post-mortem in nature.* It was further stated that time elapsed between death and post-mortem was within 18 hours.

D 8. The police after investigation submitted charge-sheet against all the accused named in the FIR and all of them were put on trial on charges under sections 148, 302, 324, 323 read with section 149 and section 506 of the Penal Code. The appellant, Hari Kishan, was also charged under section 25 of the Arms Act for possession and unlawful use of the knife and was tried separately for that offence.

E 9. In the main case the prosecution examined eight witnesses out of whom three, namely Harkesh (PW-2), Bhim Singh (PW-4) and Suresh Kumar (PW-6) claimed to be eye witnesses. Of the rest, Dr. Kishan Kumar (PW-3) was the doctor who had examined the injuries on the person of Harkesh and Kanti Prakash, Dr. Chandrika Malik (PW-5) was a member of the team of three doctors who had conducted post-mortem on the body of Dinesh, Bhoop Singh (PW-8) was the SHO Sadar Palwal PS who had recorded the statement of Harkesh and had investigated the case. The remaining two, Ashok Kumar (PW-1) and Ramesh Chand (PW-7) were formal witnesses. The prosecution also produced some documents and some material exhibits. The accused, of course, took the plea of false implication but they did not lead any evidence in their defence.

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10. On conclusion of trial, the trial court held the appellant Hari Kishan guilty of killing Dinesh by giving a knife blow on the left side of his chest and, accordingly, convicted him under section 302 and sentenced him to imprisonment for life and a fine of Rs.5000/- and in default in payment of fine, to a further period of imprisonment for one year. The trial court also convicted accused Shyam Lal, Nain Pal and Kanwar Pal under section 323 of the Penal Code for causing simple injuries to Harkesh (PW-2) and his uncle Kanti Parkash and sentenced them to imprisonment for the period already undergone by them as under-trial and fine of Rs.1000/- each.

11. What is, however, of significance for our purpose is that the trial court disbelieved a substantial part of the prosecution story. The trial court did not accept the prosecution case that accused Nathi and Roshan were present at the place of occurrence and, accordingly, directed their acquittal. As regards Rambir, the trial court pointed out that the three incised wounds on the person of the deceased that were attributed to him were, according to the medical evidence, post-mortem in nature, that is to say, those three injuries were inflicted after Dinesh was already dead. The medical evidence, thus, clearly eliminated the participation of Rambir in the case. He too was, therefore, acquitted. The acquittal of the three accused brought down the number of the remaining accused to less than five. Hence, the aid of section 149 was no longer available to bring about the conviction of the remaining three accused Shyam Lal, Nain Pal and Kanwar Pal under section 302 for the shared common intention with the appellant Hari Kishan to kill Dinesh. Apparently, that was one of the reasons for their conviction simply under section 323. The trial court further disbelieved the prosecution case that Nain Pal and Kanwar Pal had given lathi bows to Dinesh on his back and observed that this part of the prosecution story was an addition to rope in the two accused and to bring them within the mischief of section 149 of the Penal Code.

A 12. Apart from the three accused whose presence at the
 place of occurrence was not accepted, the trial court also
 doubted the presence of two out of the three eye witnesses,
 namely Bhim Singh (PW-4) and Suresh Kumar (PW-6) at the
 time of occurrence. The trial court further held that even Harkesh
 B (PW-2), the only remaining eye witness, had mixed-up truth with
 falsehood but his testimony was not liable to be discarded
 wholly since he had himself received injury in the same
 occurrence. In regard to the injury sustained by Harkesh, the
 trial court came to a truly amazing conclusion. It was the specific
 C case of the prosecution that the injury to Harkesh on the thumb
 of his left hand was caused by a knife blow given by Rambir
 while he was trying to save Dinesh and Harkesh in his
 deposition before the court also attributed that injury to Rambir.
 Rambir, however, was held by the trial court to be not present
 D at the place of occurrence. But the injury on the hand of
 Harkesh was certainly in existence and it was also proved by
 the medical evidence. The trial court resolved the contradiction
 by fastening the injury to Harkesh too on to the appellant Hari
 Kishan even though that was not the case of the prosecution.
 E The appellant Hari Kishan was, thus, held guilty also of causing
 the knife injury to Harkesh and came to be convicted under
 section 324 in addition to section 302 of the Penal Code. Under
 section 324 he was sentenced to rigorous imprisonment for one
 year. He was also convicted under section 25 of the Arms Act
 by a separate judgment of the trial court dated February 2,
 F 1998 in Sessions case No. 28 of 1995 and sentenced to the
 period of imprisonment already undergone as under-trial.

13. Against the two judgments of the trial court, three
 appeals were filed in the High Court. One (Criminal Appeal No.
 G 206-DB of 1998), by the appellant and the three other accused
 convicted and sentenced by the trial court as noted above in
 the main case; the second (Criminal Appeal No. 207-DB of
 1998), by the appellant Hari Kishan alone against his conviction
 under section 25 of Arms Act and the third appeal (Criminal
 H Appeal No. 379-DBA of 1998) was filed at the instance of the

State of Haryana against the acquittal of the three accused from all charges and the acquittal of the other three accused from the main charge of murder. Along with the three appeals the complainant also filed a revision (Criminal Revision No. 486 of 1998) agitating similar grievances as in the State's appeal.

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14. The High Court by the judgment and order coming under appeal dismissed all the three appeals and the revision and, thus, upheld the judgments of the trial court in all aspects.

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15. Mr. J. L. Gupta, Senior Advocate, appearing for the appellant assailed the High Court and the trial court judgments and contended that the appellant's conviction for the offence of murder was not sustainable both in law and on facts. Mr. Gupta submitted that there were at least four circumstances that falsified and completely demolished the prosecution case. First, there was a patent contradiction between the prosecution case and the motive assigned by it to the accused for committing the crime. Secondly, it was undeniable that injuries were fabricated both on the person of the deceased and Harkesh, the only eye witness whose evidence was accepted by the High Court and trial court. Thirdly, the prosecution had indisputably tried to falsely implicate three out of seven accused. Fourthly, the medical evidence completely belied the alleged time and the manner of occurrence.

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16. Elaborating the points Mr. Gupta submitted that according to the prosecution the main cause of conflict between the two sides was the election of Suresh Kumar as the village Sarpanch who did not pay any heed to the demands of the accused. If that were so, the accused should have targeted Suresh Kumar and not Dinesh. Suresh Kumar was admittedly present at the time of the occurrence. He was unarmed and was also physically disabled, yet no attempt was made to assault him and he got away without a scratch and in his place Dinesh was killed against whom the accused had no animus.

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17. Mr. Gupta further submitted that even according to the

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A prosecution case it was a chance encounter. The accused persons had no means to know that Dinesh would be coming from his baithak to his house to pick up his clothes and would be passing through that particular spot at that particular time, so as to ambush him there, differently armed with gun, knife and lathis.

18. Mr. Gupta next submitted that according to the prosecution case Dinesh was first struck on his back by lathis causing him to fall down on the ground. But in the post-mortem examination, no mark of injury of any kind was found on the back of the deceased. The post-mortem report further showed that three incised wounds (Injuries 2, 3, and 4) were inflicted on his body after he was dead. Obviously, those three injuries could not be attributed to any of the accused. In other words, the complainant had fabricated the injuries on the dead body of Dinesh with intent to make out a false case against the accused. Further, according to the post-mortem report, the time elapsed between death and post-mortem report was within *eighteen* hours. This, according to Mr. Gupta, clearly showed that death had taken place sometime the previous evening and not in the morning of June 24.

19. Mr. Gupta further stated that the stab by knife (Injury No. 1) that caused the death of Dinesh had pierced through his heart and would have naturally led to profuse bleeding. Shortly after receiving the injury the body of Dinesh was picked up from the ground by Harkesh (PW-2) and Bhim Singh (PW-4) to place him in the truck. And yet in reply to questions in the cross-examination Harkesh stated that his clothes or the clothes of Bhim Singh were not stained with blood. No blood stained clothes of Harkesh or Bhim Singh were produced before the police.

20. All these circumstances, according to Mr. Gupta, strongly indicated that the death of Dinesh did not take place in the manner and at the time as claimed by the prosecution.

21. Mr. Gupta further submitted that the conviction of the appellant was based solely on the testimony of Harkesh whose presence at the time of occurrence was extremely doubtful. He once again referred to the medical evidence to support his submission that Harkesh had not received the injuries in the morning of June 24 when Dinesh was alleged to have been killed and hence, he could not have been present at the time of occurrence and he falsely claimed to be an eye witness of the occurrence.

22. On hearing Mr. Gupta and Mr. Alok Sangwan appearing for the State and on going through the judgments of the High Court and the trial court and the evidence on record we find that the submissions of Mr. Gupta are not entirely without substance and at least some of the points raised by him deserve serious consideration.

23. It is seen above that the trial court doubted the presence of Bhim Singh (PW-4) & Suresh Kumar (PW-6) at the place of occurrence and did not accept their testimonies as eye witnesses. Even in regard to Harkesh (PW-2), the only eye witness remaining in the case, the trial court observed that he had mixed up falsehood with truth. Nevertheless, it did not reject his testimony as a whole and accepted his evidence as regards the knife blow given to Dinesh by the appellant because "*he (PW-2) had some injuries in that incident as is clear from the statement of Dr. Krishan Kumar (PW-3)*" and hence, the presence of Harkesh (PW-2) at the place of occurrence could not be doubted. The High Court has also adopted the same approach and it has described Harkesh as an "injured witness". Mr. Gupta questioned the very premise that the injuries found on the person of Harkesh were caused in the same incident in which Dinesh was killed and which, according to the prosecution case, had taken place in the morning of June 24 and submitted that the trial court and the High Court had completely misread the medical evidence.

24. According to the prosecution, the occurrence in which

A Dinesh was killed took place shortly after 6.15 in the morning of June 24. Harkesh was medically examined at 7.10 and Kanti Prakash at 7.15 am respectively, that is to say, within an hour when the wounds/injuries on their person would be very fresh.

B 25. But the injury report of Harkesh disclosed as follows:

“(1) An incised wound on left hand between the thumb and index finger. 0.3 cm x 0.2 cm skin deep clotted blood was present on the wound.

C (2) Four contusions Parallel to each other present on the left shoulder and upper part of chest, horizontally placed reaching on the upper arm anteriorly in the area 8”x4” red in colour.

D (3) A contusion on right upper arm on the meddle 1”x05” cm red in colour.

Injury No. 1 was caused by sharp edged weapon and injury No(s). 2 and 3 were caused by blunt weapon. Nature of injuries were simple, duration was 12 hours”

E The injury report of Kanti Prakash noted as follows:

“(1) An abrasion and contusion on the parietal region of scalp in the vertex in the mid lone 11/2 x1cm blood was oozing.

F The injury was simple, caused by blunt weapon. The probable duration was 12 hours”.

G Further PW-3, the doctor who examined Harkesh and Kanti Prakash, in cross-examination, deposed before the court as follows:

“It is correct that the injuries on both these injured have been caused probably on 23/6/95 between 6 PM and 8 PM.”

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26. Thus, according to the medical evidence, injuries on Harkesh were caused on the evening previous to the morning of June 24, when Dinesh was killed in the alleged occurrence. This takes away the basis on which he was accepted by the trial court and the High Court as an eye witness notwithstanding his proclivity to mix up falsehood with truth.

27. The submission that Harkesh had received the injuries on the evening of June 23 and not in the morning of June, 24 gains credence from the fact that an incident between the two sides had admittedly taken place on the evening of June 23, 1995.

28. In regard to the incident on the evening of June 23, 1995, Harkesh (PW-2) stated as follows:

“On 23.6.95 there was an altercation between the accused and us and it was compromised with the interventions of the respectable of the village.”

As regards the incident on the evening of June 23, Harkesh further stated in his cross-examination that:

“Bhim PW was not present at the time of earlier altercation on the previous day i.e. 23.6.95. That altercation lasted for 2 minutes. About 50/60 persons had collected including ladies had collected at that time. There are 4/5 houses near the Chaupal where this altercation took place.”

29. In the face of the medical evidence and the admitted position that an incident between the two sides had taken place on the evening of June 23, 1995 it is difficult to accept that the injuries found on the person of Harkesh were received by him in the morning of June 24. From this, either of two inferences would logically follow. One, Harkesh was not present at the occurrence in which Dinesh was killed in the morning of June 24; or the other, the occurrence in which Dinesh was killed did not take place in the morning of June 24 and he was not killed in the manner as suggested by the prosecution. Both the

A inferences are equally damaging to the prosecution case.

B 30. Summing up the discussions made up, we have before us a case where a substantial part of the prosecution story has been disbelieved and the conviction of the appellant rests solely on the testimony of Harkesh (PW-2) who does not seem to have particular respect for truth as observed by the trial court. His credibility as an eye witness lay only in that the trial court and the High Court assumed that he had received injuries in the same occurrence in which Dinesh was killed. As shown above that assumption does not appear to be very sound and is not borne out by the evidences on record. In such a situation, we find it highly unsafe to uphold and sustain the appellant's conviction for the offence of murder. To us, it appears that the prudent and safe course would be to give him the benefit of doubt.

D 31. We, accordingly, allow the Criminal Appeal No. 133/09 and set aside the judgments of the High Court and the trial court and acquit him of the charges under sections 302 & 324. Criminal Appeal No. 134/09 relating to his conviction under section 25 of the Arms Act was not pressed, presumably because the conviction no longer carries any sentence. This is, accordingly, dismissed.

E 32. The appellant Hari Kishan is directed to be released forthwith if he is not wanted in any other case.

F R.P. CrI. A.No. 133 of 2009 allowed and
CrI. A. No. 134 of 2009 dismissed.