

**IN THE COURT OF MR. DHARMESH SHARMA
DISTRICT & SESSIONS JUDGE : WEST DISTRICT
TIS HAZARI COURTS : DELHI**

SC No. 180/19

CNR No. DLWT01-002565-2019

State	Versus	1. Gautam Gambhir S/o Sh. Pardeep Gambhir R/o H.No. J-149, Vikas Puri, Delhi.
		2. Mohit S/o Sh. Rajbir R/o H.No. 611, Village Pugthala Distt. Sonapat (Haryana)
		3. Nitin Nayyar S/o Sh. Kamal Nayyar R/o H.No. M-276, Paschim Vihar, Delhi.

FIR No. : 668/2016

PS : Rajouri Garden

U/s : 354/308/324/452/34 IPC

Date of filing charge-sheet	:	06.09.2018
Date of hearing arguments	:	28.09.2021
Date of Judgment	:	21.10.2021

JUDGMENT

CHARGE

1. Accused Gautam Gambhir S/o Sh. Pardeep Gambhir; Mohit S/o Sh. Rajbir and Nitin Nayyar S/o Sh. Kamal Nayyar have been arraigned for trial by this Court on the charge that on 15.07.2016

at about 5.45 PM at Hammer Club, West Gate Mall, Rajouri Garden, New Delhi they in furtherance of their common intention armed with Swords, wooden sticks and iron pipes attacked Ms 'X'(who was a lady bouncer and referred by such pseudonym to protect her identity) and her colleagues, Sanju and Deepak with such knowledge and under such circumstances that if they had caused the death of the aforesaid victims, they would have been guilty of culpable homicide not amounting to murder; and they further in furtherance of their common intention used criminal force during the course of same transaction and outraged the modesty of lady bouncer Ms 'X' and thereby committed offences punishable under Sections 452/308/354/34 IPC.

FACTS:

2. The case of prosecution is that on 15.07.2016 DD NO. 33A Ex.PW-4/D was lodged at 6.00 p.m. at PS Rajouri Garden and investigation was marked to SI Gurcharan Singh Gill (**PW-8**) who along-with Ct. Deepu reached at Hammer Club, West Gate Mall, Rajouri Garden, New Delhi, where it was revealed that some injured persons had been taken to Guru Govind Singh Hospital and the assailants had fled away from the spot. It is the case of prosecution that SI Gurcharan Singh Gill along-with Ct. Deepu reached at Guru Govind Singh Hospital where they obtained MLC No. 48176/16 of injured Deepak S/o Vinod Kumar Ex. PW 7/B and MLC NO. 48173/16 of injured Sanju S/o Anup Singh Ex. PW-7/A who were brought by the police with the alleged history of assault by unknown persons and appeared to have suffered blunt sharp injuries in the alleged incident at

West Gate Mall, Rajouri Garden, New Delhi about one hour back. It was however revealed that both the injured persons were not found in the Hospital and reportedly left the Hospital.

3. It is then the case of prosecution that in the said circumstances, IO/SI Gurcharan Singh and Ct. Deepu came back to the Police Station, where they found the injured/complainant Ms 'X', who had come to the Police Station and stated that she was hiding due to fear and her statement was recorded with regard to alleged quarrel, which is Ex.PW-1/A in Hindi which reads as under:-

“ब्यान किया कि मैं पता उपरोक्त पर रहती हूँ और Hammer Club, West Gate Mall, Rajouri Garden, New Delhi में बतौर Lady वाउन्सर नौकरी करती हूँ और 2-3 दिन से Hammer Club व Play Club वालों की आपस में खींचा तानी चल रही थी जो आज समय करीब 5.45 बजे शाम को मैं व सन्जु, दीपक व मनजीत बाउंसर Hammer Club West Gate Mall रजौरी गार्डन में Duty पर थे कि उसी समय Play Club के दोनो मालिक गौतम गंभीर व सन्नी व कुछ अन्य वाउन्सर अपने हाथों में तलवारें, डण्डे व लोहे की पाईप लेकर आये और मेरी duty Hammer Club के गेट पर थी तो जब मैंने इनको रुकने के लिए कहा तो Play Club के मालिक गौतम गंभीर ने मेरे सिर पर डण्डा मारा व मेरी पीठ पर डण्डा मारो तो जब मैं डर के मारे भागने लगी तो सन्नी ने मुझे दोनों हाथों से पीछे से पकड़ लिया और जोर से मेरी छाती दबाई व गौतम गंभीर ने भी मेरी छाती पर हाथ मारा व मुझे चूमने कि कोशिश की और गौतम गंभीर ने मेरे पेशाब करने वाली जगह पर लात मारी और इन लोगों ने Hammer Club के अंदर जबरदस्ती घुस कर हम लोगों पर तलवारों, डण्डों व पाईप से जान लेवा हमला किया है और Hammer Club के अन्दर तोड़फोड़ की है और दीपक, सन्जु व मनजीत वाउन्सरों को भी तलवार और डण्डों से व पाइप से मारा है जिनको चोटें आई हैं। मैं Play Club के मालिक गौतम गंभीर व सन्नी और मोहित वाउन्सर को पहले से जानती हूँ व अन्य लोगों को सामने आने पर पहचान सकती हूँ। मेरे Medical कराया जावे व उनके खिलाफ कानूनी कार्यवाई का जावे। आपने मेरा ब्यान लिखा है पढ़ व सुन लिया ठीक है”

4. Needless to state that rukka Ex.PW-8/A was written and same was sent to the duty officer, who made endorsement Ex.PW-4/C receiving complaint at 10.00 p.m., which led to the registration of the

present FIR Ex.PW-4/A. It is then the case of prosecution that the complainant lady bouncer 'X' was sent for medical examination to Guru Govind Singh Hospital and in the meanwhile it transpired that another FIR No. 669/16 under Section 323/324/354-B/34 IPC had been registered at the instance of the opposite party in the same Police Station i.e. PS Rajouri Garden and investigation of such case had been handed over to SI Suresh Kumar.

5. The prosecution story then goes that at the instance of injured complainant Ms 'X', the site plan of the place of occurrence was prepared and on 16.07.2016 statement of complainant lady bouncer Ms 'X' was recorded by the Ld. MM under Section 164 Cr.P.C. During the course of further investigation and consequent proceedings before the Court, the accused persons were granted anticipatory bail; and it appears that some negotiations took place for an amicable settlement between the parties and both the parties undertook that they would move appropriate petition before the Hon'ble High Court of Delhi for getting the FIRs quashed but both the parties did not turn up for hearing and the petition for quashing of FIRs was dismissed.

6. During further investigation, the three accused persons appeared in the Police Station and they were formally arrested and their separate disclosure statements were recorded wherein they admitted their involvement in commission of the offence, which of course is not relevant and inadmissible in evidence; and after obtaining opinion as to the nature of injuries on the MLC of injured persons, present charge-

sheet was filed for prosecution of the accused persons for the commission of offence punishable under Section 452/308/354/34 IPC on 06.09.2018 and cognizance of the offence was taken on 12.10.2018 and the accused were summoned and were charged for the committing offence punishable under Section 452/308/354/34 IPC, to which they pleaded not guilty and claimed trial.

PROSECUTION EVIDENCE:

7. The main witnesses for the prosecution were **PW-1 the lady bouncer** Ms 'X'; and the other two injured were also examined namely, **PW-2 Deepak** S/o Vinod Kumar; and **PW-3 Sanju** W/o Sh. Anoop Singh. Suffice to state that the witnesses have given somewhat fractured account of the alleged incident in question about which I shall delve into in some detail with relevant case law later on in this judgment.

8. The remaining witnesses were **PW-4 HC Raghuveer Singh**, who was duty officer at PS Rajouri Garden on 15.07.2016 and testified that on the basis of rukka sent by IO/SI Gurcharan Singh he recorded FIR No. 668/2016 through CCTN Operator and same is marked Ex.PW-4/A. Further, in order to prove the authenticity of the computerized copy of the FIR, certificate under Section 66-B of the Indian Evidence Act was issued by him, which is Ex.PW-4/B; **PW-5 Ms. Anu Aggarwal**, ACMM, Rouse Avenue Court, New Delhi, who was the then MM (Mahila Court)-02, (West), Tis Hazari Courts, Delhi and deposed about recording statement of complainant Ms 'X' under

Section 164 Cr.P.C., which is Ex.PW-5/B and she also testified about the certificate given with regard to mental state of the witness that she did not appear to be under any sort of fear, coercion or undue influence, which certificate is Ex.PW-A.

9. **PW-6 Dr. Shika Arora**, Medical Officer, Guru Govind Singh Government Hospital. She testified that on 15.07.2016 at about 8.53 PM she medically examined injured Ms 'X' aged 23 years and found injuries in the nature of small hematoma on the scalp; and small bruise on the right buttock; and mild tenderness on her left elbow without crepitus. She further deposed that injured was referred to Gynecological Department and the MLC was marked Ex.PW-6/A. **PW-7 Dr. Prem Chand**, Senior Medical Officer from the same Hospital. He deposed that he had examined injured Sanju and on conducting local examination one CLW measuring 3 x 0.5 cm over scalp vertex right side. Likewise, PW-7 also deposed that he conducted local examination of injured Deepak and found stick patterned bruises over left arm/forearm laterally half of way both and abrasion present over right forearm measuring 3 x 2 cms. He testified that injuries were caused by "blunt force impact" and "simple in nature" and the MLC was proved as Ex.PW-7/B.

10. **PW-8 SI Gurcharan Singh** the Investigating Officer and lastly, **PW-9 HC Anil Kumar**, who testified that on 30.11.2016 the accused persons, namely Nitin, Mohit and Gautam Gambhir were interrogated by the IO in his presence vide memos Ex.Pw-8/E, PW-8/F

and PW-8/G respectively, and after their arrests they were released on bail in terms of order granting anticipatory bail to them.

STATEMENT U/S 313 Cr.P.C:

11. On the close of prosecution evidence, each of the three accused persons were separately examined in terms of Section 313 Cr.P.C. and on being prodded about the incriminating facts and circumstances brought against them on record, the three accused persons stated in almost chorus like manner that they were innocent and have been falsely implicated in this case. The accused persons led no evidence in defence.

DECISION:

12. I have heard Sh. Atul Kumar Shrivastava, Addl. PP for the State and Sh. Divya Kumar Kaushik, Ld. Counsel for the accused persons. I have also carefully perused the oral as well as documentary evidence on record of the case.

13. It is well settled that while in criminal cases, the doctrine of presumption of innocence casts the burden on the prosecution to prove its case against the accused persons beyond reasonable doubt, it is trite that doubt to the guilt of the accused should be substantial and not flimsy or fanciful. Such doubt need not reach certainty, but it must carry a high degree of probability. In the case of **State of U.P. v. Krishna Gopal**, (1988) 4 SCC 302, it was observed that “though this standard is

a higher standard, there is, however, no absolute standard. What degree of probability amounts to—proof is an exercise particular to each case”. Quoting from “the Mathematics of Proof-II : Glanville Williams: Criminal Law Review, 1979, by Sweet and Maxwell, p. 340 (342), it was observed that :

“The one piece of evidence may confirm the other. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over-emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice”
(*underlined emphasized*)

14. In the case of **Gurbachan Singh v. Satpal Singh**, (1990) 1 SCC 445, the Supreme Court quoted observations of Lord Denning in Bater v. Bater in (1950) 2 All.E.R. 458 that “*the standard adopted by the prudent man would vary from case to case, circumstances to circumstances*”. It was held that the Prosecution is not required to meet any and every hypothesis put forward by the accused. The contours of

benefit of doubt were discussed in the case of **K.Gopal Reddy v. State of AP**, of (1979) 1 SCC 355, wherein the court placed reliance on the enunciation by Lord Denning in Miller (Supra), which is as under:

“A reasonable doubt, it has been remarked, —does not mean some light, airy, insubstantial doubt that may flit through the minds of any of us about almost anything at some time or other; it does not mean a doubt begotten by sympathy out of reluctance to convict; it means a real doubt, a doubt founded upon reasons.”

15. The caution articulated by the Supreme Court in **Devender Pal Singh v. State of NCT of Delhi**, (2002) 5 SCC 234 also emphasizes that perfection in a case may not be natural, when it stated thus:

“-53. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent.”

16. In the light of the said proposition of law, reverting to the instant case, Id Defense counsel has vehemently urged that this was a case in which none of the public witnesses identified the accused persons as the real offender and the IO conducted a defective investigation as he deliberately withheld the CCTV footage of the incident. In order to examine to such pleas, let us examine the testimony of prosecution witnesses one by one. PW-1 Ms ‘X’ testified that she was employed and deputed as Lady Bouncer at Hammer Club, West Gate Mall, Rajouri Garden, New Delhi and there were disputes between the owner of their club and another one, namely Play Club. She testified that at about 5/5.30 PM she was standing at the

gate of the Hammer Club and at that time Gautam, Nitin @ Sunny and Mohit along-with 20-25 persons came thereat, who were armed with Swords, baseball bats and in order to save herself, she hid herself in the bathroom but the offenders, namely Gautam Gambhir, Nitin @ Sunny and Mohit dragged her out of the bathroom and accused Gautam and Nitin @ Sunny touched her chest and she was given leg blow on her private part. She further testified that the accused persons kissed her on her cheek while accused Gautam hit with danda on her head. PW-1 also deposed that her statement Ex.PW-1/A was recorded and she had identified the place of occurrence to the IO and later also testified that her statement was recorded under Section 164 Cr.P.C. before the Ld. MM and she affirmed the contents of the same Ex.PW-1/B bearing her signatures at points A and B. It would be expedient to refer to the statement of PW-1 before the Ld. Magistrate, which goes as under:-

“मैं एक Lady Bouncer हूँ और Hammer Club West Gate Mall में काम करती हूँ। मेरे club का नाम Hammer है और दूसरी party के club का नाम Play है। इन दोनों की दो-तीन दिन से आपस में लड़ाई चर रही थी। मेरी duty main gate पर है। मैं, Deepak, Sanju और Manjeet Gate पर Duty के लिए खड़े थे। Play Club का मालिक Gautam Ghambi आया। मैंने उन्हें मेन गेट पर रोका उसने मेरे सर पर और Back में डंडा मारा। जैसे ही मैं भागने लगी Sunny ने मुझे जबरदस्ती kiss किया। Gautam ने भी मुझे जबरदस्ती kiss किया। Gautam ने मेरी बाथरूम की जगह पर खिंचा कर लात मारी। मैं उन दोनों से बचकर Bathroom में छुप गई। Sunny Bouncer और Mohit Bouncer ने मुझे Bathroom से निकाल लिया और जबरदस्ती मेरा नाडा खोलने लगे। उन्होंने तलबार ले रखी थी। Sunny ने मुझे तलबार बाई हाथ पर मारी। ये सब हमारे Club में घुस गए। उन्होंने हमारे ऊपर जानलेवा हमला किया। मैंने Washroom से 100 नम्बर की काल की। बड़ी मुशकिल से कल जान बचाई है। डंडे और लोहे के पाइप लिए हुए थे। मैं जब भी Play Club के आगे से निकलती हूँ मुझे Torture करते हैं। मैं विधवा हूँ इसलिए चुप रही पर कल इन्होंने लड़ाई शुरू कर दी”

17. All said and done, PW-1 however gave a new twist to the prosecution case when initially she failed to identify the accused persons present in the Court as the assailants stating that there were many persons who had attacked and since it was dark inside the club she could not see their faces properly. Since she stated that she could not say as to which of the accused persons was Gautam Gambhir, or Mohit and/or Nitin, she was allowed to be cross-examined by the Ld. Addl. PP for the State.

18. In her detailed cross-examination by the Ld. Addl. PP for the State, PW-1 Ms 'X' conceded that she had named the assailants as Gautam, Mohit and Nitin along-with other persons in her complaint Ex.PW-1/A and she also conceded that she was attacked by Swords, wooden sticks and pipe with intention to kill and deface(sic. damage) the club and the assailants also physically assaulted his colleagues Deepak, Sanjay and Manjeet, who were other employees of the Club with swords, wooden stick and pipe due to which they sustained injuries. She denied stating to the police that she knew the owner of the Play Club, namely Gautam Gambhir, Sunny and Mohit bouncer upon which she was confronted with her statement to the police Ex.PW-1/A from point A to A.

19. Interestingly, on a question by the Ld. Addl. PP for the State as to how she named the assailants who attacked the club as Gautam, Sunny and Mohit, she replied that the owner of her club disclosed the names of the offenders with whom he had been having a

quarrel for 2-3 continuing days. Subsequent to cross-examination on 26.04.2019, she was subjected another grilling session on 29.04.2021 where she conceded that her medical examination was conducted. On a suggestion given to her by Id APP, she denied that she had named the accused Sunny and Gautam Gambhir as the assailants to Dr. Nivedita during her medical examination, upon which she was confronted from portion X to X-1 in her MLC Ex.PW-1/A (later marked Ex.PW-6/A). On further prodding in the cross-examination by the Ld. Addl. PP for the State, she relented and identified the accused Gautam Gambhir as owner of the Play Club. PW-1 further identified accused Mohit working as a Bouncer in the Play Club in the Court. She further identified the third accused Nitin as the one who was working in the Play Club.

20. On the second consecutive date i.e., 30.04.2019 when she was subjected for cross-examination by the learned defence Counsel, she testified that the CCTV Cameras were installed just above the gate and she testified that as per her information CCTV cameras were in operation as their owner used to see the footage from inside his office on the display screen. She volunteered that she had asked the Investigating Officer to take(sic seize) CCTV footage also. But then she made another somersault and testified that her duty hours started at 2 p.m. and the incident occurred at 5.30 p.m. but during this period she had not seen the accused persons.

21. Before this Court proceeds to comment on the testimony of PW-1 Ms 'X', it would be expedient to appreciate the testimony of PW-2

Deepak S/o Sh. Vinod Kumar, who testified that on the date of incident he was working as a Bouncer at Hammer Club along-with his colleagues lady bouncer Ms 'X' besides Manjeet and another Bouncer Sanju. He deposed that 3-4 boys entered the Hammer Club but he could not see their facts because of darkness inside the Club and also for the smoke that existed in the Club; and that some scuffle had taken place and thereafter 3-4 boys ran away from the place of occurrence. As the witness was resiling from his previous statement to the police, he was allowed to be cross-examined by the Ld. Addl. PP for the State wherein he showed his ignorance that Ms 'X' was performing her duties on the main gate, upon which he was confronted with his earlier statement to the police Ex.PW-2/A. He denied stating to the police that there was going on some dispute between the owners of Hammer Club and Play Club, which were situated on the same floor, upon which he was confronted with his previous statement Ex.PW-2/A from point B to B-1.

22. PW-2 Deepak further denied stating to the police that the owners of the Play Club, namely Gautam Gambhir and Sunny came with other Bouncers having dandas, swords and iron pipes in their hands and on that he was confronted with his previous statement Ex.PW-2/A given to the police, upon which he volunteered that it was owner of the Club, namely Manni Sahni who named the assailants to the police and he denied disclosing the name of the accused persons to the police. He further denied making any statement to the police that when Bouncer Ms 'X' tried to restrict their entry, Gautam Gambhir

gave a danda blow on her head and her back. He denied making statement to the police that when Ms 'X' tried to run away, accused Sunny caught hold of her from behind and pressed her chest while Gautam gave blow on her chest besides leg blow on her private part and tried to kiss her.

23. Apart from being confronted with previous statement to the police Ex.PW-2/A on such aspects, when the attention of PW-2 was drawn towards the accused persons in the Court, he deposed that that the accused persons standing in the Court were not same persons, who had entered Hammer Club and misbehaved with Ms 'X'. On cross-examination by the PW-2 by Ld. Counsel for the accused persons, PW-2 stated that CCTV cameras were installed in Hammer Club but same were not working and he stated that he had not seen the accused persons in the vicinity of the Club from 1.00 p.m. to 6.00 p.m.

24. That brings us to the testimony of PW-3 Sanju who testified that he was a Bouncer at Hammer Club at West Gate Mall and on 15.07.2016 he saw several public persons entering Hammer Club and they started beating someone in the Club. He testified that since he was inside the Club he could not see the faces of the persons, who entered inside due to darkness and after some time those assailants went away. He testified that the owner of Hammer Club, namely Manni Sahni asked him to name the accused Gautam Gambhir, Sunny and Mohit as the assailants who entered the Hammer Club and caused the scuffle. He also deposed that he did not know such persons and their identities were revealed to him by Mr. Manni Sahni.

25. As the witness resiled from his previous statement to the police, he was allowed to be cross-examined by the Ld. Addl. PP for the State. He testified that he had gone to the police station with owner Manni Sahani, where his statement was recorded by the police. He deposed that Ms 'X' was performing her duty on the main gate of the Hammer Club and also conceded that other club viz. Play Club was also situated on the same floor. On a specific question put to the witness, he testified that owner Manni Sahani had informed him that some verbal altercation had taken place with Play Club persons and he admitted that he had named owner of the Play Club Gautam Gambhir and Sunny along-with their Bouncer Mohit as the assailants and also stated to the police that they were armed with Swords, danda and iron pipe, upon which they were stopped by Ms 'X' and Gautam Gambhir gave blow on the head of Nisha with danda. He testified that he stated to the police that danda blow was given by Gautam Gambhir on the head Nisha and he also admitted that he had stated to the police that Mohit and Sunny had given him blow using iron pipes.

26. However, PW-3 volunteered that he had named the accused persons under pressure from the owner of Hammer Club, namely Manni Sahani. Anyhow, on further prodding by the Id APP for the State, PW-3 again acknowledged that he had stated to the police that accused Sunny had caught hold of Ms 'X' from behind and pressed her chest, accused Gautam Gambhir gave blow of his hand on the chest of Ms 'X' and also pressed her chest besides giving blow on her private part from the front side. But then again he did a somersault

stating that he had stated so to the police under pressure from the owner of Hammer Club, namely Manni Sahani. Further cross-examination of PW-3 reveals that he acknowledged that he had sustained injuries on his head and was medically treated at Guru Govind Singh Hospital. He did not identify the accused persons as the real assailants. Lastly, in his brief cross-examination by the learned Counsel for the accused persons PW-3 testified that all the CCTVs Camera were in working condition and access to the footage was available to the owner. He also testified that after the incident, he had gone to the Police Station along-with his employer Manni Sahani.

27. **While appreciating the testimony of the witnesses, this Court may refer to the** a common law maxim — '*falsus in uno falsus in omnibus*' meaning thereby false in one particular, false in all applied in English Law. Commenting about its application in Indian condition, in re: **Inja Vengala Reddy**, 1955 SCC OnLine AP 208 : AIR 1956 AP 26 : 1956 Cri LJ 31 : (1955) 1 An WR 920 at page 31, it was observed: "There is almost always a fringe or embroidery to a story, however true in the main. The falsehood should be considered in weighing the evidence and it may be so glaring as utterly to destroy confidence in the witness altogether. But when there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of a want of veracity on perhaps some very minor point." In **Dilawar Singh v. State of Haryana** (2015) 1 SCC 737 , the Court restated that while analyzing the evidence of eyewitnesses, *it must be borne in mind that there is bound to be variations and difference in the*

behaviour of the witnesses or their reactions from situation to situation and individual to individual. There cannot be uniformity in the reaction of witnesses. The Court must not decipher the evidence on unrealistic basis. There can be no hard-and-fast rule about the uniformity in human reaction....

28. In another case **Rohtas v. State of Haryana**, (2019) 10 SCC 554, it was observed:

“23. It is the duty of the court to separate the grain from the chaff and then to arrive at a finding of guilt of an accused or otherwise, notwithstanding the fact that evidence is found to be deficient qua another accused named in the same offence. The maxim *falsus in uno, falsus in omnibus* has not received general acceptance in India nor has this maxim come to occupy the status of rule of law. This has been restated in *Rizan v. State of Chhattisgarh* [*Rizan v. State of Chhattisgarh*, (2003) 2 SCC 661 : 2003 SCC (Cri) 664] . In para 12 of the said decision, the Court observed, thus: (SCC pp. 668-69)

“12. Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence, prayer is to apply the principle of *falsus in uno, falsus in omnibus* (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where the chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. *The maxim falsus in uno, falsus in omnibus has no application in India and the witnesses cannot be branded as liars. The maxim falsus in uno, falsus in omnibus has not received general acceptance nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it*

amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See *Nisar Ali v. State of U.P.* [*Nisar Ali v. State of U.P.*, AIR 1957 SC 366 : 1957 Cri LJ 550]) Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate accused who had been acquitted from those who were convicted. (See *Gurcharan Singh v. State of Punjab* [*Gurcharan Singh v. State of Punjab*, AIR 1956 SC 460 : 1956 Cri LJ 827] .) The doctrine is a dangerous one, specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a deadstop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See *Sohrab v. State of M.P.* [*Sohrab v. State of M.P.*, (1972) 3 SCC 751 : 1972 SCC (Cri) 819]) An attempt has to be made to, as noted above, in terms of the felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because the grain and the chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See *Zwinglee Ariel v. State of M.P.* [*Zwinglee Ariel v. State of M.P.*, AIR 1954 SC 15 : 1954 Cri LJ 230] and *Balaka Singh v. State of Punjab* [*Balaka Singhv. State of Punjab*, (1975) 4 SCC 511 : 1975 SCC (Cri) 601] .) As observed by this Court in *State of Rajasthan v. Kalki* [*State of*

Rajasthan v. Kalki, (1981) 2 SCC 752 : 1981 SCC (Cri) 593] normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those, which are not normal, and not expected of a normal person. Courts have to label the category into which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

29. In view of the aforesaid proposition of law, reverting back to the instant case, the testimonies of all the 3 witnesses, viz. PW-1; PW-2; and PW-3 read as a whole clearly bring out that on 19.07.2016 at about 5.30 p.m. they were assaulted at the behest of certain persons, who had come armed with baseball bats, swords and iron pipes. The version of incident given by the aforesaid witnesses also reveals that there was some dispute between the owner of Hammer Club and the accused persons who belonged to another joint on the same floor of the Western Gate Mall, namely Play Club. PW-1 in her statement to the police at the first available opportunity as also in her statement under Section 164 Cr.P.C. Ex.PW-1/B gave a vivid account of the incident and identified the accused persons as the real culprits. Even in her testimony before the Court, PW-1 gave a graphic description of the manner in which assault took place upon her and her colleagues, and it was in her cross-examination by the Ld. Addl. PP for the State that brought out that she could identify the assailants by their names as well as appearances. It is highly probable that the shock and horror of the brazen manner in which she was molested and assaulted

by the accused persons was heavily bearing on the mind of PW-1 but ultimately truth prevailed and her testimony is of “sterling quality”.

30. I am afraid I do not subscribe to the defence story that PW-1 and the other witnesses revealed the names of the accused persons at the behest of their owner, Manni Sahni. The testimony PW-1 demonstrates that she knew the accused persons by their names and appearance. Merely because, PW-1 did not initially support the prosecution case with regard to the identity of the accused persons as the real offenders would not wash away his entire testimony from the record in terms of Section 145 of the Indian Evidence Act. The prosecution can rely upon part of the testimony of the witness which conforms to foundational facts of their case against the accused persons and even PW-2 for that matter corroborated the allegations in the complaint levelled by his colleague PW-1 Lady Bouncer Ms. ‘X’ against the accused persons. Further, even a bare perusal of the testimony of PW-3 Sanju would show that accused persons were real assailants who had barged into their Club and assaulted as also molested PW-1 in the process or as part of the same transaction. It is but apparent that PW-2 suffered from bouts of amnesia for having been won over by the defense and was not telling the truth before the Court despite suffering bodily injuries in the incident.

31. It needs to be reiterated that it is settled position in law that testimony of a hostile witness cannot be *ipso facto* discarded in *toto*. It is well settled that portion of the testimony of a hostile witness, that

inspires confidence can be used. It is also well settled that testimony of a hostile witness finding corroboration from other material can be believed either in favour of the prosecution or the defence as the case may be. Reference can be invited to decision in Hanumappa Hanamar vs State of Karnataka, 1997 (10) SCC 197. Further in the case of Khuji vs State of Gujarat 1991 Cr.L.J. 2653, it has been held by the Hon'ble Supreme Court that testimony of a witness who has supported the case of the prosecution in examination in chief and has resiled from his version at a later date in cross examination, can be made the basis of conviction.

32. When the prosecution evidence is evaluated in an objective manner, this Court finds that the testimony of PW-1 Lady Bouncer Ms. 'X' that she was assaulted is substantiated by the nature of injuries that were sustained by her and explained in the MLC Ex.PW-6/A, wherein she revealed to the examining Doctor that she had been assaulted by Gautam Gambhir and Sunny, which portion is Mark 'X' to 'X'. The injuries in the nature of small hematoma 1 x 1 cms on left side (parietal) region scalp besides tenderness on left elbow and small bruise 2 x 1 cm on right buttock would substantiate the prosecution case that she was assaulted by the accused persons in the manner testified by PW-1 and in part corroborated by PW-3 Sanju.

33. Further, it is pertinent to point out that even in the MLC of PW-3 Sanju Ex.PW-7/A as also in the MLC of PW-2 Deepak Ex.PW-7/B, both stated to the examining Doctor that they had been assaulted

at West End Gate Mall in Rajouri Garden while PW-2 appears to have sustained CLW 3 x 0.5 cms over scalp over left side, PW-3 appears to have suffered “stick patterned” bruise over left arm/ forearm laterally half of both ways and abrasion over right forearm measuring 3 x 2 cms that might have been sustained by him while defending himself from the assault at the hands of the accused persons. There is no challenge that injuries on the body of PW-2 and PW-3 were caused by blunt force impact. There is nothing in the cross-examination of PW-2 and PW-3 so as to suggest that these injuries were self-inflicted. It is but manifest that the said injuries were sustained by PW-2 and PW-3 on being assaulted by the accused persons with baseball bats, swords and iron pipes.

34. All said and done, the only fault line in the prosecution case is the manner in which investigation was conducted by IO/SI Gurcharan Singh. Firstly, he did not record the statement of owner of the club. Secondly, if the versions of PW-1 and PW-3 are believed, CCTV cameras were working and the IO did not collect the CCTV footage. The version of the IO is that CCTV cameras were not in working condition does not inspire confidence since no notings or statement to that effect was recorded by him nor there is any thing in the case diary to suggest that he made enquiries with regard to working of the CCTV cameras so as to retrieve or seize its footage. Be that as it may, the prime objective of the criminal justice delivery system is to accord justice to all the stakeholders-the accused, the complainant/victim, the society as well as the prosecution. Integral to

such objective to conduct a fair trial to the accused and a fair chance to prove the case to the prosecution. This finds echoed in a reiteration by the Supreme Court of India in **Dayal Sin. v. State of Uttaranchal**, (2012) 8 SCC 263, in which it was emphasized thus:

“—34. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a —fair trial, the Court should leave no stone unturned to do justice and protect the interest of the society as well.”

35. Thus, mere defective or lackadaisical investigation by the Investigating Officer cannot be a sole ground to throw away the entire prosecution case in view of statement of PW-1 and portion of testimony of PW-2 & PW-3 finding corroboration from the medical evidence as regards the nature of injuries sustained by the victims. In view of the aforesaid discussion, I find that prosecution has been able to prove that the accused persons came armed with baseball bats, swords and iron pipes and they assaulted the aforesaid victims/injured persons thereby committing an offence punishable under Section 452 read with Section 34 IPC. In other words, they came armed with weapons and committed house tress-pass after preparation for hurt, assault or wrongful restrain upon the aforesaid victims / injured persons.

36. As the nature of injuries inflicted upon the victims / injured persons was by all means 'simple' in nature, the offence under Section 323 IPC was also committed by the accused persons in furtherance of their common intention and in the process or same transaction PW-1 was also molested as not only accused Gautam Gambhir and Nitin Nayyar @ Sunny fiddled with her breast and attempted to kiss her but also hit her on her private part. It was a clear case of outraging modesty of a woman punishable under Section 354 IPC.

37. Accordingly, the accused persons are held guilty and convicted for committing offences under Section 452/323/354 read with Section 34 IPC. Let the convicts be heard on the point of sentence.

Announced in the open Court **(DHARMESH SHARMA)**
on 21st October, 2021 Principal District & Sessions Judge (West)
Tis Hazari Courts: Delhi