

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 12th October, 2009*
Judgment Delivered on: 21st October, 2009

CRL.REV.P.581/2000

VINOD SOLANKI Petitioner
Through: None.
Versus

DALEL SINGH & ORS. Respondents
Through: Mr.Mohit Mathur with
Mr.Vishwajit Singh and
Mr.Shikhar Jain, Advocates for
Respondent Nos. 1 to 6.
Ms.Fizani Husain, APP for the
State/Respondent No.7.

CRL.A.576/2000

RAKESH KUMAR Appellant
Through: Mr.Mohit Mathur with
Mr.Vishwajit Singh and
Mr.Shikhar Jain, Advocates.
Versus

STATE OF N.C.T. OF DELHI Respondent
Through: Ms.Fizani Husain, APP.

CRL.A.671/2000

DALEL SINGH Appellant
Through: Mr.Mohit Mathur with
Mr.Vishwajit Singh and
Mr.Shikhar Jain, Advocates.
Versus

STATE OF N.C.T. OF DELHI Respondent
Through: Ms.Fizani Husain, APP.

AND

CRL.A.360/2004

PREM WATI

..... Appellant

Through: Mr.Mohit Mathur with
Mr.Vishwajit Singh and
Mr.Shikhar Jain, Advocates.

Versus

STATE

..... Respondent

Through: Ms.Fizani Husain, APP.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. This judgment will dispose of the aforementioned appeals which have arisen out of a common incident dated 14.7.1997 which had become the subject matter of FIR No.447/1997 registered under Sections 304/452/34 IPC P.S. Dabri.
2. Accused Dalel Singh, Ved Parkash, Khazan Singh, Mam Chand, Ramesh, Rakesh Kumar and Ram Dass i.e. seven persons had been set up for trial in the first instance. Vide judgment dated 26.8.2000, all the accused persons except accused Ram Dass had been convicted for the offence punishable under Section 147/148/452/149/304-II/149/501-I/149 of the IPC. They had been sentenced to undergo RI for one year for the offence punishable under Section 147 of the IPC; RI for two years for the offence

punishable under Section 148 of the IPC; RI for three years and a fine of Rs.500/- in default of payment of fine RI for three months for the offence punishable under Section 452/149 of the IPC; for the offence punishable under Section 506-I/149 of the IPC the aforestated convicts have been awarded RI for one year; for the offence punishable under Section 304-II/149 of the IPC Accused Dalel Singh, Khazan Singh, Ramesh, Mam Chand and Ved Prakash were awarded the substantive sentence of the imprisonment already undergone by them besides a fine of Rs.10,000/-; in default of payment of fine to undergo RI for two years. Out of the total fine deposited Rs.45,000/- was to be paid to the widow of the deceased by way of compensation. Accused Rakesh Kumar had been sentenced for the offence punishable under Section 304-II/149 of the IPC to undergo RI for a period of five years and to pay a fine of Rs.10,000/-; in default of payment of fine RI for two years, out of which an amount Rs.9000/- was to be paid to the share of the widow of the deceased. Accused Ram Dass had been acquitted of all the charges leveled against him.

3. Accused Rakesh Kumar has challenged this order of conviction and sentence vide CrI.A.No.576/2000. Dalel Singh had challenged the order of conviction and sentence vide CrI.A.No.671/2000.

4. Accused Prem Wati had not been arrested in the first instance. She had been evading arrest and a supplementary charge-sheet had been filed against her. Vide impugned

judgment dated 15.4.2000, she had been convicted for the offence punishable under Sections 147/148/149/304-II/501-I/452 of the IPC vide order of sentence dated 19.4.2004. She had been sentenced to undergo RI for one year for each of the offence punishable under Section 147/148/149 of the IPC. She had been sentenced to undergo RI for three years and to pay a fine of Rs.10,000/-; in default of payment of fine to undergo RI for 10 months for the offence punishable under Section 304-II of the IPC. She had further been sentenced to undergo RI for one year and to pay a fine of Rs.1000; in default of payment of fine to undergo RI for one month for the offence punishable under Section 452 of the IPC. For the offence punishable under Section 506 Part I of the IPC she had been sentenced to undergo RI for one year. This judgment and order of sentence was challenged by Prem Wati vide CrI.A.No.360/2004.

5. Vinod Solanki was the complainant in this case. Vide CrI.Rev.P.No.581/2000 he had challenged the order of sentence dated 30.8.2000 inflicted upon Dalel Singh, Ved Prakash, Khazan Singh, Mam Chand, Ramesh and Rakesh Kumar and had sought enhancement of their sentence.

6. The facts as culled out by the prosecution are as follows:

(i) On 14.7.1997 between 9 to 10 PM Dalel Singh along with his wife Prem Wati, his four sons Khajan Singh, Ramesh, Rakesh Kumar and Ved Prakash along with Mam Chand and

Ram Dass had trespassed into the house of deceased Shri

Krishan i.e. house no. QZ 791, Palam Village, New Delhi. Dalel Singh along his family was living in the house opposite the house of the deceased Shri Krishan. The accused persons were armed with dandas, lathis, iron rods and a brick. At that time, the house of the victim was locked; hearing noises and cries, Shri Krishan unbolted the entrance door. Dalel Singh, Rakesh, Khazan Singh, Ramesh, Ved Prakash & Mam Chand along with the wife of Dalel Singh i.e. Prem Wati came inside the house; Ved Prakash and Rakesh were holding dandas and Mam Chand and Ramesh were having iron rods. Dalel Singh was holding a lathi and wife of Dalel was having a piece of brick in her hand. Ramesh was exalting the other co-accused 'Mar Do Salon Ko Taki Roz Ka Jhagda Khatam Ho'. Khazan Singh had caught hold of Shri Krishan; Prem Wati threw a piece of brick upon him which hit him on his nose; efforts to save the victim by his son Vinod were frustrated when Dalel Singh and Ved Prakash pushed Vinod with a force pursuant to which he fell down. Rakesh holding a danda struck Shri Krishan on his head as a result of which Shri Krishan fell down. The injured was removed to DDU hospital, where he was declared brought dead.

(ii) Statement of Vinod the son of deceased Shri Krishan Ex.PW-2/A was recorded in the hospital whereupon this investigation was set into motion. The rukka was

dispatched at 1.05 AM in the early morning hours of 15.7.1997 pursuant to which the present FIR was registered.

(iii) Two sons of the victim Shri Krishan have been examined. Vinod PW-2 was an eye-witness to the incident; the second son of the victim Nitu who had reached the spot immediately after the incident and saw his father lying in an unconscious condition has been examined as PW-1; wife Sheela Devi was also an eye-witness and she has been examined as PW-3. Shukhbir PW-6 was the elder brother of the victim. Another brother of the victim Jai Bhagwan has been examined as PW-4. Injured had been removed to the DDU hospital where he was examined by Dr.Vijay Kumar PW-12 vide MLC Ex.PW-12/A noting that the patient had been brought dead in the casualty. Dr.Komal Singh PW-7 had conducted the post-mortem on the deceased and the cause of death was opined as death due to comma caused by head injury; head injury was sustained by a blunt impact on the head sufficient to cause death in the ordinary course of nature. His report had been proved as Ex.PW-7/A. Vide Ex.PW-7/C a subsequent opinion had been given by Dr.Komal Singh on the weapon of offence i.e. the bamboo danda which had been produced before him. His opinion was to the effect that the swelling on the occipital region of scalp could have been caused by this weapon. The

investigating officer SI Rakesh Giri had come into the witness box as PW-14.

7. On behalf of the accused it has been argued that the judgment of the trial court suffers from several infirmities.

(i) Testimony of the eye-witnesses PW-2 and PW-3 is liable to be disbelieved as they are close relations of the victim being the son and the wife of the deceased and being interested witnesses. Their testimony has to pass the test of a strict scrutiny and they have failed to pass this test. Their conduct is highly unnatural; they had made no efforts to save the victim and this is evident from the fact that neither of them have received any injuries; reliance has been placed upon AIR 1993 SC 1462 Anil Phukan vs. State of Assam to support this submission. Attention has been drawn to the cross-examination of PW-2; when confronted with his earlier statement made before the police Ex.PW-2/A wherein improvements made by the witness on oath in court have been pointed out. It is submitted that in his first statement before the investigating officer PW-2 had not stated that when he was returning back along with his mother to the house, Dalel Singh and his four sons were standing in the lane. The details of the arms carried by the accused persons had also not been mentioned in his first statement. PW-3 had also been confronted with his statement Ex.PW-3/DA made before the investigating officer. It is submitted that in

her first statement PW-3 had not mentioned that Dalel Singh, Mam Cand and Rakesh were talking outside the house of Dalel Singh when she bolted the entrance gate of her house. The omissions in this statement had also been pointed out qua her version on oath in court. It is submitted that in her statement before the investigating officer she had not mentioned that Ram Das had also accompanied the accused persons or that he was holding a danda and this had found mentioned for the first time in her version on oath in court.

(ii) The weapon of offence i.e. the danda has a length of 116.4 cms i.e. approximately 4 feet. The incident had taken place in the gallery of the house. On this score, attention has been drawn to the version of PW-1 who has admitted that the gallery in the house is 15 to 20 feet in length and the width is about 3 to 3 $\frac{1}{4}$ feet. Investigating Officer PW-14 has stated that the height of the gallery his 7 feet. Attention has also been drawn to the site plan Ex.PW-14/B; Mark A being the place where the victim was found lying in an unconscious state. In these circumstances, it would not have been possible to swing this weapon of offence which is four feet in length in a circumference of a gallery having a height of only seven feet and being not more than three feet wide.

(iii) Medical report is inconsistent with the oral version of the eye-witnesses, namely, PW-2 and PW-3. It is submitted that as per the version of PW-2, Khazan Singh had caught hold of the deceased by putting his arms from behind whereupon accused Rakesh holding a danda struck him on the head; since this injury was inflicted while the deceased was being held from the back, the injury suffered by the victim should have been on the nape of his neck. Attention has been drawn to the post-mortem report Ex.PW-7/A where swelling had been noted on the occipital region and a linear fracture had been noted on the occipital bone. It is submitted that the occipital region being the front portion of the head; this medical evidence is contrary to the oral version of the eye-witnesses.

(iv) There is no explanation as to why material witnesses i.e. Rishi Prakash and Kavita have not been examined.

(v) Role attributed to each accused has not been defined; reliance has been placed upon 1977 SCC (CrL.) 538 Hiralal Mallick vs. State of Bihar in support of this argument.

(vi) Recovery of the danda was effected pursuant to the disclosure statement of Rakesh which was recorded on 24.9.1997 i.e. after a lapse of more than two months; the danda as per the version of Jai Bhagwan PW-4 who was a witness to the recovery was admittedly from an open place

which was accessible to all; such a recovery has no sanctity in the eye of law.

(vii) Unequal sentences for identical offences is also not permitted; Rakesh, Dalel and Prem Wati have all been awarded separate sentences; Rameshwar Dayal vs. State of U.P. 1971 (3) SCC 924 prohibits such a policy.

8. For all the aforesaid reasons, it is clear that the investigation is tainted and benefit of doubt has to accrue in favour of the appellants entitling them to an acquittal.

9. The record has been perused and the submissions and the counter-submissions made by the respective parties have been appreciated.

10. The incident is dated 14.7.1997. Occurrence is between 9 to 10 PM. Before this incident at about 8.50 PM as per the version of Sukhbir Singh PW-6 while he was returning home, near the Shiv Mandir on the road of the Dharamshala, he noted that Mam Chand, Rakesh and Dalel were standing. Mam Chand was hurling abuses at him at the behest of Rakesh and Dalel; Mam Chand was under the influence of liquor. His sister-in-law i.e. Sheela PW-3 and his nephew i.e. Vinod PW-2 joined him there; they i.e. PW-2 and PW-3 accompanied PW-6 back to his residence; after about 15 minutes PW-6 noticed PW-3 coming to his house; she was crying and informed him that Rakesh, Dalel, Ved Prakash, Ramesh, Khazan Singh and Mam Chand and wife of Dalel had entered their house and attacked her husband; the said persons were armed

with dandas, rods and brick pieces; Shri Krishan had become unconscious. PW-6 accompanied PW-3 to the spot where he found that his nephew Vinod PW-2, Nitu PW-1 and Rishi Prakash had removed the injured to the hospital; on reaching the hospital PW-6 learnt that Shri Krishan had been brought dead. In his cross-examination PW-6 has admitted that when he reached the house of his brother, he found Kavita his daughter present in the house; none of the other family members was present; two or three tenants were present; he reached the DDU hospital in his car; there was no blood in the house when he reached his brother's house; the gallery was empty. He denied the suggestion that he is deposing falsely.

11. PW-1 Nitu, the elder son of the deceased was returning back to his house on the fateful evening at about 9.15 PM when he noticed that all the accused persons namely Dalel Singh, Khazan Singh, Ramesh, Rakesh Kumar, Ved Prakash, Prem Wati and Mam Chand beating the door of his house; some were having dandas and others were having iron rods; Ved Prakash shouted 'Pakad Lo Sale Ko Jaan Se Mar Do Jane Na Paye'; on hearing this exaltation PW-1 rushed back towards the Shiv Mandir situated near the lane of his house and hid himself behind the temple. He remained there for three to four minutes. He saw his mother PW-3 coming out from the house. She was weeping and was shouting 'Maar Diya-Maar Diya'. PW-1 came out of the temple and went towards his house and saw his father lying in the gallery of the house; his

younger brother PW-2 was massaging his feet. On enquiry from PW-2 he was told that all the accused had come inside his house and Rakesh had given a danda blow on the head of his father; his mother went to call his uncle Sukhbir Singh. PW-1 along with his cousin Rishi Kumar and another uncle Jai Bhagwan removed their father to the Sunil Nursing Home; doctor in the nursing home advised them to take the injured to a big hospital i.e. the DDU hospital, in the casualty his father was reported declared dead. Police reached the hospital. In his cross-examination, PW-1 has stated that his father was aged about 48 years; the gallery in his house is about 15 to 20 feet in length; the width being 3 to 3 ¼ feet; he did not notice any blood in the gallery; he noted abrasions over the nose of his father. He has admitted that from the temple where he had hidden himself, his house was visible. He denied the suggestion that he is deposing falsely because of enmity with the accused persons. He also denied the suggestion that his father had suffered a heart attack or a stroke prior to this incident or that his father was a chronic epilepsy patient.

12. Eye-witnesses to the incident have been examined as Vinod PW-2 and Sheela PW-3, the son and wife of the deceased.

13. PW-2 has deposed that on 14.7.1997 when was returning to his house at about 9 PM, near the corner of the lane he noticed that accused Mam Chand was abusing his uncle Sukhbir; his mother Sheela also reached there. He i.e. PW-2 and his mother requested his uncle Sukhbir not to enter into any argument with

Mam Chand as Mam Chand had consumed liquor; he i.e. PW-2 and PW-3 accompanied Sukhbir back to his house; PW-2 and his mother returned back to the house; after sometime Dalel Singh and his sons namely Rakesh, Khazan Singh, Ved Prakash, Ramesh along with Mam Chand started shouting abuses outside their house. PW-2 heard Ved Prakash shout that Nitu had come and 'Pakar Lo Sale Ko Jan Say Mar Do, Bach Kar Na Jaye'. PW-2 thought that Dalel Singh might have caught hold of Nitu; door of the house was opened; at that time Dalel Singh, Rakesh, Kazan Singh, Ramesh, Ved Prakash, Mam Chand along with the wife of Dalel Singh came inside their house. Ved Prakash and Rakesh were holding dandas, Mam Chand and Ramesh were having iron rods. Dalel was holding lathi and wife of Dalel was having pieces of brick in her hand. Ramesh shouted 'Maar Do Salo Ko Takee Roz Ka Jhagra Khatam Ho'; Khazan Singh caught hold of Shri Krishan by putting his arms behind him; wife of Dalel threw pieces of brick on Shri Krishan which hit him on his nose. PW-2 ran to save his father; Dalel Sigh and Ved Prakash pushed him Krishan as a result of which he fell down. Rakesh was having a danda in his hand. He struck the danda on the head of his father; his father fell down; accused persons ran away from the house; while running Ramesh and Khazan Singh were shouting 'Sudhar Jao Sao Warna Sabhi Ka Yahi Haal Kareng'; Nitu and his cousin brother Rishi Kumar came to the house; PW-2 disclosed the said incident to them. Thereafter the injured was removed in the emergency ward of the DDU

hospital where he was declared dead. His statement Ex.PW-2/A was recorded in the hospital; PW-2 along with Nitu and Rishi Kumar returned back to the house. At about 1.30 AM; the pieces of brick were seized by the police from the spot. In his cross-examination, PW-2 has admitted that he was a 10th Class student at the time of the incident; his house is situated at a distance of 40-45 yards away from the place where his uncle Sukhbir was being abused; the house of accused Mam Chand is situated at the corner of the lane. PW-2 has admitted that there is a gallery in their house which is about 20 feet in length and rooms are situated on either side of the gallery. There is a courtyard at the end of the gallery from where there is access to the first floor. PW-2 has further stated that the door of the house was opened by his father and he and his mother were just behind their father. He has admitted that the accused had entered upto a distance of about 2-3 feet in the gallery and they surrounded the three of them i.e. his deceased father, his mother PW-3 and himself in the gallery. He denied the suggestion that he is deposing falsely because of enmity with the accused persons and this was a chance to implicate them in a false case.

14. The second eye-witness is Sheela Devi examined as PW-3. She was the widow of deceased Shri Krishan. She has corroborated the version of PW-3. She has deposed that on 14.7.1997 at about 9-9.15 PM she was present inside the house when she heard a noise coming from outside; the noise was

coming from near Shiv Mandir Dharamshala; she went to the said spot and found Mam Chand filthily abusing Sukhbir her younger brother-in-law, her son Vinod also joined them; they i.e. PW-2 and PW-3 requested Sukhbir not to talk with Mam Chand; they i.e. PW-2 and PW-3 accompanied Sukhbir back to his house and thereafter they returned back to their own home; the house of accused Dalel Singh is situated in front of their house; she went inside the room and bolted the door; just after one or two minutes there was a banging on the door; she i.e. PW-3 heard shouts of 'Salo Darwaja Khol Do Har Roz Ka Ragra Mita Denge'; PW-3 heard Ved Prakash shouting that Nitu had come and he should be caught. Shri Krishan opened the door of their house to protect Nitu; when Shri Krishan opened the door Dalel, his wife Pram Wati, his four sons Ved Prakash, Rakesh, Ramesh and Khazan Singh along with Mam Chand came inside their house; Rakesh was holding a danda; Dalel was having lathi; Khazan was carrying danda; Ved Prakash was also having a danda; Mam Chand and Ramesh were having iron rods in their hands and Prem Wati was holding piece of brick. Khazan caught hold of Shri Krishan; Prem Wati threw piece of brick on his nose; Rakesh hit danda blow forcefully on the head of Shri Krishan; Shri Krishan fell down; Vinod intervened to rescue his father; Dalel and Ved Prakash pushed him; all the accused persons ran away; while running they threatened that 'Salo Sudhar Jao Warna Tum Sab Ka Yahi Hal Kareng'. PW-3 went to call her brother-in-law Sukhbir and related the incident to him. In her

cross-examination, she had admitted that the width of gallery in their house is about 20 feet; the height being about 10 feet. She has categorically deposed that her husband was never ill in his lifetime and he did not suffer from epilepsy; he was a healthy man. She admitted that the incident had occurred inside the gallery which was at a distance of about 2 feet from the entrance door; no blood had fallen in the gallery. She denied the suggestion that because of enmity the accused persons have been falsely implicated. She denied the suggestion that she did not witness the incident.

15. PW-2 and PW-3 are the eye-witnesses. Their versions are consistent, cohesive and cogent. No discrepancies have been noted which could assail their versions in any manner. They have in graphic detail described the first incident i.e. the verbal altercation which had taken place between Sukhbir and Mam Chand whereupon PW-2 and PW-3 had intervened and requested Sukhir not to enter into any argument with Mam Chand as Mam Chand was in an intoxicated stage. The subsequent incident i.e. the incident which is the subject matter of the present FIR had occurred within the next 15 minutes when the accused persons had reached the house of the deceased victim. On this count as well PW-2 and PW-3 are fully corroborative of one and other. PW-2 had turned to save his father but his effort was frustrated when Dalel Singh and Khazan Singh pushed him forcibly as a result of which he fell down. PW-1, the elder son of the deceased has also

in a natural flow described the manner in which the incident had occurred; he had been frightened when he had heard the accused persons shouting his name as all of them were armed with dandas and lathis and fearing the attack on himself he had hidden himself behind the temple in the lane from where he could see his house; within the next three to four minutes he saw his mother coming out of the house crying and shouting that her husband had been attacked; PW-1 reached the spot forthwith. His version is also clear and categorical and being a contemporaneous transaction is admissible under the doctrine of *res gestae* as contained in Section 6 of the Indian evidence Act.

16. Version of PW-6 who was the first person with whom the verbal duel had occurred with Mam Chand had testified about the earlier enmity between the families i.e. between the complainant and the accused. In his cross-examination, he had admitted that in May, 1995 an altercation between the parties had occurred and in that incident Shri Krishan had received injuries on his head which wounds had to be stitched. His version of the earlier enmity between the two parties has not been assailed in his cross-examination.

17. Witnesses, as Bentham has said, are the eyes and ears of justice. The presence of the eye-witnesses in the present incident is natural and probable; they being members of the family and the incident having occurred in the late evening hours of the day, it was natural for the family members to have been present in the

house and have witnessed the incident. A distinction has to be drawn between a 'related' witness and an 'interested' witness; one is not equivalent to the other. The term 'Interested' postulates that the person concerned had some direct interest in the result of the litigation, whereas a witness who is a natural one but yet a relative of the victim cannot be termed as 'interested'; a close relationship of the witness to the deceased is no ground to reject his testimony if otherwise it is reliable.

18. The site plan has been proved as PW-14/A; Mark A is the place where victim was found lying unconscious which is the gallery in the house. Incident had admittedly occurred in the said gallery and this is borne out from the versions of PW-2 and PW-3. PW-1 had described this gallery as about 15-20 feet in length and width being about 3 to 3 ¼ feet. PW-3 has described the gallery as 20 feet long and the height being about 10 feet.

19. The submission of the learned defence counsel that the four feet long danda which was the weapon of offence could not have been swung in the dimension of the gallery as described above has little force. Ocular version of PW-2 and PW-3 recites that the accused persons had after entering the house, entered the gallery and although all of them were armed, it was Rakesh who had wielded the four feet long danda and struck it on the head of Shri Krishan pursuant to which he had fallen down. Even presuming that the width of the gallery was not more than 3 ¼ feet, it would not prevent the attack by a four feet long danda in a 20 feet long

gallery, having a height of 10 feet; attack by a danda of such a dimension was well probable.

20. MLC of the victim Ex.PW-12/A has been proved in the version of Dr.Vijay examined as PW-12. He had examined the patient at 9.45 PM and had declared him brought dead. Post-mortem was conducted on the following day by PW-7 vide his report Ex.PW-7/A. Cause of death was death due to comma caused by a head injury; scotted blood was noted present on the parieto occipital region at the sub scapular area and a linear fracture of the occipital bone, 3.2 cm. in size had also been noted. This injury was sufficient to cause death in the ordinary course of nature. On 13.10.1997 vide Ex.PW-7/C a subsequent opinion had been given by PW-7 opining that the bamboo stick which has been brought to him could have been the weapon of offence and the cause of injury pursuant to which the victim had died.

21. Arguments of the defence counsel that the medical evidence is contrary to the ocular testimony of Pw-2 and PW-3 is without force. PW-2 has deposed that Khazan Singh had caught his father by putting his arms from behind his father and Rakesh holding a danda had struck him with force on his head. This witness has nowhere stated that Rakesh was behind his father at the time when he struck him which would have caused the injuries on the nape of his neck. PW-3 has also deposed that her husband had been caught hold by Khazan Singh whereupon Rakesh had hit a danda blow forcibly on his head. Neither of the two eye-witnesses

have deposed that the victim had been attacked from behind his back. There is no contradiction in this ocular and medical evidence.

22. The weapon of offence had been got recovered by accused Rakesh on 24.9.1997 in the presence of Jai Bhagwan PW-4, the elder brother of the victim. Investigating Officer PW-14 had arrested accused Rakesh on the same day i.e. on 24.9.1997 vide memo Ex.PW-14/D; his disclosure statement is Ex.PW-11/M; recovery memo of the danda Ex.PW-4/A has been signed by PW-4 at point A. Recovery was no doubt effected two months after the day of the incident; PW-4 has deposed that this recovery had been effected from the shop in a plot where after removing some earth, Rakesh had got the bamboo stick recovered. In his cross-examination PW-4 had admitted that this place was an open place accessible to all but this has reference to the open plot where the shop was located. Version of prosecution established through the testimony of PW-4 is to the effect that it was after removing the earth from a shop in the plot that the recovery had been effected; obviously, implying that the bamboo stick was lying in a hidden condition and not accessible to the public view at large.

23. This evidence has been collected by the prosecution in CrI.A.567/2000 titled as Rakesh Kumar vs. State and CrI.A.No.671/2000 titled as Dalel Singh vs. State.

24. In CrI.A. No.360/2004 titled as Prem Wati vs. State the same witnesses have been examined under different heads; Vinod has

been examined as PW-1; Sukhbir has been examined as PW-4; Nitu has been examined as PW-2, Jai Bhagwan has been examined as PW-3; Dr.Vijay has been examined as PW-7; Dr.Komal Singh has been examined as PW-6 and investigating officer SI Rakesh Giri has been examined as PW-9.

25. From the aforementioned evidence both oral and documentary, it is clear that a specific role has been attributed to each of the present appellants. Accused Rakesh Kumar was armed with danda; he was the person who had wielded this weapon of offence leading to the fatal injury which had caused death of the victim. His mother Prem Wati was holding a brick in her hand and had attacked the victim on his nose. Dalel Singh, the father of Rakesh Kumar was holding a lathi in his hand. He had entered the house of the victim along with the other co-accused jointly with the common object of attacking the victim.

26. Section 149 of the IPC creates a specific and distinct offence. The vicarious liability of the members of an unlawful assembly extends to those acts which are done in prosecution of the common object of the unlawful assembly and such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Each case has to be adjudged according to the facts as unfolded.

27. In the instant case, it is clear that the principle embodied in this Section is attracted; the members of this unlawful assembly knew that by their co-joint participation in the offence actually

committed it was likely to be committed in the prosecution of their common object i.e. of the attack on the victim; this can well be gathered from the holding of different weapons of offence by each member of the unlawful assembly; exaltation by Ved Prakash on seeing Nitu followed by the banging of the entrance door of the victim and thereupon attacking him; each of the co-accused person knew about the likelihood of the commission of this offence; actual physical attack by each member of the unlawful assembly being not a pre-requisite for the application of this section; which is based on the principle of a vicarious liability.

28. It is clear that the prosecution has established its case beyond reasonable doubt against each of the appellant; besides the eye-witness accounts of PW-2 and PW-3; version of PW-1 who had reached the spot within seconds of the incident; testimony of PW-6 also being contemporaneous coupled with the medical opinion, the recovery of the weapon of offence, as also the earlier enmity between the complainant and the accused family having been proved, it is evident that the accused persons are guilty of the offence for which they have convicted.

29. Conviction of the accused persons calls for no interference. The sentence awarded to accused Rakesh is a maxim substantive sentence of RI for five years; accused Dalel Singh had been sentenced to the substantive sentence already undergone by him; accused Prem Wati had been sentenced for a substantive maximum sentence for three years.

30. The judgment relied upon by the learned defence counsel reported in Rameshwar Dayal vs. State of U.P. 1971 (3) SCC 924 would not be applicable to the facts of the instant case. The said case was a statutory offence committed by two constables under the U.P.Pradeshik Armed Constabulary Act, 1948 for having deserted their post; the offences, defences and the facts being absolutely the same, different sentence by two different courts could not operate. In the instant case, the sentence awarded to each of the accused persons has been passed with regard to the specific role which was attributed to each of the accused; Rakesh having wielded the actual weapon of offence had been granted the maximum sentence; the attack by Prem Wati with a brick had caused abrasions on the nose of the victim; Dalel Singh was leading the unlawful assembly with no role of a physical attack; it was these acts of each of the accused which had weighed in the mind of the Trial Judges while awarding different sentences to each of the accused. The said sentences are proportionate and in conformity to the offences committed and call for no interference.

31. None has appeared in Crl.Rev.P.581/2000 i.e. the revision petition filed by the complainant Vinod Solanki seeking enhancement of the sentence. Orders of sentence, even otherwise being fair call for interference. All the three appeals and the revision petition are accordingly dismissed. Accused Dalel has already undergone the substantive sentence; bail bonds and

surety bonds of Prem Wati and Rakesh are cancelled; they are directed to surrender to suffer the remaining sentence.

(INDERMEET KAUR)
JUDGE

21st October, 2009/rb