

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

+ **Crl.A. 114/2006**

Reserved on: October 7, 2009

Pronounced on: October 9, 2009

Surjit Kaur Appellant in person

!

Versus

\$ D.S. Kapoor and others Respondent

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Through: Mr. Ravi Quazi, Advocate

CORAM:

HON'BLE MR. JUSTICE V.K. JAIN

1. Whether Reporters of Local newspapers may be allowed to see the Judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

V.K.Jain, J.

1. This is an appeal against the judgment dated 19th September, 2005 whereby the respondents were acquitted by the learned Metropolitan Magistrate, New Delhi. A complaint u/s 323/325 and 506 of Indian Penal Code r/w Section 34 thereof was filed by the appellant, late Sh. Waryam Singh and Late Ms. Amrit Kaur against the respondents and Late Sh. Vidya Sagar. It was alleged in the complaint that the respondents/accused persons wanted to oust the complainants from House No.Z-2, Hauz Khas, New Delhi and had also been threatening them with dire consequences. Complaints were lodged by the complainant with the police, in this regard, a number of times. It was further alleged that on 14th December, 1986, the accused persons attacked complainants No.1 and 3 in their house, as a result of which they sustained injuries. The tooth of complainant No.1 was broken by accused No.2, Manjit Kapoor, who gave merciless beatings to the complainants No.1 and 3. Report was lodged with the police, but only proceedings u/s 107/151 of the Code of Criminal Procedure were initiated against both the parties. The complainants

sought summoning trial and punishment of the respondents/accused persons.

2. After recording of preliminary evidence, the accused were summoned vide order dated 12th April, 1991, for the offences punishable U/Ss. 323/325/506/34 IPC. After recording of pre-charge evidence, charge U/Ss. 323/506/34 IPC was framed against all the four respondents, namely, Sh.D.S.Kapoor, Manjit Kapoor, Devika Kapoor and Sneh Manjit Kapoor; the fifth accused Vidya Sagar having expired during pendency of the complaint. The learned Metropolitan Magistrate held that the whole case of the complainants was based on the testimony of Smt. Surjit Kaur who was examined as PW-1 and since she had admitted that she was not present at the time of incident and other complainants, namely, Sh. Waryam Singh and Smt. Amrit Kaur having not been examined after framing of charge, it was difficult to ascertain how the quarrel took place, how Waryam Singh and others sustained injuries and who were the persons responsible for the incident. The learned Metropolitan Magistrate also noted that the accused did not get opportunity to examine Waryam Singh and Amrit Kaur, who expired before the charge was framed. Their statements

were not taken into consideration while passing order of acquittal.

3. A perusal of the record would show that after the respondents were summoned, only two material witnesses, namely, Waryam Singh and Surjit Kaur were examined. The third complainant, Amrit Kaur was not examined at any time after summoning of the respondent.

4. As far as Smt. Surjit Kaur is concerned, admittedly she was not at home at the time of this incident. During her cross-examination, she has specifically admitted this fact and has stated that the information regarding the attack was given to her by a friend. Thus, Smt. Surjit Kaur not being an eye-witness of the incident which took place on 14.12.86, her testimony does not prove the charge against the respondents.

5. However, as far as complainant Waryam Singh is concerned, I find that he was examined on 27th September, 1993 as well as on an earlier date which is not legible from his statement or from the order-sheets. On 27th September, 2003, his examination-in-chief was concluded and his cross-examination by learned counsel for the accused persons was deferred. The record further shows that on 1st October,

1993, complainant Waryam Singh was recalled for cross-examination and was cross-examined on that date. It was contended by the learned counsel for the respondents that cross-examination of Waryam Singh was not complete on 1st October, 1993. It is true that the cross-examination of Sh. Waryam Singh recorded on 1st October, 1993 is rather short, but, the record does not indicate that it was not concluded and was deferred on that date. The proceeding dated 1st October, 1993 shows that he was recalled and examined on that date. The statement recorded on 1st October, 1993 also does not show that the examination of Waryam Singh was deferred on that date. It was for the defence counsel to decide how much he had to cross-examine the witness. If he chose to limit the cross-examination, it cannot be said that the cross-examination was not complete. Therefore, there is no escape from the conclusion that cross-examination of Sh. Waryam Singh before charge was concluded on 1st October, 1993.

6. Section 33 of Evidence Act, to the extent it is relevant, provides that the evidence given by a witness in a judicial proceeding, is relevant for the purpose of proving in the later stage of the same judicial proceedings, the truth of the facts,

which it states, when the witness is dead, provided that the proceedings were between the same parties, and the adverse party in the first proceedings had the right and opportunity to cross-examine.

7. Section 244 of the Code of Criminal Procedure provides that when in any warrant case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, he shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. Though the section does not expressly refer to the right of the accused to cross-examine the prosecution witness, on general principles and in view of the provisions of Section 138 of Evidence Act, which provides that the witnesses shall be first examined in chief and then, if the adverse party so desires cross-examined, right to cross-examination of the witness at pre-charge stage is implicit in it and such a valuable right cannot be denied to the accused. The expression 'evidence' has been defined in Section 3 of Evidence Act to mean and include all statements which the court permits or requires to be made before it by witnesses in relation to matters to fact under enquiry. The expression "evidence" in Section 245 of the Code of Criminal Procedure

has been used in the same sense as in Section 3 of the Evidence Act and, therefore, would include examination, cross-examination and re-examination, if any.

8. If it is taken that right to cross-examine exists only when there is a provision expressly conferring such a right, then an accused in a summons case under Chapter XX cannot have any right to cross-examine a prosecution witness since no express provision conferring such a right upon the accused has been made in this Chapter. That would mean the accused cannot as a matter of right cross-examine the prosecution witness in a summons case. Such an interpretation would amount to denial of a fair trial to the accused and, therefore, cannot be accepted. In fact, an absolute right to cross-examine the prosecution witness before charge is an integral part of examination of witness so much so that whenever a witness is examined, failure to provide opportunity to the opposite party to cross-examine him would render his examination incomplete and inadmissible unless cross-examination is waived by that party. The right of the accused to be defended by a legal practitioner has now been recognized as a fundamental right under the Constitution and to hold that the accused does not

have a right to cross-examine a witness at pre-charge stage would be to deprive him of his right to defend himself at that stage. At some places, in Code of Criminal Procedure, right to cross-examine the prosecution witness has been expressly conferred upon the accused. But, omission to confer such right expressly would not *ipso facto* mean that the valuable right of cross-examination is not available to the accused. Right to cross-examination being an integral part of the examination of a witness, it is implicit whenever a witness is examined after summoning of the accused.

9. In *S.K. Abdul Awal Vs. State* 1993 (1) Crimes 611, PW-8 was examined by the prosecution before framing of charge. On account of his death, he could not be put to any cross-examination after framing of charge. After reviewing case law on the subject, it was held by a Division Bench of Calcutta High Court that since the accused had cross-examined the witness and had thereby exercised his right to cross-examine him, there has been no prejudice to him if the witness did not testify after the framing of charge.

10. Admittedly, complainant Waryam Singh had died after recording of his pre-charge statement on 1st October, 1993. Not only the respondents had the right as well as the

opportunity to cross-examine him, they did actually cross-examine him on 1st October, 1993. Therefore, the statement of Sh. Waryam Singh recorded at pre-charge stage is relevant in view of the provisions contained in Section 33 of the Evidence Act.

11. The learned Metropolitan Magistrate has not taken the pre-charge statement of Sh. Waryam Singh into consideration. In view of the mandate of Section 33 of the Evidence Act, it was obligatory for him to take the statement of Late Sh. Waryam Singh into consideration before passing judgment on the merit of the case. Failure of the learned Metropolitan Magistrate to take the statement of Sh. Waryam Singh into consideration has resulted in failure of justice and, therefore, the order passed by him cannot be sustained.

12. For the reasons given above, the impugned judgment is set aside and the matter is remanded back to the learned Metropolitan Magistrate for hearing the parties and passing a fresh order, at an early date, after taking the statement of late Sh. Waryam Singh into consideration. The parties are directed to appear before the learned Metropolitan Magistrate at 10 A.M. on 9th November, 2009. The bail

bonds furnished by the respondents during trial are restored and shall remain in force till a fresh order is passed by the learned Metropolitan Magistrate.

Lower court record be sent back within a week.

(V.K. JAIN)
JUDGE

October 09, 2009/sk