

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

+ **Crl. Appeal No. 95/2000**

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Decided on: 7th July, 2011

CHOEGYAL & ORS.

..... Appellants

Through: Mr. Anil Aggarwal and Mr. S.N.
Pandey, Advocates

versus

STATE

..... Respondents

Through: Mr. Manoj Ohri, APP for the State.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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

MUKTA GUPTA, J.

1. On 11th March, 1992 the Chinese President visited this country. The Appellants who were Tibetan nationals living in this country, reached outside the Chinese Embassy and raised slogans against China. An information was sent to P.S. Chanakyapuri. On receipt of DD No. 55-B SI Ram Sunder along with Constable Ranbir, Constable Rohtas, Constable Raj Bir, Constable Aas

Mohd and DHG Ram Kumar reached outside the Chinese Embassy where the Appellants were raising the slogans against China and quarrelling with the Special Task Force. Stones were lying on the main gate of Chinese Embassy and window panes of the guardroom were lying broken outside the guardroom. The main gate of the Chinese Embassy was broken and broken bottles and its caps were lying near the main gate. Statement of PW2 Ram Shresth Mandal, Guard at the Chinese Embassy was recorded who stated that at about 12:45 P.M. he was in the guardroom inside the Chinese Embassy. At that time, 3-4 taxies came in which some persons were sitting. One of the persons was having Tibetan Flag in his hands and others were having bottles filled with petrol. All of them while raising slogans against China, started pelting stones and also threw fire bottles at the gate of the Embassy due to which the main gate got burnt. They tried to stop them but they threw a glass after lighting it with fire on him due to which his right hand got burnt. He then locked the main gate of the Embassy and in the meantime the police arrived. On the basis of this statement, a case FIR No. 62/1992 under Sections 307/436/427/147/148/149/186/353 IPC was registered. The medical examination of PW2 Ram Shresth Mandal was done. Constable Manoj Kumar alleged that the Appellants gave him fist blows on his chest. On completion of investigation, charge-sheet was filed. Co-accused Tashi

absented during trial, thus he was declared a proclaimed offender. After recording statement of 11 prosecution witnesses and the accused, the Appellants were convicted for offences punishable under Sections 324/149 IPC and sentenced to Rigorous Imprisonment for a period of one year and a fine of ₹500/- each and in default of payment of fine to further undergo Simple Imprisonment for 15 days. They were further convicted for offences punishable under Section 435/149 IPC and sentenced to Rigorous Imprisonment for a period of three years and a fine of ₹1000/- each and in default of payment of fine to further undergo Simple Imprisonment for one month. They were also convicted for offence punishable under Sections 186/149 IPC and sentenced to Rigorous Imprisonment for a period of one month and a fine of ₹100/- each and in default of payment of fine to further undergo Simple Imprisonment for one day. They were also convicted for offence punishable under Sections 353/149 IPC and sentenced to Rigorous Imprisonment for one year and a fine of ₹500/- each and in default of payment of fine to further undergo Simple Imprisonment for 15 days. They were convicted for offence punishable under Sections 148/149 IPC and awarded a sentence of Rigorous Imprisonment for one year and a fine of ₹500/- each and in default of payment of fine to further undergo Simple Imprisonment for 15

days. This judgment of conviction and order on sentence in Sessions Case No. 72/1993 is impugned in the present appeal.

2. Learned counsel for the Appellants contends that PW 2 Ram Shresth Mandal the maker of the FIR who is also injured alongwith PW1 Om Prakash who were the guard and supervisor at the Chinese Embassy and thus natural witnesses have turned hostile and have not identified the Appellants as the accused. PW11 Constable Manoj Kumar is also an injured witness who has alleged that he was given fist blow by the Appellants however he has not identified the Appellant who gave him the fist blows. Moreover, his MLC was got conducted after six hours of the incident. There was no apparent injury on his body. No role has been ascribed to the Appellants by PW11. The case of the prosecution is contrary as PW1 and PW2 state that the rioters came in 2-3 taxies whereas PW11 has stated that taxies were stopped at Shanti Path because of the heavy 'bandobast' in view of the arrival of the Chinese President. The presence of the Appellant has been proved because of two suggestions given by the Appellants in cross-examination. Reliance is placed on *Vikas & Ors vs. State of Karnataka, II 2008 CCR 280 (SC)* and *Narain Singh & Another vs. State, 1997 (2) Crimes 464* to contend that the prosecution has to prove its case beyond reasonable doubt and for the same it

has to stand on its own legs and cannot to take advantage of the weaknesses of the defence.

3. It is further contended that DD No. 55/B which was the information received by the police has been suppressed and not placed on record. Thus an adverse inference has to be drawn against the prosecution in this regard. As per the investigating officer, PW7 he went to the spot on receipt of DD No. 55/B. Thus that being the FIR, the statement of PW2 on which the FIR is registered is non-est. Since PW2 in his statement has stated that he made the statement in the evening, the FIR is clearly ante-timed. No stones or glass pieces were seized. All the seizure memos bear the signatures of PW1 and PW2 who have clearly stated that they did not see the Appellants on that date. It is further stated that the offence under Section 149 is not made out as no sharp injury has been proved by the prosecution. Even an offence under Sections 323/149 is not made out because the complaint of chest pain by PW11 was reported after six hours and not soon after the incident. Neither PW4 nor PW11 have named the Appellants. Furthermore, the provisions of Sections 439/149 IPC are not attracted as no mischief of fire explosive was proved. There is no fire report nor was fire tender called. There is no damage proved to the iron-gate and sofa as the same have not been seized and produced in the Court. Value of the property destroyed in fire being more than

₹100/- is presumptive as no report of the loss has been got prepared and no offence in this regards has been led. Moreover, the claim of the prosecution is that the Appellants were arrested from the spot. However from their personal search neither any match box nor lighter nor match stick has been recovered. The offences punishable under Sections 353/186 IPC are also not made out as no hindrance has been caused to any public servant in discharge of his official duty. Moreover, the essential requirement that the officers was deterred in performing of their duty has also not been stated by PW4 and PW11, thereby not attracting Section 353 IPC. Even in the complaint under Section 195 Cr.P.C. Ex. PW8/A there is no allegation of obstruction or any injuries which were caused to deter them from duty. Even if assuming that an injury was caused, the same was simple which would not attract the provision of Section 353 IPC. Reliance is placed on *P. Rama Rao vs. State of Andhra Pradesh, 1984 CrL. L.J. 27*. The provisions of Sections 148/149 are also not attracted as the petrol bottles are not deadly weapons. Moreover, allegedly these bottles were thrown at the Chinese Embassy Gate and a gate of iron would not catch fire with such petrol bottles. Relying on *Nand Kishore Mohanti vs. State of Orissa, AIR 1961 Orissa 29* it is stated that the constructive liability envisaged under Section 149 IPC cannot apply to an offence under Section 148 IPC. In the alternative, it is stated that the Appellants are all aged around 60 years and

19 years have elapsed since the alleged incident occurred. There is no previous nor any subsequent criminal record of the Appellants. They have faced the ordeal of trial and have been regularly appearing in the trial court and in this Court since 19 years. They have suffered custody of 31 days and have already deposited the fine. The Appellants are also leading lives as refugees in this country and so they be not sent to jail after 19 years and the sentence be reduced to the period already undergone.

4. Learned APP on the other hand contends that PW1 and PW2 have clearly stated that glass bottles after burning were thrown at the guardroom. The window panes of the guardroom were also broken and sofa set caught fire. Though, PW1 and PW2 have not supported the prosecution case as to the identity of the Appellants but rest of the entire prosecution version has been supported by the PW1 and PW2. The identity of the Appellants is established by the testimony of PW4 Constable Satinder Singh and PW11 Constable Manoj Kumar. Even if the provisions of Section 435 IPC is not attracted, the provisions of Section 425 read with explanation punishable under Section 426 IPC is clearly attracted which is duly corroborated vide MLC of PW2 and PW1. The said MLCs were not required to be proved as the same were not disputed by the accused. From the statement of PW4 and PW11 duly corroborated by the MLC of PW11, the offence of obstruction and

assault and obstruction in official duty i.e. Section 353/149 and 186/149 are clearly proved. The presence of the Appellant is proved by the positive testimony of the prosecution witnesses PW4 and PW11 who have duly identified them. PW2 though failed to identify the witnesses however, he admits his statement Ex. PW2/A being recorded and also the personal search memos Ex. PW D/1 to Ex. PWD/9 and that the same bear his signatures. Both PW4 and PW11 have stated that the accused persons were beating Manoj and also gave fist blow to PW11. PW7 SI Ram Sunder who also reached the spot has also stated that he saw the Appellants quarrelling with the Special Task Force. Thus obstruction in discharge of official duty is clearly proved and from the act the deterrence is also proved. PW7 has also identified all the Appellants and has named the Appellant Choegyal as the one who was holding Tibetan Flag which was seized from him vide Memo Ex. PW7/A. Thus, in view of the testimony of PW4, PW11 duly corroborated by PW1, PW2 and PW7, the prosecution has proved its case beyond reasonable doubt and it is prayed that the appeal be dismissed being devoid of any merit.

5. I have heard learned counsel for the parties and perused the records. PW2 Shri Ram Shresth Mandal the maker of the FIR has stated that on 11th March, 1992 about 12:45 P.M., he was present in the guardroom inside the

Embassy building when he started taking food. In the meantime, 3-4 taxies in which persons sitting with Tibetan Flags came. On seeing the taxies, he tried to lock the gate of the Embassy. The persons sitting in the taxies started pelting stones outside the gate of the Embassy. He went inside and informed offices that some persons have come in taxies and are throwing stones at the Embassy. In the meantime, police also reached there. He showed the burnt sofa and some broken window panes. He was not injured in the incident. The police officers came at the spot and apprehended the persons who were throwing the stones. His statement was recorded at the spot vide Ex. PW2/A and he also signed the personal search memos of the accused persons Ex.PW D1 to D9. Though he resiled as to the identification of the persons and has deposed that nothing material was seized in his presence, however, he identified his signatures on the seizure memos Ex.PW1/A, Ex. PW1/B and Ex. PW1/C. On cross-examination by the learned APP, he admitted that he was medically examined on the same day and he did not remember whether he had told to the police that he had received injury on his right hand due to throwing of petrol bottle. Similarly, PW1 Shri Om Prakash who was a supervisor of Chinese Embassy stated about the persons coming in the taxies having Tibetan flags, throwing glass bottles at Chinese Embassy causing fire in the guardroom, breaking of the window panes and burning of the sofa set. He

stated that he did not receive any injuries but PW2's hand was burnt at the gate of the Embassy. He also failed to identify the Appellants however admitted his signatures being taken on memos Ex. PW1/A, Ex. PW1/B and Ex. PW 1/C. He also identified his signatures on the personal search memos Ex. PW1/D1 to Ex PW1/D9. PW4 Const. Satinder Singh in his testimony has stated that he was posted in the 7th Battalion and at about 12:45 PM he along with Const. Manoj was patrolling at Shantipath. In the meantime, 2-3 taxies came towards the Chinese Embassy main gate. One person was having flag and the remaining persons were having petrol bottles. He and Constable Manoj tried to apprehend the accused who were present in the Court but they started beating Manoj. Thereafter, he informed the PCR and also informed at the Chankyapuri Police Station. Senior police officers reached there and local police also reached at the spot and arrested all the accused persons. PW11 Constable Manoj Kumar has also reiterated the same facts as stated by PW4. He deposed that on 11th March, 1992 he was posted in Special Task Force in Police Station Chanakyapuri and at about 12.45 PM he along with PW4 was on patrolling duty at Shanti Path near Chinese Embassy. About 8-10 persons got down from three vehicles and proceeded towards Chinese Embassy. The person leading them was having a Tibetan Flag in his hand and rest all were having bottles with wick on it. When he and PW4 tried to stop them in front

of Chinese Embassy, they started abusing them and gave him fist blows. He has identified the 8 Appellants and one more person who had assaulted him and had thrown burning bottles at the Chinese Embassy. The witness further deposed that after he was beaten and as he felt pain on the right side of his chest which increased by the evening, he was medically examined at the RML Hospital. PW7 Sub-Inspector Ram Sunder, the Investigating Officer who reached at the spot has stated that he saw the Appellants quarrelling with Constables of Special Task Force and that the gate of Chinese Embassy was burnt and window panes were broken. This witness has identified Appellant No.1 Choegyal as the person who was holding the Tibetan Flag in his hand which was seized by him vide Memo Ex.PW7/A. He arrested the accused and conducted his personal search vide memo Ex.PW1/D1 to D9. He also seized the caps of broken bottles Ex/P3 and coloured bands with some inscription on it Ex. X1 and X2 vide memo Ex. PW1/C. Broken glass pieces lying outside and inside the Chinese Embassy and from inside the guard room were also seized vide memo Ex.PW1/A. Thus, from the testimony of PW7, PW11 and PW4 duly corroborated by PW1 and PW2 to the extent of the occurrence of incident, it is proved that the Appellants on the date of incident reached at the Chinese Embassy and raised slogans against China and manhandled the police officials and hence were arrested on the spot by PW7. Though PW1 and PW2

have denied the identity of all the Appellants who were apprehended at the spot but they have admitted having signed the personal search memo Ex. PW1/D1 to D9. Thus, in my opinion, the prosecution has proved the presence of the Appellants at the spot and the rioting committed by them in furtherance of their common intention. The identity of the Appellants is being duly proved by PW 11, PW 4 and PW7 who arrested them on the spot; even though PW1 and PW2 have turned hostile. Thus, there is no merit in the contention of learned counsel for the Appellants that the presence of the Appellants at the spot has been held to be proved because of the suggestions given on behalf of the Appellants and the prosecution has not proved its case and the conviction is based on the weaknesses of the defence.

6. As regards offence under Section 324/149 IPC is concerned, PW 2 has denied having received any injury however he has admitted that he was medically examined on that day. The MLC of PW 2 has not been disputed during the trial by the accused persons. It is well settled that an admitted document is not required to be proved. As per the MLC, there was a small burn of about 1 c.m. at lower half of the interior aspect of right forearm with slight blister formation. The nature of injury was opined to be simple. Even the MLC of PW 11 Constable Manoj Kumar has been admitted by the accused persons and thus was not required to be proved. As per the MLC, the injury

on the person of PW1, was tenderness at the right side of Anterior chest wall and nature of injury was opined to be simple caused by a blunt object. Thus, I find no infirmity in the conviction of the Appellants under Sections 324/149 IPC for causing hurt by burn is proved by the Prosecution.

7. As regards offence under Section 435 is concerned, it may be noted that the CFSL Report has not been proved by the prosecution nor the burnt articles were seized. What has been seized and proved is broken glass pieces and in the absence of proof that mischief was caused by fire, the Appellants are liable to be convicted for offence punishable under Section 426 IPC.

8. From the testimony of PW11, PW4 and PW7, it is clear that the Appellants obstructed the police officers in discharge of their duties. The Appellants even assaulted PW11 thereby causing deterrence to the police officers in performance of their duty which can be inferred from the facts of the present case and the testimonies of PW11 and PW4 deposing about the same and hence there is no infirmity in the impugned judgment convicting the Appellants for offence punishable under Sections 353/186/149 IPC. The reliance of the Appellant on *P. Rama Rao (supra)* is misconceived and the same has no application to the facts of the present case. In the said case, there was no deterrence caused and thus the Court came to the conclusion that the provision under Section 353 IPC was not attracted.

9. As regards the conviction under Sections 148/149 IPC is concerned, the presence of the Appellants have been proved. It is proved that they formed an unlawful assembly with the object of rioting and thus there is no infirmity in judgment on this count. Thus, the judgment of conviction of the Appellants is maintained, except modifying it from an offence under Sec. 435 IPC to that for offence under Section 426 IPC.

10. The Appellants have been awarded a sentence of imprisonment for one year and fine of ₹500/- each for offence punishable under Sections 353/324/149/148 IPC and Rigorous Imprisonment for one month and a fine of ₹100/- each under Section 186 IPC, the Appellants have already paid the fine. Since the conviction of the Appellants is modified from that under Section 435 IPC to that under Section 426 IPC which is punishable upto three months, in my opinion, it would be in the interest of justice that the sentence of the Appellants is modified to that of the period already undergone particularly in view of the fact that they have faced the ordeal of trial in the present appeal for the last 19 years. The appeal is disposed of accordingly.

(MUKTA GUPTA)
JUDGE

JULY 07, 2011
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