

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

DECIDED ON: NOVEMBER 03, 2011

+ CRL. APPEAL No. 74/2011

SUNIL DUTTA & ORS. Appellants
Through: Mr. O.P. Wadhwa, Adv.

Versus

STATE Respondent
Through: Mr. M.N. Dudeja, APP for the State

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MS. JUSTICE PRATIBHA RANI

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

MS. JUSTICE PRATIBHA RANI (OPEN COURT)

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1. The appellants impugn the judgment and order of the learned Additional Sessions Judge dated 21st December, 2010 in S.C. No. 33/2010. The Appellants were convicted for committing offence punishable under Section 302/34 IPC and were sentenced to undergo life imprisonment with fine of ₹ 2000/- and in default to undergo rigorous imprisonment for one month.

2. The prosecution case is that on the night intervening 21-22nd November, 2007, information was received at P.S. Patel Nagar regarding a quarrel going on at Gurudwara Singh Sabha at T-251, Baljeet Nagar, Delhi. The said information was recorded vide DD No. 5A and assigned to ASI Ranbir Singh for necessary action. On the same night at 1.30 AM, information was received from DDU Hospital that an unknown person had been admitted in injured condition by PCR, after being lifted from in front of Gurudwara Singh Sabha, Patel Nagar. The information was also recorded by DD no. 9A and copy of the same was also sent to ASI Ranbir Singh. He first visited the spot and then to DDU Hospital and obtained his MLC which disclosed that the injured was unfit for statement. He again visited the spot and recorded the statement of Mahender Singh Ex. PW5/B1, an eye witness and on the basis of that statement, the case bearing FIR No. 628/2007 was registered at P.S. Patel Nagar.

3. The statement made by Shri Mahender Singh Ex. PW5/B1 disclosed that on the night of 22nd November, 2007, at about 12.15 AM, on hearing some noise, he came in the gallery and saw 4-5 members of Dutta family present downstairs and trying to ascertain the whereabouts of Babloo saying that he would not be spared on that day. They went to the Granthi of the Gurudwara and asked him to open the door. Then the Granthi went downstairs to enquire into the matter. After he went downstairs, the Dutta family kicked the door and entered, uttering that Babloo was inside. He heard the sounds of quarrel, beating and cries from inside the Gurudwara and after sometime, saw the three Appellants pulling Babloo by the hair and hands, and dragging him out of the Gurudwara. After throwing Babloo in front of the gate of Gurudwara on to the road, they started beating Babloo with bricks, stones and danda. When he tried to intervene, he was also abused and kicked. Thereafter, they telephoned uttering the words '*humne sardar ko lita diya vaa maar diya, use utha le jaao*'. Thereafter, the members of Dutta family left the spot.

4. During investigation, statement of Babloo could not be recorded because of his unfit condition. On 4th December, 2007, information was received regarding death of the injured Babloo from the Hospital and DD No. 14A was recorded. The dead body was sent for post mortem.

5. During investigation, all the accused were arrested and interrogated. The stone pieces which caused injuries to Babloo were seized and one broken baseball bat was also produced by PW-9 Parminder Singh, Granthi of the Gurudwara stating that it was used for beating Babloo and thrown thereafter in the gali.

6. After committal of the case to the Court of Sessions, Appellant/Accused nos. 1 to 3 were charged for committing the offence punishable under Section 302/34 IPC. The Accused nos. 4 and 5 are proclaimed offenders.

7. In order to substantiate its case, prosecution examined 27 witnesses. Out of them, (PW-5) Shri Mahender Singh; (PW-9) Parminder Singh, granthi of the gurudwara; and (PW-15) Smt. Inder Jeet Kaur, wife of the granthi are material witnesses to the occurrence. (PW-7) Dr. M.K. Wahi, Specialist and Associate Professor, Safdarjung Hospital and Vardhman Mahavir Medical College, Delhi conducted post mortem on the body of deceased Babloo. He found that there were 12 external injuries and opined that cause of the death was head injury.

8. We have heard Mr. M.N. Dudeja, learned APP for the State, Mr. O.P. Wadhwa, counsel for the Appellants and have carefully gone through the Trial Court record. Mr. O.P. Wadhwa, learned counsel for the Appellants opened his arguments submitting that it is a fit case for acquittal of the Appellants in view of the fact that the injured has been removed to DDU Hospital as 'unknown' by PCR on the alleged telephone call vide DD No. 5A and there is delay in registration of FIR which is fatal to the case. It has been submitted that weapon of offence used in this case are danda/broken baseball bat, brick pieces and small stones which cannot be termed as dangerous weapon so as to impute the necessary intention to commit the murder with the said weapon.

9. Counsel for the Appellants urged that the eye witnesses Mahender Singh and Parminder Singh, (granthis of the gurudwara) were planted by the prosecution next day after due deliberation and in fact, it was not just possible for PW-5 to witness the incident from his gallery. Further, if Parminder Singh, had witnessed the occurrence, he would have accompanied the injured to the hospital. But here from the testimony of the prosecution witnesses, it has emerged that after due deliberations and meetings at gurudwara, a report was lodged by PW-5 Mahender Singh. There is also contradiction in

the statement of PW-5 Mahender Singh as to whether his statement was recorded at the Police Station or at Gurudwara which in itself makes the prosecution case doubtful. Not only that, the injured was admitted as 'unknown' by the PCR. In such circumstances, when injured was known to all, at least the police could have been informed about his identity and some residents who gathered at the spot could have accompanied him to the hospital. Since none accompanied the injured to the hospital and even the complaint was lodged next day in the afternoon and rukka was sent at 2.30 PM on 22nd November, 2007, this in itself is sufficient to cast suspicion about the presence of PW-5 Mahender Singh and PW-9 Parminder Singh at the spot. Not only that, the site plan shows that from the gallery, the place of occurrence is not visible and whatever too occurred inside the room could not have been seen either by PW-5 or PW-9. In these circumstances, not much weightage can be attached to their testimonies especially when PW-15 Smt. Inder Jeet Kaur, wife of the granthi, preferred not to support the prosecution case.

10. It has further been submitted by the Appellants's Counsel that the injured was a Sikh and PW-5 Mahender Singh and PW-9 Parminder Singh also being Sikhs, were interested witnesses. It has been admitted by them during their cross-examination that the injured was known to them since his childhood and they had all sympathies for him, as he was working as Sewadar in gurudwara. Learned counsel for the Appellants urged that the deceased was a bad character facing criminal trial in number of cases and the Appellants had gone to have a talk with him to persuade him to mend his ways and they had no intention to commit his murder. Not only that, the second Appellant Sandeep Dutta was not present at the spot as he had gone for a DJ programme at Rajender Nagar near fire station and returned at about 2.30 AM.

11. Learned counsel for the Appellants urged that in the statement of PW-9, he disclosed his address not of gurudwara but some other place which makes his presence at the spot highly suspect .

12. Statements of the three Appellants under Section 313 Cr. P.C were recorded in which all the them denied the case of prosecution and claimed that PW-5 and PW-9 are false witnesses, who deposed against them due to enmity. Sunil Dutta, the first Appellant claimed that he was present at J-38, West Patel Nagar where he was employed

and he was contacted by police on his telephone. Further, the accused Sandeep Dutta, Appellant no. 2 stated that he had gone to attend a DJ party organized at Rajender Nagar near fire station and returned from there at about 2.30 AM. All the three Appellants also produced two defence witnesses DW-1 Ms. Sandhya Anand and DW-2 Sanjay Thakur in their support, whose testimonies were not considered to be credit worthy by the learned ASJ.

13. Counsel for the Appellants laid great emphasis on the report of the Radiologist that there was no bone injury and in that circumstance, none of the Appellants could have been convicted for the offence punishable under Section 302/34 IPC and at the most, the case was covered by Exception 4 to Section 300 IPC; resultantly there could have been conviction only under Section 304 IPC. In support of his contentions, reliance has been placed by learned counsel on the judgment rendered by this High Court in ***Ramcharan vs. State - 1983 (2) Recent Criminal Reports 35***; and the judgment rendered by Punjab and Haryana High Court in ***Jagir Singh and Ors. vs. State of Punjab - 2004 (2)Recent Criminal Reports 738***.

14. On behalf of the State, Mr. M.N. Dudeja, learned APP submitted that the presence of PW-5 Mahender Singh and PW-9 Parminder Singh at the spot was proved from their testimonies and being not related to the deceased in any manner, the mere fact that they had sympathy for him, they could not be termed interested witnesses. It was contended that the delay in lodging FIR is not fatal to the case of prosecution as public witnesses might have been fearing for their own safety after seeing what happened to Babloo, since Appellants were residents of the area. Therefore, they might have reported the matter after some time. Therefore, the delay is well explained. Mahender Singh PW-5 and Parminder Singh PW-9 deposed in a natural manner and their testimonies are sufficient to prove the guilt of the Appellants, who were rightly convicted under Section 302/34 IPC.

15. We have considered the Trial Court record especially the testimonies of PW-5 Mahender Singh, PW-9 Parminder Singh and PW-15 Inder Jeet Kaur, who are material witnesses as well as the post mortem report. PW-5 Mahender Singh, the complainant is an old man and a resident of the area, who happened to go to the gallery after hearing noise outside. He saw the Dutta family i.e. the Appellant nos. 1-3 and their parents

Accused Nos. 4-5 downstairs, looking out for Babloo, the deceased. The entire testimony of this witness is without any embellishment. He deposed in a natural manner, to the extent what he could see from the gallery and subsequently, what he did after seeing Babloo being beaten in the gali. The manner in which PW-5 Mahender Singh was dealt with by the Appellants i.e. they grappled with him and abused him, was sufficient for him to look out for personal safety first and then help the injured, by deposing against the Babloo. The presence of Mahender Singh at the spot i.e. gali is admitted even by PW-9 Parminder Singh, Granthi of the Gurudwara. So far as testimony of PW-9 Parminder Singh is concerned, there is nothing on record to discredit his testimony that he was a Granthi residing with his wife in the Gurudwara where the deceased Babloo was working as Sewadar and also residing in the Gurudwara.

16. PW-15 Smt. Inder Jeet Kaur, wife of Parminder Singh, Granthi of the Gurudwara was declared hostile. Yet she did support the prosecution to the extent of deposing about opening of door by her husband on hearing sounds of a quarrel, going downstairs and seeing five persons accompanied by one lady beating Babloo in the sewadar's room. She rushed back and informed the police. However, she expressed inability to identify the assailants who beaten to Babloo. She did not support prosecution on identity of Appellant. But in cross-examination by learned APP, when confronted with her statement Ex. PW15/A to the police where certain facts were mentioned (but which were omitted in the court), she admitted that all the accused were present at the place of incident and were beating Babloo. The testimony of PW-15, (PW-9's wife) cannot be effaced just for the reason that she was cross-examined by learned APP on the issue of identity of the Appellants. Her testimony, to the extent it corroborates the testimonies of PW-5 and PW-9, can be considered as it inspires confidence; she is also claimed to have informed the police about the incident. So, her presence at the time of incident at the gurudwara, which she claimed to have informed to the police, is well established.

17. Another contention of learned counsel for the Appellants that PW-5 Mahender Singh and PW-9 Parminder Singh are interested witnesses having sympathy with the deceased, since they belonged to the same community and the deceased was living there since beginning, is liable to be rejected, because if that were the case, at least some of

them would have accompanied the injured to the hospital and would not have left him to be registered as 'unknown person' with none to take care of him in that critical condition. Rather they were independent public witnesses reluctant to even lodge the report with the police till the issue was discussed by the residents informally at the Gurudwara.

18. So far as delay in lodging of FIR Ex. PW-2/A and delay in making of statement by Mahender Singh, PW-5 Ex. PW-5/B1 is concerned, the submission of learned counsel for the Appellants is that the said statement Ex. PW-5/B1 was made after due deliberation with the other residents of the area.

19. In ***State of A.P. vs. S.Rayappa and Ors.(2006) 4 SCC 512***, the Supreme Court commented upon the reasons for reluctance of the public persons to join as witnesses in criminal cases. In para 7 of the report, it was observed as under:-

“7. On the contrary it has now almost become a fashion that the public is reluctant to appear and depose before the Court especially in criminal case because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are a harassed lot. They are being threatened, intimidated and at the top of all they are subjected to lengthy cross-examination.”

20. It would be pertinent to mention here that, perhaps, Mahender Singh PW-5 could not muster enough courage to be a witness against the Appellants (after seeing the fate of deceased Babloo at the hands of the Appellants). He needed some kind of social and moral support so that he also does not meet the same fate as that of deceased Babloo and when residents of the locality gathered to discuss the issue, he decided to report the matter to the police giving details of the occurrence. We are of the opinion that in the circumstance, delay in making complaint is explained and it cannot be inferred that there was any kind of manipulation.

21. We would like to observe here that the investigation has been conducted in a fair manner. Even the broken baseball bat has been shown to have been produced by PW-9 Parminder Singh, Granthi and not by or at the instance of the Appellants. The plea of *alibi* taken by the Appellant no. 2 Sandeep Dutta is concerned, there is no documentary evidence including booking order or photograph of the function produced in defence in support of his plea and this plea has rightly been rejected by the learned ASJ.

22. In the instant case, prosecution has been able to prove that the Appellants along with co-accused entered the Gurudwara in furtherance of their common intention to settle some score with deceased Babloo. They gave him beatings in his room and then dragged him on the road and beat him again with stone and a broken baseball bat etc. The manner in which the Appellants first went into the gali, barged into the Gurudwara after kicking the door without even letting PW-9 Parminder Singh to enquire into the matter and gave beatings to deceased Babloo in the room and subsequently on the road, is sufficient to infer that they were acting in furtherance of their common intention.

23. Most of the contentions raised before us by learned counsel for the Appellants were also raised before the Trial Court; and have been dealt with in right perspective by the learned ASJ. We do not find any reason to differ with the reasoning given by learned ASJ.

24. Once the incident and the manner in which injuries were caused to deceased Babloo by the Appellants is proved, the other question that arises for consideration is as to on the facts established, what offence was committed. From the nature of the injuries, post mortem report as well as testimonies of PW-5 Mahender Singh and PW-9 Parminder Singh, it is clear that the beatings were given to the deceased with stone, danda, kicks and blows and thereafter, a telephone call was made by the Appellants uttering that *sardar* be removed. It shows that they had no intention to commit the murder of deceased Babloo.

25. To invoke exception IV to Section 300 of the Code, the accused has to show that “(i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner.”

26. The cause of quarrel is not relevant nor is it relevant as to who offered the provocation or started the assault. What is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger and must not have taken any undue advantage or acted in a cruel manner.

27. In ***Surinder Kumar vs. Union Territory, Chandigarh, (1989) 2 SCC 217***, it was observed that “where, on a sudden quarrel, a person in the heat of the moment picks up a

weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly.”

28. Reverting to the facts of the present case, no doubt the time of visiting Babloo by the Appellants and their parents (Proclaimed offenders) was very odd i.e. at midnight but at the same time, the Court has to consider that they were visiting the Gurudwara which remains open till late night and they were residents of the area. They were also not armed with any deadly weapon. They used stones, bricks and broken baseball bat on which they could lay hand. After giving some beatings, they left the injured on the road. Thus, they neither took any undue advantage nor acted in a cruel manner.

29. In view of the above discussion, we are of the considered view that case of the Appellants falls under Exception 4 to Section 300 of the Code and therefore, conviction of the Appellants has to be altered from Section 302/34 IPC to Section 304 Part II IPC.

30. The appeal is partly allowed and punishment of imprisonment for life awarded to the Appellants is also altered to rigorous imprisonment for 7 years and fine of ₹ 2000/- and in default, simple imprisonment for one month.

31. The Appeal is partly allowed in the above terms.

**PRATIBHA RANI
(JUDGE)**

**S. RAVINDRA BHAT
(JUDGE)**

**NOVEMBER 03, 2011
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