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

+ **CRL. A. 376/2003**

Date of Decision: 14th August, 2013

1. SURENDER
2. RAM KARAN
3. JAGDISH
4. RAM KUMAR
5. SATYAWAN

..... Appellants

Through: Mr. P.C. Sharma, Advocate with
appellant Nos. 2, 4 and 5 in person.

versus

STATE (GOVT.OF NCT OF DELHI)

..... Respondent

Through: Ms. Fizani Husain, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The present appeal has been preferred against the judgment dated 14.05.2003 passed by learned Additional Sessions Judge in Sessions Case No.430/1996 arising out of FIR No.253/1990 u/s 307/323/452 IPC, P.S. Mehrauli vide which the appellants were held guilty for offences u/s 452/ 323/307 r/w Section 34 IPC and the order dated 23.05.2003 vide which they were sentenced as under:-

(i) For offence u/s 307 IPC, the convicts were sentenced to undergo rigorous imprisonment for a period of two years and to

pay a fine of Rs.500/- each, in default of payment of fine to undergo simple imprisonment for two months each;

(ii) For offence u/s 452 IPC, they were sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.300/- each, in default of payment of fine to undergo simple imprisonment for one month;

(iii) For offence u/s 323 IPC, they were sentenced to undergo simple imprisonment for one month and to pay a fine of Rs.200/- each, in default of payment of fine to undergo simple imprisonment for 15 days each.

2. Prosecution case emanates from the fact that on 05.10.1990, on receipt of D.D No.17A, Ex.PW 11/A, SI O.P.Yadav (PW11) along with HC Tara Chand (PW8) and Const. Anil Kumar went to house of Sahib Singh in village Neb Sarai, where he came to know that injured have been removed to hospital. After leaving HC Tara Chand at the spot, he along with Const. Anil Kumar went to AIIMS where he found injured Jal Singh, Sahib Singh, Basanti Devi and Preet Singh admitted there. Injured Jal Singh, Basanti Devi and Sahib Singh were declared 'fit for statement' while Preet Singh was declared 'unfit for statement'. Statement of Jal Singh was recorded who stated that he is resident of village Neb Sarai. On 05.10.1990 he along with Preet Singh was sitting on the shop of building material. At about 8.30

p.m. some person from the village came and informed that some villagers had entered their house and were beating their father. He along with his brother went to his house and saw that blood was oozing out from the head of his father and from both hands of his mother. On enquiry, his father told him that he and his mother, after taking dinner, were talking to each other. All of a sudden, Deep Chand and his sons Ram Karan, Ram Kumar and Jagdish came armed with jelly and lathies in their hands. Deep Chand caught hold of his father; Jagdish caught hold of his wife; Ram Karan hit his father with lathi on his head; Ram Kumar hit his mother on hand with jelly and after giving injuries to them they fled away from the spot. While he was taking his parents to hospital, son of Jagdish, namely, Satyawar, Surender and Raj Kumar, son of Ram Mehar came. They were having lathies and Jelly in their hands. All of them came inside their house and threatened to finish them. Raj Kumar caught hold of him and Surender hit Jal Singh on his head. When his brother Preet Singh tried to stop him, Satyawar hit his brother on his head with jelly and also hit him on his hand and then the ladies of the house came there to stop him and threw stones on them and raised alarm. When the neighbours came, all the accused persons ran away from the house.

All the accused had entered the house and gave injuries with intention to kill them. This statement culminated in registration of FIR against the accused persons.

3. During the course of investigation, site plan was prepared, statement of witnesses were recorded. Two lathies and one jelly was recovered. After collecting the result of MLC, charge-sheet was submitted in the Court. On committing the case to the Court of Sessions, charge for offence u/s 452/307/506/325/323 IPC was framed against the accused persons to which they pleaded not guilty and claimed trial.

4. In order to substantiate its case, prosecution examined 11 witnesses. During the pendency of the trial, two of the accused, namely Ram Kumar and Deep Chand expired. All the incriminating evidence was put to the accused persons while recording their statements u/s 313 Cr.P.C in which they denied the case of prosecution, claimed innocence and alleged false implication in this case. Vide impugned order, the appellants were held guilty of offence u/s 452/323/307 IPC read with Section 34 IPC and were acquitted of the charge for offence u/s 506/34 IPC. Feeling aggrieved by this order, the present appeal was filed by five appellants. However,

during the pendency of the appeal, appellant No.1 Surender and appellant No.3 Jagdish have expired.

5. I have heard Mr. P.C. Sharma, Advocate for the appellants and Ms. Fizani Hussain, learned Additional Public Prosecutor for the State and have perused the record.

6. It was submitted by learned counsel for the appellants that out of the 11 witnesses examined by prosecution, the material witnesses are PW Nos. 2, 3, 4 and 5. The complainant Jal Singh had already expired, as such, he could not be examined by prosecution. As regards PW-3 to 5, they are all relation witnesses. Moreover PW Nos. 4 and 5 have not supported the case of prosecution. Even as regards PW3 is concerned, it was stated that the matter was later on compromised. Both the parties are distantly related to each other. As regards PW2 Mangat Ram is concerned, he is not an eye witness to the incident. Furthermore, three MLCs were prepared by one doctor while one MLC was prepared by another doctor. However both the doctors have not been examined. Instead only the record clerk has been examined. That being so, the nature of injuries on the person of injured is not proved. Reliance was placed on ***Rajesh@ Vimal Kumar and Another V. State (Delhi Admn.)***,1995 JCC 148. It was

further submitted that in the site plan, the house of injured has not been shown. Under the circumstances, no case u/s 452 IPC is made out. There is no injury on head by jelly, as such offence u/s 307 IPC is also not proved. There are contradictions in the testimony of the witnesses as such, no reliance can be placed on the same. Reliance was placed on *Namdeo Daulata Dhayaqude & Ors v. State of Maharashtra*, AIR 1977 SC 381. It was further submitted that the appellants have faced protracted trial for the last 26 years but they were not granted the benefit of probation. As such the impugned order deserves to be set aside. In the alternative, leniency in sentence was prayed for.

7. Rebutting the submission of learned counsel for the appellant it was submitted that as regards actual incident, PW4 and 5 have supported the case of prosecution. It was only regarding the identity of the accused persons that they turned hostile. Moreover PW3 fully supported the case of prosecution and his ocular testimony finds corroboration from the medical evidence. As such the impugned order does not suffer from any infirmity which calls for interference.

8. I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have perused the record.

9. The material witnesses are PW-2 Mangat Ram, PW-3 Sahib Singh, PW-4 Smt. Basanti Devi and PW-5 Preet Singh.

10. PW-2 Mangat Ram is not an eye-witness to the incident. According to him, on 5th October, 1990, he had come to village Maksoodpur for seeing the construction of his house where he came to know that stock of cement was finished. So he went to Neb Sarai, at the shop of Preet Singh for purchase of cement. He was informed by the employee of Preet Singh that he had left for his house. He went to the house of Preet Singh and found Preet Singh, Jal Singh, Sahib Singh and Basanti in injured condition and they were taken to hospital by PCR Van. Some local police came. Two lathies and one jelly, Ex. P-1 to Ex. P-3 were seized from the spot vide memo Ex. PW-2/A.

11. PW-3 Sahib Singh is one of the injured and has deposed that on 5th October, 1990 at about 8/8.30 pm, he along with his wife were talking to each other after taking dinner. At that time, Deep Chand along with his sons came inside. Deep Chand caught hold of him and

his sons hit him with lathies and jellies on his head, back and thigh. His wife also received jelly injury over her hand. Deep Chand and his sons Ram Kumar, Jagdish and Raj Kumar came first and attacked him. Thereafter, three other persons came and attacked him and his sons. After that, police was informed. Police came and took them to hospital. Second time, four persons along with Raj Kumar, whose name he did not remember but correctly identified, came and attacked them.

12. PW-4 Smt. Basanti Devi also unfolded in her statement dated 23rd July, 2001 that about 10/11 years back at about 8.30 p.m., she was present along with her husband inside the house. Her husband was sitting in the gallery while she was doing some household work. At that time, 4-5 persons came inside the house and attacked her husband with lathi. When she came to save him and raised alarm, they fled away. Somebody informed her sons. Thereupon, her sons Jal Singh and Preet Singh came and they were apprised of the facts. In the meantime, 5-6 persons armed with lathies came and attacked all of them. They raised alarm then they ran away. She received injuries on her hand while her husband received injuries on his head, shoulder and back. Her son received injuries over his head. They

were removed to hospital. She, however, could not identify the accused persons by deposing that it was dark. Since the witness did not support the case of prosecution regarding the identity of the accused persons, she was cross-examined by learned Public Prosecutor and in cross-examination also she denied the role of accused persons. She denied that due to compromise, she is deposing falsely.

13. PW-5 Preet Singh has deposed on the lines of PW-4 Basanti Devi and he gave confirmation to the facts as deposed by PW4 that on 5th October, 1990 at about 8/8.45 pm, he along with his brother Jal Singh was present at the shop of building material when some persons of the village came and informed that a quarrel had taken place in his house. He along with his brother went there and saw his mother and father in injured condition. On inquiry, they were informed about the incident that some persons came inside the house armed with lathies and jellies and attacked them. Thereafter, three persons came inside and attacked them with lathies and jellies. However, he also did not identify the accused persons, as such, was cross-examined by learned Public Prosecutor and in cross-examination, he admitted that all the accused persons were his

neighbours. However, he denied that due to compromise in order to save the accused persons, he is not identifying them. He further deposed that his brother Jal Singh has expired and he identified his signatures at Point 'A' on Ex. PW-5/A.

14. The complainant was Jal Singh who had given the statement Ex.PW-5/A which became bed rock of investigation. However, he could not appear as he had expired. However, his signatures on the complaint Ex. PW5/A were identified by his brother Preet Singh.

15. A perusal of testimony of PW-3 Sahib Singh, PW-4 Basanti and PW-5 Preet Singh goes to show that all these witnesses have deposed regarding the incident when initially some persons entered their house and attacked Sahib Singh and Basanti with Lathis and jellies. Thereafter, on being informed about the incident, Jal Singh and Preet Singh also came and were informed about the incident by their parents. In the meanwhile, 5-6 persons armed with lathies came and attacked them. The injured were removed to hospital. It is pertinent to note that PW-4 Basanti Devi has not been cross-examined at all by learned counsel for the accused. Under the circumstances, as regards her narration of events regarding sustaining injuries at the hands of certain persons while she was sitting in her house along with

her husband goes un-rebutted and unchallenged. Similarly, PW-5 Preet Singh was cross-examined but except for a single suggestion that the complaint Ex.PW-5/A was not signed by his brother in his presence, as regards the actual incident, he was also not cross-examined. That being so, the entire incident in which certain persons entered the house of Sahib Singh and caused injuries on his person as well as Basanti Devi, Preet Singh and Jal Singh goes un-rebutted and unchallenged. It was only on the point of identification of the accused persons that PW-4 Basanti and PW-5 Preet Singh have turned hostile. The mere fact that the witnesses are close relations is no ground to discard their testimony keeping in view the fact that the incident has taken place within the precincts of house of Sahib Singh. There are catena of decisions to the effect that merely because a witness is related, his evidence cannot be eschewed as held in ***Dalip Singh Vs. State of Punjab***, AIR 1953 SC 364; ***Hari Vs. State of Maharashtra***, 2009 (3) SCC (Cri) 1254; ***Mookkiah and Another vs. State rep. by Inspector of Police, Tamil Nadu***, (2013) 2 SCC 89.

16. As regards the person responsible for causing injuries on their person, record reveals that on receipt of DD No. 17A regarding quarrel at the house of Sahib Singh Pradhan in village Neb Sarai,

Inspector O.P. Yadav along with Constable Anil and Head Constable Tara Chand went to the spot where he came to know that injured had been shifted to hospital. As such, he went to hospital and found injured admitted there. An application seeking fitness of the injured for recording statement was moved and the doctor declared the injured to be fit for statement. As such, he recorded the statement of injured Jal Singh, Ex. PW-5/A. A perusal of the same goes to show that in his statement, Jal Singh had stated that he along with his brother was present at his shop of building material. Some villagers informed him that his father was being assaulted by some persons of the village. As such, he along with his brother went to the house and found his father and mother in injured condition. On enquiry, his father revealed that Deep Chand and his sons Ram Kumar and Jagdish armed with jellies and lathis came and Deep Chand caught hold of his father while Jagdish caught hold of his mother and then Ram Karan gave lathi blow on the head of his father while Ram Kumar gave jelly blow on the hand of his mother. Thereafter, they fled away from the spot. When he and his brother were about to take his parents to the hospital, then sons of Jagdish, namely, Satyawar, Surender and Raj Kumar, son of Ram Mehar came armed with jellies

and lathis and exhorted to kill them also. Thereafter, Raj Kumar caught hold of him, Surrender gave lathi blow on the head of Jal Singh. When Preet Singh tried to rescue, then, Satyawar gave jelly blow on the head of Preet Singh and then on his hands. Ladies pelted stone in order to save and raised alarm thereupon they managed to run away from the spot. As such, at the very initial juncture, names of the accused persons with their specific roles were given to the police. Jal Singh, however, could not be examined since he had already died but Sahib Singh in his deposition has correctly identified all the accused persons. May be, that he has not specifically given the role of each and every accused but since several persons came together armed with weapons, as such, common intention can easily be gathered. It has come in the statement of Sahib Singh that there was litigation prior to this occurrence between him and the real uncle of accused regarding allotment of 'gram sabha' land. It has also come that the matter was compromised and thereafter the accused had started coming to their house. That may be the reason that PW-4 Basanti Devi and PW-5 Preet Singh chose not to identify the accused persons despite the fact that they were well known to them from before as they were neighbours. But there is no reason to disbelieve the

testimony of PW-3 Sahib Singh, who had correctly identified the accused persons as the assailant of the crime. Moreover, he was one of the injured and there was absolutely no reason for him to falsely involve the accused persons while allowing the real culprits to go scot free.

17. As regards the fact that there was earlier litigation between the parties, same cannot furnish the motive for false implication because motive is a double edged weapon. The fact that there were earlier disputes between the parties and litigations were pending, also furnishes a motive for the accused persons to enter the house of Sahib Singh and to inflict injuries on all the family members. Under the circumstances, the fact that the injuries on the person of Sahib Singh, Basanti Devi, Preet Singh and Jal Singh were caused by the accused person stands proved. The ocular testimony find corroboration from medical evidence which reveals that the injured were taken to All India Institute of Medical Sciences and MLC of Sahib Singh, Preet Singh and Jal Singh, Ex. PW-7/A to Ex.PW-7/C were prepared by Dr. A.K. Tripathi while MLC Ex.PW7/D of Basanti was prepared by Dr. J. Maheshwari. Furthermore, two lathies and one jelly were seized from the spot vide memo Ex.PW-2/A.

18. It was submitted by learned counsel for the appellant that no offence under Section 452 IPC is made out, inasmuch as in the site plan Ex.PW-11/C, the house of Sahib Singh has not been shown. This submission is devoid of merits, inasmuch as, although specifically name of Sahib Singh is not mentioned in the site plan but the marginal note reflects that 'cot' has been shown and it is mentioned that cot was lying in the gallery of the residential house of Sahib Singh where the incident regarding assault of Sahib Singh and his wife by lathies and jellies was given effect to by the accused persons. As such, the mere fact that at the point where cot was shown specifically it was not mentioned that it was the house of Sahib Singh, does not mean that the incident did not take place in the house of Sahib Singh. In fact, there is ample other material available on record to show that the incident in fact had taken place in the house of Sahib Singh. DD No. 17A was to the effect that the quarrel had taken place in the house of Sahib Singh Pradhan. When the police officials reached the spot, lathis and jellies were also found in the house of Sahib Singh which were taken into possession vide memo Ex.PW-2/A in the presence of PW-2 Mangat Ram. Moreover, all the three injured, namely, Sahib Singh, Basanti Devi and Preet Singh have also

deposed regarding the incident taking place inside their house. As stated above, PW-4 was not cross-examined at all and PW-5 Preet Singh was also not cross-examined on material aspects of the case. Even testimony of Sahib Singh could not be assailed despite the fact that he was cross-examined by the accused persons and nothing material could be elicited to discredit his testimony. As such, it was rightly held by the learned Additional Sessions Judge that the accused persons in furtherance of their common intention committed house trespass with intention to commit offence while they were armed with deadly weapons and as such Section 452 IPC was clearly attracted.

19. It is next to be seen whether the offence under Section 307 IPC is made out or not. In this regard, learned counsel for the appellant has relied upon **Rajesh** (supra) where the concerned doctor who had opined the nature of injuries as dangerous, was not examined. As such, it was held that in the absence of examination of doctor, it cannot be ascertained on what basis he formed that opinion and as such, the appellants were convicted under Section 324/34 IPC. In the instant case, MLCs of Sahib Singh, Preet Singh and Jal Singh, Ex. PW-7/A to Ex. PW-7/C were prepared by Dr. A.K. Tripathi but he could not be examined by the prosecution as he left the services of the

hospital. Instead one Suresh, Junior Medical Record Officer was examined to prove the MLCs and he deposed that he had no personal knowledge about the case. PW-10 Dr. D.N. Bhardwaj was also examined to prove the MLC of these three injured besides Basanti, Ex. PW-10/D. However, except for identifying the signatures and hand writing of the concerned doctors who had prepared the MLC, the witness/doctor could not depose further and deposed that whatever injuries are sustained, details are given in the MLC. However, PW-9 Dr. Sameer Sood examined the X-ray plates of Sahib Singh and gave his report Ex.PW-9/A and found fracture on the lower end of Radius. He also examined X-ray plate of Basanti Devi and gave the report Ex.PW-9/B and did not find any fracture. Similarly, no fracture was found on Jal Singh as per the report Ex. PW-9/D. However, fracture on the lower end of Radius was found on the person of Preet Singh as per report Ex. PW-9/C.

20. Learned counsel for the appellant has also drawn the attention of this Court to the bail orders dated 11th October, 1990 passed by the learned Additional Sessions Judge which reveals that the MLCs were lying absolutely blank since 5th October, 1990 except for mentioning the names of injured and their address. There was no mention of any

kind of history regarding the injury or other condition of patient when they were admitted to hospital. As such, the accused Deep Chand, Jagdish, Surender Singh, Satyawar and Raj Kumar were released on anticipatory bail. As per the deposition of Dr. Sameer Sood also, he did not find any fracture on the person of Basanti and Preet Singh. No cogent evidence has come on record to establish that the injuries caused by the accused persons were sufficient in the ordinary course of nature to cause their death. As such, offence under Section 307 IPC is not made out but since Sahib Singh and Preet Singh sustained fracture which comes within the definition of “grievous hurt” as per Section 320 IPC and there were simple injuries on the person of remaining injured, as such, offence under Section 325/323 IPC is made out.

21. Coming to the quantum of sentence, learned counsel for the appellant has submitted that appellants were not granted benefit of probation. The report regarding antecedents of appellant has been called which reveals that appellant Ram Karan is involved in one more case bearing FIR 50/1994 dated 10th February, 1994 under Section 448/506 IPC, PS Mehrauli whereas appellant Satyawar is involved in three other cases bearing FIR No. 50/94 dated 19th

February, 1994 under Section 448/506 IPC, PS Mehrauli, FIR No. 167/1995 dated 5th May, 1995 under Section 279/337 IPC PS Vasant Vihar and FIR No. 157/2005 dated 30th March, 2005 under Section 325/34 IPC, PS Mehrauli, New Delhi. That being so, benefit of probation cannot be granted to them. However, considering the fact that the incident pertains to the year 1990 and the appellants are facing protracted trial for the last more than 23 years, the sentence is modified to the extent that for offence under Section 325 and 452 IPC, the appellant shall undergo rigorous imprisonment for a period of one year each. The sentence of fine for these offences is maintained. The sentence awarded for offence under Section 323/34 IPC is maintained. The substantive sentence awarded under Section 325/452/34 IPC shall run concurrently. The appellant shall be entitled for benefit of Section 428 Cr. P.C.

Copy of the order along with trial court record be sent back.

**SUNITA GUPTA
(JUDGE)**

AUGUST 14, 2013
as/rs