

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

% *Judgment reserved on :10.09.2014*
Judgment delivered on : 25.09.2014

+ CRL.A. 385/2006
SAFIQ AND ORS. Appellants
Through Mr.Dinesh Kumar Garg,
MrAbhishek Garg, Mr.Dhananjay
Garg, Advocates.
versus
STATE Respondent
Through Ms.Kusum Dhalla, APP.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order of sentence dated 15.02.2006 and 13.03.2006 respectively wherein the appellants namely Safiq, Fahim and Lahiq had been convicted under Sections 307/506 of the IPC. They were acquitted of the charge under Sections 147/148/149 of the Indian Penal Code, 1860 (IPC). Relevant would it be to note that along with the three appellants, there were three other persons, all of whom were acquitted. The appellants were sentenced to undergo RI for a period of four years and to pay a fine of Rs.5,000/- and in default of payment of fine to undergo SI for six

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months for the offence under Section 307 of the IPC; for the offence under Section 506 of the IPC, each of the convicts were sentenced to undergo RI for a period of six months and to pay a fine of Rs.1,000/- and in default of payment of fine to undergo SI for one month.

2 Nominal rolls of the appellants reflect that appellant Fahim, at the time of grant of bail had undergone incarceration of almost about 11 months which included his remission. Appellant Safiq had undergone incarceration of about 10- ½ months and appellant Lahiq had undergone incarceration of about 9 months.

3 The version of the prosecution was that on 10.04.2001 at about 10:30 PM at Jhuggi No.166, LNJP Colony (near Turkman Gate, Delhi), six persons being members of an unlawful assembly and in furtherance of their common object had assaulted Mohd. Irfan (PW-2) and his family with criminal force wielding deadly weapons. They were also criminally intimidated. PW-2 was the complainant and it was on his statement (Ex.PW-2/A) that the present FIR had been registered. He had disclosed that Mehtab, Lahiq and Fahim lived in LNJP Colony i.e. the place where the victim and his family were living. On the previous night, i.e. on 09.04.2001, a quarrel had taken place between Rizwan and

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and Zakir (PW-2's brothers) on one side, and Mehtab, and appellants Lahiq and Fahim on the other. On that date, Rizwan and Mehtab were arrested. On the following day i.e. 10.04.2001 in the afternoon at 02:30 pm when PW-2 along with his brother Irshad (PW-4) and his sister-in-law (PW-3) were eating lunch, the appellants had entered their house. Lahiq was holding a soda bottle and Fahim and Safiq were holding meat cutting 'chura' (knife). Fahim attacked PW-2 with the 'chura' pursuant to which PW-2 received injuries on his left arm. Safiq also hit the 'chura' on the head of PW-2. Lahiq gave injuries to PW-4. Appellant Lahiq beat up PW-3 and gave her leg blows on her stomach. Meanwhile, Noor Mohd, Wasim and his father Shamim (since acquitted) along with some other persons also entered his house. They were all carrying dandas and lathis. They hit the victim and his family. The version of PW-2 was corroborated by the testimony of PW-3 and PW-4. PW-4 was medically examined by Dr.Ramesh Yadav (PW-1). PW-4 had to undergo emergency surgery; the injuries recorded on his persons were dangerous to life. His MLC was proved as Ex.PW-1/A. The subsequent medical record of PW-4 was proved through Dr. Shikha Sharma (PW-16) as Ex.PW-16/A. Dr. Veenita Jaiswal (PW-15) had identified the

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signatures of Dr. Udit Verma who had medically examined PW-3 and proved her MLC as Ex.PW-15/A; the MLC of PW-2 was proved as Ex.PW-15/B. Investigation was marked to SI S.R. Meena (PW-5) who was assisted by Constable Devender Singh examined as PW-8 and ASI Jaipal Singh examined as PW-9. Subsequently investigation was marked to SI Atma Singh (PW-17).

4 The statements of the accused were recorded under Section 313 of the Cr.PC; they all pleaded innocence stating that they had been falsely implicated because of the enmity with the complainant family.

5 In defence one witness Mohd. Yasim (DW-1) was produced; he had set up a plea of alibi; submission being that the accused persons had been falsely implicated.

6 On behalf of the appellants, arguments have been addressed in detail. It is pointed out that on all counts, the judgment of the trial Court suffers from infirmities. It is firstly pointed out that there are three accused persons who have been convicted under Sections 307/506 of the IPC; they have been acquitted of the charge under Sections 147/148/149 of the IPC; the aid of Section 34 has not been invoked. Conviction of the appellants on this score alone is bad and is liable to be set aside. Further

submission being that no specific role has been attributed to any of the
aforenoted appellants and even presuming that the version of PW-2 is
correct, it is not in conformity with the version set up by PW-3 and PW-
4. Even as per the version of PW-2, Lahiq had only given a leg blow on
the stomach of PW-3 which does not qualify for a conviction under
Section 307 of the IPC. The injuries suffered by the victims were
simple. Reliance has been placed upon (2011) 12 SCC 514 Fulchand
Gope and Another Vs. State of Jharkhand. His submission is that in such
an eventuality, at best the offence under Section 326 of the IPC is made
out and keeping in view the period of incarceration already suffered by
each of the appellants, they be released on the period already undergone
by them.

7 Arguments have been refuted. It is pointed out that on no count,
does the impugned judgment call for any interference. The trial Judge
has rightly specified the role of each of the appellants. The medical
evidence of the witnesses is fully corroborative of their oral versions.

8 Arguments have been heard. Record has been perused.

9 PW-2 was the complainant. His statement was recorded in the
hospital (Ex.PW-2/A) pursuant to which present proceedings were
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initiated. He deposed that on the previous day i.e. on 09.04.2001, his brothers Rizwan and Zakir had had a fight with Lahiq, Fahim and Mehtab (of whom only Lahiq and Fahim are the appellants before this Court). On the previous night itself, pursuant to the quarrel, Mehtab and his brother Rizwan were arrested. On the following day i.e. on 10.04.2001 at about 02:30 PM, when PW-2 along with his family i.e. Nasreen (PW-3) and Irshad (PW-4) were having lunch in their house, the appellants entered their house. Lahiq was holding a soda bottle; Fahim and Safiq were holding meat cutting 'churas'; they attacked PW-2 pursuant to which he sustained injuries on his left arm. His sister-in-law Nasreen (PW-3) and his brother Irshad (PW-4) were also attacked. They also received injuries. Lahiq had given a leg blow on the stomach of PW-3 (who was pregnant at the time of the incident). Fahim had attacked PW-4 with a 'chura' on his back. Meanwhile, Noor Mohd., Wasim and his father Samim also entered his house. They were also armed with dandas. In his cross-examination, he admitted that he was discharged on the same day. He did not know the reason for the quarrel which had taken place on the previous night i.e. on 09.04.2001. He also did not know the details as to why his brother Rizwan and Mehtab were

arrested pursuant to that quarrel. He reiterated that he was discharged from the hospital at 08:00-09:00 pm. His MLC also reflects that his injuries were simple.

10 PW-3 Nasreen was the sister-in-law of PW-2. She has deposed on the same lines as PW-2. She has stated that she remained in the hospital for 15 days; in her deposition she stated that the medical papers of her treatment were with her mother-in-law; later on she stated that the medical papers had been destroyed in a fire and she did not have any document to substantiate her version. She admitted that she was given a leg blow. Her MLC Ex.PW-15/A was proved through Dr. Veenita Jaiswal (PW-15) who had identified the signature of Dr. Udit Verma (who had since left the hospital). The MLC notes that the victim had been brought into the hospital at 04:00 pm. She was conscious and oriented. Her parameters were normal. She was seven months pregnant, which is also the version of the prosecution. No discharge or any other outward symptoms were noted; she was referred to a gynecologist. There is no other medical paper of PW-3 to substantiate the averment that she remained admitted in the hospital for about 15 days as is her case; admittedly there was no documentary evidence to support this

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argument.

11 Irshad (PW-4) was the husband of Nasreen (PW-3). He was also an injured person and a victim of the crime. He has also deposed on the same lines. He has stated that the parties were neighbours and the families were known to each other. He had admitted that on the previous day i.e. on 09.04.2001, his brothers Rizwan and Zakir had had a quarrel with the accused persons and they had been arrested on 09.04.2001 itself. He reiterated that appellant Lahiq had given blows to his wife (PW-3). He denied the suggestion that the accused had been falsely implicated. The MLC of PW-4 was proved as Ex.PW-1/A. The nature of injuries was opined to be 'dangerous'. There were three injuries which were noted on the person of PW-4. They read as under:

"1 6x4 cm stab left hypochondrium, going intrapostional. Omentum coming out of wound.

2 10x3 cm muscle deep laceration left scapular region.

3 4x2 cm laceration, muscle deep over frontal region of scalp."

12 PW-4 was also shifted to O.T. for emergency surgery. However, his medical papers also do not substantiate the argument of the prosecution that he remained admitted in the hospital for 15-20 days as all the medical papers to this effect are not a part of the record. Be that

as it may, this Court notes that the injuries suffered by the victim were 'dangerous' and he had to be shifted to O.T. on an emergency basis.

13 The evidence which has been collected thus reveals that the parties were known to each other. There was a quarrel on the previous night i.e. on 09.04.2001 where two brothers of the victim family, namely Rizwan and Zakir, had had a quarrel with the accused persons, pursuant to which Rizwan and another, Mehtab, had been arrested by the police. On the following day i.e. in the afternoon of 10.04.2001, the accused persons (all of whom are real brothers), had entered the house of the victims and attacked them. Nature of the injuries suffered by PW-2 and PW-3 were 'simple'. PW-2 was discharged on the same day. The version of PW-3 that she remained in the hospital for 10-15 days has not been substantiated. PW-4 suffered 'dangerous' injuries.

14 The two meat cutting 'churas' were allegedly recovered from Safiq and Fahim. The recovery memo of the weapon recovered (pursuant to the disclosure statement of appellant Safiq) was proved as Ex.PW-2/H. This recovery was effected on 06.05.2001 and was witnessed by PW-2, who testified that this 'chura' was recovered from the machan inside the Jhuggi of Safiq. In his cross-examination, he

admitted that he had not gone inside the Jhuggi of Safiq and was standing at a distance when the police officials went inside the Jhuggi where they remained for 10-15 minutes. This version of PW-2, thus clarifies that the recovery of the weapon was not made in his presence. He was only the public witness and in fact the complainant. The recovery thus becomes suspicious and cannot be relied upon.

15 The version of the prosecution that the second weapon of offence i.e. a 'chura' was recovered (pursuant to the disclosure statement of appellant Fahim) on 08.05.2001 was proved vide memo Ex.PW-2/L. This recovery was also witnessed by PW-2. In his examination-in-chief, he has testified that pursuant to the disclosure statement of Fahim, he had led the police party to his Jhuggi from where, inside the machan under a wooden box, the chura was recovered which was taken into possession and sealed. In his cross-examination, he has admitted that the house of Fahim was not very far from the place of his arrest. PW-2 was standing at the gate outside the Jhuggi of Fahim when police officials went inside and remained for 10-15 minutes. This admission qua this recovery is also suspicious as admittedly this recovery was not made in his presence; PW-2 was standing outside the gate when the recovery

was made from inside the Jhuggi of Fahim.

16 Both the recoveries i.e. Ex.PW-2/H and Ex.PW-2/L cast a doubt and cannot be relied upon.

17 The ingredients of offence under Section 307 of the IPC necessarily mandate a common intention or mens rea to cause such injuries upon the person of the victim that by their act (had the victim been killed), they would be guilty of culpable homicide not amounting to murder. The manner in which the incident had taken place has been described. There had been a previous quarrel on 09.04.2001 on which date, members of the victim family had been arrested. The reason of the quarrel on that day had not been spelt out by any witness of the prosecution even though specific questions had been put to them; they denied the suggestion that this had occurred because of an earlier quarrel which had taken place between the parties. The injuries suffered by PW-2 and PW-3 were opined to be simple and there was no medical record of PW-4 to substantiate the fact that he remained in the hospital for 15 days but this Court notes his injuries were 'dangerous'. The recovery of the weapons of offence is however doubtful.

18 Section 326 of the IPC necessarily constitutes that the act must

have been done voluntarily; it entails a mens rea; it entails causing of grievous hurt by means of any instrument of shooting, stabbing, or cutting. The injuries on the person of PW-4 being 'dangerous'; PW-4 had to undergo an emergent surgery; his MLC notes that there was a 6 x 4 cm hypochondrium wound on the omentum; 10 x 3 cm laceration on the scapular region and a third wound measuring 4 x 2 cm deep on the frontal region of the scalp. Blood loss was also evident.

19 Accordingly, this Court is of the opinion that the accused persons in furtherance of their common intention are guilty of having committed offence under Sections 326/34 of the IPC. Section 34 of the IPC does not carve out a substantive offence; it is the common intention which has to be adduced from the evidence which has been collected and merely because due to inadvertence, the trial Judge had not ordered conviction under Section 34 of the IPC and the accused persons not having suffered any prejudice on this count, this Court modifies the conviction of the accused persons from Section 307 to Section 326/34 of the IPC.

20 The ingredients of offence under Section 506 of the IPC, which involve a criminal intimidation to cause grievous hurt, are established.

The conviction under Section 506 of the IPC remains unaltered.

21 On the quantum of sentence this Court notes that the incident had taken place as way back as in the year 2001 i.e. 13 years from today. The accused persons are brothers hailing from the same family; they are doing business as fruit vendors; they are the bread earners and support of the family and as on date they have their individual families as well. They have suffered agony of a long drawn trial. Each of the appellants has already undergone incarceration of about 9 to 11 months (noted supra).

22 Thus taking in view the entire facts and circumstances of the case , interest of justice would be met if each of the appellants are sentenced to the period already undergone by them.

23 Bail bonds are cancelled. Sureties discharged.

24 Appeals are disposed of in the above terms.

INDERMEET KAUR, J

SEPTEMBER 25, 2014
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