

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. No. 667 of 2008

RISHI & ORS. Appellants
Through: Mr. Ramesh Gupta, Senior Advocate
with Mr. Amit Khanna and Mr. Sanat
Tokas, Advocates.

versus

STATE OF N.C.T. OF DELHI Respondent
Through: Ms. Isha Khanna, APP.
SI Subhash, PS: Vasant Kunj,
New Delhi.

AND

CRL.A. No. 704 of 2008

ABHAY RAM Appellant
Through: Mr. Jayant K. Sud and Mr. Ajay P.
Tushir, Advocates.

versus

STATE (GOVT. OF NCT OF DELHI) & ORS. Respondents
Through: Ms. Isha Khanna, APP.
SI Subhash, PS: Vasant Kunj,
New Delhi.
Mr. Ramesh Gupta, Senior Advocate
with Mr. Amit Khanna and Mr. Sanat
Tokas, Advocates for Respondents.

CORAM: JUSTICE S. MURALIDHAR

ORDER
14.11.2014

1. There are two appeals before this Court. Criminal Appeal No. 667 of 2008 is by 14 Appellants and is directed against the judgment dated 30th May 2008 passed by the Additional Sessions Judge ('ASJ')

convicting them for the offences under Sections 149/325 read with Section 149 and Section 323 read with Section 149 IPC in FIR No. 62 of 1996 registered at Police Station ('PS') Vasant Kunj as well as against the order on sentence dated 31st May 2008 whereby the trial Court granted the Appellants benefit of probation and required them to furnish personal bond in the sum of Rs.10,000 each with one surety in the like amount for two years.

2. The other appeal i.e. Criminal Appeal No. 704 of 2008 is by the Complainant Abhay Ram and is directed against the same judgment aggrieved by the acquittal of the Respondents 2 to 15 (who are the Appellants in Criminal Appeal No. 667 of 2000). This appeal is under Sections 11 (2) and (4) of the Probation of Offenders Act, 1958 ('PO Act') and is confined to challenging the order on sentence dated 31st May 2008 releasing Respondents 2 to 15 on probation.

Background facts

3. The case of the prosecution is that there was a parcel of land in Khasra No. 298/108 in village Ghitorni which was originally owned by late Hari Singh and after his death it fell to the share of his sons and daughters i.e. Inderjeet, Balbir, Batto and Bhagwati in equal proportion. Inderjeet had sold his share of the land to Ashok and Rishi by a registered sale deed (Ex.DW-1/B) to an extent of 285 sq. yards. Jagbir, the brother of Abhay Ram (PW-1) had purchased another parcel from the same Khasra No. 298/108 from Batto and Bhagwati.

4. The further case of the prosecution is that on 1st February 1996, Ashok (Appellant No.3 in Crl. A. No. 667 of 2008) and the other Appellants had come to take possession of the land purchased by him from Inderjeet Singh. According to the Complainant Abhay Ram (PW-1) they were already present at the site. The Appellants came there armed with *dandas* and even while talks were going on all of a sudden the Appellants started pelting stones. It is also alleged that Dhiraj (Appellant No.6) hit Jai Ram on his head with bricks, Satish (Appellant No.2) hit Abhay Ram with bricks and sticks and Ashok and Veer Singh (Appellant No.7) gave beatings to Abhay Raj with bricks and sticks. Darbara Singh was given beatings by Rishi (Appellant No.1) and Dhiraj. It is stated that Sukhbir (Appellant No.14) also joined the other Appellants in giving beatings to the Complainant party.

5. The complaint given by the Complainants was registered as FIR No. 62 of 1996. On his part, Ashok Kumar also gave separate complaint on the same date stating that when they reached there for taking possession of the land purchased by him, Jagbir and his family members i.e. Abhay Raj, Darbara Singh, Keshav Singh, Jai Ram and Balbir arrived there and started attacking them. FIR No. 63 of 1996 was registered on the complaint of Ashok.

6. The case arising out of FIR No. 62 of 1996 was committed by the learned Metropolitan Magistrate to the Sessions Court since it involved the offence under Section 308 IPC. The case was registered as SC No. 51/01. The case arising out of FIR No. 63 of 1996 filed by

the Complainant Ashok was registered as SC No. 86 of 2000. This was under Sections 147/148/149/427 and 323 IPC. Both cases were tried together.

The trial Court judgment

7. By the common impugned judgment dated 30th May 2008, the trial Court convicted the Appellants in Criminal Appeal No. 667 of 2008 in the manner indicated hereinbefore and acquitted the Appellants in Criminal Appeal No. 704 of 2008 of the offences with which they were charged in SC No. 82 of 2000 arising out of FIR No. 63 of 1996.

8. The findings of the trial Court in the impugned judgment as regards FIR No. 63 of 2006 are that the Complainant (in FIR No. 63 of 2006) and the injured “all stated that they do not know who caused injuries to them and specifically stated that the accused persons have not caused injuries to them.” On the above basis that the Complainant party i.e. Abhay Ram and others were acquitted in FIR No. 63 of 1996 where they were the accused.

9. Turning to FIR No. 62 of 2006, the trial Court noted that on 1st February 1996 Ashok and others reached the spot to take possession of the land which they purchased from Inderjeet. The Complainant party i.e. Balbir and others alleged that they were already in possession of the land and that there was no other vacant land. Trucks loaded with bricks, *badarpur* reached the spot along with the labourers. There was a dispute whether the cement bag and mixture machine also reached the spot. The trial Court noted that “the

witnesses had also deposed that both the parties were talking with each other and suddenly the fight ensued.” Another finding is that “when the accused Rishi etc. reached the spot they were not armed with weapons or having any lathies etc.” The trial Court was not prepared to accept the testimony of PW-8 that Rishi was having a country made pistol with him which he snatched and handed over to Constable Satish Tyagi. The Court noted that Rishi and others had come to take possession and the houses of the Complainant party were near the spot and therefore their presence was quite natural. There was already a civil suit pending between the parties.

10. Turning to the injuries on Abhay Ram and Jai Ram, the Court discussed the MLCs Ex.PW-7/A and Ex.PW-7/C respectively which showed that the injuries were grievous. Injuries on Darbara Singh, as per his MLC, were simple. Although the X-ray plates were not produced and the Radiologist was not examined to prove the fractures suffered by Abhay Ram and Jai Ram, the trial Court found no reason to disbelieve the MLCs. According to the trial Court, the evidence showed that all the accused formed an unlawful assembly and wanted to take a forcible possession and when this was resisted by the opposite party, they attacked them with bricks and sticks. The trial Court in the same breath noted “In the present case as discussed above all the accused persons when reached the spot were not having any weapon. Both the parties were talking with each other and suddenly the fight ensued. They threw bricks and also hit them with the *danda*. In the circumstances it cannot be said that the injuries were caused with any specific intention or knowledge that if by that act they would

cause the death they would be guilty of culpable homicide.”

11. Consequent to the finding that the accused had formed an unlawful assembly, the trial Court held each member thereof responsible for the acts committed by all of them and proceeded to convict them for the offences under Section 149/325 read with Section 149 and 323 read with Section 149 IPC.

12. This Court has heard the submissions of Mr. Ramesh Gupta, learned Senior counsel and Mr. Amit Khanna, learned counsel appearing for the Appellants in Criminal Appeal No. 667 of 2008, Ms. Isha Khanna, learned APP for the State and Mr. Jayant K. Sud, learned counsel for Appellant in Criminal Appeal No. 704 of 2008.

Offence under Section 149 IPC not made out

13. The attention of this Court was drawn to the judgment by a Division Bench (DB) of this Court in ***Rajesh v. The State*** (decision dated 17th October 2014 in Criminal Appeal No. 18 of 2000) which specifically dealt with the question of the offence under Section 149 IPC. In that case, there were two groups which had clashed with each other and two FIRs had been registered. One of the questions before the DB was whether “at all there was an aggressor group and whether at all a group formed an unlawful assembly with the object of assaulting a member or all the members or the shop of the other group.” The DB noticed that in cases of this nature witnesses on both sides will be interested parties and “therefore would speak half truths.” The DB referred to the decision of the Supreme Court in ***State***

of UP v. Jodha Singh AIR 1989 SC 1822 which held that a sudden quarrel does not attract Sections 149/148/147 or 141 IPC. The DB observed that “in a sudden quarrel if more than five persons form a group on either side, it cannot be said that the members of the group form an unlawful assembly.” The DB Bench in *Rajesh* (supra) also referred to the decision in *Lalji v. State of UP AIR 1973 SC 2505* which held that in such a case, each of the accused is liable for his own acts and not vicariously liable for the acts of others. In *Munir Khan v. State of UP AIR 1971 SC 335* and *Kanbi Nanji v. State of Gujarat AIR 1970 SC 219* it was held that in a mutual fight there is no common object. Ultimately the DB in *Rajesh* concluded on the facts as under:

“38. For the evidence noted by us hereinabove it is apparent that it is the case of a sudden mutual fight, not preceded by any group assembling with any particular object and thus we hold that neither group formed an unlawful assembly. The mutual fight cannot be treated as rioting because rioting as per Section 146 of the Indian Penal Code must be preceded by an unlawful assembly followed by use of force or violence by members thereof. The question of anybody being thus liable under Section 148 of the Indian Penal Code does not arise. The question of a common object of any unlawful assembly and hence the vicarious liability contemplated by Section 149 of the Penal Code would also not arise.”

14. Turning to the case on hand, the finding of the trial Court itself on an analysis of the evidence in more than one place in the impugned judgment was that the Appellants had come to the spot unarmed and while talks were going on between both the groups, a fight suddenly ensued. This contradicts the finding of the Court that the accused had

formed an unlawful assembly. If they had come to take possession of the land which they believed was theirs since they had purchased it, then they were within their rights unless there was an order of some Court injunctioning them from doing so. What is also significant is that the presence of both parties and the fact that they “were talking with each other” has been confirmed by the witnesses. It is clear, therefore, that the intention was not to attack the other party. In other words, the object for which the Appellants had come to the spot was to take possession of the land and it was not their common object to attack the Complainant party. In, therefore, cannot be said that the object for which the Appellants had assembled was unlawful. It also cannot be said that they were going there to take ‘forcible possession’ when there is evidence on record to show that the Appellant Ashok had in fact purchased over 200 sq. yards from Inderjeet Singh and had come there to take possession of that land. It was a vacant land. Consequently, this Court is not able to sustain the finding of the trial Court that the Appellants had formed an unlawful assembly and pursuant thereto had attacked the Complainant party. In light of the law explained by the Supreme Court in the aforementioned decisions, which have been referred to by the DB in ***Rajesh*** (supra), this Court is of the view that the offence under Section 149 IPC cannot be said to be made out against the Appellants.

15. At this stage, it must be noticed that Mr. Jayant K. Sud, learned counsel appearing for the Appellant in Criminal Appeal No. 704 of 2008, sought to support the judgment of the trial Court in so far as the finding under Section 149 IPC is concerned. However, the scope of

Criminal Appeal No. 704 of 2008 is confined to questioning the order on sentence dated 31st May 2008 granting the Appellants in Criminal Appeal No. 667 of 2008 the benefit of probation. In any event, the Court is satisfied on carefully perusing the prosecution evidence and in light of the law explained by the Supreme Court and this High Court that the offence under Section 149 IPC is not made out. Consequently, the Appellants are acquitted for the offence under Section 149 IPC.

16. As regards the offences under Sections 323 and 325 IPC, the prosecution evidence can be said to have proved the specific acts of the Appellants Rishi, Satish, Ashok, Veer Singh and Dhiraj. As far as the others are concerned, there is no clarity as to who caused which injuries. Therefore barring the above five Appellants, the evidence on record is not sufficient even to sustain the conviction under Section 323 IPC as regards the other Appellants.

Nature of the injuries

17. Now coming to the aforementioned five Appellants, it is seen that the MLCs of both Abhay Ram and Jai Ram reveal that the injuries suffered by them were grievous. In the MLC of Abhay Ram (Ex.PW-7/A) there is an endorsement that on 1st February 1996, X-ray of the left hand and chest was taken and the left second metacarpal bone was found fractured. The nature of the injuries is classified as grievous. The doctor who examined Abhay Ram is Dr. Palak Nandy who was himself unable to be produced as a witness. However, his signatures were recognised by Dr. Rajiv Sharma (PW-7) who was shown the

entire original record. The X-ray report of Abhay Ram was also produced. This was prepared by Dr. Ashok Charan, the Radiologist, who again was not examined as a witness. The Radiologist confirmed the fracture of the second left metacarpal bone of Abhay Ram. Likewise, the MLC of Jai Ram and the X-ray report of Jai Ram confirmed fracture of the front parietal bone. After seeing these X-ray reports, PW-7 confirmed that the injuries were grievous. However, in his cross-examination by learned counsel for the accused PW-7 stated “it is correct that copy of the X-ray report is not annexed with the MLC. In this case the doctor could not have given the final opinion without going through the X-ray report. I cannot give the opinion about the nature of injuries without going through the X-ray report.” Thereafter the trial Court asked this witness to give an opinion after going through the X-ray report. The transcript records that PW-7 went through the X-ray report and the opinion given thereon by Dr. Charan.

18. It was submitted by Mr. Ramesh Gupta, learned Senior counsel appearing for the Appellants that without the X-ray plates being produced and Dr. Ashok Charan who formed an opinion thereon himself being examined, the evidence of PW-7 was not sufficient to render a finding that the Appellants had caused injuries of grievous nature to the two members of the Complainant party i.e. Abhay Ram and Jai Ram. In support of the above contention, reliance was placed on the decision of this Court in *Ashok Kumar v. State* 54 (1994) DLT 638 where under similar circumstances the benefit of doubt was given to the accused and the offence was converted to one under Section 323 IPC.

19. Ms. Isha Khanna, learned APP for the State drew the attention of this Court to a subsequent decision of this Court in ***Dharam Pal v. State 2013 (3) JCC 1873*** where the decision in ***Ashok Kumar*** (supra) was distinguished by pointing out that in ***Ashok Kumar*** only a record clerk was examined whereas in the case before the Court in ***Dharam Pal***, two doctors had been examined to prove the MLC in which the opinion on nature of injuries was recorded on the basis of the report of the Radiologist. In addition, Mr. Sud drew the attention of the Court in ***Laddan v. State 2014 (1) JCC 404*** in which it was held that “Proving of MLC by a colleague doctor, who identifies the writing and signature of the doctor who had examined the patient or by an administrative staff of the hospital who had identified the signature of the doctor is sufficient and good proof and MLC cannot be doubted unless the tampering in the MLC be proved by the person alleging the tampering.”

20. In the present case, a perusal of the evidence of PW-7 reveals that although the X-ray plates were not produced, the original X-ray reports were part of the record. shown to PW-7 and he confirmed the opinion given by Radiologist Dr. Ashok Charan regarding fracture of the frontal parietal bone of Jai Ram and second left metacarpal bone of Abhay Ram. Going by the definition in Section 320 IPC, there can be no doubt at all that these were grievous injuries. The Court is inclined to adopt the reasoning in ***Dharam Pal*** .The decision in ***Ashok Kumar*** is distinguishable on facts.

21. Consequently, the conviction of Dhiraj who hit Jai Ram with

bricks, and Satish who gave a danda blow to Abhay Ram under Section 325 IPC is sustained. As far as the role played by Ashok and Veer Singh is concerned, they are said to have beaten Abhay Raj who had deposed in that regard. As far as Darbara Singh is concerned, his MLC confirms simple injuries given to him by Rishi and Dhiraj. Consequently, Rishi, Ashok and Veer Singh are convicted for the offence under Section 323 IPC.

Benefit of probation

22. Coming to the question of grant of benefit of probation to the Appellants, Mr. Sud has placed before the Court the judgment of the Supreme Court in *MCD v. State of Delhi (2005) 4 SCC 605*. In the said case under the Delhi Municipal Corporation Act, 1957 where the offence was under Sections 332/461 thereof for raising unauthorised construction, the High Court had by an order dated 26th March 2004 granted the accused the benefit of probation under Section 4 of the PO Act. Against the said order, the MCD appealed to the Supreme Court. By the judgment dated 29th April 2005, the Supreme Court reversed the judgment of the High Court holding that it was mandatory for the High Court to have called for a report of the Probation Officer (PO) under Section 4 of the PO Act and that the wording of Section 4 (2) made this exercise mandatory and a condition precedent to the release of the accused on probation.

23. There is no doubt that in the present case the trial Court has released the accused on probation without calling for any report of the PO under Section 4(2) of the PO Act. However, the present appeal

has been pending before this Court for over six years now. During this entire period the Appellants have not been shown to have breached the conditions attached to their personal bonds of good behaviour. Ms. Khanna fairly states that in respect of one of the Appellants i.e. Veer Singh (Appellant No.7) an FIR has been registered against him only six months ago in respect of an incident not involving any of the members of the Complainant party for the offences under Sections 323 and 341 IPC. Barring this, none of the Appellants have been shown to be involved in any offence whatsoever. The exercise intended to be undertaken by the PO under Section 4(2) of the PO Act is to ascertain the 'antecedents' of the offenders i.e. their conduct prior to the sentencing. Even in this regard, nothing has been brought on record before the Court to show whether any of the Appellants were involved in any offence prior to the present case. At this stage to require a report of the PO would be a futile exercise. Therefore, the Court is of the view that in the present case release of the Appellants on probation has served its purpose and the clock cannot be put back.

Conclusion and directions

24. The appeals are accordingly disposed of with the following conclusions and directions:

- (i) The Appellants in Crl A. 667 of 2008 are acquitted of the offence under Section 149 IPC.
- (ii) The Appellants Rishi, Ashok and Veer Singh are convicted of the offence under Section 323 IPC.
- (iii) The Appellants Dhiraj and Satish are convicted for the offence under Section 325 IPC.

(iv) The benefit of grant of probation by the trial Court qua the above five Appellants by the order on sentence dated 31st May 2008 qua is sustained. The order releasing qua the remaining accused does not survive.

25. The trial Court record be sent back forthwith.

NOVEMBER 14, 2014
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S. MURALIDHAR, J.

