

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Criminal Appeal D-235-DB of 2012

Date of Decision : May 07, 2015

Rajender

....Appellant

Versus

State of Haryana

.....Respondent

**CORAM : HON'BLE MR. JUSTICE T.P.S. MANN
HON'BLE MR. JUSTICE MAHAVIR S. CHAUHAN**

Present: Mr. Vinod Ghai, Senior Advocate with
Mr. Vineet Kaushal, Advocate
for the appellant.

Mr. Anil Kumar Yadav, Addl. Advocate General, Haryana.

T.P.S. MANN, J.

The appellant, namely, Rajender alongwith his brothers Rajbir and Raj Kumar and nephews Anil and Sunil was tried for committing the offences punishable under Section 148 IPC, Section 302 read with Section 149 IPC and Section 323 read with Section 149 IPC on the allegations that on 14.11.2007 at about 4.00 p.m., they were armed with deadly weapons and being members of an unlawful assembly, committed the murder of Omvir and caused simple hurt to Sunita Devi and Ude Singh. Vide judgment and order dated 24.1.2012, learned Additional Sessions Judge, Sonapat acquitted Rajbir, Raj Kumar, Anil and Sunil of the charges against them. The appellant alone was convicted under Section 302 IPC and

sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in default of payment of fine, to further undergo simple imprisonment for six months. The period already spent by him in jail was directed to be set off against the substantive sentence imposed upon him. Hence, the present appeal.

The case of the prosecution in nutshell is that on 14.11.2007 at 8.30 p.m., ASI Somvir recorded the statement of the appellant in General Hospital, Sonapat to the effect that he was an agriculturist and the fields of PW2 Kuldeep adjoined his fields wherein a mango tree was standing which was sold by Kuldeep. The persons, who had cut down the tree placed the branches in the fields of the appellant where creeper of gourd was there. The appellant did not object to the same. However, when the labourers again started cutting the tree, the appellant proclaimed that his water course passed by the tree and it be not damaged. Upon this, Kuldeep cut the water course with the help of a spade. The appellant tried to stop him which led to a wordy duel between them. Kuldeep wielded a jalli towards his stomach but the appellant while warding of the same received an injury on his left elbow. Second blow caused by Kuldeep fell on his right arm. Omvir, brother of Kuldeep came armed with a lathi and gave a lathi blow on the head of the appellant. Another lathi blow landed on the face below the right eye of the appellant. The appellant fell down. Omvir gave lathi blows on his waist, chest, right shoulder and left knee. The appellant raised an alarm which

attracted his brother Rajbir who came from the kotha, and rescued him from the clutches of the assailants. Omvir also gave a lathi blow on the back of left hand of Rajbir. The occurrence had taken place on 14.11.2007 at 4/4.30 p.m. According to the appellant, he had also inflicted minor injuries to the assailants in his self defence. The appellant was, thereafter, shifted by his brother to General Hospital, Sonapat. Subsequently on being informed, ASI Somvir reached General Hospital, Sonapat and recorded the statement of the appellant.

The aforementioned statement revealed commission of offences under Sections 323/324/34 IPC. Accordingly, the statement was sent to Police Station Kundli and on its basis, FIR No. 228 of 2007 was registered on 14.11.2007 at 9.05 p.m. against Kuldeep and Omvir for committing the offences under Sections 323/324/34 IPC.

During the investigation of the case, Sunita Devi wife of Omvir Singh got recorded her statement Ex. PA before HC Naresh Singh, Police Post Tis Hazari, Delhi on 15.11.2007 wherein she stated that on 14.11.2007 at about 4.00 p.m. she alongwith her husband, who was serving in CRPF, was going to their fields. She was following her husband, who was ahead of her. The appellant, who was holding an axe challenged her husband and also uttered abuses that he would kill him and simultaneously gave a blow with the axe on the head of her husband. Her husband raised an alarm. She went forward to rescue her husband and to over power Rajender

but Rajender exhorted his brothers Rajbir and Raj Kumar and nephews Sunil and Anil to bring lathis and jallies and kill her and her husband. All of them came to the spot with lathis and jallies in their hands so as to help Rajender. They proclaimed that they would kill her and her husband. They started causing injuries to her husband. Roshni, Indrawati and Somwati pulled her from her hair and started giving slaps and fist blows to her. She cried for help which attracted villagers to the spot. All the assailants ran away. The villagers took her husband to the hospital and later on she learnt that her husband was taken to St. Stephen Hospital, Delhi for treatment. She claimed that Rajender and his family members had assaulted her and her husband with an intention to kill them and for that reason injuries were caused to her and her husband. She pleaded for taking action against the appellant and his four co-accused as well as against Roshni, Indrawati and Somwati.

On learning about the admission of Omvir, ASI Somvir reached St. Stephen Hospital, Delhi where the doctor declared the injured unfit to make statement and also stated that the MLR and ruqa had already been sent to Police Post Tis Hazari, Delhi. ASI Somvir did not find any attendant with the injured and on reaching Police Post Tis Hazari, he was told by HC Naresh Singh that MLR of Omvir and the statement of his wife had been sent to Police Post Barota. Accordingly, on reaching Police Post, Barota he collected the MLR of Omvir and the statement of Smt. Sunita. The statement of

Smt. Sunita and MLR of Omvir revealed commission of offences under Sections 148/149/323/307 IPC. However, as regarding the occurrence, FIR No. 228 of 2007 already stood registered, cross-case in the same very FIR was initiated against the appellant and others on the basis of statement of Smt. Sunita Devi.

Further case of the prosecution is that Omvir succumbed to his injuries on 16.11.2007. Accordingly, offence under Section 302 IPC was added. The place of occurrence was photographed and rough site-plan prepared. The blood stained earth, blood stained piece of creeper of bitter gourd and one slipper were lifted from the spot and taken into possession by the police. On 23.11.2007, Inspector Pardeep interrogated the appellant, Rajbir, Anil and Raj Kumar. Pursuant to their respective disclosure statements, Rajbir and Anil got recovered lathis, Raj Kumar got recovered a jalli whereas the appellant got recovered an axe.

Upon completion of investigation, the challan was presented only against the appellant, his brothers Rajbir and Raj Kumar and nephew Anil whereas Sunil was found innocent. Said Sunil was later on summoned under Section 319 Cr.P.C. as an additional accused. Thereafter, all five of them were charged for the various offences to which they pleaded not guilty and claimed trial.

In support of its case, the prosecution examined complainant-Sunita as PW1, who testified that on 14.11.2007 at about 4.30 p.m., she alongwith her husband Omvir had reached near

the kotha of the appellant. At that time, her husband was ahead of her. The appellant while armed with an axe, Raj Kumar with jalli, Rajbir with lathi and Anil and Sunil with dandas alongwith three ladies came there. All of them had come out from the kotha and surrounded her husband. Rajender exhorted that they will finish her husband. He gave an axe blow from its blunt side on the head of her husband. On hearing her alarm, her father-in-law Ude Singh, brother-in-law Kuldeep and nephew Shamsheer reached the spot. Her father-in-law was given a lathi blow by Rajbir on his left ankle. The three ladies caught hold of her by her hair and gave her fists and slaps. The accused fled away from the spot while carrying their respective weapons. She also deposed that her husband was first taken to Civil Hospital, Sonapat from where he was referred to some other hospital and, accordingly, he was shifted to St. Stephen Hospital, Delhi for treatment and on the next day she visited the hospital and made statement Ex. PA. She further testified that her husband succumbed to the injuries on 16.11.2007.

PW2 Kuldeep Singh testified that on 14.11.2007 at about 9/10.00 a.m., a quarrel had taken place between him and his father on the one hand and the accused, on the other, over cutting of mango tree. At about 4.00 p.m., he alongwith his nephew Shamsheer was working in the fields whereas Omvir and Sunita were going to the fields through kacha passage. The accused encircled his brother Omvir whereas the ladies encircled Sunita. On hearing the alarm, he

alongwith Shamsher went to the spot where they saw that Rajender was armed with an axe, Raj Kumar with jaili, Sunil and Anil with lathi and dandas and Rajbir with lathi. Rajender proclaimed that they would kill them. Ude Singh also came at the spot. Rajender gave an axe blow from its blunt side to Omvir on his head. Rajbir gave a lathi blow to Ude Singh on his ankle and another blow on his knee. His brother Omvir fell down due to the injuries. He was shifted to St. Stephen Hospital, Delhi where he died on 16.11.2007.

PW3 Ravi Kumar testified that on 14.11.2007 at about 5.00 p.m., he was at Narela, Delhi and made a telephonic call at his residence when he learnt that his uncle had received injuries and was shifted to St. Stephen Hospital, Delhi. Accordingly, he reached there at about 6.45 p.m. When the doctor enquired as to the cause of injuries, he was in perplexed condition and, accordingly, stated that the injuries were received by his uncle Omvir in an accident. He later on enquired from his grand-father, who described that Omvir had sustained injuries at the hands of the accused.

PW4 Naveen testified that in the year 2007, he visited the place of occurrence at the instance of the police and took photographs Exs. P1 to P6, negatives of which were Exs. P7 to P12.

PW5 Dr. Vijay Kataria testified that on 14.11.2007, he was posted as Medical Officer at St. Stephen Hospital, Delhi when Omvir was brought to the casualty where he was medico-legally examined. The history described was that the injuries had been received in a

road traffic accident. He further observed as follows:-

“On examination the patient was unconscious. Pupils were bilaterally dilated with sluggish reaction to light. Chest bilateral air entry was present and bilateral conducted sounds. CVS S1 and S2 heard. Per abdomen soft nothing abnormal was detected (NAD). Bowel sounds were present. Pelvic compression negative. Clean lacerated wound over the scalp.”

Dr. Vijay Kataria further deposed that the cause of injuries was narrated by the accompanying person, namely, Ravi. He further testified that possibility of axe which was shown to him, being used for assault could not be ruled out. In cross-examination, he testified that the patient was unconscious when brought to the hospital and he was not in a position to state about the incident.

PW6 Ude deposed that about three years ago when he alongwith his son Kuldeep was cutting a mango tree standing near the khal in their fields, accused Rajedner, Raj and Rajbir objected which led to a brawl. He then came to his house in the village and at about 3.00 p.m. when his son Omvir and his wife Smt. Sunita came home, he narrated the incident to them. He then went to the fields for harvesting the paddy crop. Omvir and Smt. Sunita came to the fields after about fifteen minutes. When Omvir and Smt.Sunita reached in front of kotha of Hoshiara, accused Rajender, Rajbir, Raj Kumar, Anil, Sunil and three ladies from their families came with common intention and caught hold of Omvir. Rajender gave an axe blow on the head of

Omvir as a result of which he fell down. On hearing the noise, he alongwith Shamsher and Kuldeep reached the spot where Rajbir and Raj Kumar gave lathi blows on his ankle and left knee. The ladies also gave beatings to Sunita. Thereafter, the accused fled away from the spot.

PW7 Dr. Pushpa Punia, Medical Officer, General Hospital, Sonapat testified that on 16.11.2007, she medico-legally examined Ude Singh son of Subh Ram, aged 82 years and found the following injuries on his person:-

- “1. Diffused swelling was present over the left ankle and foot. Adv. X-ray left ankle with foot and ortho Surgeon opinion.
2. Complaining of pain in the left knee joint. On examination no external mark of injury was seen. Adv. X-ray left knee and ortho surgeon opinion.”

PW8 SI M.C.Pandey testified that on 16.11.2007, he was posted at Police Post Tis Hazari where he received information regarding the death of Omvir and found the dead body in the mortuary.

PW9 HC Naresh Singh deposed that on 14.11.2007 he was posted at Police Post Tis Hazari, Delhi where he received ruqa from St. Stephen Hospital, Delhi regarding the admission of Omvir. He reached the hospital but the doctor declared Omvir as unfit to make statement. He then recorded statement Ex. PA of Sunita, wife

of the injured.

PW10 Rajender Singh, Patwari deposed that on 17.1.2008 he had prepared the aks-shijra Ex. PL after visiting the spot and at the instance of ASI Sombir.

PW11 ASI Sombir testified that he had recorded the statement of Rajender-appellant on 14.11.2007 in General Hospital, Sonapat. On 15.11.2007 when he reached the village for further enquiry, he learnt that Omvir was admitted in St. Stephen Hospital, Delhi. He then reached Police Post Tis Hazari where he learnt that statement of Sunita had been recorded and sent to Police Station Kundli. He then came back to Police Station Kundli and made endorsement Ex. PN on the said statement. On 16.11.2007, he received information from ASI M.C.Pandey that Omvir had died. Special report was prepared and Section 302 IPC was added. The place of occurrence was got photographed and the rough site-plan was prepared. The blood stained earth, blood stained piece of creeper of bitter gourd and one slipper were lifted from the spot and taken into custody. Statement of PW Ude Singh was recorded and he was medico-legally examined.

PW12 HC Yashbir Singh testified that on 16.11.2007, he had taken one parcel containing blood stained clothes of deceased-Omvir, one envelop containing blood cloth piece for grouping which he handed over to ASI Sombir on 21.11.2007.

PW13 ASI Surender Singh testified that on 16.11.2007

ASI Sombir deposited one parcel containing blood stained bitter gourd. On 21.11.2007 SHO Pardeep Kumar handed over one parcel containing clothes of the deceased and one envelop. On 23.11.2007 SHO Pardeep Kumar also handed over four parcels containing one axe, one jalli, one lathi and one another lathi. He deposited all the articles with the FSL, Madhuban on 24.1.2008.

PW14 HC Naresh Kumar, Police Post Barota testified that on 16.11.2007, he alongwith ASI Sombir visited the place of occurrence from where blood stained earth and piece of bitter gourd were lifted and taken into possession.

PW15 EHC Ram Kumar deposed that on 24.1.2008 MHC Surender Singh handed over seven parcels which he delivered at the FSL on the same day.

PW16 Dr. S. Lal, Specialist, Forensic Medicine, Aruna Asaf Ali Govt. Hospital, Delhi testified that on 16.11.2007 he conducted post-mortem on the dead body of Omvir and found the following injuries on the body.

“1. Partially healed stitched lacerated wound with stitches 7 x 0.2 cm and bone deep, vertically placed over right parieto occipital area with contused margins, upper end placed just posterior to right parietal eminence and 5.0 cm medial to midline.

On internal examination I found the following observations:-

1. Head.

Sub scalpal extravassation of blood present over right parieto occipital bone. Linear fracture of right parietal bone extend to left side tempo parietal area, meninges intact and extra dural haemorrhage present over left parieto occipital area, sub dural and subarrachnoid haemorrhage on left parieto occipital area with oedema of brain.”

According to Dr. S.Lal, the injuries were ante-mortem in nature and cause of death was shock due to ante mortem cranio-cerebral damage produced by blunt force impact and sufficient to cause death in ordinary course of nature.

PW17 ASI Inderjeet testified that on 14.11.2007, he recorded formal FIR Ex. PT.

PW18 ASI Sombir, who was posted at Police Station Kundli testified that on 16.11.2007 he delivered the special report of the case to the Ilaqa Magistrate and the superior officers of the police.

PW19 Inspector Pardeep Kumar, Special Staff, Panipat, who stood posted as SHO, Police Station Kundli on 18.11.2007 deposed that he recorded the statement of Ude Singh, Jai Bhagwan and ASI Sombir and also took into possession the parcels containing the clothes. On 22.11.2007, he arrested the appellant as well as Rajbir, Raj Kumar and Anil. On 23.11.2007 all of them suffered disclosure statements pursuant to which Anil got recovered a lathi of

bamboo Ex. P16, Raj Kumar got recovered one jaili Ex. P15, Rajbir got recovered lathi Ex. P13 while appellant-Rajender got recovered kulhari Ex. P14. On 22.12.2007, he recorded the statement of Patwari, who had prepared aks-shijra. On 25.1.2008, he prepared final report under Section 173 Cr.P.C.

When examined under Section 313 Cr.P.C., all the five accused denied the prosecution allegations and asserted that the witnesses had deposed falsely whereas they themselves were innocent. No evidence was, however, led by them in defence.

After hearing learned counsel for the parties and on going through the case file, learned trial Court held that the appellant alone was present in the fields and armed with an axe at the time of the occurrence and after he had given a blow to Omvir on his head he had called the other accused, who came to the spot armed with lathis and jellies. His co-accused inflicted injuries to Omvir with the said weapons. After the entire incident had taken place, the villagers had reached the spot on hearing her alarm. She did not state any where about the presence of Ude Singh, Kuldeep and Shamsher Singh at the spot. Even otherwise the presence of PW2 Kuldeep Singh and PW6 Ude Singh at the time and place of occurrence was doubtful. However, there was consistent evidence by way of testimony of PW1 Sunita that appellant-Rajender had given an axe blow on the head of her husband Omvir as a result of which he fell down on the ground. She was also consistent in stating that the blow had been given from

the blunt side of the axe. Her testimony was duly corroborated by PW5 Dr. Vijay Kataria, who had conducted medico-legal examination of Omvir and found a wound over his scalp. He also confirmed the possibility of the said injury being caused with the axe shown to him. Even PW16 Dr. S. Lal, who had conducted post-mortem on the dead body of Omvir deposed that he had noticed injury on the head as a result of which there was extravassation of blood over right parieto-occipital bone and also linear fracture of right parietal bone. According to him, the cause of death was shock due to ante mortem cranio-cerebral damage produced by blunt force impact and sufficient to cause death in ordinary course of nature. Thus, from the total material on record i.e. statement Ex. PA of Sunita, statement made by her before the trial Court, statements of Kuldeep and Ude Singh as well as the medical evidence on record, grave doubt was cast regarding the presence of accused Rajbir, Raj Kumar, Anil and Sunil as members of an unlawful assembly or that they had common object to commit the murder of Omvir. Accordingly, the trial Court acquitted Rajbir, Raj Kumar, Anil and Sunil of all the charges against them. Only the appellant was held guilty under Section 302 IPC and sentenced, accordingly.

Learned counsel for the appellant has submitted that the presence of PW6 Ude Singh at the time of the occurrence and his sustaining injuries in the said occurrence is highly doubtful which shows that he has a made up witness and introduced to strengthen

the case of the prosecution. Similarly, PW2 Kuldeep was not present at the spot as he neither sustained injuries in the occurrence nor his name appeared as a witness in the first statement Ex. PA made by Smt. Sunita. It is also submitted that when Omvir was admitted in General Hospital, Sonapat, it was claimed by the complainant party that he had suffered injuries in a road side accident. It is also submitted that the medical evidence contradicts the ocular account. Further, the prosecution has not been able to prove the motive for the occurrence. It is also submitted that the FIR was registered in the first instance on the statement made by the appellant but no benefit of the same has been extended to him. Finally, it is submitted that the offence under Section 302 IPC is not made out.

Per contra, learned State counsel has submitted that the prosecution has been able to prove its case against the appellant beyond reasonable doubt and, thus, no case is made out for any interference in the impugned judgment of conviction and order of sentence passed by the trial Court.

This Court is not required to go into the question of presence of PW6 Ude Singh and PW2 Kuldeep at the spot as their presence had already been doubted by the trial Court. On the other hand, the trial Court has placed reliance upon the testimony of PW1 Smt. Sunita, who was accompanying her husband Omvir to the fields on the day of the occurrence at about 4.00 p.m. and when they had reached near the kotha of the accused, appellant-Rajender had come

out and launched an assault upon Omvir as a result of which Omvir received injuries on his head. The testimony of PW1 Sunita has a ring of truth as her statement is duly corroborated by PW5 Dr. Vijay Kataria, who had found a clean lacerated wound over the scalp of Omvir. The said injury was attributed to the appellant as having been caused with an axe which axe was recovered during the investigation of the case and when shown to PW5 Dr. Vijay Kataria, he opined that the possibility of this weapon used for assault could not be ruled. Merely because PW3 Ravi Kumar had narrated to PW5 Dr. Vijay Kataria that the injured had sustained injuries in a road traffic accident on 14.11.2007 is not at all sufficient to reject the prosecution case as PW3 Ravi Kumar had testified that on 14.11.2007 at about 5.00 p.m. he was at Narela, Delhi and made a telephonic call at his residence when he learnt that his uncle had received injuries and he was shifted to St. Stephen Hospital, Delhi. Accordingly, he went to St. Stephen Hospital, Delhi and reached there at about 6.45 p.m. He further deposed that he was in a perplexed condition and, accordingly, narrated that his uncle Omvir had received injuries in an accident. He was also under an impression that if he disclosed that his uncle had received injuries in a quarrel, the doctor might refuse to give him immediate treatment as it would have been a police case and only in order to save the life of his uncle, he stated that his uncle received injuries in an accident. During his cross-examination, he reiterated that he had mentioned in his statement before the police

about being in a perplexed condition while his uncle admitted in the hospital and inadvertently he had stated to the doctor about his uncle receiving injuries in an accident.

The medical evidence, instead of contradicting the ocular account is in conformity with the same. According to PW1 Sunita, the appellant was armed with an axe at the time of the occurrence which he had wielded in causing an injury on the head of her husband-Omvir. Said axe was used from its back side. It is true that in her statement Ex. PA made to the police, Sunita had stated that the axe was used in inflicting the solitary injury upon her husband, meaning thereby that the axe was used in the manner it is supposed to be used i.e. from its sharp side but the defence made no attempt to draw her attention to the same. As such no benefit can be extended to the appellant in respect of the medical evidence viz-a-viz the ocular account.

As regards the motive which impelled the appellant to launch an assault upon deceased-Omvir, Sunita in her statement Ex.PA did not state any thing. At the same time, in his statement made before ASI Sombir on 14.11.2007 at 8.30 p.m., appellant-Rajender himself stated that his fields adjoined that of PW2 Kuldeep and the mango tree on the land of PW2 Kuldeep was sold by Kuldeep and the persons who had cut the tree placed its branches in his fields where creeper of gourd was there. This was not objected to by the appellant. However, when the labourers again started cutting

the tree, the appellant proclaimed that the water course flowing by the side of the mango tree be not dismantled and on hearing the same it was PW2 Kuldeep, who dismantled the water course with the help of a spade and as a result thereof a wordy duel ensued between them. In such a situation, appellant-Rajender had the motive to open the assault and while being armed with an axe, he caused injury on the head of Omvir, brother of PW2 Kuldeep.

As regards the nature of offence, suffice it to say that the occurrence had developed on account of petty issue i.e. branches of the tree belonging to PW2 Kuldeep being placed close to the gourd creeper belonging to the appellant and subsequently when the labourers again started cutting the tree, the appellant proclaiming that the water course by the side of the mango tree be not dismantled. Apart from the same, there is no other background to the case. In the occurrence which ensued thereafter, the appellant is attributed causing of a solitary blow with the axe and, that too, from its wrong side in inflicting an injury on the head of Omvir, husband of complainant-Sunita. After the occurrence, injured-Omvir was taken to General Hospital, Sonapat but as his condition was serious, he was shifted to St. Stephen Hospital, Delhi where he was admitted on the same day at 6.45/7.00 p.m. It was only on 16.11.2007 at 4.20 p.m. that he breathed his last. Taking into consideration the facts and the attending circumstances, this Court is of the considered view that the appellant never intended to commit the murder of Omvir. Rather, he

had the intention of causing an injury which was likely to cause death. Under these circumstances, the conviction of the appellant under Section 302 IPC cannot be upheld. Instead, he deserves to be convicted under Section 304 Part-I IPC.

Resultantly, the conviction and sentence of the appellant under Section 302 IPC is set-aside. Instead, he is convicted under Section 304 Part-I IPC and sentenced to undergo rigorous imprisonment for eight years and to pay a fine of Rs. 10,000/- and in default of payment of fine, to undergo further rigorous imprisonment for six months.

The appeal is partly allowed to the extent indicated above.

**(T.P.S. MANN)
JUDGE**

**(MAHAVIR S. CHAUHAN)
JUDGE**

May 07, 2015
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