

\$~ 5

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

+ CRL.A. 1387/2014

% ***Judgment dated 23th March, 2015***

STATE(GOVT OF NCT DELHI) Appellant
Through: Mr.Feroz Khan Ghazi, Advocate

versus

UMESH & ANR Respondent
Through: Ms.Sana Ansari, Amicus curiae

+ ***CRL.A.1132/2014***

UMESH Appellant
Through: Ms.Sana Ansari, Amicus curiae

versus

STATE(GOVT OF NCT DELHI) Respondent
Through: Mr.Feroz Khan Ghazi, Advocate

+ ***CRL.A.1134/2014***

DEVRAZ Appellant
Through: Ms.Sana Ansari, Amicus curiae

versus

STATE(GOVT OF NCT DELHI) Respondent
Through: Mr.Feroz Khan Ghazi, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. Appeal No.1387/2014 has been filed by the State assailing the judgment of the trial court dated 19.7.2014 and order on sentence dated 24.7.2014. The appeal is restricted to the order on sentence dated 24.7.2014, by

which the respondents have been sentenced to undergo simple imprisonment for three months each for the offence punishable under Section 452 read with section 34 IPC and to pay fine of Rs.500/- each, in default thereof simple imprisonment for two months; respondents were further sentenced to undergo rigorous imprisonment for six months each for the offence punishable under Section 307 read with section 34 IPC and to pay fine of Rs.1000/- each, in default thereof rigorous imprisonment for two months; fine of Rs.500/- each was also imposed on respondents for the offence under Section 323 read with Section 34 IPC and in default thereof simple imprisonment for one month each; the respondents were further sentenced to undergo simple imprisonment for six months each for the offence punishable under Section 506 Part-II read with section 34 IPC and to pay fine of Rs.500/- each, in default thereof simple imprisonment for one month.

2. At this stage, we may notice that both the respondents (Devraj and Umesh) have also filed separate appeals [CRL.A. 1132/2014 & CRL.A. 1134/2014], challenging the judgment and order on sentence dated 19.7.2014 and 24.7.2014, respectively.
3. Both the appeals [CRL.A. 1132/2014 & CRL.A. 1134/2014] stand admitted by a learned Single Judge of this court. The file of both the appeals [CRL.A. 1132/2014 & CRL.A. 1134/2014] were called to court by an order dated 1.10.2014.
4. The appeal filed by State [CRL.A. 1387/2014] and the two appeals filed by the appellants/ accused [CRL.A. 1132/2014 & CRL.A. 1134/2014] have been heard together.
5. The case of the prosecution, as noticed by the trial court is as under:

“PROSECUTION VERSION

As per the allegation leveled in the charge-sheet on 22.07.2010 when around 05:00 PM the complainant Chitra Sen Pandey S/o Paras Nath Pandey returned home, his wife Smt. Suman Pandey told him that Dev Raj S/o Shri Umesh R/o C-469, Shiv Vihar, J. J. Colony, Uttam Nagar, New Delhi had come to their house and had used abusive language and had asked her to make her son Anand understand that he should not play in the lane (Gali) and that he should go and play in the park, on hearing which Shri Chitra Sen Pandey, the complainant went to the house of the accused Dev Raj and told him that he should not have gone to his house and should not have used abusive language to his wife and that if he had to talk he should have talked to him i.e. Chitra Sen Pandey.

It is further alleged that in the statement of Shri Chitra Sen Pandey, the complainant, which forms the basis of the FIR that on this altercation between him and Dev Raj, people from the neighbourhood collected and intervened and thereafter, he, Chitra Sen Pandey had come home.

It is further been stated by the complainant Shri Chitra Sen Pandey who was produced as PW 2 that vide Ex.PW 2/A wherein Chitra Sen Pandey stated that at about 05:15 PM he and his brother were present at his house and at that time Dev Raj and his father Umesh entered into his house and started saying "Tumne hamare paas aakar gaali – galoch kaise ki, aaj hum tumhe is baat ka mazaa chakhakar jaenge" i.e. they entered his house and told him that as he had gone to their house and had abused them, they would teach him a lesson whereupon the accused Umesh who had a Danda in his hand assaulted Chitra Sen Pandey and his brother Sudhir Pandey and at the time the accused Umesh also told his son Dev Raj to take out his knife "Apna chaaku nikaal, maar saale ko", i.e. he asked his son Dev Raj to take out his knife and to kill him. Interalia as per the FIR, the accused Dev Raj took out his knife and assaulted Chitra Sen Pandey with the same on his stomach and Chitra Sen Pandey was thus injured on his stomach. It has further been stated in the said statement of Chitra Sen Pandey i.e. Ex.PW 2/A i.e. the statement which forms the basis of the FIR, that thereafter the accused Umesh started assaulting him i.e. Chitra Sen Pandey and his brother Sudhir Pandey with dandas and then they (i.e. Chitra Sen Pandey and his brother Sudhir

Pandey) made a noise whereupon the accused Umesh and his son Dev Raj the co-accused started running away from there and also said that they had been saved that day but if they said anything again then he would kill them.

As per this statement of the complainant he then telephone the PCR at No. 100 and the PCR vehicle came to the spot and had taken him and his brother Sudhir Pandey to the DDU Hospital where they were admitted. Inter alia the complainant through his statement Ex. PW2/A stated that he did not get a statement recorded on 22.07.2010 as he and his brother had been injured and that he apprehended danger to his life and that the complainant had given his statement to the Investigating Officer at the Police Station itself. It was further alleged in the FIR that the accused had injured Sudhir Pandey and had threatened that he would kill them and had injured them.”

6. Counsel for the appellants in [CRL.A. 1132/2014 & CRL.A. 1134/2014] submits that the appellants have been falsely implicated in the present case, which is evident from the fact that the victims did not name the appellants when the call was made to the PCR although the appellants were known to them. It is further submitted that the judgment of the learned trial court is based on conjectures and surmises; and the trial court has failed to appreciate that the prosecution has not been able to prove its case beyond any shadow of doubt. The trial court has failed to consider that the appellants were named on account of previous enmity between the appellants and the victims. It is also contended that trial court has failed to consider that although PW-3 (Sudhir Pandey) testified that he was attacked with a weapon and *Dandas*, but neither the danda nor any other weapon was recovered, which is evident from the evidence of S.I. Sunil Kumar (PW-5). It is also contended that although as per the testimony of PW-3, members of his family were present at the house and at the spot of the incident but their statements were not recorded. Counsel further submits that it is most unusual that the family members

and neighbours were present at the spot but none of the public witnesses have joined in the investigation to support the version of the complainant and the prosecution. Counsel for the appellants also submits that despite the fact that the appellants were neighbours and despite the fact that it is the case of the prosecution that there have been arguments in the past, PW-2 and PW-3 who are the victims had failed to identify Dev Raj and Umesh correctly in the Court.

7. Learned APP for the State submits that the prosecution has been able to prove its case beyond any shadow of doubt. The victim did not name the appellants at the first opportunity available on account of the fact that they were neighbours and further the testimony of PW-2 and PW-3, who are victims, are truthful and reliable and, thus, can form the basis of conviction.
8. It is contended that the trial court has taken note of the entire evidence and rightly convicted the appellants, however, the State has challenged the order on sentence. Mr.Ghazi, submits that although the MLC shows nature of injury to be simple, but the injury was caused by a sharp edged weapon in the abdomen of the victim (PW-2) and the PW-3 received injuries with a blunt object, thus, the trial court has erred in awarding sentence of only six months. He thus prays for enhancement of the sentence.
9. As per the testimony of PW-2 on 22.7.2010 when he returned to his house from work between 5:00 and 5:15 p.m. his wife informed him that Umesh was abusing her and had also gave beatings to their son, who was playing in the gali after which he went to the house of Umesh and enquired from his father Dev Raj as to why Umesh has abused his wife in filthy language and gave beatings to his son; and thereafter he returned to his house. PW-2 has also deposed that thereafter Umesh and

Devraj came to his house armed with *Dandas* and started beating and Dev Raj exhorted his son “*Chaku Nikal Maar Sale Ko*”; upon which Umesh took out the knife and stabbed him in his stomach. The brother of the victim (Sudhir Pandey) came to save him and he was also beaten by Dev Raj and Umesh. PW-2 raised an alarm, upon which both the persons (Dev Raj and Umesh) ran away saying “*Aaj to bach gaye baad mein dekh lenge*’. Thereafter he informed the police and the police removed him and his brother to DDU hospital on 22.7.2010. PW-2 has also testified that he did not give any statement to the police as he was in a great pain, but on the next day he went to the police station and got his statement recorded (Ex.PW-2/A). It may be noticed that during recording of evidence in the Court both the appellants were present in court, but this witness (PW-2) wrongly pointed towards Dev Raj, Son of Umesh.

10. During the cross-examination this witness (PW-2) has testified that he knew both the accused persons, as they were living in the back lane of their house. Also during the cross-examination this witness has testified that when the accused persons [appellants herein in CRL.A. 1132/2014 & CRL.A. 1134/2014] entered the house with *Dandas* his wife, children and his brother were present at home. He has also testified that when he raised an alarm some persons came to save them. PW-3, Sudhir Pandey (brother of the Chitrsen Pandey, PW-2) also testified on the same lines. He has corroborated the testimony of his brother by deposing that when he tried to save his brother, he was also given beatings by *Dandas* and on alarm being raised some persons collected, but the accused persons ran away. This witness also could not rightly identify the accused persons in court.

11. PW-4 [(Dr.Rajiv), Senior Resident, General Surgeon, DDU Hospital],

has testified that patients (Sudhir and Chaitra Sen) were referred to him vide MLC No.13985 and 139856 from casualty; the nature of injuries found were simple.

12. PW-5 (S.I. Sushil Kumar, Special Cell) has testified that on 22.7.2010 he was performing emergency duty from 8:00 a.m. to 8:00 p.m. On receipt of DD No.65-B at 5:55 p.m. in relation to a quarrel at Shiv Vihar, J.J. Colony, near govt. School, near C-469 and 578, he reached the spot of incident. He has testified that a crowd had gathered and persons had informed that the injured had been taken to DDU hospital; and being a cluster area, there was a lot of crowd, the persons did not give their names, nor he recorded the statement of any persons from the spot. He also testified that he had requested Chaitra Sen Pandey to give his statement regarding the quarrel, but he has refused to give any statement as he was in pain and also as it was a quarrel between neighbours. On the next day between 7:00 and 8:00 p.m. Chaitra Sen Pandey gave his statement on the basis of which and on his pointing out, both the appellants were arrested. PW-5 has also testified that the weapons could not be traced. During cross-examination this witness has testified that he did not record the statement of both the victims and their respective wives. Statement of both the accused persons were recorded under Section 313 Cr.P.C. and they pleaded not guilty.
13. We have heard counsel for the parties in all the three appeals [CRL.A. 1387/2014, CRL.A. 1132/2014 & CRL.A. 1134/2014] and considered their rival submissions. We have also gone through the trial court record and the testimonies of the witnesses. We find no explanation on record as to why the FIR was not lodged at the first opportunity available; nor the appellants were named at the time when the information was given to the police especially when the accused were staying in the same colony

and were known to the complainant. We also find that despite the ASI Roop Chand having reached the spot of the incident, the appellants were not named by the victims, who were both fit for making a statement. In fact PW-3 was only beaten with a blunt object. The explanation rendered by PW-2 for not making a statement is that he was in pain, but there is no explanation as to why PW-3 did not make a statement, as not only was he a victim but was also present at the spot of the incident.

14. During cross-examination PW-2 has testified that at the time of the incident his wife, children and brother were present in the house and some other persons also came to save them. Similarly, PW-3 has testified that on noise being raised some people had collected. PW-5, SI Sunil Kumar, has also testified during cross-examination that when he reached the spot a crowd had collected and people had informed him that the injured had been taken to the hospital. He volunteered to state that it was cluster area, there was a lot of crowd, and he did not record the statement of any person at the spot including the neighbours and the family members of the victim. We also find it highly unusual that except for the statement of PW-2 & PW-3 not a single public witness was associated in the entire matter.
15. In the case of **Hem Raj and Others v. State of Haryana**, reported at (2005) 10 SCC 614, more particularly paras 8 and 9, it was held that if the public witnesses are available and they are not examined, it would be a serious infirmity. Paras 8 and 9 of the judgment read as under:

“8. The fact that no independent witness - though available, was examined and not even an explanation was sought to be given for not examining such witness is a serious infirmity in the prosecution case having regard to the indisputable facts of this case. Amongst the independent witnesses, Kapur Singh was one, who was very much in the know of

things from the beginning. Kapur singh is alleged to have been in the company of PW5 at a sweet stall and both of them after hearing the cries joined PW4 at Channi Chowk. He was one of those who kept the deceased on a cot and took the deceased to hospital. He was there in the hospital by the time the first I.O.-PW9 went to the hospital. The evidence of the first I.O. reveals that the place of occurrence was pointed out to him by Kapur Singh. His statement was also recorded, though not immediately but later. The I.O. admitted that Kapur Singh was the eye-witness to the occurrence. In the FIR, he is referred to as the eye-witness along with PW5. Kapur Singh was present in the Court on 6.10.1997. The Addl. Public Prosecutor 'gave up' the examination of this witness stating that it was unnecessary. The trial court commented that he was won over by the accused and therefore he was not examined. There is no factual basis for this comment. The approach of the High Court is different. The High Court commented that his examination would only amount to 'proliferation' of direct evidence. But, we are unable to endorse this view of the High Court. To put a seal of approval on the prosecution's omission to examine a material witness who is unrelated to the deceased and who is supposed to know every detail of the incident on the ground of 'proliferation' of direct evidence is not a correct approach. The corroboration of the testimony of the related witnesses-PWs 4 & 5 by a known independent eye-witness could have strengthened the prosecution case, especially when the incident took place in a public place.

9. Non-examination of independent witness by itself may not give rise to adverse inference against the prosecution. However, when the evidence of the alleged eye-witnesses raise serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witness-Kapur Singh, would assume significance. This Court pointed out in **Takhaji Hiraji Vs. Thakore Kubersing Chamansing & Others [(2001 6 SCC 145)]**

“[I]f already overwhelming evidence is available and examination of other witnesses would only be a

repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case, the court ought to scrutinize the worth of the evidence adduced. The Court of facts must ask itself whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the Court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein."

16. We are also conscious of the fact that ordinarily public persons are highly reluctant to join investigation but in this case we find this to be a serious infirmity for the reason that both the injured persons did not make any statement to the Police at the first opportunity available though both of them were fit to make a statement.
17. The weapon of offence either knife or the *Danda* has not been recovered. Barring the two statements made by both the victims, there is no evidence to link the appellants to the incident. Unexplained delay in recording of the FIR and the testimony of PW-2 and PW-3 which is highly unreliable, by itself cannot form the basis of conviction. We are conscious of the fact that the testimony of an interested person, including victims can form the basis for conviction, provided the testimony is reliable, cogent and trustworthy. In the present case, in the absence of

any explanation for delay in recording the FIR; there is nothing on record to suggest why PW-2 or PW-3 did not name the appellants at the first opportunity available; the fact that both the witnesses have testified that appellants are their neighbours, but could not identify them correctly in court, no public person was associated and even the statements of family members present, were not recorded, we find it highly unsafe to convict the appellants in [CRL.A. 1132/2014 & CRL.A. 1134/2014] based on the evidence on record. Resultantly, both the appeals [CRL.A. 1132/2014 & CRL.A. 1134/2014] are allowed and order of sentence and conviction is set aside. Bail bonds stand cancelled and the sureties stand discharged.

18. The appeal filed by the State [CRL.A. 1387/2014] is without any merit and the same is dismissed for the reasons stated above.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

MARCH 23, 2015

ssn