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

Judgment delivered on: February 22, 2016

+ **CRL.A.No.844/2002**
MAN SINGH & ORS. Appellants
Represented by: Mr.Sameer Sharma, Advocate.
Versus
STATE N.C.T OF DELHI Respondent
Represented by: Mr.G.M.Farooqui, Additional Public
Prosecutor for the State with
SI Madan Meena, PS Kapashera.

AND

+ **CRL.A. No.872/2002**
SURENDER & ORS. Appellants
Represented by: Mr.Sameer Sharma, Advocate.
Versus
STATE N.C.T. OF DELHI Respondent
Represented by: Mr.G.M.Farooqui, Additional Public
Prosecutor for the State with
SI Madan Meena, PS Kapashera.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Both these appeals are directed against the judgement dated 10.09.2002 and the order on sentence dated 11.09.2002 passed by the learned Additional Sessions Judge, New Delhi, in S.C. No.97/01 arising out of FIR No.213/99 registered at Police Station Kapashera, Delhi.

2. Since both these appeals have been arisen from the same FIR and the impugned judgment and involve the same incident, therefore, arguments were heard together in these appeals and the same are being disposed of by this common judgment.

3. It is pertinent to note here that during the pendency of these appeals, appellant Man Singh had expired on 14.02.2012, which fact has been recorded in the order dated 30.01.2015.

4. The prosecution case in brief is that in the morning of 30.10.1999, appellants Man Singh and Tej Pal etc. threw glass scraps of broken electric tubes opposite the house of the complainant Prem Chand (PW1), which was objected to. Resultantly, womenfolk of appellants started abusing and a petty quarrel had taken place. Both the parties allegedly went to the Police Station where the matter was settled. In the evening at about 7.30 PM, appellant Tejpal, working in Delhi Police, came to complainant's house and threatened that he had belittled the complainant party and because of fear, they tendered apology and compromised the matter. Allegedly Jai Bhagwan asked them not to pick up quarrel. In the meantime, appellant Tej Pal alongwith appellants Bijender, Dinesh and deceased Man Singh dragged Jai Bhagwan (PW5) inside their house and started giving beatings to him. In the meantime, Parminder (PW2), Manit (PW7), Saheb Singh (PW3) and Anil (PW4) came there to save PW5, whereas other appellants, namely, Attar Singh, Lakhmi Chand and Surender Singh armed with lathi, DAV and knife respectively came from the side of appellants Man Singh (since deceased) and Tej Pal and attacked the complainant party as a result of which complainant Prem Chand sustained injuries on his left thumb whereas

Jai Bhagwan sustained injuries on his head and feet, Parminder sustained injuries on his ribs, Manit sustained knife injuries in his stomach, Saheb Singh and Anil sustained injuries on their heads whereas Chandro (PW6) wife of complainant Prem Chand received injuries on her left arm. In medical examination, injury on the person of Chandro, Saheb Singh and Jai Bhagwan were opined to be grievous, whereas injuries on the person of Manit, Parminder, Prem Chand and Anil were opined to be simple. Statements of the witnesses were recorded by the police.

5. On completion of the investigation, chargesheet under Sections 147/148/149/308/34 of the Indian Penal Code, 1860 ('IPC') was filed against the appellants. On 28.07.2001, after hearing the parties, charges under Sections 148/308/323/149 IPC were framed against all the appellants and additional charges under Section 342/34 IPC were framed against appellant Tejpal, Bijender Kumar, Dinesh and deceased Man Singh to which they pleaded not guilty and claimed trial.

6. The learned Trial Court on the basis of the material brought on record held that the prosecution had been able to establish its case against appellants Bijender, Surender, Dinesh, Lakhmi Chand, deceased Man Singh, Attar Singh and Tej Pal for the offence punishable under Sections 148 and 308/149 IPC. However, noted that since prosecution had failed to prove its case for the offence punishable under Section 342/34 IPC, therefore, acquitted the appellants Tej Pal, Bijender Kumar, Dinesh and deceased Man Singh of the aforesaid charge. While passing order on sentence dated 11.09.2002, the learned Trial Court released all the appellants on probation for a period of three years on their furnishing bond in the sum of

Rs.10,000/- each with one surety in the like amount with condition that they shall maintain good behaviour and shall not commit similar offence during the above said period. Also directed, in case the terms and conditions of the bond are breached by any of the appellant, in that eventuality, they shall undergo rigorous imprisonment for a period of six months for offence under Section 148 IPC each and for offence under Section 308/149 IPC shall undergo rigorous imprisonment for three years.

7. Mr. Sameer Sharma, learned counsel appearing on behalf of the appellants submitted that FIR in question, i.e., 213/99 is a cross-case registered after lodging of FIR No.212/99 at the same Police Station at the instance of Smt. Savitri wife of Late Sh. Man Singh.

8. Learned counsel submitted that there was a long standing enmity based on caste between the complainants' party and the appellants as the complainants belong to Jat Community and are in majority in the village and appellants belong to Brahmin Community and are in minority in the village. He submitted that the present case is a counter blast to the case FIR No.212/99 already got registered against the complainant party by the appellants.

9. Learned counsel further submitted that on 30.10.1999 in the morning there had been a quarrel between wife of appellant Tej Pal and one opposite party member over throwing of glass scraps of tubes. Matter was reported to Police Station Kapashera. Subsequently, written apology was tendered by the complainants and settlement was arrived at between the parties, which prove that the complainants were at fault. Thereafter in the evening, at

around 8.00 PM complainants came in the street opposite appellants' house and addressed their women present there that "*Hum Tumhare Khasam Aa Gaye Hain Hamare Ko Mala Dal Do*". Appellants advised them to desist but they did not do so rather other members of complaints' family also came there.

10. Learned counsel further submitted that after seeing those persons, wife of appellant Man Singh (since deceased) Smt. Savitri complainant in FIR 212/99, had shut down the door of her house and gave a ring to the police. Thereafter, within 20 minutes police reached at the spot. She opened the door of her house on seeing the police. In the meanwhile, appellant Tej Pal, brother-in-law of the complainant also reached there from his duties. It is submitted that Mohinder Singh @ Muchla, accused in FIR No. 212/99, on the pretext of talking with the police party took the police to the house of Dharampal but quietly told Tarif (PW8) and his brothers to thrash the appellants. After sometime Prem (complainant), Dharampal, Happy and Mappy, Ravinder, Maneet, Sandeep, came from their houses armed with Jaili (prong), Dao, Iron road etc.

11. Thereafter, all the accused persons in FIR No. 212/99 attacked appellants Attar Singh and Tej Pal with the arms they were carrying with them. In order to save appellants Tej Pal and Attar Singh, other appellants Dinesh, Vijender, Surender and Lakhmi Chand, reached there, who were severely beaten by the complainant party. After some time PCR vehicles came and accused persons other than Jai Bhagwan @ Lala fled away from the spot. Accused Jai Bhagwan was apprehended and handed over to the police.

12. Learned counsel submitted that initially a call was made to the police from the appellants' party and subsequently an FIR No. 212/1999 was lodged under Sections 147/148/149/308/452/509 IPC against the complainant and other prosecution witnesses and subsequently, they were arrested by the police. However, they got registered a false case, i.e., FIR in question regarding above narrated incident against the appellants.

13. Learned counsel further submitted that the complainant and other prosecution witnesses had also faced trial in Sessions Case No.53/2000 arising out of FIR No.197/95, wherein all accused except Saheb Singh were convicted under Section 325/34 IPC vide judgment dated 05.02.2003 and sentenced vide order dated 07.02.2003; however, benefit of probation of Offenders Act was given to them. Similarly, in FIR No.212/1999 all accused (prosecution witnesses herein) were convicted by the learned Trial Court vide judgment dated 10.09.2002 and while passing order on sentence dated 11.09.2002, benefit of Section 4 of Probation of Offenders Act was given to them and all were released on probation for a period of three years.

14. Learned counsel submitted that in the present case also, all the appellants were convicted under Sections 148/308/149 IPC, however, benefit of Section 4 of Probation of Offenders Act was given to them and all were released on probation for a period of three years.

15. It is submitted that the complainants in the present case are habitual offenders as earlier also FIRs were filed against them and they had already been convicted in case bearing FIR No.197/95 for the offence punishable under Section 308/34 IPC and FIR No.212/99 under Sections

147/148/149/308/452/509 IPC. Moreover, conviction of the complainants in the earlier case has also been upheld by this Court vide judgment dated 18.07.2013 passed in Crl. Appeal No.92/2003.

16. It is relevant to mention here that because appellant Lakhmi Chand had got registered FIR No.197/95 under Sections 308/34 IPC against Sahib Singh (PW3), Dharam Pal, Anil Kumar (PW4) and Parvinder Kumar (PW2), since then, the complainants were nursing a grudge against the appellants. Thus, the appellants have been falsely implicated in the present case on account of enmity and the fact that criminal cases were pending against the complainant party.

17. Learned counsel further submitted that all the prosecution witnesses are interested witnesses as they all are relative of each other and are accused in cross-case bearing FIR No.212/99. He pointed out that Prem Chand (PW1) in his statement categorically admitted that a case under Section 308 IPC is pending against him in which appellants are complainants. Parvinder (PW2) deposed that he alongwith other persons tendered written apology in the Police Station. Saheb Singh (PW3) also stated that one case is pending against him in which appellants are complainants. The learned Trial Court also noted in para 9 of the impugned judgment that there was enmity between the parties and cases are pending against the complainant party.

18. In support of his submissions, learned counsel has relied upon the case of '*State of Rajasthan Vs. Chandu & Ors.*', *JT 2002 (10) SC 427*, wherein the Supreme Court held that:

"6. It is no doubt true that conviction can be based on the

sole testimony of an interested eye-witness. There is no dispute that the eye-witnesses including PW1 in the present case were all interested parties. There was severe enmity between the complainant group and accused group. There relations were fiercely inimical. The aforesaid rule that the conviction can be based on the sole testimony of an interested eye-witness is subject to the limitation that the testimony of such a witness is trustworthy and consistent and court finds it safe to fully rely upon the deposition of such a witness in regard to the nature of the occurrence and the involvement of the accused. In present case, however, it was prudent to look for corroboration on material particulars.

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8. *The High Court on appreciation of evidence has held that no independent witness had been examined as also that the prosecution had failed to explain the injuries received by the accused persons. What seems to have heavily weighed with the High Court is that the prosecution witnesses in particular the eye-witnesses have been held by the trial court not to be reliable and the facts were so intermingled that it was not possible to separate chaff from the grain and it was unsafe to base the conviction of the three accused on the sole testimony of PW1."*

19. In the case of **Sahib Singh Vs. State of Haryana, (1997) 7 SCC 231**, the Supreme Court observed that:-

"37. Indeed, enmity has always the potential of making a man stoop to the lowest level of inhumanity. This is what has happened in the instant case where certain terrorists appear to have come and attacked the shop of Dharam Pal where his father was sitting who was shot dead and the Hero Honda Motor Cycle was taken away. Not having seen as to what had Happened and who had killed their father, the three brothers, thought of involving the appellant in this

case so that he may be removed from the scene and lodged in the jail as thy, on account of the enmity, were highly interested in securing his conviction and in achieving this object, they did not shudder in lying before the court, ignoring, in the process, what WILLIAM HAZLITT had said that "Lying is the strongest acknowledgement of the force of truth."

20. Learned counsel for appellants submitted that in view of the above judgments, the impugned judgment and sentence dated 10.09.2002 and 11.09.2002 respectively are non-speaking in nature and, even otherwise, bad in law, as well as patently illegal on the face of record and, therefore, are liable to be set aside.

21. So far as conviction of the appellants under Sections 148 and 149 IPC is concerned, it is submitted that there is no evidence to support the conviction of rioting under Sections 149 and 148 IPC. Thus, the learned Trial Court was wrong in convicting the appellants under Section 148 IPC without sufficient and individual proof against each of them that he been a member of the unlawful assembly with the common object of beating or causing hurt to the complainants' party and committed rioting. The appellants could not be convicted for the offence of rioting because there was a sudden fight between the parties. The appellants have not formed themselves into an unlawful assembly in order to commit offence of rioting. Hence, none of the appellants can be convicted under Sections 148 and 149 IPC.

22. In support of his submissions, learned counsel has relied upon the case of '**Kuldip Yadav & Ors. Vs. State of Bihar**' (2011) 5 SCC 324, wherein the Supreme Court held that:

“36. In order to understand the rival claim, it is useful to refer Section 149 which reads as follows:

“149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.-If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.”

The above provision makes it clear that before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149 IPC, essential ingredients of Section 141 IPC must be established. The above principles have been reiterated in Bhudeo Mandal and Ors. v. State of Bihar, (1981) 2 SCC 755.

37. In Ranbir Yadav v. State of Bihar, (1995) 4 SCC 392, this Court highlighted that where there are party factions, there is a tendency to include the innocent with the guilty and it is extremely difficult for the court to guard against such a danger. It was pointed out that the only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the conscience of the court.

38. In *Allauddin Mian and Ors. Sharif Mian and Anr. v. State of* (1989) 3 SCC 5, this Court held:

“8....Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of any one or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of Section 149, IPC.”

39. It is not the intention of the legislature in enacting

Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC.

40. In *Rajendra Shantaram Todankar v. State of Maharashtra* and (2003) 2 SCC 257 506, this Court has once again explained Section 149 and held as under:

“14. Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the

commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behavior of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 - either clause - is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act.”

The same principles have been reiterated in State of Punjab v. Sanjiv Kumar alias Sanju and Ors. (2007) 9 SCC 791.”

23. Learned counsel further submitted that since the appellants were exercising right of private defence, therefore, no offence punishable under Section 308 IPC or any other offence is made out against them.

24. It is submitted by learned counsel for appellants that intention or knowledge has to be ascertained from the nature of injuries suffered by the victim. The doctor, in the present case, has not stated that the injury was sufficient, in the ordinary course of nature, to cause death. If death cannot be caused by such injury, there is no question of the appellants being liable under Section 308 IPC. In the present case, PW3 Saheb Singh has

not sustained any teeth injury and MLC was fabricated. Common sense guides that loss of teeth cannot be possible without receiving injuries on lips. The mere perusal of MLC Ex.PW11/D of Saheb Singh clearly indicates that there is no injury to the lower lips and there is a 2 cm x 1 cm CLW on left side of upper lip and in the end in MLC it was noted that PW3 loss six teeth of upper jaw and eight teeth of lower jaw which is not possible.

25. Learned counsel submitted that the learned Trial Court has ignored the fact that the incident had taken place on the spur of moment and it is evident from the facts of the case that there was no pre-meditated assault by the appellants. No overt act is attributed to either of the appellants and has relied upon the judgment passed by this Court in ***Prem Singh Vs. State Govt. of N.C.T. of Delhi 176(2011)DLT181***, wherein it is observed that:

“6. The testimony of witnesses specially PW4 and PW6 proves that the Appellants caused simple hurt to them in furtherance of the common intention. The Appellants were charged for offences punishable under Section 308/34 IPC for causing such bodily injury on the person of Smt. Rajia in furtherance of the common intention, that if such act had caused death of Rajia the Appellant would have been guilty of causing culpable homicide not amounting to murder. The second charge that was framed against the Appellants and the co-accused persons was under Section 323/34 IPC for voluntarily causing simple hurt in furtherance of the common intention to Ibrahim/PW4 and Ishrafi/PW6. The learned Trial Court convicted the Appellants and the co-accused person for offence punishable under Section 308/34 IPC, that is, for the act in pursuance whereof injury is caused on the person of Smt. Rajia. Though the learned Trial Court considered that the prosecution evidence showed that PW4 and PW6 suffered simple injuries. However, the Appellants were not convicted of the said offence. Thus, the

Appellants are deemed to be acquitted of the charge for offence under Section 323/34 IPC. The State has not preferred an appeal against the said acquittal. The issue thus required to be answered is that in the absence of an order of conviction for the charge for the offence punishable under Section 323/34 IPC for voluntarily causing simple hurt to Ishrafi and Mohd. Ibrahim in furtherance of common intention, whether this Court taking this as a minor offence of a separate charge under Section 308 read with Section 34 IPC can convict the present Appellants. Section 222(2) of the Code of Criminal Procedure, 1973 provides that when a person is charged with an offence and the facts proved reduces it to a minor offence he may be convicted of the minor offence although he is not charged with it. Thus, the major and the minor offence must have the main ingredients in common. The facts proved, should constitute a minor offence. When the facts required to be proved in the two offences are different, the later cannot be said to be a minor offence of the prior. In this case the Appellants were charged for the major offence, that is, under Section 308 read with Section 34 IPC relating to the bodily injury caused to Rajia in furtherance of their common intention and that if by the said act they had caused death of Razia they would have been held guilty for culpable homicide not amounting to murder. However, the facts proved in the present case are that the Appellants in furtherance of their common intention voluntarily caused simple hurt to Ishrafi and Mohd. Ibrahim. This cannot be said to be a minor offence of the major offence charged as the facts required to be proved by the prosecution case in both the charges were different, that is, in one bodily injury and intention of causing such injury to Rajia whereas in the later voluntarily causing simple hurt to Ishrafi and Mohd. Ibrahim. Thus in the absence of an appeal against the said judgment this Court cannot convict the two Appellants for the offence punishable under Section 323/34 IPC.

7. For the reasons stated the Appellants are acquitted of the charge punishable under Section 308/34 IPC. The appeals

are according allowed. The bail bond and the surety bond are discharged.”

26. Learned counsel further submitted that while passing the impugned judgment in the case in hand, the learned Trial Court had completely ignored the fact that appellants also received grievous injuries in the incident in question, which is evident from the judgement dated 10.09.2002 passed in cross-case bearing FIR No.212/99. The relevant paragraph of the aforesaid judgment is reproduced as under:-

"23. MLC of Attar Singh has been proved as Ex.PW6/H. Injuries on his persons have been opined to be grievous. His X-Ray report has been proved as Ex.PW 13/E. According to this report he sustained nasal bone fracture and multiple fractures of ribs. MLCs of other injured persons have been proved as Ex.PW 6/A-G which show that injuries were caused on head and scalp but were opined as simple caused by blunt object. MLCs have been proved by Dr. Rekha Tirkey PW 6"

27. It is submitted that there are discrepancies and contradictions in the deposition of prosecution witnesses, which had been ignored by the learned Trial Court.

28. Learned counsel submitted that the learned Trial Court has ignored a relevant fact that the FIR lodged by the appellants against the complainant party in respect of the alleged incident was prior in time and it were the appellants who called the Police at the spot when the complainants were harassing the ladies of the house of the appellants, which fact is detailed in the judgment dated 10.09.2002 passed in cross-case bearing FIR No.212/99.

29. Learned counsel also submitted that the learned Trial Court ignored

the testimony of Vijay Singh (DW2), who stated that on the day of incident, he saw that Prem, Tarif, Saheb Singh, Dharampal and Ram Kumar were standing in front of house of Late Man Singh and were abusing his family members. He further stated that when Sh. Tej Pal reached the spot the complaint party took the police official aside and started beating Tej Pal and Attar Singh.

30. Also argued, prosecution did not even produce the weapon of offence as alleged to have been used by the appellants for the commission of the alleged offence.

31. On the other hand, learned Additional Public Prosecutor appearing on behalf of the State submitted that the prosecution has been able to establish the offence alleged against the appellants beyond all reasonable doubt and the conviction and sentence recorded by the learned Trial Court do not call for interference by this Court.

32. I have heard the learned counsel for the parties.

33. Admittedly, the prosecution has proved its case that in the morning of 30.10.1999 an altercation had taken place between wife of appellant Tej Pal and injured Maneet over throwing of glass scraps and matter reached Police Station Kapashera, where it was compromised as the complainant had tendered written apology.

34. It is also borne out from the record that thereafter two cross FIRs, i.e., 212/99 and 213/99 were registered at the Police Station Kapashera. It is noted that FIR No. 212/99 was registered by Smt. Savitri wife of appellant

Man Singh (since deceased) against the complainant party alleging that at about 8.00 PM accused Tarif Singh (PW8), Prem (complainant), Dharampal and Ram Kumar came in the street opposite their house and addressed her and women of her family *Hum Tumhare Khasam Aa Gaye Hain Hamare Ko Mala Dal Do*. They were allegedly advised them to desist but they did not do so rather other members of their family also came. Complainant allegedly shut down the door of her house and gave a ring to the police. Within 20 minutes police allegedly came at the spot. The complainant allegedly opened the door of her house on seeing the police. In the meantime, appellant Tej Pal, brother-in-law of the complainant, also reached there from his duties. Mohinder Singh @ Muchla on the pretext of talking with the police party took the police to the house of Dharampal but quietly told Tarif (PW8) and his brothers that he was taking the policemen to other side and that they should thrash the complainant party. After some time Prem, Dharampal, Happy and Mappy, Ravinder, Maneet, Sandeep, came from their houses armed with Jaili (prong), Dao, Iron road etc. Dharampal was allegedly armed with danda, Tarif had Iron road, Happy was armed with Jaili, Mappy was armed with Dao, Jai Bhagwan had an iron rod in his hand and other persons were armed with lathies and were allegedly pressing Tej Pal to accompany them to the house of Dharampal, therefore, complainant allegedly asked Attar Singh to stop Tej Pal from going to the house of Dharampal. All the aforesaid persons allegedly attacked Attar Singh with the arms they were having. In order to save Tej Pal and Attar Singh, Dinesh, Vijender, Surender and Laxmi Chand, reached there, who were also given severe beatings by the complainant party. In the meantime Madhu, Pawan and Sunil also rushed to save them and to bring their

family members to their house but complainant party allegedly entered their house and gave beatings to them. After sometime PCR vehicles came and complainant party except Jai Bhagwan @ Lala fled away from there. PW5 Jai Bhagwan was apprehended. It is alleged that the family members of the complainant sustained injuries on their persons, therefore, police took Attar Singh, Laxmi Chand, Tej Pal, Dinesh, Vijender and Suresh to hospital. Madhu, Pawan and Sunil also allegedly sustained injuries. On the basis of this report police registered a case and commenced investigation. Injured persons were got medically examined, place of incident was inspected, site plan was prepared and the statements of witnesses were recorded.

35. As regards the present FIR, at the cost of repetition, it is stated that in the evening at about 7.30 PM, appellant Tejpai, working in Delhi Police, came to complainant's house and threatened that he had belittled the complainant party and because of the fear, they tendered apology and compromised the matter. Allegedly Jai Bhagwan asked them not to pick up quarrel. In the meantime, appellant Tej Pal alongwith appellants Bijender, Dinesh and deceased Man Singh dragged Jai Bhagwan (PW5) inside their house and started beating him, though both the witnesses requested them to desist from their action but they did not do so, therefore, he raised a noise. In the meantime, Parminder (PW2), Manit (PW7), Saheb Singh (PW3) and Anil (PW4) came there to save PW5, whereas other appellants, namely, Attar Singh, Lakhmi Chand and Surender Singh armed with lathi, DAV and knife respectively came from the side of appellants Man Singh (since deceased) and Tej Pal and attacked the complainant party as a result of

which complainant Prem Chand sustained injuries on his left thumb whereas Jai Bhagwan sustained injuries on his head and feet, Parminder sustained injuries on his ribs, Manit sustained knife injuries in his stomach, Saheb Singh and Anil sustained injuries on their heads whereas Chandro (PW6) wife of complainant Prem Chand received injuries on her left arm.

36. As submitted by learned counsel for the appellants that there was a long standing enmity based on caste between the complainants' party and the appellants, I do not find any substance therein. Moreover, the learned Trial Court had correctly observed that no witness was examined in defence other than the family members and if there had been some enmity based on caste, certainly any independent witness from either side would have come forward to depose on the same lines.

37. So far as submission that MLC Ex. PW 11/D of Saheb Singh (PW3) was fabricated as he did not sustain any teeth injury is concerned, it is noted that though except Tarif Singh (PW8) who is serving in Delhi Police as driver and Chandro, no other prosecution witness explained the nature of injuries suffered by the injured. Moreover, PW8 only deposed that Saheb Singh (PW3) sustained injuries on his head and had not stated that the said witness received any injury on his face and lip resulting fall of six teeth from upper jaw and eight teeth from lower jaw. It becomes noteworthy considering the fact that a person who is serving in Delhi Police and by virtue of his professional duties is accustomed with the criminal law and is in a position to manipulate facts to give favourable twist to the story to his own side, which fact is also evident in paragraph 12 of the judgement dated 10.02.2002 passed in cross-case bearing FIR No.212/99.

38. To corroborate, the aforesaid fact it is noted that in the chargesheet also complainant Jai Bhagwan (PW1) deposed that Saheb Singh sustained injuries on his head, which fact is also evident from the impugned judgment wherein recorded that Saheb Singh and Anil sustained injuries on their heads. Even perusal of MLC Ex.PW11/D of Saheb Singh clearly indicates that there is no injury to the lower lips and only a 2x1 cm CLW on the left side of upper lip is recorded. However, in the end in MLC it was noted that PW3 loss 6 teeth of upper jaw and 8 teeth of lower jaw which is difficult to believe. Thus, in the facts and circumstances of the case, non-narration of the aforesaid crucial fact by the witness like PW8 creates suspicion and in turn the submission made by learned counsel for the appellant that PW3 Saheb Singh did not sustain any teeth injury and said MLC was fabricated cannot be ruled out completely.

39. The next question which arises for consideration is whether it was a case of free fight or not.

40. Before considering the same, it would be relevant to find out what the word “free fight” means.

41. The Supreme Court in the famous case of ***Gajananand Vs. State of Uttar Pradesh, AIR 1954 SC 695***, had explained and defined the word “free fight” in very beautiful words in the following manner:

“A free fight is when both sides mean to fight from the start, go out to fight and there is pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders. When one party after preparation

and armed with deadly weapon went to the other party's house, it could not be said in these circumstances that both the parties were pre- determined for a trial of strength and had a free fight, rather the first party was the aggressor.”

Thus, it can be said that a free fight is one when both sides starts fight from the start.

42. In the case of **Kanbi Nanji Virji and Ors. Vs. State of Gujrat, AIR 1970 (SC) 219**, the Supreme Court had observed as under:

“Where there was a melee at the time of the incident and the two groups indulged in a free fight resulting in injuries to persons of both groups and death of two, if the Court comes to the conclusion that the injuries sustained by the persons were in the course of a free fight, then only those persons who are proved to have caused injuries or death can be held guilty for the offence individually committed by them”.

43. In a case of free fight, question of conviction with the aid of Section 149 IPC does not arise and for that law laid down by the Supreme Court in the case of **Puran Vs. State of Rajasthan, AIR 1976 (SC) 912**, may be referred to in which it was observed as under:

“In a case of sudden mutual fight between the two parties, there can be no question of invoking the aid of Section 149 for the purpose of imposing constructive criminal liability on accused. The accused in such a case the convicted only for the injuries caused by him by his individual acts.”

44. Moreover, no right of private defence is available in the case of free fight and for that law laid down by the Supreme Court in the case of **Vishvas Aba Kurane Vs. State of Maharashtra, AIR 1978 (SC) 414**, may be referred to in which the Supreme Court has observed as under:

“(C) Penal Code (1860) Section 96-Right of private defence – Free fight-No right of private defence is available to either party and each individual is responsible for his own acts.”

45. Before proceeding further something should be said about sudden fight. The word “sudden fight” has been defined by the Supreme Court in the case of ***Mariadasan and Ors. Vs. State of Tamil Nadu, AIR 1980 (SC) 573***, in the following manner:

“Sudden fight- When no party attacks the members of the opposite party at the commencement of the occurrence and there is no evidence regarding formation of unlawful assembly with a particular common object and the fight takes place as a result of heated passion and without premeditation, it can be said to be a “sudden fight”. No unlawful assembly can be said to have been formed in such cases and the accused cannot be convicted under this Section. All the persons must be held responsible for their individual acts and not vicariously liable for acts of others.”

46. The Supreme Court in the case of ***Mariadasan*** (*supra*), further held that even in sudden fight which had taken place on spur of moment, the accused cannot be convicted under Section 147, 148 or Section 149 IPC.

47. It may further be stated that in case of group rivalry and enmity, it often happens that there is a general tendency to rope in as many persons as possible as having participated in the assault. To avoid this eventuality, in case of free fight, the law has been laid down that persons who caused injuries would be liable.

48. Since in the present case, Prem Chand (PW1), Parvinder Kumar (PW2), Sahib Singh (PW3), Anil Kumar (PW4) and Jai Bhagwan (PW5) are injured witnesses, therefore, their presence at the scene cannot be

doubted.

49. There is no dispute on the point that in Sessions Case No. 27/2001 arising from the cross-case in which Tariff Singh (PW8), Prem Chand (PW1), Dharampal and Ram Kumar were convicted under Sections 509/148 and 308/149 IPC, accused Mohinder @ Muchla was convicted under Section 308/109 IPC and Parvinder @ Happy (PW2), Jai Bhagwan (PW5), Sandeep, Saheb Singh (PW3), Anil @ Mappy (PW4), Ravinder and Maneet (PW7) were convicted under Sections 148 and 308/149 IPC and when this being the position, then the findings of the learned Trial Court that it was a case of free fight are liable to be confirmed.

50. As already stated above, when there is free fight, no one can be convicted under Section 148 IPC or with the aid of Section 149 IPC and since the learned Trial Court convicted the appellants for offence under Sections 148 IPC as well as with the aid of Section 149 IPC, these findings are erroneous one and palpably wrong and against the well settled principles of law, thus, liable to be set aside. Consequently, the appellants are entitled to acquittal for offence punishable under Section 148 IPC and no appellant would be convicted with the aid of Section 149 IPC.

51. The next question remains to be examined is whether by causing injuries to the prosecution witnesses, the appellants had committed an offence punishable under Section 308 IPC or not?

52. In medical examination, injury on the person of Chandro, Saheb Singh and Jai Bhagwan were opined to be grievous, caused by blunt object. Whereas injuries on the person of Manit, Parminder, Prem Chand and Anil

were opined to be simple and they were also opined to be caused by blunt object. The prosecution has failed to produce the weapon of offence allegedly used by the appellants in the commission of offence. Moreover, intention or knowledge has to be ascertained from the nature of injuries suffered by the victim. The doctor, in the present case, has not stated that the injury was sufficient, in the ordinary course of nature, to cause death.

53. The Supreme Court in the case of ***Hari Kishan Vs. State of Haryana, AIR 1988 (SC) 2127***, observed that where the fight is accidental owing to sudden quarrel, conviction under Section 307 IPC is generally not called for.

54. In the case of ***Golla Sankaraiah & Ors. Vs. The State of Andhra Pradesh, Rep.by Public Prosecutor, 2008 (1) ALD (Cri) 830***, the Andhra Pradesh High Court observed that:-

“ While the first charge is exclusively for the offence punishable under Section 148 IPC, the second one is for the offence under Section 307 read with 149 IPC. To that extent, both the charges become untenable.”

55. When the case in hand is judged on the aforesaid touchstones, it can be inferred that:-

(i) There is proved enmity between the parties.

(ii) One of the appellant, i.e., Lakhmi Chand had filed FIR No.197/95 under Sections 308/34 IPC against Parvinder Kumar (PW2), Sahib Singh (PW3), Anil Kumar (PW4) and Dharam Pal, wherein they were convicted vide judgment dated 05.02.2003 in case bearing FIR No.197/95 under Sections 308/34, which had also been upheld by this Court vide judgment

dated 18.07.2013 passed in Crl. Appeal No.92/2003.

(iii) In the morning of 30.10.1999 there had been a quarrel between wife of appellant Tej Pal and one opposite party member over throwing of glass scraps of tubes. Matter was reported to Police Station Kapashera. Subsequently, written apology was tendered by the complainants and settlement was arrived at between the parties, which prove that the complainants were at fault.

(iv) The fight between both the parties was not premeditated as the incident took place due to heated arguments and altercations between them and could be termed as a result of sudden and grave provocation.

(v) It were the appellants, who reported the matter first to the police vide FIR No.212/99.

(vi) Admittedly, no independent witness except Smt.Chandro wife of complainant Prem Chand in defence was examined by the complainant party in case FIR No.212/99. However, in the present case, the appellants had examined Vijay Singh (DW2).

(vii) No weapon of offence allegedly used in the incident has been produced by the prosecution.

56. Thus, considering the facts noted above, to opine that who were the aggressors in the incident in question, more or less, the needle of suspicion points towards the complainant party instead of the appellants. However, the fact that the complainant party had received injuries in the incident in question and the fact that injury on the person of Chandro, Saheb Singh and

Jai Bhagwan were opined to be grievous caused by blunt object cannot be ignored.

57. In fact, the manner in which the incident took place does not suggest that the appellants had an intention or knowledge of inflicting injuries which would attract provisions of Section 308 IPC. Having regard to all these circumstances, I am not persuaded to hold that the appellants could be convicted for the offence punishable under Section 308/34 IPC. Therefore, considering the facts and circumstances of the case and the fact that nature of the injuries inflicted upon the aforementioned three persons was not simple, the conviction, therefore, ought to have been under Section 325 IPC.

58. The issue whether the offence falls within the purview of Section 308 IPC or it is only an offence under Section 325 IPC has been considered by the Supreme Court after discussing the law in detail in the case of **Som Raj @ Soma Vs. State of H.P reported in JT 2013 (3) SC 387**, wherein observed as under:-

“18. In Virsa Singh v. State of Punjab AIR 1958 SC 465, Vivian Bose, J. speaking for this Court, explained the meaning and scope of Clause (3), thus (at p. 1500):

The prosecution must prove the following facts before it can bring a case under Section 300, "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just

described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

19. Thus according to the rule laid down in Virsa Singh case of even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be 'murder'. Illustration (c) appended to Section 300 clearly brings out this point.

20. Clause (c) of Section 299 and Clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that Clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general - as distinguished from a particular person or persons - being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is

the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the first part of Section 304, of the Penal Code.

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.”

59. Similar view was taken by the Supreme Court in the case of ***State of Andhra Pradesh Vs. Rayavarapu Punnayya & Anr., 1976 (4) SCC 382.***

60. Now, the facts of the instant case have to be considered in the aforementioned legal guidelines. Admittedly, there was no pre-meditation and no planning to commit this offence, the injuries though opined to be grievous on the person of the three injured named above but caused by blunt object and the doctor, in the present case, has not stated that the injury was sufficient, in the ordinary course of nature, to cause death. The occurrence took place on the spur of the moment and all these facts gave rise to only one inference that there was no intention or knowledge of the appellants to cause death or to cause such injury which was sufficient in the ordinary

course of nature to cause death. Therefore, in my considered opinion, the offence committed by the appellants would fall under Section 325 IPC and not under Section 308 IPC. The learned Trial Court has not considered this aspect correctly.

61. In view of the legal position discussed above and the facts and circumstances of the case, these appeals deserve to be partly allowed. Accordingly, conviction of the appellants under Sections 148 and 308/149 IPC is hereby set aside. The appellants are convicted under Section 325/34 IPC. So far as the sentence aspect is concerned, the benefit of the Probation of Offenders Act, 1958, was extended to the appellants by the learned Trial Court vide order on sentence dated 11.09.2002. No similar offence has been committed by the appellants during the probation period.

62. The appeals are disposed of on the above terms.

63. TCR be sent back.

SURESH KAIT
(JUDGE)

FEBRUARY 22, 2016

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