

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

Date of Decision: 11th July, 2016

+ CRL. A. No. 1368/2011 & CRL. MA No. 17469/2011

RAKESH

..... Appellant

**Through: Mr.Amardeep Singh, Advocate
alongwith appellant in person.**

versus

THE STATE

..... Respondent

**Through: Mr.Hirein Sharma, APP for the
State alongwith sub-Inspector
Alok Kumar Rajan from Police
Station Sarai Rohilla.**

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. By virtue of this appeal under Section 374 of the Criminal Procedure Code, appellant Rakesh impugns the judgment and order on sentence dated 16.12.2009 and 07.01.2010 respectively in Session Case No. 144/1/2009 arising out of FIR No. 339/2003, Police Station Sarai Rohilla, Delhi vide which he was convicted under Section 323/325/304 (II)/34 Indian Penal Code and sentenced to imprisonment already undergone for all the offences with fine of Rs.5,000/- for the offence under Section 323/325/34 IPC and Rs.10,000/- for the offence under Section 304(II)/34 IPC, in default to undergo simple imprisonment for a period of six months.

2. The prosecution case emanates from the fact that vide DD No. 10A dated 28.09.2003, a PCR call was received in Police Station Sarai Rohilla regarding quarrel at RPF Line, Daya Basti, Delhi. On receipt of this information, SI Rajender Singh along with Constable Tejpal reached at the spot where he came to know that the injured have already removed to Hindu Rao Hospital. The police officials reached at Hindu Rao Hospital where he received MLC of Om Prakash, Sarvesh, Attar Singh, Munna Lal with alleged history of assault. The injured were kept under observation and injuries were reported to be received by blunt force impact. The patients were declared fit for statement. Statement of Om Prakash was recorded, wherein, he alleged that a quarrel took place on account of cleaning by his brother Naresh outside the jhuggi. The accused persons objected to the cleaning. Initially, Jai Bhagwan and Prem Lal came there. Thereafter, Rakesh and Mukesh also came at the spot and they joined the other two accused in abusing and beating Naresh. Om Prakash was also given beating with danda on different parts of his body. Meanwhile, his other brother Munna and Attar Singh living nearby Jhuggi reached the spot and they were also hit with dandas as a result of which, they sustained injuries. His wife Sarvesh came at the spot to save Attar Singh and Munna upon which, Prem Lal took danda from Rakesh and hit on her shoulder and abdomen while accused Rakesh gave fist blows on her abdomen. This statement Ex.PW-1/A became bedrock of investigation. Sarvesh ultimately succumbed to her injuries as such after completing investigation, charge-sheet was submitted under Section 304/308/325/323/34 IPC.

3. In order to substantiate its case, prosecution examined 19 witnesses. All the incriminating evidence was put to the accused persons while

recording their statement under Section 313 Cr.P.C, wherein, they denied the case of prosecution. The appellant pleaded his innocence and further stated that there was some meeting regarding the cooler installed by Naresh. The complainant party came at the place of meeting. Om Prakash was having an iron rod. He hit Rakesh with same as a result of which, he became unconscious and on gaining consciousness, he found himself in the hospital and thereafter falsely implicated in this case. The accused persons examined six witnesses in support of their defence. Vide impugned judgment, all the accused were convicted for offences under Section 325/323/34 IPC besides that the appellant and Prem Lal were also convicted for offence under Section 304(II)/34 IPC. After passing of the order of conviction, the matter was compromised between the parties. As such, keeping in view the fact that the appellant had suffered incarceration for 26 months, the other accused also remained in jail for quite some time as such, they were sentenced to the period already undergone besides imposition of fine.

4. Feeling aggrieved, the present appeal has been preferred by the appellant.

5. Assailing the findings of the learned Trial Court, learned counsel for the appellant submitted that two cross FIR's were lodged regarding the alleged incident on 28.09.2003. One FIR bearing No. 339/2003 was lodged against the appellant and other co-accused Prem Lal, Jai Bhagwan and Mukesh. The other FIR bearing No. 340/2003 was lodged against Attar Singh, Naresh, Om Prakash and Munna Lal and they were convicted vide judgment and order dated 16.12.2009 and 07.01.2010 for offence under Section 323/34 IPC. Counsel further submits that in this case, appellant was one of the witnesses and his testimony in the Court was to the effect that the

accused Om Prakash was having one iron rod and he gave blow on the head of the appellant and the appellant became unconscious and fell on the ground. He regained consciousness in the hospital. This version of the appellant was believed by the Trial Court while convicting the accused persons. That being so, it cannot be said with certainty that the appellant has committed any crime. There are two contrary versions of the alleged incident. Even otherwise, the benefit of doubt deserves to be extended to the appellant. It is further stated that the maker of FIR Om Prakash has given different versions of the alleged incident. Besides this FIR, he also made a complaint to SHO dated 11.11.2003 against the appellant and others, wherein, he does not ascribe any role to the appellant for hitting his wife Sarvesh. He also filed a complaint before the Chief Metropolitan Magistrate against the appellant and others, wherein, he also does not ascribe any role to the appellant for hitting his wife. These glaring contradictions clearly proved the innocence of the appellant. Admittedly, no blow with a danda was caused by the appellant to the deceased. Therefore, Section 304 (II) is not made out against the appellant. It is further urged that the parties have already settled the dispute. A deed of compromise/amicable settlement dated 02.01.2010 was jointly executed by the complainant, other injured witnesses as well as by the appellant and other co-accused. The said agreement was filed before the learned Trial Court after the order of conviction and before the order on sentence with a view to seek the permission to compound the offences. The Trial Court also recorded statement of the parties. Yet the order on sentence was passed. Co-accused Jai Bhagwan and Mukesh filed a Criminal Appeal No. 346/2010 where the compounding of the said offences was allowed by this Court vide order dated 19.08.2010 and they were

acquitted of the offences. A sum of Rs.2,00,000/- has been paid to the complainant party for the amicable settlement. The appellant was employed as a Safai Karamchari with the Municipal Corporation of Delhi at the time of commission of alleged offence. The appellant at present is under suspension from his job. However, the compromise will have bearing on this case and also on the future prospects of the appellant in securing back his government job. The appellant was of 24 years of age at the time of alleged incident as such, it is submitted that the impugned judgment of conviction and order on sentence be set aside and the appellant be acquitted of the offence.

6. Per contra, learned Public Prosecution for the State submitted that the impugned judgment does not call for any interference. He further submitted that as per the version of the complainant, Prem Lal took danda from the accused and hit Sarvesh on her shoulder and abdomen and thereafter, the appellant gave fist blows on her abdomen as such, he was rightly convicted under Section 304 (II)/34 IPC. Moreover, the deceased was not aggressor nor was a participant in the fight. She had merely intervened to save her brother-in-laws. The Trial Court has already taken a very liberal view by releasing the accused persons on the period already undergone. No further leniency is warranted as such, the appeal deserves to be dismissed.

7. I have given my considerable thought to the respective submissions of the learned counsel for the parties and have perused the record. It is not in dispute that the incident in question took place on a trivial issue of cleaning the space outside the jhuggi by Naresh. Both the parties were residing in the same locality for last about 12 to 13 years and there was no dispute during this period. According to the prosecution on 28.09.2003 at about 10:30 am, Naresh was cleaning outside the Jhuggi which was initially objected by Jai

Bhagwan and Prem Lal and they started giving beating to Naresh. Thereafter, his other brother Om Prakash came outside the Jhuggi on hearing the noise and when he tried to intervene then they took a quarrel with him too. Thereafter, accused Rakesh and Mukesh came at the spot and they joined the other co-accused in abusing and beating Naresh. Munna and Attar Singh, the other brothers of Naresh living nearby Jhuggi also reached the spot. They were also given beatings with dandas by the accused persons. Meanwhile, Sarvesh, wife of Om Prakash came at the spot to save Attar Singh and Munna who was also hit with danda on her shoulder and fist blows upon her abdomen which proved fatal.

8. Sarvesh was examined by Dr. S. Natrajan (PW-13) and he prepared her MLC Ex.PW-13/B. According to him, Sarvesh was brought to the hospital with alleged history of assault. It was the case of pain in abdomen and back and both shoulders region. There was tenderness on abdomen in left hypochondriac region and left costal margin. There was tenderness on both shoulders region. She was shifted to EMO (Surgery) and EMO (O). PW-16, Dr. Sujauddin proved the death summary report Ex.PW-16/A of Sarvesh and deposed that on examination, patient was found conscious and oriented. Urgent laprotomy was done. Peritoneal cavity was full of blood (about 3.5 liter approximately) and a laceration over the medial aspect of spleen was found. Life saving spleenectomy was done. The patient was put on a ventilator support. At about 9:30 am, patient developed sudden shock with pulse rate not palpable and expired due to hemorrhagic shock.

9. PW-12, Dr. C.B. Dabas conducted post mortem examination on the body of Sarvesh and deposed that there were two injuries and one was surgical wound. Upon internal examination, he observed that spleen had

been surgically removed. On the basis of clinical record and post mortem examination, he was of the view that the death in this case was due to heamorrhage and shock consequent to blunt force impact on abdomen. Injury No. 1 was surgically operated wound and injury No. 2 and 3 caused by blunt force impact. All the injuries were ante mortem.

10. DW-1 Dr. Rakesh Kumar Bansal, Medical Officer, Hindu Rao Hospital conducted operation of patient Smt. Sarvesh and deposed that during operation spleen was removed. There was laceration over the medial aspect of the spleen.

11. The accused also examined DW-1 Dr. S.C. Gupta, Proprietor, Aggarwal Nursing Home who deposed that Smt. Sarvesh was admitted in Aggarwal Nursing Home for cholelithiasis (stone in gall bladder). She was brought to the hospital on 08.03.2003 and remained in Nursing Home upto 12.03.2003 and was operated for cholelithiasis.

12. By examining this doctor, probably the accused person have tried to take the plea that due to her operation for stone in gall bladder, the victim was unable to get up from the bed and therefore, she could not have come to the spot and there was no occasion for causing any injury to her which resulted in her death. However, this plea is without any force as the operation for stone in gall bladder took place during the period 08.03.2003 to 12.03.2003 whereas the incident in question took place on 28.09.2003 i.e. after almost six months of the operation. Moreover, the removal of stone in gall bladder has no connection with rupture of spleen which had to be removed and the other injuries which find mention in the post mortem report. Under these circumstances, the prosecution had succeeded in establishing that due to injuries caused to Sarvesh with blunt force on her

abdomen, her spleen was ruptured which had to be removed and ultimately due to heammorrhage and shock consequent to blunt force impact on abdomen, she died.

13. It is also proved on record that the incident took place on a trivial issue of cleaning outside the jhuggi of Naresh. Parties were neighbours and prior to this dispute, no quarrel ever took place between them for last about 12-13 years. There was no premeditation. Everything happened in spur of moment in which both parties sustained injuries which is reflected from the fact that in cross case, complainant party was also convicted although for a lesser offence under Section 323/34. The fact remains that there was no intention on the part of the assailant to cause death of Sarvesh who arrived at the spot subsequently to save her brother-in laws. However, since injuries were caused by blunt force on a vital part of the body i.e., abdomen therefore the assailant must have known that such act of his was likely to cause death so as to bring the case within the four corners of Section 304(11) IPC.

14. The crucial question is who is responsible for causing these injuries on her person. In the initial complaint Om Prakash had stated that Prem Lal took danda from Rakesh and hit Sarvesh on her shoulder with danda and thereafter Rakesh gave fist blows on her abdomen. There is no allegation that Prem Lal gave any danda blow on her abdomen. However, in the Court, he has made improvement by deposing that Prem Lal took danda from Rakesh and hit her on her shoulder and abdomen while Rakesh gave fist blows on her abdomen. Om Prakash admitted that he had filed a complaint case regarding this incident. The accused persons proved the complaint filed by the complainant by summoning the relevant record from Record Room (Criminal) and as proved by DW-5, Sh. Sunil Kumar, LDC Record Room

(Criminal), Tis Hazari Courts. The averments made in Para 3 of the complaint Ex.DW-3/A filed before the Chief Metropolitan Magistrate by complainant is material and the same is reproduced as under:

“That on 28.09.2003 at about 10:30 A.M. Naresh, the brother of complainant was cleaning the space outside his Jhuggi to tie the goat, in the mean-time Accused No. 1 and 3 namely Prem Lal and Jai Bhagwan came there and started abusing to the brother of the complainant and asked him to stop doing any work, the brother of the complainant objected for the same, at once Prem Lal and Jai Bhagwan gave call to other co-accused persons namely Rakesh, Mukesh, Smt. Jyoti, Smt. Savitri, Smt. Kashmiro, Vinod and Deepak and said in loud voices to finish all the family of the complainant, in the mean-time wife of the complainant Smt. Sarvesh, his brother Munna Lal, Attar Singh also had come there upon all the accused namely Prem Lal, Rakesh, Jai Bhagwan, Mukesh, Smt. Jyoti, Smt. Savitri, Kashmiro, Vinod and Deepak who also were armed with Hamour (Hammer), iron rod, stone, brick, Lathi and Danda with common intention attacked to the complainant and his wife, his brother Munna Lal, Attar Singh. Prem Lal caused injuries with brick on the neck of Smt. Sarvesh, Rakesh caused injuries with Lathi, Mukesh hit with iron rod at the stomach of Smt. Sarvesh, wife of complainant and Jai Bhagwan hit with hamour (hammer) at the ribs of the wife of the complainant. Vinod caught hold to Om Prakash and Deepak gave a Lathi blow on his head, Kashmiro, Jyoti and Savitri caused injuries with stone and brick to the brothers of complainant. Rakesh also caused injuries to Attar Singh. All the co-accused namely Prem Lal, Rakesh, Jai Bhagwan, Mukesh, Smt. Jyoti, Smt. Savitri, Smt. Kashmiro, Vinod & Deepak armed with hamour (hammer), iron rod, stone, bricks, Lathi & danda caused grievous injuries to the complainant, his wife, his brothers Attar Singh and Munna with an intention to kill. The accused persons gave merciless beatings to the

complainant and his family members with hamour, iron rod, stones, bricks, Lathi and Danda with close range and they do not only broken the several bones of the part of the body of the wife of Complainant, but also damaged vital part of her body with intention to kill her.”

15. Perusal of the aforesaid averment made in this complaint reflects that the complainant has made allegations against all the accused for causing injuries on the person of Sarvesh. He also filed a complaint Ex.DW-5/B against SHO and the Investigating Officer for not registering the FIR under appropriate sections and not arresting all the accused persons. Para 2 of this complaint speaks about the incident and the same is reproduced as under:-

“That on 28.09.2003 at about 10:30 A.M. when the brother of complainant was cleaning the space outside his Jhuggi and to tie the goat, in the meantime, Accused persons Prem Lal, Jai Bhagwan came there and started abusing the brother of complainant and when complainant objected, the above said culprits came on the spot with Iron Rod, Dandas, bricks, stones and started beating the complainant, his brother Mukesh, Munna and Attar Singh, they also gave merciless beatings with Iron Rod, Dandas, Bricks with a close range to the wife of complainant in a badly manner and they not only broken the several bones of the part of body of wife of complainant but also damaged lever, vital part of the body with intention to kill her and wife of complainant on the same day died due to the severe injuries caused by all the above accused persons with iron rod, lathi, bricks and further extended threats to kill entire family.”

16. There are no allegations against the appellant for causing any injury to Sarvesh. Under these circumstances, in view of the different versions given by the complainant at different stage of the proceedings, prosecution is not able to establish beyond reasonable doubt that it was the appellant Rakesh

who gave fist blows on the abdomen of Sarvesh or Prem Lal gave danda blows on her abdomen which ultimately proved to be fatal. That being so, although a precious life has been taken on a petty issue of cleaning outside the Jhuggi of Naresh but complicity of the appellant for causing death of Sarvesh is not established beyond reasonable doubt. Accordingly, as regards this offence, he is entitled to benefit of doubt.

17. As regards, offences under Section 323/325/34 IPC are concerned, not much challenge has been laid by the learned counsel for the appellant regarding his conviction for these offences precisely for the reason that offence under Section 325 IPC is compoundable with the permission of the Court. As stated above, after their conviction, the appellant along with the co-accused settled the matter with the injured. The terms of settlement were recorded in the compromise deed dated 02.01.2010, copy of which has been annexed with this appeal. Om Prakash had suffered simple injury. His two other brothers namely Attar Singh and Naresh also suffered simple injuries while his other brother Munna suffered grievance injury due to fracture in his wrist. All of them signed the compromise deed. In terms of the compromise deed, the appellant and the co-accused have paid a sum of Rs.2,00,000/- to the injured persons in order to compensate their mental pain and suffering due to injuries received by them. The Trial Court had recorded the statement of the injured before passing the order on sentence, wherein, they had admitted that they have settled the matter voluntarily without any threat or pressure and that they have received settlement amount. When two of the co-accused preferred an appeal bearing No. 346/2010 before this Court, Om Prakash had appeared and confirmed that he and his brothers have received settled amount in terms of the settlement. In terms of the

compromise arrived at between the parties and keeping in view the nature of offence, the matter was allowed to be compounded and therefore, the appellants- Jai Bhagwan and Mukesh were acquitted in view of Section 320(8) of the Code of Criminal Procedure. The case of the present appellant stands on the same footing as that of the co-accused as regards these offences and therefore, since the matter has been compounded, he is acquitted of the offences under Section 325/323/34 IPC in view of Section 320(8) of the Code of Criminal Procedure. The fine is reported to have been deposited with the Trial Court. Same need not be returned.

18. In view of the foregoing, the impugned judgment dated 16.12.2009 convicting the appellant for the offence under Section 304(II)/34 IPC is set aside and the accused is acquitted of this offence by granting him benefit of doubt whereas the remaining offences stands compounded. The net result is that the accused is acquitted of all the offences alleged against him. The appeal stands disposed of in the aforesaid terms. Pending applications, if any also stand disposed of.

19. Trial Court record be sent back forthwith.

(SUNITA GUPTA)
JUDGE

JULY 11, 2016

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