

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

Judgment Reserved on: May 26, 2016

% *Judgment Delivered on: May 31, 2016*

+ **CRL.A. 489/2015**

SUNIL BIHARI

..... Appellant

Represented by: Mr.Sunil Tiwari, Adv.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Represented by: Mr.Ravi Nayak, APP with SI
Pawan Kumar PS Subzi Mandi,
SI Satvir Singh PS Kasmere
Gate.

+ **CRL.A. 1085/2015**

SHIV KUMAR @ BHAGGU

..... Appellant

Represented by: Ms.Rakhi Dubey, Adv.

versus

STATE

..... Respondent

Represented by: Mr.Ravi Nayak, APP with SI
Pawan Kumar PS Subzi Mandi,
SI Satvir Singh PS Kasmere
Gate.

+ **CRL.A. 1188/2015**

RAHUL JAIN @ SONU

..... Appellant

Represented by: Mr.Harsh Prabhakar, Adv.
DHCLSC with Mr.Anirudh
Tanwar, Adv.

versus

STATE

..... Respondent

Represented by: Mr.Ravi Nayak, APP with SI
Pawan Kumar PS Subzi Mandi,
SI Satvir Singh PS Kasmere
Gate.

+

CRL.A. 595/2015

AJAY @ AJJU

..... Appellant

Represented by: Mr.Dhan Mohan, Ms.Tanu B.
Mishra, Advs.

versus

THE STATE GNCT OF DELHI

..... Respondent

Represented by: Mr.Ravi Nayak, APP with SI
Pawan Kumar PS Subzi Mandi,
SI Satvir Singh PS Kasmere
Gate.

+

CRL.A. 843/2015

SHABIR ALI

..... Appellant

Represented by: Mr.Dhan Mohan, Ms.Tanu B.
Mishra, Advs.

versus

STATE GNCT OF DELHI

..... Respondent

Represented by: Mr.Ravi Nayak, APP with SI
Pawan Kumar PS Subzi Mandi,
SI Satvir Singh PS Kasmere
Gate.

+

CRL.A. 848/2015

ANIL @ BUTA

..... Appellant

Represented by: Mr.Dhan Mohan, Ms.Tanu B.
Mishra, Advs.

versus

STATE (GNCT OF DELHI)

..... Respondent

Represented by: Ms.Rajni Gupta, APP with SI
Pawan Kumar PS Subzi Mandi,
SI Satvir Singh PS Kasmere
Gate.

+

CRL.A. 891/2015

AMIT SHUKLA @ GOLDI

..... Appellant

Represented by: Ms.Rakhi Dubey, Adv.

versus

STATE NCT OF DELHI

..... Respondent

Represented by: Ms.Rajni Gupta, APP with SI
Pawan Kumar PS Subzi Mandi,
SI Satvir Singh PS Kasmere
Gate.

+

CRL.A. 907/2015

DEEPAK

..... Appellant

Represented by: Mr.Dhan Mohan, Ms.Tanu B.
Mishra, Advs.

versus

STATE G.N.C.T. OF DELHI

..... Respondent

Represented by: Ms.Rajni Gupta, APP with SI
Pawan Kumar PS Subzi Mandi,
SI Satvir Singh PS Kasmere
Gate.

+

CRL.A. 910/2015

GOMTI @ MANOJ

..... Appellant

Represented by: Mr.Dhan Mohan, Ms.Tanu B.
Mishra, Advs.

versus

STATE G.N.C.T. OF DELHI

..... Respondent

Represented by: Ms.Rajni Gupta, APP with SI
Pawan Kumar PS Subzi Mandi,
SI Satvir Singh PS Kasmere
Gate.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
MUKTA GUPTA, J.

1. Appellants have been convicted for the offences punishable under Sections 307/186/332/353/148/342/440/120-B IPC vide the impugned judgment dated February 20, 2015 and vide order dated March 27, 2015 they have been sentenced to undergo rigorous imprisonments ranging from a period of 9 years to 4 years which will be dealt in detail while dealing with the order on sentence. Besides the appellants, 4 more persons were convicted i.e. Rehan, Satpal Bedi, Dheeraj and Dharm who preferred no appeal, thus this Court in the present appeals is concerned with the abovenoted appellants only.

2. The sequence of events leading to the registration of FIR No.118/2011 at PS Subzi Mandi under Sections 307/186/333/353/148/342/440/120-B IPC exhibited as Ex.PW-2/A are that one FIR No.207/2011 was registered at PS Uttam Nagar under Sections 307/34 and 27 Arms Act wherein Bimla the informant, mother of Ajay @ Ajju suffered a firearm injury on her right thigh. In the said FIR Khalil Ahmed PW-6 and Akbar Khan PW-7 besides Aftab and Neeraj Gupta were arrested which led to animosity between appellant Ajay @ Ajju and witnesses Khalil Ahmed and Akbar Khan, all three of whom were lodged in Jail. On June 06, 2011 Khalil Ahmed, Akbar Khan and Ajay @ Ajju were to be produced in Tis-Hazari Court from Tihar jail and Rohini Jail. Thus they were taken to Tis-Hazari lockup. At around 12.30 PM HC Om Prakash PW-5 and Constable (in short 'Ct.') Tej Prakash returned with Ajay @ Ajju to the lockup after producing him before the Court. As soon as the door of

High Risk kharja was opened, 9-10 Under Trial Prisoners (in short 'UTPs') forcibly rushed out of the said kharja. In the meanwhile UTPs, namely, Gomti @ Manoj (co-accused), Anil (co-accused) and Deepak (co-accused) also returned to the lockup after attending the proceedings of their respective cases. Thereafter all of them started yelling that they would kill Khalil Ahmed PW-6 and Akbar Khan PW-7 as they had fired at the mother of Ajay @ Ajju (co-accused). The accused persons bolted the main entry gate of the lockup from inside in order to prevent the police officials from entering. Further, they broke an iron bench which was lying in the lockup and grabbed the iron pieces of the bench. The accused persons tore the warrants. They broke open the lock of SAG kharja in which Akbar Khan PW-7 was kept with the iron rods/pieces of the bench. Khalil Ahmed PW-6 was not present in the said SAG kharja at the said time as he had been taken to attend the proceedings of the case in which he was arrayed as accused. The accused persons started beating Akbar Khan PW-7 with the broken iron rods/pieces of the bench. When Ct. Tej Prakash PW-3 along with other police officials tried to intervene, co-accused Gomti @ Manoj struck on the head of Ct. Tej Prakash PW-3.

3. In this regard DD No.16 Ex.PW-1/A was received at Police Post Tis Hazari where after SI Satbir Singh PW-21 and Ct.Pawan Kumar PW-16 reached Tis Hazari lockup. Ct.Tej Prakash PW-3 was admitted in Aruna Asaf Ali hospital and had suffered a linear cut injury on the right temporal region. Akbar Khan PW-7 was taken to Sushruta Trauma Centre and as per MLC Ex.PW-8/A he suffered the following injuries:

- “i) Six contused lacerated wounds over parietal, B/L temporal and occipital region of skull.

- ii) A contused lacerated wound admeasuring 3 cm over forehead.
- iii) An incised wound admeasuring 3 x 1 cm over chin.
- iv) An incised wound admeasuring 1 cm over right postero-superior of neck.
- v) Swelling along with a laceration admeasuring 2 cm over right mid forearm.
- vi) An incised wound admeasuring 3 cm over left little finger [partial amputation].
- vii) Deep abrasion over right heel pad.
- viii) Abrasion over the right shoulder joint and swelling over left elbow joint.
- ix) Abrasion over right ...(illegible) region of abdomen and ...(illegible) aspect of chest.”

4. Injuries No. 1, 2, 5, 7, 8 & 9 on Akbar Khan were opined to be caused by blunt object whereas injuries No.3, 4 & 6 were caused by sharp object. The nature of injuries was opined to be grievous. Since Ct.Tej Prakash was declared fit for statement, his statement was recorded on the basis of which FIR No.118/2011 was registered at PS Subzi Mandi.

5. Ct.Tej Prakash stated that he was posted at Vikas Puri Lines and on June 06, 2011 he along with HC Om Prakash high risk Guard had brought high risk UTPs to the lockup at Tis Hazari. He along with HC Om Prakash had produced UTP Ajay S/o Ram Kishore in Court No.152 before the learned Metropolitan Magistrate in FIR No.64/2011 under Section 325 IPC PS Hari Nagar. After completion of proceedings before the Court, he along with HC Om Prakash brought Ajay to the lockup and the moment they entered the high risk kharja after opening the door suddenly 9-10 high risk prisoners who were locked inside, came out of the kharja forcibly. In the meantime high risk UTPs Gomti, Anil and Deepak who had also attended their proceedings reached the kharja. They all started shouting that Khalil

and Akbar Khan have got fired Ajay's mother and they would be killed. These accused persons closed the latch of the main entry gate of the kharja from inside so that Police staff could not enter in and broke the iron bench in the gallery of the kharja. They held the pieces of the iron bench lying in their hand. They tore the warrants in the hands of the Police staff. From the iron pieces of the bench they broke open the lock of SAG kharja where Khalil and Akbar Khan were locked. He clarified that Khalil was not in the kharja as he had been taken for the proceedings before the Court. The accused assaulted Akbar Khan with the iron pieces from the bench with an intention to kill him and stated that they would finish him. When he and other police staff entered to stop the scuffle, UTP Gomti inflicted an injury on his head and others also beat him. The UTPs also injured themselves deliberately. He was brought to the hospital and discharged after treatment. According to him Ajay and his companions in a pre-planned manner attacked Akbar Khan to kill him.

6. SI Satbir Singh PW-21 took into possession and seized samples of blood found near the gate of high risk kharja, torn government papers (warrants), two iron handcuffs with chain, two pieces of broken iron bench, a piece of blood stained newspaper, sample of blood collected near SAG kharja, a blood stained piece of commode, a pair of blood stained slippers, two pages of blood stained handwritten letter, sample of blood present on a register over the warrant table, hair found outside SAG kharja, one broken lock and a blood stained white kurta vide Seizure Memo Ex. PW 3/B in the presence of Ct. Pawan Kumar PW-16 and Ct. Tej Prakash PW-3.

7. After Akbar Khan was declared fit for statement at 6.15 PM on June 06, 2011 his statement under Section 161 Cr.P.C. was recorded. SI Satbir

Singh sought opinion with regard to the weapon of offence by filing an application to the Sushruta Trauma Centre on which Dr.J.K.Basu after examining the two hollow iron rods Ex.P-4 opined that the possibility of injuries No.1, 2 & 5 mentioned in Ex.PW-8/A, the MLC of Akbar Khan PW-7 having been sustained due to the impact of aforementioned weapon could not be ruled out.

8. At the time of framing of charge Vikram was discharged whereas Naim passed away during trial. Thus the present appeals before this Court.

9. Learned counsels for the appellants contends that the 'best evidence' i.e. CCTV footage has been withheld by the prosecution. The said footage would reveal the events that actually transpired in the kharja and the accused persons who were involved. HC Gulab Singh PW-10 and SI Manbir Singh PW-18 have admitted that CCTV cameras were installed in the kharja and were in operating condition on the day of incident. During the course of Trial the prosecution has not formally proved the extracts of the register that was maintained at the kharja to record the movement of prisoners between the Court and the kharja. Ct. Tej Prakash PW-3, HC Gulab Singh PW-10, HC Rakesh PW-12, HC Rajeev PW-13 and SI Satbir Singh PW-21 have admitted the existence of such a register and the fact that the Investigating Officer did not seize the same. It would however be pertinent to highlight that the extracts of the said register form part of the Lower Court Record as it was comprised in the documents appended with the Final Report. No prosecution witness has attributed any specific overt act to any of the present appellants except Gomti @ Manoj. A perusal of the testimony of HC Gulab Singh PW-10 and HC Rakesh PW-12 who have deposed about the appellants besides those named in rukka being involved in the incident, have

done so in a blogged and an omnibus manner. Furthermore, the statement under Section 161 Cr.PC of the HC Gulab Singh PW- 10 and HC Rakesh PW-12 were recorded after a delay of around 1 month i.e. on 4th July, 2011. It is a settled proposition of law that in cases where many accused are involved in a mass fight, the Courts must be cautious as there may be a tendency to implicate passive by-standers. It has been held that unless some specific overt act has been attributed to the accused, it may not be safe to sustain a finding of guilt. It assumes significance that in the present case the incident has occurred in a confined space and the investigating agency has chosen to implicate all the accused persons lodged in the High Risk kharja. Ct Tej Prakash PW-3 has deposed before the Court that 4-5 accused persons (other than accused- Gomti @ Manoj, Anil and Deepak) had forcibly come out of the door of the High Risk kharja. Therefore it is evident that all the prisoners lodged in the said kharja were not involved in the incident. Interestingly, the investigating agency has seized only two pieces of iron rod from the spot of occurrence Ex. PW-3/B and therefore, it stands ruled out that every member of the riotous mob alleged to have been formed was beating Akbar Khan PW-7 with weapons. It would thus not be safe to readily render a finding of guilt qua the appellants against whom the witnesses have deposed in a vague fashion and there exists no iota of corroborative evidence.

10. Learned Amicus Curiae for Rahul Jain Shri Harsh Prabhakar, Advocate who led the arguments above-noted in addition also stated that Khalil Ahmed PW-6 expressly said that Rahul Jain was not among the prisoners who extended threat in the morning and thus there was no pre-existing enmity between Rahul Jain and Akbar Khan or Khalil Ahmed.

Name of Rahul Jain has been taken by three witnesses i.e. HC Gulab Singh PW-10, HC Rakesh PW-12 and HC Ram Bhajan PW-15. The learned Trial Court has already disbelieved the evidence of HC Ram Bhajan PW-15 for the reason in his cross-examination he has stated that he had not witnessed the incident. As regards HC Gulab Singh and HC Rakesh are concerned, though they claim to be eye-witnesses, however their statement under Section 161 Cr.P.C. was recorded on July 04, 2011 after nearly one month of the incident though they were Police witnesses and were available to the investigating agency. HC Gulab Singh in his examination-in-chief stated that Rehan was part of the group whereas HC Rakesh stated that Rehan and Sunil were part of the group of assailants. From the kharja register which shows the entry and exit of the UTPs, Rehan and Sunil were not present at the time when incident took place. Thus testimonies of both HC Gulab Singh and HC Rakesh are suspect. Therefore, no reliance can be placed on their testimony even though they name Rahul Jain. Further the two injured witnesses have not named Rahul Jain as a member of unlawful assembly nor attributed any overt act to him. Referring to the decision of the Supreme Court in State of Punjab Vs. Praveen Kumar AIR 2005 SC 1277 it is contended that one piece of unreliable evidence cannot be used to corroborate another piece of unreliable evidence. Learned counsel further contends that where number of people are implicated, the Court has to adopt a cautious approach as the chances of false implication are very high. There is no specific overt act attributable to Rahul Jain. Further from the MLC of Akbar Khan it is evident that at best two weapons were used one by Gomti, however who yielded the second weapon is not known. In the absence of any witness testifying to this effect, appellants cannot be convicted all and

sundry.

11. Learned counsel for Amit Shukla further contends that both the injured witnesses have not named the appellant. Only PW-10 had identified the appellant who has not been relied upon by the learned Trial Court. Further the only role attributed to the appellant if the witnesses are to be believed is of tearing the warrants, hence he cannot be convicted for the rest of the offences.

12. Learned counsel for Shiv Kumar further stated that in his statement under Section 313 Cr.P.C. he had taken the plea that he was unwell, had taken medicine and was sleeping in the kharja. Though PW-6 stated that Shiv Kumar threatened however PW-6 himself was not in the kharja when the incident took place, thus there was no occasion to threaten PW-6.

13. Learned counsel for Sunil Bihari contends that he has specifically taken the plea and suggested to the witnesses that when the incident took place he had been produced in the Court and was not present in the kharja which fact has not been considered by the learned Trial Court. The register of the kharja which noted the entry and exit of the UTPs was deliberately not exhibited by the prosecution though filed with the charge-sheet. Since the entries therein are in favour of the appellant, he can certainly utilise the same to show his false implication. Despite the fact that the appellant was not named in the FIR, no TIP was got conducted. Thus omnibus identification in the dock cannot be the basis of conviction.

14. Learned counsel for Deepak and Gomti contends that they took the specific plea that they were outside the kharja at the relevant time in their statement under Section 313 Cr.P.C. which has not been considered by the learned Trial Court.

15. In the alternative all the accused have taken the plea that undue harsh sentence has been imposed on them. In case this Court upholds the conviction of the appellants, they be released on the period already undergone.

16. Learned APP for the State on the other hand contends that though Ajay, Gomti, Anil and Deepak have been named but witnesses have clearly stated that there were other UTPs and the FIR is not the encyclopaedia of the prosecution case. In the Court Ct.Tej Prakash, the maker of the FIR identifies all the appellants who were present at the time of incident and committed the offences alleged. Parwaiz Ahmed PW-11 DCP 3rd Batalion appeared in the witness box and deposed that no CCTVs were installed either inside the lockup of Tis Hazari or at the main entrance gate of Tis Hazari lockup. Thus the best evidence has not been withheld. This version of the DCP is also corroborated by the other witnesses. The entry exit register was inadvertently not exhibited though filed with the charge-sheet. Though Khalil PW-6 did not depose about the incident, however he deposed about the previous threat and involvement of Rehan, Sunil Bihari, Satpal Bedi and Amit Shukla as well. Thus even if they were not named in the rukka they were involved in the incident.

17. Before dealing with the rival contentions, it would be appropriate to note the testimony of the relevant witnesses before the Court. Ct.Tej Prakash PW-3 deposing in sync with his statement on the basis of which FIR was registered stated that when Ajay was sent inside the high risk lockup, at that time 4-5 UTPs of the high risk lockup forcibly came out of the door of the kharja and UTPs Gomti, Anil and Deepak also came in the kharja after their peshi and they started shouting that they would kill Khalil and Akbar

Khan as they have got fired on the mother of Ajay. The above-named UTPs bolted the latch of the kharja so that the Police personnel could not enter the kharja. They picked up the pieces of iron after breaking the bench and proceeded towards SAG kharja and broke the lock of the same. UTP Akbar was inside the kharja and the above-named UTPs along with others started beating Akbar Khan with the pieces of iron bench by threatening him. He along with other Police Personnel intervened to save Akbar Khan when UTP Gomti hit him on the head with the piece of iron bench. They were controlled by the other Police personnel. In Court he identified the accused involved in the incident by saying “*the other accused persons present in Court today are the same Under Trial Prisoners who were attacking Akbar Khan*”. In cross-examination he admitted that he could not identify each of the UTP by their name and that he could also not identify Deepak, Anil and Ajay @ Ajju by their name.

18. HC Gulab Singh was examined as PW-10 who claimed to be an eye-witness. According to HC Gulab Singh after Ajay and 2-3 other accused entered inside the kharja, other accused persons namely Shabir, Dharm, Naim, Rehan, Gomti, Deepak, Shukla and Jain came out of the lockup, they tore the warrants, broke the bench of the lockup, broke the lock of the lockup, entered inside SAG lockup and started beating Akbar Khan. Police officials intervened and controlled the accused persons and put them in separate kharjas. He identified that all the accused persons present in the Court except Naim who was not present, as the accused who had inflicted injuries to the Police officials who were on the duty in the lockup. In cross-examination PW-10 admitted that he had never participated in a judicial TIP and had never identified any accused person before the investigating officer.

He also admitted that his statement under Section 161 Cr.P.C. was recorded on July 04, 2011. He also admitted that CCTV was installed inside the lockup including SAG and other kharjas and was in an operative mode on June 06, 2011. Reliance cannot be placed on the testimony of HC Gulab Singh PW-10 for the reason his statement under Section 161 Cr.P.C. was recorded after nearly one month. He did not know the accused by name and only could identify them on being produced. He has identified the accused for the first time in Court on January 28, 2014 after a period of 2½ years and it was not possible for him to have known their faces so well except the one whom he would have produced in Court or had the occasion to sit with them for quite some time. This witness in his cross-examination admitted that he was outside the cell when the incident took place and what was happening inside the lockup was not visible from outside.

19. HC Rakesh PW-12 also deposed in sync with the testimony of HC Gulab Singh PW-10. He stated that when Ajay was being brought back into the lockup, Ajay, Shabir, Rehan, Satpal Bedi, Dharm, Gomti, Sunil, Naim, Rahul Jain and some more persons started shouting and abusing. He narrated about the incident. In his cross-examination he stated that he had witnessed the incident in question, however he admitted that he was outside the cell at that time and from outside the cell what was happening inside the lockup was not visible. He also admitted that he never identified any of the accused in judicial TIP nor before the investigating officer and that his statement was recorded on the same day i.e. June 06, 2011. However, from the record it is evident that statement of HC Rakesh under Section 161 Cr.P.C. was recorded on July 04, 2011 and not June 06, 2011. Thus this belated statement of HC Rakesh with no judicial TIP or identification before

the investigating officer and identification for the first time in the dock after a period of more than 2 and a half years cannot be relied upon. Moreover this witness himself admitted that he was outside and could not see what happened inside the lockup.

20. Supreme Court in the decision reported as AIR 2010 SC 3000 Siddanki Ram Reddy Vs. State of Andhra Pradesh emphasizing the need of an immediate test identification parade wherein a mob attacks the injured and there is hardly any time for the injured to see the assailants held-

“20. This Court has held in Daya Singh v. State of Haryana (AIR 2001 SC 1188; 2001 AIR SCW 936) (supra) cited by Mr. Reddy that the purpose of test identification is to have corroboration to the evidence of the eye witnesses in the form of earlier identification and that the substantive evidence of a witness is the evidence in the Court and if that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. In the facts of the present case, a mob attacked the deceased in the crowded corridors of the court of the 2nd Additional District Judge and PW-1, PW-5 and PW-6 in their evidence in the court claim to have seen the accused No. 1 (appellant) chasing the deceased with an axe and assaulting the deceased with axe on his neck. All these three eye witnesses have also stated that soon after the assault the appellant ran away from the court premises. The three eye witnesses thus saw the assailant for a very short time when he assaulted the deceased with the axe and thereafter when he made his escape from the court premises. When an attack is made on

assailant by a mob in a crowded place and the eye witnesses had little time to see the accused, the substantive evidence should be sufficiently corroborated by a test identification parade held soon after the occurrence and any delay in holding the test identification parade may be held to be fatal to the prosecution case. In Lal Singh and Ors. v. State of U.P.(AIR 2004 SC 2009; 2003 AIR SCW 6133), this Court has held that where the witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously.”

21. HC Rajeev PW-13 who was posted as MHC in ODI lockup Tis Hazari deposed about the incident and that both Akbar Khan and Tej Prakash received injuries and were taken to the hospital. He stated that he was inside the lockup and witnessed the incident. Though having witnessed the incident he does not name or identify any of the appellants present in the Court. Thus testimony of HC Rajeev is of no avail as he has neither named any of the appellants nor identified them in the Court.

22. HC Ram Bhajan PW-15 though in his examination-in-chief stated that on June 06, 2011 Ajay @ Ajju, Shabir Ali, Neeraj, Sunil, Rehan, Dharm, Naim, Rahul Jain, Shukla and Satpal Bedi were inside lockup of high risk kharja and when Ajay entered the lockup, Ajay along with these accused started abusing, the other accused started making noise and after using the force came out and tore the warrants. However in the dock he was able to identify only 4 accused namely Amit Shukla, Rehan, Rahul Jain and Anil. In cross-examination this witness stated that he had not seen the incident and was outside kharja and that on the day he was not performing his duty at

kharja. His duty was only to bring the accused persons from jail to kharja lockup and thereafter to produce them in the Court. This witness has rightly not been relied upon by the learned Trial Court and discredited.

23. Akbar Khan was examined as PW-7. However he had not supported the prosecution case and stated that he was hit by somebody on his head from behind the back and he did not know who the persons were. He was confronted with his statement recorded under Section 161 Cr.P.C. by the learned APP which he denied.

24. HC Om Prakash who had brought Ajay from the Court Room No.152 Tis Hazari Courts along with Ct.Tej Prakash and re-admitted Ajay into the lockup when the incident took place stated that he had not witnessed who quarrelled with the UTPs and could not identify them.

25. Even as per the prosecution case Khalil Ahmed PW-6 was not present when the incident took place. However Khalil Ahmed deposed that on June 06, 2011 when he was being brought to Tis Hazari lockup for hearing of the case he was sitting in the front side of the vehicle separately due to Court orders. 7-8 prisoners threatened him by showing the blades that they would kill him in the lockup itself. In view of the Court orders he was kept in a separate lockup i.e. SAG lockup where Akbar Khan was also lodged. He named Ajay @ Ajju, Dharm @ Bunti, Shabir Ali, Dheeraj and others as the prisoners who threatened him. In Court he identified the 4 above-named prisoners besides Anil and Shiv Kumar. He however did not identify Amit Shukla, Rahul, Satpal Bedi, Deepak, Sunil Bihari, Gomti @ Manoj and Rehan as the prisoners who threatened him. He deposed that when he was brought back to the lockup at 12.45 noon, he found the lock of the SAG lockup broken and articles scattered. He deposed that the accused identified

by him were inside and they had bolted the grill from inside whereas the security staff was outside and one of the Police official was injured.

26. Testimonies of HC Ram Bhajan and HC Rajeev are of no avail to the prosecution as they do not identify any of the accused and state that they have not witnessed the incident. As regards HC Gulab Singh and HC Rakesh PW-10 and PW-12 though they claim to have witnessed the incident as noted above, their statements under Section 161 Cr.P.C. were recorded only after a period of one month. No judicial TIP was conducted nor they identified the accused before the investigating officer.

27. Though some of the witnesses stated that CCTV cameras were not fitted in the kharja, the other stated that CCTV cameras were installed however the concerned DCP appeared as PW-11 and set at rest the controversy, deposing that on the date of the incident no CCTV cameras were installed either inside or outside the lockup. In the absence of CCTV camera the other evidence which can be relied upon was entry and exit register kept at the lockup which though filed with the charge-sheet was not exhibited by the prosecution. Thus though the said document cannot be read in favour of the prosecution, however it would be appropriate to note certain entries in the said register. As per entry No.5 appellant Sunil was taken out of the lockup at 11.00 AM for being produced in Court. Sunil re-entered the lockup vide entry No.11 at 1.30 PM. The incident took place around 12.30 PM immediately after Ajay entered the lockup at 12.25 PM. Thus Sunil who has been named as an accused by the witnesses was not even in the lockup at the relevant time. Similarly, as per entry No.9 Rehan S/o Safiuddin was taken for Court proceedings at 12.25 PM. Thus he could not have been at the time of incident inside the lockup. Besides Sunil and Rehan

entitled to the benefit of doubt, the version of HC Gulab Singh and HC Rakesh who have named the other co-accused with Sunil and Rehan become suspect.

28. As noted above, in the rukka Ct.Tej Prakash PW-3 named Ajay, Gomti, Anil and Deepak. He reiterated these names in his deposition before the Court. However, 4-5 other UTPs who were involved were not named by him nor was any supplementary statement recorded identifying the other 4-5 UTPs. No Test Identification was conducted. The dock identification is omnibus as noted above wherein he says that the accused persons present in the Court were the same UTPs who were attacking Akbar Khan. Thus reliance cannot be placed on the testimony of Ct.Tej Prakash as regards the involvement of other appellants besides Ajay, Gomti, Anil and Deepak.

29. The Supreme Court in the decision reported as (2012) 12 SCC 711 Busi Koteswara Rao and Ors. Vs. State of Andhra Pradesh reiterating the decision of the larger Bench in Masalti Vs. State of U.P. AIR 1965 SC 2002 held:

“12. Even, as early as in 1965, a larger Bench of this Court in Masalti v. State of U.P. [AIR 1965 SC 202 : (1965) 1 Cri LJ 226] considered about how the prosecution case is to be believed. The principles laid down in para 16 of the decision are relevant which are as under: (AIR p. 210)

“16. Mr Sawhney also urged that the test applied by the High Court in convicting the appellants is mechanical. He argues that under the Evidence Act, 1872 trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. That, no doubt is true; but where a criminal court has to deal with evidence pertaining to the commission of an offence

involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable. Therefore, we do not think that any grievance can be made by the appellants against the adoption of this test. If at all the prosecution may be entitled to say that the seven accused persons were acquitted because their cases did not satisfy the mechanical test of four witnesses, and if the said test had not been applied, they might as well have been convicted. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But sometimes it is useful to adopt a test like the one which the High Court has adopted in dealing with the present case.”

13. *It is clear that when a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, the normal test is that the conviction could be sustained only if it is supported by two or more witnesses who give a consistent account of the incident in question.*

14. *No doubt, in State of U.P. v. Dan Singh [(1997) 3 SCC 747 : 1997 SCC (Cri) 469] , a Bench of two Judges, in para 48 has held that: (SCC p. 765)*

“48. ... it would be safe if only those of the respondents should be held to be the members of the unlawful assembly who have been specifically identified by at least four eyewitnesses.”

15. *We have already quoted the requirements for convicting an accused in a clash between two groups as per Masalti [AIR 1965 SC 202 : (1965) 1 Cri LJ 226] which is a larger Bench decision of this Court. In the light of the same, we reiterate and hold that when an unlawful assembly or a large number of persons take part in arson or in a clash between two groups, in order to convict a person, at least two prosecution witnesses*

have to support and identify the role and involvement of the persons concerned.”

30. Applying the law laid down by the Supreme Court it may be noted that injured Akbar Khan PW-7 has not named any assailant whereas PW-3 has specifically named Ajay, Gomti, Anil and Deepak and by way of an omnibus statement identified all the other accused whom he has not named in the FIR and no supplementary statement was recorded. Further HC Rajeev PW-13 whose statement under Section 161 Cr.P.C. was recorded on June 06, 2011 has also not assigned any specific role to any accused and in his examination-in-chief he has not identified any of the accused present in Court as the member of the unlawful assembly, or the assailant, or who gave exhortation. Though he admits that no TIP proceedings were conducted and states that he identified the accused before investigating officer however no such statement in regard to identification was available on the judicial file. Further as noted above, statements of HC Gulab Singh PW-10 and Rakesh PW-12 under Section 161 Cr.P.C. were recorded after a period of nearly one month and there was no basis how they could name all the appellants. Testimony of PW-10 and PW-12 is contradicted by the register showing the entry and exit of Sunil and Rehan. Hence it would be unsafe to rely upon their testimony.

31. A perusal of the Trial Court Record would reveal that vide Ex.PW-14/A the prosecution proved the list of high risk UTPs who were brought from Tihar jail and the Police officers who accompanied them. Though all the participants of the unlawful assembly could not be identified it is apparent that on the basis of list all the high risk UTPs who were brought on

that day have been involved in the present case besides Ajay @ Ajju who was the other high risk prisoner brought from Rohini jail by HC Om Prakash and Ct.Tej Prakash. The mere presence of a prisoner in the high risk cell of the kharja where the incident took place would not make him a member of the unlawful assembly. The prosecution was required to prove by leading positive evidence, even if no overt act was attributed, that the accused participated in the unlawful assembly with a common object. In the absence of specific evidence of participation with a common object, a person cannot be convicted with the aid of Section 148.

32. Discussing the scope of constructive liability in an unlawful assembly the Supreme Court in the decision reported as (2013) 4 SCC 607 Subal Ghorai & Ors. Vs. State of West Bengal held:

“52. The above judgments outline the scope of Section 149 IPC. We need to sum up the principles so as to examine the present case in their light. Section 141 IPC defines unlawful assembly to be an assembly of five or more persons. They must have common object to commit an offence. Section 142 IPC postulates that whoever being aware of facts which render any assembly an unlawful one intentionally joins the same would be a member thereof. Section 143 IPC provides for punishment for being a member of unlawful assembly. Section 149 IPC provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses “First”, “Second”, “Third”, “Fourth” and “Fifth” of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. At what

point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of the person falls within the ingredients of Section 149 IPC, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of Section 149 IPC if they shared common object of the unlawful assembly.

53. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The

criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution.”

33. For the discussion aforesaid it can safely be held that the prosecution has proved its case beyond reasonable doubt only against Ajay @ Ajju, Gomti @ Manoj, Anil @ Buta and Deepak. Thus the impugned judgment of conviction qua appellants Ajay @ Ajju, Gomti @ Manoj, Anil @ Buta and Deepak is upheld.

34. Appellants Ajay @ Ajju, Anil @ Buta and Gomti @ Manoj have been awarded rigorous imprisonment for a period of 9 years. Ajay @ Ajju, Anil @ Buta and Gomti @ Manoj are suffering life imprisonment with unsatisfactory jail conduct. Thus I find no reason to interfere with the sentence awarded by the learned Trial Court. Since there was no previous conviction of Deepak and he was acquitted in one case in which he was undergoing trial, the learned Trial Court awarded him imprisonment for a period of 4 years and 3 months which also needs no interference. Accordingly, Crl.A.Nos. 595/2015, 848/2015, 907/2015 and 910/2015 are dismissed.

35. Appellant Sunil Bihari, Shiv Kumar @ Bhaggu, Rahul Jain @ Sonu, Shabir Ali, Amit Shukla @ Goldi are granted the benefit of doubt and acquitted of the charges. The impugned judgment of conviction and order on sentence qua Sunil Bihari, Shiv Kumar @ Bhaggu, Rahul Jain @ Sonu, Shabir Ali, Amit Shukla @ Goldi are set aside. Crl.A.Nos. 489/2015, 1085/2015, 1188/2015, 843/2015 & 891/2015 are disposed off. Sunil

Bihari, Shiv Kumar @ Bhaggu, Rahul Jain @ Sonu, Shabir Ali and Amit Shukla @ Goldi be released forthwith, if not required in any other case.

36. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

37. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 31, 2016
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