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HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 355 of 2006

1. Upendra Singh, aged about 35 years, S/o Sarwanath Singh, R/o Mohlai Road Baghera, P.S. Durg, Pulgaon, Distt. Durg (CG)
2. Sushil, aged about 30 years, S/o Sarwanath Singh, R/o Mohlai Road, Baghera, P.S. Durg, Pulgaon, Distt. Durg (CG)

---- Appellants

Versus

- State of Chhattisgarh through P.S. Pulgaon, Distt. Durg (CG)

---- Respondent

For Appellants :	Shri Vivek Sharma, Advocate.
For Respondent/State :	Shri Vaibhav Goverdhan, PL.

And

CRR No. 449 Of 2006

- Umashanker Singh, aged about 58 years, son of Ram Naresh, resident of Village Bhagera, P.S. Pulgaon, District Durg (Chhattisgarh).

---- Applicant
complainant

Vs

1. Upendra Singh, aged about 35 years, son of Sarvanath Singh, resident of Mohlai Road, Bhagera, P.S. Pulgaon, Distt. Durg (CG)
2. Sushil, aged about 30 years, son of Sarvnath Singh, resident of Mohlai Road, Bhagera, PS Pulgaon, Distt. Durg (CG)
3. State of CG through Police Station Pulgaon, Distt. Durg (CG)

---- Respondent

For Applicant	: Shri HB Agrawal, Sr. Adv. with Shri Pankaj Agrawal, Advocate.
For Respondent Nos. 1 & 2	: Shri Vivek Sharma, Adv.
For Respondent No.3/State	: Shri Vaibhav Goverdhan, PL.

Hon'ble Shri Justice Pritinker Diwaker

Hon'ble Shri Justice R.C.S. Samant

CAV JUDGMENT

Per R.C.S.Samant J.

11 /01/2017

01. As Cr.A.No.355/06 and Cr.Rev.No.449/06 arise out of the same judgment dated 29.4.2006 passed by the Sessions Judge, Durg in ST No.298/2003, they are being disposed off by this common judgment.

02. Appeal has been preferred against the judgment mentioned above in which appellants stand convicted under Section 325 and 323 of Indian Penal Code and sentenced with RI for two years with fine of Rs. 500/- and RI for 1 month, respectively.

03. Revision is directed against the judgment mentioned above challenging the conviction of appellants in lesser offence with prayer to remand the case for retrial.

04. Brief facts of the case are, that on 21.4.2003 at 9.10 pm FIR (Ex.P/1) was lodged by PW-1 Umashankar alleging in it, that on that day when he returned to his house, accused/appellant Upendra Singh asked him as to why he has thrown manure in front of his house and then started abusing him. He has further stated that on account of old dispute, Upendra, Sarvanath, Sushil Singh and Viresh assaulted him by club and hands on various parts of his body. After hearing commotion his son Manish, daughter Usha intervened, however they too were assaulted by the accused persons, as a result of which they also suffered injuries. Based on this FIR, offence under Sections 294, 506B, 323/34 of IPC was registered against the four accused persons i.e. Upendra Singh, Sushil Singh, Sarvanath and Viresh Singh.

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Complainant Umashanker was medically examined vide Ex.P/8, injured Manish (PW-2) was medically examined vide Ex.P/7 whereas MLC of injured Usha Singh is Ex.P/6. As per MLC, Umashanker suffered fracture of fibula and Manish suffered fracture of fronto-parietal bone. X-ray report of Umashanker is Ex.P/12 whereas that of Manish is Ex.P/13.

05. In the FIR, name of Viresh has been mentioned as one of the assailants, however, after two days of the incident Viresh expired and a counter case was registered against the complainant party namely Umashanker and others for committing murder of Viresh Singh and causing injuries to other persons.

06. During trial, accused Sarvanath Singh also expired and therefore, the trial Court proceeded against the appellants herein and they were charged under Section 307 and 323 of IPC.

07. So as to hold the accused/appellants guilty, the prosecution examined 13 witnesses in all. Statements of the accused were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication. In their defence, they examined five witnesses.

08. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted the appellants under Sections 325 and 323 of IPC and sentenced to undergo RI for two years, fine of Rs.500/- and RI for one month with default stipulation respectively. Hence being aggrieved

by the said judgment, Upendra Singh and Sushil have preferred Cr.A.No.355/06 whereas Umashanker being not satisfied with the conviction and sentence awarded to the appellants has preferred revision i.e. Cr.Rev.No.449/06.

09. Counsel for the appellants (Upendra Singh & Sushil) submits as under:

(i) that present is a case where complainant Umashanker and his family members were aggressor and it is they who first opened assault and in self defence if any injury has been caused by the appellants to the other party, they cannot be held guilty for any offence.

(ii) that in the said incident appellant Upendra has lost his brother Viresh and that itself shows that the complainant party was the aggressor.

(iii) even if while saving themselves or while saving life of the brother of the appellants, some marpeet had taken place, the accused/appellants are entitled for benefit of doubt.

(iv) that PW-1 & PW-2 are totally unreliable witnesses as they have deposed contrary to their diary statements and have given completely new story for the first time in the Court. Once these witnesses are held to be not reliable, then the entire prosecution case goes.

(v) if this Court finally comes to the conclusion that the appellants have committed some crime, then a liberal approach may be adopted considering the fact that the incident had taken place about 12 years back, in which the appellants have suffered loss of their brother. The appellants have remained in jail for two days only and therefore, in facts and circumstances of the case, instead of sending them back to

jail at this stage, by imposing suitable fine on them, their jail sentence may be reduced to the period already undergone by them.

10. On the other hand, supporting the impugned judgment in respect of Cr.A.No.355/06, it has been argued by the State counsel as under:

(i) that a very prompt report has been lodged by the complainant naming all the accused persons as assailants.

(ii) that the plea of self defence has not been taken by the appellants and therefore, their conviction under Section 325 of IPC is in accordance with law.

(iii) that PW-1 & PW-2 may have given different version but the fact remains that in the Court they have categorically stated that it is the accused/appellants who caused injuries to PWs-1 to 3.

(iv) that PW-3 & PW-4 have fully supported the prosecution case and there is no reason for this Court to disbelieve their statements.

(v) that medical report of the injured (PWs-1 to 3) also supports the prosecution case where the injuries have been found on their bodies and as per radiologist reports Ex.P/12 & P/13 it is evident that Umashanker and Manish have suffered fracture and thus, causing of grievous injuries to the victim by the appellants has been duly proved by the prosecution.

11. In Cr.Rev. No.449/2006, it has been argued that considering the nature and extent of injuries, which is grievous and dangerous to life, the trial Court ought to have convicted the accused persons under Section 307 of IPC.

12. In reply to this, it has been submitted on behalf of

respondents/accused that not only the accused persons are entitled for their acquittal under Section 307 of IPC, but even their conviction under Sections 325 and 323 of IPC is bad in law.

13. State counsel has duly assisted in the Court in criminal revision.

14. As per grounds urged in the criminal appeal and revision the question before this Court is, whether the conviction under Section 325 and 326 of IPC against the appellants is not sustainable or that whether the evidence led by the prosecution was sufficient to hold conviction against the appellants under Section 307 of IPC ?

15. Umashankar (PW1) has stated, that on the date of incident he was at his residence along with his wife Kachnar and daughter Usha. His son Manish came from outside and was entering the house by opening the channel gate, at the same time appellant Upendra Singh, deceased Viresh, Sushil Singh and Sarvnath Singh caught hold of Manish. Appellant Upendra Singh struck Manish with a rod, hearing the cry of Manish this witness came out, then appellants and others surrounded him and gave beating with rod and clubs, thereby causing injuries to him. FIR Ex.P/1 was lodged by him in Police Station, Pulgaon. In cross-examination he was confronted with the previous statement Ex.D/1 in which he stated that when he arrived from market then Upendra Singh said why he is throwing the manure (bird droppings) in front of his house, then started abusing him, then appellants and others assaulted him. Hearing the commotion his son Manish and daughter Usha came for intervention. Compared to this Umashankar (PW-1) has changed the background of the incident and

omitted that at the initial stage, that it was Upendra Singh who was objecting to throwing the manure (bird droppings) in front of his house, it is a discrepancy. Further there is improvement that appellants were armed with rod, this improved statement shall not be taken into consideration. FIR Ex.P/1 has also been recorded by this witness, compared to which his statement in Court is improved having discrepancy and omissions.

16. Manish Singh (PW-2) has stated, that on the date of incident he had an argument with appellant Upendra Singh on the main gate of the Court, later on he had been to market and came to his residence at about 8.10 p.m. carrying his cycle which was needing repair, as he was entering his residence, then appellants and others who were hidden nearby, all of sudden came on the spot and Upendra Singh assaulted him with rod on his head. On his cry his father came out, then appellants and others surrounded and gave him beating as well. Due to the injury caused, he lost his memory though he was not unconscious. He took treatment in Medical College Hospital, Raipur for 29 days. In cross-examination he was confronted with his previous statement Ex.D/2, compared to which the statement given by this witness in Court has discrepancy, omission and improvement. Stating in the same line as in the statement given by Umashankar (PW-1), this witness has also changed the background of the incident and omitted that the incident initiated when Upendra objected about throwing manure in front of his house.

17. Usha (PW-3) has stated that she was inside her residence when

appellants and others came to the channel gate of her residence and assaulted Umashankar and Manish with rod and club. She intervened and she also suffered injuries on being assaulted by Upendra Singh. She has denied about giving statement Ex.D/3 to the Police. Smt. Kachnar (PW-4) has also stated similarly. In cross examination she was confronted with her previous statement Ex.D/4 compared to which omission, contradiction and improvement are found in her Court statement. She has admitted that on the report of appellants' case under Section 302 of IPC has been prosecuted against her, her husband and son. Death of Viresh Kumar is not denied but it is denied that he suffered injury in the incident.

18. Head Constable Ghanshyam (PW-6) has stated that on the information given by Umashankar he recorded FIR Ex.P/1. Dr. V.K. Sao (PW-7) has examined Manish (PW-2) and found one lacerated wound on frontal area, one lacerated wound on left parietal region, along with one abrasion and one contusion, vide his report Ex.P/7. On the same day he examined Umashankar and found one lacerated wound on his right fronto parietal region, one lacerated wound, another lacerated wound on right frontal parietal region, one lacerated wound on left parietal region, one another lacerated wound on left parietal region, one lacerated wound on the middle of head, one lacerated wound on right eyebrow along with abrasion and contusion vide report Ex.P/8. In his cross-examination his statement has remained un-rebutted, which goes to show that Umashankar (PW-1), Manish (PW-2) suffered injuries in this incident.

19. Dr. A.K. Sahu, (PW-8) has testified vide his report Ex. P/12 that Umashankar suffered a fracture of fibula bone of left leg. He also stated that Manish suffered fracture of left parietal bone vide his report Ex.P/13. This statement has remained unrebutted. Assistant Sub Inspector R.S. Thakur (PW-9) has conducted some part of the investigation. Head Constable Shobhnath Pandey (PW-10) has made entries in the Station House Diary. Sub Inspector Farhan Qureshi (PW-11) has conducted investigation of the case. In his cross-examination he has stated that previous statement of Umashankar Ex.D/1, previous statement of Manish Ex.D/2, previous statement of Usha Ex.D/3 and previous statement of Kachnar Ex.D/4 were recorded by him as per the statement given by these witnesses and categorically denied that these witnesses gave similar statement as they have given before the Court. Patwari B.L. Gajpal (PW-13) prepared the spot map Ex.P/23.

20. In defence Dr. V.K.Sao (DW-1) has stated that on 21/02/2003 he examined Upendra Singh and found him having two lacerated wound on right part of his head, one incised wound on fronto parietal region of his head along with pain and contusion vide his report Ex.D/5. On the same day he examined Viresh and found him having one swelling above the eyebrow of right eye and one contusion on left scapula. He advised for x-ray vide his report Ex.D/6. On the same day he examined Sushil and found him having injuries of two abrasions on right and left elbow, one swelling in fronto parietal region, one abrasion on back and one abrasion on his right leg vide Ex.D/7. This statement has not been challenged by the prosecution.

21. Dr. S.K. Kamra (DW-2) has stated that injured Viresh Kumar was admitted in ICU of Sector 9 Hospital on 22/04/2003 for treatment of head injury due to which he died. He sent information of death vide Ex.D/8, this again is unchallenged statement. Dr. P. Akhtar (DW-3) has conducted postmortem of deceased Viresh vide his report Ex.D/9 he has opined that deceased Viresh Kumar had suffered one injury on left parietal region along with hematoma which led to shock and resulted in his death. In cross-examination he has admitted that the injury caused to the deceased was sufficient to cause death in ordinary course of nature.

22. Dr. A.K. Sahu (DW-4) has stated vide report Ex.D/10, that Sushil suffered one fracture on 5th metacarpal bone, which is unchallenged statement. Dr. P.C. Deshmukh (DW-5) has stated that appellant Upendra was admitted for treatment in District Hospital, Durg on 23/04/2003 and he had one fracture on the lower part of right thumb which was plastered vide report Ex.D/11. This statement is also unchallenged.

23. After scrutinizing the evidence of prosecution and defence, it is clear that appellants and deceased Viresh Kumar suffered injuries in the same incident and consequently Viresh Kumar expired. It is not disputed that complainant Umashankar (PW-1) and others have been prosecuted for murder of Viresh Kumar. All the witnesses for prosecution who have stated about the incident, are members of the same family. As per the finding arrived at that witnesses Umashankar (PW-1), Manish Singh (PW-2), Ku. Usha (PW-3), Smt. Kachnar (PW-4)

have improved their statement before the Court and the contradiction as brought about the background of the incident is to be considered, hence the reliability of the statements is questionable. Statement of witnesses receiving injury in the incident, finds support from the medical evidence, but no explanation has been given by the prosecution side as to how the appellants and deceased Viresh Kumar got injured in the same incident?

23. Reliance has been placed on the judgment of Apex Court in **Sekar@ Raja Sekharan v. State, AIR 2002 3667** by the appellants, in which it was held that the accused taking the plea of the right of private defence is not required to call evidence, he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. In this case appellants have pleaded that they exercised the right of private defence. The complainant and his son suffered grievous injuries in this incident and it is not in dispute that Viresh Kumar suffered injury in the same incident, which resulted into his death, on this ground complainant and others have faced prosecution in the counter case is a circumstance for consideration.

24. Further respondent has placed reliance on the judgment of **Hariram and another v. State of Madhya Pradesh, 2010 (1) MPHT 312**, in which it was held, that when there is time to approach public authorities then no right for private defence is available to the party. Further it was also held that right of private defence is not available for punishing the aggressor for offence committed by him **Deo Narayan v. State of Uttar Pradesh, AIR 1973 SC 473**

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followed.

25. The present case has different facts. According to the evidence led by the prosecution, the incident initiated when Upendra Singh objected about throwing manure in front of his house, after that appellants accompanied with deceased Viresh Kumar, on one hand, and applicant Umashankar Singh along with Manish, Kachnar and Usha, at another, engaged in open fight and clubs and other things were used by both the sides to cause injury to the members of other party, which is evident from the defence evidence produced before the trial Court. Hence, this appears to be a case of free fight. In **Gajanand and others v. State of Uttar Pradesh, AIR 1954 SC 695** the Apex Court relying on the definition of free fight given by Harrison J. in 'Ahmad Sher v. Emperor', AIR 1931 Lah 513 (A), is "when both sides mean to fight from the start, go out to fight and there is a 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".

26. Similarly it was held in **Emperor v. Bechar Anop, AIR 1915 Bombay 218**, that "the right of private defence cannot be successfully invoked by man who voluntarily and deliberately engage with enemy for the sake of fighting". In **re Erasi Subba Reddi, AIR 1943 Madras 492**, it was held by Madras High Court, "where both the parties engage in beating each other then parties accused cannot plead, that every blow they gave was given in self defence". Similarly it has been held in **Shanti Lal Ratnaji v. State of Gujrat, 1970 CrLJ 97**, "when two

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parties voluntarily and with determined intention come out to fight and in fact fight and that it is not possible to ascertain with reasonable certainty as to who was the aggressor or as to how that fight started, the rule of law laid down in the various decisions, that neither side is entitled to claim any such benefit arising out of the general exceptions contemplated under Section 96 read with Section 100 of the Penal Code."

27. Looking to the settled view, according to the rule of law laid down in various judgments as mentioned above, it is found that this principle of law is applicable in this case as well. The plea of right to private defence taken by the appellants is not acceptable looking to the facts and circumstances of the case.

28. The ground in appeal about the reliability of witness has no substance although some discrepancy in the form of omission in the statement before the Court has been established, which is of no consequence and insignificant, as the statement of witness about the act of appellants at the time of incident has remained un-rebutted and un-challenged which is also supported by the medical evidence.

29. The ground raised in revision that the appellants had to be convicted under Section 307 of IPC is also without substance. After going through the evidence of prosecution in detail and especially the medical evidence given by Dr. V.K. Sao (PW-7) and Dr. A.K. Sahu (PW-8), it is very clear that no opinion has been given by these doctors that any of the injuries caused to the complainant and others was life threatening or was sufficient to cause death in ordinary course of

nature. Neither there is any evidence of use of any deadly weapon by the appellants in this case. The evidence of some witnesses show that Upendra Singh used a rod to assault the complainant and others has been found to be improved statement which cannot be given any consideration, hence for these reasons this revision has no substance, which is liable to be dismissed.

30. The submission by counsel for the appellants that looking to the lapse of time and that appellants have lost their brother in the incident, the jail sentence awarded may be reduced to the period of custody already undergone by them. As per the record, appellants have remained in jail only for two days. Considering all the facts and circumstances of the case it does not appear appropriate to modify the period of imprisonment to the period of custody already undergone which is too less, but there is scope for reduction of the period of sentence of imprisonment awarded by the trial court which shall be considered accordingly.

31. As per the aforesaid reasoning given and the finding arrived in this case, the appeal is allowed in part. The conviction of appellants by the trial Court is upheld. The sentence part is set-aside and modified. Appellants are sentenced for conviction under Section 325 of IPC for a period of six months RI along with fine of Rs. 5000/-, in default of payment of fine further undergo for RI for 3 months conviction and sentence under Section 323 of IPC against the appellants is maintained as it is.

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32. The revision petition is without any substance, hence dismissed accordingly.

Sd/-
Pritinker Diwaker
Judge

Sd/-
R.C.S. Samant
Judge

Kamde