

Mohd Zahid and Another Vs State

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Court : Delhi

Decided On : Aug-09-2010

Judge : Mr. Badar Durrez Ahdmed ; Mr. V.K. Jain. J J

Appeal No. : Crl.A. 205/1997

Appellant : Mohd Zahid and Another

Respondent : State

Advocate for Def. : Mr Sanjay Lao, Adv.

Advocate for Pet/Ap. : Mr R.M. Tufail, Mr Farooq Chaudhary , Mr Vishal Sehijpal
.Advs.

Judgement :

1. Whether Reporters of local papers may be allowed to see the judgment Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

ORDER

1. These appeals are directed against the judgment dated 22.4.1997 and Order on Sentence dated 23.4.1997, whereby the appellants were convicted under Section 302 and 324 of IPC read with Section 149 and were sentenced to undergo

imprisonment for life and to pay fine of Rs 1000/- each or to undergo SI for three months each in default under Section 302/149 IPC, RI for one year each and to pay fine of Rs.500/- or to undergo SI for one month each in default under Section 324/149 IP, The appellants Mohd.Amil, Mohd.Fazil and Mohd.Sabir were also convicted under Section 148 IPC and sentence to undergo RI for one year each whereas appellant Ashiq was also convicted under Section 147 IPC and sentenced to undergo RI for six months. The sentences were directed to run concurrently. The accused Mohd. Yameen and Zahir were acquitted.

2. The case of the prosecution is that on 21st June, 1993, at about 10.15 pm, Police Control Room informed PS Hauz Qazi that a quarrel took place in House No.4561, Gali Shahtara. On receipt of copy of this information, which was recorded vide DD No.28-A of the police station, police officials reached the spot and came to know that the injured had been taken to JPN Hospital by PCR Van. On reaching the hospital, they came to know that deceased Ashfaq was brought dead to the hospital. Mohd.Akhlaq, brother of deceased Ashfaq, was found admitted in JPN Hospital in injured condition and his statement was recorded by the Investigating Officer Insp.Data Ram. The case of the prosecution, as stated in the FIR registered on the statement of the injured Mohd.Akhlaq, is that they were residing on the first floor of House No.4561, whereas his uncle Mohd.Yameen was residing at the second floor with his wife and four sons, including the appellants, Mohd.Amil and Mohd.Fazil. At about 10.00 pm, the wife of his uncle Mohd.Yameen threw water which fell in their courtyard. When he asked them not to do so, the appellant Mohd.Amil also threw household garbage in their courtyard. Thereafter, Mohd.Amil also called his maternal uncles, appellant Mohd.Sabir, Mohd. Ashiq and Mohd. Zahid, and another maternal uncle Mohd.Zahir. These seven persons entered his house, and surrounded him and his brother Mohd. Ashfaq. Mohd. Yameen asked others to kill them so as to bring the incessant quarrels to an end. Thereupon, Mohd. Yameen caught hold of him by his neck, whereas Mohd. Zahid and Mohd. Ashiq held his brother Ashfaq. Mohd. Amil gave knife blow on the left side of the chest, whereas Mohd.Fazil gave knife blow on his left elbow. Mohd. Zakir and Mohd. Sabir gave knife blows on the stomach and hand of deceased Ashfaq. His wife Rehana Begum, his aunt Gazala Begum, her daughters Shaista and Yasmin, who had witnessed this incident, raised an alarm

and tried to save them and sustained minor injuries in the process.

3. The prosecution examined 20 witnesses in support of its case. One police official was examined in defence to prove copy of DD No.28-A dated 21.6.1993 Ex.DW-1/A. The case of the prosecution rests primarily on the testimony of PW-2 Smt.Rehana Begum, PW-10 Mohd. Akhalq, PW-12 Smt. Gazala Begum, PW-13 Kumari Shaista and PW-14 Kumari Yasmeen, who are stated to be the eye-witnesses of the incident. PW-10 Mohd. Akhlaq was also given stab wounds in that incident. Eye Witnesses Account

4. The complainant Mohd. Akhlaq came in the witness box as PW-10 and supported the case of the prosecution, except in respect of accused Mohd. Yameen and Mohd. Zahir. He stated that he used to reside on the first floor along with his brothers, whereas the second floor was occupied by his uncles, Mohd. Yameen and Saeed. He further stated that on 21st June, 1993, at about 9.30 or 10.00 pm, dirty water was thrown into their courtyard, from the house of Mohd.Yameen and when he protested, the appellant Mohd. Amil threw garbage into their courtyard and also started abusing him. He also called his maternal uncles and thereafter his maternal uncles, Mohd. Ashiq, Mohd. Sabir and Zahid, along with Mohd. Amil and Mohd. Fazil entered their house and surrounded him and his brother deceased Mohd. Ashfaq. caught hold of the hair of his brother Ashfaq and Amil gave a knife blow to him (the witness), which hit him on the left side of his chest. According to him, Amil wanted to hit him on the chest but since he turned to save himself, the blow came on the left side of his chest. He further stated that another knife blow was given to him by Fazil, who wanted to hit his stomach, but he (the witness) saved himself and that blow came on his left elbow. He further stated that Zahid and Sabir gave separate knife blows to his brother which hit him on his abdomen. His brother fell down due to knife blows given to him and was taken to hospital by police. He (the witness) was taken to hospital by his aunt Gazala Begum. This witness was cross-examined by the learned Additional PP and during cross-examination, he denied that the accused Mohd. Yameen and Zahir had also come to their house. He also denied that deceased Ashfaq was caught hold of by his hair by accused Zahid and Ashiq. He maintained that it was only Ashiq who had caught hold of the hair of deceased Ashfaq. He

also denied that accused Mohd. Zakir had given a blow to deceased Ashfaq on his abdomen.

5. PW-2 Rehana Begum is the wife of PW-1 Mohd. Akhlaq. She stated that when they raised objection to dirty water being thrown in their courtyard, accused Amil and Fazil called their maternal uncles Ashiq, Zahid, Zakir and all of them attacked them. She also stated that Amil and Fazil were having knives with them. She further stated that accused Sabir and Zahid attacked deceased Ashfaq with knives, whereas Ashiq caught hold of his hair. She exonerated Zakir saying that he had not done anything. She further stated that her husband was also attacked with knives and the police came to the spot and took both the injured to hospital where Ashfaq died.

6. PW-12 Gazala Begum is another eye-witness of this incident. She stated that when she came out in the courtyard on hearing a noise, she found garbage lying in the courtyard and dirty water flowing there. She also found deceased Ashfaq and his brother Akhlaq protesting against throwing of dust and dirty water, which was thrown by the accused persons. According to her, Mohd. Yameen, Mohd. Fazil, Mohd. Ashiq, Mohd. Zahid and Mohd. Sabir, who were in possession of chhuries (knives) came down from the second floor. Mohd. Amil and Fazil grappled with Akhlaq causing injuries to him, whereas Ashiq, Zahid and Sabir caught hold of deceased Ashfaq. Zahid and Sabir caused injuries to him with chhuries. She claimed that Mohd. Yameen and Mohd. Zakir were not present at the time of occurrence. During cross-examination by the learned Additional PP, she stated that the appellants were in angry mood and they also had received simple injuries on their person.

7. PW-13 Shaista stated that when she came out in the courtyard on hearing noise coming from there, she found accused persons throwing garbage in the courtyard and Mohd. Ashfaq and Mohd. Akhlaq objected to the same. Thereafter, five persons, namely, Mohd. Amil, Mohd. Fazil, Mohd. Sabir, Mohd. Ashiq and Mohd. Zahid came down from the upper floor. Mohd. Ashfaq was caught hold of by Mohd. Sabir, Mohd. Ashiq and Mohd. Zakir. Mohd. Ashiq had caught hold of his hair, whereas Mohd. Sabir and Mohd. Zahid gave blows to him. She further stated

that Mohd. Amil gave chhuri blows on the chest of Akhlaq, whereas Mohd. Fazil gave blow on his left elbow. In cross-examination by the learned Additional PP, she admitted that one or two accused person had received injuries on their persons.

8. PW-14 Yasmeen is the fifth eye-witness in this case. She stated that when Ashfaq and Akhlaq objected to the throwing of garbage into their courtyard, five accused, namely, Mohd. Amil, Mohd. Fazil, Mohd. Sabir, Mohd. Ashiq and Mohd. Zahid came down to the courtyard of the first floor. They were armed with chhuries. Mohd. Ashiq caught hold of Ashfaq whereas Zahid and Sabir gave him chhuri blows on his abdomen. She further stated that Amil and Fazil gave chhuri blows on the chest of Akhlaq who also received injuries on his left elbow at the hands of Fazil. Police reached the spot and thereafter his mother Gazala took Akhlaq to hospital whereas Ashfaq was taken to hospital by the police. Contention of the appellants:

9. The conviction of the appellants has been assailed primarily on the following grounds:

(i) the eye-witnesses being related to deceased Ashfaq are interested witnesses and there being no independent corroboration of their testimony, it will not be safe to base the conviction solely on their testimony;

(ii) all the eye-witnesses, including the complainant told the police that these were seven persons, including Mohd. Yameen and Mohd. Zakir (who have been acquitted by the Trial Court), who had entered their premises and Yameen had exhorted the others to put an end to the daily quarrels and had said that as they (the other party) would not remain alive they would not quarrel, meaning thereby that both of them should be killed. They also told the police that it was Mohd. Yameen, who had overpowered the complainant, holding him by his waist and the knife blows to deceased Mohd. Ashfaq were given by Mohd. Zakir and Mohd. Sabir. But, when they came in the witness box, all the eye-witnesses, including the injured, Mohd. Akhlaq fully exonerated Mohd. Yameen, as well as Mohd. Zakir. The contention is that Mohd. Yameen and Mohd. Zakir having been acquitted, it will not be safe to rely upon the testimony of these witnesses, to convict the

appellants;

(iii) the prosecution has not explained the injuries found on the person of the appellant Mohd. Amil. Mohd. Amil, who when examined in the hospital, was found to be having an incised wound;

(iv) since the eye-witnesses were declared hostile, they, having been cross-examined by the prosecution, their testimonies stand wholly discredited; and cannot form the basis of conviction of the appellants;

(v) there was substantial delay in sending the FIR to the area Magistrate, who received it only at about 1.30 pm on the next day;

(vi) there is contradiction in the testimony of PW-16 as to whether he first went to the spot or to the hospital:

(vii) the Seizure Memo of the clothes of Mohd. Amil does not bear signatures of Gazala Begum, though the seal is alleged to have been taken from her, which shows that she was not a witness to the seizure of the clothes. (viii) in DD No.28-A, lodged by Smt. Famida, W/o Yameen, at about 08.45 pm on 21.06.1993, she had made a complaint against the other party and had claimed that Saeed had threatened to get the house forcefully vacated after manhandling her and her children;

(ix) The gist of the FIR was not recorded in the DD, as required by Rules. Contention No.(i)

10. As far as the complainant Mohd. Ashfaq is concerned, he, having been seriously injured in the incident, his presence at the time of the incident cannot be disputed. The injured is the best witness of the incident in which injuries were caused to him and, therefore, his testimony is entitled to great weight. The presence of such a witness at the time and place of occurrence cannot be doubted. It is not likely that he would spare the real assailant and implicate an innocent person. Being the victim of crime, he would be most keen to ensure that the real culprit does not go scot free. In *Mer Dhana Side vs. State of Gujarat* AIR 1985 SC 386, it was held by the Supreme Court that it would require very

convincing submissions to discard the evidence of the injured witnesses whose injuries would at least permit a reasonable inference that they were present at the time of occurrence. Undoubtedly, this is subject to the requirement that there must be evidence to show that these witnesses received injuries in the same occurrence. In *Machhi Singh vs. State of Punjab* 1983 Cri. LJ 1457 one witness Hakam Singh himself had sustained injuries in the course of incident in question. It was observed by the Supreme Court that it was difficult to believe that he would implicate the persons other than the real culprits and that the evidence of that witness alone was sufficient to bring home the guilt of the appellants, even if one were to exclude from consideration the evidence of other PWs. Identical view was taken by the Honble Supreme Court in a number of other cases, including *Makan Jivan and Ors. vs. State of Gujarat*: AIR 1971 SC 1797; *Mori Lal and Anr. vs. State of U.P.* AIR 1970 SC 1969; and *Jamuna Chaudhary and Ors. vs. State of Bihar* AIR 1974 SC 1822. As far as the other eye-witnesses are concerned, the incident having taken place in the premises in which they were residing and that too at about 10.00 pm when they are expected to be present in their house, their presence at the time of the occurrence was quite natural and is difficult to dispute. When the incident takes place in a dwelling house the inmates of the house are natural witnesses to the incident.

11. Even otherwise, it is not the case of the appellants that these witnesses were not present in their house, when this incident took place. Therefore, none of them can be said to be an "introduced witness". The testimony of these witnesses cannot be discarded merely because they happen to be related to the deceased and the injured.

12. In *Ashok Kumar Chaudhary vs. State of Bihar*: 2008 Cri LJ 3030, Supreme Court, while dealing with the question of creditworthiness of the evidence of relatives of the victim, after review of several decisions on the issue, including *Dalip Singh vs. State of Bihar* 1954 SCR 145, *Masalti vs. State of U.P.* (1964) 8 SCR 133 and *Rizan & Anr. v. State of Chhatisgarh* 2003 Cri LJ 1226, held that relationship per se does not affect the credibility of a witness. Merely because a witness happens to be a relative of the victim of the crime, he/she cannot be characterized as an "interested" witness. It was further observed that the term

"interested" postulates that the person concerned has some direct or indirect interest in seeing that the accused is somehow or the other convicted either because he had some animus with the accused or for some other oblique motive. In *Namdeo vs. State of Maharashtra*: 2007 Cri LJ 1819, the Supreme Court held that a close relative cannot be characterised as an 'interested' witness. The only role of caution in this regard is that the evidence of such witness needs to be carefully scrutinized with great and caution. If on such scrutiny, his evidence is found to be reliable, probable and trustworthy, conviction can be based even on the 'sole' testimony of such witness.

In *Dalip Singh vs. State of Punjab*, the Supreme Court laid down as under: "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts. We are unable to agree with the learned Judge of the High Court that the testimony of the two eye-witnesses required corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this court endeavoured to dispel in *Rameshwar v. The State of Rajasthan* 1952 Cri LJ 547. We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel." Thus, though the relative witnesses cannot in every case can be termed as interested witnesses, even with respect to the

interested witnesses, the Supreme Court in the case of Ahmed Shaikh Babajan & Ors. JT 2008 (11) 442 SC observed as under:-

"Interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. Although in the matter of appreciation of evidence, no hard and fast rule can be laid down, yet, in most cases, in evaluating the evidence of an interested or even a partisan witness, it is useful as a first step to focus attention on the question, whether the presence of the witness at the scene of the crime at the material time was probable. If so, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions\ be in the affirmative, and the evidence of the witness appears to the court to be almost flawless, and free from suspicion, it may accept it, without seeking corroboration from any other source."

13. In the present case, the presence of the eye-witnesses at the time of occurrence being natural, there can be no good reason to discard that part of their testimony which has been found to be consistent and reliable, and inspires confidence in the mind of the Court. Contention No.(ii)

14. It is true according to the prosecution that the complainant as well as other eye-witnesses had implicated Mohd. Yameen as well as Mohd. Zakir in their statements to the police, whereas both of them were exonerated by them when they testified during trial. However, that, to our mind, cannot be a ground to reject their entire testimony, including that part of the deposition, where they have been

consistent and have corroborated the testimony of each other.

15. In *Bhagwan Tana Patil vs. State of Maharashtra*: AIR 1974 SC 21, the Supreme Court held that the mere fact that the evidence of the prosecution witnesses was not firm and safe enough to be relied upon with regard to the part assigned to the acquitted accused in the occurrence, was not a ground to reject it mechanically against the appellants also. It was observed that in all Courts, the witnesses often resort to exaggerations, embellishments and "padding-up" to support a story however true it may be and it is the function of the Court to disengage the truth from falsehood and to find and reject the rest.

16. In *Satvir Singh vs. State of U.P.* 2009(4) SCC 289, four accused were acquitted by the Trial Court, whereas the appellant was convicted on the same set of evidence. It was contended before the Supreme Court that the high Court had committed grave error in doing so. Noticing that the testimony of the witnesses was neither embellished nor embroidered in respect of those who were convicted, the contention was rejected by the Supreme Court.

In *Rai Singh vs. State of Haryana*: 1971 SC 2505, the Supreme Court rejected the contention that the witnesses, who had been disbelieved in respect of the acts imputed to the accused Ram Gopal and Jaipal could not be relied upon for convicting the appellant before it. It was held that in each case the Court has to appraise the evidence to see to what extent it is worthy of acceptance and merely because in one respect the Court considers it unsafe to rely on the testimony of the witnesses, it does not necessarily follow as a matter of law that it must be discarded in all other respects as well. It is for the Court to separate the grain from the chaff and then believe that part of the evidence which is found to be true and correct. Some exaggeration or embellishment may be attributed to over anxiety leading to the witness giving an exaggerated account of the incident witnessed by him or sometimes it can be a deliberate attempt to over embellishment.

It was held by the Supreme Court in *Ganga Dhar v. State of Orissa*: AIR 2002 SC 3633 that even if major portion of the evidence is found deficient, the conviction can be based on the residual evidence, if it is otherwise sufficient to prove the guilt attributed to him. Even if a part of the testimony of a witness appears to be untrue

or false, that by itself does not destroy his testimony from beginning to end. It is only where the Court does not find it possible to separate truth from falsehood on account of the grain and chaff being inextricably mixed up that the Court has to discard the entire testimony of the witness.

In *Laxman vs. State of Maharashtra*: AIR 1974 SC 308, the Supreme Court held that the witnesses cannot be branded as liars in toto and their testimonies rejected outright even if parts of their statements are demonstrably incorrect or doubtful. It was observed that an astute Judge can separate the grain of acceptable truth from the chaff of exaggeration and improbabilities, which cannot be safely or prudently accepted and acted upon. The learned counsel for the appellants has referred to the decision of Supreme Court in *Kanbi Nanji Virji and Others v. State of Gujarat*: AIR 1970 SC 219, wherein it was held that where the truth and falsehood are so intermingled as to make it impossible to separate them, the evidence has to be rejected in its entirety. There is no dispute with the well settled proposition of law reiterated in this case. However, in the case before us, there is no difficulty in separating that part of the testimony of the eye witnesses which appears probable and trustworthy.

17. The learned counsel for the appellants has also referred to the *Bhagirath v. State of Madhya Pradesh*: 1976 CRI. L.J. 706 wherein it was observed that when the substratum of the evidence given by the eye-witnesses examined by the prosecution was found to be false, the only prudent course in the circumstances of this case left to the court was to throw out the prosecution case in its entirety against all the accused. However, in the present case it cannot be said that the substratum of the evidence given by the eye-witnesses has been found to be false, though there is a possibility that the eye-witnesses did not speak the truth either before the police or before the court as regards the role alleged to have been played by accused Yameen and Zakir are concerned. Therefore, this judgment does not apply to the facts of the present case.

18. The learned counsel has next referred to *B.N. Singh v. State of Gujarat*: 1990 CRI. L.J. 1601 in that case there was bitter rivalry between the accused union and the union of the deceased. The material witnesses in that case were, therefore,

found to be interested witnesses. It was observed that though the evidence of interested witnesses cannot be rejected outright on the ground that they are partisan witnesses, important circumstance noted in the case was that all the three witnesses had consistently deposed that accused No. 3 also was one of the persons who caught hold of the deceased, whereas the trial court has considered the evidence of DW-1 in greater detail and without any hesitation held that accused No. 3 at the relevant time was at Bombay and not at the place of occurrence, and therefore accused No. 3 was falsely implicated. This judgment is of no help to the appellants in the facts and circumstances of the present case which are altogether different. The eye witnesses in this case cannot be said to be interested witnesses merely because they happen to be related to the deceased. As far as PW-10 is concerned, he also being injured in this case, his presence at the place of occurrence cannot be disputed. The presence of other witnesses at the time this incident took place was also quite natural, the incident having taken place in their own house. Hence, the facts of the present case before us are altogether different.

19. The learned counsel for the appellants has also referred to *State v. Balbir Chand & Ors*: 1991 JCC 56 and *Ram Singh @ Pahari vs. The State*: 1996 JCC 685. We have examined these decisions and we do not find any such proposition of law in these cases which may be of any help to the appellants before us.

20. Two possibilities arise from the fact that the eye witnesses implicated Yameen and Zakir before the police who exonerate them when they were testified in the Court. The first possibility is that Mohd. Yameen and Mohd. Zakir were innocent and were implicated by the witnesses on account of their relationship with the other accused persons and when the passions cooled down and wiser sense prevailed the witnesses decided to speak truth and exonerated them during trial. The other possibility is that these two accused also being closely related to the eye witnesses, the matter between them was somehow settled outside the court and it was pursuant to the settlement that the witnesses decided to exonerate them during trial. In either case, the testimony of the eye witnesses as regards involvement of the other appellants in the incident which took place in the night of 21st June, 1993 remains wholly unaffected and un-impeached. Contention No.(iii)

In *State of Gujarat v. Bai Fatima* (1975) 2 SCC 7, the Supreme Court was of the view that:

"in a situation when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow:

(i) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self-defence.

(ii) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(iii) It does not affect the prosecution case at all." The Supreme Court specifically held that there may be cases where the non-explanation of injuries by the prosecution may not affect the prosecution case. This principle would apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, witnesses are independent and disinterested, and their testimony is so probable, consistent and creditworthy that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. In *State of Madhya Pradesh v. Sardar*, 2001 (5) AD (SC) 566, the Supreme Court held that where the evidence is clear, cogent and creditworthy, a reasonable inference which can be drawn is that the accused received injuries during the course of occurrence and some members of the prosecution party inflicted such injuries. It was further held that if the prosecution establishes that the accused were the aggressors and went to the residence of the deceased or the prosecution witnesses and inflicted injuries to the deceased and the witnesses, there was no question of right of private defence to the accused. On the contrary in such a situation the prosecution party would have the right of private defence. In *Kashmir Lal & Others v. State of Punjab* 1996 1 SCC 471, the Supreme Court held that a person who is unlawfully attacked has every right to counteract and attack his assailant and cause such injury as may be necessary to ward off the apprehended danger or threat. In *Rajender Singh v. State of Bihar* AIR 2000 SC 1779, the Supreme Court reiterated that ordinarily the prosecution is not obliged to explain each injury on an accused even though the injuries may have been caused

in the course of the occurrence, provided that the injuries are minor in nature. But if the prosecution fails to explain a grievous injury to one of the accused persons, which is admitted to have been caused in the course of the same occurrence, then certainly the court looks at the prosecution evidence with a little suspicion on the ground that the prosecution has suppressed the true version of the incident. The following propositions of law emerge from these cases:

(i) The prosecution needs to explain the serious injuries sustained by an accused in the course of the some transaction in which he is alleged to have committed the offence attributed to him. This applies particularly to a murder case.

(ii) The prosecution is not bound to explain the minor injuries, if any, sustained by an accused.

(iii) If the serious injuries sustained by an accused in the course of some transaction are not explained by the prosecution and a defence version is put up by the accused and the injuries sustained by the accused are compatible with the defence version, the court may believe the defence version, giving benefit of doubt to the accused.

(iv) Even if the prosecution fails to explain the serious injury sustained by an accused, that by itself will not result in the entire case of the prosecution being rejected on this ground alone where the testimonies of the witnesses is found to be unambiguous, creditworthy and reliable and the court is in a position to ascertain the true facts of the incident by separating the chaff from the grain.

(v) If the court, on analyzing the evidence produced by the prosecution, finds that the accused was the aggressor who went to the place of the prosecution witness(s) and inflicted injuries to him, right of private defence will not be available to the accused who by going to the place of the prosecution witness and attacking him had invited a counter-attack on him.

21. In the present case, the MLC of the appellant Mohd. Amil shows that he had one incised looking wound on the left forearm, 4-5 cm in length and one clean lacerated wound on middle finger of the left hand. The MLC further shows that the

appellant himself told the doctor that he was involved in a fight and received injuries on his left forearm and left hand. The injuries, sustained by him, cannot be said to be serious in nature and are rather minor. It was, therefore, not obligatory for the prosecution to explain the injuries found on his person. It has come in the deposition in the evidence of prosecution that the appellant Mohd. Amil had sustained some injury in the occurrence which took place on that day. PW-16 Inspector Data Ram, Investigating Officer of the case stated in his cross-examination that Mohd. Akhlaq had told him that the appellant Mohd. Amil had received injuries at the hands of his co-accused at the time of trial and that is why he did not get the case registered in respect of the injury received by him. Therefore, it is an admitted case that the appellant Mohd. Amil received these minor injuries in the same incident. It is not known by whom these injuries were caused and in what manner. What is really important in this regard is that though the appellant Mohd. Amil when he was examined, in his statement under Section 313 Cr.P.C., claimed that deceased Ashfaq had attacked him with a dagger and he had warded off his blows with hands and arms, he did not say either he or any of his companions had caused injuries to Mohd. Akhlaq /Mohd. Ashfaq in their self-defence. None of the appellants has given any such version of the incident which tells the Court as to how deceased Mohd. Ashfaq and the complainant Mohd. Akhlaq sustained injuries in that incident. They had ample opportunity to give their version of the whole incident when they cross-examined the eye-witnesses as well as when they were examined under Section 313 Cr.P.C., but, they chose not to avail these opportunities. During cross-examination of the eye-witnesses, no such suggestion was given to them as would constitute a defence version of the incident which took place on that date. No defence version, explaining the injuries caused to the deceased and the complainant, was given. Therefore, this is not a case where the injuries sustained by the appellant Mohd. Amil can be said to be compatible with a version given by the defence. Hence, non-explanation of injuries to the appellant Mohd. Amil has no impact on the case of the prosecution. Contention No.(iv)

22. The prosecution has cross-examined the eye-witnesses primarily in respect of the role attributed by the witnesses to the accused Mohd. Yameen and Zakir, who were acquitted by the Trial Court. But, that by itself cannot be a valid ground to

reject their testimony in respect of that part of the prosecution case which they supported during trial. In *Bhagwan Singh vs. The State of Haryana*: AIR 1976 SC 202, the Supreme Court held that the permission given to the prosecution to cross-examine its own witness does not completely efface his evidence which continues to remain admissible in trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence.

23. In *Gura Singh vs. The State of Rajasthan* 2001 Cri LJ 487, the Supreme Court, inter alia, observed as under: "There appears to be misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in *Bhagwan Singh v. State of Haryana*: 1976 Cri LJ 203 held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness. In *Rabindra Kumar Dey v. State of Orissa*: 1977 Cri LJ 173 it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy."

24. In *Radha Mohan Singh vs. State of U.P.* 2006 (1) SCC (Cri) 661, the Supreme Court, inter alia, observed as under: "It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the

same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof."

25. Learned counsel for the appellant has also referred to the *Jagir Singh v. The State*: AIR 1975 SC 1400, where the Supreme Court referred to the decision of Calcutta High Court in *Khijiruddin v. Emperor*: AIR 1926 Cal. 139 wherein it was held that when a witness who has been called by the prosecution is permitted to be cross-examined on behalf of the prosecution, the result of that course being adopted is to discredit that witness altogether and not merely to get rid of a part of his testimony.

26. However, the catena of the decisions of Supreme Court, referred above, indicate even where a witness is allowed to be cross-examined by the party who had called him to depose, that by itself does not altogether destroy his testimony and it is very much open to the Court to rely upon that part of his testimony which inspires confidence and is found acceptable. We, therefore, find no merit in this contention. Contention No.(v)

27. A perusal of DD No.4A, Ex.PW-6/G, recorded on 22.06.1993, would show that recording of FIR was completed at 01.30 am and the Special Report was sent to senior police officers and to the residence of the Metropolitan Magistrate through Constable Subhash Chand on DL SE 8689. The Report was, however, received by the learned Metropolitan Magistrate only at 01.30 pm, as is evident from the endorsement made by him on the FIR Ex.PW-6/A. The case of the prosecution in this regard that since the motorcycle, on which Constable Subhash Chand was taken the Special Report to the residence of the Metropolitan Magistrate broke down, it could not be delivered at his residence and had to be delivered in his Court and was endorsed by him at 01.30 pm on that day. Ex.PW-6/F is the copy of DD No.17A, lodged at Police Station Hauz Khas on 22.06.1993. This document shows that the motorcycle, on which the police officials were travelling, had developed some defects, which were got removed by him. Constable Subhash Chand came in the witness box as PW-1 and stated that this Special Report was taken by him in the night of 21-22.06.1993. Thus, the delay stands duly explained.

28. In any case, mere delay in sending a copy of FIR to the Area Magistrate cannot be a ground to discard the case of the prosecution on this ground alone. As observed by the Supreme Court in *Anil Rai vs. State of Bihar*, 2001 VI AD (SC) 133, where the FIR is shown to have been recorded without delay and investigation started on the basis of the FIR, the delay in sending the copy of the FIR to the Magistrate cannot be itself justify the conclusion that the investigation was tainted and the prosecution insupportable. It was noted that extraordinary delay in sending the copy of the FIR to the Magistrate can be a circumstance to provide a legitimate basis for suspecting that the FIR was recorded at a much later day than the stated day, affording sufficient time to the prosecution to introduce improvements and embellishment, by setting up a distorted version of the occurrence but the delay contemplated under Section 157 for doubting the authenticity of the FIR is not every delay but only an extraordinary and unexplained delay and in the absence of prejudice to the accused the delay by the police to submit the report does not vitiate the trial. It was held by the Supreme Court in *Sarwan Singh and Ors. vs. State of Punjab*: AIR 1976 SC 2304 that the delay in dispatch of FIR is not a circumstance which can throw out the prosecution case in its entirety. Contention No.(vi)

29. The contradiction, pointed out by the learned defence counsel, is absolutely insignificant and can be attributed to fading of memory with the passage of time. It is not always possible for a police officer to remember as to which was the place first visited by him in connection with the investigation of a case which was investigated by him years before he testified in the Court. This contradiction, in any case, has no bearing on the merit of the case. Contention No.(vii)

30. In our view, it is hardly of any consequence that the signatures of PW-12 Gazala Begum were not taken on the Seizure Memo of the clothes of the appellant Mohd. Amil. The seizure of the clothes of Mohd. Amil has been proved by the police officials and in any case he, admittedly, having been injured in this incident, his involvement in the incident cannot be disputed at all. Contention No.(viii)

31. Mst. Famida, who lodged DD No.28A, has not come in the witness box. The report made by her to the police in the night of at about 08.45 pm on 21.06.1993

being only a previous statement, could have been used either to corroborate or to contradict her testimony had she come in the witness box. In any case, we find nothing in this report which would damage the case of the prosecution in any manner. At best, it shows that the relations between the parties were not cordial and there used to be minor squabbles between them. Contention No. (ix)

Referring to the provisions contained in Rule 24.1 of Punjab Police Rules, Volume III, 1959 edition, as reproduced in the decision of this Court in *Lala Ram & Anr. v. State*: 36(1988) DLT 8 it was contended by the learned counsel for the appellants that since the statement alleged to have been made by the complainant to the Investigating Officer, on the basis of which the FIR was registered, was not entered in the Daily Diary of the police station as required under the Rules there was a possibility of a doctored version having been introduced in the statement of the complainant at a later point of time. The Rule relied upon by the learned counsel for the appellants reads as under: "Every information covered by Section

154, Criminal Procedure Code, must be reduced to writing as provided in that section and substance thereof must be entered in the police station daily diary, which is the book provided for the purpose. It is only information which raises a reasonable suspicion of the commission of a cognizable offence within the jurisdiction of the police officer to whom it is given which compels action under section 157, Criminal Procedure Code." In the case of *Lala Ram (supra)* it was found that substance of the statement made by the complainant Babu Ram to SI Dharampal on the basis of which an FIR was registered at the police station was not entered in the Daily Diary inasmuch as it did not give the name of the accused nor the names of witnesses or any other details in regard to the occurrence and this fact was admitted by PW 8 Jaipal Singh during his cross-examination. In these circumstances, it was observed that the entry made in the Daily Diary did not comply with the requirement of section 154 of Cr.PC and Rule 24.1 of the Punjab Police Rules. It was further observed that the failure to enter the substance of the FIR in the Daily Diary was indicative of the fact that when the said entry was made, full facts in regard to the occurrence were not known.

32. In the case before us, a perusal of the copy of the DD No.33-A Exhibit PW 6/B shows that the Rukka sent by the SHO containing statement of Mohd. Akhlaq for the purpose of registration of a case, was received in the police station at 12.30 A.M. and the FIR was registered on that basis. It further shows that writing of the FIR commenced at 12.30 a.m. As noted earlier, copy of DD No. 4A shows that the writing of the FIR was completed by 1.30 A.M. and the copy of the FIR was immediately dispatched to Addl. Commissioner of Police, Deputy Commissioner of Police, Asstt. Commissioner of Police and Metropolitan Magistrate. DD No. 4A being a contemporaneous and authentic document, there can be no reasonable doubt that the recording of the FIR was complete at about 1.30 A.M. and a copy of the same was dispatched to senior police officers and the Metropolitan Magistrate immediately thereafter, which rules out any reasonable possibility of a doctored or tailor made version being introduced in the statement of the complainant at a later point of time. The Duty Officer who recorded the FIR came in the witness box as PW 6 stated that not only the FIR but DD No.3A as well as DD No.4A were recorded by him on that day. During his cross-examination, no suggestion was given to him that the entry made by him in DD No. 4A recording dispatch of the Special Report to the senior police officers and Metropolitan Magistrate was false and the special report was not actually dispatched to them at 1.30 A.M. Even during cross-examination of PW 11 constable Subash Chander no suggestion was given to him that he had not taken the special report in the night of 21-22 June, 1993. In these circumstances, even if we proceed on the assumption that the provision of Rule 24.1 of Punjab Police Rules do apply to Delhi, failure of police to reproduce the statement of the complainant in DD No.3A does not affect the credibility of the complainant and/or other eye witnesses. We, therefore, find no merit in this contention. Unlawful Assembly and its common object:

33. Section 149 of the Indian Penal Code consists of two parts. The first part refers to the offences which are committed with a view to accomplish the common object of the assembly and hence the offence must necessarily be connected with common object of the assembly of which the accused was a member. The second part of section 149 refers to the offences, which, though not committed in direct prosecution of the common object of the assembly but which the members of the assembly knew was likely to be committed in that process.

34. The expression "in prosecution of common object" used in section 149 of Indian Penal Code would mean "in order to attain the common object". The knowledge possessed by each member of the assembly as to what was likely to be committed in prosecution of their common object may vary not only according to the information available to him but also the extent to which he shares the community of object(s). Consequently, the effect of section 149 may be different on different members of the same assembly.

35. The evidence produced by the prosecution during trial shows that five persons were involved in these incident. The crucial question to determine is whether those five persons entertained one or more common objects as specified in section 141 and, if so, what the common object(s) of the assembly was. It is not necessary that the common object should be in their minds when they assemble. It may be formed after they have assembled at the place of incident. What is necessary is that before a person can be convicted with the aid of section 149 of Indian Penal Code, he should be aware of and concur in that object. A common object being different from a common intention it does not require consent and prior meeting of minds. Also, the members of an unlawful assembly may have knowledge of objects only up to a certain point beyond which they may differ in their objects. It is not necessary that every member of the unlawful assembly must commit an overt act in prosecution of its common object. A common object may also be formed only by some of the members of the assembly and the other members may just join and adopt that object.

36. Since an object is entertained in human mind, no direct evidence can be available to prove the common object of an unlawful assembly. It must, therefore, necessarily be gathered from the acts which the persons forming the assembly commit and the result ensuing there from and other surrounding circumstances of the case. In order to determine the common object of the unlawful assembly nature of the assembly the utterances made by its members and the arms carried by its members are amongst the relevant factors.

37. Keeping the aforesaid principles in mind, we need to scrutinize the evidence produced by the prosecution to find out what the common object of the assembly

was or what were the offences which the members of the assembly knew likely to be committed in prosecution of that object. Though the case of the prosecution, as set out in the FIR, is that all the five appellants had come together to the portion occupied by the complainant and his famil, PW-2 Rehana Begum w/o the complainant Mohd. Akhlaq stated as below in this regard:- "My brother-in-law (Dever) was there when my husband went to the hospital. The accused climbed the stairs, when my husband was going to the hospital. Thereafter they attacked my Dever. First all the accused came by stairs from the gali, then they went to the house of Aamil. Aamil and Fazil had already attacked before Mohd. Zahid, Mohd. Sabir and Mohd. Aashiq came there by stairs. Aamil and Fazil came from above(roof)." Admittedly, there is a gali between the house of the complainant and the house of the appellants Mohd. Zahir, Mohd. Sabir and Mohd. Ashiq. The above referred statement of Rehana Begum shows that initially the appellants Amil and Mohd. Fazil came from the second floor, where they were residing, and later on they were joined by the appellants Mohd. Zahid, Mohd. Sabir and Mohd. Ashiq who came from the side of the street. Thus, the appellants came to the spot in two batches. In fact, if we go by the version given by Rehana Begum, the deceased was attacked only after her husband complainant Mohd. Akhlaq was being taken to hospital.

38. It is not the case of the prosecution in the FIR that all the appellants were armed when they entered the first floor portion occupied by the complainant and his family. In the FIR, out of the five appellants before us, use of arm was attributed only to Mohd. Amil, Mohd. Fazil and Mohd. Sabir. Admittedly, no woman present in the house was even touched despite the appellants being armed. Had the common object of the assembly been also to commit murder, there could have been no reason to spare them altogether.

39. Though, it was alleged in the FIR that Mohd. Yameen (who was acquitted by the trial court) had asked other accused to kill the complainant and his brother, none of the eye witness stated so when they were examined during trial. Thus, there is absolutely no evidence of any person having exhorted or motivated the members of the unlawful assembly to kill the complainant or his deceased brother.

40. The incident in which Mohd. Ashfaq lost his life and the complainant Mohd. Akhlaq was injured, took place on a petty matter, viz. throwing of garbage and dirty water in the courtyard on the first floor. Admittedly, the parties are closely related to each other, their family tree being as under:- PW12 Gazala w/o Mohd. Yameen Md. Shafi Mohd. Saeed Shaista Yasmeen Md. Amil Md. Fazil Md. Zakir Md. Ashfaq Md. Akhlaq (PW 13) (PW 14) (son) (son) Md. Sabir (deceased) (injured PW10) Daughter daughter Md. Zahid Md. Ashiq (brother-in-law Rehana (PW2) of Md. Yameen) (w/o Md. Akhlaq) Note: Mohd. Saeed, Mohd. Yameen and Mohd. Shafi are brothers.

41. The facts and circumstances of the case, in our view, do not indicate that the appellants entertained a common object to commit murder of deceased Mohd. Ashfaq. There was no exhortation by anyone to kill him. No one made any proclamation or expressed any desire to kill Mohd. Ashfaq. The facts and circumstances of the case do not indicate any pre-meditation or pre-planning. In fact, the allegation in the FIR is that the accused persons had come to the premises of the complainant and his family members in order to pick up a quarrel. In these circumstances, it is difficult to believe that all the appellants shared a common object to commit murder of deceased Mohd. Ashfaq, or that they knew that murder of Mohd. Ashfaq was likely to be committed in prosecution of the common object which they shared with each other. They did not have any motive to commit his murder and did no such act from which we may infer that the common object of the assembly was to cause murder of Mohd. Ashfaq or his brother or that all the appellants could have reasonably foreseen that a murder was likely to be committed in prosecution of the common object to which they were a party.

42. However, considering that some members of the unlawful assembly were armed with knives and also actually used knives for giving stab injuries to deceased Mohd. Ashfaq and Mohd. Akhlaq we have no reasonable doubt that all of them shared a common object to cause injuries to Mohd. Ashfaq and Mohd. Akhlaq by use of knives, which are sharp instruments normally used for stabbing and cutting. Hence, all of them are guilty of the offence punishable under section 324 of the Indian Penal Code read with section 149 thereof. Since they were also

the members of an unlawful assembly as defined in section 141 of the Indian Penal Code they are also liable to be convicted under section 143 thereof. Since force and violence was used by the members of the unlawful assembly in prosecution of the common object of the assembly, all the appellants are further liable to be convicted under section 147 of the Indian Penal Code. Individual Roles

(a) The role of Mohd. Sabir

43. The case of the prosecution as set out in the FIR and statements of witnesses recorded under section 161 of the Code of Criminal Procedure, is that he had stabbed the deceased Mohd. Ashfaq. There is consistency in the testimony of all the five witnesses as regards the act committed by this appellant. All of them have been emphatic in saying that the appellant Mohd. Sabir had given knife blows to deceased Mohd. Ashfaq. A perusal of the post mortem report shows the following injuries:

"External Injuries:- 1. Incised stab wound 3x2 x 3.5 cm vertically placed on Left lower front abdomen, the upper angle being 6.5 cms outer to and 1 cm below the umbilicus. Both angles acute, the upper being more so. A contusion 0.2 0.2 cms present on the inner margin. The lower angle is 98 cms above the left heel. The track of the wound remains and within the subcutaneous tissue. The direction of the wound is downwards, inwards and slightly backwards.

2. Incised stab wound 3x2 x 3.2 cms, obliquely placed on left lower front of abdomen, the upper inner angle being 0.5 cms directly below injury no. 1 and 6.8 cm from midline. Both angles acute, the lower outer being more so. Contusion of 0.2 x 0.2 cm present on the inner margin. The lower angle is 93.8 cm above the left heel. The track of the wound remains within the subcutaneous tissue. The direction of the wound is downwards, inwards and slightly backwards.

3. Incised stab wound somewhat obliquely placed over lower front left abdomen 2 x 1.8 cms x abdominal cavity deep. The lower inner angle is 5.8 cm from midline and 7.2 cms from anterior superior iliac spine and 92 cm above left heel. Both angles acute, lower inner being more so. The direction of the wound is downwards, inwards and backwards. The wound injuries vessels of the

peritoneum and ends in the retroperitoneal cavity. The length of the track is 7.2 cms.

4. Incised stab wound 1.5 x 0.5 x 4 cms over lower outer right arm, 3 cms above right elbow.

5. Railroad pattern contusion of 28 x 1.5 cms present over back of left side chest with an abrasion of 5 x 1.5 cms over the lower part.

6. Railroad pattern contusion of 7 x 1 cms present over outer back left side chest, 6 cms below and outer to injury no. 5

7. Incised wound 3x0.2x0.1 cms over palmar aspect of middle phalanx of right ring finger and distal phalanx right middle finger.

8. Abrasion 1.5 x 1 cms present over back of left elbow.

9. Multiple abrasions, crescentic shaped, in an area of 3x0.5 cms over the back of left hand proximal to proximal phalanx of left little finger (produced by human bite)

10. Abrasion 0.5 x 0.5 cms over back of left thumb proximal phalanx.

11. Incised wound 1.5 x 0.2 cms over palmar aspect of left thumb at junction of proximal and middle phalanges.

12. Incised wound 1 x 0.2 cms over palmar aspect of left index finger, proximal phalanx.

13. Horizontal incised wound 2 x 0.1 cms present over back of left hand, 1 cm proximal to the phalanges of left index and middle finger.

14. Contusion 5 x 1.5 cms present on uppermost front left side chest." In the opinion of PW 19 Dr. Anil Aggarwal, Head, Department of Forensic, Dr. Maulana Azad Medical College, New Delhi the death was caused due to excessive bleeding and shock consequent upon various injuries mentioned in the post mortem report. He also opined that injuries No. 1,2,3,4,7,11,12 and 13 were caused by some double edged sharp stabbing weapon, with one edge somewhat less sharp.

Injuries No. 5,6,8,10 and 14 were opined to be caused by some blunt force, whereas injury No.9 was caused by tooth bite. Injury No. 3 was sufficient to cause death in the ordinary course.

It has come in evidence and is also evident from the post mortem report that not one but several knife blows were given to deceased Mohd. Ashfaq. The injuries to deceased Mohd. Ashfaq were given on vital parts of his body, including his abdomen. Though it has come in evidence that the stab injuries to deceased Mohd. Ashfaq were given by two persons and there is no evidence to show which injury was given by whom, the number of injuries caused, the weapon used for causing the injuries and the vital organs of the body chosen for causing these stab injuries leave no reasonable doubt that in case the stab injuries were given by the appellant Mohd. Sabir alone as he intended to commit the murder of the deceased and in case he as well as a second person gave these multiple stab injuries, both the assailants shared a common intention to commit the murder of the deceased. The appellant Mohd. Sabir is, therefore, liable to be convicted under section 302 of the Indian Penal Code. (b) Role of Zahid

44. In the FIR lodged by him, the complainant, who is the injured eye-witness in this case, alleged that deceased Mohd. Ashfaq was held by Mohd. Zahid and Mohd. Ashiq by hair and knife blows were given by Mohd. Zakir and Mohd. Sabir. Same was the statement given by other eye-witnesses, namely, PW-2 Smt. Rehana Begum, PW-10 Mohd. Akhalq, PW-12 Smt. Gazala Begum, PW-13 Kumari Shaista, PW-14 Kumari Yasmeen under Section 161 of Cr.P.C. However, when they came in the witness box not only the complainant, but also the other eye-witnesses took a complete U-turn as regards the role of Zahid and stated that it was Mohd. Ashiq who held the deceased, whereas knife blows were given to him by the appellant Mohd. Sabir and Zahid.

45. The appellant Zahid was not a stranger to the eye- witnesses, he being their close relative. Therefore, it cannot be accepted that not one, not two, but all of them committed a mistake in substituting him by Zakir, who has been acquitted by the Trial Court. The name of the person(s), who gave knife blows to the deceased, was the most vital and crucial part of the testimony of the eye-witnesses and,

therefore, no mistake in this regard was likely to be committed by them in the statements given to the police immediately after the incident had taken place. It is, therefore, very difficult for us to believe their testimony in the Court, to the extent they claimed that the appellant Zahid also had given knife blows to the deceased. It will also be worthwhile to note here that in their deposition in the Court, none of these witnesses stuck to their version to the police that Zahid had held the deceased by hair when knife blows were given to him by Zakir and Mohd. Sabir. Thus, there is no evidence of his having held the hair of the deceased, when knife blows were given to him. The two versions given by the witnesses, one to the police and the other to the Court, as regards role of the appellant Zahid are wholly reconcilable and at variance with each other. Therefore, it cannot be said that the appellant Mohd. Zahid shared a common object with any other member of the unlawful assembly to commit murder of deceased Mohd. Ashfaq. He, consequently, cannot be convicted under section 302 of the Indian Penal Code either with or without aid of section 149 thereof. (c) Role of appellant Ashiq

46. The case of the prosecution, as set out in the FIR lodged by the complainant, is that Ashiq had caught hold of the hair of the deceased Mohd. Ashfaq. It is not their case that the appellant Mohd. Ashiq was still holding the hair of the deceased Mohd. Ashfaq, when knife blows were given to him. The relevant portion of the FIR in this regard reads as under:- "Yameen overpowered me by catching hold of my waist, whereas Zahid and Ashiq caught hold of the hair of Mohd. Ashfaq. In the meantime, Mohd. Amil inflicted a knife blow on the left side of my chest whereas Mohd. Fazil inflicted the knife on my left elbow which would have hit me on my abdomen had I not turned (to save myself). Mohd. Zakir inflicted knife on the abdomen of Mohd. Ashfaq whereas Mohd. Sabir also inflicted knife on the abdomen and hand of Ashfaq." When the eye-witnesses came in the witness box, they did not say that at the time knife blows were given to the deceased by Zahid and Sabir, his hair were being held by the appellant Ashiq. Thus, there is no evidence that the appellant Ashiq was holding the hair of the deceased when knife blows were being given to him. Mere holding of hair of the deceased by the appellant Ashiq does not in any manner indicate that he shared a common intention or a common object with any other member of the unlawful assembly to commit the murder of the deceased. Presuming that the appellant Ashiq had held

the hair of the deceased when knife blows were given to him, that also would not show any such sharing of a common intention or a common object on his part. There is no evidence of any member of the unlawful assembly having exhorted others to kill either Mohd. Ashfaq or Mohd. Akhlaq. There is no evidence of anyone even having desired at that time that Ashfaq should be killed. If the appellant Ashiq shared a common intention or a common object to commit murder of the deceased, he would have held the deceased by holding his hands or by holding him from the back, so as to immobilize his hands, and would not have held the deceased by his hair, since the hair being slippery, it is quite easy for the victim to get himself released from the clutches of the person, who is holding his hair. If the hair are held, the hands of the victim are absolutely free and, therefore, he is not in a position to make an attempt to ward off any attempt on him and to defend himself. Hence, if a person wants someone to be murdered, he would not hold him by hair but, would hold him in such a manner that the victim finds it difficult to ward off the attacks on him. No overt act is alleged to have been committed by the appellant Ashiq, from which we may draw an inference that he wanted deceased Mohd. Ashfaq to be murdered. It is, therefore, difficult for us to accept that the appellant Ashiq shared a common intention or a common object with any other person to commit murder of deceased Mohd. Ashfaq. His conviction under Section 302 of IPC, therefore, cannot be maintained with the aid of either Section 149 or Section 34 of IPC.

(d) The role of the appellants Mohd. Amil and Mohd. Fazil

47. There is no evidence or even allegation of the appellants Mohd. Amit and Mohd. Fazil having even touched to deceased. Even the knife blows given by them to the complainant have not been held to be murderous, since they have been convicted under Section 324/149 and not under Section 307/149, for causing injuries to the complainant. As noted earlier, there was no exhortation or declaration by any member of the assembly to kill person(s) present there. The parties are closely related to each other, and the incident which flared took such a serious dimension had its root in a petty matter relating to throwing of dirty water and/or garbage, in the portion of the complainant party. In these circumstances, it is difficult to accept that these appellants shared a common object or a common

intention, to commit murder. Their conviction under Section 302 of IPC read with Section 149 thereof cannot be maintained.

48. All the eye witnesses have, however, been consistent in their statement to the police as well as in their deposition in the Court, so far as the role alleged to have played by these two appellants is concerned. In the FIR lodged by him, the complainant alleged that Mohd. Amil had inflicted a knife blow on the left side of his chest, whereas Mohd. Fazil had inflicted knife blow on his left elbow which would have hit him on the abdomen, had he not turned to save himself. Other eye-witnesses made similar statements to the police. When the complainant came in the witness box as PW-10, He stood by the version given by him to the police in this regard and stated that Amil gave him knife blows on his chest, whereas Fazil tried to hit him with his knife on the abdomen, which he avoided and that blow caused injury on his left elbow. PW- 12 Gazala Begum also stated that Mohd. Amit and Mohd. Fazil gave injuries to the complainant with chhuries. PW-13 Shaista stated that Amil inflicted injuries with chhuri on the chest of Akhlaq whereas Mohd. Fazil inflicted injuries on his left elbow. PW-14 Yasmin stated that Mohd. Amil and Mohd. Fazil had given chhuri blows on the chest of Akhlaq. PW-2 Rihana Begum, wife of the injured, stated that her husband was attacked with knives. We see no reason to disbelieve the consistent and unimpeached testimony of the eye-witnesses as regards the injuries caused to the complainant. Both of them were, therefore, liable to be convicted under Section 324 of IPC. Conclusion

49. For the reasons stated in the preceding paragraphs, we maintain conviction of all the five appellants and the sentence awarded to them under section 324 of the Indian Penal Code read with section 149 thereof as well as under section 147 of the Indian Penal Code. Since all the appellants were members of an unlawful assembly they are also convicted under section 143 of the Indian Penal Code and are sentenced to undergo rigorous imprisonment for three months each. The appellants Mohd. Sabir is also convicted under section 302 of Indian Penal Code and is sentenced to undergo imprisonment for life and to pay fine of Rs.1,000/- or to undergo simple imprisonment for three months in default. The appellants stand acquitted of all other charges. The substantive sentences shall run concurrently. The appellant Mohd. Sabir be taken into custody to undergo the remaining portion

of the sentence awarded to him. The remaining appellants be also taken into custody to serve the remaining part of the sentences unless they have already undergone the sentences awarded to them.

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