A.F.R.

Judge

**IN THE HIGH COURT OF MADHYA PRADESH, JABALPUR**

**SINGLE BENCH : HON'BLE MR. JUSTICE N.K.GUPTA, J.**

**Criminal Appeal No.2412/1997**

Suresh Kumar Soni and others

**VERSUS**

State of Madhya Pradesh

---

Shri Satish Chaturvedi, counsel for the appellants.

Shri Ajay Tamrakar, Panel Lawyer for the State/respondent.

---

**J U D G M E N T**

(Delivered on the 12th day of February, 2015)

The appellants have preferred the present appeal being aggrieved with the judgment dated 24.10.1997 passed by the Second Additional Sessions Judge, Satna in S.T.No.53/1988, whereby appellants No.1, 4 and 6 have been convicted of offence punishable under Section 457 of IPC and sentenced to 2 years rigorous imprisonment with fine of Rs.500/-, whereas the appellants No.2, 3 and 5 have been convicted of offence under Section 459 of IPC and sentenced to 3 years rigorous imprisonment with fine of Rs.500/-. One month simple imprisonment was imposed on each of the appellants, in default of payment of fine.

**2.** The prosecution's case, in short, is that, on 12.4.1986, at about 2.10 a.m., Madhav Prasad (P.W.4) went to the Police Station Ucchehra and lodged an FIR, *Ex.D/3* in Rojnamacha that some culprits were breaking the doors of his shop and therefore, SHO Shri R.S.Tripathi and his companions immediately left for the spot. However, Madhav Prasad (P.W.4), who went to the spot had found that doors of his shop were broken and his nephew Sudama and his mother Makhaniya (P.W.3) had sustained injuries. It is also found that some boxes kept in the shop were found thrown out of the shop. SHO, Police Station Ucchera registered a case and investigated the matter. On the basis of evidence given by eye witnesses, a charge-sheet was filed before the JMFC, Nagod, who committed the case to the Court of Sessions and ultimately, it was transferred to the Second Additional Sessions Judge, Satna.

**3.** The appellants abjured their guilt. They took a plea that there was a dispute of house between the parties and therefore, they were falsely implicated in the matter due to enmity. However, no defence evidence was adduced.

**4.** Second Additional Sessions Judge, after considering the prosecution evidence, convicted the appellants No.2, 3 and 5 i.e. Bhagwandas, Shivdas and Lalai @ Lalan Singh of offence under Section 459 of IPC and sentenced as mentioned

above, whereas remaining appellants were acquitted from the charge of offence under Section 459 of IPC but, convicted for offence under Section 457 of IPC and sentenced as mentioned above.

**5.** I have heard the learned counsel for the parties at length.

**6.** After considering the peculiar factual position of this case, where the trial Court did not distinguish between offence under Sections 459 and 457 of IPC and convicted the appellants of such different offences on the basis that the appellants against whom it was found that they assaulted the victims, were convicted of offence under Section 459 of IPC and the appellants who did not assault anyone have been convicted of offence under Section 457 of IPC. Looking to the peculiar circumstances of the case, first of all, it is to be decided that what is the scope of discussion relating to offences in the present case.

**7.** Offence under Section 459 of IPC is a peculiar offence, in which act of assault should be done during the act of house breaking or lurking house trespass. Provision of Section 459 of IPC is reproduced as under:-

> *459. Grievous hurt caused whilst committing lurking house trespass or house-breaking.—Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, shall be punished with imprisonment for life, or*

> *imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

In this provision, expression "Whilst" prefixed to the words committing lurking house trespass or house breaking has given rise to a cleavage of judicial opinion and in case of ***"Syed Ahmed Vs. Emperor", [AIR 1927 Allahabad 536]***, it was held by Allahabad High Court that if assault has been caused after entering in the house then, provision of Section 459 of IPC shall not be attracted. Such assault of causing grievous hurt or attempt to cause death should be done in the course of commission of offence of lurking house trespass or house breaking. In the present case, out of the injured witnesses, Sudama Prasad had expired during the pendency of the trial and he could not be examined before the trial Court, whereas second injured Makhaniya Bai (P.W.3) has stated in her evidence that the culprits entered in the house by breaking the door pans and thereafter, they threw Sudama her grand child out of the house and assaulted the victim Makhaniya. Hence, it is very much clear by the statement of sole injured witness that the culprits did not assault anyone while committing offence of house breaking. Hence, offence under Section 459 of IPC was not made out against any of the appellants from very beginning.

**8.** The trial Court did not frame charge of offence under Sections 324 or 323 of IPC relating to victims Sudama Prasad or Makhaniya. It is also to be decided whether the appellants can be convicted for such offences under the head of charge of offence under Section 459 of IPC or not. In this context, provision of Section 222 of the Cr.P.C. is very much clear. Also, in case of ***"Tarkeshwar Vs. State" [(2006) 8 SCC 566]***, it is held by the Apex Court that where the accused is charged with a major offence and said charge is not proved, the accused may be convicted of the minor offence of the same nature, though initially he was not charged with it. In the light of aforesaid judgment, if facts of the present case are examined then, it would be apparent that the culprits could be convicted of offence under Section 459 of IPC, if they assaulted the victims or tried to cause grievous injury to them whilst house breaking. They could be convicted for any of the offences under Sections 326, 325, 324 or 323 of IPC as the case may be in the head of charge under Section 459 of IPC, if house breaking was not complete. They could be convicted of offence under Section 457 of IPC or lesser offence of the same nature, if the ingredients of assault whilst house breaking were not proved but, if the culprits had assaulted the victims after completion of house breaking then, such subsequent assault does not fall within the purview of offence under

Section 459 of IPC and therefore, for voluntarily causing hurt or causing hurt by penetrating object, charges of offence under Sections 324 or 323 of IPC should have been framed separately because such overt-act of causing voluntarily hurt was not done during the act of house breaking or lurking house trespass. Hence, in the present case, offence under Sections 324 or 323 of IPC cannot be considered as an inferior offence of the same nature relating to charge under Section 459 of IPC. The trial Court has simply framed the charge under Section 459 of IPC against all the appellants but, no separate charge under Section 324 or 323 of IPC was framed by the trial Court. The State has not preferred any counter appeal for addition of such charges or conviction of the appellants for such charges and therefore, in the scope of present discussion, overt-acts of the appellants causing hurt to Makhaniya and Sudama Prasad shall not be discussed. Such an act shall be discussed only for corroboration of guilt of house breaking.

**9.** As discussed above, it is apparent that the appellants did not assault anyone whilst alleged house breaking and therefore, prima facie no offence under Section 459 of IPC is constituted against any of the appellants. Also, no discussion is required relating to offence under Sections 324 or 323 of IPC and therefore, discussion is limited upto

offence of house breaking or lurking house trespass in the night. In the present case, Ramsakha (P.W.2), Makhaniya (P.W.3), Madhav Prasad (P.W.4) and Laxmi Prasad (P.W.5) were examined as eye witnesses. Munni (P.W.6) and Premwati (P.W.7) were also examined as eye witnesses but, no opportunity of cross-examination of these two witnesses was available to the appellants and therefore, the trial Court has discarded their evidence. Ramsakha, Madhav Prasad, Makhaniya and Laxmi Prasad have stated that the appellants have broken the door of the shop of Madhav Prasad and entered in the shop. It is stated that Laxmi Prasad (P.W.5) was an independent witness. However, Laxmi Prasad has accepted in para 4 that he had also lodged some cases against some of the appellants and therefore, he had an interest against the appellants. Also, he has accepted in para 7 of his statement that when he reached to the spot, he saw the culprits running away from the spot. When he saw them for the first time, they were 15 feet away from him. He could not say about the articles kept by the appellants in their hands while running away from the spot. It is also pertinent to note that the incident took place on 13.4.1986, whereas Laxmi Prasad came forward to give his statement to the police after 5 days of the incident. It is also important that such a grave house breaking was done by the culprits in an urban area of

the township but, no independent witness was examined in support of the interested witnesses.

**10.** In the present case, there are 2-3 defects in the evidence of the eye witnesses and such defects create a doubt about their testimony. First defect is that the witnesses could not prove that there was any arrangement of light to see the culprits or the incident on whole. Madhav Prasad claimed that he saw the culprits when they were breaking the doors of the shop and therefore, he immediately, rushed to the Police Station in the same locality and informed about the commission of crime to the police and thereafter, an FIR, *Ex.P/4* was lodged. If FIR, *Ex.P/4* is examined then, it is a document which was prepared ante time. According to the prosecution's story, Madhav Prasad went to the Police Station at 2.10 a.m. and informed that some culprits were breaking the doors of his shop. Intimation, *Ex.D/3* was recorded by the police in Rojnamachasana. However, Madhav Prasad in his cross-examination has refused that he had lodged such an FIR. Entry in Rojnamcha *Ex.D/3* is a document of prosecution itself and by mere denial, its existence cannot be discarded. In document *Ex.D/3*, Madhav Prasad did not mention the name of anyone at the first instance. If there was availability of street light in the street then, as claimed by Madhav Prasad that he could see the culprits from terrace

where he and his family members were sleeping then, certainly, he could give the names of the culprits in his first report, *Ex.D/3*. Looking to his conduct and text of Rojnamcha, *Ex.D/3*, it would be apparent that Madhav Prasad could not identify any of the culprits, before he reached to the Police station for the first time.

**11.** The FIR, *Ex.P/4* is shown to be lodged at 2.20 a.m. and interpolation is visible in the time of FIR mentioned in the document. If the text of the document, *Ex.P/4* is perused then, it is mentioned that the incident took place at 2 a.m. and FIR, *Ex.D/3* was lodged at 2.20 a.m. According to the document, *Ex.D/3*, Madhav Prasad went to the Police Station at 2.10 a.m. Thereafter, immediately he left for his house and police party has also followed him. The entire incident took place, in which Makhaniya and Sudama Prasad sustained injuries. In the text of document, *Ex.P/4*, it is mentioned that Madhav Prasad had brought the injured Makhaniya and Sudama to the Police Station Ucchera at the time of lodging the FIR, *Ex.P/4*. Hence, when Madhav Prasad had lodged a report, *Ex.D/3* at 2.10 a.m. thereafter he went to the spot and according to him, the incident was going on. Thereafter, when the culprits left the spot, he took the injured persons to the police station by Ricksaw and thereafter, FIR, *Ex.P/4* was lodged. Hence, that FIR could not be lodged by Madhav

Prasad within 10 minutes of his previous FIR, *Ex.D/3* and therefore, FIR, *Ex.P/4* is nothing but, a document prepared ante time and therefore, it loses its evidentiary value as an FIR.

**12.** In FIR, *Ex.P/4*, it was mentioned that various citizens of the locality had arrived at the spot at the time of incident. However, Madhav Prasad had denied that. He had mentioned the portion "D" to "D" in the FIR, *Ex.P/4* about arrival of various other persons. However, not a single such person was examined in support of interested witnesses. According to Madhav Prasad and Ramsakha, they were sleeping on the terrace alongwith their family members and the injured witnesses Makhaniya and Sudama were sleeping in the shop. Out of these two injured witnesses, Sudama Prasad could not be examined because he had expired during the trial, whereas Makhaniya has accepted that she was suffering from cataract and she could not see anything by one of her eye and she could see partially by another eye. She has claimed that there was light in the shop but, she did not state that whether lights in the shop were on while she was sleeping. Even in the Court see could not identify the culprits in the broad day light because the culprits were standing in the accused dock, which was 7-8 feet away from the witness box and she has claimed that she had seen the culprits from a

distant place. Hence, it is highly doubtful that witness Makhaniya was in a position to identify the culprits in the absence of any light specially when she was suffering from cataract in her eyes.

**13.** So far as evidence of Madhav Prasad is concerned, looking to the contradictions between his previous statement i.e. first FIR, *Ex.D/3* and second FIR *Ex.P/4* and also with statement under Section 161 of the Cr.P.C., that when Madhav Prasad immediately left for the Police Station and according to the document, *Ex.D/3*, he could not see the culprits before leaving his house then, it was not possible for him to come back and fight with the culprits and therefore, it appears that he went back to his house, when incident was already over and he has given his statement on the basis of his presumptions. Hence, testimony of Madhav Prasad cannot be accepted beyond doubt.

**14.** The witness Ramsakha has stated that he was sleeping on terrace and he had heard the sound of bomb blast and firing. However, no fire arm could be recovered by the police from any of the appellants. There is no document to show that police found remains of any bomb on the road. It appears that Ramsakha has exaggerated about the incident to implicate the appellants in a particular manner. When he was asked as to how he could see the incident from the terrace, he

claimed that he went to the staircase and he saw the culprits. However, Ramsakha did not sustain any injury and therefore, he did not try to save the victim during the incident. It is not proved that any of the light was illuminated in the shop at the time of incident then, if the witness Ramsakha came to the stair case then, still he could not see the actual culprits and therefore, the statement of the witness Ramsakha also depends upon his own presumptions.

**15.** The most unnatural portion of the allegation is that there was enmity between Madhav Prasad Soni and appellant Bhagwandas relating to dispute of possession of a particular house. It is not alleged against the appellants that in the same incident, they tried to occupy the house, which was under dispute. It is alleged against the appellants that they had broken the doors of the house, in which there was a shop of Madhav Prasad Soni and therefore, purpose of house breaking was not to take possession of the disputed house. Second question arises as to whether the purpose of house breaking was robbery? The answer could be “Negative”. The appellants were the citizens, who were known to the victims and were residing in the same locality and therefore, it was not possible for the appellants to commit robbery in the house of victims, otherwise, immediately, a named FIR would have been lodged against them and they could be held for the

offence of robbery and various ornaments kept in the shop could be recovered from the appellants. If text of FIR, *Ex.P/4* is examined then, there is no allegation that any robbery was committed by the appellants. Some of the witnesses have stated that the appellants had thrown some boxes kept in the shop on the road but, such fact has not been mentioned in the FIR, *Ex.P/4* and the statements of the witnesses relating to that fact is nothing but, an after thought. Hence, looking to the text of FIR, *Ex.P/4*, it is not established that house breaking was done for the purpose of robbery or burglary.

**16.** If the appellants had an enmity with the complainant and his companions then, they could not do the house breaking in the night unless they had a particular object behind it. As discussed above, it is proved that the appellants did not want to commit any robbery. They did not want to encroach upon any portion of the property, where they committed the crime of house breaking, therefore, only purpose could be to teach a lesson to Madhav Prasad and Ramsakha. If that was the purpose of the appellants then, after breaking the house of the complainant, they had no reason to assault Makhaniya or Sudama Prasad. Makhaniya was an old person, whereas Sudama Prasad was a handicapped person. The witnesses did not say that the culprits tried to come on terrace to assault Ramsakha or

Madhav Prasad. If the appellants would have entered in the house in the mid night to teach a lesson to Madhav Prasad and Ramsakha then, certainly they should have tried to assault these two persons.

**17.** If evidence of Ramsakha (P.W.2) is perused then, in para 4 of his statement, he has stated that place of incident was his shop of silver and golden jewelery and the culprits took the boxes from the shop containing some silver and golden ornaments alongwith the instruments used in making of such ornaments and threw that outside the shop. Again in the cross-examination, he has accepted that in his case diary statement, *Ex.D/1*, he has stated that his ornaments were taken by the culprits and hence, the purpose of house breaking was robbery. However, the investigation officer was not examined and no document is proved before the trial Court to show that any ornament was seized from any of the appellants or any box was seized out of the shop. Hence, it appears that Ramsakha has tried to establish a case of robbery or burglary but, in FIR, no such case was alleged. After considering the evidence of Madhav Prasad, Ramsakha and Makhaniya, it appears that there was no object with the appellants to do alleged house breaking. There is no allegation of robbery or burglary. It is not proved beyond doubt that there was any arrangement of light, so that the

witnesses could see the culprits, Ramsakha and Madhav Prasad were not in a position to see culprits, where Makhaniya was not able to see properly because she was suffering from cataract. She had lost the sight of one eye completely and lost partial sight of another eye. As discussed above, the appellants have no object to do the house breaking in the night and if they have done so, they would have tried to reach upto Ramsakha and Madhav Prasad to teach a lesson to them. Hence, it appears that some culprits have tried to cause burglary in the shop of Ramsakha and Madhav Prasad and after breaking the doors of shop and assaulting the victims Makhaniya and Sudama, a crowd of citizens was gathered and also police had arrived at the spot on the report lodged by Madhav Prasad and therefore, they could not take anything from the shop and ran away. Thereafter, Madhav Prasad and Sudama have thought to take advantage of the incident to implicate the appellants falsely.

**18.** On the basis of the aforesaid discussion, there was no object with the appellants to do house breaking. Evidence given by Ramsakha, Madhav Prasad and Makhaniya is not reliable beyond doubt that they could see or they saw the appellants that they committed house breaking. It is not proved beyond doubt that there was any source of light in the street. In the spot map, *Ex.P/2*, no arragement of light has

been shown by the investigation officer on the street. Since Makhaniya and Sudama were sleeping in the shop, there was no possibility that source of light was illuminated in the shop during sleep and thereafter, there was no possibility that Makhaniya or Sudama had switched on the source of light. It is highly doubtful that the appellants were the persons, who entered in the shop of the complainant Madhav Prasad or Ramsakha. As discussed above, the culprits did not assault anyone during entry into the shop and therefore, prima facie no offence under Section 459 of IPC was made out against any of the culprits. Under such circumstances, none of the appellants can be convicted of offence under Section 459 or 457 of IPC or any inferior offence of the similar nature. They are entitled to get the benefit of doubt. Consequently, appeal filed by the appellants is hereby allowed. Conviction and sentence for offence under Section 459 of IPC imposed against the appellants No.2, 3 and 5 as well as conviction and sentence of offence under Section 457 of IPC imposed against the appellants No.1, 4 and 6 are hereby set aside. The appellants are acquitted from all the charges. The appellants would be entitled to get the fine amount back, if they have deposited the same before the trial Court.

**19.** The appellants are on bail. Their presence is no more required before this Court and therefore, their bail bonds shall stand discharged.

**20.** Copy of the judgment be sent to the trial Court alongwith its record for information.

**(N.K.GUPTA)**
**JUDGE**
12/2/2015

Pushpendra