

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

+ Crl.A.No.178/2009

% Reserved on: 3<sup>rd</sup> February, 2010  
Date of Decision: 4<sup>th</sup> February, 2010

# TILAK RAJ ..... Appellant  
! Through: Ms.Purnima Sethi, Adv.

versus

\$ STATE (N.C.T.) OF DELHI ..... Respondent  
^ Through: Mr.Jaideep Malik, APP

\* **CORAM:**  
**HON'BLE MR. JUSTICE V.K. JAIN**

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

: **V.K. JAIN, J.**

1. This is an appeal against the Judgment dated 20.9.2008 and the Order on Sentence dated 25.9.2008, whereby the appellant was convicted under Sections 457 & 459 of IPC and was sentenced to undergo RI for one year under Section 457 of IPC and was further sentenced to undergo RI for five years and to pay a fine of Rs. 500/- or to undergo RI for six months

in default under Section 459 of IPC.

2. On 2<sup>nd</sup> April, 2006, on receipt of copy of DD No.15-A, the Investigating Officer of this case reached House No.238 in Block No.12, Lodhi Colony, where both, the appellant Rilak Raj and his co-accused Vijay, who has since expired, were found, having been apprehended by the residents of the locality and had been injured. The lock of the barsati of House No.240 was found broken and an iron rod was also lying there. The Investigating Officer then went to AIIMS where the complainant Smt.Narbada Sharma was admitted, and recorded her statement. The complainant told him that on that day, at about 8.00 p.m., when she was returning home and was climbing upstairs, in order to reach her house on the second floor, she noticed someone hiding between adjoining barsati and wall. Initially, she thought that her son had returned and was trying to hide himself from her. She then noticed the head of another person and, therefore, started climbing down the stairs. One of those persons, whose name later on came to be known as Vijay, came from behind and gave a blow with the iron rod on her head. The complainant raised alarm and when the other person came

towards her, she caught his hands and kept on raising alarm. The neighbours gathered there and apprehended both the persons and gave beating to them.

3. The complainant came in the witness box as PW-2 and stated that on 2<sup>nd</sup> April, 2006 when she was returning home and was going to her house through staircase, she felt that someone was hiding himself. Initially, she thought that it was her son who was hiding himself. She then saw another head and started returning back. She received a blow on her head with an iron object and that person went down. In the meantime, the other person came there and she caught hold of him and raised alarm, but he managed to escape. When her neighbour Digvijay tried to catch hold of them, he fell down. The witness identified both the accused, who were present in court, when she was examined. In her cross-examination she stated that the person who was trying to hide was outside barsati.

4. PW-1, Shri Digvijay, is the neighbour of the complainant. He has stated that that on 2<sup>nd</sup> April, 2006 at about 8.00 p.m., when he was present in his house, he heard someone crying outside his house. When he came out, he

saw the accused persons beating the complainant with iron rod. When he tried to apprehend them, they pushed him down. Other neighbours, however, reached there and apprehended both of them. One broken lock was found in the staircase of the house and was seized by the police. The iron rod, Ex.P-1, was also seized by the police. The witness identified Ex.P-1 as the rod with which the complainant was injured.

5. PW-6, Const.Brij Pal, has stated that on 2<sup>nd</sup> April, 2006, he along with other police officials went to House No.238 in Block 12, Lodhi Colony, where both the accused were handed over to them. PW-10, Const.Ram Prasad, has corroborated the deposition of Const.Brij Pal. PW-11, SI Vijay Tyagi is the IO of the case, who has stated that when he reached the spot the accused persons were found there in injured condition and the lock of the barsati of House No.240 was lying there along with an iron rod.

6. In his statement under Section 313 Cr.P.C., the appellant Tilak Raj stated that he along with his co-accused was apprehended when moving on the road and was beaten by the public. He has denied having entered the staircase

and having injured the complainant.

7. I see no reason to disbelieve the complainant Smt.Narbada Sharma. A perusal of her MLC, Ex.PW-7/A, would show that injuries were found on her head when she was examined in hospital on 2<sup>nd</sup> April, 2006. When she was examined in the hospital, she gave history of assault on the head by a hammer. The complainant being the injured person, there is no good reason to disbelieve her testimony. Being the injured, she is the best witness of the incident in which she sustained injuries. Her presence at the place of occurrence can never be doubted and, therefore, her testimony is entitled to be believed unless strong reasons are shown to exist which would persuade the court to reject her testimony, despite her being the victim of the crime. It is unlikely that the victim of the crime would spare the real culprits and implicate an innocent person. In fact, he would be most keen to ensure that the person who caused harm to him is brought to book and does not go unpunished. If an innocent person is punished, the victim of the crime will never be feel satisfied since, he wants the real culprit and not an innocent person to be punished for the offence committed

with him.

8. Ordinarily, an innocent person may be implicated by the injured only in a case where he does not know who really caused injury to him, but suspects, on account of some previous dispute that he could be behind the attack on him. In the present case, the appellant being a total stranger to the complainant, she could never have suspected him to be culprit and in case she had not seen the intruders, she would not have identified them as the persons who had trespassed in their building.

9. The testimony of the complainant finds full corroboration from the testimony of PW-1, Shri Digvijay, who is an independent witness of the incident and who also had no grudge to depose against the appellant. In fact, this is also not the case of the appellant that either PW-1 Shri Digvijay or PW-2 Smt.Narbada Sharma had any grudge against him and for that reason had falsely identified him as the person who was involved in this crime. The appellant was not even known to either of them. Hence, there could have been absolutely no reason for them to involve him in this case.

10. In ***Mer Dhana Sida vs. State of Gujarat*** AIR 1985 SC 386, three injured witnesses had supported the prosecution. It was held by Hon'ble Supreme Court that as there were three injured witnesses, and we 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. Very cogent and convincing ground would be required to discard the evidence of the injured. In ***Machhi Singh vs. State of Punjab*** 1983 CrI.L.J.1457, ONE WITNESS Hakam Singh himself had sustained injuries in the course of incident in question, it was observed by Hon'ble 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 the appellants even if one were to exclude from consideration, the evidence of other PWs. Identical view was taken by the Hon'ble Supreme Court in a number of other cases including "***Makan Jivan &***

***Others Vs. The State of Gujarat***”, AIR 1971 SC 1797, “***Hori Lal & Another Vs. The State of U.P.***”, AIR 1970 SC 1969, and “***Jamuna Chaudhary & Others Vs. State of Bihar***”, AIR 1974 SC 1822.

11. The case of the appellant is that he was walking on the road along with his co-accused when he was caught and beaten by the residents of the locality. The appellant has not told the court as to why he and his co-accused had gone to Lodhi Colony on that day and what they were doing in Block-12 of Lodhi Colony at the time they claim to have been apprehended and beaten by the residents of the colony. In the absence of any such explanation from the appellant, there is no reason to disbelieve the testimony of PW-1 Shri Digvijay and PW-2 Smt.Narbada Sharma to the effect that, in fact, the appellant as well as his co-accused were caught on the spot, when they were coming down after causing injuries to the complainant.

12. The appellant has been convicted under Sections 457 & 459 of Indian Penal Code. Section 457 of the IPC provides punishment for lurking house-trespass or house-breaking by night in order to commit offence punishable with

imprisonment, whereas Section 459 provides for punishment if a person while committing lurking house-trespass or house-breaking causing grievous hurt to any person or attempt to cause death or grievous hurt to any person. In order to succeed in prosecution under Section 457 IPC, the prosecution must prove (i) that the accused committed lurking house-trespass by night or house-breaking by night and (ii) that the same was committed to commit theft or an offence punishable with imprisonment. To succeed in prosecution under Section 459 IPC, the prosecution is also required to prove that either grievous hurt was caused or an attempt was made to cause death or a grievous hurt to a person, while committing lurking house-trespass or house-breaking.

13. Lurking house-trespass has been defined in Section 443 of IPC, whereas house-breaking has been defined in Section 445 thereof. House-trespass would constitute lurking house-trespass when the person committing house-trespass has taken precaution to conceal such trespass from a person who has a right to exclude or eject the trespasser from the building which is subject matter of the trespass House-

trespass would become house-breaking if the trespasser effects his entrance into the house or any part of it or if being in the house or any part of it for the purpose of committing an offence or having committed an offence therein he quits the house or any part of it in any of the following ways:

“First.—If he enters or quits through a passage by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly.—If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly.—If he enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly.—If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly.—If he effects his entrance or departure by using criminal force or committing an assault or by threatening any person with assault.

Sixthly.—If he enters or quits by any passage

which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation.—Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.”

14. In order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. If mere trespass committed by night does not constitute lurking house-trespass even if the darkness helps the accused to conceal his presence. Concealment of the accused on account of darkness does not convert the house-trespass into lurking house trespass. In “***Buddha Vs. Emperor***”, (1916) 3 AIR Lahore 425, the Lahore High Court held that in order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. The precaution to conceal house-trespass has to be taken before committing house-trespass. If a person, after committing house-trespass, tries to hide himself on seeing the occupant of the house, it cannot be said that he had, before committing house-trespass, taken any precaution to

conceal his act from the owner or occupier of the house in which trespass is committed by him. In the present case, since there is absolutely no evidence or circumstance from which any such concealment on the part of the appellant or his co-accused may be inferred, lurking house-trespass punishable under Section 457 of IPC does not stand proved against him.

15. However, since the appellant and/or his co-accused used criminal force against the complainant Smt.Narbada Sharma and also assaulted her when they were leaving after committing house-trespass, the case is squarely covered by sixth clause of Section 445 of IPC and they are, accordingly, guilty of offence punishable under Section 457 IPC read with Section 34 thereof as the house breaking was committed in furtherance of the common intention which the appellant and his co-accused shared with each other, as is evident from the facts and circumstances of the case.

16. Neither the appellant nor his co-accused attempted to cause death of any one while committing house-breaking. A perusal of the MLC of the complainant Smt.Narbada Sharma would show that the injuries sustained by her were simple in

nature and were caused by a blunt object. Grievous hurt has been defined in Section 320 of IPC which reads as under:

**“320. Grievous hurt.** – The following kinds of hurt only are designated as “grievous”-

*First.* – Emasculation.

*Secondly.* – Permanent privation of the sight of either eye.

*Thirdly.* – Permanent privation of the hearing of either ear.

*Fourthly.* – Privation of any member or joint.

*Fifthly.* – Destruction or permanent impairing of the powers of any member of joint.

*Sixthly.* – Permanent disfiguration of the head or face.

*Seventhly.* – Fracture or dislocation of a bone or tooth.

*Eighthly.* – Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.”

17. In the present case, no fracture was found when the complainant was examined, as stated by PW-4 Dr.Pooja, Senior Resident Radiologist, AIIMS, and is also evident from her report Ex.PW-4/A. There is no evidence that the complainant suffered any such injury which would have endangered her life. According to PW-7 Dr.Abhishek, the

nature of injury was simple. There is no evidence that the complainant suffered any severe bodily wound or was unable to follow her pursuits for a period of twenty days. She did not suffer any such injury as would constitute grievous hurt within the meaning any of the eight clauses of Section 320 of IPC. Hence, no grievous hurt was caused to the complainant. There is no evidence that the appellant or his co-accused having attempted to cause grievous hurt to the complainant. In these circumstances, Section 459 of IPC does not stand established against the appellant.

18. The evidence produced by the prosecution, however, proves that the appellant and his co-accused are guilty of offence punishable under Section 458 of IPC read with Section 34 thereof, as they committed house-breaking by night having made preparations for causing hurt or for assaulting the residents of the house in which they had trespassed, or for putting them in fear of hurt or of assault, as is evident from the fact that they were armed with iron rod, which they actually used for causing injuries to the complainant.

19. In view of the above discussion, the impugned judgment

is, hereby, modified to the extent that while maintaining the conviction of the appellant under Section 457 IPC read with Section 34 thereof for committing house-breaking, by night, in order to commit an offence which obviously would be theft of articles belonging to the residents of the building, his conviction under Section 459 IPC is converted into conviction under Section 458 of IPC read with Section 34 thereof. Taking into consideration that the appellant has already spent more than one year and eleven months in jail, exclusive the remission earned by him, he is sentenced to undergo RI for two years and is also sentenced to pay fine of Rs.500/- or undergo SI for one month in default under Section 458 IPC read with Section 34 thereof. The sentence awarded to the appellant by the trial court under Section 457 IPC is maintained. Both the sentence shall run concurrently.

20. One copy of this order be sent to the appellant through concerned Jail Superintendent. The trial court record be sent back, along with a copy of this order.

**(V.K.JAIN)**  
**JUDGE**

**FEBRUARY 4, 2010**  
**RS/**