IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr. Appeal No. 67 of 2010 a/w Cr. Appeals No. 72, 84 to 88, 90 to 94 & 98 of 2010

Reserved on: 30.05.2025
Decided on: 20.06.2025

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1. Cr. Appeal No. 67 of 2010:
Liyakat Ali .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

2. Cr. Appeal No. 72 of 2010:
Saleem .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

3. Cr. Appeal No. 84 of 2010:
Mohammad Phejan .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

4. Cr. Appeal No. 85 of 2010:
Mohammad Azad .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

5. Cr. Appeal No. 86 of 2010:
Noshad .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

6. Cr. Appeal No. 87 of 2010:
Mohammad Shaha Navaz .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

7. Cr. Appeal No. 88 of 2010:
Mohammad Mohsin .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

8. Cr. Appeal No. 90 of 2010:
Irshad .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

9. Cr. Appeal No. 91 of 2010:
Iqlakh .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

10. Cr. Appeal No. 92 of 2010:
Mohammad Istkar .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

11. Cr. Appeal No. 93 of 2010:
Samman .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

12. Cr. Appeal No. 94 of 2010:
Phurkan .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

13. Cr. Appeal No. 98 of 2010:
Rizwan .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Coram
The Hon'ble Mr. Justice Sushil Kukreja, Judge.
[1] *Whether approved for reporting?* Yes.

For the appellant(s): Mr. N.S. Chandel, Sr. Advocate, with Ms. Shwetima Dogra, Advocate.

For the respondent: Mr. Pawan Kumar Nadda, Additional Advocate General.

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[1] *Whether reporters of Local Papers may be allowed to see the judgment?*

Sushil Kukreja, Judge.

The instant appeals have been preferred by the appellants/accused persons under Sections 374(II) of Cr.P.C. against judgment of conviction and order of sentence, dated 30.03.2010, passed by learned Additional Sessions Judge, Fast Track Court, Shimla, H.P., in Sessions Trial No. 8-S/7 of 2009, whereby the appellants were convicted and sentenced under Sections 147, 333, 332, 353 and 506(II) read with Section 149 of Indian Penal Code (for short 'IPC').

2. The facts giving rise to the present appeal, as per the prosecution story, can be summarized as under:

2(a). On 08.04.2008, at around 02:20 p.m., one Kutub Deen (complainant), the then Rent Controller, Wakf Board, H.P., telephonically informed the police that Liyakat Ali, alongwith others, was quarreling with them in Kutub Masjid. Consequent upon the telephonic information, a police team rushed to the spot, where Kutub Deen made a statement under Section 154 Cr.P.C., wherein he stated that he was a resident of village Bharanu, Tehsil Chopal and employed in Wakf Board. He further stated that from April, 2001 onwards he was serving as Rent Controller of Wakf Board and Shimla circle was within his jurisdiction. On 08.04.2008, around 02:15 p.m., pursuant to Order No. HPWB/Kutub

Masjid/6144, dated 08.04.2008, Abdul Jamal (Peon), G.M. Saklani (Naib Tehsildar) and Mohan Singh Thakur (Kanungo), who were employees of the Wakf Board, went to Kutub Masjid in Sabzi Mandi for closing the stairs leading from upper hall to the main hall of the Masjid. When ply board was being fixed by Abdul Jamal, then Liyakat Ali (one of the accused persons), the then President of Hawkers' Union, alongwith accused Sahah Nawaz, Saleem, Mohsin and 12 to 14 other persons entered the Masjid, after making prior concert and they started thrashing complainant and others. In the interregnum, Nasibu Deen, the then Imam of the Masjid, reached the spot for joining the proceedings initiated by the Wakf Board, i.e., the closure of the stairs. Nasibu Deen was pushed by some miscreant due to which he sustained injuries on his right arm, leg, back etc. The complainant further stated that accused snatched the hammer from the hand of Abdul and gave its blows to him (complainant) and Abdul Jamal. That Abdul Jamal suffered injuries on his neck, shoulder and back of the head and his sweater was also torn by the accused. Thereafter G.M. Shaklani and Mohan Singh intervened and saved the complainant etc. from the clutches of the accused persons. The accused persons proclaimed that they would not leave the Masjid at any cost and also threatened to do away with their lives.

2(b). On the statement of the complainant, so made under Section 154 Cr.P.C., police registered a case under the apt Sections of IPC and the accused persons were arrested. The injured persons were got medically examined and one of the injuries sustained by Nasibu Deen was opined to be grievous in nature. Police effected relevant recoveries, prepared the site plan and recorded the statements of the witnesses. After completion of the investigation, police presented the charge-sheet before the learned Trial Court.

3. The prosecution, in order to prove its case, examined seven witnesses. Statements of the accused persons under Section 313 Cr.P.C. were recorded, wherein they pleaded not guilty and claimed trial.

4. The learned Trial Court, vide impugned judgment dated 30.03.2010 convicted all the accused persons. Under Section 147 IPC the accused persons were sentenced to undergo rigorous imprisonment for six months, under Section 333 read with Section 149 IPC they were sentenced to undergo rigorous imprisonment for a period of two years and to pay fine of Rs.5000/- each and in default of payment of fine to further undergo rigorous imprisonment for a period of three months. They were further sentenced to undergo rigorous imprisonment for a period of one year each

under Sections 332, 353 and 506(II) read with Section 149 IPC, hence the instant appeals preferred by the appellants.

5. The learned Senior Advocate for the appellants contended that the impugned judgment is against the law and facts, based upon surmises and conjectures, thus liable to be set-aside. He further contended that the learned Trial Court has failed to appreciate the evidence in its right and true perspective, as such the impugned judgment of conviction passed by the learned Trial Court deserves to be quashed and set-aside by allowing the instant appeals and the accused persons be acquitted.

6. Conversely, the learned Additional Advocate General for the respondent/State contended that the impugned judgment passed by the learned Trial Court is the result of proper appreciation of the material on record and the same was passed after appreciating the evidence and law in its right and true perspective. He further contended that the learned Trial Court has passed a well reasoned judgment, which does not require any interference, thus the instant appeals, which are devoid of any merit, be dismissed.

7. I have heard the learned Senior Counsel for the appellants, learned Additional Advocate General for the respondent/State and carefully examined the entire records.

8. At the very outset, it would be pertinent to mention here that during the pendency of the instant appeals, one of the appellants/accused Shamshad expired, therefore, the appeal preferred by him stood abated, vide order dated 02.06.2016.

9. The prosecution examined as many as seven witnesses. However, the edifice of the prosecution case mainly stands on the statements of PW-1 Kutub Deen (complainant), PW-2 Nasibu Deen, PW-3 Abdul Jamal and PW-6 Dr. Vijay Thakur

10. The complainant-Kutub Deen appeared in the witness-box as PW-1. He deposed that he used to serve in H.P. Wakf Board and from April, 2001, he was serving as Rent Collector and Shimla Circle was within his jurisdiction. On 08.04.2008, around 02:15 p.m. he alongwith Abdul (PW-3), Peon, G.M. Saklani, Naib Tehsildar, and Mohan Singh Thakur, Kanungo went to Kutub Masjid, Shimla, upon the orders of the Chief Executive Officer of the Board. They were directed to close the stairs leading to the main hall from the upper hall in the Masjid. When the stairs were being closed by Abdul Jamal with the help of ply wood etc. accused Liyakat Ali, the then President of the Hawkers' Union came there alongwith 14 persons (co-accused). The accused persons started thrashing them and in the interregnum Nasibu Deen, the then Imam of the Masjid reached there but he was also

pushed and thrashed by the accused persons and his arm got fractured. Nasibu Deen sustained injuries on other parts of his body as well. As per this witness, sweater of Abdul Jamal got torn by the accused and he was also given beatings. He further deposed that he was also given beatings by the accused persons and the accused persons threatened to kill them. He further deposed that he did not get himself medically examined, as he did not suffer any visible injury. As per this witness, accused persons were saying that they would not allow them to close the stair case and would kill all of them. In case Shri G.M. Saklani and Shri Mohan Singh had not intervened, the accused would have killed them. He telephonically informed the police and the police reached the spot. When the police reached the spot, accused persons were present there and his statement was recorded by the police.

11. PW-2 Nasibu Deen deposed that he was appointed as Imam of Kutub Masjid by H.P. Wakf Board. He received a letter from the Chief Executive Officer that the stairs leading from one hall to the other were to be closed and he should assist the officials of the board qua the same. On 08.04.2008 around 12:00 noon, G.M. Saklani, Mohan Singh, Kutub Deen and Abdul Jamal came to the mosque for closing the staircase. He was inside the room

and he accompanied Kutub Deen etc. to the hall. As per this witness, after taking measurements, Kutub Deen etc. were cutting the plywood and he went down to the mosque for offering prayers. He also deposed that around 02:00 p.m., upon hearing noise, he went to the spot and saw accused Liyakat Ali saying "Maaro Kaato". There were 12-14 persons with accused Liyakat Ali and on seeing him, accused Liyakat Ali told to beat him (PW-2). Accused Shah Nawaj slapped and abused him and he told that everything was being done at his (PW-2) instance and he should be killed. Subsequently, accused Liyakat Ali, Shah Nawaj, Tunu and Salim threw him on the stairs. In the interregnum police came to the spot and the accused persons were arrested. He further deposed that his arm got fractured and he was operated upon. As per this witness, Abdul Jamal also suffered injuries and Kutub Deen, Mohan Singh and G.M. Saklani were slapped by the accused persons. The sweater of Abdul was torn. He and Abdul were taken by the police to Rippon Hospital, where he was medically examined.

12. PW-3 Abdul Jamal deposed that on 08.04.2008, around 02:00 p.m., he went to mosque for affixing wooden plank to close staircase. When he was affixing the wooden plank, the accused persons came there and they told that they would not

allow them to close the stairs. As per this witness, they were directed by the Chief Executive Officer to close the staircase. Accused Liyakat Ali caught hold of him and slapped him. Accused Liyakat Ali asked accused Shah Nawaj to snatch the hammer from his hands. He was beaten by the accused persons, as he was not leaving the hammer. On hearing the noise, Imam of the mosque reached there, upon this, accused persons remarked that he was the cause of the dispute and he should be beaten. The Imam was thrown down and his arm was got fractured. As per this witness Kutub Deen telephonically called the police and when the police reached the spot, the accused persons were present there. His sweater was torn in the scuffle, which was taken into possession by the police. He was got medically examined by the police. Kutub Deen was also beaten by the accused, but he did not get himself medically examined.

13. PW-6 Dr. Vijay Thakur, deposed that injured Shri Naseebu Deen was referred to him for X-ray examination by Dr. Rohit Sood. He further deposed that the X-ray of the injured had shown fracture of lower end right radius. He gave his report, Ex. PW-6/D. As per this witness, any violent force can lead to fracture. He did not examine the patient physically. He also deposed that MLCs, Ex. PW-6/E, of Naseebu Deen and Ex. PW-6/F of Abdul

Jamal had been issued by Dr. Rohit Sood.

14. I have carefully scrutinized the entire evidence led by the prosecution and from the closure scrutiny thereof this Court is of the firm opinion that the prosecution has failed to establish its case against the accused persons beyond reasonable doubt. The complainant Kutub Deen in his statement under Section 154 Cr.P.C.Ex PA named only five persons, namely Liyaqat Ali, Shah Nawaz, Salim, Mohsin and Tunnu out of which one Tunnu is not an accused before the Court. In addition to them, no other accused was named in his statement under Section 154 Cr.P.C. In his deposition before the Court PW-1 Kutub Deen deposed that he knew the names of only 4-5 accused and their names were Liyakat Ali (A-1), Shah Nawaz (A-2), Mohd. Azad (A-5), Shamshad (A-14), Mohsin (A-6), Istkar (A-12) and Iqhlakh (A-13). He did not name Mohd. Azad, Shamshad, Istakar and Iqhlakh in the FIR and he admitted that no test identification parade was got conducted by the police. He identified the above persons for the first time in the Court. Apart from this, the names of Mohd. Azad (A-5), Shamshad (A-14), Istkar (A-12) Iqlakh (A-13), were not named by him in his statement (Exhibit PA) and the witness when confronted admitted that he did not name them. PW-2 in his statement named only four persons by deposing that accused Liyakat Ali, Shah Nawaz, Tunu

and Salim picked him up and threw him on the stairs. PW-3 who is the Peon of Wakf Board named only two accused i.e. Liyakat Ali and Shahnawaz. The prosecution did not explain, as to how it arrayed other accused persons in the absence of any evidence about the presence of other accused persons, whose names were not even mentioned in the FIR. In fact, it has come in the evidence that 50-55 persons, who were professing Muslim faith were residing in the second floor of the mosque, where the alleged occurrence took place.

15. A bare perusal of the statement of these witnesses i.e. PW-1 to PW-3 so examined by the prosecution is clearly indicative of the fact that some of the accused persons were stranger to the said witnesses and in these circumstances test identification parade was necessary in order to ascertain the identity of the accused persons. Failure to establish the identity of the accused goes to the root of the matter as such the possibility of mistaken identity cannot be ruled out.

16. It is a settled law that if an accused is not named in the FIR, his identification by the witnesses in the court should not be relied upon specifically when they did not disclose name of the accused before the police but to this general rule, there may be exceptions. In the judgment rendered by the Hon'ble Supreme

Court in the case of ***Dana Yadav @ Dahu & Ors. Vs. State of Bihar reported in AIR 2002 SC 3325,*** the Hon'ble Apex Court has elaborated upon the importance of test identification parade in a great detail. The Hon'ble Court observed that in case of failure to hold Test Identification Parade, identification of the accused before court, though is not inadmissible but it should not, ordinarily, form the basis of conviction unless corroborated by previous identification in test identification parade or any other evidence. Relevant portion of the aforesaid judgment reads as under:

> ***"38. In view of the law analysed above, we conclude thus:***
>
> ***(a) If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same.***
>
> ***(b) In cases where according to the prosecution the accused is known to the prosecution witnesses from before, but the said fact is denied by him and he challenges his identity by the prosecution witnesses by filing a petition for holding test identification parade, a court while dealing with such a prayer, should consider without holding a mini inquiry as to whether the denial is bona fide or a mere pretence and/or made with an ulterior motive to delay the investigation. In case court comes to the conclusion that the denial is bona fide, it may accede to the prayer, but if, however, it is of the view that the same is a mere pretence and/or made with an ulterior motive to delay the investigation, question for grant of such a prayer would not arise. Unjustified grant or refusal of such a prayer would not necessarily enure to the benefit of either party nor the same would be detrimental to their interest. In case prayer is granted and test identification parade is held in which a witness fails to identify the accused, his so-called claim that the accused was known to him from before and the evidence of identification in court should not be accepted. But in case either prayer is not granted or granted but no test Identification parade held, the same ipso facto can not be a ground for throwing out evidence of identification of an accused in court when evidence of the witness, on the question of identity of the accused from before, is found to be credible. The main thrust should be on answer to the question as to whether evidence of a witness in court to the identity of the accused from before is trustworthy or not. In case the answer is in the affirmative, the fact that prayer for holding***

test identification parade was rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in court in relation to identity of the accused. But if, however, such an evidence is not free from doubt, the same may be a relevant material while appreciating the evidence of identification adduced in court.

(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court.

(d) Identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable despatch for the purpose of enabling the witnesses to identify either the properties which are subject matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits.

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first Information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above."

17. I have considered the facts and evidence of present case in the light of aforesaid adjudication made by the Hon'ble Supreme Court. In this case, when no specific allegation was leveled against the accused Irshad, Mohd. Azad, Rizwan,

Samman, Naushad, Phurkan, Mohd. Phejan, Mohd. Istkar, Iqlakh and Shamshad in the FIR, then obviously it was the duty of the prosecution to prove its case beyond reasonable doubt by leading evidence of identification before the court that the aforesaid accused persons gave beatings to the complainant party. Admittedly, neither any identification parade was got conducted by the Investigating Officer nor any reliable evidence was produced before the court as to who identified the accused persons Irshad, Mohd. Azad, Rizwan, Samman, Naushad, Phurkan, Mohd. Phejan, Mohd. Istkar, Iqlakh and Shamshad. Therefore, by not conducting the test identification parade, there is a serious lapse in the investigation.

18. Apart from this, the Medical Evidence does not support the case of the Prosecution.PW-1 was not medically examined and he deposed that he did not suffer any visible injury. Admittedly, PW-2 and PW-3 were medically examined by Dr. Rohit Sood and MLC Ex. PW-6/E of PW-2 Naseebu Deen and MLC Ex. PW-6/F of PW-3 Abdul Jamal were issued by Dr. Rohit Sood, but he had not been examined to prove the aforesaid medico legal certificates and the injuries allegedly sustained by them. The prosecution had made an attempt to prove the medico legal certificates through PW-6 Dr. Vijay Thakur, however, that

would not automatically absolve the prosecution from the requirement in law to establish the truthfulness of their contents. It is more than settled that mere exhibition of a document in evidence does not amount to its proof. In ***LIC Vs. Rampal Singh Bisen (2010) 4 SCC 491,*** it has been held that admission of a document in evidence does not amount to its proof. In other words, merely marking of exhibit on a document does not dispense with its proof, which is required to be done in accordance with law. The relevant portion of the aforesaid judgment reads as under:

> ***"25. We are of the firm opinion that mere admission of a document in evidence does not amount to its proof. In order words, mere marking of exhibit on a document does not dispense with its proof, which is required to be done in accordance with law."***

19. Hence, in the case on hand, due to the non examination of Dr. Rohit Sood in the court who had medically examined PW-2 and PW-3 and issued MLCs Ex. PW-6/E and Ex. PW-6/F, the contents of the same are not stated to have been proved in accordance with law as such the prosecution has failed to prove the injuries allegedly sustained by PW-2 and PW-3.

20. Besides that, there are major contradictions in the statements of the prosecution witnesses. It was deposed by PW-3 Abdul Jamal that Mohan Singh and G.M. Saklani were not beaten by anyone, whereas PW-2 specifically stated to the contrary. PW-2 stated that accused Shahnawaz slapped him but other witnesses

are silent on this aspect. PW-1 nowhere stated that PW-2 was thrown whereas PW-2 stated that accused picked him up and threw him on the stairs.

21. As per the prosecution story, before going to the mosque, the police had been intimated through a letter qua the action of the board that was to be taken, but this fact had been specifically denied by the I.O. PW-7 ASI Krishan Chand, who had categorically deposed that he did not come across any application of Abdul Jamal etc. in the record of the police station that they were going to the mosque to close the stairs

22. The evidence led by the prosecution does not inspire confidence as the prosecution witnesses had contradicted the statements of each other on material particulars and these contradictions cannot be brushed aside by terming them as discrepancies and forgetfulness due to lapse of time. There are major discrepancies and contradictions in the statements of the witnesses of the prosecution. Thus, the statements of the prosecution witnesses qua the genesis of the incident cannot be relied upon, as the witnesses examined by the prosecution are highly interested witnesses. In fact, all the prosecution witnesses were interested in the success of the prosecution case, thus they were interested witnesses. In this view of the matter, the evidence

of the prosecution becomes suspicious, therefore, no reliance can be placed on their statements so as to make out a case for convicting the accused persons. Admittedly, the place of occurrence was a busy area, but surprisingly no independent witness was associated by the police to prove the case of the prosecution. PW-1 deposed that mosque was situated in a thickly populated area of Shimla town and there were shops and residences near the mosque. However, the police did not make any effort to associate independent witnesses, despite their availability on the spot who could have been the best persons to support the prosecution case. The prosecution deliberately and intentionally did not examine G.M Saklani, Naib Tehsildar, and Kanungo, Mohan Singh Thakur for the reasons best known to it, who could have been the best witnesses to depose about the incident in question. Therefore, an adverse inference has to be drawn against the prosecution.

23. As observed earlier, there are material contradictions, embellishments, discrepancies and improvements in the statements of the material prosecution witnesses, which demonstrate that the occurrence had not taken place in the manner, as has been depicted by the prosecution. In view of the facts and circumstances of the case and the evidence available on

record, this court finds that witnesses produced by prosecution do not inspire confidence. There are lapses on the part of investigation.

24. Consequently, in view of the detailed discussion made hereinabove, this Court is of the firm opinion that the prosecution has failed to prove its case against the accused persons beyond reasonable doubt. Accordingly, judgment of conviction dated 30.03.2010, passed by the learned trial court is not sustainable and is liable to be set aside. Therefore, the instant appeals are allowed and the judgment of conviction and order of sentence, dated 30.03.2010, passed by the learned Trial Court are quashed and set-aside and the accused persons are acquitted. Bail bonds are discharged. Pending application(s), if any, shall also stand disposed of.

25. In view of the provisions of Section 481 of *Bharatiya Nagarik Suraksha Sanhita*, 2023, the appellants are directed to furnish personal bonds in the sum of Rs.50,000/- each with one surety each in the like amount, before the trial Court within a period of four weeks, which shall be effective for a period of six months, with stipulation that in the event of Special Leave Petition being filed against this judgment or on grant of leave, the appellants aforesaid, on receipt of notice

thereof, shall appear before the Supreme Court.

(Sushil Kukreja)
Judge

20th June, 2025
(virender)