

**IN THE COURT OF VIKAS DHULL, SPECIAL JUDGE (PC
ACT) (CBI)-23, ROUSE AVENUE DISTRICT COURTS , NEW
DELHI**

CA No.01/2021

CNR No. DLCT-11-000042-2021

In the matter of :

Somnath Bharti

S/o Late Sh. Sitaram Bharti

R/o Nil, 26, Malviya Nagar, New Delhi

...Appellant

Versus

State

Through Chief Public Prosecutor

Rouse Avenue Courts,

Deen Dayal Upadhyay Marg,

New Delhi

...Respondent

Date of institution of appeal : 28.01.2021

Date on which judgment reserved : 15.03.2021

Date on which judgment pronounced : 23.03.2021

JUDGMENT

1. The appellant is aggrieved by the judgment dated 22.01.2021 of the Ld.Trial Court (**hereinafter referred to as impugned judgment**) vide which he was convicted for the offence under Section 323/353/147 IPC read with Section 149 IPC and under Section 3 of the Prevention of Damage to Public Property Act, 1984 (**hereinafter referred to as PDPP Act**) and sentence order dated 23.01.2021 (**hereinafter referred to as impugned sentence order**) vide which appellant/convict was

sentenced to simple imprisonment for 15 days alongwith fine of Rs.500/- for offence punishable under Section 323 IPC read with Section 149 IPC, simple imprisonment for a period of 06 months for offence punishable under Section 353 IPC read with Section 149 IPC alongwith fine of Rs.500/- and simple imprisonment for a period of one year for offence punishable under Section 147 IPC read with Section 149 IPC alongwith fine of Rs.1,000/-. Convict was further sentenced to simple imprisonment for a period of two years for the offence punishable under Section 3 (1) of the PDPP Act alongwith fine of Rs.1,00,000/- and all the sentences were to run concurrently and in case, fine amount was not paid, the convict/ appellant was to further undergo simple imprisonment for a period of one month. In case, fine is deposited by the convict, out of the fine amount, a sum of Rs.75,000/- was to be paid to the AIIMS, New Delhi as a compensation and Rs.25,000/- be deposited with the respondent/State.

2. The brief facts, which can be culled out from the charge sheet, which are necessary for disposing of the present appeal, are that on 09.09.2016, Sh.R.S.Rawat, Chief Security Officer, All India Institute of Medical Sciences, Ansari Nagar, New Delhi (**hereinafter referred to as AIIMS**) had made a complaint at PS Hauz Khas against the appellant and others for attempt to encroach upon the Government land.

3. It was alleged in the complaint that appellant alongwith his 300 supporters approximately assembled in Gautam Nagar near Nallah Road dead end and started breaking the fence on the boundary wall with the help of the JCB in order to give access to the unauthorized persons inside the AIIMS property. They were claiming that the road belongs to the general public.

4. It is further alleged in the complaint that they were requested to

produce the orders of the Competent Authority but they failed to produce any document. It is also alleged that the fence on the boundary wall of Government property was damaged and when the complainant had objected, they had misbehaved with the security persons and some security persons also got minor injuries while protecting the Government land. Accordingly, a prayer was made to lodge a FIR and take strict action against the accused persons.

5. Based upon the complaint of the complainant Sh.R.S.Rawat, FIR No.659/16 was registered at PS Hauz Khas on 10.09.2016 against the appellant for the offence under Section 186/353/323/147 IPC and Section 3 of the PDPP Act.

6. After the registration of the FIR, during the course of investigation, it came on record that the nallah (drain) belongs to the MCD but was given on lease to the AIIMS for covering and maintenance. The AIIMS had two campuses i.e. Ansari Nagar Campus and Masjid Moth Campus. To decongest the Ansari Nagar Campus, it was decided to shift half of the patient care activities to the Masjid Moth Campus. However, the open drain between the two campuses was a big deterrent.

7. Thereafter, the AIIMS had sought permission from the MCD and MCD had permitted AIIMS to cover the open drain for providing access to the new planned buildings at Masjid Moth Campus. Accordingly, AIIMS had covered the said open drain into two phases. In the first phase, 600 meters of drain was covered at the estimated cost of Rs.22 Crores and in the second phase, again 600 meters was covered at the cost of Rs.25 Crores and the entire funding of covering the drain was borne by the AIIMS.

8. During the course of investigation, the JCB machine, which was

used in damaging the fence on the boundary wall, was seized and was taken into police possession.

9. Further, the statement of eye witnesses namely, Sh.R.S.Rawat, Santosh Kumar, Ajay Kumar, Dinkar Kumar, Ved Prakash and Jitender Singh was got recorded under Section 164 Cr.P.C. Further, MLC of the injured namely Sanjay, Dinkar, Ajay, Santosh, Ved Prakash and Jitender Singh was obtained, wherein doctor had opined the nature of injuries to be simple.

10. Further, pursuant to service of Section 91 Cr.P.C. notice, complainant had provided documents regarding the status of land i.e. the road on the drain and video footage of the incident which were taken into police possession through a seizure memo.

11. During the course of investigation, the CCTV footage was scrutinized and from the video footage, identity of four more co-accused persons was established by the beat Constable Inder Singh.

12. After the completion of investigation, charge sheet was filed against the appellant and four more accused persons for the offence under Section 186/353/323/147 IPC and Section 3 of PDPP Act.

13. Thereafter, all accused persons were summoned and on their appearance, they were supplied with the copy of charge sheet and documents.

14. Thereafter, arguments on the point of charge were heard and vide order dated 26.10.2018, charge was framed against appellant and four other co-accused persons for the offence under Section 323/353 IPC read with Section 149 and Section 3 of PDPP Act. Thereafter, the charge was amended on 20.11.2018 and apart from Section 323/353 IPC and Section 3 of PDPP Act, Section 147 IPC read with Section 149 IPC was also added. To the amended charge, appellant and other co-

accused persons pleaded not guilty and claimed trial.

15. Thereafter, the matter was posted for the prosecution evidence.

16. The prosecution had examined in all 19 witnesses.

17. PW1 Sh.R.S.Rawat was the complainant and he had deposed all the facts as stated in the complaint Ex.PW1/A.

18. PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash were the security guards, who were posted at the AIIMS Campus and had suffered injuries during the course of rioting and were the eye witness to the incident.

19. PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash had deposed regarding breaking of the fence on the wall by use of JCB machine by appellant and his 200-300 supporters and the mob had also resorted to stone pelting in which PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash were injured.

20. PW6 Sh.Sanjeev Kumar and PW7 Sh.K.P.Kaushik were the officers of PWD. PW6 Sh.Sanjeev Kumar and PW7 Sh.K.P.Kaushik had deposed that they had replied to the queries of the police regarding presence of JCB at the spot and it was replied by them that it was present at the spot for the purpose of breaking the speed breakers as per the order of the Hon'ble Supreme Court of India.

21. PW8 Rahul was the owner of JCB machine bearing No. HR-55K-0351 and he had deposed regarding getting the same released on furnishing of Indemnity Bond and he also identified the JCB machine from the photographs.

22. PW9 Arun Kumar had deposed that on the asking of the IO, he had surrendered the JCB to the police which was seized vide memo

Ex.PW9/A.

23. PW10 Sh.Satender Kumar was the Chief Security Officer at AIIMS and he had deposed regarding giving of complaint under Section 195 Cr.P.C. to the police which was exhibited as Ex.PW10/A.

24. PW11 Ct.Sanjay Yadav was the witness to the seizure of one DVD from the complainant vide seizure memo Ex.PW11/A.

25. PW12 Ct.Inder Singh was the beat constable in the area of Gautam Nagar and he was the person, who had identified four accused persons after seeing the DVD and he also identified all the four accused persons in the court being the beat officer of the Gautam Nagar area.

26. PW13 SI Chhaggan Lal was working as a duty officer at PS Hauz Khas and on the receipt of complaint, he had got FIR No. 659/2016 registered and after registration of FIR, he had handed over the copy of same to IO Anand Swarup He also proved the FIR as Ex.PW13/B.

27. PW14 Ct. Jai Singh was posted as a photographer with the Mobile Crime Team, South District and he had deposed regarding taking of the photographs of the spot and handing over the negatives of the photographs to the investigating officer. He also identified the photographs Ex.P1 (C-1 to C-5) which he had taken at the spot.

28. PW15 HC Prem Nath was posted as MHC(M) at PS Hauz Khas and he had deposed regarding making of entry of seizure of JCB machine in register no.19.

29. PW16 Inspector R.P.Meena was posted as Inspector at PS Hauz Khas and he had worked as IO during the course of leave of the main IO Inspector Anand Swarup. He had deposed regarding getting the statement of complainant Sh.R.S.Rawat recorded under Section 164

Cr.P.C., arresting of appellant and about seizure of DVD.

30. PW17 Sh.M.L.Khan was working as the Executive Engineer, South Zone, SDMC, New Delhi. PW17 had deposed regarding granting of permission to AIIMS for covering of open drain flowing through Ansari Nagar Campus of AIIMS in Ward-14, South Zone vide letter Ex.PW1/E-11.

31. PW18 Sh.Bhunesh Kumar Sharma was the medical record technician and he had deposed regarding the MLC of injured persons and had proved the MLC of injured persons vide Ex.PW18/B to Ex.PW18/G.

32. PW19 Inspector Anand Swarup was the investigating officer of this case and he had deposed regarding getting the statement of witnesses recorded under Section 164 Cr.P.C., seizing of the JCB machine, collection of relevant documents with regard to drain, preparation of site plan, taking of complaint under Section 195 Cr.P.C and identification of co-accused persons from the video footage and after completion of the investigation, he had filed the charge sheet.

33. No other witness was examined by the prosecution. Accordingly, the prosecution evidence was closed.

34. Thereafter, appellant and other co-accused persons were examined under Section 313 Cr.P.C.

35. Appellant and other co-accused persons had denied to lead defence evidence but thereafter, an application under Section 91 read with Section 311 Cr.P.C. was filed by appellant which was dismissed by the Ld.Trial Court but the said order was set aside by the Hon'ble High Court of Delhi and the Ld.Trial Court was directed to summon the witnesses. Thereafter, appellant had summoned two witnesses namely, DW1 Sh.Anil Kumar, Assistant Engineer, SDMC, South Zone, Pushp

Vihar, New Delhi and DW2 Naib Chand, Executive Engineer, PWD, New Delhi.

36. No other witness was examined by the appellant and thereafter, the matter was posted for final arguments.

37. The Ld.Trial Court, after hearing the final arguments, had vide the impugned judgment acquitted four co-accused persons as their identity could not be established on record and only appellant was found guilty for the offence under Section 323/353/147 read with Section 149 IPC and Section 3 of PDPP Act. Accordingly, appellant was sentenced vide impugned sentence order as mentioned hereinabove.

38. Aggrieved by the impugned judgment and impugned sentence order, appellant has preferred the present appeal.

39. Notice of the appeal was issued to respondent/State, who on being served, chose not to file any reply.

40. I have heard Sh.N.Hariharan, Ld.Senior counsel for appellant and Sh.Manish Rawat, Ld.Addl.PP for respondent/State. I have also summoned the trial court record and have carefully perused the same.

SUBMISSIONS OF APPELLANT

41. It was submitted by Ld.counsel for appellant that the impugned judgment and the order on sentence have been passed by the Ld.Trial Court, based upon totally false and fabricated story of the prosecution and prosecution had miserably failed to provide an iota of evidence to prove the guilt qua the appellant.

42. It was further submitted that the prosecution case is full of improvements, embellishments, contradictions and is unworthy of

reliance and the Ld.Trial Court had failed to take notice of the said fact.

43. It was submitted that the Ld.Trial Court had failed to take into account the fact that in the present case, only five persons were charged for the offence under Section 147 read with Section 149 IPC. It was further submitted that for forming an unlawful assembly, minimum requirement is of five or more persons, who should have a common object as defined in Section 141 IPC. It was further submitted that the amended charge framed by the Ld.Trial Court dated 20.11.2018 specifically states that only five accused persons named therein, had formed an unlawful assembly and charge nowhere stated that apart from five named accused persons, there were other unidentified accused persons, who were part of the unlawful assembly.

44. It was further submitted that out of the five accused persons, who were charged for the offence under Section 147 read with Section 149 IPC, four accused persons were acquitted by the Ld.Trial Court for want of sufficient evidence. Therefore, the alleged unlawful assembly was reduced to one person only i.e. the appellant and lone person cannot form an unlawful assembly as per Section 141 IPC. Therefore, the Ld.Trial Court wrongly convicted the appellant for the offence of rioting under Section 147 IPC read with Section 149 IPC. In support of his contention, Ld.counsel for appellant had relied upon the judgment of the Hon'ble Supreme Court of India delivered in **Nagamalleswara Rao (K.) and Ors., Vs. State of Andhra Pradesh, (1991) 2 SCC 532; the Constitutional Bench judgment of the Hon'ble Supreme Court of India delivered in Mohan Singh and Anr. Vs. State of Punjab, AIR 1963 SC 174; and the judgment of the Hon'ble Supreme Court of India delivered in Amar Singh and Ors. Vs. State of Punjab, (1987) 1 SCC 679.** Accordingly, it was submitted that appellant

deserves to be acquitted for the offence under Section 147 IPC read with Section 149 IPC.

45. Secondly, it was contended by the Ld.counsel for appellant that even the offence under Section 323 IPC read with Section 149 IPC was not established on record. It was submitted that the simple hurt allegedly sustained by PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash could have been proved by the respective MLCs. It was further submitted that although the MLCs of injured persons have been brought on record but the Ld.Trial Court wrongly relied upon the MLCs of injured persons to return a finding of conviction against the appellant for the offence under Section 323 IPC read with Section 149 IPC.

46. It was submitted that the offence in question took place on 09.09.2016 at around 9.45 a.m. whereas the MLCs show that PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash were examined on 10.09.2016 at 4.33 p.m. and even the MLCs do not record any injury to have been observed by the examining doctor.

47. It was further submitted that the opinion regarding the injuries to be simple was given by the doctor on 05.05.2018 i.e. almost after two years of the incident. Therefore, the MLC of PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash Ex.PW18/D, Ex.PW18/E, Ex.PW18/C and Ex.PW18/G respectively created a doubt as to whether any injuries were suffered by PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash in the incident of 09.09.2016 and the possibility of MLCs being manipulated later on only to frame appellant, could not have been ruled out. Therefore, the Ld.Trial Court wrongly

relied upon the MLCs Ex.PW18/C, Ex.PW18/D, Ex.PW18/E and Ex.PW18/G to return a finding of conviction against appellant under Section 323 read with Section 149 IPC. Accordingly, it was submitted that appellant deserves to be acquitted for the offence under Section 323 IPC read with Section 149 IPC.

48. Thirdly, it was contended by the Ld.counsel for appellant that appellant was wrongly convicted by the Ld.Trial Court for the offence under Section 353 IPC read with Section 149 IPC. It was submitted that the offence under Section 353 IPC pertains to committing assault or using criminal force to deter any public servant from discharging their duties.

49. It was submitted that it has come in the evidence of PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash that they were working as security guards at AIIMS and they were employed in BIS Security Company which was their Contractor and even the salary was being paid by the said Contractor. It was submitted by the Ld.counsel for appellant that since the security of AIIMS was outsourced to BIS security company, who was the employer of the security guards i.e. PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash, therefore, they were not “public servants” as defined in Section 21 of IPC. Therefore, the Ld.Trial Court had wrongly relied upon clause 12 of Section 21 IPC to come to a conclusion that PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash were public servants as they were getting their remuneration from AIIMS for performance of public duty.

50. It was further submitted that Private Security Agencies are governed by the **Private Security Agencies (Regulation) Act, 2005**

(hereinafter referred to as PSA Act) and as per the definition provided in Section 2(f) of the PSA Act, “**private security**” means security provided by a person other than a public servant and as per the definition of “**private security agency**” provided in Section 2(g) of the PSA Act, it means a person or a body of persons other than a Government agency, department or organization engaged in the business of providing private security services. Therefore, the definition of “**private security**” provided in Section 2(f) of the PSA Act makes it clear that private security guards are not public servants. Accordingly, it was submitted that appellant deserves to be acquitted for the offence under Section 353 IPC read with Section 149 IPC.

51. Lastly, it was contended that even the prosecution had failed to establish the ingredients of offence under Section 3(1) of PDPP Act against the appellant.

52. It was submitted that it is an admitted case of the prosecution that AIIMS was given the permission to cover the drain upto 600 meters starting from the Ring Road towards Gautam Nagar and there was no permission to build any wall on the said drain and even the ownership right was not given to AIIMS. In this regard, Ld.counsel for appellant had drawn the attention of this court to the evidence of PW17 Sh.M.L.Khan, who was working as an Executive Engineer, SDMC, New Delhi.

53. It was further submitted that the construction of the wall was unauthorized and even the ownership, control or possession of AIIMS of the said wall was not proved, therefore, the same does not fall within the definition of “**public property**” as defined in Section 2(b) of PDPP Act.

54. It was further submitted that even damage to the wall was not

proved. It was submitted that although prosecution had filed on record the photographs showing the alleged damage to the fence on the wall but photographs were not proved on record as negatives of the photographs, which was the primary evidence, were not produced on record. Therefore, photographs Ex.P-1 were inadmissible in evidence and do not prove any damage to the fence on the wall on the drain.

55. It was further submitted that it is the prosecution case that appellant and other co-accused persons had brought a JCB machine at the spot for causing damage to the fence on the wall but the said fact of the prosecution has been demolished by their own witnesses i.e. PW6 Sh.Sanjeev Kumar and PW7 Sh.K.P.Kaushik, who had deposed that JCB machine was brought at the spot, at the instance of PWD officials.

56. It was further submitted that driver of the JCB, who was allegedly given orders by appellant to carry out the demolition of the wall has not been examined. It was submitted that it has come in the cross examination of PW19 IO Inspector Anand Swarup that JCB driver is a witness to the incident and he further admitted that he had not cited the name of Satpal, driver of the JCB in the charge sheet due to inadvertent error although he was a material witness.

57. It was further submitted that JCB driver was the best witness, who could have proved the prosecution case regarding the alleged damage caused to the fence on the wall. However, since JCB driver Satpal was not made a prosecution witness, therefore, an adverse inference is required to be drawn against the prosecution that in case, JCB driver was examined, he would not have supported the prosecution story. Therefore, withholding of the best evidence also creates a doubt in the prosecution story, benefit of which has to go to the appellant.

58. It was further submitted that the Ld.Trial Court ought to have

given equal weightage to the defence witnesses produced by appellant but in the entire judgment, the evidence led by the appellant has not been discussed. It was submitted that DW1 Sh.Anil Kumar, Assistant Engineer from the SDMC, South had deposed that the action dated 09.09.2016 for removing the wall was that of the PWD but deposition of said witness was not considered by the Ld.Trial Court.

59. Lastly, it was submitted that even no overt act has been attributed to appellant in causing the alleged damage to the fence on the wall. It was submitted that there is no trustworthy ocular evidence or corroborative evidence in the form of photographs as their negatives have not been produced on record and the evidence which has come on record from the side of prosecution clearly establishes that the alleged damage caused to the fence on the wall was not a public property as it was built unauthorizedly. Therefore, offence under Section 3(1) of PDPP Act was not proved on record by the prosecution. Accordingly, it was prayed that appellant be acquitted for the said offence also.

60. It was concluded by Ld.counsel for appellant by submitting that none of the offences for which appellant was charged, were proved in the present case by the prosecution and hence, Ld.Trial Court had wrongly convicted and sentenced the appellant vide impugned judgment and impugned sentence order. Accordingly, a prayer was made to allow the appeal and set aside the impugned judgment and impugned sentence order.

SUBMISSIONS OF RESPONDENT/STATE

61. On the other hand, Ld.Addl.PP for the respondent/State has submitted that there is no illegality or infirmity in the impugned judgment and impugned sentence order of the Ld.Trial Court and the

judgment has been delivered, based upon the reliable evidence which has come on record.

62. It was submitted that as far as offence under Section 147 IPC read with Section 149 IPC is concerned, the charge dated 20.11.2018 nowhere mentions that five accused named therein had formed an unlawful assembly. On the contrary, the charge specifically states that all the five accused persons charged therein were the members of the unlawful assembly.

63. It was further submitted that the evidence which has come on record to show what was the extent and magnitude of the unlawful assembly of PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash, who are the eye witnesses to the incident, shows that appellant was leading a mob of 200-300 persons and they were trying to break the fence on the wall with the help of a JCB machine.

64. It was further submitted that in the cross examination of PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash, no suggestion was given by appellant that he was not leading a mob of 200-300 persons and no JCB machine had damaged the fence on the wall on the drain.

65. It was further submitted by Ld.Addl.PP for respondent/State that although there is an omission in the charge dated 20.11.2018 regarding there being an unlawful assembly of 200-300 persons but still the appellant cannot be acquitted as the evidence which has come on record shows that unlawful assembly comprised of 200-300 members.

66. It was further submitted that notwithstanding acquittal of four accused persons by the Ld.Trial Court, appellant was rightly convicted for the offence under Section 147 IPC read with Section 149 IPC as the

evidence which has come on record shows that unlawful assembly was of 200-300 persons.

67. It was submitted that the Constitutional Bench judgment of the Hon'ble Supreme Court of India delivered in "**Mohan Singh and Anr.'s case (supra)**" which is the judgment relied upon by the Ld.counsel for appellant, had in para 9 discussed several categories of cases while dealing with the applicability of Section 149 IPC.

68. It was submitted that one category of the case which was referred to by the Constitutional Bench of the Hon'ble Supreme Court of India was where charge was framed against five or more persons as comprising of unlawful assembly and if ultimately two or three persons are acquitted, then also remaining persons can be convicted for the offence of rioting by the aid of Section 149 IPC, if the evidence coming on record shows that unlawful assembly was comprising of five or more persons.

69. It was further submitted that in the present case, unrebutted testimony of PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash shows that unlawful assembly was of 200-300 persons and the said unlawful assembly was being led by appellant and they had damaged the fence on the wall belonging to AIIMS with the help of a JCB machine.

70. It was further submitted that the common object of the unlawful assembly was to commit mischief / Criminal trespass as defined in Section 141 clause (iii) IPC with regard to property of AIIMS and with that object, damage was caused to the fence on the wall, built on the drain, which was in the possession of AIIMS. Hence, Ld.Trial Court had rightly convicted the appellant for the offence of rioting under

Section 147 IPC read with Section 149 IPC.

71. It was further submitted that even the offence under Section 323 IPC read with Section 149 IPC was proved on record as PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash had deposed on oath that they had suffered injuries due to stone pelting by the mob and the said deposition was not doubted by the defence/appellant as no suggestion was given in the cross examination.

72. It was further submitted that substantive evidence of PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash, who are injured in this case, was sufficient to convict the appellant for the offence under Section 323 IPC read with Section 149 IPC even in the absence of MLCs of injured on the same day of the incident.

73. It was further submitted that even the offence under Section 353 IPC read with Section 149 IPC was made out against the appellant and he was rightly convicted by the Ld.Trial Court. It was submitted in this regard that the Ld.Trial Court had rightly convicted the appellant as PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash being security guards were getting their salary from AIIMS, therefore, as per clause 12 of Section 21 of IPC, they were public servants and the Ld.Trial Court had rightly held them to be public servants and there is no reason to interfere in the finding of the Ld.Trial Court with regard to offence under Section 353 IPC read with Section 149 IPC.

74. Lastly, it was submitted that the Ld.Trial Court had rightly convicted the appellant for the offence under Section 3(1) of the PDPP Act as the evidence which has come on record proved beyond

reasonable doubt that AIIMS had incurred the expenditure in the covering of drain and they were in possession of road built on the drain.

75. It was further submitted that since AIIMS was in possession of the road built on the drain, therefore, it was a public property as per Section 2(b) of the PDPP Act. It was further submitted that damage to fence on the wall on the drain was duly proved by the witnesses i.e. PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash and also by the photographs brought on record.

76. It was further submitted that non-examination of JCB driver Satpal is not fatal to the prosecution case as damage to the fence on the wall was otherwise proved by the evidence of PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash whose evidence was found by the Ld.Trial Court to be trustworthy and reliable. It was further submitted that it is the quality of the evidence which matters in proving a case and not the quantity. It was further submitted that the evidence of PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar and PW5 Sh.Ved Prakash proves beyond reasonable doubt that damage was caused to the fence on the wall by the unlawful assembly comprising of 200-300 persons by use of JCB machine.

77. It was further submitted that the defence of appellant that act of demolition of wall by the use of JCB was a planned action of PWD, was never proved on record as PW6 Sh.Sanjeev Kumar and PW7 Sh.K.P.Kaushik, who were the officials from PWD had categorically deposed on oath that the action of demolition of the wall on 09.09.2016 was not that of PWD. Therefore, Ld.Trial Court had rightly convicted the appellant for the offence under Section 3(1) of PDPP Act.

Accordingly, a prayer was made to dismiss the appeal.

FINDINGS AND REASONS THEREOF

78. I have considered the rival submissions of respective counsels and have carefully perused the trial court record, written arguments filed on behalf of appellant as well as the judgments relied upon by the ld.counsel for appellant.

79. I shall first deal with the contention of the Ld.counsel for appellant that no offence under Section 147 IPC read with Section 149 IPC was made out against the appellant due to acquittal of four co-accused persons out of five accused persons charged for the offence of rioting under Section 147 IPC.

80. The admitted facts are that as per the amended charge dated 20.11.2018, only five accused persons were charged for the offence under Section 147 IPC read with Section 149 IPC and that out of five accused persons charged, four accused persons have been acquitted by the Ld.Trial Court vide the impugned judgment and only appellant has been found guilty for the offence under Section 147 IPC read with Section 149 IPC.

81. This court is conscious of the fact that for forming an unlawful assembly, five or more persons are required, who should be having a common object as mentioned in Section 141 IPC.

82. Now, question which arises for determination in the present appeal is whether if there is some irregularity in framing of charge with regard to number of persons forming part of the unlawful assembly but if the evidence which has come on record shows that unlawful assembly was comprising of more than five persons, then can the court rely upon the evidence which has come on record to hold that

notwithstanding the acquittal of four accused persons out of the five accused persons charged for the offence of rioting, the remaining accused persons can still be convicted for being members of the unlawful assembly or not?

83. The answer to this question lies in the Constitutional Bench judgment of the Hon'ble Supreme Court of India delivered in **Mohan Singh and Anr.'s case (supra)** which is the judgment relied upon by the Ld.counsel for appellant. In the said judgment, the Hon'ble Constitutional Bench of the Hon'ble Supreme Court had discussed several categories of cases for the applicability of Section 149 IPC. The relevant para 9 of the said judgment is reproduced hereinbelow:--

“9. In dealing with the question as to the applicability of Section 149 in such cases, it is necessary to bear in mind the several categories of cases which come before the Criminal Courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where Section 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under Section 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under Section 302/148 if the charge is that the persons before the Court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make Section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under Section 149, it is not necessary that five or more persons must necessarily be brought before the court and convicted. Similarly, less than five persons may be charged under Section 149 if the prosecution case is that the persons before the Court and others numbering in all more than five composed an unlawful assembly,

these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the Court along with unidentified and un-named assailants or members composed an unlawful assembly, those before the Court can be convicted under Section 149 though the un-named and unidentified persons are not traced and charged. Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried, then Section 149 cannot be invoked. **Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under Section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under Section 149 because on the evidence the court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the court from reaching such a conclusion. The failure to refer in the charge to other members of the unlawful assembly un-named and unidentified may conceivably raise the point as to whether prejudice would be caused to the persons before the Court by reason of the fact that the charge did not indicate that un-named persons also were members of the unlawful assembly. But apart from the question of such prejudice which may have to be carefully considered, there is no legal bar preventing the court of facts from holding that though the charge specified only five or more persons, the unlawful assembly in fact consisted of other persons who were not**

named and identified. That appears to be the true legal position in respect of the several categories of cases which may fall to be tried when a charge under Section 149 is framed.”

84. Therefore, in para 9 of the aforementioned judgment, the Hon’ble Supreme Court of India has laid down the law that in case charge for the offence of rioting is against five or more persons out of which if only two or three persons are acquitted, then also it will not affect the validity of Section 149 IPC, if the evidence coming on record shows that the persons composing the unlawful assembly were five or more than five. It was further held by the Hon’ble Supreme Court of India that in such cases, the court is required to consider whether failure to refer in the charge to other members of the unlawful assembly, who were unnamed and unidentified, has led to any kind of serious prejudice to the accused or not?

85. The present case is covered by the category of case discussed by the Hon’ble Supreme Court of India in **Mohan Singh and anr.’s case (Supra)** where there was a failure to mention in the charge regarding the number of persons, who were forming unlawful assembly apart from five accused persons named in the charge but the evidence which has come on record shows that unlawful assembly was comprising of 200-300 persons.

86. The evidence of PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash, who were the eye witnesses to the incident, is consistent to the effect that a gathering of around 200-300 persons alongwith the appellant were present near the boundary wall of the AIIMS and they were trying to break the wall and the fence of the AIIMS by the use of JCB machine and when PW2 Sh. Ajay Kumar,

PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash resisted, they were abused and they were injured due to stone pelting by the mob.

87. In the cross examination of PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash, it was nowhere disputed that crowd was not comprising of 200-300 persons or that it was not being led by appellant or that fence on the wall of the AIIMS was not damaged by the use of JCB machine. Therefore, the evidence which has come on record of the eye witnesses shows that unlawful assembly was comprising of 200-300 persons of which appellant was the member.

88. It is true that only five accused persons were charged for the offence under Section 147 IPC read with Section 149 IPC and out of which four accused persons have been acquitted but still I do not find any illegality in the conviction of appellant for the offence under Section 147 IPC read with Section 149 IPC as the evidence which has come on record shows that unlawful assembly was comprising of 200-300 persons and the remaining persons could not be identified or apprehended.

89. Further, no prejudice has been caused to the appellant in his defence as appellant very well knew from the date of filing the charge sheet as to what was the prosecution case regarding the number of members in the unlawful assembly. Even in the evidence, prosecution had stated that unlawful assembly was comprised of 200-300 persons. Even the appellant, during the course of cross examination of PW19 i.e. Inspector Anand Swarup had himself suggested that there were 100 persons on the spot but IO had deliberately selected hard core Aam Aadmi party volunteers as accused to instill fear in the Aam Aadmi

Party volunteers. Therefore, by way of this suggestion, appellant himself had admitted that unlawful assembly was comprising of more than five members. Therefore, no prejudice was caused to the appellant in his defence as he very well knew what was the number of members of the unlawful assembly.

90. The judgment relied upon by the Ld.counsel for appellant of the Hon'ble Supreme Court of India delivered in **Nagamalleswara Rao (K.)'s case (supra)** is not applicable to the facts of the present case as in the said judgment, charge was framed specifically against fifteen accused persons that **"they had formed into an unlawful assembly."** Therefore, the charge was specific that only 15 accused persons had formed an unlawful assembly. However, in the present case, charge against the five accused persons with regard to offence under Section 147 IPC read with Section 149 IPC was not that only five accused persons had formed an unlawful assembly but it was to the effect that **"you all were the members of an unlawful assembly"**. Therefore, charge in the present case did not specifically state so that unlawful assembly was only comprised of five accused persons mentioned in the charge. On the contrary, it stated that five accused persons were members of the unlawful assembly and the evidence which has come on record shows that unlawful assembly comprised of 200-300 members. Therefore, the judgment relied upon by the Ld.counsel for appellant delivered by the Hon'ble Supreme Court of India in **Nagamalleswara Rao (K.)'s case (Supra)** is not applicable as facts of the present case are quite different and even otherwise, the Constitutional Bench of the Hon'ble Supreme Court of India in **Mohan Singh and anr.'s case (supra)** has laid down the law that in a situation, where there is a failure to refer in the charge to other members of

unlawful assembly but the evidence which has come on record shows that apart from accused persons charged, there were other members of the unlawful assembly, then even if less than five accused persons are convicted, then also it will not affect the validity of Section 149 IPC.

91. Further, the failure to state in the charge dated 20.11.2018 that unlawful assembly was comprising of 200-300 persons, will not affect the finding of the Ld.Trial Court. I am fortified in my reasoning by Section 464 (1) Cr.P.C. which states as follows:-

“464. Effect of omission to frame, or absence of, or error in, charge.

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.”

92. In the present case, no prejudice has been caused to the defence of appellant due to failure to mention in the charge regarding the number of members in the unlawful assembly as appellant knew from the charge sheet what was the number of members of the unlawful assembly and even the appellant had suggested to PW19 Inspector Anand Swarup in his cross examination that unlawful assembly was comprising of 100 members. Therefore, as per Section 464(1) Cr.P.C., the finding of the Ld.Trial Court with regard to Section 147 IPC read with Section 149 IPC cannot be termed to be invalid due to irregularity in framing of charge.

93. The contention of the Ld.counsel for appellant that there is no evidence of any overt act being done by the appellant in the alleged offence of rioting, therefore, he deserves to be acquitted, is required to

be rejected.

94. The evidence of PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh. Ved Prakash proves that appellant being the member of unlawful assembly comprising of 200-300 members had formed a common object to cause mischief to the wall/fence of the AIIMS by damaging it by the use of JCB machine.

95. It is true that there is no evidence that appellant had participated in the causing of damage to the fence on the wall on the drain or in causing injuries to PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash but since appellant shared a common object with the members of the unlawful assembly to cause damage to the wall and fence of the AIIMS, therefore, he is vicariously liable, with the aid of Section 149 IPC, for the acts done by the unlawful assembly.

96. The sharing of common object by the appellant with the members of the unlawful assembly to cause damage to the fence on wall is made out from the documents filed on record by the appellant himself. As per Ex.PW1/D1 dated 19.09.2016 which are the minutes of the meeting, called by the Chief Engineer, South, it is specifically mentioned that agenda of the meeting is to discuss the opening for vehicular traffic, covered nallah between Gautam Nagar and Ring Road and in para 4 of the minutes of the meeting, it is specifically stated that appellant being the area MLA had stated that residents of Gautam Nagar and surrounding colonies are facing great inconvenience and it is the long standing demand of the residents.

97. Further, Ex.DW1/B dated 18.04.2016 produced by DW1 Sh.Anil Kumar, witness of the appellant, is also the minutes of the meeting of

the Chief Engineer, South in which the agenda to be discussed was again to open covered nallah (drain) for vehicular traffic coming from Gautam Nagar for giving access to Ring Road.

98. In para 1 of the minutes of the meeting Ex.DW1/B, it is specifically stated that the appellant, being the area MLA, had stressed the need to open the covered drain for traffic in view of the problem being faced by the residents of the nearby locality. Therefore, the documents submitted by the appellant himself i.e. PW1/D1 and the document Ex.DW1/B produced by the defence witness i.e. DW1 of the appellant shows that appellant was espousing the cause of Gautam Nagar area and the surrounding localities for opening of the road built on the drain so that residents of Gautam Nagar locality could have got access from the road built on the drain to the Ring Road. Therefore, the appellant shared the common object with the members of the unlawful assembly for breaking the wall and fence so that residents of the nearby locality could have got access to the road built on the drain for going towards the Ring Road. Therefore, even though appellant had not done any overt act in causing damage to the wall/fence but since he was the member of the unlawful assembly and had shared the common object of causing damage to the wall/ fence of the AIIMS, therefore, with the aid of Section 149 IPC, he was rightly convicted for the offence under Section 147 IPC read with Section 149 IPC and I do not find any illegality or infirmity in the finding of the Ld.Trial Court.

99. The next contention of the Ld.counsel for appellant was that Ld.Trial Court had wrongly relied upon the MLCs of PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash to return a finding of conviction against appellant for the offence under Section 323 IPC read with Section 149

IPC.

100. To appreciate the said contention, I have carefully perused the record and the MLCs Ex.PW18/C, Ex.PW18/D, Ex.PW18/E and Ex.PW18/G. The offence in question is of 09.09.2016 at 9.45 a.m. whereas the date of examination of injured as per MLCs of PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash is at around 4.33 p.m. on 10.09.2016. The MLCs. Ex.PW18/C, Ex.PW18/D, Ex.PW18/E and Ex.PW18/G do not record any kind of injuries observed by the doctor or reported by injured.

101. Further, the opinion regarding injuries has been taken by the IO on 05.05.2018 i.e. almost after two years of the incident. No explanation has been given by the prosecution as to why injured were not got medically examined on the date of the offence and on what basis, opinion was sought, when no injuries were observed by the doctor or reported by injured. Therefore, the Ld.Trial Court wrongly relied upon the MLCs of PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash Ex.PW18/D, Ex.PW18/E, Ex.PW18/C and Ex.PW18/G to hold that injured had suffered simple hurt.

102. If the MLCs Ex.PW18/C, Ex.PW18/D, Ex.PW18/E and Ex.PW18/G are ignored, then also the prosecution could have proved the simple hurt by way of cogent and trustworthy substantive evidence of injured persons. However, in the present case, the evidence which has been led by the prosecution is full of contradictions.

103. As per the evidence of PW1 Sh.R.S.Rawat, the manner in which guards have suffered injuries was that when they tried to stop the JCB machine from demolishing the wall. However, the said deposition of

PW1 Sh.R.S.Rawat is not corroborated by the evidence of PW2 Sh.Ajay Kumar, who deposed that he alongwith other guards got injured due to stone pelting. The incident of stone pelting is absent from the initial complaint Ex.PW1/A made by PW1 Sh.R.S.Rawat.

104. Further, the evidence of PW2 Sh.Ajay Kumar that he alongwith other guards suffered injuries due to stone pelting is not corroborated by PW3 Sh.Santosh Kumar, who had deposed that he got injuries when the mob which had gathered there started jostling with them whereas PW4 Sh.Dinkar Kumar Chaudhary in his cross examination has stated that he suffered minor injuries when he tried to hold the fence from falling down. Therefore, the manner in which PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar and PW4 Sh.Dinkar Kumar Chaudhary had suffered injuries, is not corroborative and is contradictory to each other which makes their testimony doubtful and unreliable.

105. Further, it has come in the cross examination of PW2 Sh.Ajay Kumar and PW4 Sh.Dinkar Kumar Chaudhary, who are injured in this case, that they were medically examined on the same day and they were given medicine by the doctor for relieving the pain. Further, PW4 Sh.Dinkar Kumar Chaudhary also deposed in his cross examination that even his X-ray was got done on the same day. However, the prosecution has not brought on record the medical examination report of PW2 Sh.Ajay Kumar and PW4 Sh.Dinkar Kumar Chaudhary , which was prepared on the day of the incident and the X-ray report of PW4 Sh.Dinkar Kumar Chaudhary. The MLC and the X-ray report of PW2 Sh.Ajay Kumar and PW4 Sh.Dinkar Kumar Chaudhary was the best evidence to show that they had suffered some injuries in the incident of 09.09.2016 and that they were prescribed medicines to be relieved from pain and even the X-ray was got done. However, the prosecution has

not brought any such medical record or X-ray on record which makes this court raise an adverse inference against prosecution that no such injuries were suffered by the injured.

106. In the light of the evidence which has come on record, the evidence of injured persons namely, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash was not at all reliable and trustworthy and the MLCs Ex.PW18/C, Ex.PW18/D, Ex.PW18/E and Ex.PW18/G could not have been relied upon, as discussed hereinabove. Therefore, the Ld.Trial Court had committed a grave illegality in convicting the appellant for the offence under Section 323 IPC read with Section 149 IPC when the evidence which has come on record, was not reliable and trustworthy. Accordingly, the appellant is acquitted for the offence under Section 323 IPC read with Section 149 IPC.

107. As far as offence under Section 353 IPC read with Section 149 IPC is concerned, the main thrust of the argument of the Ld.counsel for appellant was that since PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash were not public servants, therefore, the said offence is not attracted.

108. I agree with the submission put forward by the Ld.counsel for appellant that PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash do not fall within the definition of “**public servant**” as per Section 21 of IPC.

109. The Ld.Trial Court vide its impugned judgment in para 58 has held PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash as public servants in the light of clause 12 of Section 21 IPC as they were getting remuneration from the Government agency i.e. AIIMS for performance of their

public duty. Clause 12 of Section 21 IPC provides as follows:--

“21. “Public Servant”.--The words “public servant” denote a person falling under any of the descriptions hereinafter following, namely:-

(12).--Every person—

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;

(b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).]

110. To attract clause 12 of Section 21 IPC, a person can be a “**public servant**” if he is in the service of the Government or getting pay or remuneration from the Government for performance of his public duty.

111. In the present case, it has come in the evidence of PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash that they were working as security guards in BIS security company and they were employed as security guards in AIIMS through their contractor/employer i.e. BIS security company and even the salary was being paid by their contractor.

112. In the light of evidence which has come on record of PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash, the Ld.Trial Court had given an erroneous finding in complete disregard to the evidence which has come on record to hold that PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash were public servants, as they were getting their remuneration from AIIMS.

113. Since PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash were employed by a private contractor i.e. BIS security agency and even the salary was being paid by the contractor, therefore, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash were not public servants as per clause 12 of Section 21 IPC and a wrong finding has been given by the Ld.Trial Court in this regard.

114. Further, even as per the definition of “**private security**” provided in Section 2(f) of the PSA Act, it means security provided by a person other than a public servant, to protect or guard any person or property or both and includes provision of armoured car service. Therefore, even the definition of “**private security**” excludes a public servant. Therefore, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash were not public servants, as per clause 12 of Section 21 IPC and the Ld.Trial Court had wrongly arrived at a finding that they were public servants.

115. Further, Section 353 IPC is attracted when criminal force or assault is used on a public servant in the execution of his duty or with intent to prevent or deter such public servant from discharging his duty.

116. Since in the present case, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash were not public servants, therefore, no offence under Section 353 IPC was made out and Ld.Trial Court wrongly convicted the appellant for the offence under Section 353 IPC read with Section 149 IPC.

117. The last contention of the Ld.counsel for appellant was that offence under Section 3(1) of PDPP Act was not made out as the wall/fence in question do not fall within the definition of “**public**

property” and secondly, even the damage to the fence/wall was not proved on record as photographs regarding the damage were inadmissible in absence of negatives and further substantive evidence of the driver of JCB namely, Satpal was withheld by the prosecution.

118. To appreciate the contention of Ld.counsel for appellant, it is necessary to reproduce herein the definition of “**public property**” as provided in Section 2(b) of PDPP Act. Section 2(b) of PDPP Act provides as follows:--

2(b):- “public property” means any property, whether immovable or movable (including any machinery) which is owned by, or in the possession of, or under the control of—

(i) the Central Government; or

(ii) any State Government; or

(iii) any local authority; or

(iv) any corporation established by, or under, a Central, Provincial or State Act; or

(v) any company as defined in section 617 of the Companies Act, 1956 (1 of 1956); or

(vi) any institution, concern or undertaking which the Central Government may, by notification in the Official Gazette, specify in this behalf: Provided that the Central Government shall not specify any institution, concern or undertaking under this sub-clause unless such institution, concern or undertaking is financed wholly or substantially by funds provided directly or indirectly by the Central Government or by one or more State Governments, or partly by the Central Government and partly by one or more State Governments.

119. In the light of definition provided of “**public property**” in Section 2(b) of PDPP Act, the evidence which has come on record is required to be appreciated.

120. PW1 Sh.R.S.Rawat in his evidence had produced a letter of the MCD which is Ex.PW1/E-11 and in the said letter, permission has been granted to the AIIMS for covering the drain upto 600 meters length starting from Ring Road, on long term lease basis on a token annual rent.

121. In the said letter, it was specifically provided that ownership rights will rest with the MCD. The said letter was proved by the prosecution by examining PW17 Sh.M.L.Khan, who was the author of the said letter. PW17 Sh.M.L.Khan in his evidence also deposed that permission was granted to the AIIMS to cover the open drain. However, they were not granted any ownership rights.

122. Further, the funding for covering the drain was also met by AIIMS, as per the documents Ex.PW1/E-9 and Ex.PW1/E-10. Further, as per the evidence of PW1 Sh.R.S.Rawat, it has come in his cross examination that the covered drain is the property of AIIMS and the outer wall besides the drain is also built on the AIIMS land. The said deposition made by PW1 Sh.R.S.Rawat in his cross examination was never challenged by the appellant by giving any suggestion that the control and possession of the drain and the outer wall was not that of the AIIMS but of some other Government agency.

123. Further, PW3 Sh.Santosh Kumar has also deposed in his cross examination that on both the sides of the drain, there is a wall and as per his information, both the walls are of AIIMS. The appellant has not challenged even this deposition made by PW3 Sh.Santosh Kumar regarding the wall belonging to AIIMS as no suggestion has been given in this regard.

124. Further, PW6 Sh.Sanjeev Kumar, Assistant Engineer had also deposed in his cross examination that the wall in question belongs to

AIIMS and even the said deposition was never challenged by the appellant by giving any kind of suggestion during the possession and control of AIIMS over the said wall.

125. Further, the documents Ex.DW2/A and Ex.DW2/B produced by DW2 Sh.Naib Chand, Executive Engineer, who was the witness summoned by the appellant shows that the ownership of the drain was with the SDMC but the control and possession was that of the AIIMS and there was specific mention that the drain is a Government and a public property and the covered portion of the drain is under the control of AIIMS administration.

126. Therefore, the evidence which has come on record shows that AIIMS was given a long term lease to cover the drain by its owner i.e. SDMC, the funding for building the entire drain was met by the AIIMS from its own funds and the control and possession over the drain and wall was that of the AIIMS. On the basis of AIIMS having control and possession of the drain, the said drain and the outer wall built on it would fall within the definition of “**public property**” as Section 2(b) of PDPP Act not only talks about ownership of the Government with regard to movable or immovable property but also specifies that if any property is in control or in possession of Central Government, State Government, Local Authority or Corporation or any Institution notified by the Government of India, then also it will be a “public property”. Therefore, the road built over the drain and the walls over it were “**public property**”.

127. Accordingly, the contention of the Ld.counsel for appellant that there is no evidence to show that AIIMS had any control or possession over the wall built on the drain, is required to be rejected in the light of evidence discussed hereinabove of PW1 Sh.R.S.Rawat, PW3

Sh.Santosh Kumar, PW6 Sh.Sanjeev Kumar and the documents Ex.PW1/E-11, DW2/A and DW2/B.

128. The contention of the Ld.counsel for appellant that since AIIMS had constructed the wall unauthorisedly and had covered the drain beyond the permissible limit, hence, the same was unauthorized construction and cannot be termed as “**public property**” is required to be rejected.

129. It is true that AIIMS was not granted any permission vide letter Ex.PW1/E-11 to cover the drain beyond 600 meters length from the Ring Road or to build any wall over it as per deposition of PW17 Sh.M.L.Khan but even if AIIMS had done any unauthorized covering of drain or building of the wall with fence over the drain, then also it would fall in the definition of “**public property**” as the entire drain alongwith wall was in possession and control of AIIMS.

130. Since the entire drain was covered by the AIIMS by their own funds and even the wall and fencing was done by the AIIMS, therefore, entire drain alongwith the wall and the fence was in possession and in the control of AIIMS and, therefore, it was a “**public property**”.

131. Just because the AIIMS had raised the wall alongwith fence, without any permission from the owner i.e. the MCD, it will not cease to be a “**public property**” as Section 2(b) of PDPP Act does not specify that any property in control and in possession of any Government agency, which is built unauthorizedly, will cease to qualify as “**public property**”.

132. Even if it is assumed that the AIIMS had not built a wall over the drain, then also there is evidence on record to show that it was a Government property as per the document Ex.DW2/D produced by DW2 Sh.Naib Chand, witness of the appellant. It is specifically

mentioned in the said letter dated 01.07.2016 Ex.DW2/D that the parapet wall on the drain belongs to the MCD. Therefore, as per own document furnished by the appellant, it is proved that the ownership of wall was that of MCD, which again is a Government agency and hence, qualifies to be a **“public property”**. Therefore, the evidence which has been led on record by the respondent/State shows that the control and possession of the drain and the wall was that of the AIIMS and as per the evidence led by the appellant, said wall belonged to MCD as per Ex.DW2/D and in both eventuality, the wall on the drain falls within the definition of **“public property”**.

133. The next point which is required to be appreciated is whether damage to the fence/wall on the drain was proved by the respondent/State or not?

134. In the present case, although prosecution had brought on record the photographs Ex.P-1 showing the damage to the fence but the Ld.counsel for appellant had taken a specific objection regarding the mode of proof. Therefore, onus was on the respondent/State to have proved the photographs as per law. The photographs could have been proved on record by producing the negatives but PW14 Ct.Jai Singh, who had taken the photographs of the spot categorically deposed in his cross-examination that negatives are not on record. PW14 Ct.Jai Singh had deposed that he had handed over the negatives to the investigating officer. However, the investigating officer PW19 Inspector Anand Swarup had not produced the negatives on record. Therefore, in the absence of negatives, the photographs Ex.P-1 showing the damage to the fence were not proved and hence, could not be taken into consideration for proving the damage to the public property i.e. fence on the wall on the drain. However, there is ocular evidence of PW1

Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash to the effect that appellant while leading the unlawful assembly had caused damage to the fence installed on the wall on the drain with the use of a JCB machine.

135. The evidence of PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash is also corroborated by PW7 Sh.K.P.Kaushik, who was the Assistant Engineer, PWD and who had gone to the spot for inspection at around 4.00 p.m. on the date of the incident, where he had found the fence installed on the wall to be damaged.

136. In the entire cross examination of PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary, PW5 Sh.Ved Prakash and PW7 Sh.K.P.Kaushik, the appellant did not dispute the damage caused to the fence by the use of JCB machine. Therefore, damage to the fence stood proved.

137. The defence of the appellant was that demolition of the wall/fence was the planned action of PWD but the said defence was never established on record by the appellant.

138. PW6 Sh.Sanjeev, Assistant Engineer and PW7 Sh.K.P.Kaushik, Assistant Engineer, PWD were officials of PWD, who were examined by the prosecution but they had denied that demolition of the wall/fence on the drain was the planned action of PWD in their cross-examination.

139. Further, PW6 Sh.Sanjeev clarified that he had instructed the JCB driver to demolish the speed breakers at Mahender Kumar Jain Road, which was at a distance of 600 meters from the spot but there was no direction for the PWD to demolish the wall. Therefore, the defence of appellant was nowhere proved by the PWD officials namely, PW6

Sh.Sanjeev and PW7 Sh.K.P.Kaushik as they categorically denied that wall/fence was demolished by the PWD.

140. The appellant further made an attempt to establish his defence that demolition of wall and fence was the planned action of PWD by examining DW1 Sh.Anil Kumar, Assistant Engineer from SDMC, South-Zone. DW1 Sh.Anil Kumar had deposed in his examination in chief that the demolition action dated 09.09.2016 for making of slip road connecting Sudershan Cinema Road with covered portion of Gautam Nagar drain by removing the wall was that of PWD and the Commissioner, SDMC had permitted the PWD vide his letter Ex.DW1/A.

141. In his cross examination by Ld.APP for respondent/State, DW1 Sh.Anil Kumar stuck to his stand that permission was granted to PWD for constructing of a slip road vide Ex.DW1/A even though Ld.APP for respondent/State suggested to him that no such permission was granted.

142. I have carefully perused the Ex.DW1/A and as per the said letter, Chief Engineer of SDMC has written a letter to the Principal Chief Engineer of PWD to explore the feasibility of connecting the covered portion of Gautam Nagar drain with Sudershan Cinema Road by constructing a slip road. However, there is nothing in the letter Ex.DW1/A which permitted the PWD to carry out the demolition of the wall built on Gautam Nagar drain, which was in the possession and control of AIIMS.

143. Further, no evidence was led on record by appellant to show that PWD after receipt of letter Ex.DW1/A had granted approval of constructing a slip road to connect Gautam Nagar drain with Sudershan Cinema road by demolishing the wall and fence which was under the control and possession of the AIIMS. Therefore, the witness of

appellant i.e. DW1 Sh.Anil Kumar had deposed falsely that demolition action on 09.09.2016 was that of the PWD for the purpose of construction of slip road to connect the drain with the Sudershan Cinema Road. Therefore, the appellant had failed to establish on record that demolition of the fence on the wall on the drain was not done by the unlawful assembly, of which he was the member, but it was the planned demolition action of the PWD.

144. The last contention of the Ld.counsel for appellant that an adverse inference is required to be drawn against the prosecution due to non examination of Satpal, driver of JCB machine, is required to be rejected.

145. The reason for the same is that although it has come in the cross examination of PW19 Inspector Anand Swarup that PW Satpal, driver of JCB was a material witness but by mistake, he was not cited as a witness in the charge sheet but charge sheet shows that statement of PW Satpal was got recorded by the investigating officer under Section 164 Cr.P.C. and by mistake, his name was not mentioned in the list of witnesses. Therefore, he could not be examined as a prosecution witness.

146. Ld.APP for respondent/State on realizing his mistake, after the examination of the investigating officer, had moved an application under Section 311 Cr.P.C. for the purpose of examination of PW Satpal. However, the said application for recalling of PW Satpal was dismissed by the Ld.Trial Court vide order dated 16.12.2019 and in these circumstances, PW Satpal could not be examined as a witness in the present case. Therefore, it cannot be said that prosecution had intentionally withheld PW Satpal, the driver of JCB and in case, he was examined, then his testimony would not have been favourable to the

case of the prosecution.

147. On the contrary, from the statement of PW Satpal recorded under Section 164 Cr.P.C., it is apparent that, in case, he was examined as a witness by the prosecution, then his testimony would have further corroborated the testimony of PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary and PW5 Sh.Ved Prakash that damage to the fence on the wall on the drain was caused by JCB machine by unlawful assembly of 200-300 persons of which appellant was the member.

148. The non-examination of PW Satpal is not fatal to the prosecution case as damage to the fence on the wall built on the drain by the unlawful assembly of which appellant was the member stands duly proved by the oral testimony of eye witnesses i.e. PW1 Sh.R.S.Rawat, PW2 Sh.Ajay Kumar, PW3 Sh.Santosh Kumar, PW4 Sh.Dinkar Kumar Chaudhary, PW5 Sh.Ved Prakash and duly corroborated by the inspection done by PW7 Sh.K.P.Kaushik. Therefore, prosecution had proved beyond reasonable doubt that wall and the fence over it was a public property and the same was damaged by the use of JCB machine by the unlawful assembly. of which appellant was the member, and therefore, Ld.Trial Court had rightly convicted him for the offence under Section 3(1) of PDPP Act and I do not find any illegality or infirmity in the same.

149. In the light of above discussion, **the appeal of appellant is partly allowed and part of the impugned judgment convicting and sentencing the appellant for the offence under Section 323/353 IPC read with Section 149 IPC are accordingly, set aside.** However, the part of the impugned judgment and impugned sentence order convicting and sentencing the appellant for the offence under Section

147 IPC read with Section 149 IPC and under Section 3(1) of PDPP Act are hereby affirmed. Accordingly, **appeal is dismissed qua the conviction and sentence of appellant u/s 147 IPC read with Section 149 IPC and under Section 3(1) of PDPP Act. Appellant be taken into custody and be sent to Jail for serving the sentence as awarded by the Ld.Trial Court vide its sentence order dated 23.01.2021 for the offence under Section 147 IPC read with Section 149 IPC and under Section 3(1) of PDPP Act.**

150. A copy of judgment be given free of cost to appellant /convict.

151. TCR be sent back to the Ld.Trial Court alongwith a copy of judgment.

152. Appeal file be consigned to record room.

Announced in the open court

Dated: 23.03.2021

**(Vikas Dhull)
Special Judge (PC Act) CBI-23
(MPs/MLAs Cases), RADC
New Delhi**