



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Criminal Revision Petition No. 1290/2018

Smt Meena

----Petitioner

Versus

1. State, Through PP
2. Tejpal Singh
3. Mahaveer Singh
4. Vikram Singh
5. Balveer Singh

----Respondents

For Petitioner(s)	:	Mr. D.S. Udawat
For Respondent(s)	:	Mr. M.S. Bhati, P.P. Mr. H.S. Shekhawat

HON'BLE DR. JUSTICE PUSHPENDRA SINGH BHATI

Judgment

Reportable

08/03/2022

1. In wake of instant surge in COVID-19 cases and spread of its highly infectious Omicron variant, abundant caution is being maintained, while hearing the matters in Court, for the safety of all concerned.

2. This criminal revision petition under Section 397 read with Section 401 Cr.P.C. has been preferred claiming the following reliefs:



"It is, therefore, most respectfully and humbly prayed that this revision petition may kindly be allowed and the impugned order dated 9.8.2018 passed by the learned Addl. Sessions Judge, Jaitaran, District Pali, in Sessions Case No. 11/2017 for the offence U/s 458, 323, 324, 325, 307/34 of Indian Penal Code may kindly be modified to the extent of framing the charges U/s 459 IPC in place of Section 458 IPC against the respondents accused in the interest of Justice."

3. Learned counsel for the petitioner submits that the order, dated 09.08.2018, passed by the learned Addl. Sessions Judge, Jaitaran, Pali in Sessions Case No. 11/2017, has not rightly appreciated the facts and circumstances of the case at hand, and that the said order suffers from an incorrect framing of charges, to the extent that a charge was framed under Section 458 IPC instead of Section 459 IPC, and that it therefore ought to be modified accordingly.

4. Learned counsel for the petitioner submits that the incident in question, for which the charges were so framed by the learned Court below are that the accused respondents illegally and forcibly entered into the house of the petitioner complainant, along with *lathis, sariyas* and swords and inflicted grievous injuries upon the complainant petitioner's son and her husband, on 31.9.2016 at about 10:15 p.m in the night whilst being in the house-premises of the complainant petitioner. And that, therefore, it is evident that the charges so framed, should have been framed under Section 459 instead of Section 458 IPC.

5. Learned counsel for the petitioner placed reliance on the following judgments:



6. **Sahnaz Uddin Laskar Vs. State of Assam Criminal Appeal No. 62 (J) of 2015 (Gauhati High Court)** wherein the Hon'ble Court held asunder:-

"The learned Sessions Judge having perused such evidence convicted the accused under section 459 of the Indian Penal Code but in view of the fact that the accused did not assault on the victim inside the house but did so by dragging her outside, we are of the view that the offence committed by the accused does not attract section 459 of the Indian Penal Code but thereby he has committed an offence under section 326/453 of the Indian Penal Code. This is because an offence under section 459 of the Indian Penal Code involves committing lurking house trespass or house breaking and causing grievous hurt in course of such trespass. **If grievous hurt is caused either while making lurking house trespass or while inside the house wherein the trespass had taken place, then and then only section 459 of the Indian Penal Code would apply.** Here, in this case, the accused trespassed into the house of the victim and thus committed house breaking and then dragged her outside and sought to commit rape but on being resisted stabbed on her person four times causing grievous hurt and thus section 459 of the Indian Penal Code would not apply."

7. **Emperor Vs. Said Ahmad and Anr. Allahabad High Court AIR 1927 All 536** decided on 19.04.1927, wherein the Hon'ble Court held:

"The Magistrate has put on the record his reasons for holding that no offence under Section 459 could be held to be established. His reason is this in brief. The offense of house-breaking is complete when entry into the house is effected and any grievous hurt, subsequently caused by the persons breaking into a house cannot be said to be grievous hurt caused while they were committing the house-breaking. I was at first disposed on reading the section to hold that this was taking too narrow a view of the language, of it. But, on consideration of the section with the connected sections of the Indian Penal Code, I think that the Magistrate was correct in his view House-breaking, as defined in Section 415, is an aggravated form of criminal



trespass as defined in Section 441. One form of criminal trespass under Section 441 is the act of entering upon property, in the possession of another, with intent to commit an offence, or to intimidate, insult or annoy any person in possession of such property. If the property is used as a human dwelling, the offence of criminal trespass becomes the offence of house-trespass: vide Section 442. If this offence of house-trespass is further aggravated by an entry or departure of a forcible nature, then the entry passes from an offence merely of criminal trespass to the more serious offence of house-breaking: vide Section 445. The offence of house-breaking may be further aggravated by causing grievous hurt to any person whilst committing the house-breaking. The question then is, when is a house-breaking? Having reference to what has been stated by me, it is clear that it is complete when the act of entering into the house is complete. Section 442 shows that entry is completed by the introduction of any part of the trespasser's body into the house. In its origin too the word "trespass" meant the momentary act of "passing over"

5. So far the matter appears to me plain sailing. A doubt, however, is created by the fact that the definition given above of criminal trespass is not complete. The second clause of Section 441 defines another form of criminal trespass arising from unlawfully remaining on property, after having lawfully entered, with intention to intimidate, insult or annoy or to commit an offence. This second offence prima facie would appear to continue until the person left the property. If this were so, the view of the Magistrate as to the meaning of Section 459 would appear open to the following objection. If a person made an unlawful entry into a house, and while in the house caused grievous hurt to a person, he would not be liable for the aggravation of trespass defined in Section 459. If, however, he entered lawfully but remained on unlawfully, and before departure from the house caused hurt he would then be liable under Section 459. An unsatisfactory consequence of this reasoning would follow. The man who committed house trespass by breaking into a house and before leaving caused grievous hurt would not be guilty of the aggravated form of the offence specified in Section 459, while the man who committed criminal trespass by remaining on unlawfully in the house, after having





entered therein lawfully, would, if he caused grievous hurt before leaving the premises, be guilty of this special offence. The result would appear absurd. I think that this absurdity can be avoided by adopting either of the two following views. One is that Section 459 will never apply to a case where the basic offence of criminal trespass is that form of criminal trespass which results from remaining on in the house and will only apply to that form which results from entry into a house. **The alternative view, which in practice has the same effect, is that the offence of remaining on is not to be deemed to continue until the premises are vacated, but should be held to be complete as soon as the offender has indicated an intention by remaining on to intimidate, insult or annoy the occupant or to commit an offence.**

Criminal statutes have to be construed strictly in favour of the accused and whatever view may be adopted to meet the difficulty mentioned, I consider that there is sufficient doubt arising from the language of the Code to prevent it being held that a person who has completed a forcible entry into a house should be deemed, by reason of violence subsequently used, to have used violence while house-breaking. For this reason I hold that the Magistrate was justified in refusing to commit the accused on a charge under Section 459.

8. On the other hand, learned counsel for the private respondent opposes the aforesaid submissions made on behalf of the petitioner, and submits that the impugned order, dated 09.08.2018, has rightly appreciated the facts and circumstances of the case which clearly reveal that the offence was not committed whilst the act of lurking house-trespass or house-breaking, and that the learned Court below has therefore, on a correct interpretation of the law, framed a charge under Section 458 IPC.

9. Learned counsel for the private respondent placed reliance on the judgment rendered by this Hon'ble Court in ***Inder Puri Vs.***



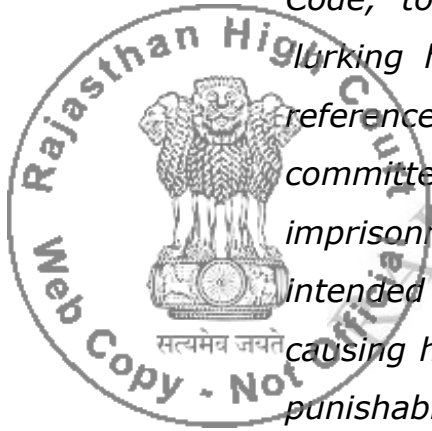
State of Rajasthan S.B. Criminal Revision Petition No. 205/2020 decided on 13.02.2020, wherein the following was observed:

"Lurking house trespass' and 'house breaking' are aggravated forms of house trespass. 'House-breaking' consists of entering into a house by an opening other than the ordinary or by force. Both these offences are punishable under Section 453, Penal Code, to 2 years' imprisonment. Then again the gravity of 'Lurking house trespass' or 'house breaking' is aggravated by reference to the purpose for which it is committed. If it is committed for the commission of an offence punishable with imprisonment it is punishable by three years and if theft is intended it is 10 years. If it is committed with the intention of causing hurt or assault or wrongful restraint or fear thereof, it is punishable by 10 years.

Lurking house trespass or house-breaking have another aggravated variation if it is committed between sun set and sun rise. If lurking house trespass and house breaking by night are committed after having made preparation for causing hurt or assault or wrongful restraint or putting any person into fear then the punishment provided is 14 years which is under Section 458 IPC.

Thus, the accused petitioners entered into the house of complainant after making preparation for causing injuries to her and her son. Therefore, the charge for offence under Section 458 IPC is made out against the petitioners. So far as the judgments relied upon by the learned counsel with regard to concealment of presence is concerned, the same does not help the petitioners in any manner at this stage, as it is a matter of evidence during the trial.

So far as the charge for offence under Section 459 IPC is concerned, as per this provision whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.





The word 'whilst' according to the Oxford English Dictionary means "during that time; meanwhile.". For applying the words "whilst committing house, breaking by night", it is necessary to show that the attempt was made in the period during which the offence of house-breaking (which involves house-trespass) was being committed. It is not sufficient to show that the attack was made after the house-trespass had ceased. In the present case, after criminal trespass, the petitioners caused grievous hurt to the complainant. **Therefore, in the opinion of this Court, during the period the house-breaking lasts if the trespasser causes grievous hurt to any person or attempts to cause death or grievous hurt the provisions of Section 459 of the Penal Code will be attracted.**

Further, it is settled law that at the time of framing the charges, the truth, veracity and the effect of the evidence, which the prosecution proposes to produce are not to be meticulously examined. At this stage, the Court only has to see whether the unrebutted evidence, which the prosecution is to adduce, makes way for conviction and if it is so then the charge can be framed. But if the evidence itself does not disclose that the accused has committed the offence, then the charge should not be framed. **The Court, while framing the charges, is required to evaluate the materials and documents on record with a view to find out if the facts emerging therefrom disclose the presence of all the ingredients constituting the alleged offence.**

In view of above, this Court is of the opinion that trial court has not committed any error in framing charge for offence under Section 323, 458, 354, 325/34 IPC against the petitioners.

However, the charge for offence under Section 459 IPC is not made out against the petitioners and petitioners are discharged of offence under Section 459 IPC."

10. Learned counsel for the petitioner, in his rejoinder arguments, submits that in the judgment of ***Inder Puri (supra)*** cited by the learned counsel for the private respondent, this Hon'ble Court did not consider the judgment it rendered in ***Bhanwarlal Vs. Mst. Parbati S.B. Criminal Reference No.***



231/1965 (Raj. HC), decided on 09.02.1967, wherein the following was held:

"The word 'whilst' according to the Oxford English Dictionary, 1933 Edition, vol. 12, is an obsolete form which means "during that time; meanwhile." It is indicative of a portion of time considered with respect to the duration of a transaction. **I am, therefore, inclined to be of the view that during the period the house-breaking lasts if the trespasser causes grievous hurt to any person or attempts to cause death or grievous hurt the provisions of Section 450 of the Penal Code will be attracted.** I am unable to take the narrow view that it is only in the process of making an entry into a house if the trespasser causes grievous hurt Section 459, Penal Code is attracted, as seems to be the view taken in Said Ahmed's case MANU/UP/0118/1927 : AIR 1927 ALL 536. Two reasons are apparent for my inability, with great respect, to agree with Ashworth, J. in Said Ahmed's case MANU/UP/0118/1927 : AIR 1927 ALL 536. The first is that the essential ingredient of lurking house-trespass or house-breaking is 'criminal trespass' and that offence continues so long the person remains upon the property in the possession of another. Entrance may be surreptitious and in some cases a split second transaction. It could not have been the intention of the legislature that if a person enters into the house of another by night having made preparations for causing hurt or assault to any person or wrongfully restraining then it would be a graver offence than the one in which a person after having entered upon the property of another causes grievous hart. Having regard, therefore, to the scheme and the place which Section 459 occupies in the Penal Code the intention of the legislature was that from the point of time lurking house-trespass or house-breaking by night commences to the time it concludes **if any grievous hurt is caused or any attempt to cause death or grievous hurt is made then the trespasser shall be punished as provided for in Section 459 of the Penal Code.**

In this view of the matter, accepting the allegations of the prosecution in the case before me if Bhanwarlal entered the house of Mst. Parbati in between sun-set and sun-rise by scaling the wall prima facie **he committed house breaking by night**



and if he caused grievous hurt on her refusal to surrender for sexual satisfaction then he caused grievous hurt whilst committing house breaking and the charge as framed by the learned Additional Munsiff-Magistrate appears to me to be correct. I should not be taken to be expressing any opinion on the merits of the case. I have assumed the facts for the purposes of examining the legal position.

The result is that this reference is rejected."

11. Heard learned counsel for both parties as well as perused the record of the case and the judgments cited at the Bar.

12. This Court observes, that in the impugned order, dated 09.08.2018, the learned Court below, has recorded the finding that given the present facts and circumstances of the case, wherein the accused were found to be carrying lathis, and sharp weapons on their person, and after unlawfully entering into the house of the complainant petitioner, attacked the complainant and her family members, inflicted upon them simple and grievous injuries, and that it is apparent from the record that the accused illegally entered into the property of the complainant with preparation, as under Section 458 IPC.

13. The controversy boils down to the simple fact as to what would constitute an offence under Section 458 IPC, and under what parameters would an offence lie under Section 459 IPC.

14. Before delving into this question of law, this Court deems it appropriate to reiterate the facts and circumstances of the present case, as is reflected from the record. It is not a disputed fact that the accused private respondents committed the act of house-breaking, in that they forcibly entered the house - premises of the petitioner complainant during the night of 31.09.2016 with lathis,



'sariyas' and swords and inflicted simple and grievous injuries upon the petitioner's son and husband.

15. This Court takes note of the provisions of law as down under Sections 445, 458 and 459 IPC, which read as follows: :

"445. House-breaking.—A person is said to commit "house-breaking" who commits house-trespass **if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence, or having committed an offence therein, he quits the house or any part of it in any of such six ways**, that is to say:—

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

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

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

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

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

Sixthly.—If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

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



458. *Lurking house-trespass or house-breaking by night after preparation for hurt, assault, or wrongful restraint. —*

*Whoever commits lurking house-trespass by night, or house-breaking by night, having made preparation **for causing hurt to any person or for assaulting any person**, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.*

459. *Grievous hurt caused whilst committing lurking house-trespass or house-breaking.— Whoever, **whilst committing lurking house-trespass or house-breaking, causes grievous hurt to any person or attempts to cause death or grievous hurt to any person**, shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

16. This Court observes, that the acts committed by accused private respondents in this case squarely fall under the definition of house-breaking contained under Section 445 IPC, on count of them being on the house-premises of the complainant petitioner with the preparation and purpose of committing an offence, in furtherance of which they had carried sharp weapons and *lathis*, and caused grievous hurt.

17. For an offence to lie under Section 458 IPC, the offence must be committed during night time, that is after sun set and before sun rise, only with the preparation to commit offences of causing hurt / assaulting / wrongfully restraining any person or putting in fear any person of hurt / assault / wrongful restraint.

17.1 The legislative intent of Section 458 IPC is therefore, clear, that whosoever commits lurking house-trespass or house-breaking



by night, with the preparation and intention to commit the aforementioned offences, would be penalized for the preparation and would attract the application of Section 458 IPC, for the fact that any person would have a simple and reasonable expectation of safety and privacy in his own home, and a heightened expectation of the same especially during night time.

18. While, whoever whilst committing lurking house-trespass or house-breaking and attempts to cause grievous hurt or death or causes grievous hurt to any person, would be penalized under Section 459 IPC.

19. This Court, while taking note of the judgments cited at the Bar, finds that:

19.1 In **Sahnaz Uddin Laskar (supra)**, the Hon'ble Gauhati High Court, on whether the offence in question in the case would fall under the ambit of section 459 IPC given that the accused therein had dragged the victim outside her residential premises, and sexually assaulted her, held that the act of house-breaking was complete, since the accused had exited the house – premises in question and committed an offence by dragging the victim outside the premises of her house, and that since the course of trespass was complete at the time of committing the offence, it did not attract the application of section 459 IPC.

19.2 The view taken in **Emperor (supra)** would in effect render Section 459 inapplicable to the offences, mentioned therein, committed or attempted to commit by those who commit lurking house-trespass or house-breaking, and therefore, this Court is disinclined to accept such a narrow view as it would not subserve



the ends of justice and defeat the legislative intention behind Section 459 IPC.

19.3 In ***Inder Puri (supra)***, this Court has held that if during the period of house-breaking, if the trespasser causes grievous hurt to any person or attempt to cause death or grievous hurt, the provisions of Section 459 IPC will apply.

19.4 In ***Bhanwarlal (supra)***, this Court held that if the trespasser causes grievous hurt or attempts to cause death or grievous hurt during the period in which the trespass onto the house has not been completed, then Section 459 IPC would apply.

19.5 This Court therefore observes that, excepting the view taken in ***Emperor (supra)***, that although the peculiar facts and circumstances of each of the aforementioned cases have lead to different conclusions, the underlying logic employed is the same, that if a trespasser causes grievous hurt or attempts to cause death or grievous hurt in the course of the trespass i.e. whilst committing lurking house-trespass or house-breaking, the provision of law laid down in Section 459 would apply.

20. In light of the aforesaid precedent law, this Court finds that, given the facts and circumstances of the present case, the offences committed by the accused private respondents would squarely fall under the purview of Section 459 IPC.

21. In this case, the accused-respondents illegal and forcibly entered the house of the complainant/petitioner, armed with *lathis, sariyas* and swords during night hours at about 10:15 p.m. on 31.09.2016, and inflicted grievous injuries upon the son and husband of the complainant/petitioner, while remaining in her house premises. The same constitutes house breaking, and the



grievous hurt is not disputed, and thus, the applicability of Section 459 IPC is made out.

22. This Court is of the firm opinion that any house breaking, which is given effect to by entering into any house or any part thereof for committing an offence or commits assault, the same shall fall within the category of house breaking under Section 445 IPC (as per fifth condition thereof). The said condition of entrance or departure by using criminal force or committing an assault, cannot be construed narrowly and has to be given effect to, that any assault or criminal force used between entrance or departure shall also constitute an offence under Section 445 IPC (as per fifth condition thereof).

23. Consequently, the present petition is allowed, and accordingly, the impugned order dated 09.08.2018 passed by the learned Additional Sessions Judge, Jaitaran, District Pali, in Sessions Case No. 11/2017 (for the offence U/s 458, 323, 324, 325, 307/34 of Indian Penal Code) is modified to the extent of framing of charges under **Section 459 IPC** in place of **Section 458 IPC**. All pending applications stand disposed of.

सत्यमेव जयते

(DR.PUSHPENDRA SINGH BHATI),J

78-SKant/-