

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

+ Crl.App. 13/2007

% Date of reserve: 02.03.2009
Date of decision: 30.03.2009

KRISHAN SHARMA ...APPELLANT
Through: Mr.Harish Malhotra, Sr.Advocate
With Mr.Rajender Aggarwal, Advocates

Versus

STATE ...RESPONDENT
Through: Mr.Navin Sharma, APP for the State
Mr.Subhash Kaushik, Advocate for the
complainant

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG, J.

1. This criminal appeal is directed against the judgment dated 23.12.2006 delivered in Sessions Case No. 81/2004, whereby the appellant was convicted under Section 308 read with Section 34 IPC and vide separate order dated 4.1.2007 sentenced to undergo rigorous imprisonment for four years with a fine of Rs.5000/- and in default of payment of fine to further undergo rigorous imprisonment for six months. The benefit of Section 428 Cr.P.C. was also given to

the appellant.

2. Briefly stating the case of the prosecution is that on 26.02.2004 when PW-2, Rohit Gaur (complainant/injured) along with his sister, PW-1, Monika Gaur was returning home after delivering a letter to Dr.Hans at his clinic and had reached in front of shop of Mamta Tailor, at about 2 PM, the appellant caught hold of the injured while his brother (co-accused) Jitender hit him on his head from behind with an iron rod. The injured Rohit Gaur was removed to AIIMS hospital by PW-3, Mahesh Sharma. He was medically treated and his statement was recorded on the basis of which FIR No. 58/2004 under Section 341/308/34 IPC was registered at Police Station Vasant Vihar. Thereafter, the appellant and his brother co-accused Jitender were arrested and on their disclosure an iron rod (Ex.P-1) was recovered, which was identified by PW-1 Monika Gaur as a weapon used for causing injury on the head of the injured. After completion of investigation, the chargesheet against the accused Jitender was filed before the Juvenile Justice Board as he was juvenile at the time of commission of offence and the chargesheet against the present appellant was filed before the learned MM, who after complying with the provisions of Section 209 Cr.P.C. committed the case to the Sessions Court as the offence punishable under Section 308 IPC is exclusively triable by the Court of Sessions. The appellant was charged for the offence punishable under Section 308 read with Section 34 IPC to which he pleaded not guilty.

3. In order to prove its case, the prosecution has examined 15 witnesses, including the injured/PW-2 Rohit Gaur and his sister PW-1 Monika Gaur, who fully supported the prosecution's version and stood by the complaint dated 26.02.2004 Ex.PW2/A. The injured, Rohit Gaur, who appeared as PW-2 has deposed that the police officials recorded his statement Ex.PW2/A in the hospital. He also deposed that his blood stained clothes were also taken into possession by the Police vide seizure memo Ex.PW2/B. This witness also identified his blood stained clothes as Ex.P2 and Ex.P3. The blood found on those clothes was proved to be of the same group as was of the injured by the CFSL. PW-1 Monika Gaur identified the iron rod by which accused Jitender hit on the head of the injured and the same was exhibited as Ex.P1.

4. Mahesh Sharma, who took the complainant to the hospital, appeared as PW-3 before the trial court and fully supported the version of the prosecution. The recovery of clothes was proved by PW-4, who also stood the test of cross-examination. Dr.Arvind Kumar, who appeared as PW-12, proved the MLC of the complainant prepared at AIIMS Hospital as EX.PW12/A. Dr.Subir Paul, who appeared as PW-13, proved the MLC of Vimhans Hospital in respect of the complainant as Ex.PW13/A. This witness has also deposed that the patient was taken to AIIMS Hospital where wounds were suture and first aid and CT Scan was done, which showed depressed fracture in the left postero-parital region. As per the MLC, this witness opined the injury as grievous blunt.

5. Thereafter, the statement of the appellant under Section 313 Cr.P.C. was recorded wherein he denied all the evidence. He stated that the report of Vimhan's hospital Ex.PW13/A is manipulated. The case was falsely registered against him at the instance of Monika Gaur as he had made a complaint of Monika Gaur to her father about one month prior to the incident that she was roaming at India Gate with one boy. He also took the plea of alibi and submitted that on the day of incident he had gone to Faridabad to attend namkaran ceremony of the son of his maternal uncle. In this regard, the appellant adduced the evidence of his uncle Vijay Parashar, resident of Faridabad, who appeared before the trial court as DW-1 and stated that the appellant had come to attend the function at Faridabad and stayed overnight there along with his mother and went back only on the next day in the morning at about 11 am. The invitation card of the function has also been produced and the same was exhibited as Ex. DW1/A.

6. The Additional Sessions Judge took note of the evidence led by the parties and found that the testimony of complainant is corroborated by other witnesses and thus, the case of the prosecution stood proved and no dent was caused to the prosecution story by the defence witness as well as by cross-examination of prosecution witness. Insofar as minor contradictions are concerned, the Additional Sessions Judge had taken note of these contradictions but has not found favour with the submissions of learned counsel appearing for the appellant that those minor

contradictions can take away the version of the prosecution to an extent that appellant can be given the benefit of doubt.

7. Before this Court, it has been submitted on behalf of the appellant that the judgment delivered by the Additional Sessions Judge is not sustainable; firstly, because there was no proper appreciation of evidence and there were contradictions and flaws in the evidence adduced by the prosecution and the evidence was not appreciated properly; secondly, the plea of alibi which was duly proved by the appellant was also not seen in its true perspective and the evidence of DW-1 was not given due weightage particularly when the evidence so adduced by DW-1 did not suffer from any infirmity, and; thirdly, the observations made by the Court below were not correct when learned Judge observed that the defence has not put to any of the witnesses, even to the injured that the appellant was not there at the site or in Delhi on the day of incident, which is factually incorrect and the errors of judgment are apparent on the face of it.

8. It is also submitted that there are lacunae and contradictions in the prosecution's case and the evidence adduced by the prosecution and that it does not inspire confidence.

9. It is also submitted that there are averments made in the FIR to the effect that when the complainant reached at T point crossing, at about 2 O' clock the appellant, stopped him and caught hold of him while his brother, Jitender hit him with something which touched his head. The complainant also averred that Krishan

hurled abuses to his sister “Aur Meri Behen Ko Bhi Inhone Gaali Di”. Monika Gaur in her examination in chief has stated that co-accused Krishan Kumar caught hold of her brother from behind and pointed out to his brother Jitender and Jitender hit the complainant with an iron rod. Both Jitender and Krishan ran away from the site thereafter. It is stated that two things are clear from the statement of Monika Gaur that Krishan caught hold of the complainant from behind and the other co-accused hit the complainant with iron rod and that abuses were hurled to Rohit and not to her. The contradiction is apparent. No eye-witness has been examined even though the incident has occurred at a public place at about 2 pm in a broad day light. It is also submitted that despite being 19 years old at the time of alleged crime and being a first offender, the appellant has not been considered for the grant of probation.

10. On the other hand, learned APP supported the judgment of the learned Additional Sessions Judge and has stated that the case against the appellant has been proved by the prosecution by leading cogent evidence which includes the evidence of the complainant as well as the statement of his sister who was accompanying the complainant at the time of the incident. He also relied upon the statement of PW-11 Dr. Hans where the complainant had gone to deliver a letter and it is thereafter, the incident took place when the complainant was coming out of the office of Dr.Hans. He also relied upon the statement given by PW-3, Mahesh Sharma, who had taken the injured to the AIIMS Hospital where

statement of the complainant was recorded by the Police which forms the basis of registration of FIR in question. He also referred to seizing of blood stained clothes belonging to injured which is stated to have contained the blood of the same group as was of the injured and thus, supports the case of the prosecution. It is also submitted that the defence evidence led by the appellant does not inspire any confidence.

11. Having heard counsel for the parties and having gone through the record of the case, I find that PW-2, Rohit Gaur (complainant) has fully supported the prosecution's version and stood by the complaint which he lodged with the Police on 26.02.2004. The testimony of complainant has been corroborated by his sister, Monica Gaur, who appeared as PW-1 as well as by Dr.Hans who appeared as PW-11.

12. Some of the observations made by the learned Additional Sessions Judge, which are of importance, for the sake of reference are reproduced hereunder:

7. Ld. Counsel further submitted that admittedly accused was known to the injured as they are living in the same locality and the complainant also shows that injured was known to the accused even before the incident. But he has not named the injured to the doctor who asked as to who had caused the injuries to him. This itself shows that the accused has been falsely implicated in the present case. Otherwise the injured would have named him to the doctor and it would have been reflected in the MLC. So far as the non-mentioning of name of assailant to the doctor is concerned, in my opinion it is not required that the name of the assailant shall be disclosed to the doctor or it shall find mention in the MLC of the injured. There is no such law that if the name of the injured is not mentioned in the MLC it creates doubt about the truthfulness of the story or that the name of the accused has been introduced later on. In the present case, the name of the injured has not been mentioned in the MLC and PW2 has stated in his cross examination of page 2 that :

"I told to doctor that one person has hurt on my head. I did not disclose the name of person who caused injury to me as the name was not enquired from me by doctor."

13. As far as the submission regarding defence evidence led by the appellant is concerned, the trial court has taken into consideration the submissions so made and have dealt with the same in paragraphs 10 and 11 of the judgment, which again for the sake of reference are reproduced hereunder:-

“10. After hearing the arguments I found that so far as false implication by PW1 is concerned I do not find any reason as to why PW1 who is the real sister of PW2, even PW2 who would not let the original culprit go and implicate the applicant herein in a false case, simply because the applicant has informed the father of PW1 that he had seen PW1 with some boy at India Gate. I do not find any reason that it gives such a strong motive either to PW1 or to PW2 to falsely implicate the accused to leave the actual culprit.

11. So far as the plea of alibi is concerned, the defence has produced one witness also, that on 26.02.2004 the Naam Karan ceremony of the son of maternal uncle of accused was performed and accused had gone there to attend the same. Witness to this effect has also been examined who has deposed on the same lines but interestingly the defence has not put to any of the witnesses even to the injured that accused was not there on the spot or in Delhi on the day of incident as he had gone to Faridabad to attend the Naam Karan ceremony of the son of his maternal uncle. The plea of alibi is no doubt a good defence but in the facts and circumstances of the present case, in my opinion, it is only an afterthought and does not inspire any confidence.”

14. Learned counsel also tried to assail the judgment on the ground that the appellant has put suggestions to the witnesses about his having gone to Faridabad and thereafter to say that he has not put his version to the witnesses is not correct. To that extent, I find that insofar as PW-1 is concerned no suggestion has been given by the appellant to her. As far as PW-2 is concerned, the only suggestion which has been given and has been denied by the complainant is “It is wrong to suggest that accused was not present at the spot and had gone to house of his maternal uncle at Faridabad”. However, it was not put to that witness as to at what time he left the Faridabad or when did he return back from Faridabad. He has also not put any invitation card to this witness. Therefore, to say that he was not present at the spot

does not inspire any confidence.

15. So far as the testimony of DW-1 is concerned, he being the maternal uncle of the appellant has all the reasons to support the appellant. The very fact that the invitation card which has been produced during his testimony was not produced at the earliest possible opportunity only shows that there is some kind of manipulation and effort to make out a case of alibi, which is without being any truth therein.

16. Insofar as the submission that the appellant has been falsely implicated as he made a complaint to father of Monica Gaur that she was roaming at India Gate with one boy, is concerned, the allegations are vague and does not reflect any grievance which could be reason for Monika Gaur to falsely implicate the appellant when her real brother has been injured and that too by the brother of the appellant who hit him from the back side. Moreover, the suggestion put to PW-1 Monika Gaur and PW-2 Rohit Gaur in this regard are highly vague as no date of the complaint has been stated in the complaint and in any event, the suggestion has been denied. No effort was made to summon the father of Monica Gaur as defence witness by the appellant.

17. Having examined the testimony of the witnesses produced by the prosecution and there being no reason for falsely implicating the appellant by the complainant and his sister, I am satisfied that the impugned judgment does not suffer from any material infirmity which may call for any interference by this Court.

18. I have also gone through the written submissions filed by the

appellant and find that except highlighting minor contradictions, nothing major has been brought to the notice of this Court, which may prove the innocence of the appellant.

19. I have also examined the judgments cited by the appellant, that are, *Paramjit Singh & Anr. Vs. State [1983 (4) DRJ 393]*, *Hem Raj & Ors. Vs. State [1996 III AD (Delhi) 869]* and *Raj Kumar Vs. State [2001 (57) DRT 268 DB]* and find that the same do not help the case of the appellant. This is for the reason that in the present case there was no necessity to join any public witness because the injured himself is the complainant and his version has been fully supported by his sister, who was accompanying the injured at the relevant time. The role of his brother has been very specifically referred to by all the witnesses and therefore, the common intention inasmuch as the appellant caught hold of the injured and his brother hit the injured is clearly proved from the joint action of the appellant and his brother.

20. The argument of the appellant that in the present case Section 34 IPC is not attracted is not acceptable in the given facts for the reason that when two persons commit an act together, Section 34 IPC is automatically attracted. In this case, as per the prosecution, the appellant caught hold of the complainant and his brother (co-accused) Jitender hit him on his head with iron rod. Thus, a case under Section 34 IPC is made out.

21. In view of the discussion above, I uphold the judgment of conviction.

22. Now coming to the last submission of learned counsel for the appellant that the appellant was hardly 19 years old when the incident occurred and the role assigned to him is only of catching hold of the injured from the back side and that he is not a previous convict and is suffering from orthopaedic disease, namely, Degenerative Disc disease L4/L5, L5-S1, with forminal stenosis which fact has been verified by the MRI test conducted on the appellant by a specialized doctor and as such, the appellant is entitled to have been dealt with sympathetically and in fact, is entitled to have been released on probation or in the alternative is entitled to the reduction of sentence to the period already undergone.

23. In view of the above, I find it would be appropriate to reduce the sentence of the appellant to the period already undergone subject to a condition that appellant will deposit a fine of Rs.50,000/- with the trial court within one week from today, which amount shall be paid to the complainant. It is only after deposit of the aforesaid amount, the bail bond of the appellant will stand discharged, failing which the appellant shall be taken into custody and he shall be liable to undergo the remaining portion of his sentence.

24. With these directions, appeal stands disposed of.

MOOL CHAND GARG, J.

MARCH 30, 2009/dc