

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

+ Crl. Appeal No. 27/2008

% Decided on: 16th August, 2010

JAMALU & ORS.

..... Appellants

Through: Mr. M.L. Yadav, Mr. S.D. Singh,
Mr. Rahul Singh and Ms. Surbhi
Shukla, Advs.

Versus

STATE OF DELHI

..... Respondent

Through: Mr. M.P. Singh, APP for the State.

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be reported
in the Digest? | Yes |

A.K. PATHAK, J. (ORAL)

This appeal is directed against the judgment dated 19th December, 2007 whereby the appellants have been convicted by the Trial Court under Section 308 read with Section 34 of the Indian Penal Code (IPC) and sentenced to undergo rigorous imprisonment vide order dated 22nd December, 2007 for five years. Benefit of Section 428 of the Code of Criminal Procedure (Cr.P.C.) has been given to the accused.

2. Prosecution story as unfolded is that on 19th May, 2004 complainant Constable Nand Kishore was returning home from

his duty at about 10:15 pm on his scooter bearing registration no. DL5-S-J-3399 and when he reached Shastri Park Red Light he noticed a truck, bearing no. HR-38-J-3936, coming from the opposite direction in high speed. The truck was being driven by accused Jamal. Complainant stopped his scooter. Truck was also stopped by the accused near the scooter. Complainant asked Jamal as to why he had suddenly stopped the truck at which Jamal got down from the truck. Accused Vakeel, who was present in the truck, also got down. Thereafter, a scuffle took place between accused Jamal and Vakeel on one side and complainant on the other. In the meanwhile, accused Jamal gave an iron rod blow on the head of the complainant resulting injuries to him. Accused Vakeel gave fist blows to the complainant. Head Constable Shankar Lal, who was present on duty in a nearby Police Picket, arrived there and removed the complainant to G.T.B. Hospital.

3. On receiving information, Investigating Officer arrived at the hospital and recorded the statement of complainant pursuant whereof, FIR No. 279/2004 under Section 308/34 IPC was registered at Police Station Seelam Pur. Blood stained T-shirt of the complainant was taken in possession by the Investigating Officer. During investigation Jamal and Vakeel were arrested from the spot itself. Jamal got recovered the iron rod from his truck pursuant to his disclosure statement. Iron rod was taken in possession. Site plan was prepared. Opinion of the doctor

regarding injuries of the complainant was obtained. Injuries were opined as simple caused by a blunt object. After completion of investigation, charge-sheet was filed in the court of learned Metropolitan Magistrate, who took cognizance of the offence and committed the case to the Sessions Court since the offence under Section 308 IPC was exclusively triable by the Sessions Court.

4. Charge under Sections 308/34 IPC was framed against the accused to which they pleaded not guilty and claimed trial. Prosecution examined nine witnesses in support of its case. Complainant was examined as PW7. HC Shankar Lal, who had reached the spot while incident was going on and had removed the complainant to G.T.B. Hospital, had been examined as PW3. PW9 ASI Ram Bahadur Singh is the Investigating Officer. PW5 Dr. Parmeshwar Ram had proved the MLC of the complainant as Ex. PW5/A. All the other witnesses are formal in nature being police officials. After prosecution closed its evidence, statements of the accused under Section 313 Cr.P.C. were recorded wherein entire incriminating evidence, which had come on record, was put to them. The case of the accused was that of simple denial. Both the accused claimed that they had been falsely implicated in this case. It was stated that many vehicles were stopped by the Police officials resulting in traffic jam. Drivers of the said vehicles protested against the brutality of the Police. They did not inflict any injury on the person of the complainant. One Amjad was examined as DW1 in their defence. He deposed that

he was present at the spot on 19th May, 2004 at about 10:05 pm. There was a traffic jam at the Shastri Park Red Light. He noticed that some people were quarrelling. Accused were also present there but they did not quarrel with anybody.

5. Learned Trial Court found the testimony of complainant PW7 trustworthy and reliable and sufficient enough to conclude that it is the appellants who had assaulted the complainant on 19th May, 2004 at Shastri Park Red Light at about 10:30 pm. Jamalu had given iron rod blow on the head of the complainant, whereas Vakeel had given fist blows. Both the accused had assaulted the complainant in furtherance to their common intention causing such injuries on the person of the complainant that had they caused death of the complainant they would have been guilty of culpable homicide not amounting to murder. Learned Trial Court was of the view that since the complainant was hit on his head by an iron rod ingredients of offence under Sections 308/34 IPC were attracted even though the injuries were opined as simple. Statement of DW1 Amjad was not preferred against the unshattered testimony of the complainant, duly corroborated by PW3 HC Shankar Lal, inasmuch as, DW1 in his cross-examination had admitted that he did not tell the Police officials that accused were innocent.

6. I have perused the statements of PW7 and eye witness PW3 and find them to be trustworthy and reliable to conclude that the accused in furtherance to their common intention had assaulted

the complainant PW7 resulting simple injuries on his person. PW3 and PW7 have corroborated each other on material points. PW7 has categorically deposed that on 19th May, 2004 at about 10:15 pm he was returning home from his duty on his scooter no. DL5-S-J-3399 via Shastri Park and when he reached at Shastri Park Red Light he noticed a truck no. HR-38-J-3936 coming from opposite direction. Truck was driven by Jamlu at a high speed. Thus he was forced to stop his scooter. Truck also stopped near his scooter. He asked Jamalu as to why he had stooped his truck at which Jamalu got down from his truck. Vakeel, who was present in the truck, also got down. They scuffled with him. Jamalu gave an iron rod blow on his head while Vakeel gave him fist blows. From the nearby Police Picket HC Shankar Lal came there and removed him to G.T.B. Hospital. His this statement is in line with the prosecution story as set out in the FIR. His this version has remained unshattered in his cross-examination. PW3 has corroborated the version of PW7 by saying that on 19th May, 2004 he was posted at Police Station Seelam Pur and was on duty at Red Light, Shastri Park between 5 pm to 10 pm. On hearing noise of quarrel at Shastri Park Red Light at about 10:05 pm he reached there and saw Jamalu and Vakeel beating PW7 Constable Nand Kishore. That apart, recovery of an Iron rod from the truck pursuant to the disclosure statement of Jamalu also corroborates the version of PW3 and PW7. PW7 has identified so recovered iron rod which is Ex.P2. I

do not find any reason to disbelieve PW3 and PW7 more so, when accused have failed to show any previous enmity or rouse between them and the complainant/injured. There is no reason as to why PW7 would falsely implicate the accused more so, when no malafide or bias has been alleged against the PW-7. In my view, testimony of PW3 and PW7 has rightly been accepted by the Trial Court. From their testimonies it is clear that both the accused were sharing common intention and in furtherance to their common intention they had assaulted the complainant PW7 Nand Kishore and caused injuries on his person.

7. Now, it has to be seen as to whether the act of the accused causing injuries on the person of PW7 attracts the ingredients of offence under Section 308 IPC. Bare perusal of Section 308 IPC clearly indicates that in order to constitute an offence under the said provision it has to be proved that the act was committed by the accused with the intention or knowledge to commit culpable homicide not amounting to murder and that the offence was committed under such circumstances that if the accused, by that act, had caused death he would have been guilty of culpable homicide. Intention or knowledge, on the part of the accused, is to be deduced from the circumstances in which injuries have been caused as also the nature of injuries and the portion of the body where such injuries were sustained by the victim.

8. In Ved Kumari and Anr. Vs. State and Anr. reported in 96 (2002) DLT 820, it has been held that in order to constitute

offence under Section 308 IPC it must be proved (i) that the accused committed an act; (ii) that the said act was committed with the intention or knowledge to commit culpable homicide not amounting to murder and (iii) that the offence was committed under such circumstances if the accused by that act had caused death he would have been guilty of culpable homicide. It was further ruled that intention is a question of fact which is gathered from the acts committed by the accused and knowledge means awareness of the consequences of the act. In *Sunder vs. State* reported in Manu/DE/0331/2010 similar view has been taken. It was held that in order to succeed in a prosecution under Section 308 IPC, the prosecution is required to prove that injury was caused by the accused with such intention or knowledge and under such circumstances, that if it had caused death, the act of the appellant would have amounted to culpable homicide not amounting to murder. In the said case also quarrel erupted all of a sudden and was not a pre-planned manner one. In these circumstances, the court found accused guilty of offence under Section 323 IPC for having caused simple hurt to the injured.

9. In the facts of this case, it is clear that a quarrel broke out between accused and the complainant all of a sudden wherein, in a fit of rage, accused assaulted the complainant/injured. In the facts of this case, it cannot be said that assault was pre-

meditated. Perusal of Ex.PW5/A indicates that complainant PW7 was having clean lacerated wound on the right parietal region measuring 2 x 0.2 mm and tenderness in the right hip joint. As per PW7, only one iron rod blow was given. Injuries have been opined as simple caused by a blunt object by Dr. Divya Jyoti. No bony injury was found as per PW6 Dr. Suchi Bhatt. PW7 was not admitted in the hospital and was discharged after medical aid. Merely because injury was found on the head of the complainant by itself would not be sufficient to hold that such injury was caused with the intention to cause culpable homicide not amounting to murder. In my view, nature of injuries and the circumstances in which the same had been caused clearly indicate that there was no intention or knowledge on the part of the accused to cause such injury which would have resulted in the death of the complainant. In my opinion, no material was available before the learned Additional Sessions Judge, to conclude that ingredients of offence under Section 308/34 IPC were attracted.

10. However, prosecution has succeeded in proving that the accused, in furtherance to their common intention had caused simple hurt to the complainant PW7, therefore, in my view, appellants are liable to be convicted under Section 323/34 IPC. Accordingly, I acquit the appellants under Section 308/34 IPC and convict them under Section 323/34 IPC.

11. Jamalu has suffered incarceration for more than a year;

whereas Vakeel has remained in jail for about four months. Keeping in mind the nature of the offence, I deem it appropriate to sentence the appellants to the period already undergone by them. Appeal is disposed of in the above terms.

12. Copy of this order be sent to the Jail Superintendent for compliance and also for serving upon the accused.

A.K. PATHAK, J.

August 16, 2010

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