

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

+ **CRL. APPEAL. 267/2001**

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Reserved on: 2nd November, 2010

Decided on: 13th December, 2010

PREM SINGH

..... Appellant

Through: Mr. Pardeep Kumar Arya, Mr. Narender
Kumar Arya, Mr. Anuj Tomar and Mr. Shobit
Mittal, Advocates.

versus

STATE GOVT. OF N.C.T. OF DELHI

..... Respondent

Through: Mr. Manoj Ohri, APP for the State with ASI
Attar Singh, PS Lodhi Colony, New Delhi.

AND

+ **CRL.A. 273/2001**

VIKAS

..... Appellant

Through: Mr. Pardeep Kumar Arya, Mr. Narender
Kumar Arya, Mr. Anuj Tomar and Mr. Shobit
Mittal, Advocates.

versus

STATE GOVT. OF N.C.T. OF DELHI

..... Respondent

Through: Mr. Manoj Ohri, APP for the State with ASI
Attar Singh, PS Lodhi Colony, New Delhi.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment?

Not necessary

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported
in the Digest? Yes

MUKTA GUPTA, J.

1. On 17th May, 1999 at about 10.12 a.m. a wireless message was received in police station Lodhi Colony regarding a quarrel at Jhuggi No. 428 JNS South Gate near nala. On reaching the spot Head Constable Rati Ram along with Constable Amar Singh found that the injured persons had been taken to AIIMS hospital. At the hospital they met injured Rajia and Israfi admitted there. On the doctor declaring the injured persons fit for statement, statement of Rajia was recorded. In her statement Rajia alleged that at about 10 a.m. all the accused persons namely Prem Singh, Govinda, Bhaleru and Vikas came near her jhuggi and started constructing a new jhuggi just adjacent to hers. She asked them not to construct jhuggi as it was a government land. In the meantime, her husband Ibrahim came who also asked them not to construct the jhuggi. Then all these 3-4 persons assaulted her and her husband. Prem Singh and Govinda caught hold of her and Bhaleru gave a danda blow on her head because of which blood oozed from her head. Govinda and Bhaleru gave slap, fist and danda blow to her husband. She also stated that in the

meantime, Israfi intervened to save them who was given slap, fist and danda blow by Vikas and Prem Singh. On the basis of the statement of Rajia and in view of the MLCs of the three injured, a case punishable under Section 308/34 IPC was registered. The accused persons were arrested and the charge sheet was filed. After trial, all the accused were convicted for offence punishable under Section 308/34 IPC and awarded sentence of rigorous imprisonment for a period of three years and a fine of ₹2,000/- out of which half of the fine realized was to be paid to the injured persons in equal proportion. In case of default in making the payment of fine they were to undergo simple imprisonment for three months each. This judgment of conviction and order of sentence is impugned in the present appeals. Co-accused Bhaleru and Govinda had also filed the appeal against the impugned judgment being Crl. Appeal No.268/2001 before this Court. However, on bail being granted to them, they jumped the same and were not available despite issuance of non-bailable warrants. Thus the order of suspension of their sentences was withdrawn and the appeal was dismissed vide order dated 10th February, 2009.

2. Learned counsel for the Appellants contends that as per the testimony of the witnesses before the Court, Bhaleru gave danda blow on the head of PW3 Rajia. PW3 in her testimony has not attributed any role to the

Appellants. She has stated that when Bhaleru gave a lathi blow on her head, she tried to ward it off by placing her hand on the head because of which she sustained injuries on her hand as well as her fingers. Her husband reached only after she received the injuries and by then all the accused persons had run away from there. She also states that her brother in law had tried to intervene but by that time the accused persons had left the spot. This version of the PW3 about the absence of PW4 and PW6 is also corroborated by the MLC as there is no injury either on her husband Ibrahim or the brother in law Israfi except abrasions. Despite public persons being there no independent witness has been examined. Ibrahim PW4 and Israfi PW6 have contradicted each other and the testimony of PW3. In view of the discrepant testimony of the witnesses they are entitled to be acquitted.

3. Learned APP, on the other hand, contends that the testimony of PW4 Ibrahim and PW6 Israfi is categorical. PW4 stated that the accused persons present in the Court came near his jhuggi and tried to grab the said place by erecting a new jhuggi. When he protested saying that it would block his way leading to his jhuggi they threatened him that they would erect the jhuggi even up to his gate. They abused and asked him whether the land belongs to his father. He also stated that he was caught by the collar and given beating. One of the accused persons gave lathi blow to his wife on her head because of

which she became unconscious. Similarly, PW6 Israfi has also stated that on 17th May, 1999 at about 10.00 a.m. when he was returning to the jhuggi of his brother he saw Prem Singh assaulting his brother with lathi and when he tried to intervene he was also beaten. At the instance of Appellant Vikas a danda was recovered from a nearby nala which was taken into possession vide memo Ex. PW4/E. Thus, according to the learned APP the prosecution has proved its case beyond reasonable doubt and the appeals deserve to be dismissed.

4. I have heard learned counsel for the parties and perused the records. PW3 in her testimony before the Court has identified all the accused persons which include the Appellants Prem Singh and Vikas, to have come on that day and tried to erect a jhuggi adjacent to her jhuggi blocking her entrance. She states that they abused and quarreled with her. Bhaleru gave a lathi blow on her head and when she tried to ward off the same with her hand she sustained injuries on her hand as well as on her fingers. PW4 Ibrahim, husband of PW3 also deposes about the presence of the accused persons at the spot. This witness has stated that all accused persons gave beatings to him. He attributes to the Appellant Prem Singh, the lathi blow given on the head of his wife. PW6 Israfi, brother-in-law of PW3 who had also tried to intervene was beaten as is evident from his MLC. He identifies the Appellant Prem

Singh assaulting his brother with lathi. Though PW3 Rajia has stated in her testimony that her husband and brother-in-law reached only when the accused have left, however, this fact is not corroborated by the testimony of PW4 Ibrahim and PW6 Israfi her brother in law. Both these witnesses are injured witnesses. The MLC of PW4 and PW6 depicts that they had reached the spot when quarrel was going on and as they intervened they received injuries in the form of abrasions. Thus, reading the testimony of these witnesses together it is evident that all the four accused came to the spot and wanted to erect a jhuggi in front of the jhuggi of Smt. Rajia and Ibrahim which was objected to. Whereafter a quarrel started and Bhaleru gave a danda blow on the head of Smt. Rajia. In the meantime PW4 Ibrahim and PW6 Israfi also reached and they also received injuries.

5. The Appellants have been convicted for offence punishable under Section 308 read with 34 IPC. The incident had taken place on the spur of moment when a verbal fight ensued between Rajia and accused persons on the issue of erection of a jhuggi adjacent to her jhuggi. Danda blow was given by accused Bhaleru on the head of the injured Rajia. This version of PW3 is corroborated by her MLC Ex. PW8/3 which shows lacerated wound on the left side scalp and swelling, tenderness on right index finger. As per the MLC the injuries to all the three injured are simple in nature. It is only the act of

giving a danda blow on the head of Smt. Rajia by Bhaleru which can be termed to be an act caused with an intention or knowledge that if by that act death is caused the accused would be guilty of culpable homicide. The Appellants before this Court are Prem Singh and Vikas. Though, the common intention can be formed on the spot itself, however, from the facts of the case it is evident that there was no pre-meditated assault by the Appellants and their co-accused. The present case is a case where parties had a quarrel for erecting jhuggi and abuses were hurled and in that process Bhaleru gave a danda blow on the head of PW3. No overt act is attributed to either Prem Singh or Vikas for the lathi blow given on the head of PW3 by accused Bhaleru. The acts of omission and commission attributable to the Appellants in furtherance of the common intention can be for causing simple hurt. Thus the prosecution has not been able to prove its case beyond reasonable doubt against Appellants Prem Singh and Vikas for the offence punishable under section 308/34 IPC.

6. The testimony of witnesses specially PW4 and PW6 proves that the Appellants caused simple hurt to them in furtherance of the common intention. The Appellants were charged for offences punishable under Section 308/34IPC for causing such bodily injury on the person of Smt. Rajia in furtherance of the common intention, that if such act had caused death of

Rajia the Appellant would have been guilty of causing culpable homicide not amounting to murder. The second charge that was framed against the Appellants and the co-accused persons was under Section 323/34IPC for voluntarily causing simple hurt in furtherance of the common intention to Ibrahim/PW4 and Ishrafi/PW6. The learned Trial Court convicted the Appellants and the co-accused person for offence punishable under Section 308/34 IPC, that is, for the act in pursuance whereof injury is caused on the person of Smt. Rajia. Though the learned Trial Court considered that the prosecution evidence showed that PW4 and PW6 suffered simple injuries. However, the Appellants were not convicted of the said offence. Thus, the Appellants are deemed to be acquitted of the charge for offence under Section 323/34 IPC. The State has not preferred an appeal against the said acquittal. The issue thus required to be answered is that in the absence of an order of conviction for the charge for the offence punishable under Section 323/34 IPC for voluntarily causing simple hurt to Ishrafi and Mohd. Ibrahim in furtherance of common intention, whether this Court taking this as a minor offence of a separate charge under Section 308 read with Section 34 IPC can convict the present Appellants. Section 222(2) of the Code of Criminal Procedure, 1973 provides that when a person is charged with an offence and the facts proved reduces it to a minor offence he may be convicted of the

minor offence although he is not charged with it. Thus, the major and the minor offence must have the main ingredients in common. The facts proved, should constitute a minor offence. When the facts required to be proved in the two offences are different, the later cannot be said to be a minor offence of the prior. In this case the Appellants were charged for the major offence, that is, under Section 308 read with Section 34 IPC relating to the bodily injury caused to Rajia in furtherance of their common intention and that if by the said act they had caused death of Razia they would have been held guilty for culpable homicide not amounting to murder. However, the facts proved in the present case are that the Appellants in furtherance of their common intention voluntarily caused simple hurt to Ishrafi and Mohd. Ibrahim. This cannot be said to be a minor offence of the major offence charged as the facts required to be proved by the prosecution case in both the charges were different, that is, in one bodily injury and intention of causing such injury to Rajia whereas in the later voluntarily causing simple hurt to Ishrafi and Mohd. Ibrahim. Thus in the absence of an appeal against the said judgment this Court cannot convict the two Appellants for the offence punishable under Section 323/34 IPC.

7. For the reasons stated the Appellants are acquitted of the charge punishable under Section 308/34 IPC. The appeals are according allowed. The bail bond and the surety bond are discharged.

(MUKTA GUPTA)
JUDGE

DECEMBER 13, 2010/mm