

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

Crl.A.No.70/2005

% Reserved on: 05th March, 2010
Date of Decision: 09th March, 2010

RAM AVTAR Appellant
! Through: Mr. Mukesh Kalia, Adv.

versus

\$ THE STATE Respondent
^ Through: Mr. Jaideep Malik, APP

Crl.A.No.07/2005

GIRJA SHANKER Appellant
! Through: Mr. Mukesh Kalia, Adv.

versus

\$ THE STATE Respondent
^ Through: Mr. Jaideep Malik, APP

Crl.A.No.65/2005

KAILASH CHAND Appellant
! Through: Mr. Mukesh Kalia, Adv.

versus

\$ THE STATE Respondent
^ Through: Mr. Jaideep Malik, APP

Crl.A.No.60/2005

RAM CHANDER Appellant
! Through: Mr. Mukesh Kalia, Adv.

versus

\$ THE STATE Respondent
^ Through: Mr. Jaideep Malik, APP

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

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

: V.K. JAIN, J.

1. This are four appeals against the Judgment dated 27th November and Order on Sentence dated 2nd December 2004, whereby the appellants were convicted under Section 307/323/201 of IPC read with Section 34 thereof and appellants Ram Avtar and Ram Chander were sentenced to undergo RI for seven years each and to pay fine of Rs.5000/- each or to undergo RI for six months each in default whereas the appellants Kailash Chand and Girija Shanker were sentenced to undergo RI for four years each and to pay fine of Rs.2,000/-each or to undergo RI for six months each in default. The appellants Ram Chander and Ram Avtar were also

sentenced to undergo RI for six months each and to pay Rs.1,000/- each or to undergo RI for three months each in default, whereas the appellant Kailash Chand and Girija Shanker were sentenced to undergo RI for three months each and to pay fine of Rs.500/-each or to undergo RI for one month each in default under Section 323 IPC. No separate sentence under Section 201 of IPC was awarded to the appellants. The sentences were directed to run concurrently.

2. On 17th September, 2001, an information was received at Police Control Room at about 04.00-05.00 pm that there was quarrel amongst 4-5 persons near Inderlok red light. On receipt of this information, the Investigating Officer of this case went to the spot and found a motorcycle parked there. On inquiry, he came to know that the injured had been taken in an auto-rickshaw. At about 7.00 pm, the complainant Vikas Kumar came to Police Post Inderlok and lodged an FIR. He alleged that his friend Avinash @ Babloo was married to the younger daughter of Ram Avtar, with whom he had a love affair and that had annoyed Ram Avtar and his family. He further alleged that on that day, Ritu called Avinash on telephone and asked him to come to Inderlok where she was

staying with her sister, so that the matter could be resolved with her brother and father who also were to come to Inderlok. Both of them reached the park near Inderlok red light and were waiting there when Ram Avtar, his brother Ram Chander, his father Girija Shanker and another person unknown to him came there and started beating Avinash @ Babloo. Ram Chander held Avinash, whereas Kailash gave fist and leg blows to him. Ram Avtar picked up a brick lying on the spot and started causing injuries on the head of Avinash. The fourth person was giving fist and leg blows to Avinash from his back. When the crowd gathered there, the assailants took Avinash with them in an auto-rickshaw saying that he was their brother-in-law. He further stated that from the spot, he went to the house of Avinash to inform his family members and when he came back to the spot and found the motorcycle to be missing. The Police Constable, who was present on the spot, told him that the motorcycle had been taken to Inderlok Police Post, whereupon he reached the Police Post and reported the matter to the police.

3. The prosecution examined 19 witnesses in support of its case. Two witnesses were examined in defence.

4. PW-1 Bhartu, PW-2 Sham Lal and PW-3 Khem Chand who were stated to be eye-witnesses of the incident, supported the prosecution in their examination-in-chief and stated that one of the boys sitting under the tree was beaten by four persons, two of whom were the accused Ram Avtar and Ram Chander present in Court, they did not support the prosecution during their cross-examination. PW-1 Bhartu and PW-3 Khem Chand claimed that they themselves did not see the incident taking place. PW-1 had also claimed that during examination-in-chief, he identified the accused persons at the instructions of the Investigating Officer. In his cross-examination, PW-2, Sham Lal claimed that he cannot identify any of the four assailants, who were beating the boy. He also claimed that in his examination-in-chief, he had identified the accused persons at the instance of Investigating Officer. Similar claim was made by PW-3 Khem Chand. PW-10 Sudhir Sharma is the brother of Avinash. He stated that the accused persons were not happy with Avinash as he had married the sister of Ram Chander.

5. PW-15 Vikas Kumar is the key witness of prosecution in this case. He has stated that Avinash was his business

partner and brother-in-law of the appellant Ram Avtar. He stated that Avinash was having a love affair with the sister of Ram Avtar and had married with her in a temple. According to him, on 17th September, 2001, Avinash came to his office at about 10.30 am and informed him that he had received a telephone call from Ritu, sister of Ram Avtar asking him to come to MCD park, Inderlok as her family members were coming forward for the purpose of compromising the matter. He accordingly went to the park with Avinash on a motorcycle. After about 14 minutes of their reaching the park, all the four accused also reached there. The accused Ram Chander caught hold of Avinash from the front side, by embracing him, whereas the accused Kailash started kicking and giving fist blows to him. A piece of brick was lying near the spot. Accused Ram Avtar picked that piece of brick and started hitting on the head of Avinash. When he tried to intervene, accused Girija Shanker gave beating to him. In the meantime, a lot of crowd gathered there on the spot. Thereupon, the accused persons caught an auto-rickshaw from the spot and took Avinash with them saying that he was their brother-in-law. He further stated that after this incident, he went to the house of Avinash

to inform his family members and from there he came back to the spot with his mother and landlord. On reaching the spot, he found the motorcycle of Avinash missing. A Constable, who was present on the spot, informed them that the motorcycle had been taken to Police Post Inderlok. They then went to the Police Post, where he lodged an FIR Ex.P-15/A. He also claimed that one brick piece stained with blood was seized by the IO from the spot in his presence. According to him, from the spot, they came to RML Hospital where Ram Avtar and Ram Chander were found outside casualty and were arrested by the police. The shirt of Ram Avtar, which was having bloodstains on it, was seized by the police. The witness has identified the shirt of Ram Avtar Ex.P-1 and the piece of brick Ex.P-2.

6. PW-17 Ritu Sharma is the wife of injured Avinash. She stated that on 17th September, 2001, Vikas had come to her house on a motorcycle and told her husband that the money, which he owed to him, would be returned to him that day and he took Avinash with him on his motorcycle. She further stated that at about 3.00 pm, she received a telephonic call from Vikas informing her that her husband had met with an

accident. According to her, when she reached the hospital, her husband was found admitted there.

7. PW-19 Shri Inderjeet Singh, Additional Rent Controller, stated that the appellant Girija Shanker was produced before him in a muffled face when he was working as Metropolitan Magistrate, Delhi and had refused to join Test Identification Parade vide his statement Ex. P-19/C

8. In their statement under Section 313 Cr.P.C., the appellants denied the allegations against them and claimed that they have been falsely implicated in this case.

9. DW-1 Shanker Dayal is the brother of appellant Girija Shanker. He stated that the other appellants are not known to him and are not related to them. DW-2 Tej Pal Sharma has stated that on 17th September, 2001, the appellant Kailash had performed *shrath* of his grandfather at their residence in village Kakola.

10. During the course of arguments before this Court, the learned counsel for the appellants did not dispute conviction of the appellants under Section 323 of IPC read with Section 34 thereof. He, however, contended that no offence under Section 307 of IPC was made out against any of them.

11. In order to succeed the prosecution was required to prove (i) that the death of Avinash was attempted, (ii) that his death was attempted to be caused by or in consequence of the act of the appellant and (iii) that such act was done with the intention of causing death or that it was done with the intention of causing such bodily injuries as the appellant knew to be likely to cause death or were sufficient in the ordinary course of nature to cause death. Although the nature of injury may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances. What the court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under the circumstances mentioned in the section. The intention of the assailants can be gathered from the motive for the crime, nature of weapon used, number of blows given by him, severity of blow and the parts of the body where the injuries are inflicted and other surrounding circumstances, if any.

12. The testimony of PW-15 Vikas shows that the injured Avinash was called to the place of this incident on a false pretext of resolving the disputes that had arisen between him

and the family of his wife Ritu on account of his marrying Rity without their consent. This clearly indicates pre-planning on the part of the appellants and it cannot be disputed that the intention behind calling Avinash to the park was to cause harm to him. The next question which then arises is as to what harm the appellants intended to cause to Avinash. He was called to a public place and not to a secluded spot. The injured was called there in day time and not at odd hours in the night. Admittedly, none of the appellants was armed when they reached the park. Admittedly, brick, which was used for causing injuries to Avinash, was not a whole brick, but was only a piece of it, which happened to be lying on the spot. This is not the case of the prosecution that any of the appellants continued giving beatings to Avinash even after blood has started oozing out from his head. In fact, PW-15 has specifically stated that after Avinash started bleeding, that ended the incident. Admittedly, immediately after Avinash started bleeding, the appellants took him to RML hospital. Admittedly, it was the appellant Ram Avtar who donated blood to the injured Avinash in RML hospital. All these facts and circumstances of the case clearly indicate that none of the

accused intended to commit murder of Avinash. Had their intention been to murder Avinash, he would have been called to some secluded place and not in a public park near traffic light, which is a public place and where other persons are always expected to be present, particularly during day hours. Had their intention been to commit murder of Avinash, they would have called him at some odd hour in the night and not during day time. Had the intention of the appellant been to take his life, they or at least some of them would definitely have been armed when they came to the park. They will not be expecting a piece of brick to be lying in the park, for being used as a weapon of offence. All the four appellants being unarmed while coming to the park is a strong indicator that they did not intend to kill him. Had their intention been to kill Avinash, they would not have stopped immediately after Avinash started bleeding. They would rather have continued causing injuries to him and would have seen to it that he was finished there and then. This is not the case of the prosecution that either PW-11 or anyone from the public had stopped the appellants from causing further injuries to Avinash. PW-11 is quite specific in saying that the incident ended the moment

Avinash started bleeding.

13. The testimony of PW-7 Dr. Shyam Gopal, who examined the injured in RML hospital on 17th September, 2001, coupled with the MLC prepared by him shows that two clean lacerated wounds, one on the right side of the scalp approximately 1.5” inside and the other with swelling on the left scalp were found to have been caused to him. Neither width nor depth of the wound found on the right side of the scalp has been given in the MLC which indicates that brick blow was not given with much force. Had the brick blow been given using a substantial force, the wound would have been deep injury scalp and in that case depth of the wound would have been noticed by the doctor and noted on the MLC. Since no size of wound with swelling on the left scalp has been given, the inference is that this wound was a minor one. Had it been a serious, its dimensions as well as depth would have been noticed and given by the doctor on the MLC prepared by him. This is yet another circumstance which shows that this was not the intention of even Ram Avtar to cause death of Avinash or to cause such injury to him as he knew to be likely to cause death or as would, in ordinary course, have been sufficient to

cause death. Had the intention of the appellants been to commit murder of Avinash, instead of taking him to hospital, they would have taken him to a convenient place where they could cause more injuries to him and finish his life. The very fact that they took him to RML hospital leaves no reasonable doubt that they did not intend to take his life. Rather they were keen to save his life by rushing him to hospital. Also, they took him to a Government hospital, which was bound to inform police and not to a private hospital which might or might not have informed the police. The act of the appellant Ram Avtar in donating blood to Avinash is yet another circumstance which shows that they wanted rather to save the life of Avinash instead of taking it away. While giving blood to Avinash in the hospital, the appellant Ram Avtar as well as the other appellant-accused with him would be quite conscious that if the life of Avinash was saved on account of blood being given to him by Ram Avtar, he was likely to cause harm to them by reporting the incident to the police and getting them arrested and prosecuted for causing injuries to him. Therefore, in the facts and circumstances of the case, it is extremely difficult to say that the appellants intended to cause

his death or to cause such injury to him as they knew to be likely to cause his death or which, in the ordinary course of nature, would be sufficient to cause his death. It is true that the part chosen by the appellant Ram Avtar to cause injuries to Avinash was a vital part of his body, but considering the nature of the weapon used by him for this purpose and other facts and circumstances of the case, it will be difficult to accept that the intention was to cause his death or to cause a fatal injury which the appellants knew to be likely to cause death or which would, in the ordinary course, have been sufficient to cause his death.

14. In my view, the facts and circumstances of the case indicate that the intention of the appellants, when they called Avinash to the park, was to cause injuries to him or may be to intimidate him so as to put pressure on him to sever his relations with Ritu. Some arguments must have ensued on the appellants asking Avinash to sever his relations with Ritu. Probably, during the course of arguments and altercation that took place in the park, Ram Avtar got enraged and picked up the piece of brick which happened to be lying in the park and caused injuries using that piece of brick on the head of

injured Avinash. In my view, Ram Avtar, gave brick blow to the injured with such intention or knowledge and under such circumstances, that if he had caused his death, the act committed by him, would have amounted to culpable homicide not amounting to murder, which is punishable under Section 308 of IPC. Had death of Avinash resulted from the injuries caused on his head with a piece of brick, the appellant Ram Avtar would have guilty of culpable homicide not amounting to murder punishable under Section 304 of IPC and his act would not have constituted murder punishable under Section 302 of IPC. Therefore, Ram Avtar is liable to be convicted under section 308 and not under Section 307 of IPC.

15. The appellant Ram Chand had held Avinash when Ram Avtar gave two blows on him using a piece of brick for this purpose. The appellant Ram Avtar did not release Avinash from his clutches even when he saw Ram Avtar picking up a piece of brick for the purpose of causing injury to Avinash. He did not release Avinash even after first blow had been given on his head by Ram Avtar. This clearly shows that Ram Chand also shared a common intention with Ram Avtar to cause injuries on the head of Avinash using a piece of brick for this

purpose. Of course, this common intention between Ram Avtar and Ram Chand seems to have developed on the spot and did not exist when they came to the park alongwith the other appellants. Therefore, the appellant Ram Chand is also liable to be convicted under Section 308 read with Section 34 thereof. Both of them are also liable to be convicted under Section 323 read with Section 34 of IPC.

16. As far as the appellant Kailash Chand and Girija Shanker are concerned, there is no overt act on their part from which it may be inferred that they also shared a common intention with Ram Avtar and Ram Chand to cause injuries on the head of Avinash with a piece of brick lying on the ground. There is no evidence of either of them having exhorted Ram Avtar to pick up the piece of brick lying in the park and give injuries to Avinash using that piece of brick. There is no allegation of either of them having helped Ram Avtar in giving brick blows on the head of Avinash. There is no allegation that they caused any injury to Avinash, after brick blow had been given to him by Ram Avtar. In fact, the entire incident came to know once Avinash started bleeding. Therefore, it cannot be said that either appellant Kailash Chander or the appellant Girija

Shanker shared a common intention with Ram Avtar or Ram Chander to cause injuries to Avinash with such intention of knowledge and under such circumstances that if the injuries had caused death, the act of Ram Avtar would have amounted to culpable homicide not amounting to murder. The appellant Kailash Chander and Girija Shanker can be held guilty only under Section 323 of IPC read with Section 34 thereof for causing simple injuries to Avinash.

17. In order to succeed in a charge under Section 201 of IPC, the prosecution was required to prove the following:

- (1) that an offence has been committed;
- (2) that the accused knew or had reason to believe the commission of such offence;
- (3) that with such knowledge or belief he—
 - (a) caused any evidence of this commission of that offence to disappear, or
 - (b) gave any information respecting that offence which he then knew or believed to be false;
- (4) that he did as aforesaid, with the intention of screening the offender from legal punishment;

The learned Additional Sessions Judge convicted the

appellant under Section 201 of IPC on the ground that they removed the injured from the park where the incident took place. In my view, the view taken by the Trial Court was wholly unjustified. The facts and circumstances of the case, as discussed in the preceding paragraphs, would show that the appellants had taken Avinash to hospital for the purpose of his treatment and not for the purpose of screening themselves from punishment for causing injuries to him. As noted earlier, they took Avinash to a Government hospital which was duty bound to inform the police about Avinash having been brought there in injured condition. Hence, the purpose of taking Avinash to a Government hospital could never have been to save them from punishment, for causing injuries to him. The very fact that one of the appellants gave blood to him in the hospital is yet another indicator that they wanted to save his life despite knowing it fully well that if his life is saved, that would result in his being a witness against them for the injuries caused by them to him. Therefore, this was not a case of causing disappearance of evidence with the intention of screening the offender from legal punishment. The appellants are, therefore, liable to be acquitted of the charge under

Section 201/34 of IPC.

18. For the reasons given in the preceding paragraphs, the appellants Ram Avtar and Ram Chand are convicted under Section 308/323 of IPC read with Section 34 thereof. The appellant Kailash and Girija Shanker are convicted under Section 323 IPC read with Section 34 IPC. During the course of arguments, I was informed that the appellant Ram Avtar has already spent about 5 years in actual custody, whereas the appellant Ram Chand has spent about 45 months in custody. Taking into consideration all the facts and circumstances of the case, they are sentenced to undergo imprisonment for the period already spent by them in custody and are further sentenced to pay a fine of Rs.25,000/- each or to undergo SI for three months each in default. No separate sentence is awarded to them under Section 323/34 of IPC. The appellants Girija Shanker and Kailash Chand have also spent about 24 months and 21 months respectively in jail. They are sentenced to undergo imprisonment for the period already spent by them in jail under Section 323 IPC read with Section 34 thereof.

The appellants Ram Avtar and Ram Chander are granted

two weeks time to pay the amount of fine. If they do not pay the amount of fine within that period, they will surrender before the Trial Court to undergo the sentence awarded to them in default of payment of fine. The amount of fine be paid, in equal share, to the mother and wife of the injured, who has expired during pendency of this case.

The record of the Trial Court be sent back alongwith a copy of the judgment for information and compliance.

(V.K.JAIN)
JUDGE

MARCH 09, 2010
BG