

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

+ **Crl. Appeal No. 965/2009**

% Decided on: 22nd January, 2010

Ramesh Appellant
Through: Mr. Vikramjit Saini, Adv.

Versus

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

AND

Crl.A.No.976/2009

Laxman Appellant
Through: Mr. Vikramjit Saini, Adv.

Versus

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

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

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

A.K. PATHAK, J. (ORAL)

1. Appellants have been convicted under Sections 308/34 of the Indian Penal Code (IPC) by the learned Additional Sessions Judge (North-West-04), Rohini, Delhi; sentenced to undergo rigorous imprisonment for a period of two years and to pay fine of Rs.3,000/- each and in default of payment of fine to further undergo simple imprisonment for a period of three months. Benefit of Section 428 of the Code of Criminal Procedure (Cr.P.C.) was made available to the appellants.

2. Since both the appeals arise from the same judgment of conviction and order on sentence, these are being decided together.

3. Briefly stated, prosecution case that emerges from the trial court record, is that on 5th July, 2005 at about 9:15 PM injured Zakir Hussain along with his wife Mehroon went to the house of accused Laxman, who was his neighbour, and asked him to return wheel of rickshaw or pay price of same, at which, Laxman became angry and on seeing this, the complainant and injured started moving away from his house. In the meanwhile, accused

Laxman and Ramesh came rushing towards Zakir and started beating to him with *danda* and *saria*. Accused Ramesh was having a *danda*; whereas accused Laxman was having a *saria*. Accused Laxman gave *saria* blow on the head of injured and accused Ramesh gave *danda* blows on other parts of his body. Both the accused, by this act, caused injuries on the person of Zakir Hussain.

4. Information regarding this incident was received in the police station Narela Industrial Area, pursuant whereof DD No. 23-PP was registered and handed over to Head Constable Shiv Kumar, for enquiry, who along with Constable Suresh Kumar, reached M.B. Hospital, Pooth Khurd, Delhi and obtained MLC of injured Zakir Hussain, who was declared unfit for statement. Accordingly, Head Constable Shiv Kumar recorded statement of wife of injured Smt. Mehroon (complainant), pursuant whereof rukka was prepared and FIR No. 338/2005 under Sections 308/34 IPC was registered at police station Narela Industrial Area.

5. Accused Laxman was arrested on 6th July, 2005. He made a disclosure statement and pursuant thereof got recovered the *saria* from his house, which was seized by the Investigating

Officer. Accused Ramesh was also arrested on 6th July, 2005 and made a disclosure statement and got recovered the *danda* from his house which was also taken in possession. Site plan was prepared by SI Ram Chander (Investigating Officer) at the instance of the complainant.

6. After completion of investigation accused Laxman and Ramesh were sent up to face trial, for having committed the offence under Sections 308/34 IPC, by the police station Narela Industrial Area, by filing a charge-sheet under Section 173 Cr.P.C. in the court of learned Metropolitan Magistrate, who took cognizance of the offence and summoned the accused, vide order dated 3rd August, 2005 and after completing the procedural formalities under Section 207 Cr.P.C. committed the case to the Sessions court, vide order dated 8th September, 2006, as the offence under Sections 308/34 IPC was exclusively triable by the Sessions court.

7. Learned Additional Sessions Judge framed charge under Sections 308/34 IPC against the accused on 18th January, 2007 to which they pleaded not guilty and claimed trial.

8. Prosecution examined ten witnesses in all. After prosecution closed evidence, statement of accused Laxman and

Ramesh was recorded under Section 313 Cr.P.C. on 3rd August, 2009 wherein entire incriminating evidence, which had come on record, was put to them, they denied the same and claimed themselves to be innocent. However, no evidence was led by the accused in their defence.

9. Injured Zakir Hussain was examined as PW7 and his wife complainant Smt. Mehroon was examined as PW2, eye-witness of the incident Sh. Sharavan was examined as PW3. However, he did not support the prosecution case and was declared hostile. All other witnesses examined by the prosecution, were formal witnesses being police officials and doctor.

10. Learned Additional Sessions Judge found testimonies of PW2 Mehroon and PW7 Zakir Hussain to be trustworthy, reliable and sufficient enough to prove the incident wherein accused Laxman and Ramesh had caused injuries on the person of PW7 Zakir Hussain by *saria* and *danda*, which they were carrying in their hands. Further, that the testimony of PW7 i.e. injured was corroborated by testimony of PW2.

11. I have perused the statements of PW2 and PW7 and I concur with the learned Additional Sessions Judge that their testimonies are trustworthy and reliable. PW2 and PW7 have

corroborated each other on material points. They are natural witnesses. Merely because one eye witness had turned hostile, by itself, cannot be made a ground to discard the versions of the injured and complainant. FIR was registered on the complaint of PW2 and her testimony in court is consistent with the prosecution story. She had deposed that when her husband asked the accused to pay cost of wheel or return the same, accused Laxman became furious and gave *saria* blow to her husband; whereas accused Ramesh gave *danda* blows to her husband. PW7 has also deposed that when he asked accused either to pay money or return the wheel, he became agitated and started abusing him; that he had hardly moved four/five steps from the house of accused, when accused Laxman and Ramesh started giving him *saria* and *danda* blows. *Saria* was got recovered by the accused Laxman while *danda* was got recovered by accused Ramesh pursuant to their disclosures. Recovery of weapons of offence at the instance of accused also corroborate version of PW2 and PW7 regarding beatings extended by the accused to the injured. PW7 had identified *danda* as well as *saria* in the court. In his cross-examination, PW7 has categorically stated that the *saria* and *danda* were the

same weapons which the accused persons used in assaulting him. There is no reason as to why injured and his wife would implicate accused persons in this case falsely, more so, when no evidence had been led by the accused persons to show any previous enmity or grouse between injured and accused. I am of the view that statements made by PW2 and PW7 are trustworthy and reliable and had been rightly accepted by the learned trial court.

12. Learned counsel for the accused has vehemently contended that there are inherent material contradictions and discrepancies in the statements of PW2 and PW7, therefore, no conviction can be based thereon. PW2 had given the time of incident as 9:00 PM while as per PW7 incident took place at 6:30 PM. According to the learned counsel, this is a material inconsistency. He has further contended that the place of incident is doubtful. As per PW2, incident took place outside the house of accused Laxman; whereas as per PW7 incident took place about four/five steps away from the house of accused Laxman. This, according to learned counsel, is yet another material discrepancy. I do not find any force in this contention of learned counsel for the accused. Admittedly, accused persons

as well as injured were neighbours and were living in the same area. Their houses were also in the same locality. Merely because one witness had said that incident took place outside the house of the accused; while other said that incident took place about four/five steps away from the house of the accused, would not make much difference. This kind of minor discrepancy may arise keeping in mind that both the witnesses were illiterate and their statements had been recorded after about two years of incident. Merely because, time of incident was given by PW7 as 6:30 PM instead of 9:00 PM would also not be sufficient to discard his testimony as a whole. PW2 is the complainant and gave the time of incident as 9:00 PM and her this version is in consonance with the prosecution case, inasmuch as, in the FIR time of incident had been mentioned as 9:15 PM. This fact is also corroborated from the MLC. Be that as it may, in view of this minor inconsistency whole deposition of these witnesses cannot be thrown in the dustbin. So far as incident is concerned, both PW2 and PW7 had corroborated each other with regard to the role played by the accused.

13. From the testimonies of PW2 and PW7, it is clear that both the accused were sharing common intention and in furtherance

of their common intention they had assaulted Zakir and caused injuries on his person.

14. Next question which arises for consideration is as to whether the act of the accused causing injuries on the person of the injured, attract ingredients of offence under Sections 308 IPC. I am of the opinion that in order to constitute an offence under Section 308 IPC, it is 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 had been caused as also the nature of injuries and the portion of body where such injuries were suffered. In this case, it appears that a quarrel broke out between the parties all of a sudden wherein, in a fit of rage, accused persons assaulted injured Zakir Hussain. Thus, it cannot be said that assault was premeditated. As per PW10 Dr. Jai Kumar, the injured had CLW over right temporo parretal region and bleeding was found and the injury was simple in nature. I am of the view that merely

because, an injury is found on the head, it cannot be said that such an injury was caused with the intention to commit culpable homicide not amounting to murder. In my view, in the fact of this case, nature of injury coupled with the circumstances in which the same had been caused shows that there was no intention or knowledge on the part of the accused to cause such injuries, which would have resulted in the death of injured. The material before the learned Additional Sessions Judge, in my view, was not such which could give rise to grave suspicion against the accused persons of their having the intention or knowledge to cause such injuries, that had it caused death of injured, they would have been guilty of culpable homicide not amounting to murder. Thus, I am of the opinion that ingredients of offence under Sections 308/34 IPC are not attracted in this case appellants are entitled to acquittal for this offence. Accordingly, appellants are acquitted under Section 308/34 IPC.

15. However, it is clear from the evidence on record that the appellants, in furtherance of their common intention, had caused simple injuries to the injured Zakir Hussain, therefore, appellants are liable to be convicted under Sections 323/34 IPC, which I do, and convict them accordingly.

16. Appellants are poor rickshaw pullers and their whole family is dependent upon them. It is stated that they do not have previous criminal record. Keeping in mind these facts, I order for release of the appellants on probation on their furnishing personal bonds in the sum of Rs.10,000/- each with one local surety each in the like amount, to maintain peace and good behaviour for a period of one year, to the satisfaction of trial court concerned.

17. Both the appeals are disposed of in the above terms.

A.K. PATHAK, J

January 22, 2010
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