

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

% **Reserved on : 13th August, 2012**
Pronounced on : 30 August, 2012

+ **CRL.A.880/2010**

JOGINDER @ MALOHRI & ANR. Appellants
Through : Mr. Vikas Pahwa, Senior
Advocate instructed by Mr.
Abhay Gupta, Adv.

versus

STATE Respondent
Through : Ms. Rajdipa Behura, APP for
State.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

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PRATIBHA RANI, J.

1. The appellants Joginder @ Malohri and Manish Kumar have impugned the judgment dated 14.07.2010 and order on sentence dated 16.07.2010 vide which they were convicted for the offence punishable under Section 307/34 IPC for attempt to commit murder of PW-6 Ashok Kumar and sentenced to undergo RI for five years with fine of Rs.2,000/- each. The appellant Manish was also convicted and sentenced under Section 25 Arms Act to undergo SI for one year with fine of Rs.500/- and further under Section 27 Arms Act to undergo SI for three years with fine of Rs.500/- for being in illegal possession of Katta and using the same at the time of incident.

2. The prosecution examined 14 witnesses to prove its case. Both the appellants who are real brothers also examined four witnesses in their defence.

3. After considering the evidence adduced by the prosecution and believing the testimony of the complainant PW-5 Satish Kumar and injured PW-6 Ashok, learned ASJ convicted and
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sentenced both the appellants in the manner referred to above.

4. On behalf of appellants, it has been urged that the learned ASJ could not have given the finding of injury being caused by gun shot on the basis of his own observation when MLC of the PW-6 Ashok was not proved by the prosecution. It has been submitted that the list of witnesses filed by the prosecution is sufficient to establish that prosecution never intended to lead any medical or scientific evidence to prove its case as neither the doctor who prepared the MLC has been named or cited as a witness nor any witness from CFSL has been named or examined to prove the guilt of the appellants.

5. It has been urged that though the MLC is not proved but the MLC placed on record reveals that the injuries have been opined to be simple in nature with no evidence to prove that they have been caused by any pellet or bullet of any fire arm. Even the katta Ex.P1 stated to have been recovered from accused/appellant Manish after one month of the occurrence in another case FIR No.849/2006, could not be connected with this occurrence.

6. Mr.Vikas Pahwa, learned Senior Advocate for the appellants submitted that PW-5 Satish Kumar and PW-6 Ashok stated about bleeding from the injuries suffered by PW-6 Ashok but none of the police witnesses or the complainant (PW-5) and injured (PW-6) could point out whether any blood fell on the floor or anywhere else in the grocery shop to prove that the occurrence had taken place in that shop. Even the blood stained clothes of the injured have not been seized by the doctor or by the IO to prove the occurrence. The comic magazine through which the bullet allegedly pierced was not got examined through Expert as to whether the hole in the magazine was made due to passing of the bullet through it and there was no burn mark on the magazine. PW-5 Satish Kumar and PW-6 Ashok are first cousin and being related to each other, are interested witnesses, hence their

testimony has to be scrutinized with great caution.

7. It has been further contended that in this case, failure of the prosecution to examine any independent witness to prove the occurrence also makes the prosecution's case doubtful especially when the occurrence is stated to have taken place in a residential-cum-commercial area. In the written synopsis, learned Senior Advocate for the appellants has pointed out various contradictions in the statement of PW-5 & 6 and the police witnesses on various aspects to establish that their testimony is not creditworthy to base the conviction of the appellants. While referring to the testimony of defence witnesses, it has been submitted that learned Trial Court failed to appreciate the previous enmity between the complainant and the appellants due to which they have been falsely implicated in this case.

8. In the alternative, it has been submitted on behalf of the appellants that even if it is presumed that the prosecution has been able to prove its case against the appellants, then in view of the nature of injury being simple, at the most, the conviction could be only under Section 324 IPC. Learned Senior Advocate for the appellants has relied upon **Ramsewak & Ors. vs. State of M.P.** (2004) 11 SCC 259; **Sukhwant Singh vs. State of Punjab** (1995) 3 SCC 367; **Kundan Singh vs. State of Punjab** (1982) 3 SCC 213; **Ramesh vs. State of U.P.** (1992) 1 SCC 318; **Dudh Nath Pandey vs. State of U.P.** (1981) 2 SCC 166; **Merambhai Punjabhai Khachar & Ors. vs. State of Gujarat** 1996 CrL.L.J. 2465; and **Dusasan Bhoi vs. State of Orissa** 1996 CrL.L.J. 3806 in support of his contentions.

9. On behalf of State, written synopsis have been filed pointing out that to justify a conviction under Section 307 IPC, prosecution is not required to prove that the injury suffered was capable of causing death. The prosecution is required to establish intention to kill and some overt act in execution of the intention which can be inferred from the circumstances without any reference at all to

actual wounds. Referring to the testimony of PW-5 Satish Kumar and Pw-6 Ashok, learned APP has submitted that their testimony on all material aspects satisfy the role of both the appellants. PW-6 Ashok being injured witness has to be believed by the Court and the complainant being the person who removed the injured to hospital and an eye witness, cannot be disbelieved just on the ground that he is related to the injured. Referring to the discrepancies pointed out on behalf of the appellants, it has been submitted that undue advantage should not be attached to such discrepancies which are bound to occur in the statement of witnesses unless such discrepancies go to the root of the matter.

10. Ms.Rajdipa Behura, learned APP has further submitted that non-examination of the doctor to prove the MLC is not fatal to the case of prosecution as prosecution is only required to prove mens rea and actus reus, which stands proved from the testimony of PW-5 Satish Kumar and PW-6 Ashok as well as Court observation about the injury marks on the body of PW-6 Ashok. The Court has to consider ocular evidence in this regard. It has been further submitted that there was no recovery of bullet, hence, the same could not be sent to CFSL and so far as absence of blackening mark on the Magazine or on the wall is concerned, it was possible only when the fire is from a close range. The prosecution case is that the bullet first hit PW-6 Ashok, then the wall, then the magazine and thereafter the roof, without their being any averment that the shot was fired from a close range, thus, absence of blackening mark does not go against the prosecution's case, hence the impugned judgment may not be interfered with.

11. I have considered the rival contentions. I have also gone through the case law relied upon by learned counsel for the appellants and find that the same have no applicability to the facts of the present case. In the case **Ramsewak & Ors. vs. State of M.P.** (Supra), the observation regarding absence of traces of blood after three incised wounds was in the facts of that

case.

12. So far as judgments ***Sukhwant Singh vs. State of Punjab*** (Supra); ***Kundan Singh vs. State of Punjab*** (Supra); ***Ramesh vs. State of U.P.*** (Supra); and ***Merambhai Punjabhai Khachar & Ors. vs. State of Gujarat*** (Supra) are concerned, it was held that though the MLC is not proved in the case but it is not necessary that injury must be caused to hold the appellant guilty under Section 307 IPC.

13. In the judgment ***Dudh Nath Pandey vs. State of U.P.*** (Supra), it was held that defence witness are entitled to equal treatment with those of the prosecution, about which there cannot be any controversy. But here none of the defence witness is an eye witness whereas in the present case, the conviction of the appellants is maintained on the testimony of injured and another eye witness.

14. The prosecution has placed on record the photographs Ex.PW11/A1 to A5 of the shop where the occurrence has taken place which were taken by PW-11 Ct.Girdhar Singh, the Photographer. These photographs reveal that the place of occurrence is a very small shop and the size is that of a small kiosk. When the photograph Ex.PW11/A1 & A5 are seen alongwith site plan Ex.PW12/F prepared by the IO, the point 'A' where the injured Ashok was standing is just the entry point of the shop which is in the gali. Point 'B' where the position of appellants is shown is again at the entry point very close to point 'A' whereas position of complainant Satish Kumar who was sitting at the counter is in the middle of the shop. Thus, the submission of learned APP for State that the blackening could be possible only when the firing is from a close range has to be rejected as points 'A' and 'B' are so close to each other that the person standing at points 'A' and 'B' could shake hands without moving from their place. The marks shown on the wall in the photograph Ex.PW11/A4 have not been proved to be caused on being hit by a

bullet. Even otherwise, if the place of occurrence is a small shop and the bullet hit the wall, it would have been embedded in the wall after being fired from such a close range and if, for some reason it again fell from there, the occurrence being reported to the police immediately, the bullet should have been recovered from the spot. Thus, it is a case where despite the occurrence taking place in a very small shop and firing from a close range, neither the bullet has been recovered nor any blood can be seen on the floor.

15. It is admitted case of the prosecution that the MLC of Ashok has not been proved to establish that the injuries suffered by him were caused due to the gun shot. I have perused the MLC placed on record which is partially carbon copy i.e. the portion which might have been written by the doctor examining the patient is a carbon impression whereas the particulars of the patient and thumb mark as well as the nature of injury is in original. Surprisingly, even name of the hospital is not printed or stamped. Even the time of arrival of the patient in the hospital is not recorded. There is no explanation given by the prosecution as to why the doctor was not cited as a witness to prove that the injuries suffered by PW-6 Ashok were caused by fire arm. In para 31 of the impugned judgment, the learned ASJ has opined as under :-

'31. At the time when PW6 appeared before the court for his statement it was observed by the Court that he had sustained injury at two point on his arm. There is evidence on record that accused uttered "aaj inko pahara pada de, maar goli".'

16. To my mind, by merely seeing a wound mark, the learned ASJ could not have arrived at the above conclusion as merely by seeing the marks of the injury, he could not have opined as to what was the age of the injury and whether it could be caused by fire arm. This finding of learned ASJ being based on no evidence is liable to be set aside.

17. Section 307 IPC read as under :-

'307 Attempt to murder :- Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offence shall be liable either to (imprisonment for life), or to such punishment as is hereinbefore mentioned.'

18. From bare reading of provisions of Section 307 IPC, it is clear that in order to prove the guilt, the prosecution is not required to prove the injuries.

19. From the testimony of PW-5 Satish Kumar and PW-6 Ashok, it is proved that the appellants visited the spot and there was some hot words exchange at the shop and there was a fire by appellant Manish. Irrespective of the fact whether due to the fire PW-6 Ashok suffered injuries or not, the necessary intention and knowledge to satisfy the ingredients of Section 307 IPC stands satisfied. Merely because on the MLC which is not even printed, the injury has been opined as simple is also no ground to make it a case under Section 324 IPC as it is the prosecution's case that the appellants, in furtherance of their common intention, fired on PW-6 Ashok.

20. In the case In ***Ratan Singh Vs. State of M.P. & Anr.*** 2009 (12) SCC 585, their Lordship's held that :

'whether the accused is possessed of the intention to commit an offence punishable under Section 307 IPC or not has to be gathered from the facts and circumstances surrounding the offence'.

21. In another case ***Sarju Prasad v. State of Bihar*** AIR 1965 SC 843 in para 6 observed that :

'mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not by itself to take it out of the purview of Section 307 IPC.'

22. The Hon'ble Supreme Court in the case **State of Maharashtra v. Balram Bana Patil**, 1983 CrI.J 331 had observed:

'9. To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention on the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its results, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.'

23. In the instant case, the presence of PW-5 Satish Kumar at the time of occurrence is also established from the fact that he has removed the injured to the hospital which fact has been proved not only by PW-5 Satish Kumar and PW-6 Ashok but also by the police officials including the IO. The statement of PW-5 has been recorded in the hospital by the IO, hence his presence at the spot is not doubtful.

24. In the case **Akhtar & Ors. Vs. State of Uttaranchal** (2009) 13 SCC 722 their Lordship's held that :

'Credence to the testimony of injured eye witnesses is to be given since his presence at the scene of crime is seldom doubtful.'

25. In another case **Surender Singh Vs. State of Haryana** 2006 I AD (SC) 389 the Court has opined that :

'9. The testimony of an injured witness has its own relevancy and efficacy. The fact that the witness is injured at the time and in the same occurrence, lends support to the testimony that the witness was present during occurrence and he saw the happening with his own eyes.

10. In view of the overwhelming evidence on record and the fact that the intention of the Appellant to cause injuries which if death would have been caused, he would be guilty of murder, was evident from the fact that the injuries were caused with a sharp weapon on the vital parts of the body, the prosecution has proved its case beyond reasonable doubt. Thus, the conviction of the Appellant for offence punishable under Sec. 307 IPC by the learned Trial Court is fully justified.'

26. Thus, it is settled that the testimony of the injured has to be given due credence and here in the present case, the testimony is duly supported by another eye witness PW-5 Satish Kumar regarding the occurrence and merely because he is related to PW-6 in itself is no ground to discard his version.

27. From the testimony of PW-5 Satish Kumar and PW-6 Ashok, the prosecution is able to prove that both the appellants, in furtherance of their common intention, fired at PW-6 Ashok, hence the conviction recorded by learned ASJ for the offence punishable under Section 307/34 IPC need not be disturbed.

28. The appellants were sentenced under Section 307/34 IPC to undergo RI for five years with fine of Rs.2,000/- each. Appellant Manish was also convicted and sentenced under Section 25 Arms Act to undergo SI for one year with fine of Rs.500/- and further under Section 27 Arms Act to undergo SI for three years with fine of Rs.500/-. It is pertinent to note here that in respect of Arms Act, case FIR No.849/2006 was registered at PS Malviya Nagar against appellant Manish Kumar. A separate chargesheet was filed in that case. When PW-4 Ct. Nitin was partly examined on 27.09.2007, a submission was made by learned APP to the effect that case under Arms Act should also be tried with this case. However, the Trial Court Record thereafter is silent as to why the

case FIR No.849/2006 PS Malviya Nagar was not tried alongwith this case. In this case, no medical or scientific evidence was adduced by the prosecution to prove that the injuries suffered by PW-6 Ashok were due to gun shot. The prosecution also failed to prove that the katta stated to have been recovered from Manish was used in the occurrence.

29. The judgment has been pronounced by learned Trial Court in case FIR No.764/2006 PS Malviya Nagar without taking care of the fact that conviction under Arms Act has been recorded without that case being subject matter of trial before learned ASJ. Conviction has been recorded only on the statement of PW-4 Ct.Nitin who was a witness in case FIR No.849/2006, PS Malviya Nagar which statement remained unsupported and uncorroborated. Even the original documents/memos prepared in this case were not produced before learned ASJ during trial of case FIR No.764/2006 and in the statement of PW-4 Ct.Nitin only, the photocopy of the sketch and the seizure memo was exhibited. There is no opinion of Ballastic Expert regarding use of katta or medical evidence to prove that the injuries suffered by PW-6 were caused by katta. On being questioned by the Court regarding the fate of case FIR No.849/2006, PS Malviya Nagar, learned APP has placed on record the copy of the proceedings dated 29.06.2011 whereby the application filed by accused Manish under Section 300 CrPC was allowed and he was ordered to be released in the case FIR No.849/2006, PS Malviya Nagar in view of his conviction being recorded in case FIR No.764/2006, PS Malviya Nagar.

30. The conviction of the appellant Manish under Section 25/27 Arms Act being recorded only on the statement of PW-4 Ct. Nitin which has remained unsupported or uncorroborated on all material aspects and even without that case being sent for trial before learned ASJ, has to be set aside. Hence, appellant Manish is acquitted of the charge under Sections 25/27 Arms Act.

31. It is established from the record that the appellants and the

complainant injured are neighbours but relations are not cordial.

32. Both the appellants are real brothers. In the order on sentence by learned ASJ, it has been recorded that appellant Joginder was aged about 28 years and is having a wife and three children to support with no criminal antecedents. Appellant Manish aged about 22 years was also married and his wife was in family way at the time of his conviction. Taking into consideration the age of the appellants and that they were not involved in any other case prior to this occurrence especially the fact that the parties are neighbours, living in the same village since birth, there being no minimum sentence prescribed for committing the offence punishable under Section 307 IPC, it would meet the ends of justice if they are sentenced to the period already undergone and the fine imposed by learned ASJ is enhanced.

33. The appeal is partly allowed. The conviction and sentence of the appellant Manish under Section 25/27 Arms Act is set aside. While maintaining the conviction of both the appellants under Sections 307/34 IPC, the substantive sentence awarded to them is reduced to the period already undergone by them in judicial custody in this case. However, the fine imposed on the appellants by learned ASJ is enhanced to Rs.50,000/- each. In default of payment of fine, they shall undergo SI for three months. The fine earlier imposed and deposited by them shall be adjusted. After depositing the fine, the appellants are also directed to file copy of the receipt with the Registry. Trial Court Record be sent back alongwith copy of the order.

PRATIBHA RANI, J

August 30, 2012

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