

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.A. 305/2009**

Decided on 03.10.2013

IN THE MATTER OF :

SHIV KUMAR

..... Appellant

Through: Mr. H.N. Pandey, Advocate with  
appellant in person.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Rajat Katyal, APP for the State

**CORAM**

**HON'BLE MS.JUSTICE HIMA KOHLI**

**HIMA KOHLI, J. (Oral)**

1. The appellant is aggrieved by the judgment dated 28.03.2009 passed by the learned ASJ in a case arising out of FIR No.777/2003 lodged under Section 308 IPC at Police Station: Ashok Vihar, convicting him under Sections 325/34 IPC and the order on sentence dated 31.03.2009, sentencing the appellant to undergo rigorous imprisonment for a period of one year and pay a fine of ₹5,000/-, in default thereof, to undergo simple imprisonment for three months.

2. Before considering the arguments advanced by both sides, the brief facts of the case are being recapitulated hereinbelow.

3. On 29.12.2003 at about 9:30 AM, the complainant, Shri Naresh duly accompanied by his sister, Pushpa were going from Jailorwala Bagh to Ashok Vihar. On the way, the appellant herein, a resident of Lal Bagh had passed some lewd remarks against the complainant's sister. When the complainant objected, the appellant blew a whistle and immediately, 2-3 persons had arrived there holding *dandas* and started beating the complainant due to which he had sustained injuries on his head, hand, foot and other parts of the body. The complainant's sister accompanied him to the police station and a DD entry was prepared at 10:46 PM (Ex.PW8/B), whereafter Ct.Ugrasen (PW-6) took the complainant in a PCR van to BJRM Hospital for undergoing the MLC. As per the prosecution, the appellant could not be arrested and he was declared a proclaimed offender by the trial court vide order dated 09.06.2006. Subsequently, he was arrested on the information of a secret informer. The charge-sheet came to be filed on 18.03.2008 under Section 308 IPC. Charges were framed on 03.11.2008 and the appellant was charged for the offence under Sections 308/34 IPC, to which he had pleaded not guilty.

4. In the course of the trial, the prosecution had examined ten witnesses, including the complainant, Shri Naresh (PW-1), complainant's sister, Pushpa (PW-2), the Radiologist of BJRM Hospital, Dr. Shipra Rampal (PW-5), Ct. Ugrasen (PW-6), ASI Anita (PW-8) and the Investigating Officer, SI Harun Ahmed (PW-10). After the evidence of the

prosecution was concluded, the statement of the appellant was recorded under Section 313 Cr.PC, wherein he had denied the evidence put to him and two witnesses were examined on his behalf, namely, Shri Noor Mohd. (DW-1) and Shri Rajman (DW-2). After examining the evidence on record and hearing the arguments on behalf of the appellant and the prosecution, the trial court had opined that the appellant could not be indicted under Section 308 IPC and it was a fit case for convicting him under Sections 325/34 IPC. Following the aforesaid judgment of conviction, the order on sentence came to be passed on 31.03.2009, convicting the appellant to undergo rigorous imprisonment for a period of one year with a fine of ₹5,000/- and in default of payment of fine, to undergo simple imprisonment for a period of three months.

5. Learned counsel for the appellant has assailed the impugned judgment on the ground that the trial court had failed to take into consideration the fact that both, the complainant and the accused were residents of the same locality and had also known each other, but despite the same, surprisingly, while giving their statements to the Investigating Officer or even at a later stage, the complainant and his sister could not tell the name of the appellant. He, therefore, states that this had cast a shadow of doubt as to the identity of the appellant and the trial court failed to take into consideration the aforesaid aspect. It is further canvassed by the learned counsel for the appellant that the statements of

the complainant(PW-1) and his sister(PW-2) are in contradiction to the statements of Ct. Ugrasen (PW-6) and the Investigating Officer, SI Harun Ahmed (PW-10). In this regard, he refers to their testimony to claim that while PW-1 and PW-2 had stated that they had first visited the police station with a complaint about the occurrence of the incident in question and thereafter, the injured had proceeded to the hospital for undergoing a MLC, PW-6 and PW-10 had deposed to the contrary and there was sufficient reason to shake the credibility of PW-1 and PW-2, whose deposition ought to have been held as unreliable.

6. It is next argued by the learned counsel for the appellant that despite the fact that both, the appellant and the complainant were residents of the same locality and it was alleged that a lot of people had gathered at the spot at the time of the incident, not a single public witness had been named and PW-2, sister of the complainant(PW-1) cannot be treated as an independent witness for purposes of indicting the appellant.

7. On the other hand, learned APP for the State has supported the impugned judgment and submits that the same does not deserve any interference. He denies the contention of the other side that PW-1 and PW-2 had not named the appellant when the DD entry was made on the date of the incident. He refers to the aforesaid DD entry (Ex.PW8/B) from the trial court record and points out that the appellant has been duly

mentioned therein and described as "*Thekedar*". He further points out that in the course of recording their testimony, PW-1 and PW-2 had identified the appellant and therefore, his identity cannot be stated to be under dispute. Learned APP also refers to the contents of the FIR registered on the complaint of PW-1, wherein the complainant had stated that he knew the appellant by the name of "*Thekedar*" and the said person was a resident of Lal Bagh and he could identify him.

8. Learned APP denies the fact that there is any contradiction between the testimony of PW-1 and PW-2 on one hand and PW-6 and PW-10 on the other hand and states that if the same are read in a seriatim, the sequence of events would fall into place and there is no scope of any doubt about the occurrence of the incident and the role of the appellant. Lastly, he submits that the mere absence of any public witness cannot be a ground to acquit the appellant for the reason that the depositions of PW-1 and PW-2 read in conjunction with the depositions of PW-6 and PW-10 and the MLC of the victim would clearly corroborate the prosecution version as to the occurrence of 29.12.2003 and the role attributed to the appellant in that regard.

9. This court has carefully perused the impugned judgment and examined the trial court record, including the evidence, both ocular and documentary. After scrutinizing the trial court record, it clearly emerges that the trial court had considered the submissions made by the counsel

for the appellant on the same lines as have been canvassed before this court and it had concluded that the testimony of PW-1 and PW-2 could not be discounted merely because PW-2 is the sister of the complainant(PW-1), more so when both their testimonies were found to be straightforward and cogent and nothing material had emerged from their cross-examination to assist the appellant. In fact, a perusal of the cross-examination of PW-1 reveals that though it had been put to him by the defence that there was some quarrel between him and the appellant in the past, prior to the date of the incident, the same had been categorically denied by PW-1 in his testimony. The inevitable conclusion of the trial court was that there was no reason whatsoever for PW-1 and PW-2 to falsely implicate the appellant and there is no justification to disbelieve them and discard their testimony. This Court concurs with the aforesaid findings of the trial court and finds no justification to overturn them.

10. Additionally, while perusing the depositions of PW-1 and PW-2, it is noticed that both the said witnesses had correctly identified the appellant as he was present in the Court at that time and therefore there can be no quarrel as to his identity. The evidence on record reveals that not only did PW-1 and PW-2 name the appellant and describe him as "*Thekedar*", they had also stated that they could identify him. Therefore, for the counsel for the appellant to contend that being residents of the same

area, it was not believable that PW-1 and PW-2 did not know the appellant, is found to be devoid of merits. On the contrary, a perusal of the DD entry as also the contents of the FIR, both establish the fact that the appellant had been duly named and identified as "*Thekedar*" therein and he was the same person who had assaulted the complainant, alongwith 2-3 other persons.

11. The next contention of the counsel for the appellant is that there are material contradictions in the depositions of PW-1 and PW-2 on one hand and PW-6 and PW-10 on the other hand. It is relevant to note that the incident in question had taken place on 29.12.2003, whereas the testimony of the aforesaid witnesses was recorded in November, 2008, i.e., after almost five years from the date of the incident. In such circumstances, if the testimony of PW-6 did not exactly match with the testimony of the Investigating Officer, PW-10, that itself is not considered sufficient to discard their entire testimony. The submission of the counsel for the appellant that PW-6 had turned hostile and therefore, he had to be cross-examined by the learned APP can also not be of any assistance to the appellant for the reason that PW-6 had himself stated that he had forgotten certain facts because of the lapse of time and further it is noticed that SI Harun Ahmed (PW-10) had narrated the exact sequence of events. In any case, the discrepancy in the sequence of events as per the appellant is that while PW-6 had stated that PW-1 and

PW-2 were taken from the spot directly to the hospital for treatment, PW-1, PW-2 and PW-10 had stated that they had gone to the police station first to record the complaint and thereafter, the injured had been taken in a PCR van to the hospital for preparation of MLC. The said minor inaccuracy in the testimony of PW-6 cannot shake the very foundation of the entire prosecution case to their detriment.

12. The claim of the learned counsel for the appellant that there had been inordinate delay in registering the FIR has to be seen in the light of the incident that had occurred on 29.12.2003. As per the complainant (PW-1), it was at about 9:30 AM on 29.12.2003 that the appellant had started passing lewd remarks against his sister (PW-2), which was followed by beatings given by the appellant and his associates to the complainant and his sister. The DD entry reveals that the complainant and his sister had reached the police station after about one hour at 10:46 AM and they were sent in a PCR van to BJRM Hospital. A perusal of the MLC of PW-1 reveals that he had arrived at BJRM Hospital with Ct. Ugrasen (PW-6) at 11:30 AM, i.e., in less than one hour from the time when PW-1 and PW-2 had reached the police station with a complaint. Dr. Shipra Rampal (PW-5) had deposed that the injured had suffered a fracture on the left forearm and the left foot. In other words, the injuries suffered by the complainant were grievous in nature. After the MLC was undertaken and the doctor had declared the injured fit for his statement

to be recorded, the Investigating Officer had recorded his statement and then prepared a *Rukka* in the hospital and forwarded the same to the police station through Ct. Ugrasen (PW-6).

13. A perusal of the FIR reveals that the same was registered at about 3:55 PM on the same day. Considering the fact that the victim had undergone an X-ray and was administered treatment at the hospital, it is not improbable that the said process would have taken at least another 2-3 hours before his statement could have been recorded for the purpose of registering the FIR. In view of the aforesaid sequence of events that have unfolded themselves on a perusal of the trial court records, this Court is of the opinion that merely because the incident in question had occurred at 9:30 AM and the FIR came to be registered at 3:55 PM, cannot be reason enough to create any suspicion about the manner of registration of the FIR and nor can it be said that there was inexplicable delay in the registration of the FIR.

14. In view of the aforesaid facts and circumstances and having carefully perused the impugned judgment in the light of the evidence on record, this Court is of the opinion that neither is there any illegality or irregularity in the impugned judgment, nor is there any non-appreciation or mis-appreciation of facts by the trial court that deserves interference in appeal. Further, taking into consideration the nature of the injuries suffered by the injured, the trial court had arrived at a conclusion that it

was not a case where provisions of Section 308 IPC were attracted and had indicted the appellant under Section 325 IPC. The said provision contemplates punishment with imprisonment for a term that may extend to seven years alongwith fine. This Court is of the opinion that as against the aforesaid quantum of sentence, the appellant has been awarded a very light sentence of rigorous imprisonment of one year and a fine of ₹5,000/- and there is no justification for interfering either in the impugned judgment of conviction or the order on sentence. Accordingly, the present appeal is dismissed as being devoid of any merits. The appellant, who is present in Court, is directed to be taken into custody and sent to jail to serve the sentence awarded by the trial court.

**OCTOBER 03, 2013**  
rkb/mk

**(HIMA KOHLI)**  
JUDGE