

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

**RESERVED ON : 25th JULY, 2013
DECIDED ON : 11th OCTOBER, 2013**

+ CRL.A. 749/2011

MAHENDER Appellant

**Through : Mr.A.J. Bhambhani, Advocate with
Ms. Nisha Bhambhani, Advocate.**

versus

THE STATE (N.C.T. OF DELHI) Respondent

Through : Mr. M.N. Dudeja, APP.

AND

+ CRL.A. 1000/2011

RADHEY SHYAM Appellant

**Through : Mr.A.J.Bhambhani, Advocate with
Ms.Nisha Bhambhani, Advocate.**

versus

THE STATE (N.C.T. OF DELHI) Respondent

Through : Mr. M.N. Dudeja, APP.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. Mahender (A-1), Radhey Shyam (A-2) and Dinesh were convicted for committing offences punishable under Section 341/304 part-

II IPC. By an order dated 28.09.2010, they were sentenced to undergo RI for ten years with fine ₹ 15,000/- each. A-1 and A-2 being aggrieved have challenged correctness of the judgment.

2. The incident out of which these appeals arise took place on 17.09.2004 at about 09.00 A.M. at village Ranhola. The genesis of the incident was petty dispute among A-1 to A-3 on the one hand and Ajay, on the other hand whereby they wrongfully restrained Ajay and assaulted him with fists and kicks. Police machinery was set in motion on 24.09.2004 when Ajay was admitted at Sanjay Gandhi Memorial Hospital (in short SGM Hospital); Daily Diary (DD) No. 65B (Ex.PX) was registered at PS Nangloi and First Information Report was lodged on 25.09.2004, under Section 341/323/34 IPC after recording Mohan Lal's statement (Ex.PW-1/A). DD No. 38A (Ex.PW-10/C) was recorded after getting intimation of Ajay's death in the hospital on 30.09.2004. During the course of investigation, Mahender, Radhey Shyam and Dinesh were arrested. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted in the Court in which they were duly charged and brought to Trial. The prosecution examined eleven witnesses to establish the case. In their 313

statements, accused persons denied their complicity with the offence in question.

3. Indisputably, a scuffle took place on 17.09.2004 in Kismat's factory in which Ajay was thrashed and beaten but neither he was taken for medical examination nor any report was lodged with the police. He was admitted in SGM hospital by Mohan Lal, his brother on 24.09.2004 at 10.15 P.M. Since the victim was unfit to make statement, the FIR was lodged on Mohan Lal's statement under Sections 341/323 IPC. Whether the victim regained consciousness or was oriented and physically fit to record statement before he died on 30.09.2004 is uncertain and unclear. The MLC (Ex.PW-3/A) records that at the time of medical examination, he was conscious and oriented. Apparently, at no stage, the victim made a statement to the police implicating the appellants for causing injuries to him. PW- Mohan Lal, who was aware of the scuffle on 17.09.2004 from the inception and was in constant touch with the victim facilitating treatment at Dr.Rajesh's clinic did not lodge any report with the police any time soon after the incident. Undoubtedly, prior to 24.09.2004, he was under medical treatment at "Vaid Ortho and Gynae Clinic, 22, Najaf Garh Road, Nangloi, Delhi" and PW-8 (Dr.Rajesh Gupta) had prescribed medicines at the first instance for two days and thereafter, for a week.

Ajay again visited Dr.Rajesh Gupta's clinic and complained of hiccup and vomiting. Dr.Rajesh advised admission if hiccup persisted vide prescription card Ex.PW-8/A. The victim got regular treatment as out-door patient from Dr.Rajesh Gupta and at no stage implicated the appellants for the injuries inflicted to him. In prescription card (Ex.PW-8/A), no injuries were noticed on the body, name of disease was not depicted. PW-8 (Dr.Rajesh Gupta) did not consider it a medico-legal case to intimate the police. PW-3 (Dr.Manoj) proved MLC (Ex.PW-3/A) prepared on the first appearance at SGM Hospital on 24.09.2004 by Dr. Anju Garg in which she observed only one injury i.e. "Right eye sub conjunctival large facial diffuse swelling ictrus present". PW-2 (Dr.B.K.Jha), autopsy surgeon in report Ex.PW-2/A found one external injury i.e. "Build abrasion on right frontal region just above eye brow 1cm X 1cm". The cause of death was opined as shock consequent to 'cirrohosis of liver as a result of physical assault'. In the cross-examination, he admitted that deceased was suffering from cirrohosis of liver, (a natural disease process) and jaundice. The Investigating Officer did not ascertain during investigation if the victim was getting any regular treatment for the said diseases. Mohan Lal, deceased's brother did not divulge as to since when Ajay was suffering from the diseases and what

treatment was being taken by him, and if so, from where. He did not produce any medical papers by which the victim had taken treatment. PW-8 (Dr.Rajesh Gupta) was not aware of the victim suffering from cirrhosis and did not prescribe any medicine for its cure. The medical evidence is lacking to inform the stage of cirrhosis i.e. compensated or de-compensated. In compensated cirrhosis, body functions fairly well despite scarring of the liver. De-compensated cirrhosis means that severe scarring of the liver has damaged and disrupted essential body functions. Patients with de-compensated cirrhosis may develop serious and life threatening symptoms and complications. Liver is an important organ of the body, it weighs about 3 ponds. Stage 4 is the final of all cirrhosis stages and the most dreaded one. Patients in the final stage have a chance of survival only if they opt for a liver transplant. Jaundice is one of the signs / symptoms of liver failure and mostly occurs in 4th stage. In the instant case, the victim was suffering from cirrhosis of liver and jaundice. Its weight was about 700 grams. Apparently, the beatings given on 17.09.2004 were not the direct cause of death of the victim. PW-1 (Mohan Lal), deceased's brother admitted in the cross-examination that when he went to the factory, Ajay was conscious; and was taken to PW-8 (Dr.Rajesh Gupta)'s clinic; got treatment for about a week without

admission as in-door patient and on 24.09.2004, he was admitted in Sanjay Gandhi Memorial Hospital, Mangolpuri. The patient was advised X-ray skull, AP and lateral view, X-ray chest PA view, Liver Function Test and referred for surgical medical opinion. Those reports were not collected and placed on record. PW-3 (Dr.Manoj) was unable to give any opinion regarding injuries in the absence of X-ray reports and blood reports. The appellants had no animosity with the victim prior to the occurrence. A sudden quarrel took place on 17.09.2004 when the victim objected to carrying of the bamboos/ ballies from one factory to the other on the instructions of Contractor – Suresh who was not implicated in the case. In the said scuffle A-1, A-2 and Dinesh assaulted Ajay and gave beatings resulting injuries on the body. The assailants were not armed with any deadly weapon and no repeated blows were inflicted on vital organ of the deceased. It appears that due to the intervention of the owner of the factory i.e. Kismat, the dispute was settled and the victim and his brother – Mohan Lal did not opt to report the incident to the police. The evidence available on record does not point out to any such injury which was so grievous as to constitute ‘knowledge’ in the mind of the accused persons that by infliction of such injuries they were likely to cause the death of the deceased. True, death was the resultant, but this resultant

could not be attributed to the knowledge of the accused persons because of the obvious fact that the alleged injuries found on the person of the deceased were not such so as to constitute knowledge on the part of the accused persons. In an offence punishable under Section 304 Part-II IPC, 'knowledge' is an important element which is missing in the instant case, and hence, it remains simplicitor an offence of 'voluntarily causing hurt' as defined under Section 321 IPC and punishable under Section 323 IPC. The injuries found on the body of the deceased were neither sufficient in the ordinary course of nature to result in death nor were they likely to cause death. The death did not take place as a result of the injuries received by him but took place due to the shock consequent to cirrohosis of liver and jaundice after about ten days of the incident. The appellants can therefore, only be held guilty of hurt under Section 323 IPC and not under Section 304 Part-II IPC.

4. In '*State of Karnatka vs. Shivalingaiah*', 1988 CrL.L.J. 394, conviction was ultimately maintained by the Supreme Court under Section 325 IPC on the ground that the act of the accused in squeezing the testicles of a person would be an offence of voluntarily causing grievous hurt under Section 325 IPC. In the said case, there was a categorical statement of the doctor that the act was dangerous to human life and had

led to cardiac arrest of the deceased which was instantaneous. In '*Bal Krishan Sita Ram Pandit vs. State*', 1987 CrL.L.J. 479, the cause of death given by the autopsy surgeon was heart failure due to coronary artery disease. He further opined that shock could also cause death if the person was having a weak heart or he was an emotional type of person. The deceased having a diseased heart and the danda blows might have produced a shock aggravating the heart attack. This Court held that the death was not necessarily caused on account of a danda blow and it could be a simple cause of heart attack on account of Mehtab Rai Jain having become emotional.

5. In the light of above discussion, conviction under Section 304 Part-II IPC is altered to Section 323/34 IPC. All the convicts were sentenced to undergo RI for ten years with fine ₹ 15,000/- each. A-1's nominal roll dated 10.07.2012 reveals that he has undergone two years, three months and twenty nine days incarceration as on 13.07.2012 excluding remission for eight months and seven days. A-2's nominal roll dated 14.11.2011 reveals that he has remained in custody for one year, four months and four days as on 16.11.2011 and earned remission for four months and twenty seven days. Apparently, they have served the sentence more than prescribed under Section 323/341 IPC and require to be

released forthwith (if not required to be detained in any other case) and no further substantive sentence can be awarded to them. Though the appellants were not liable for culpable homicide/ murder, they were nevertheless instrumental in accelerating victim's death. But for this unfortunate incident, God knows, for how many days / months, the victim could have survived. Each day was precious for him and his family. In '*Ankush Shivaji Gaikwal vs. State of Maharashtra*', 2013 (6) SCC 770, the Supreme Court emphasized that victim is not to be forgotten in criminal justice system and Section 357 Cr.P.C. should be read as imposing mandatory duty on the Court to apply its mind to the question of awarding compensation in every case. Accordingly, A-1 and A-2 are directed to deposit ₹ 40,000/- each as compensation before the Trial Court within fifteen days. The Trial Court shall issue notice to the widow to receive the compensation and if she is not available, the compensation amount should be disbursed to the deceased's children / legal heirs in equal proportions.

6. Dinesh did not opt to prefer appeal. Nominal roll dated 07.02.2013 received from Jail Superintendent reveals that he has undergone eight years, four months and four days as on 06.02.2013. The imprisonment awarded to him is almost complete. Intimation be sent to

the Jail Superintendent to release Dinesh in FIR No. 868/2004 registered at PS Nangloi under Sections 341/323/34 IPC immediately if not required to be detained in any other case.

7. The appeals stand disposed of in the above terms. Trial Court record be sent back forthwith. Copy of the order be sent to the Jail Superintendent for compliance.

(S.P.GARG)
JUDGE

OCTOBER 11, 2013/ *tr*