

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

RESERVED ON : 20th FEBRUARY, 2013

DECIDED ON : 17th MAY, 2013

+ CRL.A.1181/2010

VIJAY KUMAR KAMAT Appellant

Through : Mr.Chetan Lokur, Advocate.

versus

THE STATE (NCT OF DELHI) Respondent

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

ASI Jai Prakash, PS S.P.Badli.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant- Vijay Kumar Kamat impugns judgment dated 12.07.2010 of learned Additional Sessions Judge in Sessions Case No.54/2009 arising out of FIR No.418/2008 PS S.P.Badli by which he was convicted for committing offence punishable under Section 307 IPC and sentenced to undergo RI for ten years with fine ₹ 5,000/-.

2. Vijay Kumar Kamat was employed with Ravinder Singh in his factory R.J.Industry situated at Gali No.8, Khasra No.22/9/3, Samay Pur Badli where door hinges / kabjas were manufactured and dust was removed with compressor. Vijay Kumar Kamat used to operate the

compressor. Sadhu @ Chhotu was working at the nearby tea stall of his relative Shrawan Choudhary and used to deliver tea to the workers in the factory. On 30.09.2008, Sadhu, aged 11 years went to the factory to deliver tea to the workers. It is alleged that Vijay Kumar Kamat pumped air in his stomach by putting compressor pipe on his anus deliberately. It caused injuries to him and he was taken to hospital. Daily Diary (DD) No.15A (Ex.PW-10/A) was recorded at 12.55 A.M. at PS Samay Pur Badli. The investigation was assigned to SI Kuldeep Singh. Sadhu was not fit to make statement. SI Kuldeep Singh lodged First Information Report under Section 326 IPC. After discharge from the hospital, Sadhu's statement was recorded. The Investigating Officer also recorded statement of the witnesses conversant with the facts. Victim's MLC was collected. After completion of investigation, a charge-sheet was submitted against Vijay Kumar Kamat for committing offence under Section 307/326 IPC. He was duly charged under Section 307 IPC and brought to trial. The prosecution examined thirteen witnesses to bring home the charge. In his 313 Cr.P.C. statement, the appellant pleaded false implication. He examined three witnesses in defence. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the

impugned judgment, held the appellant guilty under Section 307 IPC. Being aggrieved, the appellant has preferred the present appeal.

3. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of hostile witnesses. It did not appreciate the testimony of material witnesses present in the factory that the appellant was not at fault and Sadhu had sustained injuries due to fall on the compressor. No due weightage was given to the testimonies of the defence witnesses. Vital discrepancies emerging in the statement of the witnesses were ignored. The victim had not lodged any complaint and his statement was recorded after a considerable delay of ten days. The appellant was not a suspect and was not arrested for five days. The doctor, did not specify that the injuries were dangerous in nature and sufficient to cause death in the ordinary course of nature. Learned APP urged that First Information Report was lodged on Daily Diary (DD) No.15A (Ex.PW-10/A) which recorded that the appellant inserted compressor pipe in the anus which resulted in causing injuries. The injuries were 'dangerous' in nature. The victim remained admitted in hospital for two months.

4. I have considered the submissions of the parties and have examined the record. The incident in which Sadhu aged 11 years sustained

injuries is not in dispute. The appellant's contention is that he was not author of the injuries to the victim and he sustained it due to fall on the compressor. Appellant's presence at the time of occurrence performing duty on the compressor is not under challenge. Sadhu had admittedly gone to serve tea to the workers there. After the occurrence, he was taken to Raj Nursing Home, Main Road, Samay Pur Badli and after first aid, he was shifted to Pentamid Hospital. PW-1 (Dr.Sudhanshu Mishra) examined him at 01.30 P.M. vide MLC (Ex.PW-1/A). He was discharged vide discharge summery (Ex.PW-1/B) after ten days on 10.10.2008. The nature of injuries was '*dangerous*'.

5. Daily Diary (DD) No.15A (Ex.PW-10/A) was recorded on at 12.55 A.M. on 30.09.2008 getting information that the air was filled thought compressor by the factory worker and the boy who used to deliver tea was admitted at Raj Nursing Home. The investigation was assigned to SI Kuldeep Singh who made endorsement (Ex.PW-13/A) and lodged First Information Report at 05.10 A.M. on 01.10.2008. In the rukka (Ex.PW-13/A), it is recorded that the victim was unfit for statement. The child was first taken to Raj Nursing Home and after first-aid, he was admitted at Pentamid Hospital. It does not record that the victim had sustained injuries due to fall on the compressor.

6. Crucial testimony is that of PW-3 (Sadhu), a child witness aged 11 years. The learned Trial Judge put number of preliminary questions to ascertain if he was a competent witness and able to give rational answers to the questions put to him. The learned Presiding Officer was satisfied that the PW-3 was able to understand the questions properly and to give rational answers. He also understood the sanctity of oath. He deposed that on the day of occurrence at about 11.00 A.M. he had gone to the factory of Sardar Ji at first floor at Gali No.8, Samay Pur Badli with four glasses of tea. The accused was working in the factory and when he took tea, he started talking to him loosely and called him 'Rani Darling'. When he took back empty glasses, his leg slipped and he fell down on the compressor. He received injuries on his legs and air got filled up in his stomach. His pant was torn at that time from his back. When he raised alarm, his relative Shrawan reached there and he was taken to the hospital. He remained admitted for about two months. In the same breath, he further deposed without interruption that the accused was operating on compressor to remove dust from the 'kabzas' and the compressor was used by him on his anus whereby he pressed compressor and filled air into his stomach through anus. He screamed in pain due to filling of air in the stomach. Shrawan scolded ViJay Kumar Kamat for that and the accused

told Shrawan that he had pressed air into his anus only 'jokingly'. He further deposed that Rustam, Alam and Rana Pratap had also taken tea from him. Learned APP cross-examined the witness after Court's permission. He stated that before he could say anything, the accused pumped air into his stomach through anus. He admitted that firstly he was taken to a nursing home and thereafter to a big hospital. He was unable to remember the date if it was 30.09.2008. However, he explained that it was neither winter nor summer. The appellant did not cross-examine the witness that day on 04.06.2009. Cross-examination was conducted on 06.10.2009 after a gap of about four months. He admitted that the accused had no enmity prior to the date of incident. He was unable to give the details about days, months and years being illiterate. He admitted the suggestion that on the day of incident he had slipped and fell down on the pipe of the compressor which was in the hand of the accused and the air got pumped into his stomach through anus. In re-examination by Addl.P.P., Sadhu denied that Vijay Kumar Kamat had inserted the compressor pipe in his anus intentionally. Again, in the cross-examination by learned APP after seeking Court's permission, the witness admitted that he was wearing half pant at the time of incident. He denied the

suggestions that the appellant was responsible for the injuries sustained by him.

7. It is true that PW-3 (Sadhu) has deviated from the statement recorded under Section 161 Cr.P.C. and has given conflicting versions in his deposition before the Court. Somewhere he specifically and unhesitantly indicted the appellant for the injuries caused to him and at other places, he completely exonerated him. Apparently, PW-3 (Sadhu) is a child witness. He is illiterate and hails from poor section of the society. The testimony of an illiterate and rustic witness is to be appreciated, ignoring minor discrepancies and contradictions. It appears that attempt was made to win over the witness after his examination on 04.06.2009. Statement of a witness is to be read as a whole in the context in which it is made. Credibility of testimony, oral or circumstantial depends considerably on a judicial evaluation of the totality, not isolated scrutiny. In the instant case, the appellant's plea was that due to fall on the compressor, Sadhu sustained injuries. This has been completely ruled out by other witnesses. PW-6 (Harish Gandhi) Supervisor in the factory admitted in his deposition that pipe of the compressor would not insert in the stomach through anus on fall over it. He further admitted that the pipe would go inside stomach through anus if it was inserted with force.

Similar is the testimony of PW-7 (Ravinder Singh), owner of the factory who deposed that pipe of the compressor installed in his factory could not automatically go in the stomach through anus on fall on it. Air would be filled in the stomach through anus if it was pumped. PW-8 (Bhupal Singh) authorized by Delhi Government under Section 31 of the Factories Act, 1958 to test pressure vessels/ plant deposed that on 07.10.2008, he visited the factory and tested the compressor and receiver for thickness and safety wall. After the evaluation for equipment to be safe, he issued certificate (Ex.PW-8/A). He was categorical that pipe of the compressor could not be automatically inserted into the anus and accordingly the air could not automatically filled in the stomach through anus. He further deposed that it was not possible that air would be filled automatically in the stomach through anus due to fall on the compressor or its pipe. Again, in the cross-examination, he opined that it was not possible that if a person falls on a pipe it would automatically insert in the anus. Statements of all these witnesses have remained unchallenged in the cross-examination. The theory propounded by the accused that the victim sustained injuries due to fall on the compressor/ pipe cannot be believed at all. PW-1 (Dr.Sudhanshu Mishra) examined the victim and opined the nature of

injuries '*dangerous*'. The accused did not opt to cross-examine him to ascertain if the injuries were possible due to fall on the compressor.

8. PW-3 (Sadhu) did not nurture grudge against the accused to falsely implicate him in the case. His statement that he was teased by the accused calling 'Rani Darling' has gone unchallenged. The accused had no occasion to tease a child calling him 'Rani Darling'. Soon thereafter, to have some fun with the child, it appears that the accused put the pipe of the compressor into his anus and filled air in the stomach. When Shrawan Kumar scolded him, he told him that he had pressed air into his anus only 'jokingly'. There are thus no good reasons to discard the cogent testimony of the child witness on this aspect whereby he was specific that the appellant was responsible for the injuries caused to him. He cannot be branded as liar and his evidence cannot be rejected outright. The Court has to appraise the evidence to see to what extent it is worthy of acceptance. Statement a hostile witness can be believed for certain purposes. PW-3's testimony coupled with other circumstances referred above is sufficient to establish that the appellant was instrumental in causing the injuries to the victim.

9. To justify a conviction under Section 307 IPC, 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 of the accused, such intention may also be gathered from other circumstance and may even, be ascertained without any reference at all to actual wounds. It is not necessary that the injury actually caused to the victim 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 result, was done with the intention or knowledge and under circumstances mentioned in Section 307 IPC. An attempt in order to be criminal need not be the penultimate act. Section 307 IPC requires an enquiry into the intention and knowledge of the accused and whether or not by his act, he intended to cause death which would amount to murder as defined in Section 300 IPC. It depends upon the facts and circumstances of each case whether the accused had the intention to cause death or knew in the circumstances that his act was going to cause death. The nature of weapon used, the intention expressed by the accused at the time of the act, the motive, the nature and size of the injuries, the parts of the body of the victim where injuries were caused and the severity of the blow or blows are relevant factors to find out intention/ knowledge.

10. In the instant case, the appellant's relations with the victim were not strained. He did not nurture any grievance with the child and had no previous animosity. No quarrel had taken place with the child. There was no previous deliberation or determination to cause injuries. It appears that the appellant intended to have fun with the child and in the process put the compressor pipe on the anus. Earlier he had uttered lewd remarks and called him 'Rani Darling'. It seems that the situation went out the appellant's control and the air was pumped in the victim's stomach. By no stretch of imagination, inference can be drawn that the appellant intended to cause child's death by his acts. He had no evil intention or knowledge. The injury inflicted was not with the avowed object or intention to cause death. Consequently, conviction under Section 307 IPC cannot be sustained. The injuries suffered by the victim were 'dangerous' in nature and were voluntarily caused by the appellant. The offence falls under Section 326 IPC. The appellant's conviction is altered to offence under Section 326 IPC.

11. The appellant was sentenced to undergo RI for ten years with fine ₹ 5,000/-. Nominal roll dated 16.01.2013 reveals that he has already undergone four years, three months and fifteen days incarceration as on 15.01.2013. He also earned remission for ten months and ten days. He is

not a previous convict and is not involved in any other criminal case. Considering the facts and circumstances of the case, the order on sentence is modified and the appellant is sentenced to undergo RI for seven years with fine ₹ 5,000/- and failing to pay the fine to further undergo SI for one month.

12. The appeal is disposed of in the above terms. Trial Court record be sent back forthwith.

(S.P.GARG)
JUDGE

MAY 17, 2013

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