

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

Date of Decision: 15th October, 2014

+ **CRL.A. 54/2011**
SUMIT GUPTA

..... Appellant

Through: Mr. Vinod Sharma and Mr. S.K. Gupta, Advs.

Versus

STATE NCT OF DELHI

..... Respondent

Through: Mr. M.N. Dudeja, Additional Public Prosecutor for the State along with SI Rakesh Kumar Police Station Sangam Vihar.

+ **CRL.A. 55/2011**
ANUP KUMAR GUPTA @ DOLLY

..... Appellant

Through: Mr. Vinod Sharma and Mr. S.K. Gupta, Advs.

Versus

STATE NCT OF DELHI

..... Respondent

Through: Mr. M.N. Dudeja, Additional Public Prosecutor for the State along with SI Rakesh Kumar Police Station Sangam Vihar.

+ **CRL.A. 56/2011**
VIRENDER GUPTA

..... Appellant

Through: Mr. Vinod Sharma and Mr. S.K. Gupta, Advs.

Versus

STATE NCT OF DELHI

..... Respondent

Through: alongwith SI Rakesh Kumar Police Station Sangam Vihar.

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Vide this judgment, I shall dispose of three criminal appeals bearing No.54/2011,55/2011 and 56/2011 as all the appeals have been filed by the appellants challenging the impugned judgment dated 21.12.2010 passed by learned Additional Sessions Judge whereby they were convicted in Sessions Case No.40/10 arising out of FIR No.885/2005, P.S. Sangam vihar, vide which they were convicted u/s 307/34 IPC and were sentenced to undergo rigorous imprisonment for 5 years and to pay fine of Rs.2000/- each in default to undergo simple imprisonment for one month.

2. Complainant Ashok Kumar was running a grocery shop at F-661, JJ Camp Tigri, Delhi. Virender Gupta was also running a shop at a short distance and he also used to sell bidi, cigarettes etc. As per the prosecution case, on 29.09.2005, complainant Ashok Kumar and his son Deepak Kumar were present at their shop. One customer purchased certain articles from their shop. After some time Virender Gupta came to his shop at about 4.45 p.m and started abusing him as to why he gave articles to his customer and picked up a brick and hit Ashok Kumar on his head. After ten minutes Virender Gupta along with his son, Sumit Gupta and nephew

Anup came to his shop and Virender Gupta inflicted a knife blow on the left side of abdomen of his son Deepak. When he tried to intervene, then he was given fist and leg blows by Anup and Sumit. On his raising alarm, the nearby residents of the locality started gathering and all three managed to escape. Deepak was removed to Batra hospital. MLC of Ashok Kumar and Deepak was prepared. During the course of investigation, the accused were arrested. Virender Gupta handed over the knife with which injuries were inflicted. After completing investigation, charge-sheet was submitted against the accused for offence u/s 307/308/34 IPC.

3. The case being triable by the Court of Sessions, after committal proceedings it was committed by the learned Metropolitan Magistrate to the Court of Sessions. Charge u/s 307/308/34 IPC was framed against the accused persons to which they pleaded not guilty and claimed trial.

4. The prosecution in order to substantiate its case examined as many as 8 witnesses. The accused pleaded their innocence and alleged false implication in the case.

5. Vide impugned judgment, the appellants were held guilty u/s 307/34 IPC and sentenced as mentioned above. Feeling aggrieved, separate appeals have been preferred.

6. I have heard Mr. Vinod Sharma, learned counsel for the appellants and Mr. M.N.Dudeja, learned Additional Public Prosecutor for the State and have perused the record.

7. It was submitted by learned counsel for the appellant that in order to invoke the provisions of Section 307 IPC it was incumbent upon the prosecution to prove the requisite knowledge or intention on the part of the appellants to cause death or injury, which in the instant case is missing. Moreover, the bone of contention between the parties was regarding sale of goods to a customer by the complainant, who was in fact the customer of the accused. This customer was a vital witness but no attempt was made to search him or to examine him. Furthermore, it was a residential area where there were many shops also but no independent witness has been examined. The recovery of knife is also doubtful. Moreover, it was only a kitchen knife as admitted by the prosecution witnesses. There was only one stab injury; the incident took place on the spur of moment; there was no premeditation or motive nor any common intention; the appellants are shop keepers and are not hardened criminals; they have been facing the rigours of trial for the last more than 9 years and their antecedents are clean. The prosecution has not been able to establish its case beyond reasonable doubt. Alternatively, it was submitted that the conviction could at best be u/s 324 IPC. Two of the appellants have remained in jail for about 9 months while one remained in jail for about one year. As such, they are liable to be released on the period already undergone. Even otherwise, since they were first time offenders they should be granted benefit of probation.

8. Reliance was placed by learned counsel for the appellants on *Balwant Singh & Others v. The State*, 1998 [1] JCC [Delhi] 222; *Avtar Singh @ Tari v. State*, 2003[3] JCC 1319 and *Satish Kumar v. State (NCT of Delhi)*, 2013[3] JCC 1749.

9. Rebutting the submissions of learned counsel for the appellants, it was submitted by learned APP for the State that even if no independent witnesses have been examined, there is the testimony of two injured persons which stands on a higher pedestal than any other witness. The oral version given by the injured finds substantial corroboration from the medical evidence. The intention on the part of the accused is reflected from the fact that initially, a brick was picked up and hit on the forehead of the complainant. However, not satisfied, the accused Virender Gupta accompanied by his son and nephew again came to the shop and gave knife blow on a vital part of the body of Deepak, as a result of which he remained in hospital for 5 days and was operated upon. The injuries were opined to be grievous. Under the circumstances, no fault can be found with the findings of the learned Trial Court and the appeals are liable to be dismissed.

10. I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have carefully perused the record.

11. The law is well settled that the evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly. In ***Akhtar and Ors. Vs. State of Uttaranchal***, (2009) 13 SCC 722 their Lordships held that credence to the testimony of injured eye witness is to be given since his presence at the scene of crime is seldom doubtful. The report reads as under:-

*“18. In **Krishan vs. State of Haryana**, (2006) 12 SCC 459 this Court has taken the view that if the prosecution case is supported by two injured eyewitnesses and if their (injured eyewitnesses) testimony is consistent before the police and the Court and corroborated by the medical evidence, their testimony cannot be discarded. Similarly, in **Surender Singh Vs. State of Haryana**, (2006) 9 SCC 247, this 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.”

12. Substantially similar view was taken in ***Mano Dutt and Anr. Vs. State of UP***, (2012) 2 SCC (Cri) 226; ***Abdul Sayeed v. State of Madhya Pradesh***, (2010) 10 SCC 259 and ***Jarnail Singh v. State of Punjab***, (2009) 9 SCC 719.

13. Reverting to the case in hand, it has come in the testimony of the complainant PW2 Ashok Kumar that on 29.09.2005, he along with his son Deepak was present at his shop where besides selling grocery items, they

also used to sell biddis and cigarettes. On that day, at about 4.45 p.m, a customer came to their shop to buy some articles and left after purchasing the same. Immediately thereafter, accused Virender Gupta came to his shop and started quarrelling as to why he gave articles to his customer and abused him. He lifted a brick from his shop and hit him on his head. Then he went to his own shop. After some time Virender Gupta, accompanied by his son Sumit and nephew Anup again came to his shop and Virender Gupta gave a knife blow on the left side of stomach of his son. He raised alarm and tried to free his son from them. Sumit Gupta and Anup Gupta both gave him fist and leg blows on his body and all the three ran away. He accompanied by his neighbour took his son Deepak to Batra hospital where he as well as his son were medically examined. His son was admitted in emergency ward while he was discharged on the same day. Police reached the hospital and recorded his statement Ex.PW 2/A bearing his signature at Point A. In the evening at about 5-6 p.m, he accompanied the police officials and the two accused namely, Anup Gupta and Virender Gupta were arrested. Accused Virender Gupta gave a knife from his shop to the police. He identified the knife Ex.P1 to be the same which was handed over by Virender Gupta to the police. The witness was subjected to lengthy cross examination. However, nothing material could be elicited to discredit his testimony. It has come in cross examination that when initially Virender Gupta had hit him by a brick, he did not lodge any report

to the police as he did not want to take action against him. It was precisely for the reason that both the complainant and accused were running their shop in the same area for last number of years and the shop of accused was at a distance of about 10-12 shops i.e. about 100 mts from the shop of the complainant. Therefore, since both were running the shops in the same area, the complainant never wanted to take any action against the accused. But things turned for the worse as Virender Gupta was not satisfied and after giving brick blow on the head of the complainant, went away and thereafter returned after about 10 minutes accompanied by his son and nephew who was armed with a knife and hit Deepak on the left side of his stomach. When complainant Ashok Kumar tried to intervene, then he was assaulted by Sumit Gupta and Anup Gupta who gave fist and leg blows to him. A suggestion was given to the witness that an FIR has been lodged by Virender Gupta against Ashok Kumar u/s 323/506 IPC. However this aspect of the matter was duly considered by the learned Trial Court by observing that the present FIR was registered on 29.09.2005. However, FIR No.165/06 was registered on the complaint of Virender Gupta on 28.02.2006. As such it was crystal clear that the present case was registered much prior in time in the year 2005 while the case against the complainant was registered pursuant to the statement made by accused Virender Gupta only in the year 2006.

14. Further, it has come on record that on receipt of DD No.24A Ex.PW 1/B, PW6 SI Harender Singh along with PW5 Head Constable Fateh Singh reached Batra hospital where he met Ashok Kumar and his son Deepak admitted in the hospital. After seeking permission from the concerned doctor, he recorded statement Ex.PW 2/A which culminated in the registration of FIR Ex. PW1/A. A perusal of the same goes to show that at the very initial juncture, the complainant had given a meticulous account of the entire incident and the specific role played by each and every accused. His testimony finds substantial corroboration from his son PW3 Deepak who is another injured who has also deposed that Virender Gupta came to the shop in order to make a complaint as to why goods had been sold to his customer and thereafter he abused his father and took a brick and hit the same on the head of his father. Thereafter Virender accompanied by his son Sumit and nephew Anup came and gave a knife blow on the left side of his stomach. The other accused gave beatings to his father. He was removed to the hospital by his father where he remained admitted for six days. He also identified the knife Ex.P1 to be the same with which he was hit. This witness was also subjected to lengthy cross examination but was of no avail to the accused persons.

15. The ocular testimony of both the witnesses find substantial corroboration from the medical evidence. PW4 Dr. Farah Hussain was working as CMO on 29.10.2005 at Batra Hospital and Medical Research

Centre. On that day he examined Deepak Kumar, son of Ashok Kumar who was brought to the hospital with alleged history of assault with knife on left side of abdomen around 4.45 p.m at his shop at Laxmi Cigarette Store at F-661, J.J Colony, Tigri, Delhi. The patient was brought to the hospital at 5.15 p.m by his father and he informed that the patient was assaulted by Virender. At that time the patient was conscious oriented. On local examination, a stab wound of 2 x 1 cm on the left side of abdomen was found and there was tenderness. The patient was advised admission. He prepared the MLC Ex. PW4/A. On the same day, he examined Ashok Kumar who had suffered abrasion on forehead and scalp on left side. On local examination, abrasion on left side of forehead and scalp region was found. He intimated police vide police intimation form Ex.PW4/D.

16. PW7 Dr. Vijay Hangloo, Sr. Consultant Surgeon has also deposed that on examination of patient Deepak Kumar, it was found that there was wound in the left flank which explore under GA. There was a sero muscular tear in the left descending colon, which was repaired with silk. He gave his report Ex. PW7/A.

17. After consulting Dr. Vijay Hangloo, Dr. Farah Hussain opined the nature of injury on the person of Deepak as grievous as per report Ex.PW4/B while the injuries on the person of Ashok Kumar were opined to be simple vide report Ex.PW4/C.

18. Under the circumstances, the ocular version of the incident as projected by the injured witnesses find substantial corroboration from the medical evidence. There was no previous enmity between the parties which may prompt the complainant to falsely implicate the accused in this case. Rather the entire sequence of events reflects that since both the parties were having their shop in the nearby vicinity, therefore, initially when Virender abused and hit the complainant with a brick on his head on a trivial issue regarding selling of goods to his customer, complainant did not report the matter to the police. Even thereafter the matter was reported only by Dr. Farah Hussain to the police when the injured went to Batra hospital for examination and thereafter police machinery swung into action. At the initial juncture when the complainant went to the hospital, he gave the history to the Doctor of assault by knife by Virender. Thereafter when the police reached the spot and recorded the statement of complainant, at that time also he gave a vivid account of the entire incident specifying the role of each and every accused. Under the circumstances there is absolutely no reason to doubt the testimony of the injured which finds substantial corroboration from the medical evidence. Moreover, since the witnesses suffered injuries, as such their presence at the spot stands established. It is highly improbable that they would implicate the accused in this case while allowing the real culprits to go scot free.

19. Non-examination of customer or the residents/shopkeepers of the locality does not cast any dent on the prosecution version inasmuch as it has come in evidence that the customer was not known to the witnesses from before. That being so, it was difficult to trace him. As regards the shopkeepers or the independent witnesses, it is common experience that public persons are generally reluctant to join police proceedings. As observed in *Aslam & Ors. Vs. State*, 2010 III AD (Delhi) 133, reluctance of the citizens to join police proceedings is well known and needs to be recognised. It cannot be ignored that public does not want to get dragged in police and criminal cases and avoids them because of long drawn trials and unnecessary harassment. The Hon'ble Supreme Court also observed in *Manish v. State*, 2000(8) SC 29 and in *Appabhai and Anr. vs. State of Gujarat*, AIR 1998 SC 696 that we cannot be oblivious to the reluctance of the common man to join such raiding parties organized by the police, lest they are compelled to attend police station and Court umpteen times at the cost of considerable inconvenience to them, without any commensurate benefit. Moreover, in the instant case since both the complainant and the accused persons were running their shop in the nearby vicinity, it is all the more reason that no resident or shop keeper would like to be involved and depose either in favour of or against the complainant or accused persons. Moreover, as stated above, non-joining of any independent witness is absolutely no ground to throw away the testimony of the injured who stood

the test of cross examination and their testimony finds substantial corroboration from the medical evidence. Under the circumstances, the prosecution has succeeded in establishing its case beyond reasonable doubt regarding the complicity of the accused persons in the crime.

20. The only question left for consideration is whether offence u/s 307 IPC is made out or not. The essential ingredient of Section 307 IPC is the mens rea. Mens rea can be inferred from the kind of weapon used, the place of injury, motive etc. To bring home a charge u/s 307 IPC, the onus lies on the prosecution to prove that the accused caused an act with the intention or knowledge and under such circumstances that if by that act, death was caused, he would be guilty of murder. *Satish Kumar*(supra) was a case where the appellant was convicted u/s 307 IPC on account of giving a knife blow on the injured by a kitchen knife on backside. The injuries were opined to be simple. Under the circumstances, the conviction was altered to Section 324 IPC. In *Balwant Singh* (supra) also, one injury on a part of neck was given by sharp edged weapon which was opined to be simple, as such it was observed that intention of the appellant was not to kill the complainant but only to inflict injury on him, as such offence falls u/s 324 IPC.

21. In the instant case, though a knife was used but a single blow was given on the abdomen. Having regard to the nature of injury caused and the genesis of the occurrence it is difficult to hold that the intention of the

appellant was to attempt to cause death. The occurrence arose out of a quarrel and the blow was given on the spot. There was no previous ill will or enmity between the parties. It was not premeditated but as a result of sudden quarrel. The injuries were opined to be grievous. Section 320 defines grievous hurt. Eight kinds of hurt are designated as grievous as set out in Section 320 IPC. Clause 8 thereof speak of two things:- (1) Any hurt which endangers life or (2) Any hurt which endangers life or which causes the sufferer to be during the space of twenty days—(a) in severe bodily pain or (b)unable to follow his ordinary pursuits. An injury can be said to endanger life if it is in itself such that it may put the life of injured in danger.

22. Section 322 postulates that whosoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause grievous hurt, and if the hurt which he causes is grievous hurt, he is said “voluntarily to cause grievous hurt”. Intention to cause hurt or knowledge that an act is likely to cause hurt is the most decisive factor to decide whether a person can be held guilty of voluntarily causing hurt.

23. In the instant case, a single blow was given on the left side of abdomen. According to Dr. Vijay Hangloo, there was a sero muscular tear in the left descending colon, which was repaired with silk. In the factual matrix of the case, it cannot be said that the appellant had intention to cause death of the injured. The appellant certainly had intended to cause

injury which was opined to be grievous in nature. As such, such an act would clearly be covered by clause eight of Section 320 Penal Code and therefore amounts to grievous hurt punishable u/s 325 IPC. Accordingly, the conviction of the appellant Virender Gupta is converted to offence u/s 325 IPC.

24. So far as accused Sumit Gupta and Anup Gupta are concerned, the mere fact that they accompanied accused Virender Gupta does not ipso facto prove that they shared common intention with co-accused Virender. They did not indulge in any overt act qua injured Deepak. The only role assigned to them is of giving leg and fist blow to Ashok Kumar which injuries were opined to be simple by the Doctor. As such, so far as these two appellants are concerned, they are liable to be convicted under Section 323/34 IPC only. Accordingly, conviction of these appellants is converted to Section 323/34 IPC.

25. The last question relates to quantum of sentence. The offence in question was committed on 29th September, 2005. As per the nominal roll of appellant Virender Gupta, he remained in jail as under trial for a period of 1 year 25 days besides earning remission for 2 months and 5 days. As per report of probation officer, he has been acquitted in two cases. No other case is pending against him. He is a businessman having responsibility of a wife, an unmarried daughter and two unmarried sons. Neighbours also gave a favourable report. Detention in jail would not

serve the purpose of rehabilitation and reformation as he is not a threat to society as such, it was recommended that he be granted benefit of probation u/s 4(1) of Probation of Offender Act. Under the circumstances, keeping in view the fact that this appellant has already remained in jail for a period of about 1 year and 3 months, it is deemed appropriate to release him on probation for a period of two years, to maintain peace and be of good behaviour, on furnishing personal bond in the sum of Rs.15,000/- with one surety in the like amount to the satisfaction of Registrar Appellate of this Court within seven working days, failing which to serve sentence for three years. He is also directed to pay compensation to the tune of Rs.25,000/- to injured Deepak within a period of four weeks, which be deposited with Registrar General of this Court who is thereafter requested to pay the same to the victim, Deepak.

26. As regards Sumit Gupta and Anup Gupta, as per nominal roll, Sumit Gupta remained as under trial for 6 months and 26 days besides earning remission of 2 months. Anup Gupta remained as undertrial for a period of 11 months and 14 days besides earning remission of two months. As per the report of the probation officer, the antecedents of the appellants are clean. The appellant Sumit Gupta was reported to be just 18 years of age at the time of incident and nothing adverse was gathered against him. Similarly, the antecedents of Anup Gupta were reported to be clean. It was further reported that he has a large family of six children and a wife who is

suffering from tuberculosis and widow mother. He has meagre earning of Rs.4000/- per month. Under the circumstances, their substantive sentence is modified to the period already undergone while keeping the sentence of fine as unaltered.

The appeals are accordingly disposed of. Trial Court record be sent back along with a copy of the judgment.

(SUNITA GUPTA)
JUDGE

OCTOBER 15, 2014
as