

\$~

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

+ **CRL.A. No.61/2002**

Date of Decision : 30th November, 2016

AMARNATH@KALLU & ANR. PETITIONERS

Through Ms.Inderjit Sidhu, Adv.

versus

THE STATE RESPONDENT

Through Mr.Panna Lal Sharma, APP with SI
Jainender Kumar, PS Anand Vihar.

CORAM:

HON'BLE MR. JUSTICE P.S.TEJI

P.S.TEJI, J

1. Aggrieved by the judgment of conviction dated 18th August, 2001 convicting the appellants finding them guilty under Section 308 read with Section 34 of the Indian Penal Code and order on sentence dated 20th August, 2001 vide which the sentence was passed against the accused to undergo rigorous imprisonment for a period of two years each and to pay a fine of Rs.5,000/- each, and in default of payment of fine, to undergo further simple imprisonment for six months, the present has been preferred by the appellants.

2. The facts in brief are that a complaint was made by Shri Kapil, son of Wakil Mohammad, in which it was alleged against

the appellants that on 13th June, 1998 when the complainant Kapil was going to the house of his friend Sarbuland Khan and reached towards Gurdwara, he saw that Sarbuland Khan; Amarnath@Kalu & Nikka@Nikkey who resided in the same locality, were quarrelling with one another. Thereafter, Sarbuland Khan asked Amarnath@Kallu as to why he teased his sister Zohra over which Kallu got angry and asked his associate Nikkey to beat them. This resulted in a minor scuffle in which Kallu and Nikkey brought dandas from their jhuggies and started beating the complainant while Sarbuland Khan went to call the police. In the meanwhile, Kallu and his associates kept on giving danda blows on the head of the complainant Kapil who fell down. After that police came on the spot and the complainant was admitted to S.D.N. Hospital and his statement was recorded by the police. After investigation of the case, the chargesheet was filed for offence under Section 308 read with 34 of the IPC against both the accused. Both the accused persons pleaded not guilty.

3. The prosecution had examined as many as 11 witnesses namely PW 1 Kapil, PW 2 Ramji Lal, PW 3 Dr.D. Chatterjee, PW 4 Dr. Amitabh Singh, PW 5 Smt.Usha Rani, PW 6 Nisan Singh, PW 7 HC Sat Prakash, PW 8 Const.Khursheed Ahmad, PW 9 SI Ramesh Malik; PW 10 Dr.Chaitanya Sharma & PW 11

Dr.Sharmila Mitra. The statements of the accused persons were recorded under Section 313 of the Code of Criminal Procedure by placing the incriminating evidence against them.

4. The challenge made to the judgment of conviction and order on sentence inter alia on the following grounds:-

(i) In the alleged incident, the appellants also received injuries. The injury on the person of the appellant no.1 was serious in nature as per Ex.PW 3/A and as stated by the investigating officer of the case. The appellant no.1 was seriously injured in the alleged incident which clearly shows that the complainant party had come prepared to attack the appellants and inflicted injuries upon them. The incident took place near the house of appellant no.1 and as the complainant party had a grudge against the appellants, they came fully prepared to attack the appellants. If the version of the prosecution is to be believed, on being attacked by the complainant, the appellants were justified in defending themselves and that the alleged injuries on the complainant could have occurred due to self defence on the part of the appellants.

(ii) There are also major contradictions in the statement of the complainant to the effect that the main reason of the attack i.e. teasing of sister of Sarbuland Khan, as per the statement of the complainant was told by Sarbuland Khan at his house when the

complainant reached there. However, in the same line, this witness went on to say that he was told of the reason when he met Sarbuland Khan near the house of the appellant.

(iii) The Trial Court failed to appreciate the fact that so far as the statement of eye witness PW 2 is concerned, the same does not inspire confidence inasmuch as according to his statement, the complainant was alone when he was being beaten by the appellants which is in complete contradiction to the prosecution case which is to the effect that both Kapil and Sarbuland Khan were present near the house of the appellants when the alleged incident occurred. Thus, if the statement of this witness is to be believed, then withholding of Sarbuland Khan as a prosecution witness goes to the root of the entire case and is fatal to the prosecution story.

(iv) The material witness i.e. Zohra, sister of Sarbuland Khan who was alleged to have been teased by the appellant no.1, had not been examined. The Trial Court did not appreciate the fact that the alleged weapon of offence i.e. dandas were not even shown to the complainant at the time of his evidence as a result of which the alleged injury which was shown to be caused by the alleged dandas by the appellants, could not be linked to the weapon which was used. No specific role had been assigned to the appellants in causing alleged injuries to the injured.

(v) Instant case lacks fair and proper investigation inasmuch as despite the knowledge of injuries on the appellants and even after medical opinion in respect of the injuries sustained, no case was registered against the complainant and his companions despite the knowledge of the incident to the police. Apart from this, the prosecution did not bother to record the statement of the injured appellants. The FIR was lodged after a lapse of twenty days from the date of incident which clearly casts doubt over the episode and shows that the possibility of altering/twisting the facts of the incident cannot be ruled out. The delay in lodging the FIR of the incident is stated to be unexplained.

(vi) The charge has been wrongly framed under Section 308 of the IPC and it ought to have been framed under Section 323 of the IPC as a bare reading of the facts and circumstances of case lead to invoking of Section 323 IPC itself.

5. The submission made by counsel for the appellants is primarily that the injury attributed in the present case makes the appellants liable to be charged under Section 323 read with Section 34 of the IPC and not under Section 308 read with Section 34 of the IPC as has been framed.

6. In support of her contention, learned counsel for the appellants relies on the judgment of this court in which the charge

framed under Section 308 of IPC was converted into Section 323 of IPC taking into consideration the facts and circumstances of the case. The relevant portion of this judgment reads as under:-

“9. It appears to me that a quarrel had actually taken place between the appellant and the complainant possibly on account of either of them feeling that the other one was staring at him and confronting him accordingly. Though the complainant did sustain injuries, in the facts & circumstances of the case, the Court cannot be sure as to whether a palta was actually used by the appellant for causing injuries to him or not. In any case, it cannot be known, what was the size and shape of the said palta. In these circumstances, it would be difficult to say that the appellant had caused injuries to the complainant with such intention and knowledge that under such circumstances that if he by that act had caused death he would be guilty of culpable homicide not amounting to murder. The charge under Section 308 of IPC, therefore, cannot be sustained. The appellant, however, is liable to be convicted under Section 323 of IPC for causing simple injuries to the complainant as Mohammad. He is convicted accordingly.”

[Mohd. Akhtar Vs. The State passed in Crl.A. No.197/2010 Dt.03.04.2014]

7. Apart from challenging the judgment of conviction, learned counsel for the appellants further submitted that as per the nominal roll, as on 12th November, 2016, the appellant no.1 Amar Nath@Kallu had undergone six months and twenty seven days incarceration and unexpired portion of his sentence is one year, two months and twelve days. Whereas as per nominal roll of appellant

no.2 Nikka@Nikkey, as on 16th March, 2002, the undergone period of sentence by him was seven months & one day while unexpired portion of sentence of the appellant no.2 was one year two months and twenty nine days. The nominal roll also reflects that the appellant no.2 was released on bail on 16th March, 2002 by the order of this Court. Learned counsel for the appellants requests for lesser sentence.

8. Per contra, arguments advanced by learned Additional Public Prosecution for the State is that the injury suffered by the complainant/injured is grievous in nature. It was argued that during his deposition in court, the injured fully supported the case of the prosecution and his testimony has been duly corroborated by another eye witness PW 2 Ramji Lal. Even the testimony of injured has been corroborated by medical evidence and statements of the doctors who medically examined the injured and his medical papers. The prosecution successfully established its case beyond reasonable doubt that on the date of incident, the appellants caused grievous injury on the head of the injured and they have been rightly convicted by the trial court.

9. Upon hearing the rival contentions of the parties at length and judgment relied upon, evidence led is being examined.

(I). The complainant Kapil examined as PW 1 in his statement

deposed that on 13th June, 1998, accused Nikkey and Amarnath teased the sister of his friend Sarbuland Khan at Gurdwara wali gali and when he and his friend Sarbuland Khan reached the narrow gali near Gurdwara to confront the accused persons regarding the teasing of sister of Sarbuland Khan, both the accused started beating them with dandas and both the accused gave danda blows on the head of the complainant. He further deposed that he became unconscious and thereafter police came and took him to the hospital where he was medically examined.

(II) PW 2 in his testimony deposed that both the accused persons were using sticks at the time of quarrel and despite his effort to intervene, he could not save the complainant/Kapil. This witness further deposed that the complainant received head injuries on his head and blood was oozing out and that the condition of the complainant did not improve on the date of his examination. This testimony of PW 2 corroborates with the injured persons testimony mentioned above.

(III) Statement of PW 5 Smt.Usha Rani, sister of the accused Amarnath was also recorded in which she deposed that her brother was arrested by the police in connection with the case and accused Nikkey was also got arrested on the next day of the arrest of his brother.

(IV) Statement of PW 6 Nisan Singh in his statement deposed that he was called to the police station where both the accused persons were arrested and their personal search was conducted in his presence vide memos Ex.PW 5/C and 5/D respectively which bears his signatures at point-B of these memos.

(V) Statement of PW 7 HC Sat Prakash was recorded in which he deposed that while being posted at Police Station Anand Vihar as Head Constable, he received a ruqqa brought by Constable Mahender Singh and that on the basis of the said ruqqa, FIR was lodged.

(VI) Thereafter, statement of PW 8 Constable Khursheed Ahmad was recorded in which he deposed that while being posted at PS Anand Vihar, he accompanied the investigating officer of the case to Bhikam Singh Colony and that the accused Amar Nath took them to his jhuggi and produced two dandas which were taken into possession by them. The memo as well as seizure memo was exhibited as Ex.PW 8/A and bore their signatures. The confessional statements of both the accused were recorded as Exh.PW 8/B & 8/C respectively and bear his signatures.

(VII) PW 9 SI Ramesh Malik in his statement deposed that he along with Ct.Omkar went to Bhikam Singh Colony wherein he was informed that the injured persons had been removed to the

police station Anand Vihar. He further deposed that both the accused also sustained serious injuries and injured Kapil was unconscious and unfit for statement. Further, he had also recorded the disclosure statements of Amarnath ExPW8/B and 8/C of Nikkey in pursuance of which he was led inside the house and shown the dandas, which were therein taken into possession. PW 9 further stated that he would be able to identify the said weapon, if shown to him.

10. Section 308 IPC provides for punishment in cases of attempt to commit culpable homicide. It provides that whoever does any act with such intention or knowledge and under such circumstances that if he by the act caused death, he would be guilty of culpable homicide not amounting to murder whereas Section 323 IPC provides for punishment for voluntarily causing hurt.

11. In this regard, reliance is placed on the pronouncement of the Hon'ble Supreme Court in which it was held as under:-

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone.

"Convincing evidence is required to discredit an injured witness." [Vide [Ramlagan Singh v. State of Bihar](#), [Malkhan Singh v. State of U.P.](#), [Machhi Singh v. State of Punjab](#), [Appabhai v. State of Gujarat](#), [Bonkya v. State of Maharashtra](#), [Bhag Singh, Mohar v. State of U.P.](#), [Dinesh Kumar v. State of Rajasthan](#), [Vishnu v. State of Rajasthan](#), [Annareddy Sambasiva Reddy v. State of A.P.](#) and [Balraje v. State of Maharashtra](#).]

29. While deciding this issue, a similar view was taken in [Jarnail Singh v. State of Punjab](#), where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29) "28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In [Shivalingappa Kallayanappa v. State of Karnataka](#) this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In [State of U.P. v. Kishan Chand](#) a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide [Krishan v. State of Haryana](#)). Thus, we are of the considered opinion that evidence of

Darshan Singh (PW 4) has rightly been relied upon by the courts below.

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

[[Abdul Sayeed v. State of Madhya Pradesh](#) [(2010) 10 SCC 259]]

12. To the similar effect is the judgment of the Hon'ble Supreme Court in which it was held as under:-

"14. Both the injured were subjected to lengthy cross examination. Despite that nothing material could be elicited to discredit their testimony. There can be no dispute about their presence at the spot as they were the victims and had sustained injuries. Despite lengthy cross examination, they stood the test of cross examination and nothing could be elicited to show that the incident had not taken place in the manner projected by them or that they had not received injuries at the hands of the accused. The FIR in this case was recorded without any undue delay. According to the injured, the incident had taken place at about 12.15. p.m. Both the injured were examined at the hospital at about 12.45/1.00 p.m. The Investigating Officer had come to know about the incident and had initially gone to the spot from where he came to know that injured had been removed to hospital. Therefore, he went

to hospital and recorded the statement of injured Rakesh Yadav and thereafter got the case registered against the accused at about 3.05 p.m. This reflects that there was no delay in lodging the FIR which rules out the possibility of their false implication. That being so, there is absolutely no reason as to why the victims would allow the real culprits to go scot free and to falsely name the accused in this case.”

[*Mano Dutt and Anr. Vs. State of UP, (2012) 2 SCC (Cri) 226*]

13. As per the testimony of injured/complainant (Kapil) PW 1, on the day of incident when he along with his friend Surbuland Khan reached in a narrow street near Gurdwara, both the appellants met them. When they complained the appellants regarding teasing of sister of Surbuland Khan, both the appellants started beating PW 1 with dandas which they were holding. He specifically stated that both the appellants gave danda blows on his head and after receiving injuries he became unconscious. Testimony of complainant/injured is duly corroborated by another eye witness Ramji Lal PW 2 who stated that on the date of incident, he saw that there was a quarrel in a narrow street between the appellants and complainant Kapil. PW 2 saw that both the appellants had used sticks at the time of quarrel. PW 2 tried to intervened but he could not save Kapil. He specifically stated that Kapil received injuries on his head and blood was oozing out. During cross-examination,

PW 2 stated that he knew Kapil and both the appellants being the residents of same locality. Kapil was alone and he was given beatings by the appellants. He also stated that he reached the spot when the quarrel was going on.

14. The testimony of the complainant/injured Kapil clearly proves the case of the prosecution that on the date of incident, both the appellants gave danda blows on his head. The testimony of injured Kapil is duly corroborated by his MLC Exh.P/w 3/B which shows that there was swelling over his right parietal region, bruises on scalp and bleeding from right ear and nose which also establishes that the danda blows given on the head of the injured were so severe that the same could have caused his death. The carrying of danda and giving their blows on the vital part of the injured clearly proves the intention and knowledge of the accused persons that they made an attempt to commit culpable homicide of the injured. So the prosecution has duly established beyond reasonable doubt that on the day of incident both the appellants caused grievous injuries on the person of the injured Kapil and thus made an attempt to commit his culpable homicide.

15. The above testimony of the injured Kapil which has duly been corroborated by another eye witness of PW 2 Ramji Lal inspire confidence. Though they were cross-examined at length by

the defence but the defence has failed to put any dent to their testimony. Their testimony remained unshaken and unimpeachable and the same was found to be reliable and trustworthy as held by Hon'ble Apex Court in the case of **Abdul Sayeed (supra) & Mano Dutt (supra)**.

16. It is pertinent to mention here the pronouncement of the Hon'ble Supreme Court in which it was held that to make an offence under [Section 308 IPC](#), the nature of injury is not conclusive. The relevant portion of the Sunil Kumar (supra) is reproduced hereinbelow:-

"4. The view taken by the High Court is obviously erroneous because offence punishable under [Section 308 IPC](#) postulates doing of an act with such intention or knowledge and under such circumstances that if one by that act caused death, he would be guilty of culpable homicide not amounting to murder. An attempt of that nature may actually result in hurt or may not. It is the attempt to commit culpable homicide which is punishable under [Section 308 IPC](#) whereas punishment for simple hurts can be meted out under [Sections 323 and 324](#) and for grievous hurts under [Sections 325 and 326 IPC](#). Qualitatively, these offences are different. The High Court was thus not well advised to take the view as afore-extracted to bring down the offence to be under [Sections 323/34 IPC](#) and then in turn to hold that since that offence was investigated by the police without permission of the magistrate, the proceedings under that provision be quashed. For the view afore-taken as to the commission of the offence under [Sections 308/34 IPC](#), it is not necessary to dwell on the correctness of the

second part of the order relating to quashing of proceedings under [Sections 323/34](#) IPC. Thus, the entire order of the High Court deserves to be and is hereby quashed, restoring the status quo ante of the trial remaining with the Additional Sessions Judge to proceed in accordance with law."

**[Sunil Kumar Vs. NCT of Delhi & Ors., (1998)
8 SCC 557]**

17. Statement of PW 4 Dr.Amitabh Singh of SDN Hospital was also recorded who medically examined the complainant Kapil on 14th June, 1998 and referred him to surgeon for further examination. PW 3 Dr.D. Chatterjee has stated that on 14.06.1998, patient Kapil was referred to him for further management. He examined the patient and found the head injury as mentioned in the MLC and other things. He referred the patient to RML Hospital as facility was not available in SDN Hospital to look after the patient of head injury. PW 11 Dr. Sharmila provided the X-Ray report as PW 11/A. The X-Ray report was examined by her on 13th June, 1998 itself and found fracture on right temporo parietal bone in the skull. PW 10 Dr.Chaitanya Sharma on the MLC which is Ex.3/B and in his statement deposed that on 14th June, 1998, the complainant Kapil was admitted in LNJP Hospital and that the injuries & X-ray report shows that the fracture on the right temporo parietal bone of the complainant Kapil clearly reflects that the injury was grievous in nature as per endorsement

Ex PW 10/A on MLC which is Exh.PW 3/B.

18. The discussion made above apparently shows that the injured Kapil is trustworthy who suffered head injury which was found to be grievous in nature as per his MLC Exhibit PW 3/B and brings the case of the prosecution within the four corners of the alleged commission of offence which culminated into the conviction of the convicts/appellants. This court is of the considered opinion that the prosecution has successfully proved the guilt of the appellants.

19. As a result, no error or illegality is found in the view taken by the Trial Court in the judgment of conviction dated 18th August, 2001 and same needs to be upheld.

20. The arguments advanced by the counsel for the appellants that the offence committed by the appellants falls under Section 323 IPC rather than Section 308 IPC, does not find any substance particularly keeping in view the judgment of the Supreme Court in the case of **Sunil Kumar (supra)** and the nature of injury which is shown to be “grievous” having fracture on the head and deserves to be turned down.

21. The submission made by counsel for the appellants is that the learned Trial Judge awarded the sentence on the higher side and claims the reduction/modification in the sentence. In view of the facts and circumstances stated above, the injury caused is the

fracture on the head and termed as “grievous” as per the MLC Exh.PW 3/B. In such circumstances, the sentence awarded cannot be said on the higher side and no case is made out for the reduction/modifying the sentence awarded vide order on sentence dated 20th August, 2001 and the same is upheld.

22. *Section 319 IPC defines the term “hurt” whereas Section 320 IPC defines “grievous hurt”. The fracture on the skull is grievous hurt and cannot be termed as simple hurt.*

A person causing fracture on skull cannot term the hurt as simple hurt as per the settled law.

23. In totality of the discussion made above, no fault or error could be found in the judgment dated 18th August, 2001 convicting the appellants and the order on sentence dated 20th August, 2001. Resultantly, the present appeal is dismissed.

24. The surety bonds and personal bonds of the appellants are forfeited. The convicts/appellants are directed to surrender before the trial court concerned within a period of fifteen days from the date of judgment.

(P.S.TEJI)
JUDGE

NOVEMBER 30, 2016
aa