

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

+ **CRL.A. 285/2011**

Date of Reserve: 07.10.2015

Date of decision: 15.10.2015

RAM KUMAR PATHAK Appellant

Through: Mr.K.K.Sud, Sr.Advocate with
Mr.Pranshu Dhingra, Advocate.

versus

GOVT. OF NCT OF DELHI Respondent

Through: Ms.Rajni Gupta, APP.
ASI Devender Kumar, P.S.Uttam
Nagar.

+ **CRL.A. 513/2011**

DURVESH SINGH Appellant

Through: Mr.Akhilesh Kr.Pandey, Advocate.

versus

STATE & ORS Respondents

Through: Ms.Rajni Gupta, APP.
ASI Devender Kumar, P.S.Uttam
Nagar.

+ **CRL.A. 897/2011**

SHOBRAN PAL AND ORS Appellants

Through: Mr.Firaj Khan, Advocate.

versus

GOVT. OF NCT DELHI Respondent

Through: Ms.Rajni Gupta, APP.
ASI Devender Kumar, P.S.Uttam
Nagar.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J.

1. All the appeals have been heard together and are being disposed of by this common judgment.
2. Ram Kumar Pathak, (appellant in Criminal Appeal No.285/2011), Shobran Pal and Ramesh Pal (appellants in Criminal Appeal no.897/2011) have challenged the judgment and order of conviction dated 11.02.2011 and 15.02.2011 passed by the learned Additional Sessions Judge (North-West-04), Rohini, Delhi, in Sessions case no.75/2009, arising out of FIR No.807/2006 (PS Uttam Nagar), whereby they have been convicted under Sections 308/34 of the IPC and have been sentenced to undergo Rigorous Imprisonment for four years, fine of Rs.7,000/- and in default of payment of fine, a further Simple Imprisonment of 7 months, with the benefit of Section 428 of the Code of Criminal Procedure (for short 'Cr.P.C.') accruing to them.
3. Durvesh Singh (appellant in Criminal Appeal No.513/2011), has on the other hand, challenged the judgment on the ground that from the evidence adduced during the course of trial, the accused persons ought to have been convicted under Section 307/34 of the IPC and not under Section 308/34 of the IPC.
4. Durvesh Singh has also questioned the adequacy of the sentence imposed upon the accused persons.
5. The appellants have questioned the correctness of the impugned judgment and order of conviction on the ground that the Trial Court has thrown to the winds the accepted canons of appreciating evidence

and has completely ignored serious contradictions in the statements of the witnesses which tantamounts to a total departure from the prosecution version. The impugned judgment has been assailed on further grounds namely; (i) non-examination of any independent witness to the occurrence; (ii) completely shutting out the evidence of two witnesses offered on behalf of the defence; and (iii) also the fact that the injury report was not proved by the Doctor who wrote the report and thus there being no material to suggest that Durvesh Singh (PW.3) was injured in the occurrence and in the manner in which the appellants are alleged to have assaulted him.

6. Durvesh Singh (PW.3), during the Trial, has supported the statement given by him before the police on 03.09.2006 (Ex.PW.3/A) and has testified to the fact that on the day of the occurrence, all three appellants (Ram Kumar Pathak, Shobran Pal and Ramesh Pal) assaulted him by means of hockey sticks and dandas. He has deposed that at the relevant time he was an employee of Jagdamba Gas Agency at Keshav Pur Depot, where the appellant Ramesh Pal also worked as supplier of gas cylinder to the customers. Ramesh Pal was harbouring a grudge that perhaps because of PW.3, he was removed from the service of Jagdamba Gas Agency. The appellant Ramesh Pal had threatened PW.3 of dire consequences in the past. He has further alleged that sometime prior to the occurrence i.e. on 24.08.2006, appellant Shobran Pal along with 2-3 other persons had surrounded him in front of Subzi Mandi, Keshav Pur, but PW.3 could anyhow save himself from being assaulted. On 03.09.2006, as has been stated by PW.3, while he was coming back from his shop and proceeding

towards his home, he met one person near the crossing of Vikas Nagar at around 08:20 p.m. who requested him to give lift till the hospital/nursing home as he was hit by a moving vehicle. PW.3 thereafter took the aforesaid person on his vehicle and proceeded for the nursing home. No sooner had he reached some distance, he noticed that the appellants, variously armed with hockey sticks and dandas, were standing on a vacant plot. The appellants Shobran Pal and Ram Kumar were having hockey sticks in their hands whereas Ramesh Pal was carrying a danda. PW.3 was assaulted by all three appellants. While warding off the attack, he received injuries on his hand leading to fractures. He was mercilessly assaulted on his legs which were also fractured. PW.3, thereafter, fell down on the ground. The appellants were of the impression that he has died because of the assault.

7. Durvesh Singh, (PW.3) has further stated before the Trial Court that somebody informed about the occurrence in his house. His brother, Anil Kumar, (PW.4), came to the spot and took him to DDU Hospital. At the hospital, his statement was recorded. He remained in the hospital for about 1 ½ months and had to undergo surgery of both his hands.

8. Anil Kumar, (PW.4) has deposed that on 03.09.2006 at about 08:40 p.m., he was informed that one person was lying injured on the road. Sensing foul, PW.4 reached the spot and identified that his brother was lying unconscious on the road. He took his brother to DDU Hospital and also informed the police about the occurrence.

9. Dr.Nishu Dhawan, (PW.2), CMO, DDU Hospital, Hari Nagar, has affirmed that on 03.09.2006 at about 10:00 p.m., Durvesh Singh (PW.3) was brought to DDU casualty with alleged history of assault. The MLC (Ex.PW.2/A) was stated to have been prepared by Dr. Aarti Soni who had signed the MLC. The injured was referred to the Orthopaedic Ward where one Dr. Dheeraj examined him. The signature of Dr.Dheeraj is also appended on the MLC (Ex.PW.2/A). Dr.Dheeraj had given an opinion as per the MLC; X-ray report regarding the fracture of right tibia bone, as grievous injury.

10. Dr.Nishu Dhawan (PW.2) has further testified to the fact that Dr. Aarti Soni and Dr. Dheeraj had left the services of the hospital and at the time of trial, their whereabouts were not known. PW.2 identified their signature and handwriting on the MLC (Ex.PW.2/A) as she had seen them signing and writing while they were in the services of the hospital.

11. Thus, from the deposition of PW.3 & PW.4, it is apparent and fully established that appellants (Ram Kumar Pathak, Shobran Pal and Ramesh Pal) assaulted PW.3 by means of hockey sticks and dandas which led to grievous injuries on his person. PW.3 has correctly identified the appellants in the dock.

12. The motive for assaulting PW.3 has also been clearly stated by the aforesaid witnesses. One of the appellants was removed from the services of Jagdamba Gas Agency and there was a suspicion in their mind that such removal was only at the instance of PW.3. As deposed by PW.3 an attempt on his life was made earlier also but with the

timely arrival of the police, the accused persons fled from the place of occurrence.

13. Rajender Singh (PW.5) has testified to the fact that he received DD No.43A and after coming to know of some person indulging in assault, he along with Sanwar Mal (PW.10) reached S-Block, Near Vikas Valley Public School, Vikas Nagar, Delhi. It was learnt at that place that the injured had been removed to DDU Hospital. The aforesaid witness and PW.10 went to the hospital where the MLC of PW.3 was obtained and his statement was recorded. On the basis of the statement recorded by PW.5, a Rukka was prepared and PW.5 went to the police station to get the FIR registered.

14. Head Constable Om Parkash (PW.6) has testified to the fact that on 06.09.2006, he had joined the investigation along with PW.10. On that day, appellants Shobran Pal and Ramesh Pal had surrendered before the Court. When they were on police remand, on the showing of appellant Shobran Pal, one hockey stick was recovered from his house and the same was seized vide memo Ex.PW.6/G. At the instance of appellant Ramesh Pal, one danda (Ex.P-1) was recovered, which also was taken into possession vide memo Ex.PW.6/H.

15. The truthfulness of the statement made by PW.3 stands further established by the deposition of Uma Shankar (PW.7) who worked as Manager in Jagdamba Sai Gas Agency. He has confirmed the fact that PW.3 was employed in the agency for supplying gas cylinders and that appellant Ramesh Pal had left the services of the gas agency from 12.08.2006.

16. The investigation in the case was conducted by SI Sanwar Mal (PW.10). While deposing before the Court during Trial, he has recounted the information received by him vide DD No.43A, leading him to go to the spot and then to the hospital where he recorded the statement of PW.3, which formed the basis of the FIR against the appellants. Appellant Ram Kumar Pathak had not been apprehended and PW.10 got processes issued under Sections 82/83 of the Cr.P.C. However, later, PW.10 learnt that Ram Kumar Pathak had surrendered before the Court. Appellant Ram Kumar Pathak's disclosure statement (Ex.PW.10/E) was recorded by him. During the course of investigation, PW.10 has asserted that, he collected the documents regarding employment of appellant Ramesh Pal and PW.3 from Jagdamba Sai Gas Agency. PW.10 also collected the MLC and X-ray report of PW.3 and after investigation, submitted chargesheet against the appellants.

17. Any discussion on the issue whether any case was made out under Section 307 or 308 of the IPC would not be complete unless the X-ray report of PW.3 is referred to.

18. Dr.Shefali (PW.9), Medical Officer, DDU Hospital, has identified the handwriting and signature of Dr.Anil Sarin, Radiologist, who had prepared the X-ray report dated 03.09.2006. Dr. Anil Sarin, at the time of trial, was not in the services of the hospital and his whereabouts were not known. However, PW.9 identified the handwriting and signatures of Dr.Anil Sarin. The X-ray report which

is Ex.PW.9/A reveals that there was a fracture of the right tibia and fracture of both the forearms. No fracture was seen in the thigh region.

19. Thus, there does not appear to be any doubt that the assault perpetrated on PW.3 by appellants, led to serious/grievous injuries on his person. Since a leg and both the arms were fractured, it can safely be presumed that the appellants committed an act which if consummated, would have made them liable for culpable homicide not amounting to murder. In the absence of any injury on any vital part of the body of PW.3, his assertion that an attempt was made by the appellants to assault him on his head and vital portions of his body, cannot be accepted to be true. There were three assailants and the injured (PW.3) who was all alone to fend for himself. If at all there was any intention of the appellants to have killed PW.3, they would not have stopped short of only assaulting the injured on his legs and hands. Not a single injury on the head of PW.3 makes it difficult to believe that the appellants intended to kill the deceased as there was no supervening circumstance which could have stopped the appellants from executing their intentions.

20. The appellants have examined Suresh Chand (DW.1) and Gulfan Singh (DW.2); both of whom have claimed to be the neighbours of the injured PW.3. Suresh Chand (DW.1) has stated that when he visited the hospital to see PW.3, he found that PW.3 was not fully conscious and was not in a position to talk. Though DW.1 has confirmed about his knowledge that the appellants and the injured worked at Jagdamba Gas Agency but did not express any categorical

information regarding the appellants harbouring any grudge against PW.3. Similar is the statement of Gulfan Singh (DW.2).

21. A perusal of their depositions clearly reveal that they have been put up at the instance of the appellants for the purpose of demonstrating that the injured, while undergoing treatment at hospital was not in a position to give any statement and that there was no surety of the motive of the appellants in assaulting PW.3 leading to the injuries and his hospitalization. However, because of the inconsistencies in their statements, it is difficult to accept their statements.

22. Thus, from a conspectus of all these facts, there remains no doubt that PW.3 was severely assaulted by the appellants, the intention being to wreak out vengeance for the grudge which was being nurtured and harboured by one of the appellants viz., Ramesh Pal, according to whom, he was thrown out of the service because of the machinations of PW.3. The clear and categorical assertions of PW.3 and the supporting evidence of other witnesses which have been discussed, this Court finds no fault with the verdict of guilt returned by the Trial Court as against the appellants.

23. The contention of PW.3 (appellant in Criminal Appeal No.513/2011) that the appellants namely (Ram Kumar Pathak, Shobran Pal and Ramesh Pal) intended to kill PW.3 is not tenable and acceptable for the reason that despite there being no supervening circumstances on the day and time of the occurrence, there was no serious injury on any vital portion of his body.

24. The contentions of the appellant that in the absence of the deposition of the Doctor who examined PW.3 and the Radiologist who prepared the report of X-Ray, neither the MLC nor the X-Ray report could be taken on record as admissible piece of evidence, is incorrect and not acceptable.

25. Section 32 of the Evidence Act provides that when a statement written or verbal, is made by a person in the discharge of his professional duty whose attendance cannot be procured without a reasonable delay, the same would be relevant and admissible in evidence. Thus, MLC (Ex.PW.2/A) and the Radiology Report (PW.9/A) are admissible piece of evidence which have been proved by PW.2 and PW.9 respectively.

26. That apart Section 294 of the Cr.P.C. reads as under:

“No formal proof of certain documents.- (1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.”

27. From a plain reading of Sections 294 of the Cr.P.C., it is evident that when particulars of a document are included in the list and when an accused is called upon to admit or deny the genuineness of such document and in case it is not disputed, the same can be read in evidence in trial, without proof of the signatures of the person, by whom it is signed. However, the Court may in its discretion require such signature to be proved. In the present case, the signature of the Doctor who prepared the MLC and the Radiologist who prepared the X-Ray report have been proved by PW.2 and PW.9 respectively. The aforesaid two witnesses namely PW.2 & PW.9 have not been questioned about the aforesaid exhibits namely Ex.PW.2/A and Ex.PW.9/A being ingenuine or forged. The aforesaid documents, therefore, can be presumed to have been accepted by the appellants without any objection. Thus, it cannot be said that the injury report and radiology report were not proved or could not have been taken into evidence for convicting the appellants.

28. Now to the question of sentence.

29. Sophocles, an ancient thinker, said that “law can never be enforced unless fear supports them”. Practically speaking, law is venerated primarily for the fear of being punished for violation of the same. Nonetheless, the reformatory theory of sentencing is equally important. If the punishment for a crime is only intended for the purposes of instilling fear in the mind of the wrongdoer, the retributive

element in the sentencing process would operate, which will only permit of sufficiently adequate punishment for redressing the grievances of the victim as also for forcing the society to behave. With profit, one is reminded of the expression of Justice Benjamin N. Cardozo that justice, though, is due to the accused is also due to the accuser. A diametrically opposite view is of the reformatory system/process of sentencing, where effort is made to make the wrong-doer realize that he has committed a mistake and that he should be given an opportunity to repent, expiate, and in the process reform himself, thereby making him an important adjunct of society.

30. A Court of Law may not be guided solely by the fact as to what would happen to the family of the convicted persons if he is sent to jail but should also not be over zealous in imparting a heavy sentence in order to demonstrate that the wrongdoer cannot be allowed to go off lightly.

31. There can hardly be any dispute over the proposition that the sentence has to be in proportion to the crime and the circumstances in which it is committed. Instances are abound where, while operating the sentencing system, the Courts of Law have adopted the corrective machinery with a reformatory approach. On many occasions, the sentencing processes have been tempered with social/humane considerations and justifiably so.

32. In *Shailesh Jasvantbhai & Anr. vs. State of Gujarat & Ors.*, (2006) 2 SCC 359, the Supreme Court, while dealing with the policy of sentencing as stated as follows:

“7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a

significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect — propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the 1 Page 20 convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.”

33. The object of punishment has been briefly but definitively explained in Halsbury's Laws of England, (4th Edition; Vol.II; para 482);

“482. The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided.”

34. However, the judicial precedents in this regard suggest that the relevant consideration for sentencing would be the facts and circumstances in each case, the nature of crime, the manner in which it was planned and committed, motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances. All the above factors individually and collectively need form part of the consideration of the Court while sentencing.

35. In the present case, the mitigating factors can be listed as follows:

- i. Non-use of any lethal weapon.
- ii. Assault on hands and legs of the victim and not on any vital part of the body.
- iii. No supervening circumstance to stop the appellants from inflicting greater harm to the victim, thus suggesting lack of requisite intention to kill.
- iv. No diabolical approach in executing the intentions.
- v. The reason for assault being a perception of the appellants that because of the victim, the employment of one of the accused persons was lost.
- vi. The occurrence having taken place in the year 2006 i.e. about 9 years ago.
- vii. The appellants have participated in the Trial which continued for a reasonably long time.

36. Considering the aforesaid facts and circumstances, this Court is of the opinion that the interest of justice would be sub-served if the appellants are sentenced for the period which they have already undergone in custody (i.e. Ram Kumar Pathak: 3 months and 12 days; Shobran Pal: 9 months and 11 days & Ramesh Pal: 8 months and 25 days) and on their paying a fine of Rs.50,000/- each, to be deposited within a period of two months from the date of passing of the judgment, before the Trial Court, to be payable to the victim (PW.3) on his application before the Trial Court. In case the appellants default in paying the fine within the stipulated period, they would suffer Simple Imprisonment for a further period of 6 months.

37. Thus, Criminal Appeal Nos.285/2011 (Ram Kumar Pathak vs. Govt. of N.C.T., Delhi) and 897/2011 (Shobran Pal & Ors. vs. Govt. of N.C.T., Delhi) are partially allowed and Criminal Appeal No.513/2011 (Durvesh Singh vs. State) is dismissed.

ASHUTOSH KUMAR, J

October 15, 2015

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