



**IN THE HIGH COURT OF JUDICATURE AT BILASPUR,
CHHATTISGARH**

CRIMINAL APPEAL No. 1010/2002

APPELLANTS

1. Tilesh Kumar, aged about 30 years, S/o Ashvani Kumar Gabel
2. Gend Singh, aged about 25 years, S/o Ashvani Kumar Gabel
3. Ashvani Kumar, aged about 53 years, S/o Ram Prasad Gabel

All residents of village
Bundeli, Police Station Mal
Kharoda, District
Janjgir-Champa
(Chhattisgarh)

Versus

RESPONDENT

State of Chhattisgarh through
the Station House Officer,
Police Station Mal Kharoda,
District Janjgir-Champa
(Chhattisgarh)

**MEMORANDUM OF APPEAL UNDER SECTION
374 (2) OF CODE OF CRIMINAL PROCEDURE**

Filed on 23.9.02
by Shri S. Pandey
Advocate
R. D. R. (1)

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRR No. 545 of 2002

Vishnu Das Gabel And Others

---- Applicants

Versus

State Of Chhattisgarh & Ors.

---- Respondents

For Applicants	:	None appears
For State	:	Mr. Chandresh Shrivastava, Panel Lawyer
For Respondents No.2 to 4 Advocate	:	Mr. S.S. Baghel,

And

CRA No. 1010 of 2002

Tillesh Kumar And Others

---- Appellants

Versus

State Of Chhattisgarh

---- Respondent

For Appellants	:	Mr. S.S. Baghel, Advocate
For State/Respondent	:	Mr. Chandresh Shrivastava, Panel Lawyer

S.B.:Hon'ble Shri Justice Manindra Mohan Shrivastava

Order On Board

25/10/2016

Heard.

1. This order shall dispose criminal Revision filed by the victims as also criminal appeal filed by accused arising out of the judgment and conviction of sentence dated 12.09.2002 passed by Additional Sessions Judge, Sakti in Sessions Trial No.4/2002 whereby and whereunder the appellants have been held guilty of commission of

offence and sentenced as described below-

Conviction	Sentence
Under Sections 308/34 of IPC	Rigorous Imprisonment for three years with fine of Rs.3000/-, to each accused in default of payment of fine further R.I. for six month.
Under Section 324/34	Rigorous Imprisonment for one year with fine of Rs.500/-, to each accused in default of payment of fine further R.I. for two month.
Under Section 323/34	Rigorous Imprisonment for three months.

2. In an incident relating to assault, FIR (Ex.P/2) was lodged on 02.10.2001 by Vishnu Dayal (PW4) stating therein that Vishnu Dayal (PW4) along with his sons Sanjay Kumar and Harish Kumar, his wife Kashi Bai and mother Budhiyarin Bai were assaulted by Tilesh Kumar, Gendsingh and Aswani by using agriculture tool like *Kharda* and clubs. The injured namely Vishnu Dayal, Harish Kumar, Sanjay Kumar, Budhiyarin Bai and Kashi Bai were sent for medical examination. On the basis of FIR, the police registered criminal case for alleged commission of offence under Section 307 of IPC, held investigation and filed charge-sheet against the appellants. On the basis of material contained in the charge-sheet, learned Trial Court framed charges against each of the appellants alleging commission of offence under Section 307 IPC. The appellants having abjured guilt, they were put to trial. In order to prove its case, the prosecution examined as many as 19 witnesses. The appellants were examined under Section 313 Cr.P.C. in respect of incriminating evidence and circumstances appearing against them. All the appellants denied having committed offence and

stated that they have been falsely implicated and that the victims, themselves, were the aggressor. In their defence, the appellants examined solitary witness, Nandkishore, DW1.

3. Learned Trial Court, after taking into consideration the oral and documentary evidence on record, held that in the facts and circumstances, the appellants are guilty of commission of offence under Section 308, 324 and 323 of IPC read with Section 34 of IPC and imposed sentenced as described above.

4. Aggrieved by this judgment of conviction and sentence, while the accused have filed the appeal, the victims have preferred revision seeking conviction of accused under Section 307 of IPC with suitable sentence to be awarded.

5. As far as revision is concerned, there is no appearance made before the Court on behalf of the applicants despite repeated calls.

6. I shall first take up the criminal appeal for consideration.

7. Assailing correctness and validity of impugned judgment of conviction and order of sentence, learned counsel for the appellants argued that the story of the prosecution is highly doubtful because of serious contradictions and omissions with regard to genesis of dispute, role played by various accused and also because the ocular testimony is not coherent with the medical evidence. It is submitted that from the circumstances of the case, evidence on record as also from the fact that the appellants also sustained injury, it is injured witnesses who were the assailants and aggressors and the appellants only sought to defend them in exercise of their right of private defence.

8. Next submission of learned counsel for the appellants is

that in the facts and circumstances of the case, taking into consideration the circumstances, in which, the incident happened, the weapon alleged to be used and the nature of injury found on the head of some of the victims, no case for commission of offence under Section 308 IPC is made out but at the most, it can be said to be a case of commission of offence under Section 324, 323 of IPC only, therefore, the appellants may be acquitted of the charges under Section 308 IPC. As far as conviction under Section 324, 323 of IPC is concerned, it is submitted that the appellants had remained in jail before they were granted bail by the trial Court. Therefore, in these circumstances, even if the Court upholds the conviction, sentence may be reduced to the period already undergone by the appellants taking into consideration that it is an incident of 2001 and also looking to the age of the appellants.

9. On the other hand, learned State counsel submits that the evidence of injured witnesses as also other eyewitnesses, who were present on the spot, undoubtedly proved beyond all reasonable doubt that the third appellant was the aggressor. They had intercepted the tractor driven by Laxman and then, at the spot, Vishnu Dayal and his son Harish Kumar and Sanjay Kumar followed by Kashi Bai and Budhiyarin Bai arrived, all of them assaulted with weapons which the appellants were holding in their hand. The wife of the injured Vishnu Dayal (PW4) has sustained as many as three injuries on her head whereas Sanjay Kumar (PW5) and Harish Kumar (PW11) have also received one injury each on their head. This clearly shows that if by the act of the appellants, death would have been caused, the appellants would have been guilty of commission of offence of culpable homicide. It is also submitted that the looking to the manner of commission of offence weapon used injury, the Court below has rightly awarded sentence which calls for no interference.

10. The case of the prosecution that while Laxman was going on the tractor, he was intercepted by the appellants Tilesh Kumar, Gend Singh and Ashwani is supported by the evidence of not only injured eyewitnesses but also of Laxman (PW7), Shyamlal (PW2) Roshan Yadav (PW6). The injured witnesses namely Vishnu Dayal (PW4) and his two sons Harish Kumar (PW11), Sanjay Kumar (PW5) and his wife Kashibai (PW9) who sustained injuries, have clearly stated in their evidence with regard to the manner in which the incident happened. All these witnesses who are either injured witnesses or either witnesses of the incident have stated that when Laxman was going on the tractor, he was intercepted by the appellants and he was asked not to cross and when Sanjay Kumar, Vishnu Dayal and Harish Kumar arrived at the spot, there was dispute and then it followed assault by the appellants on these persons. Apart from Vishnu Dayal, Harish Kumar, Sanjay Kumar, Kashibai, Budhiyarin sustained injuries. The prosecution witnesses have also stated regarding the weapon used by the third appellant. It has come in the evidence of Vishnu Dayal and other injured witnesses that Tilesh Kumar was holding *Kharda*, Ashwani was holding *Bahinga* and Gend Singh was holding a *club*. From the evidence of the prosecution witnesses, it is also borne out that the genesis of dispute was an altercation between Laxman, who was driving the tractor and the appellants who intercepted and stopped the tractor restraining Laxman from taking tractor across the land.

11. The aforesaid abundance of evidence of witnesses including eyewitness proves beyond reasonable doubt that upon dispute having arisen at the spot due to stoppage of tractor driven by Laxman, by the appellants, Vishnu Dayal, Harish Kumar, Sanjay Kumar followed by Budhiyarin and Kashibai arrived at the spot and thereafter, the appellants assaulted them with the help of weapons held by them at the spot.

12. Dr. D.D. Mishra (PW17) and Dr. Ramprasad Kurre (PW12), who have examined the injured witnesses - Vishnu Dayal, Harish Kumar, Kashibai, Sanjay Kumar and Budhiyarin Bai have proved their MLC report and the injuries sustained by these persons. According to the evidence of Dr. Ramprasad Kurre (PW12), Kashibai sustained following injuries -

- i. Multiple bruise upon left wrist caused by hard and blunt object and simple in nature.
- ii. Multiple bruise around right wrist caused by hard and blunt object and simple in nature.
- iii. Bruise and swelling on frontal part of the head caused by hard and blunt object and simple in nature.

The doctor has proved his examination report Ex.P/10.

Injuries caused to Vishnu Dayal, Sanjay Kumar, Harish Kumar, Budhiyarin Bai have been proved by Dr. D.D. Mishra (PW17) as below :-

Injuries of Vishnu Dayal -

- i. Incised wound on left parietal part of the head.
- ii. Incised wound on temporal part of the head.
- iii. Swelling with bruise on left temporal part.
- iv. Incised wound on left thumb.
- v. Swelling with pain in the left hand.

According to the doctor, these injuries were caused by sharp edged and hard object. He has proved his report Ex.P/15.

Injuries of Harish Kumar -

An Incised wound injury on the middle part of the head caused by hard and sharp object, simply in nature proved by Ex.P/16.

Injuries of Sanjay Kumar -

A lacerated wound in the middle of the head caused by hard and blunt object, simple in nature proved by report Ex.P/17.

Injuries of Budhiyarin Bai -

Swelling in the right hand from palm up to the hand caused by hard and blunt object proved by report Ex.P/14.

13. The X-ray reports Ex.P/19 and Ex/P/20, proved by the doctors also proved fracture of wrist of Vishnu Dayal, two fractures in the wrist of Budhiyarin Bai. None of the injuries of Sanjay Kumar and Harish Kumar were found to be grievous, involving any fracture.

14. Dr. D.D. Mishra (PW17) has also deposed regarding the weapons alleged to be used in commission of offence by the appellants. According to the evidence of Dr. D.D. Mishra (PW17), the details of weapons are stated as below :

(a) Bahinga-

Length 5 feet 9 inch with width of 7.cm. which middle width ranging from 7 to 12 c.m. According to Dr., injury No.3 on Vishnu Dayal and injury No.1 on Sanjay Kumar and injury No.1 of Budhiyarin Bai could be caused by this weapon.

(b) Kharda -

146 c.m. in length with width of 9.5 to 10 c.m. pleated with an iron plate on 8.5 c.m. from which injury No.1 of Vishnu Dayal and injury No.1 of Harish Kumar could be caused.

(c) An iron rod pleated with plastic cover in middle, 49 c.m. long with sphericity thickness of 9 cm. by which injury No.4 of Vishnu Dayal and injury No.1 of Sanjay Kumar could be caused. The report Ex.P/10, in this regard has been proved by the doctor.

15. With regard to the nature and extent of injury and description of three weapons, nothing material could be elicited in the cross-examination so as to create any doubt with regard to the creditworthiness of evidence of the doctor in this regard.

16. Investigating Officer (PW19) has proved seizure of weapons from the accused persons.

17. As far as commission of offence under Section 324 & 323 of IPC is concerned, from the evidence on record and injury sustained by the five victims namely Vishnu Dayal, Harish Kumar, Sanjay Kumar, Budhiyarin Bai and Kashi Bai proves wrist fracture of Vishnu Dayal, Budhiyarin Bai commission of offence under Section 304 & 323 IPC is fully proved by the prosecution.

18. The question, however, arising for consideration is whether in the facts and circumstances, can it be said that the appellants are also guilty of commission of offence under Section 308 IPC. In order to appreciate the submission and decide the issue, the relevant provision contained in Section 308 IPC is extracted for reference of the Court, as below :-

“Section 308 of Indian Penal Code -Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to

three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.”

A perusal of the provision postulates doing 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 need not result in hurt. It is attempt to commit culpable homicide which is punishable under Section 308 IPC, whereas punishment for simple hurt could be meted out under Section 323 and 324 and for grievous hurt under Sections 325 and 326. Qualitatively these offences are different.

19. A comparative reading of Section 307 of IPC and 308 of IPC shows that they make provision for punishment of an attempt to commit certain offence and that while Section 307 IPC is linked with the offence of murder punishable under Section 302 of IPC, section 308 IPC is linked with the offence of culpable homicide under Section 304 of IPC. Section 307 IPC covers those cases where the Act has not resulted in death but if it had resulted in death, it would have amounted to murder. Similarly, Section 308 IPC, covers a case where the Act has not resulted in death but if it resulted in death, the offence would have amounted to culpable homicide not amounting to murder.

20. Thus, the distinction between the provision contained in Section 307 and 308 of IPC is of the same nature as distinction between the offence of murder and offence of culpable homicide not amounting to murder.

21. Therefore, in order to find out whether an offence under

Section 308 of IPC has been committed or not, the Court is required to examine the act of the offender, the evidence on record from which the intention or knowledge could be gathered and then cumulative view whether in the event of death, the offender would have been guilty of culpable homicide not amounting to murder. If these ingredients are fulfilled, it would be a case of an offence of culpable homicide not amounting to murder.

22. Culpable homicide does not amount to murder (a) if the act is done with the intention or knowledge referred to in Section 300 IPC but under circumstances which would bring the case within one of the exceptions mentioned in that Section or (b) if the act is done with the intention or knowledge referred to in Section 299 but not falling under clauses (2),(3) and (4) of Section 300 IPC. Thus, if an accused does not intend to cause death or any bodily injury, which he knows to be likely to cause death or even to cause such bodily injury as sufficient in the ordinary course of nature, to cause death, Section 308 IPC would apply if death, in fact, does not result.

23. If the aforesaid principles are applied to the facts and circumstances of the present case, it is proved that the genesis of dispute was stopping of tractor by the appellants. The tractor was being driven by Laxman. The appellants warned Laxman not to proceed further with the vehicle and when quarrel arose, at the spot Vishnu Dayal, Harish Kumar and Sanjay Kumar followed by Kashi Bai and Budhiyarin Bai arrived and at that stage, the appellants opened assault. The ocular testimony proves beyond reasonable doubt that the appellants used their respective weapons which resulted in injury to victims. Learned counsel for the appellants contended that the evidence of Vishnu Dayal proved that all the injuries on his head were caused by Tishesh Kumar and not by other accused. Even if this arguments is accepted, the

manner in which all the accused had gathered at the spot, armed with weapon and the concerted manner in which they not only stopped the vehicle but assaulted arrivals, clearly manifest a common intention on their part. Therefore, while all the accused persons were assaulting the victims, the criminal liability cannot be said to be confined only to the one who assaulted on the head of Vishnu Dayal. In fact, Vishnu Dayal has said that along with Tilesh Kumar and other accused Ashwani and Gend Singh also assaulted him though on different parts of the body.

24. It is a case where the appellants had come armed with certain articles which were used as weapon. True, it is that all the articles are used as agriculture tool, notwithstanding, looking to length and breadth of such articles, they could be used as a solid weapon, capable of causing any kind of injuries and it cannot be said that with these weapon, it is not possible to cause any serious injury. Not only this, it is not a case that initially at the time when the scuffle started, between the parties at the spot, the appellants were empty handed but with the development of dispute, they picked up certain articles lying around them and then assaulted. The evidence on record shows that the appellants armed with different weapons in their hand, intercepted Laxman who was crossing through tractor saying that they will not allow Laxman to cross. Moreover, the evidence further shows that as soon as other victims arrived at the spot, the appellants in a concerted manner immediately opened assault.

25. As has been considered in detail herein above and Vishnu Dayal sustained three injuries on his head, Harish Kumar one injury and Sanjay Kumar one injury on their head. These injuries are stated to have been caused by sharp edged weapon as the nature is incised wound. This would clearly indicate that the appellants assaulted with sharp edged weapon and while giving assault, they did not confine

their assault to other parts of the body but also gave blow on the head. Looking to the background of the dispute that started with stoppage of vehicle, arrival of victims witnesses on the spot and fight between the parties, it cannot be said that there was intention to murder but definitely if death would have been caused of any of the victims who sustained injury, it would have been a case of culpable homicide though not amounting to murder.

26. The contention of learned counsel for the appellants that as the injury on the head of Vishnu Dayal, Harish Kumar and Sanjay Kumar are simple, offence under Section 308 IPC would not be made out, is liable to be rejected on the face of provision. A bare reading of the provision of Section 308 IPC would show that even when no hurt is actually caused, offence may be made out if other ingredients are fulfilled. Therefore, where even causing of injury is not necessary for constituting offence under Section 308 IPC, the nature of injury being simple would not oust application of provision of Section 308 of IPC. A comprehensive reading of provision only reveals what has been stated by the Supreme Court in the case of **Sunil Kumar Vs. NCT of Delhi and others, 1998 (8) SCC 557 as below -**

4.....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.....

27. As an upshot of above discussion, I have to hold that in the circumstances of the case, the appellants have been rightly held guilty of commission of offence under Section 308 IPC irrespective of fact that all the injury caused on the head of various victims have been found to be simple in nature.

28. However, the nature and extent of injury is definitely relevant while determining the sentence which should be awarded to the appellants. The injuries sustained by Vishnu Dayal, Harish Kumar and Sanjay Kumar are simple in nature. Moreover, the dispute had arisen at the spot instantaneously on account of arrival of Vishnu Dayal, Harish Kumar, Sanjay Kumar, Kashi Bai and Budhiyarin Bai who were not present. Moreover considering that though the accused had occasioned to inflict heavy blow, they have chosen not to inflict heavy blow on the head of any of the victims resulting only in simple injury, in considered opinion of this Court, the sentence part of the appellants is liable to be reduced to one year.

29. For the reasons and descriptions herein above, criminal revision filed by the victims fails and is hereby dismissed.

30. The appeal of appellants is partly allowed in the manner that while the conviction and sentence under Section 324, 323 IPC are maintained, upholding conviction under Section 308 IPC, sentence reduced from three years to one year.

31. In view of the above, the appeal is partly allowed. As the accused are on bail and records does not show that they

have already undergone one year of R.I for commission of various offences as now imposed upon them, their bail bonds cancelled and they shall surrender and taken it into custody to serve out the sentence by adjusting the period during which they have remained in jail before and after the trial.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Rekha