

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Judgment delivered on : December 08, 2016

+ CRL.A. 964/2002
RAJINDER KUMAR

..... Appellant

Through: Mr. Yogesh Saini, Advocate

versus

THE STATE

..... Respondent

Through: Mr. Ashish Datta, Additional Public
Prosecutor for the State with Sub-
Inspector Shiv Charan, Police Station
Anand Parbat, New Delhi

CORAM:
HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

P.S.TEJI, J.

1. Aggrieved by the judgment of conviction dated 09.10.2002 passed by the learned Additional Sessions Judge, Delhi convicting the appellant for the offence punishable under Section 308-II of I.P.C., and the order on sentence dated 17.10.2002 vide which the sentence has been passed to undergo rigorous imprisonment for a period of two years with fine of Rs.10,000/- and in default of payment of fine, to further undergo simple imprisonment for further four months, the

present appeal has been preferred by the appellant.

2. In brief, the facts of this case are that a case under Section 307 of I.P.C. was registered on 12.07.2000, when it was informed through wireless operator on 09.07.2000 that in Gali No.2, Military Tank Road, near Gurudwara, that one person has been inflicted knife injuries. DD was handed over to Sub-Inspector Ranbir Singh, who went to the place of the incident and came to know that the injured has been taken to hospital. No eye witness was found there. He went to DDU Hospital but the injured was not found there. Thereafter, a call was made to Ram Manohar Lohia Hospital and it came to the notice that injured Manoj resident of 16/645 Bapa Nagar has been admitted to the hospital. The investigating officer went to the hospital, collected the MLC of the injured Manoj, who was found to be not fit for statement. After taking into consideration the MLC of the injured the rukka was sent for registration of a case under Section 307 of I.P.C.

3. Investigation was conducted, accused Rajinder was caught from his residence and weapon of offence was also recovered at his instance. Charge under Section 307 of I.P.C. was framed against the accused/appellant who did not plead guilty and claimed trial.

4. The prosecution had examined as many as 11 public witnesses namely; Manoj Kumar (PW-1), Sanjay (PW-2), Constable Satbir (PW-3), Smt. Shanti Devi (PW-4), Head Constable Arvind Kumar (PW-5), Dr. Pankaj Sharma (PW-6), Dr. U.C. Pant (PW-7), Constable Netra Singh (PW-8), Constable Surender (PW-9), Head Constable Biswas (PW-10), Sub-Inspector Ranbir Singh, Investigating Officer (PW-11). The statement of the appellant was recorded under Section 313 of the Cr.P.C., wherein he did not plead guilty and claimed trial and stated that he has been falsely implicated in the present case.

5. After conclusion of the trial, the appellant was held guilty for the offence punishable under Section 308, Part II, by the learned Additional Sessions Judge and by an order dated 17.10.2002, and sentenced to undergo rigorous imprisonment for 2 years with a fine of Rs.10,000/- and in default of payment of fine, to further undergo simple imprisonment for further four months. Hence, the appellant is before this court to challenge the conviction and order on sentence.

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

- (i) That the order of learned trial court is against law and facts and is not sustainable.
- (ii) The learned Trial Court has not weighed the evidence on record and there are contradictions, inconsistency on material parts of the prosecution story and the evidence produced in support of the same are not reliable.
- (iii) The learned Trial Court gravely erred in holding that on the date of incident, i.e., on 7.2.2000 at 8.30 PM, though no case under Section 307 of IPC is made out against the appellant but still he is convicted under Section 308, Part II of IPC by holding that *the accused if not guilty of attempt of murder, he is definitely guilty of attempt of causing culpable homicide not amounting to murder punishable under Section 308, Part II IPC.*
- (iv) The learned Trial Court has failed to observe that the name of the appellant is not mentioned in the FIR nor the name of eye witness is mentioned in FIR. There is no evidence which links the appellant with the offence under reference.
- (v) The learned Trial Court has acted illegally by convicting the

appellant on the basis of the evidence of Sanjay (PW-2) who after seeing the occurrence neither reported the matter to the police nor took the injured to hospital for treatment and even did not try to intervene at the time of incident.

- (vi) The appellant also raised a ground of inordinate delay in recording the statement of the eye witness Sanjay (PW-2) and no satisfactory explanation is given by the investigating officer.
- (vii) Shanti Devi (PW-4) who took the injured to the hospital neither disclosed the name of assailant to the Duty Constable at RML Hospital nor to the doctor on duty when the name of the assailant was given to her by injured Manoj(PW-1). The name of the appellant was introduced only after the occurrence of the incident therefore, the presence of the appellant becomes doubtful therefore, he is liable to be acquitted.
- (viii) The learned Trial Court has wrongly convicted the appellant only on the evidence of Sanjay (PW-2), as he was known to the injured Manoj (PW-1) for a long time prior to the incident, therefore, he is not an independent witness of the incident.

- (ix) Learned Trial Court has failed to appreciate the fact that the eye witness Sanjay (PW-2) did not support the prosecution in regard to recovery of knife from the possession of the appellant. Therefore, the learned Trial Court acted illegally while basing the conviction of the appellant by ignoring material evidence regarding recovery of incriminating article from the possession of the appellant.
- (x) The further ground taken by the appellant is that the investigating officer has neither seized clothes of injured nor sent the knife alleged to have been recovered from the possession of the appellant to the CFSL so as to link the petitioner with an offence under reference.
- (xi) On the point of injuries, the ground taken by the appellant was that the learned Trial Court had acted illegally in holding the injuries on the person of Manoj (injured) (PW-1) to be dangerous when the medico legal report neither suggested any major blood vessel was cut nor was there any hemorrhage to major blood vessel, nor depth of injury was measured by Doctor Pankaj Sharma, (PW-6), before opining the injury to be

dangerous. However, no fracture was found in skiagram of X-ray report (Ex.PW7/A) and there was no evidence to the effect that any major blood vessel had been cut nor was there any hemorrhage to major blood vessel. Therefore, the injury was simple in nature.

(xii) The learned Trial Court while convicting the appellant in the case under reference had lost sight of the important principle of law that all circumstances appearing in evidence against the appellant should be put to him during his examination under Section 313 of Cr. P.C. and explanation regarding the said circumstances should be elicited from him before convicting him in regard to the case under reference.

(xiii) The learned Trial Court has also lost sight of the important principle of law that it is the bounden duty of prosecution to prove a case against the petitioner beyond all reasonable doubts and not for the defence to disprove the same. Even if the defence is false and sham the prosecution is not absolved for proving its case against the appellant beyond all reasonable doubts.

7. Learned counsel for the appellant further argued that the investigating officer had not seized the clothes of injured nor was the knife sent to CFSL so as to link the appellant with the offence. It is further argued that the MLC did not suggest that any major blood vessel was cut or there was any hemorrhage to major blood vessel, nor depth of injury was measured by Dr. Pankaj Sharma, (PW-6) before opening the injury to be dangerous. In support of his submission a decision of this court in *Sheo Singh vs. State*, reported **1995 JCC at page 259** was relied upon on behalf of the appellant.

8. In support of the grounds/submissions made hereinabove, the learned counsel for the appellant relied on the decision of this Court in *Angrej Singh & Ors. Vs. State*, decided on **21.10.2013**, dealing with the issues relating to a case where no independent witness is there; where the recovery of weapon is disputed and unreliable, the same was not shown to the doctor for his opinion as to whether the injuries on the victim could have been caused by such a weapon; where the weapon of offence was not sent to CFSL for examination; the weapon of offence was also not shown to the eye witness for identification as to whether the same was used in the commission of the offence; and

the contradictions in the prosecution case, and this court had reduced the sentence from 5 years to one and half years for the offence under Section 307 of I.P.C.

9. Mr. Ashish Datta, learned Additional Public Prosecutor for the State has vehemently opposed the aforesaid contentions raised on behalf of the appellant and submits that the judgment and order on sentence as passed by learned Additional Sessions Judge do not suffer from any irregularity or illegalities and is passed with a reasoned order, therefore, the same is not liable to be interfered.

10. Learned Additional Public Prosecutor for the State has further drawn attention of this court that the appellant has caused the injuries to the injured, which were opined by the doctor as being dangerous. There is also a recovery of the weapon of offence being a knife, at the instance of the appellant. So far as the material contradictions in the prosecution cases, the same cannot be the basis for rejection of the other material evidence and deposition of the material witnesses, which are corroborated with the incident and guilt of the accused.

11. Upon hearing the rival contentions of the parties at length,

evidence led is being examined as under:

- (I) The injured Manoj Kumar came into witness box as PW-1 on 02.08.2001, and deposed that about a year back when he was taking bath in underwear at Sulabh Complex Bapa Nagar near his house and Rajinder Kumar told him that he was not going to spare him that day and thereafter he was attacked with knife which caused injuries on the left side of his chest. Though he tried to escape for about 2/3 times, but he got injuries on the left side of the chest. He ran into the gali and fell down and became unconscious. He regained his conscious only in the hospital. He deposed that he cannot identify the knife with which he was hit. However, he deposed that one Sanjay was present near him when the attack was done by the accused Rajinder.
- (II) Sanjay (PW-2) deposed in his statement recorded before court that on the date of incident at about 8.30 PM, he came out of his house and was sitting near transformer in front of the gali No.10, on a two wheeler scooter alongwith Manoj. He saw the accused Rajinder stabbing Manoj Kumar on the left side of his chest. Thereafter police of Police Station Anand Parbat came on

the spot. Public persons took the injured to RML Hospital. He has further deposed that the accused was caught from his house by the police, who also recovered a knife from his house. No disclosure was made by the accused in his presence. In cross examination, he had deposed that the accused had not made any disclosure and no knife was recovered in his presence. The witness did not identify the knife which was shown to him.

(III) Constable Satbir (PW-3) had deposed in his deposition that he accompanied ASI Ranbir Singh and reached the place of incident, where it was learnt that somebody had received knife injuries and has been taken to the hospital. It is further deposed that no-eye witness was available at the spot. In his cross examination, he deposed that he did not notice any blood near the place of occurrence.

(IV) The other material witness was Dr. Pankaj Sharma (PW-6), who after seeing the MLC of the injured Manoj had opined the injuries as being dangerous, record of which has been exhibited as Ex.PW-6/A. He also submitted that the depth of the injury was beyond peritoneum because food matter was coming out

from the injury. There was no hemorrhage to the major blood vessel.

12. I have heard the submissions made on behalf of both the sides and also gone through the evidence as well as material placed on record. Perusal of the impugned judgment reveals that the learned Additional Sessions Judge has recorded the arguments raised on the point of contradictions and there was no explanation by the prosecution. For ready reference, the same are reproduced herein as under:

“6. Counsel for the accused argued that there is no explanation by the prosecution:

- i) That why the name of the accused was told to the doctor?*
- ii) Why PW Sanjay did not report to the police immediately?*
- iii) Why PW Sanjay did not take the injured to the hospital?*
- iv) Why the knife was sent to the doctor to explain whether the injury could be caused with such knife or not?*

13. This court further observes from the deposition of the injured Manoj Kumar (PW-1) that he was put to suggest that he was asked by

the public not to take bath in public and he has falsely implicated the accused, to which he had denied. It is also observed that the appellant was known to the injured and the enmity has been claimed by the appellant, then the appellant would have definite knowledge as to how the injured received injuries. This court further observes that there is a clear statement of the injured PW-2 duly corroborated by the medical evidence to the effect that the injuries were received and there is no reason to disbelieve the injured witness that it is the appellant who inflicted the injuries.

14. This court further observes that the impugned judgment records the deposition of PW-6 – Dr. Pankaj Sharma, who opined the injuries to be dangerous. The doctor deposed in his cross-examination that he had examined the patient only at the time when he was admitted. He further went on to depose that he did not ascertain the depth in centimeter of the injuries but injury was beyond peritoneum because the food matter was coming out but there was no hemorrhage to the blood vessel. The depth of the injury was recorded to be 3 Cm x 1 Cm and such injury can only be caused with a sharp weapon.

15. The judgment is challenged primarily on the ground that there

was only a single injury to the injured and there was no intention of the appellant while causing injuries to commit murder. However, as per deposition of the injured witness (PW-1), it is recorded that when he was taking bath at sulabh complex Bappa Nagar, near his house, the appellant told him that on the previous occasion he had been spared but now he will not spare him. It is further deposed that he was taking bath in underwear and the accused/appellant scolded him that he was taking bath naked. It was deposed that the appellant attacked him with a knife and although, he succeeded to avoid 2/3 times, but finally he hit him on the left side of the chest and he started bleeding.

16. This court also observes that the premise of the conviction of the appellant was that the injuries caused to the injured were dangerous; stab wound on chest of 3 cm x 1 cm which could only be possible by a sharp weapon. Though the case was registered under Section 307 of I.P.C. but ultimately, the learned Additional Sessions Judge held the appellant guilty of attempting to cause culpable homicide not amounting to murder punishable under Section 308 Part II I.P.C., vide order dated 09.10.2002. Consequentially, an order on sentence dated 17.02.2002 was passed thereby sentencing him for RI

for two years with fine of Rs.10,000/- and in default of payment of fine the appellant was further directed to undergo simple imprisonment for four months.

17. From the facts of the present case, this court observes that initially, the case was registered under Section 307 of IPC, charge sheet was also filed for the offence under Section 307 IPC and despite that, the learned Additional Sessions Judge has convicted the accused/appellant under Section 308 Part II of IPC. The relevant extract from the judgment is reproduced as under:-

“12. Now the next question is for which offence the accused would be convicted for causing injuries to the injured Manoj. The injuries is dangerous. It is a stab wound on chest of 3 cm. x 1 cm. such would be caused only with a sharp weapon. Whereas PWs says that it was caused with a knife. The counsel's this argument that there is no intention of the accused while causing injuries to commit murder which according to him is apparent because there is only simple injury. Accused claimed that he objected the injured of this taking bath at public toilet naked. The accused if not guilty of attempt of murder, he is definitely guilty of attempt of causing culpable homicide not amounting to murder punishable under Section 308 Part II IPC. Accused is accordingly convicted for the aforesaid offence.”

18. This court fails to understand as to on which ground the learned trial court has reached to such a conclusion, especially, there is a

specific deposition of Dr. Pankaj Sharma (PW-6), who in his cross deposed that *he did not ascertain the depth in centimeter of the injuries but injury was beyond peritoneum because the food matter was coming out but there was no hemorrhage to the blood vessel. The injured remained in the hospital for 13 days.* The learned Additional Sessions Judge has also recorded its finding in para 10 in the following words:-

“10. I am of the view that the prosecution has also established on record that injury caused was the dangerous one. So far as the recovery of knife is concerned, the knife is an ordinary knife. The knife was not sent to CFSL nor it was sent to doctor to examine whether the injuries in this case could be possible by such type of knife. Accordingly, the recovery of the knife is definitely not material.”

19. The impugned judgment further records that the injured Manoj Kumar (PW-1) deposed before the court that he was attacked with knife by the appellant/accused which caused injuries on the left side of his chest. ***He avoided 2/3 times, finally he hit him on the left side of the chest.*** He started bleeding. He ran into the gali and fell down and became unconscious.

20. Let us examine the ingredients of an offence falling under Section 307 of IPC. It reads as follows:

*"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 murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to (imprisonment for life), or to such punishment as is hereinbefore mentioned."*

21. From reading of the aforesaid section, it makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. This court is of the opinion that it is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section and it is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

22. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of the

given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 IPC. The determinative question is intention or knowledge, as the case may be, and not nature of the injury.

23. For a proper consideration of these questions, we may summarise briefly the factual background, which is as under:

“The incident is of 09.07.2000, when the injured Manoj Kumar was taking bath in sulabh shauchalya. As per, appellant the injured was taking bath nude, however, the injured deposed that he was wearing underwear at the time of occurrence. As the injured told him that he spared him on previous occasions but he will not spare him on that day. Thereafter, he scolded the injured and attacked with knife. Though the injured succeeded in saving himself 2/3 times, but finally he got stab wound on the left side of the chest. Since there was no eye witness available at the spot or the hospital, the police after seeing the nature of MLD/injuries, registered a case under Section 307 of IPC. In support thereof, there is deposition of the doctor PW-6, who in his cross deposed that the injury was beyond peritoneum because the food matter was coming out and opined the injuries to be dangerous one. There is another deposition of a public witness being PW-2 – Sanjay, who corroborated the statement of the injured witness to the effect that he saw accused Rajinder present in the court coming running and he stabbed Manoj Kumar on the left side of his chest.”

24. From the above mentioned narration of facts, this court observes that the appellant had in fact inflicted more than two blows,

out of which one hit at the left side of the chest of the injured. Therefore, it cannot be said that the accused had inflicted only a single blow. Having a knife in hand and hitting the victim with intention to inflict injuries, it cannot be said that at that time the accused would not have any knowledge of the fact that hitting with a weapon like knife may result in death of the victim. Though the injured succeeded in saving himself from the blows of the appellant 2/3 times, still the accused/ appellant continued to hit the injured with knife and ultimately, the appellant succeeded in hitting the victim on the left side of his chest. Thereafter, the victim fell down and became unconscious.

25. Under Section 307 of IPC what the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. Without this ingredient being established, there can be no offence of "attempt to murder". Under Section 307, the intention precedes the act attributed to the accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. There are other factors to be taken into consideration while holding an accused guilty for the offence punishable under Section

307 of IPC which are; the nature of the weapon used; manner in which it is used; motive for the crime; severity of the blow; the part of the body where the injury is inflicted. In this case, the weapon of offence was knife and the injury was inflicted at the left side of the chest of the victim. The severity of the blow was brutal and was made on the chest, which is a vital part of the body and as per the opinion of the doctor (PW5), the injury was so dangerous that the food matter was coming out of it which is reflected from the MLC Ex.PW6/A.

26. *From the foregoing discussions, this court is of the opinion that the impugned judgment dated 09.10.2002 passed by learned Additional Sessions Judge, thereby convicting the appellant/accused for the offence punishable under Section 308 Part II, IPC cannot be held to be legally sustainable, firstly for the reason that there is no Part II of Section 308 of IPC. Second and foremost reason for setting aside the same is that the ingredients of Section 307 of IPC are duly established in the present case. Accordingly, the appellant/accused is held to be guilty of committing attempt to murder of injured Manoj Kumar.*

27. *This Court is of the opinion that the conviction in a case of*

injury dangerous to life culminated into conviction only and only under Section 307 of IPC. Thus, the appellant needs to be convicted under Section 307 of IPC.

28. Now, coming to the sentence awarded to the appellant, perusal of record shows that the charge sheet was filed against him under Section 307 of IPC and charge under Section 307 IPC was also framed against him, whereas vide impugned judgment of conviction, the appellant was convicted under Section 308 Part II IPC and sentenced thereunder.

29. This Court is of the considered opinion that an accused can be convicted only for the charge framed. Though, he may be convicted for lesser offence but only under the sections mentioned in the Indian Penal Code and not by self created sections. A Judge can pass the conviction and pass the order on sentence only under the sections mentioned in the Code and not otherwise.

30. Section 308 of IPC reads as under:-

“308. Attempt to commit culpable homicide.—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.”

31. A bare perusal of this Section shows that Section 308 does not envisage or divided into parts, such as 308 Part I or 308 Part II. So, there is no charge under Section 308 Part II in the Indian Penal Code. Conviction and sentence awarded by the trial court under Section 308 Part II is not sustainable under the law. A perusal of the judgment of conviction under Section 308 Part II is unfounded in the Code and the same demonstrates the lack of basic knowledge of the bare provision of Indian Penal Code as well as due application of mind. Therefore, the same deserves to be set aside and modified.

32. Counsel for the appellant has referred to the judgment of this Court in Crl. A. No. 46/2005, titled as ***Angrej Singh & Ors. Vs. State, decided on 21.10.2013***, wherein this court also dealt with the judgment in ***Mohinder Singh & Anr vs. State of Punjab, 1987 (Supp) SCC 65*** and ***Krishnakanta Nag vs. The State of Tripura, 2012 Crl.***

L.J. 2179, wherein the sentence awarded to the appellant was reduced to one and half years.

33. In the present case, the sentence awarded by learned Additional Sessions Judge is of two years for non-existent Section 308 Part II, therefore, the same is modified to 307 of IPC. However, the quantum of sentence is kept intact as of rigorous imprisonment for a period of two years with fine of Rs.10,000/- and in default of payment of fine, to further undergo simple imprisonment for further four months with entitlement of the benefit of provision under Section 428 of Cr. P.C.

34. The appellant is directed to surrender before the trial court concerned within a period of 15 days to serve the remainder of sentence of imprisonment.

35. A copy of this order be sent to the Trial Court for information and necessary steps.

36. With aforesaid directions, the present appeal is disposed of.

**(P.S.TEJI)
JUDGE**

DECEMBER 08, 2016
pkb/dd