

* IN THE HIGH COURT OF DELHI AT NEW DELHI
Judgment delivered on : March 30, 2017

+ CRL.A. 599/2001
AAS MOHAMMAD

..... Appellant

Through: Mr. Bharat Bhushan Bhatia,
Mr.Akshay Bhatia, Advocates

versus

STATE

..... Respondent

Through: Mr. Panna Lal Sharma, Additional
Public Prosecutor for the State

+ CRL.A. 824/2001
BALMAT

..... Appellant

Through: Mr. Varinder Kumar Sharma,
Ms.Suman Rani, Advocates

versus

N.C.T. OF DELHI

..... Respondent

Through: Mr. Panna Lal Sharma, Additional
Public Prosecutor for the State

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

JUDGMENT

P.S.TEJI, J.

1. By way of separate appeals, the appellants seek to challenge the judgment of conviction and order on sentence dated 09.08.2001,

whereby the appellants – have been held guilty for the offence punishable under Section 308/34 of IPC and they have been sentenced to undergo rigorous imprisonment for a period of three years each with fine of Rs.2000/- each and in default, they were ordered to further undergo simple imprisonment for thirty days.

2. Since the appellants have been convicted and sentenced by the common order passed by learned Additional Sessions Judge, therefore, with the consent of Mr. Bharat Bhushan Bhatia, learned counsel for the appellant – Aas Mohammad and Mr. Varinder Kumar Sharma, learned counsel for the appellant – Balmat, arguments in both the appeals are heard together and are being disposed of by this common order.

3. The incident in question is of 29.04.1994, at about 1.30 AM, when the complainant Kulbir Singh, who was a tempo driver, came home by bicycle after parking the tempo at the place of the tempo owner. When he was easing himself outside his house, four persons namely Deenu, Balmat, Basti and brother of Deenu forcibly took him to the House of Nirmala. These persons were carrying lathies with them. First of all, brother of Deenu gave lathi blows on Kulbir Singh's head due to which he became unconscious. Thereafter he was admitted in Deen Dayal Upadhyay Hospital in an injured condition. On receipt of information, the investigating officer reached the hospital. The injured was found unfit for statement and ultimately on 16.05.1994, the statement of the injured Kulbir Singh was recorded when he narrated the incident to the investigating officer. He informed

that the aforesaid four persons were carrying lathies with them and when brother of Deenu gave lathi blows on his head, he became unconscious.

4. During the course of investigation accused Deen Mohd and Basti were declared proclaimed offenders and only the appellants herein were charged with the offence under Section 308 read with section 34 of IPC, to which they did not plead guilty and claimed trial. However, the appellants had not led any witnesses in their defence.

5. To bring home the guilt of the appellants, the prosecution examined as many as 10 witnesses. They are, Kulbir Singh (PW-1); Smt. Rajbala (PW-2); Dalbir Singh (PW-3); Constable Narsingh (PW-4); Dr. Yash Raj, Specialist Radiology, Guru Gobind Singh Hospital (PW-5); Head Constable Dalip Kumar (PW-6); Constable Ajay (PW-7); Dr. D.D. Gulani, CMO DDU Hospital (PW-8); Inspector Gurmeet Singh (PW-9); Head Constable Ram Narain (PW-10).

6. Thereafter, entire incriminating material on record was put to the appellant, and his statement under Section 313 of Cr.P.C. was recorded, in which they pleaded not guilty and claimed trial. However, the appellants did not prefer to lead any defence evidence.

7. After considering the facts, evidence led and the material on record, the learned Additional Sessions Judge held the appellants - Aas Mohammad and Balmat guilty for the offence as mentioned above and vide order on sentence passed, sentenced the appellants, as

indicated above. During pendency of the present appeal, the sentence imposed upon the appellant – Aas Mohammad was suspended vide order dated 30.08.2001 and the sentence of appellant – Balmat was suspended vide order dated 05.12.2001.

8. Learned counsel for the appellant – Aas Mohammad contended that the appellant has been convicted merely on the statement of injured Kulbir Singh (PW-1) stating that he had suffered grievous injury caused by the appellant on his head from the back side. However, as per the prosecution, the injury was caused by Deen Mohd, who remained a proclaimed offender and had also received injuries from the hands of the complainant party. The prosecution case has been changed by stating that he was given beating in the Gali in the presence of witnesses Dalbir Singh and his wife, however in the report under Section 173 of Cr.P.C. charge sheet states that he was dragged in the house of her aunt Nirmala, daughter of appellant – Balmat where he was given beatings. Further, motive is also absent from the present case. Delay of 16 days in lodging the FIR is also urged. It is further urged that the Investigating Officer of the case deposed that no witness was present at the spot and incident took place at the residence of Nirmala. Still Nirmala has not been cited as an eye-witness.

9. Learned counsel for the appellant – Balmat contended that there is delay of 17 days in lodging the FIR. Apart from this, the complainant Kulbir Singh had deposed in his statement that he had suffered grievous injury caused by Aas Mohammad, i.e., the co-

accused of the present appellant, on his head from back side, as such there is no specific allegation of causing any injury to the complainant on the part of the appellant – Balmat. It is further argued on behalf of the appellant – Balmat that there was no motive of beating the complainant. The incident took place in the night of 29.04.1994 and the appellant was named after 16 days on 16.05.1994 and as per the prosecution version, no eye witness was present at the spot. It is further urged that Inspector Gurmeet Singh, investigating officer of this case (PW-9) in his statement deposed that no eye witness was present on the spot and the incident took place at the residence of Nirmala, but Nirmala has not been cited as eye witness to the incident. There are contradictions in the deposition of the witnesses, whereas as per prosecution version, the injury was caused by Aas Mohammad and the other witness Dalbir Singh (PW-3) deposed that all the accused had given stick injuries in the Gali. However, there was no eye-witness on the spot. It is further argued that the investigating officer (PW-9) had admitted the fact that there was a dispute between Nirmala and injured regarding division of property and after the death of Nirmala's husband the complainant party were after her property and later on complainant/injured had succeeded in grabbing her property. Further, there is no seizure of weapon/lathi as alleged by the complainant received from the appellant. On point of sentence, it is urged that the appellant – Balmat is a senior citizen and physically weak and prior to the judgment and order on sentence the appellant has already been languished in judicial custody for 29 days.

10. Per contra, learned Additional Public Prosecutor for the State has submitted that the present case was registered on the statement of Kulbir Singh (PW-1), and the injured is the best witness of the incident in which he was hurt and his testimony regarding his presence at the time and place of occurrence cannot be doubted. It is not likely that the injured would spare the real assailants and implicate an innocent person. The injured Kulbir Singh (PW-1) in his statement specifically mentioned that on the date of incident, when he came out from his house to defecate in the street, four persons namely Deenu, his brother Aas Mohd, Basti and Balmat surrounded him in the street while being armed with lathies. Thereafter, appellant – Aas Mohd gave two lathi blows on his head due to which he became unconscious. In these circumstances, the impugned judgment passed by learned Additional Sessions Judge does not suffer from any infirmity and illegality by holding the appellant guilty for the offence and passing order on sentence as indicated above. Therefore, the appeals filed by the appellants are liable to be rejected.

11. I have heard the submissions made on behalf of both the sides and also gone through the evidence of relevant witnesses as well as material placed on record. The material witnesses to the present case are Kulbir Singh (injured) (PW-1), Smt. Rajbala, wife of the injured (PW-2), Dalbir Singh (PW-3), and Inspector Gurmeet Singh (PW-9), and Dr. Yash Pal (PW-5) who prepared the MLC of the victim. This court observes that the appellants were charged under Section 308/34 of IPC.

12. To check the veracity of the impugned judgment on the touchstone of the depositions of the material witnesses available on record, let the depositions of the material witnesses be scrutinized. The material witness to the present case is injured Kulbeer Singh (PW-1), who in his examination-in-chief deposed that on 29.04.1994, at the mid night of 29/30.04.1994, he had left the tempo at the house of Randhir Singh and thereafter after parking his cycle inside his house, came out to defecate in the street and the time was 1/1.30 AM when four persons namely Deenu, his brother Aas Mohammad, Basti and Balmat, surrounded him in the street while being armed with lathies. The appellant – Aas Mohammad gave two lathi blows on his head due to which he became unconscious. However, during his cross-examination he had deposed that a quarrel took place in a gali and Dalbeer, Nirmala and he himself, were around the spot. He further deposed in his cross-examination that he became unconscious after receiving one blow on his head and the blow on his head was given from his back.

13. The other material witness is Smt. Rajbala (PW-2), who deposed in his statement before the court that on the date of incident when his husband Kulbir Singh returned back from his job and after parking his cycle inside the house his husband gone outside for defecating. After few minutes she heard the noise from the street. She alongwith her mother-in-law and her sister-in-law Anita, they found four persons namely Deenu, his brother Aas Mohammad, Basti and Balmat were beating her husband Kulbir. She saw her husband having

injury on his head and lot of blood was oozing out from his head. She found her husband lying unconscious in the street. Thereafter lot of other neighbours had arrived at the spot whereupon all the four persons including the appellants fled away from the place of incident. Thereafter, she alongwith her brother-in-law (jeth) namely Dalbir Singh carried her husband to RML Hospital. Her husband regained consciousness after about 15 days.

14. The other relevant witness corroborating the statement of the injured regarding the occurrence of incident is Dalbir Singh (PW-3), who in his deposition stated that on 29.04.1994, he was woken up by his mother between 1.30 to 2.00 am, when she told him that there was some noise outside the house. He went for outside alongwith his mother, sister in law Raj Bala and his wife. When he reached outside, he saw that Basti, Balmat, Dinu and his bearded brother were beating his brother Kulbeer Singh with sticks. When they made noise, all the four accused persons fled away. Thereafter, they took Kulbir to DDU Hospital in a TSR.

15. To corroborate the injuries, Dr. Yash Raj (PW-5), Specialist, Radiology, Guru Gobind Singh Hospital, deposed that he examined X-ray plates of the injured Kulbir Singh and found fracture of the parietal and occipital bone of the left side of skull. He identified his signatures on Ex.PW-5/A at point A. In his cross examination, he opined that, that particular kind of injury was possible if somebody fell down and his head hit on the corner of any wall. Whereupon, his he was re-examined by the APP, in which he replied that this type of fracture can

also be caused by a lathi blow.

16. Inspector Gurmeet Singh (PW-9) is the Investigating Officer of the case who in his deposition stated that on 29.04.1994, he received DD No.5A about admission of an injured in DDU Hospital, whose name was Kulbir Singh and upon reaching the hospital he was declared unfit for statement. Thereafter, he was referred to RML Hospital. On 16.05.1994 he was declared fit for statement and accordingly he recorded his statement Ex. PW-1/A and made an endorsement and got the FIR lodged. He had inspected the site and prepared site plan. He also arrested the accused Deen Mohammad, Balmat and Aas Mohammad. In his cross-examination it is deposed that the incident in the case/quarrel took place inside the house of Nirmala. As per the case of prosecution there was no eye witness to the occurrence and only after hearing the cries the people gathered. He did not notice the blood stains at the gate of Nirmala's house. He also deposed in his cross-examination that it is a cross case registered against the complainant by the accused in the present case.

17. From a careful scrutiny of the case in hand, the identity of the appellants on the day and time of the occurrence is established by the deposition of the injured witness PW-1 as well as PW-2 and PW-3. So far as the contradiction raised on behalf of the appellant to the effect that as per the prosecution case, the complainant alleged in FIR that he was taken to the house of Nirmala where beatings were given to him whereas when he deposed in the court he stated that the incident took place in the Gali. Even as per the deposition of the investigating

officer of this case, the incident took place inside the house of Smt. Nirmala but on the other hand PW-2 and PW-3 had deposed before the court that the beatings were given to him in the street. From the careful perusal of this material contradiction between the depositions of the injured, Investigating officer and the other two eye witnesses to the incident, upon careful scrutiny of the facts of the case, this court observes that the injured has specifically stated in his statement that on the date of incident he came in Gali to defecate, where four persons came with lathies and gave lathi blows on his head and due to which he fell unconscious. Thereafter, he was taken to the house of Nirmala and given further beatings. But this court cannot lose sight of the fact that the injured had sustained injuries of 7 cm long CLW on right fronto parietal region, CLS 5 cm. long on right fronto occipital region and CLW 4 cm long on right side of forehead. Further, Dr. Yash Raj (PW-5), Specialist, Radiology, Guru Gobind Singh Hospital, had also deposed that he had examined x-rays plates of the injured Kulbir Singh and found fracture of the parietal and occipital bone of the left side of skull.

18. In the aforesaid situation, looking at the overall acts of the accused, any prudent person can logically arrive at the conclusion that the injuries caused to the victim with a weapon like lathi and that too on the head, which is the vital part of body, due to which the injured got paralyzed, though he may have died due to that act of the accused persons, is a serious offence. Simultaneously, it is well settled that common intention implies a pre-arranged plan and acting thereafter in

concert pursuant to the said plan. Common intention comes into existence prior to the commission of the act in point of time. At the same time, it has to be borne in mind that for common intention neither any written nor any oral agreement is necessary. The common intention may well develop at the spot itself.

19. This court observes that the learned Additional Sessions Judge had held the appellants guilty for the offence punishable under Section 308 of IPC. Now the question arising for consideration before this court is as to whether the accused had a common intention to kill the injured on the date of incident, is a matter to be examined by this court or not. For a better understanding the contents of Section 308 of IPC, are reproduced 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.

Illustration A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby

caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

20. In view of the facts and circumstances of the present case, this court does not find any material on record which could justify the appellants for holding them guilty for the offence under Section 308 of IPC. Even the weapon of offence being lathies were not recovered in the present case. This court further finds the fact from the cross-examination of the injured – Kulbir Singh (PW-1) that he was given lathi blows on his head from his back. Therefore, looking at the injuries sustained by the injured and on the basis of the deposition of the material witnesses this court finds the appellants guilty for the offence punishable under Section 325 of IPC, which reads as under:-

*325. Punishment for voluntarily causing grievous hurt.—
Whoever, except in the case provided for by section 335,
voluntarily causes grievous hurt, shall be punished with
imprisonment of either description for a term which may
extend to seven years, and shall also be liable to fine.*

21. In the light of the aforesaid discussion, from a careful perusal of the record of this case, this court does not find the impugned judgment dated 09.08.2001, whereby the appellants have been convicted for the offence under Section 308 IPC, as liable to be upheld since the prosecution was unable to establish the fact that there was any intention of the appellants to kill the injured. No doubt, the appellants

were had the intention to cause grievous hurt to the injured, what to say by giving lathi blows on the head of the injured. Accordingly, in the considered opinion of this court, the impugned judgment cannot be upheld and the appellants are entitled to the benefit of doubt on the account of contradictions in the statements of the material witnesses and non-recovery of the weapon of offence. Resultantly, the appeals filed by the appellants are partly allowed and the impugned judgment dated 09.08.2001 is modified to the extent that the appellants are held guilty for the offence punishable under Section 325 of IPC.

22. On the quantum of sentence, this court observes that the appellants – Aas Mohammad and Balmat have been awarded sentence of rigorous imprisonment for a period of 3 years for the offence under Section 308 IPC. Since the conviction of the appellants has been modified thereby convicting them for the offence under Section 325 of IPC, the order on sentence is also liable to be modified.

23. From the peculiar facts of this case, this court finds that the incident in question is of the year 1994 and considering the fact that the appellants have faced the agony of trial for the last 23 years, and the fact that after suspension of their sentence on 30.08.2001 and 05.12.2001, nothing adverse is found against them coupled with the fact that the appellants are at the verge of their age, this court is of the considered opinion that in the interest of justice sentence awarded to the appellants – Aas Mohammad and Balmat for the offence under Section 325 of IPC be reduced to the extent of period already undergone by them. It is ordered accordingly.

24. Consequently, the court culminates into an opinion that the appellants – Aas Mohammad and Balmat deserve to be acquitted from the charge under Section 308 of IPC and held guilty for the offence under Section 325 of IPC.

25. Accordingly, the impugned judgment and order on sentence dated 09.08.2001 are modified to the extent that the appellants – Aas Mohammad and Balmat are acquitted for the offence under Section 308 of IPC and are held guilty for the offence under Section 325 of IPC. Considering the peculiar facts and circumstances of the present case, the sentence of the appellants – Aas Mohammad and Balmat for the offence under Section 325 of IPC is reduced to the period already undergone by them.

26. Appellants – Aas Mohammad and Balmat are on bail. Their bail bonds and surety bonds are discharged.

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

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

(P.S.TEJI)
JUDGE

MARCH 30, 2017
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