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

Judgment delivered on: 5th June, 2017

+ CRL.A. 730/2016

IMTIYAZ

..... Appellant

Through: Mr.Habibur Rahman, Adv.
Mr.Amar Nath, amicus curiae with
Mr.Love Deep Gaur, Adv.

versus

STATE

..... Respondent

Through: Ms.Kusum Dhalla, APP for State
SI Kali Charan, PS-Ashok Vihar

**CORAM:
HON'BLE MR. JUSTICE I.S.MEHTA**

JUDGMENT

I. S. MEHTA, J.

1. The instant appeal is arising out of the judgment dated 21.04.2016 and order on sentence dated 23.04.2016 wherein the appellant-Imtiyaz was convicted for committing offences punishable under Sections 308/34 IPC. Aggrieved by the said judgment and order on sentence, the appellant has preferred the present appeal.

2. Brief facts stated are that on receiving information vide DD No.26-A, SI Puneet Grewal reached to the spot along with Ct.Nand Kihore and thereafter they came to know that the injured was taken to BJRM hospital, Jahangirpuri where the injured Bunty was found to be admitted in the hospital vide MLC Ex.PW-2/A. The statement of the injured was recorded. PW-5 Bunty i.e. the injured in his statement has stated that on 29.10.2015 at about 11:15 pm he was

passing through Kuda Khatta, near Lekhram Park, Wazirpur where he met appellant Imtiyaz and his friend who demanded the loan amount given to him and on his showing inability, knife blow on his person was caused by the appellee Imtiyaz. On the basis of statement of the injured, FIR was registered. Consequent upon the registration of the FIR, the appellant was arrested on 31.10.2014, however, the co-accused was not arrested as his whereabouts were not known. The weapon of offence i.e. knife could not be recovered from the possession of the appellant. After completion of the investigation, charge sheet was filed under Sections 308/34 IPC qua against the present appellant only.

3. On the basis of charge sheet, charge under Section 308/34 IPC was framed against the appellant vide order dated 16.04.2015; to which the appellant did not plead guilty and claimed trial. To prove its case, the prosecution examined 8 witnesses viz. PW-1 SI Prem Pal, PW-2 Dr.Mukesh Mandal, PW-3 Dr.Rahul Kumar, PW-4 HC Surya Kant, PW-5 Bunty (injured), PW-6 Ct.Mukesh, PW-7 Ct.Nand Kishore and PW-8 SI Puneet Grewal.

4. The onus to prove the offence being committed always lies on the prosecution. In the instant case, the charge was framed under Section 308/34 IPC. The essential ingredients to prove an offence under Section 308 IPC is that:

(a) the accused did some act towards the victim

(b) the act was done with such intention or knowledge and under such circumstance that had it caused death, the accused would have been guilty of culpable homicide not amounting into murder.

5. In the instant case, as per the statement and version of the prosecution there is only one eyewitness i.e. the injured/victim PW-5 Bunty.

The examination-in-chief of PW-5 is reproduced:

"I am working as a painter and reside at above said address alongwith my parents. On 29.10.2014, at

about 11.00 pm, when I was coming back from my work and passing through Kuda Khatta, near Lekhram Park, Wazirpur, I saw a person who was looking like accused Imtiyaz and I thought that he would ask money which I had taken from Imtiyaz and I started running away from there. While running away from there, I got struck from a stone lying on the road and fell down on the stone due to which I sustained injury on my head. Blood was oozing out from my head and my shirt was soaked in blood. I dialled at 100 number. Police officials came there and took me to BJRM Hospital, Jahangir Puri. IO inquired about the incident. I falsely implicated the accused Imtiyaz as I had to pay his money. I falsely stated to the IO that Imtiyaz had caused injury on my head with knife, when I told him that I would pay money later on. IO recorded my statement which is Ex.PW5/A bearing my thumb impression at point A. I have compromised the matter with the accused.”

PW-5 in his examination-in-chief has nowhere stated that the injury on his person was caused by the appellant or he received knife injury on his person. PW-5 has deposed that he received injury as he struck against stone lying on the road and he fell down. PW-5 has stated nothing against the appellant or any other person on the point of receiving injuries on his person vide MLC Ex.PW-2/A. The defence taken by the accused (appellant herein) at the stage of framing of charge is that he does not plead guilty. In his statement under Section 313 Cr.P.C, the accused (appellant herein) has denied all the allegations alleged against him.

6. Onus lies on the prosecution to prove that the injury caused on the person vide MLC Ex.PW-2/A was by the appellant through knife. The weapon of offence i.e. knife which is alleged to be used during the commission of offence has not been recovered during the investigation.

The weapon of offence i.e. knife is neither recovered nor there was any

occasion to put suggestion to PW-3 Dr.Rahul Kumar that the injury caused on the person of the victim was by the said knife.

During his cross-examination, PW-5 has admitted that at the time of incident he was drunk and the said fact has been confirmed by PW-3 Dr.Rahul Kumar which is reproduced as under:

“...It is correct that the injured was under the influence of liquor when he was examined...”

The injured witness when himself does not put any allegation against the appellant; in absence of ocular evidence qua against the present appellant, charge under Section 308/34 IPC cannot be said to be proved. Therefore, the impugned judgment suffers from material infirmity for want of sufficient evidence to prove the essential ingredients for offence under Section 308 IPC that:

(a) the accused did some act towards the victim

(b) the act was done with such intention or knowledge and under such circumstance that had it caused death, the accused would have been guilty of culpable homicide not amounting into murder.

Consequently, the appeal of the appellant is allowed, resulting into setting aside of the impugned judgment dated 21.04.2016 and order on sentence dated 23.04.2016 passed by the learned Addl. Sessions Judge-II (North-West), Rohini Courts, Delhi.

7. The appeal stands disposed of in the above terms. All pending application(s) also stand disposed of. Trial Court record be sent back forthwith along with the copy of the judgment. One copy of the judgment be also sent to the Jail Superintendent for necessary compliance for release of appellant.

I.S.MEHTA, J

JUNE 05, 2017/sr