

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 18.05.2020

+ **CRL.A. 682/2016 & CRL.M.A. 11271/2016**

STATE (GNCT OF DELHI)

..... Appellant

Versus

MUKIM ALI @ JUMMAN ALI & ORS.

..... Respondent

Advocates who appeared in this case:

For the Appellant	: Mr Amit Gupta, APP for State.
For the Respondent	: Ms Sowjhanya Shankaran and Mr Siddharth Satija, Advocates.

JUDGMENT

VIBHU BAKHRU, J

1. The State has filed the present appeal against an order dated 11.12.2015 (hereafter the 'impugned order') passed by the learned ASJ, West District, Tis Hazari Courts, whereby the respondents were sentenced to undergo rigorous imprisonment for the period already undergone by them, which was about two months for committing an offence punishable under Sections 208/34 of the Indian Penal Code, 1860 (IPC). The respondents were convicted after trial in a case emanating from FIR No. 335/2012 under Sections 308/34 of the IPC, registered with PS Rajouri Garden.

2. According to the State, sentence awarded to the respondents are highly inadequate and not commensurate with the gravity of their offence. The appellant prays that their sentence ought to be enhanced.

3. The appellant states that the injury caused to the victim was dangerous in nature and the ingredients of committing an offence punishable under Section 308 of the IPC were duly proved against the respondents and they were convicted. An offence described under Section 308 of IPC is punishable with imprisonment for a term, which may extend to seven years or with fine or with both, if a hurt is caused.

4. The case of the prosecution is that on 09.09.2012, on receipt of DD No. 9A, SI Govind along with Ct Sumit reached C-293, 12.5 sq. yards, TC Camp, Raghubir Nagar where they were informed that a quarrel had taken place at Woodland Park, Tagore Garden. The aforesaid officials reached Woodland Park, Tagore Garden where they were informed that the injured person had been removed to DDU Hospital. Accused Mukim Ali (respondent no. 1) was found present at the spot and on enquiring admitted his involvement in the incident. The victim's shirt, pant and slipper were found at the western corner of the Woodland Park. Blood was also found on the walk-way inside the said park. Thereafter, SI Govind went to DDU Hospital, where the injured (Vinay) was found admitted.

5. Vinay's statement was recorded. He stated that in the intervening night of 08/09.09.2012 at about 12:30 am, he was going to his second *jhuggi* where he would sleep at night. When he reached TC Camp Shauchalaya, the accused (respondents herein) met him. He stated that

he was, earlier, involved in a quarrel with them. The accused kept walking along with him and took him to Woodland Park. Once inside the park, the accused Bijender caught hold of him and accused Jumman started beating him. While doing so he stated that his father (Vinay's father) had filed a complaint resulting in closure of their business and they stated that they would not leave him (*"aaj hum tume nahin chordenge"*). He alleged that Suraj also started beating him. While he was being beaten, he saw two persons (Lallo Kabari and Chota) and appealed to them for help; they came inside the park but on witnessing the accused beating him, they did not intervene and left telling him that they would inform his family members. The accused continued to beat him. They kicked him and delivered fist blows on his chest. He alleged that the accused Jumman, stated that let's kill him before his family members arrive (*"iska kaam tamam kar dete hai"*). He also stated that they would not leave him alive. He stated that he lost his consciousness and when he regained the same, he found himself in DDU Hospital.

6. Charges under Sections 308/34 of the IPC were framed against the accused, to which they pleaded not guilty and the matter was set down for trial. The prosecution examined twenty-one witnesses and the defence examined three witnesses.

7. By a judgment dated 11.12.2015, the learned ASJ convicted the accused persons under Sections 308/34 of the IPC and by the impugned order dated 11.12.2015, sentenced them to rigorous imprisonment for the period already undergone by them, which was about two months.

Submissions

8. Mr Gupta, learned APP for the State contended that the impugned order dated 11.12.2015, sentencing the respondents to effectively two months of rigorous imprisonment, is highly inadequate and disproportionate to the gravity of the offence for which the respondents have been tried and convicted. He submitted that it was established that the victim had suffered a dangerous injury and had remained in hospital for almost a month. He had to undergo surgery for the injury caused to his pancreas. He submitted that the evidence on record clearly established that the victim had been brutally assaulted. In the given circumstances, awarding two months of imprisonment, which was already undergone during trial, was highly inadequate and manifestly erroneous.

9. Ms Shankaran, learned *amicus curiae* appearing for the respondents countered the aforesaid submissions. She contested this appeal both on limitation and on merits. In addition, she also contested the conviction of the respondents and submitted that they are liable to be acquitted.

10. First of all, she submitted that the appeal was filed beyond the period of limitation and therefore, the same ought to be dismissed on the ground of delay. She pointed out that the impugned order was passed on 11.12.2015 and the appellant had applied for a certified copy of the same after nearly a month (that is, on 12.01.2016). She stated that after obtaining administrative clearances, the file was sent to the Standing Counsel (Criminal), Delhi High Court on 27.04.2016 for filing

the appeal. Thereafter, the appellant took almost three months to file the present appeal. She submitted that in addition to the delay in filing the present appeal, the appellant did not pursue the present appeal actively and despite issuance of notice, took no steps for service of the same for nearly three years. She submitted that it would be highly prejudicial to the respondents to be called upon to contest the appeal after expiry of more than eight years after the alleged offence and more than four years after they were released.

11. Next, she submitted that the appeal was unmerited as the impugned order did not suffer from any manifest error. She stated that an appellate court would interfere with the sentence only where it shocks the court's conscience and in exceptional cases, where it finds the order on sentence manifestly erroneous. She submitted that there was no minimum sentence prescribed for committing an offence punishable under Section 308/34 of the IPC (the offence for which the respondents were convicted) and therefore, the sentence awarded to them was well within the scope of the Trial Court's discretion. She submitted that since there was no manifest error in the quantum of sentence awarded to the respondents, the present appeal ought to be dismissed. She relied upon the decisions of the Division Bench of this Court in ***State v. Sonu: Crl. A. 1256/2019 decided on 21.11.2019*** and ***State v. Raja: Crl. A. 652/2019 decided on 17.12.2019***, in support of her contention.

12. Next, Ms Shankaran submitted that since the appellant had preferred the appeal, the respondents were entitled to challenge their

conviction. She submitted that in the present case, the respondents ought to have been acquitted of committing an offence punishable under Sections 308/34 of the IPC. She submitted that the Trial Court erred in not appreciating that the testimony of the material witnesses was not reliable, as the same were inconsistent with their statements recorded earlier.

13. She stated that the victim (PW-1) had admitted in his testimony that he had no enmity with the respondents. However, in his statement recorded under Section 161 of the CrPC, he had stated he was involved in a quarrel with the respondents in the past. Next, she submitted that although he had testified that the respondents had removed his clothes, no such allegation was made in his statement recorded under Section 161 of the CrPC. She also pointed out that PW-1 had in his testimony stated that the respondents, while assaulting him, had stated that “*iska kaam tamam kar dete hai kyunki iska baap ne hum pe complaint kiya hai*”. She stated that no such allegation was made in the statement recorded under Section 161 of the CrPC. She also stated that PW-1’s claim that he had used the words “*bachao bachao*” and requested PW-2 and PW-3 to assist him was also untrue, as his statement recorded earlier does not mention any such act. Next, she submitted that PW-1 had made a false claim that he was hospitalised for a period of two and half months. She stated that evidence of Dr Irfan (PW-16) and Ex.PW-16/A clearly show that PW-1 was discharged on 27.09.2012 that is, eighteen days after the alleged incident. Next, she submitted that the testimonies of other witnesses were also inconsistent with their

respective statements recorded earlier as well as *inter-se*. She also contended that the testimonies of PW-2 and PW-3 did not support the prosecution's case because PW-2, in his cross-examination, had clearly stated that he did not see who was beating the victim. He claimed that he did not even enter Woodland Park. PW-3, in his examination-in-chief, had stated that he heard a noise of quarrel from inside the park and had gone in but he categorically stated that he did not see anyone beating the victim since it was dark. He was confronted with his earlier statement (Ex.PW-3/B). However, he denied having made any such statement to the police.

14. Ms Sankaran also earnestly contended that the ingredients of Section 308 of the IPC were not established in the facts of this case. First of all, no weapons were used to injure Vinay (PW-1). Secondly, three doctors – Dr Jain, who deposed as PW-4; Dr Aakanksha, who deposed as PW-15 and; Dr Sahid, who deposed as PW-20 – had described the injuries suffered by Vinay as simple. His MLC also indicates that the injuries suffered by him were simple. However, it is only Dr Irfan (PW-16) who had opined that the injury suffered by the victim was a “dangerous injury”. However, he had not conclusively established that the injury to Vinay's pancreas was caused by the respondents allegedly beating the victim. She also relied on PW-16's cross-examination, where PW-16 he had stated that such injuries could have been sustained as a result of a fall from height. She contended that this raises significant doubts as to whether respondents were responsible for inflicting any such injury. She submitted that the MLC

also indicated that the victim (Vinay) had elevated levels of blood alcohol at the time of his admission to DDU hospital and therefore, it is possible that he would have sustained the injuries as a result of an accident/other circumstances.

15. She pointed that the site plan (Ex.PW-3/A) was admittedly drawn at the instance of PW-3 and contended that since a statement given to the police officer is inadmissible by virtue of Section 162 of the CrPC, the site plan was inadmissible. She relied on the decision of the Supreme Court in ***Tori Singh and Anr. v. State of Uttar Pradesh: (1962) 3 SCR 580*** in support of her contention.

16. Next, she submitted that although the photographs of the blood found at the crime scene had been produced, however, the investigating officers failed to establish that the blood spilt was that of the victim as the same was not sent for any forensic analysis.

17. Lastly, she contended that there were lapses in the chain of custody of vital evidences. First of all, the prosecution had failed to establish the PCR call pursuant to which DD No.9A was allegedly recorded. She stated that the brother and the father of the victim, who were allegedly informed of the incident by PW-2 and PW-3 and had made the PCR call, were not examined. The prosecution had not proved the items seized from the site. Further, the prosecution had not established that respondent no.1 was present at the crime scene. She submitted that although a *kalandra* under Sections 107/151 of the CrPC was referred to, however, that was not made a part of the chargesheet.

Reasons and conclusion

18. The first and foremost issue to be addressed is with regard to condonation of delay in filing the present appeal. The impugned order was passed on 11.12.2015. A certified copy of the said order was applied for by the State on 12.01.2016; that is, after a delay of about a month. The same was received by the State on 25.01.2016. It is stated that, thereafter, a report on conviction was prepared by the Additional Prosecutor and was forwarded to the Chief Prosecutor, who gave his opinion on 27.01.2016. The Directorate of Prosecution gave an opinion on 28.01.2016 and the same was then forwarded to the office of the Principal Secretary, (Department of Law, Justice and Legislative Affairs) on 01.02.2016. The Department of Law, Justice and Legislative Affairs then forwarded the approval under cover letter dated 11.04.2016. On 23.04.2016, the Director of Prosecution forwarded the certified copy of the judgement to the Chief Prosecutor and the matter was marked to the Additional Prosecutor for necessary action. Thereafter, on 27.04.2016, the complete file was sent to the office of the Standing Counsel (Criminal), Delhi High Court on 27.04.2016 for necessary action. The petition was, thereafter, prepared and filed.

19. There is a delay of 158 days in filing the present appeal. However, this Court is of the view that the said delay has been explained and is, thus, liable to be condoned. In this view, the appellant's application (Crl.M.A.11271/2016) is allowed and the delay in filing the appeal is condoned.

20. The next question to be addressed is whether the respondents are liable to be acquitted as contended by the learned *amicus curiae*. The case of the prosecution largely rests on the testimony of the victim (PW-1) and the medical evidence obtaining in this case. It is trite law that evidence of an injured witness is required to be given a very high weightage. His version needs to be accepted, unless there is convincing evidence to discredit it.

21. In ***Abdul Sayeed v. State of M.P.: (2010) 10 SCC 259***, the Supreme Court had reiterated the principle and had held as under:-

“28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. Convincing evidence is required to discredit an injured witness.”

22. The aforesaid passage was also referred to by the Supreme Court in a recent decision in ***Baleshwar Mahto & Anr. v. State of Bihar & Anr.: (2017) 3 SCC 152***.

23. The testimony of PW-1 is required to be examined keeping the aforesaid in mind. According to the learned *amicus curiae*, the testimony of PW-1 that he had no enmity with the respondents is contrary to his statement recorded on 10.09.2012 under Section 161 of

the CrPC. However, a closer examination of PW-1's testimony indicates that the said contention is erroneous. There appears to be no inconsistency in the testimony of PW-1 and his earlier statement.

24. Although in his cross-examination, PW-1 had stated that he had no enmity with the respondents, he had also stated that his father had lodged a complaint against the accused persons (respondents) in the police station to the effect that the accused persons used to quarrel at his shop after consuming liquor. He stated that the accused had also beaten his younger brother (Manish), who had received stitches on his head as a result of the same. In addition, he also stated that the accused had attacked several persons as they were in a habit of attacking persons after consuming liquor. Clearly, in view of his statement that he had no previous enmity with the accused persons must be read in conjunction with his testimony regarding quarrel(s) that the respondents had with his father and brother. Viewed in this light, his earlier statement that there were quarrels with the accused in the past cannot be considered inconsistent with his testimony.

25. PW-1 in his testimony had stated that his clothes had been removed by the respondents. There is sufficient evidence on record to establish that the victim's clothes were removed. They were then recovered from the site and a *pullanda* was made, which was opened in the Trial Court. The victim had identified the clothes that he was wearing on the date of the incident. In his statement recorded under Section 161 of the CrPC (Ex.PW-1/DA), PW-1 had omitted to state that his clothes had been removed by the respondents. However, the fact

that he had not mentioned this in his statement cannot be considered as a point of inconsistency. An omission to state a particular fact in a statement recorded under Section 161 of the CrPC does not necessarily cast any doubt as to the testimony of a witness. It certainly cannot be considered as inconsistent because PW-1 had not stated anything to the contrary.

26. PW-1 in his testimony had stated that respondent no.1 had, while beating him, stated that “*iska kaam tamam kar dete hai kyunki iska baap ne hum pe complaint kiya hai*”. It was contended on behalf of the respondents that since no such allegation was made in the statement of PW-1 that was recorded immediately after the incident, the same indicated that PW-1 had sought to improve upon his testimony. This contention is also unmerited, as is apparent from the close examination of the victim’s statement recorded on 10.09.2012 (Ex.PW-1/DA). In his statement, he had clearly stated that the accused had started beating him and while doing so had stated that “*aaj hum tumhein nahi chodenge*” (that they would not leave him today). This was because his father had made complaints against the respondents. PW-1 had also stated that the accused Juman had stated that before his family members arrive, let us finish him off (*ise pehle iske parivar wale aaye iska kaam tamam kar dete hai*). He had also stated that the accused had, while beating him, stated that they would not let him live (“*tujhe aaj zinda nahi chodunga*”). It is not necessary that a witness must narrate what has been stated in exact words. A witness is not expected to memorise the exact words that were spoken; it is sufficient if he narrates the

meaning of what he has heard. A plain reading of PW-1's statement recorded on 10.09.2012, indicates that he had indicated the essence of the statement made by Juman (respondent no.1). The statement that the accused were beating him because his father had made a complaint against them, as well as they intended to finish him off was clearly stated in his statement recorded under Section 161 of the Cr.PC (Ex PW-1/DA). In this view, his testimony cannot be considered as inconsistent with his statement recorded earlier.

27. It was contended on behalf of the respondents that PW-1's testimony that he was hospitalised for a period of two and a half months, was blatantly false. It was pointed out that according to the testimony of PW-16 (Dr Irfan), PW-1 was operated on the same date (09.09.2012) and he was discharged on 27.09.2012. It was contended that thus, PW-1 had remained in the hospital only for a period of eighteen days and not two and a half months. In his cross-examination, PW-1 had stated that he had remained in the hospital for one and a half to two months and he was discharged about 10-15 days prior to 01.11.2009. Clearly, he did not recollect the exact date on which he was discharged. However, the essence of his testimony that he was admitted to a hospital for a significant period of time and had undergone surgery of his abdomen, is clearly established.

28. In view of the above, this Court is unable to accept that there is any material inconsistency between PW-1's statement recorded earlier and his testimony. The Trial Court had evaluated the same and had

accepted PW-1's testimony as creditworthy. This Court finds no fault in doing so.

29. Before proceeding further, it is also relevant to examine whether the respondents were liable to be acquitted on account of any inconsistency in the testimonies of PW-2 and PW-3. The statement of Om Pal (PW-3) was also recorded on 10.9.2012. He had stated that Lalu Kabbadi (who testified as PW-2) had come to his house and told him that his foot was aching and he required to go to DDU hospital for taking some medicines. He stated that he and Lalu Kabbadi were going towards DDU hospital, and at about 12:50 AM while they were near the gate of Woodland Park, Tagore Garden, Delhi, they heard a scream from inside. They went inside and saw that Vinay (the victim) was screaming and the accused were beating him. He stated that they were giving blows on his chest and on his abdomen. He stated that they could not save him and therefore, they left the place to inform the family members of the victim. They went to the victim's house and informed his brother and his other family members. And, when they returned the accused persons saw them together and fled from the spot. PW-3's testimony is not consistent with this statement, except to the extent that he denies witnessing the accused beating the victim. PW-3 testified that Lalu Kabbadi had come to him and ask him to accompany him to DDU hospital and on the way at about 01:00 a.m. when they reached the gate of Woodland Park, Tagore Garden they heard the noise of a quarrel inside the said park. He states that they entered the park and saw Vinay (the victim) lying unconscious on the ground and he was bleeding. PW-

3 stated that he along with Lalu Kabbadi @ Hira Lal rushed to Vinay's house and informed his father and his brother. They took him to the spot where Vinay was lying and thereafter, they went to DDU Hospital. The learned APP had sought permission to cross-examine PW-3, since he had resiled from his earlier statement. This request was allowed. In his cross-examination, he was confronted with his statement made earlier (Ex.PW-3/B). However, he resiled from the same and stated that he had not stated so to the police.

30. PW-2 testified that while he and PW-3 were near the Tagore Garden at about 12:50/1:00 am, they had a noise of quarrel and he saw the accused beating Vinay. He stated that he was having pain in his leg and therefore, he was unable to rescue Vinay from the accused person; therefore, he along with Om Pal (PW-3) went to Vinay's house and informed his brother about the incident. They returned to the spot where Vinay was lying on the ground and thereafter, he and Om Pal left the spot to go to DDU Hospital. In his cross-examination, he accepted the suggestion that he did not see who was beating whom. But he was re-examined and in his re-examination, he clarified that he had seen the incident from the gate of the park and witnessed the three accused persons beating Vinay. He stated that "these three accused persons were beating Vinay with kicks".

31. It is clear from the material/evidence on record that PW-2 and PW- 3 had seen Vinay at Woodland Park. PW-3 did not testify that he had seen the accused beating Vinay but PW-2 had unequivocally testified to the aforesaid effect. Considering that this was also PW-3's

statement recorded earlier, the only inference that one can draw is that the respondents may have influenced PW-3. Notwithstanding the aforesaid inconsistencies in the testimony of PW-3, since the testimony of PW-1 is unambiguous, the same is sufficient to have convicted the respondents for beating and injuring the victim.

32. The contention that the site plan (Ex.PW-3/A) was inadmissible by virtue of Section 162 of the CrPC is also unmerited. PW3 had testified in the Trial Court that the plan was made at his instance and had identified his signatures on the site plan. The site plan was not sought to be introduced as evidence by the concerned police officer as a statement made by a third party but was done so by the concerned witness. In ***Tori Singh and Anr. v. State of Uttar Pradesh*** (*supra*), the concerned police official had sought to introduce a site plan drawn at the instance of a third party, who was not examined. The said decision has no application in the facts of this case.

33. The next question to be examined is whether the ingredients of Section 308 of the IPC have been established in this case. Ms Shankaran had relied upon several decisions of this Court including the decision in the case of ***Ashok Kumar v. Delhi: Crl. A. 17/2011 decided on 20.02.2015***; ***Deshraj v. Kewal Krishan & Ors.: Crl. Rev. P. 544/2001 decided on 23.11.2009***; ***Ramesh v. State Crl. A. 965/2009 decided on 22.01.2010*** and ***Laxman v. State Crl. A. 976/2009 decided on 22.01.2010*** in support of her contention that the nature of the injuries do not indicate commission of the offence punishable under Section 308

of the IPC and no knowledge or intention that such injuries could be fatal, could be attributed to the respondents.

34. Section 308 of the 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.”

35. It is clear from the plain language of Section 308 of the IPC that in order to establish that an offence punishable under the said provision has been committed, it is necessary to establish that the person committing such offence had the knowledge or the intention of that the offending act, if caused death, would result in him being guilty of culpable homicide not amounting to murder. It is also trite law that the question whether the assailants had the knowledge or intention to commit such an act, which if resulting in death, would amount to an offence of culpable homicide not amounting to murder, must be established and proved.

36. In order to establish whether the offenders had the intention or knowledge to commit such an act, it is necessary to not only see the nature of injuries, the weapons used but also the surrounding circumstances. In the present case, there is no material to establish that

the respondents had used any weapon to injure the victim. It has been established that they had delivered blows by fists and had kicked the injured on his abdomen and his chest.

37. Dr Shami Ahmed, Eye Surgeon deposed as PW14. He testified that he had examined the patient Vinay and found the following injuries.

Injuries on the left eye:-

1. Periorbital swelling present.
2. CLW 3 cm x 0.5 cm x 0.3 cm near eye brow at lateral canthus.
3. Conjunctival chemosis and congestion.
4. Rest anterior segment within normal limit.

Injuries in the right eye:-

1. Mild periorbital abrasion at eye brow near lateral canthus.
2. Conjunctival chemosis and congestion.

Rest anterior segment within normal limit.

38. There is no evidence to establish that any of the said injuries were grievous or in any manner endangered the life of the victim (Vinay).

39. The victim had also suffered injuries on his knee and his chest. His MLC indicates that there was an abrasion on his knee. There was an abrasion over his chest and tenderness over his chest. Accordingly, he was referred for an X-ray. Dr Akansha, who deposed as PW15, had examined his X-ray and had reported "*no bony injury seen*" (Ex PW15/A). Thus the injuries suffered by the victim (Vinay) on the chest were also not serious.

40. Dr Irfan, senior resident, Department of Surgery, DDU Hospital

was examined as PW16. He deposed that he had examined the victim, when he was brought to the hospital on 09.09.2012, and found that the victim had suffered a “*Pancreatic injury of grade IV (transection at the neck of pancreas)*”. He testified that the injured was admitted and operated upon the same day. He was discharged on 27.09.2012. He affirmed that he had opined the nature of injury as dangerous.

41. One of the most accepted grading system for pancreatic trauma is the Organ Injury Scale (OIS) developed by the American Association for the Surgery of Trauma. “*Laceration: Proximal transection or pancreatic parenchymal injury involving the ampula*” is considered as grade IV.

42. Vinay’s injury was classified as grade IV by PW-16. Pancreatic trauma is associated with significant mortality and complications and some authors place the same above 60%. PW-16 had also classified the injury suffered by the victim as dangerous. Considering the above, there is no doubt that the injury to the pancreas suffered by the victim – which it is established was on account of blunt force – endangered his life. Thus the same was classifiable as a grievous hurt within its meaning under Section 320 of the IPC.

43. However, it is difficult to accept that the respondents had knowledge that their act could result in a fatal injury. It is material to note that respondents had also delivered blows on other parts of the victim’s body. However, none of those blows had resulted in any grievous injury. The victim had been kicked on the chest, but did not

suffer any significant injury on his chest. None of the bones of the victim were broken. Although he had suffered injuries near his eye, the said injuries were also not dangerous and there is no material to indicate that the same had resulted in any permanent damage. This does indicate that although the respondents had delivered brutal blows but it is not established that the same were intended to cause any fatal injury. It is unfortunate that one of the blows on the abdomen had resulted a dangerous injury. However, that does not mean that the respondents had the knowledge or the intention to commit culpable homicide.

44. PW1 had deposed that while beating him the accused had also said “*iska kaam tamam kar dete hai kyunki iska baap ne hum pe complaint kiya hai*”. But that too, is not determinative of the question whether the accused intended to kill him. Clearly, if the accused so desired to kill the victim, the injuries suffered by the accused on his head and chest would be more serious and the accused would have used other weapons/objects.

45. In ***Bishan Singh v. State of Punjab: (1974) 3 SCC 288***, the Supreme Court had considered a case where six persons had accosted the injured and each of them were armed with a *lathi* and they had delivered blows which had caused seven injuries on the body of the injured. All other injuries but one was grievous. The arm of the injured was fractured. The Court reasoned that out of seven injuries that were inflicted, only one of them (fracture of the arm), which was not on a vital part of the body, was grievous; thus, the offence punishable under Section 308 of the IPC was not established. However, the Court held

that the accused would be guilty of offences falling under Sections 323 and 325 of the IPC.

46. Given the fact that the respondents had not used any weapon, they had undoubtedly picked up a quarrel with the victim (PW-1) and had brutally beaten him. There is little doubt that they had caused a grievous hurt as one of the injuries had resulted in damage to the pancreas that required surgical intervention. The victim had remained in the hospital for eighteen days. It is obvious that even after being discharged, the victim would be under severe discomfort as is obvious in a case of any such surgical intervention with regard to a vital organ of the human body.

47. In view of the above, this Court finds merit in the respondents' contention that they could not be convicted of an offence under Section 308 of the IPC. This Court is of the view that the evidence obtaining in the case clearly establishes that the respondents are guilty of offences punishable under Sections 323 and 325 of the IPC.

48. Having stated the above, this Court finds much merit in the contention that the punishment awarded to the respondents is not commensurate with the gravity of their offence. Notwithstanding that the respondents are not guilty of an offence punishable under Section 308 of the IPC, they have certainly committed an offence of causing hurt and grievous hurt to the victim. An offence under Section 323 of the IPC is punishable with imprisonment of either description for a term which may extend to one year or with a fine which may extend to

₹1,000/-, or with both. In terms of Section 325 of the IPC, the offence of voluntarily causing grievous hurt is punishable with of imprisonment of either description which may extend to seven years and also fine.

49. It is well settled that several factors are required to be considered for awarding the sentence. In ***State (GNCT of Delhi). v. Mukesh: ILR (2011) 6 Delhi 340***, a Division Bench of this Court had observed:

“12. Penology and sentencing in our country has remained an underdeveloped concept. In several jurisdictions across the world, sentencing choices are guided not only by the subjective “facts of the case” but a whole variety of factors, such as social investigation of the offender, his family background, his social environment, behaviour, tendencies, etc. These are apart from the more “traditional” factors such as the history of previous offences or convictions, subjective facts pertaining to the offender, such as age, gender, gravity of the offence, circumstances leading to the offence, etc. More often than not, these are factored into a set of codified rules or regulations, which in some cases, prescribe great details, and even mandate separate hearings, where the judge is obliged to consider evidence presented in that regard.”

50. In ***Mohd. Giasuddin v. State of A.P.: (1977) 3 SCC 387***, the Supreme Court had observed as under:

“A proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances extenuating or aggravating of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with

reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, prospect for rehabilitation of the offender, the possibility of return of the offender to normal life and the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect of the particular type of the offence. These factors have to be taken into account by the Court in deciding upon the appropriate sentence”.

51. In the present case, the Trial Court had noted certain mitigating factors, namely, the young age of the respondents and the fact that they were the only bread winners in their respective families. The Trial Court had also noticed that the respondents have children, which they require to take care of. The Trial Court had further noticed that they did not have any previous convictions and their conduct during the course of the trial had remained unblemished. However, a punitive measure must also have a retributive element. The severe trauma suffered by the victim cannot be ignored. Plainly, keeping the same in mind, a prison sentence of only two months is inadequate and is not commensurate with the gravity of the offence.

52. Having stated the above, this Court cannot be oblivious to the delay in serving the notice of this appeal to the respondents. The present appeal was listed on 27.07.2016 and notice was directed to be issued, returnable on 04.12.2016. The notice was not issued for want of deposit of process fee and on 04.12.2016, the matter was adjourned to 04.05.2017, with the direction that order dated 27.07.2016, be complied

with. However, the appellant failed to take steps for issuance of notice. On 04.05.2017, this Court noted that notice could not be issued for want of process fee and directed issuance of fresh notice returnable on 14.11.2017. But the appellant did not deposit the process fee and on 14.11.2017, the appeal was once again adjourned, with the direction for issuance of notice. The appeal was next listed on 04.04.2018, but the process fee deposited by the appellant was under objections, which were not cleared and therefore the notice could not be issued to the respondents. Once again, this Court directed issuance of fresh notice returnable on 27.08.2018. The appellant defaulted in filing the process fee yet again and notice could not be issued to the respondents. And, the matter was adjourned to 18.02.2019. On 18.02.2019, the appeal was adjourned to 08.08.2019.

53. In view of the above, this Court considers it apposite not to enhance the prison sentence awarded to the respondents at this stage; but, to impose a fine of ₹20,000/- on each of the respondents. It is so directed. The fine shall be paid in three months, failing which the respondents shall undergo simple imprisonment for a further period of three months.

54. The appeal is disposed of in the aforesaid terms. The application is also disposed of.

VIBHU BAKHRU, J

MAY 18, 2020
RK/MK