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

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Reserved on: 12.12.2022

Pronounced on: 05.01.2023

+ **CRL.A. 162/2011**

HOTI LAL

..... Petitioner

Through: Mr. Rajat Wadhwa, Amicus
Curiae with Ms. Dhreti Bhatia,
Mr. Lakshay Luthra, Mr. Vasu
Kalra and Mr. Aditya Varun,
Advocates

versus

STATE OF DELHI

..... Respondent

Through: Mr. Naresh Kumar Chahar,
APP for State

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present Appeal under Section 374 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") filed by the appellant assails the impugned judgment dated 14.01.2011 passed by learned Additional Sessions Judge-01, Central, Delhi in SC No.19/09 whereby the appellant was convicted for offence punishable under Section 308(Part-II) of Indian Penal Code, 1860 ("I.P.C."). The appeal further assails the order on sentence dated 17.01.2011 whereby the appellant was sentenced to undergo rigorous imprisonment for three years with fine of Rs. 10,000/- (Rupees Ten Thousand) and in default of payment of fine, further

rigorous imprisonment for six months.

2. The present appeal was admitted on 10.02.2011 and sentence of the appellant was suspended by virtue of order dated 04.03.2011.

FACTUAL MATRIX

3. Briefly stated, the case of prosecution as recorded by the learned Trial Court is that on 18.05.2006 at about 10.00 pm, appellant Hoti Lal, was urinating in front of the door of complainant who was the landlady of the premises No. 16/7-1, Gali No. 3, Bapa Nagar, Karol Bagh, Delhi and appellant was the tenant. The complainant was preventing him from doing so as the same was not a place for urinating, however, the appellant insisted on said behavior and retorted in a raised voice, hearing which, two sister of appellant, namely Vimla (accused no. 1) and Hem Lata (accused no. 4) came to the door and joined in the quarrel. It is further the case of prosecution that accused no. 1 exhorted appellant and accused no. 4 to attack the complainant. Both of the sisters caught hold of complainant by hand and started beating her, and Hoti Lal took a piece of brick lying nearby and hit her thereby inflicting injuries on her head. In the meanwhile, accused no. 2 Dabbal @ Niranjan had also come to the spot and had started beating the complainant. Post the altercation, the four accused persons ran away from the spot, while the complainant was taken to police station and then to Lady Harding Medical College & Sucheta Kirapiani Hospital where her MLC was recorded.

4. The information about the incident was received at Police Station Prasad Nagar *vide* DD no. 51-B which was made over to Head

Constable Hari Bhushan (Investigating Officer/IO), who along with Constable Bhim Singh went to the place of occurrence where they were informed that complainant had gone to the police station. On returning to police station, they were further informed that complainant had been sent to hospital. The MLC of the complainant was collected and her statement was recorded, pursuant to which, the present FIR bearing no. 180/2006 was registered at P.S. Prasad Nagar under Sections 308/34 IPC. During the investigation, ladies shirt/jumper of complainant having blood stains was taken in possession vide seizure memo. A site plan was prepared by the Investigating Officer (IO). All four accused persons were arrested, a charge sheet was filed on 11.09.2008. Charges were framed against the accused persons on 11.05.2009.

5. The prosecution examined the following witnesses in support of its case before the learned Trial Court:

- i. PW-1, Sh. Balwanta Ram, Head Constable
- ii. PW-2, Sh. Devender, Head Constable
- iii. PW-3, Smt. Sharda, Complainant
- iv. PW-4, Sh. Hari Ram, Assistant Sub Inspector
- v. PW-5, Smt. Nutan, Home Guard
- vi. PW-6, Sh. Bhim Singh, Head Constable
- vii. PW-7, Sh. Satyavir Singh, Constable
- viii. PW-8, Sh. Hari Bhushan, Head Constable
- ix. PW-9, Dr. Shashank Aggarwal

6. The proceedings against accused no. 2 stood abated on her passing away during the course of trial. Statement of appellant and other two accused were recorded under section 313 Cr.P.C. wherein the

accused persons refuted all the evidence produced against them by the prosecution and claimed that dispute was on account of tenancy, as accused no. 1, who was tenant under the complainant, had not been vacating the tenanted premises for which the complainant had filed an eviction suit.

7. By way of impugned judgment, the learned Trial Court, after evaluating the evidence on record, acquitted accused no. 1 and 4, whereas convicted accused no. 3 i.e., present appellant for commission of offence under Section 308(Part-II) of IPC. The operative portion of the impugned judgment is as under:

“41. In above facts and circumstances, the prosecution cannot succeed as against A-1 or A-4. However, the guilt of A-3 in voluntarily causing the said injury on the person of A-3 has been brought home beyond pale of all doubts.

43. In above view, the guilt of A-3 for offence under Section 308 IPC part-II IPC has been brought home

44. In the result, A-1 and A-4 are acquitted. A-3 is held guilt and convicted for offence under Section 308 Part-II IPC.”

SUBMISSIONS BY LEARNED COUNSELS

8. The appellant through his appeal and submissions made by his counsel submits that prosecution's story is a mere concoction and the evidence produced in support of the same is highly concocted, contradictory on material points, and unreliable. It is stated by learned counsel for appellant that complainant/PW-3 had deposed that she was hit with a brick on her 'hand' by appellant in her testimony before the learned Trial Court, and that the learned APP had not cross examined

this witness and had not put to her that she was hit on the 'head' and not on the 'hand'. In absence of such cross examination, at the stage of Appeal, the said clear and unequivocal statement ought not to be read differently than what is simply stated by the witness.

9. It is stated by learned counsel for appellant that injuries described by PW-3 in her statement on oath before the court do not find corroboration in the MLC since except for injury on 'Parietal' region, there is not a whisper of any other injury. The MLC does not even say that any blood was found on any part of the body of complainant. It is also argued that the brick used to commit the offence was allegedly handed over by complainant/PW-3 to the police but was not seized and hence not produced during the trial. In fact, it is stated, that the police have themselves disowned this version of PW-3 in their statements.

10. It is further stated the alleged incident occurred at a densely populated area and no independent witness was produced or examined to corroborate the version of complainant. It is also contended that daughter of the complainant had accompanied the complainant in the injured condition to the police station and hospital as per the version of complainant, but the daughter was neither produced nor her statement in that connection was recorded by the IO under Section 161 Cr.P.C, for the purpose of corroborating the version of the complainant on material particulars. Learned counsel for appellant also contends that the blood stained kurta handed over by PW-3 to the police, and admittedly seized as well as produced during trial, was never sent to FSL for any scientific examination in order to determine that the blood on the said kurta is that of complainant/PW-3.

11. It is averred by the learned counsel for appellant that learned Trial Court fell in grave error when it believed the version of PW-3 to convict the appellant, whereas it had rightly disbelieved her version of the incident qua other accused persons who were acquitted. Reliance is placed on the judgment of Hon'ble Supreme Court titled ***Balaka Singh v. State of Punjab (1975) 4 SCC 511.***

12. On the other hand, learned Additional Public Prosecutor for State argues that the impugned judgment does not suffer from any illegality or infirmity and the learned Trial Court has rightly convicted the appellant by appreciating the entire evidence on record. With regard to complainant stating being hit on her 'hand' by appellant in statement before the learned Trial Court, it is stated that the same is a typographical error, and the MLC of the complainant clearly points out that the injuries suffered by the complainant were on her head. It is argued by learned APP for State that detailed observations, with regard to injuries suffered by the complainant and the manner in which they were caused by the appellant, have been made in the impugned judgment.

ANALYSIS AND FINDINGS

13. The arguments of either side have been heard and the records of the case have been perused. A perusal of the impugned judgment and examination of material on record compels this Court to consider and analyse certain issues, relevant for the adjudication of present matter.

14. Weapon of Offence and Investigation qua Injuries

14.1. The case of the prosecution has been that the complainant was hit on her head by a piece of brick during the course of altercation and she had suffered injuries due to the same. The complainant/PW-3 in her testimony before the learned Trial Court had deposed that she had produced the said weapon of offence before the concerned police officials at P.S. Prasad Nagar on the day of incident, although the police had not kept the same in *pullanda* or sealed it in her presence.

14.2. The said version of complainant, has however, been denied by the prosecution witnesses themselves. PW-6 i.e., the police constable who had also accompanied the Investigating Officer to the spot of incident, in his testimony stated that neither the weapon of offence i.e. brick was handed over by the complainant to police, nor the police could recover the same from the spot of incident. Furthermore, the Investigating Officer PW-8, had also stated in the cross-examination that no piece of brick, alleged to have been used to hit the complainant, was handed over to him. It was further deposed that he could not trace the weapon of offence despite making his best efforts.

14.3. Therefore, as per the case of prosecution, the weapon of offence could neither be recovered nor seized. The same has also been recorded in the impugned judgment and the view of the learned Trial Court is as under:

“34. The defence counsel then submitted that brick with the help of which PW-3 was injured was not seized. I do not think such lapse on the part of I.O. should lead to PW-3 being disbelieved. Injury noticed suffered as per MLC Ex. PW 9/A read with medical notes Ex. PW 9/B, confirms her word about the manner in which she was wounded.

35. In this very context, it may be added that the submissions of the defence that the injury might have been self-inflicted does not impress me. The nature of injury, particularly its situs, is such that it could not have been self inflicted. There is no plausible reason why PW-3 would go to the extent of injuring herself in this manner.”

14.4. In this regard, this Court has also perused the MLC and the medical notes available on record. As per the MLC, the complainant was found to have suffered a lacerated wound on the parietal region, and the injury was opined to be simple in nature, and underlying bone was not affected. The complainant/PW-3 in her testimony had stated that she was drenched in blood when she had gone to the police station and hospital, however, the MLC of the complainant makes no mention of any blood. It is further the case of prosecution that blood stained *kurta* of the complainant was handed over by her and was seized by the Investigating Officer. However, it also the admitted case of prosecution that the said crucial piece of evidence was not sent to FSL for examination. The same has also been recorded by the learned Trial Court and consequently, the blood stained piece of *kurta* was held to be of no consequence. The relevant part of impugned judgment is as under:

“24. Though, ladies jumper Ex. P-1 had been deposited in the malkhana, as proved through entry Ex. PW 4/A in register no.19, maintained by PW-4 MI-IC(M). Since the said exhibit was not sent to Forensic Science Laboratory, there being no confirmation in the nature of expert opinion about it bearing blood stains, this piece of evidence is of no consequence.”

14.5. When admittedly, there has been no forensic examination of blood stained *kurta* of complainant to prove that stains of the blood were actually of complainant, and also when MLC has no mention of complainant being drenched in blood, rather the injury being simple in nature, the exact nature of injuries caused to the complainant cannot be established and inferred beyond reasonable doubt, especially when the weapon of offence has also never seen the light of day. Further, no evidence was led so as to show that a brick could have caused such an injury.

15. Non-Examination of Witnesses and Sole Testimony of Complainant

15.1. Learned counsel for appellant had argued that out of nine witnesses examined before the learned Trial Court, seven are police officers, one is a doctor, and one is the complainant. No other witness has been examined to corroborate the version of complainant. It was contended on behalf of appellant that even though several public witnesses were present at the time of alleged incident, neither their statements were recorded by the IO nor were they examined before the learned Trial Court. Even the daughter of complainant, who as per the complainant's version, had accompanied her to police station as well as to hospital was not examined by the prosecution.

15.2. In this regard, the testimonies of the witnesses have been perused. Firstly, PW-3 in her cross-examination had deposed that many public persons had gathered around her house at the time of incident. It was further stated by her that no one else in the neighbourhood had

seen the appellant urinating or hitting her with the brick. Investigating officer PW-8, in this regard, deposed that though some of the persons in neighbourhood had seen the incident, but all of them refused to get their statements recorded. Secondly, PW-3 had also stated in her examination-in-chief and reiterated in cross-examination that she had gone to the police station and hospital along with her daughter. PW-2, who was posted as constable at PS Prasad Nagar, however, stated that none of the family members of complainant had either come to police station after the alleged incident took place or to the hospital where the complainant was taken for medical examination. Thus, the version of complainant qua her daughter accompanying her has been disapproved by the prosecution witness itself.

15.3. The learned Trial Court also observed that non-examination of public witnesses who are not willing to come forward and non-examination of daughter of complainant is not fatal to the case of prosecution, and sole testimony of PW-3 can be relied upon.

15.4. There is no dispute regarding the issue that non-examination of public witnesses, *ipso facto*, is not fatal to the case of prosecution, if the testimonies of other witnesses are consistent and can be relied upon to prove the case of prosecution beyond all reasonable doubts. However, as discussed in the preceding paras, there are several contradictions among the testimonies of witnesses, and the version of complainant has not been supported by the prosecution witnesses themselves, qua the discovery and seizure of weapon of offence as well as regarding presence of daughter of complainant at police station and hospital. It also appears from the record that PW-8 i.e. Investigating Officer had

stated before the learned Trial Court that as per his investigation, the quarrel had taken place between the complainant and accused persons over getting the rented accommodation vacated from the accused persons, but the case of complainant has been different, that the quarrel had broken out since the appellant was urinating outside the door of her house. PW-3, in her cross-examination had admitted the pendency of a suit for eviction against the accused persons. It was argued by the learned counsel for appellant that the actual reason for quarrel was this civil dispute, and the appellant was wrongly implicated in a criminal case by the complainant.

15.5. The learned Trial Court on the basis of sole testimony of PW-3, by ignoring all the discrepancies and contradictions, convicted the appellant under Section 308(Part-II) of IPC. It is pertinent to note, however, that also on the basis of said/same testimony of PW-3, the other two accused persons were acquitted. The reasons in this regard given by the learned Trial Court are reproduced as under:

“40. Going by the evidence of PW-3, it is clear that A-3 is the author of the aforementioned injury. Though PW-3 would also attribute she having been roughed up by A-1 and AM assisted by A-2 (since deceased), the MLC does not indicate any injury other than one lacerated wound having been suffered. In these circumstances, the assault by A-1, A-2 and A-4 as deposed to by PW-3 does not find corroboration from the medical record. Though in the FIR PW-3 had attributed exhortation by A-1 to A-3 to the effect of hitting the latter with a brick piece, in her evidence in court, PW-3 was silent on this score. The sequence narrated by her in the witness box during the trial does not show that the act of A-3 hitting PW-3 with a brick piece was on account of he having been instigated or encouraged by

anyone else. The deposition in the court reflects that act on the part of A-3 to be an act committed by him on his own volition.

41. In above facts and circumstances, the prosecution cannot succeed as against A-1 or A-4. However, the guilt of A-3 in voluntarily causing the said injury on the person of A-3 has been brought home beyond pale of all doubts.

42. The charge faced by A-3 is under Section 308 IPC. He is the author of the injury referred above. Though as per the opinion recorded in the MLC Ex. PW 9/A the injury in question was simple in nature, the said opinion is essentially based on radiological examination indicating no fracture. Even in the medical notes Ex. PW 9/B, it is clear that the under lying bone was not affected. But then, the fact remains that the injury caused with a brick piece was on the vital part of the body. Had it resulted in fracture, it may have resulted in serious consequence including death. The injury on the head caused by A-3 was intentionally inflicted. It was brought about with the help of a brick piece, apparently used to add force to the impact and intended to cause extensive damage. The use of brick piece against parietal bone could have resulted in fracture and, therefore, injury was such as was likely to cause death. Knowledge of such possible consequences will have to be imputed to A-3. Had death occurred, this would have brought the case within the mischief of third clause of Section 299 IPC, rendering it a case of culpable homicide. But then, the case would not travel beyond that into Section 300 IPG, in the given facts and circumstances.

43. In above view, the guilt of A-3 for offence under Section 308 IPG part-1 IPG has been brought home."

15.6. Learned counsel for appellant has assailed the aforesaid findings of learned Trial Court on the ground that when testimony of complainant was disbelieved and ignored qua all other accused persons,

the same course should have been adopted qua the present appellant also. Reliance in this regard was also placed on the decision of Hon'ble Apex Court in ***Balaka Singh v. State of Punjab (1975) 4 SCC 511***, relevant portion of which reads as under:

“8.We are satisfied that in the facts of the present case, having regard to the partisan and interested evidence of the prosecution witnesses who can implicate the appellants and the four accused equally with regard to the assault on the deceased it is not possible to reject the prosecution case with respect to the four accused and accept it with respect to the other five appellants. If all the witnesses could in one breath implicate the four accused who appear to be innocent, then one cannot vouchsafe for the fact that even the acts attributed to Balaka Singh, Joginder Singh, Pritam Singh, Darbara Singh and Jamail Singh may have been conveniently made to suit the needs of the prosecution, case having regard to the animus which the witnesses as also Banta Singh bore against the appellants....”

15.7. As rightly argued by learned counsel for appellant, the learned Trial Court has categorically held in para 40 of impugned judgment that the version of complainant with respect to the role of other accused persons in holding her hands and instigating the appellant to hit her with the brick, is inconsistent and cannot be relied upon, in view of which prosecution qua them would fail. However, the allegations and version of the same witness have been *per se* believed to be true and reliable, despite there being lack of corroboration of the same from material on record as well as from other prosecution witnesses.

15.8. It is also pertinent to note that while convicting the appellant under Section 308 (Part-II) of IPC, the Court has observed that though the injury caused on the complainant's head was of simple in nature,

the same could have been fatal if more damage such as fracture would have been caused to the vital body part i.e. head, since complainant was intentionally attacked using a piece of brick in order to cause extensive damage. For a quick reference, Section 308 of IPC is 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.”

15.9. Needless to say, no brick was either recovered or produced before the learned Trial Court so as to conclude that the injury was caused by using the same and then to further conclude that since a brick was used, the intention was to cause extensive damage to the complainant. Therefore, the said findings of the learned Trial Court are based on presumptions, in absence of any cogent evidence in this regard.

CONCLUSION

16. In the present case, it is not in dispute that blood stained clothes of the complainant were not sent to FSL for forensic examination so as to confirm that the said blood was of the complainant. It is also not disputed that the alleged weapon of offence could not be found or seized so as to advance the case of prosecution. Though several public

witnesses were present on the spot of incident, including the daughter of complainant, who had witnessed the incident, their statements could not be recorded. Moreover, the version of complainant also finds no support, rather has been contradicted on several points, by the prosecution witnesses themselves. In light of such facts and circumstances, the sole testimony of complainant/PW-3, in absence of corroboration from other witnesses and material on record, cannot be relied upon to convict the appellant, more so, when the same has not been relied upon to convict other accused persons, who were acquitted vide the same impugned judgment by the learned Trial Court.

17. Considering the overall facts of the case and material on record including the testimonies of witnesses, this Court is of the view that the evidence on record is insufficient and inconsistent to establish the guilt of the appellant beyond reasonable doubt.

18. In view thereof, the impugned judgment dated 14.01.2011 and the order on point of sentence dated 17.01.2011 passed by learned Trial Court are set aside. The appellant is acquitted of the offences of which he has been charged and convicted.

19. The appeal is allowed accordingly, with no order as to costs.

20. This Court also appreciates the efforts of Mr. Rajat Wadhwa, Advocate who was appointed as *amicus curiae* in the present matter to represent the appellant.

SWARANA KANTA SHARMA, J

JANUARY 05, 2023/ns