



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

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*Reserved on: 22nd July, 2024
Pronounced on: 23rd August, 2024*

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CRL.A. 541/2009

STATE (G.N.C.T.) OF DELHI

.....Appellant

Through: Mr. Hemant Mehla, APP for State
with SI Ajit Krishna, P.S. Gokalpuri.

versus

1. MOHIT KUMAR

S/o Shri Shish Pal
R/o C-66, Mata Wali Gali,
Johripur, Delhi

...Respondent No.1

2. SANDEEP KUMAR

S/o Phool Singh
R/o C-66, Mata Wali Gali,
Johripur, Delhi.

.....Respondent No.2

Through: Mr. Kapil Singhal, Advocate.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. The present Criminal Appeal under Section 378 of the Code of Criminal Procedure (*hereinafter referred to as 'CrPC, 1973'*) has been filed on behalf of the appellant, to challenge the Judgment dated 01.10.2008 *vide* which the respondents, namely, Mohit Kumar and Sandeep Kumar, have



been acquitted for the offence under Section 308/34 of the Indian Penal Code, 1860 (*hereinafter referred to as 'IPC, 1860'*).

2. **The case of the prosecution in brief**, is that on 20.09.2006, at about 5:30 p.m., Mohit Kumar (*accused*), son of Shish Pal along with another boy (*co-accused Sandeep Kumar*), went to the house of the complainant Maninder Gautam and called him outside, after which they abused and threatened him and then hit him with a pointed/sharp instrument, which resulted in a serious wound on his head. He started bleeding profusely and became unconscious. His neighbour, Mr. Kamal Singh, who saw him lying unconscious, called the PCR and the injured was taken to Guru Teg Bahadur Hospital where he received 21 stitches on his head. Thereafter, on his complaint, *FIR No. 701/2006* under Section 308/34 of IPC, was registered.

3. Subsequently, on 26.09.2006, the respondents were arrested at the instance of the complainant. The two co-accused/respondents led the police for the recovery of the nail cutter from near the wall, close to the place of incident. On the completion of investigation, the *Charge-Sheet* was filed in the Court and the charges were framed under *Section 308/34 IPC*.

4. **The prosecution examined 12 witnesses** out of whom *PW-1* Kamal Singh was the person, who had called the PCR. *PW-2* Maninder Gautam is the injured, who had proved his complaint *Ex.PW-2/1* and had deposed about the entire incident. *PW-3* Sanjay Tomar, who was an eye witness but he failed to support the case of the prosecution. *PW-6* Dr. P. Yadav, CMO, GTB Hospital had examined the injured on 30.09.2006 and prepared his *MLC, Ex.PW-6/1*. *PW-7* Dr. Pradeep Saini has opined the nature of injury to be simple. *PW-10* Head Constable Ashok Kumar had joined the investigations with *PW-9* ASI Dharam Singh, the Investigating Officer and



effected the recovery of the nail cutter at the instance of the respondents. Rest were the police witnesses who have deposed about the investigations that had been carried out.

5. **The statements of the respondents** were recorded under Section 313 Cr.P.C. in which they pleaded their innocence. They examined *DW-1*, Roshan Lal who deposed that he was present at the Bhushan Nai (barber shop) on 20.09.2006 at about 5:30 p.m. and no incident of fight took place.

6. **Learned ASJ observed** that *PW-1* Kamal Singh, who had found the injured lying unconscious had deposed that he had seen the injured walking towards him in injured condition with blood profusely coming out of his head and had also deposed that the injured had disclosed the names of the assailants to him. It was observed that the testimony of *PW-1* Kamal Singh was contradictory to the testimony of the injured, *PW-2* Maninder Gautam, who had deposed that he had fainted soon after the injury was inflicted and then gained consciousness only in the GTB Hospital. Learned ASJ further observed that the identity of the weapon of offence i.e. nail cutter was not be established and the possibility of the weapon of offence having been planted could not be ruled out. Thus, the story of the prosecution was not believed and the two respondents were acquitted.

7. *Aggrieved, the present Appeal* has been filed wherein the impugned Order of acquittal, has been challenged by the State on the **grounds** that the testimony of *PW-1*, Kamal Singh and *PW-2* Maninder proved the entire chain of events, which led to the commission of the offence.

8. *Secondly*, minor discrepancies in the testimony, have been over emphasized and they do not cast any doubt on the actual happening of the event.



9. *Thirdly*, learned ASJ has also overlooked that the inability of the complainant/injured to identify the weapon of offence, is understandable as he had been hit on his head from behind.

10. Hence, the impugned Judgment has been challenged with a prayer to set-aside the Order of acquittal and to convict the respondents.

11. The respondents were represented by their Counsel, in the present Appeal.

12. **Submissions heard and the record perused.**

13. This is a case where the complainant had been inflicted with an injury allegedly by the two respondents, which resulted in registration of the FIR under Section 308/34 of the IPC.

14. Before embarking upon the facts of the case, it would be pertinent to understand the contours and ingredients to constitute the offence under section 308, IPC, 1860 which 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. Thus, it emerges that the main element of an offence under section 308 IPC, 1860 is *the knowledge and intention to cause such injury which would be likely to cause death and if such death is caused the offender would be liable for the offence of committing culpable homicide not*



amounting to murder. Apex court in the case of Sunil Kumar vs. NCT of Delhi, 1998 8 SCC 557 emphasised that the court has to see whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in Section 308 IPC, 1860.

16. In Narinder Kaur Oberoi v. State 2015 SCC Online Del. 7864, Coordinate Bench of this Court observed that the facts and circumstances of each case need to be considered to ascertain whether the accused had the requisite intention or knowledge. The factors that may be relevant to ascertain the element of “*intention or knowledge*” could be the nature of weapon used, the intention expressed by the accused at the time of act, the motive for commission of offence, the nature and size of injuries, parts of the body of the victim selected for causing the injuries and severity of blow and blows.

17. The Supreme Court, in the case of Roop Chand @ Lala vs. State (NCT) of Delhi bearing *Criminal Appeal No. 2204 Of 2010* decided on 22.09.2020, held that *the nature of the attack and the intent or knowledge that the actions of the accused were likely to cause death* must be established. The severity of the injuries inflicted was also held as another significant aspect.

18. Thus, to meet the threshold for Section 308 IPC, it has to be clearly established that there *existed an intent/knowledge to cause death* though the nature of injuries may also be material to ascertain the requisite *mens rea*.

19. With these principles as a guide, the facts and circumstances of the case at hand may be examined.

20. ***The First important evidence*** is the testimony of material witnesses. The star prosecution witness is the injured, PW-2 Maninder Gautam, who



has deposed that on the day of incident i.e. 20.09.2006, at about 5:30 p.m., the respondent No. 1/Mohit Kumar along with another boy had called him outside the house and had started abusing him. Thereafter, they hit him on the back side of his head with some sharp instrument which caused a deep wound and profuse bleeding, on account of which he became unconscious. He regained his consciousness in the GTB hospital where the police recorded his statement, Ex. *PW-2/1*.

21. In corroboration, the prosecution had relied on an eye witness *PW-3* Mr. Sanjay Tomar, who however, retracted and denied having been a witness to the entire incident.

22. The *third material witness* examined by the prosecution was *PW-1* Mr. Kamal Singh, who had called the PCR, which had taken the injured to the GTB Hospital where the injured got admitted for the treatment. He in his examination-in-chief had deposed that he had seen the complainant, who was injured and blood was oozing from his head, walking towards him and he disclosed the names of the assailants, after which he had called the PCR.

23. Over emphasis has been placed by the learned ASJ on his testimony to be materially contradictory since according to the complainant, he had become unconscious on the spot after being attacked and gained consciousness only in the GTB hospital. *PW-1*, therefore, could not have seen the injured walking near the nala nor *PW-2* could not disclosed names of the assailants as he was unconscious.

24. However, while making these observations, the learned ASJ failed to consider the cross-examination of *PW-1* Kamal Singh conducted on behalf of the accused, wherein he has deposed that “*when I met injured Maninder, he was already lying in the gali in front of his house. At that time, injured*



was semi-conscious. It is correct that I have stated to the police in my statement that he laid down on the ground in an unconscious condition.”

25. Pertinently, when the testimony of *PW-1* Kamal Singh is read holistically, it is not in contradiction but in consonance with the testimony of *PW-2*, the injured who after being hit, become unconscious. The learned ASJ, therefore, misdirected itself in observing that there were material contradictions in the testimony of the *PW-2* complainant and the *PW-1*.

26. Pertinently, *PW-3* Mr. Sanjay Tomar may have been recorded as an eye witness by the police but merely because he failed to support the case of the prosecution in evidence, does not in any way cast any doubt on the testimony of *PW-2* injured, which is consistent and fully supported by the injury which he had suffered and is proved by the medical record.

27. Further, it is corroborated by the testimony of *PW-8* ASI Satya Pal who has deposed that on 20.09.2006 he was posted as In-charge, PCR Van, Backer 39 in PCR North-East zone when he received a PCR call at about 6:05 P.M. informing him about a quarrel at *H. No. C-105, Mata Wali Gali Johripur (place of incident)* and on reaching the spot he found the complainant/Maninder in injured condition. Thus, the injured was taken by *PW-8* to the GTB Hospital in the PCR van and gotten him admitted for the treatment.

28. The incident and the injury suffered by the complainant stands established beyond doubt.

29. ***The second relevant aspect is the identification of the accused persons.*** Pertinently, the respondent No. 1/ Mohit Kumar was known to the injured/ *PW-2* from before as has been deposed by him in his cross-examination that they used to play cricket together in the ground.



Respondent No. 2/Sandeep, has also been identified by the injured as the nephew of Mohit, who had accompanied him on the date of incident. The name of Sandeep, may not have been known to the complainant but the fact remains that he had been identified by the complainant. It is at the instance of the injured that the police had apprehended both the respondents on 26.09.2006 and at no point of time have the respondents controverted or questioned their identity or being involved in the crime. No suggestion whatsoever has been given to *PW-1* Kamal, *PW-2* Maninder injured and *PW-3* Sanjay that the respondents were not the actual assailants.

30. *PW-9* ASI Dharamveer Singh, the Investigating Officer has corroborated the testimony of the injured that on 26.09.2006, the accused Mohit and Sandeep had come to the Police Station at which time the injured was also present and on his identification, the two respondents had been arrested. Again, there is no suggestion given to *PW-9* to the contrary.

31. ***The third aspect is the factum and nature of injury caused to the complainant.*** The prosecution has examined *PW-6* Dr. P. Yadav, CMO, GTB Hospital, who has deposed that he had examined the injured and had found his vitals stable. He had a *penetrating wound of size 2cm X 1cm on the right TM (temporomandibular) joint region.* In addition, he had a *lacerated wound of size 5cm X 1cm over left temporal region.* His testimony is further corroborated by *PW-7* Dr. Pradeep Saini, who has deposed that he had given his opinion on *MLC*, which is exhibited as *Ex.6/1* that the injury was simple, which has been endorsed as *Ex.PW-7/1.*

32. ***Ld. Counsel on behalf of the Respondents had tried to question the entire incident on the basis of the endorsement on the MLC that it was a "riot hit injury".*** *PW-6* has explained in the cross-examination dated



13.05.2008 that in the MLC *Ex.6/1* he has categorized the injury as "*riot hit injury*" but had later rectified it as "*assault.*" This cannot cast a doubt about the injury suffered by the complainant, because the injured was admittedly unconscious when taken to the Hospital and the History obviously was on the basis of information initially available with the accompanying *PW-8* ASI Satyapal. The initial history was based on the first available information which was subsequently rectified on getting more information about the manner in which the injury was caused. It is settled law that not much significance can be attached to initial history recorded by the doctor especially when it is recorded on the basis of the information provided by the person who was not the eye witness. The manner in which the injury had been caused to the injured is fully proven by the prosecution.

33. ***The fourth aspect is the recovery of the alleged weapon of offence.*** *PW-9* ASI Dharamvir Singh has deposed that on the arrest of the two respondents, they made a disclosure statement that they had used a nail cutter for inflicting the injury. Pursuant to their disclosure statement, they led the *PW-9*, who was accompanied by *PW-10* Ashok Kumar, near the scene of crime and got recovered a nail cutter lying near the wall. This nail cutter had a blade for filing the nails, which could be pulled out and used as a sharp weapon to cause a deep cut.

34. It is no doubt correct and true that the recovery had been made from an open public place after five days. It is also on record that the scene of incident was near the barber shop. The recovery of the nail cutter from an open area; that too from near the barber shop after about five days of the incident, may not inspire confidence but the fact remains that the testimony of the complainant/injured about the injury having been inflicted by the



respondents by using a pointed instrument, is unassailable and is duly corroborated by the MLC and the opinion of the doctor.

35. Much has been emphasized on the manner of the recovery of the nail cutter and also that the same has not been identified by the complainant. Insofar as, non-identification of the Nail cutter by the complainant is concerned, the complainant has been consistent in saying that the injuries were inflicted from behind, after which he became unconscious. Thus, it is quite comprehensible that he would not be in a position to identify the weapon as the attack was from behind. However, he has clarified that the injury had been inflicted by the accused Sandeep.

36. *DW-1* Roshan Lal, examined by the respondents in their defence, had deposed that he remained on the scene of crime on the relevant date i.e. 20.09.2006 from about 5:30 p.m. for about one and a half hours and no such incident as deposed by the complainant ever took place. However, the witness has admitted in his cross-examination, recorded on 15.09.2008 i.e. after about two years of incident. that he did not remember the dates of Diwali, Dushhera etc. which implies that he had been told about the date of incident and the testimony to be deposed. Furthermore, he admitted that he had come on the request of the father of respondent no. 1/Mohit Kumar. Thus, the witness is an interested witness who, aside from his bald testimony has not been able to adduce any independent evidence to establish his presence at the scene of crime and thus, his testimony does not inspire confidence.

37. ***To conclude***, it is proved from the consistent testimony of the complainant which is corroborated by independent circumstances, that that the accused used a sharp-edged weapon to attack the complainant, resulting



in a deep wound on his head which required 21 stitches, though opined as *Simple*. A person hitting a victim on his head with a sharp pointing weapon would do so with the knowledge and intention that such attack/injury on the head of the victim is likely to result into death of a person.

38. From the aforesaid discussion, it has to be necessarily concluded that the prosecution has proved beyond reasonable doubt that the two respondents had intentionally inflicted injury on the head of the injured with an intent and knowledge that such injury could result in death. The offence under Section 308/34 of the IPC, has been proved beyond reasonable doubt, by the prosecution.

39. The learned ASJ has fallen into the error in disbelieving the testimony of the injured and in observing that it was in contradiction with the testimony of PW-1 Kamal Singh.

40. **The impugned Judgment dated 01.10.2008 is hereby set aside and the respondent Nos. 1 and 2 are convicted under Section 308/34 of the IPC, 1860.**

41. Be listed for arguments on sentence on 30.08 .2024.

**(NEENA BANSAL KRISHNA)
JUDGE**

AUGUST 23, 2024/RS