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In the Delhi High Court

Case No : Criminal Appeal No. 707 of 2001

Rajesh Sharma @ Raju and Another — APPELLANT

Vs

State N.C.T. of DELHI — RESPONDENT

Date of Decision : 13-12-2010

Acts Referred:
Penal Code, 1860 (IPC) — Section 308, 323, 324, 325, 326

Citation : (2011) 3 AD 206 : (2011) 1 JCC 266

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : B.S. Rana, for the Appellant; Manoj Ohri, APP, for the Respondent

Final Decision : Dismissed

Judgement

Mukta Gupta, J.—By way of this appeal, the Appellants who are father and son challenge their conviction for commission of offence punishable u/s 308 read with Section 34 IPC and the sentence of RI for three years to the Appellant No. 2 and release on probation on furnishing a personal bond in the sum of Rs. 5,000/- with one surety of the like amount for a period of three years to Appellant No. 1 Rajesh, for causing injury to the complainant Naresh by brick which injury was opined to be simple in nature.

2. Learned Counsel for the Appellants contends that the prosecution examined four witnesses to the alleged incident i.e. PW1 Naresh the injured, his mother PW2 Smt. Angoori and two independent witnesses PW3 Sanjay and PW8 Jai Pal Singh. PW3 and PW8 have turned hostile and have not supported the prosecution case at all. The case of prosecution as put forward on the basis of the testimony of PW1 and PW2 is also full of material contradictions as Naresh and Smt. Angoori in their statement before the police stated that Rajesh caught hold of Naresh and Sat Narain hit brick on his head whereas both these witnesses in their deposition before the court stated that Sat Narain caught hold and Rajesh gave brick blow to Naresh. It is contended that such a contradiction is a material contradiction and shakes the trustworthiness of the witnesses. Thus, no

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conviction could have been based on such evidence. The X-ray Ex. PW7/A shows no fracture and as per the MLC Ex. PW6/A, the injury is simple blunt. Alternatively, relying on Ramesh and Ors v. State 2010 III AD (DHC) 225, it is contended that such an injury is punishable for an offence u/s 323 IPC and not u/s 308 IPC and thus, the Appellant No. 2 be also granted probation or awarded a lesser sentence for offence punishable u/s 323 IPC only.

3. Learned APP on the other hand contends that on the fateful day i.e., 8th February, 1998, two incidents took place ; one in the afternoon and the other at 6:30/7.00 P.M. The Appellants have been named in the ruqqa itself. The testimony of the eye witnesses is corroborated by the MLC. It is contended that for an offence punishable u/s 308 IPC the assault resulting in an injury is not essential. Reliance is placed on Sunil Kumar v. State 1999 (1) JCC (SC) 92 to canvass that simple injury on the person is not an evidence to contend that no case punishable u/s 308 IPC is made out. PW1 is an injured witness and his testimony cannot be discarded easily. The evidence of PW1 and PW2 proves the prosecution case beyond reasonable doubt. It is thus prayed that the appeal be dismissed.

4. I have heard learned Counsel for the parties. As per the evidence of the two witnesses examined in the court, two incidents took place; one at around 2 pm and the other around 7 pm. It is stated that at about 7 pm when the witness Naresh Chand was opening the buffalos, accused Sat Narain caught hold of him and accused Raju gave brick blow whereupon he fell unconscious. Both the witnesses have been confronted with their statement before the police but they are consistent and categorical that it was the Appellant Sat Narain who caught hold and Raju gave brick blow.

5. Certain omissions and improvements do not permit the court to take a view that on these alleged contradictions the statement of the witness specially an injured witness should be described to be an unreliable one. Unless the testimony of the witness is shaken by contradicting him on material points or there are other grounds to disbelieve the statement of the witness, it is not proper to reject the testimony of the witness. Both the witnesses have sustained the contravention on the basis of their statement before the police and corroborate each other. The contention of the learned Counsel for the Appellants that the testimonies of PW1 and PW3 suffer from material contradictions is misconceived. Ordinarily it so happens that witnesses are overtaken by event. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore, cannot be expected to be attuned to absorb the details and at time result in confusion as to the role played as well.

6. The testimony of the two eye witnesses i.e. PW3 and PW 8 who have turned hostile also suggests that a fight had ensued wherein both the Appellants were involved. The act of Appellants is clearly premeditated. At 2.00 P.M. the Appellant No. 2 abused the injured PW1 and then when at 7.00 P.M. he was opening the

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buffalos, Appellant Sat Narain caught hold of him and Appellant Rajesh gave a brick blow on his head. The Appellants hit the injured with a brick on the frontal region resulting in a 4 cm long contused lacerated wound and also swelling and tenderness on the nose. Thus, the injured has been hit on a vital part by a brick with premeditation.

7. I also find force in the contention of the learned APP that an injury has resulted or not is immaterial for commission of an offence punishable u/s 308 IPC. For the offence to be attracted the knowledge and intention of the accused who have committed the said offence has been seen in Sunil Kumar (supra) it was held:

The view taken by the High Court is obviously erroneous because offence punishable u/s 308 I.P.C. postulates doing of an act with such intention or knowledge and under such circumstances that if one by that act caused death, he would be guilty of culpable homicide not amounting to murder. An attempt of that nature may actually result in hurt or may not. It is the attempt to commit culpable homicide which is punishable u/s 308 I.P.C. whereas punishment for simple hurts can be meted out under Sections 323 and 324 and for grievous hurts under Sections 325 and 326 I.P.C. Qualitatively, these offences are different.

8. I find no merit in the appeal. The Appellant No. 1 has rightly been granted probation by the learned Trial Court in view his tender age. The Appellant No. 2 has been directed to undergo a sentence of Rigorous Imprisonment for three years. The learned trial court held that the Appellant Sat Narain being a Head Constable in Delhi Police is not entitled to be released on probation. I find no infirmity in the reasoning for not releasing the Appellant No. 2 on probation. However, as the incident is around 12 years old, it would serve the ends of justice if the Appellant Sat Narain is directed to undergo Rigorous Imprisonment for a period of one year and to pay a compensation of Rs. 5,000/- to be paid to the injured within four weeks.

9. The appeal is accordingly disposed of. List for compliance on 18th January, 2011.

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