

R-7A

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

+ **Crl.A.92/2005**

Date of Order: 9th February 2010

SUNDER Appellant

Through: None.

versus

^ \$ STATE Respondent

Through: Mr.Jaideep Malik, APP.

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

: **V.K. JAIN, J. (Oral)**

1. This is an appeal against the judgment dated 13.1.2005 and Order on Sentence dated 15.1.2005 whereby the appellant was convicted under Section 308 of IPC and was sentenced to undergo Rigorous Imprisonment for six months and to pay a fine of Rs.15,000/- or to undergo Rigorous Imprisonment for three months in default. The

amount of fine was directed to be paid as compensation to the injured.

2. The case of the prosecution is that on 14.1.2001, the injured Mahipal was selling *Chhole Bhatoore* on his cart on Wazirabad Road, Ashok Nagar, Delhi. The brother of the appellant purchased one plate of *Chhole Bhatoore* from Mahipal for Rs.5/- and consumed it on the spot. While going back, he demanded a sum of Rs.95/- from the injured, claiming that he had given a hundred rupee note to him. The injured having refused to refund the amount of Rs.95/- to him, he left saying that he would definitely recover the balance amount of Rs.95/- from him. After some time, he, accompanied by two old persons and the appellant Sunder, returned to the cart of Mahipal and demanded the balance amount of Rs.95/-. Mahipal refunded the amount of Rs.95/- to him. After taking the money and while going back the appellant caused injury on the head of Mahipal, using lemon-presser for this purpose.
3. The injured Mahipal came in the witness box as PW-3 and stated that on 14.1.2000, Vinod Kumar, brother and co-accused of the appellant, purchased one plate of

Chhole Bhatoore from him after paying Rs.5/- to him. After some time, Vinod started demanding Rs.95/- on the ground that he had given a hundred rupee note to him. When he refused to refund the amount of R.95/- to Vinod, he left with a threat to recover that amount. After some time, Vinod came back accompanied by his parents. He returned Rs.95/- to Vinod, with a view to avoid quarrel. After some time, the appellant Sunder, who is the brother of Vinod picked up the lemon-presser from his cart and gave blow on the left side of his head.

4. PW-2 Kali Charan stated that on 14.1.2001, there was hot exchange of words between Mahipal and Vinod. Vinod claimed that he had given Rs.100/- to him. Vinod left after giving threat to recover Rs.95/- from Mahipal. After some time, Vinod returned, accompanied by his parents and the appellant Sunder, to the cart of Mahipal and demanded the balance amount of Rs.95/-. Mahipal returned Rs.95/- in order to avoid quarrel. After that, the appellant Sunder, who is the younger brother of Vinod picked up the lemon-presser from his cart and hit the same on the head of Mahipal, as a result of which,

he fell down and started bleeding. The appellant Sunder was, however, over-powered by other hawkers.

5. PW-5 Satpal Singh has stated that on 14.1.2001, Vinod took a plate of *Chhole Bhatoore* after paying Rs.5/- to him. Later Vinod started claiming that he had given Rs.100/- note to Mahipal. Vinod then left after threatening Mahipal. He returned after some time along with other accused. Mahipal offered Rs.100/- to him but the appellant Sunder attacked him with lemon-presser as a result of which he fell down.
6. Other witnesses being more or less formal in nature, their testimony need not be discussed. In his statement, under Section 313 of Cr.P.C., the appellant denied the allegations against him.
7. The learned counsel for the appellant states that considering the deposition of the injured, which has been supported by two-eye witnesses namely PW-2 Kali Charan and PW-5 Satpal Sinch and also finds further corroboration from the MLC of the injured, she does not dispute the injury caused to Mahipal but no offence under Section 308 of IPC is made out from the facts and circumstances of the case.

8. In order to succeed in a prosecution under Section 308 of IPC, the prosecution was required to prove that injury to Mahipal was caused by the appellant with such intention or knowledge and under such circumstances, that if it had caused death, the act of the appellant would have amounted to culpable homicide not amounting to murder.
9. In the present case, admittedly, there was no previous enmity or dispute between the appellant and Mahipal. The brother of the appellant had gone to the cart of the Mahipal to eat *Chhole Bhatoore*. He actually purchased a plate of *Chhole Bhatoore* from him and consumed it on the spot. The dispute arose when the brother of the appellant, rightly or wrongly, claimed that he had given a hundred rupee note to Mahipal whereas Mahipal, rightly or wrongly, claimed that only a five rupee note was given to him. The brother of the appellant was, therefore aggrieved on account of refusal of Mahipal to refund the balance amount of Rs.95/-, which he felt was genuinely payable to him. The only threat alleged to have been given by the brother of the appellant when leaving the cart of the Mahipal was that he would

recover the balance amount of Rs.95/- from him. No threat to cause any injury to Mahipal was given by the brother of the appellant.

10. When the brother of the appellant returned back to the cart of Mahipal, he was accompanied by the appellant as well as by their parents. Though, PW-2 Kali Charan and the injured Mahipal claimed that the parents of the appellant had left his cart after taking Rs.95/- and the appellant had subsequently come to his place, this part of the deposition of PW-2 and PW-3 is obviously false, since, in the FIR itself, it has been specifically alleged that when Vinod, brother of the appellant, returned to the cart of Mahipal, he was accompanied by his parents as well as the appellant Sunder. In fact PW-5 Satpal Singh has also stated that when Vinod returned back to the cart of Mahipal, he was accompanied by his parents as well as by the appellant. The obvious purpose behind claiming that the appellant had come alone to the cart of Mahipal after his parents had already left having taken Rs.95/- from Mahipal, was to show that the appellant had pre-planned to cause injuries to Mahipal. Therefore, no intention on the part

of the appellant to cause injuries to Mahipal, at the time he visited his cart, stands proved in the facts and circumstances of the case. When Vinod, accompanied by his parents and the appellant Sunder, came back to the cart of Mahipal, the purpose was to take back Rs.95/- from him. Though, Mahipal claims to have returned Rs.95/- to them, this part of his statement does not appear to be correct. Had Mahipal returned Rs.95 to them, the dispute would have ended there and then, since the only purpose behind the appellant, his brother and his parents coming to the cart of Mahipal was to take back Rs.95/- from him.

11. The true facts seems to be that Vinod genuinely believed that Mahipal had misappropriated the balance amount of Rs.95/- which was returnable to him, and that is why he brought his parents and brother to the place of Mahipal, in order to pressurize him to refund the amount of Rs.95/-. Mahipal must have refused to return the amount of Rs.95/- claiming that Vinod having paid only Rs.5/- to him, no amount was returnable by him to them. This obviously must have led to some altercation between the appellant and his companions on the one

hand and Mahipal on the other hand, which resulted in the appellant picking up the lemon-presser which was lying on the cart and giving one blow on the left backside of the skull of Mahipal. The very fact that neither the appellant nor any of his companions was armed when they came to the cart of Mahipal is a strong indicator that their intention was to take back Rs.95/- from Mahipal and was not to cause any injury to him. Thus, there was absolutely no pre-planning or pre-meditation on the part of appellant and the entire incident took place during the course of an altercation, which must have ensued on the spot, on account of Mahipal persisting in refusing to return Rs.95/- to the brother of the appellant.

12. It has come in the testimony of PW-3 Mahipal that the lemon-presser was made of wood. Mahipal was selling *Chhole Bhatore* and the lemon-presser must have been kept by him at his cart, in order to squeeze lemons for putting some lemon juice in the *Chholas* which he used to give along with *Bhatooras*. A wooden lemon-presser cannot be said to be a dangerous or deadly weapon, in any manner. Such pressers/squeezers are kept even in

households to squeeze lemons. Therefore, no intention to cause culpable homicides not amounting to murder can be inferred from the nature of weapon used by the appellant for causing injury to Mahipal. It cannot be said that a person giving a single blow using the wooden lemon-presser knows that the injury given by him was likely to cause death of a human being.

13. A perusal of the MLC of Mahipal would show that only one blow was given on the left side of skull. The size of the wound was 3X1 cm. The size of the wound indicates that the wooden lemon-presser for causing the injury to Mahipal was of a rather small size. The injury caused to Mahipal appears to be superficial as no depth of the wound has been given in the MLC. Had the wound not been superficial, it would be having some depth which the doctor would have noticed and recorded in the MLC.

14. Since the wound was superficial, it shows that no much force was used by the appellant while causing injury to Mahipal. Had he used substantial force, the injury would have been deep and not superficial.

15. Admittedly, only one blow was given by the appellant to Mahipal. Had the intention of the appellant been to cause such injury to Mahipal as was likely to cause death, he would not have stopped at giving one blow and would have given multiple blows to him. This is yet another indicator, which shows that the appellant did not intend to cause death of Mahipal nor did he know that the injury caused by him was likely to result in death of Mahipal.

16. In **Velu Vs. State** 2004 CrL.L.J. 3783, there was a dispute between the appellant and the injured when the appellant parked his vehicle in front of the vehicle of the injured. The appellant caused injury on the backside scalp of injured using an iron pipe for this purpose and run away from the spot. It was held by the Madras High Court that the blow having been given in a spur of moment and there being no pre-plan or pre-mediation, the offence under Section 308 IPC was not made out against the appellant.

17. The offence under Section 308 of IPC does not stand established from the facts and circumstances of the present case. The appellant is guilty only of offence punishable under Section 323 of IPC, for having caused hurt to Mahipal.

18. For the reasons given in the preceding paragraphs, while setting aside the conviction of the appellant under Section 308 of IPC, I convict him under Section 323 thereof. During the course of the arguments, I am informed that the appellant had already spent some days in judicial custody. Taking all the facts and circumstances of the case, the appellant is given benefit of probation and is directed to be released on his furnishing a bond of peace and good conduct in the sum of Rs.10,000/- with one surety of like amount for a period of six months, to the satisfaction of the trial court within two weeks from today. During the period of bond, the appellant shall maintain peace and good conduct and shall refrain from committing any crime. He shall appear, as and when directed, to receive the sentence. In default of furnishing the bond, the appellant shall undergo Rigorous Imprisonment for six

months. The appellant shall also deposit a sum of Rs.15,000/- as compensation which may be paid to the injured Mahipal. In case fine was deposited by the appellant, in terms of the sentence awarded to him by the trial court, that amount will be treated as compensation paid in terms of this judgment and will be paid to the injured, unless already paid.

Record of the trial court be sent back along with the copy of judgment.

**V.K. JAIN
(JUDGE)**

FEBRUARY 09, 2010
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