

**Court No. - 16**

**Case :- CRIMINAL REVISION No. - 584 of 2022**

**Revisionist :-** Vijay Mishra

**Opposite Party :-** State Of U.P. Thru. Secy. Home Deptt. Lko. And Another

**Counsel for Revisionist :-** Ram Prakash Singh, Vivek Kumar

**Counsel for Opposite Party :-** G.A.

**Hon'ble Subhash Vidyarthi, J.**

1. Heard Sri Anoop Kumar Upadhyay, Advocate holding brief of Sri Ram Prakash Singh, learned counsel for the revisionist and Sri Tilak Raj Singh, learned A.G.A. for the State respondents and perused the record.
2. The instant revision under Sections 397/401 of the Criminal Procedure Code has been filed by the accused-revisionist seeking to challenge the validity of the order dated 27.05.2022 passed by the learned Sessions Judge, Gonda in Sessions Trial No. 338 of 2022 (State vs. Vijay Mishra & Others), arising out of Case Crime No. 90 of 2019, under Sections 323, 325, 308 I.P.C., Police Station- Umari Begumganj, District- Gonda whereby the application under Section 228 (1) (a) of the Cr.P.C. filed on behalf of the accused-revisionist for transferring the case to the Court of Magistrate, has been rejected.
3. The aforesaid case has been instituted on the basis of an F.I.R. alleging that the four named accused persons, including the revisionist, had assaulted the informant's brother with sticks, because of which he fell unconscious. The injured was taken to the police station while he was still unconscious. On these allegations, the F.I.R. was registered in respect of offences under Sections 323, 325 and 308 I.P.C.
4. The medical examination report of the injured mentions following injuries suffered by the victim:-
  1. Lacerated Wound - 8 x .5cm I Bron above (Right) ear.
  2. Lacerated Wound - 4.8 cm x 1cm Top of Head.

3. Lacerated Wound - 2x2 cm (Right) Leg above 12cm (Right) Ankle.
4. Contused- Swelling 6x4 cm over right shoulder.
5. Contused- Swelling over (Left Right) wrist all around.
6. Swelling over (Right) Ankle.
7. Complaint of Pain- Over back of chest abdomen B/ 1 upper & lower limbs.
8. Contusion 25cm X 13cm right side back of chest.

5. On the basis of the aforesaid F.I.R., a Sessions Trial No. 338 of 2022 has been instituted, which is pending before the learned Sessions Judge, Gonda.

6. The accused persons filed an application under Section 228 (1) (a) of Cr.P.C. in the aforesaid Session Trial stating that none of the injuries reported in the medical examination report of the injured person indicates that death could have been caused by such injury. As there is no injury which could be life threatening, *prima facie* no offence under Section 308 I.P.C. is made out and it can at the most lead to commission of offences punishable under Section 323 and 325 I.P.C., both of which are triable by a Magistrate. The accused persons accordingly prayed that Section 308 I.P.C. may be expunged and the case be transferred to the Court of Magistrate for its trial.

7. The aforesaid application was rejected by the learned Sessions Judge, Gonda by means of the order dated 27.05.2022 holding that the injured has suffered injuries on his head and head injuries could be life threatening. Therefore, the accused persons have rightly been charged with an offence under Section 308 I.P.C. Accordingly, the application filed under Section 228 (1) (a) Cr.P.C. has been rejected.

8. Assailing the aforesaid order dated 27.05.2022 before this Court in Revision, the learned counsel for the revisionist has submitted that the order dated 27.05.2022 has been passed in a mechanical manner without properly considering the evidence available on record, which does not support the prosecution story regarding commission of an offence under Section 308 I.P.C. The learned counsel for the revisionist has further submitted that the ingredients of Section 308

I.P.C. are not made out in the present case and this aspect has been ignored by the learned court below.

9. On the other hand, Sri Tilak Raj Singh, learned A.G.A. has submitted that there is sufficient material on record to indicate commission of an offence under Section 308 I.P.C. and the order dated 27.05.2022 passed by the learned court below is based on sound reasons and it needs no interference by this Court in exercise of the revisional jurisdiction.
10. Before proceeding to decide the rival submissions made before this Court, it would be appropriate to look at the provisions of Section 308 I.P.C., which provides as follows:-

*"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. Illustration A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section."*

11. The essential ingredients of the first part of Section 308 I.P.C. are that
  - (i) a person does any act
  - (ii) with intention or knowledge to commit culpable homicide not amounting to murder,
  - (iii) that the offence was committed under such circumstances that if by that act the accused caused death, he would be guilty of culpable homicide not amounting to murder.
12. A bare perusal of the aforesaid statutory mandate makes it clear that by enacting Section 308 I.P.C., the Legislature has made a composite provision in order to deal with two separate situations.

13. The first part of Section 308 does not make any inference to any hurt being caused by the accused persons and, therefore, any hurt being caused is not an essential condition to attract the provisions of Section 308 I.P.C.
14. The second part of Section 308 provides that if hurt is caused to any person by an act which falls within the purview of the Section, the accused shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.
15. A combined reading of both the parts of Section 308 clarifies that the legislative mandate in Section 308 is that 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, but inspite of the effort made by him he completely fails to achieve his goal of committing culpable homicide not amounting to murder, he shall still be held guilty of committing an offence under Section 308 I.P.C. and he shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. However, if by his attempt hurt is caused to any person by such act, shall be yet be guilty of committing an offence under Section 308 I.P.C. and in such a situation a higher punishment of imprisonment of either description for a term which may extend to seven years, or fine, or both will be inflicted upon the accused.
16. Now I proceed to consider the submission made by the learned Counsel for the Revisionist that the medical examination report does not mention any injury on any vital part of the victim's body and, therefore, *prima facie* the accused-revisionist cannot be tried for an offence under Section 308 I.P.C. and he can only be tried for offences under Section 323 and 325 I.P.C., both of which are triable by Magistrate and, therefore, his case should be transferred from the Court of Sessions to a Court of Magistrate under Section 228 (1) (a), Cr.P.C. This contention is liable to be rejected for two reasons. First, the medical examination report of the injured shows that he has suffered a Lacerated Wound of size 8x.5cm above his right ear, a Lacerated Wound of size 4.8 cm x 1cm on the top of his head and he

has also suffered a Contusion of size 25cm X 13cm on the right side of back of his chest. All these injuries are on vital parts of the injured's body and, therefore, the contention of the learned Counsel for the revisionist that the accused-revisionist did not cause any injury on any vital part of the injured's body is incorrect and the same is rejected.

17. Secondly, assuming that the injured did not suffer any injury on any vital body of his body, even then *prima facie* it appears that the accused-revisionist committed an act with an 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, then even if the accused-respondent failed completely in his attempt and he could not inflict any hurt on the body of the injured, the accused-revisionist would still be guilty of committing an offence punishable under the first part of Section 308 I.P.C. and he has to face a trial for the said offence. For this reason also, the contention of the learned Counsel for the revisionist is liable to be rejected.
18. The order under challenge in this revision has been passed upon an application filed by the accused under Section 228 (1) (a) of Cr.P.C., which reads as under:-

*"228. Framing of charge.*

*(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-*

*(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;*

*(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.*

*(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."*

19. Since from the discussion made above, the contention of the accused-respondent that no injury has been caused on any vital part of the body of the injured and, therefore, the charges against him at the most make out a case under Section 323 and 325 I.P.C. and no offence under Section 308 I.P.C. is made out, has already been rejected, therefore, the accused-applicant cannot maintain an application under Section 128 (1) (a) Cr.P.C. for transferring the case from the Court of Sessions to a Court of Magistrate on the ground that no offence under Section 308 I.P.C. is made out against him.
20. Whether the accused has committed the offence punishable under Section 308 I.P.C. or not and if yes, whether his act would fall under the first part of Section 308 or in the second part thereof, are matters to be decided during the trial and at this stage only this much can be said that the accused has to face trial for the offence under Section 308 I.P.C., which is triable by a Court of Sessions and, therefore, the case cannot be transferred to a Court of a Magistrate.
21. Keeping in view the aforesaid discussions, this Court is of the considered view that the order dated 27.05.2022 passed by the learned Sessions Judge, Gonda, rejecting the accused-revisionist's application under Section 228 (1) (a) Cr.P.C. does not suffer from any illegality so as to call for an interference by this Court in exercise of its revisional jurisdiction..
22. The revision lacks merit and is, accordingly, ***dismissed***.
23. However, there is no order as to costs.

**Order Date :- 3.6.2022**

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