

R-81- 85

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

% *Date of Decision: August 28, 2009*

+ **CRL.A. 430/2001**

SHYAMRAJ @ SHYAM Appellant
Through: Ms. Padama Priya, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CRL.A. 508/2001

RAJKUMAR @ RAJU @ GHAY Appellant
Through: Ms. Padama Priya, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CRL.A. 608/2001

RAJKUMAR @ RAJU Appellant
Through: Ms. Padama Priya, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CRL.A. 29/2002

OM PRAKASH @ RAVI Appellant
Through: Ms. Padama Priya, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CRL. A. 246/2002

AJAY KUMAR @ PINTOO @ ULAA Appellant
Through: Ms. Padama Priya, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether judgment should be reported in Digest? Yes

: **PRADEEP NANDRAJOG, J.** (ORAL)

1. Vide impugned judgment and order dated 14.5.2001, the appellants have been convicted for the offence of having murdered Radhey S/o Ram Lubhaya.

2. Vide order dated 15.5.2001, the appellants have been sentenced to undergo imprisonment for life and pay a fine in sum of Rs.5,000/-; in default of payment of fine the appellants have been directed to undergo further simple imprisonment for 6 months.

3. As per the findings returned by the learned Trial Judge, appellant Om Prakash was aged 20 years, appellant Rajkumar S/o Prahlad was aged 20 years, appellant Rajkumar S/o Kushal Chand was aged 27 years, appellant Shyam Raj was

aged 21 years and appellant Ajay was aged 21 years when the offence was committed.

4. In returning a finding of guilt, the learned Trial Judge has held that the testimony of Ram Pal PW-19 inspires confidence and is without blemish.

5. The learned Trial Judge has further held that the prosecution has successfully established that pursuant to the disclosure statement Ex.PW-20/G of Om Prakash, made by him on 29.12.1998, he got recovered an iron rod Ex.P-11, sketch whereof has been drawn on Ex.PW-3/B and seizure whereof has been recorded in the seizure memo Ex.PW-20/K and that as per report Ex.PW-23/C and Ex.PW-23/D of the serologist, human blood of group 'O' i.e. same group of the deceased was detected.

6. With reference to the post-mortem report Ex.PW-3/A of the deceased, the learned Trial Judge has held that the same evidences that the deceased had received 3 injuries being:-

- (i) Lacerated wound 2.5" x 1/3" x bone deep on left frontal region obliquely placed, margins contused.
- (ii) Lacerated wound over occipital region 1.25" x .25" x .25" surrounded by haematoma.
- (iii) Abrasion on right knee in front .25" x .25" below

right knee .25" x .25".

7. Since injury No.1 caused by blunt object was opined to be sufficient in the ordinary course of nature and that what had triggered the death was the cranicerebral injury i.e. the injury to the brain and the deceased had died soon after having received the injury No.1, learned Trial Judge has held that it was apparent that all the accused shared a common intention when the injured was assaulted and hence would be constructively liable for the act of each other.

8. Ram Pal PW-19 has deposed as under:-

"On 27.11.1998 at about 6.00/6.30 PM there were 3/4 boys were beating a boy in the factory situated in Sant Nagar, adjoining to the part where I went to meet my friend. The boys who were beating were also shouting if somebody came to the rescue of the victim he shall also be dealt with. I found that the victim boy was brother of my friend Rajesh. On watching the scene I went to the Samrat Theatre to tell my friend Rajesh and he was not available there. Then I went to residence of Rajesh he was also not available there so I came back on the spot and by the time the police had already taken away the boy injured Radhey to Jaipur Golden Hospital. Thereafter I went to Jaipur Golden Hospital where the injured Radhey was found dead. The 5 accused present in Court have been pointed out by the witness as who were giving the beatings to the injured/deceased Radhey. The injured was being given beatings with rod in the hand of one of the accused and the other boy was having stone on his hand and the other accused were beating by hitting with kicking and blowing. The witness has identified the iron rod Ex.P-1, stone P-2."

9. Learned counsel for the appellant points out to us

that the date 27.11.1998 recorded as the day of the incident in the testimony of Ram Pal is incorrect for the reason the deceased received the injury on 27.12.1998 evidenced by the fact that the rukka Ex.PW-20/A records the date and time of occurrence of the crime as 27.12.1998 at about 6:45 PM. Counsel further draws our attention that the FIR Ex.PW-2/A also so records i.e. that the incident took place on 27.12.1998.

10. Having perused the rukka and the FIR we are satisfied that the date of the offence is 27.12.1998 and not 27.11.1998. It is apparent that either PW-19 incorrectly stated the month or that the month got incorrectly typed.

11. This issue assumes some importance for the reason in the northern parts of India and in particular in the city of Delhi, as winters approach, the span of sunlight is reduced resulting in the sun rising late and setting early. By 6:30 – 6:45 PM on 27th December it is dark. At the same time in the month of November it is twilight.

12. Conceding that Ram Pal PW-19 has successfully withstood the test of cross-examination, learned counsel for the appellant points out one blemish in the testimony of Ram Pal and urges that it is apparent that Ram Pal has given an exaggerated version by stating that the appellants were beating the deceased with a rod in the hand of one, a stone in

the hand of another and the remaining beating him by giving blows and kicks. Learned counsel urges said submission with reference to the post-mortem report Ex.PW-3/A of the deceased, which as noted above, records only 3 external injuries on the person of the deceased. Only one internal injury relatable to external injury No.1, to the brain stands recorded.

13. Referring to the post-mortem report where the opinion has been penned by the doctor who conducted the post-mortem, learned counsel draws our attention that as per the opinion, injury No.1 was opined to be caused by a blunt object and injury No.2 and 3 were opined to be possibly due to fall against a hard surface.

14. In any case, urges the counsel, the presence of only 3 injuries on the persons of the deceased rules out 5 people assaulting with a rod, a stone and kicking and giving fist blows to the deceased; for if this was so, at least 5 injuries would have been inflicted upon the person of the deceased.

15. We find merit in the submission made by learned counsel for the appellant, in that, it is apparent that PW-19, while deposing in Court, has somewhat over-exaggerated the facts.

16. We need not note various authorities where it has been observed that it is a habit for witnesses, in India, to make

embellishments and weave exaggerated versions in their testimonies. These witnesses have not to be labeled as untruthful witnesses and their testimonies have not to be discarded in toto. It is the duty of the Court to segregate the chaff from the grain. While throwing away the chaff, the grain has to be properly utilized and accounted for.

17. From the testimony of Ram Pal it is apparent that the appellants were friends and had joined in causing the injury to the deceased. Some pushing around seems to have ended with a blow struck on the head.

18. The common intention of the accused to cause an injury to the deceased is evidenced from the testimony of Ram Pal.

19. We need not bother ourselves as to which appellant used the rod, though the disclosure statement made by Om Prakash and his act of getting the rod recovered would tend to suggest that Om Prakash was the one who yielded the rod, but, it is settled law that confessional parts of a disclosure statement are inadmissible in evidence. Therefore, we are not treating that the evidence establishes that Om Prakash had yielded the rod.

20. With reference to the post-mortem report of the deceased it is apparent that evidence of a conclusive nature

relates to only injury No.1, being caused by the use of a blunt object. Injury No.2 and 3 could possibly be the result of a fall.

21. The sketch Ex.PW-3/B of the rod shows that its length was 71 cm i.e. the rod was about 2' 6". The sketch shows that the diameter of the rod was 1.5 cm i.e. $\frac{3}{4}$ ".

22. It is apparent that the rod did not have much weight and therefore when swung would not have a much momentum. Of course, the strength of the man yielding the blow would result in the resultant impact injury which would be caused when the rod was struck.

23. While considering the question whether the accused had a particular intention, in the absence of any other evidence to show the intention, the same has to be gathered from the act. This is premised on commonsense principle that every person intends to act in the manner in which he/she has acted.

24. In criminal law, intention of a person has to be gathered with reference to the circumstances surrounding the actual act.

25. Where the offence charged of is culpable homicide or culpable homicide amounting to murder it has to be seen whether the evidence unequivocally shows that the intention of the assailant was to strike the blow at the very part of the body where the blow was actually struck.

26. When an incident has taken place in dim light, Courts have always founded a handicap to return conclusive findings that the blow was directed towards that particular part of the body on which the blow has actually fallen.

27. In the decision reported as (2003) 10 SCC 472 Augustine Saldanha vs. State of Karnataka, with reference to various authorities on the issue, in paras 22 and 23 it was observed as under:-

“22. Undisputedly, the incident took place in a dark night when visibility was poor but identification was possible because the victims of the assailants were known to each other. Therefore, there is nothing wrong in PW-1 identifying the accused persons. The fact remains that in the dark night, obviously, one cannot move without a torch or some other lighted object. In fact, in Exhibit P-1 also there is mention of a torch.

23. It needs to be noted that only one blow was given in the dark night. Though it cannot be said as a rule of universal application that whenever one blow is given application of Section 302 IPC will be ruled out and that even a single blow delivered with a heavy or dangerous weapon on a vital part of the body would make the offence a murder. On the peculiar facts found in the present case, we feel that clause “thirdly” of Section 300 cannot be applied. The blow was said to have been delivered with a stick and in pitch dark night-time in the forest surroundings of the area where it occurred. It could not reasonably be stated with any certainty that the accused chose that vital part of the body to inflict the injury and that the blow which was aimed without any of such specific intention could have landed on the head due to so many other circumstances, than due to any positive intention also. We, therefore, alter the conviction of appellant Augustine Saldanha from Section 302 IPC to Section

304 Part II. Custodial sentence of eight years would meet the ends of justice. His appeal is accordingly allowed to the indicated extent. So far as appellant Rocky Saldanha is concerned, in view of the detailed analysis made by the High Court, we do not find any scope for interference with his conviction or the sentence imposed. His appeal is dismissed. The accused persons who are on bail, are directed to surrender to custody to serve remainder of their sentences."

28. In the instant case, the incident, as noted herein above, took place around 6:30 – 6:45 PM on 27.12.1998. We have noted the features of the iron rod used. We have noted the fact that there is conclusive evidence of only one injury being ante mortem and result of being hit by a blunt object. Two other injuries on the person of the deceased have been opined to be possible consequences of a fall. Thus, it cannot be said that the act of the accused attract the offence of murder. The act of the accused at best attracts the offence of culpable homicide not amounting to murder and punishable under Section 304 Part-II IPC.

29. What should be the appropriate sentence which needs to be imposed upon the appellants?

30. The nominal roll of the appellants shows that the instant offence is the only offence committed by them. Thus, there is no previous history of being involved in any criminal activity.

31. The age of the appellants, as noted herein above,

at the time of commission of offence, was as under:-

- (i) Om Prakash and Rajkumar S/o Prahlad ...20 years.
- (ii) Ajay and Shyam Raj ...21 years.
- (iii) Rajkumar S/o Kushal Chand ...27 years.

32. The crime was committed on 27.12.1998 i.e. 11 years ago.

33. The sentence already undergone by the appellants is as follows:-

- (i) Appellant Om Prakash ...4 years 6 months.
- (ii) Appellant Shyam Raj ...4 years.
- (iii) Appellant Ajay Kumar ... 4 years 4 months.
- (iv) Appellant Rajkumar S/o Prahlad ...3 years 4 months.
- (v) Appellant Rajkumar S/o Kushal Chand ...3 years 1 month.

34. The nominal rolls of the appellants show that they have earned remissions ranging from 2 months to 4 months.

35. In view of the young age of the appellants and considering that the minimum sentence undergone is of 3 years and 1 month and the maximum sentence undergone is of 4 years and 4 months, we feel that the ends of justice would require the appellants to be sentenced for the period already undergone.

36. The appeal stands disposed of setting aside the conviction of the appellants for the offence punishable under

Section 302/34 IPC. The appellants are convicted for the offence punishable under Section 304 Part-II IPC and are sentenced to undergo imprisonment for the period already undergone.

37. In view of the sentence imposed upon the appellants, noting that the appellants have been released on bail, the bail bond and surety bonds furnished by the appellants are discharged.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR, J.

AUGUST 28, 2009
Dharmender