

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

% *Date of Decision: 3rd September, 2009*

+ **CRL.A. 467/2001**

OM PRAKASH Appellant
Through: Ms.Charu Verma, Amicus Curiae.

versus

STATE Respondent
Through: Mr.M.N.Dudeja, A.P.P.

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

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

PRADEEP NANDRAJOG, J. (Oral)

1. The appellant has been convicted on the testimony of the solitary eye-witness, Ms.Babita Kumari PW-1, who stated as under:-

"I do not remember the exact date of the incident. About six/five months ago, I was present at my house and my mother had gone to the shop. My mother deceased Manju Devi was running a small grocery shop. At about 8:30 PM, I was present at my house, I saw the accused present in the court near our shop with a sariya in his hand. My mother told the accused present in the court either to return the money or in lieu of give the radio to her as he took grocery items on loan from mother, but the accused refused. My mother snatched the radio from the hand of the

accused. The accused left the shop with threat to her. After half an hour, accused came with 5/6 persons. At that time accused was also having a sariya in his hand. He tried to snatch radio from the possession of my mother, as a result, scuffle took place between my mother and the accused. The accused gave a sariya blow to my mother on her chest right side, as a result, she fell down on the ground. Accused after giving sariya blow, ran away from the spot. After sometime my father came who took my mother to hospital. The quarrel took place as the accused has taken grocery items from my mother and did not pay the money on demand. I lodged the report to the police which bears my signatures at point 'A'. I can identify the radio if shown to me. I identify the radio Ex.P-1 is the same which was snatched by my mother."

2. Learned counsel for the appellant, very fairly concedes that Ms.Babita, aged 14 years when she deposed and aged 13 years when her mother was stabbed on 8.10.1996, has withstood the test of cross-examination. We may only note that the FIR has been registered on the basis of the statement Ex.PW-1/A of Babita. The endorsement Ex.PW-13/A shows that the rukka was dispatched at 2:00 AM on 9.10.1996 i.e. the night of 8th and 9th October 1996. The incident in which Babita's mother was stabbed took place at 9:00 PM on 8.10.1996. So soon after the incident has Babita disclosed the facts to the investigating officer that the possibility of Babita being tutored is ruled out. We further note that the testimony of Babita is in conformity with her statement Ex.PW-1/A.

3. The only question which needs our attention is whether the offence made out is that of murder punishable

under Section 302 IPC or the offence is homicide simplicitor punishable under Section 304 IPC. If yes, whether Part-I or Part-II of Section 304 IPC is attracted.

4. The site plan Ex.PW-5/A shows no street light. The site plan also shows a fact, admitted by PW-1 in her cross-examination, that the street in front of the grocery shop of Manju Devi is 15 feet wide. The site plan shows the spot from where Babita witnessed the assault on her mother, as also the spot where the assault took place. The distance between the two is about 10 feet. Babita has admitted that her house, which housed the grocery shop as well, did not have any electricity connection.

5. Though Babita has said that the accused gave a saria (iron rod) blow on the chest of her mother, but the post-mortem report Ex.PW-6/A and the testimony of Dr.C.B.Dabas PW-6 who conducted the post-mortem clearly shows that the weapon of offence was a sharp edged object. The solitary injury on the chest of the deceased shows that a sharp edged object having width of 1 cm has pierced the chest of the deceased on the right side at the seventh intercostal space penetrating through the diaphragm and traversing at a slight angle, vertically into the body of the deceased damaging the superior surface of the lobe of the liver. Unfortunately, the

renal artery (RT) got cut. Being dark, Babita mistook the weapon as a saria (iron rod). But, the same highlights a facet that due to darkness Babita could not clearly see the weapon of offence. It could thus be also assumed that Babita could not see with clarity as to which part of the body was made the target.

6. No doubt, the injury caused to the deceased has proved fatal but law requires it to be established that the deceased intended to cause the injury on the part of the body where the injury was actually caused and not that the part of the body where the injury was caused, got accidentally struck.

7. Wherever the injury is a single injury and there was darkness when the occurrence took place, the injury being sufficient in the ordinary course of nature to cause death, has been held to be attracting the offence punishable under Section 304 Part-I IPC. The reason is obvious. Where an occurrence takes place in the dark it becomes difficult for a witness to see with clarity. There is also a possibility of the blow being intended to be directed on some other part, accidentally striking another part of the body. These factors weighed with the Court in the decision reported as Thangaiya vs. State of Tamil Nadu (2005) 9 SCC 650 and Sunder Lal vs. State of Rajasthan 2007 (6) SCALE 649.

8. From the testimony of Babita it is apparent that Munni Devi snatched the radio from the hand of the appellant and retained it as security till he paid to her the outstanding money for grocery purchased by him. Appellant left the shop and returned with some persons and tried to snatch the radio from the possession of her mother. A scuffle ensued. The appellant inflicted a blow on her mother. It is apparent that the incident took place upon a quarrel, which has the trappings of a sudden quarrel. Even at the stage two of the quarrel, having returned to the spot to retrieve his radio, the appellant did not immediately cause injury to the deceased. He attempted to retrieve his radio and when he faced resistance, he struck a blow on the deceased.

9. The blow has been directed towards the stomach. It has not been directed towards the heart or the lungs. But for the renal artery (RT) being incidentally cut, the deceased would have survived.

10. Under the circumstances we are of the opinion that the facts of the instant case as also the circumstances noted by us, unfortunately ignored by the learned Trial Judge, do not make out the offence of murder. We note that the weapon of offence has not been recovered.

11. The offence made out is culpable homicide not

amounting to murder punishable under Section 304 Part-I IPC.

12. The appeal is partially allowed. The conviction of the appellant for the offence punishable under Section 302 IPC is modified, in that, the appellant is held to have committed an offence punishable under Section 304 Part-I IPC for which offence the appellant is sentenced to undergo imprisonment for the period already undergone. We note that vide order dated 10.1.2005 the appellant was directed to be released on bail on furnishing a personal bond in sum of Rs.5,000/- with one surety in the like amount to the satisfaction of the learned Trial Judge, by which date the appellant had undergone an actual sentence of 8 years and 1 month. The last available nominal roll sent to this Court on 9.10.2001 shows that the appellant had earned remission of 7 months and 9 days as of 4.10.2001. On the assumption that the conduct of the appellant continued to remain good, between October 2001 and January 2005, the appellant would have earned further remissions of at least 4 months. Thus, even if the appellant is directed to undergo imprisonment for ten years, extending benefit of the remissions, the appellant would have to undergo further imprisonment for about seven months only. This is our reason for imposing the sentence by restricting the same for the period already undergone. We further note that there is no

history of the appellant being involved in any other crime.

13. In view of the sentence imposed upon the appellant, the bail bond and surety bond furnished by the appellant are discharged.

**(PRADEEP NANDRAJOG)
JUDGE**

**(INDERMEET KAUR)
JUDGE**

September 03, 2009
Dharmender