

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

% *Judgment Delivered on: May 20, 2009*

+ **CRL.A.538/2001**

DEVA Appellant
Through: Mr. Sumeet Verma, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CRL.A.403/2000

KHOOB RAM Appellant
Through: Mr. Sumeet Verma, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CRL.A.427/2000

ROHTAS Appellant
Through: Mr. Sumeet Verma, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

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. At the outset, it may be noted that Mr. Sumeet Verma has appeared on behalf of the appellants informs us that on an earlier occasion, he had appeared for the appellant Rohtas to argue the application seeking suspension of sentence and noting that the appellants are likely to be heard, has prepared the matter.
2. We note that legal aid counsel has been provided to the appellant Deva as well as appellant Khoob Ram. Unfortunately, the legal aid counsel appointed for said appellants have not appeared at the hearing today.
3. Mr.Sumeet Verma states that he can argue all the three appeals.
4. Noting that Mr.Sumeet Verma, Advocate, has formally not been appointed as an *amicus curiae* in the three appeals, we formally appoint Mr.Sumeet Verma as *amicus curiae* and fix his fee at Rs.7,500/- (one set).
5. Vide impugned judgment and order dated 8th February 2000, the appellants have been convicted for the offence of having murdered Desraj, at around 5.30 p.m. in the residence of Desraj.

6. The star witness of the prosecution, Mrs.Kamlesh PW-1, at whose statement, Ex.PW-1/A, the FIR was registered, deposed as under:

“On 12-11-96, at about 5.50 p.m., I was present at my house along with my husband and children. Accused Rohtas, Deva and Khub Ram, present in the court, who were residing in the same gali, came to my house. They were known to me from before. They all demanded money for liquor from my husband namely Desraj. My husband told them that he was a poor person and as such cannot afford to pay them for liquor and he asked all the accused persons to go away from the house and they started quarrelling with my husband. Accused Rohtas and Khub Ram caught hold of my husband and accused Deva stabbed my husband with knife. My husband was stabbed with knife on so many parts of his body. Thereupon, I raised alarm and my Dharam brother Karnail and one other person came there. On this, all the accused persons ran away. Then my husband was taken to hospital in a three wheeler scooter. Thereafter police came there and recorded my statement which is Ex. PW-1/A. The same bears my thumb impression at point ‘A’. I had pointed out the place of occurrence to the police. Accused Rohtas was apprehended within 24 hours. I had identified accused Deva and Khub Ram at P.S. I do not know if their personal search was conducted or not. “

7. Needless to state, the role assigned to accused Rohtas and Khoob Ram was catching hold of the husband of Kamlesh; to facilitate the commission of the offence by co-accused Deva.

8. Desraj died as a result of the assault and as noted in the post-mortem report Ex.PW-20/A, nine injuries were inflicted on his person, being as under:

“1. On external examination there was one incised wound 5cm x0.5 cm obliquely placed spindle shaped,

both ends are acute present on the posterior surface of the right thigh.

2. Incised wound of 1.5 cm x 1cm placed 4 cm below of above injury

3. Incised wound on right antromedial aspect over lower 1/4th of the thigh 2 cm x 0.5 c.m.

4. Incised wound at lower 1/3 rd of the right thigh size 5 cm x 1cm x 0.5 cm.

5. Incised wound slightly medioposterior of above injury 2.5 cm x 1 cm x 0.5 cm. 5 cm lower and middle to incised wound 2.5 cm x 1 cm.

6. Incised wound on lower 1/4th of the left thigh 2.5 cm x 0.5 cm x 0.5 cm.

7. Incised wound 6 cm below of above injury is 2.5 cm x 0.5 cm x 0.5 cm.

8. Incised wound on left posterior aspect of the thigh 5cm late a 1 to the above injury.

9. Incised wound 6 cm x.08 cm on lumber region at midline area. There is no injury mark on both ends. However, they were smeared with blood.”

9. That Kamlesh was a natural witness to the occurrence is evidenced by the fact that the crime took place in the precincts of her house.

10. We have perused the cross-examination of PW-1, indeed, nothing has been brought out in the cross examination which could discredit the testimony of PW-1.

11. Noting that the police reached the place of the occurrence soon after the crime was committed and promptly recorded the statement Ex.PW-1/A made by Kamlesh, in which she graphically

described the assault on her husband; a fact and a circumstance which lends assurance to her testimony in Court, we, accordingly, concur with the view taken by the learned trial Judge that the testimony of PW-1 establishes the manner in which her husband was assaulted.

12. In view of the unimpeachable eye-witness account, it would be useless for us to note other incriminating evidence, i.e., the weapon of offence which was recovered on the disclosure statement of accused Rohtas (we note that though the knife was used by Deva, recovery thereof has been pursuant to the disclosure statement of Rohtas, and at his instance). We also need not refer to the report of the CFSL, as per which, blood of group 'A' was detected on the knife and that the blood group of the deceased was 'A'.

13. The only issue which has been debated at the Bar and in respect thereof we have to take a decision in appeal, is whether the testimony of PW-1 evidences the commission of an offence punishable under Section 302 IPC or the commission of an offence punishable under Section 304 Part 1 IPC.

14. That all accused had a common intention is evidenced from the testimony of PW-1 who has stated that after entering her house, all the accused demanded money from her husband to purchase liquor, and that upon her husband refusing to do so, all

accused started quarrelling with her husband and Rohtas and Khoob Ram caught hold of her husband and Deva stabbed her husband.

15. It is apparent that the appellants had come with a common intention to extract money from Desraj. It is settled law that intention to commit a crime can be formed by the accused at the spur of the moment. It is settled law that where the evidence establishes that the accused had come with an intention to commit a particular crime and had manifest themselves to use all possible means to commit the crime, contemporaneous acts committed, which constitute the commission of some other offence would be treated as in furtherance of the common intention, i.e., to achieve the object for which the accused had marched under a banner with the approach: come what may we shall achieve the object of our march.

16. From the testimony of PW-1 it is apparent that the primary intention of the accused was to extract some money from Desraj. From the testimony, it is apparent that the accused were determined to extract some money from Desraj. The money to be extracted was a petty sum, i.e., just enough to purchase a bottle of liquor. Obviously, the initial intention was to commit a petty crime of extorting a petty sum. Frustrated in their endeavour to give effect to their desire of extracting a petty sum,

the appellants joined in the commission of an act, which led Rohtas and Khoob Ram to demobilise the deceased and facilitate an assault by Deva.

17. But, the assault by Deva, evidenced from the post-mortem report, shows that all blows were directed towards the thighs i.e. non-vital parts of the body. But for stabbed wound No.9, which entered the lumbar region and proved to be fatal, the other 8 blows would and could not have taken the life of the deceased as the resultant injury therefrom were non-fatal and on a non-vital part of the body.

18. Indeed, the post-mortem report evidences that injury No.9 cut the left kidney, sufficient to cause death, opined by PW-20, to be sufficient in the ordinary course of nature to cause death.

19. It is obvious that the stabbing by Deva has been indiscriminate i.e. without any specific intention being evidenced to cause any particular or such injury.

20. It appears to be a case where Deva has consciously directed, though indiscriminately, all the blows towards the thighs; unfortunately, one blow appears to have got misdirected.

21. In the decision reported as Kapur Singh vs. State of Pepsu, AIR 1956 SC 654, 18 injuries inflicted with a gandasa, all directed towards the legs of the deceased; cumulative effect whereof was

the death of the deceased due to excessive bleeding, were held to be attracting Section 304 Part 1 IPC and not Section 302 IPC.

22. The reasoning of the Supreme Court was that though 18 in number, all injuries were inflicted on a non-vital part of the body. The motive held established by the Supreme Court was to wreak vengeance on the deceased who had done a wrong on the son of the accused resulting in the amputation of the leg of the son of the accused. This was an additional circumstance noted by the Supreme Court evidencing the intention to take a limb for a limb.

23. The decision aforenoted has been followed by the Supreme Court in the decision reported as 2007 (10) SCC 371 Sunder Lal Vs. State of Rajasthan. The weapon of offence was a gandasi, except for one blow which was inflicted upon the head of the deceased, all other blows were directed towards the legs and the hands. The decision does not evidence the number of blows directed towards the legs resulting in the injuries on the legs or the injuries on the hands, but, the expression used is in the plural i.e. that a number of injuries were inflicted on the leg as also on the hand. This shows that in said decision, a number of injuries were inflicted.

24. Noting, in para no.11, that the attack was indiscriminate, conviction was sustained for the offence punishable under

section 304 Part 1 IPC. The decision of the Court of Sessions as upheld by the High Court that the offence committed was of murder, was accordingly modified.

25. The decision has followed the locus classicus dictum of Vivian Bose, J. in Virsa Singh's case reported as Virsa Singh Vs. State of Punjab, AIR 1958 SC 465. As extracted in Sunder Lal's case (supra), the Supreme Court has extracted various observations in Virsa Singh's case as under :-

16. In *Virsa Singh v. State of Punjab*, Vivian Bose, J. speaking for the Court, explained the meaning and scope of Clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300 "Thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that: it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

17. The ingredients of clause "Thirdly" of Section 300 IPC were brought out by the illustrious Judge in his terse language as follows:

'12. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300, "Thirdly".

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.'

18. The learned Judge explained the third ingredient in the following words (at page 468):

'16. ...The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, nor intended serious consequences, is neither here or there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion.'

19. These observations of Vivian Bose, J. have become locus classicus. The test laid down by *Virsa Singh* case for the applicability of clause 'Thirdly' is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz., that the injury found to be present was the injury that was intended to be inflicted.

20. Thus, according to the rule laid down in *Virsa Singh* case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

21. Clause (c) of Section 299 and Clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that Clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons - being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

22. The above are only broad guidelines and not cast iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third

stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.”

26. Needless to state, whenever two views are possible, at a criminal trial, a court is bound to adopt such view, which is favourable to the accused.

27. In the instant case, guided by the appreciation of evidence in Kapur Singh's case (supra) and Sunder Lal's case (supra), we note that the intention, in the instant case, appears to be to scare the deceased by injuring him so that he would part with some money and not to cause death. The same is evident by the fact that nine blows have been directed towards the legs. Unfortunately, one out of the nine blow has got misdirected, hitting the lumbar region i.e. the lower abdomen and as a result a kidney being pierced.

28. The offence which stands made out is the offence of culpable homicide not amounting to murder punishable under Section 304 Part 1 IPC.

29. We dispose of the appeals by partially allowing the same. The conviction of the appellants for the offence of murder is modified to a conviction for the offence of culpable homicide not

amounting to murder. The offence committed by the appellants is punishable under Section 304 Part 1/34 IPC.

30. The appellants are directed to undergo rigorous imprisonment for a period of ten years and to pay fine of Rs.500/- each. In default of payment of fine, to undergo simple imprisonment for one month. Needless to state, benefit of Section 428 Cr.P.C. would be available to the appellants.

31. The appellants are on bail. Should the appellants be required to undergo further imprisonment, the appellants are directed to surrender and undergo the remaining sentence.

32. The bail bond and the surety bond Furnished by the appellants are cancelled, but, with a clarification that before they are apprehended or compelled to surrender, the period of incarceration undergone by the appellants shall be taken note of with reference to the jail record of the appellants, and while doing so, the remission if any, already earned would be duly accounted for.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

May 20, 2009/rb