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IN THE HIGH COURT OF DELHI

Judgment reserved on : February 12, 2009

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Judgment delivered on : February 16, 2009

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CRL.A. 57/2001

ZULFIKAR Appellant

Through: Mr. Rajesh Mahajan, Advocate

versus

STATE Respondent

Through: Mr. Pawan Sharma and Ms. Richa Kapoor
APPs for the State.

CRL.A. 631/2000

ALIMUDDIN Appellant

Through: Mr. Rajesh Mahajan, Advocate

versus

STATE Respondent

Through: Mr. Pawan Sharma and Ms. Richa Kapoor
APPs for the State.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

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

: PRADEEP NANDRAJOG, J.

1. Our apology for a brief judgment. Arguments concluded in the two appeals at 4:30 PM on 12.2.2009, leaving us no time to dictate judgment in open Court.

2. The facts are in a very narrow compass and indeed,

learned counsel for the appellant conceded that the entire contours of the case of the prosecution, duly proved through the testimony of the eye witnesses and in particular the injured eye witness Rahisuddin PW-2, are to be found in the rukka Ex.PW-2/A.

3. The police reached the place of the occurrence when information conveyed was recorded vide DD No.20A at 11:55 AM on 29.4.1996 informing the police that Danu has been injured. Const.Surinder Singh PW-8 posted at the police chowki accompanied by HC Devender Kumar PW-9 reached the place of occurrence and learnt that the injured had been removed in a PCR van to the hospital by Const.Sukh Ram Pal.

4. SI Jeet Singh PW-16, was also handed a copy of DD No.20A and he also proceeded to the spot. Therefrom he went to the hospital i.e. GTB Hospital since he was informed that Danu Mia as also Rahisuddin were removed to the hospital. He learnt that Danu Mia had died in the hospital and Rahisuddin was given medical treatment for an injury on his hand. Rahisuddin was suffering a superficial injury caused on his hand by a sharp edged weapon. He made his statement Ex.PW-2/A that 29.4.2006 was Bakr Id and everyone was in a festive mood and taking dinner. Appellant Zulfikar came and accused Danu

Mia of defaming his sister. A verbal spat ensued between the two and Alimmudin (Saleem) also came and joined. Zulfikar caught the hand of Alimmudin to lead him out. Danu Mia followed. All of a sudden, Alimuudding took out a knife. He i.e. Rahisuddin saw this and, to save Danu Mia attempted to snatch the knife from the hand of Alimuuddin upon which Alimuuddin inflicted a cut on his right hand. At that Zulfikar exhorted Alimuuddin to assault Danu (Mar Saale Danu Ko) at which Alimuuddin inflicted a stab blow on the right shoulder of Danu. A crowd had gathered. Zulfikar was apprehended at the spot and that he was brought to the hospital along with Danu.

5. It is not in dispute that Zulfikar was apprehended at the spot and accused Alimuuddin was apprehended soon thereafter. It is also not in dispute that the weapon of offence i.e. the knife used was recovered from a charpai in the house of Alimuuddin pursuant to his disclosure statement Ex.PW-16/H.

6. Salim PW-1, has corroborated what was disclosed to the police by Rahisuddin who appeared as PW-2 and deposed said facts and withstood cross examination.

7. As per the post-mortem report Ex.PW-4/A proved by Dr.K.K.Banerjee who conducted the post-mortem of Danu on 30.4.1996, two injuries were seen on the body of Danu. The first

was an incised wound present on the right axilla in the front starting from the tip of right shoulder cutting across the anterior axillary fold, the tip of right axilla going 2.5 cms in front of posterior axillary fold. The second wound was an incised subcutaneous tissue deep wound on the lateral border of left abdomen.

8. Unfortunately for Danu Mia, the first wound cut through the blood vessels and resulted in excessive bleeding. He died due to shock resulting from haemorrhage.

9. The learned Trial Judge has held that the testimony of PW-1 and PW-2 establishes that Zulfikar exhorted Alimuddin and pursuant to the exhortation Alimuddin stabbed Danu and since Danu died, both appellants are liable to be convicted for the offence of murdering Danu.

10. Learned counsel for the appellant after making us go through the record and pointing out a discrepancy here or a discrepancy there, but ultimately conceding that none was material, restricted submissions to the plea that at best a case for conviction under Section 304 Part II is made out.

11. From the testimony of Rahisuddin PW-2, it is important to note that the accused Alimudding had reached after co-accused Zulfikar had reached and that the altercation

between Zulfikar and Danu Mia had commenced before accused Alimuddin reached. It is thus obvious that Zulfikar and Alimuddin did not reach the place of the occurrence with any pre-determined intention and that none was sharing the intention of the other. It is also apparent that the scuffle took place on account of a grievance of Zulfikar against Danu Mia that Danu Mia was spreading rumors about his sister. It is also important to note that as per his initial statement to the police, when Alimuddin intervened in the spat between Zulfikar and Danu, Zulfikar caught the hand of Alimuddin and attempted to take him away from the spot and Danu Mia followed. We note that neither PW-1 and PW-2 have stated as to what happened which provoked Alimuddin to take out a knife and assault Danu when Rahisuddin intervened but could not prevent Alimuddin from attacking Danu.

12. Obviously, something must have happened and probably it had to be a provocation from the deceased.

13. We say so for the reason, in the sequence of event Rahisuddin has said that when Zulfikar and Danu were having a spat, Alimudding arrived and joined issues and at that Zulfikar attempted to remove Alimuddin from the spot and Danu Mia followed them.

14. It is true that a common intention can surface at the spur of the moment and need not necessarily be the result of a pre-planned meeting of the minds.

15. It is true that when a provocation, in all probability, was given by Danu, Zulfikar did exhort Alimuddin but the words '*mar saale ko*' need not necessarily imply to kill a person. They can also mean to beat a person.

16. Learned counsel for the State had urged that where a co-accused is having a knife in the hand and the other co-accused gives an exhortation, it can reasonably be inferred that the exhortation was to attack with the weapon of offence in hand.

17. Yes, this would be the ordinary inference which every reasonable and prudent person would draw.

18. To that extent, it certainly can be said that Alimuddin attacked Danu on the exhortation of Zulfikar and that by giving the exhortation Zulfikar intended that Alimuddin should attack Danu with the knife. It has to be noted that as per the evidence, Alimuddin was having the knife in his hand when the exhortation was given.

19. But, where the origin of the fight is a sudden quarrel and it becomes difficult to ascertain as to who started the fight,

the benefit of the lesser inference to be drawn qua the guilt has to be given to the accused.

20. As noted above, but for Danu Mia following the appellants, his life was not in danger. He followed them and probably said something which the witnesses could not hear which provoked Zulfikar to give the exhortation and triggered Alimuddin to launch the attack.

21. It has to be noted that a mild cut on the abdomen which is skin deep and a stab wound on the shoulder has been inflicted by Alimuddin. The MLC shows that the stab wound is on the upper right shoulder and has cut at the right axilla in the front starting from the tip of the shoulder; cutting anteriorly through the axillary fold, had reached the front of posterior axillary fold.

22. In a layman's language the stab wound is at the shoulder at the collar bone and has moved down and backwards along the shoulder.

23. No vital organ of the body is situated in said part of the body. Unfortunately, an artery got cut and the result was Danu Mia suffering excessive bleeding.

24. It cannot be said that the nature of injury was such that in all probability, the probability being a near certainty,

Danu Mia would have died. It is a case where the injury was likely to cause death, and hence the offence is not of murder but is of culpable homicide not amounting to murder.

25. The level of knowledge that death would ensue has to be low in the instant case. It has to be noted that one out of the two stab wounds is too superficial and the other is also not of a kind which can be called imminently dangerous.

26. Part II of Section 304 IPC and not Part I thereof is attracted.

27. On the sentence, we note that Alimuddin had been in judicial custody for 7 years and 4 months as on 20.11.2003 when his sentence was suspended and he was admitted to bail. We note that appellant Zulfikar has remained in judicial custody for 5 years when his sentence was suspended on 17.7.2002.

28. In our opinion ends of justice would be met if the sentence imposed upon the appellants is directed to be for the period already undergone.

29. The appeals are partially allowed.

30. Impugned judgment convicting the appellants for the offence of murder is modified, in that, the appellants are convicted for the offence of culpable homicide not amounting to murder and are convicted under Section 304 Part II IPC. The

sentence imposed upon them, is for the period already undergone.

31. Since the appellants are on bail, the bail bond and the surety bonds shall stand discharged.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

**February 16, 2009
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