

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

% *Judgment Reserved On: October 07, 2009*
Judgment Delivered On: October 09, 2009

+ **CRL.A. 695/2002**

KULDEEP KATARIA Appellant
Through: Mr.R.N.Mittal, Senior Advocate with
Mr.Puneet Mittal, Advocate

versus

STATE Respondent
Through: Ms.Richa Kapoor, A.P.P.

CRL.A. 813/2003

MAHENDER SINGH Appellant
Through: Mr.Madhukar Pandey, Advocate

versus

STATE Respondent
Through: Ms.Richa Kapoor, A.P.P.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

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.

1. Segregating the trial of co-accused Vivek and referring his trial before the Juvenile Justice Board on account of Vivek being a juvenile, appellant Mahender Singh, appellant Kuldeep Kataria and co-accused Surender were tried by the Court of

Sessions for having murdered Gaurav Sirohi. The three, i.e. the appellants and Surrender were charged for the offence punishable under Section 302/34 IPC. They were also charged for the offence of causing hurt to Manjeet Singh PW-8.

2. Vide impugned judgment and order dated 31.7.2002, appellant Mahender has been convicted for the offence of having murdered Gaurav. It has been held that the evidence on record did not warrant Section 34 IPC to be applied. Appellant Mahender Singh has been fastened liability for his act of twice stabbing the deceased in the chest with an ice-pick. It has been held that the other accused did not share any common intention with Mahender. Appellant Kuldeep Kataria has been convicted for the offence punishable under Section 326 IPC. The appellants have been acquitted of the charge of causing hurt to Manjeet Singh PW-8.

3. Appellant Mahender Singh has been sentenced to undergo imprisonment for life for the offence of murder. Appellant Kuldeep has been sentenced to undergo rigorous imprisonment for seven years.

4. The conviction of the appellants is based on the testimony of Manjeet Singh PW-8, the complainant at whose instance the FIR was registered and who claimed to be an eye-witness. Additionally, the recovery of the ice-pick pursuant to the disclosure statement of appellant Mahender and at his

pointing out the place wherefrom the ice-pick was recovered has been held to be additional incriminating evidence against Mahender. We note that Ravinder Singh PW-2, a stated eye-witness, turned hostile.

5. At the outset we may note a very important fact which seems to have escaped the notice of the learned Trial Judge, which fact constitutes incriminating evidence against the appellants. The same is the refusal by the appellants to participate in the test identification proceedings before Ghanshyam Gupta PW-5, Metropolitan Magistrate, Delhi. The record of the proceedings Ex.PW-5/B and Ex.PW-5/C pertaining to appellant Mahender records the reason of refusal by Mahender to participate in the proceedings, being that the witness had seen him at the spot when he was killing the victim. The record of the proceedings Ex.PW-5/E and Ex.PW-5/F pertaining to appellant Kuldeep records the reason of refusal by Kuldeep to participate in the proceedings, being that he was seen by the witness at the spot.

6. Ignoring the confession of Mahender before the learned Metropolitan Magistrate; the confession being contained in his reason while refusing to participate in the test identification proceedings, suffice would it be to state that Mahender's refusal to participate in the test identification proceedings is

certainly incriminating evidence against him. So is the case with appellant Kuldeep.

7. Police was informed of the incident when DD No.15A, Ex.PW-4/A was recorded at 5:52 PM on 22.4.2000 at PS Malviya Nagar about a stabbing incident near Gitanjali Hospital. SI K.P.Singh PW-17 along with Const.Banwari Lal PW-7 proceeded towards Gitanjali Hospital and soon after Inspector Ashok Kumar PW-12 from the police station also reached the place. On being informed that the injured was admitted at Gitanjali Hospital the two police officers reached the hospital, SI K.P.Singh having reached first.

8. At the hospital, as recorded in the MLC Ex.PW-6/A Gaurav was brought at the hospital at 5:00 PM by Leelu Rawat PW-3. His condition was serious. The pulse was feeble and the systolic blood pressure was 50 mm Hg. Before any meaningful medical aid could be given to Gaurav, he died, as noted in the MLC, at 5:40 PM. Thus, SI K.P.Singh obtained the MLC of Gaurav and by that time Inspector Ashok Kumar also reached.

9. Manjeet PW-8 met the two police officers at the hospital. Inspector Ashok Kumar PW-12 recorded the statement Ex.PW-7/A of Manjeet and making an endorsement Ex.PW-4/B there under sent the same, at 8:00 PM, as recorded in the endorsement Ex.PW-4/B, for FIR to be registered.

10. Gaurav's dead body was sent to the mortuary where Dr.O.P.Murthy PW-15 conducted the post-mortem on 23.4.2000 and prepared the report Ex.PW-15/A noting therein two punctured stab wounds on the chest, both of which pierced the heart and the lungs resulting in excessive blood loss and collapse of the lungs and hence death due to haemorrhagic shock. Five other injuries being contused abrasions and bruises over the chest and the back, some of which were buckle shaped were also noted.

11. After the appellants were arrested, pursuant to the disclosure statement Ex.PW-12/H, as noted in the seizure memo Ex.PW-12/J the ice-pick Ex.P-4 was recovered from a municipal garbage bin on 23.4.2000. The sketch thereof is Ex.PW-12/K.

12. The sketch of the ice-pick shows that it has a wooden handle 10 cm long and an iron needle 12 cm in length. The ice pick is the object used by the court staff to punch/pierce paper while preparing the court files. In colloquial language it is called '*sua*'.

13. It may be noted at this stage that in the post mortem report Ex.PW-15/A the two stab wounds have been referred to as almost circular in shape. It may also be further noted that Dr.O.P.Murthy PW-5 deposed that the two stab wounds could possibly be caused by the ice-pick Ex.P-4.

14. Since the appellants have been convicted on the testimony of Manjeet Kumar PW-8 who has been found to be a truthful witness, we straightaway note the testimony of Manjeet Kumar and thereafter deal with the contentions urged at the hearing of the appeals.

15. Manjeet deposed that on 22.4.2000 at around 3:30 PM he and Gaurav left the studio of one Amit Sharma to purchase eatables and after purchasing the same went to Gaurav's house. They left Gaurav's house at 4:15 PM on a two-wheeler scooter. As they reached near a school two boys in school uniform passed comments at them using foul language. Gaurav made him to stop the scooter and after getting down from the scooter said something to the two boys i.e. accused Mahender and Kuldeep. Accused Mahender also arrived. He had an ice-pick and he stabbed Gaurav with the ice-pick. Appellant Kuldeep started punching Gaurav. The other boy started hitting Gaurav with a bat. He i.e. Mahender tried to intervene but was hit with a belt. He ran away and went to the shop of Amit. He and Amit returned and learnt that Gaurav had been removed to Gitanjali Hospital. He went to the hospital. His statement Ex.PW-7/A was recorded at the hospital.

16. On being cross-examined, Manjeet admitted that he was physically handicapped i.e. had a deformity in his leg, but

denied that he could not drive a scooter. He was cross-examined at length, but nothing has been brought out in the cross-examination which discredits Manjeet. During arguments in the appeal, learned counsel for the appellants could not show us any blemish worth noting wherefrom Manjeet can be discredited as a witness.

17. It has to be noted that the FIR has been registered at around 8:15 PM and the rukka has been dispatched from the hospital at 8:00 PM. The incident took place at 4:00 PM. The delay, which is not exceptional, is on account of the fact, as deposed to by Inspector Ashok Kumar PW-12 that Manjeet was crying inconsolably at the hospital due to his friend being declared dead. It was only after Manjeet regained composure that he i.e. Inspector Ashok Kumar recorded the statement Ex.PW-7/A of Manjeet.

18. Shri R.N.Mittal, learned senior counsel for appellant Kuldeep had urged that the learned Trial Judge has not found any common intention and thus Kuldeep can be convicted for the offence committed by him and not for the offence committed by Mahender. Learned counsel urged that as per Manjeet his client gave fist blows to the deceased. Counsel wondered as to how his client could be convicted for the offence punishable under Section 326 IPC the sine qua non whereof is causing grievous injuries with a dangerous weapon

or by means of a substance which is harmful to the human body.

19. Indeed, learned counsel for the State could not justify Kuldeep's conviction for the offence punishable under Section 326 IPC.

20. We have carefully perused the impugned judgment and regret our inability to find as to on what process of reasoning has the learned Trial Judge convicted Kuldeep for the offence punishable under Section 326 IPC. We note that in para 25 of the impugned decision, holding qua the guilt of Kuldeep, the learned Trial Judge has observed as under:-

“25. Under the circumstances and having regard to the evidence on record, it cannot be said that the prosecution has proved the common intention on the part of this accused for killing the deceased. I, therefore, hold accused Kuldeep guilty of the offence punishable under Section 326 IPC and convict him accordingly having battered and bruised the deceased mercilessly even while he lay helplessly on the ground.”

21. Now, Manjeet PW-8 has nowhere stated that he saw Kuldeep mercilessly battering and bruising the deceased. Qua Kuldeep he stated: *'Accused Kuldeep started punching Gaurav'*.

22. It appears that the learned Trial Judge was carried away by emotions ignoring the difference between voluntarily causing grievous hurt and voluntarily causing grievous hurt by dangerous weapons or means. The learned Trial Judge has

obviously got confused between the offence punishable under Section 325 IPC and the offence punishable under Section 326 IPC.

23. That apart, the MLC of the deceased does not show that the hurt caused to the deceased by the punch blows was a grievous hurt.

24. Common intention being negated by the learned Trial Judge, Kuldeep had to suffer the consequence of his acts, which as per the testimony of Manjeet are no more than causing simple hurt i.e. the offence punishable under Section 323 IPC which carries a maximum sentence of one year imprisonment.

25. When released on bail by this Court, Kuldeep had already undergone a sentence of 2 years, 4 months and 25 days as on 20.9.2002. Kuldeep was admitted to bail vide order dated 3.10.2002. By the time he came out of jail, Kuldeep would have undergone an actual sentence of 2 years, 5 months and 10 days.

26. Thus, the appeal filed by Kuldeep requires to be allowed partially, in that he has to be acquitted for the offence punishable under Section 326 IPC and convicted for the offence punishable under Section 323 IPC with corresponding correction qua the sentence.

27. Qua appellant Mahender, learned counsel for the appellant urged that as per Manjeet, two boys; namely Mahender and Kuldeep were standing and they had provoked Gaurav. Counsel urges that it is apparent that Mahender could not be the boy with the ice-pick because as per Manjeet the third boy who came was the one with the ice-pick in his hand.

28. The argument of learned counsel for the appellant is based upon an apparent typographic error while recording the testimony of Manjeet. The error is apparent when one reads the relevant part of the testimony of Manjeet, which is as under:-

“When we reached near school at about three minutes two boys who were wearing the school uniform were coming from our opposite direction and they passed some comments on us and they used the bad language also. Gaurav told me that he would stop and he would ask those boys. However I said to him “leave them” and we should proceed but Gaurav stopped saying that let him talk to those boys as to what was the problem. I was driving the scooter at that time. Gaurav got down from the scooter while I remained on the scooter as the engine was on. When Gaurav was talking with those two boys another boy came there and started talking with Gaurav in a wrong way. The two accused persons present in the Court are the same boys and the witness has pointed towards accused Mahender and Kuldeep present in Court. Accused Mahender also arrived at the spot when the three persons were talking with Gaurav. One of those boys said Gaurav as he is claiming himself to be the dada “aaj isko laga do”. I asked Gaurav to go away. In the meantime, accused Mahender came with a ice stick and immediately started attacking on Gaurav.”

29. The error is in the part of the testimony which has been underlined by us. Obviously, if Mahender and Kuldeep were present at the spot, how could Mahender be the one to arrive later on and constitute a part of the three? It is apparent that there is some typographic error. Either reference to Mahender as one out of the two boys initially present is incorrect or the reference to Mahender at the second instance being the third person to join is incorrect, for Mahender could not be twice at the spot as recorded.

30. What breaks the ice in favour of the prosecution and against Mahender is the categorical testimony of Manjeet that Mahender attacked Gaurav with the ice-pick.

31. We may remind ourselves that the ice-pick has been recovered at the instance of Mahender and interestingly the reason given by Mahender to refuse to participate in the test identification proceedings is that the witness saw him when he was murdering the deceased.

32. The sole argument advanced by learned counsel for appellant Mahender to discredit the testimony of Manjeet is nothing but clutching at straws.

33. The alternative submission made by learned counsel for Mahender was that the incident took place at the spur of the moment and without any premeditation. Thus, counsel urges that the offence committed by Mahender is of culpable

homicide not amounting to murder, punishable under Section 304 Part-I IPC.

34. From the testimony of Manjeet it is apparent that the accused abused the deceased and Manjeet, i.e. the accused triggered the cause which resulted in the unfortunate death of Gaurav. The theory of a sudden quarrel is premised on the fact that the origin of the fight is shrouded in uncertainty and it cannot be pointed out as to whether the accused or the victim was the trigger. In the decision reported as JT 2008 (1) SC 640 Shaikh Majid & Anr. vs. State of Maharashtra & Ors., it was observed as under:-

“11. The residual question is the applicability of Section 302 IPC. As noted above it was submitted that only one blow was given and that too in the course of a sudden quarrel.

12. In essence, the stand of learned counsel for the appellant is that Exception IV to Section 300 IPC would apply to the facts of the case.

13. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

14. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which

clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be a no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The

expression “undue advantage” as used in the provision means “unfair advantage”.”

35. The testimony of Manjeet does not show that the deceased participated in any quarrel. The testimony of Manjeet shows that the accused foul mouthed the deceased and Manjeet. Whereas Manjeet swallowed the insult, the deceased, being a man of self-respect, told the accused to behave themselves and unfortunately invited a fatal assault. It is not the case of the accused that Gaurav attacked any of them. No suggestion has been given to Manjeet that Gaurav assaulted any accused.

36. The theory of a sudden quarrel and the act of Mahender being in a sudden quarrel being rejected, we consider the alternative submission made that an ice-pick is not a dangerous weapon and knowledge cannot be attributed to Mahender that in all probability his act would result in the death of Gaurav. Counsel urged that the knowledge attributable to Mahender was of a lesser degree attracting the third limb of Section 299 IPC.

37. As explained by the Supreme Court in Virsa Singh's case AIR 1958 SC 465 the Court has to look whether the intention of the accused was to strike at the part of the body of the deceased actually struck, whether the part of the body was a vital or a non-vital part and thereafter has to cull out the

intention of the accused to cause the injury actually caused with reference to the nature of the weapon of offence and the ferocity of the blow with which the weapon was struck. Lastly, the Court has to see whether the injury caused was sufficient in the ordinary course of nature to cause death. The reason being that Section 300 thirdly makes a culpable homicide murder if the act is done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. The same is evidenced from paras 8 to 13 of the decision, which read as under:-

“(8) It was argued with much circumlocution that the facts set out above do not disclose an offence of murder because the prosecution has not proved that there was an intention to inflict a bodily injury that was sufficient to cause death in the ordinary course of nature. Section [300](#), 3rdly was quoted :

“If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.”

It was said that the intention that the section requires must be related, not only to the bodily injury inflicted, but also to the clause, “and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.”

(9) This is a favourite argument in this kind of case but fallacious. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, the “thirdly” would be unnecessary because the act would fall under the first part of the section, namely -

"If the act by which the death is caused is done with the intention of causing death."

In our opinion, the two clauses are disjunctive and separate. The first is subjective to the offender:

"If it is done with the intention of causing bodily injury to any person."

It must, of course, first be found that bodily injury was caused and the nature of the injury must be established, that is to say, whether the injury is on the leg or the arm or the stomach, how deep it penetrated, whether any vital organs were cut and so forth. These are purely objective facts and leave no room for inference or deduction : to that extent the enquiry is objective; but when it comes to the question of intention, that is subjective to the offender and it must be proved that he had an intention too cause the bodily injury that is found to be present.

(10) Once that is found, the enquiry shifts to the next clause -

"and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

The first part of this is descriptive of the earlier part of the section, namely, the infliction of bodily injury with the intention to inflict it, that is to say, if the circumstances justify an inference that a man's intention was only to inflict a blow on the lower part of the leg, or some lesser blow, and it can be shown that the blow landed in the region of the heart by accident, then, though an injury to the heart is shown to be present, the intention to inflict an injury in that region, or of that nature, is not proved. In that case, the first part of the clause does not come into play. But once it is proved that there was an intention to inflict the injury that is found to be present, then the earlier part of the clause we are now examining -

"and the bodily injury intended to be inflicted" is merely descriptive. All it means is that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature; it must in addition be shown that the injury is of the kind that falls

within the earlier clause, namely, that the injury found to be present was the injury that was intended to be inflicted. Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to be with the question of intention.

(11) In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense : the kind of enquiry that "twelve good men and true" could readily appreciate and understand.

(12) To put it shortly, the prosecution must prove the following facts before it can bring a case under S.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.

(13) Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under S.300, 3rdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional.”

38. The testimony of Manjeet categorically shows that Mahender targeted the chest of the deceased. Thus, it is apparent that Mahender intended to strike the blows with the ice-pick on the chest of the deceased. His testimony coupled with the post-mortem report of the deceased shows that Mahender actually struck two blows on the chest of the deceased with the ice-pick. The intention to cause the injury which has proved to be fatal has to be gathered, as per the decision in Virsa Singh's case (supra) from the body part struck i.e. a non-vital or a vital part of the body, the nature of

the weapon of offence and the ferocity of the blow with which the weapon was struck.

39. The chest is a very vital part of the human body. The post-mortem report shows that the ice-pick pierced the heart and the lung of the deceased twice over. The sketch of the ice-pick Ex.PW-12/K shows that the piercing part thereof i.e. the head has a length of 12 cm. The ferocity with which the blows were struck is evidenced by the depth to which the ice pick has traversed inside the body of Gaurav. The heart and the lungs have been pierced. Death has been instantaneous. In the decision reported as AIR 2008 SC 1854 Bavisetti Kaneswara Rao @Babai vs. State of Andhra Pradesh, the weapon of offence was a screw driver i.e. an object akin to the instant ice-pick, having a blade of similar length i.e. 12 cm. A single blow inflicted in the epigastria region of the abdomen resulting in instant death, as in the instant case, was held to be an act constituting the offence of murder.

40. We accordingly hold that appellant Mahender has rightly been convicted by the learned Trial Judge for the offence of having murdered Gaurav.

41. Crl.Appeal No.813/2003 filed by appellant Mahender is dismissed.

42. Crl.Appeal No.695/2002 filed by appellant Kuldeep is partially allowed. His conviction for the offence punishable

under Section 326 IPC and the relatable sentence thereto is set aside. Appellant Kuldeep is convicted for the offence punishable under Section 323 IPC for which he is sentenced to undergo imprisonment for one year. Since Kuldeep has already undergone a sentence much in excess of one year and is on bail, we discharge his bail bond and surety bonds.

43. Since appellant Mahender is still in jail, we direct that a copy of this judgment and order be sent to Superintendent, Central Jail, Tihar with a direction that the same be supplied to appellant Mahender.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

October 09, 2009
Dharmender