

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. Appeal No. 437/2004**

% **Date of Order : April 09, 2009**

SANTOSH @ SANJU Appellant
Through : Mr. Rajesh Mahajan, Advocate

VERSUS

STATE Respondent
Through : Mr. Pawan Sharma, Advocate

CORAM :-
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper 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. Vide impugned judgment and order dated 25.2.2004, the appellant has been convicted for the offence of having murdered Kelment Nandan @ Raju.

2. In a nut shell, the reasons given by the learned Trial Judge are:-

A. Notwithstanding PW-1 and PW-4, cited by the prosecution as eye witnesses, turning hostile, their testimony that the appellant and the deceased were seen quarrelling

coupled with the fact that PW-1 admitted his signatures on his statement Ex.PW-1/1 and also admitted his signatures on the seizure memo Ex.PW-1/2 and the personal search memo of the deceased Ex.PW-1/3 as also admitted his signatures on the disclosure statement Ex.PW-1/4 of the accused and his signatures on the seizure memos Ex.PW-1/5 and Ex.PW-1/6 established that the appellant was the assailant of the deceased.

B. That a knife i.e. the weapon of offence, stained with blood was recovered pursuant to the disclosure statement of the appellant and on his taking the police to the place where the knife was recovered, being concealed in the roof of the house of the appellant; upon which knife vide FSL Report Ex.PX1 human blood was detected.

C. The clothes which the appellant was wearing at the time of the commission of the crime were found stained with blood as per FSL Report and matched the blood group of the deceased.

3. Circumstance B and C noted hereinabove have been used by the learned Trial Judge to reinforce the finding of guilt.

4. It is not in dispute that at 3:28 AM on 11.10.2002 i.e. in the intervening night of 10th and 11th October 2002

information was received at the local police station about a dead body lying near Durga Puja Bhoomiheen Camp near DDA Flats in Kalka Ji which was noted vide DD No.18A Ex.P-8/1 pursuant where to SI Dharampal Singh PW-10 accompanied by HC Raghuvinder Singh PW-8 left for the spot and found the dead body of a male with fresh stab wounds at the spot. They met Uttam Burman PW-1 at the spot who resides in jhuggi No.224, Bhoomiheen Camp. He told SI Dharampal Singh that he i.e. Uttam Burman, the deceased, the appellant, Nepal Dass PW-4 and another person were drinking liquor. While drinking the appellant abused the deceased who pushed the appellant, as a result where of the appellant fell down and after getting up picked up a knife and stabbed the deceased and ran away. That being petrified all others left the place but on seeing the police reaching the spot he picked up the courage to come back.

5. On the basis of the statement Ex.PW-1/1, the FIR in question i.e. Ex.PW-7/1 was registered.

6. It is apparent that if the complainant i.e. Uttam Burman and Nepal Dass who were examined as PW-1 and PW-4 respectively, stood their ground, there would be hardly anything for the appellant to urge with respect to the incident in question, save and except to urge that it is a case of the

appellant acting upon a sudden quarrel and hence the offence punishable is not as held by the learned Trial Judge but culpable homicide not amounting to murder; an offence punishable under Section 304 IPC.

7. In his testimony PW-1 deposed as under:-

“I am residing in Jhuggi no.244, Bhumiheen Camp Govind Puri for the last 14- 15 years. I know accused Sanju@Santosh present in court and also Nepal Das as we are residing in the same jhuggi camp. I however did not know Raju. On the night intervening 10-11.10.2002 I, Sanju @ Santosh and Nepal Das and one more person were taking liquor in DDA flats Kalka Ji, near Water Tank at about 2:00 AM. The deceased was not amongst those who were taking liquor and I did not know him. There was a collision between the accused and the deceased. There was exchange of abuses between the accused and the deceased. I became scared and ran away. I went inside a tent where Puja was being performed. Nepal had also run away from the spot where there was exchange of abuses between the accused and the deceased. Later on Nepal came to the tent where Puja was being performed and told me that dead body of the deceased was lying. Many of us reached the spot and found the dead body of the deceased lying there. The accused was not present there. I cannot say how the deceased expired. I have now come to know that the name of deceased was Raju. The name of the fourth person who was taking liquor with us was Bhagat.”

8. On being declared hostile and on being cross examined by the learned APP, PW-1 admitted his signatures on his statement Ex.PW-1/1 as also on various other memos which were prepared by the police.

9. Nepal PW-4 deposed as under:-

"I know accused Sanju @ Santosh present in the Court and also know PW-1 Uttam. In the night of 11.10.2002, I was taking liquor with accused, PW-1 Uttam and deceased Raju near tent where Durga Puja was being performed, in Kalka Ji. I left the spot, where we were taking liquor and by that time there was no quarrel. Uttam had also left the spot when I left. The accused and the deceased remained there. There was no quarrel in my presence. When I was present in the tent I came to know that there was a quarrel taking place. When I came to the spot I found deceased Raju lying dead. The accused was however not present at that time. Police came to the spot. Police had recorded my statement. I had told the police that I had not seen as to who had killed the deceased."

10. Assuming that PW-1 did not actually see the appellant stab the deceased, but his testimony shows that he was present when the deceased, the appellant, Nepal Dass and one more person were consuming liquor and there was a collision between the accused and the deceased followed by exchange of abuses between the two. Assuming PW-1, on becoming scared ran away, but the fact that immediately thereafter the deceased was found injured, leads to the only inference that the appellant had injured the deceased.

11. In our decision dated 18.3.2009 in CrI.A.No.246/01 Vijender @ Bijoo Vs. The State, in paras 25 to 29, we had discussed as under:-

"25. That apart, it is settled law that facts which are not themselves in issue may affect the probability of the existence of facts in issue, and thus can be used as the foundation of inferences

respecting the facts in issue; such facts are relevant facts. The only requirement is that such facts have to be relevant to the facts under enquiry and have to be sufficiently connecting with the later to afford good ground for an inference as to the existence or non-existence of the facts under enquiry. Facts which are so closely or inseparably connected with the facts in issue are often said to be forming part of the same transaction. A transaction may constitute a single incident occupying a few moments and encompassing a variety of acts occurring at the same or different places. All these acts are constituents of the same incident and are relevant because they accompany and tend to explain the fact in issue. They form a chain as it were encircling the fact in issue.

26. Section 6 of the Evidence Act makes relevant, facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, whether they occur at the same time and place or at different times and places. It is important to bear in mind that what is admissible under Section 6 are facts which are connected with the facts in issue as part of the transaction under investigation. In order that different acts constitute the same transaction they must be connected by proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

27. Where a fact has occurred with a series of acts preceding or accompanying it, it can safely be presumed that the fact was possible as a direct cause of the preceding or accompanying acts unless there exists a fact which breaks the chain upon which the inference depends.

28. The evidence of last seen is based on the reasoning above. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. To put it differently, as held in the

decision reported as AIR 2003 SC 3131 Mohibur Rahman Vs. State of Assam there may be cases, where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the deceased suffered death or should own the responsibility for homicide.

29. Thus, the fact that the appellants chased Anita and appellant Vijender was armed with a thapki and appellant Om Prakash was armed with a button operated knife, and within less than two minutes of Anita and the appellants leaving the room, Anita is found stabbed with a knife and hit by a blunt object, are facts by themselves sufficient to draw an adverse inference against the appellants unless they explain as to how Anita was stabbed and hit with a blunt object.”

12. We thus hold that even on the truncated testimony of PW-1 the learned Trial Judge has rightly concluded that the same establishes that the appellant was the assailant.

13. But, we find that the learned Trial Judge has lost sight of Exception 4 to Section 300 IPC. Indeed, if the offence is committed without pre-meditation in a sudden fight and in the heat of passion upon a sudden quarrel, the offence has to be culpable homicide not amounting to murder.

14. From the testimony of PW-1 it is apparent that the deceased and the appellant as also PW-1 and PW-4 and one more person were sitting as good friends drinking liquor and for no apparent cause, a sudden quarrel ensued which resulted

in the appellant assaulting the deceased with a knife. It is not a case that the appellant came with a pre-conceived intention to kill the deceased.

15. We thus partially allow the appeal and modify the impugned judgment and order dated 25.2.2004 and hold the appellant guilty of the offence of culpable homicide not amounting to murder.

16. Noting the young age of the appellant who was about 19 years to 20 years of age when the offence took place and the fact that all were drunk when the incident took place and that there was no pre-meditation in the crime we sentence the appellant to undergo rigorous imprisonment for 8 years. Needless to state benefit as per law for the period spent in custody as a under trial would be granted to the appellant, who would also be entitled to remissions as per policy.

17. Copy of this order be sent to the Superintendent Central Jail Tihar for necessary action.

(PRADEEP NANDRAJOG)
JUDGE

(ARUNA SURESH)
JUDGE

APRIL 09, 2009
MM