

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

% *Date of Decision : 9th July, 2009*

+ **CRL. APPEAL NO.577/2005**

ASHOK KUMAR Appellant
Through: Mr. Vijay Singh Charak, Advocate

versus

THE STATE (NCT) OF DELHI Respondent
Through: Mr. Pawan Sharma, Advocate

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

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not?
- (3) Whether the judgment should be reported in the Digest ?

PRADEEP NANDRAJOG, J. (Oral)

1. Vide impugned judgment and order dated 25.11.2004, the appellant has been convicted for the offence of having murdered his brother Prem Chand. The appellant has been sentenced to undergo imprisonment for life. The correctness of the findings rendered by the learned Trial Judge

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have been questioned in appeal. Two submissions have been urged at the hearing of the appeal.

2. It is firstly urged that the evidence on record casts, at best, a grave suspicion on the conduct of the appellant but fails to achieve the standard of proof beyond reasonable doubt. Second submission made is that at best it is a case of culpable homicide simplicitor and not culpable homicide amounting to murder.

3. To consider the merits of the contention urged, a brief backdrop of the case at hand may be penned.

4. DD No.23-A, Ex.PW-9/A, was recorded by SI Mahender Singh PW-9 as he was the duty officer at PS Patel Nagar at 2:30 AM on 7.5.2003. He noted therein that the duty constable at DDU Hospital had informed that one Prem Chand S/o Kishan Chand R/o Baljit Nagar was admitted at the hospital in an injured condition and was declared dead by the doctor on duty. The information was transmitted for further investigation to ASI Rawal Singh PW-17, who left to further investigate the matter and was accompanied by HC Suraj Pal PW-14 and other police officers. Since SI Manoj PW-8 was in the company of ASI Rawal Singh even he i.e. SI Manoj (PW-8) accompanied ASI Rawal Singh. Inspector Ram Sewak PW-18

was the SHO of the police station. He also received the information. Even he proceeded to the hospital. In this manner three senior police officers namely Inspector Ram Sewak PW-18, SI Manoj PW-8 and ASI Rawal Singh PW-17 reached the hospital along with few constables and head constables.

5. Since inspector Ram Sewak was the senior most officer and was also the SHO of the police station he conducted the spot investigation and was assisted by SI Manoj and ASI Rawal Singh. He i.e. Inspector Rawal Singh collected the MLC Ex.PW-4/A of the deceased and at the hospital met Ranbir Singh PW-1 the brother of the deceased and Gyan Dev another brother of the deceased. He recorded the statement Ex.PW-8/A of Gyan Dev. Since the second submission of learned counsel for the appellant seeks sustenance from the said statement, we note the same in toto. It reads as under:-

"I live at the address given above and work as regular labourer in Telephone Exchange BSNL, Rajinder Nagar. Apart from me I have four brothers Ashok, Ranbir, Prem Chand and Anil. Ashok and Ranbir are married and others are unmarried. We have one property No.WT-2, Gali No.8, Baljeet Nagar which is in the name of my mother Sunehri Devi. Now a days we were constructing a house on the said property in which my brother Prem was not contributing and instead Prem wanted his separate share in the property which was opposed by my brother Ashok and on this Prem often quarreled with

my mother and Ashok. Two days prior to 4.5.2003 Prem after raising quarrel had got the renovation work stopped and my elder brother Ashok had felt bad about it. Today in the night intervening 6/7.5.2003 at about 11:30 PM I and Prem were present in a room of aforesaid house. I was lying on a Diwan, whereas Prem was sitting on the floor. At that time Ashok came there and asked Prem to refrain from regular quarrel over property otherwise it would not be good for him. At that time Ashok was wearing only one checked 'tehmad'. On hearing Ashok, Prem retorted and misbehaved with Ashok. On this Ashok got enraged and started abusing Prem. On this Prem picked up a Coca Cola bottle lying on the room on which Ashok retorted that he would finish the daily quarrel by killing him. After saying so Ashok picked up a spade lying outside the room and gave blow with handle of spade on the left temple of Prem. Prem fell down on the floor and Ashok gave two more forceful blows on the left temple of Prem with the handle of spade as a result of which the temple of Prem was badly injured and he fell down bleeding profusely. I, on seeing the incident got scared and thinking that I may also not be killed went to the roof of the house and lay on the cot. I came down after some time after arrival of police. You have inspected the site at my instance. My brother Ashok had killed my younger brother Prem Chand intentionally by giving him spade blow, so that he may not be given share in the house. Action should be taken against Ashok. You have recorded my statement which I have heard and is correct."

6. The SHO made an endorsement Ex.PW-18/A beneath the statement Ex.PW-8/A and transmitted the same for an FIR to be registered under Section 302 IPC. HC Suraj Pal PW-14 took the statement Ex.PW-8/A and the endorsement beneath i.e. Ex.PW-18/A (rukka) to the police station where

Const.Sanjeev Kumar PW-11 registered the FIR Ex.PW-9/B at around 5:40 AM.

7. The body was seized and sent for post-mortem and the police team proceeded to the place where the incident had taken place. Inspector Ram Sewak, on the pointing out of Gyan Dev, prepared the site plan Ex.PW-18/B. Blood stained bed sheet, two bottles of Coca Cola and a pair of hawai chappal were seized as entered in the seizure memo Ex.PW-8/B, Ex.PW-8/C and Ex.PW-8/D. A spade stained with blood and hair found in an adjoining room presence whereof was pointed out by Gyan Dev were lifted as recorded in the seizure memo Ex.PW-8/E.

8. Since Gyan Dev had stated that the appellant had fatally assaulted his brother under the circumstances as disclosed in the statement Ex.PW-8/A, the appellant was apprehended and on interrogation made a disclosure statement Ex.PW-8/J, inter-alia, informing that the lungi which he was wearing at the time when the offence was committed got stained with blood could be got recovered by him as he could point out the place where he had hidden the same. He led the investigating officer to the roof of the house and got recovered a blood stained lungi which was seized as recorded

in the memo Ex.PW-8/F.

9. Dr.Manoj Nagpal conducted the post-mortem of the deceased and prepared the post-mortem report Ex.PW-13/A recording therein the following 7 injuries on the person of the deceased:-

“1. Blunt injury 12 cm about clavicle on the left side and 5 cms from the mid line on the left temporal regions irregular margins in front upwards measuring 12 x 8 cms the bone (temporal) was fractured and brain matter was lacerated. The multiple laceration 4 in number.

2. Two cms. above left eye-brow is an injury and 4 cms from injury no.1. It was a laceration of size 3 x 1 cm.

3. An injury of 1.5 cms lateral to the injury no.2 present or size 3 x 1 cm.

4. Contusion of size 4 x 4 cms on the right zygomaticarch.

5. There was a contusion on the right ear.

6. Contusion on the left wrist on its dorsal aspect size 5 x 1 cm.

7. Contusion multiple in number on the dorsal aspect of right wrist involving in the area of 4 x 4 cms.”

10. After conducting the post-mortem, the blood sample of the deceased was handed over to the investigating officer on a piece of gauze. The clothes of the deceased as also hair clippings were handed over by the doctor to the

investigating officer, seizure whereof was recorded in the memo Ex.PW-15/A.

11. The blood stained spade, the hair which was recovered from near the place of incident, the lungi recovered pursuant to the disclosure statement of the appellant and upon his pointing out as also the blood sample of the deceased, the hair clipping of the deceased and the clothes of the deceased which were seized vide memo Ex.PW-15/A were sent for scientific examination by a serologist and a scientific expert pertaining to an analysis of hair. Reports Ex.PW-18/F and Ex.PW-18/G were received as per which the blood group of the deceased was 'A' and that on the lungi which was got recovered by the appellant, human blood of same group was detected. Qua the spade, it was opined that human blood was detected but group thereof could not be ascertained.

12. The mother of the deceased who happened to be the mother of the appellant, for the reason the appellant and the deceased were real brothers, as also Ranbir Singh PW-1 who apart from Gyan Dev were present in the house and were cited as witnesses of the prosecution.

13. Needless to state the prosecution sought to establish the case through the testimony of Gyan Dev, at

whose instance the FIR was registered, Ranbir Singh and Sunehri Devi as also the fact that the lungi which was got recovered by the appellant was stained with human blood of the same group as that of the deceased as evidenced by the FSL Report; namely the evidence pertaining to the seizure and the report of the Forensic Science Laboratory.

14. At the hearing of the appeal, no submissions have been made pertaining to the disclosure statement of the appellant and the recovery of a blood stained lungi at the instance of the appellant as also the FSL Report and hence we note that one piece of incriminating evidence which has been brought on record is that the lungi which the appellant got recovered soon after the incident was stained with human blood, group whereof was the same as that of the deceased and that the appellant has not rendered any satisfactory explanation as to how said lungi was stained with human blood.

15. Unfortunately, Gyan Dev died before he could be examined as a witness and hence neither the prosecution could prove its case through his testimony nor the accused got an opportunity to test the veracity of the first information report.

16. Ranbir Singh the other brother of the deceased as also the brother of the appellant was examined as PW-1. He partially supported the case of the prosecution and partially turned hostile.

17. He deposed that they were 5 brothers. The accused was the elder brother. They all resided in House No.WT-2, Gali No.8, Baljit Nagar which was in the name of their father and that in May 2003 the house was under renovation. He i.e. Ranbir Singh, Ashok i.e. the appellant and Anil were contributing towards the reconstruction of the house. Prem i.e. the deceased also used to contribute towards construction of the house and that under influence of liquor sometimes Prem used to stop the construction work. That he i.e. Prem used to quarrel with the accused but no serious quarrel ever took place. At 11:00 PM in the intervening night of 6th and 7th May 2003 he had left the house after taking meal to take a walk and when he returned at around 12:30 midnight he saw the accused at the door of the house. The accused was perplexed and was saying “mar gaya – mar gaya”. He went inside and saw his brother Prem lying on the floor and was bleeding from his head. He found Prem unconscious and immediately took him to DDU Hospital where he was declared

dead.

18. On being declared hostile and cross examined by the learned APP, Ranbir Singh denied having ever told the police that the appellant fought with the deceased and during course of the fight, fatally assaulted him with a spade and ran away.

19. Sunehri Devi the mother of the deceased and the appellant was examined as PW-2. She deposed that the appellant killed her son Prem but immediately added that she had not seen the occurrence and that she learnt about the said fact later on. She deposed that she knew nothing about the quarrel and that she was renovating the house with her own funds and that her sons were not contributing a penny towards the construction.

20. The learned Trial Judge has convicted the appellant holding that from the testimony of PW-1 it was established that the appellant was in a perplexed state of mind and was uttering “mar gaya – mar gaya” and soon after hearing said uttering of the appellant when PW-1 entered the house he saw Prem seriously and grievously injured. Learned Trial Judge has opined that from said evidence it can safely be concluded that the appellant had caused the injuries on the person of his

brother. The learned Trial Judge has held that the testimony of SI Manoj PW-8, ASI Rawal Singh PW-17 and the investigating officer Inspector Ram Sewak PW-18 proves the recoveries of blood stained bed sheet, two bottles of coca cola and a pair of hawai chappal from the spot. It also proves that a spade stained with blood was recovered from the spot. The fact that the spade was stained with human blood, group whereof was the same as that of the deceased, has been held to be sufficient to prove that the spade was the weapon of offence. The fact that the lungi Ex.P-2 was recovered pursuant to the disclosure statement of the appellant and was found to be stained with human blood of the same group as that of the deceased has been held to be further incriminating evidence against the appellant.

21. The learned Trial Judge has concluded that the circumstances collectively prove that the appellant had committed the murder of his brother.

22. Learned counsel for the appellant has not been able to show any inherent infirmity of improbability in the testimony of PW-1.

23. If this be so, we concur with the view taken by the learned Trial Judge that the testimony of PW-1 establishes the

strange conduct of the appellant: being a perplexed state of mind. The testimony of PW-1 establishes that the appellant was uttering “mar gaya – mar gaya” when PW-1 saw him at the door of the house inside where the deceased had been fatally attacked. We concur with the view taken by the learned Trial Judge that the said conduct of the appellant is indicative of the fact that the appellant could be the one who had assaulted the brother.

24. The fact that there is no evidence of any third party entering into the house and committing the offence the could be factor get automatically converted into would be. Linking therewith the recovery of the blood stained lungi which the appellant was wearing at the time of the offence, the would be factor reaches the level of ‘has been proved to have committed the offence’.

25. We concur with the view taken by the learned Trial Judge that the evidence conclusively establishes that the appellant had assaulted his brother.

26. Homicide is clearly established, for the reason the deceased has been struck with blows, some of which were directed towards the skull resulting in injury to the brain and consequential death.

27. But, every case of homicide does not automatically get converted to a case of murder.

28. The distinction between culpable homicide amounting to murder and culpable homicide not amounting to murder is legion and if one were to sit down and catalog judicial opinions one could prepare volumes and volumes of reported case law.

29. If ingredients of Section 300 IPC are made out the inquiry has not to be abruptly closed, as has been done in the instant case. It is the duty of the Court to consider whether facts attract anyone out of the 5 Exceptions provided under Section 300 IPC. If anyone out of the said 5 Exceptions is attracted the offence would fall back as one of culpable homicide not amounting to murder.

30. Exception 4 to Section 300 reads as follows:-

“Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offence having taken undue advantage or acted in a cruel or unusual manner.”

31. Discussing Exception 4 and its interplay with Exception 1, an illuminative discussion is to be found in the decision of the Supreme Court reported as JT 2008 (1) 187 Ramesh Krishna Madhusudan Nayar Vs. State of Maharashtra

as also the decision reported as JT 2008 (1) SC 640 Shaikh Majid & Anr. Vs. State of Maharashtra & Ors., which decisions, we note, have highlighted the aforesaid positions with reference to an earlier decision of the Supreme Court reported as Sandhya Jadhav Vs. State of Maharashtra 2006 (4) SCC 653.

The discussion reads as under:-

“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.

The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of persecution 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 reasons 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's 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 the IPC. It takes two to make a fight. Heat of passion requires that there must be 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 and 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 a sudden quarrel and 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'."

32. The evidentiary value of a first information report stands on a different footing vis-à-vis statements of witnesses recorded under Section 161 Cr.P.C. Statements in an FIR can be used to corroborate and contradict the testimony of the maker of the complaint. This is settled law.

33. It is equally settled law that an accused would be entitled to the benefit which flows to him with reference to whatever is presented in evidence against him by the prosecution. An FIR is the lynch pin of a prosecution and is a vital document at every criminal trial.

34. It was thus incumbent upon the learned Trial Judge to have taken note of the case of the prosecution which commenced with reference to the FIR.

35. A perusal of the FIR shows that the origin of the incident was a sudden quarrel. How did it all start? As recorded in the first information report, the deceased wanted his separate share in the property which was opposed to by the other brothers. This had become a source of irritation. Two days prior, the deceased had got stopped the renovation work. In the intervening night when the incident took place, the deceased was sitting on the floor. The appellant came

there (unarmed) and enquired as to why was the deceased creating hurdles in the reconstruction of the property. The deceased retorted and misbehaved. What words were actually spoken and in what manner the deceased misbehaved with the appellant has not been expounded. The complaint further records that after the deceased misbehaved and retorted, the appellant got enraged and abused the deceased, who picked up a coca cola bottle lying on the room and this provoked a counter reaction from the appellant, who picked up a spade and gave blows from the handle of the spade on to the left temple of the deceased.

36. It is apparent that everything happened upon a sudden quarrel. It is not the case of the prosecution that the appellant came to the house armed with a spade. There is no pre-meditation. Exception 4 to Section 300 IPC is clearly attracted. The illuminating observations of the Supreme Court noted hereinabove highlighting the facets of Exception 4 to Section 300 are clearly attracted.

37. We accordingly hold that the prosecution has successfully established that the appellant committed culpable homicide not amounting to murder and as held by the Supreme Court on somewhat similar facts in the decisions

noted hereinabove the offence which stands made out is the offence punishable under Section 304 Part 1 IPC.

38. The appeal is partially allowed. The appellant is acquitted of the charge of having murdered his brother. But, the appellant is convicted for the offence of culpable homicide i.e. killing his brother and thus having committed the offence punishable under Section 304 Part 1 IPC.

39. The custodial sentence of 10 years would be appropriate sentence. We therefore impose the sentence to undergo rigorous imprisonment for 10 years upon the appellant.

40. Copy of this order be sent to the Superintendent Central Jail Tihar for making relevant entries in the record.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR, J.

JULY 09, 2009
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