

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

% *Date of Decision: 14th January, 2010*

+ **CRL.APPEAL NO.272/2004**

MUSHTAK Appellant
Through: Mr.Rajesh Mahajan, 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.(Oral)

1. The *rukka* prepared on the basis of the statement of Musharraf PW-1 reads as under:-

“I have been living in Delhi for the last eight months. I had worked on a Tata vehicle in Badarpur for two months earlier and for the last six months I have been working in Patodi House as a rickshaw puller and ply cycle rickshaw on hire from Mohammad Deen a cycle rickshaw contractor. I sleep on the pavement, along

with me there are number of boys who ply the cycle rickshaw on hire from Mohammad Deen, the contractor Jabir S/o Nabi Mohammad, r/o village Sirsol, Distt. Badayun, U.P. (deceased) was one of them. One Mustak S/o Razzak a resident of the village of Jabir also works as a rickshaw puller. We all sleep on the pavement near the rickshaw garage in Patodi House. Jabir (deceased) and Mustak (accused) used to gamble by the spin of the coin. They had quarreled over this on many occasions. Yesterday night, I along with Jabir and some other rickshaw pullers including Yunus S/o Sukhey and Latif had slept on the pavement opposite house No.1510, Patodi House. Before this at about 10.00 PM Jabir and Mustak had quarreled with each other over a quilt. Mustak had given beating to Jabir and had also threatened "KI MAIN TUJHE DEKH LUNGA" thereafter Jabir had gone to ply my rickshaw. I had returned at about 12.00 AM and had settled near Jabir in the quilt of Yunus. At that time Jabir was awake. I had brought cigarette for him. He had smoked cigarette where after we all had gone to sleep. About half an hour before dawn I was about to get up in order to urinate. I saw Mustak who was coming from the shop of Mohammad Deen (contractor) and was having a rickshaw Dhura in his hand. As soon as he came there he gave blow with Dhura on the head of Jabir. The first blow, however fell on the ground. I asked him "KYA KAR RAHA HAI" but in the meanwhile he lifted the Dhura and again gave a blow with the same on the head and right ear of Jabir, which were not covered with the quilt. He ran away after throwing away the Dhura and also left the chappal worn by him in this commotion. On receiving the Dhura blow Jabir cried. I made Yunus and Latif to wake up and told them that Mustak had given a Dhura blow on the head of Jabir and had run away. We saw blood coming out of the mouth and ear of Jabir. I tried to wake up the other rickshaw pullers who were sleeping on the pavement but was unable to do as they were fast asleep. We all got frightened. Jabir had stopped breathing. We picked up our quilt and settled at some distance in front of him. After it was dawn I went to Kucha Chellan to a relation of Jabir,

namely Irfan who works on a wooden tall and belongs to his village. I told him about this incident and brought him to the spot. In the meanwhile somebody had rung up the police. I am an eyewitness to this occurrence Mustak has committed the murder of Jabir with the help of a rickshaw Dhura over petty quarrel. Action be taken against Mustak. I have heard my statement, which is true.”

2. Musharraf has appeared as PW-1 and has supported the case of the prosecution. After going through his deposition and the cross examination, learned counsel for the appellant concedes that there are no serious embellishments in the testimony of Musharraf and there is no reason why his testimony should not be believed.

3. Vide impugned judgment and order dated 28.1.2003 the appellant has been convicted for the offence of murder.

4. It has been held by the learned Trial Judge that the testimony of PW-1 proves that there was previous hostility between the accused and the deceased and that the two had a quarrel at 9:00 PM. The weapon of offence used was a *dhura* which was a lethal weapon and can be dangerous. It has been held that the accused aimed the blow at the head; the situs of the injury was a vital part of the body and hence offence punishable under Section 302 IPC was made out.

5. With reference to the finding of there being past enmity, sufficient would it be to state that as per Musharraf, the accused and the deceased used to gamble by flipping a coin and on many occasions they would quarrel. The accused and the deceased are rickshaw pullers and are migrants to the city of Delhi. That they used to regularly gamble and quarrel does not mean that there was enmity between the two. The quarrel with relation to gambling has to be understood as one being the concomitant of the other. Gamblers do pick up petty quarrel with each other accusing that one of the two is cheating. These are petty quarrels and in our opinion the correct expression to be used is not the word '*quarrel*' but the word '*squabble*'.

6. As regards the issue that a dhura was used and the opinion of the learned Trial Judge that the dhura is a dangerous weapon, it may be noted that dhura is an axle. The sketch of the axle in question has been drawn by the doctor who conducted the post-mortem when he gave the opinion with respect to the injuries caused by the axle i.e. the opinion exhibited as Ex.PW-8/C.

7. The learned Trial Judge has thus incorrectly held that a lethal weapon of offence was used. It is apparent that a common object available with rickshaw pullers i.e. the axle has

been picked up and used. What we intend to convey is that the appellant has not procured a weapon as conventionally understood; intending to use the same for a particular purpose.

8. As per the post-mortem report Ex.PW-8/A, a single blow was inflicted on the skull of the deceased. It is true that a skull is a vital part of the body but what has been lost sight of by the learned Trial Judge is the fact that a single blow was inflicted when it was dark. As per Musharraf the blow was inflicted half-an-hour before dawn. We note that the date of the incident is the intervening night of 18th and 19th January 2001.

9. As held in the decision reported as Virsa Singh vs. State of Punjab AIR 1958 SC 465, where it is found that there was no intention to cause death and the death is a result of an injury, it has to be ascertained whether the particular part of the body on which the injury was caused was intended to be injured. Whenever assaults took place in darkness and a single blow is inflicted, view taken by the Courts is that it become difficult to return a determinative finding that the blow was directed on a particular part of the body or that it was intended to cause the injury on the part of the body where the injury has actually been caused.

10. In our opinion, the facts of the instant case do not make out a case of the offence punishable under Section 302 IPC being committed. The act of the appellant at best makes out the offence punishable under Section 304 Part-I IPC.

11. The appeal is partly allowed. The conviction of the appellant for the offence of murder is set aside and the appellant is convicted for the offence punishable under Section 304 Part-I IPC.

12. We inflict the sentence upon the appellant to undergo rigorous imprisonment for ten years.

13. The appellant shall be entitled to the benefit of Section 428 Cr.P.C.

14. Noting that the appellant is in jail since the time of his arrest i.e. 19.1.2001 we direct that a copy of this judgment and order be sent to the Superintendent, Central Jail, Tihar for necessary action.

15. For the benefit of the Superintendent, Central Jail, Tihar, we may note that as of today i.e. 14.1.2010 the appellant has undergone an actual sentence of 5 days less than 9 years. If appellant has earned remissions of 1 year and 5 days i.e. the remaining unexpired portion of the sentence imposed upon him,

the appellant would be set free forthwith if not required in custody in any other case.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**JANUARY 14, 2010
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