

*** HIGH COURT OF DELHI : NEW DELHI**
Judgment reserved on: February 09, 2010
Judgment pronounced on: February 19, 2010

+ Crl. Appeal No. 4 of 2004

% Zia-ud-din
Son of Late Mohd. Sher Khan ... Appellant
Through: Mr. S.K. Sharma, Mr. Jivendra
Katoch and Mr. Dhruv Kumar,
Advocates.

versus

State (NCT of Delhi) ... Respondent
Through: Mr. Amit Sharma, Additional Public
Prosecutor

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
 2. To be referred to Reporter or not?
 3. Whether the judgment should be reported in the Digest?
- No.

SUNIL GAUR, J.

1. Appellant herein has been convicted by the trial court for the offence of culpable homicide not amounting to murder and has been sentenced to rigorous imprisonment for ten years with fine for the offence under Section 304 (Part-II) of the

Indian Penal Code.

2. Prosecution case stands unfolded by Master Banti (PW-11), who along with his maternal uncle Dinesh had gone to the nearby shop to purchase candle as there was no electric light in the residential area at about 10:00 p.m. on 29th Day of May, 2001 and while they were returning, Mehndi, younger brother of appellant-accused started abusing aforesaid Dinesh and in the meanwhile, appellant-accused came there and started giving leg and fist blows to abovesaid Dinesh. According to this witness (PW-11), he immediately rushed to his house and had informed his parents about this incident and soon he along with his father returned at the spot and they saw appellant-accused and his co-accused were beating Dinesh. As per the prosecution version, many persons had gathered at the spot and injured-Dinesh was removed to the hospital, where he was declared as brought dead.

3. Regarding this incident, FIR No. 268/2001 under Section 302/34 of Indian Penal Code was registered at Police Station Timarpur, Delhi. After conducting the spot proceedings, Sub-Inspector Surya Prakash collected MLC of the deceased and thereafter had arrested the appellant/accused in this case. Post

Mortem Report of the deceased was obtained and the exhibits of this case were seized and were sent to CFSL for analysis. Investigation of this case stood completed with the filing of charge sheet for the offence under Section 302/34 of Indian Penal Code before the Sessions Court, whereas, co-accused - Mehndi was prosecuted before the Juvenile Justice Board, as he was said to be a juvenile on the day of this incident.

4. Trial of this case proceeded as appellant/accused chose to contest the murder charge framed against him in this case. Prosecution evidence consists of deposition of twenty witnesses and the material ones out of them, whose deposition has been referred to, during the hearing of this appeal, are Bunty (PW-11), his parents (PW-3) and (PW-9). Post Mortem Report of the deceased is Ex.PW-2/A, which gives the cause of death as shock due to sudden vagal inhibition caused by blows to the testis of the deceased. Sub-Inspector Surya Prakash (PW-19) and Inspector R.K. Rathi (PW-20) had conducted the investigation of this case.

5. The stand of the appellant/accused before the trial court was of denial of the prosecution case and of his being innocent. He had claimed that he has been framed in this case

by the police. Three witnesses, who had been got examined by the appellant/accused in his defence were his neighbourers and the stand taken by them was that appellant/accused was not present at the spot, when this incident had occurred. However, the defence evidence was not referred to, during the hearings of this appeal.

6. The trial of this case ended with the conviction of the appellant/accused for the lesser offence, i.e., under Section 304 (Part-II) of Indian Penal Code and the sentence imposed upon him, is under challenge in this appeal.

7. Learned counsel for the appellant had tried to dislodge the evidence of Buntty (PW-11) by contending that the time of this incident given by this witness, is 9.30 p.m., whereas, in the FIR of this case, the time of this incident mentioned is 10:00 p.m. It is urged on behalf of the appellant/accused that PW-3 – brother-in-law of the deceased, who had lodged the FIR of this case, has not supported the prosecution case. It has been emphatically argued by appellant's counsel that there was no previous dispute or enmity, nor there was any intention or knowledge on the part of the appellant/ accused that the alleged beating would result in death of injured-Dinesh. It has

been urged that the evidence of star witness (PW-11) does not show that appellant/ accused had given any injury on the private parts of the deceased. It is pointed out that the Doctor (PW-2) who had conducted the post-mortem examination on the dead body of the deceased, has stated that possibility cannot be ruled out of the injury, which is the cause of death in this case, being sustained by the person falling on the hard object.

8. According to learned counsel for the appellant, the alleged incident was on sudden impulse and no knowledge can be attributed to the appellant/accused that mere giving of kick and fist blows could by any stretch of imagination, result in the death of Dinesh. In the last, it is asserted on behalf of the appellant/accused that the offence, if any, committed by the appellant/ accused would fall within the ambit of Section 323 of Indian Penal Code and not under Section 304 (Part-II) of Indian Penal Code and for this submission, reliance has been placed upon a decision of the Apex Court in *“State of Karnataka vs. Shivalingaiah alias Handigidda”*, **AIR 1988 SC 115**. Thus, it is urged that the impugned judgment is unsustainable and is liable to be set aside.

9. Mr. Amit Sharma, Additional Public Prosecutor for the Respondent - State counters the arguments raised on behalf of the appellant/accused, by contending that the deposition of Bunty (PW-11) by itself is sufficient to prove the prosecution case. It is pointed out that the hostility of PW-3 - father of Bunty is of no avail, as PW-9 – mother of Bunty corroborates the version of this incident as narrated by Bunty (PW-11). It is also pointed out that the medical evidence corroborates the ocular version and the appellant/accused has been rightly convicted by the trial court for the offence under Section 304 (Part-II) of Indian Penal Code, as the fatal assault on Dinesh by the Appellant and his co-accused - Mehndi was without any provocation and that there is no merit in this appeal.

10. After carefully considering the arguments raised by both the sides and upon analysis of the evidence on record, this Court finds that the most crucial evidence is that of Bunty (PW-11), whose deposition is assailed by the defence by contending that there is variation in the timing of this incident as this witness has stated in his evidence that this incident had happened at 9:30 p.m. whereas in the FIR lodged by father of the deceased, the time of this incident given is 10:00 p.m. To

say the least, this so called variation is hardly of any consequence as it is no body's case that the FIR of this case has been ante timed. During the hearing of this appeal, it was not shown as to how inconsequential variance in the timing of this incident, adversely reflect upon the prosecution case.

11. It is true that this witness (PW-11) has not stated in so many words that any injury was caused to the deceased on his private parts, but it has to be kept in mind that this incident had taken place at night time and when the deceased was being assaulted by giving of kick and fist blows by the appellant, then in normal course of events, it is not expected that the witness would state with precision as to on which particular part of the body, the leg and fist blows were given. In a somewhat similar case of a deceased receiving injury by kick on his private parts and of his dying instantly at the spot, Apex Court in *"State of Karnataka vs. Mohamed Nazeer @ Babu"* **AIR 2003 SC 999** had set aside the conviction of the accused for the offence under Section 323 of the Indian Penal Code and had restored his conviction under Section 304 (Part-II) of Indian Penal Code, by aptly observing as under:-

"One has never come across nor can it be expected of the witnesses to state that the blow or kick was

aimed at the private parts or a particular part and that it then landed on that part”.

12. In the light of the above, non-specification by the eye witness (PW-11) as to on which part of the body, the deceased had received injuries, does not cause any dent in the prosecution case. Medical evidence needs to be looked into to gauge as to whether the bodily injuries received by the deceased were likely to cause his death or not. Out of the three injuries sustained by the deceased, the two which are material, are as under:-

“2. Bruise 4X2 cm over left scrotum on lower surface.

3. Bruise 3X3 cm , over right scrotum over lower surface. There was effusion of blood under injury No.2 and 3 alongwith contusion of both testis.”

13. The effusion of blood under aforesaid injuries no. 2 & 3 clearly shows that the intensity of the kick blows was quite severe, otherwise effusion of blood under injuries no. 2 & 3 with contusion of both the testes is just not possible. The presence of bruises at the seat of injuries no. 2 & 3, also indicate that the kick blows were inflicted upon the private parts of the deceased with considerable force by the appellant. The possibility of deceased receiving the injuries in question by

falling on a hard object, is ruled out as there is no whisper in the evidence of the eye witness (PW-11) or in the deposition of any other witness that deceased had fallen on any hard object. There is nothing in the medical evidence which creates a reasonable doubt about deceased sustaining the injuries in question by kick blows. Infact, the medical evidence advances and proves the prosecution case to the hilt.

14. Though it was urged on behalf of the appellant, that the happening of this incident was on sudden impulse, but the appellant does not disclose as to what was that impulse. Infact, the deposition of the eye witness (PW-11) reveals that the deceased was fatally assaulted by the appellant, without any provocation being there from the side of the deceased. This distinguishes the case of the appellant from that of '*Shivalingaiah alias Handigidda*' (*Supra*), where the deceased had put his hands on the shoulder of the respondent/accused with a view to make him sit down and all of a sudden, the accused had reacted by squeezing the testicals of the deceased resulting in his instantaneous death and in the facts of the aforesaid case, the conviction was enhanced from Section 323 to Section 325 of the Indian Penal Code.

15. Regarding the nature of offence committed, on the basis of the evidence on record, the reasoning of the trial court, to convict the appellant for the offence under the second part of Section 304 of the Indian Penal Code, appears to be logical and is as under:-

“Considering the events of the case, I find that kick blows were given on testis of the deceased, which proved fatal. It is a matter of common knowledge that testis is more sensitive part to a injury. If someone gives blows on testis, he would having a knowledge that such injury was likely to cause death. Herein the case blows were given on testis of the deceased as a result of which there was bruise on lower surface of left as well as right scrotum. Effusion of blood alongwith contusion on testis were also noted by the autopsy surgeon. These facts bring it over the record that blows with full force were given on the testis of the deceased. When accused gives blows with full force on the testis of the deceased, he is to be credited with the knowledge that the acts committed by him was likely to cause death of the victim. Therefore, it is apparent that accused had the knowledge that his act was likely to cause the death of Dinesh.”

16. After having scrutinized the evidence on record, I find no good reason to take a different view than the aforesaid one taken by the trial court. Consequentially, the conviction of the

appellant by the trial court deserves to be upheld and it is accordingly done. However, on the quantum of sentence, this Court finds that there is ample scope to interfere with the impugned order on sentence. Trial court has awarded the maximum substantive sentence for the offence in question. Although trial Court has taken note of the fact that appellant was a young man, aged about 23 years, having clean antecedents but proceeds to observe that the conduct of the appellant was so cruel that he had taken away life of the deceased. Observation of the trial court regarding cruel conduct of the appellant in committing the offence in question is not borne out from the records of this case. In the facts and circumstances of this case, it becomes quite clear that the trial Court has taken a harsh view and has inflicted highly excessive substantive sentence upon the appellant.

17. A perusal of the record of this case reveals that the appellant was aged about twenty one years when this incident took place and he had been suffering from tuberculosis and he had remained in custody during the trial of this case but during the pendency of this appeal, the substantive sentence imposed upon the appellant was suspended and he is on bail since

February, 2004. As per the Nominal Roll of the appellant he has undergone substantive sentence of about two years and six months and his conduct during his detention in jail, was satisfactory and it does not reveal appellant's involvement in any other criminal case.

18. In the peculiar facts of this case, this Court finds that the period of substantive sentence already undergone by the appellant would meet the ends of justice and it would be too harsh to now send the appellant behind bars to undergo substantive sentence of a year or so. If it is so done, then it would reflect a punitive approach and not a reformative one. By now appellant has settled in life and to upset him after nearly a decade or so, would not serve any purpose. Especially so, when he has faced the agony of the trial and appeal proceedings for long nine years or so. The offence punishable under the second part of Section 304 of the Indian Penal Code leaves a lot of discretion with the Court as the punishment to be imposed for the offence of this nature, may extend to ten years or in an appropriate case, the accused may be left with fine alone.

19. By adopting a humanistic approach, in view of the facts

emerging on record, the substantive sentence imposed upon the appellant is reduced to the period already undergone by him. However, to strike a balance, the sentence of fine is suitably enhanced to Rupees fifty thousand only. In default of the payment of the enhanced fine, appellant will have to undergo simple imprisonment for a period of six months. Out of the enhanced fine, if realized, Rupees forty thousand shall go to Smt. Urmila (PW-9), mother of the deceased.

20. This appeal stands partly allowed in the aforesaid terms. Trial Court be apprised of this order to ensure its compliance.

21. The appeal as well as pending application, if any, are accordingly disposed of.

Sunil Gaur, J.

February 19, 2010
pkb/rs