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

% Date of Decision: 15th April, 2010

+ **CRL.APPEAL NO.84/2010**

ASHOK & ORS. Appellants
Through: Mr.K.B.Andley, Sr. Advocate with
Mr.M.L.Yadav, Advocate

versus

STATE Respondent
Through: Mr.M.N.Dudeja, Advocate

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?
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J. (Oral)

1. The post-mortem report Ex.PW-20/A-1 records the following injuries on the person of deceased Mamchand:-

- "1. Marbling effect at back and front of both thighs.
2. Contusion on both thigh and leg.
3. Contusion Rt. temporal region."

2. Internal injuries are recorded as under:-

"Subdural Subarachnoid hematoma at right parietal region."

3. Cause of death opined is cardiac arrest as a result of head injury.

4. 7 accused, namely appellants Ashok, Vinod Kumar and Shiv Shankar as also Surender Kumar, Rajender Sharma, Sushil Sharma and Vijay were put up for trial for having entered into a conspiracy to commit the offence of abducting deceased Mamchand and in furtherance thereof inflicting such bodily injuries on him with the intention of causing death. Accused were also tried for the offence of causing disappearance of evidence by secretly throwing the dead body of Mamchand.

5. Whereas accused Sushil Kumar died pending trial, in view of the evidence led, Surender Kumar, Rajender Sharma and Vijay have been acquitted. Appellant Ashok Kumar, Vinod Kumar and Shiv Shankar have been convicted for the offence of having entered into a conspiracy to abduct the deceased and murder him as also the offence punishable under Section 201 IPC.

6. Appellants Ashok Kumar and Vinod Kumar are sons of appellant Shiv Shankar and as per record were aged 20 years, 29 years and 54 years respectively when the offence was committed.

7. In view of the testimony of PW-2, PW-5, PW-8, PW-11 and PW-19, learned counsel for the appellants concedes that the prosecution has successfully established that deceased Mamchand was accused of misappropriating 1 kg gold by the appellants and that the accused took Mamchand with them at around 1:30/2:00 PM on 11.7.1999 and that was the last seen of Mamchand as a living human being whose body was found outside Rohtak Medical Hospital at around 8:30 PM the same day i.e. 11.7.1999. Mamchand had died.

8. Post-mortem conducted on 14.7.1999 noted the external and internal injuries on his person as aforementioned in para 1 and 2 above.

9. As per the aforementioned witnesses, Mamchand was working as a Manager in the shop of the appellants where gold jewellery used to be manufactured.

10. As per the witnesses, the appellants suspected Mamchand of having stolen gold weighing 1 kg. At the intervention of the appellants probably some kind of an informal panchayat proceedings were held at the shop of one Ishwar Singh Pradhan in village Nangloi. After some arguments and discussions Mamchand left in the company of the appellants and never returned home.

11. When examined under Section 313 Cr.P.C. the appellants failed to render any satisfactory explanation as to when they parted company with Mamchand. The appellants denied being with Mamchand as claimed by the witnesses of the prosecution, which denial is obviously false and as conceded by learned counsel for the appellants, the testimony of PW-2, PW-5, PW-8, PW-11 and PW-19 proves that the appellants and Mamchand were at the shop of Ishwar Singh to sort out the issue of theft of 1 kg gold in the shop of the appellants and since Mamchand did not acknowledge having stolen the gold, appellants and Mamchand left the shop of Ishwar Singh and all of them walked away together.

12. Being satisfied with the quality of last seen evidence against the appellants and noting that the appellants have failed to render any satisfactory explanation as to when the deceased parted company with them, the only question which needs to be answered is: what is the offence committed by the appellants?

13. Now, the motive proved against the appellants is of suspecting Mamchand to have stolen jewellery weighing about 1 kg belonging to the appellants. From the injuries on the person of Mamchand, it is apparent that Mamchand was physically beaten, probably to extract a confession from him.

Save and except one injury on his head resulting in subdural subarachnoid hematoma, no other fatal injury is to be found. It is relevant that except for 1 injury on the temporal region, all others which are on the thighs and the legs are non-life threatening injuries. The injuries are contusions as also injuries resulting in marbling effect at the back and front of both thighs.

14. Said injuries show that Mamchand was being beaten on the legs; intention being to cause extreme pain so that Mamchand would speak. Apparently nothing else was intended by the appellants.

15. Under what circumstances Mamchand suffered the head injury would not be known to us for the reason there is no eye witness. But, two things could have happened. Either Mamchand fell when he was pushed or probably, overdoing what was intended to be done, one accused intentionally or accidentally hitting a blunt object on the head of Mamchand.

16. Now, the blunt object could be a stick or it could also be a fist blow or it could be the result of a fall on being pushed.

17. But, two empirical facts are before us. Firstly, there is no fracture on the skull. Secondly, the brain has not been damaged but subdural subarachnoid hematoma was detected.

Medical Jurisprudence guides us that there are three membranes inside the skull which enwomb the brain. These three membranes afford protection against injury to the brain. The outer most membrane, just beneath the skull, is called dura mater. Beneath the dura mater is another membrane called arachnoid mater and beneath the arachnoid mater is the third membrane called pia mater. Medical Jurisprudence further guides us that suffering head trauma means either something hitting the head or the head hitting a hard object resulting in extravasation of the capillaries. Depending upon the intensity of the trauma haemorrhage takes place. If the intensity is more, the haemorrhage of the pia mater takes place i.e. the internal most membrane gets affected. If the intensity is less, the arachnoid mater is affected resulting in subarachnoid hematoma. Where the impact is the least, the dura mater is affected resulting in subdural hematoma.

18. As noted above in para 2, in the instant case, subdural and subarachnoid hematoma was noted. Meaning thereby, the intensity of the blow on the head was not severe enough to impact the pia mater; it was more than the injury which would have only caused subdural hematoma i.e. the force used was in the mid category.

19. Instant case is of using force to extract a confession.

20. Even in the case of custodial deaths, where accused were beaten to extract confessions, the judicial trend has been to hold the police officers guilty of intending to grievously hurt or doing an act having knowledge that death may result due to their acts. We need not make a catalogue of various decisions pertaining to custodial death and the relatable intention while causing injury to extract confessions, for the reason, most of them have been noted by a co-ordinate Bench of this Court, in the decision reported as 153 (2008) DLT 693 (DB) State Vs. R.P.Tyagi.

21. Two persons named Ram Kumar and Mahender were severely assaulted in police custody. Both died before any meaningful medical aid could be extended. The finding of the Court of Sessions that the police officers were guilty of murder was set aside by the Division Bench holding that with reference to the injuries caused, at best knowledge could be imputed to the police officers that the victims may die. The police officers were convicted for the offence of culpable homicide not amounting to murder punishable under Section 304 Part II IPC.

22. We hold that in the instant case, the acts of the accused make out the commission of an offence punishable under Section 304 Part II IPC, for the reason, with reference to the injuries caused to Mamchand knowledge can be imputed to the accused as contemplated by Section 299(c) IPC.

23. What should be the sentence imposed?

24. In R.P.Tyagi's case (supra) a Co-ordinate Bench of this Court imposed sentence to undergo RI for 8 years and to pay compensation in sum of Rs.2 lacs.

25. Matter was taken up before the Supreme Court by the accused. Maintaining the decision of the High Court pertaining to the conviction for the offence punishable under Section 304 Part II IPC, the Supreme Court enhanced the compensation to Rs.6 lacs and reduced the sentence to undergo rigorous imprisonment for five years. The decision of the Supreme Court is reported as JT 2009 (15) SC 341 R.P.Tyagi Vs. State.

26. As noted above appellant Ashok was aged 20 years on the day when the offence was committed. Vinod Kumar was aged 29 years. Shiv Shankar was aged 54 years.

27. The father and his two sons have no past history of any criminal activity. They are not criminals as conventionally understood. By doing the instant act they are offenders at

law. In their over anxiety, the father and sons thought that they could extract a confession from Mamchand and recover their gold; unfortunately for them, their over-enthusiasm proved to be a misadventure.

28. Having convicted the appellants for the offence punishable under Section 304 Part II IPC which attracts a maximum sentence of rigorous imprisonment for ten years and for the reason the act of the appellants have been held by us without any intention to cause death or cause such bodily injury as is likely to cause death but with knowledge that their act was likely to cause death, we note the provisions of the Probation of Offenders Act 1958. Section 6 thereof reads as under:-

“6. Restrictions on imprisonment of offenders under twenty-one years of age-

(1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment but not with imprisonment for life, the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under section 3 or section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

(2) For the purpose of satisfying itself whether it would not be desirable to deal under section 3 or section 4 with an offender referred to in sub-section (1) the court shall call for a report from the probation officer and consider the report, if any, and any other information available to

it relating to the character and physical and mental condition of the offender.”

29. Suffice would it be to state that where the offender is under 21 years of age and is found guilty of having committed an offence punishable for imprisonment but not imprisonment for life, it is the duty of the Court not to sentence the accused unless the Court hold determinatively that it is not desirable to deal with such an accused under Section 3 or Section 4 of the Probation of Offenders Act 1958.

30. Section 3 and Section 4 of the Probation of Offenders Act 1958 read as under:-

“3 - Power of court to release certain offenders after admonition - When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code, or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition.

4. Power of court to release certain offenders on probation of good conduct -

(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the

case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under subsection (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

31. Thus, qua appellant Ashok, it would be our compulsion, to release him on probation, unless we hold that it is not desirable to extend benefit of Section 4 of the Act to Ashok.

32. There is no past record of Ashok being involved in any criminal activity. There is no evidence that Ashok is a vagabond. There is positive evidence that Ashok and his brother Vinod Kumar were living a meaningful life, earning their bread and butter, helping their father Shiv Shankar run jewellery business. During the pendency of the trial which commenced in the year 1999 and decision being rendered on 4.1.2010, all appellants were admitted to bail but were taken into custody when impugned decision was pronounced. During this period Vinod got married and has been blessed with two daughters.

33. We see no reason why Ashok should be denied the benefit of Section 6 of the Probation of Offenders Act 1958.

34. As regards Vinod and Shiv Shankar, save and except that they were more than 21 years of age and are not entitled to the benefit of Section 6 of the Probation of

Offenders Act 1958, the two would certainly be entitled to be considered whether the benefit of Section 4 of the Probation of Offenders Act 1958 should be extended to them.

35. Thus, whatever be the sentence which we may be inclined to impose upon appellants Vinod Kumar and Shiv Shankar, it would be our duty to consider the plea of learned counsel for the appellants that we should consider one of the two alternatives. Alternative one being to direct all appellants to undergo imprisonment for the period already undergone and pay reasonable compensation to the wife of the deceased, who we note has the liability of feeding 3 mouths i.e. her minor children. Alternatively learned counsel argues that the sentence which may be imposed upon appellants be kept in abeyance and the three be released on probation after entering into a bond for the period of their sentence requiring them to maintain peace and good behaviour.

36. If we do so, under either alternative all the appellants who are in jail would earn their freedom.

37. Sh.K.B.Andley, learned senior counsel, on instructions from the parokar of the appellants namely Jai Bhagwan who is the brother-in-law of Shiv Shankar i.e. whose sister is married to Shiv Shankar, states that on behalf of his clients his consent be taken on record that the father and two

sons would pay compensation in sum of Rs.6,00,000/- (Rupees Six Lakhs only) to the widow of the deceased and that the three appellants would jointly deposit the compensation with the learned Trial Judge within 7 days from today.

38. Accordingly, without quibbling on the issue of sentence for the reason even if we were inclined to sentence the appellants to undergo imprisonment for a period of five years which we were contemplating but being inclined to grant benefit of probation to the appellants, we dispose of the appeal modifying the conviction of the appellants and hence the sentence.

39. The conviction of the appellants for the offence punishable under Section 302 IPC is set aside and the appellants are convicted for the offence punishable under Section 304 Part-II IPC. The conviction of the appellants for the other offences are maintained. The order on sentence is modified with a direction that for all the offences the appellants shall stand sentenced to undergo imprisonment for the period already undergone with a further direction that the appellants shall jointly pay compensation in sum of Rs.6,00,000/- (Rupees Six Lakhs only) to the widow of the deceased within one week from today.

40. Compensation shall be positively deposited with the learned Trial Judge within a period of one week from today and on the same being deposited the learned Trial Judge would proceed to issue notice to the widow of the deceased for which purpose we direct SHO PS Nangloi to render all cooperation and assistance to the learned Trial Judge.

41. While imposing the sentence, we may frankly confess of being guided by the fact that the adventurism by the appellants was a one-time brush with the criminal law. The appellants had employed ten workmen who are without a job since the workplace of the appellants had to close since all male members of the family were in jail. In other words, ten families were rendered without a livelihood and were suffering for the misadventure by the appellants. We have also been influenced by the fact that it would be desirable to compensate the family of the deceased and the pecuniary loss to the appellants would sufficiently deter them not to be adventurous in future. We have attempted to blend penal justice of sending an accused to jail with compassionate justice of securing freedom of first time offenders with compensation to the victim.

42. In view of our present decision we direct that the appellants who are in jail shall be set free forthwith.

43. Copy of this decision be handed over to learned counsel for the appellants under signatures of the Court Master.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

April 15, 2010
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