

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

% *Judgment Reserved on: 20th January, 2010*
Judgment Delivered on: 22nd January, 2010

+ **CRL.APPEAL NO.763/2005**

MEHBOOB ALAM Appellant
Through: Mr.Sumeet Verma, Advocate

Versus

STATE NCT OF DELHI 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.

1. Though the point urged is short and one would have expected an instant decision, we were constrained to reserve the appeal for pronouncing judgment for the reason by the time arguments concluded there was hardly any time left to pen the judgment.

2. Arguments were concluded on 20.1.2010.

3. With reference to the testimony of Ct.Ram Mehar PW-3 and the testimony of HC Babu Lal PW-13 who had apprehended the appellant at the spot itself, learned Trial Judge has held that the prosecution has successfully established that the appellant is guilty of the offence of having murdered Ashiq on 2.5.2003.

4. Conceding that the testimony of the two police officers was without blemish, only submission urged by learned counsel for the appellant was that the act of the appellant read in conjunction with the post-mortem report Ex.PW-15/A of the deceased and the opinion of Dr.Manoj who prepared the post-mortem report pertaining to the cause of death would, at best, make out a case for conviction for the offence of culpable homicide not amounting to murder.

5. The post-mortem report Ex.PW-15/A notes and records the following external injuries on the body of the deceased:-

“1. Laceration middle of the forehead, 3 cm above right eyebrow running upwards measuring 3 cm x 1 cm.

2. Contusion left shin linear measuring 3 cm x 2 cm.

3. Contusion and pressure marks seen on the neck below thyroid cartilage with finger impression, one on the right side and three on the left side."

6. As opined by Dr.Manoj, cause of death is, to quote: *"the death could have been by head injury"*.

7. It has to be noted at the outset that the head injury is a laceration in the middle of the forehead 3 cm above right eyebrow running upwards measuring 3 cm x 1 cm.

8. Internal examination recorded in the MLC shows the internal injuries were sub arachnoid and subdural haemorrhagic over frontal region. The trachea and bronchi showed large amount of congestion and contusion with lungs congested. The stomach contained 100 ml liquid. What was the liquid? Apparently liquor. We say so for the reason, as deposed to by Ct.Ram Mehar PW-3 and as recorded in the seizure memo Ex.PW-3/E, from the spot where Ashiq was retrieved and the appellant was apprehended, a half liquor bottle and an empty glass were recovered. The appellant was medically examined on 3.5.2003 and as per MLC 'Mark A' was found intoxicated.

9. As deposed to by Ct.Ram Mehar and HC Babu Lal, the two police officers were posted at Police Post Ranjit Nagar

under the jurisdiction of PS Patel Nagar and were on patrolling duty, at 8:45 PM they reached Madhav Setu and heard sound of water splashing in the drain under the bridge. They looked down and saw the appellant holding a person by the neck and attempting to drown him by pushing him in the stream of water. They saw the appellant pushing a man 4 to 5 times in water i.e. they saw the appellant catch hold of a man from the scuff of his neck and thrust the head down. Obviously, the victim would push himself back and the appellant would re-push him down. HC Babu Lal jumped into the drain and disentangled the appellant. Thinking that water had congested the lungs of the victim they attempted to revive the victim by making him lie on the ground and tried to pump out the water but could not do anything. The Chowki In-charge was informed who in turn informed the SHO. ASI Rajinder Singh came to the spot and took the victim to the hospital. They handed over the custody of the appellant to the SHO who prepared the seizure memo.

10. A photographer was summoned who took 4 photographs Ex.PW-1/A-1 to ex.PW-1/A-4.

11. Drawing out attention to the said photographs learned counsel pointed out that the deceased is lying nearly nude with only a shirt which is upturned on the body. Counsel stated that as told to him by his client, the deceased attempted to sodomize the appellant who reacted when the indecent overture was made. Counsel stated that the appellant and the deceased were good friends and it is obvious that both of them were consuming liquor when aforesaid incident took place. Learned counsel highlighted the fact that 100 ml liquid was found in the stomach of the deceased and a half bottle of liquor and a glass were recovered from the spot. Arguing further, learned counsel urged that with reference to the post-mortem report and the opinion pertaining to the cause of death of the deceased the doctor has not recorded that the injury caused on the deceased and in particular injury No.1 was sufficient in the ordinary course of nature to cause death. Counsel urges that the opinion recorded by the doctor is that *"the death could have been caused by head injury"*. Thus, learned counsel urges that the offence made out is culpable homicide not amounting to murder, punishable, at best, under Section 304 Part-II IPC.

12. Learned counsel for the State urged that from the testimony of the two police officers it is apparent that the appellant intended to cause the death of the deceased whose head he was repeatedly thrusting inside the drain where water was flowing. Counsel urged that but for the two police officers intervening; the appellant would have certainly drowned the deceased. That the deceased died because his forehead struck some hard object resulting in internal injury to the brain is just a matter of chance. With respect to the plea urged by learned counsel for the appellant that the appellant had informed the counsel that during liquor session the deceased attempted to sodomize the appellant and the appellant acted in defence, learned counsel urged that no such defence has been predicated at the trial. The appellant has not even taken said defence when examined under Section 313 Cr.P.C.

13. From the photographs of the dead body of the deceased which were taken at the spot itself it is apparent that the deceased is completely naked save and except a shirt on his person which has been tucked up. That the deceased consumed liquor is a fact proved from the post-mortem report and that a half liquor bottle and a glass were recovered from

the spot. Even the appellant was intoxicated. Notwithstanding that the appellant has taken no such defence of an indecent exposure but the photographs do show an indecent exposure by the deceased.

14. As held in the decision reported as Kashiram & Ors. vs. State of M.P. (2002) 1 SCC 71, notwithstanding the fact that an accused has made no suggestions to the witnesses of the prosecution pertaining to a defence and has not even taken a defence while leading evidence in rebuttal, but if a probable defence emerges from the evidence led by the prosecution at a criminal trial pertaining to serious offences, it is the duty of the Court to see whether there is a possibility of something having happened as urged during arguments.

15. From the testimony of the two police officers it is difficult to draw conclusive opinion that the appellant was intending to cause the death of the deceased.

16. Absence of any possible motive even attempted to be proved is another handicap in the instant case. We add a caveat; absence of motive is not to be treated as fatal to the case of the prosecution, where otherwise, the prosecution has successfully established its case.

17. The distinction between murder and culpable homicide not amount to murder has been laid down by the Supreme Court in a number of decisions and we do not intend to be academic by referring to the case law. To summarize, we may state that the law declared is that if on referring to a Section 300 IPC, the Court is of the opinion that the killing does not come within any one of the four clauses than one has to refer to Section 299 IPC. If the killing comes within the second part of Section 299 IPC, that which relates to the intention of causing a bodily injury likely to cause death, it comes under Section 304 Part-I IPC and if there is no intention but only knowledge, that is to say, if there is no intention to cause death or a bodily injury likely to cause death, but only knowledge that death is likely to be caused, the offence is under Section 304 Part-II IPC. Cases under exceptions to Section 300 IPC will fall under Section 304 Part-I IPC if death is caused by an act done with the intention of causing death or done with the intention of causing a fatal injury. The offence would be murder if the act and the intention are covered by either of the four clauses of Section 300 IPC. Clause-1 and Clause-2 in their application do not create much problem. But

Clause-3 and Clause-4 in their applicability do create problems. The best way to appreciate Clause-4 is to keep in mind illustration (d) to Section 300 IPC.

18. Problems do arise when Clause-3 of Section 300 IPC, which refers to a *bodily injury sufficient to cause death* is to be contrasted with Section 299 IPC, where reference is made to *the bodily injury likely to cause death*. The distinction between the two is one of degree, for the reason the expression '*likely to cause death*' connotes that there is a less probability of death and the expression '*sufficient to cause death*' means that the probability of death is greater. But, it is easy to state so but very difficult to apply in relation to the facts.

19. This problem is extremely grave in India for the reason we find witnesses tend to use vague words while describing an event and do not state the same with precision. The prosecutors tend to make their witnesses speak without precision and the result is, if we may use the expression: '*blogged statements made by the witnesses*'. Even when the doctors are examined, in borderline cases, no questions are

put to the doctor concerned, who has conducted the post-mortem, to throw light on the grey areas.

20. This has happened in the instant case. A violent blow on the forehead while the victim was being thrust down and probably hit a hard surface has produced contusions and extravasation of blood on the surface of the subcutaneous tissue of the brain. A somewhat situation existed in the decision reported as Reg vs. Govinda ILR (1876) 1 Bom.342. It was held in the said case that the offence was culpable homicide not amounting to murder.

21. The facts of the case were that the accused in the said case kicked his 15 years old wife and struck her several times on which she fell on the ground and the accused put his one knee on the chest and struck her two or three times on the face. One of the two blows, having been violent, took effect on the girl's left eye producing contusion. The skull was not fractured (as in the instant case) but the blow caused an extravasation of blood in the brain and the girl died as a consequence, either on the spot or very shortly thereafter.

22. Taking guidance from the said decision, we hold that the offence committed by the appellant is culpable homicide not amounting to murder.

23. We sentence the appellant to undergo imprisonment for the period already undergone noting that as per the nominal roll of the appellant sent to this Court, as of today, the appellant has already undergone a sentence of 6 years 8 months and 16 days and he had earned remissions of 1 year 4 months and 3 days.

24. Copy of this order be sent to the Superintendent, Central Jail, Tihar with a direction that if not required in any other case, the appellant be set free forthwith.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

JANUARY 22, 2010
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