

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

Judgment reserved on: May 13, 2010
Judgment delivered on: May 17, 2010

+ **CRIMINAL APPEAL NO.945/2009**

ARSHAD @ ASHRAF **....APPELLANT**

Through: Mr.A.J.Bambhani, Advocate

Versus

STATE **.....RESPONDENT**

Through: Mr.Lovkesh Sawhney, APP.

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether 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 Digest ?

AJIT BHARIHOKE, J.

1. The appellant Arshad @ Ashraf has preferred this appeal against his conviction for the murder of his father Akhtar Ali in Sessions Case No.11/2006 FIR No.95/2006 Police Station Sarai Rohilla under Section 302 IPC vide impugned judgment dated 14.07.2009 and the consequent order on sentence dated 17.07.2009 pursuant to which the appellant has been awarded life imprisonment.

2. Briefly stated, case of the prosecution is that on 05-03-2006 around 4.40 a.m., DD No.4 was recorded at Police Station Sarai Rohilla

regarding a quarrel at jhuggi No.N-95/45, Shahzada Bagh, Inderlok, Delhi. A copy of the DD report was entrusted to ASI Ram Kishan (PW-6) for verification, who immediately proceeded to the spot of occurrence. There he found that the injured had been removed to Hindu Rao Hospital. He then visited the hospital and found that both the injured persons namely, the deceased Akhtar Ali and the appellant Arshad were in the operation theatre. ASI Ram Kishan met the complainant Kallu (PW-2) at the hospital and recorded his statement Ex.PW-2/A.

3. Kallu in his statement Ex.PW-2/A stated that on the fateful morning at around 4.30 a.m., he was woken up by some neighbours who told him that they had heard the noise of quarrel emanating from the jhuggi of the deceased. On this, they went to jhuggi No.N-95/45. Someone within the jhuggi was shouting "bachao bachao". They tried to open the door of the jhuggi but it was closed from inside. Thus, they broke open the door of the jhuggi. The moment the door was broken open, the appellant came out of the jhuggi and tried to run away. He was apprehended and when asked as to what had happened, the appellant told that the deceased was abusing the appellant's mother. On this, a quarrel ensued between him and his father and in the process he struck his father on the head with a grinding stone (*sil-batta*). On the basis of this statement, a formal FIR was registered. Akhtar Ali ultimately succumbed to his injuries in the hospital. The Investigating Officer went through the formalities of the investigation

and on completion thereof, challan against the appellant was filed in the Court.

4. The appellant was charged for the offences punishable under Section 302 IPC and Section 201 IPC for causing disappearance of the evidence. The appellant pleaded not guilty to the charge and claimed to be tried. On completion of the trial, learned Trial Court, relying upon the testimony of witnesses examined by the prosecution found the appellant guilty and convicted him under Section 302 IPC.

5. During the course of arguments, learned counsel for the appellant, on instructions from the appellant has submitted that the appellant admits that he had struck his father with a "*sil-batta*" (grinding stone) resulting in head injury to him which ultimately proved to be fatal. He, however, has confined his challenge in appeal to the conviction of the appellant for the offence of murder under Section 302 IPC and has submitted that in the given factual matrix of the case, the case of the appellant falls within Exception 4 to Section 300 IPC. As such, he could only be held guilty for the offence of culpable homicide not amounting to murder punishable under Section 304 Part-II IPC. Expanding on the argument, learned counsel for the appellant submitted that as per the case of the prosecution, a quarrel had taken place between the appellant and his father in which even the appellant sustained injuries. He submitted that cause for that altercation was that the deceased was abusing the mother of the

appellant and in the fit of anger, as a consequence of sudden quarrel, the appellant had given a "*sil-batta*" blow to the deceased which unfortunately fell on his head and proved to be fatal. Otherwise, there is nothing on the record to suggest any intention on the part of the appellant to cause death of the deceased.

6. Learned counsel for the State, on the other hand, argued that the appellant has been rightly convicted under Section 302 IPC. He has submitted that the appellant, as per the evidence, had struck the deceased with a heavy stone on his head which is vital part of the body. Therefore, from this it can be safely inferred that the appellant intended to cause death of his father.

7. In order to appreciate the rival contentions, we consider it necessary to extract Exception 4 to Section 300 IPC which defines the offence of culpable homicide amounting to murder:-

"300. Murder

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Exception 4-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 offenders having taken undue advantage or acted in a cruel or unusual manner."

8. The submission of learned counsel for the appellant is that there is no evidence on record to show that the appellant had any intention or motive to cause death of the deceased, who was his father. It has also come in evidence that the altercation resulting in fatal injury to the deceased was triggered when the deceased started abusing the mother of the appellant, which angered him and in that sudden quarrel in the fit of anger the appellant hit the deceased with a “*sil-batta*” which unfortunately struck the head of the deceased and proved to be fatal. He submitted that weapon of offence is a “*sil-batta*” which is not a conventional weapon like knife, pistol or lathi etc. which are used for committing murder or causing dangerous injuries to the victim. “*Sil-batta*” is a kitchen tool which was handy at the spot when the altercation took place and in the fit of anger as a result of sudden fight, the appellant struck the deceased with a “*sil-batta*” without having any intention to kill him. Therefore, his case squarely falls within the Exception 4 to Section 300 IPC. As such, he could only be held guilty for the offence of culpable homicide not amounting to murder punishable under Section 304 Part II IPC.

9. Learned counsel for the appellant, in support of his plea has referred to the judgments of the Apex Court. Learned Counsel submitted, by relying on **Tholan Vs. State of Tamil Nadu, 1984 SCC(Criminal) 164**, that where in a sudden fight a single blow given with a knife was held to fall within Section 304 Part II of the IPC, a sudden fight like the present one where a single blow is given on the

head would also invite the same provision. The relevant observations are reproduced as under:-

“There arose a situation in which appellant probably misguide by his own egocentric nature objected as to why Sampat should ask him to leave the place and in this background he gave one blow with a knife which landed on the right side chest of the deceased, which has proved fatal. Could the appellant be said to have committed murder? In other words, whether Part I or Part III of Section 300., I.P.C. would be attracted in the facts of this case. Even Mr. Rangam learned Counsel for the State of Tamil Nadu could not very seriously contend that the appellant intended to commit murder of Sampat. His submission was that at any rate appellant when he wielded a weapon like a knife and gave a blow on the chest, a vital part of the body, must have intended to cause that particular injury and this injury is objectively found by the medical evidence to be fatal and therefore Part III of Section 300 would be attracted. On this aspect, the decisions are legion and it is not necessary to recapitulate them here merely to cover idle parade of familiar knowledge. One can profitably refer to Jagrup Singh v. State of Haryana, Randhir Singh v. State of Punjab ,; Kulwant Rai v. State of Punjab and Hari Ram v. State of Haryana. To this list two more cases can be added Jagtar Singh v. State of Punjab and Ram Sunder v. State of U.P. Having regard to the ratio of each of these decisions, we are satisfied that even if Exception I is not attracted the requisite intention cannot be attributed to the appellant. But in the circumstances herein discussed he wielded a weapon like a knife and therefore he can be attributed with the knowledge that he was likely to cause an injury which was likely to cause death. In such a situation, he would be guilty of committing an offence under Section 304 Part II of the Indian Penal Code. Having regard to the circumstances of the case a sentence of 5 years would be quite adequate.”

10. Learned counsel also referred to the elucidation in respect of the 4th exception of Section 300 of the IPC made in **Ravindra Shalik Naik & Ors. Vs. State of Maharashtra, 2009 (2) Scale 354** as under:-

“6. The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution 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 acting 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'. These aspects have been highlighted in *Dhirajbhai Gorakhbhai Nayak v. State of Gujrat*, (2003) (5) Supreme 223, *Parkash Chand v. State of H.P.* (2004) (11) SCC 381,; *Byvarapu Raju v. State of A.P. and Anr.*, (2007) (11) SCC 218 and *Buddu Khan v. State of Uttarakhand SLP* (Crl.) No. 6109/08 disposed of on 12.1.2009"

11. Learned counsel for the appellant has also referred to **Pappu Vs. State of M.P.**, 2009 (4) Scale 521 and submitted that in the above

referred case, the exchange of hot words between the accused and the deceased resulted in a shot being fired resulting in an injury on the chest of the deceased which was held to be a fit case for conviction under Section 304 Part II of the IPC with a custodial sentence of eight years.

12. The legal principles enunciated above, in our considered view, would squarely apply to the facts of the present case. The case in hand is a case of a blow given by the appellant with a "*sil-batta*" in a sudden fight without any pre-meditation and in the heat of moment. There is no evidence of motive or previous enmity between the appellant and the deceased which is also ruled out because of the fact that both of them were living together in the same jhuggi. Therefore, taking into account the factual matrix of this case, we find it difficult to infer that the appellant had intention to cause death of the deceased or to cause him such injury which was likely to result in his death. He cannot even be attributed with the knowledge that his act will result in death of his father. Apparently, the appellant had acted in a sudden fight without pre-meditation and had not taken undue advantage of the situation nor had he acted in a cruel or unusual manner. Thus, we are of the view that the act of the appellant falls within Exception 4 to Section 300 IPC. The result is that the conviction of the appellant under Section 302 IPC cannot be sustained. It is, accordingly, converted into conviction under Section 304 Part II IPC.

13. Coming to the sentence, the appellant is a young man aged 23 years who is in incarceration for a period of more than four years since the date of his arrest. There is no history of previous conviction record against the appellant and as per his nominal roll, his conduct in jail is reported to be satisfactory. Keeping in view the aforesaid factors, the nature of offence and the circumstances under which the offence took place, we sentence the appellant to undergo rigorous imprisonment for a period of five years which would meet the ends of justice.

14. The impugned judgment and consequent order on sentence are modified to the aforesaid extent.

15. The appeal is disposed of accordingly.

AJIT BHARIHOKE, J.

MAY 17, 2010
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A.K. SIKRI, J.