

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

% Date of Decision: 09th February, 2010

+ **CRL.APPEAL No.19/2010**

PRADEEP KUMAR Appellant
Through: Ms.Charu Verma, 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? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J. (Oral)

1. Information was noted at 5:45 AM vide DD No.52-B at PS Alipur that a man has been injured with a phawra at J.B.Gupta Farmhouse, Bhaktawarpur Road.

2. Accompanied by Const.Surya Prakash, ASI Mohar Singh PW-9 left for the farmhouse and met none. HC Daya Chand PW-7 and Const.Ajit PW-8 from near a police picket informed him that the injured had been removed in the PCR van to Babu Jagjeevan Ram Hospital. He reached the hospital and found one Raj Kumar admitted in an injured condition and unfit for statement.

He met one Sita Devi PW-14 and her minor son Om Prakash PW-11 at the hospital and he recorded statement Ex.PW-9/1 of Om Prakash as per which the appellant had assaulted the injured. Making the endorsement Ex.PW-9/2 on the statement Ex.PW-9/1 he sent a rukka through Const.Surya Prakash for FIR to be registered. Approximately at the same time the injured died. The body was sent to the mortuary.

3. Being a case of suspected murder, investigation was taken over by Inspector P.C.Jha the Additional SHO of the police station i.e. PW-22.

4. Further investigation at the spot was conducted jointly by ASI Mohar Singh and Inspector P.C.Jha. Returning to the spot i.e. J.B.Gupta Farmhouse they lifted a phawra, a blood stained mattress and a blood stained pant from a room in the farmhouse. Photographer was summoned who took photographs of the place. The Additional SHO prepared the site plan.

5. Since Sita Devi and Om Prakash named the appellant as the assailant he was searched for and finally apprehended at his work place.

6. Needless to state, case of the prosecution hinged upon the testimony of PW-11 and PW-14 with respect to the act of the appellant.

7. Whether the act of the appellant showed commission of an offence punishable under Section 302 or Section 304 Part I or Section 304 Part II became a matter of issue to be determined with reference to the post-mortem of the deceased.

8. Dr.Anil Shandil PW-13 who conducted the post-mortem on the dead body of the deceased noted the following 3 injuries:-

“1. Stitched wound right post auricular region 5 cm from right ear posterior aspect, 4 cm in length with three stitches on opening the stitches margin contused irregular lacerated with dried up blood and clots along margins.

2. Stitched wounds over right parietal region 3.5 cm long. On opening the stitches margins contused irregular lacerated with dried up blood and clots along margins.

3. Right eye black eye (periorbital bruising) on incision underneath tissues effused with blood and clots.”

9. He recorded the same in the post-mortem report Ex.PW-13/A and gave the opinion that as a result of injuries 1 and 2 the skull got fractured. Subdural and sudarachnoid haemorrhage resulted. Death was caused due to cranio ceriberal damage. All injuries were opined to be ante mortem and could be possible with a hard blunt object.

10. At the trial PW-11 Om Prakash and PW-14 Sita Devi, deposed in harmony with reference to the past relationship shared by Sita Devi and the accused. Both of them were common in their deposition that after the husband of Sita Devi left her, she found employment in a cooker factory where the appellant was also a co-worker. The appellant was on visiting terms with her. The son Om Prakash PW-11 went a step further and stated that the appellant had lived with his mother for about 1½ years. Both deposed commonly that when the daughter of Sita Devi reached marriageable age the appellant was told by Sita Devi to leave the house but the appellant used to regularly visit the house of Sita Devi.

11. With respect to what happened in the wee hours of the morning of 26.10.2005, both stated that Sita Devi did not return home from J.B.Gupta Farmhouse, Village Ibrahimpur where she had taken employment a few days earlier. The appellant had spent the night in the house of Sita Devi and in the morning asked Om Prakash as to why his mother had not returned. Om Prakash informed him that since the farmhouse was far away and his cousin Manoj who used to escort his mother has not come, probably his mother has stayed at the farmhouse. Om Prakash and the appellant reached the farmhouse

and knocked the door of a room. Sita Devi opened the door. On seeing the deceased inside, the appellant assaulted the deceased with a phawra, using the blunt side and not the side having metal thereon. He fled after assaulting the deceased. Whereas Om Prakash stated that he ran to the police picket nearby, PW-14 stated that both ran to the police picket nearby and informed about the incident. HC Daya Chand PW-7 and Const.Ajit PW-8 at the police picket stated that the mother and son had come to the police picket at about 5:30 AM in the morning of 26.10.2005 had informed about the incident. The two were not cross examined.

12. It is apparent that while deposing in Court PW-11 has made a slight blemish pertaining to only his going to the police picket. The same is immaterial.

13. While deposing in Court, PW-11 stated that before the deceased was removed in a PCR van to the hospital the police officers questioned him. He denied that his statement was recorded in the hospital. He stated that his mother did not go to the hospital.

14. But we note that as per Sita Devi she also went to the hospital but not in the PCR Van as there was no space inside. She went in a scooter. It is apparent that

the child and the mother have not contradicted each other on said issue.

15. On the issue where the statement Ex.PW-9/1 of Om Prakash was recorded, notwithstanding Om Prakash stating that no such statement was recorded in the hospital and that his statement was recorded in the farmhouse we note that when ASI Mohan Singh PW-9 deposed that he recorded the statement of Om Prakash in the hospital, said statement was not challenged during cross examination.

16. While narrating the facts aforenoted we have noted slight variations in the testimony of the mother and the son for the reason the learned counsel for the appellant has urged that the same are material contradictions.

17. We disagree. It is apparent that these are minor variations. It has to be taken note of that when Om Prakash deposed in Court he was aged 12 years. Thus, he was about 11 years old when the crime was committed.

18. PW-14 is a domestic help. The mother and son come from a humble background. They are poor people. Their utterances have to be viewed as utterances of common humble folks on the street and not literate persons well articulated.

19. No motive for the mother and the son falsely implicating the appellant has emerged.

20. Faced with the evidence aforenoted and the fact that what was sought to be highlighted as variations of a material nature have turned out to be mere specs of sand, learned counsel for the appellant falls back on the only argument which is worthy to be considered.

21. With reference to the fact that it hardly matters where a man sees his wife in the company of another man or sees his mistress or the one who he loves in the company of another, overcome by passion he assaults the man in whose company he sees his beloved and the fact that the lethal part of the phawra i.e. the side having metal piece was not used to inflict the injuries but the blunt side was and that only 2 injuries were caused, learned counsel urges that it is apparent that the appellant was overcome, if not by a grave and a sudden provocation, at least by a sudden burst of emotion and considering the fact that the blunt side of the phawra was used to assault it is apparent that to wreck vengeance and anger the appellant only intended to cause injury to the deceased and no more.

22. Learned counsel draws attention of this Court to the decision reported as 2005 (9) SCC 650 Thangaiya

Vs. State of TN where only one injury with a stick was caused on the right parietal region resulting in death due to brain being damaged; conviction sustained was for the offence punishable under Section 304 Part I IPC. In the decision reported as JT 2008 (5) SC 407 Kesar Singh & Anr. Vs. State of Haryana where the blow on the head was inflicted from the blunt side of a spade, conviction sustained was for the offence punishable under Section 304 Part I IPC. In the decision reported as AIR 1974 SC 1351 Thakarda Lalji Gamaji Vs. The State of Gujarat where two blows were inflicted on the head with the blunt side of a scythe and other blows were on the arm, the injury resulting was fracture of the temporal bones and the brain suffered damage; noting that the sharp side of the scythe was not used but the blunt side thereof was used to cause injury, conviction was sustained for the offence punishable under Section 304 Part I IPC.

23. Factoring the circumstances in the instant case that the appellant never went armed; the appellant went with Om Prakash to bring back Sita Devi to her house; on seeing Sita Devi inside the room with the deceased the appellant having a soft corner for Sita Devi got enraged and picked up the phawra lying at the spot and used not the lethal side thereof but the non-lethal side thereof,

taking guidance from the 3 decisions aforementioned we conclude that the offence committed by the appellant is punishable under Section 304 Part I IPC.

24. On the issue of sentence, learned counsel urges that in the decision reported as AIR 1998 SC 1007 State of UP Vs. Lakhmi, the Supreme Court had inflicted the sentence to undergo imprisonment for 6 years for the offence punishable under Section 304 Part I IPC.

25. We note that the general trend of the Courts is to sentence the accused to undergo RI for 10 years pertaining to offence punishable under Section 304 Part I IPC unless there are some mitigating factors.

26. In the decision cited, the victim was the wife. Evidence established that the accused had seen something lascivious between his wife and PW-2 and on account thereof his mind became suddenly deranged; the sentence of 6 years was imposed.

27. There is no evidence of the kind as was before the Supreme Court in Lakhmi's case (supra) to reduce the sentence with reference to the moral worth of the action of the deceased to provoke the crime.

28. In our opinion, a sentence to undergo RI for 10 years is the appropriate sentence to be imposed upon the appellant.

29. The appeal stands disposed of by partially allowing the same. The conviction of the appellant for the offence punishable under Section 302 is modified.

30. The appellant is convicted for the offence punishable under Section 304 Part I IPC and sentenced to undergo RI for 10 years. Needless to state, the appellant would be entitled to the benefit of Section 428 Cr.P.C.

31. Since the appellant is in jail, copy of this order be sent to the Superintendent Central Jail Tihar, to be made available to the appellant.

32. Before concluding we place on record our appreciation for the prompt assistance rendered by learned counsel for the appellant and the State.

33. The appeal filed in the month of January 2010 and which was listed for preliminary hearing on 12.1.2010 has been decided within just over one month of its filing due to the unfailing cooperation and assistance rendered by learned counsel.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**FEBRUARY 09, 2010
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