

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

PRONOUNCED ON: 26.08.2011

+ CRL.A. 673/2011 & Crl.M.(Bail) No.939/2011

NOOR MOHD. Appellant

Through: Mr. Jitender Sethi with Mr.Amit Yadav, Advocates

versus

STATE NCT OF DELHI Respondent

Through: Mr. M.N.Dudeja, APP for the State

AND

CRL.A.850/2011 & Crl.M.(Bail) No.1209/2011

DALIP KUMAR Appellant

Through : Dr.I.S.Chaudhary with Mr. Ajay Chaudhary, Advocates

Versus

STATE GOVT. OF NCT OF DELHI Respondent

Through : Mr. M.N. Dudeja, APP for the State

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE G.P. MITTAL

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. These appeals were listed for considering the applications for suspension of sentence. However, with consent of counsel for the parties, the appeals were heard finally for disposal.

2. The present judgment will dispose of two appeals by Noor Mohd. and Dalip. They were accused of having committed offence punishable under Sections 302/34 IPC, and convicted by the learned ASJ in his judgment dated 13.05.2011 in S.C. No. 58/2008. The appellants were sentenced to undergo life imprisonment and also fined for committing the crime.

3. The prosecution allegation was that the police received information about a quarrel at H. No. 35/85, Trilokpuri at about 7.50 PM. ASI Kishan Lal Singh, PW-5 along with Constable Anil, PW-14 rushed to the spot where they found blood splattered all over the place. They were informed that the injured Moinuddin had been taken to Mehraj Nursing Home. When the policemen reached that place, they were informed that Moinuddin had died and that a PCR Van had taken him to LBS Hospital. It later transpired that PW-12 ASI Rajinder Prasad, who was in the PCR had taken the injured to the LBS Hospital. A D.D. entry (Ex. PW-4/A) had been recorded with regard to the quarrel which occurred in the vicinity of Mehraj Nursing Home. PW-5 reached LBS Hospital and collected the Medico-Legal Certificate (MLC) (Ex. PW-15/A), prepared by Dr. Mayank Bansal where the injured Moinuddin (hereafter called “the deceased”) was brought dead. The statement of Rahisuddin, PW-3, the brother of the deceased, was recorded, being Ex. PW-3/A.

4. According to the prosecution, PW-3 was the material eye witness present when the incident occurred. He stated that he had been present outside his house when the attack took place. He saw his neighbors Dalip and Imran (latter a juvenile) quarelling with the deceased. He tried to intervene and pacify them and took the deceased inside his house. According to him, 5 minutes later, Dalip and Imran went to his house and

called-out the deceased. Dalip had a knife; Imran caught hold of Moinuddin's hands. PW-3 stated that Dalip gave knife blows to the deceased on his left thigh, stating, "*Aaj mai tujhe jaan se maaroonga. Toone aaj phir mere kaam mein taang adai hai*". It was stated that when Dalip again tried to inflict the knife blow on the deceased's abdomen, the latter tried to fend off the blow, to save himself. PW-2 said that he reached the spot to save his brother and on seeing him, Dalip and Imran, along with their associates ran away from the spot. According to the materials placed on the record by the prosecution, Moinuddin died around 08.30 pm. Dalip was arrested on 27.12.2007; the Disclosure Statement made by him led to the arrest of co-accused Imran and Noor Mohd. The juvenile accused Imran surrendered in Court on 15.01.2008, and was arrested. After completion of investigation, the appellants and Imran were charged with committing murder and offence punishable under Section 302/34 IPC. The juvenile Imran was referred for inquiry and trial to the Juvenile Justice Board (JJB).

5. The appellants denied the charges and claimed trial. During the proceedings before the Trial Court, the prosecution examined 21 witnesses. After considering the testimonies of witnesses and the materials placed on the record, the Court convicted the present appellants.

6. It is argued on behalf of the appellant Noor Mohd. that PW-3 is an unreliable witness. Learned counsel placed reliance on the testimony of PW-1, the statement recorded at the initial stage of the investigation, i.e. PW-3/A, and submitted that the statement of Rahisuddin under Section 161 Cr.PC did not name Noor Mohd. or the alleged role played by him. He did not even mention his presence. Learned counsel emphasized that Noor Mohd. was sought to be implicated in the alleged attack and the crime later, i.e. 31.05.2008 when a supplementary statement was recorded. It was submitted that similarly, the FIR in this case (Ex. PW-4/C) does not mention Noor Mohd. These circumstances not only cast a grave suspicion over the prosecution story but even falsified its claim so far as the involvement of Noor Mohd is concerned. It is submitted that the omission to name Noor Mohd. by Rahisuddin, who claimed to have witnessed the attack in Ex. PW-3/A, the earliest version recorded by any witness or even name him in

the FIR, ought to have alerted the Trial Court in disbelieving about the allegations leveled against him. In overlooking these aspects and in proceeding to accept the prosecution version, urged counsel, the Trial Court committed a grave error of fact in appreciation of evidence.

7. It is urged by learned counsel for Dalip that PW-3 could not be believed because there was no corroborative material in support of his assertion about having accompanied his brother to the hospital. Reliance was placed upon the MLC (Ex. PW-15/A), which is silent about the name of the injured; besides it recorded that the police had taken the body. Learned counsel argued that if indeed Rahisuddin had witnessed the incident and had either accompanied the PCR or had gone with it, there was no reason for the hospital authorities to exclude the mention of his name. Learned counsel emphasized that in this context, the time-lag between the alleged occurrence (07.30 pm) and the recording of the FIR at 10.50 pm assumed importance. It was emphasized here that if PW-3 was present and his version were to be believed, Moinuddin died at 08.30 pm the same evening. If again the prosecution version – and the deposition of PW-3 were to be believed, he was at hand to record the statement throughout. In these circumstances, the unexplained delay of more than 2 hours in registering the FIR was vital to the prosecution story.

8. It was argued in the alternative that even if the prosecution can be said to have established the attack, the Trial Court could not have, in the circumstances of this case, convicted the appellant Dalip under Section 302 IPC. Learned counsel highlighted that the deceased had received only a single knife blow on his thigh. He also relied upon the deposition of PW-3 to argue that when the deceased was helpless, the knife blow was given to a non-vital part of the body even though the appellant could well have inflicted the knife injury on the head or chest or any other vulnerable part. Learned counsel further emphasized that in cross-examination, PW-3 admitted that Dalip did not attack deceased Moinuddin after his hands were released by Imran. It was urged that having regard to these peculiar circumstances, the facts at the most pointed to the appellant inflicting the injury which he knew, could have resulted in Moinuddin's death and thus attracting the provisions of Section 304 Part-II.

9. From the previous discussion, it is apparent that the prosecution hinged entirely on the eyewitness testimony of PW-3. It would be relevant, therefore, to reproduce material portions of that witness's testimonies, which are as follows:

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Rahisuddin s/o Islamuddin r/o H. No. 35/42, Trilokpuri, Delhi.

On S.A.

I have motorcycle repairing shop at Mata Sundri Road. On 23.12.07, at about 7.30 p.m, I was present at my house bearing no. 35/42, Trilokpuri, when my younger brother Mainuddin was standing outside the house near the park. I heard noise and I came out from my house and I saw that two boys namely Imran and Dalip were quarrelling with my brother Mainuddin. I intervened the matter and I took my brother to the house, while Dalip and Imran left from the spot. After about 5-7 minutes, Dalip and Imran, accused present in the court today came alongwith their associates and Dalip called my brother out of the house. After hearing the call, I also came out and saw that Dalip was holding knife in his hand and Imran caught hold hands of my brother and Noor was saying “jan se mar sale ko”. Accused Noor is present in the court today. I also identity accused Dalip and Raju who are present in the court today. Accused Imran is not present. I can identify him if shown to me. (Accused Imran being juvenile tried separately by the Juvenile Court). Thereafter, accused Dalip made a knife blow on left thigh of my brother and thereafter while he was making the other blow on the stomach of my brother, my brother in order to save him put his hands in between which resulted injuries on the back side of right palm. Thereafter, I raised alarm ‘Bachao Bachao’ and the accused persons ran away from the spot. I took my brother to nearby Mehraj Nursing Home. The Doctor gave first aid to my brother and stitched the wound. Thereafter, at about 8.30 pm my brother expired.....

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.....My brother went out after about 5-7 minutes after the first incident and that is too, on the calling of accused Dalip. Three persons came to my residence. All the three persons remained outside the house. At the time of calling, my brother was at home. My house is 1 ½ storey. I was also present at home but at the first floor and my brother was on the ground floor. After hearing the noise, I came out and then I saw the accused. It is correct that initially the quarrel took place near the park and there lot of people collected and we were separated by them. It is correct that deceased went out first and then I followed him. The

difference between going out of my brother and myself hardly could be 1-2 minutes. My brother was wearing pant and shirt at that time.

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.....Accused Imran had caught hold the hands of my brother by keeping his hands on his back side and at that time, my brother was in standing position. The accused Dalip was also in standing position and he gave knife blows while in the same position. It is correct that my brother and accused Dalip were fact to face. I did not take the notice from which direction, the knife blow were given on the thigh, whether it was up to down, down to up, left to right or right to left. Same is the position with regard to second knife blow. At the time of incident, I was at the distance of about 3-4 feet. The incident has taken place at 4-5 steps from the outer door of the house. After the receipt of knife blows, my brother fell down at the same spot.....

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.....My first statement was recorded by police by making the detailed enquiry. It is correct that I had not mentioned the name of accused Noor Mohd. in my first statement.

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10. Now so far as Noor Mohd. is concerned, the above testimony would disclose that the witness himself admitted to not having named him when the incident was reported, to the police. The statement recorded under Section 161 Cr.PC (Ex. PW-3/A) is also silent and has not implicated Noor Mohd. or named him. It appears from the record that Noor Mohammed was named much later in May 2008 – more than 5 months after the incident, in a supplementary statement recorded by the police. He was also arrested much later, i.e. on 04.06.2008 – evidenced by Ex. PW-9/F. Learned APP did not proffer any explanation as to how Noor Mohammed was implicated in the crime, considering that the solitary eyewitness Rahisuddin PW-3 omitted mentioning him in his first statement under Section 161 Cr.PC and most significantly, the absence of his name as an accused in the FIR. In view of these facts, this Court is of the opinion that the Trial Court fell into an error in overlooking these material circumstances. The facts on the record show that the assault took place at 07.30 pm; the injured Moinuddin was taken to hospital immediately and later declared dead. He was shifted to a second hospital around 09.15 pm. The FIR was

recorded at 10.50 pm. If PW-3 had witnessed the incident and was able to recapitulate the events coherently, as he seems to have done in the statement, Ex. PW-3/A, the omission to name Noor Mohammed is not only important; it is in fact fatal to the prosecution version against that accused. We, therefore, are of the opinion that Noor Mohd.'s name was included later for unexplained reasons best known to the prosecution. He clearly did not participate in the attack nor was in any manner associated with the incident. His appeal, therefore, has to succeed.

11. As far as the appellant Dalip is concerned, the submission made regarding the omission to mention Rahisuddin in the MLC, in this Court's opinion, are insubstantial. Often the relatives who accompany the injured who is a victim of a crime and depose later in the proceedings do not find mention in the medical documents, such as the MLC. The reason most often explained for this omission is by saying that the doctors or any other paramedics who record the MLC are more concerned with the treatment to be given to the injured at that moment rather than noting the names of those who accompany him. This Court notices that PW-3 is consistent in his version – even in his cross-examination that he followed the injured Moinuddin, who was taken in the PCR. This circumstance itself affords an explanation because the MLC (Ex. PW-15/A) records that the injured was taken to the hospital by PCR Official ASI Rajender. It might well have been that when he was admitted, PW-3 had not reached or having reached, was searching for the place where his brother had been taken.

12. As far as the second argument, i.e. the delay in the recording of FIR is concerned, we would notice at this stage that the injured was first taken to Mehraj Nursing Home; he was thereafter taken to LBS Hospital and the MLC recorded at 09.10 pm. In these circumstances, the IO, PW-1, stated that he went to the hospital and then went back to the spot after which PW-3's statement was recorded, and thereafter, the FIR was lodged. Although the recording of FIR has to be at the earliest opportunity, there is no inflexible rule that immediately upon receipt of information, the police has to invariably put-down the entire account. In this case, the earliest incident are the D.D. entries (Ex. PW-4/A) proved by the prosecution, which led to the MLC, the preparation of the *Rukka*, recording

of PW-3/A and then the recording of the FIR (Ex. PW-4/C) at 10.50 pm. In these circumstances, the Court discerns no delay in the registration or lodging of the FIR.

13. This Court is of the opinion that the last submission of Dalip has considerable merit. Dalip, according to PW-3 gave knife blow on the thigh of Moinuddin when the co-accused (the delinquent) Imran had restrained both his (i.e. the deceased's) hands. Furthermore, this Court notices that Dalip had inflicted single knife blow. The other injury mentioned by PW-15 in the Postmortem Report (Ex. PW-15/A) is a knife injury on the back of the deceased's palm – apparently received when he sought to ward-off a blow. The testimony of PW-3 also is that after receiving the knife injury (on the thigh), Moinuddin fell-down and the accused fled the spot. What is important is that the solitary knife injury – which eventually proved to be fatal – was not on a vital part of the body and even though Dalip had the opportunity to inflict more serious injuries on the vulnerable spots, such as the neck, head or chest, he did not do so. He also did not inflict any injury after that one knife blow.

14. The difference between an offence punishable under Section 302 and one punishable under one or the other part of Section 304 is narrow, and appreciable on a close examination of the facts in each case. Where death occurs as a result of a solitary serious injury, inflicted by a dangerous weapon, more often than not, the site of the injury and the severity with which it is inflicted determines the nature of the homicidal attack, persuading the Court to convict the offender under either Section 302 or under Section 304, IPC. It would be relevant in this context, to consider a few decisions of the Supreme Court to see whether the facts proved here amount to offence punishable under Section 302, or under Section 304. In the judgments reported as *Tholan v. State of Tamil Nadu* 1984 (2) SCC 133; *Dashrath Singh v. State of U.P.* 2004 (7) SCC 408; *Kulwant Rai v. State of Punjab* 1981 (4) SCC 245; *Kashiram v. State of M.P.* 2002 (1) SCC 71 and *Chamela v. Govt. of NCT* (Crl. A. No. 545/2004 dated 13.04.2010) this aspect was considered, and the approach of criminal courts, while dealing with fatal injuries, indicated. In *Tholan (supra)*, while converting the conviction for murder into one under

Section 304 Part-II IPC, in a case involving one knife-blow, the Supreme Court held as follows:

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9. *Learned Counsel for the appellant contended that having regard to the genesis of the occurrence and the surrounding circumstances and the fact that one blow with a knife was given which happened to land on the chest it cannot be said with reasonable certainty that appellant intended to commit murder of deceased Sampat or appellant intended to cause the particular injury and the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.*

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12. *It is equally not in dispute that appellant gave only one blow with a knife. Appellant had no quarrel or dispute with deceased Sampat. It is not shown that deceased Sampat had anything to do with the chit organised by K.G. Rajan. No malice has been alleged to have been entertained by the accused towards deceased Sampat. The incident occurred on the spur of the moment. It appears that the house of the deceased Sampat was somewhere near the house in which the organisers or at least one of them was residing. Appellant had his dispute and grievance with the organisers of the chit. It is the prosecution case that accused abused organisers of the chit. Deceased Sampat is not shown to be the organiser of the chit. Probably when the deceased Sampat told the accused not to misbehave in the presence of ladies and not to use vulgar and filthy language the appellant retorted by questioning the authority of Sampat to ask him to leave the place. Presence of Sampat is wholly accidental. Altercation with Sampat was on the spur of the moment. Even the meeting was accidental. There arose a situation in which appellant probably misguided 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 AIR 1981 Randhir Singh v. State of Punjab AIR 1982 ; Kulwant Rai v. State of Punjab AIR 1982 and Hari Ram v. State of Haryana AIR 1983. To this list two more cases can be added Jagtar Singh v. State of Punjab 1983 Cri LJ 852 and Ram Sunder v. State of U.P. Crl. A. No. 555/83 decided on 24-10-83. 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 Penal Code. Having regard to the circumstances of the case a sentence of 5 years would be quite adequate.

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15. In *Kulwant Rai* the Court reiterated a similar approach:

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3. When the matter was before the High Court it was strenuously urged that in the circumstances of the case part I of Section 300 would not be attracted because it cannot be said that the accused had the intention to commit the murder of the deceased. In fact, that is conceded. More often, a suggestion is made that the case would be covered by part 3 of Section 300 Penal Code in that not only the accused intended to inflict that particular injury but the injury intended to be inflicted was by objective medical test found to be sufficient in the ordinary course of nature to cause death. The question is in the circumstances in which the offence came to be committed, could it ever be said that the accused intended to inflict that injury which proved to be fatal. To repeat, there was an altercation. There was no premeditation. It was something like hit and run. In such a case, part 3 of Section 300 would not be attracted because it cannot be said that the accused intended to inflict that particular injury which was ultimately found to have been inflicted. In the circumstances herein discussed, it would appear that the accused inflicted an injury which he knew to be -likely to cause death and the case would accordingly fall under Section 304 Part II Penal Code.

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16. In *Dashrath Singh*, the Supreme Court held that:

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24. Firstly, it must be noted that the intention to cause the death of Pratap Singh cannot be imputed to the accused Raja Ram. Apart from the finding of both the Courts that the common object of the unlawful assembly was not to kill Pratap Singh or any other member of his family but only to cause hurt or apply criminal force in order to desist them from asserting the rights over the disputed site, one more circumstance that rules out the intention on the part or any of the accused to kill Pratap Singh is that after the single blow inflicted on the victim with the kanta, there was no further move to attack him. PW1 made this clear in his deposition. If Raja Ram intended to kill him, he would not have stopped at injuring him once only. Still, the question remains whether the offensive act done by the appellant Raja Ram falls within clause thirdly of Section 300. That the appellant intended to cause bodily injury to the victim by striking him on his head with a sharp-edged weapon the appellant was carrying cannot be denied in view of the sequence of events deposed to by PWs 1 to 4. From the medical evidence of PWs 6 & 8 coupled with the magnitude of the injury caused on head with a dangerous weapon, it can be presumed that the injury which was inflicted and intended to be inflicted is sufficient in the ordinary course of nature to cause death. PW 8 who performed the surgery on 13.8.1977 noted the pre-operative diagnosis on Exhibit ka-9 as follows:

"Right fronto-parietal infected compound commutated fracture of skull with brain heriniates, underneath: brain abscess and cerebrates with heriniation."

25. He prescribed post-operative treatment. PW 8 stated that the death was on account of the head injury which caused brain abscess and such injury could lead to the occurrence of death in the ordinary course of nature. The evidence of PW 8 leaves no doubt that the skull and brain injury caused to the victim was sufficient in the ordinary course of nature to cause death. PW6 who attended on the victim on the day of occurrence itself noticed the incised wound of 15 cm x 5 cm x brain tissue deep found on the head of the patient. He stated that the injury was appearing to be dangerous to life and the injury must have been inflicted by a sharp-edged object thrust with sufficient force.

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17. In *Chamela (supra)* a Division Bench ruling of this court, the accused had inflicted several knife blows. That did not deter the court from holding that the offence made out was punishable under Section 304, Part I and not under Section 302, IPC. In the present case, as held earlier, the genesis of the quarrel is known to none; Haji Hamid Khan concededly had suffered injuries, which led to his medical examination, a fact

proved by the record. Furthermore, the fatal injuries, described by the post-mortem report, and the doctor examined in the case, were spindle shaped wounds – one 74 cm above the left heel, and the second, 3cm x 1 cm, obliquely placed on the lateral aspect of the left thigh at its middle, 72 cm above the left heel. The other injuries were abrasions. The doctor (PW-12) deposed that death occurred due to hemorrhagic shock on account of the injuries.

18. Having regard to the facts found, and the previous discussion, as well as the nature of injuries, and the circumstance that the Appellant Dalip, in the present case did not attack the deceased on a vital part of his body, despite having been presented with sufficient opportunity to do so, this court is of opinion that the conviction of the Appellants under Section 302 IPC is not appropriate. The injuries could not be said to have been inflicted with the intention of causing death. They however, fall within Section 304 Part II, as there was knowledge that the injury would result in death, in the normal course of nature.

18. In view of the above, the Appellant Dalip's conviction is substituted to one under Section 304 Part II, IPC. His appeal, No.850/2011 is partly allowed in the above terms. His sentence is substituted to RI for 7 years. The Appellant Noor Mohammed's appeal (Criminal Appeal No.673/2011) has to succeed; it is allowed. The Appeals are disposed of in the above terms.

S. RAVINDRA BHAT, J

G. P. MITTAL, J

AUGUST 26, 2011