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

DECIDED ON: 22.11.2011

+ CRL.A. 953/2011, Crl. M. (Bail) 1347/2011

AMIT KUMAR Appellant
Through: Sh. S.K. Balain, Advocate.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent
Through: Sh. M.N. Dudeja, APP.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MS. JUSTICE PRATIBHA RANI

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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. In this appeal, the judgment and order of the learned Additional Sessions Judge dated 29.04.2011 in S.C. No.117/2008 has been challenged. The appellant was convicted for having committed the offence punishable under Section-302, IPC and was sentenced to undergo life imprisonment.

2. The prosecution's case is that an intimation was received by the police in Police Station Uttam Nagar that a fire incident had occurred during the night intervening 31.10.2007 and 01.11.2007 around 12:30 AM in house no.17/A Som Bazar, Vikas Nagar. After recording the DD Ex.PW-13/B-1, the police reached the spot. According to the prosecution, the injured Rampal had been taken to the Deen Dayal Upadhyaya Hospital by his wife Radha. After inspecting the spot, ASI Mamur Khan went to the hospital and recorded the statement of Rampal - Ex.PW15/B. The injured stated that at around 12:30 AM, his neighbour, the appellant Amit was quarreling with his family members under the influence of liquor. His wife Sonia and mother were raising an alarm since the appellant threatened to set himself on fire. Sonia cried out for help; the injured Rampal went to the appellant's house and saw that he had a plastic bottle containing petrol. Rampal tried to snatch the bottle from the appellant; the latter, however, caught hold of him and in this struggle, petrol spilled over Rampal and bottle fell. Some petrol also spilled on the floor. The appellant pushed Rampal and bolted the door, lit a match-stick and threw it on Rampal and ran away. Rampal sustained fire injuries. Rampal succumbed to his injuries on 03.11.2007. The investigation was later carried on by Inspector Rakesh Tyagi. After the conclusion of the investigation, the appellant was charged with committing the offence of murder. He pleaded not guilty and claimed trial.

3. The prosecution examined 18 witnesses and also relied upon material documents such as postmortem report and dying declaration made by Rampal - Ex.PW-15/B and on consideration of all these, the Trial Court convicted the appellant.

4. Learned counsel for the appellant urged that the findings of the Trial Court cannot be sustained because of fatal discrepancies between the statements of PW-2 Radha, the deceased's wife, on the one hand and the so called dying declaration Ex.PW-15/B. It was submitted that PW-2 clearly was not an eye witness and joined in the proceedings after the burning incident took place. Counsel urged that even PW-1, brother of the deceased mentioned having gone to the gali and seeing his brother on fire. If the dying declaration were kept aside, the evidence of these two eye witnesses could not have been the basis for a charge let alone conviction under Section-302, IPC. It was next urged that the MLC in this case nowhere reflected that the injured Rampal had mentioned the name of the assailant when he was taken to the hospital at about 01:30 AM. Furthermore, having regard to his condition, particularly, the nature of the burn injuries, it was highly improbable that he in fact stated as alleged and agreed to affix his thumb impression. Counsel also relied upon the statement of PW-2 who deposed that her husband was asked by the police to sign his statement. He, however, wanted to verify the contents but the police officials nevertheless put his thumb impression. Having regard to these circumstances and fact that the prosecution witness herself mentioned that thumb impression was taken forcibly, it could not be said that the dying declaration was voluntary. Furthermore, no Doctor's fitness certificate was mentioned or proved.

5. It was urged alternatively that even if the Court were to believe that in fact dying declaration had been made under the circumstances alleged by the prosecution, at the highest, this was a case for conviction under Section-304 Part-II, IPC and not for a conviction under Section-302, IPC. Counsel here emphasizes that the prosecution did not allege or establish any motive on the

appellant's part; on the contrary, its case was that the appellant was trying to commit suicide by pouring petrol and setting himself on fire. The deceased Rampal on hearing the commotion tried to save the appellant who was in a drunken condition. In the struggle, the appellant allegedly set fire the petrol which caused burn injuries to the deceased. All these facts taken together did not establish any intention to kill nor even existence of intention to cause bodily injury that would have normally resulted in death. Having regard to the mental condition of the appellant, the only inference that could have been drawn on the basis of these proved facts, was that he had knowledge that his action might result in injuries which would lead to Rampal's death.

6. Learned APP, on the other hand, argued that the appellant was aware of the dangers associated with pouring petrol. The fact that he was attempting to commit suicide but instead of that event, someone was doused with kerosene and ultimately received serious injuries did not in any manner diminishes criminal responsibility. He had a clear intention to do an act which would certainly result in death and, therefore, the benefit of Explanation-IV to Section-300 could not have been availed.

7. In this case, the account even was recorded through the statement of the deceased Rampal. That statement had been produced as Ex.PW-15/B. That statement has been testified by PW-1, who deposed that his brother spoke to the police about the surrounding circumstances which led to the injuries. PW-2 also corroborated the fact that her husband's statement was recorded. She too deposed that in her presence Rampal had told the police that he was burnt by appellant after the latter poured petrol on him. The initial Investigation Officer PW-15 SI Mamur Khan deposed that on

receiving the DD-Ex.PW-13A, he reached the spot. He came to know that PW-2 and PW-1 had taken Rampal to the hospital; he inspected the crime scene, seized a match box containing 2/3 sticks, a plastic bottle smelling of petrol and kept it in a sealed parcel which was marked as Ex.PW-11/A. When he was at the spot, he received information through DD-5A from the hospital regarding the admission of Rampal. After reaching hospital, PW-15 claims to have made an application to the Doctor seeking to record his statement; that application was produced as Ex.PW-15/A. The concerned Doctor PW-6 Dr. Rajeev Tyagi had examined the patient and he recorded that the patient Rampal was in a fit condition to make a statement. The Doctor's endorsement was proved as Ex.PW-6/B. It was under these circumstances that PW-15 recorded the statement of the deceased.

8. At this stage, it would be necessary to notice some of the findings recorded by the impugned judgment which after discussing the relevant case laws concerning the admissibility of dying declarations during the course of the criminal trial held as follows:-

“33. In the light of above discussion and observation on Section 32 (1) Indian Evidence Act, the statement Ex. PW15/B of deceased Rampal dt. 01.11.07 falls under the category of dying declaration. The statement was made by deceased Rampal in the circumstances where he never foresee his death. The statement was recorded after the doctors declared him fit to make the statement and it suffers from no infirmity or exaggeration of the incident which took place with him. Hence the statement Ex. PW15/B i.e. dying declaration of deceased Rampal is admissible as it passes the test that it was made in fit state of mind, voluntarily and on the basis of personal knowledge. PW2 Radha w/o Rampal (deceased) further corroborated the fact that statement of deceased Rampal was

recorded by police in her presence. Her deceased husband stated to the police that he was burnt by accused Amit Kumar after accused poured petrol at him and burnt him with a lit match stick. Her truthfulness further comes out when she objected on taking of thumb impression of the deceased because she had apprehension whether the police recorded true facts or not. Further record reflects that police recorded correct version. She also explained why she resisted the police officials from taking the thumb impression because she wanted the accused to be arrested first. PW2 Radha successfully passed the test of cross examination and explained how she reached at the house of accused. She further explained that they had no visiting terms relations with the accused and about 20-25 days prior to the incident, some incident took place between deceased Rampal and accused. After going through the testimony of PW2 Radha and dying declaration of deceased Rampal Ex. PW15/B it is further proved that accused had the intention to kill deceased due to which he had poured petrol on the deceased and lit him on fire with a match stick, though the deceased had gone to make him understand not to burn himself and tried to help him.

34. PW1 Mansa Ram brother of deceased further corroborated the facts regarding the incident as to how it was started and he also reached there. He did not support the police version being eye witness of the incident. However he corroborated the fact that his brother deceased Rampal told him that accused Amit Kumar had poured petrol on him and then lit him with a match stick. Another witness examined by prosecution PW5 Babu Ram turned out to be hostile but his hostility is not effecting the prosecution case at all. However he corroborated the fact regarding the incident that deceased Rampal was seen by him coming out in burnt condition from the house of accused Amit Kumar.

35. The wife of accused namely Sonia who appeared as DW1 in this case also corroborated that on 31.10.07 after midnight accused consumed huge quantity of liquor and gave beatings to his brother in law Sumit and in the afternoon she gave birth to

a male child. She raised alarm and deceased came to rescue the accused and to help them. She admitted that deceased was trying to make accused understand not to burn himself and tried to snatch the bottle of petrol which was with the accused. This version of DW1 Sonia, wife of accused, further corroborates the prosecution case in respect of incident. The dying declaration given by deceased Ex. PW15/B stands corroborated by the versions given by PW1 Mansa Ram and PW2 Smt. Radha. The same also stands corroborated by the statement of DW1 Sonia, wife of accused.”

The cause of death in this case can be ascertained through the postmortem report Ex.PW-13/A; according to it and according to PW-13 Dr. Arvind Thergaonkar, the cause of death was shock following 65% ante mortem flame burns.

9. It is evident from the above discussion that the incident unfolded itself very rapidly; the appellant was apparently drunk and was threatening to kill himself. Though the medical examination report Ex.PW-3/A i.e. the MLC of the appellant does not throw much light since the examination took place around 07:25 PM on 01.11.2007, the combined testimonies of PW-1 and 2 and even DW-1 would show that the appellant's violent conduct left DW-1 crying for help. The deceased Rampal who was the appellant's neighbour reached there and tried to wrest the petrol bottle from him. The appellant apparently resisted and in the process poured the petrol over the deceased; some quantity of the petrol also got spilled on the floor. The appellant then lit the petrol with the match stick. This resulted in serious injuries to Rampal who was immediately rushed to the hospital. His statement was recorded; he later succumbed to the injuries on 03.11.2007.

10. Section-300, IPC in its opening part says that culpable homicide would be murder save the exceptions. Exception 4 to Section 300 of the IPC reads as under:-

"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 offender having taken undue advantage or acted in a cruel or unusual manner."

If the prosecution can successfully establish that the accused inflicts an injury with the intention of causing it and such injury would result ordinarily in the course of nature in death or inflicts injury with the intention of causing death or inflicts an injury knowing that such injury would cause death, he would be punishable with imprisonment for culpable homicide.

11. In this context, it would be useful to extract the following observations of the Supreme Court in *Jagrup Singh v State of Haryana* 1981 (3) SCC 616:

"In the present case, there is no doubt that there was a sudden quarrel and the appellant assaulted the deceased with the blunt side of the gandhala on the head in the heat of the moment. What actually was the immediate cause for the assault by the appellant on the deceased at the marriage ceremony of Tej Kaur is not clear. The genesis of the quarrel resulting in the head injury to the deceased is not known. The prosecution came with a positive case that the appellant, together with his three brothers, who had not been invited to the marriage of Tej Kaur by Mst. Dalip Kaur at the instigation of deceased Chanan Singh, came armed with different weapons to teach the deceased a lesson. But the prosecution has failed to examine Mst. Dalip Kaur and the defence version is that the appellant and his brothers had been invited to the marriage of Tej Kaur by Mst. Dalip Kaur. In view of these infirmities in the prosecution case, the High Court was constrained to observe:

*“In the absence of any specific and positive evidence whether oral or documentary, it is not possible to arrive at any positive conclusion that this circumstance furnished any motive for the accused to attack Chanan Singh (deceased) and three other prosecution witnesses. After a careful perusal of the entire prosecution evidence, it appears more probable that the accused had also joined in the marriage as the collaterals, but something happened on the spur of the moment which resulted in the infliction of injury by Jagrup Singh on the person of Chanan Singh which resulted into his death. In the first information report, it had not been disclosed, as was subsequently made out at the trial, that the accused had come from the house of Jarmail Singh, accused, armed with weapons.
(emphasis supplied)”*

In our judgment, the High Court having held that it was more probable that the appellant Jagrup Singh had also attended the marriage as the collateral, but something happened on the spur of the moment which resulted in the infliction of the injury by Jagrup Singh on the person of the deceased Chanan Singh which resulted in his death, manifestly erred in applying Clause Thirdly of s. 300 of the Code. On the finding that the appellant when he struck the deceased with the blunt side of the gandhala in the heat of the moment, without pre-meditation and in a sudden fight, the case was covered by Exception 4 to s. 300. It is not suggested that the appellant had taken undue advantage of the situation or had acted in a cruel or unusual manner. Thus, all the requirements of Exception 4 are clearly met. That being so, the conviction of the appellant Jagrup Singh, under s. 302 of the Code cannot be sustained. The result, therefore, is that the conviction of the appellant under s. 302 is altered to one under s. 304, Part II of the Indian Penal Code. For the altered conviction, the appellant is sentenced to suffer rigorous imprisonment for a period of seven years.”

Similarly, in *Thangaiya Vs. State of T.N* (2005) 9 SCC 650 it was held that:

“Thus, according to the rule laid down in Virsa Singh case even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be CrI.A @ S.L.P.(CrI.)No.8847 of 2009 (contd.) murder. Illustration (c) appended to Section 300 clearly brings out this point. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses.

It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons -- being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages”.

12. Here, in this case, the quarrel was on between the appellant and other members of his family; he threatened to set himself ablaze. His wife raised an alarm; the deceased rushed to his house, and tried to stop him from committing suicide. The appellant was apparently drunk; he had a bottle of petrol, the contents of which fell on to the deceased, as well as on the floor. The ensuing event led to the fire, and serious burn injuries, which ultimately

claimed Rampal's life. These proven facts do not point to a calculated or pre-meditated intent on the part of the appellant to kill the deceased; clearly this is not a case for conviction under Section 302. The appellant, however, can be said to have possessed knowledge that his act would result in such injuries on the deceased, which in the normal course of nature would have resulted in his death, and consequently was guilty of the offence punishable under Section 304, Part II, IPC.

13. In view of the above discussion, the Appeal is entitled to succeed in part. The appellant's conviction under Section 302, IPC is altered to Section 304 Part II, IPC. His sentence is therefore modified; instead of life imprisonment, he shall serve rigorous imprisonment for seven years. The Appeal is allowed in these terms.

S. RAVINDRA BHAT
(JUDGE)

PRATIBHA RANI
(JUDGE)

NOVEMBER 22, 2011

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