

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 16.12.2011

+ **CRL.A. No. 886/2010**

VIJAY LAMA

.....Appellant

-versus-

STATE

..... Respondent

Advocates who appeared in this case:-

For the Appellant : Ms Nandita Rao, Advocate

For the Respondent : Ms Richa Kapoor, APP.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MS JUSTICE VEENA BIRBAL

VEENA BIRBAL, J

1. The present appeal is directed against the judgment dated 25th March, 2010 passed by the Additional Sessions Judge, Delhi arising out of FIR No.298/05 PS DBG Road whereby the appellant has been convicted for the offence punishable u/s 302 IPC. The appeal is also directed against the order of sentence dated 26th March, 2010 wherein appellant has been sentenced to undergo life imprisonment and a fine of ₹ 2000/- has been imposed upon him.

2. The case of the prosecution is as under:-

On 9th August, 2010 at about 10.30 pm, Head Constable Puran Singh, PW-20 who was posted at P.S DBG Road was present near Ajmal Khan statue in the Ajmal Khan Park. He found blood lying in front of hutment there. He also found a dead body lying inside the hutment under a bench. He immediately informed the Duty Officer of the aforesaid police station who recorded DD No.20A Ex.PW29/A and 29/B which was assigned to Inspector Rajinder Bhatia PW-29. On the basis of aforesaid DD, he along with SI R.D.Yadav PW-21, SI H.N. Giri PW-22 and Constable Samdev PW-28 rushed to Ajmal Khan Park in a government vehicle where they saw a dead body plying in pool of blood under a bench in the hut. On inspection, it was found that there were two injuries on the back and one injury on the left side of chest and on enquiry, the name of the dead person was revealed as Lal Bahadur. No eye witness was available at the spot. Inspector Rajender Bhatia, PW-29 put his endorsement on the DD report and got the FIR No.298/2005 Ex.PW 29/B registered. The Crime team was called at the spot which prepared rough site plan Ex.PW 29/C. The crime team inspected the spot. Inspector Rajender Bhatia, PW-29 lifted a broken bottle from the spot and seized the same vide memo Ex.PW 21/E after completing necessary formalities. Blood stained earth and earth control sample were also lifted by him from the spot.

3. On 11th August, 2005, deceased's sister Maya, PW-4 and Rameshar, nephew of deceased came at the police station and from there they were

taken to Lady Harding college where they identified the dead body. After recording their statements, postmortem examination of the deceased was conducted and thereafter the body of the deceased was handed over to Ms. Maya, PW-4. On the basis of secret information, appellant was apprehended on the pointing out of secret informer on 13th August, 2005 at 3.15 pm near Kapashera Bus stand. After interrogation, appellant was arrested vide memo Ex.PW 21/F. His personal search was conducted vide Ex.PW 21/G. The appellant made a disclosure statement Ex.PW 21/H. Pursuant to this statement, he led the police party to Sarai Kale Khan Railway Station Fatak and from the bushes near the rail lines he got recovered one blood stained knife and one check shirt. Necessary formalities about seizure of the knife and check shirt were done at the spot and the same were seized vide memo Ex.PW/K. Appellant also got recovered one piece of a blue coloured *baniyan* having blood stains on it, from the railway line boxes. The same was also seized vide Ex.PW21/L. The appellant had also given his half pant to the IO, which was also seized vide memo Ex.PW 21/M. Before seizing, necessary formalities were completed. Medical examination of appellant was got done from Lady Harding Medical College. After completion of necessary formalities, a report u/s 173 Cr.P.C was prepared and filed before the learned M.M Delhi. Thereafter the case was committed to the Session's court and a charge was framed against the appellant for having committed the offence punishable u/s 302 IPC. The appellant pleaded not guilty and claimed trial.

4. Prosecution in all had examination 29 witnesses, out of which Yudhishtar Kumar Rana PW02, Krishan Khadga @ Sethi PW-5, Ashok Kumar Rana PW-6 and Sanjay Kumar Kandari PW-7 are stated to be eye witnesses to the occurrence. Maya, PW-4 had received the dead body of deceased. Sanjay PW-9 is another public witness in whose presence it is alleged that a quarrel had taken place between deceased and the appellant just prior to the occurrence and the deceased had allegedly caused an injury on the head of the appellant with a broken bottle. Remaining evidence relates to police officials and Doctors.

5. Incriminating evidence was put to the appellant u/s 313 Cr.P.C wherein he has stated that he used to sleep occasionally in the hutment in Ajmal Khan Park where other persons namely Yudhishtar Kumar Rana PW-2, Michael and Gunjan Lama and deceased Lal Bahadur used to sleep. He denied having made any disclosure statement or having recovered a knife or clothes vide memo Ex.PW-21/K. As per him, on 13th August, 2005, he was going to Palam, where he was living, and on the way, police officials came in an auto rickshaw and apprehended him. He has stated that his clothes were stained with his own blood from his head injury caused to him by the deceased Lal Bahadur. He denied the other incriminating evidence against him and stated that he is an innocent person and has been falsely implicated in the present case. He has further stated and that he had received head injuries at the hands of deceased Lal Bahadur and thereafter Lal Bahadur went inside Ajmal Khan Park while he left the place for Village Palam to

meet his wife and children. He did not know as to what had happened to Lal Bahadur when he went inside the park. No evidence was led in defence.

6. The learned Addl. Sessions. Judge, Delhi held that the ocular witnesses i.e., Yudhishtar Kumar Rana PW-2, Krishan Khadga @ Sethi PW-5, Ashok Kumar Rana PW-6, Sanjay Singh Kandari PW-7 have denied having seen the incident. But reading the entire evidence of aforesaid material witnesses on record, it is clearly proved that the appellant was last seen with the deceased. It is further held that other circumstances established against the appellant including recoveries at his instance and medical evidence on record clearly established that appellant is guilty of the occurrence. Accordingly, the learned Additional Sessions Judge convicted him under section 302 IPC.

7. Learned counsel for the appellant has argued that eye witnesses to the occurrence i.e., Yudhishtar Kumar Rana PW-2, Krishan Khadga @ Sethi PW-5, Ashok Kumar Rana PW-6, Sanjay Singh Kandari PW-7 have all turned hostile. They have denied having seen the appellant causing injuries on the deceased with a knife. It is contended that as they have not supported the case of the prosecution, their entire evidence cannot be taken into consideration. It is further contended that evidence of police witnesses i.e., Inspector Rajender Bhatia PW-29, SI R.D.Yadav PW-21 and HC Sam Dev PW-28 about alleged recovery of knife and clothes at the instance of the appellant does not inspire confidence as no public witness had joined in the

alleged recoveries. It is contended that as case is based on eye-witnesses, the appellant cannot be convicted on the basis of circumstantial evidence. It is contended that prosecution has failed to establish its case beyond reasonable doubt against the appellant, as such, the appellant deserved acquittal in the present case. It is further contended that assuming, on the basis of the evidence on record that the court comes to a conclusion that the appellant is responsible for the alleged occurrence, in that event, the present case is not a case of murder but it is a case of culpable homicide not amounting to murder as ingredients of Exception 4 to Section 300 IPC are clearly established in the present case.

8. On the other hand, the learned APP has argued that eye witnesses i.e., Yudhishtar Kumar Rana PW-2, Krishan Khadga @ Sethi PW-5, Ashok Kumar Rana PW-6, Sanjay Singh Kandari PW-7 have not supported having seen the occurrence but their evidence cannot be rejected in totality. It is contended that the evidence of Sanjay PW-9, clearly establishes the quarrel having taken place between the appellant and the deceased immediately prior to the occurrence and thereafter they have both entered the park as is clearly established from the evidence of eye witnesses PWs 2, 5, 6 and 7. The evidence of police witnesses clearly establishes the recovery of knife and blood stained clothes at the instance of the appellant pursuant to disclosure statement. It is contended that evidence of police witnesses inspires full confidence and cannot be disbelieved simply because no public witness was joined. It is contended that medical evidence on record including opinion about cause of death of deceased and opinion about

possibility of injuries on the deceased with knife Ex. P4 and the corresponding cut marks on the clothes of the deceased with the aforesaid knife and CFSL report Ex.PW 29/H, all support the case of prosecution. It is contended that considering the totality of circumstances proved against the appellant, the guilt of the appellant stands established. It is contended that that learned Addl. Sessions Judge has rightly convicted the appellant and no case for interference is made out.

9. Perusal of evidence on record shows that the witness to the quarrel just prior to occurrence is Sanjay, PW-9. The said witness has deposed that he is a rickshaw puller and at the relevant time he used to reside at house no.16/830, Pyare Lal Road, Bapa Nagar, Karol Bagh, Delhi. On the day of occurrence, he was present on the pavement. The appellant and one Nepali boy were also present and they had an altercation. The appellant had broken a liquor bottle by hitting it on the rickshaw. A piece of bottle had also hit him. Thereafter, both of them had gone inside the park. As he had not fully supported the case of prosecution, he was cross-examined by learned APP. In cross examination he has stated that the Nepali boy was deceased Lal Bahadur. He has deposed having known Lal Bahadur as he used to reside in a hutment in Ajmal Khan Park. He has also stated that in his presence, the appellant had put his hand on the shoulder of deceased Lal Bahadur and had asked him as to whether he would not be provided liquor. Thereupon Lal Bahadur had caused injury with the broken bottle on the head of appellant.

On being cross-examined by Amicus Curiae for appellant, nothing relevant has come out in his cross-examination by which it can be said that there was no quarrel between the deceased and the appellant on 9th August, 2005 at about 8.30 pm near his rickshaw on the pavement of Ajmal Khan Park. There is no cross-examination on his material deposition to the effect that the appellant had asked for liquor and, thereafter, the deceased had caused injury on the head of the appellant with a broken bottle.

10. The alleged eye witnesses to the occurrence are Yudhistar Kumar Rana PW-2, Kishan Khadga @ Sethi PW-5, Ashok Kumar Rana PW-6 and Sanjay Singh Khandari, PW-7. Yudhistar Kumar Rana, PW-2 has deposed that on 9th August, 2005 at about 8.30 pm he along with his friends Ashok PW-6, Kishan PW-5, Sanjay Singh Khandari PW-7 and one Gunjan were present in Ajmal Khan Park in front of statue of Ajmal Khan and were hearing commentary of a cricket match between India and Sri Lanka. They were sitting on the road which was inside the park. At that time, a person by the name Dalla came from behind them and he had placed a hand on his chest. He was crying "*Bachao Bachao*" Kishan PW-5 made him lie on a stone slab. The moment he had removed his hand from the injury, blood gushed out like a fountain and within no time that man breathed his last. He has identified the appellant in court and deposed that at that time appellant was having blood stains on his forehead and was running with a knife in his hand and was ahead of Dalla by 15-20 steps. As the aforesaid

witness did not fully support the case of the prosecution, he was cross-examined by the learned APP wherein he has stated that deceased used to be called *Dalla*. He has denied having seen the occurrence i.e., appellant having overtaken the deceased in the park and had brought a knife from hutment and gave repeated blows to deceased. He has further stated that Sanjay PW-7, Ashok, PW-6, Michael and deceased Lal Bahadur used to sleep in one hutment and appellant also used to come there to sleep. He further deposed that the hut is inside the park and is meant for taking shelter in case it rains.

On being cross-examined on behalf of the appellant, he has denied that he did not see the appellant running in the park with a knife and having had blood stains on his forehead. He has denied that in order to oblige the police officials, he has deposed that he had seen the appellant running with a knife in the park.

11. As per the prosecution, Kishan Khadga @ Sethi, PW-5 is another eye witness to the occurrence. He has deposed that in 2005, he used to reside in Ajmal Khan Park area, Karol Bagh, New Delhi. He along with his friends Michael, Sanjay PW-7, Rana PW-6 and deceased Lal Bandur used to reside in one jhuggi in Ajmal Khan Park. Some other persons also used to sleep there. It was a big jhuggi. On the date of occurrence at about 8.45 pm, he was present with his friends Sanjay PW-7, Rana PW-2, Michael and Ashok PW-6 and were hearing commentary of a cricket match. In the meantime, the deceased Lal Bahadur had come inside the jhuggi and said '*Bachao Bachao*'. He was bleeding from his wound in his chest. He was made to lie down.

However, he had fallen and died. He had also seen appellant Vijay there with a knife. However, he ran away. He has also deposed that deceased Lal Bahadur was assaulted by the appellant with a knife. In his further statement he has denied having seen the appellant inflicting injury on the deceased. He has deposed that he had seen deceased Lal Bahadur in an injured condition and was crying *Bachao Bachao* and the appellant who was also present with a knife, fled away. The above witness was treated as hostile by the APP and was cross-examined on behalf of State. In the cross-examination, he has deposed having stated to the police that appellant Vijay inflicted injuries with a knife with an intention to kill deceased Lal Bahadur.

On being cross-examined by defence counsel, he has stated that he did not raise any alarm. He further deposed that he along with Ashok Rana PW-6, Michael and Sanjay Singh Khandari PW-7 were made to sit in the police station by the police for two days and thereafter their statements were recorded. He has stated that whatever was recorded was read over to him. His statement was recorded by police on 10th August, 2005. He denied having made any statement to the police under pressure. On further cross-examination he has deposed that appellant did not inflict any injury on deceased Lal Bahadur with a knife.

12. The other alleged eye witness to the occurrence is Ashok Kumar Rana, PW-6. He has deposed that on 9th August, 2005, he along with other friends was hearing commentary of a cricket match. They were present near the

statue in the park which was at a distance of 4-5 steps. At 8.45 pm, the appellant had come there. He was bleeding from his forehead. The appellant was followed by the deceased Lal Bahadur who was crying “*bachao bachao mar gaya mar gaya*”. The appellant had entered the *jhuggi* and had fallen. He had his hand on his chest and when his hand was removed, bleeding started like a fountain. Thereafter he died. The appellant had run away from the place. He denied having seen the appellant causing injury to the deceased with a knife on the day of occurrence at 8.30 pm. As he was resiling from his statement to the police, he was cross-examined by the learned APP and was confronted with statement Marked portion C to C wherein it was alleged that he had stated to the police that appellant had taken out a knife from the *jhuggi* and with that knife the appellant had inflicted two blows on the back and one on the chest of the deceased. He did not own up having made said statement to police.

There is no cross-examination on his material deposition as regards having seen appellant and deceased in the park i.e., appellant having injury on his forehead and being followed by the deceased who was crying “*bachao bachao*”.

13. Sanjay Singh Kandari, PW-7 is another alleged eye witness to the occurrence. As per his evidence he was present near the *jhuggi* and was hearing commentary on road at about 8.45 pm. He had seen the deceased bleeding profusely. He had come near the statue. Deceased was followed by appellant. The appellant was bleeding from his head. The appellant had

scaled over the wall and had fled away. As he was resiling from his statement made to the police, he was also cross-examined by the learned APP and was confronted with his previous statement Mark C made to the police. He has also admitted having stated to the police that deceased Lal Bahadur had come from Ajmal Khan Road side and was being followed by the appellant. However, he denied having stated to the police that appellant had overtaken the deceased and had taken out a knife from the *jhuggi* and caused injuries to deceased. He has denied that in order to save appellant, he was twisting the facts.

The above witness was not cross-examined by the Amicus Curiae appearing for appellant.

14. As noted above, the alleged eye witnesses examined on behalf of the prosecution have denied having seen the appellant causing injuries to the deceased Lal Bahadur with a knife. They have all turned hostile as regards the material occurrence. However, all the aforesaid eye witnesses have deposed that appellant was known to them. They have all also deposed that the appellant used to sleep with them in the hutment in the park. Their evidence establishes that the appellant is their friend. The appellant in his statement u/s 313 Cr.P.C. has stated that he used to sleep in the hutment occasionally. Under these circumstances, chances of their saving appellant by not fully supporting the prosecution, cannot be ruled out. It is settled legal proposition that the evidence of prosecution witnesses cannot be rejected in toto merely because prosecution chose to treat them as hostile and cross-

examined them. The evidence of such witnesses cannot be effaced or washed off the record altogether but the same can be accepted to the extent that their version is acceptable on a careful scrutiny thereof. (vide Bhagwan Singh v. The State of Haryana :AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa: AIR 1977 SC 170; Syad Akbar v. State of Karnataka: AIR 1979 SC 1848 and Khujji @ Surendra Tiwari v. State of Madhya Pradesh :AIR 1991 SC 1853).

In State of U.P. v. Ramesh Prasad Misra and Anr.:AIR 1996 SC 2766, the Supreme Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by the Supreme Court in Balu Sonba Shinde v. State of Maharashtra: (2002) 7 SCC 543; Gagan Kanojia and Anr. v. State of Punjab (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb and Ors. v. State of U.P. : AIR 2006 SC 951; Sarvesh Naraian Shukla v. Daroga Singh and Ors. : AIR 2008 SC 320 and Subbu Singh v. State : (2009) 6 SCC 462.

After considering the legal proposition as regards evidence of hostile witnesses, the Supreme Court in C.Muniappan and Ors V. State of Tamil Nadu: AIR 2010 SC 3718 has held as under:-

“Thus, the law can be summarized to the effect that the evidence of a hostile witness cannot be discarded as a

whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.”

In **Rameshbhai Mohanbai Koli and Ors v. State of Gujarat : (2011) 3 SCC (CH) 102**, where the eye witnesses turned hostile and the accused was convicted u/s 302 IPC by the trial court and the High Court on the basis of circumstantial evidence, the Supreme Court upheld the conviction holding as under:-

"7. In the instant case, all the eye-witnesses examined on the prosecution side have en bloc turned hostile due to influence and pressure of the accused persons which included a sitting MLA of the ruling party. This aspect has been analyzed by the trial Court while convicting and awarding sentence on the accused/appellants. This Court has noted and observed in a large number of cases that witnesses may lie but circumstances do not. On going through the entire materials, particularly, the chain of circumstances, we are satisfied that the prosecution has been successful in bringing home the guilt of the appellants herein for the commission of murder of Prakashbhai Raveshia and the eye-witnesses turning hostile, do not, in any manner, create a dent in the case of the prosecution."

15. In the light of the law discussed above, the evidence of eye witnesses i.e., PW-2, PW-5 to PW-7 and other evidence led by the prosecution, has been examined.

16. The evidence of the alleged eye witnesses i.e., Yudhistar Kumar Rana PW-2 and Krishan Khadga @ Sethi PW-5 clearly establish that on 9th August, 2005, at about 8.30 pm, they were present with their friends namely Ashok PW-6, Sanjay PW-7 and Gunjan Lama in Ajmal Khan Park in front of the statue and were hearing cricket commentary. The hut wherein they were residing was at a distance of 4-5 steps from that place. Their evidence also establishes that at that very time, they had seen the deceased in the park and appellant was also there with a knife in his hand. The appellant was also bleeding from the forehead which supports the deposition of Sanjay PW-9. The evidence of Ashok Kumar Rana PW-6 and Sanjay Singh Khandari PW-7 also establishes that on the day of occurrence at 8.45 pm, appellant had come there in the park when they were hearing commentary. He was bleeding from his head. They had also seen the deceased entering the *jhuggi* and having fallen. The deceased was having his hand on his chest. Both have deposed that appellant ran away from there.

17. The evidence of aforesaid witnesses clearly proves the presence of deceased and appellant in the park on the date of occurrence around the same time in the condition as is stated above. All the aforesaid PWs have also deposed that at that very time deceased was having injury on his chest. The evidence of Sanjay PW-9 also establishes that there was a prior quarrel at about 8.30 pm between the deceased and the appellant when the deceased had hit the appellant with a broken bottle on his head.

18. The appellant, in his statement under section 313 Cr.P.C, has admitted having met the deceased outside the park. As per him, he did not ask him to provide liquor to him. He had only asked the deceased as to why he was drinking liquor. He had also admitted having known appellant for the last many years. As per him, he had advised him not to consume liquor. Thereupon the deceased had hit him with a bottle on his head and he had sustained injuries. He has further stated that from there the deceased went inside the park and he left from there. No defence evidence is led by him to substantiate that he did not enter the park.

19. The arrest of appellant on 13th August, 2005 stands proved by the evidence of Inspector Rajender Bhatia PW-29, SI R.D.Yadav PW-21 and HC Sam Dev PW-28. They have categorically deposed that on 13th August, 2005 appellant was arrested from Kapashera border on the identification of secret informer vide arrest memo Ex.PW 21/F. The IO PW-29 has deposed that after his arrest the appellant had made a disclosure statement Ex.PW-21/H and had led them to Sarai Kale Khan near Nizamuddin Railway Station Phatak from where the appellant got one knife and one check shirt having blood stains on it recovered. The same were seized vide seizure memo Ex.PW21/K after completing necessary formalities. The aforesaid P.Ws have also deposed in the same manner as is deposed by IO PW-29 and have proved their signatures on the sketch of knife Ex.PW 21/J as well as memo Ex.PW 21/K by which knife and check shirt were seized. IO Inspector Rajender Bhatia, PW-29, SI R.D. Yadav PW-21 and HC Sam Dev PW-28

have deposed that appellant had also got recovered one piece of blue coloured *baniyan* having blood stains from the railway line box which was taken into possession by the IO, PW-29 vide seizure memo Ex.PW-21/L. The aforesaid witnesses have proved their signatures on the said memo. Their evidence about recovery of these articles was not demolished in cross-examination. The evidence of aforesaid PWs is in consonance with each other as regards recovery of the knife Ex.P4 and check shirt Ex.P7 having blood stains and one piece of blue coloured *baniyan* Ex.P3. They have identified these articles in court. No contradictions of material nature are pointed out by the amicus curiae in the evidence which could make the recovery unbelievable. Their evidence inspires full confidence. Their evidence cannot be rejected on the ground that no public witnesses were joined by the IO. Reference in this regard is made to State of NCT of Delhi Vs. Sunil and anr : 2000 VIII AD (SC) 613. No evidence is led by appellant to substantiate his defence that nothing was recoverable at his instance. The appellant, in his statement under section 313 Cr.P.C, has stated that he was apprehended by the police when he was going to Palam to meet his wife. However, no evidence is led in defence to substantiate the same.

20. The postmortem report Ex.PW-3/A of deceased is proved on record by Dr.Anil Kumar, Professor, Forensic Medicine, Maulana Azad Medical College PW-3 and Dr.Vinod, PW-8. The relevant portion of the postmortem report Ex.PW-3/A reads as under:-

“EXTERNAL INJURIES

1. Incised stab wound 5X2cmsXcavity deep present over the left side front of the chest 3cm outer to the left nipple. The wound was almost transverse with both margins clean cut, the inner angle is blunt while the outer is acute.
2. Incised wound 7X2cmsX4cm deep present over the left side back of abdomen 33cms below the lower angle of left scapula. The wound is showing tailing. The direction of the wound was forward, downwards and outwards to finish in the muscles of the gluteal region.
3. Incised wound 5X1cmX3.5 cm deep present over back of right side of abdomen. The wound was 18cm below the lower angle of right scapula. The direction of the wound is forward, downwards and outwards in the muscles of the back.

INTERNAL EXAMINATION

1. Injury no.1 Enter the left chest cavity after piercing the skin and intercostal muscles at 5th left intercostals space (left) making a cut 5X.5cm. It then enters the left ventricular cavity of the heart after making a cut 4cm long in the pericardium. The wound enters the cavity near the apex over the front of the left ventricle to finish in the cavity. The direction of the wound was backward, downwards and inwards and the depth was about 10cm.

The stomach was empty. All the visceral organs were pale.

OPINION

Death was due to hemorrhage and shock consequent upon stab injury to the heart vide injury no.1. All the injuries were ante mortem, recent in duration could be caused by a single edged sharp weapon. Injury No.1 is sufficient to cause death in ordinary course of nature.”

The clothes of deceased were also seized during investigation, which were handed over to IO, PW-29 by Anil Kumar PW-3. Opinion on the cut marks on the clothes of the deceased was taken from Dr. Anil Kumar, PW-3 who had conducted the postmortem. The relevant portion of the opinion is as under:-

“OPINION

Clothings (Parcel no.1) Cuts corresponding to injuries no.1, 2 & 3 on the body of the deceased were present on 1/A & 1/B. (1A is the shirt of deceased and 1B is pant of deceased).

WEAPON (Parcel No.2)

The injuries no.1, 2 & 3 on the body of the deceased and cuts in the clothings could be caused by the said weapon examined.

Parcels no.1 & 2 with seals 5 & 7 together with sample seal were handed over to Police Officer SI R.D.Yadav, Police Station D.B.G.Road.”

21. The above opinion shows that injuries on the body of deceased and corresponding cut marks on the clothes of deceased could be caused by knife Ex.P4 which was recovered at the instance of appellant. The same also supports the case of prosecution. The appellant was also medically examined vide MLC Ex.PW 29/E which shows following injuries:-

“small CLW-1 cm on forehead in healing process

CLW-scalp-3 cm
The duration of injuries is 4 to 5 days”

The same also supports the case of prosecution.

The CFSL report Ex.PW-29/H shows the presence of blood on the knife Ex P4, shirt Ex.P7 and baniyan Ex.P3 of appellant which were recovered pursuant to his disclosure statement Ex.PW 21/H.

22. In view of the above discussion, the evidence led by prosecution clearly establishes that on 9th August, 2005, at about 8.30 pm, there was a quarrel between the appellant and the deceased near the rickshaw of Sanjay PW-9 on the pavement of Ajmal Khan Park as the appellant had demanded liquor from deceased and thereupon deceased had hit him with a broken bottle and they ran inside the park. There is evidence of Yudhishtar Kumar Rana PW-2, Ashok Kumar Rana PW-6 having seen both appellant and deceased in the park at that very time and appellant being armed with a knife and having fled from the park. The recovery of knife Ex.PW-21/K as discussed above at the instance of appellant pursuant to disclosure statement Ex.PW-21/H also stands proved. The opinion of Dr.Anil Kumar, PW-3 also establishes that cut marks on the clothes of deceased and injuries 1, 2 and 3 on the deceased could be caused by knife Ex.P4 which were recovered at the instance of the appellant. The CFSL report Ex.PW-29/H also supports the case of prosecution.

23. The defence of the appellant was that after the quarrel, he did not enter the park and had gone to palam to see his wife and children. However, no evidence in defence was led to substantiate the same whereas, as per the prosecution witnesses, they had seen them inside the park where they were hearing commentary. They also saw that appellant had injuries on his forehead and also had a knife in his hand and that the deceased had a wound on his chest. As per the postmortem report Ex.PW-3/A, the time since death was about one and half days which corresponds with the time of incident. As per said report, death is also unnatural. The MLC dated 13th August, 2005 (Ex.PW 29E) of the appellant shows injuries on his forehead/scalp in the healing process. The duration of injuries is 4 to 5 days. The same also supports the case of prosecution. The circumstances discussed above, clearly points towards the involvement of the appellant.

24. The evidence on record also shows that the incident had occurred on a sudden quarrel. Firstly, the deceased hit the appellant and thereafter both ran inside the park and the occurrence took place. The contention of the learned counsel for the appellant is that, in any event, present is a case of culpable homicide not amounting to murder. It is contended that evidence establishes that it is a case which would fall within Exception 4 to Section 300 IPC. Exception 4 to Section 300 IPC reads as under:-

“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 offender

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

This exception postulates four conditions for its applicability (i) that it was a sudden fight; (2) that there was no pre-meditation; (3) the act was done in the heat of passion and (4) that the appellant had not taken any undue advantage or acted in an unusual or cruel manner.

25. There is nothing on record to show that there was a previous enmity between the deceased and the appellant. The evidence on record shows that incident had occurred on a sudden quarrel. Firstly, the appellant had put his hand on the shoulder of deceased and asked him for liquor. Thereupon there was an altercation between them and then the deceased caused the injury with a broken bottle on the head of appellant. Thereafter they ran towards Ajmal Khan Park where the fatal incident had taken place. There was no pre meditation for committing the offence and the act was committed in the heat of passion. The postmortem report Ex.PW-3/A shows three stab wounds on the deceased and injury no.1 was sufficient to cause death. The other injuries were neither on vital part of the body nor the same were fatal. There is nothing on record to show that appellant had acted in a cruel or unusual manner. In Surender Kumar v. Union Territory of Chandigarh: AIR 1989 SC 1094, which was a case of three stab wounds, the benefit of Exception 4 to Section 300 IPC was given.

In *Sangharaj Bhogappa Kamble v. State of Maharashtra: (2011) 2 SCC (Crl) 370*, the incident had taken place all of a sudden when accused and deceased were consuming liquor. The father of the accused therein had told him to leave the place and to stop drinking. Thereupon exchange of hot words had taken place following which accused therein had slapped his father. The deceased had intervened at that stage and asked why he was abusing his father. Thereupon, accused told him that he was nobody to interfere. Thereupon, accused had taken out a knife from his pocket and had stabbed the deceased causing serious injury leading to his death. In the said case, the Supreme Court held that conditions necessary for the applicability of Exception 4 to Section 300 IPC were established and the accused was acquitted of the offence punishable u/s 302 IPC and was convicted for the offence punishable under section 304 Part I of the IPC and sentenced the accused to undergo RI for five years.

26. Keeping in view the facts and circumstances of the case, we are of the view that on the basis of evidence on record, it is proved that appellant had committed the offence of culpable homicide without premeditation, in a sudden fight, in the heat of passion and did not act in a cruel or unusual manner and the case is covered under Exception 4 to Section 300 IPC which is punishable under section 304 Part I of the IPC.

27. In view of the above discussion, we feel that the conviction of the appellant for the offence punishable under Section 302 of IPC is not made out. He is, accordingly, acquitted of that offence. We, however, convict him

for the offence punishable under Section 304 Part I of the IPC and sentence him to undergo rigorous imprisonment already undergone by him i.e ., six years four months. The appellant be released forthwith, if not required in any other case.

The appeal is allowed to the aforesaid extent.

VEENA BIRBAL, J

BADAR DURREZ AHMED, J

DECEMBER 16th, 2011
ssb