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

DECIDED ON: 16.01.2012

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CRL.A. 1350/2011

DARSHAN KUMAR Appellant
Through: Mr. Michael Peter with
Mr. Dharmendra Vashishtha, Advocates.

versus

STATE Respondent
Through: Mr. Sanjay Lao, APP.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The appellant is aggrieved by the judgment of learned Additional Sessions Judge dated 17.01./2011 convicting him and two others for the offences punishable under Sections-302/323/34 IPC.
2. At the outset, it is pointed out that the appeal of the co-accused was decided on 15.09.2011 in Crl. Appeal No.535/2011 (Rameshwar Prasad & Anr. v. State). For the sake of convenience, it would be useful to extract the factual narrative in Rameshwar Prasad's case; the same is as follows: -

“2. The prosecution’s case is that on 2.11.2008 in the late evening around 10/10:30-10:45 pm, in front of plot No.18/38, Gali No.5, Anand Parbat Industrial Area, the present appellants and one Darshan (the third co-accused, who is not a party to the present appeal) had inflicted injuries on Shanker (hereafter referred to as deceased) with iron rod “saria”. In this case, the FIR was registered at PS Sarai Rohilla on an intimation received about the attack, by the police. The prosecution relied principally on the eye witnesses testimonies of PW-3 and 4 i.e. the brother and wife of the deceased, who died without recovering from the coma, caused as a result of the injuries suffered by him, on 04.11.2008. The prosecution also relied upon the testimony of PW-5, in support of its case about the recovery of sarias, the murder weapons in this case. After the arrest of the accused, the charge-sheet was initially filed under Section-304 read with 323/34, IPC. The Trial Court after considering the materials on record, framed charges under Sections-302/323/34, IPC. The accused pleaded not guilty and claimed trial. After due consideration of the material on record, which included, the testimonies of the witnesses and the material exhibits, the Trial Court concluded that the prosecution had established the guilt of the accused for the offences they were charged with, beyond reasonable doubt and handed down the impugned judgment and order.”

3. The relevant discussion as to the evidence and the reasoning of the Court is found in the following portions of the judgment: -

8. We have considered the submissions as well as the materials on record; we have also carefully gone through the original records of the Trial Court, summoned by the Court for hearing the present appeal.

9. So far as the argument of Mr. Vivek Sood, learned counsel for the appellants concerning the testimonies of PW-3 and 4 is concerned, while there is no doubt that these witnesses

were related to the deceased Shanker, that itself, is not a disabling circumstance. There can be, of course, situations, where the depositions of relatives of the deceased or a victim requires close scrutiny. At the same time, it has been repeatedly held by the Courts that when an eye witness who is also a relative of the deceased, joins the investigation and deposes during the trial, the Court has to be alive of the fact that he would be anxious to ensure that justice is done and the real culprit is brought to book. In other words, he would be anxious to ensure that the person guilty of the offence is actually implicated and would not go out of the way to falsely implicate or involve anyone else. We also notice that PW-3 Uma Shanker was injured during the attack. This circumstance, to our mind, strengthens the probability of his presence and his testimony being genuine and truthful. The prosecution has been able to show the nature of injuries by producing Ex.PW-12/B, the MLC of this witness.

10. PW-3 stated that the deceased and his family - including him - used to sleep near one Chadha's factory. During Diwali in 2008, one of the appellants i.e. Rameshwar with others were bursting crackers. This was apparently objected to by the deceased Shanker. However, he did not pick up any quarrel since the occasion was a festive one i.e. Diwali. He deposed that on 02.11.2008 at about 10:30 PM, he along with Shanker and his family was about to go to bed. Shanker came out to attend the call of nature and at that time, PW-3 noticed the appellants and Darshan in the gali. The appellants Rameshwar and Mukesh were apparently carrying saris. They gave blows to Shanker. Darshan, according to PW-3, was giving him fist blows. The witness claimed to have rushed to the spot to save his brother; upon which, Mukesh gave him saria blow on the left arm and Rameshwar and Darshan kicked him and gave fist blows. Apparently, at that time, Sunita, the deceased's wife (who also deposed as PW-4), reached the spot and raised an alarm. On hearing this, the accused fled the

spot. PW-4 has also deposed in much the same fashion and corroborates the version given by PW-3. We noticed that despite cross examination of these two witnesses, their testimonies and versions remain more or less unshaken as regards the previous evening's incident, the attack on Shanker as well as the identity of the assailants.

11. The Doctors, who recorded the MLC and also conducted the post mortem are PWs-6, 9 and 12. The testimony of PW-12 lists out the following injuries upon Shanker:

- (i) Lacerated wound 3 cm below the right eye.*
- (ii) Lacerated wound 4 cm over the right occipital region.*
- (iii) Abrasions were found 1x1 cm over the ulnar aspect of the right distal 1/3rd fore arm.*
- (iv) Abrasion 3 cm over the left upper chest.*
- (v) Abrasion 1x1 cm over the lateral aspect of left elbow.*

12. The medical evidence also is that except the injury no.2, i.e., "lacerated wound 4 cm over the right occipital region" which was caused by the iron rod, the other injuries were possibly caused by kicks and fist blows. According to PW-6, the cause of death was craniocerebral damage consequent upon blunt force impact to the head. PW-9 stated that cause of death was the impact of saria which led to the cardio arrest.

13. Having regard to the entire conspectus of the facts and the limited jurisdiction of the High Court in interfering with the findings of the Trial Court, we are of the opinion that the testimonies of the PW-3 and PW-4 are credible and trustworthy as regards the incident prior to the fatal attack, the sequence of events which occurred on 2.11.2008, which ultimately culminated in the death of Shanker. However, this by itself is not dispositive of the appeal, since we are also of the opinion

that the alternative argument put forward by the appellant's counsel is substantial and requires some consideration."

4. This Court after discussing the relevant law as to the nature of the intention of the accused in such cases, concluded that the prosecution had established the ingredients of an offence under Section-304, Part-I, IPC. This was in view of the fact that the allegations against the appellants in that case (i.e. Rameshwar and Mukesh) were that they were responsible for inflicting saria blows which ultimately led to the death of the Shankar. Having regard to these considerations, the Court concluded as follows: -

"18. We noticed that in this case, the facts proved, point to the existence of a single fatal blow on the deceased's occipital region. Although, there is mention of two sarias by the witnesses, it is also established that one of the accused rained blows on PW-3, the injured eye witness; his MLC is on record as Ex.PW-12/B. In the circumstances, there is reasonable probability - having regard to the testimony of PW-12 - that except the fatal blow, the other injuries were the result of the fist blows. The deceased was a recipient of one saria blow.

19. Having regard to these conspectus of facts, we are of the opinion that alternative submission made on behalf of the appellants is merited and they have to receive the benefit of conviction for a lesser offence under Section-304, Part-I, IPC. We also noticed that prosecution had initially charged them with this offence.

20. The appellants have undergone nearly 2 years and 10 months imprisonment. We are of the opinion that having regard to the circumstances, ends of justice would be fulfilled if

they are sentenced to undergo 8 years Rigorous Imprisonment; they shall be entitled to the benefit of remission as well as the period undergone in accordance with law.”

5. In this case, we notice that the role attributed by PW-3 & PW-4 to the appellant is that he accompanied the co-accused and that he gave fist blows and kicks to the deceased Shankar. To this, the learned counsel for the appellant submitted that the prosecution was unable to establish any prior meeting between the appellant and the co-accused and that the possibility of his being implicated falsely could not be ruled out. It was also submitted that the role attributed to him i.e. of giving fist blows and kicks is highly improbable in view of the findings recorded i.e. that the other accused were administering saria blows. We noticed that the prosecution had concededly not attributed any specific role to the appellant. In any event, it was not of the kind alleged against the other accused. PW-3 and PW-4 had deposed that Darshan Kumar had inflicted on the deceased kicks and fists blows. This Court is unimpressed with the submission that the prosecution failed to establish any meeting of minds between the accused. The material on record shows that Darshan Kumar was related to the co-accused. He had accompanied the others despite knowing that they were armed with saria. The saria, in this case, was about 3 feet in length. Having regard to the facts established, the appellant's submissions that he was not aware or was in the dark about the real intention of the co-accused cannot be countenanced. Anyone who

accompanies friends or relatives who are out to teach someone a lesson and one of whom is armed with 3 feet long rod, cannot be said to be entirely innocent. In fact that is also the legislative purport of Section-34, IPC.

6. However, having regard to the material and depositions against the present appellant, we are of the opinion that even though his conviction under Section-304, Part-I, IPC and the other provisions are to be maintained as in the case of the others, he deserves a lighter sentence.

7. In view of the above discussion, the appeal has to succeed in part. The conviction of the appellant is converted into Section-304, Part-I/34 IPC instead of Section-302 IPC. His sentence is also reduced to four years RI. The other directions vis-à-vis fine and sentence under Section-323 IPC are left undisturbed.

8. The appeal - Crl. Appeal-1350/2011 - is partly allowed in the above terms.

Order *dasti*.

S. RAVINDRA BHAT, J

S.P.GARG, J

JANUARY 16, 2012

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