

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

% *Judgment reserved on :01.10.2013*
Judgment delivered on:07.10.2013

+ CRL.A. 337/2011
MOHD. SULEMAN & ANR.

..... Appellants
Through Mr. M.L. Yadav, Adv.

versus

STATE OF DELHI

..... Respondent
Through Mr. Sunil Sharma, APP for the
State

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 On 05.03.2008 at about 03:00 PM, the appellants Ahmad Sikander and Mohd. Suleman both sons of Mohd. Yusuf had committed the murder of the victim Mohd. Nazim. While Mohd. Suleman had caught hold of the victim, Ahmad Sikandar had inflicted stab injuries upon his body.

2 This incident was projected on a motive which was to the effect that earlier in the day at about 10:00 AM, Ahmad Sikandar had gone to

the house of the victim and had demanded return of Rs.3,000/- which he had lent to him at the time of Eid; the deceased had stated that he does not have the money which had led to an exchange of heated arguments between the two; Sikander had left the place threatening to kill the victim.

3 This version of the prosecution was unfolded in the testimony of Mohd. Asim (PW-1), the real brother of the victim and who was a witness both to the incident of 10:00 AM in the morning as also the subsequent eye-witness account of 03:00 PM. It was in fact PW-1 who had removed the injured to the hospital in a rickshaw. The victim was taken to the LNJP Hospital. Nazim Khan (PW-16) who was also an eye-witness had accompanied PW-1 to the hospital. The victim had succumbed to his injuries on that day itself at 07:40 PM.

4 HC Kailash Kumar (PW-6) was posted as duty constable at the hospital and he informed the local police station Jama Masjid about the victim having been admitted in the hospital. This information was received by HC Baljit Kaur (PW-19) which was documented in DD No.17-A (Ex.PW-19/A). This DD was recorded at 03:35 PM.

5 HC Surender (PW-18) on receipt of DD No. 17-A reached the

hospital where the MLC of the victim (Ex.PW-2/A) was obtained; he was found unfit for statement; the statement of the eye-witness (PW-1) was recorded and on his statement, the rukka (Ex.PW18/A) was dispatched at 04:50 PM pursuant to which the present FIR was registered under Section 307/34 of the IPC; thereafter upon the death of the victim at 07:40 PM, the offence was converted from Section 307/34 of the IPC to an offence under Section 302/34 of the IPC.

6 The post-mortem of the victim was conducted on the following day i.e. on 06.03.2008 by Dr.Ankita Dey (PW-13) who had noted the following four external injuries on the body of the deceased:-

1. *Incised stab wound (3x1.5)cm. Present over front of left side of chest 2 cm below clavical and 4 cm above left nipple. The wound is acute angles on both sides directed inword medially downward cutting through skin subcutaneous tissue and intercostals muscles of second intercostals place and perforating left lung apical region, then passing from left to right side penetrating the right atrium and ventricle.*
2. *Surgical stitched wound 18 cm long present over left side of chest 3 cm below left nipple.*
3. *Incised stab wound 3 x1.5 cm muscle deep with acute angles present over back of left side of chest over supra scapular region. The wound is directed dowarnds backward and medially piercing skin subcutaneous tissues and muscles.*

4. *Incised stab wound 3x 1.5 cm muscle deep present over back of left side of abdomen with both acute angles. The wound is directed downward, backward and medially piercing skin subcutaneous tissue and muscles.*

7 The internal injuries were noted as under:-

1. *Chest –Collar bone/sternum/ribs- as described in injury no.1.*
2. *Plural cavity- about 1000 ml of fluid mixed with clotted blood present inside left plural cavity.*

3. *Weight of the lung – right- 350 gram*

Left- 340 gram

Surgical stitched wound present over apical region of left lung. Both lungs are pale.

Heart- Penetrating wound present over right atrium passing through right ventricle. About 30 ml fluid mixed with blood present inside pericardial cavity”.

8 Post mortem report (Ex.PW-13/A) had opined the cause of death to be haemorrhage and shock consequent upon stab wound to chest via injury No. 1. All the injuries were ante-mortem and recent. Injury No.1 was produced by sharp double edged weapon. Injuries No. 2 & 3 are produced by sharp double edged weapon. Injury No. 1 was sufficient to cause death in the ordinary course of nature; time since death was reported to be one day.

9 On 06.03.2008 Inspector Narender Rana (PW-22) accompanied by SI Ramzan Ali (PW-21) and ASI Mohd. Harun (PW-8) on secret information arrested both the appellants from Netaji Subhash Park, Jama Masjid. Their disclosure statements were recorded. Pursuant to the disclosure statement of Ahmad Sikander (Ex.PW-18/F), he got recovered the knife which was the weapon of offence from the bushes of Subhash Park; the knife was taken into possession vide memo Ex.PW-18/H and was sealed with the seal of the Investigating Officer. The clothes of both the appellants as also the weapon of offence was sent to the CFSL and the reports of the CFSL Ex.PW-22/C and Ex.PW-22/D were obtained.

10 This was the sum total of the evidence collected by the prosecution.

11 In their statements under Section 313 of the Cr.PC, both the appellants have pleaded innocence. They denied the incident and stated that they have been falsely implicated; deceased himself was a bad character and there were several persons who had inimical terms with him.

12 No evidence was however led in defence.

13 On this evidence collected both oral and documentary by the prosecution, both the appellants were convicted under Section 302/34 of the IPC.

14 At the outset, arguments have been addressed on merits. The alternate submission of the learned counsel for the appellants being that the offence at best can be the offence under Section 304 of the IPC and the lesser punishment should be imposed upon the appellants. Learned counsel for the appellants, after some arguments, in fact has chosen to give up his contentions on merits of the case. He under instructions from his clients i.e. wives of both the appellants who were present in Court stated that he is in fact not challenging the conviction but keeping in view the fact that the appellants have no criminal background and both the appellants being young in years and Ahamd Sikandar in fact having got married just seven months prior to the incident as also the contention that the incident had occurred on the spur of the moment in a heat of passion without any intent to kill the victim as is evident from the injuries suffered by the victim, conviction should be altered from Section 302 of the IPC to Section 304-II of the IPC.

15 Attention has also been drawn to the cross-examination of PW-1

wherein he has admitted that victim was a criminal of the area and there were several criminal cases pending against him and in some of those cases, he has also been convicted; most of those cases related to dacoity or extortion; the victim himself was admittedly a bad character of the area. Submission being that this additional factor should be taken into account by the Court while considering the case of the appellants.

16 These submissions have been refuted by the learned public prosecutor. His submission being that this incident was trigger of the first incident which had occurred at 10:00 AM in the morning. In these circumstances, it cannot be said that the appellants did not have the intent to kill the victim.

17 We have perused the record. The conviction is not under challenge. That apart, the clear and cogent testimony of the eye-witness PW-1 which is fully corroborated by the medical evidence which is the post-mortem report and the nature and manner of the injuries received by the victim, the case of the appellants must necessarily fail on merits. We need not go into any further details as the learned counsel for the appellants as noted supra under instructions from his clients has stated that he is in fact not challenging the conviction on merits.

18 There is no doubt that an unfortunate life has been lost. The victim was aged 36 years of age. Sympathy has to weigh not only in favour of the families of the appellants as has been argued by the learned counsel for the appellants but this Court also cannot forget the fact that the victim was also a family-man and the trauma that his close relatives must have undergone at the time of his death cannot be explained in words.

19 Section 300 of the IPC reads as under:

“300. Murder- Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or”

20 There are four exceptions contained in this provision of law. Exception 4 has been pressed into service by the learned counsel for the appellants. Exception IV to Section 300 reads herein 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.

Explanation.- It is immaterial in such cases which party offers the provocation or commits the first assault.”

21 To invoke Section 300 of the IPC, four conditions must be satisfied i.e. (i) it was a sudden fight; (ii) there was no premeditation;

(iii) it was in the heat of passion and (iv) the assaulter had not taken any undue advantage or acted in a cruel or unusual manner. Number of injuries may not be a decisive factor but what is important is that the occurrence must have been sudden and not premeditative and the offender has acted in a fit of rage; at the same time, the offender should not have taken any undue advantage or acted in a cruel manner.

22 Narration of PW-1 is relevant. He is an eye-witness on which the conviction has been founded. He has deposed that the deceased who was his elder brother had come to visit their mother who was not well. This was on 04.03.2008. On the following day i.e. on 05.03.2008 Ahmad Sikander had come to his house and demanded Rs.3,000/- from the victim which he had lent to his brother but when his brother stated that he does not have the money, Ahmad Sikandar got enraged. At about 03:00 PM when PW-1 along with his deceased brother were going to visit their brother-in-law and were crossing gali Shayamlal Bazar Matia Mahal, Ahmad Sikander along with Mohd. Suleman accosted them; Mohd. Suleman caught hold the deceased whereas Ahmad Sikandar stabbed the victim twice with a knife. This was at his back. When his brother turned, Ahmad Sikander stabbed him on the left side of his

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chest. PW-1 managed to save his brother. The appellants thereafter fled away.

23 In his cross-examination, PW-1 had admitted that the incident took place within a span of 2-3 minutes. The incident had occurred at Gali Shayamlal and the shops at that time were open in the gali; rickshaws and two-wheeler scooters were going on the road; there was a police post about 50 spaces away.

24 It is not the case of PW-1 that the appellants knew of the proposed visit of PW-1 and his brother to Seelampur where they were going to meet their brother-in-law. It has also come on record that the place of incident was a busy place; it was in the afternoon at 03:00 PM the place of incident having several shops in the gali (as is evident from the site plan Ex.PW-21/A) which were open; it was a busy place. The appellants also not knowing about the previous plan of the victim and PW-1 of going to Seelampur had obviously per chance met them in the gali where both the appellants accosted the victim. The role attributed to Mohd. Suleman was that he caught hold of the victim and Ahmad Sikander stabbed him.

25 The post-mortem report Ex.PW-13/A is also relevant. It has noted

four injuries. MLC Ex.PW-2/A had however noted three injuries.

26 The eye-witness account and injuries No. 3 & 4 in the post mortem report corroborate one another; eye-witness account being that Ahmad Sikander had stabbed the victim at his back; one was at the back of the left side of chest over scapular region which wound measured 3X1.5 cm and the second injury was over the back of left side of abdomen also measuring 3X1.5 cm. Both these injuries were pitched upon the victim from the back. They were not on the vital parts of the body. When the victim turned around, the third injury was inflicted upon the right side of his chest.

27 This eye-witness account coupled with the medical evidence establishes that the appellants did not have the premeditative intent to plan the murder. Firstly it was not known to the appellants that the victim and his brother would be going to meet their brother-in-law at 03:00 PM. Obviously they had met the victim in the busy gali per chance when all of a sudden in a fit of rage Ahmad Sikander who was nursing a grievance of his money not having been returned by the victim attacked him; Mohd. Suleman had caught hold of the victim. The

injuries were also not on vital parts of the body. The weapon was also not of a nature which could be said to be brutal.

28 In this background, keeping in view that there was a sudden arouse of passion and the injuries also being not on vital parts of the body as also that the appellants neither having acted in an unusual or a cruel manner, the case of the appellants falls under Section 304-I of the IPC. Part-I applies where the accused caused bodily injury with the intention to cause death; or with intention to cause such bodily injury as is likely to cause death.

29 The conviction of the appellants is accordingly modified and they are convicted under Section 304-I of the IPC.

30 The observations of the Apex Court in (2006) 11 SCC 444 Pulicherla Nagaraju@Nagaraja Reddy v. State of Andhra are in this context relevant and read as under:

“.....It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or

was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre- meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.”

30 The appellants are stated to be in judicial custody. They have no criminal antecedents. Although PW-17 had brought the criminal record of both the appellants but apart from the present case as on date, there is no case pending against them. Both the appellants are young in years. Mohd. Suleman is aged 34 years and has a six years old child. Ahmad Sikander is aged 30 years. He was married just seven months prior to his conviction.

31 In this background, each of the appellants are sentenced to undergo RI for a period of eight years and to pay a fine of Rs.5,000/- each and in default of payment of fine, to further undergo SI for six

months each.

32 Appeal is modified and disposed of in the above terms. A copy of this order be sent to the Jail Superintendent for intimation and necessary compliance.

INDERMEET KAUR, J

KAILASH GAMBHIR, J

OCTOBER, 07 2013

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