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

+ **CRIMINAL APPEAL NO.429/2012**

% **Date of decision: 1st March, 2013**

SATPAL

..... Appellant

Through Mr. Saurabh Kansal, Advocate.

versus

STATE

..... Respondent

Through Mr. Sanjay Lao, APP for the State.

CRIMINAL APPEAL NO. 430/2012

RAJU

..... Appellant

Through Mr. Manoj Kumar Singh, Advocate.

versus

STATE

..... Respondent

Through Mr. Sanjay Lao, APP for the State.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

SANJIV KHANNA, J. (ORAL):

The two appellants have been produced before us from the

prison. Learned Amicus Curiae spoke to them outside the Court. Mr. Sanjay Lao, APP has also spoken to them outside the Court. As noticed in our order dated 28th February, 2013, ASI Rajvir Singh (PW-3) has not been cross-examined at the Trial Court. PW-3 is the most important witness, as per the Trial Court judgment itself, as he has stated that he had seen the occurrence and detained the appellants immediately thereafter. Learned Amicus Curiae, after talking to the appellants, have averred that they do not want to avail opportunity to cross-examine PW-3. The aforesaid statement has been taken on record.

2. These two appeals by Satpal and Raju impugn the common judgment dated 25th May, 2011 convicting them under Section 302 read with Section 34 of the Indian Penal Code, 1860 (IPC, for short) for having committed murder of Ram Sudhar on 13th December, 2007 at about 9.00 P.M. The aforesaid conviction arises out of FIR No. 629/2007, Police Station Bawana. By the order of sentence dated 28th May, 2011, they have been sentenced to life imprisonment and fine of Rs.10,000/- each, in default which they have to undergo rigorous imprisonment for three months.

3. The appellants, who are brothers, were detained by ASI Rajvir Singh (PW-3) and Constable Kuldeep Singh, (PW-6), after the incident, therefore, their statements are crucial for the present case.

4. ASI Rajvir Singh (PW-3) has averred that, on 13th December, 2007, he was posted on PCR duty from 8.00 P.M. to 8.00 A.M., at PCR van L-77, and was present with Constable Kuldeep Singh (PW-6) at Hanuman Mandir Narela Road, near Western Yamuna Canal. At about 9.00 P.M., a passerby came and apprised them that at the distance of about 500 - 600 yards, two men were beating another person. They reached the spot immediately in the PCR van and found the two appellants to be present there. On interrogation they revealed their names. The person they had mauled, aged around 35 years, was lying naked, in an unconscious condition. A track pant found nearby was put on his lower body. The injured and the two appellants were removed from the spot at about 9.15 P.M. and taken to M.B. Hospital, Pooth Khurd where the injured was declared as brought dead. Subsequently, Sandeep (PW-2) identified the dead body to be of his father Ram Sudhar.

5. PW-3 has further deposed that crime team was called, site plan was prepared and photographs were taken at the crime spot. The investigating officer seized blood, blood stained pieces of dry bushes, blood stained grass and earth control. In addition, one full sleeves sweater of sleti colour, one chocolate colour half sleeves, one underwear of sky blue colour, one pant of chocolate colour, one T-shirt of sky blue colour half sleeves, one cap of sleti colour, all blood

stained were seized vide seizure memo Exhibit PW-2/A, signed by him at point 'B'. From the spot, the IO further seized one right side chappal blood stained, one pair of brown colour shoes blood stained, other pair of blue coloured plastic chappals blood stained and two caps of black colour on which the word 'Nike' was written in English. After wearing apparel were arranged from their house, the clothes worn by the two appellants, which were blood stained, were also seized by the investigating officer vide seizure memo Exhibit PW- 2/F and - 2/G. The deceased's clothes (collectively marked Exhibit P-1) were identified by PW-3. The shoes found at the spot were marked Exhibit P-2. The track pant found lying which was put on the unconscious deceased was marked Exhibit P-3. One pair plastic slippers was marked Exhibit P-4 and the single chappal found at the spot was marked Exhibit P-5. The clothes worn by the appellant-Satpal were marked Exhibit P-6, P-7 and P-8 and the clothes worn by the appellant-Raju were marked Exhibit P-9, P-10 and P-11. PW-3 correctly identified the aforesaid articles in the Court.

6. Constable Kuldeep Singh (PW-6) has deposed that in the intervening night of 13th/14th December, 2007 he was posted as a driver from 8.00 P.M. to 8.00 A.M. with PCR van L-77 which was parked in front of Hanuman Mandir, Bawana Road, Narela. At about 9.00 P.M., ASI Rajvir Singh, in charge of PCR van, was informed by a passer-by

that two boys were beating a third boy at about 500/600 yards towards Bawana side on Narela Bawana Road. He drove the PCR van with ASI Rajvir Singh and reached the place of occurrence where he saw the two appellants mercilessly beating another person, after removing his clothes. He identified the two appellants, in the court, and averred that they were apprehended at the spot and were made to sit with the injured in the PCR van which was taken to M.B. Hospital, Pooth Khurd. He was cross-examined by the counsel for the two appellants and has deposed that the spot of occurrence was secluded and there was no shop or establishment nearby. The factory area was at some distance. They saw the two appellants beating the deceased from a distance of about 40 feet. PW-6, however, could not recollect the name and address of the person, i.e., passer-by, who had given them the information. Public persons were not joined in the said proceedings. PW-6 has further deposed that the injured was unconscious and could not make any statement. PW-6 remained in the hospital for 30 to 40 minutes and then returned back to the spot at about 10.00/10.30 P.M. His statement was subsequently recorded by Inspector H.S. Meena at the spot.

7. H.S. Meena (PW-18), the investigating officer and the SHO of Police Station Bawana, has deposed that at 10.15 P.M. he received information from duty officer that an injured has been admitted in MB

Hospital by PCR and doctor had declared him dead. Thereafter, he along with Constable Satish, Constable Joginder and an operator reached M.B. Hospital. The appellants were present there in custody of Head Constable Dharambir and Head Constable Balwan. Thereafter, he reached the spot of occurrence and found ASI Rajvir Singh (PW-3), driver Kuldeep Singh (PW-6) and the deceased's son Sandeep were present there. A crime team had reached the spot. He prepared the rough site plan at the instance of ASI Rajvir Singh (marked Exhibit PW-18/B), recorded the statements and lifted the incriminating material/evidence etc. He also took into possession the blood stained clothes worn by the appellants. The case properties were identified by him in the Court. In the cross-examination he has stated that the place of occurrence was surrounded by jungle and, therefore, there was no question of any enquiry from a third person. The incriminating material was seized and sent to CFSL for a report.

8. The CFSL reports (Exhibit PW-11/A and 11/B) were proved by Dr. Rajender Kumar (PW-11), Assistant Director, Biology, FSL, Rohini, Delhi. As per the said report (Exhibit PW-11/A), blood was found on the articles sent for examination but could not be detected on the earth control, deceased's cap, the pair of dirty shoes, the pair of slippers and one belt. As per the serological report (Exhibit PW-11/B) human blood was found on other articles. The blood group indicated

for most of the articles was of blood group 'A' but cotton wool swab, blood stained soil, slipper right foot, one pant and the payjama had no reaction.

9. We agree with the appellants counsel that the FSL report (Exhibit PW-11/A and 11/B), which show presence of human blood or blood group 'A' cannot, obviously, be a decisive proof against the appellants since the appellants were taken with the deceased in the same PCR van. At that time the blood oozing from the deceased's body could have stained and come on to the clothes worn by the two appellants. The presence of the appellants in the PCR van and in the hospital is an accepted and admitted position by the prosecution. This is clear from the above mentioned statements of PW-3, PW-6 and PW-18. Similar statement was made by Inspector Satyapal Singh (PW-15), who on receipt of DD entry No. 26A, along with Constable Charan Singh, reached M.B. Hospital, Pooth Khurd. In the meanwhile other police officers also reached the hospital. PW-15 had recorded the statement of ASI Rajvir Singh (Exhibit PW-3/A).

10. The MLC of the deceased (Exhibit PW-4/A) does not mention the name of the deceased, who has been described as unknown male aged about 35 years. It records that the said unknown person was brought to the casualty ward on 13th December, 2007 at 9.25 P.M. and was declared brought dead.

11. The FIR in question was recorded on 14th December, 2007 at about 1.50 A.M. However, it is noticeable that the crime team had reached the spot on 13th December, 2007 at 11.30 P.M. after receiving information and had remained there till 12.30 A.M. They have recorded the time of departure from the police station as 11.05 P.M.. The crime team report is Exhibit PW-8/A.

12. We have been through the statements of the two appellants recorded under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C., for short). In reply to the questions put forth to them, the appellants have either stated that the suggestion given was incorrect or that they did not know. They have averred that they were innocent and had been falsely implicated in this case by the police officers to solve the case.

13. Learned counsel for the appellants has relied upon DD entry No. 26A (Ex.PW-5/A) which was recorded by ASI Prem Singh (PW-5) at 9.55 P.M. on 13th December, 2007. The said DD entry mentions that three boys, who were heavily drunk, had beaten up one boy and all of them were being taken to the M.B. Hospital. As per the DD entry No. 26A (Exhibit PW-5/A), the aforesaid entry was recorded by PW-5 on the basis of information given by the PCR. The reference to three persons appears to be incorrect or probably includes the deceased. We note that viscera report of the deceased is not on record. We further

note that the MLC of the two appellants was placed on record before the trial court but was not proved and, therefore, not given exhibit mark. However, it is noticeable that the appellants were formally arrested vide arrest memos Exhibit PW-2/B (Satpal) and Exhibit PW-2/D (Raju). The arrest of Satpal has been shown at 6.40 A.M. on 14th December, 2007 from the M.B. Hospital. Raju was shown to be arrested at 6.10 A.M. on 14th December, 2007 from M.B. Hospital. The delay in arrest and that too from the hospital raises some doubt regarding whether the appellants had suffered injuries and why they were in the hospital from 9.15 P.M. at night till 6.00 A.M. in the morning.

14. From the statements of PW-3 and PW-6, it is apparent that there was a sudden scuffle between the appellants and the deceased. The appellants did not know the name of the deceased, who was an unknown person. The identity of the deceased came to the knowledge of the police subsequently when his son Sandeep (PW-2) identified him. The identity of the deceased is not mentioned in the MLC (Exhibit PW-4/A). Further, the appellants who were nabbed at the crime spot and detained were not carrying any weapon of offence. They were completely unarmed and had not picked up any object like stone, wood etc. to attack and/or injure. The MLC (Exhibit PW-4/A) does not mention any physical injury on the body of the deceased.

However, the post-mortem report (Exhibit PW-12/A) records that there was fracture-dislocation of the second, third, fourth, fifth and sixth of the left side of middle clavicular line. The brain matter was congested and oedematous. The post-mortem report refers to small reddish bruises and abrasions and the cause of death was opined to be cerebral damage as a result of blunt force directed upon the head. All injuries were ante mortem in nature. It also refers that the other injuries in form of abrasions and bruises caused by blunt force during assault and there were some fingernail marks as a result of manual pressure on the neck but this was not delineated as the cause of death.

15. What is discernible from the facts, as proved by PW-3 and PW-6 and the post-mortem, is that there was a scuffle or a sudden hand to hand fight. In the said grapple possibly the deceased fell down and injured or hurt his head which caused the fatal injury resulting in cerebral damage and his subsequent death. Learned counsel for the appellants has rightly submitted that the bruises and abrasions, which are mentioned in the post-mortem report, are minor in nature and could have been caused during the scuffle and when the deceased fell down. As noticed and highlighted, the MLCs of the accused were not proved and exhibited. The doctor, who had examined the appellants, was not produced though it has come on record that the appellants had remained in the hospital till early morning of 14th December, 2007.

This is strongly indicative or suggestive to the fact that appellants too suffered injuries during the scuffle.

16. It is difficult to accept that the fatal injury, which resulted in cerebral damage, was the intended injury and there is no evidence to show that the appellants had caused or beaten the head of the deceased on the ground. We have already noticed DD entry No. 26A (Exhibit PW-5/A), which mentions that three persons were inebriated. The viscera report of the deceased is not available. It has been stated in ***Virsa Singh v. State of Punjab*** (1958) 1 SCR 1495:

“16. The learned counsel for the appellant referred us to *Emperor v. Sardarkhan Jaridkhan* (1917) I.L.R. 41 Bom 23, 29 where Beaman J., says that -
"where death is caused by a single blow, it is always much difficult to be absolutely certain what degree of bodily injury the offender intended." With due respect to the learned Judge he has linked up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes overlap. The question is not whether the prisoner intended to inflict a serious injury or a racial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended

serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict and injury of particular degree of seriousness, but where he intended or inflict the injury in the question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distant question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.

17. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial; scratch and that by accident this victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact; and whether the conclusion should be one way or the other is a matter of proof, where necessary, by calling in aid all reasonable inferences of fact in the absence of direct testimony. It is not one for guess-work and fanciful conjecture.”

17. Even otherwise Explanation 4 to Section 300 IPC would be applicable to the facts of the present case as there that there was a sudden quarrel. The fact that the two appellants were not carrying any

weapon of offence and did not know the name of the deceased, are suggestive of the said facts and position. The post-mortem report (Ex.PW-12/A) does not indicate that there was any attempt to have unnatural intercourse or the deceased was sexually assaulted. Neither is that the case of the prosecution.

18. Keeping in view the aforesaid facts, we feel that the appellants should be convicted under Part-I of Section 304 IPC and not under Section 302 IPC as held by the trial court. Their conviction is accordingly modified.

19. On the question of sentence, we notice that the appellants have been in custody since 14th December, 2007 and have already suffered incarceration for more than five years and two months. They do not have any previous history of being involved in any offence. It is stated by the two appellants, who are present in the Court, that they had come to Delhi from their native village to work as beldars. The appellants Satpal and Raju were about 32 and 22 years old, respectively, at the time of occurrence. Keeping in view the aforesaid facts, we feel that they should be released on the sentence undergone, which as noted above, is more than five years and two months. Both the appellants state that about Rs.2,000/- each are lying to their credit with the prison authorities on account of work performed by them. The amounts lying

to the credit of the two appellants will be treated as fine paid in the present case. The jail authorities will transfer/transmit the said amount to the trial court concerned. The appeals are accordingly disposed of.

SANJIV KHANNA, J.

SIDDHARTH MRIDUL, J.

MARCH 01, 2013

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