

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

+ **CRL.A. 555/2010**

RAMESH Appellant
Through: Mr. Sumit Verma, Advocate.

versus

STATE (NCT) OF DELHI Respondent
Through: Ms. Ritu Gauba, APP.

% Date of Decision : May 09, 2013

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL
HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT

: REVA KHETRAPAL, J.

1. The Appellant seeks to challenge the judgment dated 22.10.2009 vide which Appellant was held guilty of offences under Sections 302/397/307 IPC and under Section 25 Arms Act, 1959 and order of sentence dated 27.10.2009 vide which he was sentenced as under:-

- (i) For the offence under Section 302 IPC, he was sentenced to RI for life and was also ordered to pay fine of ₹ 1,000/-. In default, to undergo SI for 2 months.
- (ii) For the offence under Section 307 IPC, he was sentenced to undergo RI for 5 years and pay fine in the sum of ₹ 1,000/-. In default, to undergo SI for 2 months.
- (iii) For the offence under Section 397 IPC, he was sentenced to undergo RI for 7 years and pay fine of ₹ 1,000/-. In default, to undergo SI for 2 months.
- (iv) For the offence under Section 25 Arms Act, he was sentenced to undergo RI for 3 years and pay fine in the sum of ₹ 500/-. In default, to undergo SI for 1 month.

All the sentences were to run concurrently.

2. Shorn of unnecessary details, the prosecution case emerging from the record is that on 22.6.2003 at about 12.45 p.m. behind Subzi Mandi Ghazipur, Delhi, the Appellant snatched a bag from the possession of Sudhir Munim working at Aarat No.103, Subzi Mandi Ghazipur. When Sudhir objected, the accused took out a desi katta and fired at the deceased. The fire hit the deceased Sudhir Munim and he fell down on the ground. While Appellant was fleeing from the spot, the complainant Ram Kishan who reached there along with his nephew Rajpal raised alarm. He along with public persons chased the Appellant Ramesh. The Appellant Ramesh again fired from his katta, which fire hit Rajpal on his left hand. PCR officials reached there and the Appellant was apprehended. From the possession of the Appellant, a katta and bag of Sudhir was recovered. SI Etender

Swaroop, Investigating Officer reached at the spot on receiving DD No.15A and prepared rukka and got the FIR registered at P.S. Kalyan Puri. The injured Sudhir succumbed to injuries sustained by him on 24.6.2003. The learned Trial Judge in his judgment convicted the Appellant for offences under Sections 302/307/397 IPC and Section 25 Arms Act, 1959 on the basis of the following chain of events, which he concluded stand established beyond any reasonable doubt by the evidence led by the prosecution:-

- (i) Accused with the motive to commit robbery armed with illegal desi katta fired a shot on the back of Sudhir who happened to cross from there containing a bag in his hand.
- (ii) PW-3 and PW-6 both being related to each other happened to pass through the scene of crime as they were going to their house after purchasing vegetables. They both saw accused firing at Sudhir and snatching his bag.
- (iii) Both PW-3 and PW-6 after seeing the incident alongwith other public persons chased the accused, who ran towards Gazipur Village. To deter the public and PW-3 and PW-6, the accused fired at PW-3 thereby injuring his left hand.
- (iv) PW-11, PW-8 and PW-16 were posted in PCR van and were patrolling that area. They saw the accused being chased by the public. These police officials also joined the public in apprehending the accused.

- (v) After accused was apprehended PW-9 and PW-10 who were on patrolling duty on their motorcycle and were posted in the local police station also reached there. They found the accused being apprehended by PW-16 and PCR officials.
- (vi) IO PW-26 received information regarding this incident through DD No.15-A and alongwith PW-17 reached at the spot. The countrymade pistol and the bag snatched from deceased Sudhir which were recovered from the possession of the accused were handed over to the IO. The bag was found containing a small account book, one register, one visiting card, one used calculator, a small note book, 20 receipts of M/s. Satnam Singh, 15 visiting cards and currency notes in the sum of Rs.4,810/-. The katta was measured after it was unloaded and one live cartridge recovered. Thereafter IO completed the other procedural formalities as per law.

3. At the outset, it may be recorded that Mr. Sumit Verma, learned counsel for the Appellant did not challenge the conviction of Appellant for the offences under Sections 307/397 IPC and Section 25 Arms Act on the ground that Appellant has already remained in jail for the punishment awarded to him for these offences. The sole submission of Mr. Verma was that the learned Trial Judge fell into error in convicting the Appellant for the offence under Section 302

IPC instead of Section 304, Part II IPC. The aforesaid submission was made on the strength of the following facts and circumstances:-

- (i) The cause of death is a single injury on the back of the deceased pursuant to a scuffle between the Appellant and the deceased as is borne out from the medical evidence on record.
- (ii) The Appellant and the deceased were not even known to each other and no ill-will or animosity has been alleged by the prosecution between the Appellant and the deceased. The only motive of the offence was, therefore, robbery.
- (iii) The offence was not a pre-planned or pre-meditated one and took place in the heat of the moment during a scuffle between the Appellant and the deceased.
- (iv) The Appellant and the deceased co-incidentally happened to pass each other. The Appellant snatched the bag of the deceased. The deceased resisted when the Appellant was trying to escape and tried to prevent the Appellant from escaping. The Appellant in a bid to escape fired a shot. It is not as if the Appellant snatched the bag of the deceased by pointing the katta at him.

4. On the basis of the aforesaid facts and circumstances, counsel submitted that the proper conviction of the Appellant would be under Section 304, Part II IPC and not under Section 302 of the Penal Code. In order to substantiate his aforesaid contention, he placed reliance upon the judgment of the Supreme Court in *Pappu alias Hari Om vs.*

State of Madhya Pradesh, (2009) 11 SCC 472. The prosecution version in the said case was that one Ramesh (deceased) and some others were playing cards near the house of Kishanlal under an electric pole. The Appellant Pappu @ Hari Om along with the co-accused Bal Kishan came there and asked the persons who were playing cards to permit them to play with them. Ramesh objected to it and this gave rise to a quarrel between him and the accused Pappu @ Hari Om and Bal Kishan. Both Bal Kishan and Pappu @ Hari Om went away after abusing Ramesh. After sometime, they returned back. Pappu @ Hari Om had a .12 bore gun in his hand. Both the accused abused Ramesh and Pappu @ Hari Om fired gunshots, which caused injuries on the right shoulder of Ramesh and he fell down. Since there was a wound on the chest of the deceased, he was taken to hospital where he succumbed to his injuries. The Supreme Court after considering the circumstances in their entirety including the part of the body where the bullet fire hit the deceased held that the appropriate conviction would be under Section 304, Part II IPC and that custodial sentence of 8 years would meet the ends of justice.

5. Reliance was also placed by learned counsel on the judgment of the Supreme Court rendered in *Balkar Singh vs. State of Uttarakhand, (2009) 15 SCC 366*. In the said case, there was old enmity between appellant-Accused and one of deceased (Deceased 1). The prosecution case was that the accused requested the Deceased 1 to have some wine with him, but the Deceased curtly turned down the request. The appellant felt insulted, went inside the house and came back with a gun. The Deceased and the witnesses in the meanwhile

started travelling in their tractor and when the tractor was moving at a high speed, the appellant first fired in the air and thereafter indiscriminately fired shots resulting in the death of Deceased 1 and 2. Deceased 1 died on the spot in the tractor. Injured Deceased 2 succumbed to the injuries in the hospital. The trial court convicted the accused under Section 302 IPC and the High Court upheld the conviction recorded by the trial court. On further appeal, the Supreme Court after examining and analyzing the provisions of Sections 299 and 300 in the backdrop of the celebrated judgment of Vivian Bose, J. in *Virsa Singh vs. State of Punjab*, AIR 1958 SC 465, held that the offence was not covered by Section 302 IPC and the proper conviction would be under Section 304, Part I IPC with custodial sentence of 8 years in the peculiar facts of the case.

6. The next judgment relied upon by the learned counsel was rendered in the case of *Daya Nand vs. State of Haryana*, AIR 2008 SC 1823. In the said case, an altercation took place between one Shankar (PW5) and the deceased on one side and the accused Amar Singh (since acquitted) and his son Daya Nand on the other with regard to the flow of irrigation water in their respective fields. Accused threatened that they will see them and both of them left towards the village. Shankar and the others went to supervise the flow of irrigation water through the water courses. In the meantime, both the accused came back. Accused Daya Nand was armed with a gun. Accused Amar Singh exhorted his son accused Daya Nand to fire a shot. Accused Daya Nand then fired a shot from his gun towards Chhajju Ram who took a turn but was hit on the right side of

the waist and fell down. Chajju Ram succumbed to his injury. Considering the aforesaid facts, the Supreme Court opined that the appropriate conviction would be under Section 304, Part II and restricted the sentence to eight and a half years already undergone by the accused Daya Nand. The Court also highlighted the difference between 299 and 300 IPC. It was held that:-

“According to the rule laid down in Virsa Singh’s case, even if the intention of 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 not be murder. Illustration (c) appended to Section 300 clearly brings out this point.

20. 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.”

7. Reliance was also placed on behalf of the Appellant on a judgment of a Division Bench of this Court in ***Vishnu Mohan vs.***

State (NCT of Delhi), (2001) 6 SCC 296. In the said case, the accused who was a drug addict in order to snatch money and the gold ornaments of his mother manually strangled her. The Court held that at best from the nature of the injuries that had been caused to the deceased, it could be said that the accused may have the knowledge that the injuries were likely to cause hurt to his mother but intention to kill as such could not be inferred from the evidence available on record. The accused in order to snatch money and the gold ornaments of his mother did the act. He had no intention that this act of his would in all probability caused the death of his mother. Therefore, the case at best was covered under Section 304, Part II IPC, instead of Section 302 IPC.

8. Ms. Ritu Gauba, the learned APP on behalf of the State sought to rebut the contention of learned counsel for the Appellant that a single gun shot injury on the back of the deceased was not sufficient to convict the Appellant under Section 302 IPC and the conviction deserved to be converted into one under Section 304, Part I. She relied upon the judgment of the Supreme Court in *Bhagwan Munjaji Pawade vs. State of Maharashtra, (1978) 3 SCC 330* to contend that the case was not covered by Exception 4 to Section 300 of IPC as was sought to be made out by appellant's counsel. In the case of *Bhagwan Munjaji*, it was submitted on behalf of the Appellant that the circumstances disclosed that the quarrel had erupted suddenly and the injuries were inflicted by the Appellant in the heat of passion without pre-meditation during a sudden fight, and, as such, he was entitled to the benefit of Exception 4 to Section 300 of IPC and the

offence committed by the Appellant was one under Section 304, Part I of IPC. Rebutting the aforesaid submission, the Supreme Court observed:-

“It is true that some of the conditions for the applicability of Exception 4 to Section 300 exist here, but not all. The quarrel had broken out suddenly, but there was no sudden fight between the deceased and the appellant. ‘Fight’ postulates a bilateral transaction in which blows are exchanged. The deceased was unarmed. He did not cause any injury to the appellant or his companions. Furthermore, no less than three fatal injuries were inflicted by the appellant with an axe, which is a formidable weapon on the unarmed victim. Appellant, is therefore, not entitled to the benefit of Exception 4, either.”

9. Ms. Gauba also relied upon the case of ***Vijender Kumar alias Vijay vs. State of Delhi, (2010) 12 SCC 381*** to contend that where it is a unilateral act on the part of the Appellant as in the instant case, it cannot be said to be a sudden quarrel and as such the case of the Appellant cannot fall under Exception 4 to Section 300. She further contended that the number of injuries caused in such a case is not conclusive in determining nature of offence, but what has to be primarily seen are the circumstances preceding the incident and not exclusively during the incident.

10. In the aforesaid context, learned APP heavily relied upon a Division Bench judgment of this Court in ***Mohd. Aslam @ Aslam vs. State, 186 (2012) DLT 481***. In the said case, this Court relying upon the observations of the Supreme Court in the judgments reported as ***Bhagwan Munjaji Pawade vs. State of Maharashtra*** and ***Vijender***

Kumar alias Vijay vs. State of Delhi (supra) held that where the accused was armed with dangerous weapon and the deceased was unarmed conviction for the offence of murder deserved to be sustained.

11. We find that the facts in the case of *Mohd. Aslam @ Aslam vs. State (supra)* and the facts of the present case bear a degree of similarity. In the said case, the Appellant and his alleged accomplices had entered the premises of the family of the deceased with the intention to commit robbery and were armed with deadly weapons. Their entry was noted resulting in hue and cry being raised. The robbery got aborted. The accomplices of the Appellant managed to flee. The Appellant was apprehended at the spot by the crowd but before he could be finally pinned down, he fired at the deceased and his younger brother from a close range. The former died and the latter was injured. The Court held that though the Appellant may have had no intention to kill but it could safely be said that he voluntarily caused the death. Dwelling upon and highlighting the definition of the word ‘Voluntary’ as per Section 39 of the Indian Penal Code and the illustration thereunder, the Court held that the fact that the accused was armed with dangerous weapon and the deceased was unarmed was sufficient to indict the accused with the offence of murder. For the sake of ready reference, Section 39 of the Indian Penal Code with the illustration are reproduced hereunder:-

“39. “Voluntarily” – A person is said to cause an effect “voluntarily” when he causes it by means whereby he intended to cause it, or by means which,

at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustration

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery and thus causes the death of a person. Here, A may not have intended to cause death; and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.”

12. Distinguishing the case of ***Balkar Singh (Supra)***, the Division Bench in ***Mohd. Aslam @ Aslam Vs. State (Supra)*** observed that:-

“12. Though not expressly said, the signature tune of the judgment guides us that the Court found probable intention was to fire out of anger and with no particular motive, that is, a mindless act and since the distance from where the shot was fired and the place where the deceased was hit was considerable, knowledge of a lower degree was attributed to the accused.”

13. In the instant case, the ocular evidence of the two eye witnesses PW3 and PW6, in our considered opinion, sufficiently shows that there was no sudden fight. The Appellant was armed with a katta for the purpose of robbery. There was a scuffle for the bag from the hand of the deceased and when deceased objected, the Appellant fired with the country made pistol which hit the deceased on the back side of the deceased. Thereafter, the deceased fell down and Appellant ran towards Ghazipur village after snatching his bag. When PW3 Rajpal alongwith other persons tried to apprehend the Appellant, the Appellant made fire on him, which hit on his left hand in the wrist.

The PCR officials reached the spot and the Appellant was overpowered by the public persons and the PCR officials. As reiterated by the Hon'ble Supreme Court from time to time, what has to be seen is the circumstances taken as a whole for the purpose of judging whether there was a sudden fight between the deceased and the accused. True, only a single gun shot was inflicted but there is no denying the fact that the wound was inflicted in the course of armed robbery. The autopsy report Ex.PW1/A showed a firearm entry wound .5 X .5 cm was present on the lower middle back over the second lumbar vertebra. The edges of the wound was showing blackening. The injury had gone to the underlying vertebra and entered the abdominal cavity. The cause of death was opined as ante-mortem injuries produced by a firearm projector and sufficient to cause death in the ordinary course of nature. The blackening of the wound clearly goes to show that the shot was fired from a short distance. The accused was armed with a dangerous weapon which he fired from close range resulting in the death of the deceased. Thus, it could safely be said that he voluntarily caused the death of the deceased, in as much as if his intention was only to run away with the booty, he could have fired the shot in the air to facilitate escape and if at all needed, to fire on a non-vital part of the body such as leg of the victim, but instead of doing so he fired from a close range on the lower middle back over the second lumbar vertebra, which proved fatal. As such, in our opinion, considering the evidence on record the appropriate conviction would be under Section 302 of the IPC. We are, therefore, not inclined to alter the order on conviction of the

learned trial judge into one under Section 304, Part II IPC or Section 304 Part I.

14. The appeal is accordingly dismissed.

**REVA KHETRAPAL
JUDGE**

**SUNITA GUPTA
JUDGE**

May 09, 2013
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