

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

% *Judgment reserved on:17.07.2013*
Judgment delivered on:22.07.2013

+ CRL.A. 719/2010 & Crl. M.A No. 20265/2012
MANGE KHAN

..... Appellant

Through: Mr. Avninder Singh and Mr.
Aditya Vaibhav Singh, Advocates

versus

STATE

..... Respondent

Through: Mr. Sunil Sharma, Additional
Public Prosecutor for the State
along with Inspector Rajesh
Vijay.

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

INDERMEET KAUR, J.

Crl. M.A No. 20265/2012

1 This is an application filed by the applicant Mange Khan under Section 391 read with Section 311 and Section 482 of the Code of Criminal Procedure (hereinafter referred to as the 'Code) for recalling PW-6, PW-8 & PW-9 for their further cross-examination.

2 The averments made in the application are to the effect that although admittedly all the aforementioned witnesses i.e. PW-6, PW-8 & PW-9 had been examined and cross-examined but because of the fault

of the counsel, no effective cross-examination could be conducted; the said witnesses being material witnesses, permission should be accorded to recall them.

3 Reply has been filed opposing the application. Submission of the prosecution being that this provision cannot be used to fill in lacuna.

4 Record shows that PW-6 was the landlord where the deceased was living; PW-8 was a co-tenant and so also was PW-9. All the aforementioned witnesses were examined-in-chief and cross-examined at length by the counsel for the accused Ms. Vandana Ruhela on 20.03.2007. The said witnesses were discharged on the same day. Relevant would it be to state that Ms. Vandana Ruhela was a private counsel; she had been engaged privately by the accused and was not a legal aid counsel; the legal aid counsel representing the accused was in fact discharged as a private advocate had been engaged. This has been noted by the court in its order dated 20.3.2007. Thereafter an application seeking recall of PW-3, PW-6 and PW-8 was filed before the trial Court. This application was dismissed on 18.02.2009 by a speaking order. It was noted that effective cross-examination of all the aforementioned witnesses has been carried out by the counsel for the accused; no case having been made out to recall the aforementioned witnesses, the said application was dismissed.

5 In the body of the appeal at one point it has been stated that a revision was filed against the order dated 18.02.2009 but the learned counsel for the applicant states that he is not aware of the fate of the said revision. Learned Additional Public Prosecution is also not able to assist

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this Court on this point. Neither party is in fact sure as to whether a revision petition had in fact been filed against the said order dated 18.02.2009 or not. Record shows that no such order is either on the trial Court record or on the file of this Court.

6 Be that as it may, this Court notes that after the order dated 18.02.2009 qua recall of PW-6 & PW-8 had been passed; there was no challenge to it except at the time of filing this appeal.

7 Learned counsel for the applicant argues that he is pressing his prayer under Section 391 of the Code and the appellate Court is well within its powers to take additional evidence or to give appropriate directions to the trial Court in this regard.

8 In this context, the averments made in the application are relevant. Nowhere has it been stated or can it be deciphered as to what was the 'non-effectiveness' of the cross-examination or what are the further questions which are sought to be put to the said witnesses. On oral query, learned counsel for the applicant submits that the statements recorded of PW-6, PW-8 & PW-9 under Section 161 of the Code do not conform with their deposition on oath in Court and these statements had not been accosted to the aforementioned witnesses to point out their contradictions; if these versions had been permitted to be put to the aforementioned witnesses, the credibility of the said witnesses would have been tarnished and benefit of this would have been accorded to the applicant. Learned counsel for the applicant has in fact read out the statements of PW-6, PW-8 & PW-9 recorded under Section 161 of the

Code. His submission is largely to the effect that the place where the deceased was found lying is not clear; whether she was lying in the courtyard or whether she was in the room is in conflict in the versions of the aforementioned witnesses. A perusal of their statement recorded before the police & their versions on oath in Court show no such conflict or contradiction. Both in their statements recorded before the Police as also their deposition on oath, they have stated that the victim was found lying in the courtyard. This argument thus does not in any way advance the version of the applicant.

9 Even otherwise, this provision of law has not been engrafted by the legislature to fill in lacuna. It cannot be used to fill in gaps. This Court has time and again taken a view that merely because there has been a change of counsel, it cannot be used as a benefit by a party to seek indulgence of the Court to recall a witness. The power to recall a witness should not be exercised merely because there has been a lapse on the part of the defence counsel; this will in fact be opening flood gates; this power has to be exercised with care and caution. It may be noted that PW-6, PW-8 & PW-9 have been examined and cross-examined as way back as in March, 2007. Seven years have since elapsed.

10 Reliance by the learned counsel for the applicant on the judgment reported as 2010 (174) DLT 558 Salamat Ali Vs. State is misplaced. In this case PW-2, PW-3, PW-4 and PW-13 whose presence has been sought to be recalled had been noted not to have been effectively cross-examined and for this reason the entire cross-examination of the said

witnesses had been penned down in the said judgment which had led to the Court to draw a conclusion that the counsel conducting the trial was wholly unprofessional as no cross-examination had been conducted on almost all material aspects. This is not in the instant case. The said judgment is clearly distinguishable on facts. In fact the second judgment relied upon by the learned counsel for the appellant and reported as AIR 1999 SC 2292 Rahendra Prasad Vs. The Narcotic Cell would negative his stand. In this case out of the three witnesses whose recall had been sought, PW-21 had not been tendered for his examination at all; PW-4 had also not been cross-examined. It was these circumstances which had weighed in the mind of the Court to hold that a just trial had not been conducted. This is again not so in the instant scenario.

11 All the witnesses have in the present case been cross-examined at length. In this background, in the facts of this case, the applicant has failed to make out a case for grant of his prayer under Section 391 of the Code. Application is without any merit. Dismissed.

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12 On 22.09.2006, DD No. 28-A (Ex.PW-11/A) recorded at 04:05 AM was received in Police Station Khajuri Khas to the effect that a man had killed his wife in E-Block, House No. 218, West Karawal Nagar. This information had been transmitted by ASI Satpal Singh (PW-15) who was on PCR duty on the fateful day and information to this effect had been received by him on his wireless set at about 04:00 AM in the morning; the offence was stated to have been committed at house No.

218, E-Block, 20 Feet Road, West Karawal Nagar. Local police was accordingly informed pursuant to which Ex.PW-11/A was recorded.

13 The investigation machinery was set in motion. Ex.PW-11/A was marked to ASI Rajender Singh (PW-11). He along with Constable Bhure Singh reached the spot where it was learnt that the victim Anisha and her husband Mange Khan had been removed to Guru Teg Bahadur Hospital in the PCR van. This is fortified by the version of PW-15.

14 Further case as set up by the prosecution is that the statement of the victim Anisha was recorded in the hospital after she had been declared fit for statement; the said statement/dying declaration has been proved as Ex.PW-11/B having the right thumb impression of the victim. The statement of the other witnesses Achhey Lal (PW-6), the landlord of the premises where the victim along with her husband was staying was recorded; so also the statements of the co-tenant Harich Chand (PW-8) and Ram Kishore (PW-9). The statement of Master Sagar (PW-3) child of the parties aged 5 years was also recorded under Section 164 of the Code. From the spot a kitchen knife smeared with blood was seized and sealed and taken into possession vide memo Ex.PW-6/A9 and sealed with the seal of RCR; sketch was prepared. Crime team accompanied by Constable Sanjeev (PW-16) had reached the spot. Eight photographs from various angles were taken and proved as Ex. PW-16/A1 to Ex. PW-16/A8; negatives whereof were proved as Ex.PW-16/B1 to Ex. PW-16/B8.

15 FIR was initially registered under Section 307 of the IPC but after the information of death of the victim (which occurred at about 06:30 AM), the offence of Section 307 IPC was converted into an offence under Section 302 of the IPC.

16 The Investigating Officer Inspector M.S. Shekhawat (PW-14) had also reached the hospital. Request for post-mortem was made and the post-mortem of the dead-body was conducted by Dr. Barkha Gupta whose signatures were testified by Dr. Atul Gupta (PW-18) as she had since left the hospital. The injuries noted on the victim read herein as follows:-

1. Incised wound 6.5 x 0.7 x 0.5 cm situated on the front of the neck obliquely placed upper end situated on left side. It is situated 5.5. cm above sternal region and 6.0 cm below chin cutting a soft tissue and superficial muscle of the front neck.

2. Incised wound 1.3 x 0.5 x 0.3 cm obliquely placed situated just below the inner end of the left clavicle.

3. Incised stab wound 2.5 x 0.5 cm vertically placed present on the front of the abdomen in the midline 5.0 cm below umbilicus lower angle being more acute than the upper angle. On dissection the track of the wound going upward and backward in midline making multiple wounds in the intestine and mesentery and ending by making the nick in the post abdominal wall. It is 9.0 cm deep in abdominal cavity.

4. Incised wound 1.0 x 0.5 x 3.00 cm present 4.5 cm above and to the right of the previous injury.

5. Incised stab wound 2.4 x 0.5 cm obliquely placed present on left umbilical region situated 3.5 cm left from midline and 11.5 cm below left costal margin, left and

lower angle being more acute than right and upper angle. On dissection the track of the wound going upward, backward and medially going through and through the intestine and ending by making the nick in the post abdominal wall. It is about 10.0 cm deep in the cavity.

6. Incised stab wound 3.0 x 0.6 cm present on right iliac fossa obliquely placed upper and outer angel being more acute than the lower and inner angle upper angle situated just inside the auterior superior iliac spine. It is situated 9 .0 cm right to the mid line and 35.0 below the right nipple. On dissection the track of the wound is giving upward backward and medially going through and through the intestine and ending by making the nick in the posterior abdominal wall. It is about 9/0 cm in the abdominal cavity.

7. Incised wound 1.3 x 0.5 x 0.4 cm obliquely placed present on outer aspect of Right forearm 7.0 cm above wrist joint.

8. Incised stab wound 2.4 x 0.6 cm present on Right gluteal region, obliquely placed situated 10.0 cm Right to midline and 19.0 cm below iliac crest. The track of wound going forward and medially in the soft tissue of gluteal Region. It is about 6.5 cm deep upper inner angle being more acute.

9. Incised stab wound 2.4 x 0.6 cm horizontally placed inner angle being more acute than outer angle present on right gluteal region situated 3.5 cm Right to midline and 19.0 cm below iliac crest. The track of the would going forward in the soft tissue of gluteal region. It is about cm deep.

10. incised stab wound 2.4 x0.6 cm present on the right gluteal region horizontally placed inner angle being more acute parallel to the injury. No.(9) the track of the wound going forward in the soft tissue of gluteal region. It is about 6.5 cm deep.

17 The dead-body was handed over to the father of the victim Ali Hussan (PW-2) and brother of the victim Sanjeev Khan (PW-7) vide
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memo Ex. PW-2/B. The cause of death was noted as shock as a result of haemorrhage caused by multiple injuries. All the injuries were ante-mortem and caused by sharp edged cutting/stabbing weapon. The incised stab wounds are caused by single edged cutting stabbing weapon. Injuries No. 3, 5 & 6 were sufficient in the ordinary course of nature to cause death. Subsequent opinion on the kitchen knife i.e. the weapon of offence had been proved as Ex. PW-18/B.

18 The accused had also suffered injuries. He had also been admitted to GTB Hospital. His MLC Ex. PW-13/B was prepared wherein the following injuries were noted upon his person:—

“1. Swelling and injury mark of about 2.00 cm with sharp margins .. that are (R) side of the abdomen.

2. 2 sharp incise mark on the chest (L)

3. 2 sharp incise mark ...thigh (L)”

He was arrested on 26.09.2006 vide memo Ex. PW-11/H.

19 On the aforementioned evidence collected by the prosecution, the accused was charge-sheeted under Section 302 IPC. The case as set up by the prosecution had weighed in the mind of the trial Judge and an order of conviction was pronounced by the impugned judgment on 30.04.2010. Vide separate order of sentence, he was sentenced to undergo imprisonment for life as also to pay a fine of Rs.2,000/- in default of payment of fine to undergo simple imprisonment for five months.

20 Learned counsel for the appellant submits that the appellant has been framed in this case; there is no credible evidence against him which could have led to his conviction. Attention has been drawn to that part of the judgment where the trial Judge while discussing the dying declaration (Ex.PW-11/B) has noted that it is suspicious; submission being that when the trial Judge itself had drawn the conclusion that the dying declaration was not fit to be relied upon, testimony of the other witnesses who were not the eye-witnesses could not have been sufficient to order the conviction of the accused. Further submission being that the child witness PW-3 has been tutored; he is since the date of the incident living with his maternal grandparents and he having come into the witness box from their custody, it is a clear case where the child had been asked to make the statement in the manner in which it was recited in the Court; no reliance could have been placed upon his version. The other witnesses namely PW-6, PW-8 and PW-9 had not witnessed the incident. The trial Judge has erroneously relied upon their version; it was unfortunate that the counsel handling the case of the appellant could not cross-examine the said witnesses on material aspects which has been to the detriment of the appellant for no fault of his. The trial Court has overlooked the fact that the accused himself had sustained injuries which is evident from his MLC Ex. PW-13/B and further fortified by the revelation made by the victim in her dying declaration (Ex.PW-11/B) wherein she has disclosed that after the accused had stabbed her, he had started inflicting injuries upon himself and started shouting that “*main apne aap ko khatam kar loonga*”. This circumstance by itself clearly

shows that it was a quarrel which had arisen when passions between the two parties had suddenly been ignited and even presuming that this act had been committed by the accused it was on the spur of the moment; his case is covered by Exception 4 of Section 300 of the IPC. The extreme penalty for the offence under Section 302 IPC could not have been attracted; at best the offence could have been one under Section 304 Part II of the IPC.

21 Arguments have been rebutted. Learned APP has drawn the attention of this Court to the post-mortem report as also the injuries noted therein. Submission being that there were multiple injuries caused by a sharp weapon upon the various parts of the body of the victim which also included her vital parts i.e. neck and the upper thoracic region; the intent of the accused was evident; it was to murder the victim. The trial Judge had rightly convicted the accused for the offence for which he had been charged. The evidence was writ large; not only was there a dying declaration but also the version of an eye witness with contemporaneous evidence adduced in the form of the immediate neighbours who had reached the spot forthwith; oral dying declarations were also made to all the aforementioned persons. The conviction calls for no interference.

22 Record has been perused.

23 There is a whole set of evidence which has been relied upon by the Prosecution. The first piece of evidence is in the form of the dying declaration of the victim (Ex.PW-11/B). This has been penned in the handwriting of PW-11 who reached the spot at 05:00 AM. The incident

had occurred between 03:30 AM to 04:00 AM and the PCR had received a call on his wireless at about 04:00 AM. This is apparent from the testimony of PW-15. PW-11 had also reached the spot but the PCR had already removed the victim to the hospital. The MLC of the victim Ex.PW-13/A shows that she had been admitted in the hospital at 05:20 AM. Multiple injuries had been noted on her body and in view of the precarious condition of the patient, she was immediately shifted to the operation theatre. She was put on IVF. Her blood pressure was noted as 90/79 and the pulse could not be detected. The MLC at one point notes that the patient is fit for statement but the same has not been endorsed on that point by the Doctor; it is also not clear as to at what time the patient had been declared fit as the MLC notes that immediately on her reaching the hospital she had been shifted to the OT. Further version of PW-11 in his cross-examination is that he had reached the hospital at 05:15 AM and at that time, the victim was in the emergency ward; he does not remember the Doctor who was attending the victim. He had started recording the statement of the victim at 05:30 AM and spent about 45 minutes in recording the said statement which would approximately be up to 06:15 AM. Harish Chand PW-8 was also present and so also the investigating officer Inspect M.S. Shekhawat PW-15. Further version is to the effect that the Doctor had opined the victim to be fit for statement between 05:15 AM to 05:30 AM.

24 This version of PW-11 is not substantiated from the record. The MLC of the victim Ex. PW-13/A shows that the patient was examined at 05:20 AM; since her pulse could not be detected and the pupils of her

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eyes having dilated she was immediately rushed to the OT; in this scenario her injuries also could not be noted. It would thus be impossible to imagine that the doctor would have given an opinion at 05:15-05:20 AM that the victim was fit to give a statement. The post-mortem has noted the time of death of the victim as 06:30 AM. Again it would be difficult to conceive of a situation that the statement of the victim was being continued up to 06:15 AM (when she had allegedly thumb marked the said statement) and thereafter she had expired in the next 15 minutes.

25 Ex. PW-11/B has also not been attested by either Harish Chand (PW-8) or Inspector M.S. Shekhawat (PW-15) inspite of they being presnt at that time. This again throws a doubt on the credibility of statement as in the eventuality that both the aforementioned persons were present, nothing prevented the investigating officer from obtaining their signatures on the said dying declaration; the said dying declaration had also not been endorsed by the doctor. Needless to state that the doctor in these circumstances who was not even known to PW-11 was also not examined.

26 Reliance by the learned counsel for the appellant upon AIR 2008 SC 19 Nallapati Sivaiah Vs. Sub Divisional Officer would thus advance his submission that such a dying declaration could not be relied upon; in this case the doctor who had given the fitness certificate has not been examined; the surrounding circumstances thus had thrown a doubt on the credibility of this dying declaration.

27 There is no doubt to the proposition that a dying declaration is an

important piece of evidence and conviction can be based solely on a dying declaration. The Court must however keep in mind that the dying declaration must inspire full confidence of the Court as to its correctness. It must not be a product of imagination of the investigating agency; the Court must be further satisfied that the deceased was in a fit state of mind to make this statement. Tested on this anvil, the dying declaration suffers from various infirmities. No credence can be attached to such a dying declaration. This piece of evidence is accordingly disregarded.

28 The other evidence relied upon by the Prosecution is the version of the eye-witness PW-3 Master Sagar who was the child of the victim and the accused. The incident is dated 22.09.2006. PW-3 was aged five years at that time; he had come into the witness box about six months later. Before dealing with his testimony on oath, it would be relevant to note that the version of PW-3 was got recorded by PW-14 under Section 164 of the Cr.PC as early as on 23.09.2006. It was recorded by Mr. Raj Kumar Tripathi, learned MM and the text of the said statement reads herein as under:-

“Jab main so raha tha to meri mummy ko mere papa ne chaaku bhonk diya. Jab maine awaz suni to main uth gaya aur dekha ki meri mummy padi hui thi. Mere papa aur mummy dono ke kapde gande the.”

29 This statement was recorded after the learned Presiding Officer has satisfied himself that PW-3 was capable of making a statement as he was able to understand the preliminary questions which had been put to

him. In his testimony in Court, he has corroborated this version. He has admitted that his father Accused Mange Khan was residing with his mother and himself; his mother had received stab injuries and his father Mange Khan had stabbed her. Much emphasis has been laid on that part of the version of PW-3 in his chief wherein he has stated that he was awake at that time whereas in his cross-examination in part one he has stated that when he woke up his mother Anisha was having injuries in her abdomen. Submission of the learned counsel for the appellant on this score is that PW-3 has made an inconsistent statement; whether he was awake at the time of incident or he woke up subsequently is not clear.

30 This submission of the learned counsel for the appellant has no force. The testimony of a witness has to be read in its entirety; the Court must gather an impression that it has a ring of truth in it. There is no doubt that once this impression is formed, it is necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and to evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken so as to render it unworthy of belief. Apart from the fact that a witness cannot be expected to possess a photographic memory, the testimony of a child witness has to be scrutinized keeping in view the age of the witness as also the fact that in this particular case, the child witness must have suffered a deep trauma keeping in view the nature of incident wherein his own parents were involved; in such a scenario, the mental faculties of the child could not

be expected to give each and every detail in a chronological manner.

31 The testimony of this eye-witness tested on this touch stone clearly shows that the child who was sleeping in the same room where his parents were sleeping had woken up on hearing cries and saw that his mother has received stab injuries on her body; there was blood spread all over and his father had stabbed his mother. This is not only the version given by this witness on oath in Court six months after the date of incident but also the same version was given by him one day after the date of the incident when his statement was recorded under Section 164 of the Cr.PC. Both these versions are in conformity with one another. The question of tutoring does not arise. Nothing has also been elicited in the cross-examination of this witness to discredit his version. There is thus no reason why this version should not have been relied upon.

32 Apart from the version of PW-3, testimonies of PW-6, PW-8 & PW-9 are also relevant. PW-6 Achhey Lal was the landlord where the accused was residing as a tenant in one room of his house bearing No. E-219, Street No. 3, West Karawal Nagar. He was living there with his wife Anisha and two children for a considerably long period. The site plan Ex.PW-11/E shows that the room in occupation of the accused and the victim was adjoining the room of Harish Chand (PW-8). It had a common wall. The third room was in occupation of Ram Kishore PW-9. There was common wall between the wall of PW-8 & PW-9. All the three rooms opened out into a court yard which was common for all the

three rooms.

33 PW-8 whose room was immediately adjacent to the room of the accused has on oath deposed that about 03:30 AM on the fateful day when he was sleeping in his room he heard the children of Mange Ram weeping; he woke up and found Anisha having stab injuries on her neck; on inquiry she told PW-8 that she had been stabbed by Johny's father; PW-8 has further elaborated that Johny is the son of Mange Ram. Anisha requested him to call a doctor; PW-8 noted that Mange Ram was inside the room; he was having a stab injury. In his cross-examination he has stated that Anisha was present in the courtyard at that time. PW-8 called up PW-6 (their landlord) who also reached the spot forthwith.

34 PW-6 the landlord has corroborated this version of PW-8. As per his version, he had received a telephonic call from PW-8; he reached the spot at 04:00 AM where he saw Anisha having a stab injury on her neck; she was weeping and requested him to remove her to the hospital; PCR was informed by PW-6; he did not note any injury upon the person of Mange Khan. Anisha told him that she had been stabbed by the father of Johny. Blood was lying in the courtyard. In his cross-examination, he has admitted that he has not gone to the hospital with the accused; when he reached the spot, Anisha was sitting in the courtyard and accused was lying on the floor by her side.

35 The other co-tenant whose wall was common with the wall of PW-8 has been examined as PW-9. He was Ram Kishore. He had also woken up at 03:30 AM on hearing a noise when he came out from his room and found Anisha in the courtyard having stab injuries on her

neck. She told him that she had been stabbed by the father of Johnny i.e. Mange Khan. Version of PW-9 is fully corroborated by the version of PW-6. He has testified that he has reached the spot; PCR was informed; PW-8 had accompanied the accused and the victim to the hospital. The spot was photographed by the crime team; a knife was lying near the cot and blood was also lying on the floor of the room as also in the courtyard. In his cross-examination to a specific query he has stated that Anisha was outside her room when he reached the spot.

36 Not only is the versions of PW-6, PW-8 & PW-9 in conformity with one another; there also appears to be no motive or reason as to why they would depose falsely against the accused. In fact the accused had been living in the house of PW-6 as a tenant for a considerable period of time and there appears to be no reason as to why he or the other witnesses would falsely implicate him.

37 They are all consistent on two points; first being that the victim Anisha had made an oral dying declaration to all the three persons i.e. to PW-6, PW-8 & PW-9; she had told all of them that she had been stabbed by the father of Johnny i.e. Mange Khan. Stab injuries had been noted on her neck and Mange Khan was lying close to her and blood was smeared on the floor of the room as also in the courtyard.

38 The law on dying declaration is clear. There is no particular form of a dying declaration in which it is required to be made. It may also be in the oral form; however before an oral dying declaration can be relied upon, the consistency of the statement and its veracity emanating from the fact the victim was at that time in a fit state of mind to make such

statement has to be strictly adhered to. The oral dying declaration made by the victim to the aforementioned witnesses is a substantive piece of evidence.

39 The Supreme Court in *Meesala Ramakrishnan Vs. State of A.P. 1994 (3) SCR 497* had noted that a dying declaration made by gestures and nods by the deceased was also admissible. This was a case where the victim was the wife who had been burnt to death by her husband.

40 The second point on which all the aforementioned witnesses are again consistent is the fact that when they reached the spot, Anisha was lying in the courtyard i.e. outside her room. Much emphasis has been laid by the learned counsel for the appellant on this point. In fact his application under Section 391 of the Code (which has since been dismissed) was largely on this point that the aforementioned witnesses had not been accosted with their oral statements recorded under Section 161 of the Code; had permission being granted to the defence counsel to accost these versions to the witnesses the truth would have come out which would have been established that there were different versions given by the different witnesses as to where the victim was lying; whether she was in the courtyard or in the room was not clear.

41 This Court while dismissing this application has noted these contentions and had returned a finding that all the aforementioned witnesses i.e. PW-6, PW-8 & PW-9 have been consistent in their versions that when they reached the spot the victim was lying in the courtyard i.e. outside her room. Site plan Ex.PW-11/B shows that all the three rooms in fact open out to a common courtyard; entry/exit appears to be from

one side only and all rooms exit out into this common courtyard. The aforementioned witnesses have also testified that there was blood lying in the room as also in the courtyard.

42 Section 6 of the Indian Evidence Act speaks of the relevancy of facts forming part of the same transaction. All facts which part of the same transaction become relevant and are admissible in evidence. Illustration (a) of Section 6 is relevant in the context of facts of the present case; it reads as under:-

“A is accused of the murder of B by beating him. Whatever was said or done by A or B or by-standers at the beating or so shortly before or after it as to form part of the transaction, is a relevant fact.”

43 Under Section 6 where the facts are so connected as to form part of the same transaction, they become admissible as *res gestae*. This principle was first recognized in English law; the essence of this doctrine is that a fact which though not in issue is so connected with the fact in issue as to form part of the same transaction and becomes relevant by itself. This submission of the learned counsel for the appellant that the aforementioned witnesses i.e. PW-6, PW-8 & PW-9 had reached the spot after the transaction is over and thus their evidence cannot be relied upon would thus be of a little weight. The rule embodied in Section 6 that statement made contemporaneous with the act which constitutes the offence or least immediately thereafter are admissible. This is also evident from Illustration (a) noted above.

44 Not only are the statements of PW-6, PW-8 & PW-9 admissible as being *res gestae* but their versions also show that an oral dying

declaration was made by the victim to each one of them; they have been consistent on this score as well.

45 All of them have in the same manner described the incident as also the victim having told them that the father of Johny (Mange Khan) had stabbed her. The accused was in the same room at that time. It is also not a case of a denial of the incident by him. No motive or ulterior purpose has also been attributed to the aforementioned independent witnesses as to why they would falsely implicate the accused.

46 The motive for the offence has also been revealed in the testimony of PW-2 and PW-7. PW-2 is the father and PW-7 is the brother of the victim. Both of them have stated that the victim had a strained relationship with her husband; PW-2 has stated that his daughter used to tell him that she was harassed and ill-treated by her husband; he used to beat her; so also is the version of PW-7 her brother. He has also deposed that the accused used to beat and abuse his sister.

47 The application made by the investigating officer requesting for a post-mortem on the dead-body of the victim had also recorded that the couple had had a quarrel on the fateful day; reason given was that the accused wanted to go to his native place to settle the marriage of his sister which was being opposed consistently by the victim on the ground that there was a financial constraint in the family. This is also confirmed by the version of PW-9 who was his immediate neighbor; his deposition being to the effect that he woke up on hearing some noise. PW-6 has also reiterated this stand; his deposition being to the effect that he was told by Harish Chand that an altercation had taken place between Mange

Khan and his wife.

48 The kitchen knife which was the weapon of offence was smeared with blood; it was lying in the courtyard in the room. The sketch of the knife shows that it is a sharp bladed instrument; length of the blade being 13.2 cm X 2.4 cm in depth; the subsequent opinion of the doctor on this weapon of offence had also been proved by PW-13 who had after examining this weapon opined that the injuries as depicted in the post-mortem report could have been caused by this weapon.

49 The defence sought to be built up by the accused in his statement under Section 313 Cr.PC is to the effect that he did not cause any injury to his deceased wife; he was innocent; some miscreants had entered into his room with the intention to rob his valuables and on his protest, he wife and himself were assaulted; he had never harassed his deceased wife. This defence which was taken up in his statement under Section 313 of the Code does not find mention in the cross-examination of the witnesses of the prosecution. In all 19 PWs were examined by the prosecution but except for a suggestion given to PW-11 about the miscreants having entered his house, no suggestion has been given to any other witness. In fact, cross-examination of PW-11 on this count was recorded on 03.09.2007. This defence clearly appears to be an afterthought as all other witnesses prior to PW-11 including the public witnesses had been examined in March, 2007 and no such defence had emanated till that time. This defence is palpably false.

50 The aforementioned sum total of evidence collected by the prosecution has established the fact that it was the accused who had killed his wife.

The alternate submission advanced by the learned counsel for the appellant is that even presuming that it is held that the accused was guilty of killing his wife yet the incident is not a case of premeditation or of any intention; the incident had occurred on the spur of the moment and the intent being missing, the offence of murder is not made out. Submission is that his case falls in Exception 4 of Section 300; at best it can be a case of culpable homicide as there was no premeditation; it was a sudden fight; it was in the heat of passion that a quarrel has taken place and the injuries were inflicted upon the victim. At best, the offence would fall in part II of Section 304 IPC; only a knowledge can be attributed to the accused.

51 There is no doubt that an unfortunate life has been lost. The question however which arises for decision and which will also answer this last submission of the learned counsel for the appellant is as to whether the present case is one of murder simpliciter or of culpable homicide not amounting to murder. The line of distinction between two offences is thin but nevertheless distinct.

52 It cannot be laid down as a rule of universal law that whenever death occurs, Section 302 IPC is attracted. Each case would depend upon its own facts; the weapon used; the size of it, the force with which the blow was given as also the parts of the body where it was given. The motive for the crime would also become relevant.

53 Relevant at this stage it would be to extract Exception 4 of Section 300. It reads herein 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 –

Exception 4.- Culpable homicide is not murder if it is committed without premeditation in a sudden fight, in the heat of a passion upon a sudden quarrel and without the offenders 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.”

54 This fourth Exception to Section 300 covers acts done in a sudden fight. To invoke this exception four pre-requisite conditions must be satisfied; (i) it was a sudden fight; (ii) there was no premeditation and offence was committed in a heat of passion and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. All the above conditions must co-exist. Even these essential conditions co-exist and are present, the cause of quarrel may not be relevant. The assailant should not have taken an undue advantage and nor acted in a cruel manner.

55 The injuries in the present case (as per the post-mortem report) are numerous. They are in fact multiple; they are 10 in number. Injury No. 3, injury No. 5 and injury No. 6 are by themselves sufficient to cause death in the ordinary course of nature.

56 Injury No. 3 is an incised stab wound measuring 2.5 x 0.5 cm vertically placed on the front of the abdomen in the midline 5.0 cm

below umbilicus lower angle being more acute than the upper angle. On dissection the track of the wound going upward and backward in midline making multiple wounds in the intestine and mesentery and ending by making the nick in the post abdominal wall. It is in fact 9.0 cm in depth in abdominal cavity. Injury No. 5 is incised stab wound 2.4 x 0.5 cm obliquely placed present on left umbilical region situated 3.5 cm left from midline and 11.5 cm below left costal margin, left and lower angle being more acute than right and upper angle. On dissection the track of the wound going upward, backward and medially going through and through the intestine and ending by making the nick in the post abdominal wall. It is about 10.0 cm deep in the cavity. Injury No. 6 is another incised stab wound 3.0 x 0.6 cm present on right iliac fossa obliquely placed upper and outer angle being more acute than the lower and inner angle upper angle situated just inside the anterior superior iliac spine. It is situated 9.0 cm right to the mid line and 35.0 below the right nipple. On dissection the track of the wound is going upward backward and medially going through and through the intestine and ending by making the nick in the posterior abdominal wall. It is about 9.0 cm in the abdominal cavity. The first injury is on the neck and the second injury is on the left clavicle near the shoulder. Injuries have also been inflicted on the forearm and in the gluteal region in its soft tissue.

57 A perusal of these injuries does not really advance this last submission of the appellant. Had it not been a case of non-intent, not only would there not have been so many number of injuries but the

depth of the injuries (as noted supra) would have also had been definitely lesser. The injuries in this case are not only multiple and numerous but also deep and penetrating; they are also not confined to one part of the body; there are several injuries in the abdominal cavity which in fact had led to the death of the victim; injuries have also been noted on other vital parts i.e. on the neck, injuries on the shoulder, forearm and soft tissue in the gluteal region have also been noted.

58 This clearly appears to be a case where a quarrel might have started in the midst of the night on a trivial issue but which had escalated and that is why the accused unable to control his anger and fury had continued to stab his half sleeping wife on several portions of her body. His wife obviously must have screamed for help and that is the time when her children woke up and the neighbours also heard her cries. The two superficial injuries on the left side of the chest and two superficial injuries on the right side of abdominal cavity of the accused appellant from one 2 cm injury on the side of the abdominal of the accused. These were nothing but a cover up by the accused of his heinous and unforgiveable act. He had self inflicted these injuries to protect himself; the possibility of they being self inflicted had also been noted in his MLC (Ex.PW-13/B).

59 In (2002) 3 SCC 341 Virender Vs. State (NCT) of Delhi where the armed offender took undue advantage of the weapon against an unarmed person, he could not get benefit of Exception 4; the accused was armed with lethal weapon whereas the deceased was unarmed. In AIR 2007 SC 363 Naveen Chandra Vs. State of Uttranchal, the
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Supreme Court had noted that where a person during the course of a sudden fight and probably in the heat of passion used a knife or a dagger but took undue advantage on the victim and acted in a cruel manner it could not be said that he was not guilty of murder.

60 In the facts of this case, the intent of the accused to kill his wife with a premeditated mind cannot be excluded. Offence of murder is clearly made out.

61 Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

KAILASH GAMBHIR, J

JULY 22, 2013

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