

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

% *Judgment reserved on:20.09.2013*
Judgment delivered on :26.09.2013

+ CRL.A. 951/2011
FIZAQAT ALI

..... Appellant
Through Mr. Prasoon Kumar, Mr. Deepak
Chander Pal, Mr. Awnish Kumar
& Mr. Kshitiz Kumar, Advs.
versus

STATE & ANR Respondents
Through Ms. Richa Kapoor, APP for the
State.

CORAM:

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

INDERMEET KAUR, J.

1 On the fateful day of 17.07.2010 at about 04:00 PM in the jhuggies of Kalandar Colony, Bhalswa Dairy, while Guddo (PW-15) and her son Sakeem (the deceased) were sitting outside their jhuggi; in the adjacent jhuggi Fizaqat Ali (the appellant) was beating his son; the deceased intervened upon which the appellant took out a knife and stabbed the deceased on his neck; the deceased started bleeding profusely and fell into the lap of his mother; Nafis (PW-12) informed the PCR who reached the spot.

2 The deceased was removed to the B.J.R.M. Hospital by HC Jagdish (PW-9) who was on PCR duty; the deceased was brought dead

which is evident from his MLC Ex.PW-3/A.

3 The statement of the eye-witness Guddo i.e. mother of the victim was recorded. Her version was to the effect that the appellant was having an enmity towards her deceased son; this was for the reason that both of them were doing the work of “madari” and the appellant for this reason used to threaten her son to leave the profession. On the fateful day at about 04:00-04:30 PM while she was sitting along with her son Sakeem outside their jhuggi, the appellant started beating his son; her son Sakeem intervened upon which the appellant took out a knife from his dub and gave a knife blow on his neck; “Sakeem tarphrane laga aur meri god me gir gaya”; he was bleeding; 100 number was informed; the PCR reached the spot; her son was removed to the hospital. Her statement was recorded in the hospital.

4 Record shows that the rukka was taken on this statement of PW-15 at 06:45 PM and the present FIR (Ex.PW-4/A) was registered thereafter. Investigation was marked to SI Balwan Singh (PW-19) who reached the spot along with HC Dhirender (PW-17). Inspector Dharampal (PW-21) also arrived there. Since the injured had been removed to the hospital, the investigating team reached the hospital where it was learnt that the victim had succumbed to his injuries.

5 As noted supra it was on this statement of PW-15 the mother of the victim that the rukka had been sent and the FIR was registered.

6 The police party thereafter reached back at the spot. Crime team was summoned. The spot was inspected by the crime team in-charge SI Mahesh Chander (PW-2) who prepared the report Ex.PW-2/A.

Constable Subhash (PW-1) took photographs of the scene of crime (Ex.P-1 to Ex.P-15). Blood was lifted from the spot which contained blood stained earth and was sealed in separate pulandas with the seal of Investigating Officer and seized vide memo Ex.PW-17/A.

7 The site plan Ex.PW-21/A was prepared by the investigating officer at the instance of the eye-witness.

8 The appellant was arrested on the same day in the evening from the pipeline near Khatta, Kalander Colony, Bhalsava Dairy, vide memo Ex.PW-15/B. His personal search was conducted and pursuant to his disclosure (Ex.PW-17/B) he got recovered the knife/dagger which was the alleged weapon of offence; this was from a heap of dung which was lying near the public toilets in Kalander Colony. The sketch of the knife (Ex.PW-17/E) was prepared evidencing the length of the blade as 13 inches and the width as 1” inch; it was taken into possession vide memo Ex.PW-17/F. The pyjama worn by the appellant at the time of crime was also seized by the Investigating Officer vide memo Ex.PW-17/D and was thereafter deposited in the malkhana along with other exhibits including the weapon of offence.

9 Post-mortem on the deceased was conducted on 18.07.2010 by Dr. V.K. Jha (PW-20). The following two injuries were noted upon the victim. They read as under:-

“1. Multiple linear scratch abrasion mark present on front of chest, abdomen left arm and forearm and right arm.

2. Incised wound 9 cm below left ear of size 2.5 cm X 0.5 CM X chest cavity deep on left side of neck, 3 CM above collarbone.”

10 Cause of death was opined as haemorrhagic shock as a result of the stab wound inflicted by other party. All the injuries were ante-mortem in nature and injury No. 2 was sufficient to cause death in the ordinary course of nature.

11 Subsequent opinion of the doctor was also obtained on the knife vide memo Ex.PW-20/C; the doctor opined that the injuries upon the victim could have been caused by this weapon.

12 The CFSL vide its report Ex.PW-14/A had examined the articles which were sent to it for examination which included the pyjama of the appellant upon which blood group 'B' had been detected which was also the blood group of the deceased. Apart from pyjama, four more articles i.e. one lungi, one pyjama, one baniyan as also one dupatta had been sent to the CFSL upon which also the same blood group had been detected.

13 In the statement of the appellant recorded under Section 313 of the Cr.PC he pleaded innocence; his submission being that when he was returning from his in-laws' house he was arrested by the police officials near the by-pass.

14 He produced one witness in defence Meena Khan DW-1. The deposition of DW-1 was to the effect that the appellant was not in town on the fateful day; his mother-in-law was not well on 15.07.2010 and he had gone to see his mother-in-law and had returned back only on 17.07.2010; he was already in police custody at about 11-11:30 PM when he was brought by the police to his jhuggi and the key of the

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jhuggi of the appellant had been handed over by DW-1 to the police.

15 This was the sum total of evidence collected by the prosecution. The evidence both oral and documentary was examined by the trial Judge. He thought it to be a fit case to convict the appellant for having committed the offence of murder of the deceased Sakeem. This was largely on the basis of the eye-witness account of PW-15 coupled with the version of PW-12 and PW-9 as also the recoveries and corroborated by the medical and scientific evidence which had been collected by the prosecution.

16 On behalf of the appellant, arguments had been addressed at length. Learned counsel for the appellant points out that the testimony of the eye-witness is liable to be dis-believed; she is an interested and partisan witness; she has improved her version and as such it is liable to be discarded. For this proposition reliance has been placed upon a judgment delivered in Crl. Appeal No. 186/2011 Mangru Ram Vs. The State (NCT of Delhi) as also another judgment of the Apex Court reported as 2013 (3) JCC 1914 Hargiyan Singh Vs. State;. Attention has also been drawn to the testimony of PW-15 recorded by the police as also her version on oath in Court; submission being that it is clear from the record that PW-15 in her statement before the police has not stated that “Sakeem tadpane lagaa aur meri gaud me gir gaya”; submission being that her embellished statement in Court did not match her version before the police and as such it being full of improvements is liable to be disbelieved. Attention has also been drawn to the version of PW-12; submission being that this version also does not match the version of Crl. Appeal No. 951/2011

PW-15 as PW-15 had never stated that deceased Sakeem was lying in her lap as is the statement of PW-12. There is also no explanation as to why in this scenario, the clothes/sari of PW-15 was not sent to the CFSL. Attention has also been drawn to the CFSL reports Ex.PW-14/A and Ex.PW-14/B where what had been examined by the CFSL was one lungi, one pyjama, one baniyan and one dupatta as also another pyjama; submission being that what had been sent to the CFSL does not appear to be the clothes of the victim as the doctor (PW-20) had stated that the clothes worn by the victim were a track suit and 'T' shirt; the clothes examined by the CFSL thus could not be the clothes of the victim. There is also no explanation as to why no blood was found on the alleged weapon of offence i.e. the dagger. No finger prints had also been taken from the said weapon. The prosecution is even otherwise not clear as to whether the nylon strip of the dagger (Ex.P-6) was of a green colour or a blue colour and for this proposition attention has been drawn to the seizure memo (Ex.PW-17/F) wherein the colour of the nylon strip has been noted to be of deep blue colour whereas the entry in register No. 19 (Ex.PW-18/D) shows that what had been deposited in the malkhana was of green colour. The site plan has also not depicted the place of occurrence correctly. On all counts, the investigation being tinted the appellant is entitled to a benefit of doubt and a consequent acquittal. In the alternative, it has been submitted that there being only a single injury and the incident having occurred in the heat of passion and the appellant not having acted in a cruel or unusual manner, the appellant should be afforded the benefit of Exception IV of Section 300 of the IPC; he is at

best liable to be convicted under Section 304-II of the IPC. To substantiate this proposition, reliance has been placed upon AIR 1981 SC 1552 Jagrup Singh Vs. State, AIR 1982 SC 126 Kulwant Rai Vs. State of Punjab, 1984 I OLR 317 Lokanath Behera Alia Khokan Vs. State, 1984 CrL. L.J. 478 (1) Tholan Vs. State of Tamilnadu and 1985 CrL. L.J. 1118 Bishnu Charan Das Vs. State.

17 Arguments have been countered by the learned Public Prosecutor. His submission being that impugned judgment suffers from no infirmity. The testimony of the eye-witness is clear and categorical; she was a natural witness; the incident had occurred just outside her jhuggi; rukka was taken within the shortest span i.e. 06:45 PM when the incident is of 04:30-05:00 PM; the question of a false implication does not arise. Further submission being that the medical and scientific evidence also corroborate the version of PW-15. The opinion of the doctor evidences that the dagger which had been got recovered by the appellant was sufficient to cause the fatal injury No. 2 which had led to unfortunate death of the victim; scientific evidence has also established that the pyjama of the appellant was stained with the blood group of the deceased i.e. group 'B'. On no count, does the impugned judgment call for any interference. The appellant also does not deserve any leniency on any other count; it was simplicitor a case of murder and the site plan has depicted the place of incident at point 'A' which is being outside the jhuggi of PW-15 evidencing the fact that the appellant had marched up to his jhuggi to kill her son.

18 Record has been perused. We have also appreciated the
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submissions of the learned counsel for the parties.

19 The eye-witness account of PW-15, the mother of the victim inspires confidence. It is an admitted case that the incident had taken place just outside the jhuggi of PW-15; it was at about 04:30-05:00 PM in the evening. Presence of PW-15 was but natural; she was sitting outside her own jhuggi along with her son. The rough site plan (Ex.PW-21/B) as also the scaled site plan (Ex.PW-8/A) have both been perused. Point 'A' in Ex.PW-8/A shows the place where the appellant had attacked the deceased with the knife; point 'B' close by is the point from where PW-15 had witnessed the occurrence. Jhuggi of the appellant is approximately 450-500 mtrs away i.e. about 13-14 feet; site plan further shows that there is no intervening divide between the jhuggi of PW-15 and that of the appellant which could cause any interruption in the visual region. Version of PW-15 being that when the appellant was beating his children, the deceased (Sakeem) objected to the same upon which the appellant got enraged and attacked the deceased with a knife. Testimony of PW-15 also unfolds a motive which is that since both her son and the appellant were in the same trade i.e. doing the work of "madari", the appellant was nursing a grudge against her son and was inimical towards him. This motive has however not been advanced. Apart from this single statement of PW-15, there was no evidence to suggest any other background of enmity between the two parties. It is an admitted case that both the deceased and the appellant are closely related. The appellant was in fact the nephew of PW-15; it is also not the case of the prosecution that any complaint had been lodged or any grievance had

been made earlier by PW-15 on this score i.e. about the inimical terms that the appellant had nursed towards the deceased. Thus in our view, there does not appear to be any motive on the part of the appellant which he was earlier nursing and which had led to the present offence having been committed by him.

20 The connected argument of learned counsel for the appellant on this score is on the rejection of the testimony of PW-15 on the ground that she is an interested witness. There is no doubt that PW-15 is the mother of the victim; merely she is closely related would not term her as an 'interested witness'. This by itself cannot be sufficient to discard such a witness. The test of creditworthiness or acceptability is the guiding factor. If the testimony of a witness is otherwise credible and inspires confidence as is so in the instant case and her credibility not having been shaken in her cross-examination, there is no question of casting any doubt upon her version. In fact most of the times, eye-witnesses happen to be family members or close associates and this is especially so when the scene of occurrence is just outside the house of the so call interested witness. {see AIR 2003 SC 282 Alamgir Vs. State(NCT, Delhi)}.

21 This Court also notes that the testimony of PW-15 has in fact been corroborated by the version of PW-12. The rough site plan (Ex.PW-21/B) shows that the jhuggi of PW-12 is just outside the jhuggi of the appellant; there is only a gali in between; PW-12 had in the normal course of his routine while returning home between 04:30 to 05:00 PM seen Sakeem bleeding lying in the lap of his mother; he immediately informed the PCR. This version of PW-12 is corroborated

by the version of HC Jagdish (PW-9) who was on PCR duty on the fateful day. He has also deposed that he has received a wireless message that one person had been attacked by a chaku; when he reached the spot he saw Sakeem bleeding lying in an injured condition; he was shifted to the hospital; PW-15, the mother of the victim accompanied him; on the way PW-15 told that her son Sakeem had been attacked by the appellant Fizaqat. His name specifically finds mention in the version of PW-9. Relevant would it be to state that not a single suggestion has been given to this witness that no such version has been disclosed by PW-15 to PW-9.

22 In his cross-examination, he had stated that a crowd had gathered there. This admission of PW-9 that a crowd had gathered there is again nowhere in contrast with the version of PW-15 as has been argued by the learned counsel for the appellant. PW-15 has also stated in her cross-examination that 2-4 public persons were present at the spot at that time.

23 This evidence thus establishes the fact and the manner in which the incident had taken place.

24 PW-15 had also identified four articles of clothing which had been taken out from one pulanda and which had been produced by the Investigating Officer in the Court; they were one lungi, one pyjama, one baniyan as also one dupatta; she had also identified the knife.

25 The answer to the argument of the learned counsel for the appellant on the discrepancy in the report of the CFSL (Ex.PW-14/A & Ex.PW-14/B) and the version of the doctor (PW-20) about the clothing which had been sent to the CFSL for examination is answered by the

seizure memo. The seizure memo (Ex.PW-21/E) dated 18.07.2010 shows that after the victim had been examined by the doctor; the clothes of the victim which included one track suit pyjama, a 'T' shirt and a lungi had been handed over to the Investigating Officer who had then deposited the same in the malkhana before they were sent to the CFSL. The pyjama was the track suit pyjama as noted in the seizure memo; the baniyan (as noted by the CFSL) was analogous to the 'T' shirt; a round-neck 'T' shirt could well be described as a baniyan; lungi had also been handed over by the doctor to the Investigating Officer and this rightly finds mention in the report of the CFSL. There is no discrepancy in these three articles of clothing seized and those sent to the CFSL till this point.

26 However, one article of clothing i.e. the dupatta appears to be mismatched; it did not find mention in the seizure memo. It was obviously not an article of clothing of the deceased. However the possibility that this "dupatta with dark stains" could be the blood stained clothing of the mother (PW-15) who has in the rukka explained that after her deceased son had been attacked, she had tried to stop the bleeding cannot be ruled out. This dupatta might have been used for the said purpose. Although there is no mention about the wearing apparels of PW-15 and there is also no mention by the Investigating Officer that her wearing apparel had been seized yet this minor lapse on the part of the investigating agency does not work to the advantage of the appellant. The fact that this blood stained dupatta had been sealed in the pulanda and had been opened in the Court along with other articles of clothing is

evident from the examination of PW-15 who had identified all the four articles of clothing which included the dupatta in the Court. It has also come in her deposition that the seals on this dupatta were intact at the time when this parcel was opened. In these circumstances, the only answer on the dupatta is that it was the blood stained garment of PW-15 which had been sealed with the clothes of the deceased but because of a lapse on the part of the Investigating Officer, the same was not described.

27 This answers the argument of the learned counsel for the appellant qua this point.

28 The fact that the knife which was recovered on 18.07.2010 was not blood stained is for the reason that it was recovered from a heap of cow dung. Even if the weapon was blood stained at the time when the offence was committed (which was one day prior in time) but having been recovered one day later from a heap of cow dung, it is clear that it is for this reason that no blood could be detected on this weapon.

29 The colour of the nylon strip on the dagger has been described as blue in the ocular testimony of the Investigating Officer (PW-21) as also in the version of the other recovery witnesses i.e. HC Dhirender (PW-17) and SI Balwan Singh (PW-19). All of them have described the nylon strip on the knife as of a blue colour. In the seizure memo (Ex.PW-18/L) the nylon strip has been described as of a green colour. It is relevant that both blue and green colours are of same family and depending upon the perception of an individual and that too at the level of a constable such a mere difference in the description of the colour is

not note-worthy. This argument is accordingly rejected.

30 The corroborative evidence also cannot be disbelieved. The appellant was well known to PW-15; there was no reason as to why he would be falsely implicated. No such suggestion has also been given to any of the witnesses of the prosecution.

31 The appellant was arrested on the same day in the evening at 10:00 PM. Not only had he got the blood stained knife recovered from a heap of cow dung but he also got recovered his blue colour pyjama; this was contained in parcel 4 (Ex.P-4); the CFSL had also noted that the blue coloured pyjama (which is the pyjama of the accused) bore blood group 'B' which was the blood group of the deceased. This has been established by the CFSL. The version of the prosecution on all counts fully stands established. The appellant has also taken shifting stands in his statement under Section 313 of the Cr.PC as also the defence which he has adduced. Thus on all counts conviction of the appellant for having caused the death of the victim does not in any manner call for any interference.

32 The last submission of the learned counsel for the appellant however has to be answered. His submission being that even if the appellant is found guilty of having committed the murder of the deceased, he should be entitled to the benefit of Explanation IV of Section 300 and convicted of the lesser offence i.e. offence under Section 304-II as the incident had erupted suddenly in a heat of moment.

33 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”

34 There are four exceptions contained in this provision of law. The fourth exception has been relied upon by the learned counsel for the appellant. 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.”

35 This Exception is based upon the principle that where there is no premeditation on any intention on the part of the appellant to cause death of the victim; the incident had occurred in the heat of passion upon a sudden quarrel and the offender had not acted in a cruel or unusual manner; this provision can be resorted to.

36 The facts of the case show that the quarrel had erupted suddenly on the spur of the moment. The spur of moment was that when the deceased intervened and objected to the appellant for beating his children; the appellant got enraged and in a fit of fury, he attacked the victim with a knife. The incident had started and ended within a span of some minutes. Motive as noted supra has not been established by the prosecution.

37 The medical evidence is relevant. The post-mortem has depicted two injuries. The first injury (as described supra) is noted to be abrasion. The second injury was the fatal injury. This injury is 2.5 CM x 0.5 CM

in width and breadth and going linearly from the shoulder entering into the tip of the lobe of left lung. Submission of the appellant being that this injury was long in length for the reason that the weapon of offence had a blade of 13 cms; had the intent on the part of the appellant been to murder the victim, the injury could have been much deeper as the blade of the knife was itself more than 1 foot long; thus injury which was 2.5 CM X 0.5 CM had in fact pierced the victim from the side of the left shoulder and had the intention or premeditation been to commit the murder of the victim, it would have been on a vital part of the body.

38 These submissions of the learned counsel for the appellant have force. Thus what comes on record is that the incident had occurred without any premeditation. In these circumstances, we think it fit to convict the appellant for lesser offence i.e. Section 304-I of the IPC.

39 The judgment relied upon by the learned public prosecutor in Crl. A. No. 62/1996 Amiruddin Vs. State (Delhi Administration) in this context would not apply to the facts of this case. This was a case where two incidents had occurred; after the first incident, the appellant had gone to the house of the complainant for a second time which by itself shows the intent on the part of the said accused and as rightly noted in the said judgment it was not something which was happened on the spur of moment. In the said case, the utterances of the appellant before inflicting the knife blow had also reflected his intent. The facts of the instant case are distinct.

40 In this background, while setting aside the conviction of the appellant under Section 302, he stands convicted under Section 304-I of Crl. Appeal No. 951/2011

the IPC. The appellant is stated to be in judicial custody for almost four years. He admittedly has no criminal antecedents; the family of both the appellant and the victim are too poor; they both are living in jhuggies. The wife of the appellant is a rag picker. She also has six minor children.

41 The appellant is accordingly sentenced to undergo RI for a period of eight years. Copy of this order be sent to the Jail Superintendent for information and necessary compliance.

42 Appeal disposed of in the above terms.

INDERMEET KAUR, J

KAILASH GAMBHIR, J

SEPTEMBER 26, 2013

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