

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

+ **CRL.A. 1380/2010**

**RAKESH SHUKLA @ SHIV
BHAGWAN SHUKLA**

..... Appellant

Through : **Mr.K.B.Andley, Senior
Advocate with Mr.M.Shamikh,
Adv.**

Versus

STATE

..... Respondent

Through : **Mr.Narender Kumar
Choudhary, APP for the State
with Inspector Ram Kishan.**

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Date of Decision : 07th October, 2013

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J. (ORAL)

1. By filing the present appeal, the Appellant impugns the judgment dated 27.10.2010 and order on sentence dated 29.10.2010 passed in Sessions Case No.91/09. The Appellant has been convicted for having committed the offence punishable under Section 302 IPC and sentenced to undergo life imprisonment with fine of Rs.5,000/- and in default to pay the fine, to undergo R.I. for six months.

2. In brief, the prosecution's case is that on 12.07.2006 at 10.41 PM an information was received at PS Mandir Marg that a person was lying unconscious near Nehru Chowk, RPF Office, Panchkuian Road, Delhi. The information was recorded vide DD No.23-A Ex.PW10/A

and assigned to SI Rajwant who visited the spot and found one person lying at the spot with injuries on his head. One half filled liquor bottle alongwith empty tumbler, one plastic mug, one boiled egg and some salt (on a piece of newspaper) were also found lying nearby. CAT Ambulance A-11 was at the spot and Mr.Anil Aggarwal, Incharge of Ambulance, RML Hospital, on checking, found the injured to be dead. The injured was taken to Lady Hardinge Medical College/Smt. S.K.Hospital, New Delhi where he was declared 'Brought Dead'. Identity of the injured remained 'Unknown'. SHO Inspector Ram Kishan also reached the spot, conducted necessary investigation there and after obtaining MLC from the hospital, he sent rukka Ex.PW14/A through Ct.Satish for registration of the case on the basis of which FIR No.282/2006 was registered at PS Mandir Marg.

3. During investigation, two eye witnesses i.e. PW-2 Charan Singh @ Chunva and PW-3 'R' (name of the witness withheld being minor) surfaced and they disclosed the identity of the offender to be Rakesh Kumar Shukla i.e. the Appellant and of the deceased as Babloo. The IO made efforts to ascertain the complete identity of the deceased. Various search operations were conducted to apprehend the offender. Ultimately on 17.07.2006 the Appellant was arrested from House No.23, Chander Vihar, IIIrd Floor, Mandawali, Delhi and from there, at his behest, one T-shirt used by him to wipe out the blood from his pant, was seized. The wooden support with which he hit the deceased was also got recovered by him from the bushes inside the LHMC Boundary Wall, opposite Block No.112 LHMC staff quarters. He was sent for medical examination where the clothes which he was wearing

at that time, were also seized as they were also having some blood stains.

4. On arrival of father of the deceased and identification of the dead body, post-mortem was got conducted on 18.07.2006. On 04.08.2006, opinion of the doctor was also obtained as to whether the injury could be caused with the wooden support. The opinion confirmed that the injury suffered by the deceased could be caused by the wooden support which was got recovered by the Appellant. The postmortem report summarised the cause of death as :

“Cranio cerebral damage as a result of blunt force impact. All injuries are antemortem in nature and fresh in duration. Injury No.4 and 5 with their corresponding internal injury are sufficient to cause death in ordinary course of nature collectively as well as individually”.

On completion of investigation, chargesheet was filed against the Appellant Rakesh Kumar Shukla for committing the offence punishable under Section 302 IPC. Subsequently CFSL result was also obtained and filed in the Court.

5. Prosecution examined 15 witnesses in support of its case. Statement of Appellant was recorded under Section 313 CrPC. On appreciation of entire evidence and believing the testimony of the two eye witnesses i.e. PW-2 and PW-3, the Appellant was convicted for committing the murder of deceased Surya Prakash @ Babloo and sentenced in the manner stated to above.

6. We have heard Mr.K.B.Andley, learned Senior Advocate for the Appellant as well as Mr.Narender Choudhary, learned APP for the State. We have also examined the testimony of material prosecution

witnesses as well the documentary evidence.

7. Mr.K.B.Andley, learned Senior Advocate for the Appellant submitted that as per prosecution, the deceased acquired the knowledge of the Appellant having relations with the wife of his employer who was a Tea-Vendor at Panchkuian Road. He submitted that at the time of occurrence, the deceased as well the Appellant were taking liquor on the roadside pavement in close vicinity when all of a sudden the Appellant is stated to have lifted a wooden support from a nearby rickshaw and hit 4-5 times on the head of Surya Prakash @ Babloo – the deceased. The Appellant used to prepare tea at the Tea Shop of Ramu and PW-3 ‘R’- another employee of Ramu used to supply tea to the nearby customers in the market. The deceased Babloo as well as PW-2 Charan Singh ‘Chaat Wala’ also used to buy tea from the same shop. Thus all of them were well known to each other. PW-2 Charan Singh and PW-3 ‘R’ have stated that they were not aware of any enmity between the deceased and the Appellant. Learned Senior Advocate for the Appellant submitted that though both the eye witnesses i.e. PW-2 Charan Singh and PW-3 ‘R’ have stated that they were detained in the police station for many days till the Appellant was arrested in this case which raises serious question mark on the veracity of their version but without entering into this controversy, even if the incident is accepted, it cannot be a case of murder. At the most, an offence under Section 304 IPC can be said to have been committed by the Appellant. Learned Senior Advocate Mr.K.B.Andley submitted that in the facts and circumstances of the case, this Court, after considering the submissions of the State, may

examine all the facts and circumstances to the limited extent whether it is a case punishable under Section 302 IPC or under Section 304 IPC.

8. Mr.Narender Choudhary, learned APP for the State vehemently contended that the case of the prosecution from the very beginning is that the Appellant committed murder of deceased Babloo by hitting him on his head with a wooden support. While referring to the post-mortem report, learned APP for the State submitted that the injuries were caused on the head and were sufficient in the ordinary course of nature to cause the death. The opinion of the Doctor Ex.PW-16/C dated 04.08.2006 is sufficient to hold that the fatal injuries were caused with the wooden support Ex.P1 which has been got recovered by the Appellant from the bushes inside the LHMC Boundary Wall, opposite Block No.112 LHMC staff quarters. While referring to the testimony of two eye witnesses i.e. PW-2 Charan Singh and PW-3 'R', learned APP for the State submitted that they have given every minute details as to how the Appellant approached the deceased and started attacking him repeatedly with the wooden support thereby causing injuries which resulted into his death. He emphasised that the testimony of two witnesses being natural and creditworthy, the learned Trial Court has rightly convicted the appellant under Section 302 IPC and sentenced him to undergo life imprisonment. He urged that once the incident is admitted by the Appellant, in view of the postmortem report, this Court, in appellate jurisdiction, should not interfere with the finding of conviction of the Appellant under Section 302 IPC. Learned APP for the State prayed for dismissal of the present

appeal.

9. Before adverting to the rival contentions, we would like to refer to the testimonies of PW-2 Charan Singh and PW-3 'R' who have been examined by the prosecution as eye witnesses.

10. PW-2 Charan Singh @ Chunva stated that he used to sell 'chaat' at Panchkuian Road. Appellant Rakesh Kumar Shukla was working at the Tea Shop of Ramu. He knew deceased Babloo who used to visit his 'Chaat' shop. The Appellant and deceased being known to him, all of them also used to sit, eat and drink together.

11. While narrating the incident wherein Babloo lost his life, PW-2 Charan Singh stated that on 12.07.2006 at about 10.00 pm while he alongwith Babloo – the deceased was taking liquor on the pavement by roadside, PW-3 'R' was also sitting with them. At that time, Appellant was seen coming there with wooden support hidden by him behind his back. The Appellant started hitting Babloo with that wooden support. At that time, the Appellant also asked him (PW-2) to run away from there. PW-2 ran away from there but stopped at some distance to witness the occurrence. Appellant hit twice on the back of Babloo and then hit on his head. He further stated that next day, he was taken to police station where he narrated the incident to the police.

12. PW-2 Charan Singh stated that in the police station, his statement was recorded and his thumb impressions were taken on four papers. He further stated that he remained in the police station till accused was arrested i.e. **for about 8 days**. PW-3 'R' was also with him in the police station during this period and they were kept in the

police station so that Shukla (Appellant) could be arrested.

13. PW-3 'R', who is a minor witness, aged about 13 years at that time, has been examined on oath by learned Addl. Session Judge without putting questions to him to test his capability to understand the questions and answer them or whether he understood the sanctity of oath.

14. PW-3 deposed that when he alongwith deceased Babloo and Chunva (PW-2) was sitting on the 'patri', Babloo and Chunva were consuming liquor when he saw the Appellant Rakesh Kumar Shukla coming there with the wooden support Ex.P1 and hit Babloo (deceased) on his head. He stated that he got frightened and fled from the spot. PW-3 also stated about his detention in the police station for about 1-2 days.

15. The MLC Ex.PW13/A pertains to 'Unknown', s/o 'Unknown' aged 30 years brought by HC Ashwini Kumar, No.696/ND to RML Hospital at **12.31 am**. The 'Unknown' person (later on identified as Babloo) was declared as 'Brought Dead'. At this stage, we note that the distance between the place of occurrence and RML Hospital is so short that it could not have taken about one-and-a-half hour to take the injured to hospital especially when CAT Ambulance had already arrived at the spot by the time SI Rajwant reached the spot on receipt of DD No.23-A.

16. The post-mortem was conducted on 18.07.2006 after the recovery of weapon of offence Ex.P1 on 17.07.2006. No reason is forthcoming as to why the opinion of the doctor was not taken about weapon of offence on the day of post-mortem or immediately

thereafter. The request for giving the opinion about the weapon of offence was made only on 04.08.2006 and the opinion has been given on the same day on the reverse of letter of request.

17. From the testimony of PW-2 and PW-3, it is proved that the Appellant and the deceased were well known to each other and prior to the occurrence, they used to eat and drink together. On the day of occurrence also the Appellant and the deceased were taking liquor on the road side but in close proximity to each other. As per prosecution story, the Appellant was nursing grudge against the deceased who happened to see him in objectionable condition with the wife of his (Appellant's) employer . Since the incident has not been disputed by the appellant, the only point left to be considered by this Court is whether it is a case of murder punishable under Section 302 IPC or culpable homicide not amounting to murder punishable under Section 304 IPC.

18. We are in complete disagreement with learned APP for the State that once the incident is admitted, conviction has to be under Section 302 IPC.

19. The category under which the incident falls has to be determined on the basis of narration of the incident given by two eye witnesses i.e. PW-2 and PW-3 as to the manner in which the occurrence has taken place.

21. The distinction between offence of murder and culpable homicide not amounting to murder had been considered by Supreme Court in various decisions and legal position in this regard is fairly well settled. In a recent report *Raghubir Chand & Ors. vs. State of*

Punjab 2013(10) SCALE 20, the Supreme Court analysed the effect of exception IV of Section 300 IPC. The relevant discussion is in the following terms :

‘10. This will take us to a consideration of the case of the Appellant No. 4 Kamal Kumar. The evidence of PWs 2, 4 and 5 has already been held by us to be credible and acceptable. We will, therefore, have to proceed on the basis that the said Appellant had inflicted 4-5 knife blows on the abdomen of the deceased. Learned Counsel for the Appellant has contended that even if the said evidence is accepted in its entirety no offence under Section 302 Indian Penal Code is made out against the 4th accused-appellant. In this regard, Learned Counsel for the Appellants has tried to persuade us that in the totality of the facts of the present case, the 4th exception to Section 300 Indian Penal Code would come into operation so as to make the said Appellant liable to the lesser offence under Section 304 Indian Penal Code. The 4th exception to Section 300 Indian Penal Code is in the following terms:

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.

*11. A decision of this Court of somewhat old vintage (**State of Andhra Pradesh v. Rayavarapu Punnayya and Anr.** MANU/SC/0180/1976 : (1976) 4 SCC 382 may be re-noticed to remember what would be the correct approach in dealing with the question whether an offence is murder or culpable homicide not amounting to murder. The following passages from the aforesaid decision may be usefully noticed hereunder:*

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third Clause of Section 299 is applicable. If this question is found in the positive, but the case comes, within any of the Exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the First Part of Section 304, Penal Code.

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court.

But sometimes the facts are so inter-twined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

*It appears that the aforesaid view in **Rayavarapu Punnayya** (supra) has been reiterated in **Ghelabhai Jagmalbhai Bhawad and Ors. v. State of Gujarat** (2008) 17 SCC 651 wherein it is observed thus:*

6. Murder is considered to be an aggravated form of culpable homicide and to render it a murder the case must come within the four clauses of Section 300. Consequently, it needs consideration at the threshold as to whether any of the accused has done any act by which he has caused the death of another person. Incidentally, it requires a consideration as to whether such act(s) amounted to culpable homicide, as envisaged under Section 299. If the evidence on record could evoke a positive answer in affirmation, the stage for consideration of the applicability or otherwise of Section 300 in the light of the clauses elucidating the offence as well as the exceptions engrafted therein arise. If the facts proved by the prosecution do not satisfy any one of the clauses contained in Section 300, it would only be a case of culpable homicide not amounting to murder, punishable under Section 304, the further question as to under which part of the said provision depending upon the nature of evidence and the necessary ingredients proved to attract one or the other clauses of Section 300 is satisfied, yet if the evidence could establish that the case falls under any one of the exceptions still the offence said to have been committed would only be culpable homicide not amounting to murder punishable under Section 304 of the Penal code. Thus, culpable homicide will not also amount to murder if the case falls within any of the exceptions in Section 300 and only by such process

of reasoning and elimination, a case for murder can be held proved.'

22. Guided by the above decision of the Supreme Court and on examining the facts and circumstances of the present case as narrated by PW-2 and PW-3, we have no hesitation in arriving at the conclusion that the Appellant had hit the deceased with the wooden support without any premeditation, in a spur of moment and by lifting the wooden support from the nearby rickshaw. He left the spot after hitting the deceased 4-5 times and in the given facts and circumstances we feel that the Appellant can be attributed with the knowledge that such act was likely to cause death.

23. Having regard to the above circumstances, we are of the opinion that the Appellant succeeds partially to the extent of alteration of his conviction from Section 302 IPC to Section 304 (Part-II) IPC. Accordingly, the appeal is partly allowed. The conviction of the Appellant is altered from Section 302 IPC to Section 304 (Part-II) IPC. The sentence awarded to the Appellant under Section 302 IPC to undergo life imprisonment is hereby set aside. The Appellant is sentenced under Section 304 (Part-II) IPC to undergo RI for seven years with fine of Rs.5000/- and in default, to undergo SI for one month.

24. In compliance of order dated 04.10.2013, the nominal roll of the Appellant has been received today as per which he has already undergone seven years, two months and eighteen days in judicial custody in this case as on 05.10.2013.

25. Appeal stands disposed of in above terms. TCR be sent back along with copy of the order.

26. Copy of the order be also sent to the Jail Superintendent to release the Appellant, if not wanted in any other case, on depositing the fine or undergoing the sentence in default of payment of fine.

PRATIBHA RANI
(JUDGE)

REVA KHETRAPAL
(JUDGE)

OCTOBER 07, 2013
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