

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

Reserved on: 29th January, 2013

Pronounced on: 8th April, 2013

+ **CRL.A. 45/2012**

ASHOK KUMAR & ORS. Appellants

Through: Mr. Ravinder Tyagi, Adv. with
Mr. Himanshu Sharma, Adv.,
Mr. Bhanu Nandwani, Adv.

Versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through: Ms. Jasbir Kaur, APP for the State.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. This Appeal is directed against a judgment dated 12.07.2011 and the order on sentence dated 18.07.2011 whereby the Appellants were convicted for an offence punishable under Section 304-II of the Indian Penal Code (IPC). Appellant Ashok was sentenced to undergo Rigorous Imprisonment for a period of 6½ years whereas Appellants Gopi and Rinku were sentenced to undergo Rigorous Imprisonment for a period of five years each.
2. In order to establish its case, the prosecution examined 13 witnesses. PW-2 Vijay Pal and PW-8 Balbir were projected as the witnesses of the actual incident. The learned Additional Sessions Judge (ASJ) declined to believe that PW-2 Vijay Pal was a witness of the actual occurrence. However, regarding PW-8 Balbir, the learned ASJ opined that the three

Appellants had committed an offence punishable under Section 304-II/34 of the IPC for causing death of Malkhi.

3. The following contentions are raised on behalf of the Appellants:-

- (i) PW-2 is purported to be the author of the FIR. If testimony of PW-2 is excluded, the whole case of the prosecution falls to the ground.
- (ii) As per PW-8 Balbir only two blows were given to the deceased Malkhi whereas doctor found four injuries on his person. This contradiction belies the prosecution version.
- (iii) As per the prosecution version the injury by knee on the deceased's testicles was caused by Rinku. Appellants Ashok had simply caught hold of deceased Malkhi while Appellant Gopi gave a fist blow on his left eye. Thus, Appellants Ashok and Gopi could not have been convicted under Section 304-II IPC with the aid of Section 34 of IPC as none of the three Appellants were armed with any weapon and no common intention can be said to be shared by Appellants Ashok and Gopi in causing injuries on the testicles.

4. The prosecution story as recorded by the police on the statement of PW-2 Vijay Pal in the impugned judgment is extracted hereunder:-

“That he had shifted 6 months ago from the jhuggies of Vikas Puri, there he alongwith his cousin brother Malkhi was selling toffees, cigarettes etc. on a wooden plank in front of three jhuggy, and they were making living out of that.

Today on 13.10.2006, at around 7:00 a.m., he along with his brother were present at their said shop, and one of the neighbour Balbir was also standing there. At that time, three persons, namely, Gopi, 'Rinku and Ashok, who were residing in their locality came to their shop and started lifting the goods of their own, to which Malkhi objected and told them that he would himself

give the goods they wanted, which infuriated them and they started abusing him and also started beating him.

At that time, Ashok caught hold of Malkhi, whereas Rinku hit him with his knee on his private parts, at that same time, Gopi gave him fist blow on his left eye. Due to the said injuries he fell down on the floor, when they raised the alarm, all the said persons ran away from the spot. Police was informed. PCR came to the spot, which removed his brother to the M.B. Hospital, where he declared brought dead”.

5. The learned ASJ primarily disbelieved PW-2 Vijay Pal on three grounds, first, that he did not come forward to save his cousin Malkhi; second, that his name is not recorded in the MLC; and, third, that his presence at the spot was not admitted by PW-8 Balbir.
6. In my view, the learned ASJ did not appreciate the testimony of PW-2 in right perspective. PW-2 Vijay Pal when questioned as to why he did not intervene to save his cousin Malkhi, had explained that he had got recently married and could not dare to intervene. It is well known that even some of the stoutly built people would not gather courage to intervene in a dispute particularly when a friend or relation is being attacked by a number of persons and the person feels that he would be unable to save the relation. In the circumstances, simply on account of non intervention of PW-2, in the quarrel his presence at the spot cannot be doubted.
7. As far as removal of the deceased to the hospital along with PCR officials is concerned, I may say that no suggestion was given by the defence to PW-2 that he did not accompany the deceased to the hospital with the police (PCR).
8. No explanation was sought from PW-2 as to why his name was not recorded in the MLC. If any such question had been asked he would

have given the explanation. Thus, the learned ASJ also erred in disbelieving the presence of PW-2 on the ground that his name is not mentioned in the column of “*brought by*”. Admittedly, the deceased was removed to the hospital by PCR officials. The doctor was not wrong in recording that the deceased was brought to the hospital by the police officials because he was in fact taken to the hospital by the police officials. But the entry in the MLC that the deceased was brought by the police would not mean that PW-2 did not accompany the deceased to the hospital. It may further be noticed that his statement under Section 161 Cr.P.C. on the basis of which the instant FIR was recorded was taken down by the IO in the hospital. No question was put to PW-11 the IO that PW-2 was not present in the hospital when he reached there. In this view of matter, it is difficult to sustain the view taken by the learned ASJ that PW-2 was not present at the spot at the time of the incident.

9. Of course, PW-8 stated in his cross-examination that PW-2 was not present at the spot at the time of the incident. In this regard it would be appropriate to refer to PW-2’s testimony who stated in his examination-in-chief as under:-

“Upon this all the three accused persons started abusing Malki and said “TOO BAHOOT BAN KAR DIKATA HAI”. They thereafter started giving beatings to Malki. In the meantime, I had already come out of the jhuggi. Accused Gopi gave a fist blow at near the right eye of Malki and as a result blood started oozing out. Accused Ashok thereafter caught hold of Malki and accused Rinkoo gave a knee blow at the private parts of Malki. They all gave beating to Malki by fist blows etc. also. Malki as a result fell down on the ground. All the three accused thereafter ran away towards Nahar....”

10. Thus, it may be seen that the shop (the stall) was being run by the deceased and Vijay Pal by putting a wooden plank in front of the jhuggi.

It seems that when the incident started PW-2 was inside and when the words “*TOO BAHOOT BAN KAR DIKATA HAI*” were exclaimed PW-2 had come out of his jhuggi. It is evident that he was not actually present at the stall and was at some distance whereas PW-8 was present close to the stall. In any case, these contradictions were not enough to exclude PW-2’s presence at the spot.

11. Even if, testimony of PW-2 is excluded as was held by the learned ASJ PW-8’s testimony who had no enmity with the accused persons cannot be disbelieved. In fact, there was no motive even for PW-2 to have falsely deposed against the Appellants. In this view of matter, the incident, that is, holding of the deceased by Appellant Ashok and infliction of knee blow on Malkhi’s testicles and a fist blow at the deceased’s eye by Appellant Gopi cannot be doubted. It is true that as per the prosecution case only two blows were given by the Appellants. The other injuries which were in the shape of bruises etc. which can be possible in the course of falling/scuffle. Thus, prosecution version with respect to the Appellants Rinku and Gopi cannot be doubted.
12. The vital question for consideration is whether Appellant Ashok and Gopi could be convicted under Section 304-II IPC with the aid of Section 34 IPC. In other words, whether there was pre-concert or prearranged plan to cause injuries by the three accused persons.
13. It is well settled that there need not be prearranged plan to cause injuries which are likely to cause death and that the common intention may well develop at the spot. In the instant case, there is no evidence that there was any pre-concert. In fact there was no previous enmity between the Appellants on the one hand and the deceased or any of his relation on the

other. There was no cause or motive to cause any injury on the deceased. As per prosecution case there was an altercation between the deceased and the Appellants on the matter of taking the articles from the deceased's shop by the Appellants without deceased's permission. On an objection being raised by the deceased the Appellants got enraged and exclaimed "*TOO BAHOOT BAN KAR DIKATA HAI*". Thus, the quarrel started on the spur of moment. The Appellant Ashok caught hold of the deceased and Appellant Rinku gave a knee blow on the deceased's testicles which proved fatal. Admittedly, the Appellants were not armed with any weapon when they reached the deceased's shop. They were simply picking up the articles at the shop. As stated earlier the common intention can well develop at the spot, but what is more important to see is whether common intention was to cause Malkhi's death.

14. In *Preetam Singh v. State of Rajasthan*, (2003) 12 SCC 594, the Supreme Court held that although the common intention can well develop at the spot but it should be the result of prior concert and prior concert can be inferred from the conduct of the accused revealing unity of purpose and the part played by them at the time of the occurrence, the injuries inflicted and other relevant factors.
15. In *Harjit Singh & Ors. v. State of Punjab*, AIR 2002 SC 3040 there were two parties of the assailants who caused injuries. A-2 was member of the first party of the accused who had come on the tractor. He or the persons accompanying him were not armed with any weapon to cause death. As per the prosecution version because Harjeet Singh (A-1) joined first party at a later point of time and he was armed with revolver. The members of the first and the second party raised *lalkara* to the deceased to come out of the house, which was found to be a material improvement. A-2 who

was member of the first party and since the first party was not armed with any weapon to cause death, the Supreme Court held that the common intention to inflict injuries with the intention of causing death cannot be shared by A-1 who was member of the first party.

16. In *Abani K. Debnath & Anr. v. State of Tripura*, (2005) 13 SCC 422 , on facts, the Supreme Court held that although the common intention can also be formed on the spot but in the instant case it was difficult to say that there was common intention shared by A-1 with A-5. A-5 was accordingly acquitted of the charge of murder. The facts can be extracted from Para 2 of the report as under:-

“2.....The prosecution story as unfolded was that the quarrel between the accused Amar Debnath and Anil Das, PW 1 ensued over grazing cows. The cow of the accused is said to have entered into the field of PW1 by breaking the fence. A-5 Amar Debnath picked up a stick of bamboo from the bamboo fencing and started bearing Anil Das, PW-1. On seeing PW-1 being beaten, the unfortunate deceased Ranjit Das who was standing nearby intervened to save Anil Das, PW-1 from the beating. In the quarrel that ensued, it appears that there was a mutual fight between the accused and the prosecution party and both parties suffered simple injuries on their bodies. In the meantime, A-1 Abani Kumar Debnath rushed to the spot and stated to have dealt a dao-blow on the occipital region of the deceased which ultimately resulted in death.....”

17. Turning to the facts of the instant case, keeping in view the fact that all the three assailants were not armed with any weapon, the quarrel started all of a sudden simply because the Appellant Ashok held the deceased or that the Appellant Gopi gave a fist blow on the deceased's eye, it cannot be said that they shared the common intention to cause an injury by the knee on the deceased's testicles. That was an individual act of the

Appellant Rinku. In the facts of the case, the other two Appellants Ashok and Gopi can be said to have shared the common intention only to cause injuries. Thus, Appellants Ashok and Gopi's conviction under Section 304-II read with Section 34 of IPC cannot be sustained. The same is altered to the offence punishable under Section 323/34 of IPC. Appellant Rinku did have knowledge that injury on the vital part of the body (i.e. testicles) would be sufficient to cause death of the deceased. Thus, conviction of Appellant Rinku for the offence punishable under Section 304-II/34 of IPC is however altered to Section 304-II IPC.

18. Appellant Ashok was sentenced to undergo RI for a period of 6½ years whereas Appellants Gopi and Rinku were sentenced to undergo RI for a period of five years each. Reason for awarding harsher punishment to Appellant Ashok is that he had threatened the witnesses during the trial for which another case under Section 506 IPC was registered against him.
19. I have altered the conviction of the Appellants Gopi and Ashok from offence under Section 304/34 IPC to the offence punishable under Section 323/34 IPC. They have already served a sentence of over four years. The maximum sentence provided under Section 323 IPC is imprisonment which could extend to one year. In the circumstances, they are sentenced to undergo imprisonment for one year which they have already undergone and are ordered to be set at liberty forthwith.
20. Appellant Rinku has served sentence of four years, two months and three days. He has also earned remission of six months and 18 days and the period of unexpired portion of his sentence is about three months and 9 days. In the circumstances of the case, he is also sentenced to undergo

imprisonment for the period which he has already undergone and is ordered to be set at liberty forthwith.

21. The Appeals are allowed in above terms.
22. Pending Applications also stand disposed of.
23. A copy of the judgment be transmitted to the Superintendent jail immediately.

(G.P. MITTAL)
JUDGE

APRIL 08, 2013

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