

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

Reserved on: 04th April, 2014
Pronounced on: 30th April, 2014

+ **CRL. L.P.162/ 2014 & CrI. M.A. 3174/ 2014**

STATE (GOVT. OF NCT OF DELHI) Petitioner
Through: Mr. Rajesh Mahajan, Additional
Standing Counsel for the State.

Versus

NAUSHAD & ORS. Respondents
Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE G.P. MITTAL

J U D G M E N T

G.P. MITTAL, J.

1. By this petition under Section 378 (3) of the Code of Criminal Procedure, 1973 (Cr.P.C.), the State seeks leave to file an appeal against the judgment and the order on sentence dated 24.05.2013 and 28.05.2013 respectively whereby respondents No. 1 to 3 were convicted for the offences punishable under Section 304 (Part I) read with Section 34 and Section 308 read with Section 34 of the Indian Penal Code, 1860 (IPC). For the offence punishable under Section 304 (Part I) IPC, respondents Naushad @ Sonu and Dilshad Khan were sentenced to undergo RI for a period of 8 years each and to pay a fine of Rs. 50,000/- each or in default of payment of fine they were sentenced to undergo RI for 2 years each whereas for the offence punishable under Section 304 (Part I)/34 respondent Hameed Khan

was sentenced to undergo RI for a period of 7 years and to pay a fine of Rs. 40,000/-. In default of payment of fine, he was sentenced to undergo RI for 1½ years. Similarly, for the offence punishable under Section 308/34 IPC, respondents Dilshad Khan and Naushad were sentenced to undergo RI for a period of 6 years each and to pay a fine of Rs. 30,000/- each, or in default of payment of fine they were sentenced to undergo RI for 2 years each. Respondent Hameed Khan, on the other hand, was sentenced to undergo RI for a period of 5 years and to pay a fine of Rs. 25,000/- or in default of payment of fine he was sentenced to undergo RI for 1½ years for the offence punishable under Section 308/34 IPC.

2. The State's grievance is that the assault being premeditated and there being intention to inflict the injury which ultimately caused deceased's Rajiv death and the injuries on the person of Babar Khan (PW1) being dangerous, the respondents ought to have been convicted for the offence punishable under Section 302/34 and Section 307/34 IPC. It has also been averred that even if the respondents were convicted for the offence punishable under Section 304/34 IPC and Section 308/34 IPC, the quantum of sentence awarded was insufficient and inadequate.
3. By the impugned judgment, the Trial Court found the case of the prosecution to be proved beyond reasonable doubt but held that the injuries were caused in a sudden fight without premeditation and thus, the respondents never intended to cause the death of deceased Rajiv. Therefore, in spite of the fact that the injuries inflicted were dangerous, the Trial Court held that the respondents were entitled to

the benefit of Exception 4 to Section 300 IPC and were only guilty of culpable homicide not amounting to murder.

4. The manner of the incident can be summed up from the Court's testimony of Babar Khan (PW1) on whose statement Ex. PW1/A, FIR Ex. PW10/A was registered. The relevant portion of the impugned judgment is extracted as under:

"....On the first Ramzan on 02.09.2008, I alongwith my family consisting of my father, mother, wife alongwith my children went to meet my uncle at New Seemapuri. At about 04:30 p.m. for the purpose of breaking the fast of Roza, I came to New Seemapuri Fruit market for purchasing the fruit. My brother Rajeev Khan also came in the meanwhile in a three wheeler which he drives bearing No. UP-14 Y-9411. He was parking the three wheeler on a side in front of Khan Tailors. There was a byecycle (sic bicycle) parked in front of the shop. The auto accidently hit the cycle while parking which resulted in the cycle falling on the ground. On this issue, my brother Rajeev had grappelling (sic grappling) with Dilshad who came from inside the shop of Khan Tailors. I try (sic tried) to intervene. In the meantime, Naushad, brother of Dilshad came out of the shop Khan Tailors with chhura in his hand and his father Hamid having scissor in his hand. The father of Dilshad handed over the scissor to Dilshad. Naushad stabbed my brother with the chhura on the neck of my brother. Dilshad stabbed my brother on his head with the scissor. Hamid at the time of handing over the scissor exhorted his sons 'mar do salon ko.' My brother fell down on account of injury. I tried to save him. Dilshad stabbed me with scissor on my back, near my neck and on below my arm pit (Court Observation: The witness by removing his shirt showing (sic showed) the injury marks in the court).

All the three had attacked me and my brother to kill us.

Thereafter the accused fled away from his shop. I can identify the assailants if shown to me. The witness identified the accused persons present in the court today correctly. Someone called the police. PCR came and took me and my brother to GTB Hospital. Police came at the hospital and recorded my statement. My statement is Ex. PW1/A which bears my signature at point A. My brother died in the hospital after half an hour/45 minutes....”

5. The Trial Court found the statement of Babar Khan (PW1) to be reliable and convincing and thus, convicted and sentenced the respondents as aforesaid.
6. Mr. Rajesh Mahajan, learned Additional Standing Counsel for the State urges that the number of injuries inflicted on the person of the deceased and on PW1 Babar Khan speak volume about the respondents intention to cause death. It was Babar Khan's good luck that he survived the serious injuries. He argues that the fact that the injuries were caused by respondents Naushad and Dilshad in pursuance of the exhortation given by respondent Hameed is sufficient to show that the respondents had the intention to kill the deceased and PW1 and thus, the respondents were not entitled to the benefit of Exception 4 to Section 300 IPC and they ought to have been convicted under Section 302/34 and 307/34 IPC.
7. We have earlier extracted the prosecution case. As borne out from Babar Khan's testimony which is fully corroborated by the FIR, the manner of starting of the quarrel is not in dispute. Admittedly, the deceased had parked his three-wheeler (TSR) in front of the shop of Khan Tailors belonging to the respondents. There was a bicycle parked in front of the shop. The TSR accidentally hit the bicycle as a

result of which the cycle fell on the ground. Admittedly, the deceased grappled with respondent Dilshad who had come out of the shop on account of falling of the bicycle. It was at this stage, as per PW1, that he (PW1) intervened in the matter. Thus, there were two persons from the side of the victim and there was just one person from the side of the respondents. Thereafter, other 2 respondents, *i.e.* Naushad (brother of Dilshad) and Hameed (father of Dilshad) came out of their shop. Naushad came with a *chhura* in his hand, whereas Hameed came with a scissor in his hand. Thus, it is clear that there was no premeditation on the part of the respondents. The start of the quarrel was innocuous, because of the parking of TSR by the deceased in front of respondents' shop and hitting and falling of the cycle, the respondents Naushad and Hameed had come outside to save their brother/son armed with the most handy weapons/articles available in the shop that they could find.

8. According to the prosecution, Naushad who joined the quarrel stabbed the deceased with the *chhura* on the neck. Dilshad who had been handed over the scissors by respondent Hameed struck the scissors on the deceased's head. When PW1 tried to save the deceased, he was also stabbed with the scissors on his back, near his neck and below his arm pit by respondent Dilshad. As per the post mortem report Ex. PW9/A, there were overall 12 injuries found on the person of the deceased, whereas as per the MLC Ex.PW5/B, PW1 suffered three injuries on his person. The injuries found upon the deceased were as under:

1. Incised stabbed wound measuring 3.3 cm x 0.5 cm present

over the left temporal scalp, 4 cm above left ear and 6.5 cm above left eyebrow (outer end), its anterior angle is blunt and posterior angle is acute, track of the wound goes slightly inwards and downwards cutting the soft tissues of the scalp to a depth of 4.2 cm;

2. Lacerated wound measuring 4.3 cm x 0.4 cm x bone deep present over the left frontal scalp, its lower end is 6.5 cm above lateral end of left eyebrow and upper end is 3 cm from midline, margins are contused;
3. Lacerated wound measuring 2 cm x 0.3 cm x bone deep present on the left parietal scalp, its lateral end is 8.5 cm above left ear and upper medial end is 3 cm from midline, margins are contused;
4. Lacerated wound measuring 5.4 cm x 0.3 cm x bone deep present on the posterior parietal scalp, its left end is 10 cm medial to left ear and right end is 13.5 cm from right ear;
5. Lacerated wound measuring 5.2 cm x 0.3 cm x bone deep present on the left occipital scalp, 9.5 cm behind left ear and 3 cm below injury No. 4;
6. Reddish abrasion 0.5 cm x 0.3 cm present on left forehead, 2 cm above mid of left eyebrow, 9.5 cm medial to left ear;
7. Reddish bruise 2 cm x 1 cm present on right side face, 2 cm lateral to lateral canthus of right eye;
8. Reddish bruise 2 cm x 2.5 cm on right shoulder joint area;

9. Reddish abrasion 1 cm x 1 cm on right side neck, 10 cm below right ear lobule and 8 cm from mid line;
10. Multiple scratch abrasions ranging in size from 1.7 cm x 0.1 cm to 0.4 cm x 0.1 cm present on left sides of face in an area of 8 cm x 3.5. cm;
11. Reddish bruise 4 cm x 3 cm present on mid line lower neck, just above supra sterna notch; and
12. Incised stabbed wound measuring 6.5 cm x 0.2 cm on surface present horizontally over the posterior aspect of left shoulder blade, 1.5 cm lateral to base of neck. It's both the angles are acute. The track of the wound goes forwards, downwards and medially cutting the soft tissues and muscles of the left side of the neck, going forward it cuts the left jugular vein and internal carotid artery and ends by cutting the soft tissues in the mid line of the neck interiorly, thus making a total depth of 9.5 cm. Entire track is haemorrhagic.

9. Out of these 12 injuries, as per the subsequent opinion of the doctor Ex.PW9/B, 8 injuries were caused by scissors (*i.e.* by respondent Dilshad Khan); one injury was caused by knife (*i.e.* respondent Naushad) and three injuries in the shape of abrasions, *etc.* were caused by some blunt object which could also be result of a fall on the ground. Similarly, the three injuries present on PW1 Babar as per his MLC Report Ex. PW5/B were as follows:

1. 5 X 2 cm incised looking wound on back;
2. 3 x 1.5 cm incised looking wound on back;

3. 1.5 cm incised looking wound on chest (2 spots).

As per his own testimony, these 3 wounds on the person of PW1 were attributed to respondent Dilshad.

10. Although, the respondents have disputed the manner of the incident and stated that the injuries were caused by the deceased and PW1 on each other with a broken bottle of beer in front of their shop Khan Tailors and that when Hameed Khan tried to pacify them, he too was attacked by the deceased and injuries on his palm were caused with the broken bottle, and that when his 2 sons tried to save him, Dilshad too was injured on his left hand with the broken bottle, no pieces of broken beer bottle could be recovered from the scene of the crime. On the other hand, although Investigating Officer Inspector Pankaj Sharma (PW17) had recorded the disclosure statements of the respondents wherein they had stated that they had themselves inflicted injuries upon them to protect themselves from the police and falsely implicate the deceased and PW1, the prosecution did not collect nor did it adduce any legal evidence to prove that the injuries were self-inflicted. Probably, the injuries found on the person of Hameed vide MLC Ex.PW20/A and on the person of Dilshad vide MLC Ex. PW21/A were received in this very incident, though the manner of inflicting the injuries could not be established. In any case, no legal evidence was adduced by the prosecution that the injuries were self-inflicted.
11. As per the post-mortem report Ex. PW9/A, it was only injury No. 8 attributed to respondent Naushad which was found to be sufficient to cause death in the ordinary course of nature. It goes without saying

that the injuries were caused in a sudden fight and in the heat of passion upon a sudden quarrel. However, on the basis of the number of injuries and the alleged exhortation by respondent Hameed, the learned ASC urges that the case was not covered by Exception 4 to Section 300 IPC.

12. It is well settled that the number of injuries caused in such a case is not decisive in determining the nature of the offence, but what has to be primarily seen are the circumstances preceding the incident and not exclusively during the incident. (*Vijender Kumar v. State of Delhi*, (2010) 12 SCC 381).
13. In *Sukhbir Singh v. State of Haryana*, (2002) 3 SCC 327, while analysing the purpose of insertion of Exception 4 to Section 300 IPC, the Supreme Court observed as under:

“17. To avail the benefit of Exception 4, the defence is required to probabalise that the offence was committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual manner. The exception is based upon the principle that in the absence of premeditation and on account of total deprivation of self-control but on account of heat of passion, the offence was committed which, normally a man of sober urges would not resort to. Sudden fight, though not defined under the Act, implies mutual provocation. It has been held by the courts that a fight is not per se palliating circumstance and only unpremeditated fight is such. The time gap between quarrel and the fight is an important consideration to decide the applicability of the incident. If there intervenes a sufficient time for passion to subside, giving the accused time to come to normalcy and the fight takes place thereafter, the killing would

be murder but if the time gap is not sufficient, the accused may be held entitled to the benefit of this exception.”

14. It is not necessary that the accused must bring some evidence either in cross-examination or in defence that the injuries were inflicted in the course of a sudden quarrel without premeditation and that the accused did not act cruelly or in unusual manner. An accused facing trial for an offence under Section 302 IPC can very well refer to the prosecution evidence to claim that his case falls under Exception 4 to Section 300 IPC. The opinion of the Supreme Court is consistent that the number of injuries is not decisive to determine whether an accused is entitled to benefit of Exception 4 to Section 300 IPC or not. In *Ghapoo Yadav & Ors. v. State of M.P.*, (2003) 3 SCC 528, the facts were as under:

“3....Lekhram (PW2) and Gopal (hereinafter referred to as “the deceased”) were sons of Ramlal (PW1). Accused Ghapoo Yadav is the father of accused Janku, Kewal and Mangal Singh. Accused Sunder is the nephew of accused Ghapoo. The deceased, the witnesses and the accused belonged to the same village and there was land dispute between them. On a request made by Ramlal (PW1), measurement of the land was done by the Revenue Authority. On the basis of the said measurement, it was found that the land belonging to accused Mangal Singh was in the possession of Ramlal (PW1) and over the said land a berry tree existed. Though, initially the tree was in possession of Ramlal, after measurement he parted with possession thereof. The said tree was cut by the family members of Ramlal (PW1) a day prior to the incident for which the deceased had altercation with the accused persons. On the date of incident i.e. 9-6-1986 there were altercations between the accused persons and the deceased, his brother Lekhram and father Ramlal. Accused Janku enquired from the deceased as to why they were cutting the tree. Lekhram responded that it was cut three days prior to

the incident as the tree belonged to them and was planted by their family members. The deceased claimed that he had not cut the tree. This led to altercations and scuffles amongst them and the accused persons assaulted the deceased, which resulted in a fracture of his leg. When Ramlal and Lekhram went to save him, the accused persons ran towards them threateningly. Ramlal and Lekhram fled away from the place of incident, and returned later on with the other villagers. They took the deceased who was then gasping for breath on a cot to Maharajpur Police Station. Information was given by the deceased to the police at 8.45 p.m. He was sent for treatment and was examined by Dr. R.K. Chaturvedi (PW3). On examination he found seven injuries on the body.”

15. After analysing the scope of Exception 4 to Section 300, the Supreme Court held that out of the seven injuries, only injury No. 2 was sufficient to cause death in the ordinary course of nature. It was held that causing of seven injuries in the facts of the case cannot be termed to be either in a cruel or in an unusual manner for denying the benefit of Exception 4 to Section 300 IPC.
16. In *Shaikh Azim v. State of Maharashtra*, 2008 (11) SCC 695, the deceased and his son were present at their house alongwith other family members. They noticed some filth thrown in the backyard of their house from the side of the house of the accused and expressed their displeasure in this regard. The family members of the accused also abused them. One of the accused holding a stick, the other holding an iron rod and the third accused was also holding the stick, came out of their house and gave blows on the head of the deceased. When his son rushed to his rescue, the accused also gave injuries to him with iron rod and sticks. The deceased succumbed to the injuries

caused to him. It was held that the appropriate conviction of the appellant/accused would be under Section 304 Part I of the IPC.

17. Recently, this Court in *Sunil Kumar & Ors. v. Govt. of NCT of Delhi* (Crl. App. 19/1998) decided on 05.02.2014, in a case of multiple injuries, including injury No. 5 which was caused by a sharp edged weapon and was sufficient to cause death in the ordinary course of nature, speaking through Sanjiv Khanna, J. extended the benefit of Exception 4 to Section 300 IPC and converted the conviction of the appellants from Section 302 IPC to Section 304, Part I IPC. In para 14, this Court said thus:

“14. Keeping in view the aforesaid facts, we are inclined to accept the contention of the appellants that the occurrence in question was result of a sudden fight or quarrel and not due to premeditation and prior planning. In the heat of passion, while grappling was going on, injuries were caused. There was only one major injury which had resulted in death of Tejpal. In these circumstances, we apply Exception 4 to Section 300 IPC and convert the conviction of appellants from Section 302 IPC to Section 304, Part-I IPC.”

18. In *Mahender v. State* (Crl. A. 972/2008) decided on 16.02.2009, a Division Bench of this Court speaking through Pradeep Nandrajog, J. while relying on *Surinder Kumar v. U.T. Chandigarh*, (1989) 2 SCC 217, gave the benefit of Exception 4 to the appellant in a case of eight injuries. In paras 15 and 16, the Division Bench observed as under:

“15. From the post-mortem report it is apparent that injuries 6 to 8 are abrasions. Injuries No.1 to 5 are the result of being hit by a blunt object. The blunt object, in the instant case is a brick. The injuries are directed towards the head. The result was a damage to the brain.

16. In the decision reported as AIR 1989 SC 1094, Surinder Kumar v. U.T.Chandigarh where 3 injuries were caused on the person of the deceased; all injuries being with a knife and

directed towards a vital part of the body, namely the chest and that too the place where the heart is to be found and the neck; noting that the quarrel was sudden and the accused, in a heat of moment, picked up the weapon which is handy i.e. did not bring along with him the weapon, held that it cannot be said that Section 300 IPC was attracted. We may clarify that the Supreme Court held that Exception 4 to Section 300 would take said act out from the rigors of Section 300 i.e. the offence of murder and would reduce the same to the offence of culpable homicide not amounting to murder. To put it pithily the act held was an imminently dangerous act and knowledge could be attributed to the offender that by the act he would be causing death, but since the quarrel was a sudden quarrel Exception 4 to Section 300 was held applicable. That 3 injuries were caused was held as not justifying an inference that the accused had acted in a cruel manner.”

19. Turning to the facts of this case, there were twelve injuries on the person of the deceased and three on the person of PW1; out of twelve, six injuries were caused by scissor, three could be the result of a fall or a result of some blunt object and only one injury i.e. injury No. 12 was found to be serious enough to cause death in the ordinary course of nature. It is a case where there was a sudden and unexpected fight, in which the two sides indulged in violence and hurt each other. The occurrence was outside the shop of the accused. Testimony of Babar Khan (PW-1), though relevant and credible, has to be read with caution to avoid exaggeration and reflective of one side. Causing of these several injuries cannot be attributed to any one single accused. The fatal knife blow was inflicted by one accused. Moreover, no injuries were caused either to the deceased or to PW1 once they had fallen down. Thus, the Trial Court rightly applied the provision of Exception 4 to Section 300 IPC to convict the respondents for the offence punishable under Section 304/34 and 308/34 IPC. The view

and opinion formed by the Trial Court is plausible and takes into account several facets of the occurrence. No interference is required and warranted on the said aspect.

20. The sentence of imprisonment of 8 years and 6 years to respondents Naushad and Dilshad for the offence punishable under Section 304(Part I)/34 and 308/34 IPC along with fine and sentence of imprisonment for a period of 7 years and 5 years to respondent Hameed for the offence punishable under Section 304 (Part I)/34 and 308/34 IPC along with fine cannot be said to be insufficient or inadequate. The impugned judgment and order on sentence do not call for any interference.
21. The petition seeking leave to appeal is devoid of any merit. The same is accordingly dismissed.

CRL.M.A.3174/2014 (delay)

There is a delay of 151 days in filing the leave to appeal. Since we have examined the merits of the leave to appeal and have found the same to be devoid of any merit, we are not inclined to issue any notice on the application for condonation of delay. The application is accordingly dismissed.

(G.P. MITTAL)
JUDGE

(SANJIV KHANNA)
JUDGE

APRIL 30, 2014
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