

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

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CRL.A. No. 264 of 2014

SONU

..... Appellant

Through: Mr. R.K. Ruhil with Mr. Amjad
Hussan, Advocates with Appellant in person.

versus

STATE (GNCT OF DELHI)

..... Respondent

Through: Ms. Isha Khanna, APP.

WITH

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CRL.A. No. 265 of 2014

SUNIL

..... Appellant

Through: Mr. R.K. Ruhil with Mr. Amjad
Hussan, Advocates with Appellant in person.

versus

STATE (GNCT OF DELHI)

..... Respondent

Through: Ms. Isha Khanna, APP.

AND

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CRL.A. No. 266 of 2014

RAMPAL

..... Appellant

Through: Mr. R.K. Ruhil with Mr. Amjad
Hussan, Advocates with Appellant in person.

versus

STATE (GNCT OF DELHI)

.... Respondent

Through: Ms. Isha Khanna, APP.

CORAM: JUSTICE S. MURALIDHAR

ORDER
16.09.2014

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1. These appeals are directed against the judgment dated 31st August 2013 passed by the learned Additional Sessions Judge ('ASJ') in Sessions Case Nos.10/12 convicting the Appellant Sunil for the offence under Section 304 (Part II) IPC and Appellants Sonu and Rampal for the offence under Section 325 IPC and the order on sentence dated 5th February, 2014, whereby Appellant Sunil was sentenced to undergo five years rigorous imprisonment ('RI') under Section 304 (Part-II) IPC coupled with fine of Rs.15,000/-, in default of payment of fine, he shall undergo six months simple imprisonment ('SI'). Further Appellant Sonu and Rampal were sentenced with three years RI under Section 325 IPC coupled with fine of Rs.10,000/- each, in default of payment of which to undergo three months SI each. Out of the total fine amount of Rs. 35,000/-, Rs.30,000/- was to be given to the wife of deceased Sher Singh and remaining Rs.5,000/- to the State.

2. On 9th October, 2011 a DD entry No.44 A, was registered at Police Station ('PS') Adarsh Nagar about a person being attacked by 20/25 persons near Shiv Mandir, near Petrol Pump, Lal Bagh, Azadpur on which Investigating Officer (IO) Sunny (PW-17) reached the spot. He learnt that the injured Sher Singh was taken to BJRM Hospital, Jahangir

Puri by the PCR van. On this he reached BJRM Hospital, where injured Sher Singh could not give any statement due to pain on that date. However, the next morning, i.e., on 10th October 2011, PW-17 recorded the statement (Ex.PW17/A) of the injured Sher Singh who stated that he was returning from his duty as a driver around 10 p.m. on 9th October, 2011 and when he reached near Lal Bagh Petrol Pump, A-1 along with his associates Sonu (A-2) and Ramphal (A-3) blocked his way stating '*tune mujhe bahut tang kiya hai, hum aaj tuje sabak sikha denge*'; and all of them gave him legs, fist and kick blows and beat him with dandas. Someone called the police and the PCR van shifted him to hospital.

3. During investigation Premwati (PW-1) wife of injured Sher Singh and who was eye witness to the incident gave a statement naming the three accused persons who were then arrested on that date. The statements of two other eye-witnesses, i.e. Gyan Prakash (PW-2) and Karan Singh (PW-3) were recorded on 11th October 2011.

4. Injured Sher Singh was shifted to LNJP Hospital from BJRM Hospital. Initially an FIR was registered under Sections 323/341/34 IPC. On 17th October 2011, Sher Singh succumbed to his injuries and Sections 304/34 IPC were added. The post-mortem report of deceased Sher Singh Ex. PW12/A noticed that there were as many as 12 external injuries. It found effusion of blood present over right temporal occipital

region on the scalp. The brain was found diffused with subdural haemorrhage present over right temporal occipital region and over the cerebellum. The cause of death was due to combined effects of cerebral damage and haemorrhage and shock consequent upon multiple injuries to the body. All injuries were ante-mortem and were possible to be caused in the manner as alleged.

5. The prosecution examined 17 witnesses. In their statements under Section 313 CrPC the Appellants claimed that they were falsely implicated. On behalf of A-1, Mr. Basant Kumar Gupta, (DW1) employer of A-1 was examined.

6. The trial Court concluded that the evidence of PW1 and other eye witnesses was corroborated by evidence of PW2 & PW3. However, this was a case of attack on deceased by more than one person and it was not possible on the said evidence to infer any common intention as contemplated by Section 34 IPC. Hence each of them will be responsible for his individual act only. In view of the testimony of PW1 to PW3, it could not be said that the accused persons shared any common intention. The trial Court held that although the accused persons did not have a common intention to cause the death of Sher Singh, A-1 had knowledge that causing such injuries by a danda was

likely to cause death of Sher Singh. Therefore, the act of A-1 would fall under Section 304 (Part-II) IPC and the acts of the co-accused Sonu and Rampal would attract Section 325 IPC.

7. It was submitted by Mr. R.K. Ruhil, learned counsel for the Appellants, that the evidence of the principal eye witness PW1 was inconsistent with the medical evidence. It was contradicted by the statements of the other witnesses, including PW2 and PW3. PW-1 also declined to identify the danda which was shown to her in the Court. Mr. Ruhil further submitted that apart from the fact that PW1 was an unreliable witness she failed to identify A-2 and A-3, whom she did not know prior to the incident. Even PW2 and PW3 were not eye witnesses to the incident. PW3 had a good acquaintance with the deceased. Mr. Ruhil submitted that the statement made by the deceased to PW17 in the hospital could not be considered to be a dying declaration as the IO failed to get the opinion of the doctor whether the deceased was fit to make a statement. No such certificate was appended to the so-called dying declaration. Reliance was placed on the decisions in *Dalip Singh v. State of Punjab AIR 1979 SC 1173*, *Munna Raja v. State of Madhya Pradesh AIR 1976 SC 2199*, *Brundaban Moharana v. State of Orissa (2010) 13 SCC 381* and *Vinod Kumar v. State of U.P. 1991 Crl LJ 360*.

8. Countering the above submissions, it was pointed out by Ms. Isha Khanna, learned APP that a Constitution Bench of the Supreme Court in ***Laxman v. State of Maharashtra (2002) 6 SCC 710*** clarified that it is not always necessary that a medical certification be appended to a dying declaration. It was the duty of the Court to decide whether the declarant was in a fit state of mind to make the declaration. Where the eye witnesses' evidence to that effect is available, the mere absence of a doctor's certification as to the fitness of the declarant's state of mind, would not *ipso facto* render the dying declaration inadmissible. The fitness of the declarant's state of mind could be proved even by the Magistrate who recorded it.

9. In the present case, the time when PW-17 first went to BJRM Hospital on the intervening night of 9th and 10th of October 2011, he was unable to record the statement of the deceased as the latter was in pain. In his deposition PW-17 stated that when he again went to BJRM Hospital on 10th October 2011 he made an inquiry from the doctor about the fitness of the injured to give statement and the doctor declared him fit for statement.

10. In his cross-examination on this aspect PW-17 stated that "When I was recording the statement of injured Sher Singh doctor was not present there near the injured. I had not obtained any fitness certificate

as to the condition of the injured in writing with regard to giving the statement by the injured”. He also admitted as correct that “there is no mentioning in the statement recorded by me that the same has been read over to the injured”.

11. Later on in his cross examination, he stated that he did not know whether the injured was illiterate or not. At the time when he reached at the hospital for recording the statement of injured Sher Singh it was not anticipated that Sher Singh would succumb to the injuries and at that stage the case was being investigated for the offences under Section 323/341/34 IPC. Secondly, the statement made by PW17 that he did seek the opinion of the doctor as to the fitness of the witness to make a statement was not challenged in the cross examination. The law in relation to dying declarations had been explained in detail by the Supreme Court in *Laxman v. State of Maharashtra* (supra). The Constitution Bench reconciled the two conflicting decisions in *Paper Ambaha Rosamna & Ors v. State of A.P.* 1999 CrLJ 432 and *Koli Chunilal Savji v. State of Gujarat* (1999) 9 SCC 562. The Constitution Bench in *Laxman v. State of Maharashtra* (supra) affirmed the decision in *Koli Chunilal Savji* (supra) and held that the certification of doctor was not essential when a dying declaration was recorded by the Judicial Magistrate. The ultimate test was that the dying declaration

should be truthful, voluntary and trustworthy.

12. The Court notices that in its recent pronouncement *Brundaban Moharana v. State of Orissa (2010) 13 SCC 381*, a two-Judge Bench of the Supreme Court, did not notice the above decision of the Constitution Bench in *Laxman*. The earlier decisions of *Munna Raja v. State of Madhya Pradesh* (supra) and *Dalip Singh v. State of Punjab* (supra) will now have to be understood in light of the Constitution Bench in *Laxman* (supra).

13. The statement of the victim in the present case was recorded by the IO, at the earliest point in time but at that time it was not expected to be in contemplation of death. The failure to obtain a dying declaration in the present form is, therefore, understandable. However, the credibility of the statement is not in doubt. It appears to be truthful and voluntary. The IO satisfied himself by inquiring him from the doctor that the injured victim was fit to give a statement. The statement of the victim was made at the earliest opportunity in which he clearly named the three accused.

14. PW-1 identified the accused persons and categorically stated that they were present at the spot and attacked the deceased. Her cross-examination brought out contradictions to the effect that PW-1 stated

that the deceased was attacked by A-1 with a knife by cutting his fingers, while the post-mortem report shows contusion on the back of the wrist. There was no knife injury on the body of the accused but multiple contusions and abrasions all over. PW-1 also stated that the accused beat the deceased with dandas and strangled his neck with a belt. However, no belt was recovered. Also there was no visible injury mark on the neck of the victim. It must be remembered that after receiving the call from the deceased and hearing him cry, PW-1 went in search of him and stated that he was attacked by Sunil accused No.1. After seeing her husband being attacked by the accused, she returned to her gali and raised an alarm. It is possible, therefore, to explain the lapse of memory in being able to recollect the exact manner of the death of the deceased given her state of mind at that point of time, her inconsistent statements when compared to the evidence of PWs-2 and 3, can be explained.

15. PW-3 cannot be said to an partial witness. Keeping the said evidence apart, the dying declaration of the deceased himself and the evidence of PW-1 can be said to be corroborated by the medical evidence which shows that 12 external injuries were found on the body of the deceased which cumulatively resulted in death of the deceased. PW-15 Dr. Monish Pradhan, has confirmed that at least two of the

grievous injuries could have been caused by a danda.

16. Learned counsel for the Appellants relied on the decision in *Anter Singh v. State of Rajasthan (2004) 10 SC 657* and urged that recovery of danda in the present case was extremely doubtful and could not be believed. In particular, he submitted that despite PW-17 knowing that the deceased was attacked by a danda no effort was made to recover it pursuant to a disclosure by A-1. The seizure memo recorded that A-1 on his own brought out the danda without any protest.

17. Learned counsel for the Appellants may be right in his submission that in the present case the recovery of danda could not be said to be pursuant to a disclosure statement. However the deposition of PW-17 is significant. He stated that the danda was got recovered from behind the main door of the house and there was a gali just outside the said door. He denied the suggestion that the danda was planted by him upon A-1. The persistent cross-examination of PW-17 to get him to state that the danda was not recovered from A-1 was not successful. While it is true that no public witness was associated in the recovery of the danda, the Court is not persuaded to hold that this is a case of a weapon being planted on the accused to falsely implicating them in the case. The use of dandas is spoken about even by the injured victim.

18. The motive for crime was spoken to by PW-1. A-1 harboured a grudge against the deceased following the death of the wife of A-1 by suicide. The deceased in his dying declaration also points to the previous enmity.

19. As regards the role of A-2 and A-3, they were clearly known to the deceased who named them. Although PW-1 stated that she did not know them prior to the incident, she volunteered stating that her husband knew them. She also recognized A-2 as the person who had subjected her to threats. It was not suggested to her in the cross-examination that she was not in a position to identify A-2 and A-3. When it was suggested to her that the place of incident was dark, she volunteered that there was street light. There was no reason for PW-1 to falsely implicate A-2 and A-3, much less for the deceased in his dying declaration to do so.

20. The evidence brought on record by the prosecution has proved beyond reasonable doubt the presence of the three accused at the spot and their role in attacking the deceased. It was submitted by learned counsel for the Appellants that even if the accused could be said to have attacked the deceased, the offence can at best be one under 325 IPC. It was submitted that in her deposition, PW-12 admitted that the deceased did not receive any injury on his vital parts and that since it could not be

stated clearly as to which of the accused caused the fatal injury, the offence would be one under Section 325 IPC. PW-12 also admitted that the injuries sustained by the deceased could be possible in a road accident. Reliance was placed on the decision dated 9th April 2010 of the Division Bench in Criminal Appeal No. 266 of 2010 (*Dev Raj @ Polar v. State Govt. of NCT of Delhi*) and the decision dated 15th March 2012 in Criminal Appeal No. 88 of 2010 (*Chander Prakash v. State*).

21. The post-mortem report in the present case reveals 12 external injuries. The medical opinion is clear that there was effusion of blood present over right temporal occipital region although no fracture present. There was diffuse subdual haemorrhage present over right temporal occipital region and over cerebellum and there was patchy sub-arachnoid haemorrhage present consequent upon the external injuries. PW-15 proved that some of the external injuries could be caused by a danda. The two decisions cited by learned counsel for the Appellants are distinguishable on facts. There was no use of danda to cause the injuries in either of the said case. The injuries there were caused by the fist blows.

22. When a person is beaten up by danda repeatedly, to the extent of causing 12 visible external injuries, some of them on the back of the chest and of the arms, the accused may not be heard to say that they

were not aware that the cumulative effect of the injuries would not result in death. While it is one thing to say that the three accused did not share a common intention to cause death, as far as A-1 is concerned, he was clearly the principal perpetrator of the crime who took along with him A-2 and A-3 for the act and can be attributed the knowledge of the fatal nature of the injuries being caused.

23. Therefore, the conclusion reached by the trial Court as to the nature of the offence against each of the accused, i.e., Section 304 Part II as far as A-1 is concerned and Section 325 IPC as far as A-2 and A-3 cannot be faulted.

24. Lastly, learned counsel for the Appellant prayed for a lenient view as regards the sentence. He pointed out that A-1 had already undergone over two years of imprisonment and A-2 and A-3 had undergone over nine months of imprisonment. He reiterated that they had families to support and that A-2 was aged 66 years.

25. As far as A-1 is concerned, he had been awarded five years' imprisonment for the offence under Section 304 Part II IPC. The sentence cannot be said to be excessive or disproportionate. The Court is not inclined therefore to interfere with the said sentence.

26. As far as A-2 and A-3 are concerned, the Court on a consideration of

the submissions made by learned counsel for the Appellants, reduces the sentence awarded to them to 18 months RI while maintaining the fine amounts.

27. The appeals are accordingly disposed of in the above terms. The Appellants will surrender forthwith to serve the remainder sentences.

28. The trial Court record along with a certified copy of this judgment be delivered forthwith to the trial Court for further steps.

29. Order be given *dasti*.

S. MURALIDHAR, J

SEPTEMBER 16, 2014

anu/rk