

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

% *Judgment Reserved on: September 12, 2014*
Judgment Delivered on: September 22, 2014

+ **CRL.A. 975/2013**

ZAHID & ANR. Appellants
Represented by: Mr.Riaz Mohd., Advocate

versus

STATE Respondent
Represented by: Ms.Aashaa Tiwari, APP
SI Rizwan Khan, PS Seelam Pur

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. A ladder is a vertical or inclined set of rungs or steps. It is an object used to climb and achieve heights, but sometimes, before jumping into a pit it may also be used after it is lowered in the pit, but before one jumps into the pit, to climb out of the pit. Never have we heard of a ladder sucking people into the void beyond life and being the cause for a few to lose their liberty. A wise man does not need a ladder, because he is a ladder himself. Regretfully neither side in the instant case appears to be wise nor do they appear to be aware of what a ladder is meant for. The humble ladder was the cause of two deaths and five injured on the one side and three injured on the other side.

2. The dead are Chand and Shamshad. Mohd.Iliyas their brother, Rasheed, Shareef and Jameel their brothers-in-law and Husna the sister-in-law of Shamshad are the injured. On the other side are appellants Abdul Aziz and his brother Zahid who were injured and Bhuri the wife of Abdul Aziz.

3. Undisputedly a fight took place between the two groups on December 26, 2008. The venue was House No.C-3, Gali No.13, Shastri Park, Delhi. The time was 12:00 noon.

4. Since Chand and Shamshad are dead, they could obviously not tell what happened which resulted in the two dying. Chand's post mortem report Ex.PW-13/A notes that he had two deep incised wounds having depth of 10 cm and 11 cm on the left side of the chest and one incised wound over back of right hand besides an abrasion which was reddish in colour over right side of forehead. Post mortem report of the dead body of Shamshad, Ex.PW-13/B notes that he had suffered two incised stab wounds, one in the epigastric area of abdomen having depth of 13 cm and the other on the left side of the chest being 18 cm deep besides a grazed abrasion which had turned red over front of left arm 15 cm below the top of the shoulder.

5. Mohd.Iliyas, Jameel and Husna who also were admitted at Lok Nayak Jai Prakash Hospital had absconded from the hospital and thus as regards the three except for the fact that at the trial their MLCs Ex.PW-5/D, Ex.PW-5/E and Ex.PW-2/E could be proved, no opinion as to the gravity of the injuries could be brought on record. The MLC Ex.PW-2/C of Rahees evidenced that he had suffered stab injuries in the middle of the chest, left side of the chest below arm pit and also a cut on the right side of the chest beginning from the middle and going up to the back.

6. Accepting the version of the incident deposed to by Mohd.Iliyas PW-1, Shareef PW-4, Jameel PW-6, Rahees PW-7 and Husna PW-8, keeping in view the post mortem reports of the two deceased and the MLC of Rahees, vide impugned decision dated March 23, 2013 the learned Trial Judge has convicted appellants Zahid and Abdul Aziz for the offence of having murdered Chand and Shamshad. The two have been convicted for having attempted to murder Rahees. The two have also been convicted for causing simple injuries to Mohd.Iliyas, Shareef, Jameel and Husna.

7. Vide order on sentence dated March 26, 2013, for the offence of murder the two have been sentenced to undergo imprisonment for life and pay fine in sum of ₹5,000/- each and in default to undergo simple imprisonment for one month. For the offence of attempting to murder Rahees, they have been sentenced to undergo rigorous imprisonment for three years and for the offence of causing simple hurt they have been sentenced to undergo imprisonment for three months.

8. A third co-accused 'C', being a juvenile, his trial was referred to the Juvenile Justice Board and in the instant appeal we would not be concerned with him, but shall be noting the relevant evidence concerning even his participative role, for the reason MLC Ex.PW-2/B of Bhuri, Ex.PW-2/A of accused Abdul Aziz and Ex.PW-2/D of accused Zahid evidence that Bhuri had suffered two clean incised wounds on the left arm, Abdul Aziz had four injuries, a laceration in the scalp on the right side, laceration on the medial aspect of the left thigh, laceration on outer aspect of middle of right arm and abrasion in (illegible) region on right side. The unexhibited MLC of juvenile 'C' at page 434 of the Trial Court Record records no injury suffered by him.

9. Mohd.Iliyas PW-1, Shareef PW-4, Jameel PW-6, Rahees PW-7 and Husna PW-8 have deposed in sync attributing role to Zahid, Abdul Aziz and juvenile 'C' of kicking and punching Mohd.Iliyas along with the role of stabbing deceased Chand and deceased Shamshad. The role of stabbing Rahees to Abdul Aziz. The role of causing injuries by knives to Shareef Jameel and Husna to Zahid and Abdul Aziz, with the variation that as per Husna she truthfully stated that she does not recollect as to who inflicted the injury on her head.

10. It would thus be useless for us to extensively note the testimonies of Mohd.Iliyas, Rahees, Shareef, Jameel and Husna, who have withstood the test of cross examination and whose testimony inspire a great degree of confidence, but has the common blemish of neither explaining how two out of the three accused namely Abdul Aziz and Zahid suffered the injuries and additionally how Bhuri wife of Abdul Aziz also suffered the injuries at the incident in question in which unfortunately two lives were lost. The witness who has spoken about the full contours of the incident is Mohd.Iliyas PW-1 and we pen profile the incident through his percipient eyes.

11. It was all about a ladder.

12. Mohd.Iliyas PW-1 has deposed that at 12:00 noon on December 26, 2008 he was at his house No.C-3, Gali No.13, Shastri Park, Delhi and saw a wooden ladder in front of his house near which was standing accused Abdul Aziz. He told him that the ladder belonged to him and got the response from Abdul Aziz that the ladder belonged to him. To prove his point he gave the identification mark on the ladder and the number of steps, to prove his claim of ownership of the ladder on the reason that he who could give identification marks on the ladder and the number of steps would be giving

good evidence of proof of owning the ladder; a reasoning with respect to dispute of an object which is logical and worthy of acceptance. Abdul Aziz replied that he had purchased the ladder from the person who had sold the house opposite to where Mohd.Iliyas and his brothers lived. It is apparent that the family of the accused had purchased a house opposite to that of Mohd.Iliyas and his brothers and had just shifted in. Since the ladder was not claimed to have been purchased by Abdul Aziz, he obviously countered the logical argument of Mohd.Iliyas by saying that the owner of the house had, along with the sale of the house sold the ladder to them. As per Mohd.Iliyas he responded to Abdul Aziz informing him that the ladder belonged to them and was stolen nine months ago. When the dialogue was on Shamshad and Chand, brothers of Mohd.Iliyas joined. The two said that the ladder belonged to them. Outnumbered 3:1, Abdul Aziz abused and went inside his house, which was opposite the house where Mohd.Iliyas and his brothers lived, to return with his brother Zahid and nephew juvenile 'C'; obviously to shift the balance 3:3. The three were statedly armed with a knife each in their hands and indiscriminately attacked Mohd.Iliyas, Chand and Shamshad who raised an alarm and the summons for rescue were responded to by Rahees, Shareef, Jameel and Husna who also were attacked. Somebody informed the police and the police reached.

13. This then is the entire pen profile of what transpired at the spot. It is apparent that while speaking the substantial truth, Mohd.Iliyas has withheld some part of the truth concerning injuries suffered by the two accused and Bhuri wife of Abdul Aziz.

14. A truncated defence version has been attempted to be brought on record by examining Bhuri as DW-1 as per which a quarrel had taken place

between Husna PW-8 and others. She intervened. Shareef PW-4 came and stabbed her.

15. It is apparent that the truncated defence version is worthless because Bhuri spoke hardly anything worthy of being considered to throw light on what had happened.

16. We are thus left with the analysis of the version of the incident as deposed to by Mohd.Iliyas PW-1, with whom other witnesses have spoken in sync, with the taint that the witnesses have not explained the injuries on the person of the two accused and Bhuri wife of accused Abdul Aziz.

17. The task of a Judge is to capture the evidence from a 360° angle for only then truth can be arrived at.

18. It is natural human conduct to belittle ones incriminating role and somewhat exaggerate the role of the opposite party, but this would not mean that the teller of the story is a liar. Truth has to be separated from the lies as is grain from the chaff. Blemishes, slight taints and variations, embellishments etc. have to be carefully removed from the mass of evidence and the truth decanted to give the right texture to the brew.

19. We do so.

20. We revisit the contours of the testimony of Mohd.Iliyas PW-1, with which as noted above, other witnesses speak in sync. The incident commenced when Mohd.Iliyas saw accused Abdul Aziz standing near a ladder and claimed the ladder to be belonging to their family and Abdul Aziz claiming that the owner of the house who has sold the house to his family has sold the ladder to them. Mohd.Iliyas and his family members and Abdul Aziz and his family members were living in two houses opposite to each other. The second part of the incident is Shamshad and Chand (both

deceased) joining in the dialogue between Abdul Aziz and Mohd.Iliyas and taking the side of Mohd.Iliyas. At this stage of the testimony of Mohd.Iliyas, we find that he has laid the aggravating seeds to the crop which he and others wanted to harvest by saying that thereupon Abdul Aziz started abusing and went back to his house. Why would Abdul Aziz start abusing, if at all he did so? It obviously would be he being outnumbered 3:1 and realizing that the three would take away the ladder. The story moves forward. Abdul Aziz goes inside his house only to return with co-accused Zahid and juvenile co-accused 'C'. The onward march of the story is the sudden assault launched on Mohd.Iliyas, Shamshad and Chand and in continuation thereof, responding to their shrieks Shareef PW-4, Jameel, PW-6, Rahees PW-7 and Husna PW-8 coming out of their house and Bhuri DW-1 wife of accused Abdul Aziz coming out of her house and the assault continuing, resulting in Rahees, Shareef, Jameel and Husna also receiving injuries. But we find that Abdul Aziz, Zahid and Bhuri have also received injuries, albeit of a much lesser magnitude than the opposite side. At this stage we need to highlight that accused Zahid and Bhuri have received incised wounds, meaning thereby a sharp edged weapon was used against them. Whereas Bhuri received two clean incised wounds, gravity whereof could not be ascertained because just as Mohd.Iliyas, Jameel and Husna absconded from the hospital, so did she, Zahid received one incised wound on the scalp, but since even he absconded.

21. The site plan Ex.PW-10/A is a relevant document and throws considerable light on a very vital aspect of the evidence. The site plan shows that the house where the victims resided being C-3 on Gali No.13 is on the eastern side of the street and the house where the accused resided i.e.

C-6 was on the western side. The two houses were not strictly opposite to each other, but were diagonally opposite to each other. The legend in the site plan has marked spots A to J. Spot F is where the wooden ladder, the cause of the dispute, was lying and we need to highlight that the spot is just at the gate of House No.C-6 where the accused resided. The other spots are on the street where blood was lifted and where the stabbing took place.

22. It is apparent that the wooden ladder was in the possession and custody of the accused, the previous owner who had sold the house C-6 to the family of the accused had left a ladder and when the said ladder was seen by Mohd.Iliyas, he and his brothers Chand and Shamshad tried to retrieve the same.

23. Thus, everything happened upon a sudden quarrel without any premeditation.

24. In the decision reported as 2006 (11) SCC 444 Pulicherla Nagaraju Vs. State of A.P. the Supreme Court very succinctly summarized the applicability of Section 4 to Section 300 of the Indian Penal Code concerning free fights/melees as under:-

“Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters--plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to

cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention....”

25. In the decision reported as 1989 (2) SCC 217 Surender Kumar Vs. U.T. Of Chandigarh, the assailant's and the complaint's family occupied different rooms in the same floor of a house, in a melee, with trivial injuries on the side of the accused, injuries on the deceased and his brother found to be inflicted with knives, notwithstanding a dominant aggressive role by the accused, everything ensuing from a scuffle, the Supreme Court held that Exception 4 to Section 300 of the Penal Code would be attracted.

26. The hues captured by us on the canvas evinces a painting of the incident where the backdrop of Exception 4 to Section 300 of the Penal

Code being attracted cannot escape ones notice.

27. With respect to the evidence that Abdul Aziz, outnumbered 3:1 went inside his house and returned with his brother and nephew, the argument that the three coming out armed with the knives is reflective of premeditation and the verbal spat between Abdul Aziz on one side and Mohd.Iliyas, deceased Chand and Shamshad on the other had come to an end, and thus the assault not being upon a sudden quarrel, we only have to say that time lapse during a continuous incident have to be kept in mind to ascertain whether the heat of the passion was still on; the passion being the result of a sudden quarrel, or sufficient time lapsed for reason to step in.

28. The narrative of the incident shows no such intervening time to lapse for reason to step in. Everything happened during the heat of the moment.

29. Keeping in view the injuries which have resulted in the death of Shamshad and Chand, the accused have committed an act punishable under Section 304 Part I IPC pertaining to the death of Chand and Shamshad. Concerning the injury caused to Rahees, their act would constitute the offence punishable under Section 308 IPC and not 307 IPC.

30. We dispose of the appeal setting aside appellants' conviction for the offence punishable under Section 302 IPC for the death of Chand and Shamshad and we convict them for the two deaths for the offence punishable under Section 304 Part I IPC and sentence them to undergo rigorous imprisonment for 10 years. Altering the conviction to the offence punishable under Section 308 IPC for the injuries caused to Rahees we sentence them to undergo RI for 3 years. For the simple injuries caused to the other victims we maintain the sentence imposed to undergo imprisonment for 3 months.

31. All sentences shall run concurrently. The two shall be entitled to the benefit of Section 428 Cr.P.C.

32. TCR be returned.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 22, 2014

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