

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

Judgment delivered on: January 29, 2014

+ **CRL.A. 1165/2010**

NARENDER & ANR. Appellants

Through: Ms. Saahila Lamba, Advocate

versus

STATE Respondent

Through: Ms. Richa Kapoor, APP for the
State

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT

KAILASH GAMBHIR, J

1. Challenge the in present appeal is the impugned judgment and order on sentence dated 24.7.2010 and 18.8.2010, respectively, passed by the learned Additional Sessions Judge whereby the appellants were convicted under Section 302 read with Section 34 IPC and sentenced to undergo imprisonment for life together with payment of fine of Rs. 25,000/- and in default thereof to further undergo simple imprisonment for 3 months each.

2. The case of the prosecution in brief is as under:

“The case of the prosecution is that on 04.04.2007 an information was received at the police control room from telephone number 9313522370

regarding the quarrel and stabbing in J.J Colony, C Block, Uttam Nagar pursuant to which DD No. 51A was recorded and ASI Jai Prakash reached the spot where he came to know that the injured was shifted to hospital by his family members and in the mean time ASI Mamur Khan along with staff also reached the hospital where he found the dead body of Nand Kishore @ Nandu. On receipt of DD No. 51 A SI Suresh Chand reached the spot and then DDU hospital where he recorded the statement of Kishan Lal father of the deceased. Kishan Lal informed the police that at 09:30 p.m one Ballu came to their house and told his son that some boys were calling him, on which his son Nandu went with Ballu. At about 10:30 pm, Kishan Lal received information from his brother Phool Chand that some boys of B-Block were beating his son. Kishan Lal went to the spot on motorcycle and his brother, Phool Chand followed him on another motor cycle and on reaching the spot Kishan Lal saw that Nandu was lying on floor and accused Ballu was holding him from hairs, accused Nandu was holding him by hands and accused Mohd. Guddu was holding a broken glass tumbler and was hitting Nandu on his neck and side of the back and accused Arif Ahmed was standing at a little distance."

3. At the very outset, Ms. Saahila Lamba, learned counsel appearing for the appellants submitted that the appellants would be challenging the conviction and order of sentence only to the extent that the alleged offence committed by the appellants would not fall under Section 302 IPC but under Section 304 Part I IPC. Additionally, qua appellant No. 1 Narender, contention raised by the counsel was that the role, which is ascribed to appellant No.1, Narender was that he caught hold of the deceased, by his feet while the deceased was being assaulted by appellant No. 2 Mohd. Guddu and, therefore, it cannot be said that appellant No.1 shared common intention with appellant No. 2 to commit the murder of the deceased. In order to bring home the point that offence, which would be made out against the appellants would be culpable homicide not

amounting to murder punishable under Section 304 Part I IPC, submission made by learned counsel for the appellants can be outlined as under:-

- (i) None of the witnesses, produced by the prosecution, disclosed as to how and in what manner the dispute between the deceased and the accused persons started and, therefore, the genesis of the incident remained a mystery.
- (ii) The stand of the prosecution and the defence fully supports the fact that the appellants and other accused were unarmed at the time of the commission of the crime and the weapon of the offence was a broken glass tumbler, taken by the accused persons from nearby juice shop belonging to Jaffar Ali PW-7.
- (iii) The use of broken glass tumbler, as a weapon of offence, clearly proves that a fight between accused persons and the deceased was sudden, without any premeditation, without their being any intention on the part of the accused to commit the murder of the deceased. Furthermore the fact of glass tumbler, being picked up from a nearby juice shop, is a clear pointer to the fact that some sudden quarrel/fight had taken place between the appellants and the deceased and it was out of anger or provocation that appellant No.

1 hit the deceased with broken glass tumbler.

- (iv) Out of 9 injuries, as were found on the person of the deceased, only injury No. 6 proved fatal and was held by the Doctor to have caused death of the deceased and this injury No. 6 was also inflicted at the back of the deceased, which further reflects that the intention of the appellants was not to murder the deceased, otherwise, the deceased would have been hit from his front at some vital part of his organ.
- (v) The grudge which the appellants and their co-accused were nursing against the deceased cannot be said to be so strong that they would have carried out the murder of the deceased as the deceased was merely an accused of murdering a friend of the accused persons and not of their any blood relation.
- (vi) The only role ascribed to appellant No. 1 Narender was that he caught hold of the deceased, by his hands while the deceased was being assaulted by appellant No. 2. There is no allegation made by the prosecution that appellant No. 1 Narender himself inflicted any injury upon the deceased.

4. Based on the above submissions counsel for the appellants urged that the present case is a fit case for converting the offence from Section

302 IPC to Section 304 Part I IPC. In support of her arguments counsel for the appellants placed reliance on the following judgments:-

- a. *Kamal Kishore Singh @ Pandit vs The State (Govt. Of NCT) Delhi 2013 VII AD (Delhi) 288.*
- b. *Nadodi Jayaraman and Ors. Vs. State of Tamil Nadu AIR 1993 SC 777.*
- c. *Satish Narayan Sawant vs State of Goa (2009) 17 ;SCC 724.*
- d. *Sunder Lal vs State of Rajasthan (2007) 10 SCC 371.*
- e. *Hasibul Rehman vs State Criminal Appeal No. 935/2011 decided on 09.04.2013 (Delhi High Court)*
- f. *Neeraj Kumar vs. State 2012VAD(Delhi)560*

5. Refuting the said submissions of counsel for the appellants, Ms. Richa Kapoor, learned APP for the State strongly contended that the appellants have been rightly convicted for an offence under Section 302/34 IPC and there is no scope for interference in the well reasoned judgment and order on sentence passed by the learned Trial Court. Counsel argued that there was previous enmity between the deceased and the accused persons and with a view to eliminate the deceased, he was called from his house through Ballu and then was attacked by all the accused persons, as a result of which Nandu expired. Counsel further submitted that the case of the prosecution is based on the testimony of an eye witness PW4 Kishan Lal, who is father of the deceased and in his testimony he fully supported the case of the prosecution. Counsel further submitted that PW4 himself saw the appellant Narender, holding the hands of Nandu and Guddu, appellant No. 2 hitting Nandu with a broken

glass tumbler. Counsel also argued that the deceased Nandu was picked up by PW4 and he put him on a motorcycle, which was driven by Phool Chand, and both of them took Nandu to DDU hospital where he was declared brought dead. Counsel also argued that although Phool Chand, PW3 turned hostile but as per the settled legal position, his testimony on material aspects can be read into evidence to the extent it supports the case of the prosecution. Counsel further argued that testimony of PW4 is duly corroborated by the evidence of PW7 and PW8, medical and forensic evidence and evidence adduced by the police officials.

6. Dealing with the first issue whether the offence committed by the appellants would only be culpable homicide amounting to murder under Section 300 IPC clause thirdly or would be culpable homicide not amounting to murder, under Exception 4 section 300 IPC, let us first reproduce the said provision which reads as under:-

Section 300

"Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

2ndly.-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. or-

3rdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

4thly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 4 to Section 300 of the Code, reads as follows:

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."

7. In the landmark judgment of *Virsa Singh v. State of Punjab* reported in (1958) 1 SCR 1495, the Hon'ble Supreme Court held that the following are the four steps of inquiry involved in the offence of Murder under section 300 IPC, clause *thirdly*:

- "i. first, whether bodily injury is present;
- ii. second, what is the nature of the injury;
- iii. third, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended; and
- iv. fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature."

8. In the present case as per the post mortem report of the deceased (Ex. PW-15), following injuries were inflicted on the deceased by the accused persons:

- a. "Contused lacerated wound with clean cut and well defined margins present over left parieto occipital region of dimensions 4.5 cm X .5 cm X bone deep.
- b. Contused wound in an area 2.5 cm X 1 cm present over right ala nose and dried up blood and clots present over face and nostrils.
- c. Abraded contusion present over the lateral aspect of neck on the right side in an area of 7 cm X 3 cm, 5 cm above the clavicle (collar bone)
- d. Incised wound with clean cut and regular margins present over left side nape of neck area, 3 cm below the hairline, obliquely arranged of size 2.5 cm X 1 cm X muscle deep, 2 cm from mid line.
- e. Incised wound with clean cut and well defined margins present over left side of back of the neck, of size 2.3 cm X .8 cm X muscle deep, vertically arranged, 7 cm below the injury No.4.
- f. 14 cm below injury No.5, over the back of the lower chest, incised wound with clean cut and well defined margins, of size 2.5 cm X 1 cm X

chest cavity deep, both angle acute (elliptical shape), 1 cm from mid line, on exploration traversed and pierced ninth inter-costal space, penetrating and cutting through left lung.

- g. Incised wound with clean cut margins and well defined shape present over the back of the lower chest-upper abdomen, 9 cm below injury No.6, 5 cm from mid line, of size 2.5 cm X 1 cm X muscle deep.*
- h. Incised wound of size 2.5 cm X .7 cm X 3 cm present over the right buttock, 8 cm from the natal cleft and 21 cm from right iliac spine.*
- i. Abrasion of irregular shape of light brown- reddish colour, of dimensions 4 cm X 3 cm present over left knee- patellar region."*

9. The cause of death as opined by the doctor (PW-15) who conducted the post mortem of the deceased was haemorrhagic shock consequent upon injuries to left lung and heart i.e. injury no. 6, sufficient to cause death in the ordinary course of nature.

10. Thus all the above elements are fulfilled, there is an injury on the left lung as well as on the heart of the deceased; it is a fatal injury; the injury is the one which the accused intended to inflict and also the injury has been proved to be sufficient to cause death in the ordinary course of nature. Thus it has sufficiently been proved that the accused has committed murder of the deceased under Section 300 IPC. To this extent we do not find any infirmity in the decision of Learned Trial Court.

11. In order to bring the offence under this exception IV of Section 300 IPC, four things shall be proved by the accused:

- i. "That the act was without premeditation.*
- ii. There was a sudden quarrel*
- iii. In the heat of passion upon a sudden quarrel there was a sudden fight.*
- iv. Offender did not take undue advantage or acted in a cruel or unusual*

manner."

12. In *Pappu v. State of Madhya Pradesh* reported in (2006) 7 SCC 391 the Hon'ble Apex Court almost exhaustively dealt with the parameters of Exception IV to Section 300 of the Code. The relevant paras of the judgment are reproduced as under:

"13...The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 Indian Penal Code is not defined in Indian Penal Code. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage. It cannot be laid down as a rule of universal application that whenever one blow is given, Section 302 Indian Penal Code is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body on which it was given and several such relevant factors. "

13. For this purpose let us examine the facts of the case once again. As per the case proved by the prosecution, accused Ballu, came to the house of deceased at 9:30 p.m., to take him along, on the pretext that few people called him. After about an hour, i.e. at 10:30 p.m., the father of the deceased was informed by PW-3, Phool Chand that some persons were

beating his son. Immediately thereafter PW-3 went on the spot and saw that his son was lying on the floor, accused Ballu was holding him by the hair; Narender was holding him by hands and Guddu was holding a broken glass tumbler and was hitting deceased on his neck and side of back. This statement of PW-4 found corroboration from the statement of PW-3, Phool Chand as well as PW-8, Manish Kumar. PW-3 although turned hostile on material aspects in his testimony, yet his statement that Krishan Lal was present on the spot at the time of the incident and also that he and Krishan Lal together took the deceased to the hospital, corroborates the statement of PW-4. PW-8 in his statement before the court deposed that on 4/4/2007 he was present at his shop and he came to know that deceased had received injuries. Immediately thereafter he went to the spot and saw that deceased was lying in a pool of blood and pieces of glass were lying scattered. It also came on record through PW-7 Jaffar Ali that the glass tumbler in the hands of accused Guddu was taken by the accused from one juice shop in the area. Thus as per the admitted case of prosecution, PW-3 Phool Chand only saw the deceased being beaten up by the accused at around 10:30 p.m whereas the deceased went to meet the accused persons at 09:30 p.m i.e. an hour before the incident. Therefore no body is the witness of what happened in that one hour

between the deceased and accused persons. Even no weapon of offence has been carried by the accused persons in advance rather it was picked by Guddu from a shop on the spot. This fact also clearly shows that there was no pre mediation on the part of the accused persons to kill the deceased, because had it been the case they must have brought one or the other weapon to kill the accused.

14. In the present case unfortunately no witness has been brought on record, who would have witnessed the reason of fight between the parties, however as per the MLC report of the accused, Kalim, Arif and Mohd. Guddu, they had also received injuries during the fight. As per the evidence of PW-6, Ajay Sharma, the injuries on the persons of accused, Kalim and Mohd. Arif, were possible with broken glass. He also deposed that there were old abrasions with scars seen on the left hand dorsal of the appellant which could be one to seven days old. Thus after taking all the facts and circumstances in consideration we think that there must have been some fight between the parties. In the absence of any other circumstance to prove contrary we firmly believe that some quarrel must have taken place between the accused persons and the deceased which led to the alleged offence.

15. It shall be noted that accused persons were having no previous animosity with the deceased. Although, PW-4 has deposed before the court that appellant Narender had a grouse against the deceased because the deceased was involved in the murder of one of his friend. However we are not inspired by his statement firstly because he was an interested witness and also because his statement does not find corroboration from any other evidence on record.

16. In the matter of *Satish Narayan Sawant Vs. State of Goa*, reported in **2009 CrLJ 4655**, where the accused had inflicted number of injuries in the heat of passion without any premeditation and without any intention that he would cause that injury, the Hon'ble Apex Court held that the case was covered by Exception 4 to Section 300 of the IPC; the accused was convicted under Section 304-II of the IPC. Relevant paragraph of the said judgment is reproduced as under:-

"As already noted, it is quite clear from the record that there was an altercation preceding the incident. The place of occurrence is a residence inhabited by both the parties and there is no evidence on record that the deceased was armed with any weapon. Initially the accused-appellant also did not have any weapon with him but during the course of the incident he went inside and got a knife with the help of which he stabbed the deceased. PW-7 in his cross examination has categorically stated that death due to stab injury was in consequence of Injury No. 1 and all other injuries were superficial in nature. So, it was only Injury No. 1 which was fatal in nature. Factually therefore, there was only one main injury caused due to stabbing and that also was given on the back side of the deceased and therefore, it cannot be said that there was any intention to kill or to inflict an injury of a particular degree of seriousness. Records clearly

establish that there was indeed a scuffle between the parties with regard to the availability of electricity in a particular room and during the course of scuffle the appellant also received an injury which was simple in nature and that there was heated exchange of words and 30 scuffle between the parties before the actual incident of stabbing took place. There is, therefore, provocation and the incident happened at the spur of the moment. That being the factual position, we are of the considered view that the present case cannot be said to be a case under Section 302 IPC but it is a case falling under Section 304 Part II IPC. It is trite law that Section 304 Part II comes into play when the death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death.”

17. In the view of the facts and circumstances stated above we find that it has been sufficiently proved on record that there was a sudden quarrel between the accused persons and the deceased, on which a sudden fight ensued between them and in that transaction only the accused caused the deceased, a bodily injury. Although, the injuries inflicted proved to be fatal, but it was inflicted in the heat of passion and without any premeditation, and also without the accused taking undue advantage or acting in a cruel or unusual manner.

18. This brings us to the last contention raised by the Counsel for the appellants, that the role ascribed to appellant No. 1 Narender, was that he had caught hold of the deceased, by his hand while the deceased was being assaulted by appellant No.2. There is no allegation made by the prosecution that appellant No. 1 Narender himself inflicted any injury upon the deceased.

19. Common intention as envisaged under Section [34](#) IPC is an exception to rule of evidence. It lays down the principle of constructive liability, wherein if one person also commits the crime, all the other persons who were sharing a common intention with them, will also be liable. A person may be having a similar intention like other, but a similar intention becomes common when they mutually agree to commit an offence conjointly i.e. there is meeting of mind consensus ad idem. This mutual agreement results into a mutual agency, wherein one person represents the other and therefore even if one person commits the offence, it is deemed that all of them have committed the same. It is further pertinent to mention here that for proving common intention, it is essential to prove that there was a meeting of mind. The burden of proving the meeting of minds is on the prosecution. The burden is strict and the court shall not presume anything till proved.

20. In the present case, as far as appellant No. 1 is concerned, there is nothing proved on record by the prosecution that he had any common intention to kill the deceased or that he had any previous knowledge of the fact that the act of the accused Guddu will cause murder of the deceased. Merely because the accused Narender was holding deceased by hands, it

cannot be concluded that he was having a common intention with

appellant No.2 to cause death of the deceased, although the intention could be to cause the grievous hurt as he was assisting the accused in hitting the deceased with the help of a glass tumbler.

21. In the matter of ***Jagannath vs. State of M.P.***, reported in 2007(11) SCALE 252, where an altercation took place and the accused Prabhu Dayal inflicted one axe blow on the head of the deceased causing his death and co-accused/appellant Jagannath who was also armed with axe inflicted simple injuries to others, the Hon'ble Supreme Court held as under:-

"Concededly, the occurrence took place all of a sudden. The act of theft on the part of the accused persons was complete. They had been taking away the wood. They were followed by the deceased and PW-11. They must have been obstructed from taking away the wood by them as the same were in their possession. It was at that juncture the deceased was said to have been assaulted by Prabhudayal and Dhan Singh. In a situation of this nature where the accused persons had acted at the spur of the moment having regard to the altercations which had preceded the incident, in our opinion, it is difficult to lead to the conclusion that Prabhudayal and the appellant had developed a common intention of causing death of the deceased.

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We, therefore, are of the considered view that the appellant is guilty of commission of an offence under Section 326 of the Indian Penal Code and not under Section 302/34 thereof."

22. In the matter of ***Rama Meru and another vs. State of Gujarat***, reported in AIR 1992 SC 969, wherein the appellant No.1 and 7 were not seen inflicting any knife injury, but they were assisting the accused in causing murder of the deceased, the Hon'ble Supreme Court held as

under:-

"In the aforesaid circumstances, it cannot be definitely held that the appellants had been harbouring a common intention to murder the deceased and with such common intention they had inflicted knife injuries on the person of the deceased. In the absence of common intention to murder being established beyond all reasonable doubts, simply on account of death of Rambhai as a result of cumulative effect of all the injuries inflicted on the person of the deceased, a case for conviction for murder under Section 302 read with Section 34 IPC cannot be sustained. In our view, in the facts and circumstances of the case, the learned Sessions Judge was justified in holding that a case under Section 326 read with Section 34 IPC"

23. In another case of ***Tirthi Lal and another vs. State of Punjab, Criminal Appeal No. 63-DB of 1996 Decided On: 30.04.1998 (Punjab and Haryana High Court)*** wherein in a sudden fight hot words were exchanged between the accused and deceased and without any premeditation, co-accused inflicted single knife blow on the body of the deceased, while appellant caught hold of the hands of the deceased. The Court held that the appellant cannot be said to have shared common intention to cause death of the deceased and accordingly he was convicted under section 326 read with section 34 IPC.

24. In the matter of ***Sanjeev Alias Sonu & Birender @ Boya vs. State, Crl. A. No. 897/2010 Decided On: 24.05.2013 (Delhi High Court)***, wherein a sudden fight ensued between two groups and on the spur of moment one accused caused a stab injury to the deceased, however prosecution failed to prove that the co-accused share common intention,

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the division bench of this Court convicted the other co-accused for the offence under section 324 read with Section 34 IPC.

25. In view of the aforesaid discussion, we find that it is a clear case of culpable homicide not amounting to murder falling under Exception 4 of Section 300 IPC, as the act was committed without premeditation, in a heat of passion upon sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

26. Accordingly, the judgment and the order of the learned Additional Sessions Judge dated 24.7.2010 and 18.8.2010, respectively, convicting the appellants for the offence punishable under Section 302 IPC is modified to the extent that the appellant No.2 is convicted under Section 304 Part I IPC and accordingly the sentence of life imprisonment imposed upon him by the Ld. trial court is converted to the Sentence of imprisonment for a period of ten years and the appellant No.1 is convicted under Section 326 read with Section 34 IPC and accordingly the sentence of life imprisonment is converted to the Sentence of the period already undergone by him.

27. Appellant No.1 is on bail. His bail bond be discharged.

28. A copy of this order be sent to jail superintendent for information and further compliance.

29. It is ordered accordingly.

KAILASH GAMBHIR, J.

SUNITA GUPTA, J.

JANUARY 29, 2014

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