

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRIMINAL APPEAL NO. 892/2009**

Reserved on : 20th February, 2014
Date of decision: 30th April, 2014

SHIV KUMAR

..... Appellant
Through Mr. Sumeet Verma, Advocate.

Versus

STATE (NCT) OF DELHI

..... Respondent
Through Ms. Rajdipa Behura, APP for the State.

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

SANJIV KHANNA, J. :

By the impugned judgment dated 6th March, 2009, the appellant-Shiv Kumar stands convicted for murder of Chander Pal and by an order of sentence dated 9th March, 2009, he has been sentenced to imprisonment for life and fine of Rs.10,000/-, in default of which, he has to undergo Simple Imprisonment for six months. The impugned judgment also convicts the appellant under Section 201 of the Indian Penal Code, 1860 (IPC, for short) and the appellant has been sentenced to Rigorous Imprisonment for three years and fine of Rs.2,000/-, in default of which, he was to undergo Simple Imprisonment for one month. The sentences are to run concurrently and benefit of Section 428 Cr.P.C. has been granted.

2. The conviction arises in charge sheet filed after investigation of FIR No. 396/2003, Police Station Mangolpuri, Delhi.

3. The deceased-Chander Pal was admitted in Sanjay Gandhi Memorial Hospital, Mangolpuri on 25th July, 2003 at 1.30 P.M. with stab wound in the abdomen. This is proved from the MLC marked Exhibit PW-14/C, which was proved by Dr. V.K. Jha (PW-14), who had identified signature of Dr. Suresh Jaiswal on the said MLC. The MLC states that a stab wound was noticed in the right hypochondrium and the size of the wound was 4 cm x 2 cm just lateral to midline. The patient was gasping for breath. Pulse and blood pressure were not recordable.

4. Post-mortem of the dead body was conducted on 26th July, 2003 by Dr. R.K. Punia (PW-11) and he recorded external injury in the form of obliquely placed stab incised wound over the front of the right side abdomen 2.7 cm x 1.1 cm and abdominal deep cavity. The track of the wound showed that the injury had perforated the skin, abdominal muscle, peritoneum and penetrated the liver. Peritoneum cavity contained about 3000 ml of blood and blood clots. The said injury was ante mortem in nature, fresh and sufficient to cause death in the ordinary course of nature. Death was due to shock and haemorrhage as a result of injury to the liver. Thus, homicidal death of deceased-Chander Pal has been proved beyond doubt and debate.

5. The first controversy pertains to the involvement of the appellant and whether the appellant is responsible for the said injury, as held in the impugned judgment.

6. On the said aspect, the State primarily relies upon the testimony of Chiranji Lal, father of deceased-Chander Pal, who has deposed as PW-1. PW-1 has testified that on 25th July, 2003, he along with his son Chander Pal was present in his house, when at about 12.30 P.M. the appellant-Shiv Kumar called out his son-Chander Pal, upon which Chander Pal went outside and both of them started quarrelling loudly. As a result, PW-1 came outside the house. The appellant at that time was stating that a day earlier Chander Pal had escaped but today he would not leave but kill him. The appellant caught hold of the neck of Chander Pal by one hand and gave a stab blow to him in his abdomen. Chander Pal started bleeding profusely. PW-1 tried to chase and catch hold of Shiv Kumar, but he felt giddiness and fell down. A rickshaw puller had taken deceased Chander Pal to the hospital where he eventually died. Statement of Chiranji Lal (Exhibit PW-1/A) was recorded by the police and thereupon FIR was registered. He identified the dead body of the deceased, which was also handed over to him for cremation after post-mortem.

7. In his cross-examination, Chiranji Lal (PW1) has stated that the appellant-Shiv Kumar used to reside near his house. He deposed that

Chander Pal, his son had not gone for his duty on 25th July, 2003 and he was present in the house. He has further stated that by the time he reached the spot, the appellant had already given a knife blow in Chander Pal's abdomen and, therefore, he had no chance to save him. The quarrel had taken place at a distance of 10 to 12 paces from his house. After the incident, he heard the appellant but he became unconscious and after half an hour he regained consciousness and went to the hospital.

8. SI Mahesh Kumar (PW-5) has stated that on 25th July, 2003 he along with Constable Rajpal Singh (PW-2) went to Sanjay Gandhi Memorial Hospital where Chander Pal was admitted and was undergoing treatment. However, he died at about 2.15 P.M. and his MLC was prepared. They then recorded the statement of Chiranji Lal (PW-1), father of the deceased and thereafter, FIR under Section 302 IPC was registered. PW-5 in his cross-examination has stated that he reached the hospital at 1.25 P.M. and Chiranji Lal met him only after 2.15 P.M. He had sent Constable Rajpal Singh with rukka at about 4.30 P.M. and he returned with a copy of the FIR at about 5.30 P.M. Similar deposition has been made by Constable Rajpal Singh (PW-2) regarding recording of statement of Chiranji Lal (PW-1), writing of rukka by SI Mahesh Kumar and receipt of copy of the FIR. PW-2 has further deposed with regard to lifting of blood stained earth control from the spot, which was seized vide memo Exhibit PW-2/A.

9. Learned counsel for the appellant is right in his submissions that there is no explanation or justification for the prosecution to not examine Ahibaran Singh S/o Ram Singh, resident of Budh Vihar, Sultanpuri, the name mentioned in the MLC Exhibit PW-14/C of Sanjay Gandhi Memorial Hospital, Mangolpuri. Chander Pal was brought to the hospital by Ahibaran as recorded in the said MLC. This factual position is also mentioned in DD No. 18A (Exhibit PW-5/A). The said DD entry was made at Police Station Mangolpuri and marked to SI Mahesh Kumar (PW-5) for inquiry/investigation. However, there are good and cogent reasons why we feel that the appellant is not entitled to acquittal for the said reason. The Investigating Officer Azad Singh (PW-15), who was then the Additional SHO, Police Station Mangolpuri was not cross-examined on the said aspect. Moreover, we are satisfied that Chiranji Lal (PW-1) has rightly deposed as to the occurrence on 25th July, 2003. We have already referred to PW-1's deposition in detail. In the cross-examination, PW-1 had stated that he used to work as a watchman at night and come back home at 10 A.M. from his duty. His presence in the house at the time of occurrence, i.e., 12.30 P.M. on 25th July, 2003 was, therefore, natural and normal. It has not been debated and questioned before us that the actual stabbing and occurrence had taken place just outside the building/property where the deceased and PW-1 used to reside. The said factual position has

been proved and established beyond doubt from the unscaled and scaled site plans marked Exhibit PW-15/A and Exhibit PW-4/A respectively. The photographs of the place of occurrence, which also show the blood stains, have been marked Exhibit PW-7/A1 to A4. The said site plans were proved by SI Manohar Lal (PW-4) and Inspector Azad Singh (PW-15). The photographs were taken by Constable Dalvir Singh (PW-7), who had deposed to the said effect. SI Manohar Lal (PW-4), Constable Dalvir Singh (PW-7) and Inspector Azad Singh (PW-15) were not cross-examined on the question of the site plans both unscaled and scaled and the photographs.

10. However, we agree with the counsel for the appellant that Chiranji Lal (PW-1) may not have seen the actual occurrence, i.e., when the stab wound was inflicted and PW-1's statement to the extent that he had seen the actual incident of stabbing is possibly an exaggeration, as in fact he came outside the house only after hearing noise and by that time injury had been inflicted on Chander Pal. PW-1 in his examination in chief had claimed that he had seen the actual occurrence in which the knife blow was given but in his cross-examination he had accepted that when he had reached the spot, the accused had given the knife blow in the abdomen of his son. It is, therefore, probable that on hearing loud noise, PW1 came out but by then the appellant had already given the knife blow to Chander Pal.

PW-1 tried to chase the appellant but in the meanwhile he became giddy and fell down. At this stage, it would be relevant to state that Chiranji Lal (PW-1) at the time of his court deposition on 9th December, 2004 was about 65 years old and, therefore, at the time of occurrence was about 64 years of age. In the cross-examination, PW-1 confirmed that he had become unconscious and stated that he regained consciousness after about an hour and then went to the hospital.

11. In the MLC (Exhibit PW-14/C), name, parentage, age, residential address etc. of deceased Chander Pal is mentioned. We do not know who had given these details before they were recorded in the MLC (Exhibit PW-14/C). Possibly they had been given by Ahibaran, the rickshaw puller, who had brought the deceased to the hospital as the name of the deceased is also mentioned in DD No. 18A (Exhibit PW-5/A) recorded at Police Station Mangolpuri at about 1.10 P.M. and this was the first entry or recording in the Police Station with regard to the occurrence. However, how and when details came to the knowledge of Ahibaran could have been best explained by the said person, but this should not deter us from completely disbelieving the testimony of Chiranji Lal (PW-1). Chiranji Lal (PW-1) had also mentioned that after the occurrence many persons had collected at the spot. The occurrence had taken place right below the residence of Chiranji Lal (PW-1) and the deceased Chander Pal. Persons

in the neighbourhood could have given the said details. It is also apparent that the persons in neighbourhood did not come forward and volunteer to make statements before the Investigating Officer, though from the said site plans (Exhibits PW-15/A and PW-4/A) it is apparent that the street in question was frequented and had food stalls. The loud noise referred to by Chiranji Lal (PW-1) would have compelled others to also look out and inquire as to what was happening.

12. This brings us to the second primary issue in alternative argued by the appellant, i.e., the challenge to conviction of the appellant under Section 302 IPC and the submission that at best conviction under Section 304 Part-I IPC is made out. Both sides accept that it is a case of single blow and this is a relevant factor but not the determinative circumstance to decide whether the offence would be brought under Section 302 or Section 304 Part I or II, IPC. A single blow cannot always imply or mean conviction under Section 304 Part I or II. The difference between Sections 302 and 304 IPC has already been explained and elucidated in the locus classics *Virsa Singh versus State of Punjab*, AIR 1958 SC 465 and in the subsequent decisions of the Supreme Court in *Jai Prakash versus State (Delhi Administration)*, (1991) 2 SCC 32, *State of Karnataka versus Vedanayagam*, (1995) 1 SCC 326 and *Arun Nivalaji More versus State of Maharashtra*, AIR 2006 SC 2886.

13. In order to decide whether the case falls under thirdly of Section 300 or Section 304 Part I/II IPC, we would refer to a decision of the Supreme Court in *Pulicherla Nagaraju versus State of A.P.*, (2006) 11 SCC 444, wherein it has been elucidated:-

“18. The third contention relates to the question whether the offence is a murder punishable under Section 302, or culpable homicide not amounting to murder punishable under Section 304 Part II. The evidence shows that there was a long-standing enmity between the families of the two brothers (A-1 and PW 2). There was a quarrel on 24-4-1999 in respect of PW 2 taking a tractor through the land of A-1. There was another quarrel when A-1 allegedly removed the fence and PW 1 and PW 2 questioned A-1 as to why he removed the fencing, which led to an altercation between A-1 and A-3 on the one hand and PW 1 and PW 2 on the other about half an hour before the stabbing of the deceased, which resulted in injuries to PW 1 and PW 2. After the second incident, Purushotham Reddy followed by PW 1 and PW 2 was going towards A-1's house to protest against A-1 and the appellant causing injuries to PW 1 and PW 2. Neither Purushotham Reddy nor PW 1 and PW 2 were armed with any weapon. There was no indication that they intended to cause any physical harm to the accused, or that they intended to retaliate for the earlier incident. The nature and size of the weapon used by the appellant (*barisa*, which is a big size dagger), the force with which the weapon was used, the part of the body where the injury was caused, just below the neck, a vital part of the body, the nature of the injury, stab wound measuring 3 cm × 5 cm × 12 cm, resulting in instantaneous collapse leading to death, leaves no room to doubt that the intention of the appellant was to cause the death or, at all events, cause bodily injury, which is sufficient in the ordinary course of nature to cause death.”

(emphasis supplied)

14. Dealing with Exception 4 to Section 300 in *Mahesh Balmiki versus State of Madhya Pradesh*, (2000) 1 SCC 310, it has been observed:-

“7. Now Exception 4 to Section 300 IPC is in the following terms:

“*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's 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.”

The requirements of this exception are:

- (a) without premeditation in a sudden fight;
- (b) in the heat of passion upon a sudden quarrel;
- (c) the offender has not taken undue advantage; and
- (d) the offender has not acted in a cruel or unusual manner.

Where these requirements are satisfied, culpable homicide would not be murder.”

15. Applying the aforesaid parameters and tests in the present case, we feel that benefit of doubt should be given to the appellant and the conviction of the appellant should be converted from ‘murder’ to ‘culpable homicide not amounting to murder’ under Section 304, Part I IPC. It is an apparent case of sudden quarrel, the cause and reason for which remain unknown, an aspect not necessary for determining applicability of Exception 4. MLC (Exhibit PW-14/C) also records and refers to smell of alcohol when the deceased Chander Pal was brought to the hospital. This

fact has not been deposed or stated by Chiranji Lal (PW-1) in his court deposition.

16. On the nature of the injury, we have evidence in the form of post-mortem report (Exhibit PW-11/A) and testimony of Dr. R.K. Punia (PW-11) to the effect that the injury was ante mortem and fresh and sufficient to cause death in the ordinary course of nature. The cause of death was shock and haemorrhage as a result of injury to the liver. Regarding the question whether this was the intended injury, Chiranji Lal (PW-1) has deposed that after hearing a loud noise he came out and heard the appellant saying that Chander Pal had escaped a day earlier but today he would not leave him. He then caught hold of the appellant from his neck by one hand and gave stab blow in the abdomen with the other hand. This, as we have noted above, appears to be an exaggeration and probably PW-1 had not seen the actual occurrence, as by the time he came down the actual stab wound had been delivered in view of what has been stated by PW-1 in his cross-examination, i.e., that when he reached the spot, the appellant had already given knife blow. What had by then transpired and happened outside before the knife blow was given is not on record.

17. The weapon of offence has not been recovered in the present case as the appellant had absconded and was arrested after nearly two months on 22nd October, 2003. Recovery of a knife is however attributed and claimed

from the appellant. As pointed out by the trial court, the recovery of knife had resulted in registration of FIR No. 666/2003 under Section 399/402 IPC, Police Station Mangolpuri. Chiranji Lal (PW-1) could not identify the weapon of offence nor did it have any distinctive mark. It has been observed in paragraph 29 of the impugned judgment that the disclosure statement (Exhibit PW-6/A) is inadmissible and hit by Section 25 of the Evidence Act and no recovery could be attributed to the said disclosure statement under Section 27 as a knife had already been recovered prior to recording of the disclosure statement.

18. We agree with the counsel for the appellant that there are circumstances to indicate that there was no pre-meditation or a plan to stab the deceased. Chiranji Lal (PW-1) has deposed that appellant had called out and thereupon the deceased Chander Pal had himself gone out of the house to talk to the appellant. Chiranji Lal (PW-1) did not follow the deceased and did not ask or prevent the deceased from going out or speaking to the appellant. PW-1 did not, suspect that there would be violence and had only gone out of the house when he heard loud noise or spat outside and when he reached there, the appellant had stabbed the deceased in the abdomen.

19. From the deposition of PW-1 and the inference drawn by us, it is clear that they were on talking terms. Even if they were not friendly, the

appellant and the deceased were not antagonistic. They were known to each other and not apprehensive and did not suspect each other. We are not aware as to the cause of the quarrel or the differences between the appellant and the deceased. The appellant, as per the prosecution version and we accept, had come to the house of the deceased to speak to him and had called him outside for a conversation, when the occurrence took place. There was no proved past history of violence or of quarrel between them. PW-1 has referred to a sentence spoken by the appellant, which we have disbelieved. It is also apparent that PW-1 has not given any reason for the differences between the appellant and the deceased.

20. The real issue to look into would be, did the appellant take undue advantage and act in a cruel or unusual manner? Secondly, did the appellant intend to cause the said injury in the abdomen?

21. Judgment of the Supreme Court in *Virsa Singh (supra)* and other decisions do indicate that the statement of the accused under Section 313 Cr.P.C. is of crucial importance and relevance as it could help establish and prove how the appellant accused got possession of weapon of offence and in what circumstances and how the injury was caused. Statement of the appellant under Section 313 Cr.P.C. does not help and assist the appellant in the present case as he has neither stated nor indicated how he came into possession of the knife or as to the injury caused. In the absence of

explanation, the appellant/accused is entitled to rely upon evidence and material produced by the prosecution and in some cases, failure to cite and produce relevant/material evidence without justification may lead to adverse inference. In the facts of the present case, it is noticeable and it has been proved that the deceased was under the influence of liquor/alcohol. The issue is whether the prosecution had failed and faulted in collecting, ascertaining and producing material evidence and effect thereof. We have concluded and held that Chiranjilal (PW1) had not seen the actual occurrence but had reached the spot after the stab wound or injury was caused. The occurrence had taken place in a street outside. It is understandable and one can appreciate the problem and the difficulty of the police as public witnesses who might have witnessed the actual occurrence had not come forward and accepted that they had seen the occurrence and therefore failure to cite them cannot be a ground to convert the conviction. But, there is evidence and material to show that one rickshaw wala named Ahibaran had brought the deceased Chander Pal to the hospital. He had given the address and parentage of Chander Pal in the MLC. Address and other details of Ahibaran stand recorded in the MLC. However, the said Ahibaran has not been examined by the police and there is no explanation regarding the same. In fact, Ahibaran was not cited as a witness and his statement under Section 161 Cr.P.C. was also not recorded.

There is no reason or ground why Ahibaran was not questioned and it was not ascertained whether he had seen the occurrence or not. It was natural and normal to ask and ascertain details from Ahibaran. It is probable that Ahibaran had seen the occurrence but the said witness has neither been produced nor has he deposed about the occurrence. In the present case, therefore, the prosecution had necessary information and could have without being put to impossibility or even disproportionate labour and inconvenience, established and produced evidence as to the actual occurrence by ascertaining the facts and producing Ahibaran. To this extent, therefore, the prosecution has failed and, thus we feel that benefit of the said failure to the limited extent of converting the conviction of the appellant from Section 302 IPC to Section 304-B, Part I, IPC can and should be given. Thus, though the appellant has been silent in his statement under Section 313 Cr.P.C., we are inclined to give benefit of doubt to him in view of the aforesaid factual matrix.

22. In view of the aforesaid discussion, we uphold the finding of the Trial Court that the appellant was the perpetrator who had caused injuries/stab wound resulting in death of Chander Pal, however, we convert his conviction from murder under Section 302 IPC to Section 304 Part I, IPC. We also uphold the conviction of the appellant under Section 201 IPC as he had caused evidence of commission to disappear with the

intention to screen himself from legal punishment. The weapon of offence in the present case was concealed or made to disappear and has not been recovered.

23. On the question of quantum of sentence, we uphold the sentence awarded to the appellant under Section 201 IPC i.e. Rigorous Imprisonment for three years and fine of Rs.2,000/-, in default of which, he has to undergo Simple Imprisonment for one month. The appellant has already undergone the said sentence of imprisonment, substantive and in default. On the question of quantum of sentence under Section 304 Part I, IPC, we notice that the appellant has already undergone sentence for more than 10 years, 3 months and 25 days as on 18th February, 2014. He had earned remission of 8 months and 7 days. In these circumstances, we direct the appellant would be released on the sentence undergone for the offence under Section 304 Part I, IPC and the remission earned shall be regarded as period spent in jail in lieu of fine of Rs.5,000/-. Both sentences shall run concurrently and benefit of Section 428 Cr.P.C. stands granted.

24. The appeal is disposed of.

(SANJIV KHANNA)
JUDGE

(G.P. MITTAL)
JUDGE

APRIL 30th, 2014

VKR/kkb

Crl. A 892/2009