

\$~R-20, 21 & 22

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

+ CRL.A.34/2000

Date of decision: 07.05.2015

AAS MOHAMMAD ETC.

..... Appellant

Through

Mr. Imtiaz Ahmed, Mrs. Naghma
Imtiaz & Ms. Amra Moosavi, Advs.

versus

STATE

..... Respondent

Through

Ms. Aashaa Tiwari, APP for the state
SI Vivek Sharma, PS Gokulpuri.

+ CRL.A.119/2003

STATE (GOVT. OF DELHI)

..... Appellant

Through

Ms. Aashaa Tiwari, APP for the state.

versus

AAS MOHAMMAD ETC.

..... Respondent

Through

Mr. Imtiaz Ahmed, Mrs. Naghma
Imtiaz & Ms. Amra Moosavi, Advs.
SI Vivek Sharma, PS Gokulpuri.

+ CRL.REV.P.230/2000 & CRL.M.A.1412/2000

VAKILA

..... Appellant

Through

None.

versus

AAS MOHAMMAD ETC.

..... Respondent

Through

Mr. Imtiaz Ahmed, Mrs. Naghma
Imtiaz & Ms. Amra Moosavi, Advs.
SI Vivek Sharma, PS Gokulpuri.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J. (ORAL)

1. This common judgment will dispose of the aforesaid appeals and the revision petition. Appeal no. 34/2000 has been preferred by Aas Mohammad, Akhtar and Sher Mohammad against their conviction under Section 304 Part II read with Section 34 of the Indian Penal Code, 1862 ('IPC') vide judgment dated 24th December, 1999 and the order of Sentence of the same date, sentencing them to Rigorous Imprisonment for 3 years and a fine of Rs.5,000/- each. In default of payment of fine, they have to further undergo Simple Imprisonment for one month. State (Govt. of Delhi) has filed Criminal Appeal No. 119/2003 claiming that Aas Mohammad, Akhtar and Sher Mohammad should have been convicted for murder of the deceased Nek Shah under Section 302 read with Section 34 IPC and awarded a more severe sentence, and Vakila, wife of the deceased Nek Shah, has filed Criminal Revision Petition No.230/2000 praying that the impugned judgment dated 24th December,1999 should be set aside

and a harsher sentence should be awarded to Aas Mohammad, Akhtar and Sher Mohammad.

2. Vakila is present in person along with her son Shamshuddin (PW-8) and has stated that she does not want to press her revision petition. Similar statement was made by Vakila and her son Shamshuddin on the last date of hearing i.e. on 1st May, 2015. We had then questioned them to ascertain whether they were under any pressure, compulsion or threat. This was one of the reasons why we had adjourned the above said appeals and the revision petition filed by Vakila and have taken them up for hearing today.

3. Learned counsel for the appellants Aas Mohammad, Akhtar and Sher Mohammad has drawn our attention to the post-mortem report of the deceased Nek Shah marked Exhibit PW-4/A and testimony of Dr. Upender Kishore (PW-4). It is urged that Nek Shah had died due to coronary artery disease and the death cannot be attributed to any act of the appellants. Our attention is also drawn to the findings recorded by the trial court for convicting the appellants, Aas Mohammad, Akhtar and Sher Mohammad under Section 304 Part II IPC.

4. On the question of occurrence in question, we would begin with

the testimony of Shamshuddin (PW-8). He was about 12 years of age when his testimony was recorded in the Court on 6th August, 1999. PW-8 has deposed that at about 2.30 P.M., on 2nd November, 1998, he was present with his father Nek Shah at the *patri* on the Wazirabad Road. They had set up a shop on the footpath to sell masalas. Appellant Aas Mohd. had also set up a stall (*thiya*) to sell potatoes. The deceased Nek Shah had asked Aas Mohd. to shift his shop (*thiya*) and thereupon, the appellant Aas Mohd. had abused his father. Akhtar and Sher Mohd. joined him and had grappled with his father. Sher Mohd. and Akhtar had held the arms of his father from the back side. Thereafter, appellant Aas Mohd. had picked up a bag (*theli*) of weights and gave blows on the chest and abdomen of his father Nek Shah. Nek Shah fell down. In the meanwhile, one Babu Azimuddin (PW-1) came there. The three appellants ran away and Nek Shah was taken to GTB hospital by Babu Azimuddin (PW-1) and Shamshuddin (PW-8). Nek Shah had died at the spot itself. MLC Report of the deceased Nek Shah (Ex. PW-8/A) records that the patient was brought dead to the hospital. In his cross examination, PW-8 has stated that every shopkeeper had a platform or *thiya* on which they stored articles

for sale in the weekly market. Before the occurrence, his father had never quarreled with anyone. PW-8 claimed that potato vendors carried weights of 1 or 2 kgs. and not weights of 5 or 6 kgs. He denied the suggestion that several persons, including the appellant Aas Mohd. had called the police and PCR officer had come to the spot. Several other suggestions were also denied by him. We do not think that those are of relevance. However, as per the deposition of Shamshuddin (PW-8), Babu Azimuddin (PW-1) had come to the spot, post the occurrence. The appellants had, thereupon, fled away from the spot.

5. Babu Azimuddin (PW-1) was the complainant on whose statement FIR No.812/1998 at Police Station, Gokulpuri was registered. PW-1 claims that he had gone to purchase vegetables at the weekly market and saw that a crowd had gathered. PW-1 saw three persons, namely, Aas Mohd., Akhtar and Sher Mohd. assaulting his nephew Nek Shah. They had quarrelled over the platform (*thiya*) in the bazaar. The deceased Nek Shah had fallen down. A police vehicle came and took Nek Shah with them. Aas Mohd. had beaten Nek Shah with a bag (*theli*) of weights and two others had caught hold

of Nek Shah. Blows were given on the back, chest, abdomen etc. In his cross -examination, PW-1 testified that he had gone a Masjid to offer Namaz and, thereafter, had reached the bazaar. Two to four blows were given to the deceased Nek Shah. Thereafter, Nek Shah fell down. On the question of weights, PW-1 claimed that they could be of 5 kg, 2 kg. or of 1 kg. Nek Shah was about 30 to 35 years old, was not weak and was not suffering from any illness.

6. We are inclined to partly accept the testimony of Shamshuddin (PW-8) that there was a quarrel between the deceased Nek Shah and the appellants Aas Mohd., Akhtar and Sher Mohd. over a small and trivial matter. Possibly, abuses were exchanged and, thereafter, the appellants had hand-to-hand fight with the deceased. It is also probable that the appellants may have used the bag (*theli*) of weights during the said quarrel to hit the deceased Nek Shah. However, whether the deceased Nek Shah was hit and injured on the chest, is debatable and has been examined below, when we refer to the medical evidence. Nek Shah fell down and was later taken to the hospital. He had died by the time he reached the hospital. PW-1 has deposed on similar lines but it is apparent that PW-1 had reached the place of

occurrence after the deceased Nek Shah was injured. PW-8's deposition does not support PW-1's presence at the spot when the quarrel and violence took place.

7. Dr. G.L. Arora of GTB hospital had appeared as PW-8/A and has testified that on 2nd November, 1998, at about 3.30 P.M., he had examined a patient named Nek Shah, who was brought to the casualty ward by Ct. Amar Singh with alleged history of assault. The patient was declared brought dead and the body was sent to mortuary for post-mortem examination. PW-8A proved the MLC Ex.PW-8/A. The said MLC does not refer to any external bodily injury except a scar on the left cheek and a scar on the lower portion of the right leg. Importantly, there was no scar or injury on the chest. The post mortem on the dead body of Nek Shah was conducted by Dr. Upender Kishore, (PW-4). PW-4 had estimated the age of Nek Shah as 42 years and on examination, only one external injury, namely a reddish abrasion of size 1.6 X 1.2 cm. present on the outer right ankle was noticed. The heart weighed 300 gm. and on exploration, the following medical condition emerged:-

“On cut section old heeled subendocardial scar areas present over anterior wall of right ventricle with thinning of wall. Scarring also seen over myocardium and pericardial surface at places.

Coronaries-right anterior decending is block – 80 to 90% from the middle to its terminal ends with calcification. Right circumflex block 90%. Left circumflex 80%. Left coronary block 90%. All arteries showed various atheromatocus changes and calcification.

Opinion:

Death due to coronery artery disease and its sequel.

In his cross examination, Dr. Upender Kishore (PW-4) opined that a coronary disease had caused the deceased to suffer the heart attack. On examination of the body, PW-4 did not notice any external injury except one abrasion found on the right ankle. There were no contusions or bruises on the body of the deceased including chest and abdomen. Further, PW-4 opined that the injury on the right ankle could have been caused by a fall.

8. Thus, as per the medical opinion, the death in the present case was on account of coronary heart attack caused by coronary artery heart disease. The disease was latent and unknown. The right-anterior decending coronary artery was blocked to the extent of 80 to 90 percent from middle to its terminal ends, with calcification. The right and left circumflex was similarly blocked to the extent of 80 to 90 percent. Even the left coronary artery was blocked to the extent of 90 percent. The arteries showed various atheromatocus changes and calcification.

9. In light of the aforesaid medical opinion of Dr. Upender Kishore (PW-4) and the post mortem report (Ex. PW-4/A), it would be appropriate and correct to hold that the death of Nek Shah cannot be attributed to any injury caused or acts of the appellants in the course of quarrel which had taken place on 2nd November, 1998.

10. The Trial court has recorded the following finding in the impugned judgment to invoke Section 304, Part II IPC :-

“13. However, we have to bear it in mind that giving chest blow with cloth pouch containing weights is like hurling stones on the chest. The person who hurls stones has to be presumed to have knowledge that death may be caused or likely to be caused as the chest and heart are very sensitive parts of the body and any blow on them is likely to cause death. We have to, therefore, presume that the accused Aas Mohd. principally and accused Sher Mohd. and Chhote @ Akhtar had the knowledge that the blows given on the chest of Nek Shah were likely to cause death. The blows must have accelerated the death by pumping more blood than the arteries etc. could carry. So, even if the medical evidence says that the death was due to heart attack, the impact had a role to play. The hurling of the pouch containing weights had the likelihood of causing death to a normal person also. All the three accused persons are covered by the offence under Part II of Section 304 IPC instead of Section 302/34 IPC. All the three accused persons are, therefore, convicted accordingly.”

At the same time, in the preceding two paragraphs, the trial court observed:-

“11. From the above evidence, it is difficult to draw the conclusion that the three accused wanted to murder Nek Shah. The circumstances and the genesis of the occurrence lead to the inference that they wanted to beat Nak Shah. It was for this reason that they

gave fist blows and kick blows to him and Aas Mohd. gave blows with a cloth pouch containing weights on the chest of Nek Shah. This also does not indicate that he had the intention to kill Nek Shah. The words 'Maaro Sale ko' does not mean that the victim should be done to death. They are general words used for beating also. The Hon'ble Supreme Court had the occasion to consider these words in the case 'Ajay Sharma vs. State of Rajasthan' (1998 VI A.D.(S.C.) 610 and earlier in Matadin etc. Vs. State of Maharashtra (1998 V A.D.(S.C.) 517 and held that these words do not convey the intention of killing.

12. *It may also be mentioned that their intention to kill, even if assumed in this case, would not be punishable as the medical evidence establishes that Nek Shah died of heart attack and was a serious heart patient and not as a consequences of intention. There is no medical evidence that the bony cage over the heart muscle was damaged or any internal bleeding had taken place because of the impact of the blows on the chest."*

11. We find that there is a contradiction in the findings recorded in paragraphs 11 and 12 and the ultimate findings, which are recorded in paragraph 13. We do not agree with the findings recorded in paragraph 13 that the appellants had the necessary knowledge that the "blows" given on the chest were likely to cause death or could have accelerated the death because the arteries had to pump more blood than they could carry. It is not the contention of the prosecution that the appellants had the knowledge or were aware that the deceased Nek Shah, a young man between the age of 35 and 42 years, was suffering from coronary artery disease. In fact, even the deceased himself and his family members were unaware of the above stated medical

condition.

12. The expression 'knowledge' postulates existence of positive mental attitude as to the consequence of the conduct. Knowledge has to be factually implied from the circumstances, though it may not be necessary that the accused must exactly know what will happen. Reasonable man' test is applied to decide whether knowledge can be attributed. On the question of knowledge, it was observed by the Supreme Court in the case of *Alister Anthony Pareira v. State of Maharashtra*, (2012) 2 SCC 648:

40. *If the act is done with the knowledge of the dangerous consequences which are likely to follow and if death is caused, then not only that the punishment is for the act but also for the resulting homicide and a case may fall within Section 299 or Section 300 depending upon the mental state of the accused viz. as to whether the act was done with one kind of knowledge or the other or the intention. Knowledge is awareness on the part of the person concerned of the consequences of his act of omission or commission indicating his state of mind. There may be knowledge of likely consequences without any intention. Criminal culpability is determined by referring to what a person with reasonable prudence would have known.*
42. *A person, responsible for a reckless or rash or negligent act that causes death about which he had knowledge as a reasonable man that such act was dangerous enough to lead to some untoward thing and the death was likely to be caused, may be attributed with the knowledge of the consequence and may be fastened with culpability of homicide not amounting to murder and punishable under Section 304 Part II IPC.*
79. *There is a presumption that a man knows the natural and likely consequences of his acts.*

Knowledge means consciousness and an offender is expected to be aware of the consequences of his act, albeit not more or beyond natural and normal awareness attributable to a reasonable person. It would be stretching and unrealistic in the facts of the present case, to hold that the appellants can be attributed with knowledge or awareness of criminal culpability of the nature required for an offence under Section 299 read with Part II of Section 304, IPC. In absence of specific and peculiar facts regarding ailment of the deceased being known, criminal culpability determined by applying the Clapham Omnibus test would not justify conviction under Section 304, Part II IPC.

13. The death in the present case was due to unknown and latent coronary artery disease. The arteries of the deceased were blocked to the extent of 80 to 90% which caused the heart attack, the cause of death of Nek Shah. In view of the facts and principles discussed above, we hold that the appellants cannot be attributed with the requisite knowledge for conviction under Section 304, Part II IPC. The Supreme Court reached a similar conclusion in the case of *Mayandi v. State* (2010) 11 SCC 774. The facts of the case were

stringent and severe than the facts of the present case. The accused had attacked the deceased with a sickle causing several injuries. The victim died of heart attack. Doctors opined that the death was not due to injuries caused by the accused. Medical evidence revealed that deceased had undergone an angioplasty. This fact was not within knowledge of accused. There was no evidence to show that injuries could have independently caused death of deceased, even if deceased had not been suffering from a heart problem. Deceased had died due to complications arising out of myocardial infarction. Post-mortem report did not suggest that the death was a result of the injuries inflicted. The Supreme Court held that the case would fall within Section 326 IPC and not Section 302 IPC. There was no intention on the part of the accused to cause death of deceased nor could he be attributed with knowledge that death would be caused. No offence was made out under Section 304 Part I or Part II IPC.

14. The next question which arises is whether the appellant has committed an offence under Section 325 IPC read with Section 320 IPC or Section 322 IPC read with Section 323 IPC. In view of facts of the present case, Section 325 IPC would not apply for the reason that

the deceased had not suffered any grievous hurt. It has also not been established that the appellants intended to cause or knew that grievous hurt was likely. The term and expression “grievous hurt” has been defined in Section 320 IPC. Eight kinds of hurt are designated as ‘grievous’, as set out in Section 320, IPC and none of them are applicable to the facts of the present case. Undoubtedly, Shamshuddin (PW-8) has referred to the deceased being hit on the chest with a bag (*theli*) of weights and with fist blows on the chest and abdomen, however, the medical reports do not show any external injuries on the chest and abdomen. We would accept the version of Shamshuddin (PW-8), but it is apparent that in the grapple, the punches or hits were feeble, for a hit by a sack having measuring weights with force and intensity would have caused bodily injuries, atleast superficial in nature. Significantly, in the present case, the deceased did not have even a scar or abrasion on his chest and abdomen.

15. The appellants have committed an offence under Section 323 IPC and have to be punished for the said offence. The view we have expressed finds support from the decision of the Supreme Court in *Pirithi v. State of Haryana*, (1994) Supp (1) SCC 498. In the said

case, the punishment was altered from Part II of Section 304 to

Section 323 IPC observing as under:-

“Having regard to the medical opinion, admittedly the injury to the testicles was not the direct cause of death. No treatment was given for two days and it is only on 4.4.86, that the deceased was admitted in the hospital. But, unfortunately, in the meanwhile gangrene developed. Under the circumstances, the offence only amounts to one punishable under Section 323 I.P.C. In the result, the conviction of the appellant under Section 304 Part II I.P.C. and the sentence of four years' R.I. awarded there under are set aside. Instead he is convicted under Section [323](#) I.P.C. and sentenced to undergo seven months' R.I. The sentence of fine with default clause and the direction that the whole amount should be paid to the heirs of the deceased are confirmed. Subject to the above modification of sentence, the appeal is disposed of.”

16. In another decision of this Court, **Satpal versus State**, (2012) 195 DLT 452, case law on the subject was examined and the conviction, on noticing the facts of the case, was converted to Section 325 IPC. The accused, therein, had hurled a stone, which had resulted in fracture of the skull bone. This decision refers to several earlier decisions, including the decision of the Supreme Court in **State of Karnataka versus Shivalingayya**, AIR 1988 SC 115. In Shivalingayya's case, it has been observed:-

We have heard learned counsel for the parties as to the nature of offence and sentence. Agreeing with the High Court, we are inclined to the view that in the facts and circumstances, it cannot be said that the respondent had any intention of causing the death of the deceased when he committed the act in question nor could he be attributed with knowledge that such act was likely to cause his

cardiac arrest resulting in his death. We wish to make it clear that it cannot be that in all circumstances such an act would not be covered by clause Thirdly and therefore amount to culpable homicide amounting to murder punishable under Section 302 or culpable homicide not amounting to murder punishable under Section 304 Part II. It all depends on the facts and circumstances of each case whether the accused had the requisite intention or knowledge. The High Court has brought out the circumstances which show that the respondent acted on a sudden impulse. The High Court was therefore right in its conclusion that the act complained of would not amount to culpable homicide amounting to murder or not amounting to murder punishable under Section 302 or Section 304 Part II. The question however still remains as to the nature of the offence committed by the respondent. In our opinion, the High Court was not right in its view that the act of squeezing the testicles of a person would be an offence of voluntarily causing simple hurt punishable under Section 323 of the Indian Penal Code. The testimony of Dr T.C. Seetharam clearly shows that such act was dangerous to human life. It actually led to the cardiac arrest of the deceased as a result of which he died almost instantaneously. Such an act in the instant case would clearly be covered by clause Thirdly (sic Eighthly) of Section 320 of the Indian Penal Code and therefore amount to grievous hurt punishable under Section 325 of the Indian Penal Code.

17. In view of the findings recorded above, we partly allow the Criminal Appeal No. 34/2000 filed by the appellants -Aas Mohd, Akhtar and Sher Mohd. and dismiss the appeal filed by the State, i.e., Criminal Appeal No. 119/2003. The criminal revision filed by Vakila, which she does not want to press, has to be dismissed. While partly allowing the present appeal, we modify their conviction from Section 304, Part II IPC to Section 323 IPC.

18. The last part relates to the sentence for the offence under Section 323 IPC. For an offence punishable under Section 323 IPC,

the appellants can be awarded Rigorous Imprisonment for upto one year or with fine or both. We had called for the nominal rolls of the appellants- Aas Mohd., Akhtar and Sher Mohd. Superintendent Jail-I and Jail-III has stated that records in respect of Aas Mohd. are not traceable but he was admitted to jail on 6th November, 1998 and was released on bail on 4th March, 1999. He has, thus, suffered incarceration for about 118 days. With regard to Sher Mohd., the records are not traceable on the basis of particulars available. No report has been received in the case of Akhtar. Akhtar and Sher Mohd., who are present in the Court state that they were in jail for a period of 2 to 3 ½ months.

19. In view of the aforesaid factual position and also considering the fact that the accident in question had occurred about seventeen years back, we do not think that it would be appropriate to send the appellants now to prison. The offence in question had occurred in 1998. They are released on the sentence already undergone by them. However, they shall pay a fine as imposed of Rs.1,000/- each, in default of which they shall undergo Simple Imprisonment for one month. In addition, they shall also pay compensation of Rs.10,000/-

each under Section 357 Cr.P.C. The said compensation and fine will be paid within a period of one week from today. We clarify that the question of compensation was not raised or stated earlier or when Vakila and her son Shamshuddin had made the statement that they want to withdraw the revision petition. There is no link and connection between the said statement and award of compensation. The compensation amount, once deposited, shall be paid to Vakila. Counsel for the appellants states that the compensation can be paid to Vakila in the Court itself. The appeal filed by the appellants-Aas Mohd., Akhtar and Sher Mohd. will be listed for the said purpose on 15th May, 2015. Crl. Appeal No. 119/2003 titled *State (Govt. of Delhi) v. Aas Mohd.* and Crl. Rev. P. No. 230/2000 titled *Vakila v. Aas Mohd.* are dismissed. Crl. Appeal No. 34/2000 titled *Aas Mohd. v. State* is partly allowed and disposed of.

20. List as directed on 15th May, 2015.

(SANJIV KHANNA)
Judge

MAY 7, 2015/ab/VKR

(ASHUTOSH KUMAR)
Judge