$~R-40 to 43

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

% *Date of Decision : April 28, 2016*

\+ **CRL.A.841/2001**

MOHD.HANIF ..... Appellant
Represented by: Ms.Saahila Lamba, Advocate

versus

STATE ..... Respondent
Represented by: Mr.Varun Goswami, APP

CRL.A.856/2001

MOHD.RAFIQ ..... Appellant
Represented by: Ms.Inderjeet Sidhu, Advocate

versus

STATE ..... Respondent
Represented by: Mr.Varun Goswami, APP

CRL.A.903/2001

MIRAZUDDIN ..... Appellant
Represented by: Mr.Chetan Lokur, Advocate with Mr.Nitish Chaudhary, Advocate

versus

STATE ..... Respondent
Represented by: Mr.Varun Goswami, APP

CRL.A.880/2001

SIRAZUDDIN ..... Appellant
Represented by: Mr.Harsh Prabhakar, Amicus Curiae with Mr.Anirudh Tanwar, Advocate

versus

STATE ..... Respondent

Represented by: Mr.Varun Goswami, APP

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

PRADEEP NANDRAJOG, J. (Oral)

1. To adjudicate the captioned four appeals we proceed to note that at about 5:30 AM on March 10, 1999 Shamim (hereinafter referred to as the deceased) was brutally battered as a result of which he died at 1052, Phatak Ram Kishan Dass, Chitli Qabar, Chandani Mahal, New Delhi.

2. The case set up by the prosecution was that the deceased was working as an employee in a factory established by the appellants, who are real brothers. At about 5:30 AM on March 10, 1999 the appellants found their sister Shahjahan DW-2, a deaf and dumb lady, in a compromising position with the deceased. On seeing this, the appellants got enraged and brutally assaulted the deceased using a hammer and *shamshrik* (a wooden tool used by embroiders) as a result of which assault the deceased died a homicidal death. As per the prosecution the incident was witnessed by Juned PW-11 and Atabul PW-12 who, along with the deceased were workers in the factory of the appellants.

3. Believing the case of the prosecution to be true, vide judgment dated October 15, 2010 the learned Trial Judge has convicted the appellants for having murdered the deceased and vide order on sentence dated October 16, 2010 has sentenced them to undergo imprisonment for life.

4. The testimony of the two eye witnesses : Juned PW-11 and Atabul

PW-12, which has withstood the test of cross-examination clearly establishes that the appellants had brutally assaulted the deceased and as a result of the injuries inflicted the deceased died on account of extravasation and subdural haemorrhage.

5. Faced with this situation, learned counsel for the appellants have confined their submissions only to the aspect of the applicability of Section 302 IPC in the facts and circumstances of the case. It is urged that in view of the factual conspectus projected by the prosecution the case which at best could be made out against the appellants is of culpable homicide not amounting to murder punishable under Section 304 Part II IPC in view of the operation of Exception 1 to Section 300 IPC.

6. Per contra, the learned Additional Public Prosecutor would submit that the case at hand reveals that the deceased suffered 14 injuries at the hands of the appellants who mercilessly beat him to pulp and therefore the present case stood squarely covered within the ambit of Section 302 IPC.

7. We have endowed careful consideration to the rival submissions advanced at the bar. At the outset we note that the evidence led by the prosecution at the trial unequivocally evinces that the sister of the appellants Shahjahan DW-2 was indeed subjected to sexual intercourse at around the time of the incident in view of the positive evidence emerging in the form of the CFSL Report Ex.PX and a scientific opinion (not proved at the trial but capable of being used in favour of the accused because the law being that every material gathered by the Investigating Officer which is in favour of the accused has to be looked into by a Court) of her vaginal swab obtained by the Investigating Agency which indicates presence of sperms. The factum of the sister of the appellants subjected to sexual intercourse with the

deceased, consensual or otherwise, is also not in dispute in view of the history narrated by the Investigating Agency before the doctors who examined Shahjahan.

8. We therefore have no hesitation in concluding that the plea of the appellants canvassed before us in fact stands transposed in the citadel of the prosecution case and the material produced by the prosecution itself probabilizes the same. True, as brothers would do, in the statements under Section 313 Cr.P.C. when incriminating circumstances were put to the four appellants each said in unison that when appellant Mohd.Hanif saw the deceased in a compromising position with their sister he accosted the deceased; and as would be expected in such kinds of statements the role of Mohd.Hanif was minimised to say that as Mohd.Hanif jostled with the deceased, the injuries were suffered by the deceased due to fall.

9. In its decision reported as AIR 1962 SC 605 *K.M.Nanavati Vs. State of Maharashtra* the Supreme Court expressed a note of caution that the test of grave and sudden provocation is whether a reasonable human being belonging to the same class of society as the accused, placed in the situation in which the accused was so placed, would be so provoked as to lose self-control. It was further held that what a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc., in short the cultural, social and emotional background of the society to which an accused belongs.

10. We cannot lose sight of the fact that the incident pertains to year 1999 when the appellants witnessed their sister in a compromising position with the deceased who was their employee and that too at an unearthly hour. As highlighted earlier, Shahjahan DW-2 was in a vulnerable state being a deaf

and a dumb lady. Faced with such a situation it is ex-facie writ large that the appellants lost self-control. The morally demented act of the victim invited the wroth and the retribution by four brothers who had lost self-control.

11. It also assumes significance that the testimony of the two eye witnesses Juned PW-11 and Atabul PW-12 does not indicate that there was a time period available to the appellants to 'cool off' and thus contrive to eliminate the deceased. It may also be highlighted that the appellants did not procure lethal weapons from elsewhere and assaulted the deceased with handy objects found in the surroundings – a hammer and a *shamshrik*. A word about the hammer. It is not the usual hammer which one comes across in life. Photograph Ex.8-A/4 shows that it is a small hammer used by artisans engaged in the craft of embroidery; the one used to mildly hammer a wooden frame to put it into place.

12. Indeed, forensic evidence emerging from the post-mortem report Ex.PW-2/A does disclose presence of 14 injuries on the body of the deceased, however we note that according to the opinion of Dr.Anil Kumar Mittal PW-2, only injuries Nos.1, 2 and 3 could be attributed to have resulted in the death of the deceased i.e. were cumulatively sufficient in the ordinary course of nature to cause death. The remaining injuries were essentially in the nature of contusion and abrasions on non-vital organs of the body.

13. It is beyond pale of controversy that Exception 1 appended to Section 300 IPC is not enmeshed with a proviso akin to the one as comprised in Exception 4 viz. that the accused must not have acted in a cruel manner or taken undue advantage. The sublime jural philosophy underlying the said provisions is that in a case of grave and sudden provocation as envisaged

under Exception 1 the offender looses self-control and consequently is impelled to commit the crime.

14. Viscount Simon, L.C. in the decision reported as 1946-2 ALL ER 124 Holmes Vs. D.P.P. pertinently observed : '*The whole doctrine relating to provocation depends on the fact that it causes, or may cause a sudden and temporary loss of self-control, whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived.*'

15. Once the offender looses self-control, he cannot be expected to act in consonance with the norms of reasonableness or decency. Therefore, in such cases the number of injuries are not determinative in adjudging the applicability of Exception 1 to Section 300 IPC. A similar view has been taken by the Allahabad High Court in the decision reported as AIR 1964 ALL 262 Akhtar Vs. State wherein it was held that once power of self-control had been lost, it would be futile to expect the accused to retain such a degree of control over himself as to exercise a choice over the weapon used by him for an attack or that the mode of resentment must bear a reasonable relationship to the provocation that operated upon him.

16. From the above discussion we are of the considered opinion that the offence which is made out against the appellants is one punishable under Section 304 Part II IPC and thus the conviction of the appellants is modified from having committed the offence of murder of having committed the offence punishable under Section 304 Part II IPC.

17. A perusal of nominal rolls shows that the appellants have spent about 4 years and 5 months in custody when they were admitted to bail by this Court. The unfortunate incident took place 17 years ago. Ends of justice would thus be met if the appellants are sentenced to the period already

undergone by them for the offence committed by them.

18. Appellants are on bail. The bail bonds and surety bonds are accordingly discharged.

19. Copy of this decision be sent to the Superintendent Central Jail Tihar for his record.

20. TCR be returned.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

APRIL 28, 2016
mamta