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

+ **CRL.A. 145/2015 & CRL.M.(B) 1653/2017**

AMIT KUMAR & ORS. Appellants
Through: Mr.K.Singhal, Advocate

versus

STATE (NCT OF DELHI) Respondent
Through: Ms.Radhika Kolluru, APP for State

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

ORDER
21.11.2017

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1. This is an appeal by the three accused in FIR 380/2011, registered at Police Station (PS) Aman Vihar against the judgment dated 23rd December, 2014, passed by the learned Additional Sessions Judge-III, North District in SC No. 590/12 convicting the Appellants for the offence under Section 302 read with Section 34 Indian Penal Code (IPC). The appeal is also directed against the order on sentence dated 3rd January, 2015 whereby the three Appellants were sentenced to undergo rigorous imprisonment for life with fine of Rs.5000/- each for the offence punishable under Section 302/34 IPC and in default of payment of fine to undergo simple imprisonment for a period of three months.

2. The case of the prosecution is that on 17th December, 2011 at around 10 pm, Sub-Inspector Kishan Lal (PW24) received DD No. 58 A regarding a quarrel that had taken place at N-19, 40 Feet Road, Bikaner Street, Prem

Nagar-II, Delhi. When PW-24 reached the spot with Constable Rakesh (PW-23) he learnt that Jitender (the deceased) had been taken in an injured condition to the hospital by Giri Raj (PW 2) and Jitender's brother Karan Singh (PW-1). Leaving PW-23 at the spot, PW-24 proceeded to the hospital where Jitender had been admitted and declared dead.

3. PW-1 met PW-24 at the hospital and informed him that on 17th December 2011, he and his brother Jitender were both at the terrace of the house of an elder brother of their friend Giriraj (PW-2) in connection with the birthday celebration of the daughter of the elder brother of PW-2. The house was opposite to the house of PW-1 and the deceased Jitender. At around 9.40 pm, he had received a missed call on his mobile from another mobile number and that it was the same number from which he had received a missed call on the previous day i.e. 16th December, 2011 as well. When PW-1/Karan Singh called back on that number Ashu, son of Raghubir Singh, (Accused No.2 - A-2) answered and immediately started abusing him and asked PW-1 to come down.

4. PW-1 then stated that when he came down stairs all the three accused i.e. Amit Kumar (A-1), Ashu (A-2) and Ajay Kumar (A-3) were present. They started abusing and beating him with fist and leg blows. On hearing the noise of a quarrel, the deceased Jitender, the elder brother of PW-1, also came down stairs. According to PW-1 at that time he was being held by Ashu (A-2) and Ajay Kumar (A-3) and the deceased tried to extricate him, at which point Amit (A-1) exhorted to the other two accused "*pehle isi ka kaam tamaam kar dete hain*" (referring to Jitender). A-1 then brought a pair

of tailoring scissors from the tailoring factory (adjoining the house of the elder brother of PW-2 and stabbed Jitender on the left side of his chest. Jitender collapsed as a result. Even during this time PW-1 was being held by A-2 and A-3. Thereafter all three accused persons fled away. Upon hearing the commotion Giriraj (PW-2) is stated to have come down stairs and helped PW-1 to take his brother Jitender to the SGM Hospital, Mangol Puri, Delhi on a motorcycle.

5. It is stated that PW-2 who took the deceased to the hospital met PW-24. The blood stained clothes of PW-2 were taken into possession by the Investigating Officer (IO) (PW-28). The post-mortem examination on the body of the deceased Jitender was conducted by Dr. Manoj Dhingra (PW-27) along with Dr. Munish Wadhawan (PW-7). It showed that there was one incised penetrating wound of size 2x .7 cm, wedge shaped with one angle acute and other rounded obliquely placed on front of left side of chest 9 cms below left nipple and 7 cms from mid line. It was noticed on exploration that underlying skin, subcutaneous tissues and muscles were cleanly cut. Injury track was running backwards, medially and upwards with extensive blood extravasation in surrounding tissues, passing through 5th left inter-coastal space and piercing anterior wall of left ventricle of heart. Total depth of wound was about 10 cm. The cause of death was opined as 'hemorrhagic shock as a result of injury to the heart caused by single edged sharp weapon'. All injuries were antemortem in nature. By a supplementary report Dr. Manoj Dhingra (PW-27) opined that the injury noticed on the deceased was possible by the scissors that were recovered at the instance of accused Amit (A-1). Further, the blood stains on the scissors were found to match the

blood group of the deceased.

6. 28 witnesses were examined by the prosecution. There were 2 Court Witnesses CW-1 & CW-2 regarding the age of A-2.

7. The story of the defence as put to PW-1 in his cross-examination was that PW-1 and his brother Jitender used to talk to the daughter of Ram Niwas (PW-5) which led to an alleged dispute between the family of PW-5 and the family of the deceased Jitender. This was sought to be projected as the real cause for the incident. This was also because the phone from which the missed calls were received by PW-1 was the phone belonging to Ram Niwas (PW-5) which was being used by his son Ajay (PW-4).

8. However, the Trial Court noticed that despite a lengthy cross-examination of PW-1, nothing fruitful could be elicited which could support the above theory put forth by the accused. In fact PW-5 and his son PW-4 supported the case of the prosecution which was that PW-1 and his brother Jitender were working with the accused persons at their tailoring factory and had left work as they were not satisfied with the payments. According to the prosecution the quarrel was on the issue of payment between PW-1, his brother the deceased Jitender and the accused persons. The Trial Court therefore concluded that “while PW-1 Karan had left the job, certain money was due to be paid by the accused party to the PW1 Karan and the deceased and there was a dispute between the rival parties over the payment of money which can very well be treated as the motive for the commission of the offence.”

9. The Trial Court noticed that PW-1 described the incident in a cogent and convincing manner and the sequence of events had been established and proved by the prosecution. It accordingly held that the prosecution had duly proved the charges under Sections 302/34 IPC against all three accused beyond a shadow of doubt.

10. This Court has heard the submissions of Mr. K. Singhal, learned counsel for the appellants and Ms. Radhika Kolluru, learned APP for State.

11. Much of the submissions of Mr. Singhal have centred around the nature of the offence particularly since the testimony of PW-1, who is an eyewitness, has been unable to be shaken in his cross-examination by the defence. He has indeed spoken clearly and cogently as to how the incident took place. The recovery of the blood stained scissors at the instance of A-1 and the blood matching the group of the deceased has further strengthened the case of the prosecution as far as A-1 is concerned.

12. Giriraj (PW-2) arrived at the scene after the stabbing of Jitender had already taken place. When PW-2 came downstairs he saw Jitender lying on the ground in an injured and unconscious condition. Therefore only PW-1 was the eye witness to the incident.

13. If one carefully studies the evidence of PW-1, it becomes apparent that he was the person who was in fact called down stairs by A-2 after he returned the latter's missed call. When -1 came down stairs, he was beaten by the three accused with "fist and leg blows". This means that at that stage none of the three accused was armed. One cannot therefore attribute to any

of the accused, at that stage, any intention other than to subject PW-1 to some beatings.

14. The second aspect of the matter is that Jitender was not supposed to be in the picture at all. Hearing the noise of the quarrel he happened to come down stairs. When he came down stairs, PW-1 was being held by A-2 and A-3. PW-1 continued to be held by them and this led Jitender to try and rescue PW-1 from the clutches of A-2 and A-3. The exhortation regarding finishing off Jitender was given by A-1. It was A-1 who ran into the factory to fetch the scissors. Clearly, therefore, neither A-2 nor A-3 can be said to have shared a common intention to kill Jitender.

15. As far as A-1 is concerned, he too was not armed to begin with. Noticing that Jitender was trying to rescue PW-1, A-1 gave an exhortation that Jitender should first be taken care off. In that rage he went into the tailoring factory, brought the scissors from there and gave a single stab blow to Jitender on the left side of his chest. A-1 acted at the spur of the moment. The killing was certainly not premeditated although, A-1 can be attributed the knowledge that the injury caused by the scissors at the vital part was likely to cause death.

16. As far as causing the fatal injury to the deceased is concerned, A-2 and A-3 did not share any common intention with A-1. Further A-1 himself did not intend to do that to begin with. Their focus was essentially on PW-1 who fortunately did not suffer any serious injury apart from receiving fist and leg blows. This also has to be viewed in the context of what PW-2 disclosed in his cross-examination. He stated that there were about 70-75 persons who

had attended the birthday function. It was attended by PW-1 and Jitender as well. PW-2 stated that A-1 had also been invited to the said party and had taken meals on the roof. He stated “the deceased Jitender was also eating meals with accused Amit.” This is an indication that A-1 perhaps did not have any enmity with Jitender as such and that Jitender just happened to come down on hearing the quarrel between PW-1 and the three accused.

17. Given the overall sequence of events as described by PW-1, the Court is not convinced that there was any pre-meditated plan even by A-1 to commit the murder of deceased Jitender. The offence even as described by the prosecution through the version of PW-1 answers the description of culpable homicide. It appears to fall in Exception 4 to Section 300 IPC which brings it within the ambit of culpable homicide not amounting to murder. Further, this Court is of the view that the said offence can be attributed only to A-1 and not to A-2 or A-3. The punishment for the offence would be under part II of Section 304 IPC since it is an act done with the knowledge that it is likely to cause death but without the intention to cause such death.

18. Consequently, the Court acquits A-2 and A-3 for the offence under Section 302/34 IPC and converts the conviction of A-1 from one Section 302/34 IPC to one under Section 304 (II) IPC.

19. As far as the sentence is concerned it is seen from the nominal roll of A-1 that as on 26th October, 2017, without remission, A-1 had undergone a total sentence of 5 years, 4 months and 29 days and his jail conduct has been satisfactory. The Court accordingly sentences A-1 to imprisonment for a period of 6 years without remission. The order on sentence passed by the

Trial Court stands modified accordingly.

20. As far as A-2 and A-3 are concerned, their bail bonds stands discharged.

21. The appeal and application are disposed of accordingly.

S. MURALIDHAR, J.

I.S. MEHTA, J.

NOVEMBER 21, 2017

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