

\$~R-9

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

+ CRL.A. 1497/2014

SHER SINGH @ SHERU Petitioner
Through: Mr.Suresh Kumar, Advocate

versus

THE STATE (N.C.T) OF DELHI Respondent
Through: Ms.Kusum Dhalla, APP for State

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE I.S.MEHTA

% **ORDER**
11.10.2018

1. The present appeal has been preferred by the appellant-convict to assail the judgment dated 08.05.2013 passed by the learned Special Judge, NDPS-2, Central District, Tis Hazari Courts, Delhi in SC No. 03/12 titled State v. Sher Singh @ Sheru arising out of FIR No.288/2011, under Section 302 IPC, registered at Police Station-Burari. By the impugned judgment the appellant stands convicted under Section 302 IPC and vide order on sentence dated 28.05.2013 he has been sentenced to Rigorous Imprisonment for life and fine of Rs.10,000/- under Section 302 IPC and in default of payment of fine, he shall undergo Simple Imprisonment for a period of two

months.

2. The brief facts of the case has been taken note of in the impugned judgment which read as follows:

“The brief facts of the prosecution case are that in the intervening night of 18/19.09.2011 near Sinchai Nala, accused Sher Singh @ Sheru committed murder of Surender Singh s/o Kedar Singh, FIR was registered u/s 302 IPC. The investigation was taken over by SI Vinod Kumar. The dead body was identified as that of Surender Singh and after identification proceedings, the post-mortem was conducted. During the investigation, the statements of witnesses were recorded. Accused Sher Singh was arrested on 21.09.2011. His disclosure statement was recorded and in pursuance thereof chance prints were lifted from the scene of occurrence. The clothes worn by the accused at the time of commission of offence were also recovered at the time of commission of offence were also recovered at his instance and were sent for scientific analysis. FSL result and finger print report were collected and after completion of investigation, accused was charge sheeted.”

3. The submission of learned counsel for the appellant, on instructions from the appellant, are that the appellant does not dispute the factual findings returned by the trial Court in so far as the involvement of the appellant in the commission of the culpable homicide of the deceased is concerned. The only

argument advanced by the learned counsel for the appellant is that the present case does not fall under Section 300 read with Section 302 IPC as the culpable homicide was not intentional, and that the conviction of the appellant should be converted to one under Section 304 IPC. For this, the submission of learned counsel for the appellant is that the case falls under exception 4 of Section 300 IPC.

4. From the testimony of PW-4 and PW-5, the mother and father of the deceased, it emerges that the appellant and the deceased were friends who used to regularly consume liquor in the evening. In fact, the parents of the deceased were not happy with the friendship that the deceased had with the appellant. On the fateful day i.e. 18.09.2011, at about 8 pm, the accused and the deceased went, as usual, to consume liquor. The prosecution has produced three other last seen witnesses who are PW-4, PW-10 and PW-11- who stated that they had seen the accused and the deceased proceed to the place of occurrence viz, the Sinchai Nala at about 9.15 pm and at 11.00 pm. After the recovery of the dead body on the next day morning i.e. on 19.09.2011 at 6.00 am, on the statement of the mother of the deceased PW-4, the rukka was recorded and FIR was registered. The appellant absconded and was arrested only on 21.09.2011.

5. The submission of learned counsel for the appellant is that upon the post-mortem of the dead body of the deceased, alcohol to the extent of 17 mg per 100 ml was found in his blood. This establishes the fact that the deceased had consumed alcohol before his demise. Learned counsel for the appellant

has also drawn the attention of the Court to the injuries found on the body of the deceased, which were as follows:

1 Two grazed abrasions of size 2 x 1.25 cm and 2 x 2 cm over left side forehead.

2 Few tiny abrasions scattered over tip of nose and left ala nasii with contusion around.

3 Diffuse bruise 6 x 4 cm over front of left shoulder.

4 There were four contusion lines placed obliquely over middle fronto lateral aspect of left arm, parallel to each other about 0.5 to 01 cm apart each other of individual size about 6 to 8 cm long and 1 cm wide.

5 Diffuse bruises 9 x 8 cm and 11 x 6 cm over right scapular regions and left side of lower back of chest respectively.

6 There were multiple scattered scratches over both mandibular regions right side neck irregularly.

7 Diffuse bruise 5 x 3 cm just behind the right ear.

8 Multiple contused abrasions over right elbow.

All abrasions were reddish brown in colour and bruises were reddish in colour.

On internal examination, there was faint subscalp bruising over frontal region. All neck structures were intact. Both lungs were profusely oedematous, ballooned up, covered the heart completely. On cut sections, both lungs ooze blood tinged massive froth. There was about 150 ml of liquid mixed with sand, grass pieces and other small vegetation pieces and one small snail in the stomach. Faint alcohol like smell was present

in the stomach contents.

The opinion of the examining doctor was:

“All injuries were ante mortem in nature caused by blunt force impacts and were consistent with assault. Cause of death was asphyxia consequent upon antemortem drowning. In view of the findings the drowning was consistent with homicidal in nature. Time since death was about 36-37 hours.”

In this regard, reference may be made to the testimony of PW-20 Dr.Kulbhushan Goyal.

6. The submission of learned counsel for the appellant is that the external injuries on the body of the deceased do not show a murderous attack on him by the accused. The cause of death was asphyxia due to drowning. The submission of learned counsel is that the same could have been caused on account of the inebriated condition of the deceased, in the sudden fight that erupted in the heat of passion between the accused and the deceased while they were drunk.

7. Learned counsel submits that there was no premeditation, since no deadly weapon was used in the commission of culpable homicide. The two had left the home of the deceased with the knowledge of the mother of the deceased at about 8.00 pm, as usual, to consume alcohol. They were both friends and there was no motive for the accused to commit the murder of the deceased.

8. Our attention has also been drawn by the learned counsel to the MLC of the accused which was conducted upon his arrest on 21.09.2011. The same shows that even he had suffered injuries which were as follows:

- “1) Old abrasion on left knee (healing) size approximately 1cm x 1cm.
- 2) Old abrasion on right elbow (healing) size approximately 1cm x 0.3 cm.
- 3) Multiple linear old abrasion on right arm.
- 4) Multiple linear old abrasion on back.”

In this regard reference has been made to the testimony of PW-6 Dr.Surender Kumar who exhibited the MLC of the accused as Ex.PW-6/A. The submission is that the abrasions were old, but healing. Thus, the said injuries had not yet fully healed when the MLC was conducted. Since the incident happened on the night on 18-19/09/2011 and the MLC was conducted on 21.09.2011, in the span of about two days, the said injuries appeared old (as opposed to fresh), but still had not completely healed. Learned counsel submits that this shows that there was a sudden quarrel between the accused and the deceased and the injuries were not only one sided i.e. on the body of the deceased. He further submits that there is nothing to show that the accused took undue advantage, or acted in a cruel or unusual manner in the commission of the crime.

9. Learned counsel has drawn the attention of the Court to the judgment of this Court in ***Sanjay Saha @ Sanju v. State***, being CrI.A.1096/2015,

decided on 02.07.2018 in a similar factual matrix, whereby this Court converted the conviction of the appellants from one under Section 302 IPC to one under Section 304 Part I IPC.

10. We have also heard the submissions of Ms.Dhalla, learned APP. She has supported the impugned judgment.

11. Having scrutinized the impugned judgment and considered the submissions of learned counsels, we are of the view that the appellant has been able to probablize the defence that the culpable homicide of the deceased resulted due to a sudden fight or a sudden quarrel between the accused and the deceased. This is probablized by the fact that both the deceased and the accused were friends who would regularly consume alcohol. The bonding between the accused and the deceased also appears to be strong inasmuch, as, despite the parents of the deceased resisting the said friendship, the deceased continued to pursue the same with the accused. The accused and the deceased had left the home of the deceased at about 8.00 pm to the knowledge of the mother of the deceased. Both the accused and the deceased were also seen by the other last seen witnesses. Thus, there was no endeavour on the part of the accused to cover his steps while taking away the deceased with him. Since the accused and the deceased were friends, it appears that there was no motive for the commission of a crime. The prosecution has failed to lead any evidence in this respect during the trial.

12. The nature and number of injuries found on the body of the deceased

shows that none of them were grievous, which probabalizes the fact that they were inflicted as a result of scuffle, and were not intended to cause the death of the deceased. There was no pre-meditation in the commission of the crime inasmuch as, firstly, no evidence in this regard has been led by the prosecution and, secondly, because no dangerous weapon was used in the commission of the crime. It appears that both of them went, as usual, to consume liquor to the Sinchai Nala and it appears that on account of a sudden fight in the heat of passion a quarrel broke out between them which resulted in the drowning of the deceased and lead to his death due to asphyxia. The fact that a fight had broken on between them is probabalized by the injuries found on the body of the accused, which had not yet healed when he was got medically examined about 3 days after the incident. The deceased had consumed alcohol and, presumably the accused too was inebriated when the sudden fight may have broken out between the two. There is nothing to show that the appellant took undue advantage or acted in a cruel or unusual manner at the time of commission of the offence. The evidence brought on record and the circumstances do not establish the presence of the intention on the part of the accused, to commit the culpable homicide of the deceased.

13. Keeping in view the aforesaid circumstances, giving the benefit of the doubt to the appellant, we set aside the conviction of the appellant under Section 302 IPC and substitute the same with his conviction under Section 304 Part I IPC.

14. The appellant was about 24 years at the time of commission of the offence. When he was sentenced on 28.05.2013, he was 27 years of age and his family comprised of his widow mother, one sister and two brothers. There were no reported instances of involvement of the appellant in other criminal activity.

15. Keeping in view the aforesaid facts, we are inclined to sentence the appellant to 7 years of Rigorous Imprisonment or the period undergone, whichever is larger. The fine imposed upon the appellant by the trial Court is, however, maintained. In the aforesaid circumstances, if the appellant has already undergone the sentence of 7 years or more of Rigorous Imprisonment, he should be set free forthwith, unless he is required to be detained in any other case.

16. The appeal stands disposed of.

VIPIN SANGHI, J

I.S.MEHTA, J

OCTOBER 11, 2018

sr