

5

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

Reserved on: 24th July, 2018
Decided on: 01st August, 2018

CRL.A. 1166/2017

GULFAM AND ANR

..... Appellants

Represented by: Mr. Mohd. Parvez Dabas,
Advocate.

versus

THE STATE OF GOVT OF NCT OF DELHI

..... Respondent

Represented by: Mr. Ashok Kr. Garg, APP for
the State with SI Mukesh
Yadav, PS Jagat Puri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, Gulfam and Mustar Jahan challenge the impugned judgment dated 11th October, 2017 convicting them for the offences punishable under Sections 448/304-II/34 IPC in FIR No. 222/2012 registered at PS Jagat Puri and the order on sentence dated 30th October, 2017 directing them to undergo simple imprisonment for a period of seven years and to pay a fine of ₹5000/-; in default thereof to undergo simple imprisonment for a period of three months for the offence punishable under Section 304 Part-II/34 IPC and rigorous imprisonment for a period of six months for the offence punishable under Section 448/34 IPC.
2. Assailing the conviction, learned counsel for the appellants contends that there was no allegation of any head injury. Furthermore, as per the postmortem report, the deceased Mohd. Jamil was suffering from broncho-pneumonia and the same has been proved during the cross examination of Dr. Aistesh Bajwa (PW-1).
3. Process of law was set into motion on 2nd June 2012 at around 12:40

6

P.M. when a call was received pertaining to a quarrel having taken place at Khureji Khas, Kasai Wali Gali, near MCD School. Aforesaid information was lodged by DD No.28A (Ex.PW-3/A) and was assigned to SI. C.P Singh (PW-14) who along with Ct. Lakhan (PW-10) went to the spot. They found dead body of a man lying on the ground floor at House No.92, Khureji Khas, Kasai Wali Gali, Delhi and the household articles were scattered. Mehrunisha was also present at the spot. In the meantime, Beat Ct. Samman Khan (PW-13) also reached the spot. Crime team consisting of photographer Narender (PW-6) and finger print proficient under the supervision of SI Karamveer came to the spot. Dead body was sent through Ct. Samman Khan alongwith request letter Ex.PW-14/A.

4. Statement of Mehrunisha was recorded vide Ex.PW-2/A wherein she stated that she stays at H.No 92, Kasai Wali Gali, Khuraji Khas, Delhi with her husband and children. She belongs to Islamnagar, Kasba-Katholi, Thana-Katholi, Jila Muzafarnagar, Uttar Pradesh. She has four kids out of which two are girls and two are boys. Her husband was having breathing problems since 5-6 months. She was getting his treatment done at the Kingsway Camp Hospital. Whenever her husband used to feel better, he used to put a biryani stall. Earlier they used to stay in Kotla Village. She had taken the abovementioned house on rent for ₹3,000/- per month. On 24th May 2012, the day she had moved into the house, she had given the landlady Mustar Jahan W/o Jafar Mohammad, ₹700/- and told her that she would be paying monthly rent from next month onwards. On 1st June 2012 in the evening, the landlady Mustar Jahan came to her room and told her to move out of her house as she had to rent it out to a factory worker. She asked Mustar Jahan to give some time to find a new place to stay but Mustar Jahan

2

refused to do so and asked her to move out by the next day. On 2nd June 2012 at around 10:30 A.M., Mustar Jahan's son Gulfam disconnected the electricity of her house due to which she went to Mustar Jahan's room to enquire about the same. Gulfam then said that '*hamari light hain, hum aise hi karengey, tum makkan khali karo*'. She pleaded in front of them to connect the light as her husband was unwell and she would move out as soon as she finds a room on ground floor, after which she came back to her room. After a while, Mustar Jahan and Gulfam came to her room and started throwing her things out of the house and told her to move out right away as they had taken an advance from a factory worker. She then requested them for some time and asked them to not throw her stuff out and tried to stop them from throwing her articles. They pushed her as a result of which she fell on the floor. Then both of them dragged her husband out of the room. Her husband started begging them to leave him as he was unwell but they didn't listen and instead Mustar Jahan held his hands from the back while Gulfam kicked and punched him which made him unconscious. When she raised an alarm both of them ran away. Thereafter, she called the police and by the time they arrived, her husband had passed away.

5. On the basis of the aforementioned statement, FIR No.222/2012 (Ex.PW-3/B) was registered at PS Jagat Puri for the offences punishable under Sections 304-II/448/34 IPC. Further investigation was handed over to Insp. O.P Jakhar who came at the spot around 7-7:15 PM where he met Mehrunisha who told him that Gulfam and Mustar Jahan had killed her husband. Insp. O.P Jakhar along with SI C.P Singh went to house No. 92, Third floor, Khureji Khas, Kasai Wali Gali, Delhi where Gulfam and Mustar Jahan were found present. Gulfam was arrested vide arrest memo Ex.PW-

10/A and his personal search was conducted vide memo Ex.PW-10/B. His disclosure statement was recorded vide Ex.PW-10/C. Mustar Jahan was arrested vide arrest memo Ex.PW-12/A and her personal search was conducted vide memo Ex.PW-2/F. Her disclosure statement was recorded vide Ex.PW-4/C. After completion of investigation, charge-sheet was filed.

6. Mehrunisha (PW-2) deposed in sync with the statement made before the police. She further stated that when her brother Ikrar (PW-4) and her son Mohd. Shakir went to the appellants to talk to them, Gulfam abused them and pushed Ikrar (PW-4) due to which he fell down on her son. Mustar Jahan told her brother "*tu zyaada hamdardi lekar aaya hain, teri bhen kamra kyo nahi khali kar rahi hain*". Thereafter, her brother and son came back. They were followed by the appellants and daughter of Mustar Jahan, Khatija into her room. Mustar Jahan told her children that Mehrunisha would not vacate the room this way and asked them to throw out her goods. When she objected, Khatija pulled her hair and Mustar Jahan slapped her and started throwing her goods out of the house.

7. Mohd. Ikrar (PW-4) and Mohd. Shakim (PW-8) corroborated the testimony of Mehrunisha.

8. Dr. Aistesh Bajwa (PW-1), Senior Resident, Mortuary, Aruna Asaf Ali, Government Hospital stated that on 4th June 2012, he conducted postmortem examination on the dead body of Jamil S/o Sultan aged about 45 years. On examination, clothes on the body were found intact. The dead body was poorly built; rigor mortis was absent. Postmortem staining was present on the back. Following external injuries were found:

- i. Reddish brown abrasion 4.2 x 3.3 cm was present at right gluetial reason, at outer aspect, 20.1 cm below anterior

9

superior iliac spine.

- ii. Palpable swelling was present at right fronto parietal region of scalp. On dissection infiltration of blood was present.

9. On internal examination, sub scalp bruise was present at right fronto parietal region. Bones were found intact. Multiple contusion was present at right fronto parietal region with cerebral oedema (sulci narrowed and gyrus flattened). The bilateral lungs were adherent to the chest wall. Multiple patches were present with area of consolidation and fibrosis. On dissection purulent discharge was present. It was opined that the injuries mentioned were ante-mortem in origin caused by blunt force/surface impact. The cause of death was opined to be compression of brain. Time since death was about 2 days. He prepared the postmortem report which was proved vide Ex.PW-1/A. His detailed subsequent opinion was proved vide Ex.PW-1/C wherein he opined that the features of broncho-pneumonia as mentioned in this histopathological report had led to asphyxia which along with head injury led to comato-asphyxia which was sufficient to cause death in an ordinary course of nature. His subsequent opinion dated 18th January 2013 was proved vide Ex.PW-1/D wherein he opined "head injuries mentioned in the postmortem report per se are sufficient to cause death in an ordinary course of nature in this case". In his cross examination he stated that it is correct that in case of prolonged illness of chronic broncho pneumonia, if remained untreated, may lead to death of the patient but it was wrong to suggest that it may also lead such a patient into a state of coma.

10. Gulfam in his statement recorded under Section 313 Cr.P.C stated that he was innocent and had been falsely implicated in the present case. When this incident occurred, he had come from his shop and was taking rest in the

10

house. After hearing noise, he came down and saw that Mohd. Jamil was lying on the floor. Some neighbours had also gathered there. He called his father who along with some neighbours put Jamil on a cot and thereafter he was sent to the shop by his father.

11. Mustar Jahan in her statement recorded under Section 313 Cr.P.C stated that she was innocent and had been falsely implicated in the present case. She stated that Mehrunisha took one room of her house on rent on 24th May 2012. Mehrunisha took this room for only 7-8 days and paid only for 7-8 days which amounted to about ₹700/- and she promised them to vacate the house after the abovementioned duration. Mehrunisha was going to shift to a room in House No 62, Kasai Wali Gali, Delhi and she told her that her husband had expired. Some of her household articles were inside the rented room and some were lying outside. Since then she did not vacate the room, nor paid the rent or electricity bill.

12. Mohd. Iqbal (DW-1) stated that on 28th or 29th March 2012, Mehrunisha came to his House No. 62, School Waali Gali, Khureji Khas, in search of a room. He showed her an empty room which she was ready to take and informed him that she would come to reside with her husband in 2 to 4 days. On 2nd June 2012 at about 8.00-8.30 AM, she came to the room and took the key of the abovementioned room. She gave him ₹500/- in advance and then after putting some clothes in the room, she went to take remaining articles. When he came back from work in the evening, he learnt that her husband had expired as he was ill. After two days Mehrunisha came back to take her belongings and advance and informed him that she would be retaining her previous room.

11

13. High Court of Rajasthan in the decision reported as 2009 SCC OnLine Raj 3492 : (2010) 1 RLW 631 State v. Goru while considering the issue whether the offence in such a situation would be culpable homicide not amounting to murder punishable under Section 304 Part-II IPC or grievous hurt punishable under Section 325 IPC or hurt punishable under Section 323 IPC and observed as under:

16. In view of the above referred to authoritative passages on Science of Medical jurisprudence it cannot be gainsaid that enlarged and diseased spleen itself is sensitive and it is vulnerable and susceptible to rupture by a slightest force. Now, therefore, the question which requires to be considered is as to whether the accused have committed the offence of culpable homicide not amounting to murder punishable under Section 304 Part II of IPC or grievous hurt punishable under Section 325 of the IPC or hurt punishable under Section 323 of the IPC.

17. A similar question arose before the Calcutta High Court way back in 1920 in the case of Emperor v. Saberali Sarkar, AIR 1920 Calcutta 401. In that case, the accused, having found that a young man had approached his kept mistress for the purpose of having sexual intercourse with her, thought that he would be justified in teaching him a lesson by giving him a good thrashing. He accordingly sent for the brother of the young man, and in the presence of the villagers gave him a good beating by kicks and blows, which resulted in his death. The deceased was of a weak constitution and had an enlarged spleen, and it appeared that when the villagers told the accused that he was about to kill the young man by his kicks and blows, he observed that the deceased was merely pretending and gave him some more strokes with a cane. The accused was thereupon charged with an offence under S. 304. The jury found him guilty under S. 323. The Sessions Judge disagreed with the jury and being of opinion that the accused was guilty under S. 325, referred the matter to the High Court

12

under Section 307 of the Old Code. In the aforesaid fact situation, the High Court held that in the circumstances of the case it was doubtful whether the accused had either intended or knew it to be likely that he would cause grievous hurt and as the case seemed to be on the border line between Ss. 323 and 325 the accused might be given the benefit of the doubt and should be convicted of an offence under S. 323.

18. In the case Ramakrishna Panicker v. State of Kerala AIR 1959 Kerala 372, before Kerala High Court the victim was having a spleen of diseased condition which got ruptured. In the said fact situation, Kerala High Court held that when the injury is not serious and there was no intention to cause death or grievous hurt, nor did the accused have knowledge that it was likely to cause grievous hurt or death, he is guilty of causing hurt and not death even though death is caused. It was further held that therefore where from the circumstances of the case it is impossible to draw an inference that the accused would have intended to give the deceased anything more than a beating or thrashing to teach him a lesson for using foul language to him, a police officer, it would not be possible to attribute to him the requisite intention or knowledge merely because of the diseased condition of the spleen of the deceased which got ruptured. In such circumstances his conviction under Section 304 cannot stand.

19. A similar question arose before a Division Bench of Allahabad High Court in the case of Sri Prakash v. The State, 1990 Cr.LJ 486. In that case, the beating given by the accused to a child has resulted into the death of the child. However, there was no visible injuries found on the dead-body. Beating given to the child, therefore, could not be severe. On medical evidence, spleen of the child was found to be ruptured and, therefore, enlarged spleen could only be the reason of death. The accused was not knowing of the enlarged spleen of the deceased. On the fact situation, the Division Bench held that the accused could not be held guilty under Section 304 of IPC

and further held that conviction will be proper under Sec. 323 and not under Sec. 325 of IPC.

20. Applying the principles laid down by three High Courts in the above referred judgments and the passages quoted by us from the Medical jurisprudence of Dr. Modi and Dr. Jhala and Raju to the facts of the present case, it cannot escape from the conclusion that the deceased Onkar died in an ordinary incident which has resulted into quarrel between the complainant and the accused party and accused A-1 Goru and A-3 Hajari got excited and gave lathi blows to the deceased whose spleen as per the medical evidence was ruptured as it was enlarged and diseased. Therefore, neither intention nor knowledge can be attributed to the accused for causing murder or culpable homicide not amounting to murder of deceased Onkar. However, the deceased has also received multiple fractures of 7th, 8th and 9th ribs, therefore, at the most the offence under Section 325 of IPC is proved against accused A-1 Goru and A-3 Hajari.

14. Case of the prosecution from the statement of Mehrunisa is that Mustar Jahan caught hold of the hand of the deceased and Gulfam kicked and punched him. Thus it cannot be held that the appellants assaulted the deceased with an intention to kill him. Though in the subsequent opinion the postmortem doctor opined that the head injuries perse were sufficient to cause death in the ordinary course of nature but the doctor also opined that features of broncho-pneumonia has led to asphyxia which along with the head injury lead to comato asphyxia which was sufficient to cause death in the ordinary course of nature. It is thus evident that because the deceased was suffering from broncho pneumonia it aggravated the cause of death of the deceased.

15. In view of the facts discussed above and the law laid down conviction of the appellants is converted to one for offence punishable under Section 325 and 448 read with Section 34 IPC. As per the nominal rolls appellant Gulfam has undergone imprisonment for a period of 3 years 3 months and 15 days including remissions. Further Mustar Jahan has undergone imprisonment for a period of nearly 1 year 3 months. Thus the sentence of the appellants is modified to the period undergone.
16. Appeal is disposed of. Superintendent, Central Jail, Tihar is directed to release the appellants forthwith if not required in any other case.
17. Copy of this order be sent to Superintendent, Central Jail, Tihar for updation of the Jail record.
18. Trial Court record be sent back.

Mukta Gupta
(MUKTA GUPTA)
JUDGE

AUGUST 01, 2018
'yo'