

\$~Part-B (R-10)

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

+ **CRIMINAL APPEAL NO. 74/2000**

Date of decision: 6th August, 2015

KRISHAN KUMAR AND ANOTHER Appellant

Through Mr. M.L. Yadav and Mr. Lokesh Chandra, Advocates for appellant-Krishan Kumar.

Ms. Aishwarya Rao, Advocate for appellant Rakesh.

Versus

STATE Respondent

Through Ms. Aashaa Tiwari, APP with Inspector M.L. Meena and SI Ramesh Kumar, PS-Sultanpuri.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

R.K.GAUBA, J. (ORAL):

By judgment dated 11th January, 2000, the Additional Sessions Judge, Delhi on conclusion of the trial in Sessions Case No.79/1998, found the two appellants guilty and convicted them for the offence under Section 302 read with Section 34 of the Indian Penal Code, 1860 (IPC), as charged, for the murder of Bharat, a young boy aged about 18 years, committed as a result of the injuries suffered by him in an incident that occurred at about 11.30 A.M. on 6th November, 1997 near House No. H-102, Prem Nagar-I, Gali No.3 within the jurisdiction of police station Sultanpuri. By order on

sentence dated 12th January, 2000, the learned trial Judge awarded life imprisonment with fine of Rs.2,000/- each to the two appellants directing that in case of default in payment of fine, the appellants would further undergo Rigorous Imprisonment for four months.

2. The case was registered by the police on the basis of the statement (Ex.PW1/A) of Ganga Saran (PW1), father of the deceased Bharat. PW1 was a resident of the aforementioned house in Prem Nagar-I. He was working as a Gardner in Delhi Development Authority (DDA). It is stated that on the date in question i.e. 6th January, 1997, he was present in his house being on leave. During the course of trial, questions were raised as to the possibility of he (PW1) being on leave and his absence from the duty on the said date, inasmuch as it was a working day. Though, efforts were made to discredit Ganga Saran (PW1) on this count as to his claim with regard to being on leave, no material was brought forth to show facts to the contrary.

3. The statement Ex.PW1/A was recorded by Head Constable Zhabar Singh (PW11), who made an endorsement (Ex.PW6/A) and got the FIR (Ex.PW6/B) registered in the police station Sultanpuri at about 6 P.M. on the same date.

4. According to the prosecution case, the initial intimation about the incident had been received in Police Control Room (PCR) sometime before 11.45 A.M. on 6th November, 1997. The information was relayed by PCR to the police station at 11.45 A.M. and came to be logged vide DD Entry No.14A (Ex.PW7/A). From the police station, Head Constable Zhabar Singh (PW11) was dispatched, for necessary action, with Constable Anandpal. In the meantime, the PCR had been activated and Head Constable Karan Singh, In-charge of the PCR van available nearby is stated to have reached the place of occurrence. He found Bharat (the

victim) lying in an injured state. He rushed the victim to Deen Dayal Upadhyay Hospital (DDU Hospital). According to the record, the victim was brought by Head Constable Karan Singh of PCR to DDU Hospital sometime around 1.20 P.M. On the same afternoon, Medico Legal Report (MLC) was recorded by the examining medical officer. Since the said medical officer is no longer available, the MLC has been proved at the trial by Mr. JC Vashisht, Record Clerk (PW17) vide Ex.PW17/A.

5. The MLC shows that when the victim was brought to the emergency of the DDU Hospital, he was almost in an unconscious state with pupils semi-dilated. Amongst the injuries recorded in the MLC by the medical officer, there was swelling on the right temporal region besides active bleeding from right ear. The victim was referred to surgery for emergency treatment.

6. It may be mentioned here itself that the victim remained hospitalised, under treatment, and was shifted to Ram Manohar Lohiya Hospital (RML Hospital) sometime on 11th November, 1997. As per the death summary (Ex.PW18/B) proved by Mr. Ram Niwas (PW18), Medical Record Clerk, in absence of the author of the document, the victim had suffered cardiac arrest in RML Hospital at 5.45 P.M. on 13th November, 1997 and he died at 6 P.M. on the same day despite all efforts for resuscitation.

7. The prosecution claimed in the charge sheet that the incident had been witnessed, amongst others, by Ganga Saran (PW1), father of the victim, who at that time was present in the house. According to the sequence of events narrated in the FIR, on 6th November, 1997 at about 11.30 A.M., Ganga Saran (PW1) had heard noise of “*Bachao-Bachao*” and when he came out, he saw Krishan Kumar (A-1) and Rakesh (A-2) assaulting his son Bharat with bricks in their hands. He stated that Bharat

was hit with bricks by the two appellants 2-3 times and thereafter his head was hit against the wall (*bheet*). The first informant i.e. Ganga Saran (PW1) also stated that the assailants A-1 and A-2 were saying while beating Bharat that this was the result of talking to Neeraj, a girl, apparently taking exception to the conduct of the victim in attempting to be friendly with her.

8. Neeraj (PW3) was stated to be present at the scene and had witnessed the entire sequence of events. However, when produced in the witness box, she was not supportive of the prosecution case. She was declared hostile and subjected to cross-examination by Additional Public Prosecutor but nothing fruitful in favour of the prosecution case could be brought out.

9. According to the prosecution, the appellants A-1 and A-2 while hitting Bharat with bricks on his head were saying that he could not be saved even by 'God'. Bharat had fallen down unconscious. Ganga Saran (PW1) stated that since he did not have any means of transport available, he had gone away to fetch a three wheeler scooter (TSR). In the meantime, the vehicle of PCR had come to the scene and shifted injured Bharat to hospital. PW1 followed them in the TSR to the hospital.

10. The appellants were arrested in the course of investigation. The report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) filed by the police sought their trial for the offence under Section 302 IPC, inasmuch as the victim had died as a result of the injuries suffered. The prosecution relied on besides the evidence of Ganga Saran (PW1), the testimony of Meena (PW2), Neeraj (PW3), Usha (PW4) and Malti (PW6). It may be clarified here that Head Constable Zile Singh has also been examined as PW6 and, therefore, he shall be hereinafter referred to as "PW6A".

11. We have already taken note of the fact that Neeraj (PW3) was not supportive to the prosecution. Other witnesses i.e. PW2, PW4 and PW6 also would not confirm the allegation of prosecution. They were examined but disowned their statements given under Section 161 Cr.P.C. However, Usha (PW4) provided some corroboration to the word of Ganga Saran (PW1) by deposing that she had seen the two appellants at the spot where Bharat had suffered injuries. During cross-examination, she went on to state that she had seen the appellants running away from the scene.

12. The deposition of PW1 confirms the entire incident as also the fact that he was an eye witness to the scene. His statement proves the sequence narrated by him in the FIR sometime before 5.30 P.M. as reported to Head Constable Zile Singh (PW6A) on 6th November, 1997. Before we come to the testimony of Ganga Saran (PW1), it may be mentioned that during the course of investigation conducted by Inspector Ranbir Singh (PW16), who had taken over the case after registration of the FIR at the instance of Head Constable Zhabar Singh (PW11), amongst other steps, certain brick pieces lying at the scene had been seized vide memo Ex.PW1/B. There was blood stained soil, which was also seized vide memo Ex.PW1/D. During the treatment in the hospital, clothes of the victim were also gathered as evidence by the Investigating Officer. These exhibits were sent to the Forensic Science Laboratory (FSL), the report Ex.PW16/H whereof, however, does not indicate presence of any blood stains on the brick pieces presented as the weapon of offence. As pointed out by the learned counsel for the appellants, no blood stains are shown to be found on the wall against which the head of Bharat was banged in the course of assault.

13. In the absence of PW2 to PW4 and PW6 not being supportive, except for relying on the statement of Usha (PW4) about she having seen the two appellants running away from the spot, the prosecution rested its

case on the sole testimony of Ganga Saran (PW1). The learned trial Judge found the said evidence of PW1 to be trustworthy and, on that basis, returned the finding of guilty.

14. The learned counsel appearing for the appellants, however, have argued that the above witness (PW1) is not reliable. They submitted that PW1 is an employee of DDA, who was posted in a DDA nursery at Saraswat Vihar, which is about 7-8 kilometres from the place of his residence and would report for duty in Sector 20, Rohini, which is also at a similar distance. They argued that that presence of PW1 in the house at the time of incident is not properly proved by the prosecution. They also submitted that the conduct of PW1 is not natural as his son having been seriously injured, there was no reason why he should not accompany him to the hospital and instead choose to stay back only to follow later. The argument is that the possibility that Ganga Saran (PW-1) was at his workplace and had been called by someone after the incident had taken place cannot be ruled out. The counsel for the appellants referred extensively to the statement of PW1, particularly the part during cross-examination, to show that PW1 took his own time in reaching the hospital. They submitted that his statement in the Court is at variance in material particulars when compared with the statement Ex.PW1/A.

15. Learned counsel for the appellants further submitted that since the weapon of offence i.e. bricks have not been found to have any blood stains and there were no blood stains on the wall as well, the story of the head being hit, or banged against the wall, has not been properly brought out. They further argued that photographs of the place of occurrence were taken during the course of investigation by the crime team, but the same have been withheld and, therefore, an adverse inference should be drawn.

16. We have gone through the testimony of Ganga Saran (PW1). We do not agree with the submissions of the counsel for the appellants that this witness is not reliable. PW1 has given due explanation as to his presence in the house on the date in question. Though efforts were made to discredit his statement with reference to the attendance register in his office, there is no reason why his word as to his presence on account of leave of absence from duty should be disbelieved.

17. It is true that in the statement Ex.PW1/A, PW1 had spoken about hearing the noise "*Bachao-Bachao*" while in the witness box, he used the words "*Maro-Mar*". It is also true that in the witness box, PW1 spoke of he coming out of the house after "sufficient time". But, in our opinion, these contradictions, if they can be called contradictions, cannot result in the witness being disbelieved. These are small variations, which normally do occur on account of natural wear and tear of the memory.

18. We must take note of the fact that Ganga Saran (PW1), father of the victim, upon being repeatedly questioned about the time, has explained his inability to be very clear on the score, referring in this context to his disturbed state of mind consequent upon the occurrence. Given the position in which he was then placed, we view his testimony bearing in mind his disturbed state.

19. The fact that PW1 did not accompany the victim to the hospital has been duly explained by him. He was not a man of means. He did not have any mode of transportation of his own. The evidence of the Investigating Officer has clearly brought out that the place where PW1 was living is an unapproved (unauthorised) colony, where even *pukka* roads were not available. PW1 had to walk for about one and a half kilometre to fetch a TSR. We have the word of Head Constable Karan Singh (PW9), the Officer In-charge of PCR van showing that the van had reached the place

of occurrence within four minutes. Since the condition of the victim was serious, he was immediately taken to the hospital. Thus, before PW1 could return with TSR, the PCR van had moved away with his son to the hospital.

20. The distance between the place of occurrence and the DDU Hospital, where the victim was taken, is about 14 kilometres. The PCR van had moved with the victim from the place of occurrence on way to DDU Hospital sometime around noon time, it had taken about one and a half hour to reach the DDU Hospital. Taking this as the measure, it is quite natural that PW1 thereafter reached the said hospital in the TSR arranged by him (adding to the delay by more than one hour) after about two hours. This would explain the belated arrival in the hospital. This would also coincide with the testimony of Head Constable Zhabar Singh (PW11) that Ganga Saran (PW1) had met him in the hospital where he had recorded his statement vide Ex.PW1/A. PW11, having recorded the statement of PW1 (since the victim himself was unfit for statement), had returned to the spot from where he dispatched the *rukka* (Ex.PW6/A) for registration of FIR at 5.30 P.M. Given the fact that the FIR was registered at 6 P.M., the registration of the FIR was prompt and without any inordinate delay.

21. In the above facts and circumstances, we have no hesitation in accepting the testimony of Ganga Saran (PW1) as wholly reliable. His evidence proves that he was inside the house when he heard heard the noise of some quarrel. He seems to have initially ignored the same, for the reason children were playing outside. Nonetheless, after some time, he came out and saw the two appellants assaulting his son and hitting his head with bricks. He also saw the appellants banging his son's head against a wall.

22. The testimony of Ganga Saran (PW1) stands corroborated by what was noted by the medical officer in the MLC (Ex.PW17/A) and by Dr.K. Goel (PW10), the autopsy doctor, in the post mortem examination report (Ex.PW10/A). Noticeably, the autopsy had brought out a number of injuries corresponding to what were noted initially in the MLC. These injuries included haematoma on right-fronto temporal region in the area of 3''× 2.5''. On internal examination, bruising was found underneath the scalp right temporal region. There was a fisher fracture of right temporal bone extending vertically towards base. The autopsy doctor opined that death had occurred as a result of cranio-cerebral injuries on account of hard blunt object diverted on the head. The injury on the right fronto-temporal region referred to above, in view of the autopsy doctor, was sufficient to cause death in ordinary course of nature.

23. There is no reason why the medical opinion corroborating the word of Ganga Saran (PW1) as to the manner of assault should not be believed. The learned trial judge has found the appellants guilty for the offence of murder punishable under Section 302 IPC on the reasoning that they intended to cause death. Given the evidence on record, however, we are inclined to agree with the submission of the learned counsel for the appellants that intention to cause death cannot be inferred from the facts and circumstances proved. The evidence clearly brings out that children were playing outside. The victim as well as the appellants were boys of similar age. There is nothing on record to show past quarrel or enmity. The only cause referred to is some dispute over the victim trying to communicate with a girl named Neeraj. Though Neeraj (PW3) does not confirm this to be the fact, there is no reason why the version of PW1 with regard to the utterance to such effect should be discredited. From these facts, it can safely be inferred that some dispute over Neeraj (PW3) had

arisen on or about the time of assault. Since children were playing outside, and the noise of quarrel came in the midst of playful sounds, the possibility of the assault occurring in the course of a sudden fight, in the heat of passion, will have to be factored in.

24. Undoubtedly, the injury caused by the appellants was such as was likely to cause death. Since the injury was inflicted voluntarily and intentionally, the acts indulged in by the appellants, sharing common intention, inasmuch as they were aiding and assisting each other, would fall in the second clause of Section 299 IPC (culpable homicide) and could even further travel to the third clause of Section 300 IPC (murder). But given the possibility of the assault occurring in a sudden fight, in the heat of passion, upon a sudden quarrel, it not being the case that the appellants took undue advantage or acted in a cruel or unusual manner, the fourth exception to Section 300 IPC gets attracted. In this view of the matter, the case cannot be treated as one of murder punishable under Section 302 IPC. It gets relegated to the first part of Section 304 IPC i.e. culpable homicide not amounting to murder.

25. For the foregoing reasons, we convert the conviction of the two appellants from the one for offence under Section 302 IPC read with Section 34 IPC to the first part of Section 304 IPC read with Section 34 IPC.

26. The offence for which the appellants now stand convicted was committed in November 1997. Almost eighteen years have passed by. The appellants do not have any other criminal record. At least, the learned Additional Public Prosecutor has not been able to show any other criminal antecedents. The offence was committed in the prime of youth and in a manner which cannot be termed to be pre-meditated. The appellants have remained in custody for over 5 years and if we take into account the period of

remission of 10-11 months, they have suffered incarceration of over 6 years. In these circumstances, we feel that at this distance of time in relation to the incident, the punishment of imprisonment for the period of detention already undergone by them during investigation, trial and appeal would suffice as punishment.

27. We, thus, modify the order on sentence and award the period of detention already undergone as the substantive punishment. We, however, increase the fine from Rs.2,000/- each to Rs.20,000/- each. The fine as imposed by the learned trial Judge, if already deposited, shall stand adjusted. The amount of fine as now payable shall be deposited with the learned trial judge within six weeks, as requested. The fine, upon realisation, shall be released by the learned trial Judge as compensation to Ganga Saran (PW1), in accordance with law.

28. The appeal is disposed of in the above terms.

(R.K.GAUBA)
JUDGE

(SANJIV KHANNA)
JUDGE

AUGUST 06th, 2015
NA