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

+ **CRIMINAL APPEAL No. 132/2011**

% *Date of decision :08th January, 2015*

BHAGWAN SAHAI

..... APPELLANT

Through : Shri Mukesh Sharma, Advocate,
Shri Raj Kumar, Advocate,
Shri Tomar, Advocate and
Shri Manish Tanwar, Advocate

STATE

..... RESPONDENT

Through : Shri Sunil Sharma, APP for the State.

CORAM :

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

JUDGMENT (ORAL)

1. Present appeal has been filed under Section 374 Code of Criminal Procedure against the order of conviction dated 18th December, 2010 and order on sentence dated 24th December, 2010, by which the appellant has been convicted and sentenced to undergo imprisonment for life and to pay Rs.10,000/- as fine and in default of payment of fine to further undergo simple imprisonment for six months for the offence punishable under Section 302 Indian Penal Code. Appellant has also been sentenced to undergo rigorous imprisonment for five years and to pay fine Rs.2,000/- and in default thereby to undergo simple imprisonment for two months for the offence punishable under section 201 Indian Penal Code. Both the sentences were to run concurrently.

2. The facts of the case as noticed by the learned trial court are as under:-

“1. On the night intervening 21-22.10.2009 at about 12:47 am, Police Control Room received a call about at RZ-271, Kakrola Road, Near Dabas Medical Centre. PCR Van Zebra-1 immediately rushed to RZ-271 where one Hari Mohan Meena met PCR officials and told them that murder had occurred in House No. RZ-260A and that it was he who had called the police at 100 number. On this information HC Ramdhari, In-charge PCR proceeded to House No. RZ-260A along with Hari Mohan Meena where some other public persons including accused Bhagwan Sahai and his wife Sharda were found present. Sharda informed HC Ramdhari that she was running a tailoring shop wherein one Raju was earlier her employee. He had though stopped working for her for last about two months but he continued to stay with them in their house and that her husband accused Bhagwan Sahai had murdered said Raju whose dead body was lying in the outer room of their house. On inquiry from the accused, he also told HC Ramdhari that he had killed Raju because he used to behave indecently with Sharda. PCR officials saw a male dead body lying in a pool of blood on the floor of outer room of the house and blood was seen flowing out of the room. Meanwhile, local police also reached at the spot. Accused Bhagwan Sahai was apprehended and on statement of Sharda, case was registered. Crime team inspected and photographed the spot. Blood stained cloths of Sharda and accused Bhagwan Sahai worn by them at that time along with other exhibits and a wooden stick, the weapon of offence were seized from the spot. Dead body was sent for postmortem. Necessary investigation was carried out and on conclusion thereof, accused was charge sheeted.”

3. The prosecution has examined 20 witnesses. Statement of appellant was recorded under Section 313 of the Code of Criminal Procedure. No evidence was lead by the defence.
4. Mr. Mukesh Sharma, learned counsel for the appellant submits that the judgment and order on sentenced passed by the learned trial court are contrary to the law and based upon surmises and conjectures and has resulted in miscarriage of justice. Learned trial court has completely

misread the evidence on record and failed to consider that PW2 Master Nitin, son of the appellant and PW3 Ms.Sharda, wife of the appellant turned hostile and did not support the case of the prosecution. Mr. Mukesh Sharma, learned counsel for the appellant also contends that learned trial court erred by relying upon the testimony of PW4 Hari Mohan as the evidence of PW4 Hari Mohan is unreliable and cannot be the sole basis of the conviction of the appellant. He also submitted that the learned trial court failed to consider that since PW3 Sharda has not supported the case of the prosecution, the testimony of PW4, cannot be considered as PW-4 has testified that PW3 Sharda had informed him that her husband had murdered deceased Raju @ Mohd. Gurfan. It is further submitted that blood sample of the appellant was not collected and in the absence thereby the blood on the Danda i.e. weapon of offence and also on the clothes of the appellant cannot connect the appellant to the crime committed.

5. Attention of the court is also drawn to the rukka which is based on the statement of PW3 Sharda. Learned counsel for the appellant submits that statement of PW3 Sharda recorded under Section 161 Code of Criminal Procedure would show that this witness had not stated that she had mentioned the factum of the appellant murdering Raju @ Mohd. Gurfan to anyone and in the absence thereof the statement of PW4 cannot be read as statement under Section 6 of the Evidence Act. It is further contended that PW4 Hari Mohan was not the first person to reach the spot of the incident and thus it cannot be said that utterance, if any, made by PW3 Sharda to PW4 Hari Mohan was spontaneous and thus the testimony of PW4 Hari Mohan is hearsay evidence. A similar argument is raised by learned counsel for appellant with regard to the statement of PW6 Ct. Ompal Singh.

6. It has also been argued before us that no recovery was made at the instance of the appellant and moreover even as per the case of the prosecution the Danda i.e. weapon of offence was found under the stair case, a place which is accessible to all and thus no benefit can be derived under Section 27 of the Evidence Act. In support of his submission that PW4 Hari Mohan was not the first person to arrive at the place of incident and substantial period had lapsed between the time of the incident and the arrival of PW4 Hari Mohan at the spot, counsel relies on the evidence of PW13 Ramdhari wherein it has been testified that the caller did not give the name of the accused in the first call made.
7. Reliance is placed by Mr. Mukesh Sharma, learned counsel for the appellant on *Kashmira Singh Vs. State* AIR 1965 Jammu and Kashmir, 37 (V 52 C 11), and more particularly para 3, in support of his submission with respect to Section 6 of the Evidence Act, which reads as under:

“3. Learned Advocate General appearing for the prosecution submitted that the evidence of Hajee Ahad Dar though hearsay may be relevant for the purposes of proving the conduct of the accused under Sections 6 and 8 of the Evidence Act, Section 6 makes relevant only those facts which are so connected with the facts in issue that they form a part of the same transaction. This pre-supposes that there is a fact in issue, to prove which other facts connected with it could be used as corroborating pieces of evidence. In the instant case, the fact in issue was whether the complainant was teased by the petitioner inasmuch as the petitioner used insulting words against her. This fact is not proved at all, except by the hearsay evidence of Hajee Ahad Dar. In these circumstances, therefore, the evidence of Hajee Ahad Dar cannot be said to form part of the same transaction, when the transaction itself is not proved. Moreover, Hajee Ahad Dar admits that he came after the actual occurrence was over and did not see it with his own eyes. Thus his statement cannot form part of res gestae so as to be admissible under Section 6 of the Evidence Act. Statements of by standers to be admissible

under Section 6 must be of persons actually present at the time of occurrence and not of persons reaching the spot after the occurrence is over.”

8. Mr. Mukesh Sharma, learned counsel for the appellant has also relied upon **Malkhan Singh Vs. State of Madhya Pradesh**, 1999 CrL L.J 2736, which read as under:

“14. In the last, Shri H.D. Gupta, learned Government Advocate, contended that the statements of Ramniwas (PW. 6) and Shahjad (PW. 2) are admissible as res gestae under Section 6 of the Evidence Act. In our opinion, in the facts of the case and in the light of the discussion of the evidence of these two witnesses, which does not inspire confidence and also the fact that the statement of Kailash Narayan made to these witnesses is not spontaneous nor is contemporaneous but the same was made in answer to a query after some time of the occurrence, when the witnesses reached the spot, the statements of these witnesses cannot be considered as res gestae. (See Pratap Singh v. State of M.P. (1971 Cri LJ 172) (supra).”

9. Mr. Mukesh Sharma, learned counsel for the appellant submits that the trial court failed to consider that the door was locked from outside and merely because the appellant was present at the spot of incident that by itself cannot be the sole ground to hold the appellant guilty.
10. Learned counsel for the appellant has also contended that the appellant was residing with his wife and two children and it is only on the account of the conduct of the deceased who started residing in one room and developed intimacy with his wife which could not have been tolerated by the appellant and assuming the court comes to the conclusion that appellant is guilty, the case squarely falls under Section 304 Part(II) as neither the murder was planned nor pre-determined and was a result of sudden provocation as the appellant has seen his wife in a compromising position with the deceased. It is also submitted that the appellant has

already spent more than five years and also earned remission. It is thus, prayed that the appellant be released on the period already undergone.

11. On the other hand, learned counsel for the State submits that prosecution has been able to prove its case beyond any shadow of the doubt. He further submits that although both the witnesses turned hostile but there is evidence on record to show that the appellant along with other family members were present in the house at the time of the murder. This fact has neither been denied by the appellant in his statement recorded under Section 313 Code of Criminal Procedure nor during cross examination of PW3 Sharda, the wife of appellant.
12. We have heard counsel for the parties and examined the evidence on record and considered their rival submissions. In this case on the night intervening 21st /22nd October, 2009 at about 12:47 a.m. Police Control Room had received a call with respect to a murder at RZ-271, Kakrola Road, Near Dabas Medical Centre. A PCR van rushed to the spot and the officials met one Hari Mohan Meena, who informed the officials that he had called up police at 100 number. At the spot of the incident Bhagwan Sahai, appellant herein, his wife Sharda (PW-3) were found present. On the basis of the statement of PW-3, Sharda that Raju, the deceased was working as her employee, he was staying at their house; and her husband Bhagwan Sahai had murdered him because he used to behave indecently with him, the appellant, Bhagwan Sahai was arrested and the case was registered. Blood stained clothes of Sharda, appellant (Bhagwan Sahai) as also the wooden stick the weapon of offence were seized. On examination of the evidence of PW-2, Master Nitin and PW-3 Sharda, wife of the appellant, it clearly establishes that the deceased, Raju used to reside in one room of their house. PW-2 also testified that his mother was

running a stitching shop where the deceased was working for many years, although he had left the shop 2/3 months prior to his death. PW-2 has also testified that on 21st October, 2009 all i.e. he, his brother and parents had slept after taking their meals; between 11 and 12 at night, he was woken up by his mother as she heard a noise inside the room, in which the deceased was sleeping. Although this witness was declared hostile and cross-examined by the Public Prosecutor, but his evidence clearly establishes that on the fateful night, the deceased, he and his parents were present at the house. PW-3 (Sharda) also turned hostile, but she testified that Raju was residing in a rented room in the same house and she had heard a noise at night. She has also testified that she, her husband and children were with her in the room at that time. PW-3 has also testified that on the fateful night, the deceased had dinner with her and her family; and after dinner she and her kids had gone to sleep but her husband was ironing clothes in the room of the deceased. In the statement under Section 313 Cr.P.C. the appellant has also not disputed that he was residing in the same house, as the appellant, PW-2 and PW-3.

13. PW-4, Hari Mohan has testified that on the fateful night somebody had knocked at his gate when he came out he saw many public persons had gathered there. He learnt that Raju had been murdered. He immediately went to the house where Raju was living. He met Sharda (PW-3) and upon his asking, PW-3 told him that her husband, Bhagwan Sahai, whom he had identified in court had killed Raju. He also asked Bhagwan Sahai why he killed Raju, to which he replied that Raju used to tease his wife; thereafter he went to his house and informed the police. During cross-examination this witness testified that he had told the police that he was informed by Sharda that her husband had killed Raju. This witness was

confronted with his statement, Ex.PW-4/DA, wherein it was recorded that Sharda was saying that Bhagwan Sahai had killed Raju.

14. The first submission of counsel for the appellant is that the evidence of PW-4 cannot be relied upon, as it is hearsay evidence and Section 6 of the Evidence Act, would not be applicable, as *per se* the statement made by Sharda to Hari Mohan was not on the spur of moment and it was not spontaneous and moreso when PW-3 Sharda has turned hostile.
15. In our view the trial court has rightly relied on the evidence of Hari Mohan, who is an independent witness and not related either to the deceased or the appellant. As per his testimony, Ms.Sharda PW-3 soon after the incident had made a statement that her husband had murdered Raju, a statement which can be relied upon in terms of Section 6 of the Evidence Act, since the statement being *res gestae* which is an exception to rule of hearsay evidence. The Apex Court in the case of **Gentela Vijayauardhan Rao Vs. State of A.P.** reported in 1996 (6) SCC 241, has held as under:

“The principle of law embodied in section 6 of the Evidence Act is usually known as the rule of *res gestae* recognized in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue as to form part of the same transaction that it becomes relevant by itself. This rule is roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however, slight it may be, which was

sufficient enough for fabrication then the statement is not part of res gestae.”

16. Similar view was taken in the case of **Parsadi Ram Vs. State of M.B. (Chhattisgarh)** reported at 2007 (1) F.J.C.C. 145, further adding that in order to hold the statement res – gestae, it has to be remembered that the statement should be reasonable, contemporaneous and also spontaneous.
17. Similarly in the case of **Chandrashekharappa Vs. State of Karnataka, (Karnataka)**, reported at 2001 CrI.L.J. 765, a Division Bench of Karnataka High Court has held that statement of independent witness that immediately after incident due to hue and cry of father of deceased, he came to spot and father of deceased disclosed to him that accused had killed his daughter, was treated as “Res Gestae” under Section 6 of the Evidence Act. The trial court in our view correctly applied the law laid down in the aforesaid judgments to the facts of the present case.
18. On examination of the evidence of PW-4 and applying the law laid down, we find PW-4, is an independent witness, whose evidence is reliable; moreso, there has been no motive which has been attributed to him nor there is any suggestion that there was any enmity between this witness and the appellant, to falsely implicate the appellant.
19. The judgments relied upon by counsel for the appellant i.e. **Kashmira Singh (Supra) & Malkhan Singh (Supra)** are not applicable to the facts of the present case. PW-4, Hari Mohan was amongst the first who reached the spot of incident, which is duly corroborated from the fact that he had made a call to the police.
20. At this stage, a short question which has arisen before the court as to whether the case of the appellant falls under Section 302 or Section 304 of Indian Penal Code. Section 304, read as under:

“304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, **or** of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

21. It would be useful to refer to the case of *Augustine Saldanha Vs. State of Karnataka* (2003) 10 Supreme Court Cases 472, wherein it has been held:

“In the scheme of the IPC culpable homicide is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the greatest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.”

22. In *Basdev Vs. State of PEPSU*, AIR 1956 SC 488, it has been held that:

“Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act.”

23. In Surinder Kumar Vs. Union Territory, AIR 1989 SC 1094, it has been held that:

“To invoke Exception 4 to Section 300 I.P.C. four requirements must be satisfied, namely (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion, and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this Exception provided he has not acted cruelly.”

24. We are unable to reach to the conclusion that the intention of the appellant was to cause death of Raju. We have also considered the fact that the appellant had used a 3 ft. long danda, as the weapon of offence. The evidence on record shows that deceased was residing with the family of the appellant and had developed illicit relation with the wife of the appellant and we are inclined to accept the submission of the learned counsel for the appellant that the act was committed on account of sudden provocation and in the heat of the moment having seen his wife in a compromising position and the appellant had no intention to cause death.
25. We are, therefore, of the view to alter the conviction of the appellant from Section 302 IPC to Section 304 Part-II of the Indian Penal Code. The appeal is accordingly allowed to the above extent. We are informed that appellant has already undergone more than five years four months and

also earned remission. The appellant shall be released from Jail, if not warranted in any other case, on the basis of period already undergone.

26. Copy of the judgment be sent to the Superintendent, Central Jail, Tihar.

**G. S. SISTANI
(JUDGE)**

**SANGITA DHINGRA SEHGAL
(JUDGE)**

8th January, 2015
gr/ssn