

*** IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CRIMINAL APPEAL No.608/2013**

%

Judgment Reserved On: 10th March 2015

Judgment Delivered On: 16th March, 2015

SHIV LAL @ LALA

..... Appellant

Through: Mr. Chetan Anand, Advocate.

versus

STATE

.....Respondent

Through: Mr. Sunil Sharma, APP for State

CORAM :

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J.

1. Challenge in this appeal, filed under Section 374(2) of the Criminal Procedure Code, is to the judgment dated 17.09.2012 and the order on sentence dated 18.09.2012 whereby the appellant has been convicted and sentenced to rigorous imprisonment for life and fine of Rs. 5,000/- has been imposed for the offence punishable under Section 302 of IPC and in default of payment of fine simple imprisonment for a period of one year more.
2. The case of the prosecution, as noticed by the trial court, is that:

“On 26.02.2008 at about 6:15pm the accused started quarrelling with his mother Vedwati and when deceased Mamta (wife of his brother Pawan)

intervened, the accused picked up a kitchen knife and stabbed her. DD No. 12A was registered and was assigned to ASI Habib Ahmed who alongwith Const. Ashok Kumar and Const. Jitender reached at the spot i.e C-98, Ankur Enclave, Karawal Nagar, Delhi and found the injured Mamta lying on a rickshaw and bleeding from the wound in her stomach. On being questioned regarding the incident, the deceased Mamta disclosed that her jeth Shiv Lal had stabbed her. Injured was sent to GTB hospital where she was declared brought dead. The MLC of the deceased was collected, statement of Vedwati (mother of the accused) was recorded and FIR was registered against the accused. On secret information, accused was arrested and one kitchen knife was recovered from the right side pocket of his pants. Postmortem of the deceased was carried out and the Doctor opined that injury was possible by the given knife. After completion of investigation, charge sheet was filed against the accused u/s 302 IPC.

3. Learned counsel for the appellant submits that the impugned judgment passed by the learned trial court is bad in law, based on conjectures and surmises and not based upon cogent, clear, credible or unimpeachable evidence.
4. Counsel for the appellant further submits that the trial court did not appreciate that as per DD No. 12A Ex.PW2/A, information regarding scuffle was provided by Const. Ved Prakash and he has not been examined. He further contends that the PCR official whose name is disclosed in MLC

Ex.PW8/A as HC Brij Mohan and who removed the injured to the hospital has not been examined. Also the children of the deceased have not been examined.

5. In support of his submissions, reliance is placed by learned counsel for the appellant in the case of ***Sahaj Ram & Ors. Vs The State of U.P 1973 CAR 102 (SC)***, wherein the Hon'ble Supreme Court observed that, though the prosecution is not bound to call all available witnesses, irrespective of considerations of number and of reliability, witnesses essential to the unfolding of the narrative on which the prosecution case is based must be called by the prosecution, whether the effect of their testimony is for or against the case of the prosecution.
6. With regard to injury inflicted on the deceased Mamta, counsel for the appellant submits that as per the sketch of the knife Ex.PW3/E, it is a small kitchen knife and the blade of the knife is 7cms and the handle of the knife is 10.1cms and as per Ex.10/B the depth of injury is 10.5cms and therefore from such a small knife the kind of injury reflected in the post mortem report Ex.PW10/A is not possible.
7. Elaborating his arguments further, learned counsel for the appellant, submits that there are material contradictions in the testimony of prosecution witnesses regarding the arrest of the appellant and the recovery of weapon of offence from him. It is further contended that the PW1 Vedwati who is the

author of FIR and sole eye witness has not supported the prosecution story in her cross examination and even when she was re examined on 05.12.2011.

8. Counsel for the appellant further submits that PW3 Ashok Kumar Sharma and PW4 Smt. Poonam, the neighbours of PW1 Smt Vedwati are not the eye witnesses as they reached the spot after the alleged incident took place so their testimonies were wholly hearsay and therefore, inadmissible.
9. With regard to the identity of the dead body it is submitted by counsel for the appellant that prosecution has failed to examine Pawan (husband of the deceased) and Krishan Kumar (Jeth of the deceased) who identified the dead body of the deceased Mamta and since they have not been examined, the identity of the dead body is not established.
10. Counsel for the appellant also submits that circumstantial evidence is of weak type of evidence and unless unbreakable chain is proved the conviction is bad in law.
11. Counsel further submits that the arrest memo Ex.PW3/C, Personal search memo Ex.PW3/D and sketch of knife Ex.PW3/E have not been signed by PW11 SI Satender Pal Singh as deposed by him in his testimony. Also PW3 Ashok Kumar Sharma in his testimony deposed that the appellant/accused Shiv Lal was arrested at 6:15pm or 6:30pm but as per the arrest memo Ex.PW3/C on record, the appellant/accused was arrested at 11:55pm. On the basis of aforesaid submissions counsel urged that these contradictions are material enough to throw doubts about the credibility of the prosecution's

version, and ought to have led the Trial Court to acquit the appellant/accused and in the alternative, that even if the appellant/accused is held guilty, he could not have been convicted for murder u/s 302 of IPC.

12.Per contra, learned counsel for the State, submits that the prosecution has been able to establish its case beyond any shadow of doubt. Counsel further submits that the testimony of the material witnesses PW1 Vedwati, PW3 Ashok Kumar Sharma and PW4 Smt. Poonam coupled with the statement of PW8 Dr. P Phukan who proved the MLC of deceased Mamta and the statement of PW10 Dr. Sumit Tellewar who proved the post-mortem report prove beyond reasonable doubt that it was the appellant/accused who committed the murder of the deceased Mamta.

13.Counsel further submits that the recovery of knife and bloodstained pants of the appellant/accused prove that he was the author of the crime.

14.Counsel for the state contended that the dying declaration made by the deceased Mamta to ASI Habib Singh (PW6) that her jeth stabbed her with the knife and the circumstantial evidence i.e recovery of knife from the possession of appellant/accused, his bloodstained pants and the fact that appellant/accused absconded from the house points towards the guilt of the appellant/accused in commission of offence and trial court rightly convicted him u/s 302 of IPC.

15.We have heard the learned counsel for the parties, considered the rival submissions made by them and carefully perused the trial court record. The

prosecution in all examined 16 witnesses. In order to appreciate the submission of learned counsel for the appellant, it would be useful to refer to the evidence of some of the material witnesses, as noticed by the trial Court:

PW1 Vedwati deposed that on 26.02.2008 at about 6pm, appellant/accused Shiv Lal started quarrelling with her and was beating her when the deceased Mamta intervened and tried to save her when appellant/accused stabbed her with a kitchen knife. She further deposed that police recorded her statement Ex.PW1/A, and she pointed out the place of occurrence and identified the kitchen knife with which the appellant/accused Shiv Lal stabbed the deceased Mamta.

In her cross-examination by learned defence counsel this witness deposed that appellant/accused Shiv Lal did not stab deceased Mamta with a knife and somebody told her that her daughter in law (deceased Mamta) has been stabbed. She further deposed in her cross examination that police arrived at the spot and obtained her thumb impression on the document Ex.PW1/A and the contents of Ex.PW1/A were not read over to her by the police.

PW3 Ashok Kumar Sharma who is a neighbour of the deceased Mamta has deposed that on 26.02.2008 at about 6:20pm he heard loud noise and on hearing the same he came out of his

house and saw that PW1 Vedwati was crying “Shiv Lal ne apni Bhabhi ko chaku Maar diya”. He further deposed that appellant/accused Shiv Lal was standing there with a knife in his hand and deceased Mamta was lying in the house and blood was oozing from her abdomen. He next deposed that the appellant/accused was arrested in his presence vide arrest memo Ex.PW3/C and one knife was recovered from the right side pocket of the appellant/accused which was seized vide memo Ex.PW3/F and disclosure statement ExPW3/G was made by the appellant/accused.

PW4 Smt. Poonam who is also a neighbour of the deceased Mamta deposed that on 26.02.2008 at about 6pm on hearing the commotion she came out of the house and saw deceased Mamta lying near the main door of the house and her clothes were soaked in blood. She further deposed that persons who were present there told her that appellant/accused Shiv Lal had stabbed his bhabhi Mamta and appellant/accused was present there having a knife in his hand but later he fled from the scene.

In her cross examination it was deposed by PW4 that Vedwati (PW1) told her that appellant/accused Shiv Lal had stabbed deceased Mamta and while they were taking the deceased Mamta to the hospital in rickshaw, police arrived and deceased

Mamta told police officials that appellant/accused Shiv Lal had stabbed her.

PW10 Dr Sumit Tellewar proved the post-mortem report (Ex.PW10/A) and deposed that the cause of death was shock as a result of antemortem injury to the heart produced by a sharp cutting/stabbing weapon. He further deposed that injury no.1 as mentioned in post-mortem report Ex.PW10/A is antemortem in nature and is sufficient to cause death in the ordinary course of nature. He next deposed that injury no.1 was possible by the knife (Ex.PW10/B).

16. We may notice that there is some variation in the evidence of PW1, PW3 and PW4 but what is required to be considered is whether the aforesaid variations are material and would affect the case of the prosecution substantially. It is a settled law that every variation may not adversely affect the case of the prosecution.

17. It can be seen from the above discussion that the prosecution had relied on the testimony of PW1, PW3 and PW4. While PW1 Vedwati deposed in the examination in chief recorded on 02.01.2009 in favour of the prosecution about having witnessed the incident, she resiled from the version in the cross examination conducted on 31.01.2009 and re-examination on 5.12.2011. In the case of *Khujji vs. State of Madhya Pradesh, AIR 1991 SC 1853* it was held by the Court that:

“the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.”

Relying upon the aforestated case, trial court chose to discard the cross examination deposition of PW1, and relied only on her testimony recorded during examination in chief.

18. The question is whether the Trial Court was justified in rejecting the cross examination deposition of PW1 and solely relying on the testimony made in examination in chief. We are of the view that the observation made by the trial court was correct as the presence of PW1 Vedwati is not disputed at the place of occurrence, nowhere in her examination she denied this fact that she was not present at the place of incident. Also the statement of PW1 Vedwati was recorded immediately after the incident and there is no reason why PW1 will falsely implicate her own son as she was the one who lodged the FIR and narrated the incident to the police. In our opinion, the trial court rightly felt that she had been either won over or intimidated during the interval (between his examination in chief, and the time when her cross examination took place).

19. In case of *Syad Akbar Vs. State of Karnataka (1980) 1 SCC 30* it was held as under:

“As a legal proposition, it is now settled by the decisions of this Court, that the evidence of a prosecution witness cannot be rejected wholesale, merely on the ground that the prosecution had clubbed him 'hostile' and had cross-examined him.”

20. In another case of **Sat Paul v. Delhi Administration 1976 CriLJ 295**,

similarly, it was observed that:

“Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto.”

21. For the reasons stated above, we are of the view that there is no ambiguity

in the examination in chief of PW1 Vedwati as it clearly supported the prosecution allegations totally about the appellant/accused Shiv Lal stabbing the deceased Mamta. This finds corroboration in the testimony of PW4 Smt. Poonam who deposed that she reached the place of occurrence and was told by persons standing there that appellant/accused Shiv Lal stabbed the deceased Mamta and spotted Shiv Lal there with a knife in his hand. The testimony of PW4 is corroborated by the testimony of PW3 Ashok Kumar

Sharma who deposed that when he reached the place of occurrence PW1 Vedwati was crying “SHIV LAL NE APNI BHABHI KO CHAKU MAAR DIYA”. Also the presence of human blood on the weapon (knife) and pants of the appellant/accused lends corroboration to the prosecution case. In these circumstances, the reliance placed on, or the preference given by the Trial Court to the examination in chief of PW1 Vedwati, on the one hand, and discarding the statement in cross examination, was not improper. The medical evidence, too vitally supports that version, since the death occurred due to one fatal blow.

22.The last submission of the learned Counsel for the appellant is that in any event, the present case does not fall within Section 302 of IPC but the same would fall under Exception IV of Section 300 of IPC and the appellant be given benefit of Section 304 of IPC as there was no motive on the part of the appellant to kill the deceased Mamta who was his sister in law. Even as per the prosecution the appellant had not pre-planned to kill anyone and the appellant had no animosity with the deceased. The incident took place because of sudden altercation when appellant/accused was beating his mother (PW1) and deceased Mamta tried to intervene and he stabbed her with a kitchen knife.

23.Also the present case is not such in which it can be said that the appellant had inflicted injuries on the deceased with the intention to kill her or he had the intention to cause such bodily injuries to the deceased which would be

sufficient to cause death in the ordinary course of nature and, therefore, the case is covered under Exception IV to Section 300 of the Indian Penal Code.

24. To invoke the Exception IV of Section 300 IPC, four requirements must be satisfied by the accused; he must show that (i) there was a sudden fight; (ii) there was no premeditation on the part of the accused; (iii) the act of the accused resulting in the death of the victim was done in the heat of passion; and (iv) the assailant should not have taken any undue advantage of the situation and should not have acted in a cruel manner. Unless all these requirements are fulfilled an accused cannot get the benefit of exception IV of Section 300 of IPC.

25. In order to consider the contention of learned Counsel for the appellant, it would be fruitful to have a look at the law relating to culpable homicide. The distinction between two types of culpable homicide that is, murder and culpable homicide not amounting to murder has been analysed by the Supreme Court in leading case titled as *State of A.P. v. Rayavarappu Punnamayya AIR 1977 SC 45*. The relevant portion of the judgment is reproduced as under:

“In the scheme of the Penal Code, "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 this generic offence, the code practically

recognizes three degrees of culpable homicide. The first is, what may be called, culpable homicide of the first degree. This is the gravest 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 1st 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".

26. Let us now examine the present case in the light of abovementioned settled

law. It is well settled, that the question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the number of injuries inflicted, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him.

27. The prosecution has not placed any material on record with regard to any previous grudge or any enmity, pre-planning by the Appellant or pre-meditation or motive in causing death of the deceased Mamta.

28. In ***Surinder Kumar v. Union Territory, Chandigarh AIR 1989 SC 1094***, there was a heated argument between the parties followed by uttering of filthy abuses. The Appellant/accused got enraged, picked up a knife from the kitchen and gave one blow on the neck of the witness and three knife blows,

one on the shoulder, the second on the elbow and the third on the chest of the deceased. The Supreme Court convicted the Appellant under Section 304 of IPC.

29. In *Krishna Tiwary and Anr. v. State of Bihar AIR 2001 SC 2410* where the accused inflicted knife blows in the heat of passion without any premeditation and without any intention that he would cause that injury, his case was covered within Exception 4 to Section 300 IPC and he was convicted by the Supreme Court under Section 304 IPC.

30. In the facts and circumstances of the case, we are of the view that there was no premeditation or preplanning, there was no previous enmity between the deceased and the appellant, the appellant had no motive to commit murder of the deceased and one injury was caused to the deceased Mamta in a heat of passion on an issue of deceased Mamta intervening between the appellant/accused and his mother PW1 Vedwati with a kitchen knife. The case is clearly covered under Exception IV of Section 300 of IPC. We accordingly alter the conviction of the appellant from Section 302 IPC to section 304 Part I of IPC.

31. After verifying the record, it appears that the appellant has nearly spent eight years in jail including the remission earned by him during the period when he was in jail. In view of the background of the present case and taking into consideration all the facts and circumstances of the case, we alter

the sentence to the period undergone. The appellant be released forthwith, if not required in any other case.

32. A copy of this order be sent to the Superintendent Jail.

33. The appeal stands partly allowed accordingly. Trial Court record be sent back.

G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

MARCH 16, 2015

sc

.