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

+ CRL.A. 615/2013

% *Judgment dated 30th April 2015*

DHARMENDER PANDEY @ CHANCHAL Appellant
Through : Mr.R.M. Tufail, Mr.Vishal Raj Sehijpal,
Mr.Anwar A. Khan and Mr.Farooq
Choudhry, Advs.

versus

STATE Respondent
Through : Mr.Sunil Sharma, APP for the State
along with Inspr. Mohinder and SI
Dhirender, P.S. Ali Pur.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

1. Present appeal has been filed by the appellant under Section 374 of the Code of Criminal Procedure against the judgment dated 8.3.2013 and order on sentence dated 14.3.2013 passed by learned Additional Sessions Judge/Special Judge-NDPS, Rohini Courts, New Delhi, whereby the appellant has been convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to undergo life imprisonment with fine of Rs.10,000/- and in default of payment of fine the appellant has been directed to undergo simple imprisonment for two years.
2. Before the rival submissions of the parties can be considered, the case of the prosecution, as set out by the trial court, is as under:

“Facts of the case are that there are two godowns of Hyundai

Company in Jindpur, Delhi merely at a distance of about 200 meters but opposite to each other across the road. Shakti Singh complainant was a security guard in one showroom and Prem was a security guard in other showroom. One Dharmender Pandey was Incharge of both godowns for day and night and he used to reside in a room in the showroom but he was addicted to drinking and other vices. Due to these complainant he was removed from night Inchargeship and was replaced by Sunil Kumar. Dharmender Pandey was asked to vacate the room and so, he had to take a room on rent in village Mukhmelpur. He was harbouring a grudge against Sunil Kumar thinking that complaints against him were made to Hyundai Management by Sunil Kumar. On 5.12.2008, as usual, Shakti Singh and Prem joined their duty at 7.45 P.M. After some time, Dharmender Pandey came there in an inebriated condition and started taking drinks in the office and asked Shakti Singh to join but he refused. Shakti asked Dharmender to leave the office but he was waiting for Sunil Kumar. He asked Shakti Singh to make a call to Sunil Kumar to come speedily to the office, and hence, guard Shakti Singh asked Sunil Kumar to come early. After making telephone call, both came to the showroom and started waiting Sunil. Sunil Kumar came at 10.00 P.M. and blew horn. The main gate was opened by Shakti Singh and Sunil Kumar parked the bike inside the showroom. The usual practice was to lock the main gate from inside and its key would be handed over to Prem. So, after closing the main door and locking it, Shakti Singh went to other showroom to give key to Prem. When Shakti was with Prem, he heard the cries of Sunil Kumar and when he reached there running, he saw Sunil Kumar lying on the ground gasping and yearning for life. Blood was oozing from his head and Dharmender Pandey was standing near him with an iron oil dispenser. He placed the oil dispenser on the side after seeing the complainant. In the meantime Prem, i.e. Security Guard/Chowkidar of the other Hyundai godown also came. In the presence of both Security Guards, accused Dharmender Pandey confessed that he had committed a blunder by murdering Sunil Kumar and sought mercy from them saying that he had very little children. They raised noise and pushed Dharmender Pandey inside the showroom. When several persons assembled there, Dharmender Pandey took to heels. Police was informed by Shakti Singh by using the telephone of Prem. FIR was registered and investigation was handed over to Inspr. Mahender Pal.

3. *Charge u/s 302 IPC was framed against accused on 05.12.2009 to which he claimed trial.”*

3. In order to prove its case, the prosecution has examined twenty witnesses. The appellant appeared as a witness in the matter.
4. Mr.Tufail, learned counsel for the appellant, submits that the appellant has been falsely implicated in this case. The trial court has failed to take into account that in fact PW-1, Shakti Singh, and PW-5, Prem, did not support the case of the prosecution. Counsel further submits that both, PW-1 and PW-5, have testified that they were not the eye-witnesses and the trial court has erred in relying upon their testimonies. PW-1 and PW-5 have also testified that the appellant had simply told PW-1, Shakti Singh, “*Uncle, Mujhe Bacha Lo*”, which has been misinterpreted by the learned trial court as an extra-judicial confession and on this ground alone the appellant is liable to succeed in the present appeal. Counsel further contends that reliance by the trial court on the so-called extra-judicial confession has caused miscarriage of justice. It is also contended that since there was no eye-witness in the matter, the case of the prosecution would rest on circumstantial evidence and sufficient evidence has not been on record and further the chain of circumstances are not complete, which would lead to the only conclusion of guilt of the appellant in the murder of the deceased, Sunil Kumar.
5. An alternate argument has also been made by counsel for the appellant that no case under Section 302 of the Indian Penal Code is made out against the appellant for the reason that it is the case of the prosecution that an oil dispenser, which was lying on the spot, was used to hit the deceased, which resulted in his death. Thus, it cannot be said that it is a case of premeditation.

6. Mr.Tufail, counsel for the appellant, also contends that it is not a case where the offence was committed by a weapon, neither there was pre-meditation nor has the appellant acted in a cruel manner, nor has he taken any undue advantage of the condition of the deceased. Mr.Tufail has also pleaded that the Court must take into account that as per the post-mortem report only two blows were inflicted upon the deceased, which resulted in the death of Sunil Kumar.
7. Mr.Sharma, learned counsel for the State, submits that presence of the deceased, the appellant, PW-1 Shakti Singh and PW-5 Prem, stand duly established by the Attendance Sheet Registers, which were produced. Counsel further contends that even otherwise in the statement made under Section 313 of the Code of Criminal Procedure, the appellant has not disputed the presence of the aforesaid persons. Mr.Sharma also contends that evidence of PW-1, Shakti Singh, would show that the appellant was anxious that he should be relieved from his duty and the deceased Sunil Kumar was to relieve him. The appellant had prevailed upon PW-1 to make a phone call to Sunil Kumar and to enquire as to when he would join the duty. PW-1 informed the appellant that Sunil Kumar had informed him that he would finish his dinner and reach within 15-20 minutes.
8. It is contended by Mr.Sharma that evidence of PW-1 would show that the deceased and the appellant were together and soon after the incident the appellant had informed PW-1 that he had committed a mistake and he should be saved as he has small children. Mr.Sharma also submits that this initial statement has not been supported by this witness during his testimony in Court as he had been won over by the relations of the appellant, but he has deposed in Court that the appellant had told him that “*Uncle Mujhe Bacha Lo*”. Mr.Sharma also contends that the

prosecution has been able to establish its case beyond any shadow of doubt and the links in the chain of circumstances are complete, which is evident from the presence of the deceased, appellant and two star witnesses, being PW-1 and PW-5 at the spot of the incident; and the fact that soon after the incident the appellant slipped from the place of the incident and only surrendered on 15th December, 2008, i.e. after a gap of ten days from the date of the incident, during which period his native village was also raided, but he could not be found there. This would thus be another circumstance and vital link in the chain of circumstances which would prove the guilt of the appellant.

9. As far as the submission of counsel for the appellant that the case under Section 302 of the Indian Penal Code would not be made out against the appellant is concerned, learned counsel for the State submits that in fact there were two major blows given to the deceased, which is evident from death report of the deceased (Ex.PW-14/E), and, thus, the appellant was well aware that these blows would result in the death of the deceased Sunil Kumar.
10. We have heard learned counsel for the parties, who have taken us through the evidence in the matter. We have also given our thoughtful consideration to the submissions, which have been made before us.
11. In this case, there were two godowns of Hyundai Company in Jindpur, Delhi. Shakti Singh, PW-1, was employed as a security guard in one of the showrooms and Prem Kumar, PW-5, was employed as a security guard in the other showroom. The appellant was also employed and was initially working at the night shifts. He was also given one room. The appellant was addicted to drinking. Due to complaints, he was replaced by Sunil Kumar.
12. The case of the prosecution revolves primarily around the testimonies of

two witnesses, being PW-1, Shakti Singh and PW-5, Prem. A careful analysis of the testimonies of the aforesaid two witnesses would show that since 23.11.2008 PW-1, Shakti Singh, was working with 24 Security Guarding Private Limited, Rohini. On the intervening night of 5th /6th December, 2008, PW-1 was on duty at the godown of Hyundai Motors, situated at Jindpur, from 8.00 p.m. to 8.00 a.m. This witness has further testified that when he joined the duty at the godown the appellant, Dharmender Pandey, was incharge and in the night he used to stay in the room situated in the godown itself. 2-3 days prior to the incident Dharmender Pandey had been replaced by Sunil Kumar and the room occupied by Pandey was allotted to Sunil Kumar. On the fateful night, PW-1 reached the godown at 7.45 p.m. Prem Kumar was on duty at the godown on the other side of the road. The appellant was also present at godown. The appellant informed PW-1 that he would be relieved by Sunil Kumar. At about 10-10.30 p.m., the appellant had asked PW-1 to go to a nearby PCO and make a telephone call to Sunil Kumar, however, PW-1 had refused to do so, but on repeated requests of the appellant, he accompanied the appellant to the nearby PCO. Thereafter the appellant dialled the number of Sunil Kumar and handed over the phone to PW-1. PW-1 was informed that Sunil Kumar would reach within fifteen minutes after having his dinner. This witness has also testified that at around 10.30 p.m. he heard the noise of blowing of horn at the gate of godown, he opened the gate and Sunil Kumar came inside the godown on his motorcycle. Prior thereto the appellant had asked PW-1 as to whether he was interested in having a drink, to which PW-1 refused being on duty.

13. The testimony of PW-1 also shows that the main gate of the godown was then locked and he went outside from the small gate to hand over keys of

this godown to Prem Kumar, the guard of the other godown, which was on the other side of the road. When PW-1 was handing over keys to Prem Kumar, the appellant came there. At that time the appellant was very nervous (*Ghabraya hua tha*) and told PW-1 that “*Uncle Mujhe Bacha Lo*” and also asked Prem Kumar for some Gutkha (panmasala with chewing tobacco). On questioning by PW-1 as to what has happened, the appellant pointed out towards the godown where PW-1 was deputed. He saw that Sunil Kumar was lying on the floor and his head was in a pool of blood. He was gasping and yearning for breath (*Tadap raha tha*). He then raised an alarm and asked Prem Kumar to call the Police and the Ambulance. Prem Kumar dialled No.100 from his cell phone and gave the cell phone to PW-1, who informed the police about the incident. PW-1 has also testified regarding the formalities completed by the Police with regard to seizure of motorcycle of the deceased, plastic chairs and the oil dispensing pump.

14. Leading questions were put to PW-1 by the learned APP. PW-1 was confronted with various portions of his statements made to the Police under Section 161 with regard to the fact that the duty of the appellant had been changed on account of his habit of consuming liquor and also the fact that Sunil Kumar had made complaints to the Management with regard to the appellant being found under the influence of liquor during duty hours, all of which were denied during the evidence in Court. PW-1 also denied having made a statement under Section 161 that the appellant had told him that he killed Sunil and committed a mistake. He was also confronted with the Statement recorded under Section 161.
15. We have also examined the testimony of PW-5, who has also deposed that he was on duty on the fateful night. He has also corroborated the evidence of PW-1 that he was on duty and had seen PW-1 and the

appellant talking to each other. He has also corroborated the testimony of PW-1 that the appellant had told PW-1 “*Mujhe Bacha Lo, Mujhe Bacha Lo*”. PW-5 has also testified with regard to the presence of PW-1, the deceased, the appellant and his own presence at the time of the incident. He has also corroborated the evidence of PW-1 with regard to the appellant having requested Shakti Singh to telephone Sunil Kumar as he had to leave early and the fact that after the incident he had informed the Police. Both these witnesses have testified that before the arrival of the Police, the appellant had left the spot of the incident. This witness also confronted with the portions of his statement recorded under Section 161.

16. Based on the testimonies of both the witnesses i.e. PW-1 and PW-5, the following four important aspects emerge:
 - (i) The appellant, the deceased, PW-1 Shakti Singh and PW-5 Prem were present at the spot of the incident on the fateful night at the relevant time;
 - (ii) The appellant was eagerly waiting for Sunil Kumar to relieve him and he repeatedly requested PW-1 to call up Sunil.
 - (iii) The appellant had told PW-1 “*Uncle Mujhe Bacha Lo*”;
 - (iv) The deceased was found lying in a pool of blood, the Police was informed and before the Police arrived the appellant had left the spot of the incident.
17. In our view these are four very important links in the chain of circumstances, which lead to the only conclusion of guilt of the appellant, *de hors* the extra judicial confession made by the appellant to PW-1.

18. A defence was raised before the trial court that some unknown persons had scaled the wall of the godown, killed Sunil Kumar and fled from the spot. The said defence was disbelieved by the trial court and we are in agreement with the same as a godown, which employs 24 hours security, would not leave the wall, which can be easily scaled. It may also be noticed that the evidence shows that the wall was 18'5" high, which cannot even be scaled by a Gymnast.
19. A perusal of the FSL report also shows that the blood group of the deceased was A, the oil dispenser which was used by the appellant to inflict the blows on the deceased had group A on it, although the clothes which were sought to be recovered at the instance of the appellant also had group A (which has been disbelieved by the trial court on the ground that nobody would keep the clothes for more than 10 or 11 days).
20. Having regard to the fact that presence of the appellant been established; the fact that the appellant insisted that PW-1 should call Sunil Kumar as he was in a hurry to go early and taking into consideration the post-mortem report where it has been opined that the oil dispenser could have been the weapon used for committing the crime, which has blood of group A, we see no reason to interfere in the judgment of the learned trial court. However, as far as the submission of counsel for the appellant that this case in fact would fall under Section 304 Part II is concerned, we find that the evidence placed on record would show that neither any pistol nor any knife nor even a danda was used to commit the offence. The offence has been committed, it seems on the spur of the moment, on account of delay by the deceased in relieving the appellant, whose duty hours had come to an end. The testimony of PW-5 also shows that the night duty allocated to the appellant had been switched by the agency and even the room provided to him had been taken away and given to

the deceased.

21. PW-2 has also testified that the deceased had made a complaint against the appellant of consuming liquor at the place of work. It has also come in the evidence that the appellant was in fact in a hurry to reach home as his gona was fixed on the next morning.
22. To understand what constitutes Culpable homicide and Murder it will be useful to refer to the decision rendered by the Apex Court in the case of ***Chacko @ Aniyam Kunju and Ors. Vs. State of Kerala***, reported at (2004) 12 SCC 269, wherein it was held as under:

“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, IPC 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 first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type.

10. The academic 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. Distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the courts. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences:

1. Clause (b) of Section 299 corresponds with Clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under Clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of Clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim is sufficient to bring the killing within the ambit of this clause.

2. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under Clause (2) of Section 300 can be where the assailant causes death by a fist-blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In Clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding Clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between Clause (b) of Section 299 and Clause (3) of Section 300 is one of degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in Clause (b) of Section 299 conveys the sense of probability as distinguished from a mere possibility. The words "bodily injury ... sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of

the injury, having regard to the ordinary course of nature.”

23. In another case of **Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh** (2006) 11 SCC 444, the Hon’ble Supreme Court enumerated some of the circumstances relevant to find out whether there was any intention to cause death on the part of the accused. The Court observed:

*“...Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable Under Section 302, are not converted into offences punishable Under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable Under Section 302. **The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi)***

whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention...”

*Similarly in **Ghapoo Yadav and Ors. v. State of M.P.** (2003) 3 SCC 528 and **Sukbhir Singh v. State of Haryana** (2002) 3 SCC 327, it was observed that :*

...After the injuries were inflicted the injured has fallen down, but there is no material to show that thereafter any injury was inflicted when he was in a helpless condition. The assaults were made at random. Even the previous altercations were verbal and not physical. It is not the case of the prosecution that the accused Appellants had come prepared and armed for attacking the deceased....”

24. 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.”

25. In the case of **Jagtar Singh vs State of Punjab** (1983) 2 SCC 342, it was held:

“The question is whether in the circumstance in which the appellant gave a blow with a knife on the chest, he could be said to have intended to cause death or he could be imputed the

intention to cause that particular injury which has proved fatal? The circumstances in which the incident occurred would clearly negative any suggestion of premeditation. It was in a sudden quarrel to some extent provoked by the deceased, that the appellant gave one blow with a knife. We cannot confidently say that the appellant intended to cause that particular injury which is shown to have caused death. There was no pre-meditation. There was no malice. The meeting was a chance meeting. The cause of quarrel though trivial was just sudden and in this background the appellant, a very young man gave one blow. He could not be imputed with the intention to cause death or the intention to cause that particular injury which has proved fatal. Neither para 1 nor para 3 of Section 300 would be attracted. We are fortified in this view by the decision of this Court in *Jagrup Singh v. State of Haryana*. It was subsequently followed in *Randhir Singh @ Dhire v. State of Punjab* and *Kulwant Rai v. State of Punjab*. Following the ratio of the aforementioned decisions, we are of the opinion that the appellant could not be convicted for having committed murder of the deceased Narinder Singh. His conviction for an offence under Section 302 IPC and sentence of imprisonment for life are liable to be set aside.”

26. Having regard to the facts and circumstances, which would show that the offence was not pre-planned; no weapon of offence was used except what was lying on the spot; the act was committed in a heat of the moment; two blows were inflicted on the head of the appellant; the appellant did not act in a cruel manner; the utterances of the appellant to PW-1 “*Uncle Mujhe Bacha Lo*”, which would show the element of remorse; the age of the appellant; the fact that the appellant has clean antecedents; and in view of the settled position of law in the case of *Jagtar Singh* (supra), we feel that this case should fall under Section 304 Part II of the Code of Criminal Procedure. Accordingly, to meet the ends of justice, the appellant’s conviction under Section 302 IPC is altered to Section 304 Part-II IPC. Consequently, the sentence of the appellant is modified from life imprisonment to seven and a half years.

27. The appeal is partly allowed. The appellant shall serve the remaining sentence, as modified.
28. Let a copy of this order be sent to the concerned Trial Court as well as to the Superintendent Jail by fax as well as through email for necessary compliance.
29. Appeal stands disposed of in above terms.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

APRIL 30, 2015

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