

\$~2

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

CRIMINAL APPEAL No. 911/2013

Date of decision: 7th October, 2015

SHAMBHU SHAH

..... Appellant

Through: Mr. Chetan Anand, Adv.

Versus

STATE & ANR

..... Respondents

Through: Ms Aashaa Tiwari, APP with
Inspector Virender Singh from PS
Vasant Kunj (North).

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J. (ORAL):

1. With the consent of the counsels for the parties, we are taking up the appeal for hearing in terms of our order dated 10th July, 2015.
2. By the impugned judgment dated 29th November, 2012, the appellant Shambhu Shah stands convicted under Section 302 read with Section 34 of Indian Penal Code, 1860 (in short "IPC") for murder of Bharat Chaudhary at about 03:00 - 04:00 A.M. on 18.04.2009. By the impugned order on sentence dated 5th December, 2012, the appellant has been sentenced to imprisonment for life, to pay a fine of Rs.20,000/- and in default of payment of fine, to undergo simple imprisonment for two months. Section 428 of the Code of Criminal Procedure, 1973 (Cr.P.C. for short) would apply.

3. Learned Amicus Curiae appearing for the appellant does not dispute that the deceased Bharat Chaudhary had suffered homicidal death in the intervening night of 17th/18th April, 2009. On the said aspect, our attention has been drawn to the Police Control Room (PCR) form (Ex.PW3/A) by which information regarding the murder was intimated at about 08:45 A.M. Pursuant to the said information, SI Randhir Singh (PW14) along with Ct. Harish Kumar (PW-7) had visited plot No.111, Block-B, Rangpuri Extn. Near Shamshan Ghat and had seen the dead body of Bharat Chaudhary lying inside a room. Over there, they had met Kalawati, wife of Bharat Chaudhary who has deposed as PW9. Kalawati (PW9) is the first informant. SI Randhir (PW-14) who had examined the dead body of Bharat Chaudhary and had recorded statement of Kalawati (Ex.PW9/A), made an endorsement (Ex.PW14/A) and had got the FIR in question (Ex.PW5/A) registered through Ct. Harish (PW-7). In his cross-examination, SI Randhir (PW14) had accepted that he had reached the spot at about 09:30 AM on 18th April, 2009 and took 4-5 minutes to record the statement of Kalawati (PW9). Thereafter, he had remained at the spot till 03:00-04:00 P.M. The FIR (Ex.PW5/A) was recorded at about 1305 hours on 18th April, 2009. The crime room report (Ex.PW11/A) records that they were present at the spot from 11:30 AM to 12:15 PM. It also records that the time of occurrence was between 2:30 A.M. to 3:00 A.M. on 18th April, 2009 as per enquiries made by them.

4. The post-mortem report (Ex.PW8/A) of the Department of Forensic Medicine & Toxicology, Safdarjung Hospital and Vardhman Mahavir Medical College, New Delhi, records one stab wound over left anterior chest by the size of 1.5cmx5cm cavity deep. On opening of the chest, the stab was tracked up to anterior surface of the heart cutting a part of the left

lung. No other fresh external injury was present. The cause of death was shock due to haemorrhage caused by a sharp edged pointed weapon, sufficient to cause death in the ordinary course of nature.

5. On the question of involvement and the role of the appellant, prosecution relies upon the sole testimony of Kalawati (PW9), wife of the deceased. She has deposed that on 18th April, 2009, the deceased Bharat Chaudhary (her husband) and the appellant Shambhu Shah alongwith one Saroj (nephew of Shambhu Shah) had drinks in the room of Shambhu Shah. Thereafter, they had quarrelled and her husband Bharat Chaudhary was taken to the street where Shambhu Shah caught hold of her husband and had asked Saroj to give a knife blow. Saroj, thereupon, had inflicted a knife blow on the chest of her husband. She had put a tape on the injury suffered by her husband to stop the blood from oozing. Nobody took her husband to the hospital and he died after sometime. The landlord when called on telephone had stated that he would come in the morning and then, would take her husband to the hospital. We note and record that Saroj, the co-accused could not be arrested and has been declared a proclaimed offender. The appellant Shambhu Shah was arrested on 20th April, 2009 vide Ex.PW9/B at about 07:00 PM. Thus, Kalawati (PW9) in her testimony has stated that Saroj (proclaimed offender) had killed her husband and Shambu Shah was his co-participant who had shared common intention.

6. In her cross-examination, Kalawati (PW9) has again affirmed that only Saroj (proclaimed offender) had given the knife blow to her husband and Shambhu Shah, the present appellant did not give any blow but had caught hold of her husband. At one stage, Kalawati (PW9) had proclaimed that Shambu Shah did not help her husband. However, Kalawati (PW9) contradicted herself when she accepted that Shambhu Shah had taken her

husband to the room and made him lie there. She has accepted that 6-7 persons including one Suresh Sharma had collected and gathered at the spot after the incident. The said persons, she claimed, were residing in the neighbourhood. In her cross-examination, Kalawati (PW9) has claimed that she had not gone to the house of Saroj (Proclaimed Offender) when they were taking liquor. She once again accepted that Shambhu Shah had gathered her husband in his arms and made him lie in his room and thereafter, had run away. However, there is some confusion for in the next sentence Kalawati (PW-9) has stated “it is wrong to suggest that accused Shambhu Shah ever run (ran) away”. Learned Public Prosecutor has submitted that the word “ever” is a typographical error and should be read as “never”. We only record and notice that if we read the word “ever” as “never”, it would make and convey an entirely difference meaning to the answer given by Kalawati (PW9). Care and caution should have been taken while recording the said sentence which was of importance and significance. However, the said facts do reveal that Shambhu Shah had not immediately left the spot or run away. He had lifted and taken the deceased Bharat Chaudhary to his room where he had made him lie down. To this extent, there cannot be any doubt or debate whatsoever. This conduct of the appellant Shambhu Shah is relevant and of pertinence.

7. Kalawati (PW-9) has deposed that someone had made a call to the landlord but claimed that she did not know as to who had made the said call. It may also be relevant to state that the neighbours have not been examined by the prosecution, though Kalawati (PW-9) has taken the name of Satpal and accepted that the neighbours were present after the occurrence.

8. Kalawati (PW-9), as recorded above, had named Suresh Sharma as the person present at the time of occurrence. The said Suresh Sharma is the

brother of the landlord - owner of the said plot, where Bharat Chaudhary (deceased), appellant Shambhu Shah and Saroj (proclaimed offender) were residing. Suresh Sharma had appeared and deposed as PW1. He claims that at about 8:00 P.M., he had seen Bharat Chaudhary (deceased), Shambhu Shah and his friends consuming liquor. They were around 5-6 in number. At about 2-2:30 A.M., PW1 had received a call from the appellant Shambhu Shah claiming that Bharat Chaudhary had fallen after consuming liquor and sustained an injury on his head. PW1 had then asked the appellant Shambhu Shah to shift Bharat Chaudhary to Safdarjung hospital. The appellant Shambhu Shah had replied that Bharat Chaudhary had been given first aid and the injury did not appear to be serious. At about 8:00 A.M., he came to the plot and by then, Bharat Chaudhary had died. Thereafter, PW1 had made a call to the police on number 100. He was not cross-examined and declared hostile by the public prosecutor, though his testimony was not as per his statement under Section 161 Cr.P.C. In his cross-examination by the Amicus Curiae, PW1 has deposed that he had informed the police that the appellant Shambhu Shah had informed him that Bharat Chaudhary had not sustained severe injuries, but this fact was not recorded by the police in his statement under Section 161 Cr.P.C. He has also testified that 6-7 persons were staying in the plot but he could not give their names. He proclaimed that Bharat Chaudhary had been inducted as a tenant at the request of the appellant Shambhu Shah.

9. Learned counsel for the appellant Shambhu Shah has drawn our attention to the first information given by Kalawati, marked Ex.PW9/A, wherein it is recorded that at about 12:00 midnight Shambhu Shah had quarrelled with his nephew Saroj (proclaimed offender) and at that time, the deceased Bharat Chaudhary had intervened to pacify both of them. Later

on, the three had started quarrelling on the street and at that time, the injury was inflicted.

10. We have also noticed the photographs (Ex. PW-10/1 to Ex.PW10/2). The photographs do not show any blood on the chest or body of the deceased. The wound was covered with a small bandage. It does appear that none of the persons including Kalawati (PW9) felt that the wound or injury suffered was a serious or grievous one. It is also clear that the appellant Shambhu Shah did not immediately run away or abscond from the spot and had lifted and taken Bharat Chaudhary inside the house and made him lie down. Thereafter, he had made a call and had spoken to Suresh Sharma (PW1) and had asked for help in taking Bharat Chaudhary for medical treatment.

11. At the same time, we have categorical affirmation of Kalawati (PW9) who has stated that Shambhu Shah had caught hold of her husband and had asked Saroj (proclaimed offender) to give a knife blow and thereafter, the knife blow was given at the chest of Bharat Chaudhary. As per the post-mortem report, there was only one injury which had pierced the lung and had reached the heart. There was no other injury.

12. In view of the aforesaid facts and discussion, we feel that the present case would be covered by Exception IV of Section 300 IPC and the conviction of the appellant should be converted from 302 IPC to 304 Part-I IPC. The violent attack by knife, it is apparent, had taken place at the spur of the moment. The appellant Shambhu Shah did not visualize and understand that the Saroj (proclaimed offender) would give a knife blow on the chest of the deceased with such force that it would pierce the lung and injure the heart. The salutary conduct of the appellant Shambhu Shah, post

the injury, is relevant and merits recognition. Earlier, the three, possibly alongwith others were drinking together and initially the quarrel/fight was between Shambhu Shah and his nephew Saroj (proclaimed offender). Common intention for committing an offence under Section 300 IPC on the part of the appellant Shambhu Shah was missing and absent.

13. On the question of sentence we notice that the appellant Shambhu Shah, as on 6th June, 2015, had already suffered incarceration of about six years, one month and nine days. Thus, till today, the appellant has suffered incarceration of about six years and five months. The conduct of the appellant in the jail as per the nominal role is satisfactory. He has earned remission of more than nine months and eleven days.

14. Keeping in view the aforesaid facts, we are inclined to release the appellant for the period/sentence already undergone. He would also pay a fine of Rs.5000/- and in default, would undergo Simple Imprisonment for a period of one month. Section 428 Cr.P.C. would apply.

15. The appeal is accordingly partly allowed and disposed of in the aforesaid terms.

(SANJIV KHANNA)
JUDGE

(R.K.GAUBA)
JUDGE

OCTOBER 07, 2015
mr