

\$~

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

+ CRL.A. 1080/2013

% ***Judgment dated 03 February, 2015***

KRISHAN Appellant

Through: Mr.Harit Chhabra, Advocate

versus

STATE Respondent

Through: Mr.Sunil Sharma, APP for the State

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(2) of the Code of Criminal Procedure read with Section 482 of the Code of Criminal Procedure for setting aside the judgment dated 12.7.2013 and order on sentence dated 16.7.2013 passed by learned Additional Sessions Judge, Rohini Courts, Delhi, in case FIR No.1674/06 registered under Sections 302/397/34 IPC at Police Station Sultan Puri, by which the appellant has been convicted to undergo imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code with fine of Rs.5,000/- and in default of payment of fine to undergo further simple imprisonment for six months. The appellant was further directed to undergo Rigorous Imprisonment for the period of seven years with fine of Rs.3,000/- for the offence punishable under Section 397 of the Indian Penal Code and in default of payment of fine Simple Imprisonment for

three months. It was directed that both the sentences would run concurrently and benefit of section 428 was given to the appellant.

2. The case of the prosecution, as noticed by the trial court in its judgment dated 12.7.2013, is as under:

“1. Briefly stated the case of the prosecution is that on the night intervening 18/19.10.2006, PW-26 Ins. Ravinder Singh was patrolling in the area of PS Sultan Puri and while patrolling, he was informed by the duty officer that DD No.7-B dated 19.10.2006 had been registered regarding apprehension of one thief at P-II Sultan Puri. Accordingly, PW-26 Ins. Ravinder Singh reached there and found PW-10 ASI Ranbir, PW-12 Ct. Biri Singh and accused Krishan present there and came to know that accused Krishan along with his other co-associate had inflicted injuries on the person of one lady namely Pinky and that accused Krishan had been apprehended at the spot and that the injured lady had already been removed to Sanjay Gandhi Memorial Hospital, Mangol Puri, Delhi by her husband/PW-3 Deepak Kumar. PW-26 Ins. Ravinder Singh went to Sanjay Gandhi Memorial Hospital, Mangol Puri, Delhi, along with his staff and accused Krishan, leaving PW-21 Ct. Joginder at the spot. The PW-8 HC Raj Kumar and PW-13 Ct. Ravinder were also called to the hospital and accused Krishan was handed over to them with directions to get his medical examination conducted. The PW-26 Ins. Ravinder Singh also met PW-3 Deepak, husband of injured Pinky in the hospital, however, he did not give any statement then as he was busy

in treatment of his wife. At about 3:15/3:20 A.M. the concerned doctor declared Smt. Pinky dead. Thereafter, Ex.PW-3/A i.e. statement of PW-3 Deepak Kumar was recorded, wherein he stated that he was residing with his family in rented accommodation at P-II/1484, Sultan Puri, Delhi and was working in a factory. He had married Pinki (since deceased), two years prior to the incident. On the night of the incident, complainant was watching film on television along with his parents, sister Sadhana and cousin (maternal brother) Vijay in the room, while his wife was sleeping on a bed on the roof of the room. At about 12.30/12.45 mid night, the complainant heard his wife screaming and he came out of the room and saw that two boys had climbed roof of the house. One of the said boys had closed the mouth of his wife, while the other gave a forceful blow with a brick on the head of his wife. In the meantime, Vijay, cousin brother of the complainant also came out. As the complainant was liming the ladder, kept for going to the roof, to save his wife, both the boys started coming down from the said ladder. The first boy pushed complainant backwards and managed to escape by climbing down the ladder, however, complainant managed to apprehend the other boy, who had given blow with a brick on his wife's head, while he was attempting to escape. In the meantime, public persons also collected at the spot and gave beatings to accused Krishan, as his name was revealed later on. Complainant took his wife to Sanjay Gandhi Memorial Hospital and while doing so, he observed that the artificial

ear-rings, which his wife had been wearing, were missing. The complainant further started that accused Krishan told that name of his co-accused was Parveen. The complainant prayed that necessary action be taken against the accused persons. The PW-26 Ins. Ravinder Singh prepared rukka Ex. PW-26/A on the basis of the said complaint and sent it to PS for registration of the case through PW-12 Ct. Biri Singh.”

3. At the outset, learned counsel for the appellant submits that he does not wish to contest the conviction of the appellant under Section 397/34 of the Indian Penal Code. Counsel further submits that the present case is covered under Section 304, Part I, of the Indian Penal Code as the appellant had no intention of killing the deceased and the motive was only theft but since the deceased raised an alarm the appellant had picked a brick and hit her on the head, which proved fatal. It is further contended that the act was committed without premeditation, in the heat of the moment and only one blow was inflicted, and the appellant did not act in a cruel manner.
4. We have heard learned counsel for the parties and examined the trial court record, the evidence and the judgment passed by the trial court. PW-3, Deepak Kumar, who is the husband of the deceased, has supported the case of the prosecution and has given details as to how on hearing the noise of his wife he immediately came out of the room with Vijay, his cousin brother, and saw two boys were present on the roof. He further testified that one of the boys had gagged his wife's mouth while the other was holding a brick in his hand, which he hit on her wife's head. The person, who had hit the wife of PW-3 with a brick, was apprehended. He was given beatings by the neighbours. He disclosed his name as Krishan,

appellant herein. PW-3 identified the appellant in Court. It is further testified by PW-3 that at Sanjay Gandhi Memorial Hospital her wife was declared dead. PW-3 also testified that the appellant had disclosed the name of the other boy as Praveen. PW-6, Vijay Kumar, cousin brother of PW-3, Deepak Kumar, has testified on the lines of PW-3.

5. Based on the testimony of the eye-witnesses, PW-3 Deepak Kumar and PW-6 Vijay Kumar, PW-5, Harpal Singh, and having regard to the fact that the appellant was apprehended at the spot, the trial court has rightly convicted the appellant. The only argument raised by learned counsel for the appellant is that the present case would fall under the Section 304, Part-I, of the Indian Penal Code. It has also been brought to the notice of the Court that the appellant has already undergone the sentence of more than eight years.
6. Section 304 of the Indian Penal Code, reads 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.”

7. In *Rajendra Singh Vs. State of Bihar*, reported at AIR 2000 SC 1779 it has been held that :

“In order to bring the case within Exception 4 to Section 300 of Indian Penal Code all the following conditions have to be

*fulfilled, namely, (1) The act must be committed without pre-meditation in a sudden fight in the heat of passion; (2) when there was a sudden quarrel; (3) without the offender taking undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual conduct or exchanging of blows on each other. When the deceased was armed and did not cause any injury to the accused even following a sudden quarrel and the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted” – In **Kikar Singh Vs. State of Rajasthan** AIR 1993 SC 2426, it was held that :*

“If the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that giving the blows with the knowledge that they were likely to cause death, he had taken undue advantage.

14. Considering the background facts in the light of the principle set out above, the inevitable conclusion is that Exception 4 to Section 300 IPC is applicable and the offence is relatable to Section 304 Part I and not Section 302 IPC. That being, so the conviction is altered. Custodial sentence of 10 years would meet the ends of justice.

15. The appeal is allowed to the aforesaid extent.”

8. In the case of **Litta Singh & Anr. Vs. State of Rajasthan** reported at 2013 Crl.L.J. 3321, a case where the injuries had been caused with use of lathi and sickle. It was held that the accused was liable to be convicted under Section 304 Part-II IPC and not for murder. The court took into account based on the testimony of the witnesses that the accused persons did not intend to cause death and also when the persons reached the place the accused persons ran away. Paragraphs 18 to 21 of the judgments are reproduced below:

“18. It is well settled proposition of law that the intention to cause death with the knowledge that the death will probably be caused, is very important consideration for coming to the conclusion that death is indeed a murder with intention to cause death or the knowledge that death will probably be caused. From the testimonies of the witnesses, it does not reveal that the accused persons intended to cause death and with that intention they started inflicting injuries on the body of the deceased. Even more important aspect is that while they were beating the deceased the witnesses reached the place and shouted whereupon the accused persons immediately ran away instead of inflicting more injuries with intent to kill the deceased.

19. In the case of [Gurdip Singh & Anr. vs. State of Punjab](#), (1987) 2 SCC 14, this Court came across a similar type of incident, where the prosecution case was that one Maya Bai had two sons and two brothers. She was the mother of accused Nos. 1 and 2 and sister of accused Nos. 3 and 4. The deceased was one Kishore Singh. The accused suspected that Mayabai had illicit relations with the deceased. Hence one day when the deceased was returning from village and when he reached the field of Kashmiri Lal, the accused came out of the wheat field. The first appellant had a kirpan and the second appellant had kappa. It was alleged that the four accused took deceased on wheat field and threw him on the ground. One of the acquitted accused Jit Singh caught hold of arms of the deceased and the two appellants caused injuries with the weapons in their hands. There was an alarm created by Lachhman Singh, PW-3, which had attracted PW-4 and Mohinder Singh. When they reached the spot, the accused ran away with their weapons. The deceased had seven injuries on his body. Injury No.7 was fatal according to the doctor, who examined him. It was argued that the prosecution had not come forward with true case as to how the incident happened. The trial Judge found two accused Jit Singh and Teja Singh not guilty, since the case against them was not proved beyond the reasonable doubt. The appellants were convicted because they had weapons with them unlike the acquitted accused. This Court on consideration of the entire evidence did not interfere with the findings that the appellants were responsible for the death of the deceased by attacking him with the weapons in their hands, but on reappraisal of the entire evidence, the Court found it difficult

to agree with the trial court that the appellants were guilty of the offence under Section 302 IPC. Hence, converting the offence under Section 304 Part I, this Court observed:-

“6. The trial Judge was not wholly justified in observing that there was no evidence about the so-called illicit relationship between Maya Bai and Kishore Singh, the deceased. The materials available create considerable doubt in our mind as to whether the appellants really intended to kill Kishore Singh or whether his misconduct pushed them to wreak revenge against the deceased and in this pursuit attacked him. We are not unmindful of the fact that the 7th injury noted in the post-mortem certificate is in the ordinary course sufficient to cause the death of the deceased. But we are not fully satisfied that the appellants intended to kill the deceased. The correct approach on the evidence and other circumstances in this case, would according to us, be to find the accused guilty under Section 304 Part I, and to sentence them under that section.”

20. After analyzing the entire evidence, it is evidently clear that the occurrence took place suddenly and there was no premeditation on the part of the appellants. There is no evidence that the appellants made special preparation for assaulting the deceased with the intent to kill him. There is no dispute that the appellants assaulted deceased in such a manner that the deceased suffered grievous injuries which was sufficient to cause death, but we are convinced that the injury was not intended by the appellants to kill the deceased.

21. In the facts and circumstances of the case, in our considered opinion, the instant case falls under Section 304 Part II IPC as stated above. Although the appellants had no intention to cause death but it can safely be inferred that the appellants knew that such bodily injury was likely to cause death, hence the appellants are guilty of culpable homicide not amounting to murder and are liable to be punished under Section 304 Part II IPC.”

9. In the case of **Vineet Kumar Chauhan Vs. State of Uttar Pradesh**, reported at (2009) 1 SCC (Crl.) 915, wherein the Supreme Court held that the appellant was guilty of culpable homicide not amounting to murder.

The Supreme Court took into account that there was no enmity between the parties nor that the appellant had pre-meditated the crime of murder. The Supreme Court also took into account that the appellant would have had knowledge that use of revolver was likely to cause death. The appellant was held guilty of culpable homicide not amounting to murder under Section 304 Part II IPC and sentenced to five years rigorous imprisonment. Paragraphs 17 and 18 of the judgments read as under:

“17. Reverting to the facts in hand, as noted above, it stands proved that there being a direct causal connection between the hitting of the bullet, fired by the appellant, to the deceased and her death, the death of the deceased was caused by the appellant. However, having regard to the circumstances, briefly enumerated above, particularly the manner in which the appellant fired the shots, in our view, the appellant could not be attributed the mens rea requisite for bringing the case under clause (3) of Section 300 IPC. Concededly, there was no enmity between the parties and there is no allegation of the prosecution that before the occurrence, the appellant had pre-meditated the crime of murder. We are inclined to think that having faced some sort of hostile attitude from the family of the deceased over the cable connection, a sudden quarrel took place between the appellant and the son of the deceased, on account of heat of passion, the appellant went home; took out his father's revolver and started firing indiscriminately, and unfortunately one of the bullets hit the deceased on her chin. At the most, it can be said that he had the knowledge that the use of revolver was likely to cause death and, as such, the present case would fall within the third clause of Section 299 IPC. Thus, in our opinion, the offence committed by the appellant was only “culpable homicide not amounting to murder. Under these circumstances, we are inclined to bring down the offence from first degree “murder” to “culpable homicide not amounting to murder”, punishable under the second part of Section 304 IPC.

18. Consequently, we partly allow the appeal; set aside the conviction of the appellant under Section 302 IPC and instead convict him under Section 304 Part II IPC. The sentence of rigorous imprisonment for five years would meet the ends of justice.”

10. In the case of *Naimuddin Vs. State of West Bengal* reported at 2009 [4] JCC 3058, the Apex Court in appeal convicted the appellant under Section 304 Part-II and conviction under section 302 IPC was set aside. Relevant portion of the judgment reads as under:

“19. We have heard the learned counsel for the parties at length. On analysis of the entire evidence on record, it is abundantly clear that the conviction of the appellant cannot be sustained under sections 302/149 IPC. However, we do not agree with the second submission of Mr. Sanyal that the appellant also cannot be convicted under section 304 Part II/149 IPC. In our considered view, when the bricks were thrown on the vital parts of the body of the deceased who was an old man of 78 years, in that event, knowledge to commit murder can definitely be attributed to the appellant. In this case, the deceased died instantaneously after receiving the brick injuries. On consideration of the totality of the facts and circumstances of the case, the ends of justice would be met if the conviction of the appellant under sections 302/149 IPC is set aside and the appellant is convicted under sections 304 Part-II/149 IPC and sentenced to five years imprisonment.”

11. In the case of *Gudu Ram Vs. State of Himachal Pradesh* reported at 2013 CrL.L.J. 481, the accused had hit the deceased on the head by a wooden bat. The conviction of the appellant under Section 302 IPC was set aside by the Apex Court and the appellant was convicted for the offence under second part of Section 304 IPC. Relevant paragraphs of the judgment are reproduced below:

“35. The next question to be considered is whether the appellant had the intention to kill Dalip Singh. Here we have some difficulty in accepting the understanding of the events as narrated by the Trial Court and the High Court.

39. However, the nature and number of injuries and their location (the skull) as well as the “weapon” used (a small wooden cricket bat) lead us to conclude that to a reasonable person, an attack of the nature launched by the appellant on Dalip Singh could cause his death. While it may be difficult to delve into the mind of the attacker to decode his intentions, knowledge of the consequences of his actions can certainly be attributed to him.

40. Accordingly, we are of the opinion that the appellant had knowledge that his actions are likely to cause the death of Dalip Singh. He would, therefore, be guilty of culpable homicide not amounting to murder and liable to be sentenced under the second part of Section 304 of the IPC.

Conclusion :

41. Under the circumstances, we partly allow this appeal and set aside the conviction of the appellant for the murder of Dalip Singh but convict him of an offence punishable under the second part of Section 304 of the IPC.

42. We have been informed that the appellant has already undergone over eight years of actual imprisonment and almost eleven years including remissions earned. Under the circumstances, we sentence him to imprisonment for the period already undergone.”

12. Applying the law laid down by the Apex Court to the facts of this case and having regard to the evidence of the witnesses, it is firmly established that the prime objective of the appellant was to commit theft and in the process ear rings of the deceased were removed and only when victim made a noise the appellant hit a brick on her head thus it cannot be said that the act committed by the appellant is with pre-meditation. It is also not the case of the prosecution that the appellant had carried brick to hit the deceased on her head. Thus, it can be said that when the deceased made a noise the brick was used to silence her. The post mortem report would show that only one blow was given and thus it cannot be said that

the appellant had acted in cruel or undue manner or took undue advantage of the deceased. Accordingly, the appeal is partly allowed. We are of the view that in the present case the appellant is liable to be convicted under Section 304 Part-I IPC and not under section 302 IPC, having regard to the above factors and more importantly that a brick was used at the spur of moment and only one blow was inflicted.

G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

February 03, 2015
msr /ssn