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

+ CRL.A. 64/2013

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Date of Judgment: 10th April, 2015

SURESH KUMAR

..... APPELLANT

Through : Mr. Sumeet Verma, Advocate with
Mr. Amit Kala, Advocate

versus

STATE OF DELHI

..... RESPONDENT

Through : Mr. Sunil Sharma, APP for the State
with SI Pawan Tomar, PS-Prashant
Vihar.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J. (ORAL)

1. Present appeal has been filed against the impugned judgment dated 05.06.2012 and order on sentence dated 04.08.2012, whereby the appellant has been sentenced to undergo life imprisonment for the offence punishable under Section 302 of Indian Penal Code and fine of Rs.10,000/- and in default of the payment of fine rigorous imprisonment for six months. Appellant has been further sentenced to undergo simple imprisonment for three months for the offence punishable under Section 30 of the Arms Act and fine of Rs.1,000/- and in default of payment of fine further simple imprisonment for one month.
2. Mr. Sumeet Verma, Advocate appearing on behalf of appellant submits that the impugned judgment is contrary to the well settled

principle of criminal law and the law laid down by the Hon'ble Supreme Court of India in various cases. It is also contended that learned Trial Court has totally ignored the facts and circumstances of the case and the impugned judgment is totally contrary to the evidences. It is further contended that the learned Trial Court has erred and failed to consider the material lapse in the present case and also failed to take into account the material contradictions in the statements of witnesses with respect to the time of incident. It is contended that as per PW1 Brijesh Pandey, the incident took place on 6.4.2010 at 2:00 a.m. in the night while as per PW2 Chanderbali Pandey, the incident took place at 9:45 p.m. It is further contended that these contradictions go to the root of the matter as both these witnesses claimed to have reached the spot immediately on hearing the gun shots and on reaching the spot they were informed by the appellant that he had fired the gun shots. It is also contended that the prosecution has failed to compare the finger prints of the appellant with the finger prints on the weapon of offence i.e. Double Barrel Gun.

3. Mr. Verma next contended that in the cases of circumstantial evidence, the motive assumes importance, however in the present case, the prosecution has failed to establish any motive for the appellant to have fired gun shots and killed the deceased. An alternate, argument has also been raised by Mr. Verma that in case, the prosecution's case is taken to be true that due to a quarrel, appellant fired at the deceased, in that case having regard to the fact that only a single shot was fired, the appellant did not take any

undue advantage of the helplessness of the deceased, the single gun shot in fact hit the base of the neck of the deceased however as per the MLC, the bullet hit the upper shoulder of the deceased. It is thus contended that the present case of the prosecution falls within the purview of Section 300 of Indian Penal Code moreover the incident took place in the heat of the moment on account of a sudden quarrel and the appellant did not have any intention to commit the murder of the deceased. Mr. Verma further contended that to invoke the Exception IV of Section 300 of Indian Penal Code, 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. It is further contended that in the present case, all these requirements are fulfilled and therefore the appellant should have been given the benefit of exception IV of Section 300 of Indian Penal Code.

4. Reliance has been placed on ***Rajesh Kumar Vs. State [2011 (4) JCC 2522]***, wherein in somewhat similar circumstances, this Court altered the conviction from Section 302 of Indian Penal Code to Section 304 Part-II of Indian Penal Code. For the same arguments, reliance is also placed on ***Sukhdev Singh Vs. Delhi State [2003 7 SCC 441]*** and ***Rampal Singh Vs. State of UP [2012 (8) SCC 289]***.
5. Mr. Sunil Sharma, learned counsel for the State submits that PW1 Brijesh Pandey and PW2 Chanderbali Pandey are natural

witnesses, who reached the spot of incident on hearing the gun shots. They have given the truthful account of the incident and contradiction with regard to the time of incident which by itself cannot make their testimony unreliable. It is further submitted that gun shots were fired from the licensee Double Barrel Gun of the appellant. He was apprehended at the spot. It is further submitted that cartridges matched with the gun of the appellant. Mr. Sharma further submits that the testimonies of the witnesses and evidence on record would not leave any room of doubt that appellant had fired the fatal shot on the deceased.

6. Before we consider the rival contentions of the parties, we may deem it appropriate to notice the case of the prosecution as noticed by Trial Court:

- “1. Briefly stated the present case was registered on the statement of complainant Chandrabali Pandey who was appointed by SIS Security as Supervisor at NDPL Training Centre, Cenepeid, Sector-11, Rohini, Delhi and used to live in a room of training center and his duty hours used to be from 2:00 p.m. to 10:00 p.m. According to the complainant on 06.04.2010, his reliever did not come so he had also been doing the duty from 10:00 p.m. to 6:00 a.m.

2. According to the complainant deceased Susheel Bahadur Singh was deputed as a guard at the main gate from 10:00 p.m to 6:00 a.m. and Gunman Suresh Kumar along with his double barrel gun was on patrolling duty in the complex from 7:00 p.m. to 7:00 a.m. Both were deputed by the SIS Security.

3. According to the complainant there used to

be quarrel between deceased Susheel Bahadur Singh and Gun Man Suresh Kumar and there was a quarrel between them on 06.04.2010, also at about 10:30 p.m. According to the complainant he separated them and went to check the other guards on duty. At about 2:00 p.m. in the night complainant heard the sound of bullet. He rushed to the main gate and on reaching there he saw that Gunman Suresh Kumar was standing in the veranda of guard room having his gun in his hand and deceased Suheel Bahadur Singh was lying on the floor of veranda in a pool of blood. According to the complainant Gunman Suresh Kumar told him that deceased was disturbing him since many days so today he killed him with the gun shot. In the mean time other guards also reached there. Complainant snatched the gun from the hand of Gunman Suresh and Guard Brajesh Pandey made a call at No. 100 from the phone installed in the guard room. Inspector Sudhir Kumar with his staff reached there and complainant handed over the double barrel gun and Suresh Kumar to him.

4. F.I.R. bearing No. 116/10 was registered at P.S. Prashant Vihar and investigation went underway. Accused was arrested. After completion of investigation final report U/s. 173 Cr.P.C. was prepared and was filed in the Court of Metropolitan Magistrate who after completing all formalities committed the case to the court of sessions for trial.”

7. The prosecution examined 18 witnesses. No evidence was led by the defence. Statement of the appellant was recorded under Section 313 of Code of Criminal Procedure. PW1 Brijesh Pandey deposed that he was working as Guard in the NDPL Training Centre, Rohini and on the date of incident his duty hours were

from 10:00 p.m. to 6:00 a.m. At about 2:00 a.m., he heard the sound of bullet fire and he rushed the main gate and saw Sushil Bahadur Singh, a Guard lying in pool of blood and appellant was present there with a gun in his hand. He identified the appellant in Court. He also testified that PW2 Chanderbali Pandey also came at the spot and appellant had told him that he had killed the deceased and also that PW2 Chanderbali Pandey took the gun from the hands of the appellant. We may notice that during cross examination of PW1, a suggestion was made to this witness that appellant was drinking water when deceased picked up his gun and pointed towards him and when the deceased was about to pull the trigger, the appellant in order to save himself had grappled with the deceased and in that process a shot was fired which hit Sushil Bahadur Singh. Another suggestion was put to this witness that there was no quarrel and death was an accidental death.

8. PW2 Chanderbali Pandey testified that he was working as a Supervisor at NDPL Training Centre, Rohini and was on duty from 2:00 a.m. to 10 p.m. and on the day of incident his reliever did not come and due to said reason, he was on duty from 10:00 a.m. to 6:00 a.m. Sushil Bahadur Singh was on duty as Guard Man at main gate from 10:00 a.m. to 6:00 a.m. and appellant was also on duty from 7:00 p.m. to 7:00 a.m. in the same complex. He also testified that deceased and appellant used to quarrel and a quarrel also took place between them on 10:30 p.m. He had intervened and pacified them. On hearing a sound of gun shot, he rushed to the spot immediately and saw the deceased lying in pool of blood

and appellant was present there with a gun in his hand and on inquiry, he informed him that he killed the deceased. In the meanwhile, other guards also reached and he took the gun from the hands of the appellant and PW1 Brijesh Pandey called the police by calling at 100 number. This witness also identified the gun. Similar suggestions were also put to this witness as the suggestion which were put to PW1 Brijesh Pandey.

9. We also deem it appropriate to notice that testimony of PW16 Dr. K. Goel, Chief Medical Officer, Aruna Asaf Ali Hospital, whose testimony is reproduced as under

“On external examination, there was one big irregular lacerated punctured wound 5X4 cm in size over right side base of neck just above and adjacent to right clavicle. Margins were burnt, blackish with abraded colour. Initial tract of the wound was cheery red in colour. No other external injury was found on the body.

On internal examination there was blood clots with cherry red discolouration were seen all around right side neck. The right sided neck vessels, muscles and other soft tissues were extensively blasted out. There was one plastic wed and multiple lead pellets were recovered from the soft tissues of right side neck. There was fracture comminution of right clavicle with clots. The right side area of sixth and seventh cervical vertebrae were extensively blasted out due to blast effect of fire arm with clots around.

OPINION : *The injuries were ante mortem in nature caused by fire arm which was shot gun. Range of fire arm was close range. Cause of death was shock and hemorrhage consequent upon*

extensive neck injuries. Fire arm injury was sufficient to cause death in ordinary course of nature. Time since death was about 12-13 hours.”

10. On careful examination of the testimonies of PW1 & PW2, we find that there are no contradiction in their statements. We may however notice that as per PW1 Brijesh Pandey, the incident took place at about 2:00 a.m. whereas as per testimony of PW2 Chanderbali Pandey, he had heard the bullet fire at about 9:45 p.m. Learned counsel for the appellant has submitted before us that this is a material contradiction which goes to the root of the matter and thus the testimonies of both PW1 Brijesh Pandey and PW2 Chandrabali Pandey are unreliable. In our view, the submission is without any force as 9:45 p.m. is simply a typographical error. A complete reading of the testimony of PW2 Chanderbali Pandey shows that in the preceding lines, this witness has testifies that at about 10:30 a.m., a quarrel erupted between deceased and accused and few lines thereafter it has been recorded that *“On the night at about 9:45 p.m., I heard some sound of bullet fire and I immediately rushed to the main gate and saw deceased Bahadur Singh lying in pool of blood and accused present in court today was also present with gun in his hand.”* In case appellant had fired at 9:45 p.m., this witness could not have witnessed a quarrel at 10:30 p.m., which would clearly shows that the timing of 9:45 p.m. is a typographical error.
11. Other than this, we find that both the witnesses have testified that they were on duty on 06.04.2010 at NDPL Training Centre, Rohini

and they run to the spot of incident after hearing the bullet fire and found that the deceased was lying in the pool of blood while appellant was present with a gun in his hands. PW1 Brijesh Pandey has testified that PW2 Chanderbali Pandey took the gun from the hands of the appellants and he telephoned the police at 100 number. PW2 Chanderbali Pandey has also testified on identical lines that he took the gun from the appellant and PW1 Brijesh Pandey called the police by calling 100 number. The gun has been duly identified by PW2 Chandrabali Pandey. We, thus, find the testimonies of PW1 Brijesh Pandey and PW2 Chanderbali Pandey to be truthful and reliable and there is no doubt that they were present at the spot and it also leaves no room for doubt that appellant was also present at the spot and weapon of offence was in his hands which was taken by PW2 Chanderbali Pandey and handed over to the police.

12. We have also examined the report Ex.PW18/J of Forensic Science Laboratory, as per which lead pellets marked 'P1' to 'P4' corresponded to shot No. 1 of regular 12 bore ammunition. Having regard to the testimonies of PW1 Brijesh Pandey & PW2 Chandrabali Pandey, which establishes the presence of appellant at the spot with his licensed fire arm and result of Forensic Science Laboratory which shows that the fire pellets matched with double barrel gun which was taken from the hands of the appellant by PW2 Chanderbali Pandey. The Trial Court has rightly reached the conclusion of guilt of the appellant.
13. We find force in the submission of Mr. Verma, learned counsel for

the appellant that the offence under Section 304 Part-II would be made out against the appellant. In case of **Sukhdev Singh (Supra)**, it has been held that:

“15. On the contrary, this appears to be a case as noted above, covered by Exception 4 to Section 300. Four requirements are to be satisfied to bring in application of Exception 4. They are as follows:

(1) it was a sudden fight;

(2) there was no premeditation;

(3) the act was in a heat of passion; and

(4) the assailant had not taken any undue advantage or acted in a cruel manner.

16. The cause of quarrel is not relevant nor is it relevant who offered the provocation or started the fight.

17. The factual scenario as presented by the prosecution and the conclusions of the High Court, noted supra, go to show that in course of sudden quarrel, the offender fired the shots.

18. Therefore, though the High Court was justified in holding that Section 302 was not applicable, it was not correct in holding that Exception 1 applied. In fact, Exception 4 to Section 300 applied. We, therefore, alter the conviction to Section 300 Part II instead of Section 304 Part I, as was held by the High Court. Custodial sentence of 8 years would suffice. So far as Section 308 IPC is concerned, we do not find any infirmity in the conclusions of the High Court to warrant interference.”

It would also be useful to refer **Rampal Singh (Supra)**, wherein it has been held that:

“30. Another very important aspect is that it is not a case of previous animosity. There is nothing on record to show that the relation between the families of the deceased and the Appellant was not cordial. On the contrary, there is evidence that the relations between them were cordial, as deposed by PW1. The dispute between the parties arose with a specific reference to the ladauri. It is clear that the Appellant had not committed the crime with any pre-meditation. There was no intention on his part to kill. The entire incident happened within a very short span of time. The deceased and the Appellant had had an altercation and the appellant was thrown on the ground by the deceased, his own relation. It was in that state of anger that the Appellant went to his house, took out the rifle and from a distance, i.e., from the roof of Muneshwar, he shot at the deceased. But before shooting, he expressed his intention to shoot by warning his brother to keep away. He actually fired in response to the challenge that was thrown at him by the deceased. It is true that there was knowledge on the part of the Appellant that if he used the rifle and shot at the deceased, the possibility of the deceased being killed could not be ruled out. He was a person from the armed forces and was fully aware of consequences of use of fire arms. But this is not necessarily conclusive of the fact that there was intention on the part of the Appellant to kill his brother, the deceased. The intention probably was to merely cause bodily injury. However, the Court cannot overlook the fact that the Appellant had the knowledge that such injury could result in death of the deceased. He only fired one shot at the deceased and ran away. That shot was aimed at the lower part of the body, i.e. the stomach of the deceased. As per the statement of PW2, Dr. A.K. Rastogi, there was a stitched wound obliquely placed on the right iliac fossa which shows the part

of the body the Appellant aimed at.

31. This evidence, examined in its entirety, shows that without any pre-meditation, the Appellant committed the offence. The same, however, was done with the intent to cause a bodily injury which could result in death of the deceased.

*32. In the case of **Vineet Kumar Chauhan v. State of Uttar Pradesh** (supra), the Court noticed that*

“17..... concededly there was no enmity between the parties and there was no allegation of the prosecution that before the occurrence, the Appellant had pre-meditated the crime of murder. Faced with the 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 the chin.”

33. Appreciating these circumstances, the Court concluded:

“17.....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 Indian Penal Code.”

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In view of the above discussion, we partially accept this appeal and alter the offence that the Appellant has been held guilty of, from that under

Section 302 of the Code to the one under Section 304 Part I of the Code. Having held that the accused is guilty of the offence under Section 304 Part I, we award a sentence of ten years rigorous imprisonment and a fine of Rs. 10,000/-, in default to undergo simple imprisonment for one month. The judgment under appeal is modified in the above terms. The appeal is disposed of accordingly.”

14. 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.”

15. 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.”

16. 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.”

17. The evidence on record shows that deceased was working in the same complex with the appellant and a quarrel took place between them. The act was committed on account of sudden provocation and without any premeditation and in the heat of the moment and the appellant had no intention to cause death.
18. Keeping in view the facts and circumstances of the case and the above principle laid by Hon’ble Apex Court, we find that the present case appears to be one under Section 304 Part-II of Indian

Penal Code. We thus, modify the conviction and sentence of the appellant from Section 302 of Indian Penal Code to Section 304 Part-II of Indian Penal Code and sentence him to undergo rigorous imprisonment for a period of eight years with fine as already imposed by learned Trial Court.

19. The appeal is partly allowed. The appellant shall serve the remaining sentence as modified.
20. Copy of the order be sent to the concerned Trial Court as well as to the Superintendent Jail by fax as well as e-mail for necessary compliance.

SANGITA DHINGRA SEHGAL, J.

G. S. SISTANI, J.

APRIL 10, 2015

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