

\$~R-28

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

% *Date of Decision: April 06, 2016*

+ **CRL.A.614/2000**

AVDESH

..... Appellant

Represented by: Mr.Harsh Prabhakar, Advocate with
Mr.Anirudh Tanwar, Advocate

versus

STATE

..... Respondent

Represented by: Mr.Varun Goswami, APP

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (ORAL)

1. The appellant assails the judgment dated September 14, 2000 passed by the learned Additional Sessions Judge convicting the appellant for the offence punishable under Section 302 IPC and consequently, in terms of the order dated September 15, 2000 he has been sentenced to imprisonment for life and pay fine in sum of ₹1,000/-; in default to undergo rigorous imprisonment for a period of six months.
2. At the outset we note that the other accused arrayed at the trial, namely : Arvind Kumar and Jagdhari @ Sadhu have been acquitted of the respective charges framed against them. Therefore, we are to decide the fate of the appellant alone in this appeal.
3. The facts germane to the adjudication of the appeal lie within a narrow compass and may be taken note of pithily to avoid prolixity; while eschewing unnecessary reference to the circumstances/evidence *qua* the co-

accused because the State has not preferred any petition seeking Leave to Appeal and their acquittal has attained finality.

4. The fateful day was March 24, 1997. At around 01:30 PM Raj Kumar @ Sonu PW-13 (informant) along with his two friends, namely, Ikramul PW-7 and Shrikant PW-11 while celebrating the festival of '*Holi*' reached in front of '*Barat Ghar*' (Community Centre) in the colony at Shahbad Dairy. The appellant : Avdesh and co-accused : Arvind Kumar, residents of Block A Shahbad Dairy approached them from the opposite direction. A boy accidentally fell on Avdhesh and consequently, Avdesh hurled abuses at the boy. Raj Kumar @ Sonu intervened. Avdesh also abused him and a quarrel erupted. In the meanwhile co-accused Jagdhari @ Sadhu (father of the Avdesh) came with a '*lathi*' and gave a blow on the head of Raj Kumar @ Sonu who became unconscious.

5. On receiving information of a quarrel, the parents of Raj Kumar @ Sonu namely, Ramesh Kumar PW-14 and Asha PW-8 along with their elder son - Rajender Kumar @ Happy (deceased) reached the spot. They gave nursing at the spot to Raj Kumar @ Sonu and as a result he regained consciousness at the spot.

6. Thereafter Asha, Ramesh Kumar, Raj Kumar @ Sonu (informant), Ikramul, and Shrikant along with the deceased - Rajender Kumar proceeded to the house of Avdesh along with 5-7 neighbours. Relevant would it be to note that it has emerged in evidence [Scaled Site Plan-Ex.PW-6/A] that the house of Avdesh was located at a distance of approximately 1.3 kilometers from the Community Centre.

7. Consequently, they are stated to have remonstrated with regard to the issue of '*lathi*' blow having been inflicted upon Raj Kumar @ Sonu. Neighbours from the locality of Avdesh also conglomerated outside house

of Avdesh. According to the prosecution, co-accused Arvind (neighbour of Avdesh) caught hold of Rajender Kumar (deceased) and Avdesh stated to have inflicted a knife blow on his chest.

8. Immediately thereafter, Asha went to the Police Post - Shahbad Dairy along with the other eye-witnesses namely Raj Kumar @ Sonu (informant), Ikramul, Shrikant and Ramesh Kumar. D.D.No.21 [Ex.PW-10/A] was recorded at 02:05 PM at P.P.Shahbad Dairy wherein Asha informed that '*some boys had assaulted her sons and the condition of Rajender Kumar was serious*'. In furtherance thereof, HC Durender Singh (not examined during trial) along with Ct.Surinder Singh (not examined during trial) were deputed to conduct preliminary investigation. Rajender Kumar was shifted to Hindu Rao Hospital in a police van. In the meanwhile, Raj Kumar @ Sonu was brought to Hindu Rao Hospital by Ct.Deep Chand PW- 4 in T.S.R. Asha, Ramesh Kumar, Ikramul and Shrikant also reached Hindu Rao Hospital.

9. Dr.N.R.Tulli PW-1 examined Rajender Kumar at 02:50 PM and declared him 'Brought Dead' in the MLC [Ex.PW-1/A]. In the meanwhile, Insp.Mohinder Singh- S.H.O. P.S.S.P.Badli PW-16 reached the spot of occurrence along with the police staff. He learnt that Rajender Kumar had been taken to the hospital. Therefore he reached the hospital and collected the M.L.C. of Rajender Kumar.

10. Raj Kumar @ Sonu was examined by Dr.Rameshwar Sharma PW-2 at around 03:40 PM [Ex.PW-2/A] and he was declared fit for statement. The statement/*fardbayan* [Ex.PW-13/A] of Raj Kumar @ Sonu was recorded by Insp.Mohinder Singh. Significantly, it would be pertinent to notice the fact that the earliest version of the incident stated by Raj Kumar @ Sonu (informant) in his *fardbayan* reveals that '*Rajender Kumar was*

stabbed by Avdesh only once'. There is no reference to the fact that Rajender Kumar was stabbed multiple times and more than one knife blow was inflicted on his person.

11. Insp.Mohinder Singh made the endorsement/*tehrir* [Ex.PW-16/A] beneath the statement of Raj Kumar and recommended registration of a case under Section 302/308/34 I.P.C. Accordingly, *rukka* was sent to P.S.S.P.Badli through Deep Chand at around 05:15 PM. Thereafter, Insp.Mohinder Singh returned to the spot of occurrence along with Raj Kumar and other witnesses.

12. HC Vijender Singh - Duty Officer P.S.S.P.Badli PW-12, received the *rukka* from Deep Chand and registered FIR No.214/97 [Ex.PW-12/A] under Sections 302/308/ 34 I.P.C. at 06:00 PM.

13. At the spot of the occurrence Insp.Mohinder Singh conducted the spot investigation and prepared the Visual Site Plan without scale [Ex.PW-16/B] at the instance of Raj Kumar @ Sonu. The statements of witnesses including, Ramesh Kumar, Shrikant, Ikramul and Asha in terms of section 161 Cr.P.C. were recorded by him.

14. The next day i.e. on March 25, 1997, copy of the FIR [Ex.PW-12/A] was received by the concerned *Illaq*a Magistrate at 07:00 AM in compliance with the mandate of Section 157 Cr.P.C.

15. The dead body of Rajender Kumar was seized by Insp.Mohinder Singh who along with the inquest papers sent the dead body to the mortuary of Hindu Rao Hospital for post-mortem. Dr.C.B.Dabas PW-3 conducted the post-mortem and prepared the post-mortem report Ex.PW-3/A. recording therein that Rajender Kumar had four injuries on his person. Injury No.1 was a stab wound on the left front side of the upper chest. Injury No.2 was a skin deep incised wound on the outer middle part of the

left arm. Injury No.3 was a stab wound on the left side back of chest. Injury No.4 was an abrasion on the forehead. The cause of death was opined to be hemorrhage and shock as a result of the injuries. Injury No.1 was opined to be sufficient in the ordinary course of nature to cause death. The post-mortem report evinced that the injury Nos.1, 2 and 3 were caused by a sharp edged weapon and injury No.4 was caused by blunt force.

16. Avdesh surrendered in the Court on March 31, 1997 and was formally arrested. No recovery was made pursuant to the statement made by him to Insp.Mohinder Singh.

17. SI Manohar Lal Draftsman PW-6 prepared the site plan to scale Ex.PW-6/A at the instance of Raj Kumar on April 28, 1997.

18. At this stage it would be relevant to note that a Cross-FIR bearing No.323/97 was registered on April 28, 1997 at P.S.S.P.Badli on the basis of statement of Jagdhari @ Sadhu (father of Avdesh), which statement was recorded on March 24, 1997 itself. The said FIR was registered against Ikramul, Shrikant and Raj Kumar for offence punishable under Section 325/34 IPC because Jagdhari @ Sadhu was grievously assaulted with a brick in consequence of which his tooth was broken. A Final Report in terms of Section 173 Cr.P.C. with respect to the cross-FIR was submitted in the concerned Court on May 10, 1997 against Ikramul, Shri Kant and Raj Kumar @ Sonu. But, the fate of the proceedings emanating from the Cross-FIR do not emerge on record.

19. Avdesh along with the two acquitted co-accused were arrayed for trial. Prosecution examined 16 witnesses in support of the charge.

20. Upon conclusion of trial the learned Trial Court held Avdesh guilty for the offence punishable under Section 302 IPC taking into consideration the eye-witness account emerging in form of testimonies of Ikramul, Asha,

Shrikant, Raj Kumar @ Sonu and Ramesh Kumar. Co-accused Arvind Kumar and Jagdhari @ Sadhu were acquitted of the respective charges framed against them.

21. We have endowed careful consideration to the rival submissions advanced at the bar by Shri Harsh Prabhakar, learned *Amicus-Curiae* appearing on behalf of the appellant and Shri Varun Goswami, learned Additional Public Prosecutor. Synopsis of Submissions submitted by the learned *Amicus* during course of hearing has also been taken on record.

22. The factual conspectus delineated by us above necessarily gives rise to twin issues that beg consideration. Firstly, whether the prosecution has successfully established that it was Avdesh who inflicted the fatal injuries upon the deceased and secondly, if so, what offence is constituted.

23. We venture to answer the second issue at the outset.

24. Even a cursory analysis of the contours of the present case evinces that the unfortunate incident in which Rajender Kumar was stabbed outside the house of Avdesh was shortly preceded by another incident which transpired in front of the Community Centre wherein the younger brother of Rajender Kumar was injured. As noted by us earlier, Jagdhari @ Sadhu the father of Avdesh was also grievously assaulted by the members of the informant faction. Prosecution evidence itself establishes that once Raj Kumar @ Sonu; who was accompanied by Ikramul and Shrikant was injured at the hands of co-accused Jagdhari @ Sadhu in front of the Community Centre, Asha, Ramesh Kumar and Rajender Kumar (deceased) reached the said spot. The testimony of Asha reveals that the said persons along with 5-7 persons from the neighbourhood proceeded towards the house of Avdesh. Significantly, the Scaled Site Plan [Ex.PW-6/A] evidences that the house of Avdesh is located at a distance of

approximately 1.3 kilometers from the Community Centre. It is thus apparent that the informant faction, which was much larger in number, hounded the three accused persons and travelled the said distance not to remonstrate innocuously but to escalate the fight further. We are not oblivious to the instinctive human tendency of the witnesses to suppress the role played by them in the quarrel and paint an exaggerated picture of unilateral unprovoked assault having been unleashed upon them. Admittedly, the members of the informant faction did not deem fit to inform/involve the police at that stage and sought to take law in their own hands. In wake of such attending circumstances, where the family of Avdesh was surrounded by the members of the rival faction, the instinct of self preservation and protecting ones family may have overtaken Avdesh and consequently, he may have regrettably exceeded his right to private defence recognized under law by resorting to stab Rajender Kumar. It assumes significance that it has emerged on record that father of Avdesh also suffered grievous injuries at the hands of the members of the informant faction. It is ostensible that the prosecution witnesses have not clearly/truthfully explained the circumstances in which injuries were suffered by the co-accused Jagdhari @ Sadhu and have sought to suppress the true geneses of the occurrence by projecting a puerile picture that cannot be accepted in its entirety. The factual conspectus of the case at hand would attract Exception 2 to Section 300 IPC and even if it is held proved that Avdesh stabbed the deceased, at best the offence under Section 304 IPC would be made out as the act of the appellant would be in excess of exercising his right to private defence.

25. Viewed from another perspective, the offence would stand mitigated to Section 304 IPC owing to operation of Exception 4 to Section 300 IPC.

Admittedly, the incident of stabbing occurred outside the house of Avdesh when the rival faction arrived in strength of numbers. No evidence has been led by the prosecution to establish existence of prior-enmity between Avdesh or co-accused and the family of Rajender Kumar. As highlighted by us in the preceding paragraph, it is evident that the informant faction, without seeking police intervention, travelled a distance of 1.3 kilometers not to remonstrate innocuously but to escalate the fight further. It was during the course of such sudden fight the deceased was unfortunately stabbed. Since it was the informant faction who chose to escalate the issue and visit the house of Avdesh, the element of premeditation cannot be attributed to Avdesh to oust the applicability of the said Exception. Furthermore, the Explanation appended to Exception 4 mandates that it is immaterial in such cases which party offers the provocation or commits the first assault. In the context of adjudging the applicability of Section 304 IPC, when more than one stab blows have been inflicted by the accused upon the vital parts of the deceased, the Supreme Court in its decision reported as (2011) 2 SCC 123 Mangesh v. State of Maharashtra pertinently observed that even though an injury may be caused on the vital part of the body, however, it must also be borne in mind that when a person loses his sense he may act violently and that by itself may not be a ground to be considered against him while determining the nature of offence. In the said case three stab wounds were inflicted by the accused upon the deceased and the fatal injury was located on the left side of the chest. The Supreme Court in another authoritative pronouncement reported as (2008) 11 SCC 637 Shamboo Singh v. State of Rajasthan invoked Exception 4 to Section 300 IPC in a case wherein during course of sudden quarrel two knife blows were inflicted on the chest and one knife blow was delivered on the

abdominal region of the deceased. The accused was not held to have acted in a cruel or unusual manner so as to oust the applicability of Exception 4 to Section 300 IPC. At this juncture, it would also be apposite to consider the decision of the Supreme Court reported as (2015) 2 SCC 638 K. Ravi Kumar v. State of Karnataka. The facts comprised in the report of the judgment reveal that the accused asked his wife to accompany him to see the condition of his ailing father but the wife refused by saying that they would go some other day. This resulted into a heated argument between the couple and the same led to the stabbing of the wife. The accused also poured kerosene oil on his wife and set her on fire. After taking a stock of various decisions rendered on this aspect, the Court observed that there was no premeditation in the commission of the offence and the incident occurred due to sudden quarrel which ensued between the accused and his wife. Resultantly, the Supreme Court altered the conviction of the accused from Section 302 IPC to Section 304 (II) IPC. In the case at hand, the deceased has suffered three stab wounds and abrasion on the forehead. The fatal injury i.e. Injury No.1 is located on the front left side of chest whereas the other stab injuries are located on the left side back of chest and outer middle part of the left arm. Taking into consideration the nature/*situs* of injuries coupled with the fact that the informant faction came to the house of the appellant in strength of numbers and had grievously assaulted the father of the appellant little earlier, the appellant cannot be construed to have acted in a cruel manner or taken undue advantage. Thus, we are of the considered view that the appellant may also be entitled to invoke Exception 4 to Section 300 IPC and even if it is held proved that the appellant stabbed the deceased, offence under Section 304 IPC would be constituted.

26. We hasten to remark that in cases of such kind it is the solemn duty of every Court to adjudge the applicability or otherwise of Section 302 IPC in light of the statutory exceptions engrafted under the Code upon complete appraisal of evidence. The said duty arises *de hors* the fact that the bar may fail to address submissions on this material aspect. It is the sacrosanct duty of the Courts of the land to punish the guilty only under the appropriate provision of law. Unfortunately, we do not find much deliberation on this crucial aspect by Courts below. We hope and trust that in future Courts would advert their consideration to this aspect of the matter more carefully. We may highlight that it is for this purpose that we have extensively discussed the aspect of applicability of Section 302 IPC in the present case, even though the same is not necessary for resting our conclusion for the reasons expressed in the succeeding paragraphs.

27. Now, we proceed to consider the first and foremost issue formulated by us in paragraph 22 viz. whether the prosecution has successfully established that it was the appellant who inflicted the fatal injuries upon the deceased.

28. Upon microscopic analysis of the evidence led by the prosecution in the present case we are persuaded to observe that it cannot be safely concluded that it was Avdesh who in fact inflicted the fatal stab wounds upon the deceased. Asha (mother of the deceased who claims to have witnessed the occurrence) stated before the police at 02:05 PM that '*some boys*' had assaulted her sons. The said fact is evinced from bare perusal of D.D.No.21 dated March 24, 1997 recorded at P.P.Shahbad Dairy. It assumes significance that when she made the said statement before the police she was accompanied by other prosecution witnesses who also claim to be eye witnesses to the incident of stabbing, yet the name of Avdesh or

the fact that the assailant resided at A-159, Shahbad Dairy did not surface. Furthermore, there exists no cogent explanation as to under what circumstances the name of Avdesh could be gathered since the assailant and consequently be disclosed by Raj Kumar @ Sonu in the *fardbayan* [Ex.PW-13/A] recorded by the police at Hindu Rao Hospital at 05:15 PM on March 24, 1997. It would be pertinent to highlight that Raj Kumar @ Sonu has stated in cross examination that no public witness other than his parents were present at the hospital when his statement was recorded.

29. In this regard it may also be highlighted that the earliest version of the incident disclosed by Raj Kumar @ Sonu in his *fardbayan* recorded by Insp.Mohinder Singh at Hindu Rao Hospital at around 5:15 PM reveals that according to him '*the deceased was stabbed by the present appellant only once*'. There is no reference to the fact that the deceased was stabbed multiple times and more than one stab wound was inflicted. The said fact is in teeth with the findings comprised in the post-mortem report [Ex.PW-3/A], wherein, it has been recorded that '*three stab wounds on different parts of the upper body*' and abrasions on the forehead were found on the deceased. Thus it is evident that the prosecution witnesses have not actually witnessed the deceased being stabbed even though the said witnesses may have been present at the spot of occurrence. There exists an imminent possibility that the deceased may have been stabbed by some person in the crowd that had conglomerated outside the residence of Avdesh where the incident occurred. It is evident that a free fight had ensued outside the residence of Avdesh. The faction of the informant itself consisted of the informant himself, Ramesh Kumar, Asha, Ikramul and Shrikant. Pertinently, Asha has stated during cross examination that 5-7 persons from their neighbourhood had accompanied them and many residents of the

village of accused were also present at the spot of occurrence. In this connection, it may also be highlighted that Shrikant has also stated during cross examination that around 15- 20 persons had collected when the deceased was stabbed. Ikramul has also admitted in cross examination that the deceased had hit Jagdhari (father of the appellant) with a brick. In wake of such cacophony it is quite possible that some sympathizer of the faction of the accused may have unilaterally resorted to stabbing the deceased. We may also highlight that suggestions to this effect have been given to various prosecution witnesses on behalf of the accused.

30. For the foregoing reasons the appeal is allowed. The impugned judgment of conviction dated September 14, 2000 and order on sentence dated September 15, 2000 passed by the learned Additional Sessions Judge is set aside. The appellant is acquitted. The appellant is on bail. Bail bonds and Surety bonds are discharged.

31. TCR be returned.

32. Copy of this decision be sent to the Superintendent Central Jail Tihar for updating of the jail record.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

APRIL 06, 2016
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