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

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Date of Judgment: 19th September, 2017

+ **CRL.A. 72/2014**

AFSANA

..... Appellant

Through: Ms. Manika Tripathy Pandey &
Mr. Ashutosh Kaushik, Advocates.

Versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP

+ **CRL.A. 102/2014**

NOOR MOHAMMAD

..... Appellant

Through: Mr. Azhar Qayum, Advocate.

Versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

1. Both the appeals have been heard together with the consent of the parties. Arguments have been addressed by the learned counsel for the parties and the same are being disposed of by a common judgment.

2. Both the appeals have been filed under Section 374 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') against the judgment dated 20.04.2013 by which the appellant Noor Mohammed has been held guilty for the offence under Sections 302 and Section 201 of the Indian Penal Code (hereinafter referred to as 'IPC'). The appellant Afsana has been convicted under Section 201 of IPC. Challenge is also made to the order on sentence dated 30.04.2013 by which the appellant Noor Mohammed has been sentenced to rigorous imprisonment for life and a fine of Rs. 10,000/- for the offence under Section 302 of IPC, in default of payment of fine, simple imprisonment for one month. The appellant Noor Mohammed has been further sentenced to rigorous imprisonment for a period of 5 years and a fine of Rs.2,000/- for the offence under Section 201 of IPC, in default of payment of fine, simple imprisonment for one week. The appellant Afsana has been sentenced to rigorous imprisonment for a period of five years and a fine of Rs.2,000/- for the offence under Section 201 of IPC, in default of payment of fine, simple imprisonment for one week.
3. The case of the prosecution as noticed by the learned Trial Court reads as under:

"2. The case of the prosecution is that on 4.8.2012 at about 11:30 AM an information was received at Police Station Rani Bagh that foul smell was oozing out of House No. 125, Village Pitampura, Delhi and that two-three days prior there was a quarrel amongst the tenants residing in the said room and they were missing since then. On this SI Pawan along with Ct. Devender reached the spot i.e. first floor of House No. 125, Village Pitampura, Delhi which was found lock and smell was coming out of the same. After sometime SHO Police Station Rani Bagh also reached the spot and on his directions the lock

was broken by SI Sandeep after which the police entered the room where they found two steel boxes/ trunks which were kept one over the other. The box which was kept on the top was opened and it found containing two blood stained mattresses and green coloured bangles sticking to the same. Thereafter the second box was opened which found to contain dead body of a male in a decomposed condition. Statement of the landlord Naveen Kumar was recorded wherein he informed the police that the said room was rented out to one Noor Mohd. and his wife Afsana and on the intervening night of 1-2.8.2012 at about 2:00 – 2:30 AM he heard the shouting from the said room and when he went to the room and knocked the same it was opened by Mohd. Sultan S/o Noor Mohd. and on asking the wife of Noor Mohd. namely Afsana she informed that it was their personal matter. According to Naveen Kumar thereafter on 2.8.2012 at about 9:00 AM he noticed the lock at the door of Noor Mohd and after two days foul smell was founding coming from the said room on which they informed the PCR. On the basis of statement of Naveen Kumar the FIR was got registered and Crime Team was called to the spot who inspected the scene of crime. The body was thereafter removed to BJRM Hospital and various exhibits were lifted from the spot.

3. On 06.08.2012 pursuant to a secret information the accused Noor Mohammad and Afsana along with their three children were apprehended while they were sitting on a footpath near Gazipur Bus Stand. On interrogation both the accused Noor Mohammad and Afsana confessed about the incident of this case after they were arrested. One Chinese mobile phone KACHADDA model K-9 with double IMEI and one SIM and battery was recovered from the possession of Noor Mohammad which he disclosed to be belonging to his deceased brother Shahrayar which mobile phone was taken into possession. Disclosure statements of both the accused were thereafter recorded wherein they disclosed that they had thrown the weapon of offence i.e. Knife along with their blood stained wearing clothes in a polythene at near Haiderpur canal. Pursuant to the same both the accused led the police party near Haiderpur canal near Outer Ring Road from where

at the instance of the accused Noor Mohammad one plastic polythene bearing EKCO dry cleaners was recovered in the bushes which was checked and one blood stained knife (butchers knife) and one pair of blood stained male clothes i.e. Cream color pant and red color T-shirt and one pair of blood stained female clothes i.e. Pink color kurta, pink color salwar, green and pink color chunni were recovered. The said knife and the clothes of the accused were thereafter seized. After completion of investigations charge sheet was filed against both the accused.”

4. The charge under Section 120-B, Section 302 read with Section 120-B and Section 201 read with Section 120-B of IPC was framed against both the appellants.
5. In order to prove its case, the prosecution examined as many as 25 witnesses. The statement of the appellants was recorded under Section 313 of Cr.P.C. whereby they denied all the incriminating material against them. Both the appellants stated that they were innocent and claimed to be falsely implicated in the present case.
6. Ms. Manika Tripathy Pandey, learned counsel for the appellant Afsana in Crl. A.72/2014, does not contest the conviction under Section 201 of IPC. Counsel submits that the appellant Afsana stands acquitted for the offence punishable under Section 120B of IPC and also for the offence under Section 302 read with Section 120-B of IPC as there was no meeting of mind. Counsel contended that the appellant Afsana has minor children to look after. In this background, it is strongly prayed that the sentence of the appellant Afsana be modified to the period already undergone by her which is more than one and a half year.
7. Mr. Azhar Qayum, learned counsel for the appellant in Crl. A. No. 102/2014, submits that it would be highly unsafe to convict the

appellant Noor Mohammed solely on the testimony of an eight year old child witness, who was patently tutored, which is evident upon a reading of the statement under Section 164 Cr.P.C. in comparison to the statement made by him in Court. The counsel also submits that a reading of both the statements would show that the child was under pressure to make such a statement.

8. Lastly, Mr. Qayum does not contest the conviction of the appellant Noor Mohammed and submits that he has minor children to look after. The prosecution has failed to establish any motive in the commission of the charged offence. The offence was committed in the spur of the moment. There is also material contradiction with regard to the recovery of the weapon of offence. The counsel also submits that there was no lethal weapon of offence, but a knife, which was picked up from the place of the incident, as there is no evidence on record to show that the appellant Noor Mohammed had entered his room with a knife. He further submits that the *chunni*, which was tied on the neck of the deceased, in fact gave an indication that after the unfortunate act, an attempt was made to save the deceased, but he died. Thereafter, in panic, the hands and the feet of the deceased were tied to put him in a box to dispose off the dead body.
9. *Per contra*, Mr. Katyal learned counsel for the State submits that the State has been able to prove its case beyond any shadow of doubt. There is no infirmity in the order of conviction as also the order on sentence. He submits that the appellant Noor Mohammed had used a deadly weapon to attack the deceased which was having the blade size of 26.5 cm in length. The knife blow inflicted was one on the neck of the deceased which resulted in his death. He submits that the fact that

the appellant Noor Mohammed used a knife and inflicted injuries on the vital part of the body shows that the appellant Noor Mohammed had knowledge and intention to kill the deceased and, thus the Trial Court has rightly convicted the appellant Noor Mohammed under Section 302 of IPC. Mr. Katyal further submits that as far as the conviction of the appellant Afsana is concerned, there is no infirmity in the judgment of conviction passed against her.

10. We have heard learned counsel for the parties and considered their rival submissions, carefully examined the testimonies of the witnesses on record and the impugned judgment rendered by the Trial Court. In order to deal with the contentions of both the parties, it would be appropriate to analyse the testimonies of the material witnesses. The Trial Court has strongly relied upon the eye witness account of the child witness PW13 Sultan to convict the appellants herein.
11. Before scrutinizing the testimony of the solitary eye witness who was aged about 8-9 years at the time of the deposition in Court, we deem it appropriate to re-visit the legal position regarding the testimony of a child witness.
12. In the case of ***Panchhi v. State of UP*** reported at (1998) 7 SCC 177, it was held that the evidence of the child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus an easy prey to tutoring. The evidence of the child witness must find adequate corroboration before it is relied upon, as the rule of corroboration is of practical wisdom than of law. [***Prakash v. State of MP***, reported at (1992) 4 SCC 225].

13. PW13 Sultan (son of the appellants) testified in his examination-in-chief that he was studying in the first standard at the time of deposition in Court, in a school situated opposite the road of village Khanpur. His father was having one brother namely Shaharyar who had expired. PW13 was not aware as to when his uncle Shaharyar had expired but stated that it was Wednesday and there was festival of *Raksha Bandhan*. PW13 further deposed that his father had pressed the throat of his uncle (Shaharyar) on which his uncle kicked his father. His father tied the hands of his uncle with the help of a *duppata* after which his father gave a knife blow on the throat of his uncle and put his uncle in the box. It was put to PW13 as to whether there was anybody else with his father, to which PW13 replied that his maternal uncle had come to their house during the day. PW13 also deposed that at the time of the incident, his mother was also present at home and had handed over the knife to his father. It was further deposed by PW13 that his mother also helped his father in putting the dead body of his uncle in the box. It was put to PW13 that if anybody had come to their house at the time of the incident, on which PW13 replied that the landlord had come and has voluntarily deposed that prior to the incident his uncle had come to the house along with one Jabbar to handover the money. Thereafter, Jabbar left his home. The meal was taken by his uncle. His father told his uncle to take rest and when his uncle was taking rest, the present incident took place. PW13 duly identified both the appellants in the Trial Court. PW13 further deposed that after the incident, he along with his parents (the appellant herein) and his sister had gone to *Ghonda* where police had come during night. On a specific question put to PW13, it was asked as to

whether during the incident his mother had helped his father, on which PW13 replied that his mother had given him her *Dupatta*. PW13 affirmed that the police made inquiries from him and his statement was recorded by the police.

14. In this backdrop, we deem it appropriate to analyse the other evidence relied upon by the prosecution under separate heads.

Medical Evidence:

15. PW25 Dr. Sudesh Kumar proved the post-mortem report of the deceased which was prepared by Dr. V.K. Jha on 06.08.2012 at about 4.00 PM. The detailed report was proved by him as Ex.PW25/A. The following injuries were found on the body of the deceased:

“External Examination:

- 1. Cut throat injury on front of the neck above adams apple of size 12 cm x 11cm x vertebrae deep. There was bruising on vertebral surface.*
- 2. Circular bruise on right leg and left leg at lower end.*

Internal Examination:

- 1. Scalp tissue discolored, skull bone was intact, brain matters and meninges and cerebral vessels liquified. Base of the skull is intact.*
- 2. Neck and soft tissue: on dissection of injury No. 1 it has cut the skin, muscles, vessels upto to the vertebral surface and vertebral surface bruised.”*

16. PW25 Dr. Sudesh Kumar proved the opinion rendered by Dr. V.K. Jha with regard to the death of the deceased. The cause of death was opined as haemorrhagic shock and asphyxia as a result of anti-mortem cut throat injury. All the injuries were opined as anti-mortem in

nature. The injury No. 1 was sufficient to cause death in the ordinary course of nature. The injury No. 2 was consistent with the fastening. The subsequent opinion with regard to the weapon of offence was proved as Ex.PW25/B. As per which, the injury No. 1 could have been caused by the weapon of offence sought for the opinion or with similar such weapon.

Forensic Evidence:

17. PW18 A. K. Shrivastava, Deputy Director (Biology), FSL, Rohini testified that on 26.09.2012, he received six sealed parcels for the DNA Finger Printing. After opening the parcel No.5, PW18 found the blood in gauze piece of the deceased which was marked as Ex.P-5. Parcel No. 6 contained the exhibits which were marked as 6A to 6Z. Parcel No. 7A contained one wet *chunni*, which was marked as Ex.7A. Parcel No. 7B contained one damp cut/ torn *saree* and was marked as Ex.7B. Parcel No. 8 contained one knife which was marked as Ex.8. Parcel No. 9 contained one lady *kurta*, one *salwar*, one *chunni*, one half sleeve T Shirt, one pant having dirty stains which were marked as 9A, 9B, 9C, 9D and 9E respectively.
18. The detailed DNA fingerprinting report was proved by PW18 as Ex.PW18/A. As per which, the alleles from the source of exhibit 5 (blood gauze of the deceased) were accounted in the alleles from the source of exhibit 7A (*chunni*), 8 (knife which was recovered at the instance of the appellant Noor Mohammed), 9a (ladies *kurta* which belonged to the appellant Afsana), 9b (*salwar* which belonged to the appellant Afsana), 9c (*chunni* which belonged to the appellant Afsana), 9d (T-shirt of the appellant Noor Mohammed) and 9e (pants

of the appellant Noor Mohammed) connect the appellants with the crime.

19. PW19 Sunita Gupta, Senior Scientific Officer (Biology) deposed that on 27.09.2012, she received four sealed parcels and were marked to her for examination. After opening the parcel No. 1, it contained exhibit 1 i.e. Broken pieces of bangles. Parcel No.2 was containing exhibits 2a and 2b i.e. two mattresses having dark brown stains. Parcel No.3 was containing exhibit 3 i.e. Stone pieces having dark brown stains. Parcel No.10 was containing exhibit 10a i.e. damp found smelling pant and exhibit 10b damp foul smelling T-shirt and exhibit 10c i.e. damp found smelling underwear and Parcel No. 5 was containing exhibit 5 i.e. gauze cloth piece having dark brown stains. PW19 has testified that as per query No. 6, parcel at serial No. 5 i.e. Blood gauze of the deceased was deposited in DNA unit and was taken from DNA for biological and serological examination.
20. The detailed biological report was proved by PW19 as Ex.PW19/A. As per which, blood was detected on exhibits 1, 2a, 2b, 3, 10a, 10b, 10c and 5. On serological examination, exhibits 2a, 2b and 5 were found to contain human blood which was having blood Group B (same as that of the deceased). The serological report was proved by him as Ex.PW19/B.
21. The question which arises for our consideration is as to whether the present case is one of deliberate or intentional killing resulting in the injuries, which would be a case of murder under Section 302 of IPC. Further, if it is a case of unintentional and not a premeditated act and had arisen out of sudden quarrel, in the spur of the moment whether it

falls under one of the special exceptions carved out under Section 300 of IPC?

22. To establish the factum of quarrel between the appellants and the deceased, the prosecution has relied upon the testimony of PW15 Sudha and PW16 Naveen Kumar.
23. PW15 Sudha (neighbour of the appellants, who was residing in the same building as the appellants) testified in her examination-in-chief that on the intervening night of 01-02.08.2012 at about 2.00-2.30 AM, she heard noises of a lady which was coming from the first floor of the building in which she was residing alongwith the appellants. PW15 further deposed that the landlord of the house namely Devender Singh used to reside on the second floor, however, on the third floor some other tenants were residing. On hearing the noises, the son of the landlord namely Bittoo went to the first floor and scolded them and came back to his house at the second floor. PW15 further deposed that she did not visit the house of the appellants and remained at her house. The next day, in the morning at about 5.00 AM, the appellant Afsana came down to wash her face and PW15 enquired her as to why they were shouting in the night but the appellant Afsana did not reply and went back to her first floor. Thereafter, PW15 did not see the appellants and after two-three days, smell was coming from the first floor where the appellants were residing. PW15 further deposed that she came to know that there was a decomposed dead body of a male person after the police came there and searched the house. The dead body was found in a trunk kept at the first floor. In her cross-examination, PW15 categorically stated that she heard the shouting of

a lady and the sounds were coming as such that someone was giving beatings to the other.

24. The next witness relied upon the prosecution was PW16 Naveen Kumar who was the landlord of the appellants and had deposed in his examination-in-chief that he was residing on the second floor in the same building as resided by the appellants. On the intervening night of 01-02.08.2012 at about 2.00-2.30 AM, he heard the appellant Afsana shouting, on which he went to the room of the appellants and knocked the door which was opened by Sultan (PW13/son of the appellants). PW16 further deposed that as soon as he entered into the room, the appellant Afsana came out, to which, PW16 asked the appellant Afsana as to why she was shouting, on which she replied that it was their personal matter and assured him that there would be no shouting and closed the door. Thereafter, PW16 went back to his house and slept. On 02.08.2012 at about 9.00 AM, when PW16 was coming down, he saw lock at the room of the appellant Noor Mohammed and his family members were not seen by him for about two days. After two days, foul smell was noticed by him, which was coming from the first floor. On 04.08.2012, PW16 made a call on 100 number as a result of which police reached at the spot. PW16 proved his statement Ex.PW16/A, which was recorded by the police officials. It was further deposed by PW16 that on the next day police visited the spot again and searched the room whereupon one blood strained mattress, one knife and some clothes were seized by them. The Police also lifted sample of the floor of the room from where the recovery of dead body was effected.

25. Reading of the testimony of PW15 and PW16 would show that they heard the screams of the appellant Afsana on the fateful night of 01-02.08.2012 at about 2.00-2.30 AM. It was deposed by PW16 that after hearing the shouts of the appellant Afsana, PW16 went to the first floor of the building and complained to the appellant Afsana whereupon the appellant Afsana told him that it was personal matter between them and assured him that it would not be repeated again. Additionally, it was stated by PW15 in her cross-examination that she heard the shouting of a lady and the sounds were coming as such that someone was giving beatings to the other. Furthermore, the presence of broken blood stained pieces of the bangles at the spot shows that there was a scuffle between the parties which establishes the factum of quarrel between the parties.
26. A coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was member, in *Kamaljeet v. State*, MANU/DE/1752/2017 (paragraph 40) observed that “[t]o bring a case under the exception, fourfold requirement must be satisfied: first, there must be a sudden fight; second, absence of pre-meditation; third, the accused must have been overcome with the heat of passion; and fourth, the accused must not have taken undue advantage or acted in a cruel or unusual manner.”
27. In *Sandhya Jadhav v. State of Maharashtra*, reported at (2006) 4 SCC 653, a solitary knife blow was given to the deceased when he attempted to intervene and separate the convicts trying to assault his uncle. The Supreme Court converted the conviction to Section 304 Part I observing as under:

“8. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion

upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

9. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this

case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression “undue advantage” as used in the provision means “unfair advantage”.”

(Emphasis Supplied)

[Also see *Abhijeet Raj v. State (Govt. of NCT of Delhi)*, MANU/DE/1264/2016 and *Jagtar Singh v. State of Delhi*, 190 (2012) DLT 445]

28. The present appeal is to be decided on the touchstone of the law laid down by the Hon'ble Supreme Court and reiterated by this Court in the foregoing para. Admittedly, the fact that the appellant Noor Mohammed gave a single fatal blow with a knife which was used by him in the daily routine as he was a fruit vendor. The fatal blow landed on the neck of the deceased Shaharyar which resulted in his death is not open to dispute and not questioned before us. After analysing the evidence on record, it is evidently clear that the occurrence has the features of an incident in which the injuries are inflicted in a sudden fight without pre-meditation in the heat of passion upon a sudden quarrel within the contemplation of Exception 4 to Section 300 of IPC, which takes the case out of the purview of murder.

29. As defined in the Exception 4, there was no premeditation on the part of the appellant Noor Mohammed; the appellant Noor Mohammed was not armed prior to the incident and only picked a knife from the spot. There is no evidence that the appellant Noor Mohammed made special preparation for assaulting the deceased with the intent to kill him. There is no dispute that the appellant Noor Mohammed assaulted deceased in such a manner that the deceased suffered grievous injuries, but considering the fact that the appellant Noor Mohammed did not act in a cruel or unusual manner, did not take undue advantage. The medical evidence further establishes there was a single external injury sustained by the deceased which was sufficient to cause death in the ordinary course of nature. The ends of justice would be met if we modify the conviction of the appellant Noor Mohammed from Section 302 of IPC to Section 304 Part I of IPC. Accordingly, the sentence awarded to the appellant Noor Mohammed is also modified to rigorous imprisonment for a period of eight years. Consequently, the appeal of the appellant Noor Mohammed is allowed in part, the conviction and order on sentence recorded by the Trial Court is modified to the extent indicated hereinabove.
30. As far as the conviction of the appellant Afsana is concerned, having regard to the fact that the appellant Afsana has minor children, with nobody to look after them and also taking into consideration that there is a patent contradiction in the testimony of a child witness (PW13) recorded under Section 164, Cr.P.C. and in Court, to the extent that the appellant Afsana had tried to save the deceased, however, she was threatened by her husband and having regard to the strata of society to which both the appellants belong and the fact that the appellant

Afsana is an illiterate person and her husband was in a commanding position and had threatened her, the sentence of the appellant Afsana shall be modified to the period already undergone by her i.e. more than one and half years.

31. The bail was granted to the appellant Afsana vide order dated 04.03.2014, however, she could not secure bail due to her inability to furnish personal bond of Rs. 20,000/- with one surety in the like amount to the satisfaction of the learned Trial Judge. The surety amount was further reduced to Rs. 10,000/- vide order dated 13.05.2014. On 05.08.2014, this Court enlarged her on bail after furnishing only a personal bond of Rs. 10,000/- without a surety bond. In this background, we exempt the fine imposed upon the appellants Noor Mohammed and Afsana and the default sentence awarded to them.
32. Accordingly, both the appeals stand disposed of.
33. The Trial Court record be sent back along with a copy of this judgment.
34. Copy of this judgment also be sent to the Superintendent-Central Jail, Tihar for updating the jail record.

G. S. SISTANI, J.

CHANDER SHEKHAR

SEPTEMBER 19, 2017

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