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

+ **Date of Decision: 30.11.2017**

% **CRL.A. 722/2014**

SMT SHABANA & ANOTHER Appellants

Through: Mr. Joginder Tuli, Ms. Oshin Belove,
Ms. Divya Jangid, Ms. Joshini Tuli &
Ms. Ashu Sharma, Advocates.

Versus

THE STATERespondent

Through: Ms. Aashaa Tiwari, APP for the State.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE P. S. TEJI

VIPIN SANGHI, J. (ORAL)

1. The present appeal is directed against the judgement dated 18.11.2013 passed by the learned Additional Sessions Judge, Dwarka Courts, New Delhi in Sessions Case No.32/2013 arising out of FIR No.105/2011 registered at PS – Bindapur under Section 302/ 34 IPC. The appellants along with another co-accused Salman were convicted by the Trial Court. Salman, however, being a juvenile was dealt with accordingly.

2. The appellants have been sentenced to life imprisonment by the order

on sentence dated 29.11.2013, along with fine of Rs.5,000/-. In default of payment of fine, they have been directed to undergo Simple Imprisonment for a period of three months. Benefit of Section 428 Cr.P.C. has been given to the convicts.

3. The conviction of the appellants relates to the murder of the deceased Mohd. Ilias – the husband of Shabana (appellant No.1), and father of Imran Khan (appellant No.2). Salman (juvenile) is the younger son of Shabana and the deceased Mohd. Ilias.

4. Shabana was the first wife of the deceased. They had an acrimonious relationship. They were residing on the first floor of the property bearing No. Q-105, Vikas Vihar, Uttam Nagar, Delhi, which belonged to Amina Begum (PW-21) – the mother of the deceased Mohd. Ilias. On account of the acrimonious relationship, the deceased Mohd. Ilias and his mother Amina Begum (PW-21) were residing in a tenanted premises.

5. From the testimony of PW-21, it appears that the said witness and Mohd. Ilias were keen to sell the said property, and to give a share to Shabana (appellant No.1). On the fateful day, Mohd. Ilias had come to the property with Shahnaz (PW-4) – the prospective purchaser on the ground floor, which was vacant. While Mohd. Ilias was with Shahnaz – the prospective purchaser, the appellants along with Imran Khan came to the ground floor and had a quarrel with the deceased. The deceased was struck with an iron rod measuring 2-feet, and a Baseball bat by his two sons, while Shabana (appellant No.1) held the deceased from his hair. Despite Shahnaz (PW-4) seeking to intervene, the convicts continued to assault the deceased

by stating that it was their family affair and that she should not intervene. The blows inflicted upon the deceased proved fatal and he died on the spot. The medical evidence, including the statement of Dr. Yogesh Tyagi (PW-5) has established that the blows given to the deceased Mohd. Ilias caused his death. The incident in question is clearly established by the independent eye-witness Shahnaz (PW-4).

6. In view of the aforesaid, the only submission advanced by learned counsel for the appellants is that the offence in question does not tantamount to murder under Section 300 IPC. He submits that the case falls in Exception 4 to Section 300 IPC, which provides that “*Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner*”.

7. Learned counsel for the appellants submits that there were previous disputes and quarrels between the appellants and the co-convict Salman on the one hand, and the deceased Mohd. Ilias on the other hand – as spoken of by Amina Begum (PW-21), the mother of the deceased in her testimony. Mohd. Ilias and Amina Begum (PW-21) desired to sell the property and deprive Shabana and their children of the said property where Shabana (appellant No.1) was residing with her children. Mohd. Ilias came to the property on the fateful day with the prospective purchaser Shahnaz (PW-4), which led to a sudden fight in the heat of passion. That sudden fight led to infliction of the unintended fateful blows upon the deceased Mohd. Ilias by his own two sons, while Shabana (appellant No.1) held his hair. Learned

counsel submits that it was in the heat of passion that the crime was committed by the convicts, without the intention of committing the murder of the husband of Shabana, and the father of Imran Khan and Salman.

8. Learned counsel further submits that there was no pre-meditation for commission of the crime, and the same is evident from the aforesaid circumstances as well as the circumstance that no lethal weapons were used in the offence. The two weapons used were an iron rod measuring 2-feet, and a Baseball bat – both of which were lying in the house of the appellants. Imran Khan (appellant No.2) was only 20 years of age at the time of commission of the offence, and neither of the convicts had any previous criminal antecedents. Thus, learned counsel submits that the conviction of the appellants under Section 302/34 IPC be set aside.

9. On the other hand, the submission of Ms. Tiwari is that the testimony of PW-4 shows that the accused Imran Khan and Salman (juvenile) had come down from first floor along with weapons, i.e. the iron rod or Baseball bat, and then they caused the injuries on the deceased. Hence, it cannot be said they did not have the intention. Evidently, in the present case, the conviction has been made on the basis of testimony of PW-4 – the sole eye witness in the instant case.

10. Learned counsel for the respondent has referred to the following extract from the testimony of PW-4:

“Accused Shabana and her daughter were not in the house during the night. They were in the hospital as her daughter was sick. Her two sons were present in the house throughout the

night. At about 9.30 a.m. accused Shabana alongwith her daughter came to the house and went straight to the first floor portion without talking to me. At about 9.45 a.m., she came down to talk to her husband Mohd. Ilyas, who was sitting in the ground floor. They started abusing each other. Accused Shabana caught Ilyas by his hairs and started beating him. I tried to intervene but the deceased stopped me from doing so saying that it is their family matter. Thereafter, daughter of Shabana also joined Shabana in quarrel with Ilyas. Shabana thereafter called his both sons. They also came down. The elder son was having an iron rod in his hand and the younger son was having a baseball bat in his hand. They started beating Ilyas with the rod and bat in my presence. The elder son is the accused Imran present in Court today. I requested them not to beat Ilyas but they did not stop saying that it is their family matter and asked me to remain silent. I called police PCR on telephone no.100 from my mobile phone no.8800650721. While I was calling PCR, the sons of Shabana pushed me outside the room and bolted the room from inside. I watched through window of the room that accused Shabana and his sons were again beating Ilyas and pushed him into the gap between the sofa set and the double bed in the room. I raised an alarm. The accused and her sons opened the door of the room and went upstairs to the first floor. I went inside the room and found blood all over in the room. Ilyas was not in a position to talk or move. Police reached there after about half an hour. By that time, Ilyas had died.” (emphasis supplied)

11. In the given circumstances, from no stretch of imagination it can be said that the intention of the accused was to cause such bodily injuries to the deceased, which would be sufficient in the ordinary course of nature, to cause his death. The testimony of PW-4 and PW-21 shows that this was a case of a sudden quarrel between family members, i.e. mother and children on one side, and the husband on the other side, and their dispute was with regard to the aforesaid property.

12. Learned counsel for the appellants submitted that the appellants have already undergone sentence of about seven years, including remissions.

13. The Supreme Court in the case of **Satish Narayan Sawant vs. State of Goa**, MANU/SC/1628/2009, observed that :

*“Section 299 and Section 300 IPC deals with the definition of culpable homicide and murder respectively. Section 299 defines culpable homicide as the act of causing death; (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death or (iii) with the knowledge that such act is likely to cause death. The bare reading of the section makes it crystal clear that the first and the second clause of the section refer to intention apart from the knowledge and the third clause refers to knowledge alone and not intention. Both the expression "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degrees. The mental element in culpable homicide i.e. mental attitude towards the consequences of conduct is one of intention and knowledge. If that is caused in any of the aforesaid three circumstances, the offence of culpable homicide is said to have been committed. Section 300 IPC, however, deals with murder although there is no clear definition of murder provided in Section 300 IPC. It has been repeatedly held by this Court that culpable homicide is the genus and murder is species and that all murders are culpable homicide but not vice versa. Section 300 IPC further provides for the exceptions which will constitute culpable homicide not amounting to murder and punishable under Section 304. **When and if there is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II.** The aforesaid distinction between an act amounting to murder and an act not amounting to murder has been brought out in the numerous decisions of this Court.*

*That being the well settled legal position, when we test the factual background of the present case on the principles laid down by this Court in the aforesaid decisions, we are unable to agree with the views taken by the High Court. As already noted, it is quite clear from the record **that there was an altercation preceding the incident. The place of occurrence is a residence inhabited by both the parties and there is no evidence on record that the deceased was armed with any weapon. Initially the accused-appellant also did not have any weapon with him but during the course of the incident he went inside and got a knife with the help of which he stabbed the deceased.** Factually therefore, there was only one main injury caused due to stabbing and that also was given on the back side of the deceased and therefore, it cannot be said that there was any intention to kill or to inflict an injury of a particular degree of seriousness. Records clearly establish that **there was indeed a scuffle between the parties with regard to the availability of electricity in a particular room and during the course of scuffle the appellant also received an injury which was simple in nature and that there was heated exchange of words and scuffle between the parties before the actual incident of stabbing took place. There is, therefore, provocation and the incident happened at the spur of the moment. That being the factual position, we are of the considered view that the present case cannot be said to be a case under Section 302 IPC but it is a case falling under Section 304 Part II IPC. It is trite law that Section 304 Part II comes into play when the death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death.**” (emphasis supplied)*

14. Further, in the case of *Elavarasan v. State*, (2011) 7 SCC 110, the Supreme Court observed:

“Fifthly, because the Appellant did not evidently use the sharp edged weapon for causing injuries to the deceased as he

had done in the case of Dhanalakshmi and Valli, PWs 2 and 3 respectively. In the circumstances we are inclined to hold that there was no intention on the part of the Appellant to cause the death of the deceased, though looking to the nature of the injuries suffered by the deceased, the Appellant must be presumed to have the knowledge that the same were likely to cause death. The fact remains that the Appellant committed culpable homicide without premeditation in a sudden fight and in the heat of passion. The fact that the Appellant did not use the sharp edged weapon with which he was armed also shows that he did not act in a cruel or unusual manner nor did he take an undue advantage. It is evident from the deposition of Dhanalakshmi, that she did not see the Appellant assaulting the deceased. It is, therefore, just possible that a hard blow given to the deceased by his bare hand itself threw the child down from the bed causing the injuries that proved fatal.” (emphasis supplied)

15. In the case of **Ankush Shivaji Gaikwad v. State of Maharashtra**, AIR 2013 SC 2454, the Supreme Court has gone into detail with regard to circumstances under which a case would be classified as one of murder, or one involving commission of culpable homicide, not amounting to murder. While dealing with this aspect, it was observed that :

*“Time now to refer to a few decisions of this Court where in similar circumstances this Court has held Exception 4 to Section 300 of the Indian Penal Code to be applicable and converted the offence against the Appellant in those cases from murder to culpable homicide not amounting murder. In **Surinder Kumar v. Union Territory, Chandigarh** MANU/SC/0589/1989 : (1989) 2 SCC 217, this Court held that if on a sudden quarrel a person in the heat of the moment picks up a weapon which is handy and causes injuries out of which only one proves fatal, he would be entitled to the benefit of the Exception provided he has not acted cruelly.*

This Court held that the number of wounds caused during the occurrence in such a situation was not the decisive factor. What was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a fit of anger. Dealing with the provision of Exception 4 to Section 300 this Court observed:

... To invoke this exception 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. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. 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.

We may lastly refer to the decision of this Court in Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh MANU/SC/8419/2006 : (2006) 11 SCC 444 where this Court enumerated some of the circumstances relevant to finding out whether there was any intention to cause death on the part of the accused. This Court observed:

...Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls

Under Section 302 or 304 Part I or 304 Part II.
Many petty or insignificant matters - plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable Under Section 302, are not converted into offences punishable Under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable Under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in

a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention...

(Emphasis supplied)

Coming back to the case at hand, we are of the opinion that the nature of the simple injury inflicted by the accused, the part of the body on which it was inflicted, the weapon used to inflict the same and the circumstances in which the injury was inflicted do not suggest that the Appellant had the intention to kill the deceased. All that can be said is that the Appellant had the knowledge that the injury inflicted by him was likely to cause the death of the deceased. The case would, therefore, more appropriately fall Under Section 304 Part II of the Indian Penal Code.” (emphasis supplied)

16. The above discussion establishes that in the absence of intention of the accused to cause death of the deceased, the offence under Section 302 IPC would not be made out.

17. In the aforesaid light, we may take note of the relevant facts and circumstances:

- (i) The accused/ convicts and the deceased form part of the immediate family. Appellant No.1 was the wife of the deceased, while appellant No.2 and the juvenile Salman, who inflicted the blows, were his own sons.
- (ii) There was acrimony in the family with the appellants and Salman

(juvenile) on one side and the deceased on the other side.

- (iii) The deceased was not living with the appellant No.1 (his wife) and children but was residing with his mother (PW-21) in a tenanted premises.
- (iv) The deceased and his mother (PW-21) desired to sell the house occupied by the appellants and Salman. The deceased brought a prospective buyer and was with the said prospective buyer (PW-4) on the ground floor of the property, while the appellant No.1 and her children were residing on the first floor.
- (v) During the night before the incident, the appellant No.1 was in the hospital since her daughter was not well. When she returned home at about 09:30 a.m., she saw the deceased and PW-4 on the ground floor.
- (vi) At about 09:45 a.m., appellant No.1 came down to talk to her husband. They started abusing each other. Thus, the two sided quarrel erupted. It was not the case of appellant No.1 launching a deadly attack on the deceased the moment she came down on the ground floor where the deceased and PW-4 were present. The daughter of appellant No.1 also joined in the quarrel with the deceased. All this while, the sons, i.e. Imran Khan (appellant No.2) and Salman were not present. The appellant No.1 called her sons. It is not so stated by PW-4 that she called her sons to come armed with a view to kill the deceased.

- (vii) The sons of the deceased, namely Imran Khan (appellant No.2) and Salman came down armed with a Baseball bat and a 2-feet long iron rod. Neither of these two can be classified as deadly weapons. They could be articles lying in any household.

18. From the aforesaid circumstances, it is evident that the incident took place at the residence of the appellants, where the deceased had come with PW-4. Appellant No.1 did not have any weapon whatsoever with her during the incident. Appellant No.2 and Salman did not come armed with any sharp or deadly weapon. The incident took place following the quarrel between the deceased and appellant No.1 and his daughter which evidently was on account of the endeavour of the deceased and his mother (PW-21) to dispose of the property occupied by the appellant No.1 and her family to PW-4. Thus, there was provocation and the incident happened at the spur of the moment. The aforesaid circumstances clearly establish that there was no intention on the part of the appellants and Salman to cause the death of the deceased. There was no pre-meditation since there does not appear to be any pre-planning. The appellants and Salman were in their own home. It is the deceased who came to the property with PW-4 to show the house to her. There is nothing to show that the appellants and Salman were waiting for the deceased to turn up so that they could kill the deceased.

19. In view of the aforesaid, we are of the considered opinion that the present case falls under Section 304 Part-II IPC, since the convicts would have had the knowledge that their act of beating the deceased with a Baseball bat and an iron rod is likely to cause death or to cause such bodily

injury as is likely to cause death. Accordingly, the conviction and sentence under Section 302 IPC imposed upon the accused is not called for. In our considered view, the appellants deserve to be acquitted under Section 302 IPC and the sentence therefor is required to be set aside.

20. In the fact and the circumstances, the accused are hereby acquitted of offence under 302 IPC, and convicted for a lesser offence under Section 304 Part-II IPC. Accordingly, the appellants are convicted under Section 304 Part-II IPC and they are sentenced to 9 years imprisonment along with fine of Rs.5,000/-.

21. The appeal stands disposed of in the aforesaid terms.

VIPIN SANGHI, J.

P. S. TEJI, J.

NOVEMBER 30, 2017

B.S. Rohella