

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

+ **CRL.APPL. No.222/2012**

Reserved on: 16th September, 2017
Date of decision : 28th October, 2017

MALKHAN

.....Appellant

Through Mr.Ajay Verma and
Mr.Upendra Yogesh, Advs.

Versus

STATE (GOVT. OF NCT) OF DELHI ... Respondent

Through Ms.Radhika Kolluru, APP for
the State with SI Hem Karan,
PS Adarsh Nagar.

CORAM:

HON'BLE MR. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J.

1. The appellant-Malkhan has filed the present appeal challenging the order dated 21st November, 2011 passed by the Additional Sessions Judge (NW)-01, Rohini convicting him of offences punishable under section 302 IPC and section 27 of the Arms Act. The appellant further challenges the order dated 23rd November, 2011 sentencing him to undergo RI for life and to pay a fine of Rs.7,000/- and in default SI for 2 months under Section 302 IPC and a further sentence of RI for 3 years and to pay a fine of Rs.3,000/- and in

default SI for 3 months under Section 27 of the Arms Act. Both the sentences were ordered to run concurrently.

2. The case of the prosecution is based primarily on the testimony of the eye witness, Surinder @ Suraj (PW-1) who has stated that on 17th October, 2009 at about 1.30 am, he was coming back from his shop at Harphool Singh Building, Sabzi Mandi, Ghanta Ghar, Delhi and when he reached near A-block, Lal Bagh, Delhi his friend Mohan (deceased) met him and they started talking to each other. Mohan told him that he was feeling hungry and accordingly, they went near Azadpur bus terminal and ate paranthas at the shop of Kale. Thereafter, they started walking towards their house and on the way to Lal Bagh at about 3.15 am, when they reached G.T.Karnal road, Azadpur, the appellant met them. There was an altercation between the deceased and the appellant and the deceased gave 4-5 slaps to the appellant. The appellant warned the deceased that he had not done the right thing by slapping him and he would have to face dire consequences. Thereafter, the appellant left the spot. Surinder and the deceased thereafter met Vijender (PW-2) at his redhi and both of them started talking to him. At about 4.00 am, Vijender told them that he wanted to open his shop and asked both of them to go to their house. They both started walking towards their house and at about 4.05 am, when they reached opposite Mishra Clinic, in front of factory No.G-I/39, Service Road Lal Bagh, the appellant met them again. This time, the deceased apologized to the appellant for having slapped him. The appellant told the deceased not to worry and kept his hand on the

shoulder of the deceased. However, after moving two steps, the appellant took out a knife from his right pocket and started stabbing deceased in his stomach and chest. He also threatened Surinder to keep away otherwise, he would stab him also. Surinder immediately ran from the spot and met Vijender (PW-2) and narrated the entire incident to him. They both rushed to the spot. Someone called the police at No.100 and PCR reached the spot and took the deceased to Babu Jagjiwan Ram Memorial Hospital, Jahangir Puri.

3. At around 4.20 am, DD No.4A was registered at PS Adarsh Nagar regarding stabbing near Masjid, Sudarshan Dairy. SI A.P.Singh (PW-22) along with HC Ramkaran (PW-18) went to the spot and on reaching there came to know about the incident and the deceased having already been removed to Babu Jagjiwan Ram Memorial Hospital. At the spot, they met Constable Rahul Tyagi (PW-21) leaving Constable Rahul behind, SI A.P.Singh and HC Ramkaran went to the hospital and obtained the MLC of the deceased, who was declared brought dead. They thereafter, went back to the spot and recorded the statement of Surinder (PW-1). On the basis of the said statement, a rukka was prepared which resulted in registration of FIR no.244/2009 at PS Adarsh Nagar.

4. On 19th October, 2009, the appellant was arrested at the instance of Surinder and a bloodstained vest (baniyan) worn by the appellant was seized. During interrogation, the appellant also got recovered the shirt which he was wearing at the time of incident from the house of his brother in law, Rajkumar (PW-13). He also got recovered the

weapon of offence i.e. knife from the house of father in law of his elder brother namely Chanderpal (PW-17). The seized items were sent to FSL for their examination and opinion and in the FSL report (Ex.PW6/A and PW6/B) blood group-A was found on the knife, vest and the shirt recovered from or at the instance of the appellant. The same matched with the blood group of the deceased.

5. The knife that had been recovered was also sent to the Medical Officer, Babu Jagjiwan Ram Memorial Hospital who opined that the injuries mentioned in the post mortem report can be caused by the said weapon (Ex.PW15/C).

6. As far as the injuries on the deceased are concerned, the following injuries were found on the deceased in the post mortem:

- 1) *Multiple incised wounds over left forearm size varying from 3cms x 0.5 cms x muscle deep to 5 cms x 1 cm x muscle deep.*
- 2) *Incised wound on the right arm upper aspect 3 cms x 2 cms x muscle deep.*
- 3) *Incised wound on the left side of neck 5 cms x 1 cm x muscle deep and one wound below it 1 cm of size 8 cms x .5 cm x muscle deep.*
- 4) *Incised wound 1 cm below/umblicus in mid line 3.5 cms x 1 cm x abdominal cavity deep, intestinal coil coming out through it multiple cut marks at places and at places through and through.*
- 5) *Incised wound on left lumbar region 4 cms x 2 cms x abdominal cavity deep intestinal coil coming out through it multiple cut over intestinal coil.*
- 6) *Incised wound of size 3.5 cms x 1.5 cms x abdominal cavity deep 12 cms above umblicus.*
- 7) *Incised wound on mid axillary line 2 cms x 1 cm x muscle deep and 10 cms obliquely downwards from left nipple.*

- 8) *Incised wound of size 2 cms x 1 cm x muscle deep placed 1 cm above injury no. 7.*
- 9) *Incised wound on left face 2.5 cms x 0.5 cm x muscle deep.*
- 10) *Incised wound on back of chest 3 cms x 1.5 cms x muscle deep lateral to mid line in scapular region.*
- 11) *Incised wound on back of left ear in mastoid region 5 cms x 3 cms x muscle deep.*

7. It was opined that the injuries were antemortem in nature and injury Nos.4 and 5 were sufficient to cause death in ordinary course of nature (Ex.PW15/A).

8. The prosecution examined 23 witnesses in support of its case.

(a) PW-1 Surinder @ Suraj is the eye witness as also the witness to the arrest of the appellant and the recovery of shirt and the knife from the appellant.

(b) PW-2 Vijender is an important witness as he corroborates the statement made by PW-1 regarding the presence of PW-1 and the deceased on the night of the incident at the spot; being informed about the earlier fight between the deceased and the appellant and the PW-1 coming back and telling him about the stabbing of the deceased by the appellant.

(c) PW-3 Manoj is also a relevant witnesses. He has deposed about the earlier fight between the deceased and the appellant where the deceased had slapped the appellant and later PW-1 coming back and telling him about the stabbing of the deceased by the appellant.

(d) PW-4 HC Prabhad Singh was working as MHC (M) at PS Adarsh Nagar and has testified the deposit of the exhibits, its safe keeping and transfer to the FSL for seeking their opinion.

(e) PW-5 Harichand is the father of the deceased. He is also the witness to the arrest of the appellant and the recoveries of the vest (baniyan), shirt and the knife from him or at his instance.

(f) PW-6 Ms. Anita Chhari, Sr. Scientific Asstt. , FSL has proved her report of examination of the exhibits (Ex.PW6/A and PW6/B)

(g) PW-7 Ram Chander is the brother of the deceased who identified the dead body as that of his brother Mohan.

(h) PW-8 Bal Sudhar is another vital witness for the prosecution. He deposed that on 17th October, 2009, he was working as Choukidar at Lalbagh and in the night intervening 16th/17th October, 2009 at about 3.00-3.15 am, he saw the deceased and PW-1 coming from the side of Azadpur and the appellant coming from the side of Lalbagh. He further deposed that there was an altercation that took place between the deceased and the appellant. He scolded them and directed them to leave the spot.

(i) PW-9 Dr. Neeraj Choudhary, CMO, Babu Jagjiwan Ram Memorial Hospital proved ME (Ex.PW-9/A) made by Dr. Vineet.

(j) PW-10 Dr. Rajeev, CMO, Babu Jagjiwan Ram Memorial Hospital proved MLC (Ex.PW-10/A) made by Dr. Danish.

(k) PW-11 HC Om Prakash had taken the deceased in the PCR van to Babu Jagjiwan Ram Memorial Hospital.

(l) PW-12 SI Divender Singh was posted as I/C Mobile Crime Team, N-W District and had inspected the scene of the crime.

(m) PW-13 Rajkumar is the brother in law of the appellant. It is the case of the prosecution that the shirt worn by the appellant at the time of the incident was got recovered at his instance from the house of Rajkumar. However, Rajkumar did not support the case of the prosecution in the witness stand.

(n) PW-14 HC Mahender was the photographer who took the photographs of the scene of crime.

(o) PW-15 Dr.V.K.Jha, Medical Officer, Babu Jagjiwan Ram Memorial Hospital proved the post mortem report of the deceased (Ex.PW15/A) as also his opinion that the knife recovered at the instance of the appellant could have caused the injuries sustained by the deceased (Ex.PW15/C).

(p) PW-16 HC (Retd.) Paramanand had recorded DD No.4A (Ex.PW16/A) and also registered FIR (Ex.PW16/C) on receiving the rukka.

(q) PW-17 Chanderpal is the father in law of the younger brother of the appellant. It is the case of the prosecution that the knife used by the appellant to inflict injuries on the deceased was recovered

from the house of Chanderpal at the instance of the appellant. However, Chanderpal did not support the case of the prosecution.

(r) PW-18 HC Ram Karan had accompanied SI A.P.Singh to the site of the incident upon receiving DD no.4A.

(s) PW-19 Constable Vipin Kumar had taken the exhibits to FSL.

(t) PW-20 SI Manohar Lal had prepared the detailed scaled site plan (Ex.PW20/A).

(u) PW-21 Constable Rahul Tyagi had joined the investigation and was a witness to the arrest of the appellant as also the recovery of the vest (baniyan), shirt and the knife.

(v) PW-22 SI Arvind Pratap Singh had reached the spot on receiving DD no.4A.

(w) PW-23 Inspector Mahavir Kaushik is the Investigating Officer of the case and deposed about the investigation carried out by him.

9. The appellant in the statement recorded under section 313 Cr.P.C. denied all allegations made against him by the prosecution.

10. The trial court primarily relying upon the statements of PW-1, PW-2, PW-3 and PW-8 found that the prosecution had been successful in bringing home the guilt against the appellant for committing the offences punishable under section 302 IPC and section 27 of the Arms

Act, beyond a reasonable doubt. The appellant was, however, was acquitted of the offence punishable under section 506 IPC, giving him the benefit of doubt. The learned Trial Court further sentenced the appellant to life and 3 years RI for offence under section 302 IPC and 27 of the Arms Act, respectively.

11. Learned counsel for the appellant besides challenging his participation in the crime, has pleaded Exception 1 to Section 300 IPC. It is contended that earlier incident of slapping by the deceased had acted as a grave and sudden provocation and, therefore, the appellant should have been found guilty of offence under section 304 IPC and a leniency on the question of sentence should be shown.

12. We have thoroughly examined the evidence led by the prosecution in the case. From reading of the statements of PW-1/Surinder @ Suraj, the eye witness as corroborated by the statements of PW-2 Vijender, PW-3/Manoj and PW-8/ Bal Sudhar, the two instances that happened on the night intervening 16th /17th October, 2009 and the involvement of the appellant in the same, in our opinion, have been proved beyond doubt.

13. Despite PW-17/Chanderpal not supporting the case of prosecution, we do not find any doubt in the recovery of the shirt and the knife at the instance of the appellant, which has been proved beyond reasonable doubt from the testimony of PW21 and PW23 duly corroborated by the testimony of PW5/Harichand.

14. Though, there are certain contradictions, inconsistencies, exaggerations and embellishments in the testimony of PW-2/Vijender and PW-5/Hari Singh, we find them to be minor and trivial in nature which do not by themselves render evidence of the eye witness unbelievable as held by the Supreme Court in the case of *Leela Ram (Dead) Thr. Duli Chand vs. State of Haryana & Anr.* (1999) 9 SCC 525.

“9) xxxxxxxxxxxxxxxx *There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment there may be but variations by reason therefor should not render the evidence of eye witnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence.*”

15. The nature of injuries suffered by the deceased and the opinion of the doctor that injury nos.4 and 5 were sufficient to cause death in ordinary course of nature and also that the weapon i.e. knife recovered could have caused the injuries on the deceased, leave no doubt that the appellant committed the murder of Mohan punishable under Section 302 IPC. It is now required to be seen whether the appellant has made out a case falling under Exception to Section 300 IPC.

16. On the question of invocation of Exception 1 to Section 300, Supreme Court in *B.D.Khunte vs. Union of India* (2015) 1 SCC 286, held as under:-

“What is critical for a case to fall under Exception 1 to Section 300 IPC is that the provocation must not only be grave but sudden as well. It is only where the following ingredients of Exception 1 are satisfied that an accused can claim mitigation of the offence committed by him from murder to culpable homicide not amounting to murder:

- (i) The deceased must have given provocation to the accused.*
- (ii) The provocation so given must have been grave.*
- (iii) The provocation given by the deceased must have been sudden.*
- (iv) The offender by reason of such grave and sudden provocation must have been deprived of his power of self-control; and*
- (v) The offender must have killed the deceased or any other person by mistake or accident during the continuance of the deprivation of the power of self-control.”*

17. In the case of *Arun Raj vs. Union of India & Ors.* 2010 (6) SCC 457, Supreme Court after examining the judgment in the case of *Mancini vs. Director of Public Prosecutions*, held as under:-

“16) The aforesaid section provides five exceptions wherein the culpable homicide would not amount to murder. Under Exception 1 an injury resulting into death of the person would not be considered as murder when the offender has lost his self-control due to the grave and sudden provocation. It is also important to mention at this stage that the provision itself makes it clear by the Explanation provided that what would constitute grave and sudden provocation, which would be enough to prevent the offence from amounting to murder, is a question of fact. Provocation is an external stimulus which can result into loss of self-control. Such provocation and the resulting reaction need to be measured from the surrounding circumstances. Here the provocation must be such as will upset not merely a hasty, hot-tempered and hypersensitive person but also a person with calm nature and ordinary sense. What is sought by the law by creating the exception is that to take into consideration situations wherein a person

with normal behaviour reacting to the given incidence of provocation. Thus, the protection extended by the exception is to the normal person acting normally in the given situation.

17) *The scope of the 'doctrine of provocation' was stated by Viscount Simon in Mancini v. Director of Public Prosecutions.*

'It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death. ...The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in R.v. Lesbini, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.'

18. As noted above, the first incident in which the deceased had slapped the appellant occurred at about 3.00-3.15 am. PW-8/Bal Sudhar had intervened in the scuffle and had scolded both the deceased and the appellant and directed them to leave the spot. In fact, the appellant left the spot. At about 4.00 or 4.05 am i.e. after almost 45 minutes of the first incident, the appellant again met the deceased. At this stage, he was armed with a knife. It has been deposed by the PW-1/Surinder that at this stage, the deceased had in fact apologized to the appellant and the appellant told the deceased not

to worry and kept his hand on the shoulder of the deceased, however, after moving two steps, he took out the knife from the pocket of his pant and stabbed the deceased. We have already noticed above, the nature of injuries inflicted on the deceased. Taking into account the time lag between the two incidents; the appellant returning back with a weapon; the nature of provocation in the first incident, the nature of injuries inflicted on the deceased by the appellant and applying the ratio laid down by the Supreme Court, we do not find the appellant to have made out any case for invoking Exception 1 to Section 300 IPC.

19. In view of the above discussion, we find no merit in the present appeal and the same is accordingly dismissed.

20. Trial Court record be sent back.

21. Copy of the order be sent to the Superintendent of Tihar Jail for updation of the records and information to the appellant

NAVIN CHAWLA, J

MUKTA GUPTA, J

OCTOBER 28, 2017
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