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

% *Date of Judgment: 17th July, 2017*

+ **CRL. A. 124/2015**

SANDEEP KUMAR @ SONU Appellant

Through : Mr.D.K. Sharma, Adv.

versus

STATE OF NCT, NEW DELHI Respondent

Through : Ms.Radhika Kolluru, APP for the
State along with Insp. Satyapal
Singh, PS Bharat Nagar, North West,
in person.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

1. This is an appeal under Section 374 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') filed on behalf of the appellant challenging the impugned judgment dated 24.11.2014 and the order on sentence dated 01.12.2014 passed by the Trial Court in SC 96/2013 arising out of FIR 169/2011 PS Bharat Nagar. By the former, the appellant has been convicted under Sections 304 Part-I, 324 and 509 of the Indian Penal Code, 1860 ('IPC') and Section 27 of Arms Act, 1959. For the offence punishable under Section 304 Part-I IPC, the appellant has been sentenced to undergo rigorous imprisonment for life and a fine to the tune of Rs.1 lac, in default of payment of fine, the appellant would undergo simple imprisonment for a period of three months; for the offence punishable under Section 324 IPC, the appellant has been sentenced to undergo rigorous imprisonment for a period of three years; for the offence punishable under Section 509

IPC, the appellant has been sentenced to undergo simple imprisonment for a period of one year; and for the offence punishable under Section 27 of Arms Act, the appellant has been sentenced to rigorous imprisonment for a period of five years and a fine to the tune of Rs.2,000/-; in default of payment of fine, the appellant would undergo simple imprisonment for a period of seven days. All the sentences were ordered to run concurrently.

2. The case of the prosecution, as noted down by the learned Trial Court, is as under:

“(2) The case of the prosecution is that [sic: on] 20.08.2011 at 3:14 PM an information was received at Police Station Bharat Nagar regarding a firing incident pursuant to which SI Satish along with Ct. Ram Avtar reached the spot i.e. English Wine Shop, Nimri Colony, Commercial Complex where he found two vehicles parked there. On inquiry he came to that one vehicle was the one in which the accused had come and one vehicle was belonging to the deceased Virender. HC Devender met at the spot and he informed SI Satish that the injured had been shifted by the PCR official and one boy had been apprehended by the name of Sandeep who had allegedly fired at the injured. In the meantime the SHO Inspector Lalit Joshi also reached the spot and had also inquired the matter at the spot. Ct. Ram Avtar and HC Devender were the left at the spot to safe guard the same whereas SI Satish along with SHO reached Sunder Lal Jain Hospital where they collected two MLCs i.e. one of Virender who was declared brought dead and the other was of Nisha, the injured. Nisha was fit for making the statement and her statement was recorded wherein she had alleged that while she was sitting with the deceased Virender in the Maruti Esteem Car, the accused Sandeep had started [sic: stared] at her and passed obscene comments which was objected to by Virender on which the accused Sandeep had fired upon Virender in which incident she had also received injuries. On the basis of the statement of Nisha Verma the present case was registered.

(3) The Crime Team was also called to the spot who reached the spot and inspected the same and also photographed the scene of crime. The Maruti Esteem bearing No. DL9CB0129 belonging to deceased was also inspected by the Investigating Officer after the inspection by the Crime Team. Thereafter various exhibits were lifted from the spot of incident and were taken into possession. The Esteem Car and the Maruti Omni Van were also taken into possession. The accused Sandeep @ Sonu who was in the custody of HC Devender, was then interrogated by the Investigating Officer and thereafter the accused was arrested in the present case. From the personal search of accused one licence of Arms was also recovered which was taken into possession vide a separate seizure memo. The licensed revolver of the accused was checked and was found to be containing three live cartridges and one empty cartridge after which the sketch of the revolver was prepared and thereafter the cartridges and the revolver were seized.”

3. After hearing arguments, charges under Sections 302, 324, 509 IPC and Section 27 of the Arms Act were settled, to which the appellant pleaded not guilty. To bring home the guilt of the appellant, the prosecution examined 32 witnesses. Statement of the appellant was recorded under Section 313 Cr.P.C and the defence examined two witnesses including the accused/appellant himself.
4. The Trial Court after appreciating the evidence on record, found that the ocular evidence was duly supported by the medical, forensic and other circumstantial evidence on record and held the charges to be proved against the accused/appellant. At the same time, it found that the case was covered under Exception 4 to Section 300 IPC and hence, convicted the appellant under Section 304 Part I IPC and sentenced the appellant as noticed in paragraph 1 aforegoing.

5. Although, Mr.Sharma, learned counsel for the appellant had argued at some length that this was a case of an accidental death occasioned on account of a scuffle between Virender ('deceased') and the appellant pursuant to the deceased having snatched his licensed revolver and the appellant with a view to take possession of his revolver approached the deceased leading to an accidental firing and death of the deceased, however, learned counsel subsequently on instructions states that he would not contest the matter on merits and he would only make submissions with regard to the order on sentence.
6. Learned counsel for the appellant first contended that the case would fall under Section 304 Part II and the Trial Court erred in convicting the appellant under Section 304 Part I. Even otherwise, the sentence awarded by the Trial Court is extremely harsh, especially when the Trial Court has noticed that there was no intent and having regard to the fact that the appellant was employed as a Guard and was protecting the cash in a Maruti Van. Mr.Sharma has also highlighted that the genesis of the incident is that the appellant had objected to the deceased parking his car while blocking the Maruti Van which contained cash. Mr.Sharma also highlights that the deceased was in a state of intoxication and this resulted in a verbal altercation. The deceased had refused to remove his car which was blocking the Maruti Van. He submits that the deceased had then walked to the Wine Shop and he and Nisha were in the Car while drinking and eating. Another altercation took place in which the revolver fired by mistake. He submits that the post-mortem report also establishes that the deceased was under intoxication at the time of his death.

7. *Per contra*, Ms.Kolluru submitted that there is no infirmity in the judgment and the order on sentence of the Trial Court. She submitted that the prosecution had been able to establish the guilt of the appellant beyond reasonable doubt. Learned counsel for the State submitted that the factum of the firing was admitted by the accused/appellant and the case of the defence was that the firing had occurred when the appellant had attempted to recover his licenced revolver from the deceased, which led to a tussle with the deceased, Nisha Verma (PW-5) and the appellant tugging on the revolver leading to an accidental firing. She submits that the story concocted by the defence had been rightly rejected by the Trial Court and hence, the offence duly stood established before the Trial Court. In respect of the applicability of Section 304 Part I IPC, Ms.Kolluru submitted that the appellant had fired from a close distance at the face of the deceased and thus, the same can by no means bring the offence under Section 304 Part II IPC. Learned counsel finally submitted that the quantum of sentence has also been adequately assessed by the Trial Court as it was found that the appellant, while being a private security guard had been indulging in moral policing and therefore, a harsh sentence was rightly imposed by the Trial Court.
8. We have heard the learned counsel for the parties and perused the impugned judgment and the evidence available on record. We have already noticed that Mr.Sharma had only pressed the appeal on the point of the offence and being covered under Section 304 Part II IPC and not Section 304 Part I IPC.
9. Even otherwise, we deem it appropriate to examine the evidence on record to find whether the order of conviction has been rightly arrived at. The prime witness, who was herself injured in the incident, is

Nisha Verma (PW-5) being the friend of the deceased. She has categorically deposed that on 20.08.2011 at about 3 PM, she along with the deceased went to Nimri Commercial Complex in his Esteem Car. A Wine Shop is situated inside the complex and one Maruti Omni, Radio Taxi of white colour was also stationed there, inside which two persons were sitting. The person sitting on the passenger seat (appellant herein) looked at her with bad intentions and passed obscene comments. The deceased objected leading to the appellant abusing the deceased, which was ignored by the deceased and he went inside the Wine Shop and brought a can of beer and sat inside the car. At the same time, the appellant came near the Esteem Car and hit the bonnet and then came near the driving seat and started banging the driving seat glass while hurling abuses. The deceased brought down the glass and tried to pacify the appellant, while PW-5 attempted to put her hand on the mouth of the deceased to stop the conversation. The appellant, who was having a revolver, pointed the revolver on the nose of the deceased and fired. The index finger of the right hand of PW-5 also received an injury as it was on the mouth of the deceased. During cross-examination, PW-5 was confronted with her statement to the police where she did not mention the appellant as having passed lewd comments and only mentioned that the appellant was continuously staring at her.

10. Dhirender Kumar (PW-21) deposed that he was the cash officer/cashier in the cash management service and had come with the appellant, co-cashier Jaipal Singh and Driver Vinod (PW-22) to collect cash at Nimri Shopping Complex at about 3 PM on 20.08.2011. While he and Jaipal had gone inside the Wine Shop to collect cash, they heard the sound of firing. They came out and saw

that one person was lying in an injured condition on the driver's seat of the Esteem Car and their security guard/appellant herein was standing holding his license revolver in his hand. Meanwhile one policeman came there and overpowered the appellant and took his revolver in his possession.

11. Vinod Kumar (PW-22), driver of the Cash Van, also deposed similarly about the incident, he deposed that the deceased came and asked the appellant as to why he was looking towards his car, which led to exchange of hot words. The matter was pacified by the intervention of PW-22. Thereafter, the deceased went to the Wine Shop and brought two beer cans and went towards his Esteem Car while staring towards the appellant. The appellant was continuously staring towards the girl sitting in the Esteem Car and saying "*kitna badiya maal hai*". The deceased advised the appellant not to do such things and went and sat in his car. The appellant then went to the car and brandished his revolver and told him to go away. The appellant then went towards the Esteem Car. PW-22 followed him to pacify him but before he could intervene, the appellant exchanged hot words with the deceased and fired upon him on his face with his licenced revolver.
12. Gyan Singh (PW-25) had also deposed on similar lines. He deposed that on 20.08.2011 at about 3 PM he was sitting on the counter of the Wine Shop and watching television when a bank van came there to pick up cash from the Wine Shop and two persons entered the Shop while two persons, driver and guard, remained outside. One Esteem Car also reached there and parked in front of the van and there was a dispute between the driver of Esteem Car and the guard of the Omni Van regarding wrong parking. The driver of the van pacified both. Thereafter, the driver of the Esteem Car went to the liquor shop and

purchased one can of beer and he again went back. There was a verbal altercation between him and the guard and there was *hathpai* (scuffle) and they moved towards the Esteem Car. The guard was saying to handover his *samaan* (goods) to him and thereafter, the boy of Esteem Car sat in his car and the quarrel continued. One girl was also sitting in the car and she was trying to intervene and pacify the matter and then PW-25 heard the sound of firing and boy in the Esteem Car received the gun shot injury. However, Gyan Singh (PW-25) refused to identify the appellant explaining that he was sitting at the counter of the shop and thus, could not see.

13. The story of the prosecution was duly corroborated by the post-mortem (Ex.PW-15/A) proved by Dr.Vivek Rawat (PW-15); the MLC of Nisha Verma (Ex.PW-13/A); the forensic evidence (Ex.PW-14/A and Ex.PW-14/B) as well as the Ballistics Report (Ex.PW-23/A). Accordingly, we find no infirmity in the order of the Trial Court recording the conviction of the appellant/accused.
14. The submission of Mr.Sharma in respect of the incident having taken place owing to the deceased having snatched the revolver and the shot having fired in the ensuing scuffle when the appellant went to recover his revolver arises out of the statement of the appellant under Section 313 Cr.P.C. In this regard, we may notice that the evidence proves that the incident had taken place when the deceased was sitting on the driver seat of his esteem car and Nisha Verma (PW-5) was sitting next to his seat and the accused/appellant was standing outside the window of the car. Further, the shot was not fired at point blank range, but from a distance of 15 cms. This coupled with the direction of the shot clearly shows that the revolver was in the hands of the appellant and

not the deceased as alleged by the defence and thus, the Trial Court had correctly repelled the story of the defence.

15. After the appreciation of the evidence, the story emerges that initially there was a parking dispute between the appellant and the deceased as the deceased had wrongly parked his Esteem Car in front of the Cash Van, which was objected to by the appellant leading to an altercation. The dispute was pacified by the intervention of Vinod (PW-22) after which, the deceased parked his vehicle and went inside the Wine Shop to purchase a beer can. After purchasing, the deceased returned and sat inside his vehicle with Nisha (PW-5). The appellant was staring at Nisha (PW-5) objectionably, who conveyed it to the deceased. The deceased then objected to the same, resulting in a verbal altercation between the appellant and the deceased, in which the appellant came to the vehicle of the deceased with his revolver. There was a scuffle in which the appellant fired the shot instantly killing the deceased and injuring Nisha (PW-5).
16. The question which remains, is whether the same would come under the purview of Section 304 Part I or Section 304 Part II. Now the injury inflicted by the appellant was a gun-shot directed towards the face of the deceased from a distance of merely 15 cms. In this circumstance, the appellant must be imputed to cause such bodily injury as was likely to cause death, if not the intention to cause death, hence, the Trial Court rightly recorded the conviction of the appellant under Section 304 Part I.
17. We may also notice that not even a whisper has come in the judgment of the Trial Court regarding the reason for conviction of the appellant under Section 27 of the Arms Act. It is not in dispute that no offence under Section 27 of Arms Act is made out as the weapon used was a

licenced revolver. Accordingly, the appellant stands acquitted under Section 27 of the Arms Act.

18. The final aspect to be noticed is whether the sentence imposed upon the appellant was commensurate to his guilt or not? Sentencing vests great discretion in the hands of the judge, which is to be exercised in a sound manner while balancing the aggravating and mitigating circumstances of a case. There cannot be any uniform policy which may be resorted to as sentencing involves a comprehensive view of both the crime and the criminal allowing for a myriad situations or questions which may fall for the Court. All the while the doctrine of proportionality must be adhered as both deficient and excessive punishments undermine the criminal justice system [Viz. **Ramjee Lal v. State (Govt. of NCT) Delhi, 2017 SCC OnLine Del 8581** (paragraph 21)].
19. We may also notice the judgment of a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in **Nandan v. State, MANU/DE/2154/2015**, where the appellant had been convicted for the rape of a six year old was punished with Rigorous Imprisonment for actual life with fine of Rs.25,000/- (with no remission). This Court considering the mitigating factors that the appellant had two children and was taking care of his old parents and wife in addition of belonging to a background of impecuniosity, reduced the sentence to that of rigorous imprisonment of 14 years. While doing so, the bench rejected the proposition that retribution plays a role in sentencing in a civilized society and observed as under:

“12. Sentence is to be imposed keeping in mind the nature of the offence and the manner in which the offence has been committed. Primarily it is to be borne in mind that sentencing for any offence has a social goal. The fundamental purpose of imposition of sentence is based

on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

...

21. Furthermore we believe that being a civilised society -- a tooth for a tooth and an eye for an eye ought not to be the criterion and as such the question of there being acting under any haste in regard to the life imprisonment would not arise; Rather our jurisprudence speaks of the factum of the law courts being slow in that direction and it is in that perspective a reasonable proportion has to be maintained between the heinousness of the crime and the punishment. While it is true, punishment disproportionately severe ought not to be passed but that does not even clothe the law courts, however, with an opinion to award the sentence which would be manifestly inadequate having due regard to the nature of offence since an inadequate sentence would not subserve the cause of justice to the society. The Courts would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of just deserts that serves as the foundation of every criminal sentence that is justifiable. In other words, the doctrine of proportionality has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to

examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.”

(Emphasis Supplied)

20. In the present case, the Trial Court was primarily swayed by the fact that the incident was one of moral policing by a private security guard and dealt with the matter with a stern hand imposing the harshest penalty permissible under law for the offence under Section 304 Part I IPC. No doubt any case moral policing should generally be dealt with a stern hand by the Courts, however, the present case is not one of moral policing, but one where the appellant indulged in leering and when the same was objected to by the deceased, a scuffle ensued in which the appellant used his licenced revolver to shoot the deceased. It was not a scenario wherein the appellant had objected to the couple drinking together at the Wine Shop and wanted them to disband. The appellant was not enforcing his own moral standard upon the couple. We proceed to analyse the aggravating and mitigating circumstances in the case. The only aggravating circumstances is that the incident was sparked by the indecent behaviour of the appellant while the mitigating circumstances are:
- a. The appellant was of young age;
 - b. The appellant did not act in a cruel or unusual manner as there was only one solitary gunshot wound;
 - c. The whole incident was a chance happening;
 - d. The appellant was a first time offender; and
 - e. The conduct of the appellant in jail has been “*satisfactory*”.
21. While balancing the foregoing factors, the harshest penalty stipulated under Section 304 Part I IPC was not warranted at all and hence, we reduce the sentence imposed on the appellant for the offence under

Section 304 Part I IPC from one of rigorous imprisonment for life to rigorous imprisonment for a period of seven and a half years. The order in respect of fine and compensation remains unchanged.

22. Thus, the appeal is partly allowed and order on conviction and sentence are modified in the above terms. The appeal is disposed of.
23. Trial Court record be returned along with copy of this judgment.
24. Copy of this Judgment be sent to the concerned Jail Superintendent for updating the jail record.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

JULY 17, 2017

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