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

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

+ **CRL. A. 482/2015**

HARISH CHANDRA @ SURAJ Appellant

Through : Ms.Saahila Lamba, Advocate

versus

STATE Respondent

Through : Mr.Rajat Katyal, APP for the State
along with SI Harkesh Meena, PS
Tilak Marg, in person.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

1. Present appeal has been filed under Sections 374(2) of the Code of Criminal Procedure, 1973 ('Cr.P.C.') against the judgment dated 07.03.2014 by which the appellant has been convicted for the offence punishable under Section 302 of the Indian Penal Code, 1860 ('IPC') (described as Section 300 Secondly in the judgment of the Trial Court) and by an order of sentence dated 10.03.2014 the appellant has been sentenced for rigorous imprisonment for life under Section 302 IPC for committing the offence under Second definition under Section 300 IPC.

2. The case of the prosecution as noticed by the Trial Court is as under:

"1. As per prosecution, on 19.05.2012, an information was received that one person has assaulted to another by stone on footpath, Mathura Road and this information was recorded vide DD No.24A, PS Tilak Marg and same was marked to SI Ramji Lal for further necessary action. Thereafter, he alongwith Ct. Lokesh reached the spot and sent the injured to RML Hospital through PCT Van. In the meanwhile, another

call was received from the duty constable RML Hospital, vide DD No.28A that the injured from Mathura Road has been declared as brought dead vide MLC No.E/85709/12 in the RML Hospital. The same was marked to Insp. B.M. Bahuguna for further necessary action. Thereafter, Insp. B.M. Bahuguna(IO of the case) alongwith Ct. Sombir reached RML Hospital and collected the MLC of unknown male, aged about 35 years. As per the MLC, the alleged history, as given in the MLC, was physical assault and nature of injury as blunt. The body of the deceased was inspected and no article, disclosing the identity of the deceased, was recovered from the possession of the deceased. No eye witness of the incident was found in the hospital. The photographs of the deceased were taken and the dead body was preserved in the mortuary for identification. Thereafter, IO went to the spot, i.e., Mathura Road, opposite Gate No.4, National Stadium and found SI Ramjilal alongwith the complainant and accused. The statement of Kundan Jaiswal was recorded. As per the statement of Kundan Jaiswal, he is doing engineering from NIIT, Preet Vihar, Delhi. On 19.05.2012, he alongwith his elder brother Chandan came to the Chandni Chowk for shopping. On return from the Chandni Chowk, he hired TSR and at around 9.00 PM, he along with his brother reached near red light, Bhairo Road, T-point, Mathura Road in the TSR No.DL-1RJ-3892. He also stated that after some distance from the red light, on the side of the footpath, a person was having a big heavy stone in both his hand and that person was giving beatings to the other person by that stone. The other person was lying on the footpath. The complainant further stated in his statement that the person, who was having stone in his hands, hit upon the other person, who was lying on the footpath 2-3 times with that stone. The complainant further stated that he had stopped the TSR and with the help of his brother and TSR driver Sunil Dhawan, apprehended the accused. The injured person was unconscious, as due to excess bleeding from his head and mouth. The complainant has called on 100 number from his mobile and informed the police about the incident. Thereafter, the accused was handed over to the police. The injured person was taken to the hospital by PCR van. The accused has disclosed his name as Suraj, s/o Sh. Kishori. Thereafter, on the basis of the

statement of the complainant and MLD of the deceased, case u/s 302 IPC was registered against the accused.

During the course of investigation, the crime team was also called for inspection of scene of crime and the photograph of the scene of crime were taken. At the instance of the complainant, site plan had also been prepared and scaled site plan was prepared by the draftsman. Accused was arrested at the spot on 20.05.2012. The disclosure statement of the accused was also recorded. It was disclosed by the accused, in his disclosure statement that he is an addict of alcohol and smack and deceased also used to take alcohol and smack with him. Both are vagabond in Delhi and used to work as rag-picker. Accused disclosed that two weeks back, he gave Rs.350/- to deceased to bring alcohol and smack for him, but he cheated him and did not turn up. Accused, in his disclosure statement, further disclosed that on the day of incident, he had seen the deceased on the footpath, while he was going to Bhairo Mandir and he asked the deceased to return Rs.350/- and on this deceased quarrelled and abused him. Thereafter, accused picked-up a big heavy stone and hit upon the deceased with the stone. The police has also recorded the statements of the witnesses u/s 161 Cr.P.C. The blood stained stone was also taken into possession and sent to the Forensic Department, LHMC for expert opinion and autopsy surgeon opined that the injury no.1 on the body of the deceased could be produced by the said stone or some similar object. The post-mortem of the deceased was got conducted in LHMC Hospital.”

3. Charges were framed against the appellant/accused under Section 302 IPC, to which the appellant pleaded not guilty and claimed trial. The prosecution examined 18 witnesses. No evidence was led by the defence. Statement of the accused was recorded under Section 313 Cr.P.C. The appellant/accused explained that he and deceased are the rag-pickers and were staying near Hanuman Mandir in Connaught Place. They were known to each other by face. About two weeks before the day of incident, he had given Rs.350/- to the deceased to bring liquor and eatables, however, he did not bring the same and ran

away. On the day of incident, he met him on Mathura Road, near Baihrow Mandir. They took liquor there, then he demanded his money back then he started quarrelling with him and abused him by the name of mother and sister. There was scuffle between them. He picked up a piece of stone and hit him on his face which injured him with the injury near the left eye on the face. To save himself, he pushed him back and he fell on the road, hitting his face on a stone lying there. He got injured and a little blood oozed out from the injury. He had tried to save himself from the deceased. Then some people came, caught hold of him.

4. After appreciating the evidence before it, the Trial Court convicted the accused/appellant herein, which has led to the present appeal.
5. Ms.Saahila Lamba, learned counsel for the appellant, at the outset, submits that she would not contest the matter with regard to conviction of the appellant on merits, but will limit her submissions to the extent that a case under Section 302 IPC would not be made out against the appellant. Learned counsel submitted that the appellant had stated in his statement under Section 313 Cr.P.C. that when he demanded his money back from the deceased, he started quarrelling leading to a scuffle and it was in this sudden fight that the appellant inflicted the fatal blow to the deceased. It is submitted that the present case would be covered under the Fourth Exception to Section 300 and hence, the conviction should be converted to one under Section 304. She submitted that the prosecution was unable to prove any previous enmity between the appellant and the deceased. The whole incident took place owing to a sudden fight occasioned by the asking of the appellant to return his borrowed money.

6. *Per contra*, Mr.Katyal, learned counsel for the State, submitted that the Trial Court had correctly recorded the guilt of the accused/appellant as there was sufficient ocular and medical evidence on the record to establish his guilt. He submitted that PW-3, PW-4 and PW-16 were all independent witnesses which had seen the accused hitting the deceased with the stone (Ex.P-1). As regards the submission in respect of applicability of Section 302, Mr.Katyal submitted that the Trial Court has come to a clear finding that the present case was covered under the second definition of Section 300 as the act of the appellant was done with the intention of causing such bodily injury as likely to cause the death of the person. He submits that the prosecution was able to show that the appellant had given beatings with a stone (Ex.P-1) to the head of the deceased which resulted in Injury No.1 described in the Postmortem report (Ex.PW-2/A) which was found to be sufficient to cause death in the ordinary course of nature.
7. We have heard the learned counsel for the parties, examined the judgment of the Trial Court and the Trial Court record. It has already been recorded that Ms.Lamba had restricted her submissions to the applicability of Section 302 IPC.
8. Prior to dealing with the contention of the learned counsel for the appellant in respect of the applicability of Section 302 IPC, we deem it appropriate to examine whether the finding of guilt has been rightly arrived at by the Trial Court? We find ample of evidence in the present case. The case of the prosecution is primarily premised upon the testimonies of PW-3, PW-4 and PW-16 and we think it apropos to examine their testimonies.

9. Sunil Dhawan (PW-3) deposed that he is a TSR driver by profession. On 19.05.2012, he picked two passengers from Chandni Chowk to Govind Puri in his TSR bearing no. DL1RJ-3892. It was around 9 PM, he reached near the Zoo on Mathura Road towards Oberoi Hotel. He saw one person was lying on the footpath and one another person was holding a stone in his hand and that other person was hitting to the first person by that stone. He immediately stopped his TSR and he alongwith the two passengers overpowered that person, who was hitting by the stone to the first person. One passenger made a call to police on 100 number. One PCR Van reached the spot. He handed over that person (attacker) to the police. Blood was oozing out from the mouth and head of the injured person and the injured became unconscious. The PCR officials took the injured to Hospital. Local police also reached the spot and accused/attacker was handed over to the local police. Appellant was correctly identified by PW-3 and he after seeing the photograph of the deceased (Ex.PW-2/DA), deposed that he was the same person to whom injured was caused by the accused/appellant with the stone.
10. Kundan Jaiswal (PW-4) deposed that on 19.05.2012, he alongwith his brother Chandan (PW-16) went to Chandni Chowk for shopping and after shopping, they hired a TSR from Chandni Chowk to Govindpuri. At about 9.00 PM, they reached near Zoo, infront of Gate no. 4 of Major Dhyan Chand National Stadium, he saw one person was hitting other person by a stone and that person was holding a stone in his both hands and was hitting the other person. He attacked 2-3 times. The injured was lying on the footpath and the person holding the stone was hitting upon the person lying on the footpath. He also identified the appellant. Blood was oozing out from the head and mouth of the

injured. He alongwith his brother and the TSR driver apprehended the accused and he informed the police by his mobile phone by dialling 100 number. One police official reached at the spot and thereafter, the PCR Van also reached at the spot and accused/appellant was handed over to PCR officials. The injured person was removed by PCR Van to Hospital. Local police also reached at the spot.

11. The final eye-witness is Chandan Jaiswal (PW-16), who deposed that on 19.05.2012, he along with his younger brother Kundan Jaiswal had gone to Chandni Chowk for marketing purpose. He and his brother were returning back on auto TSR from Chandni Chowk and were going towards Govindpuri. At about 9 PM, he had observed one person on the road side and he was carrying a big stone in his hand and one person was lying on the ground and the person, who was carrying the stone was hitting the person, who was lying on the ground with the stone. They got the auto TSR stopped. He and his brother and the driver then approached the person, who was having stone. They caught hold of him. He had observed the person, who was lying on the ground, was bleeding from his face. His brother Kundan made a call to 100 number. After sometime police arrived at the spot and he narrated the facts before the police and he also handed over the person, who he had apprehended, to the police. PW16 further deposed that he does not remember the name of the person, who he had handed over to the police.
12. During cross-examination by Ld. Addl. PP, PW-16 stated that whatever was told by him in his statement to the police were true and correct facts. He had stated the number of the TSR Auto in which they were returning back, as DL1RJ3892 and the name of the TSR driver was later on revealed as Sunil Dhawan. PW-16 admitted that

he had told the police that when they had crossed Mathura Road, Bhairo Road, T-point red light then on the left side on the Mathura Road, he had seen the incident. He had stated that one person was hitting the other person with the stone and the other person was lying on the side of the footpath. He had also stated that the person was having a big stone and he was hitting the stone on the person, who was lying down on the ground. He had stated that they all three had apprehended the person, who was carrying the stone. He had stated that the person, who was lying down on the ground was bleeding heavily from his mouth and head. PCR van had arrived at the spot and took the injured to the hospital. PW-16 admitted that name of the accused was later on revealed as Suraj and that the police had seized the stone and the pant of the accused having blood stains.

13. Their depositions establish that the witnesses had seen the appellant giving repeated blows with a stone (Ex.P-1) upon the head of the deceased and that they had apprehended the appellant red handed. The testimonies of HC Yadvinder (PW-5), Ct. Lokesh (PW-12) and SI Ramji Lal (PW-13) further support the account of the three eye-witnesses. We may also notice that as per the postmortem report (Ex.PW-2/A), the following external injuries were found on the body of the deceased:

“Injury no. 1 : multiple contused abrasion reddish brown in colour of size ranging from 8 cm x 4 cm to 1 cm x 1 cm with Central Laceration of size ranging from 6 cm x 1.5 cm x buccal cavity deep to 2 cm x 0.5 cm x muscle deep present over right side of face extending from right pinna upto angle of mouth and from lateral aspect of eyebrow to angle of mandible. Face appears compressed bilaterally. All the facial bones on the right side of the face including mandible are found fractured.

Injury no. 2 : Multiple contused abrasion, reddish brown in colour, size ranging from 7 cm x 4 cm to 1 cm x .5 cm present

over postero – lateral aspect of right side of neck, extending from 4 cm lateral to midline to nape of the neck posteriorly and from Mastoid above till root of neck downwards.

Injury no. 3 : Contused abrasion reddish brown in colour 4 cm x 3 cm over front of neck in midline. Extending 5 cm below chin and 3 cm above sternal notch.”

14. In the opinion in respect of the weapon of offence (Ex.PW-2/B), it was opined that the Injury No.1 could have been produced from the weapon of offence, i.e. a stone weighing about 20 kgs (Ex.P-1). Dr.Manoj Kumar Handa (PW-2) also stated during his cross-examination that the Injury No.1 was sufficient to cause death in the ordinary course of nature.
15. In view of the foregoing ocular evidence supported by the medical evidence, we find that the Trial Court had rightly recorded the conviction of the appellant herein. The prosecution was able to establish that on 19.05.2012 at about 9 PM, the appellant had inflicted blows upon the deceased using the stone (Ex.P-1).
16. The remaining bone of contention is whether the case would be covered under Section 302 IPC? In this regard, Ms.Lamba had submitted that the prosecution has failed to show any previous enmity, there was no intention of the appellant to kill the deceased, there was a sudden fight owing to a demand for money and the appellant did not act in any cruel or unusual manner.
17. In order to appreciate the submission of learned counsel for the appellant, we deem it appropriate to refer to the medico-legal examination of the appellant/accused. The appellant was medically examined on two occasions on 20.05.2012, at 4:55 AM (Ex.PW-8/A) and 1:40 PM (Ex.PW-10/A). In both, a lacerated wound over the left eyebrow was found and the nature of injury was blunt as per Ex.PW-10/A. Further, Chandan Jaiswal (PW-16) had also stated during his

cross-examination by the counsel for the accused that upon his query as to why the appellant was hitting the other person, the appellant had responded that *“he had taken money from me and he (deceased) not returning the said amount.”* PW-16 also stated that the appellant was drunk at the moment. In this background, we find merit in the submissions of the learned counsel for the appellant.

18. After going through the judgment of the Trial Court, we find that not even a whisper had come regarding the defence taken by the accused/appellant. The Trial Court had noticed the submission of the counsel for the accused that *“[w]hatever happened, happened out of sudden and spur of moment between the accused and deceased”*, however, the Trial Court ignored the submission and did not deal with the submission of the appellant.
19. To conclude, the appellant and the deceased were known to each other and on the fateful evening, the appellant and the deceased were drinking together, which escalated into a scuffle upon the asking of the appellant to return his money. In the scuffle, the appellant suffered the injury mentioned in MLCs (Ex.PW-8/A and Ex.PW-10/A) and in return, the appellant inflicted a blow with the stone (Ex.P-1). Further, though there were three injuries on the body of the deceased, Dr.Manoj Kumar Handa (PW-2) had also stated in his cross-examination that in his opinion *“single injury might have been inflicted aiming to the face of the deceased which is sufficient to cause death in the ordinary course of nature.”* Thus, there was only one blow which caused the three injuries. The weapon used is also of significance. The appellant had used a heavy stone (Ex.P-1) weighing 20 kgs, which could have been obtained at the spot of the incident evincing that there was no preparation. It is clear that the intention to

kill has not been established and actually the fatal blow suffered by the deceased was the result of sudden fight and in the heat of passion, without any premeditation. It cannot be said that the appellant had taken any undue advantage or acted in a cruel or unusual manner as he had only given one blow with the concrete slab. Hence, the present case would be covered under Exception 4 of Section 300, which reads as under:

“Exception 4.—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.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.”

(Emphasis Supplied)

20. 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.”
21. In ***Sayaji Hanmant Bankar v. State of Maharashtra***, (2011) 14 SCC 477, the convict had thrown a water pot and a kerosene lamp on the deceased (his wife) after a quarrel with her, the burn was exasperated by the fact that the deceased was wearing a nylon sari resulting in her death. The Apex Court found that there was a sudden fight and modified the conviction from Section 302 IPC to Section 304 Part I IPC. The relevant paragraphs read as under:

“8. It is clear from the reading of aforesaid Exception 4 that if the act is done without premeditation in a sudden fight or in the heat of passion upon a sudden quarrel and if the offender does not take any undue advantage or act in a cruel or unusual manner, then Exception 4 will be attracted.

9. We have gone through the evidence carefully. It seems that as soon as the accused entered the house, there appeared to be some quarrel with his wife and in that fight first, he threw a water-pot and thereafter a kerosene lamp. The burning seems to be more out of the fact that unfortunately at that time, the lady was wearing a nylon sari. Had she not been wearing a nylon sari, it is difficult to imagine how she could have been burnt to the extent of 70%. In our view this was a case which clearly falls under Exception 4 to Section 300 IPC since there was a sudden fight. There was no premeditation either. Therefore the appellant-accused is liable to be convicted for the offence punishable under Section 304 Part I.

10. We, accordingly, alter the conviction of the accused from Section 302 IPC to Section 304 Part I IPC and sentence him to the period already undergone by him. The sentence of fine remains the same.”

(Emphasis Supplied)

22. In *Sandhya Jadhav v. State of Maharashtra*, (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]

23. Coming to the case at hand, all the essentials stand satisfied: the incident took place pursuant to a sudden fight erupting between the deceased and the appellant; there was no pre-meditation on the part of the appellant as a solitary blow was inflicted in the heat of passion with a stone (Ex.P-1) obtained from the place of the offence; and the appellant neither acted in a cruel nor unusual manner. However, having regard to the weapon of offence, i.e. a heavy stone (Ex.P-1) weighing 20 kgs, and the severity of the injury caused, the appellant must be imputed to cause such bodily injury as was likely to cause death, if not the intention to cause death. Accordingly, the conviction of the appellant is modified from Section 302 to one under Section 304 Part I of the Indian Penal Code.
24. Having regard to the culpability of the appellant and the fact that the appellant was a rag-picker, we are of the view that the ends of justice would be met if the sentence of the appellant is modified to imprisonment for 7 years. No fine was imposed by the Trial Court and we find no reason to vary the same.
25. Thus, the appeal is partly allowed and orders of conviction and sentence are modified in the above terms.
26. Trial Court record be returned.

27. Copy of this Judgment be sent to the concerned Jail Superintendent for updating the jail record.

G. S. SISTANI, J.

JULY 17, 2017
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CHANDER SHEKHAR, J.

