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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Judgment: 1st May, 2017

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Crl. A. No.570/2015 & Crl. M. (Bail) No.2255/2016

DANISH

..... Appellant

Through: Mr.R.K.Thakur, Adv. with Mr.Udit
Goyal, Adv.

versus

STATE (GOVT OF NCT) DELHI

..... Respondent

Through: Mr.Rajat Katyal, APP for the State.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. Present appeal has been filed under Section 374 (2) of the Code of Criminal Procedure against the impugned judgment and order on sentence dated 17.01.2015 by which the appellant has been held guilty and convicted for the offence punishable under Section 302 of the Indian Penal Code (hereinafter referred to as 'IPC'). By virtue of the order on sentence, the appellant was sentenced to rigorous imprisonment for life and a fine of Rs.10,000/-; in default of payment of fine, the appellant was directed to further undergo simple imprisonment for four months.

2. The case of the prosecution, in short, is that on 03.07.2011 vide DD No.23-A, an information was received at PS Sadar Bazar regarding admission of injured/deceased Amin @ Raja in Hindu Rao Hospital who was declared brought dead by the doctor. On receipt of the said information, Insp. Pramod Gupta reached the hospital and recorded the statement of Nadeem (brother of the deceased) with respect to the stab injuries having been caused to his brother Amin @ Raja by the appellant Danish with a knife. On the basis of his statement as well as MLC of the injured/deceased, FIR under Section 302 of IPC was registered. During the investigation of the case, IO got post-mortem examination conducted on the dead body of the deceased, prepared site plan, got inspected the scene of crime through Crime Team, arrested the appellant/accused, recorded his disclosure statement and recovery of weapon of offence was effected at the instance of the appellant. The exhibits were sent to FSL for expert opinion and after completion of investigation, charge-sheet under Section 302 of IPC was filed in the Court.
3. To support its case, the prosecution has examined 25 witnesses in all. No witness has been examined in defence. Statement under Section 313 of the Code of Criminal Procedure was recorded wherein he pleaded innocence and claimed to be falsely implicated in the present case.
4. Mr. R. K. Thakur, learned counsel for the appellant has submitted that the learned trial Court has decided the case only on the basis of probabilities. PW-1 has not witnessed the incident. PW-7, who

claims to be an eye-witness, is an interested witness being the brother of the deceased and his testimony is not reliable and trustworthy. He has contended that the judgment of the trial Court is based on conjectures and surmises. Counsel contends that the trial Court failed to consider that the presence of PW-7 is doubtful, as the site plan Ex.PW-25/A prepared by the IO on the date of the incident does not show the place where PW-7 was allegedly present. In his testimony, PW-25, the IO, has categorically stated that, *“It is correct that it is not mentioned in the site plan Ex.PW-25/A as to on whose instructions this document was prepared. It is correct that it is not shown anywhere in the site plan as to where the complainant was present/standing at the time of incident. In the site plan, house of the deceased is shown but shop of the complainant is not shown.”*

5. Counsel also submits that there are contradictions between the two site plans. There are also contradictions in the testimonies of PW-8 (draftsman) and PW-25 (IO). As per the draftsman, he reached the place of the incident at 3.20 p.m. whereas as per the IO, the draftsman had reached the Police Station only at 5.00 p.m. and the IO was unable to give the time when he accompanied the draftsman to the place of incident. Counsel further submits that in DD Nos.23A, 24A, 25A, 27A and 28A, all dated 03.07.2011, PS Sadar Bazar, the name of the appellant has not been mentioned which would show that the appellant has been falsely implicated in this case.
6. Counsel also submits that PW-1 and PW-7 are planted witnesses. It is contended that PW-1 has deposed that the deceased was his nephew

and he had seen him in an injured condition at 3.30 p.m. however, PW-1 did not go to the hospital along with the deceased nor did he inform the police, although the Police Post was hardly at a distance of 500 meters and the Police Station was 1 k.m. away from that place. This unusual conduct of PW-1 shows that he was not present at the place where the deceased fell down. Counsel contends that it is only one Md. Ilyas who informed the PCR at 4.39 p.m. and the PCR informed the local police vide DD No.25A. Even in the PCR call, the name of the person, who stabbed the deceased, was not disclosed. Counsel contends that although the Crime Team reached the spot at 5.30 p.m. and remained there till 6.00 p.m., nobody from the public including PW-1 disclosed the name of the assailant to the police. The presence of PW-1 is also doubtful by the fact that PW-7 in his deposition has not disclosed the presence of PW-1 at the time when he was lifting the deceased and had taken him to the hospital in a rickshaw.

7. Counsel also contends that the presence of PW-7 is also doubtful at the place of the incident, for the reason that PW-7 claims that he was only 5-6 paces away from his brother, but he did not try to save him during the incident. Counsel submits that the recovery is also doubtful and so is the manner of his arrest.
8. Learned counsel for the appellant, on instructions from the appellant and also from the family members of the appellant, who are present in Court, submits that even otherwise, no case under Section 302 of IPC is made out and only a case under Section 304 Part-II of IPC would be

made out, as the incident had taken place at the spur of the moment. There was no pre-meditation. The appellant did not act in a cruel manner and only one injury was inflicted on the deceased which led to his death. It is thus submitted that the appellant does not press the appeal on merits and limits his submissions that an offence under Section 302 of IPC has not been made out.

9. Per contra, learned APP for the State submits that the prosecution has been able to establish its case beyond any shadow of doubt. PW-1 had seen the deceased running being chased by the appellant with a *CHHURA* in his hand, while PW-7 is the eye-witness who had witnessed his brother being stabbed by the appellant. He named the appellant in his first statement recorded by the police at the first opportunity available. He had not made PCR call, therefore, he would not have named the appellant and he had also no control over the DD entries and thus, no benefit can accrue to the appellant.
10. Counsel further submits that the PCR call received was that an incident of stabbing had taken place after a quarrel, as is evident upon reading of Ex.PW-12/B in which the incident of quarrel is mentioned. Learned counsel for the appellant also relies on this document Ex.PW-12/B to show that it was a sudden quarrel. Counsel for the appellant also submits that the testimony of PW-7 would establish that there were cordial relations between the family of the deceased and the family of the appellant and thus, there was no previous enmity and the incident took place at the spur of the moment and in a gush of anger between two youngsters, the appellant being 20 years of age at the

time of incident and the deceased was also 23 years of age, residing in the same neighbourhood and were friends.

11. We have heard the learned counsels for the parties, considered their rival submissions and examined the evidence on record. Before dealing with the contentions of both the parties, it would be appropriate to examine the testimonies of material witnesses. The Trial Court has strongly relied upon the testimony of eyewitnesses including PW-1 Sagir Beg and PW-7 Nadeem Beg to convict the appellant herein.
12. PW-1 Sagir Beg has testified that on 03.07.2011 he was sitting in front of the shop of his nephew, Nadeem (PW-7/brother of the deceased) which is situated at 7854, New Basti, Bara Hindu Rao, Delhi. Nadeem (PW-7) was running a tea shop and his shop was situated in his house. The witness further deposed that he along with his family was residing at the ground floor and Nadeem along with his family reside at the second floor of the house. This witness further testified that Nadeem was shouting *PAKRO PAKRO* and he was followed by Amin @ Raja (the deceased). Amin was in injured condition. He had seen blood on his shirt and injury on his chest. Ahead of Nadeem, the appellant was running who was carrying a *CHHURA* in his hand. The appellant ran to the side of Chammellion Road, while Amin fell down in front of the shop of General Store. He along with Nadeem went to help Amin who was in injured condition when he was told by the Amin that the appellant had stabbed him with *CHHURA*. He left the

injured at the spot and went to trace the appellant who was not found. Thereafter he returned to the spot and informed the Police.

13. Another eyewitness, whose testimony is strongly relied upon by the prosecution, is PW-7 Nadeem Beg (brother of the deceased). In his testimony, this witness has testified that on 03.07.2011 at about 3.00/3.30 p.m., he saw that the appellant was threatening his brother. He identified the appellant who was present in Court. He also deposed that the appellant was carrying a *CHHURA*/ knife in his hand while threatening his brother. He had shouted “*YE KYA HO RAHA HAI*”. The appellant stabbed his brother on the left side of the chest. He chased the appellant and also raised noise “*PAKRO PAKRO*” and followed him till a certain distance but he ran away with *CHHURA* to the side of Chammellion Road. He saw that his brother was lying on the ground in a pool of blood in front of Shop No.7848. He lifted him and stopped one riksha puller and took him up to the place where three-wheelers were parked. He hired a three-wheeler and took his brother to Hindu Rao Hospital. He was informed after some time by the Doctor that his brother has expired. This witness has also testified that prior to the date of this incident the appellant had quarrelled with his brother and threatened him. However, the matter was pacified at that time.
14. We may notice that the clothes of PW7 Nadeem were stained with blood and were handed over to the police. The clothes were seized and sealed with the seal “PG”. The clothes’ parcel was taken in possession by a Seizure Memo Ex.PW-7/D. The clothes were sent to

the FSL for examination. As per the FSL report Ex.PW-6/A and the Serological report Ex.PW-6/B, human blood was found on the clothes of this witness and they matched with the blood group of the deceased.

15. We may also notice that the weapon of offence, i.e. *CHHURA* was correctly identified by the witness PW-7. He had also identified the clothes he was wearing, which were kept in a sealed *Pulanda*, at the time when he was carrying his brother to the hospital. During cross-examination, this witness had testified that he knows the appellant since childhood. They had good social relations with the appellant and his family prior to the incident. The house of the appellant is two houses away from the houses of the deceased and PW-7. During the cross-examination, the defence was unable to shake the testimony of this witness.
16. Besides the above public witnesses, PW14 Const. Yogesh who was posted as Duty Constable at Hindu Rao Hospital and gave information to PS Sadar Bazar with respect to the admission of the injured/deceased in the hospital. PW15 HC Kedar has registered the FIR and has proved the same vide Ex.PW15/B. PW25 Insp. Pramod Gupta, who was the Investigating Officer in the present case and has conducted the investigation and filed the chargesheet.
17. We are of the considered view that the trial Court has rightly convicted the appellant primarily on the basis of the testimonies of PW-1 and PW-7.

18. In the present case, since the order on conviction has not been challenged and after examining the evidence on record, we find no infirmity in the same, the only issue which remains to be decided is as to whether the case of the appellant would fall under Section 302 of IPC or Section 304 of IPC.
19. As noted above, on instructions, the learned counsel for the appellant has argued that no case under Section 302 of IPC is made out, as the incident had occurred on the spur of the moment between two friends of approximately the same age groups who were residing in the same area and were known to each other. Counsel has also strongly urged that the appellant was only 20 years of age at the time of the incident; he did not act in a cruel and unusual manner and inflicted only one injury which would show that there was no intention on the part of the appellant to kill the deceased. It is also strongly urged that the appellant has already been incarceration for more than 6 years; his conduct in Jail has been satisfactory. Counsel has relied upon a recent judgment of *Jai Bhagwan v. State of Delhi* reported at **2017(1) JCC 22**, wherein the division bench of this Court modified the order of conviction of the appellant from Section 302 of IPC to under Section 304 Part II of IPC and modified the order on sentence of the appellant to the period already undergone by him which was about 7 years.
20. To deal with the aforesaid submission made by the counsel for the appellant, we deem it appropriate to analyse the medical evidence in detail. In this regard testimonies PW-4 Dr. Noor Ali and PW-3 Dr. M. K. Panigrahi assume importance. PW-4 Dr. Noor Ali has proved the

MLC of the deceased, which is Ex.PW4/A deposed in his examination-in-chief that on 03.07.2011, at about 04.10 PM he had examined the deceased Ameen brought by his brother namely Nadeem in an injured condition. On examination, a flat line was observed on ECG and the patient was declared brought dead at 04.20 PM.

21. PW-3 Dr. M. K. Panigrahi had conducted post-mortem examination of the deceased on 04.07.2011. On external examination, he found a stab wound of size 3.8 cm x 1 cm x chest cavity deep, vertically placed over the precordial region of the left side anterior chest wall. On internal examination of external injury No.1, PW-3 found a track measuring about 9 cm long which passes through the 4th intercostals space vertically and cut across the left 5th rib anteriorly than enters into the chest cavity and cut the pericardium on its left lateral aspect and enter into the pericardial sac and pierces through the anterior wall of left ventricle of the heart and ends in the left ventricular cavity.
22. After the post-mortem examination, PW-3 Dr. M. K. Panigrahi opined the cause of death as hemorrhage and shock consequent upon stab injuries to the heart. The above said injury was ante-mortem and recent in nature, which could have been caused by forceful thrust of a sharp weapon/object. The injury was sufficient to cause death in the ordinary course of nature. As to the weapon of offence, PW-3 opined that on 15.07.2011, Investigating Officer brought a knife and sought subsequent opinion, which is Ex.PW3/B. After observing the knife and the post-mortem report he opined that injuries No. 1 as mentioned in post-mortem report could be possible with the knife which had been shown to him and similar other sharp, pointed weapon/object.

23. We may profit with the view taken by the Hon'ble Supreme Court in the case pertaining to the Exception 4 of Section 300 of IPC. In the case of ***Golla Yelugu Govindu v. State of Andhra Pradesh***, reported at ***(2008) 16 SCC 769***, a case where there was exchange of hot words between the husband and wife at about 2.00 AM in the night. The husband hacked his wife with a sickle on her back and the wife fell down. The husband once again hacked on her neck and her left ear causing severe bleeding injuries. The relevant para 13 to 16 read as under:

“13. The residuary plea relates to the applicability of Exception 4 to Section 300 IPC, as it is contended that the incident took place in the course of a sudden quarrel.

14. *“10. For bringing in its operation 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.*

11. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution (sic provocation) 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 could in such cases 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 offenders 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 had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and 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 a cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.” [Ed.: As observed in **Dhirajbhai Gorakhbhai Nayak v. State of Gujarat**, (2003) 9 SCC 322, at p. 327, paras 10-11.]

15. “19. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In **Kikar Singh v. State of Rajasthan** [AIR 1993 SC 2426] it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that [giving] the blows with the knowledge that they were likely to cause death, he had taken undue advantage.” [Ed.: As observed in **Babulal Bhagwan Khandare v. State of Maharashtra**, (2005) 10 SCC 404, at p. 411, para 19.]

16. Considering the factual scenario in the background of the position in law as highlighted above, the inevitable conclusion is that the appropriate conviction would be under Section 304 Part I IPC. Custodial sentence of ten years would meet the ends of justice. Appeal is allowed to that extent.”

(Emphasis Supplied)

24. In the case of **Surinder Pal @ Billoo v. State of Delhi**, reported at **MANU/DE/3059/2009**, this Court modified the conviction of the

accused under Section 304 Part I of IPC and sentenced him to eight years rigorous imprisonment. Relevant para 15 reads as under:

“15. From the testimony of PW4 Sanjay and PW5 Ms. Sudesh, it is apparent that the occurrence in question was an extension of the quarrel between the appellant and PW4 Sanjay, which started as a result of exchange of hot words between the mother of the appellant and PW5 Ms. Sudesh. From the testimony of PW4 Sanjay and PW5 Ms. Sudesh, it transpires that just before the main occurrence there was some altercation between PW4 Sanjay and the appellant in which the appellant, who admittedly was threatening to hit the mother of PW4 Sanjay with a brick, threw the said brick and gave fist blows to PW4 Sanjay, which circumstance clearly indicates that till that time there was no intention on the part of the appellant to cause a serious injury to PW4 Sanjay or PW5 Ms. Sudesh or any member of the family. It is only when the younger son of the deceased Rajnish PW9 went and called his father Omvir (deceased), the unfortunate occurrence took place. It has also come in evidence that when the deceased rushed to the spot, he was followed by PW3 Dharamjit Singh, complainant, who was carrying a saria in his hand and even PW4 Sanjay had admittedly brought a “balli” (a wooden log) and rushed towards the appellant. Only thereafter, the appellant had inflicted two knife blows to the deceased. From the said sequence of events, it is apparent that the appellant was not the aggressor and it was the deceased Omvir who came running to the spot to intervene in the fight. Therefore, there was no possibility of the appellant having planned to kill the deceased. It has not come in evidence from where the knife came, but it is apparent from the record that the deceased had stabbed the appellant because of the aforesaid sudden quarrel, which started with the exchange of abuses and hot words between the mother of the appellant and PW5 Ms. Sudesh, in the heat of moment. Indeed, the appellant inflicted two knife blows on the person of the deceased, which unfortunately proved to be fatal, however, from the

circumstances detailed above the intention to kill on the part of the appellant cannot be inferred and, in our considered view, the offence committed by the appellant squarely falls within Fourth Exception to Section 300 IPC. ”

(Emphasis Supplied)

25. In the case of ***Rampal Singh vs. State of Uttar Pradesh*** reported at **2012 (8) SCC 289**, the Hon’ble Supreme Court altered the conviction of the accused from Section 302 to 304 Part I of IPC and awarded a sentence of 10 year rigorous imprisonment. Relevant para 25 and 30 read as under:

“25. As we have already discussed, classification of an offence into either part of Section 304 is primarily a matter of fact. This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of premeditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be punished. This can also be decided from another point of view i.e. by applying the “principle of exclusion”. This principle could be applied while taking recourse to a two-stage process of determination. Firstly, the Court may record a preliminary finding if the accused had committed an offence punishable under the substantive provisions of Section 302 of the Code, that is, “culpable homicide amounting to murder”. Then secondly, it may proceed to examine if the case fell in any of the Exceptions detailed in Section 300 of the Code. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law. We are stating such a proposition to indicate that such a determination would better serve the

ends of criminal justice delivery. This is more so because presumption of innocence and right to fair trial are the essence of our criminal jurisprudence and are accepted as rights of the accused.

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30. Another very important aspect is that it is not a case of previous animosity. There is nothing on record to show that the relation between the families of the deceased and the appellant was not cordial. On the contrary, there is evidence that the relations between them were cordial, as deposed by PW 1. The dispute between the parties arose with a specific reference to the ladauri. It is clear that the appellant had not committed the crime with any premeditation. There was no intention on his part to kill. The entire incident happened within a very short span of time. The deceased and the appellant had had an altercation and the appellant was thrown on the ground by the deceased, his own relation. It was in that state of anger that the appellant went to his house, took out the rifle and from a distance i.e. from the roof of Muneshwar, he shot at the deceased. But before shooting, he expressed his intention to shoot by warning his brother to keep away. He actually fired in response to the challenge that was thrown at him by the deceased. It is true that there was knowledge on the part of the appellant that if he used the rifle and shot at the deceased, the possibility of the deceased being killed could not be ruled out. He was a person from the armed forces and was fully aware of the consequences of use of firearms. But this is not necessarily conclusive of the fact that there was intention on the part of the appellant to kill his brother, the deceased. The intention probably was to merely cause bodily injury. However, the Court cannot overlook the fact that the appellant had the knowledge that such injury could result in the death of the deceased. He only fired one shot at the deceased and ran away. That shot was aimed at the lower part of the body i.e. the stomach of the deceased. As

per the statement of PW 2, Dr A.K. Rastogi, there was a stitched wound obliquely placed on the right iliac fossa which shows the part of the body the appellant aimed at.”

(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]

26. We may usefully refer to a recent judgment of *Anil @ Hunny vs. State of NCT of Delhi*, in *Crl. A. No. 423/2016*, decided on 28.04.2017, another Division Bench of this Court, of which one of us (G. S. Sistani, J.) was also a member, modified the order of conviction under Section 302 of IPC to under Section 304 Part I of IPC wherein there were two stab injuries sustained by the deceased and out of the two, only one injury was sufficient to cause death.
27. Applying the law to the facts of the present case, we are persuaded to accept the alternative limb of submission advanced by the learned counsel for the appellant and are of the considered view that the present case would fall within the ambit of Section 304 Part I of IPC.
28. Having regard to the testimonies of PW-1 and PW-7 that both the witnesses have identified the appellant. The appellant was previously known to the witnesses since childhood. They had good social relations with the appellant and his family prior to the incident. The house of the appellant is two houses away from the houses of the deceased and there was no previous enmity between the family members and the incident took place at the spur of the moment; in a

gush of anger between the two youngsters. It is evident from the post-mortem report that the deceased had sustained one fatal blow from a knife which resulted in his death. The ends of justice would be met if we modify the sentence of the appellant Danish to the rigorous imprisonment for a period of 8 and ½ years.

29. Consequently, the appeal is allowed in part, the conviction and order on sentence recorded by the trial Court is modified to the extent indicated hereinabove. The appeal stands disposed of. The fine imposed upon the appellant and the default sentence awarded to him shall remain unaltered.
30. The Trial Court record be sent back along with a copy of this judgment.
31. Copy of this judgment also be sent to the Superintendent-Central Jail, Tihar for updating the jail record.

Crl. M. (Bail) No.2255/2016

32. In view of the above, the application stands infructuous.

G. S. SISTANI, J.

VINOD GOEL, J.

MAY 01, 2017//ka