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

+ **CRL.A. 170/2002**

BRIJ MOHAN & ORS

..... Appellants

Through: Mr.Mukesh Kalia and Mr.Haanumant
Sakhuja, Advocates.

Versus

STATE

..... Respondent

Through: Ms.Kusum Dhalla, APP for State with
Insp. Birender Singh, P.S. Shahdara,
Delhi.

+ **CRL.A. 333/2002**

SITA RAM

..... Appellant

Through: Mr.S.B.Dandapani, Advocate/Amicus

Versus

STATE

..... Respondent

Through: Ms.Kusum Dhalla, APP for State with
Insp. Birender Singh, P.S. Shahdara,
Delhi.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE I.S.MEHTA

ORDER

15.02.2018

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Dr. S. Muralidhar, J.:

1. These appeals are directed against the judgment dated 18th February 2002 passed by the learned Additional Sessions Judge (ASJ), Karkardooma Courts, Delhi in Sessions Case No.87/2001 arising out of FIR No.212/1990, at Police Station Shahdara, whereby the appellant Sita Ram (Accused No.2:

A-2) was convicted for the offence under Section 302/34 IPC and Section 323/34 IPC and the other appellants, i.e. Brij Mohan (A-5), Rajinder Kumar (A-6) and Subhash Chand (A-9) were convicted for the offence under Section 323/34 IPC.

2. These appeals are also directed against the order on sentence dated 25th February 2002 whereby for the offence under Section 302/34 IPC, A-2 was sentenced to imprisonment for life with a fine of Rs.10,000/- and in default of payment of fine to further undergo simple imprisonment (SI) for one year. For the offence under Section 323/34 IPC, all the four aforementioned accused, i.e. A-2, A-5, A-6 and A-9 were sentenced to rigorous imprisonment (RI) for six months and to pay compensation of Rs.1,000/- to each of the injured. All the sentences were directed to run concurrently.

3. At the outset, it requires to be noticed that originally nine accused were sent up for trial. In terms of the order on charge dated 22nd May 1992, the nine of them were charged for the offence under Section 323/34 IPC for voluntarily causing simple injuries with blunt object to Leelawati (PW-4) and Jai Singh (PW-14) and under Section 325/34 IPC for causing grievous injuries with blunt object to Raj Kumar (PW-9). Girdhari Lal (A-1), Sita Ram (A-2), Ram Pal (A-3) and Ram Phal (A-4) were separately charged with having committed the offence punishable under Section 302/34 IPC for causing the death of Mangal Singh (the deceased) at 10:15 p.m. on 2nd July 1990 at Old Kardampuri within the jurisdiction of Police Station Shahdara, Delhi.

4. By the impugned judgment dated 18th February 2002, the learned trial

Court acquitted Rajesh Kumar (A-7) and Manphool Singh (A-8) of all the offences with which they were charged. Brij Mohan (A-5), Rajinder Kumar (A-6) and Subhash Chand (A-9) were convicted for the offence under Section 323/34 IPC, i.e. for causing simple injuries to PW-4 and PW-14 as well as Raj Kumar (PW-9). They were acquitted of the offence under Section 325/34 IPC.

5. As far as Accused No.1 to 4 were concerned, apart from being convicted for the offence under Section 323/34 IPC for causing simple injuries to PWs 4, 9 and 14, they were also convicted for the offence under Section 302/34 IPC for causing the death of the deceased Mangal Singh.

6. During the pendency of the present appeals in this Court, Girdhari Lal (A-1), Ram Pal (A-3) and Ram Phal (A-4) expired and their appeals accordingly abated. Therefore, as of date, the appeals of Sita Ram (A-2), and that of Brij Mohan (A-5), Rajinder Kumar (A-6) and Subhash Chand (A-9) remain to be considered, and are being disposed of by this common judgment.

7. There were four injured eye witnesses in the case. These were Kalawati (PW-19), wife of the deceased Mangal Singh, his sons Raj Kumar (PW-9) and Jai Singh (PW-14), and his daughter-in-law Leelawati (PW-4), the wife of PW-14.

8. What transpired on the fateful day of the incident has been spoken to by all the above four eye witnesses, who also happened to be the injured witnesses. The settled legal position is that merely because the eye witnesses may be related to the deceased, will not *ipso facto* require their evidence to

be disbelieved. It is only that the Court must examine their evidence with caution to rule out any inconsistencies, improvements and contradictions. Where there is any ambiguity, the Court might look for corroboration. In ***Jayabalan v. UT of Pondicherry (2010) 1 SCC 199***, the Supreme Court held as under: (SCC p. 213, paras 23-24)

“23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.”

9. In the present case, the testimony of PW-19 was to the effect that she and the deceased were returning home at around 10 pm on 2nd July 1990 after closing their tea shop which was located at Kardampuri. When they reached the shop of Girdhari (A-1), she noticed that Sita Ram (A-2), Ram Pal (A-3) and Ram Phal (A-4) were also present there. The deceased told Girdhari Lal (A-1) not to steal electricity supply by tapping it from the electricity pole because it was leading to a disturbed supply and fluctuation at the house of the deceased. On hearing this, A-1 to A-4 began abusing the deceased. While A-1 gave him a slap, Ram Pal (A-3) hit the deceased with something on his head as a result of which he sustained injuries and started bleeding. According to PW-19, Ram Phal (A-4) and Sita Ram (A2) were both having a *danda* each. She, however, stated that “*both of them hit Mangal Singh with hockey and danda*”.

10. PW-19 proceeded to state that as a result of the beatings given by A-1 to A-4, the deceased fell down. When PW-19 intervened to save her husband, A-1 to A-4 beat her as well. PWs 4, 9 and 14 came there in order to save the deceased and PW-19. At that point, A-5 to A-9 came in support of A-1 to A-4 and beat PWs 9, 14 and 19. When PW-4 intervened, all the accused beat her as well. PW-4 pointed out that PW-9 sustained head and leg injuries. She was able to identify all of the accused persons present in Court.

11. Nothing much has been elicited from PW-19 in her cross-examination. In fact, she was confronted with her previous statement made to the police only to the extent that in the Court she stated that the hockey and *dandas* were taken from the shop of sons of A-1, wherein the taking of the weapons from the shop is not mentioned in her previous statement. The second contradiction was in relation to her deposition in the Court that the other five accused brought the weapons of offence from their house whereas in her previous statement to the police she did not state so. In other words, the line of defence was not to deny the presence of the accused persons at the scene of occurrence or even to deny that A-2 and A-4 were armed in the manner described by PW-19.

12. The evidence of PWs 4, 9 and 14 have on all the above aspects completely corroborated PW-19 and have stood firm in their respective cross-examinations on the key element as to who attacked the deceased and with what weapon.

13. Dr. M.P. Sarangi (PW-6), who conducted the post-mortem of the

deceased noticed as many as nine external injuries which included three lacerated wounds on the head region. Two of them were scalp deep and one was bone deep. The other six injuries were bruises all over the body. On an the internal examination, he observed as under:

“In the abdomen, stomach contained above 200 ml of brownish fluid material, walls were normal. Other internal organs in the abdomen and pelvis were apparently normal, except the kidneys showed metullary congestion. The structures in the neck and the chest cavity were also apparently normal except the lungs which showed both congestion and consolidation. Spinal column was normal. In head, scalp showed extra, vasation of blood in the occipital area and parieto temporal region on both sides. Skull showed fractures as shown in the diagram at portion A, Brain matter showed defuse subdural and subarachoid hatancirrhages on the dorso lateral surface of right parietal and right occipital region. Basis of frontal and temporal, lobes of the brain matter showed contusion haemorrhages. Haemorrhage were also seen in the mid brain.”

14. As regards his opinion about the cause of death, he stated as under:-

"From the aforesaid post mortem examination I was of the opinion that death in this case was due craneo cerebral damage consequent upon blunt force impact to the right side of the head which could be by hockey stick in the manner as alleged. External injury No.9 was a patent injury and was caused by a hockey stick. Injuries No.5 and & 8 appeared as protective wounds while warding off the blows. All the injuries were ante mortem and recent. External injuries from 1 to 3 with corresponding internal damages in the creaeal contends and cranium were fatal in ordinary course of nature. Death was homicidal.”

15. There was no cross-examination of the above witness. Therefore, it is plain that the death of the deceased was homicidal and that according to PW-6 “the external injuries from 1 to 3 with corresponding to internal damages in the cremeal contends and cranium were fatal in the ordinary course of nature. It is seen that there were three head injuries, two of which

i.e. injuries No.1 & 3 were scalp deep and injury No.2 was bone deep.

16. On behalf of the A-2, it was contended by Mr.Dandapani, Advocate that from the description of the occurrence by the four alleged eye witnesses it should be concluded that the offence was not that of murder but culpable homicide falling within the description of Exception-4 to Section 300 IPC. According to him, provocation for the fight was given by the deceased himself when he falsely alleged that A-1 was tapping the main electricity line. He submitted that the prosecution was unable to substantiate this bald allegation in the investigation and in fact A-1 did not tap the electricity line to steal electricity. According to learned counsel for the Appellant, this provocation which was sufficient to result in a sudden fight and the attack on the deceased was due the heat of passion upon a sudden quarrel without premeditation.

17. Exception 4 to Section 300 IPC 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”.

18. The ingredients that are required to be satisfied in order that the offence may be brought within Exception-4 to Section 300 IPC are as under:-

- (i) The crime must be committed without premeditation.
- (ii) It must be committed in a sudden fight in the heat of passion upon a sudden quarrel.

- (iii) The offender should not have taken undue advantage.
- (iv) The offender should not have acted in a cruel or unusual manner.

19. The Legislature has taken care to clarify that it is immaterial in such cases as to which party offers the provocation or commits the first assault.

20. While two of the ingredients of Exception-4 are that the killing should be without premeditation and should take place in a sudden fight upon a sudden quarrel in the heat of passion, it is not enough that if two ingredients alone are satisfied. The offenders will necessarily also have to show that they did not take undue advantage and importantly that they did not act in a cruel or unusual manner.

21. The words 'undue' to qualify 'advantage' and 'cruel or unusual' to qualify 'manner' signify proportionality. For e.g., if the victim is unarmed but the offender is armed, and is not in a position to defend himself effectively against the attack upon him by the offender with the weapon, the offender could be said to be taking undue advantage of the vulnerability of the victim. Further, when the offender is shown to have used the weapon, the Court has to further ascertain whether the offender in using such weapon acted in a cruel or unusual manner. Here the nature of the weapon, the manner in which it was wielded, the place on the body where injuries were caused and the number of the injuries would be important factors to determine if the offender acted in a cruel or unusual manner.

22. In *Surinder Kumar v. Union Territory, Chandigarh*, (1989) 2 SCC 217,

the Supreme Court held that if on a sudden quarrel a person in the heat of the moment picked up a weapon lying handy and caused injuries, one of which was fatal, such person could have the benefit of Exception 4, provided he did not act in a cruel manner. It was observed:

"7. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly....."

23. In ***Ghapoo Yadav v. State of M.P. (2003) 3 SCC 528*** the Supreme Court held:

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 the Indian Penal Code. 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 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".

24. In the present case, while learned counsel for the Appellant Mr. Dandapani may be justified in contending that there was no premeditation, the Court is not entirely convinced that the events that unfolded took place in a sudden fight in the heat of passion upon a sudden quarrel. A fight necessarily involves two parties. In the present case, there appears to be no attack on A-1 to A-4 or for that matter A-5 to A-9 by any of the victims. Learned counsel for the Appellant did not dispute that no MLCs of any injuries sustained by any of the aggressors formed part of the Trial Court record. The mere statement by the deceased that A-1 was illegally tapping electricity from the electricity line could not *per se* be said to constitute an invitation to a fight. Therefore, the Court is not convinced that there was a 'fight' as contemplated in Exception-4 to Section 300 IPC.

25. Even assuming that there was a sudden fight and it happened in the heat of passion upon a sudden quarrel, the remaining two conditions, viz., that the offender should not have taken undue advantage and should not have acted in a cruel or unusual manner cannot be said to be satisfied in the present case. It must be recalled that the Explanation to the Exception 4 makes it irrelevant if the victim was the one who offered the provocation as the issue is of proportionality. If the offender acted in a disproportionate manner in relation to the so-called provocation, that will deprive the offender of the benefit of Exception-4.

26. In the present case, there are three fatal injuries on the head of the

deceased. As already noticed, two of them are scalp deep and one of them is bone deep. The medical opinion which has gone unchallenged is that the injuries 1 to 3 with corresponding internal damage in the brain were fatal in the ordinary course of nature to cause the death of the deceased. This, therefore, fails to satisfy the requirement of Exception-4 to Section 300 IPC that the offender should not have taken undue advantage of the position of the victim, which in the present case was that the victim was unarmed and further that the offender should not have acted in a cruel or unusual manner as the victim was having three injuries on his head for as mild a provocation as the deceased alleging that A-1 was stealing electricity and should desist from doing so.

27. It was then urged that in his deposition PW-6 stated that the injury caused to the right side of the head “which could be caused by hockey stick” was the injury that caused the death of the deceased. It was submitted that according to the deposition of PW-19, the hockey stick was wielded by Ram Pal (A-3), whereas A-2 wielded the *danda*. It was accordingly submitted that the fatal injury was caused by A-3 and not by A-2 and, therefore, he should not be attributed with having had the intention to kill the deceased and, therefore, cannot be convicted for the offence under Section 302 IPC with the aid of Section 34 IPC.

28. The above submission overlooks the fact that the further opinion of PW-6 stated just two lines thereafter is that all the three injuries to the head, i.e. injuries 1 to 3 with corresponding internal damage to the cranium were fatal in the ordinary course of nature. Even if one of the injuries can be said to

have been caused a by hockey stick, the other two certainly were not caused solely by the hockey stick but also by the *danda* wielded by A-2.

29. It was then contended that there was no evidence to show that A-2 in fact aimed at the head of the deceased while wielding the *danda*. The consistent version of the injured eye witnesses leaves no manner of doubt that the aggressors simply pounced upon the deceased and later even beat his family members who tried to save him. As far as the deceased is concerned, they assaulted him brutally and certainly two of them were armed with a hockey stick and a *danda* and attacked him on his head. They did not stop with one blow as is evident with there being as many as nine injuries on his body, three of them being on his head. With more than one injury inflicted on the head, it is difficult to accept the submission that the accused did not actually aim for the head of the deceased. The injuries speak for themselves. When one of the accused aims for the head and the victim is already in vulnerable position, and a further one attacks the head already wounded by the other accused, it ensures that the victim is not able to recover. The place of the attack being the head, gives very little scope for the accused to contend that they had no intention to cause the death of the deceased. As far as A-2 is concerned, he clearly shared the common intention with the other wielder of the weapon i.e Ram Phal, to cause the death of the deceased.

30. It was finally contended that Sita Ram (A-2) is today 70 years of age and that he has undergone the ordeal of long trial followed by appeal for almost 27 years and, therefore, the offence should be treated as one punishable

under Section 304 Part-I IPC.

31. The Court is unable to accept the above submission. The specific conditions that have to be met have been spelt out in great detail in Exception-4 to Section 300 IPC. Penal statutes admit of strict construction. Either the offence falls within the Exception or it does not. Mere passage of time cannot possibly persuade the Court to treat what is obviously a murder, as culpable homicide, if it does not fulfil the requirements of Exceptions 1 to 4 of Section 300 IPC.

32. For the afore-mentioned reasons, the Court is unable to be persuaded to hold that the trial Court committed an error in convicting A-2 for the offence under Section 302/34 IPC. The corresponding order on sentence also does not call for interference.

33. Turning now to the appeals by A-5, A-6 and A-9, the Court finds that they have been convicted for the offence under Section 323/34 IPC and they have been sentenced to undergo six months RI with compensation of Rs.1,000/- each to all the injured eye witnesses. In their cases, the factor of long pendency of trial and appeal for over 27 years and the passage of time does have bearing on the kind of punishment which they should be subjected to. Each of them is stated to have undergone two to three weeks' imprisonment.

34. Keeping in view these circumstances, the Court considers it appropriate to modify the sentence awarded to A-2, A-5, A-6 and A-9 for the offence under Section 323/34 IPC to the period already undergone by them for that

offence and enhance the fine amount to Rs.10,000/- each to be deposited in the trial Court not later than 22nd February 2018, failing which they will each undergo SI for two months.

35. The matter will be placed before the trial Court on 23rd February, 2018, on which date all the Appellants, i.e. A-2, A-5, A-6 and A-9 shall remain present in Court. If the fine amount as ordered by the Court for the offence under Section 323/34 IPC is not deposited by the Appellants by 22nd February 2018, the Trial Court will proceed to ensure that they serve the default sentence for the same. The Trial Court will also ensure that the fine amount, if deposited, will be paid over to the victims after proper verification, in equal shares.

36. As far as Sita Ram (A-2) is concerned, he will surrender on or before 23rd February, 2018, i.e. the date fixed before the trial Court, failing which the SHO of the concerned Police Station will take steps forthwith to take him into custody. The bail bonds and surety bonds furnished by the Appellants (A-5, A-6 and A-9) stand discharged subject to their fulfilling the above conditions. The bail bond and surety bond furnished by A-2 stand cancelled.

37. The appeals are disposed of in the above terms. The trial Court record be returned forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 15, 2018/‘dc’