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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Crl.A. No. 60/2003

BUNDU KHAN & ORS.

..... Appellants

Through

Mr. Anurag Jain & Ms. Ayushi
Sharma, Advocates

versus

STATE (NCT OF DELHI)

..... Respondent

Through

Mr. Hirein Sharma, APP for State

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VINOD GOEL

JUDGMENT

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05.07.2018

Dr. S. Muralidhar, J.:

1. This is an appeal against the judgment dated 21st December 2002 as well as the order on sentence on the same date passed by the Additional Sessions Judge, New Delhi in the sessions case arising out of FIR No. 179/2001 registered at Police Station (PS) Ambedkar Nagar convicting the Appellants Bundu Khan (Accused No.1: A-1/Appellant No.1) and Naim, S/o Bundu Khan (A-3/Appellant No.2) for the offences under Section 302/307/34 IPC and Appellant Nazim (A-2/Appellant No.3) and Asif (Appellant No.4) for the offences under Sections 307 and 302/34 IPC and Sections 302 and 307/34 IPC respectively.

2. The trial Court sentenced the Appellants No.1 and 2 to imprisonment for life with a fine of Rs. 500/-, each and in default of payment to undergo

simple imprisonment (SI) for one month each for offence under Section 302/34 IPC; rigorous imprisonment (RI) for five years with a fine of Rs.500/-, and in default to undergo SI for one month each for the offence under Section 307/34 IPC. The trial Court sentenced the Appellant No.4 Asif to imprisonment for life with a fine of Rs.500/-, and in default to undergo SI for one month for the offence under Section 302 IPC and RI for five years with a fine of Rs.500/-, and in default to undergo SI for one month for the offence under Section 307/34 IPC. The trial Court sentenced the Appellant No.3 Nazim to RI for five years with a fine of Rs.500/-, and in default to undergo SI for one month for the offence under Section 307 IPC and imprisonment for life with a fine of Rs.500/-, and in default to undergo SI for one month for the offence under Section 302/34 IPC. The sentences were directed to run concurrently.

3. At the outset, it requires to be noticed that during the pendency of the present appeal, Appellant No.1 Bundu Khan expired on 16th March, 2005. The appeal filed by him therefore stood abated. The present appeal is being pursued by Appellants 2 to 4.

4. As far as Appellant No.4 Asif is concerned, the order dated 5th February, 2007 suspending his sentence noticed that as of that date, he had already undergone five years and six months of incarceration. As far as Appellant No.3 Nazim is concerned, the order dated 19th July, 2006 of this Court noticed that as of that date, he had already undergone over five years of incarceration. As far as Appellant No.2 Naim is concerned, the order dated 17th August, 2005 suspending his sentence noticed that as of that date, he

had already undergone four years and two months of incarceration.

Charge

5. The case against the four Appellants was that on 4th May, 2001 at around 9.30 pm in front of House No. A-II/285, Madangir, they gave beatings to and committed the murder of Kallu (deceased) with sharp edged objects and thereby committed an offence punishable under Section 302/34 IPC. Appellant No.3 Nazim was separately charged with having caused injuries to Tahir thereby committing an offence punishable under Section 307 IPC whereas the other co-accused were for the same crime charged with committing an offence under Section 307/34 IPC. Appellant No.4 was separately charged under Section 302 IPC for committing the murder of Kallu.

6. The testimony of the injured eye witnesses is to the effect that the deceased and his brothers were cloth vendors. The accused were engaged in the work of painters but also used to sell clothes on the street. The deceased and his brothers used to reside as tenants on rent at the house of Appellant No.1. About two years prior to the incident, they had moved out and started residing separately.

7. On 4th May, 2001 at around 9.30 pm A-1 and his three sons, the co-accused i.e. Asif, Nazim and Naim were filling water in buckets from a pipe in front of the house of the deceased. Alam (PW-4), the cousin of the deceased (Kallu) while trying to jump over the buckets touched one with his feet and it fell down. This angered the accused, all of whom started

beating him. On hearing the noise, PW-9 and other eye witnesses i.e. PWs 1 to 3 and 5 came there, rescued PW-4 and thought the matter was resolved. According to the eye witnesses, after some time A-1 and his three sons again came there armed with sharp edged weapons. The deceased was then attacked by them and injuries were also caused to Tahir.

8. The trial Court based its judgment convicting the accused essentially on the deposition of the eye witnesses, who have supported the case of the prosecution. Learned counsel for the Appellants very frankly did not seek to assail the evidence of the eye witnesses and confined his submissions to the question of the nature of the offence. He submitted that the case made out by the prosecution, given the description of eye witness Tahir (PW-2) himself, showed that the offence is one of culpable homicide not amounting to murder falling under Exception 4 to Section 300 IPC. He submitted that the offence in the present case was committed as a result of grave and sudden provocation, without premeditation and in the heat of passion. Moreover, the fatal injury was a single stab injury. Therefore while it could be said that the accused had the knowledge that by using sharp edged weapon they could cause the death of the deceased, they did not intend to cause death.

9. The law in relation to the applicability of Exception-4 to Section 300 was explained by the Supreme Court in ***Ghapoo Yadav v. State of M.P. (2003) 3 SCC 528*** thus:

“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".

10. 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.....”

11. This Court has carefully examined the post mortem report and the deposition of the Dr. Sanjeev Lalwani (PW-12) who noted the external injuries on the body of the deceased, one of which was injury No.6 i.e. “stab incised wound 3.5 x1.25 cms with gaping over left side anteriorly situated 3 cms lateral to midline, 21 cms above umbilicus and 7.5 cms medial below and lateral. It was situated at 4-5 intercostal space and was about 10 cms deep.” The opinion of PW-12 was to the fact that the death was caused due to haemorrhagic shock as a result of stab injury No.6.

12. Having examined the testimonies of the eye witnesses as well as of PW-12, the Court is satisfied that this is a case where Exception 4 to Section 300 IPC stood attracted. The provocation was over a trivial issue of a water bucket being touched by the leg of one of the complainants which provoked an instant, angry reaction from the accused. They were assaulting Alam (PW-4), and when stopped from doing so, they returned immediately thereafter with sharp edged weapons with which they attacked the complainant party. Unfortunately one of them, who was not targeted in particular, succumbed to the sole knife blow on his chest. Clearly the crime was committed as a result of sudden provocation at the spur of the moment, without premeditation and in the heat of passion. With the fatal injury being the single stab injury, the Court is inclined to treat the offence of the killing of Kallu (the deceased) as one of culpable homicide not amounting to murder punishable under Section 304 Part 2 IPC.

13. Accordingly, the impugned judgment of the trial Court convicting the

Appellants for the offence under Section 302 read with 34 and Appellant Asif for the offence under Section 302 IPC for the killing of Kallu stands modified to a conviction for the offence punishable under Section 304 Part II IPC. The conviction of the Appellants for the offences under Section 307 and 307/34 IPC is however not disturbed. However as regards the sentence awarded by the trial Court, it is modified for both offences i.e. Section 304 IPC and 307 IPC read with Section 34 IPC and is confined (inclusive of the default sentence for the non payment of fine) to the period already undergone by each of the Appellants.

14. In that view of the matter, the bail bonds and surety bonds furnished by the Appellants stand discharged. The appeal is disposed of. The trial Court record be returned together with a certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL, J.

JULY 05, 2018

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