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

+ **CRL.A.136/2018 & CrI.M.B.219/2018**

ARUN KUMAR

..... Appellant

Through: Mr. S.P.Singh Chaudhari, Advocate
with Mr. Uddhav Pratap, Advocate.

versus

STATE

..... Respondent

Through: Mr.Kewal Singh Ahuja, APP

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE VINOD GOEL**

JUDGMENT

19.07.2018

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1. This appeal is directed against the judgment dated 22nd November 2017 passed by the learned Additional Sessions Judge-04 (North), Rohini Courts, Delhi in Sessions Case No.58004/2016 arising out of FIR No.309/2011 registered at P.S. Samaipur Badli convicting the Appellant for the offences under Sections 302 and 323 read with Section 34 of the Indian Penal Code (IPC) and the order on sentence dated 28th November 2017 whereby for the offence punishable under Section 302 IPC the Appellant was sentenced to imprisonment for life with a fine of Rs.10,000/-, and in default of payment of fine to undergo simple imprisonment (SI) for a period of three months and for the offence under Sections 323/34 IPC to undergo SI for a period of one year. Both the sentences were directed to run concurrently.

2. At the outset, it requires to be noticed that the Appellant was sent up for trial along with four other co-accused, that is, Anish Kumar @ Shiva (Accused No.2; A-2), Rajan Kumar (A-3), Mohan (Proclaimed Offender)

(A-4) and Sone Lal (A-5) for committing the murder of Ram Parvesh Yadav @ Ram Sevak (the deceased) on 21st August 2011 at around 11.30 pm at Sector-18, Rohini, Delhi and causing simple injuries to Aslam (PW-8) thereby committing the aforementioned offences. Whilst acquitting A-2, A-3 and A-5 for the offence under Section 302 IPC, the trial Court convicted each of them for offence under Section 323/34 and sentenced each of them to a period of 1 year of SI. The Appellant (A-1) herein has been convicted and sentenced as mentioned above.

3. The two star witnesses for the prosecution were Smt. Sita Devi (PW-1), the wife of the deceased and Aslam (PW-8), the injured eye witness. That the death of the deceased was homicidal was established by the post mortem conducted by Dr. Vijay Dhankar (PW-19). He noticed the following external injuries on the body of the victim:

“1. Laceration 2 cm x 1 cm x bone deep present on middle of forehead with underlying fracture of frontal bone.

2. Laceration 2.5 cm x 1.5 cm x bone deep present on middle of upper lip.”

4. PW-19 further noticed on external examination that:

“extravasation of blood was present over the frontal region on both sides. Depressed fracture of middle of frontal bone measuring 4.5 cm x 4 cm was present. Brain was liquefying and sub-arachnoid haemorrhage was present.”

5. The cause of death was opined to be cranio-cerebral damage consequent to blunt force impact on the head.

6. As far as PW-1 was concerned, she stated that her husband, the deceased,

used to ply a Vikram vehicle and load goods on that vehicle. On 21st August 2011 at about 11:30 pm she was present at home watching television with her children. Her husband had not returned home until then. She then heard some noise from the road outside her house, and went outside. At the same time, the deceased also reached there on his three wheeler Vikram vehicle. She noticed that PW-8 who was a resident of the neighbourhood was quarrelling with the accused who were also residing in the same locality. PW-1 and the deceased reached near the place of quarrel and noticed PW-8 being beaten with *danda*, *fatta*, wooden *balli* and rods carried by the accused. The deceased asked the accused why they were beating PW-8. The Appellant is then supposed to have asked the co-accused A-4 (PO) to let go of PW-8 and first attack the deceased. Upon this, A-4 caught hold of the deceased by both arms from the rear and all accused person started beating him instead. According to PW-1, the Appellant was beating him with an iron rod (*lohe ka danda*) whereas the remaining accused were beating him with *fatta*, *dandas* and wooden *ballis* which had iron nails embedded in them.

7. Learned counsel for the Appellant has placed before the Court a note on the contradictions in the testimony of PW-1 in the Court when compared to what she stated in the first instance to the police as noted in the FIR.

8. In his testimony PW-8 stated that the Appellant caught hold of his collar from behind while A-2 hit him with a *danda* on his leg. Specific to the deceased, PW-8 stated that it was the Appellant who attacked him on the head with a wooden *fatta* having nails on it and blood started oozing from his head whereas this was not mentioned in the FIR.

9. A careful examination of the evidence of the injured eye witness PW-8 makes it clear that it was the Appellant who attacked the deceased on his head. This core portion of his testimony has been corroborated by PW-1.

10. Consequently, as regards the presence and culpability of the Appellant in the attack on the deceased, the Court is satisfied that the prosecution has been able to prove its case against him beyond reasonable doubt. To that extent, the impugned judgment of the trial Court suffers from no legal infirmity.

11. Learned counsel for the Appellant then focussed on the question of the nature of the offence. From what has been portrayed by both PWs-1 and 8, it does appear that the attack on the deceased was not pre-meditated. The target of the attack was, in fact, PW-8. The deceased only happened to come there by chance and the anger of the accused got diverted when he questioned them as to why they were beating PW-8. The attack on the deceased was in the spur of the moment and in the heat of passion. Moreover, the post mortem report reveals that there only two external injuries with only the injury on the head being the fatal one.

12. In the circumstances, the Court is inclined to accept the plea of the counsel for the Appellant that in the present facts and circumstances, the offence should be viewed as one of culpable homicide not amounting to murder punishable under Part-II of Section 304 IPC.

13. The Court is informed that the Appellant has already undergone nearly 7 years of imprisonment. Consequently, while modifying the offence for which the Appellant is guilty punished from Section 302 IPC to Section 304 Part-II IPC, the Court modifies the sentence awarded to the Appellant for the said offence to the period already undergone by him inclusive of the default period for non-payment of fine. His conviction for the offence under Section 323/34 IPC and the sentence for the said offence are left undisturbed.

14. As a result, unless wanted in some other case, the Appellant will be released forthwith. The Appellant shall satisfy the requirement of Section 437A to the satisfaction of the trial Court.

15. The appeal is disposed of in the above terms along with the pending application. The trial Court record be sent back forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL, J.

JULY 19, 2018
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