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

+ CRL.A. 196/2015 & CrI. M.B. No. 307/2018

SUNDER

..... Appellant

Through: Ms. Inderjeet Sidhu, Advocate

versus

STATE

..... Respondent

Through: Ms. Aashaa Tiwari, APP for the State
with Insp. Shailendra Singh, PS
Fatehbur Beri

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

ORDER

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22.03.2018

The appellant has been produced from custody. We have interacted with him in court. Ms. Sidhu, learned counsel for the appellant, after taking instructions from the appellant, states that the appellant does not dispute the factual findings returned by the Trial Court.

The only submission that the appellant wishes to advance is that the conviction of the appellant under Section 302/323 IPC may be substituted by conviction under Section 304 Part II/ 323 IPC.

We have, accordingly, heard the submissions of learned counsel for the appellant and the learned APP on the said aspect.

The background in which the present case arises is as follows, which we are taking from the impugned judgment itself:

“1. Sunder, aged 32, years, has been committed for trial by Ms. Jyoti Kler, Metropolitan Magistrate-02, New Delhi: and so, he stands charged with the commission of offences punishable under sections 302 and 323 of the IPC, namely, that he on 04.04.2012 at about 12:30 am committed murder of Neelam wife of his younger brother Surender @ Killu (PW-9); and voluntarily caused hurt to his mother Smt. Kamlesh wife of Chet Ram (PW7)

2. The circumstances leading to the committal of the case and subsequent charge against the accused, as per the record of the case, are that in the intervening night of 03.4.2012 and 04.4.2012, having received copy of daily diary (DD) entry no. 5A, regarding a quarrel, Head Constable (HC) Surender Kumar (PW9), being posted at police station Fatehpur Beri, alongwith constable Amit (PW1) reached house no. 216, Fatehpur Beri, New Delhi, where, subsequently after receiving copy of DD no. 7A, he, came to know that injured Neelam, who was removed in a police control room (PCR) van, was admitted in Sessions Case No. 63/14 Trauma Center of the All India Institute of Medical Sciences (AIIMS) by her husband Surender @ Killu; that having left constable Amit at the spot, HC Surender Kumar reached the hospital and collected medico legal case (MLC) report of the injured, whereon it was observed by the doctor that the patient was brought dead; that no eye witness was found present at the hospital and therefore, HC Surender Kumar returned to the spot, where Kamlesh, the mother in law of the deceased was found present; that HC Surender recorded statement (Ex. PW7/A) of Smt Kamlesh, who told him that she had two sons: elder son Sunder and younger son Surender @ Killu. Smt. Kamlesh further stated to HC Surender Kumar that his elder son Sunder was a drunkard, due to which, about three years ago, his wife Shoya deserted him. Smt. Kamlesh further stated to HC Surender Kumar that her younger son Killu was married to Neelam, who had been residing with her husband, mother in law and Sunder in the same house. Smt. Kamlesh further stated to HC Surender Kumar that her elder son Sunder had evil eye on Neelam. She further stated to HC Surender Kumar that on 03.4.2012, her son

Killu had gone to milk the cows and to attend to them and Neelam was in her room at the first floor of the house; that at about 11.30 pm, Sunder, the accused, went upstairs in the room of Neelam and started teasing her; that when Neelam protested, the accused started quarreling with her; that while quarreling, the accused and Neelam came down and Neelam told that she was going to report the matter to the police; and left the house. Smt. Kamlesh further stated to HC Surender Kumar that she followed Neelam and entreating her not to go outside as it was quite dark outside. Smt. Kamlesh further stated to HC Surender Kumar that in the night at about 12.30 am, as she and Neelam were on the way, near the house of Bijender, the accused came with a baahi (bamboo stick used in building a cot that run parallel to the arms of sleeper) in his hand and told Neelam that he will see how she goes to the police to report the matter and dealt a blow to Neelam on her head with the baahi. Smt. Kamlesh further stated to HC Surender Kumar that she attempted to save Neelam, but the accused also hit her with baahi on her left shoulder. Smt. Kamlesh further stated to HC Surender Kumar that Neelam became unconscious and fell down. Smt. Kamlesh further stated to HC Surender Kumar that she raised alarm and the neighbours came on the spot and thereafter, with their aid, she had taken her daughter in law to her house and made her to lie there. Smt. Kamlesh further stated to HC Surender Kumar that in the mean time her son Surender @ Killu also reached the house and she narrated the incident to him and thereafter, he went in search of the accused. Smt. Kamlesh further stated to HC Surender Kumar that the police reached the spot and Neelam was removed to the hospital and subsequently, she came to know that she had died. On the statement of Smt. Kamlesh, a rukka (Ex. PW9/A) was prepared by HC Surender Kumar and through constable Amit the same was sent to police station Fatehpur Beri for registration of first information report (FIR).

3. On the basis of the information laid by Smt. Kamlesh, on 04.4.2012, FIR no. 81 (copy: Ex. PW6/A) under sections 302 and 323 of the Indian Penal Code was registered at police station Fatehpur Beri, New Delhi and subsequently the matter was investigated. During the investigation the accused was arrested by the police and pursuant to his disclosure statement, at his instance, baahi

Ex. P2 was recovered from a field. After investigation it was concluded that the accused had committed murder of Neelam and voluntarily caused hurt to Smt. Kamlesh. After conclusion of the investigation, a police report was submitted before the learned Metropolitan Magistrate with a view to take cognizance of offences punishable under sections 302 and 323 of the Indian Penal Code and to put the accused on trial”.

The submission of learned counsel for the appellant is that the offence in question is not one of murder, since the act of the appellant was not intentional with the intention to cause the death of the victim. The submission is that the present case would fall in exception 4 to section 300 IPC, since the act was committed without premeditation in a sudden fight in the heat of passion, upon a sudden quarrel. He submits that the appellant is not shown to have taken undue advantage or acted in a cruel or unusual manner.

Learned counsel for the appellant submits that the appellant and the deceased were related inasmuch, as, the deceased was the wife of the younger brother of the appellant. There was a quarrel on the fateful night on account of the appellant having gone to her room and teased her. She disapproved of the same and left the home to report the matter to the police. However, her mother-in-law Kamlesh (PW-7) persuaded the deceased not to go out in the dark. While they were on their way home, as a part of the same transaction, the appellant picked up a bamboo stick/ charpai balli (coat arm) and inflicted injuries on the head of the deceased just when she was few spaces out of the home and was being brought back by the mother of the appellant.

Learned counsel for the appellant submits that the present case is

covered by the second part of section 304 IPC, and in support of her submission that the facts do not disclose the intention on the part of the appellant to cause the death of the deceased, she places reliance on two decisions of the Supreme Court, namely, *State of U.P. v. Indrajeet @ Sukhatha*, (2000) 7 SCC 249, and *Ankush Shivaji Gaikwad v. State of Maharashtra*, JT (2013) 7 SC 26.

In *Indrajeet* (supra), the Supreme Court observed in para 7 as follows:

*“7. We have carefully considered the submissions of the learned counsel appearing on either side and we are of the opinion that except for certain inappropriate language used to express the conclusions of the High Court, the learned Judges could not be held to have committed any serious or grave error of law of great importance or that it could be legitimately contended for the appellant State that in altering the conviction under Section 302 IPC to one of Section 304 Part II, on an appreciation of the evidence on record, any grave injustice has been caused. On the facts and circumstances of the case, we do agree with the claim on behalf of the appellant that there is no such thing as a regular or earmarked weapon for committing murder and that it would have been more proper to have used a better terminology and language to identify the weapon used by the accused, a carpenter by profession himself, and the same being nothing but an implement used in carpentry, to be not really such a “deadly weapon” so as to cause, per se, any serious wound or a grievous hurt or injury to the victim. It is also not in dispute that of the two injuries found inflicted on the body of the victim, only one was found to be a serious one, which was considered in the normal course to be sufficient to cause death. **Though the intrusion into the hut by the respondent in the early hours of the morning may be construed to be with a sinister intention or purpose, but from the type of the weapon he was carrying, it could not be either reasonably or legitimately postulated that it was with the intention of committing the murder of the victim or inflicting upon the victim such a grave/serious injury sufficient to cause***

her death, particularly when he would be fully aware of the fact that in the hut the father and mother of the deceased would also be present at that time. If the observation of the Division Bench of the High Court is viewed in this context giving due allowance or lenience to the not-too-happy language used and the gravamen of the charge and sum and substance of the evidence placed on record is considered, the inevitable consequence which follows should be that apart from any positive motive being either attributed in this case, or alleged or proved by the prosecution, there is no clinching circumstance or evidence to reasonably establish the culpability of the accused for a charge of murder. Absence of intention to cause the death coupled with the lack of knowledge that death would be inevitably caused on account of the injury would make the offence fall only under Section 304 Part II IPC, and not under Section 302 IPC. Consequently, in the absence of any motive or intention to kill and having regard to the type of weapon used and the number as well as the nature of injuries found inflicted, the case on hand could not appropriately be said to be one warranting the application of Section 302 IPC. The High Court has chosen to also impose the maximum punishment of ten years. That apart, we find no important principle of law involved and no grave impropriety would result nor injustice be caused in sustaining the judgment of the High Court. The High Court, therefore, in our view, was justified in converting the conviction of the respondent by altering the same to one under Section 304 Part II IPC, instead of Section 302 IPC. (emphasis supplied)

Similarly, in *Ankush Shivaji Gaikwad* (supra), the Supreme Court delved on the issue as to how the intention of the accused could be gathered from the circumstances of a particular case. The Supreme Court in, turn, referred to *Pulicherla Nagaraju @ Nagaraja v. State of Andhra Pradesh*, (2006) 11 SCC 444, wherein it was observed:

“... Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will

*decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters — plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. **The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.***

(emphasis supplied)

Relying upon the said decision, the Supreme Court observed:

“24. Coming back to the case at hand, we are of the opinion that the nature of the simple injury inflicted by the accused, the part of the body on which it was inflicted, the weapon used to inflict the same and the circumstances in which the injury was inflicted do not suggest that the appellant had the intention to kill the deceased. All that can be said is that the appellant had the knowledge that the injury inflicted by him was likely to cause the death of the deceased. The case would, therefore, more appropriately fall under Section 304 Part II IPC”.

On the other hand, the submission of learned APP is that the act of the appellant was intentional inasmuch, as, he inflicted the injuries on a vital part of the deceased i.e. on her head and the injuries were inflicted when the deceased was returning to her home with the mother of the appellant.

A perusal of the testimony of PW-7 - the mother, shows that the incident took place within a minute of the deceased leaving the house to report the matter to the police, and just a few paces from the home of the appellant and the deceased. Thus, it appears that the incident took place as a part of the same transaction, and there was no cooling off period. The weapon of offence was bamboo stick/ charpai bhalli (coat arm), which was an article lying at home. The same was picked up by the appellant and used to inflict injuries on the deceased. The fact that the injuries were inflicted in the heat of the moment can also be gathered from the fact that when PW-7 i.e. the mother of the appellant tried to save the deceased, he inflicted injuries upon her arm as well. Therefore, the appellant did not even differentiate his own mother in the heat of the moment.

In these circumstances, we are of the considered view that the conviction of the appellant under Section 302 IPC is not justified in the facts

and circumstances of the case. The same is converted to conviction under Section 304 Part II IPC. For the said offence, the appellant is sentenced to 7½ years rigorous imprisonment. The fine imposed upon the appellant of Rs.10,000/- is maintained. For the offence under Section 323 IPC, his conviction and sentence is also maintained. The sentences shall run concurrently and the appellant shall be entitled to the benefit of Section 428 IPC.

The appeal stands disposed of in the aforesaid terms.

VIPIN SANGHI, J

P.S.TEJI, J

MARCH 22, 2018

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