

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

CRL.A. 1226/2013

Reserved on: 3rd January, 2018

Decided on: 19th January, 2018

JAMIL @ JAMIR

..... Appellant

Through: Mr.Kanhaiya Singhal, Advocate
(DHCLSC).

Versus

STATE (GOVT NCT OF DELHI)

..... Respondent

Through: Ms.Radhika Kolluru, APP for State

+

CRL.A. 1383/2013

IRSHAD @ PUCHI

..... Appellant

Through: Ms.Inderjeet Sidhu, Advocate
(DHCLSC).

Versus

STATE (GOVT. OF NCT) OF DELHI

..... Respondent

Through: Ms.Radhika Kolluru, APP for State.

+

CRL.A. 1460/2013

NASIR

..... Appellant

Through: Mr.Kanhaiya Singhal, Advocate

Versus

STATE OF NCT OF DELHI

..... Respondent

Through: Ms.Kusum Dhalla, APP for State.

+

CRL.A. 1581/2013

YASIN

..... Appellant

Through: Mr.Aditya Vikram, Advocate
(DHCLSC) with Mr.Avinash, Advocate.

Versus

STATE

..... Respondent

Through: Ms.Kusum Dhalla, APP for State.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA**

J U D G M E N T

Dr. S. Muralidhar, J.:

1. These 4 appeals are directed against the impugned judgment dated 26th July 2013 passed by the District and Sessions Judge (East), Karkardooma Courts in S.C.No.01/11/2010 arising out of FIR No.306/2010 registered at Police Station ('PS') Jyoti Nagar convicting the Appellants for the offences under Sections 302/34 and 323/34 of the Indian Penal Code ('IPC'). The appeals are also directed against the order on sentence dated 29th July 2013 whereby, for the offence under Section 302/34 IPC, each of the Appellants were sentenced to imprisonment for life and fine of Rs.10,000/- and in default of payment of fine to undergo simple imprisonment ('SI') for 6 months. For the offences under Section 323/34 IPC, the Appellants were sentenced to undergo SI for 1 year.

Case of the prosecution

2. The prosecution case begins with a PCR call at 6:58 pm on 29th June 2010 from one Ramesh giving the place of incident as 'Gali No.1, Kabir Nagar, C-Block' and information as "*caller ke bhai ko goli mar di hai, injured hai*". The PCR form also shows that at around 7:04 pm a police team reached Guru Teg Bahadur Hospital ('GTB Hospital') and noted that Afsar Ali @ Yusuf, son of Shabban Ali, aged around 34 years (the deceased), "*ko padosi Yaseen chati par goli maar kar bhag gaya. Inj ko Yusuf ka bada bhai*

Sarafat Ali pehle hi GTB Hosp le gaya hai. SHO with Staff/Tiger-44 moka par hai". It further states that "*Dr. Sahab ne B/dead ghoshit kar diya hai*". Therefore, at the very first instance, the information that was available with the police was that the deceased had been shot by Yasin (Accused No.4/A-4) and that Sharafat Ali (PW-1), brother of the deceased, took the deceased to the GTB Hospital where he was declared to be brought dead.

3. The information was converted into DD No.20A by S.I. Vinay Pal (PW-4) who then passed on this information to ASI Bishambhar Dayal (PW-9) who rushed to the spot. On reaching the spot along with Head Constable Vijay, PW-9 learnt that the injured had been removed to GTB Hospital by a relative. On reaching the hospital, PW-9 collected the MLC of both the deceased as well as the injured, Sharafat Ali (PW-1), who was declared fit for making a statement. This was recorded as Ex.PW-1/A and formed the basis of *Rukka* which in turn was registered as the aforementioned FIR.

4. In his statement first made to the police, PW-1 mentioned that at around 6:30 pm, PW-1 and his younger brother were feeding pigeons on their terrace when his wife Maqsooda (PW-14) came there and informed him that his younger brother Afsar Ali @ Yusuf (deceased) was being beaten up by some persons near Hamza Masjid. On hearing this, PW-1 and his younger brother Rafiq (PW-2) went to Hamza Masjid and noticed that Jamil (A-1) and his two sons, Nasir (A-2) and Yasin (A-4) along with Irshad @ Puchi (A-3) were beating up the deceased. Both PW-1 and PW-2 intervened and rescued the deceased and as they were taking him away to their house and had reached Gali No.4 near the STD shop of Guddu at C-block, Kabir

Nagar, the four accused came from behind them. Jamil exhorted his co-accused stating that *“Afsar should not be allowed to remain alive”*, upon which the other three accused snatched and pulled the deceased away from the hands of PW-1. Nasir then exclaimed in a loud voice *“maar goli dekh lenge”* on which Irshad @ Puchi caught hold of the hand of the deceased and Yasin (A-4) took out a country made revolver which was in his possession and fired upon the chest of the deceased. The deceased then fell down. When the accused noticed that members of the public were gathering at the spot, they ran away. PW-1 then took the deceased to GTB Hospital.

Investigation

5. The investigation of the case was entrusted to ACP B.S. Ahlawat (PW-23), the investigating officer (‘IO’). He called the crime team and got the spot inspected. The photographer Ct. Shyam Lal (PW-5) took photographs of the scene of the crime (Ex.PW-5/P-1).

6. PW-1 produced his blood stained pants which were consigned to a cloth parcel and sealed with the seal of BSA by a memo (Ex.PW-6/DA). PW-23 could not trace any of the accused immediately. Meanwhile, the deceased was examined at the GTB Hospital by Dr. P.K. Phukan (PW-13) who stated that at around 7:15 pm, the deceased was brought by PW-1 to the Casualty ward ‘in a unconscious state’. It was stated that “on examination, BP pulse was not recordable; chest was not having breath sound. Heart sound was also absent. Pupils were dilated and fixed on both sides and ECG was straight line. The patient was declared brought dead and body was preserved for post-mortem”.

7. The post-mortem examination was conducted by Dr. Meghali Kelkar (PW-10), who *inter alia* noted the firearm entry wound on the front of the chest and neck and gave the cause of death as “shock as a result of ante-mortem injury to heart and aorta produced by projectile of a firearm”. The said injury was said to be sufficient to cause death in the ordinary course of nature. There were five other abrasions and continuation wounds noticed.

Arrest and disclosures

8. Meanwhile PW-23 continued to search for the assailants and arrested accused Jamir @ Jamal, who was interrogated and made a disclosure statement about his involvement in the present case (Ex. PW-16/B). PW-23 obtained non-bailable warrants (NBW) against the remaining co-accused on 9th July, 2010. On 15th July, 2010 he received information that Nasir (A-2) had been arrested by the Crime Branch for an offence under the Arms Act and would be produced in the Court of ACMM in Tis Hazari Courts on the following day. He moved an application for interrogation and arrest of A-2 before the said Court and affected the said arrest with permission.

9. Upon interrogation, A-2 is supposed to have made a disclosure statement (Ex. PW-16/E). On 29th July, 2010, S.I. Rakesh Yadav (PW-16) received information about the presence of Irshad @ Puchi (A-3) who was then apprehended from Raj Ghat. A-3 too gave a disclosure statement (Ex. PW-16/G) and then got recovered the blood stained clothes worn by him at the time of commission of the offence.

10. On 1st September 2010, PW-23 received information from SO, P.S.

Hathras that Yasin (A-4) had been arrested in an Arms Act case and a country made pistol had been recovered from him. Here again with the permission of the concerned Court, PW-23 arrested Yasin in the present case. A-4 is stated to have made a disclosure that the country made pistol already recovered by the police in the Hathras Arms Act case was the same one used by him in the present case.

Charges

11. On 25th September, 2010, the charge sheet was filed in the Court against Jamil, Nasir and Irshad. After receipt of the report from the Ballistic Division pertaining to examination of the country made pistol, a supplementary charge sheet was filed against all the accused.

12. Charges were framed against the four accused by an order dated 8th March, 2011 by the trial Court for the offences under Sections 302/34 and 323/34 of IPC. The latter was in respect of simple hurt caused to PW-1 by A-3 by giving him a blow on his ribs whilst snatching the country made pistol from A-4.

Statements of the accused under Section 313 Cr PC

13. The prosecution examined 25 witnesses. In their statement under Section 313 Cr.P.C. all the four accused pleaded innocence and claimed that they have been falsely implicated. It was stated that the complainant party itself was the bad element and of bad character indulging in '*hafta vasooli*' (extortion). They were involved in many criminal cases. It is stated that some unknown person had fired upon the deceased. Jamil stated that he was

arrested from his house along with his wife and kept in the PS for three days. His wife was released after 3 days and he was challenged in the present case.

Impugned judgment of the trial Court

14. By the impugned judgment, the trial Court held that the testimony of the three eye witnesses, PW-1 (Sharafat Ali), PW-2 (Mohd. Rafiq) and PW-3 (Ashu) remained unshaken. Their versions were corroborated by the medical evidence which showed that the death was due to a firearm injury. The further evidence of recovery of the country made pistol and the ballistic report proved the guilt of the Appellants for the offences with which they were charged beyond reasonable doubt.

15. The trial Court observed that while the prosecution had proved the presence of the Appellants at the scene of crime by the aforementioned evidence, the Appellants had not led any evidence to show where they were, if not at the scene of crime, during the relevant time period. The trial Court also rejected the plea of the Appellants that the three eye witnesses were interested witnesses and, therefore, could not be relied upon.

16. The trial Court concluded that the prosecution had duly established that on the date of the incident, i.e., 29th June, 2010, Irshad @ Puchi (A-3) had given beatings to Ashu (PW-3) as he had objected to PW-3 having an affair or friendly relations with Ruksar, the daughter of Jamil (A-1). According to the prosecution, A-3 gave beatings to PW-3 after which PW-3 reported this to the deceased Yusuf @ Afsar Ali. The deceased then confronted A-3 as to

why he had beaten up Ashu. A quarrel ensued not only between the deceased and Irshad but also between the other three co-accused who reached there. It was further held that the motive for committing the offence was duly established. By a separate order dated 29th July, 2013, the trial Court awarded the sentences as already noticed.

Submissions of counsel for the Appellants

17. The submissions of Mr. K. Singhal, learned counsel for A-1 and A-2, Ms. Inderjeet Sidhu, learned counsel for A-3 and Mr. Aditya Vikram, learned counsel for A-4 were as under:

(i) As far as Jamil is concerned, his only role was that he tried to instigate the others to not let the deceased go. This cannot be termed as instigating others to kill the deceased. Therefore, the trial Court wrongly applied Section 34 IPC to convict Jamil. It is further submitted that the ballistic report was inconclusive.

(ii) If PW-2 was indeed present at the spot, it is surprising that he did not accompany the deceased to the hospital. Further, PW-2 sought to suggest that he gave a complaint to the police when in fact he did not. The prosecution version is also contradicted by PW-15 who disputes that his motorcycle was used to take the deceased to the hospital. It is also pointed out that the deceased was still in an unconscious state when he was first brought to the hospital and that PW-13 unnecessarily wasted time in determining whether he was still alive.

(iii) On behalf of A-3 Irshad @ Puchi, the submission is that he was in fact trying to prevent any further firing by A-4 Yasin by pulling away the gun from A-4. In that process A-3 ended up hitting PW-1. It is submitted that the name of A-3 did not appear in the first instance when the complaint was given to the police as recorded in the PCR Van. PWs 1 and 2 were interested witnesses as they were brothers of the deceased and their evidence had to be scrutinized carefully.

(iv) The motive to implicate all members of the family of A-1, and A-3 who was close to the family of the accused, should not be discounted. There was no evidence of any enmity or of any quarrel between the parties.

(v) The evidence gathered by the crime team was never placed on record by the prosecution. For instance, neither the earth control sample nor the blood stained earth of the spot where the deceased fell down with a gunshot wound was lifted.

(vi) It is pointed out that the pistol recovered in the PS Hathras Arms Act case was not proved to be the pistol used in the firing. No cartridges were lifted from the spot. Therefore, the ballistic evidence in fact did not support the case of the prosecution and, therefore, did not corroborate the version of the eye witnesses.

(vii) In the rough site plan which was prepared by the IO, the spot shown to be the one where the deceased is supposed to have fallen down was in fact not proved. The scaled site plan does not improve the situation any further.

It does not show the presence of any of the eye witnesses. The person who first gave the complaint to the police and whose name is recorded in the PCR Van, viz., Ramesh was not examined as a prosecution witness.

(viii) Apart from the two interested witnesses, PWs-1 and 2 who were brothers of the deceased, there were no independent witnesses examined. As regards, Ashu, PW-3, it is pointed out that his statement was recorded more than 3 months after the incident and, therefore, he was not a safe or reliable witness. There was no person from the STD booth of Guddu who was examined.

(ix) It is submitted that while A-3, Irshad @ Puchi had an issue with PW-3 Ashu, there was no previous issue between any of the other accused and the deceased and, therefore, they can all not be accused of the same offence. Reliance is placed on Section 38 of IPC and the illustration thereunder in this regard.

(x) It is submitted that there is a distinction between a 'common intention' and a 'similar intention' and that the trial Court erred in concluding that all the accused shared 'common intention' when in fact, at the highest, they may have shared a 'similar intention'.

(xi) There was no pre-meditation, pre-planning or prior meeting of minds. There was no evidence to show that any of the other accused knew that A-4 had a gun and there was very little time between when the scuffle took place between PW-3 and A-3 and the time the deceased was killed. Therefore, the

alternative submission made on behalf of all the accused is regarding the nature of the offence. All of them have urged, in the alternative, that the offence should be characterised as one under Section 304, Part-I IPC.

Submissions on behalf of the State

18. Ms. Radhika Kolluru and Ms. Kusum Dhalla, learned APP's, on the other hand, supported the impugned judgment of the trial Court and submitted that this was a case which was pre-meditated as far as the killing of the deceased was concerned.

19. It is pointed out that one of the key ingredients for an offence to be treated as culpable homicide not amounting to murder is that there should have been no pre-meditation amongst the accused. In the present case, the eye witnesses PWs-1 and 2 have been clear and consistent that after PWs-1 and 2 took away the deceased from the spot outside Hamza Masjid where he was being beaten up by A-3 with the participation of the other accused and whilst they were all walking towards their house, the four accused pursued them and snatched away the deceased from their grip. This was clearly as a result of pre-meditation and could not be an act of sudden impulse. This was not a case, according to the learned APP, where Exception-4 to Section 300 was attracted.

Analysis of the evidence of the eye witnesses

20. The above submissions have been considered. The case of the prosecution rests mainly on the version of the two eye witnesses, that is, PW-1 and 2. At the outset, it requires to be noticed that PWs-1 and 2 are the real brothers of the deceased and they are both related and interested

witnesses. While their evidence is not to be discarded only for these reasons, the settled legal position is that the Court has to be cautious in readily accepting their version. In particular, the Court has to be careful to determine whether there are any internal inconsistencies that are material enough to cause doubts on the credibility of their versions. Ultimately, the Court has to be satisfied that the two eye witnesses, despite being related and interested witnesses, are trustworthy and believable. The settled legal position was explained by the Supreme Court in *Jayabalan v. UT of Pondicherry (2010) 1 SCC 199* thus:

“ 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.”

21. The Court now proceeds to examine the version of the two eye witnesses. As far as PW-1 is concerned, he has remained consistent both in his initial statement to the police and the subsequent deposition in the Court as to what transpired when he reached the spot outside Hamza Masjid where he noticed A-3 beating the deceased in the company of A-1, A-2 and A-4. He is clear that after rescuing the deceased, when PW-1 and PW-2 were taking the deceased to their house and reached Gali No.4 near the STD booth of Guddu in C-Block, all the four accused persons came up from behind them. Jamil asked the other co-accused not to spare the deceased. A-

2, A-3 and A-4 pulled the deceased from the hands of PW-1. Thereafter, there was a clear exhortation by A-3 when he said “*goli maar jo hoga dekh lenge*”, upon which A-4 took out the country made pistol and fired at the chest of the deceased.

22. This act of firing by A-4 on the chest of the deceased is consistent with the version given by PW-1 to the police as recorded in the PCR form which specifically mentions that it was A-4 who fired at the deceased and that this was conveyed to the police by PW-1. Therefore, the presence of PW-1 on the spot cannot be doubted at all.

23. The cross-examination of PW-1 did not yield much for the defence. While it is true that at least three of the accused belong to the same family, i.e., A-1 is the father and A-2 and A-4 are A-1's sons, there was no previous enmity between PW-1 and the family of A-1 for PW-1 to unnecessarily implicate A-1 and his sons. If indeed he were to implicate them falsely, he might have alleged that each of them was armed. In any event, he had nothing against A-3 for him to falsely implicate A-3. The blood stains on the pants of PW-1 which were sent to FSL identified the blood group thereon as belonging to the deceased. Therefore, the fact that PW-1 carried the deceased to the hospital from the spot where he was fired upon also stands proved.

24. The fact that PW-1 himself did not call the police although he was having a mobile phone can also be explained from his own deposition. He saw his brother, i.e., the deceased fall down as a result of the bullet injury

and his immediate reaction at that point of time would have been to save his brother. He immediately carried him to the hospital. Moreover, PW-1 himself was injured by A-3 giving him a blow with the butt of the pistol that was used by A-4. Therefore, PW-1 was in no position to immediately call the police. Ultimately, PW-1 did call the police and he went to the police station where he made a statement. The mere fact that PW-15 turned hostile and it was his motorcycle on which the deceased is supposed to have been taken to the hospital does not raise doubts on the truthfulness of the version of the PW-1.

25. There was much argument on whether there was any further provocation while the deceased was being taken away by PWs-1 and 2 back home after getting him rescued from the accused when they were beating him. According to A-3, who made a disclosure statement which forms a part of the charge sheet, A-1 who was giving a beating to the deceased outside Hamza Masjid along with other accused subsequently shouted "*isne haemin gali di hai, ise zinda mat jaane do*". However, this per se is not admissible evidence. It was sought to be suggested by learned counsel for the accused that this is a clear admission of a second provocation as a result of which the accused pursued the deceased and then ultimately gunned him down. The Court is not prepared to accept this submission because the only source of this so called additional provocation is given in the disclosure statement made by a co-accused. It has not come in the evidence of either PW-1 or PW-2.

26. As far as PW-2 is concerned, he is the other brother who went along

with PW-1 to rescue the deceased from the clutches of the accused outside Hamza Masjid. He clearly identified all the accused persons in the Court. He was consistent and he corroborated PW-1 fully when he stated that when the three of them, i.e., the deceased, PW-1 and PW-2 reached near the STD booth of Guddu in Gali No.4, all the four accused 'chased us from back side'. He is also consistent with and fully corroborates PW-1 as far as A-1 giving the *Lalkara* (cry) "*isse zinda mat jaane do*" was concerned and A-3 pulling the deceased from his and PW-1's clutches forcibly. He is also consistent about what was uttered by A-3 Nasir who exhorted A-4 that he could go ahead and fire the gun. The precise words were "*maar goli dekh lenge*". The firing by A-4 with a country made pistol on the chest is fully proved by the eye witnesses PW-1 and 2.

27. Again, the cross-examination of PW-2 has not yielded much for the defence. A careful perusal of the testimonies of both PWs-1 and 2 lends assurance to the Court that they are natural witnesses who were present at the scene and have had occasion to witness what actually happened to the deceased from close quarters. The Court is not satisfied that either of these witnesses was deliberately uttering falsehoods or wanted to falsely implicate the members of one family i.e., A-1, A-2 and A-4.

28. There is no explanation why the statement of PW-3 Ashu was not recorded till about 3 months after the incident. This is strange considering the fact that the genesis of the entire incident is that PW-3 was supposed to be friendly with Ruksar, the daughter of A-1 and this was objected to by A-3, Irshad, who then beat him up due to the resultant altercation. PW-3 is

supposed to have wept before the deceased as a result of which the deceased offered to question Irshad about it. It is this incident involving PW-3 that resulted in the deceased confronting Irshad which resulted in the altercation in which all the accused got together to give beatings to the deceased.

29. Even if one were to keep aside the evidence of PW-3, since his statement was recorded only after about 3 months, the evidence of PWs-1 and 2 is consistent with each other and believable. Once we have at least two eye witnesses who are truthful, consistent and reliable, the issues concerning non-lifting of the earth sample by the crime team, the discrepancies in the site maps both rough and scaled do not weaken the case of the prosecution. The non-recovery of cartridges from the site, or any doubts as a result of non-recovery of the weapon used again do not cast doubts that the death of the deceased was homicidal and as a result of a gunshot wound on a vital part of the body. The presence of the four accused at the spot has more than adequately been established by the prosecution.

30. Counsel for all the Appellants have urged that the complainant, PW-1 is himself a “bad character” involved in many criminal cases and in collusion with the police, has falsely implicated three of the accused belonging to the same family. However, on a reading of the complete evidence, the Court is not persuaded to agree with this submission. The eye witnesses have spoken clearly and cogently and without any material inconsistency or contradiction. They withstood the intense cross-examination and on the essential particulars have fully corroborated each other.

Is the offence one of culpable homicide?

31. That brings us to the alternative submission of the accused. Can this be said to be a case that can be brought within Exception 4 to Section 300 of the IPC which states that culpable homicide would not amount to murder “if it is committed without pre-meditation, in a sudden fight, in the heat of passion upon a sudden quarrel and without having taken undue advantage or acted in a cruel or unusual manner”?

32. In order to answer that question it would have to first be examined whether the killing can be said to have happened as a result of a “sudden fight in the heat of passion upon a sudden quarrel”. The ingredients of Exception-4 to Section 300 IPC are as under:

- i) The killing must be committed without pre-meditation
- ii) It must be in a sudden fight in the heat of passion upon a sudden quarrel and
- iii) The offender should not have taken undue advantage or acted in a cruel and unusual manner.

33. On the above ingredients, when the present case is examined, it cannot be said that there was a pre-meditation preceding the killing. The manner of commission of the crime, as described by the prosecution, is more consistent with the crime having happened at the spur of the moment.

34. The Court has carefully perused the rough site plan as well as the scaled

site plan. While the house of A-1 was very close to the spot where the scuffle took place between A-3 and the deceased, the rough site plan shows the route taken by the accused to pursue the deceased and his brother with arrow marks. There is, however, no such route indicated in the scaled site plan. Nevertheless, the distance between the place where the scuffle took place and the place where the deceased was fired upon, does not appear to be much.

35. According to PW-3 (Ashu), he was beaten up by A-3 at around 6:30 pm. Even if some allowance is made for PW-3 to have met the deceased and convey to him the above happening, A-3 would have been confronted by the deceased at around 6:45 pm. The deceased was beaten up not only by A-3 but also by A-1, A-2 and A-4 who reached the spot outside Hamza Masjid on the calling of A-3. Accounting for the time taken for PWs 1 and 2 to reach that spot to free the deceased from the clutches of the accused and then begin to walk down the road back to their house, it would be around 6:50 to 7 pm. One also has to account for the time taken thereafter for the four accused to pursue the deceased who was walking home with his brothers PWs 1 and 2, and then attack the deceased near Guddu's STD booth. The PCR form gives the time of the first call as 6:58 p.m., by which time the deceased had been shot at by a fire arm. All of this indicates that there was hardly any time gap between the deceased leaving the spot outside Hamza Masjid in the company of his brothers PW-1 and PW-2 and the deceased being shot at near the STD Booth of Guddu. Therefore, the distance could not have been much.

36. In the cross-examination of PW-3, he states “*Sarafat, Rafiq and Asharaf had reached and intervened when scuffling took place between Afsar @ Yusuf and the accused persons. Sarafat, Rafiq and Ashraf have escaped free Afsar @ Yusuf from the clutches of the accused persons before 4-5 minutes of the incident.*”

37. In his cross-examination, PW- 2 states:

“The distance between the place of the beating and the place of gunshot injury was about 150 steps. When we were taking my injured brother Afsar Ali to home then the accused persons reached at the spot where the gun shot injury was caused and fired upon my brother. Accused Irshad was leading them and he was followed by Yasin and the other two accused persons were behind them.”

38. Turning to the evidence of PW-1, he too states that “*The distance between Hamja Masjid and Guddu STD may be about 100 steps/paces*”. The same witness states that he was first informed of the deceased being beaten up by 6:25 p.m. and he reached the spot, that is, outside Hamza Masjid at about 6:27-6:28 p.m. Therefore, the distance between the house of PW-1 and Hamza Masjid is just 2-3 minutes by foot. Viewed from any angle, therefore, there was hardly any time gap between what happened outside Hamza Masjid and the firing upon the deceased near Guddu STD Booth.

39. One of the key ingredients for the applicability of Exception-4 to Section 300 IPC is that “it must be in a sudden fight in the heat of passion upon a sudden quarrel”. It was submitted by the learned APP that there was pre-meditation inasmuch as the four accused pursued the deceased who was

walking back home with his brothers and that the time gap between the beating up of the deceased outside Hamza Masjid and his being gunned down outside the STD Booth of Guddu was sufficient enough for the plan to eliminate the deceased to be hatched.

40. The eye witnesses are consistent about the exhortation given by A-2 “*goli maar de hum dekh lenge*”. This also means that A-2 knew that A-4 was carrying a weapon. The exhortation was for A-4 to use the weapon, which he did. However, all of this was soon after the scuffle outside Hamza Masjid. It was within ten minutes of that scuffle. While a common intention could be said to have developed then and there, it is not possible to agree with the learned APP that there was sufficient time for any pre-mediated plan among the accused to kill the deceased after the scuffle at Hamza Masjid but before the accused caught up with the deceased and PWs 1 and 2 near the STD shop of Guddu.

41. Further, A-3 snatched the weapon from the hands of A-4 after one gun shot was fired. This definitely stopped any further firing. However, resultantly, A-3 gave PW-1 a blow with the butt of the unlicensed pistol. In the present case, there was a single gunshot wound fired by only one of the accused who was armed, i.e. A-4. No doubt, it was on the chest but there was no overt act thereafter *qua* the deceased.

42. It was contended by counsel for the Appellants that in the present case while the Appellants may have shared a ‘similar intention’, they did not share a ‘common intention’. Reliance was placed on the decision in **Suresh**

v. State of U.P. AIR 2001 SC 1344 where the Supreme Court held that “in the absence of a pre-arranged plan, and thus a common intention, even if several persons simultaneously attacked a man and each of them by having his individual intention, namely, the intention to kill and each can individually inflict a separate blow and yet none would have a common intention required by the Section.” It was further observed: “the sharing of the common intention and not the individual acts of the persons constituting the crime” was the essential requirement of Section 34 IPC.

43. However, in the present case, with all the Appellants pursuing the deceased and his brothers and giving exhortations to one of the co-accused, who all of them knew was armed, to open fire, it cannot be said that they did not share a common intention for the purposes of Section 34 of the Act. Therefore it is clear that the offence was without pre-meditation but more as a result of a sudden fight or heat of passion. The accused also did not take undue advantage of the position of the deceased. However, all of them shared a common intention of causing such injury to the deceased which they new would in all probability cause his death. The next question is whether the offence described by the prosecution fits in with the first or second part of Section 304 IPC?

Discussion of case law

44. At this stage, the Court would like to discuss some of the decisions which appear to support the alternative plea of the Appellants that the offence in the present case is culpable homicide not amounting to murder falling within Part I of Section 304 IPC.

45.1 In *Sukhbir Singh v. State of Haryana (2002) 3 SCC 327*, the facts were that at around 5 to 5:15 pm, when it was still drizzling, the deceased Lachhman's son was sweeping the street in front of his house with a broom. Some mud splashes struck the Appellant in that case, while he was passing in the street. When the Appellant and the son of the deceased were abusing each other, the deceased separated them and gave two slaps to the Appellant. The Appellant then went to his home stating that he would teach them a lesson. The Appellant's house was situated on the northern side of the house of the deceased. There was a street in between.

45.2 After sometime, the Appellant along with 8 other accused persons variously armed came to the spot. The Appellant challenged the deceased to come out so that a lesson could be taught to him. When the deceased came near the door of his house, the Appellant gave two thrust-blows with his *bhala* on the upper right portion of his chest. The deceased fell down and thereafter the other accused persons assaulted the deceased and his other relations with their respective weapons. The deceased succumbed to the injuries. The High Court upheld the conviction of the appellant under Section 302 IPC.

45.3 The Supreme Court while modifying the conviction to one under Section 304, Part-I IPC, observed as under:-

“17. To avail the benefit of Exception 4, the defence is required to probabalise that the offence was committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual

manner. The exception is based upon the principle that in the absence of premeditation and on account of total deprivation of self-control but on account of heat of passion, the offence was committed which, normally a man of sober urges would not resort to. Sudden fight, though not defined under the Act, implies mutual provocation. It has been held by courts that a fight is not per se palliating circumstance and only unpremeditated fight is such. The time gap between quarrel and the fight is an important consideration to decide the applicability of the incident. If there intervenes a sufficient time for passion to subside, giving the accused time to come to normalcy and the fight takes place thereafter, the killing would be murder but if the time gap is not sufficient, the accused may be held entitled to the benefit of this exception.

18. In the instant case, concededly, there was no enmity between the parties and there is no allegation of the prosecution that before the occurrence, the appellant and others had premeditated. As noticed earlier, occurrence took place when Sukhbir Singh got mud splashes on account of sweeping of the street by Ram Niwas and a quarrel ensued. The deceased gave slaps to the appellant for no fault of his. The quarrel appeared to be sudden on account of heat of passion. The accused went home and came armed in the company of others though without telling them his intention to commit the ultimate crime of murder. The time gap between the quarrel and the fight is stated to be few minutes only. According to Gulab Singh (PW10) when Sukhbir Singh was passing in the street and some mud got splashed on his clothes, he abused Ram Niwas. They both grappled with each other whereupon Lachhman (deceased) intervened and separated them. Accused Sukhbir had abused Lachhman who gave him two slaps. The said accused thereafter went to his home after stating that he would teach him a lesson for the slaps which had been given to him. After some time he, along with other accused persons, came at the spot and the fight took place. His own house is at a different place. There is a street in between his house and the house of Lachhman (deceased). On the northern side of his house, the house of the

appellant is situated. Similarly Ram Niwas (PW11) has stated that after the quarrel the accused went towards his house and within a few minutes he came back with other accused persons. It is, therefore, probable that there was no sufficient lapse of time between the quarrel and the fight which means that the occurrence was "sudden" within the meaning of Exception 4 of Section 300 IPC.

19. The High Court has also found that the occurrence had taken place upon a sudden quarrel but as the appellant was found to have acted in a cruel and unusual manner, he was not given the benefit of such exception. For holding him to have acted in a cruel and unusual manner, the High Court relied upon the number of injuries and their location on the body of the deceased. In the absence of the existence of common object, the appellant cannot be held responsible for the other injuries caused to the person of the deceased. He is proved to have inflicted two blows on the person of the deceased which were sufficient in the ordinary course of nature to cause his death. The infliction of the injuries and their nature proves the intention of the appellant but causing of such two injuries cannot be termed to be either in a cruel or unusual manner. All fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of not availing the benefit of Exception 4 of Section 300 IPC. After the injuries were inflicted and the injured had fallen down, the appellant is not shown to have inflicted any other injury upon his person when he was in a helpless position. It is proved that in the heat of passion upon a sudden quarrel followed by a fight, the accused who was armed with Bhala caused injuries at random and thus did not act in a cruel or unusual manner.”

46.1 In *Raghubir Chand v. State of Punjab (2013) 12 SCC 294*, the facts were that on 14th January, 1991 at about 7 am when PW-2 and PW-4 who were brothers had gone to the fields to answer the call of nature in front of the house of Appellant No.1, the 4 accused persons assembled in front of the

house of Appellant No.1. Each of them was armed. The Appellant No.1 exhorted the other accused that both PWs 2 and 4 should be taught a lesson for having abused them. Appellant No.2 gave a blow from an iron rod on his hand which was aimed at the head of PW-4. Appellant No.4 gave a knife blow on the left flank of PW-4. Appellant No.1 gave a *dang* blow on the right elbow of PW-2. Appellant No.4 gave a knife-blow on his head. At this stage, the deceased and PW-5 (brothers of PWs 2 and 4) arrived there whereupon Appellant No.4 gave 4 to 5 knife blows in the abdomen of the deceased, who later succumbed to those injuries.

46.2 The High Court confirmed the conviction of the Appellants under Sections 302/324 and 323/34 IPC. The Supreme Court applied Exception-4 to Section 300. It held that that Appellant No.4 had the requisite intention, if not of causing death, at least of causing such bodily injury which was likely to cause death. Had he dealt a single blow, the outcome may have been different. The Supreme Court observed

“Had Appellant No.4 dealt a single blow on the deceased, perhaps, it would have been open for us to seriously consider the applicability of the latter part of the 4th Exception to Section 300 to the present case, namely, that the appellant had not taken undue advantage or had not acted in a cruel or unusual manner”.

46.3 With 4 or 5 knife blows having been inflicted on a vital part of the body of the deceased, it was held that “no such conclusion can be reasonably reached”. The above decision is an important pointer that the number of injuries inflicted would also be indicative of the frame of mind of the assailants and, in particular, indicate whether they had they taken undue advantage or acted in a cruel or unusual manner or not, consistent with the

later part of Exception 4 to Section 300.

47.1 Turning now to the decision in *Ankush Shivaji Gaikwad v. State of Maharashtra JT 2013 (7) SC 26*, the facts were that the deceased and his wife Mangalbai (PW-1) were guarding the jaggery crop in their field. The Appellant accompanied by the other two accused was walking past the field of the deceased when a dog owned by the deceased started barking at them. Angered by the barking of the animal, the Appellant hit the dog with the iron pipe that he was carrying. When the deceased objected, the Appellant abused him and told to keep quiet or else he too would be beaten like a dog. The exchange of hot words led to a scuffle in the course of which the other two accused beat the deceased with fists and kicks while the Appellant hit the deceased with the iron pipe on the head. The deceased fell to the ground and the accused persons ran away from the spot. The internal injury to the temporal and occipital region under the scalp and a fracture on the base of the skull were found sufficient to cause the death of the deceased.

47.2 The Supreme Court gave three reasons why Exception 4 to Section 300 IPC would be attracted. First, there was no pre-meditation. Second, the Appellant had no enmity or motive to commit any offence against the deceased “leave alone, a serious offence like murder”. The exchange of hot words in the quarrel over the barking of the dog led to a sudden fight which in turn culminated with the deceased being hit by the rod unfortunately on a vital part like the head. Third, the weapon used was not lethal. The usage of the words revealed the intention of the Appellant and his companions to belabour the deceased and not kill him as such.

48.1 In *Vineet Kumar Chauhan v. State of Uttar Pradesh AIR 2008 SC 780*, the facts were that on 13th October 1993 at about 9.45 am, the husband of the deceased along with his wife and children was watching television. The Appellant who was a neighbour and a cable operator came to their house along with his servant and tried to persuade the son of the complainant and the deceased to take a cable connection. However, they declined the request. Thereupon an altercation took place between the Appellant and the son of the deceased. The deceased and her husband intervened and asked the Appellant to leave their house. The Appellant returned to his house, brought out his licensed revolver and opened indiscriminate firing towards the house of the deceased from the door of his house. Some bullets hit the door of the house and the deceased who was closing the door received one of the bullets on her jaw. She was taken from Moradabad to Delhi for treatment and ultimately died on 24th March, 1994.

48.2 The Supreme Court was of the view that the case would fall under Clause (3) of Section 300 IPC and, therefore, it was only “culpable homicide not amounting to murder” attracting Section 304, Part-II IPC.

49. When the case on hand is examined in light of the principles enunciated above, the Court agrees with the learned APP that the offence in this case cannot be brought within the scope of Part-II of Section 304, i.e. a killing being committed with the knowledge and not with the intention that the injury caused is likely to result in death. It falls under Part I of Section 304 IPC since the gunshot was aimed at the chest of the deceased. The Appellants cannot contend that they did not share a common intention of

“causing such bodily injury as is likely to cause death” of the deceased.

50. A further question that arises is whether the case of A-4, who fired at the deceased with an unlicensed pistol, should be treated differently from the remaining accused? It must be recalled that while A-4 fired the weapon, the exhortations were made by A-1 and A-2. A-3 was present and was in fact the main reason for the original altercation at Hamza Masjid. A-4 was not acting of his own volition. All of them shared a common intention.

51. Further, although the case of the prosecution was that the weapon used was unlicensed, the ballistic evidence did not support the prosecution. In other words, it was not able to be shown that the pistol which was recovered in FIR No.671/2010 registered at P.S. Hathras in U.P. was, in fact, the same weapon which was used to kill the deceased. The reports given by the FSL, in the present case, (Ex.PW-21/A) and Ex.PW-21/B) did not prove that the bullet that killed the deceased was fired from that pistol. Therefore, merely because the weapon used may have been an unlicensed one, in the absence of recovery of such weapon, and in light of Section 34 of IPC, it cannot be said that A-4 should be visited with a consequence different than that of the other accused.

52. For all the aforementioned reasons, the Court modifies the conviction of the four Appellants for the offence under Section 302 read with Section 34 IPC to one under Section 304 Part-I IPC read with Section 34 IPC.

Sentence

53. Turning now to the question of sentence, it is seen from the order on

sentence dated 29th July, 2013 of the trial Court that A-1, Jamil was involved in 27 criminal cases, A-2, Nasir in 20 criminal cases and A-3 Irshad in 6 criminal cases. All of this weighed with the trial Court in awarding them and A-4 life imprisonment for the offence under Sections 302 IPC.

54. The nominal roll of A-1 presented before this Court shows that he has no previous convictions. There are only two pending cases, one under Sections 452, 323 and 324 IPC in FIR No.33/2009 registered at PS Jyoti Nagar in which he is on bail and one Criminal Complaint Case under Section 135 of the Electricity Act. As of date, he has served nearly 8 years of imprisonment inclusive of remissions. His jail conduct has been satisfactory.

55. The nominal roll of A-2 Nasir shows that he has been convicted in three other less serious cases including one under the Arms Act, one for the offence under Section 380 IPC and the third under 468/471 IPC. He too has served nearly 8 years of sentence including remissions. His jail conduct has been satisfactory.

56. A-3 was, at the time of commission of the offence, 19 years old. He has no previous convictions and no pending cases. As of date, he has served nearly 8 years of imprisonment inclusive of remissions. His jail conduct has been satisfactory. A-4 Yasin also has served the same period and his jail conduct too is stated to be satisfactory.

57. Keeping in view all the above factors, the Court sentences each of the Appellants to 10 years of rigorous imprisonment (inclusive of the remissions

earned). The fine amounts for the offence under Section 304, Part-I IPC is enhanced to Rs.30,000/- for each of the Appellants. In default of payment of fine, each of them will undergo further simple imprisonment of 6 months. The fine amounts deposited by the Appellants shall be paid to the family of the victim as compensation under Section 357 Cr PC. The conviction and sentence awarded to the Appellants by the trial Court for the offence under Section 323/34 IPC are affirmed. The sentences are directed to run concurrently.

58. The bail and surety bonds furnished by Jamil (Appellant in CrI. A. 1226 of 2013) are cancelled. He shall surrender forthwith to serve out the remaining sentence. The appeals are disposed of in the above terms.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 19, 2018

'anb'