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

+ **CRL.A. 740/2017**

RAJESH BANSAL alias MONTU Appellant
Through Mr. S.B.Dandapani, Advocate

versus

STATE Respondent
Through Mr.Kewal Singh Ahuja, APP for State

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VINOD GOEL

JUDGMENT
14.08.2018

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1. This appeal is directed against the judgment dated 28th November, 2016 passed by the learned Additional Sessions Judge-04, North-West, Rohini in Sessions Case No.16/03/13 arising out of FIR No.347/2012 registered at Police Station, North Rohini convicting the Appellant for the offence under Section 302 IPC and the order on sentence dated 22nd February, 2017 whereby he was sentenced to imprisonment for life along with a fine of Rs.10,000/-, and in default of payment of fine to undergo simple imprisonment (SI) for a period of two months.

2. In the order on sentence, after noticing that the family of the deceased comprised of his mother, wife and two children, the learned trial Judge issued directions to the Delhi State Legal Services Authority ('DSLISA') for compensation to be determined for being paid to the victims under the Delhi

Victims Compensation Scheme in terms of Section 357A Cr PC.

3. The charge against the Appellant was that at around 10.50 pm on 11th October, 2012 near the Hanuman Mandir Bus Stand, opposite Vatsalaya Mandir, Sector-7/8 dividing road, Rohini, he murdered Deepak Vaid (deceased) by giving him knife blows.

4. The case was based on the direct evidence of the wife of the victim i.e. Smt. Suman Vaid (PW-2). The trial Judge found in the impugned judgment that not only was PW-2 truthful and reliable but her testimony was also corroborated by the medical evidence. Holding that the prosecution had proved the guilt of the Appellant beyond reasonable doubt, the trial Court proceeded to convict and sentence him in the manner indicated above.

5. With the assistance of Mr. S.B. Dandapani, learned counsel for the Appellant and Mr. K.S. Ahuja, learned APP for the State, the Court has examined the trial Court record.

6. The principal prosecution witness is PW-2. She deposed that she was operating a beauty parlour from her residence which at that time was at A-1/124 in Sector-7 in Rohini. She also provided door to door services as a beautician. Her husband, the deceased was a TSR driver. At the relevant time he was not doing any particular work. In her initial statement to the police on the basis of which the *rukka* was drawn up (Ex.PW-2/A), PW-2 stated that her husband and the present Appellant were friends and used to play cards in a park at Sector-8 Rohini. She also mentioned that one week

earlier to the incident there had been some difference of opinion between the Appellant and the accused over money in connection with playing cards.

7. According to her at around 10.50 pm on 11th October, 2012 she and the deceased were returning from a dentist at Nangloi. The deceased was riding the scooter and his wife was on the pillion. They reached near Vatsalya Mandir in Sector-7, Rohini. The Appellant was standing in front of the Hanuman Mandir bus stand. She stated to the police that on seeing the Appellant, the deceased stopped the scooter and asked PW-2 to wait while he spoke to the Appellant. Very soon PW-2 heard raised voices and noticed that there was a quarrel between the deceased and the Appellant. She heard the noise of '*Hathapai*'. She then noticed that the Appellant was knocked down to the ground. The Appellant then stood up and took out a knife from his pocket and stabbed the deceased 2 or 3 times. By the time PW-2 reached the spot where her husband had fallen and raised an alarm, the Appellant fled from the spot. PW-2 found her husband in a pool of blood. She shook him but there was no response. Meanwhile, the police reached the spot and took her husband to the BJRM hospital.

8. It appears that on receiving DD No. 42A at PS North Rohini, Inspector A.S. Sandhu (PW-17) along with Constable Surender Kumar (PW-13) reached the spot and found the deceased in a pool of blood on the footpath near Hanuman Mandir bus stand. PW-2 met them there and her statement was recorded (Ex.PW-2/A). It was then sent with PW-13 to the PS at around 11.55 pm for registration of the FIR. The crime team was called to

the spot and the blood stained cloth material as well as earth control was kept in separate plastic containers and sealed. Photographs of the spot were taken.

9. After sending the dead body to the hospital Inspector A.S. Sandhu (PW-17) along with Constable Baljeet (PW-16) and PW-2 reached the house of the Appellant at A-2/371 Sector-8, Rohini. Upon being identified by PW-2 the Appellant was arrested and his personal search conducted. The Appellant at the time of arrest was found having an injury on the left side of his forehead. His shirt was also blood stained. Consequently, the Appellant was taken to the BSA Hospital where he was examined by Dr. Meet Kumar (PW-3). The following injuries were noticed on the Appellant by PW-3:

- “1. Lacerated wound left lateral aspect of right orbit approx, 1.5 cm x 0.5 cm
2. Swelling and tenderness right palm, thinner aminance.
3. Swelling and tenderness left palm, thinner aminance.
4. Abrasion over lower lip 0.5 cm x 0.5 cm mucosal aspect.
5. Lacerated would over left lateral end of scapula 0.5 cm x 0.5 cm.”

10. At the time of his medical examination, the Appellant was wearing a yellow and blue coloured, blood stained shirt which was collected and wrapped in a *pullanda* and sealed.

11. The post-mortem of the deceased was performed by Dr. Vijay Dhankar (PW-8) on 12th October, 2012 between 1.30 P.M. and 2.30 P.M. The external examination revealed the following injuries:

“1. Incised wound 4.5 cm x 0.5 cm, horizontally placed, present over the pinna of left ear and extending to the mastoid region of the head. Full thickness of the pinna has been cut. The margins are clean cut.

2. Incised wound 1 cm x 0.5 cm, horizontally placed, present over the front of the middle-part of neck in the midline. The margins are clean cut and the wound is skin deep.

3. Incised stab wound 2.5 cm x 0.6 cm, horizontally placed, present over the upper front of chest just left to the midline placed 8 cm above and medial to the left nipple. The margins are clean cut and one of the angles is acute while the other is comparatively obtuse.

4. Incised stab wound 2.5 cm x 0.5 cm, horizontally placed, present over the left lower lateral part of front of chest placed 13 cm from the midline. The margins are clean cut and one of the angles is acute while the other is comparatively obtuse.

5. Contusion 3 cm x 2 cm present over the left upper lateral part of back of abdomen.”

12. The internal examination of the neck revealed that the injury therein was skin deep. The internal examination of the chest resulted in the following observations:

“On reflection of chest wall, extravasation of blood was seen in the chest wall beneath and surrounding the external injuries. Muscles of the chest wall showed cuts beneath the external injuries no. 3 and 4.

Collar bone, Sternum and Ribs showed no fractures. The 3rd costal cartilage was cut in the middle beneath the external injury no. 3. The cut is horizontally placed 3 cm x 0.2 cm and pierced the full thickness of the costal cartilage. The cut is wider laterally and narrower medially. The 8th intercostal

muscles were cut horizontally beneath the external injury no. 4.

Left pleural cavity contained about 1200 cc of fluid and clotted blood. About 400 cc of fluid and clotted blood collection present in the facial planes of mediastinum extending from the root of neck to the top of heart.

The lungs were pale and collapsed. Left lung showed cut marks beneath the external injuries.

A cut 1.5 cm X 0.3 cm was present in the anterior margin of the left lung beneath the external injury no. 3. The cut perforated the full thickness of the lung. Lung tissue was approximately 1 cm thick at the site of cut.

A cut 2 cm X 0.5 cm was present in the lower lateral margin of the left lung beneath the external Injury no. 4. The cut perforated the full thickness of the lung. Lung tissue was approximately 1 cm thick at the site of cut.

Diaphragm was cut 2.5 cm x 0.5 cm at the lateral side beneath the injury no. 4. The cut pierced the full thickness of the diaphragm. The diaphragm tissue was approximately 0.5 cm thick at the site of cut.”

13. PW-8 also made note of the track of injuries as under:

“Injury No.3 – the weapon pierced the skin through injury no.3 cut through the subcutaneous tissues, the pectoral muscles, cut through the 3rd costal cartilage, pierced the parietal pleura, cut the visceral pleura, cut the anterior margin of the left lung and pierced its full thickness and cut the facial layers of mediastinum. The total depth of the injury is about 8 cm. The direction of the injury is forwards to backwards and left to right in the horizontal plane.

Injury No. 4 - the weapon pierced the skin through injury no.

4, cut through the subcutaneous tissues, cut through the 8th intercostal muscles, pierced the parietal pleura, cut the visceral pleura, cut the lower lateral margin of the left lung and pierced its full thickness and again cut the visceral pleura over the diaphragm, cut full thickness of the diaphragm. The total depth of the injury is about 10 cm. The direction of the injury is forwards to backwards, left to right and below upwards.”

14. The opinion as to the cause of death was as under:

“Cause of Death: Death is due to hemorrhagic shock consequent to multiple stab injuries to the chest.

All injuries are ante-mortem and fresh at the time of death. Injury No.3 and 4 individually as well as collectively with other external injuries are sufficient to cause death in the ordinary course of nature.

Injury No.1 to 4 have been inflicted with a one side sharp edged weapon.

Injury No.5 could be caused by a blunt object.

Manner of Death: Homicide.”

15. After completion of the investigation, the charge sheet was filed and by the order dated 29th April, 2013 the trial Court framed the charge against the Appellant in the manner indicated.

16. 18 witnesses were examined for the prosecution and none for the defence. When the incriminating circumstances were put to the Appellant under Section 313 Cr PC, he simply denied them and maintained that he had been falsely implicated.

17. As already noticed, the eye witness to the occurrence and the star prosecution witness was PW-2. She was subjected to extensive cross-examination and confronted with certain improvements she had purportedly made over her previous statement to the police. One of these was about her not stating that it was the Appellant who had called out to the deceased, whereas in her previous statement she had simply mentioned that the Appellant was standing in front of the Hanuman Mandir Bus Stand and upon seeing him, the deceased had stopped the scooter and told PW-2 that she should wait there whilst he spoke to the Appellant. The Court does not find this to be a material improvement.

18. The other improvement which was sought to be elicited was the fact that she was standing on one side of the road whereas the quarrel between the Appellant and the deceased was happening on the other side and that in order to reach her husband, PW-2 would have had to cross the road. This again the Court does not find to be a material improvement. The fact remains that the attack by the Appellant on the deceased happened in front of PW-2. She was very clear that she was an eye witness to the Appellant having repeatedly stabbed the deceased with a knife. A suggestion was given to PW-2 that the deceased had earlier been involved in a case of chain snatching which she denied. The suggestion that the deceased had snatched money from the Appellant was also denied by her. She maintained that the arrest of the Appellant and the recovery of the knife used for the commission of the offence by the Appellant happened in her presence.

19. PW-2 also identified the clothes worn by the Appellant which had been

seized during his medical examination by PW-3. Having carefully examined the testimony of PW-2, the Court is unable to find any serious challenge to either the truthfulness or the consistency of her testimony. As already pointed out by the trial Court, the testimony is also fully corroborated by the medical evidence which reveals that there were at least four incised wounds on the body of the deceased.

20. Faced with the prospect of not being able to assail the impugned judgment in so far as the reliability of the testimony of PW-2 was concerned, Mr. Dandapani then focused on the nature of the offence. He sought to submit that Exception 4 to Section 300 IPC would stand attracted in the facts and circumstances of the present case. Exception 4 of Section 300 IPC reads as under:-

“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.”

21. It is submitted that even according to the testimony of PW-2 the incident was not pre-meditated; it was as a result of a sudden fight in the heat of passion upon a sudden quarrel between the Appellant and the deceased. Mr. Dandapani pointed out that it was the deceased who knocked the Appellant to the ground and was virtually sitting on top of him. In order to fend off the deceased, the Appellant stood up, took out the knife which he was carrying and stabbed the deceased.

22. Mr. Dandapani sought to submit that all the ingredients of Exception 4

to Section 300 IPC stood satisfied in the present case. Apart from the attack not being pre-meditated and as a result of a sudden fight, the offender had not taken “undue advantage or acted in a cruel or an unusual manner”. According to Mr. Dandapani where the stabbing was as a result of a sudden fight, it did not matter whether there was one stab wound or several stab wounds.

23. The Court is unable to accept the above submissions of Mr. Dandapani. The law in relation to the applicability of Exception 4 to Section 300 IPC is fairly well settled. 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.....”

24. 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".”

25. Recently this Court, in the case of *Brij Mohan v. State* (decision dated 15th February, 2018 in Crl.A.No.170/2002), held as under:

“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.”

26. It is not sufficient if only some of the ingredients of Exception 4 to Section 300 IPC stand satisfied. All of the ingredients must cumulatively be satisfied. In other words, not only must the defence be able to show that the offence was committed without pre-meditation in a sudden fight in the heat of passion upon a sudden quarrel but, importantly, it must be shown that the offender did not take “undue advantage and did not act in a cruel or unusual manner”. The word ‘undue’ which qualifies the word advantage and pre-supposes that although the victim may have initiated the quarrel and may

have been unarmed, the accused despite being armed is expected not to take advantage of the victim's vulnerability more than what a reasonable person would. In the present case, for instance, it is plain that while the Appellant was armed with a knife, the deceased was not armed. Clearly, therefore, the Appellant had a greater advantage than the deceased. If the Appellant had, in such circumstances, stopped with delivering one stab wound to the deceased after the latter had been knocked to the ground, it would have been possible to hold that the Appellant did not take 'undue' or unfair advantage of the vulnerability of the deceased. But since the Appellant did not stop with giving one stab wound but repeatedly attacked the deceased, and that too on his vital parts, it cannot be said that the Appellant did not take 'undue advantage' of the relatively vulnerable position of the deceased.

27. The last ingredient of Exception 4 to Section 300 IPC is that the accused should not have acted in a cruel or unusual manner. This is where the type of injuries on the person of the deceased and their location becomes relevant. As already noticed there were at least four incised stab wounds, two of them on the chest and one on the neck. The fatal injuries were the chest injuries. The post mortem report further notes the track of injuries. One injury was of 8 cms depth and the other of 10 cms. This meant that the accused did not stop with one deep wound on the chest caused by stabbing the deceased. He clearly pulled out the knife and again plunged it deep into another portion of the chest, making it certain that the deceased would not survive. It is this that makes it clear that the Appellant was acting in "a cruel or an unusual manner" because whatever may have been the provocation caused by the deceased, Exception 4 to Section 300 IPC

expects the assailant not to act in such disproportionate manner to the provocation. Consequently, the Court is not persuaded that all the ingredients of Exception 4 of Section 300 IPC stand fulfilled in the present case.

28. The Court finds no reason to interfere with the impugned judgment and order on sentence of the trial Court.

29. The appeal is accordingly dismissed. The trial court record be returned together with a certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL, J.

AUGUST 14, 2018

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