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

5+ **CRL.A. 1055/2017 & CRL.M.(Bail) 2046/2017**

RAJU

..... Appellant

Through: Mr.Jagat Rana, Advocate with
Mr.Abhinav Dang, Advocate

versus

STATE

..... Respondent

Through: Ms.Kusum Dhalla, APP for State
Inspector Ajay Kumar, PS-
Jahangirpuri

6+ **CRL.A. 1056/2017 & CRL.M.(Bail) 2047/2017**

PRASHANT

..... Appellant

Through: Mr.Jagat Rana, Advocate with
Mr.Abhinav Dang, Advocate

versus

STATE

..... Respondent

Through: Ms.Kusum Dhalla, APP for State
Inspector Ajay Kumar, PS-
Jahangirpuri

7+ **CRL.A. 1079/2017 & CRL.M.(Bail) 2089/2017**

MUNNI

..... Appellant

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

versus

STATE

..... Respondent

Through: Ms.Kusum Dhalla, APP for State
Inspector Ajay Kumar, PS-
Jahangirpuri

8 +

CRL.A. 1121/2017 & CRL.M.(Bail) 2169/2017

SURESH @ BANTI

..... Appellant

Through: Mr.K.Parameshwar, Advocate

versus

STATE

..... Respondent

Through: Ms.Radhika Kolluru, APP for State
Inspector Ajay Kumar, PS-
Jahangirpuri

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE I.S. MEHTA

ORDER

23.01.2018

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Dr. S. Muralidhar, J.:

1. These appeals are directed against the judgment dated 15th July 2017 passed by the learned Additional Sessions Judge-04, North, Rohini Courts, Delhi in Sessions Case No.57924/2016 arising from FIR No.241/2011, registered at Police Station ('PS') Jahangirpuri, convicting the Appellants for the offences under Sections 302/452/325/323/34 Indian Penal Code 1860 ('IPC').

2. There were four accused in the case, i.e. Suresh @ Banti (A-1), his wife, Munni (A-2), and his sons, Prashant (A-3) and Raju (A-4). As far as the

victims are concerned, they also belong to the same family. The deceased is Mohit, the son of Giandass Sankar (PW-5) and Dularwati (PW-1). The injured eye-witnesses in the case, apart from PW-1 and PW-5, are their son, Hemant (PW-2), their daughter, Neetu (PW-4), and two other relatives, Suman (PW-6) and her husband Pappu (PW-9).

3. The appeals by the respective accused are also directed against the order on sentence dated 27th July 2017, whereby all of them were sentenced to imprisonment for life and fine of Rs.10,000 each and in default of payment of fine, to undergo Simple Imprisonment ('SI') for 3 months for the offence under Section 302/34 IPC, i.e. the murder of Mohit; to undergo Rigorous Imprisonment ('RI') for 3 years and to pay a fine of Rs.3,000 each and in default of payment of fine, to undergo SI for a period of 1 month for the offence under Section 452/34 IPC, i.e. trespassing into the house of the victims; RI for 3 years and to pay a fine of Rs.3,000 each and in default of payment of fine, to undergo SI for 1 month for the offence under Section 325/34 IPC, i.e. causing grievous injuries to PW-6, PW-9, PW-5, PW-4; SI for 6 months and to pay a fine of Rs.1,000 each and in default of payment of fine, to undergo further SI for 10 days for the offence under Section 323/34 IPC, i.e. for causing simple injuries to Om Prakash (PW-10), a cousin of PW-9, as well as PW-1.

4. The case of the prosecution is that at around 10 pm on 31st July 2011, all the accused forcibly trespassed into the house of the victims which was at 902, H-2 Block, Jahangirpuri. In the version of PW-1, the mother of the deceased who was herself an injured victim, the precursor to this was that

her son Hemant had left for Haridwar on 17th July 2011 with the three sons of A-1, i.e. Prashant (A-3), Raju (A-4) and Chanderjeet @ Vicky (who incidentally faced a separate trial for the same offence before the Juvenile Justice Board) to bring *Kawar*. Hemant returned on 27th-28th July 2011 and informed PW-1 that, on the way, A-3, A-4 and Vicky had quarrelled with him on a petty issue of Hemant asking for Rs.100 from them which they refused to give. There was a scuffle between them and Hemant. With the intervention of some other *Kawaria*, the matter was patched up and they returned to Delhi. According to PW-1, even on 30th July 2011, Hemant (PW-2) had told PW-1 that A-3, A-4 and Vicky had threatened him.

5. According to PW-1, on the night of 31st July 2011, at around 10 pm, Giandass Sankar (PW-5) was sitting outside his house. His daughter, Neetu (PW-4), was putting *henna* on his hair. At that time, A-1 and A-3 came there asking for Hemant (PW-2). They also conversed with PW-5 about the incident of their quarrel with Hemant during the *kawar*. PW-5 then told them that this was a petty issue and pushed them towards their house. It is stated that in reaction to this, A-1 threatened PW-5 that he would be back in 10 minutes.

6. According to PW-1, within 10 minutes thereafter, A-1, A-2, A-3 and A-4 along with Vicky forcibly trespassed into the house of the victims. A-3 and A-4 were stated to be carrying knives in their hands. A-1 was stated to be carrying a *danda* and A-2 an iron rod. Vicky was also stated to be carrying a *danda*. A-2 first attacked PW-1 by hitting her with the rod on her head. After that, all the four accused attacked PW-5 with their respective weapons.

7. PW-1 further deposed that during this altercation, the younger son of PW-1 and PW-5, Mohit (the deceased), appeared. One arm of Mohit was caught by A-4 and the other arm by Vicky. Mohit's hair was caught hold off by A-2. A-1 at that point allegedly exhorted "*saale ka kaam tamam kar do*" and on this A-3 attacked the deceased with the knife on his back. The deceased fell unconscious on the road.

8. It is stated that on hearing the quarrel, the nephew of PW-1, Pappu (PW-9), who was also running his own shop near the shop of the victims, reached there. When he tried to intervene, A-1, A-3, A-4 and Vicky chased him with their respective arms into his house where he had run to in order to save himself. There the accused are stated to have attacked both PW-9 and his wife Suman (PW-6) with their respective arms due to which PWs 6 and 9 suffered injuries as well. Om Prakash (PW-10), another nephew of PW-1, who was also running a *paan* shop nearby tried to come to the rescue of the victims. He too was attacked by the accused persons. He also suffered injuries.

9. On the completion of investigation, the charge sheet was filed. By an order dated 6th January 2012 the trial Court framed the following charges against the accused:

"That on 31.07.2011 at about 10:30 PM near Aggarwal Sweet Jahangipuri, H.No.902/901, HZ Block, Delhi within the jurisdiction of PS Jahangir Puri you accused Prashant, carrying knife, Suresh carrying Danda, Munni carrying iron rod, Raju carrying knife, alongwith your co-accused Vicky s/o Sh. Suresh @ Bunti (juvenile) in furtherance of your common intention criminally house

trespassed of H. No.901-902, HZ Block, Jahangirpuri after having made preparation for causing hurt or assaulting occupants of the said house and thereby you all have committed an offence punishable under Section 452/34 IPC within my cognizance.

Secondly, on the aforesaid date, time and place you all in furtherance intention you committed murder of Mohit, s/o Sh. Gian Dass and thereby you all have committed an offence punishable u/s Section 302/34 IPC, within my cognizance.

Thirdly, on the aforesaid, date, time and place you all in furtherance of you common intention you caused grievous injuries (dangerous) on the person of Suman, w/o Pappu, Pappu s/o Kishor, Gian Dass, s/o Bhagwati Pd., Neetu, d/o Gian Dass, thereby committed an offence punishable under section 315/34 IPC, within my cognizance.

Fourthly on the aforesaid, date, time and place you all in furtherance of you common intention caused stabbed injury on the parietal region with the sharp edge weapon on the person of Dular Wati, w/o Gian Dass thereby committed an offence punishable under section 324/34 IPC, within my cognizance.

Fifthly, on the aforesaid, date, time and place you all in furtherance of you common intention, caused simple injuries on the persons of Om Prakash, s/o Shri Ram, thereby committed an offence punishable under section 323/34 IPC, within my cognizance.”

10. The prosecution examined 36 witnesses. As far as their respective defences were concerned, in his statement under Section 313 Cr PC, A-1 stated that he was running *choley bhature* shops at Chandni Chowk and Rohini. His sons A-3, A-4, Vicky and Sonu and Deepak were helping him in both shops. According to A-1, on the date of the incident, 31st July 2011, he along with A-3, Vicky, Sonu and Deepak were present at the shop in Chandni Chowk which normally closed at around 11.00-11.30 pm. A-1

claimed that someone informed them that an incident had taken place at their house. He, along with his sons A-3 and Vicky, rushed to the house leaving behind Sonu and Deepak at the Chandni Chowk shop in the company of A-1's partner, Chander Pal. When they reached home at around 11 pm they found A-4 and A-2 lying in an injured condition. A-3 then called the police. The PCR van reached there and took A-1 and his family members to the PS. A-1 claimed his son Raju (A-4) was also picked up by the police. However, A-1 was not aware where A-4 was taken. He claims to have met A-4 only on 1st August, 2011 at around 5 pm in the PS when they were being shifted to jail. He claimed to have been falsely implicated.

11. Similar statements were made by A-2, A-3 and A-4 as well. The defence also examined two witnesses. HC Rajender Kumar (DW-1) was to produce the PCR Call Record for the intervening night of 31st July 2011 to 1st August 2011 between 7 pm and 1 am. However, he stated that the said record had been destroyed by an order dated 15th May, 2015 of the DCP/PCR. Chander Pal (DW-2), partner of A-1, was examined in support of the claim of A-1 and A-3 that they were present at their shop at Chandni Chowk at the time of the incident.

12. There were four court witnesses (CWs) examined. Dinesh (CW-1) was examined to prove the date of birth of A-3 as 15th March, 1992. CW-2, CW-3 and CW-4 were also examined for the same purpose.

13. By the impugned judgment dated 15th July, 2017, the trial Court came to the following conclusions:

(i) From the testimony of the injured witnesses it was established that the accused persons had actively participated in the commission of the offence. The deceased was caught hold of by Vicky and A-4 from both his arms, A-2 had caught hold of him by his hair, A-1 had exhorted that they should all kill him and A-3 had given the fatal stab wound;

(ii) As the injuries were inflicted by a deadly weapon on the vital part, the offence was one of murder. All the accused formed a common intention at the spur of the moment.

(iii) The trial Court noted the decision of the Supreme Court in ***Ghapoo Yadav v. State of M.P (2003) 3 SCC 528*** as well as ***A. Maharaja v. State of Tamil Nadu 2009 Crl J 315*** which had held that one of the requirements for Exception 4 to 300 IPC be attracted is that “the fight must have been with the person killed”. Since in the present case the fight was not with Mohit (the deceased), the trial Court rejected the alternative plea of the accused that the offence was one under Section 304 Part II IPC.

14. The trial Court by a separate order on sentence dated 27th July, 2017 sentenced the accused in the manner indicated herein before.

15. This Court has heard the submissions of Mr. Jagat Rana, Mr. Aditya Vikram and Mr. K. Parameshwar, learned counsel for the Appellants and Ms. Kusum Dhalla and Ms. Radhika Kolluru, learned APPs for the State.

16. There are at least 7 injured witnesses who have consistently spoken

about the trespass of the accused into their house forcibly, armed with weapons. Although some argument was made regarding the recovery of the weapons and no question being put to the doctor who examined the injured victims whether the injuries could have been caused by those weapons, in view of the fact that the injured eyewitnesses have consistently spoken not only of the forcible house trespass but also about the accused coming there variously armed and attacking the members of the family of PW-1 and PW-5, the Court is unable to be persuaded that there was no forcible house trespass by the accused, who were the aggressors, on the family of the victim.

17. What then arises for consideration is whether on acceptance of the manner of commission of the crime as described by the prosecution, Exception 4 to Section 300 IPC could be said to be attracted as far as the killing of Mohit is concerned.

18. It must be recalled that according to the prosecution, the quarrel that A-3, A-4 and Vicky had was with Hemant (PW-2) with whom they had gone to Haridwar in July 2011, the previous month. In fact, even on the date of the incident, A-1 and A-3 had come to the house of the victims looking for Hemant. The provocation, therefore, was the quarrel that A-3, A-4 and Vicky had had with Hemant during their trip to Haridwar. This means therefore that when they said that they would come back in 10 minutes, they did not have any premeditation or prior plan to either attack or harm the deceased Mohit, the younger son of PW-1 and PW-5, who was not even present at that time.

19. The short interval between their initial visit to the house of the victims and when they actually came back armed with weapons does lead to the conclusion that a sudden quarrel had taken place at the spur of the moment. PW-5 had pushed A-1 and A-3 back to their house by making light of the quarrel that had taken place between the sons of A-1 and Hemant during the trip to Haridwar. That appears to be the immediate trigger for the accused to collect their respective weapons and come back to attack the victims. In fact, even the trial Court notes that the incident occurred in the spur of the moment.

20. The ingredients that require to be fulfilled in order to attract Exception 4 to Section 300 IPC have been explained by the Supreme Court in a large number of cases. It was explained in *Sukhbir v. State of Haryana (2002) 3 SCC 327* as under:

“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.”

21. In the aforementioned case, the quarrel was not with the deceased. It was with the son of the deceased. The accused went back to his house, collected the weapons of offence and came back to attack the son of the deceased who had provoked him. The Court noted that “there was not 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”. However, with the injuries on vital parts of the body of the deceased, the offence was characterized as falling within Part I of Section 304 IPC.

22. Again in ***Raghubir Chand v. State of Punjab (2013) 12 SCC 294*** the person who succumbed to the injuries was not either of the two persons who were meant to be attacked by the accused. He happened to be their brother. The deceased was given knife blows in his abdomen as soon as he had reached the spot where the accused were attacking the other two brothers. Here again the Supreme Court applied Exception 4 to Section 300 IPC and converted the offence to one under Section 304 Part I IPC.

23. In ***Ankur Shivaji Gaikwad v. State of Maharashtra JT 2013 (7) SC 26***, which again was a case of Section 304 Part I IPC, where a single blow was made to the head of the deceased due to an altercation in the spur of the moment. In ***Vineet Kumar Chauhan v. State of Uttar Pradesh AIR 2008 SC 780*** the person who got killed was not the person with whom there had been an altercation. The offence was held to fall under Section 304 Part I IPC.

24. In the two decisions noted by the trial Court which have also been relied upon by the learned APP in this Court. The additional condition that the fight/dispute must have taken place with the deceased, appears to be reading in to Exception 4 something which is not there. The exception requires the crime to be 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 an unusual manner.”

25. In the present case, the post-mortem report confirms that there was only one injury on the deceased i.e. the stab wound on his back piercing his right side lung which undoubtedly was fatal. But the point to be noted is that it was a single stab injury. If indeed there was a plan to kill the deceased, the accused need not have stopped with that single stab. It is claimed that the deceased was not even in that plan of action as far as the attack by the Appellants on the family of the victims was concerned. The deceased appears to have emerged suddenly when the attack was in progress and in that process he was pounced upon by the accused and given the fatal stab wound. The attack was on all the members of the family and it was not an isolated attack on the deceased.

26. In the considered view of the Court in the manner in which the injured eye witnesses have described the attack, the killing of the deceased really happened at the spur of the moment. With the injury being on the vital part, it will not be possible for the Appellants to plead that there was no intention to cause his death. The Court is of the view that the offence should be

categorised as one falling under Part I of Section 304 IPC. While it is true that the fatal blow was given by A-3 using his knife, the presence of the other accused and the exhortation by A-1 is proved beyond reasonable doubt by the other injured eye witnesses. Therefore, the four accused would be liable for the same offence under Section 34 IPC having shared a common intention.

27. Consequently, the Court modifies the conviction of the four accused, as far as the killing of the deceased is concerned, from Section 302 read with Section 34 IPC to Section 304 (I) read with Section 34 IPC. The Court is not inclined to interfere with the conviction of the accused for the other offences.

28. Now turning to the question of sentence, it is seen from the nominal roll that the four accused have completed 6 ½ years of imprisonment. They appear to have no previous or pending cases against them and their conduct in jail has also been said to be satisfactory. In the circumstances the Court sentences the four accused for the offence under Section 304 Part I read with Section 34 IPC to the period already undergone. The fine amounts awarded against each of the accused and the sentences awarded for the other offences as ordered by the trial Court are left undisturbed. The sentences will run concurrently.

29. The appeals and pending applications are disposed of as per above terms.

30. A certified copy of this judgment be delivered forthwith by a Special Messenger to the Jail Superintendent, Tihar Jail, who will in turn immediately inform the Appellants of it and also take consequential action.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 23, 2018

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