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IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A.1279/2015

BALKESHWAR

...Appellant

Through:Mr. M.L. Yadav, Advocate

versus

STATE

...Respondent

Through:Ms Radhika Kolluru, APP for State along with Inspector Surender Singh

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CRL.A.15/2016

PARMOD KUMAR

...Appellant

Through:Mr. Sitab Ali Chaudhary, Advocate (DHCLSC) with Mr Azharuddin Chaudhary, Advocate

versus

STATE

...Respondent

Through:Ms Radhika Kolluru, APP for State along with Inspector Surender Singh

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CRL.A.41/2016

JITENDER KUMAR

...Appellant

Through:Mr.Harsh Prabhakar, Advocate (DHCLSC) with Mr Anirudh Tanwar and Ms Seema Rao, Advocates

versus

STATE

...Respondent

Through:Ms Radhika Kolluru, APP for State along with Inspector Surender Singh

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CRI..A.12/2016

VISHNU YADAV

...Appellant

Through: Mr Nitish Chaudhary, Advocate for
Mr Chetan Lokur, Advocate (DHCLSC)

versus

STATE

...Respondent

Through: Ms Kusum Dhalla, APP for State along
with Inspector Surender Singh

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE L.S. MEHTA

J U D G M E N T

30.01.2018

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Dr. S. Muralidhar, J.:

1. These are four appeals directed against the common judgment dated 23rd September 2015 passed by the learned Additional Sessions Judge (ASJ)-II, North West Rohini Courts, Delhi convicting the Appellants for the offences under Section 302/326/323 Indian Penal Code ('IPC') read with Section 34 IPC and the order on sentence dated 26th September 2015 whereby they were sentenced to:

- (i) undergo rigorous imprisonment for life (each) and a fine of Rs. 20,000/- (each) is imposed, in default of payment of fine, to undergo SI for 06 months for the offence punishable U/S 302/34 IPC.
- (ii) undergo rigorous imprisonment for a period of 05 years (each) along with fine of Rs. 10,000/- (each) for the offence U/S 326/34 IPC; in default of payment of fine, to undergo SI for 03 months.

- (iii) undergo rigorous imprisonment for a period of 01 year (each) alongwith fine of Rs. 1000/- (each) for the offence U/S 323/34 IPC; in default of payment of fine, to undergo SI for 01 month."

Case of the prosecution

2. The case of the prosecution begins with two calls made to the Police Control Room ('PCR') on 29th March 2013 – one at 8.22 am and the other at 8.33 am both stating that a quarrel was going on at II-115, Chelanwala Bagh, Mazhar Ke Pasi, Ashok Vihar, Phase-II. This was reduced as DD No.8A and entrusted to Sub-Inspector ('SI') Rajinder (PW30) who was posted at Police Station ('PS') Ashok Vihar. He along with Constable Narsi reached the spot and came to know that the injured had already been shifted to the hospital by a CAT Ambulance. In fact, this is also noted in the PCR form itself. The police were told that Mohd. Kayum Khan (PW10), Jigar (PW22) and one Shabana had received simple injuries whereas Shaukat Ali (deceased) had received serious injuries and had already been taken to the hospital. In the PCR form it was further noted that the persons gathered there informed that "*quarrel wale thane chale gaye*".

3. When PW30 reached L.NJP Hospital, he met the deceased, Shaukat Ali, and the other two injured persons, i.e. PW10 and PW22. While PW10 and PW22 were declared to be fit for statement, the deceased was declared not fit to make any statement.

4. PW30 recorded the statement of PW10 (Ex.PW10/A) and prepared a *tehrir* (Ex.PW30/A). The bloodstained clothes of PW10 were seized and put into a cloth *pulanda* and sealed. Likewise, the bloodstained clothes of the

deceased were also seized and put into a cloth *pulanda*. The *tehrir* was then to the Police Station ('PS') through Constable Narsi.

5. At this stage, it is important to examine the statement (*rukka*) of PW10. This was recorded in the hospital itself on 29th March 2013 at around 1pm and this was the earliest statement. In it, it was stated by PW10 that in the morning at 8.30 am, he was standing outside his shop when the four accused, i.e. Balkeshwar (A3) having a *danda* in his hand and his sons Parmod Kumar (A1) having an iron rod and Jitender Kumar (A2) having a cricket stump, accompanied by another person, Vishnu (A4), were standing. He stated that the first three were neighbours. A3 asked PW10 that the police complaint filed by him against them should be withdrawn. When PW10 declined, A3 started abusing him and when PW10 objected A3 started beating him. At that time, Shaukat Ali (deceased) and Jigar (PW22) reached there and tried to save PW10. A4 then caught hold of the deceased from behind and A1 beat him on the head with the iron rod (*saria*). A2 started beating PW22 with the wooden stump on his head and body. In the meanwhile, someone called the police on the 100 number and a CAT Ambulance arrived there which then took PW10, the deceased and PW22 to the LNJP Hospital.

6. PW30 also recorded the statement of Prabhat (PW13) on 29th March 2013 itself. The statement of PW13 made to the police under Section 161 Code of Criminal Procedure ('Cr.P.C.') (Ex.PW13/DX1) was to the same effect as the statement of PW10. The critical portion of that statement is that he was having a barber shop next to the shop of PW10. On hearing the commotion,

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he came out and noticed that A4 was holding the deceased from behind and A1 was attacking him on the head with his iron *saria*. A3 was attacking PW10 with his wooden danda and A2 was attacking Jigar with the wooden stump. Somebody called the police at number 100 and the four of them ran away.

7. The above two statements of PW10 and PW13, having been recorded at the earliest point in time on 29th March 2013 itself, formed the basis of the registration of the FIR in the present case.

Investigation

8. There were multiple investigating officers in the present case. While the FIR was initially registered under Section 307 IPC, after the deceased succumbed to his injuries in the hospital itself, Section 302/34 IPC was added and the investigation was entrusted to Inspector Satpal Pawar (PW25) on 2nd April 2013. However, apart from recording the statement of one more eye witness, Sunil (PW19), on 3rd April 2013, no other steps were taken by PW25.

9. Ultimately, the investigation was entrusted to Inspector Surender Singh (PW31) on 28th May 2013. On that very day, he got the MLCs of PW10 and PW22 deposited in the hospital for final opinion as to the nature of their injuries. On 31st May 2013, he got the exhibits deposited in the FSL, Rohini. On 6th June 2013, he got the scaled site plan (Ex.PW1/A) prepared at the instance of PW10 and other eye witnesses. On 7th June 2013, PW31 recorded the statement of the wife of the deceased, Nazma Khatoon (PW12). He collected copies of *kalandara* dated 8th November 2012 which showed

that there were previous disputes between A3 and his sons on the one hand and the deceased and his family members on the other.

10. PW31 also recorded the supplementary statement of PW10 on 6th June 2013, i.e. one day before recording the statement of PW12.

Medical Evidence

11. In the meanwhile, the post-mortem of the deceased was conducted by Dr. Anju Rani (PW9). The external injuries noted by PW9 on the body of the deceased were as under:

- “1. An abrasion, reddish scabbed, 2Acm x 1.6cm was present over right side of forehead, 1.5cm above right eye and 7.5cm away from midline.
2. An abrasion, reddish scabbed, 1cm x .4cm was present over right side of forehead, 2.5cm below and outer to injury No.1.
3. An abrasion, reddish scabbed, 1cm x Acm was present over right temporal region of scalp, 3.7cm above right ear and 4.5cm above injury no. 1 and 11cm away from midline.
4. Lacerated wound, stellate shape, measuring 1.4cm (horizontal limb) x 1.2cm (inner limb) x 2cm (outer limb) x bone deep situated over left side of forehead, 2cm above left eye brow and 5.5cm away from midline.
5. Contused lacerated wound, 4cm x 2.5cm x .5cm present over left parietal region of scalp, situated 4.5cma above and behind left ear, Bem away from midline and 5cm above injury no. 4.
6. Contusion, reddish 5.5cm x 2cm present over left side of

forehead 1 cm above injury no. 4."

12. The internal examination of skull and brain revealed the following:

"Skull & brain:

Sutural (diastatic) fracture of left parieto-temporal bone present at skull wall. Fracture of left orbital plate in left anterior cranial fossa present at the base of skull. Thick layer subdural hematoma was present uniformly over right cerebral hemisphere (volume of SDH = 150 ml). Contusion-laceration of bilateral basifrontal and right basi-temporal lobes of cerebrum was present. Brain stem hemorrhage was also present. On cut section, petechial hemorrhage was present in the white matter of frontal lobe of right cerebral hemisphere."

13. The opinion as to the cause of death was "cranio-cerebral damage consequent upon blunt force trauma to the head". Subsequently, when the weapons were recovered, i.e. wooden *danda*, metallic rod, and wooden stump, PW9 opined that the injuries could be caused by those weapons.

Framing of Charge and Trial

14. Initially, a charge-sheet was filed on 19th June 2013. By an order dated 17th July 2013, the following charges were framed against the four accused:

"That on 29th March 2013 at about 8.15 AM at Gali near Mazar Peer Baba Jailorwala Bagh, Delhi within the jurisdiction of PS Ashok Vihar you all accused in furtherance of your common intention committed murder of Shaukat Ali by giving iron rod blows on his head with intention to cause his death and thereby you all committed and offence punishable under Section 302/34 IPC and within my cognizance.

Secondly on the above said date, time and place you all accused in furtherance of your common intention gave the iron rod and the wooden stump (wicket) blow on the head and upon the body of Qayyum Khan with such intention or knowledge and under

such circumstances that if you by that act caused death of Qayyum Khan, you would be guilty of murder and thereby all committed an offence punishable under Section 307/34 IPC and within my cognizance.

Thirdly, on the above said date, time and place, you all in furtherance of your common intention voluntarily caused hurt on the person of Jigar and thereby you all committed an offence punishable under Section 323/34 IPC and within my cognizance."

15. The prosecution examined 32 witnesses. Interestingly, on 28th October 2013, the date on which the supplementary charge sheet was filed, as many as 26 eye witnesses were examined. The counsel appearing for the Appellants in this Court pointed out that their counterpart in the trial Court, a legal aid counsel, was given no time to prepare and cross-examine several of the 26 witnesses who were examined on a single date, i.e. 28th October 2013. On 9th February 2014, the remaining six witnesses were examined.

16. In their respective statements under Section 313 Cr PC, the Appellants denied their involvement in the commission of the offence. As far as A1 was concerned, he claimed that the accused were pressurized to sell their house to the complainant. It is pointed out that the wife of A3 was not even being allowed to stay in her house. As far as A2 was concerned, he too maintained the same version. A3 stated that he and his wife had called the police on 8th November 2012 when there was a quarrel during which the wife of A3 was beaten up by the complainant. He claimed that they were forced to compromise the matter in the PS. On 26th April 2013, when the wife of A3 went to the house to take some clothes, PW10 abused her and threatened her

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to go away and not live there. Even at the time of deposition in the trial Court, A3 disclosed that his wife had been forced to reside in their native village. He apprehended that his house may have been trespassed and the household items may have also been stolen.

17. The stand taken by A4 was that on the date of the incident, he was not even present at the spot but was on duty in his factory, i.e. DD Gears Limited, A-34, G.T. Karnal Road, Industrial Area. According to A4, he worked in two shifts with the first shift from 10 pm on 28th March 2013 to 6 am on 29th March 2013 and the second from 6 am to 2 pm on 29th March 2013. He claimed that after 2 pm on 29th March 2013, he left the factory when the relieving workman arrived. He then claims to have gone to the PS to know the whereabouts of his relatives and was made to sit there and implicated falsely in the present case.

18. No witness was examined for the defence.

Impugned judgment of the Trial Court

19. By the impugned judgment dated 23rd September 2015, the trial Court held the Appellants guilty of the aforementioned offences under Sections 302/326/323/34 IPC and in that process, came to the following conclusions:

- (i) It was proved that the accused had the motive to inflict injuries on PW10. It was also proved that they had made preparations for causing hurt to PW10 by means of dandas, stump and iron rod.
- (ii) The opinion regarding the weapons of offence revealed that the injuries sustained by PW10 had been caused by blunt-force and were possible by the weapons examined by PW9. Although the injuries to

PW10 were of grievous nature on account of fracture of shaft of the right clavical and fracture of distal end of fourth metacarpal bone of PW10, the prosecution failed to prove that the injuries sustained by PW10 were on his vital part. Consequently, it was held that the ingredients of Section 307 IPC qua PW10 were not fulfilled. The offence committed was held to be one under Section 326 IPC and, therefore, all accused were held guilty under Section 326/34 IPC.

- (iii) The trial Court noted that there was no instigation on the part of PW22 or the deceased. It had to, therefore, be held that the Appellants had the intention to commit the offences charged with.
- (iv) It was held that all the six injuries on the body of the deceased were on vital parts and all proved fatal to his life. There was no instigation on the part of the deceased whereas the four accused left him in an unconscious condition at the spot and ran away from there. Consequently, all of them were held guilty under Section 302/34 IPC.

Analysis and Reasons

20. This Court has heard the submissions of Mr. Harsh Prabhakar, learned counsel appearing for A2 (appellant in CrI.A.No.41/2016); Mr. M.L. Yadav, learned counsel appearing for A3 (appellant in CrI.A.No.1279/2015); Mr. Sitab Ali Chaudhary, learned counsel appearing for A1 (appellant in CrI.A.No.15/2016); and Mr. Nitish Chaudhary, Advocate who is appearing on behalf of Mr. Chetan Lokur, learned counsel for A4 (appellant in CrI.A.No.12/2016). Ms. Radhika Kolluru and Ms. Kusum Dhalla, learned APPs, have made submissions on behalf of the State.

21. At the outset, it requires to be noticed that Parmod Kumar (A1) was declared a juvenile on the date of the commission of the offence by this Court vide its order dated 20th December 2016 in CrI.A.No.15/2016. With A1 having already served out the three years of his sentence in terms of the Juvenile Justice (Care and Protection) Act ('JJ Act'), his appeal is only relevant as regards his conviction. The second factor to be noted is that the other Appellants have completed slightly over five years of imprisonment (inclusive of remissions).

22. If the *rakka* is to be taken to be the correct depiction of the events, particularly since it was on the statement of the injured eye-witness PW10, and if it is seen in the context of the scaled site plan, it is seen that the houses of A3 and his two sons and the house of the deceased were opposite each other in the *jhuggi-jhopri* cluster ('JJ cluster'). The house of PW10, where he also had a repair shop (and where PW22 also stayed), was not adjoining the house of the deceased. That shop was at a crossing at a distance of around 200m from the house of the deceased. It would not have been clearly visible from the house of the deceased.

23. It was pointed out by learned counsel for the Appellants, and not effectively countered by learned APPs for the State, that in the supplementary statement recorded of PW10 the major improvement was to the effect that all the accused were beating the deceased.

24. Indeed, both the statements of PW10 and PW13 made in the first instance to the police under Section 161 Cr PC do not say that all the accused were beating up the deceased. There were specific acts attributed to

each of them. A3 was having a *danda* in his hand and was beating PW10. A2 was having a cricket stump was beating up PW22. A1 who has having an iron rod (*saria*) was inflicting blows on the head of the deceased who was being held from behind by A4. Thus, the improvements sought to be made in the supplementary statement and thereafter in the Court, cannot be said to be immaterial or insignificant.

25. Having carefully perused the evidence of PW10, PW13, and PW22, the Court is of the view that the three witnesses have consistently and cogently spoken about the sequence of events reflected in the *rukka* which finally led to the registration of the FIR.

26. What the prosecution has not been able to prove is that all the four accused assembled in front of the shop of PW10 three of them, i.e. A1 to A3, being armed and A4 being unarmed. Therefore, the question of the attack on him being as a result of 'a sudden fight', in the heat of passion in a sudden quarrel, as mentioned in Exception 4 to Section 300 IPC cannot said to be applicable. The attack was pre-planned. All the four accused shared a common intention which is why three of them at least came armed and assembled in front of the shop of PW10 without any provocation whatsoever.

27. The trigger to the above aggression by the accused was an incident of 22nd March 2013 where the young child of the deceased was urinating in front of the house of the accused to which the accused objected. This led to some quarrel and beatings being subjected to the deceased by A3 which was stopped by the intervention of PW10. Even otherwise, the accused

themselves in the cross-examination of the aforesaid eye witnesses, have accepted that several quarrels had taken place between the families of A3 and the deceased.

28. Consequently, the conviction of the four accused for the offences under Sections 326/34 IPC for inflicting grievous hurt on the person of PW10 and the conviction for the offence under Section 323/34 IPC for injuries caused to other victims, including the sentences and fine amounts awarded, do not call for any interference whatsoever.

29. Turning now to the offence under Section 302/34 IPC, the question is whether there was any pre-planning or pre-meditation on the part of the four accused to inflict such serious injuries on the deceased as would likely to cause his death.

30. In this context, if the sequence of events is carefully perused, it is plain that only when the deceased sought to rescue PW10 that A1 started attacking him on his head with an iron rod with A4 holding him from behind. This part of the event, therefore, appears to be on the spur of the moment, without any premeditation. Secondly, it cannot be said that all the accused then and there shared a common intention to kill the deceased. Although in the subsequent statement under Section 161 Cr PC, certain exhortations were attributed to some of the accused, the Court is not prepared to accept such improvements, particularly when the supplementary statement under Section 161 Cr PC was recorded after a considerable gap.

31. Ms. Radhika Kolluru and Ms. Kusum Dhallia, learned APPs for the State,

sought to point out that it is only on account of the two IOs preceding PW31 not taking effective steps in recording the statements of the eye-witnesses did the need arise to record a supplementary statement under Section 161 Cr PC. Further, due to these lapses the statement implicating all the four accused in the killing of the deceased victim could not be taken at the earliest point in time. It was argued that it cannot be said that the police has deliberately tried to distort the actual events by getting the supplementary statement recorded.

32. The Court is of the view that the statements of these very witnesses made to the police in the first instance and their deposition in the trial Court are so vastly different that it cannot escape the attention of any person reading the evidence that there are material improvements made by these eye-witnesses through their subsequent statements. This cannot be accepted as being truthful or reliable.

33. Turning now to the killing of the deceased, the fatal injuries on his skull were obviously attributable to the blows inflicted by A1 using an iron rod. If one keeps aside the exaggerations of the eye-witnesses, it is evident that it was only A1 and A4 who were involved in the killing of the deceased, i.e. A4 was holding the deceased from behind and A1 was attacking him with an iron rod.

34. Qua the deceased, therefore, it has to be seen whether A1 and A4 can take advantage of Exception 4 to Section 300 IPC. Exception 4 uses the expression 'sudden fight in a heat of passion in a sudden quarrel'. As far as the first part is concerned, it could be said that qua the deceased, there was

no premeditation of all the accused and even on the spot, it could not be said that all of them shared their common intention. While A4, who was holding the deceased, and A1, who was attacking him, could be said to have shared a common intention qua PW10, the same cannot be said of either A3 (who was attacking PW10) or A2 (who attacked PW22 with a cricket stump).

35. The Court is satisfied that *qua* A1 and A4, the offence cannot be said to be outside the scope of Exception 4 to Section 300 IPC. In other words, it should not be viewed as murder punishable under Section 302 IPC but culpable homicide not amounting to murder punishable under Section 304 Part I IPC. This is because the attack on the deceased by A1 and A4 was not premeditated and happened at the spur of the moment.

36. Consequently, the Court is inclined to modify the impugned judgment of the trial Court convicting A1 and A4 for the offence under Section 302/34 IPC to a conviction for the offence under Section 304 Part-I/34 IPC. The Court accordingly acquits A2 and A3 for the offence under Section 302/34 IPC.

Sentence

37. As regards the sentence to be awarded to A1 and A4 for the offence under Section 304 Part-I/34 IPC, the Court need not consider the case of A1 since he has been declared a juvenile at the time of the commission of the offence and has already served out the maximum sentence that he could be given in terms of the JJ Act.

38. Turning to A4, it is seen that the offence is punishable either with

rigorous imprisonment ('RI') for life or, in the alternative, for a term which may extend to ten years. The Court notes that A4 himself was not an immediate relative of A1, A2 and A3. He was perhaps an acquaintance. He, therefore, could not have shared the same motive vis-à-vis the deceased as A1 might have. In fact, A4 had no previous quarrel with the deceased. Secondly, A4 was unarmed and his role was to hold the deceased from behind while A1 attacked the deceased. Keeping all these facts and the fact that his nominal roll shows that there is no other pending case and his conduct in jail has been satisfactory, the Court sentences A4 to RI for a period of six years with the fine amount being maintained at Rs.20,000/- and the default sentence in case of failure to pay fine as SI for six months.

Irregularities in Trial Procedure

39. The Court is constrained to note that 26 prosecution witnesses, including eye witnesses, were examined by the trial Court on a single day and that too on the very same day that a supplementary charge sheet was filed. This gave no time to the defence counsel to prepare and properly cross-examine the witnesses. This has prejudiced the accused persons as they were denied a proper and effective opportunity to put forth an adequate defence.

Conclusion

40. The result of the above discussion is as under:

- (i) The conviction of all the accused for the offences under Sections 326/34 and 323/34 IPC and the sentences and fine amounts awarded to them for those offences are hereby confirmed.
- (ii) The Appellants – Balkeshwar (A3) and Jitender (A2) – are acquitted

of the offence under Section 302/34 IPC and to that extent, the impugned judgment of the trial Court and the corresponding order on sentence stands set aside.

- (iii) The impugned judgment of the trial Court stands modified qua A1 (Pramod) and A4 (Vishnu) inasmuch as their conviction for the offence under Section 302/34 IPC is converted into conviction under Section 304 Part-I/34 IPC.
- (iv) Since A1 has been declared to be a juvenile and has served out the maximum possible sentence for the aforementioned offence, as far as he is concerned, no further orders are called for. As far as A4 is concerned, the order on sentence for the offence under Section 302/34 IPC is set aside and he is sentenced for the offence under Section 304 Part-I/34 IPC to RI for six years together with fine of Rs.20,000/- and upon failure to pay the fine, to undergo SI for a further six months.
- (v) It is clarified that the impugned judgment of the trial Court regarding compensation to be paid to the family of the victim from the fine amount stands undisturbed.

41. The appeals are disposed of in the above terms. The trial Court record be returned forthwith along with a certified copy of this judgment.


S. MURALIDHAR, J.


I.S. MEHTA, J.

JANUARY 30, 2018

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