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

Judgment Reserved on 09th January, 2020
Judgment Pronounced on: 15th January, 2020

+ **CRL.L.P. 3/2020**

STATE

..... Petitioner

Through: Ms. Neelam Sharma, APP for the State
with Inspector Vishesh Kumar, Police
Station Bhalswa Dairy.

versus

RAM NATH CHOUDHARY & ANR.

..... Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J

1. By the present Leave Petition filed under Section 378(1) of the Code of Criminal Procedure (hereinafter referred to as '**Cr.P.C.**'), the State seeks enhancement of sentence pursuant to the judgment dated 23.09.2019 passed by Additional Sessions Judge, Special Judge (NDPS), North District, Rohini Courts, New Delhi, whereby the respondents (accused persons before the Trial Court) were convicted for the offences punishable under Sections 304(II)/34 of the Indian Penal Code (hereinafter referred to as '**IPC**').

2. The brief facts of the case, as recorded by the learned Trial Court are reproduced as under:

“Brief facts of the prosecution case are that the accused persons along with accused Govind (JCL) were arrested by the Police officials of Police Station Bhalswa Dairy, Delhi and were challaned to the court for trial of commission of the offences punishable U/s 302/34 IPC. Prosecution story, as unfolded from the perusal of the charge-sheet is that on 28.07.2013 on receipt of DD No.4B, SI Krishan along with Ct. Laxman Pandey reached at BJRM hospital where on MLC no. 63252/13 patient Dharmender Sharma aged 32 years was found admitted and it was mentioned on the MLC that patient was unconscious and not responding to physical stimulation and had been declared brought dead. In the hospital, witness Poonam met who got recorded her statement as:

I am residing at tenanted premises i.e. Gali no. 19, D block, Kargil colony, Mukundpur. Yesterday on 27.07.2013, the neighbourer of our room Ram Nath Chaudhary had hosted a party in lieu of birth of a baby girl and that party was going on the roof of our room. In that party, Kundan Kumar and Govind Kumar were taking liquor. In the meantime, they also called my husband and my husband also started taking liquor. During that, a scuffle took place between them and Kundan asked my husband to give Rs.500 back on which my husband asked Kundan that he had brought Drill machine from my husband and has not made payment for that. On this, Kundan at once took out 500 rupees note and gave it to my husband. For some time Kundan remain pacified but later on started abusing my husband. He asked my husband to return back the remaining amount as Rs.500/- could not be the amount of drilling machine otherwise he will teach my husband a lesson and whatever my husband had taken inside in the form of liquor he will take it out by stabbing knife

in his stomach, Govind and Ramnath also took the side of Kundan. I was watching all this in the stairs but the when the matter was not sorted, at about 11 pm, I also rushed to the roof and tried to pacify my husband and Kundan. After some time, Kundan again started abusing my husband and stated that today let him (my husband) finish as earlier also he had not paid for the party. Ramnath and Govind took side of Kundan and they all lifted my husband and thrown him in the nearby house. I immediately after shouting ran towards the nearby house. Ramnath also came there and we both after taking TSR of Mohit reached at Jagjivan Ram hospital, where my husband was declared brought dead by the doctor.”

3. On completion of the investigation, a charge sheet was filed against the accused persons and charges for the offences under Section 302/34 of IPC were framed against them to which they pleaded not guilty and claimed trial, however, accused Govind was declared as a juvenile and proceedings qua him were initiated before Juvenile Justice Board.
4. To bring home the guilt of the accused persons, prosecution examined twenty witnesses in all. Statements of accused persons were recorded under Section 313 of Cr.PC, wherein they reiterated their innocence and denied all prosecution charges and both accused persons took a plea that deceased had a quarrel with them which was resolved and they returned to their respective houses, however, the deceased remained on the roof in an inebriated condition and slipped and fell down from the roof. No defence evidence was led by the accused persons.

5. Ms. Neelam Sharma, learned APP for the State opened her submissions by contending that the impugned judgment dated 23.09.2019 was based on conjectures and surmises; that the view taken by the learned Trial Court is contrary to the facts of the present case and the established principle laid down by the Hon'ble Apex Court; that the prosecution has successfully proved its case against the respondents for the charged offences beyond any reasonable doubt.
6. Learned APP for the State restricting her arguments to the extent that the respondents are liable to be punished for the offence punishable under Section 302 IPC contended that the deliberate act of the respondents of throwing the deceased from the rooftop shows their premeditation and intention to kill the deceased and clearly brings the offence within the ambit of Section 302/34 IPC. She further added that 'knowledge' as contrasted with 'intention' signifies a state of mental realization with the bare state of conscious awareness of certain facts in which human mind remains supine or inactive. On the other hand, 'intention' is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. To substantiate her arguments, learned APP for the State has placed reliance on the decision rendered by the Apex Court in *Basdev v. State of Pepsu* reported in *AIR 1956 SC 488*.
7. Ms. Sharma further contended that the medical evidence adduced by the prosecution and in view of injury no. 3 (Abraded bruise on the left shoulder of size 3cm x 2 cm.) of the deceased, pushing/throwing

the deceased from terrace cannot be ruled out, which also lends credence to the version of PW-1 (Poonam).

8. We have heard the learned APP for the State at length and carefully examined the impugned judgment and the material available on record as well.
9. Undoubtedly, medical evidence plays a vital role to ascertain the guilt or innocence of the accused persons. In the instant case, PW-10 Dr. V.K. Jha, Medical Officer, BJRM Hospital has deposed that he conducted the Post Mortem on the dead body of deceased and observed following injuries:
 - i. *Abrasion of size 3cm x 2cm and 2cm x 2cm at the lower end of right and left leg respectively.*
 - ii. *Abrasions of size 3cm x 3cm mid region of left leg.*
 - iii. *Abraded bruise on left shoulder of size 3cm x 2cm.*
 - iv. *lacerated wound on left occipital region 3cm x 1 cm x bone deep.*
10. PW-10 (Dr. V.K. Jha) opined that the cause of death, Crania Cerebral Damage was because of a fall from height; that possibility of throwing/pushing cannot be ruled out in view of the injury No. 3 (Abraded bruise on the left shoulder of size 3cm x 2 cm.); that all injuries were ante mortem in nature and the head injury was sufficient to cause death in the ordinary course of nature and time since death was approximately same as time when the deceased was declared brought dead i.e. 12:23 a.m. on 28.07.2013.
11. Further, in order to determine whether the respondents had committed the said offence with premeditation and intention to cause

death of the deceased, we deem it appropriate to peruse the testimonies of PW-1 (Poonam) and PW-2 (Pappu).

12. Ms. Poonam, wife of the deceased appeared as PW-1 and deposed as under: -

“While my husband and accused persons were drinking at the roof of our house, accused Kundan demanded Rs.500/- from my husband. My husband earlier had left his drill machine at the house of accused Kundan where he worked. Accused Kundan told my husband that he would return his drill machine only when my husband would pay him Rs.500/-. Accused Kundan falsely demanded Rs.500/- from my husband who refused to pay the same by saying that there is no amount he owed to accused Kundan. Accused Kundan said that if my husband would not pay Rs.500/- to him, he would get the liquor consumed by him back by stabbing his stomach (agar tune 500 rupaye nahi diye to jitna piya hai sharab chaku marke nikal lunga). Accused Kundan, Ramnath and Gobind (JCL) started quarreling (hathapai) with my husband. I saved my husband from the accused persons and brought him to the ground floor of our house. The mobile phone of my husband was left behind at the roof of our house where my husband went to the roof our house to took back his mobile phone. The accused Kundan, Ramnath and Gobind (JCL) lifted my husband and threw him in the aangan (courtyard) in the house of my neighbourhood i.e. house belonging to Pappu. I was in the staircase of my house going upwards to the roof of my house. I followed my husband to the upstairs. I was pregnant and walking slowly in the staircase. I saw the accused persons threw my husband in the courtyard of the house of Pappu. Gobind (JCL) jumped on the body of my husband who was lying on the ground in the courtyard of Pappu.”

13. PW-2 Pappu, a neighbor of the deceased and the respondent No. 1 (Ramnath Choudhary) turned hostile. During cross examination by learned APP for the State, he deposed that:

“It is correct that the incident took place in the year 2013 during summer season. It is correct that the incident took place on 27.07.2013. It is correct that there was a party on the roof top of the house of accused Ramnath. It is also correct that upon hearing some scuffle in the party I along with Smt. Poonam went to the said roof top. It is correct that said Smt. Poonam counseled the accused persons including her husband Dharmender and the matter got pacified. It is correct that after some time the accused persons and said Dharmender again started quarreling each other with fits and blows regarding some money transactions between them.”

14. Hence, based on the abovementioned evidence on record, we deem it appropriate to analyze whether the present case would fall within the ambit of Section 302 of IPC or Section 304 of IPC.
15. The Apex Court in a catena of Judgments has discussed the distinction between Section 302 and Section 304, Indian Penal Code. In ***Vijay Ramkrishan Gaikwas v. State of Maharashtra*** reported in ***(2012) 11 SCC 592***, it was observed as under: -

“..... The occurrence thus has the features of an incident in which an injury is inflicted in a sudden fight without pre- meditation in the heat of passion upon a sudden quarrel within the contemplation of exception 4 to Section 300 of the Indian Penal Code, which takes the case out of the purview of murder as defined in the said section. It is true that only one injury was caused to the deceased but the same is not conclusive by itself, for even a single injury can in a given case constitute murder, having regard to the weapon used and the part of the

body chosen for inflicting the injury. The legal position in this regard is well settled by the decision of this Court in Bavisetti Kameshwara Rao alias Babai v. State of Andhra Pradesh : 2008 (15) SCC 725:

(Para 13) It is seen that where in the murder case there only a single injury is, there is always a tendency to advance an argument that the offence would invariably be covered under Section 304 Part II Indian Penal Code. The nature of offence where there is a single injury could not be decided merely on the basis of the single injury and thus in a mechanical fashion. The nature of the offence would certainly depend upon the other attendant circumstances which would help the court to find out definitely about the intention on the part of the accused. Such attendant circumstances could be very many, they being (i) whether the act was premeditated; (ii) the nature of weapon used; (iii) the nature of assault on the accused. This is certainly not an exhaustive list and every case has to necessarily depend upon the evidence available. As regards the use of screwdriver, the Learned Counsel urged that it was only an accidental use on the spur of the moment and, therefore, there could be no intention to either cause death or cause such bodily injury as would be sufficient to cause death. Merely because the screwdriver was a usual tool used by the accused in his business, it could not be as if its use would be innocuous."

16. The Apex Court in **K. Ravi Kumar Vs. State of Karnataka** reported in **(2015) 2 SCC 638**, has again considered the distinction between Section 302 IPC and Section 304 IPC and observed as under: -

"11. In Surinder Kumar v. Union Territory, Chandigarh: (1989) 2 SCC 217, this Court on the same issue held that if on a sudden quarrel a person in the heat of the moment picks up a weapon which is handy and causes injuries

out of which only one proves fatal, he would be entitled to the benefit of the Exception provided he has not acted cruelly. This Court held that the number of wounds caused during the occurrence in such a situation was not the decisive factor. What was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a fit of anger. Dealing with the provision of Exception 4 to Section 300, this Court 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."

12. In Ghapoo Yadav and Ors. v. State of M.P.: (2003) 3 SCC 528, this Court held that in a heat of passion there must be no time for the passion to cool down and that the parties had in that case before the Court worked themselves into a fury on account of the verbal altercation in the beginning. Apart from the incident being the result of a sudden quarrel without premeditation, the law requires that the offender should not have taken undue advantage or acted in a cruel or unusual manner to be able to claim the benefit of

Exception 4 to Section 300 Indian Penal Code. Whether or not the fight was sudden, was declared by the Court to be decided in the facts and circumstances of each case. The following passage from the decision is apposite:

10. The help of Exception 4 can be invoked if death is caused: (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. 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 Indian Penal Code 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".

11.After the injuries were inflicted the injured had fallen down, but there is no material to show that thereafter any injury was inflicted when he was in a helpless condition. The assaults were made at random. Even the previous altercations were verbal and not physical. It is not the case of the prosecution

that the accused-Appellants had come prepared and armed for attacking the deceased..... This goes to show that in the heat of passion upon a sudden quarrel followed by a fight the accused persons had caused injuries on the deceased, but had not acted in a cruel or unusual manner. That being so, Exception 4 to Section 300 Indian Penal Code is clearly applicable.....

13. In Sukhbir Singh v. State of Haryana: (2002) 3 SCC 327, the Appellant caused two Bhala blows on the vital part of the body of the deceased that was sufficient in the ordinary course of nature to cause death. The High Court held that the Appellant had acted in a cruel and unusual manner. Reversing the view taken by the High Court this Court held that all fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of Exception 4 to Section 300 Indian Penal Code. In cases where after the injured had fallen down, the Appellant-accused did not inflict any further injury when he was in a helpless position, it may indicate that he had not acted in a cruel or unusual manner. This Court observed:

19. 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 Indian Penal Code. 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.

14. In Mahesh v. State of M.P.: (1996) 10 SCC 668, where the Appellant had assaulted the deceased in a sudden fight and after giving him one blow he had not

caused any further injury to the deceased which fact situation was held by this Court to be sufficient to bring the case under Exception 4 to Section 300 of Indian Penal Code. This Court held:

4. Thus, placed as the Appellant and the deceased were at the time of the occurrence, it appears to us that the Appellant assaulted the deceased in that sudden fight and after giving him one blow took to his heels. He did not cause any other injury to the deceased and therefore it cannot be said that he acted in any cruel or unusual manner. Admittedly, he did not assault PW 2 or PW 6 who were also present along with the deceased and who had also requested the Appellant not to allow his cattle to graze in the field of PW 1. This fortifies our belief that the assault on the deceased was made during a sudden quarrel without any premeditation. In this fact situation, we are of the opinion that Exception 4 to Section 300 Indian Penal Code is clearly attracted to the case of the Appellant and the offence of which the Appellant can be said to be guilty would squarely fall Under Section 304(Part I) Indian Penal Code.....”

17. The respondents have been sentenced for the offence punishable under Section 304(II)/34 of IPC. Section 304 of IPC, reads as under:

“304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause

death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

18. An offence is stated to be culpable homicide not amounting to murder, punishable either under Part I or Part II of Section 304 of IPC, if: -

a) It comes under any of the five exceptions mentioned under Section 300 of IPC, or

b) It does not come under the four clauses of the definition contained in Section 300 of IPC.

19. Consequently, if any of the Exceptions mentioned under Section 300 of IPC are attracted, the offence would be punishable under Part-II of Section 304 of IPC. Section 300 of IPC which reads as under: -

“300. Murder. —Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

Secondly. —If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

Thirdly—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

Fourthly—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

xxx

xxx

xxx

Exception 4. —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's having taken undue advantage or acted in a cruel or unusual manner.

Explanation. —It is immaterial in such cases which party offers the provocation or commits the first assault.”

20. In our considered view, to invoke the provisions of exception 4 of Section 300 of IPC, four ingredients have to be satisfied i.e.

- 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.*

21. A perusal of the abovementioned testimony of PW-1 (Poonam) and PW-2 (Pappu) proves that respondents and the deceased were drinking together at the relevant time and a sudden scuffle took place between them at the spur of the moment for Rs.500/-, pursuant to which the respondents without any premeditation pushed the deceased off the terrace. It is pertinent to mention herein that the respondent/Ramnath Chaudhary immediately after the incident took the deceased to the hospital for treatment, which goes to prove that the respondents did not have any intention to kill the deceased. Thus, there was no hostility, no motive, no premeditation and the interval between conception and execution was not very long.

22. In view of the above discussion, we are of the considered view that the present case falls within the purview of Section 304 Part II and the learned Trial Court has rightly convicted and sentenced the respondents for the said offences.

23. Keeping in view the facts of the present case and applying the principles laid down by the Hon'ble Apex Court, this Court is of the view that it would neither be fair nor reasonable to convict the respondents under Section 302 IPC.
24. Having regard to the principles laid down by the Apex Court in the case of *Ghurey Lal vs. State of U.P.* reported at **2008 (10) SCC 450**, we do not find that there is any perversity in the reasoning given in the impugned judgment and for the abovementioned reasons, this Court does not find any reason to interfere with the same.
25. We, therefore, do not find any illegality or perversity in the impugned judgment rendered by the learned Trial Court. The learned Trial Court has taken a holistic view in the matter and carefully analysed the entire evidence placed on record.
26. Accordingly, no ground to interfere with the impugned judgment is made out and the leave petition is dismissed.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

JANUARY 15, 2020

gr/sr