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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 31st May, 2022Pronounced on: 8th July, 2022

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CRL.A. 448/2018**MUKESH KUMAR**

.... Appellant

Represented by: Ms. Kavita Jha, Mr. Aditeya
Bali, Advocates.

versus

STATE

....Respondent

Represented by: Mr. Tarang Srivastava, APP for
State with Insp. Ashok PS
Rohini South.**CORAM:****HON'BLE MS. JUSTICE MUKTA GUPTA****HON'BLE MS. JUSTICE MINI PUSHKARNA****J U D G M E N T****MINI PUSHKARNA, J.**

1. This appeal arises out of the judgment dated 30.01.2018 and order on sentence dated 06.02.2018 passed by learned ASJ-04 (North West District), Rohini Courts in SC No.52312/2016, arising out of F.I.R. No. 17/2013 under Section 302 IPC registered at Police Station South Rohini. The appellant has been convicted for offence punishable under Section 302 IPC and sentenced to undergo Rigorous Imprisonment for life and a fine of Rs.10,000/-. In default of payment of fine, he has been directed to undergo Simple Imprisonment for 3 months. Benefit of Section 428 Cr.P.C. was also extended to the



appellant.

2. The prosecution case is that upon call being received by the Police Control Room about quarrel in the house of Krishan Pal near Tula Ram School in which one person had sustained injuries, S.I. Amit from Police Station Mangolpuri reached the spot of incident, i.e., House No. 29/1, Village Mangolpur Kalan, Delhi. On his reaching the spot, it transpired that the injured had been taken to hospital in PCR van and that the said area fell within the jurisdiction of P.S. South Rohini. S.I. Amit therefore informed the said police station about the incident and the matter was assigned to S.I. Manoj for taking appropriate action. Almost immediately thereafter, a call was received at police station South Rohini that the injured was declared dead by the doctors. The said information was passed on to S.I. Manoj telephonically.

3. During preliminary inquiry at the spot, S.I. Manoj gathered that the deceased and the appellant herein were living together in a room in the house in question. They quarrelled with each other in the night, resultantly, bleeding started from the nose of the deceased. The appellant informed that he was cooking food at that time when deceased fell down. The appellant picked up the deceased, but he again fell down. By observing that the situation was serious and required further inquiry, S.I. Manoj recorded D.D. at Police Station South Rohini on 14.01.2013 at 1:30 PM. In the meanwhile he requested for preservation of dead body in mortuary and locked the tenanted room of the deceased and kept its keys.

4. Relatives of the deceased came to police station on 17.01.2013,



on which further proceedings were assigned to S.I. Bal Kishan due to non availability of S.I. Manoj. He got the post-mortem conducted and delivered the body to the relatives of the deceased. As the post-mortem report indicated it to be a case of murder, S.I. Bal Kishan went to the spot and recorded the statement of complainant/landlady, Smt. Usha Dagar (PW-4), who was residing on second floor of the same house.

5. Smt. Usha stated that the deceased was living as tenant in one room on first floor of her property since last two and a half years and used to work as labourer. Although he was in the habit of taking liquor, yet he had never created any scene. The appellant had started residing with the deceased in his tenanted room from 16.12.2012. On being asked about him, deceased had informed that the appellant was a mason hailing from his village and will leave his home within a month after receiving salary. After returning from work in the evening both of them used to consume liquor before going to sleep. In the evening of 13.01.2013, deceased and the appellant had consumed liquor. Manoj Ram, another tenant on first floor of the same house had also joined them. When he was returning, appellant had asked him to stay over for more liquor and that they will gamble thereafter. Noise of something falling down in the room of the deceased was heard by her and other occupants of the house at about 9:00 PM, where upon she came down stairs from second floor where she resided, to first floor where room of the deceased was located. The door of their room was closed from inside. On peeping through the holes of the door, she saw the deceased lying on the floor with his face down and appellant



hitting him with kicks and fists. On the door being knocked for some time, appellant opened the door. She informed the PCR on seeing that the deceased was bleeding from his nose. When he was turned on his back, his hands were found to be tied with *parna* (*gamcha*). When appellant was asked the reason for tying the hands of the deceased, he immediately opened the knot and threw the *parna* aside.

6. On the basis of the aforesaid complaint, F.I.R. was registered and investigation was taken over by Inspector V.N. Jha. Crime team inspected the spot and lifted the evidence. They found one button which was white on one side and off-white on other side in which a broken thread was also found entangled, Ex. PW4/C. Around 50 playing cards were recovered from the incident spot, which were exhibited as Ex.PW4/F. Other recoveries included Ex.PW4/B, the yellow cloth (*gamcha*) and Ex. PW4/E, seizure memo of liquor bottle.

7. On the basis of the evidence collected in the case, appellant was arrested on 18.01.2013. On completion of investigation, charge sheet was filed in the court on 17.04.2013 and charge under Section 302 IPC was framed on 03.05.2013. Appellant pleaded not guilty and claimed trial. To prove its case, prosecution examined 27 witnesses.

8. PW-4, Smt. Usha, landlady deposed that at about 9 PM after hearing noise from the room of the deceased, she came downstairs from second floor to first floor. Other tenants who were residing on the first floor also raised an alarm and informed her that the deceased and the appellant were fighting inside their room. She found that the door of their room was locked from inside. On peeping through a chink which was there in the door of the said room, she saw the



deceased lying on the floor with his face down and appellant was hitting him with kicks and fisticuffs. They raised an alarm to open the door. They also kicked the door but the same could not be opened. After a considerable gap, appellant opened the door. Upon entering the room PW-4 saw that the deceased was lying on the floor in a face down position and was bleeding from his nose. When they turned the deceased on his back, she noticed that hands of the deceased were tied with one *parna* (*gamcha*). Upon her asking the appellant as to why the hands of the deceased were tied, he immediately opened the knot of the *parna* and threw it.

9. Testimony of PW-4, Usha was corroborated by the testimony of PW-5, Shri Tarkeshwar, who was also a tenant on the first floor of the said premises. He deposed that on 13.01.2013 at about 9 PM when all the tenants including himself, after taking dinner were in the process of going to sleep, he heard a noise and as such all the tenants came out of their respective rooms. The said noise was coming from the room occupied by the deceased and the appellant. They tried to open the door of room of the deceased but same was found bolted from inside. They knocked on the door repeatedly and after a considerable gap of time appellant opened the door and they saw that deceased was lying on the floor in face down position. Even after opening the door, appellant gave a kick blow to the deceased. At that time PW-5 slapped the appellant and asked him to take deceased to a doctor. After hearing this, the appellant replied that deceased had played a fraud with him. He similarly deposed that hands of the deceased were tied with yellow coloured towel (*gamcha*), which the appellant immediately removed



and threw, when asked as to why the hands of the deceased were tied.

10. PW-6, Manoj Ram also deposed on similar lines as PW-4 and PW-5. He stated that both the deceased and the appellant used to consume liquor in the evening daily and used to gamble. On some occasions he also used to join their company to consume liquor. On the fateful day, he joined the company of the deceased and the appellant, and had liquor with them. When he was about to leave, the appellant asked him to have more liquor. At that time, the appellant told him that deceased had won Rs.500/- from him by fraud. He further deposed that appellant told him that he will make deceased heavily drunk and then he will defeat him in gambling and teach him a lesson. However, PW-6 did not stay any further and left the room, while the deceased and the accused were still consuming liquor. When he was in the process of going to sleep, he heard noise from room of the deceased. When he came out, he saw that a number of persons were there outside the room of the deceased. He saw deceased was lying on the floor of his room in prawn position. Appellant was saying that “Sudhish had played fraud upon him and he would kill him”.

11. PW7, Sh. Janardhan also corroborated the testimony of other witnesses. He deposed that he resided in a room situated on the first floor of the house in question as a tenant. Deceased used to reside in a room adjacent to his room as a tenant and from 16.12.2012, the appellant also started residing with the deceased in his room being his co-villager. The deceased and appellant used to consume liquor daily in the evening. On 13.01.2013, at about 9:00 pm when he was taking dinner, he heard a noise from the room of the deceased. All the tenants



who were residing on the first floor came out of their respective rooms and found the room of the deceased bolted from inside. There were three chinks in the door of the said room and there were also chinks in the window of the said room. While peeping through the said chinks, he saw that the deceased was lying on the floor of his room in a prawn position i.e. facing towards ground and appellant was beating him with kicks and fists. Meanwhile, Tarkeshwar also reached there. They all knocked and shook the door of the room of the deceased vigorously and repeatedly asked the appellant as to why he was beating the deceased and also asked him to open the door. After some time, the appellant opened the door of the room and even after opening the door, he gave a kick blow to the deceased while he was lying on the floor. Tarkeshwar gave a slap to the appellant telling him that there was no movement in the body of the deceased and even then the appellant was beating him. After hearing this, appellant told Tarkeshwar that deceased had played a fraud with him and he will not leave him alive. The landlady had also reached there. They turned the body of the deceased and saw that his hands were tied with a yellow coloured *gamcha* (towel) and he was bleeding from his nose. When they asked the appellant as to why his hands were tied, then he immediately untied and removed the said *gamcha* from the hands of the deceased. In the said room at that time, playing cards, bunch of hair, one button having small threads, *gamcha*, blood and one liquor bottle containing 1/4th liquor in it, were lying.

12. Ms. Kavita Jha, learned Counsel for the appellant submitted that the judgment was contrary to the facts of the case and not sustainable



in the eyes of law. The prosecution had failed to prove its case beyond reasonable doubt, as such the appellant should be given benefit of doubt. None of the prosecution witnesses had stated that they had seen the appellant causing any injury to the deceased. There was delay of 4 days in registering the F.I.R. and delay has not been properly explained. There was undue delay in recording the witnesses' statements. Crime team was not called immediately at the spot and instead the room was locked by S.I. Manoj when he first reached the spot. In the alternative, it was submitted that in the facts and circumstances of the present case, conviction of the appellant is required to be modified to an offence punishable under Section 304 IPC and not Section 302 IPC.

13. On the other hand Shri Tarang Srivastava, learned APP for the State supporting the impugned judgment passed by the learned Trial Court contended that there was no delay in registration of F.I.R. or in recording of witnesses' statements. Both the deceased and the appellant herein were residing in the same room. Once the appellant was in the room with the deceased, the onus shifts on the appellant to explain how the deceased died as per Section 106 of the Evidence Act. Prosecution had proved its case beyond reasonable doubt, regarding the culpability of the appellant in causing murder of the deceased.

14. We have heard the learned counsels appearing for the parties and perused the materials placed on record.

15. From perusal of the evidence on record, it is proved that the deceased and the appellant were staying in the same tenanted room. They were in the habit of consuming liquor everyday at night. On the



day of the incident also, both the appellant and the deceased consumed liquor and also gambled. This is evident from the deposition of the various prosecution witnesses as well as recoveries made from the spot of incident, i.e., 50 playing cards, Ex. PW4/F as well as liquor bottle, Ex. PW4/E. The public witnesses, PW-4, PW-5, PW-6 & PW-7 resided in the same building as the deceased and the appellant herein. On the date of the incident they heard noise from their room and gathered outside their room. On peeping through the holes of the door, they saw that deceased was lying on the floor with his face down and the appellant was hitting him with kicks and fisticuffs. The door of the room was opened by the appellant only after alarm was raised by the various persons present there who had gathered outside their room on the date of the incident after hearing noise from their room. When the appellant opened the door, the prosecution public witnesses saw that the deceased was lying on the floor in a face down position and was bleeding from his nose. When he was taken to the hospital, he was declared brought dead.

16. On scrutiny of the evidence on record, it is clear that the appellant was the only person who was present with the deceased inside the room at the time of the incident in question. The deposition of the witnesses present at that time clearly shows that the appellant had a fight with the deceased over the money won by the deceased from the appellant in gambling. Both of them had been drinking liquor and gambling. Fight ensued between them on account of the deceased winning money in gambling, which allegedly was won by defrauding the appellant. The appellant thrashed the deceased with kicks and fists,



which is manifest from the deposition of the witnesses as well as the medical evidence on record. As per the post-mortem report dated 17.01.2013, the deceased had fracture of 4th to 6th rib of right side in mid-axillary line with blood effusion in tissue. As per the post-mortem report, death was due to head injury as a result of blunt force impact. All injuries were opined to be ante-mortem in nature. Thus, from the evidence on record it is clear that the deceased had received injuries during the fight with the appellant; and subsequently died due to head injuries which were caused during the fight between the deceased and the appellant. Considering the facts and circumstances of the case that have come to the fore, there is no doubt that the appellant caused injuries to the deceased, which led to his death.

17. Now let us consider the contention on behalf of the appellant regarding delay in registration of F.I.R. and recording of statement of witnesses. From the evidence on record, it is seen that S.I. Amit, the Sub-Inspector on duty on that day from P.S. Mangolpuri, had initially reached the spot of incident. It transpired that the said area fell within the jurisdiction of P.S. South Rohini. S.I. Amit therefore informed the said police station about the incident and the case was assigned to S.I. Manoj. The said S.I. Manoj from P.S. South Rohini reached the spot and made preliminary inquiry. During the preliminary inquiry, the appellant informed that he was cooking food at the time when the deceased fell down. He picked up the deceased, but he again fell down. S.I. Manoj also received information that the injured had been declared dead by the doctors in the hospital. Thus, he observed that the situation was serious and required further inquiry. He locked the



tenanted room of the deceased and kept its keys. The relatives of the deceased came to the police station on 17.01.2013, on which the further proceedings were assigned to S.I. Bal Kishan due to non availability of S.I. Manoj. He got the post-mortem conducted. As the post-mortem report indicated it to be a case of murder, S.I. Bal Kishan went to the spot and recorded the statement of complainant/landlady, Usha Dagar, PW-4, who was residing on the second floor of the same house. On the basis of the statement of the landlady/PW-4, F.I.R. was got registered.

18. Perusal of the aforesaid narrative shows that the deceased was living alone away from his family that resided in village. The relatives of the deceased visited the police station on 17.01.2013 when the machinery was set into motion by the police. Though there is delay of 4 days by the police in registering the F.I.R. and recording the statement of the witnesses, in the facts and circumstances of the case, we are of the view that the same is not fatal to the prosecution case. Hon'ble Supreme Court in a catena of judgments has held that delay in lodging F.I.R. cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. In Ravinder Kumar Vs. State of Punjab, (2001) 7 SCC 690, Hon'ble Supreme Court held that in any case, where there is delay in making the F.I.R. the court is to look at the causes for it and if such causes are not attributable to any effort to concoct a version, no consequence shall be attached to the mere delay in lodging the F.I.R. Thus, there is no hard and fast rule that delay in lodging the F.I.R. would automatically render the prosecution case doubtful, and be a ground to doubt the prosecution



case.

19. Similarly, it is well settled law that delay in recording the statement of witnesses does not necessarily discredit their testimony. The court may rely on such testimony if it is found to be cogent and credible. In Mohd. Khalid Vs. State of West Bengal, (2002) 7 SCC 334, Hon'ble Supreme Court has held as follows:

"12.....Mere delay in examination of the witnesses for a few days cannot in all cases be termed to be fatal so far as the prosecution is concerned. There may be several reasons. When the delay is explained, whatever be the length of the delay, the court can act on the testimony of the witnesses if it is found to be cogent and credible....."

20. Perusal of the evidence on record clearly manifests that the evidence of the public witnesses is consistent and uniform with respect to the presence of the appellant inside a closed room with the deceased. The room was opened by the appellant only after hue and cry was raised by the persons present there and the deceased was found injured lying with his face down upon opening of the door. The whole narration of the incident by the various witnesses is natural, and there is nothing to disbelieve the deposition given by the various witnesses. The said witnesses are natural witnesses to the occurrence and their presence at the spot of incident cannot be disputed being residents of the same building. The evidence of PW-4, PW-5, PW-6 and PW-7 cannot be termed to be unreliable even after a close scrutiny. They have remained constant and unvarying in their depositions. Thus, the delay of 4 days in recording the witnesses'



statements in the present case cannot be considered as an infirmity in the prosecution case.

21. From the evidence, it is also clear that the appellant was the only person who was present with the deceased inside the room at the time of the incident. The evidence on record does not establish presence of any other third person inside the room along with the appellant and the deceased at the time of the incident. Since the appellant was the only person with the deceased at the time of the incident, burden shifts on him to prove as to how the deceased died as per Section 106 of the Evidence Act, which onus appellant has failed to discharge. In his statement under Section 313 Cr.P.C. explanation of the appellant is that it was a natural death which explanation is incorrect as per the opinion of the post-mortem report.

22. The facts in the present case are indisputable that the appellant was the only person who was present with the deceased in the room which was locked from inside when the incident happened. The appellant opened the door only when an alarm was raised by the witnesses present there and upon opening of the door, the deceased was found lying on his stomach with his nose bleeding. He was declared dead by the doctors in the hospital. Though there has been delay of 4 days in registration of F.I.R. and recording the statements of witnesses, considering the facts and circumstances of the present case, we are of the view that the same does not impinge upon the prosecution case, which proves the guilt of the appellant beyond reasonable doubt. The evidence against the appellant is incontrovertible and proves the guilt of the appellant beyond



reasonable doubt.

23. This brings us to the issue whether a case has been made out for modification of conviction of the appellant under Section 304 Part II IPC instead of Section 302 IPC.

24. At this stage, it would be useful to refer to Section 300 of IPC, which deals with murder and Exceptions thereto. Culpable homicide is not murder in any of the cases falling under the Exceptions. Relevant portion of Section 300 IPC is reproduced as below:

“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—*

2ndly.—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—

3rdly.—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—

4thly.—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.

Exception 1.—When culpable homicide is not murder.—*Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or*



accident.

The above exception is subject to the following provisos:—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

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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.”

25. The Hon'ble Supreme Court in the case of Nandlal Vs. State of Maharashtra, (2019) 5 SCC 224, has held as follows:

“13. In order to bring the case within Exception 4 to Section 300 IPC, the following conditions enumerated therein must be satisfied: (i) The act must be committed without premeditation in a sudden fight in the heat of passion; (ii) upon a sudden quarrel; (iii) without the offenders having



taken undue advantage; and (iv) the accused had not acted in a cruel or unusual manner.”

26. Looking at the circumstances in which the present incident had taken place, it is seen that in the present case, there was no pre-meditation on the part of the appellant. Both the appellant and the deceased were drinking liquor as they did every night. They were gambling in which the appellant lost money to the deceased. Due to this, the appellant felt cheated, as he perceived that he had lost the money in gambling to the deceased on account of fraud having been played by the deceased upon the appellant. This fact is verified from the deposition of the witnesses, as well as evidence on record. This led to a fight between the appellant and the deceased in which the deceased fell down having been injured by the appellant, which ultimately led to his death.

27. The post-mortem report, Ex.PW-10/A shows external injuries as nil. As regards the internal injuries, it shows fracture of 4th to 6th rib of right side in mid-axillary line with blood effusion in tissue. The post-mortem shows the skull as intact. As per the opinion given in the post-mortem report by Dr. Munish Wadhwan (PW-10) and Dr. Manoj Dhingra, PW-11, death was caused due to head injury as a result of blunt force impact. Considering the nature of injuries, where there were no external injuries and skull was intact, despite cause of death being head injury as a result of blunt force impact, it is apparent that the deceased received head injuries by falling down on the floor during the course of the fight between the appellant and the deceased in an inebriated state.



28. Considering the aforesaid facts and circumstances of the case, it is clear that it was not a premeditated incident. The circumstances of the case indicate that the appellant had not taken undue advantage of the situation. At the same time, it can be said that the act was done by the appellant with the knowledge that it is likely to cause death, but without any intention to cause death. Thus, in our view the case falls within Exception 4 to Section 300 IPC. The conviction of the appellant is, thus, modified from an offence punishable under Section 302 IPC to one under Section 304 Part II IPC.

29. As per the Nominal Roll dated 20.09.2021, the appellant has already undergone sentence of 8 years 7 months and 29 days as on 16.09.2021. Thus, the appellant has undergone about 9 years 6 months imprisonment. Considering the facts and circumstances of the case, the sentence of imprisonment is modified to the period already undergone by the appellant. The appellant is thus directed to be released forthwith unless his presence is required in any other case.

30. The appeal is partly allowed in the above terms.

31. A copy of this judgment be communicated to the Jail Superintendent forthwith for necessary action and updation of record.

(MINI PUSHKARNA)
JUDGE

(MUKTA GUPTA)
JUDGE

JULY 8th, 2022

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