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

% ***Date of decision: 30th January, 2024***

+ CRL.L.P. 529/2022

STATE

..... Petitioner

Through: Ms. Manjeet Arya, APP for the State.

versus

RAJENDER

..... Respondent

Through: Mr. Abhinav Kajal, Advocate with
respondent in person.
Inspr. Parvesh, PS Vivek Vihar and
Inspr. Vijay Kumar, MACT Central
Distt.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE MANOJ JAIN

J U D G M E N T (oral)

1. Present appeal has been filed by the State challenging the order of learned Trial Court whereby respondent has been held guilty, albeit, for commission of offence under Section 304 (Part-II) IPC and has been sentenced to the period already undergone by him which was over six years.

2. Briefly stated, case of the prosecution is that on 14.11.2013 at about 8.30 PM, accused Rajender was returning after purchasing mustard oil from one provisional store. He collided with Rajesh (deceased herein) due to which the mustard oil spilled on the ground. It made him furious and he



started abusing Rajesh who also became infuriated and he started beating accused. In the meanwhile, younger brother of accused, who was juvenile at that time, came there and they both threatened to eliminate and teach a lesson to Rajesh. Accused and his younger brother went back to their jhuggi and returned in a while, with a knife. Juvenile offender caught hold of Rajesh and accused Rajender stabbed him near his right armpit. They both were, however, apprehended at the spot with the help of public persons. Police also reached at the spot and they both were handed over to the police along with the weapon of offence.

3. Injured was rushed to the hospital where he, eventually, succumbed to his injuries.

4. As far as accused Rajender is concerned, he was charged for commission of offence under Section 302/34 IPC and also under Section 27 Arms Act to which he pleaded not guilty and claimed trial.

5. Prosecution examined twenty-seven witnesses including PW1 Rakesh (brother of deceased), PW5 Neelam and PW10 Ashok. They all are eyewitnesses of the occurrence in question.

6. Learned Trial Court, after analysis of the evidence led before it, held accused guilty, albeit, for offence under Section 304 (Part-II) IPC instead of Section 302 IPC.

7. The present appeal had, initially, been filed by the State under Section 377 (3) Cr.P.C. praying therein that conviction be altered from Section 304 IPC to Section 302 IPC and the sentence may be enhanced as it's a case of



inadequate sentence. Section 377 Cr.P.C. essentially deals with appeal against the order on sentence on the ground of its inadequacy and if any such appeal is filed, sentence cannot be enhanced except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, accused may plead for his acquittal and even for the reduction of his sentence.

8. Fact remains that since the prayer made in the present petition was for conviction under a different penal head, the present petition was directed to be treated as a petition seeking as leave to appeal under Section 378 Cr.P.C. in terms of order dated 10.11.2022 and accordingly Crl. Appeal 121/2022 was re-registered as Crl. L.P. 529/2022.

9. It is admitted position that as far as order of conviction under Section 304 (Part-II) IPC is concerned, respondent has not challenged the same.

10. It has been argued by the prosecution that it is not a case where accused could have been held guilty for offence under Section 304 (Part-II) IPC. It is contended that it is a clear cut case where accused should have been rather held guilty for commission of offence under Section 302 IPC or in alternate under Section 304 (Part-I) IPC.

11. As already noticed above, there are three eyewitnesses of the occurrence in question.

12. However, as far as alleged two eyewitnesses i.e. PW3 Neelam and PW10 Ashok are concerned, they have not supported the case of prosecution.



13. PW5 Smt. Neelam merely deposed that she had seen a verbal duel going on between her brother Rajesh (deceased) and the accused persons. She thereafter went inside her house and came out only after she heard some noise coming from the street and then she saw that her brother had already been stabbed. She never witnessed the stabbing incident as such. Despite the fact that she was cross-examined by the prosecution, she remained adamant in her such stand and denied having seen the incident with her own eyes.

14. PW10 Ashok has also not supported the prosecution case and claimed that he had come out of his house after hearing the noise coming from the street. He saw his cousin Rajesh and accused Rajender fighting. He intervened and separated them and when he had hardly moved around 8-10 steps, he looked back and saw Rajesh lying on the ground and bleeding. According to him, he did not see Rajender present there at that time. According to him, when he started taking Rajesh to the hospital, police also reached in the meanwhile. Interestingly, when he was cross-examined by the prosecution, he caused further damage to the case of prosecution by deposing that even Rakesh (the prime eyewitness) was not present when he separated Rajesh (deceased) and accused Rajender.

15. PW1 Rakesh did support the case of prosecution by deposing that there was collision between his brother Rajesh and accused Rajender, due to which mustard oil, being carried by accused Rajender, had fallen down. He also deposed that altercation (*haatha-pai*) took place between them and he and Ashok intervened and separated them. He also deposed that accused left the spot while threatening and returned with his brother after 5-10



minutes. Accused Rajender was carrying a knife and his brother caught hold of Rajesh and then Rajender stabbed him below his armpit.

16. We have carefully gone through the testimony of PW1 Rakesh and we notice several material improvements. He was also duly confronted with his previous statement in this regard as well but there is no explanation for such improvements.

17. As per postmortem report which has been proved as Ex. PW3/A, stab wound measuring about 4cm x 0.9 cm right side chest cavity deep, almost horizontally placed over right side lower front of the chest in the auxiliary region, placed 12.5 cm below the top of the right side armpit was noticed. Though the knife blow had been given towards right side of the armpit, it damaged liver and as per postmortem report, cause of death was *“hemorrhage and shock consequent upon stab injury of the liver”*.

18. As already noticed above, accused Rajender (respondent herein) has not challenged his conviction and, therefore, sole question, which arises before us is very limited.

19. Only it needs to be evaluated whether it is a case of culpable homicide amounting to murder or whether the case falls in any of the exceptions given under Section 300 IPC.

20. According to Ld. Trial Court, the case fell under Exception 4 as the offence had been committed without any pre-meditation and in the heat of passion upon sudden quarrel and the offender had not taken any undue advantage and had not acted in a cruel or unusual manner. Learned Trial



Court observed that it was a case of sudden provocation and accused had no intention that a single blow would result into death particularly when the blow had landed near right armpit and not on the chest or any other vital part of the body.

21. It is not in dispute that there was a collision between accused and the deceased which resulted in the verbal duel. There is no pre-existing rivalry between them. Incident had happened in a heat of passion and in a spur of moment. If PW1 Rakesh is to be believed, accused had gone back to his house and came back with a knife and gave stab injury and, therefore, according to learned APP for the State, it was not a case of sudden fight without any pre-meditation and, therefore, there was no reason to have recorded conviction under Section 304 (Part-II) IPC. It is argued that accused had left the spot in a fit of anger and while leaving, he had extended threat to Rajesh and returned later to the spot with a knife in his hand which shows that it is a case of murder and not culpable homicide amounting to murder.

22. There are various factors which, however, persuade us to hold that it was a case of culpable homicide not amounting to murder.

23. Firstly, quarrel had erupted on account of sudden collision between accused and deceased. So much so, even the deceased had manhandled the accused initially. Though as per PW Rakesh, accused left the spot and came back but his such return to the spot was virtually instantaneous and there is nothing to indicate that he had sufficient time to cool off his anger. In a heat of passion and anger, he seems to have given a solitary blow. If he was



harbouring any intention to kill him, he would have given multiple stabs to Rajesh or injury on a vital part. Moreover, he did not run away from the spot and was apprehended at the spot itself. Be that as it may, the facts indicate that he was not having any intention to cause such bodily injury that was sufficient in the ordinary course of nature to cause death. He was also not having knowledge that such solitary stab blow, in all probabilities, would cause death. Thus, from the given facts and circumstances of the case, we are unable to gauge intention or knowledge suggesting that the death was the only reasonable certainty.

24. During course of arguments, learned counsel for respondent has drawn our attention to *Arjun Vs. The State (Govt. of NCT of Delhi): 2017 SCC OnLine Del 10140* wherein facts were almost similar.

25. In that case also, there was altercation between deceased and the accused and they both were pacified by the neighbours. Accused left the spot while threatening the deceased and after some time, accused returned and caught hold of deceased who was given danda blow as well as knife blow. When the brother of the deceased tried to save his brother, even he was not spared and he was also attacked. The question which came up for consideration before this Court was also the same. In that case also, the accused were convicted under Section 304/34 IPC and they challenged their such conviction. The State also filed leave to appeal assailing the judgment and order on sentence with the prayer that accused should have rather been convicted under Section 302 IPC. Appeal filed by accused and the application seeking leave to appeal were dismissed. The Co-ordinate Bench of this Court came to the conclusion that it was a case which attracted



Exception 4 of Section 300 IPC and the incident had taken place in the sudden fight in the heat of passion and there was no time-gap, sufficient to allow the tempers to cool off. Reference be made to following paras of the aforesaid judgment which read as under: -

"34. In a recent judgment, a coordinate bench of this Court, of which one of us (G.S.Sistani, J.) was a member, in Jite v. State, MANU/DE/1791/2017 had extensively discussed the law with regard to „cooling off“ period. The facts therein were similar to ones before us, after a first altercation, all the parties rushed to their homes (2-4 minutes away), the appellant procured the weapon of offence, i.e. knife, and returned to stab the deceased. The bench modified the conviction from Section 302 to Section 304 Part I IPC finding insufficient cooling off period. The relevant portion reads as under:

“38. In respect of cooling off period, we may refer to the judgment of a coordinate bench in Mohd. Sultan @ Kallu v. State, MANU/DE/2530/2011 : 2011 Cri. L.J. 4680, wherein the accused had returned in 2-3 minutes after a heated exchange of words with a knife and stabbed the deceased, the conviction of the appellant was changed from one under Section 302 IPC to Section 304 Part I IPC. The relevant paragraphs read as under:

“14. It is clear from the testimonies of P Ws 8, 9 and 10 that there was no previous enmity between the Appellant Mohd. Sultan @ Kallu and Yamin and his brothers and cousin. It is also apparent from their testimonies that a theft had taken place in the night intervening 17/18.09.1992 in the factory of Mohd. Farukh and his brothers. There was a heated exchange of words on the next night around 9:15 pm between Mohd. Sultan @ Kallu and PW8 Mohd. Farukh, in which the Appellant Mohd. Sultan is said to have questioned Mohd. Farukh as to why the former's name was being dragged in connection with the theft of the previous night. The altercation between the two escalated and resulted in Mohd. Sultan @ Kallu slapping Mohd. Farukh 2/3 times. On the intervention of the other brothers and cousin Mumtaz, Mohd. Sultan left the premises threatening to teach them a lesson. He went to his brother's factory nearby in the same gali and returned with a knife within 2-3 minutes and



immediately thereupon stabbed Yamin who was standing outside the factory with PW9 Yasin. This incident was, of course, seen by PW9 Yasin. Immediately thereafter, Mohd. Sultan @ Kallu ran away from the scene. This is clearly a case of culpable homicide. It would not be murder and would fall under Exception 4 if it was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. There is no doubt in our minds that the incident took place without premeditation and the time gap between the heated exchange of words and the second incident of stabbing is only of 2-3 minutes, which clearly indicates that it was a sudden fight and there was no time for the tempers to have cooled so as to allow in the concept of premeditation. The tempers had not cooled and, therefore, in our view, the stabbing incident has to be regarded as in the course of a sudden fight in the heat of passion upon a sudden quarrel. 15. A similar situation had arisen in the case of Sukhbir Singh v. State of Haryana (2002) 3 SCC 327. In that case also there was no enmity between the parties. The occurrence had taken place when Sukhbir Singh got mud splashes on account of sweeping of a street by Ram Niwas and a quarrel ensued. The deceased slapped the Appellant for no fault of his. The quarrel was sudden and on account of the heat of passion. The accused went home and came armed in the company of others without telling them of his intention. The time gap between the quarrel and the fight was a few minutes only. The Supreme Court observed that it was, therefore, probable that there was insufficient lapse of time between the quarrel and the fight which meant that the occurrence was sudden within the meaning of Exception 4 of Section 300 IPC.”

(Emphasis Supplied)

[See also Darshan Singh (Supra) (paragraphs 20 - 24)]

39. In Tayyab v. State NCT of Delhi, MANU/DE/4258/2013 : 2014 (1) JCC 271 the accused persons had hot talks with the deceased on the issue of money, when the accused rushed to his house to bring a chhura, with which he had inflicted the stab injury on the body of the deceased,



this Court had converted the conviction from one under Section 302 to Section 304 Part I IPC, observing that:

23. In the present case, PW-1 in his examination-in-chief, had admitted the fact that he was not aware as to how the quarrel had started and at whose instance. He volunteered to say in his cross-examination that the quarrel was continuing when he had reached the spot. PW-4, Mohd. Ansar Ahmed also deposed on the same lines confirming the fact that some hot talks were in progress between the accused persons and his brother on the point of money and the deceased Rashid told him and his brother (PW-1) that the accused persons had to give money but they were not willing to return the same. With the deposition of said two eye witnesses, one thing becomes crystal clear, that a sudden quarrel had taken place between the deceased and the accused persons. It also becomes clear that both the said witnesses were not exactly aware as to how the said quarrel had begun but they are consistent in their stand that the quarrel was on the issue of money which the accused owned to the deceased but they were not willing to return back. From their deposition, another vital fact that emerges is that the appellant was not carrying any weapon of offence with him as amidst quarrel he had rushed to his house to bring chhura with which he had inflicted stab injury on the body of the deceased. Further a time gap between the said quarrel and the bringing of the murder weapon by the appellant was also quite narrow, as the house of the appellant was located very nearby and within two-three minutes he could bring the said chhura from his house to inflict the stab injuries, which ultimately resulted in the death of the deceased. Thus there was no time for the accused to cool down or plan his action. ...

27. In the facts of the present case also what we find is that a sudden quarrel between the accused persons and the deceased had taken place over some money transaction and the sudden quarrel ultimately turned ugly, resulting into a sudden fight and ultimately, the murder of the deceased at the hands of the appellant. There was neither any premeditated plan or common intention of the accused persons to carry out the murder of the deceased nor there was any cooling time between the said fight and the act of the appellant, as the house of the appellant was nearby from where he brought the weapon of offence just within two-three minutes. The recovery of weapon of offence was also not believed by the learned trial court and therefore, it cannot be said whether



the chhura used by the appellant was a small knife or was a big dagger, as per the sketch of the same proved on record as Ex. PW-17/F. Further the injuries sustained by the co-accused, Mohd. Rafiq may be simple in nature but they cannot be completely overlooked at least to prove the fact that there was a quarrel taken place between the accused persons on the one hand and the deceased on the other hand.”

(Emphasis Supplied)

40. Similarly, a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in *Vinod Kumar. v. State*, MANU/DE/1351/2016 : 2016 Cri. L.J. 4810 had while converting the conviction from Section 302 to Section 304 Part I, observed as under:

“39. From the evidence on record, it is very clear that the appellants intended to cause bodily injuries which culminated into the death after 7 days. In our opinion, there was a sudden altercation which ensued in the heat of the moment and there is no deliberate planning. In the present case, as stated above there was no due deliberation on the part of the appellants and they assaulted the deceased almost immediately after the fact of the quarrel between the children came to their knowledge. It was further established that there was no cooling off period as the gap was short and they were in the same state of mind and wanted to take revenge with the deceased. The quarrel between the children was lingering in their mind and tormented them mentally. Treating the time gap between the quarrel and the incident which resulted in the death of the deceased to be negligible, we conclude that the appellants had not committed the crime with any pre-meditation. It is very likely that the intervention of the deceased between the quarrel of the children provoked the appellants to such an extent that they chose to take this extreme step. The entire incident happened within a very short span of time. The intention probably was to merely cause such bodily injuries.”

(Emphasis Supplied)

41. We may also fruitfully refer to the judgment of the Apex Court in *B.D. Khunte v. Union of India*, (2015) 1 SCC 286 wherein in respect of Exception I to Section 300, it was observed as under:

“19. ...Between 1400 hrs when the appellant was given a grave provocation and 2130 hrs, the time when the appellant shot the deceased there were seven hours which period was



sufficient for the appellant to cool down. A person who is under a grave and sudden provocation can regain his cool and composure. Grave provocation after all is a momentary loss of one's capacity to differentiate between what is right and what is not. So long as that critical moment does not result in any damage, the incident lapses into realm of memories to fuel his desire to take revenge and thus act as a motivation for the commission of a crime in future. But any such memory of a past event does not qualify as a grave and sudden provocation for mitigating the offence. The beating and humiliation which the accused had suffered may have acted as a motive for revenge against the deceased who had caused such humiliation but that is not what falls in Exception 1 to Section 300 IPC which is identical to Exception 1 to Section 300 of the Ranbir Penal Code applicable to the State of Jammu and Kashmir where the offence in question was committed by the appellant."

(Emphasis Supplied)

42. From the aforegoing, it is clear that for a case to fall within Exception IV of Section 300, the incident must have taken place in a sudden fight in the heat of passion. There must not be any time gap or the time gap should be insufficient to allowed tempers to cool off. If the tempers continued to run high, then the case would fall within Exception IV; but if they cool down, then the heat of passion gives way and retribution/revenge may bear in the mind of the culprit.

43. In the present case as well, we find that there was no cooling off period between the two incidents, it has come in evidence that the distance between the piao/water tank and the house of the deceased could be covered in 2-4 minutes on foot. After the first altercation, all parties had hurried to Balmiki Basti, where the incident of stabbing took place. It cannot be said that there was a sufficient cooling off period. Thus, all the four essentials of Exception 4 stand satisfied: the offence was committed pursuant to a sudden fight, there was no premeditation, the single solitary blow was inflicted in the heat of passion without sufficient time to cool down, the appellant did not carry with him the weapon of offence and procured the same after the first altercation, and the appellant neither acted in a cruel nor unusual manner. [See Sandhya Jadhav v. State of Maharashtra, MANU/SC/8086/2006 : (2006) 4 SCC 653 (paragraphs 8 - 9)]."

35. The law is well-settled, if there is sufficient cooling off period then the tempers may thaw and the desire of vengeance may overwhelm the accused



establishing a clear intention to kill the deceased. However, if the tempers continue to run high, the incident might take place in the heat of passion. Coming to the case at hand, as per the account of Raju (PW-3), the time gap between the two incidents was about 5-7 minutes, while as per the father of the deceased (PW-5) it was 1-2 minutes. We have also gone through the Scale Site Plan (Ex.PW10/A), as per which the distances between the jhuggis of the respondent Arjun and the deceased and the bathing area/hand pump is meagre. The distance between the jhuggi of the deceased and the locus in quo is 685 cms, while the distance between the spot and jhuggi of respondent Arjun is about 345 cms. It is clear that there was no cooling off period to allow tempers heat to cool and open the scope of premeditation. Though PW-7 had stated that there was a difference of about 1 ½ hours between the two incidents, the same is belied by Ex.PW-10/A and even otherwise, whenever two views are possible, the one favourable to the appellant must be believed.

36. Mr.Katyal had placed reliance upon the judgment in Islam (Supra) to submit that the intention can develop at the spot and the fact that the respondent Arjun had gone to fetch the knife showed some amount of pre-meditation. We are unable to subscribe to the view as in Islam (Supra), the Supreme Court had found that there was an interval of time between the first altercation and when the accused came back armed with a farsa. Though the exact time gap is not mentioned, it is clear that the interval was found sufficient to allow the development of intention and show premeditation, which is not the case before us.

37. Learned counsel for the State had also relied upon the judgment in Hukam Chand (Supra) to submit the very fact the respondent Arjun had returned armed with a deadly weapon (Ex.P-1), which was no ordinary knife, would show that he harboured an intention to cause the death of the deceased. In the case, the Apex Court had gauged the intent of the accused by the fact that he had arrived at the place of occurrence armed with a pharsa in hand. Indubitably, the weapon of offence (Ex.P-1) is no ordinary knife and had a blade of more than 19 cms as evidenced by Ex.PW-11/E and Ex.PW-13/B, however, the weapon was never identified by any of the eyewitnesses to the incident as the one used to stab the deceased. It is not clear whether the respondent Arjun had procured an ordinary kitchen knife or a deadly one. Further, the fact that the deceased succumbed to his injuries after 3 days hints towards the former. In such circumstances, the very fact that the respondent Arjun had procured the knife cannot be used to impute the intention to cause death upon him.

38. All the essentials of Exception 4 to Section 300 stand satisfied. The offence was committed in a sudden fight having been erupted between the deceased and respondent Arjun; which was pacified, however, there was no



time to allow cooling of tempers. Within a couple of minutes, the respondent Arjun returned alongwith respondent Loliya armed with a danda and a knife. Now neither the danda was recovered nor Ex.P-1 was identified as the knife used by the respondent Arjun. The deceased protested and the fight resumed and in the heat of passion, the respondent Arjun took out a knife, which was procured in the little time between the two incidents, and gave a solitary blow on the abdomen of the deceased while the respondent Loliya immobilized him. Had there been any premeditation, the respondent Arjun might have stabbed the deceased in the first altercation or at a vital part. Finally, it cannot be said that the respondents had acted in a cruel or unusual manner. Accordingly, the offence punishable under Section 302 was not made out [See Sandhya Jadhav v. State of Maharashtra, (2006) 4 SCC 653 (paragraphs 8 - 9)].

26. In the instant case, prosecution, also, cannot run away from the testimony of PW10 Ashok who is cousin of the deceased and who categorically deposed that after he separated the accused and the deceased, when they were quarelling, he had hardly moved around 8-10 steps, when he noticed that his cousin was lying on the ground and was bleeding. This also indicates that stabbing incident had also taken virtually in the continuity and there was no time to cool off the temper.

27. In view of our foregoing discussion, we do not find any merit in the application seeking leave to appeal. Same is hereby dismissed.

(SURESH KUMAR KAIT)
JUDGE

(MANOJ JAIN)
JUDGE

JANUARY 30, 2024
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