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**(2011) 04 DEL CK 0225**

**In the Delhi High Court**

**Case No :** Criminal A. No. 137 of 2011 and Criminal M. (Bail) 160 of 2011

Gopal

APPELLANT

Vs

The State (Nct of Delhi)

RESPONDENT

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**Date of Decision :** 29-04-2011

**Acts Referred:**

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 300, 302, 304

**Citation :** (2011) 2 JCC 1468

**Hon'ble Judges :** S. Ravindra Bhat, J;G.P. Mittal, J

**Bench :** Division Bench

**Advocate :** Charu Verma, for the Appellant; Lovkesh Sawhney, APP., for the Respondent

**Final Decision :** Allowed

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## **Judgement**

S. Ravindra Bhat, J.—This judgment will dispose of an appeal impugning a judgment (hereafter called "the impugned judgment") of the Addl. Sessions Judge (Trial Court) dated 22.09.2010. The Appellant was convicted for offence punishable u/s 302 IPC.

2. The prosecution alleges that on 26.03.2008, at about 6.25 pm, at Asaf Ali Road, opposite Delite Cinema Hall, the Appellant had criminally assaulted Aniruddin with a sharp iron patti with the intention of killing him. The prosecution relied primarily on the testimonies of PW-1 Kamal Kishore Jha, PW-17 Nisar Ahmed and PW-20 Ct. Manoj Kumar, and alleging that they were eye witnesses. The Appellant, upon being charged with committing the offence, denied involvement in the crime and claimed trial. By the impugned judgment, the Trial Court held that the charges leveled against the Appellant were proved beyond reasonable doubt.

3. Ms. Charu Verma, learned amicus appearing in this case on behalf of the Appellant, submitted that the description of incident, the alleged recoveries in this case, and the entire circumstances raise suspicion about the prosecution

story, which ought to have dissuaded the Trial Court from recording the Appellant's guilt. It was submitted that the incident is alleged to have occurred at a busy thoroughfare, i.e. a public road where the deceased is supposed to have collapsed. Learned amicus pointed-out that even according to the prosecution story, the alleged attack occurred in the course of a quarrel, in which the Appellant as well as the deceased were allegedly pelting stones at each other. It was submitted that PW-1's testimony, regarding the identity of the Appellant was unreliable because he clearly deposed that he became aware about the Appellant subsequently. The learned amicus urged that PW-7 deposed having seen the Appellant for the first time on the day of the incident that he had not seen him earlier. She also highlighted that this witness had admitted that due to heavy traffic on the road, it was ordinarily difficult to cross it. It was argued that so far as the testimony of PW-20 went, the Trial Court should have not given it any credence because he was allegedly the first informant and was also present at the time of the Appellant's arrest. His participation in the proceedings, therefore, cast grave doubt about the fairness of the investigation.

4. Learned amicus next argued that the prosecution had cleverly built a story about the incident in which two alleged eye witnesses could identify him with a view to avoid a Test Identification Parade (TIP), which is essential in all such cases.

5. It is submitted next that the recovery of the alleged weapon of offence from the roof of a parking lot cannot be believed for the simple reason that the parking assistants, who were natural witnesses to the recovery were not joined in the investigation at that stage. Learned Counsel submitted that significantly, the access to the parking lot was through a locked entrance. The prosecution did not lead any evidence to show who had opened the lock. Similarly, the recovery of a shirt, allegedly worn by the Appellant at the time when he had assaulted the deceased, was also impeached. It was contended that the recovery was from a place where the members of the general public had access, i.e. a public toilet.

6. Learned amicus next argued that recoveries in this case could not also be believed because PW-13, who had headed the Crime Team clearly deposed about visiting the spot on 27.03.2008, and not discerned or recovered any incriminating object. The learned Counsel lastly submitted that without prejudice to the contentions, even if the prosecution story were to be believed, there was no material, much less evidence measuring to the standard of proof beyond reasonable doubt, pointing to any motive on part of the Appellant to kill the deceased. Learned amicus highlighted that the consistent prosecution story was as regards a quarrel, the deceased and the Appellant chasing each other, and the accused landing a blow on the person of the deceased. Learned Counsel submitted that the accused too had suffered injuries and a Medico Legal Certificate (MLC) had been issued which was spoken to by PW-18, Dr. Arvind Mohan. According to his testimony, the Appellant had suffered a laceration at about 1.5 cm over the knees and an abrasion of about 3 cms, which is below the

left eye. The MLC was marked as Ex. PW-18/A. It was stated that having regard to these circumstances, the Trial Court wrongly concluded that the Appellant was guilty for the offence punishable u/s 302.

7. Learned APP submitted that the three eye witnesses relied upon by the prosecution as well as the Trial Court were present and natural eye witnesses. PW-1 was a parking attendant, managing the Parking lot in front of the Delite Cinema Hall where the incident occurred, and PW-7 was a parking attendant. It was emphasized that both these witnesses were clear as to who had attacked the deceased. PW-17 even deposed that he had intervened and asked the two quarreling individuals to leave, as they could damage the parked cars. Learned APP relied upon the scaled map produced in evidence before the Trial Court to say that both the witnesses had sufficient opportunity to observe the entire incident and also identified the parties concerned because the chase, the attack and the collapse of the deceased took place in a spread-out area. Furthermore, the deceased as well as the Appellant were known to the said two witnesses, PW-1 and PW-17, who were present in the vicinity of the place of occurrence.

8. It was contended that the recoveries in this case, particularly of the shirt worn by the Appellant, was within his specific knowledge, since it was hidden from public view in the hospital toilet. It was argued that unlike recoveries from public places, the Appellant's torn T-shirt was recovered from the roof of the toilet -a fact which could have been known only to the person hiding it. The shirt had the deceased's blood group, which also clearly implicated the Appellant. The Trial Court, while dealing with the credibility of the eye witnesses rendered the following findings:

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#### (i) DIRECT EVIDENCE/ OCULAR EVIDENCE

44. According to the prosecution, the occurrence took place near Asaf Ali Road, Opposite Delite Cinema, at about 6.25 pm on 26.03.08. The spot of occurrence is a public and crowded place. PW1 Kamal Kishore and PW17 Nisar Ahmed have been parking contractor and parking attendant respectively at the spot. They have narrated the incident in detail specifically and clearly pointing out that accused Gopal assaulted the deceased by means of knife/patti. They correctly and confidently identified the accused in the court during trial PW20 Ct. Manoj Kumar was also on duty at Delite Cinema at the relevant time. All these witnesses have been consistent while deposing about the details of the incident and clearly stated that accused Gopal stabbed the deceased by means of knife like iron object. These witnesses are also natural and probable witnesses of the occurrence and their presence at the spot is not at all doubtful and I find no reason on their part to falsely implicate the accused in the present case. The documents pertaining to the investigation also reflect consistency with the deposition of the above witnesses and also corroborate the factum and manner of occurrence as alleged. These witnesses have stood through the test of cross

examination and no inconsistencies have emerged from their testimony so as to render them unreliable. It also stands established that PW5 Ct. Sanjay Sharma was also on duty near the place of occurrence and reached immediately at the spot and shifted the injured to the hospital. The statements of all these material witnesses are in conformity with each other and inspire confidence. I therefore conclude that direct evidence is trustworthy and proves the guilt of the accused.

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9. We do not see any infirmity with the above reasoning. Both PW-1 and PW-17 were not chance witnesses, and happened to be at the place of occurrence in the normal course of their work. PW-17, the Parking Attendant in fact deposed having tried to intercede the deceased from the Appellant. He deposed as follows:

I asked them to go away from the said place as I was afraid that they may not damage any vehicle. Then both of them started running on the road.

10. It is, therefore, clear that PW-17 had an occasion to observe both the quarrelling parties. The attempt by the learned amicus to discredit the testimony of PW-17 by stating that he had not seen the Appellant, is not acceptable. Even though PW-17 stated that he had stated that he had not previously seen the Appellant, that circumstance is not sufficient to discredit his testimony because it finds corroboration in the evidence of PW-1. The latter witness had clearly stated that he knew the Appellant even though he added the words "later on by the name of Gopal". The reasons why the Court accepted the testimony of PW-17 would apply to the case of this witness. The length or period of time during which he was acquainted with the Appellant is irrelevant so long as he could credibly testify his role. For these reasons, the Court does not find any contradiction or infirmity in the evidence of the eye witnesses.

11. As regards the recoveries, the Trial Court held as follows:

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#### (b) RECOVERY OF CLOTHES

47. It is stated by PW11 Ct. Ajay, PW20 Ct. Manoj, PW7 HC Tapsi, PW28 ASI Surender and PW29 SI Virender Singh that accused got recovered T shirt from the roof of public toilet of mandir situated in front of the hospital in pursuance of his disclosure statement. This becomes admissible u/s 27 of Indian Evidence Act as leads to discovery of incriminating material. The arguments of learned defense counsel that Ct. Ajay has not signed the memo of recovery of T shirt is not of much consequence particularly when other witnesses have been consistent and confident on this point. Also the presence of PW11 Ct. Ajay Kumar is proved in the testimony of PW28 ASI Surrender Singh according to which Ct. Ajay Kumar informed whereabouts of the accused to the SHO. Merely because Ct. Ajay has not signed the recovery memo, no justification to disbelieve the factum of recovery. The prosecution witnesses mentioned above have correctly identified the T shirt produced, as case property during the trial. It also stands

corroborated by the testimony of witnesses of occurrence as they have given the description of the T shirt in their statements. There has been no suggestion from the side of the accused that the said T shirt did not belong to him. The T shirt was also found having blood group of the deceased on scientific analysis of the same. In these circumstances, I conclude that recovery of blood stained T shirt worn by the accused at the time of occurrence is sufficiently established on record and points out to the guilt of the accused.

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12. This Court is of the opinion that the attempt to discard the recovery, at least of the T-Shirt cannot be accepted. We are of the opinion that the Trial Court correctly, inferred that knowledge about a T-Shirt hidden from public view albeit in a public place is of some significance. This, coupled with the CFSL report, Ex. PW-30/A and B, which states that the T-Shirt found and recovered had blood stains with A-Group. The same report also bespeaks of the Appellant's blood group being "B". In these circumstances, the findings of the Trial Court, recording the recoveries and their connection with the Appellant stands established.

13. The above conclusions are not dispositive of this appeal. Even though we notice that the Trial Court had taken note of the injuries upon the Appellant/accused, not much significance was given to it. The Trial Court has correctly held that where ocular evidence is forthcoming, the proof or lack of motive is irrelevant, and that aspect pales into insignificance. If such be the correct position, we are of the opinion that the Trial Court ought to have given some weight age to the depositions of PW-1 and 7, who consistently maintained that, the deceased and the Appellant were quarrelling, a chase which took place and that the deceased was attacked with an iron patti by the Appellant. If viewed together with the injury - which the Trial Court correctly inferred to be a fresh one - on the person of the Appellant, place the entire incident in another light.

14. The origin or reason for the quarrel in this case is unknown and obscure. What has emerged from the record is that both the deceased and the Appellant were involved in a sudden quarrel. It is in such cases that Exception 4 to Section 300 IPC comes into play. It indicates that 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 having taken undue advantage or acted in a cruel or unusual manner. The explanation to this provision instructs that it is immaterial in such cases which party offers the provocation or continues the first assault. Now, as observed earlier, the deceased and the Appellant had quarreled; apparently, the Appellant received some injuries which the Doctor deposed, were a day old when she had examined them. The weapon of offence is also an iron patti. Its sketch discloses it to be shaped like a knife but without a handle. Since the origin of the quarrel is unknown and concededly, both PW-1 and PW-17 stated that the two parties (the deceased and the Appellant) were quarrelling, the entire conspectus of circumstances in this case point to absence of intention

to kill the deceased by the Appellant.

15. The Supreme Court has, in Shaikh Majid and Another Vs. State of Maharashtra and Others, explained the true position on this aspect as follows:

For bringing in operation of Exception 4 to Section 300, I.P.C., it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

The Fourth Exception to Section 300, I.P.C. covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. As fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation, and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender 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, I.P.C. is not defined in I.P.C. 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 or 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 that there was no premeditation. It must further be shown

that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage."

In Mahesh Vs. State of M.P., the Supreme Court explained the position as under:

At the spot, there was an altercation between the parties and in the sudden fight, after the deceased objected to the grazing of the cattle, when possibly hot words or even abuses were exchanged between the parties, the Appellant gave a single blow with the pharsa on the head of the deceased. The statement of the Appellant and the suggestions given on his behalf to the prosecution witnesses that there was an attempt to assault the deceased with a Parena, which was with the deceased, does not appear to be improbable.

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 P. W. 2 or P. W. 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 P.W.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, I.P.C. 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 u/s 304 (Part-I) I.P.C. The trial Court, under the circumstances, was justified in convicting him for the said offence and the High Court, in our opinion, fell in error in interfering with it and that too without dispelling any of the reasons given by the trial Court. The judgment of the High Court convicting the Appellant for an offence u/s 302, I.P.C. cannot be sustained and we accordingly set it aside and instead convict the Appellant for the offence u/s 304 (Part-I) I.P.C.

In the present case, the Appellant by all accounts, does not appear to have preplanned and execute the attack. The prosecution witnesses are forthright that he and the deceased were quarrelling; the Appellant also suffered two injuries - though of a minor kind, on his face. He used the iron patti, and attacked the deceased. The injuries inflicted by him, were grave. The incident appears to have snow balled into a major incident, on account of a "sudden fight" between the deceased and the Appellant. The explanation to Exception (4) of Section 300, in the opinion of the court, is attracted to the facts of this case.

16. For the above reasons, the appeal is entitled to partially succeed. The conviction of the Appellant is substituted -from the existing one, u/s 302 to 304, Part I, IPC. The sentence is accordingly altered to seven years" rigorous imprisonment. The Appeal is allowed in the above terms.