

(2009) 12 DEL CK 0161
In the Delhi High Court
Case No : Criminal A. No. 442 of 2009

Ombir Singh and Another

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 16-12-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428
Penal Code, 1860 (IPC) — Section 300, 302, 304, 34

Citation : (2009) 12 DEL CK 0161

Hon'ble Judges : Sanjay Kishan Kaul, J;Ajit Bharihoke, J

Bench : Division Bench

Advocate : Rajinder Singh, for the Appellant; Sunil Sharma, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The appellants have preferred the present appeal against the judgment of the learned Additional Sessions Judge dated 27.3.2009 and order on sentence dated 28.3.2009 sentencing both the accused to imprisonment for life and fine of Rs. 10,000/-each for the offence punishable u/s 302 r/w Section 34 IPC and in default of payment of fine both accused to undergo SI for six months each.

2. The facts of the case are that both the accused used to work together in Delhi. On the night intervening 23/24.10.2004 both the accused along with deceased and some other persons were employed at a stall in the Ramleela ground, Kamla Market, Delhi when at about 2:00 a.m., while they were preparing to sleep both the accused came in a drunken condition and started making noise. The deceased Ram Avtar told them not to make noise and went to the urinal and when he came back he was abused by both the accused. The deceased then asked the accused persons not to abuse him on which the accused Ombir exhorted his co accused Damodar "Yeh saala zyaada chaudhary banta hai" and caught hold of the hands of the deceased while Damodar stabbed him on his chest with a vegetable cutting knife and both the accused fled from the spot. The deceased was taken to the JPN hospital where he was declared brought dead.

The case against the appellants was registered in the FIR No. 480/04 u/s 302 IPC.

3. On completion of investigation, the appellants were challaned and sent for trial for the offence punishable u/s 302 IPC read with Section 34 IPC.

4. Both the appellants pleaded innocence and claimed to be tried.

5. In order to prove the guilt of the appellants, the prosecution examined 21 witnesses. The important witnesses are the eye witnesses, Jai Chand, PW1, Ramesh, PW2, Vidya Sagar, PW3, Veer Pal, PW4 and Nanku, PW5, who as per the prosecution, had seen the occurrence. Another important witness is Dr. Rohit, PW17, who conducted post mortem examination on the dead body of the deceased and as per his version, he found two incised stab wounds on the left side of chest of the deceased. He opined that the death was caused due to hemorrhage and shock consequent upon the stab injuries. The doctor further opined that the injuries were possible with a sharp edged weapon.

6. In the course of hearing, learned Counsel stated on instructions from the appellants, that they admit their guilt for having caused fatal injury which resulted in the death of the deceased and does not dispute the facts in that behalf. The only argument advanced is that the learned Additional Sessions Judge fell into an error while convicting the appellants u/s 302 IPC with the aid of Section 34 IPC, as the case is one of culpable homicide not amounting to murder u/s 304 IPC.

7. The prosecution case rests mainly upon the eye witness account. The only witness who had fully supported the case of the prosecution is PW2, Ramesh. PW1, Jai Chand, and PW4 Veer Pal have partly supported the case of the prosecution, but they resiled on certain aspects of the case. PW3 Vidya Sagar and PW5 Nanku are totally hostile to the case of prosecution and they have not supported the prosecution version. PW2 Ramesh has stated that when the appellant was returning after easing himself, the accused persons uttered the words "Yeh saala zyaada chaudhary banta hai" and the appellant Ombir caught hold of the hands of the deceased whereas the appellant Damodar gave stab blows on his chest which gives an impression that the appellants stabbed the deceased without any provocation or altercation. PW4 Veer Pal, however in his testimony has given a slightly different version that both the appellants taunted him by saying "Yeh saala zyaada chaudhary banta hai" and thereafter both the parties started hurling abuses at each other and it was then that the appellant Ombir caught hold of the hands of Ram Avtar and the appellant Damodar stabbed him with a knife on his chest. From the aforesaid version, it appears that the stabbing took place as a consequence of altercation and hot words having been exchanged between the parties. There is no evidence on record to suggest any previous enmity or motive on the part of the appellants. Therefore, a possibility of any premeditation to kill the deceased is ruled out. From the testimony of PW3, Veer Pal, it is apparent that the occurrence took place as a

consequence of exchange of hot words and altercation which took place on a trivial issue which makes it clear that the deceased was stabbed by the appellant in the heat of moment as a consequence of sudden altercation, without having any intention to kill or to cause serious injury to the deceased. The knife used in this case admittedly is a small kitchen knife used for cutting vegetables. The appellants and the deceased admittedly were working at a chaat stall which implies that knife was handy at the spot of occurrence. Therefore, under the circumstances, we are of the view that the instant case is squarely covered under Exception 4 to Section 300 IPC. As such, in our considered view, the learned trial Judge has fallen in error by holding the appellants guilty for the offence punishable u/s 302 read with Section 34 IPC whereas their case squarely falls within the ambit of 4th Exception to Section 300 IPC which is reproduced 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-

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 offenders having taken undue advantage or acted in a cruel or unusual manner.

8. In our view, we find support from the judgment of the Supreme Court in the matter of Ravindra Shalik Naik and Others Vs. State of Maharashtra, wherein it was observed thus:

6. The Fourth Exception of Section 300, IPC 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 reasons 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. A 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's having taken undue advantage or acting 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, IPC is not defined in the IPC. 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 cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage". These aspects have been highlighted in *Dhirajbhai Gorakhbhai Nayak v. State of Gujrat* (2003) (5) Supreme 223; *Prakash Chand Vs. State of H.P.*, ; *Byvarapu Raju Vs. State of Andhra Pradesh and Another*, and *Buddu Khan v. State of Uttarakhand SLP (Crl.) No. 6109/08* disposed of on 12.1.2009

9. The result of the above discussion is that the appellants are liable to be convicted for culpable homicide not amounting to murder punishable u/s 304 Part II IPC and not for the offence of murder punishable u/s 302 IPC. Thus, we partially accept the appeal and convert the conviction of the appellants from 302/34 IPC to Section 304 Part II IPC read with Section 34 IPC.

10. Coming to sentence, keeping in view the overall circumstances of the case and the background of the appellants, we modify the sentence awarded to the appellants from life imprisonment to the imprisonment for a period of six years while maintaining the fine imposed by the trial Court. Needless to say, the appellants shall be entitled to the benefit of Section 428 Cr.P.C.

11. The appeal is accordingly allowed with the above referred modifications.

12. A copy of this order be sent expeditiously to the Superintendent, Tihar Jail.