(2011) 07 DEL CK 0465

Delhi High Court

Case No: Criminal A. 274 of 1997

Mohd. Sultan @ Kallu		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: July 8, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 428
- Penal Code, 1860 (IPC) - Section 300, 302

Citation: (2011) 5 AD 720 : (2011) CriLJ 4680

Hon'ble Judges: V.K. Jain, J; Badar Durrez Ahmed, J

Bench: Division Bench

Advocate: Reema Upadhaya, Amicus Curiae, for the Appellant; Richa Kapur, for the Respondent

Final Decision: Allowed

Judgement

Badar Durrez Ahmed, J.

This appeal is directed against the judgment dated 31.05.1997 passed by the learned Additional Sessions Judge, Delhi in Sessions Case No. 33/1996 arising out of FIR 22/1992 u/s 302 IPC registered at Police Station Bara Hindu Rao. By virtue of the impugned judgment, the Appellant has been found guilty and has been convicted for the offence punishable u/s 302 IPC for having caused the death of Yasin. The order on the point of sentence, which is also impugned in this appeal, was passed by the learned Additional Sessions Judge on 04.06.1997, whereby the Appellant Mohd. Sultan @ Kallu was sentenced to undergo imprisonment for life and to pay a fine of Rs. 500/- for the offence punishable u/s 302 IPC and in default of the fine, he was to further undergo rigorous imprisonment for two months. The Appellant was granted the benefit of provisions of Section 428 of the Code of Criminal Procedure, 1973.

2. The case of the prosecution was that Mohd. Farukh and his brothers Yasin and Yamin were engaged in the work of electroplating (nickel polish) at house No. 6353, Gali Ishwari Prasad, Bara Hindu Rao, Delhi. Mumtaz, their cousin (maternal uncle''s son) was also working with them. It is also the case of the prosecution that the Appellant''s brother Taslim was also engaged in the same type of work of electroplating in the same neighbourhood. It is alleged that on the night intervening 17/18th, September, 1992, some steel plates were stolen from the factory of the complainant Mohd. Farukh. The said Mohd. Farukh and his brothers doubted the involvement of the Appellant Mohd. Sultan @ Kallu. They also had conversations with regard to their suspicion with others in the mohalla. On the night of 18.09.1992 at about 8 - 9:15 pm, the said Mohd. Farukh and his brothers Yasin and Yamin as also their cousin Mumtaz were discussing amongst themselves about the theft which had taken place in their factory the previous night. It is alleged that at that time, the Appellant Mohd. Sultan @ Kallu came to the factory and immediately started abusing the complainant Mohd. Farukh and questioned him as to why his (Mohd. Sultan''s) name was being mentioned with regard to the theft of the steel plates which had taken place in the complainant''s factory.

3. The prosecution case further is that the complainant Mohd. Farukh denied that Mohd. Sultan''s name was mentioned with regard to the theft which had taken place but this did not pacify Mohd. Sultan @ Kallu and he slapped Mohd. Farukh 2-3 times. Thereafter, Mohd. Sultan left the factory while hurling abuses. Mohd. Farukh''s brother Yasin asked Mohd. Sultan @ Kallu not to abuse and upon this, Mohd. Sultan is alleged to have stated that he would teach him a lesson. Immediately thereafter, Mohd. Sultan ran towards his brother Taslim''s factory and within minutes he returned with a chhuri (knife) and immediately stabbed Yamin on the left side of his chest. When Yasin and Mumtaz rushed to save Yamin, the Appellant Mohd. Sultan @ Kallu ran way towards Bara Hindu Rao along with the knife. Thereafter, the complainant Mohd. Farukh and his brother Yasin rushed Yamin to Hindu Rao Hospital in a three wheeler scooter. At the said hospital, Yamin was examined by Dr Ravi Dutt Sharma at 9:55 pm and was declared as having been brought dead.

4. The prosecution examined as many as 17 witnesses in support of its case against the Appellant. The most important witnesses are PW8 Mohd. Farukh, PW9 Yasin and PW10 Mumtaz, apart from PW1 Dr Ravi Dutt Sharma, who proved the MLC Exhibit PW1/A, and PW5 L. K. Baruwa, who conducted the post mortem examination on the dead body of the deceased Yamin on 19.09.1992 and proved his report Exhibit PW5/A. PW14 HC Hasmat Khan is the person in whose presence the Appellant Mohd. Sultan @ Kallu was arrested by Inspector Tulsi Ram from his house at about 12:45 am on 19.09.1992 and the knife Exhibit P-1 was recovered from the right pocket of the trouser of the Appellant and the same was seized vide seizure memo Exhibit PW10/B. The shirt and baniyan (vest) of the Appellant, which were blood stained, were also seized by Inspector Tulsi Ram in the presence of PW14 Head Constable Hasmat Khan vide seizure memo Exhibit PW10/C.

5. The learned Counsel appearing on behalf of the Appellant submitted that although there are three purported eye witnesses, namely, PW8 Mohd. Farukh, PW9 Yasin and PW10 Mumtaz, but they are all closely related to the deceased Yamin. As pointed out earlier, PW8 Mohd. Farukh and PW9 Yasin are brothers of the deceased Yamim and PW10 Mumtaz is a cousin. It was also contended by the learned Counsel for the Appellant that there are serious discrepancies in the testimonies of the said three eye witnesses and, therefore, their accounts cannot be taken to be credible. Apart from this, the learned Counsel for the Appellant also submitted that the alleged recovery of the knife Exhibit P-1 and the blood stained shirt and baniyan (vest) was also not free from doubt. He submitted that it was improbable that the Appellant Mohd. Sultan @ Kallu would be wearing the same blood stained clothes in the morning after the incident and would also be carrying the murder weapon on his person. Finally, it was contended by the learned Counsel for the Appellant that in the alternative this was a case of culpable homicide not amounting to murder inasmuch as the incident, even if it is assumed that the Appellant was involved, was one which fell within Exception 4 to Section 300 and was culpable homicide not amounting to murder and, therefore, punishment for the same ought to be u/s 304, Part-II.

6. The learned Counsel for the State supported the decision of the learned Additional Sessions Judge and submitted that this was a clear case of murder and is fully supported by the eye witness accounts of PW8 Mohd. Farukh, PW9 Yasin and PW10 Mumtaz who were all natural witnesses. Although there may be some small discrepancies in their accounts, but that would not enable us to detract from the position that they all saw Mohd. Sultan @ Kallu stabbing the deceased Yamin with a knife which resulted in his death. The learned Counsel for the State also submitted that the arrest and recovery of the murder weapon as well as the blood stained baniyan (vest) and shirt of the Appellant Mohd. Sultan @ Kallu also stand established by virtue of the testimonies of the Investigating Officer as also PW14 Head Constable Hasmat Khan.

7. First of all, let us examine the nature of the injuries on the body of the deceased Yamin. As per PW1 Dr Ravi Dutt Sharma, who examined Yamin on 19.09.1992, at about 9:55 pm, there was a clean incised would 1 inch length on the left side of the chest. This is also indicated in the MLC Exhibit PW1/A. PW5 Dr L. K. Baruwa, who conducted the post mortem examination on the dead body of the deceased Yamin found the following injuries on the dead body:

1. Abrasion over left side of chin in an area of 2 cm x 1.5 cm;

2. Incises wounds on the left side from the chest 9 cm below and slightly medial to the left nipple and the size of the injury was 2.5 cm x 1.5 cm x No other external injury was seen on the body.

8. Injury No. 2 had entered the left chest cavity through the 6th intercostal space and had cut the left lung on its lower lobe through and through and then it pierced diaphragm and then it had cut the left dome of liver and had a total depth of about 12 cms. According to PW5 Dr L. K Baruwa, injury No. 2 was ante mortem in nature and was caused by a sharp edged weapon and was sufficient to cause death in the ordinary course of nature and the death had resulted due to shock and haemorrhage on account of the said injury. PW5 Dr L. K. Baruwa had also opined that there were corresponding cut marks on the shirt and baniyan (vest) which the deceased Yamin was wearing at the time of the incident and which was found on his dead body at the time of the post mortem examination.

9. PW8 Mohd. Farukh in his deposition stated that Yamin was his younger brother and that he used to do electroplating work along with him in Gali Ishwari Prasad at house No. 6353. He further stated that on 17.09.1992, some nickel plates were stolen from their factory and that he had a talk with the Appellant Mohd. Sultan''s brother Taslim and also with the landlord/ owner of the factory premises. He identified Mohd. Sultan @ Kallu, who was present in court and who used to do electroplating work in the same neighbourhood while Taslim used to do the work of pressing clothes in Shish Mehal area. The witness further stated that when he enquired from Taslim about the stolen articles, Taslim told him that his brother Mohd. Sultan could do such type of work as he was in the habit of stealing goods. This part of the testimony does not appear to be believable. However, it does not detract from the eye witness account given of the actual incident itself. PW8 Mohd. Farukh stated that on the night of 17.09.1992 at about 9 pm, he, his younger brother Yamin and cousin Mumtaz and another younger brother Yasin were sitting in the factory premises and were discussing with each other as to what course of action should be adopted with regard to the stolen goods. It is at that point of time that Mohd. Sultan @ Kallu had come to their factory premises and had started abusing him and questioned him as to why his name was being taken with regard to the stolen goods. The witness further stated that Mohd. Sultan @ Kallu also slapped him two times. On hearing the noise, the residents of the locality had gathered there. However, Mohd. Sultan stated that he would come back and would teach him a lesson. The Appellant Mohd. Sultan then appeared on the scene after 5 minutes and started abusing him and his brothers. As Yamin intervened, Mohd. Sultan @ Kallu stabbed him with a knife on the left side of his chest once. It was further stated by this witness that when Mohd. Sultan @ Kallu again was about to stab Yamin with the knife, Yamin caught hold of that knife and Mohd. Sultan @ Kallu ran away from the scene leaving the knife in the hand of his brother Yamin. Thereafter, he (PW8 Mohd. Farukh) and his younger brother Yasin and cousin Mumtaz rushed Yamin to Hindu Rao Hospital in a three wheeler scooter and the doctor, after examining him, declared him to be dead.

10. PW9 Yasin narrated the same incident with regard to the theft having taken place at their factory in the night intervening 16/17.09.1992. According to him steel

plates weighing about 54 kilograms had been stolen from their factory, the value of which was about Rs. 9,000/-. The steel plates had been received by them for doing the work of electroplating (nickel polish). This witness also stated that they had talked about the theft of the goods with their neighbours and had also had a talk with the landlord of their factory premises. He further testified that on the night intervening 17/18.09.1992, at about 9:15 pm, he, his brothers Mohd. Farukh and Yamin and cousin Mumtaz were talking with regard to the stolen goods and at that time Mohd. Sultan @ Kallu arrived at their factory premises and started abusing Mohd. Farukh and also slapped him 2-3 times. He also questioned as to why his name was being dragged in connection with the stolen goods. The Appellant Mohd. Sultan @ Kallu is stated to have left the place by uttering the words that he would come back and would teach them a lesson. Mohd. Sultan @ Kallu then went to his factory and brought back a knife with him within 5 minutes and stabbed Yamin with the knife on his heart once and then ran away with the knife. Thereafter, he (PW9 Yasin), his brother Mohd. Farukh and cousin Mumtaz rushed in a three wheeler scooter rickshaw to Hindu Rao Hospital where the doctor had declared him as having been brought dead. He further stated that in the process his pants, which he was wearing, got blood stained with the blood of Yamin and the same was given to the police vide seizure memo Exhibit PW8/C. He also identified the blood stained clothes of the deceased Yamin, being blood stained shirt Exhibit P-2, blood stained pant Exhibit P-1, baniyan (vest) Exhibit P-4 and underwear Exhibit P-5. In his cross-examination, this witness PW9 Yasin stated that the incident had taken place around 9:15 pm and the initial abusing and quarrel was between the Appellant Mohd. Sultan @ Kallu and Mohd. Farukh for about five minutes. It is further stated that Mohd. Sultan @ Kallu had slapped Mohd. Farukh about 3/4 times. Though nobody from outside had come to intervene, he (PW9 Yasin), Yamin and PW10 Mumtaz intervened and pushed the Appellant Mohd. Sultan @ Kallu out of their premises. But, they did not close their factory premises. He stated that Mohd. Sultan returned after 5/6 minutes and when he stabbed Yamin, he saw the knife in his hand. He also stated that when Mohd. Sultan returned, he (PW9 Yasin) was standing in front of the factory premises with his brother Yamin and that Mohd. Farukh was inside the factory. He further stated that when Mohd. Sultan @ Kallu stabbed his brother Yamin, he (PW9 Yasin) was standing outside the factory while his brother Mohd. Farukh and Mumtaz were inside the factory premises. Upon Yamin being stabbed, Mohd. Farukh and Mumtaz came to the spot within two minutes and the Appellant Mohd. Sultan @ Kallu had already run away when Mumtaz and Mohd. Farukh reached the spot. Upon a court question being put to this witness, he clarified that Mohd. Sultan was not seen running away by Mohd. Farukh and Mumtaz. But, he ran away within his (PW9 Yasin''s) view. Since the witness had given a new version in his cross-examination, the learned APP had sought permission to cross-examine him. He was allowed to do so. In the cross-examination by the learned APP, the witness reverted to his original stand and stated that it is correct that the incident was witnessed by him, his brother Mohd. Farukh and cousin

Mumtaz and it is also correct that when the accused Mohd. Sultan ran away after inflicting the stab injury, he (PW9, Yasin), his brother Mohd. Farukh and his cousin Mumtaz had seen him running away from the spot.

11. PW10 Mumtaz, who is the third purported eye witness, deposed more or less in the same lines as PW8 Mohd. Farukh. Although he deposed that the initial incident took place at about 8:30 pm, when there was an altercation between the Appellant Mohd. Sultan @ Kallu and PW8 Mohd. Farukh. He stated that there was a heated exchange of words between them and Mohd. Sultan @ Kallu slapped PW8 Mohd. Farukh 2/3 times. Thereupon, Mohd. Sultan rushed towards his brother Taslim''s factory, which was at a short distance in the same gali, saying that he would teach them a lesson. Within 2-3 minutes, Mohd. Sultan returned carrying a knife and immediately thereafter, he stabbed Yamin with the knife on his chest. Yamin fell down on the ground and the Appellant Mohd. Sultan @ Kallu ran away towards Bara Hindu Rao with the knife. Thereafter, he (PW10 Mumtaz), PW9 Yasin and PW8 Mohd. Farukh took the injured Yamin in a three wheeler scooter rickshaw to Hindu Rao Hospital, where the doctor, after examining Yamin, declared him to be dead. PW10 is also a witness of the recovery of the knife from the Appellant Mohd. Sultan @ Kallu.

12. On going through the depositions of the three purported eye witnesses, we find that there are some discrepancies with regard to the time of the incident - whether it happened at 8:30 pm or around 9:15 pm. At one place PW8 Mohd. Farukh has also given the wrong date, that is, 17.09.1992, when, in fact, the incident took place on 18.09.1992. There is also a discrepancy in the testimony of PW8 Mohd. Farukh, when he stated that the assailant Mohd. Sultan @ Kallu left the knife in the hand of Yamin, whereas the other two witnesses, namely, PW9 Yasin and PW10 Mumtaz stated that the Appellant Mohd. Sultan @ Kallu ran away from the scene with the knife. There are also other minor contradictions. However, the most important aspect can be derived from the testimony of PW9 Yasin, who, in his cross-examination by the learned Counsel for the defence, stated that Mohd. Farukh and Mumtaz were inside the factory when the incident of stabbing took place and arrived at the scene within two minutes after Mohd. Sultan @ Kallu had run away. This testimony, however, was got corrected by the prosecution, when the learned APP, after getting permission from the court, cross-examined PW9 Yasin. However, to our minds, this is a very material circumstance which casts serious doubts on the factum of PW8 Mohd. Farukh and PW10 Mumtaz being eye witnesses of the actual stabbing incident. Be that as it may, the fact remains that even if we discount the testimonies of PW8 and PW10, the testimony of PW9 Yasin remains with regard to the actual stabbing incident. We also find that the trial court had serious doubts with regard to the recovery of the knife from the pant worn by the Appellant the next morning. The trial court observed that the manner in which the knife is stated to have been recovered did not appear to be convincing when no independent witness of the locality was joined at the time of arrest of the accused. However, the trial court

observed that even if it is held that no knife was recovered at the instance of the accused, the ocular version, as given by the prosecution witnesses, was sufficient to link the Appellant Mohd. Sultan @ Kallu with the commission of the offence. We entirely agree with this conclusion of the learned Additional Sessions Judge with the rider that the testimonies of PW8 Mohd. Farukh and PW10 Mumtaz, with regard to the actual stabbing incident, appear to us to be doubtful. However, PW9 Yasin is clearly an eye witness of the actual stabbing incident and that in itself is sufficient for us to conclude that it is the Appellant Mohd. Sultan @ Kallu who had stabbed the deceased Yamin with a knife and caused him the injuries noted in the post mortem report and which ultimately led to his death.

13. This takes us to the alternative plea taken by the learned Counsel for the Appellant that the offence would not be murder but would be culpable homicide not amounting to murder and would fall within Exception 4 of Section 300 IPC, which reads as under:

300. Murder. -

Exception 1. - xxx

Exception 2. - xxx

Exception 3. - 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.

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 Vs. State of Haryana, . 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.

16. It has now to be examined as to whether the offender had taken undue advantage or acted in a cruel or unusual manner. We see no evidence of this inasmuch as the Appellant Mohd. Sultan @ Kallu had only given one knife blow. Even the post mortem report indicates a single stab injury. Thus, we are clearly of the view that this is a case of culpable homicide not amounting to murder within the ambit of Exception 4 of Section 300 IPC. However, we are not in agreement with the learned Counsel for the Appellant that this is a case which would fall u/s 304, Part-II. Mohd. Sultan certainly knew, even if it is assumed that it was not intended to cause the death of Yamin, that by stabbing Yamin on the left side of the chest in a deep thrust, it would result in causing such bodily injury as was likely to cause death.

17. Therefore, we are of the view that the Appellant Mohd. Sultan @ Kallu should be punished u/s 304, Part-I. His conviction for murder is set aside. He is, however, convicted for committing culpable homicide not amounting to murder in view of Exception 4 of Section 300 IPC and he is awarded a sentence of imprisonment for a term of 10 years as also a fine of Rs. 500/- and in default whereof, he has to further undergo rigorous imprisonment for two months. His conviction and sentence stand altered accordingly.

18. The Appellant Mohd. Sultan @ Kallu has already undergone the entire period of the sentence, as also the in default period. Consequently, he does not require to suffer any further incarceration. His bail bonds stands cancelled and the surety stands discharged. The appeal is allowed partly, as indicated above.