

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

% Date of Decision : 11th January, 2010

+ **CRL. A. No. 78/1997**

SURINDER SINGH Appellant
Through: Ms. Ritu Gauba, Advocate

versus

STATE Respondent
Through: Ms. Richa Kapoor, APP

+ **CRL. A. No. 102/1997**

RAJINDER @ RAJU Appellant
Through: Ms. Ritu Gauba, Advocate

versus

STATE Respondent
Through: Ms. Richa Kapoor, APP

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J. (Oral)

1. Vide impugned judgment and order dated 28.09.1996 the appellants have been convicted for an offence of having murdered their real brother Rakesh.

2. Vide order 28.09.1996, the appellants have been sentenced to undergo imprisonment for life and pay fine in

sum of Rs. 2000/-; in default of payment of fine they have been directed to undergo further RI for six months.

3. Learned counsel for the appellant concedes that the evidence on record establishes beyond reasonable doubt that the appellants participated in the injuries which were inflicted upon Rakesh, but contends that from the acts committed by the appellants, there being no evidence of past motive, at best the evidence makes out a case of culpable homicide not amounting to murder, punishable under Section 304 Part I IPC.

4. We may note, at the outset, that the weapon of offence Ex. P-5, a knife, has been per profiled by the learned trial Judge while recording the testimony of Sh.Niranjan PW-9 who deposed on 12.08.1993, in the following words:-

"The knife Ex. P-5 produced in Court today is only a small CHHURI usually used in household for cutting vegetables etc., Its blade is 4.9 inches long and 1 inch wide with a wooden handle of 3.9 inches long attached with the blade."

5. The injuries on the person of Rakesh as noted in the post-mortem report Ex. PW-15/A, which report has been proved by author thereof; namely, Dr.L.K.Baruah PW-15 notes the following four injuries on the person of Rakesh:-

"1. One incised wound on the front of chest place almost horizontally, 7 cm below the medial end of the left collar bone of size 3 cms. X 1.2 cms.

2. One incised wound on the antero medial aspect on the right leg on its upper part in front side. This injury was placed 7 cm below the lower border on the

right patela and the size of the injury was 2.5 cms X 1.5 cms. Muscle deep.

3. Abrasion of size 5 cms X 2.5 cms were seen on the back of right side abdomen on his lower part and the injury was placed vertically.

4. Abrasion of size 7 cms X 3 cms. was seen on the left side back of the abdomen in lumber area."

6. In respect of injuries found on the person of the deceased, it may be noted that injury no. 1 proved fatal inasmuch as the knife entered the chest cavity between the second and the third rib and cut the right auricle of the heart. Death was due to hemorrhagic shock resulting from excessive bleeding.

7. It may be noted that injury no. 3 and 4 are simple abrasion on the back of the right side abdomen. They appear to be the results of fists and blows inflicted on the back. Injury No. 2 is a muscle deep incised wound on the right leg. It is apparent that the said injury is on a non-vital part of the body. Only injury No. 1 is inflicted on a vital part of the body i.e. chest and has resulted in the heart being punctured.

8. The circumstances under which the injuries were caused have been narrated by PW-2 to WP-5. Let us briefly note the testimony of the said four witnesses.

9. Rajbala PW-2, who is the neighbour of the appellants and the deceased deposed that the appellants and deceased were real brothers. They had a sister named Uma who wanted to

marry one Dalip. Whereas the deceased opposed the marriage, other family members were in favour of the marriage. On 21.8.1991 i.e. the date of the incident, at about 11 in the night she i.e. Rajbala, one Maya Devi, deceased Rakesh along with two person named Raghubir and Shiv Kumar were sitting outside house No. 1785 in the street. Appellants Rajinder under the influence of liquor came. He abused Rakesh and other persons of the street. Rakesh requested Rajinder not to abuse other persons in the street because it was a family matter. When abusing was going on, Surinder came out of his house and both i.e. Rajinder and Surinder started fighting with Rakesh. Some *marpitai* took place. Rakesh entered house No. 1785 and bolted the door from inside. Appellant Rajinder broke open the door. Both Rajinder and Surinder entered the house. She heard sounds like "HO HO" and "MARNE KI". Both accused left and she saw Rakesh lying dead inside the house No. 1785 which belonged to Maya Devi.

10. Maya Devi PW-3 deposed para materia with the testimony of PW-2 but gave additional information, that the mother of the appellants and the deceased, namely, Smt. Sarla intervened.

11. Narangi Devi PW-4 deposed that when she was in the

street at around 10:30 PM on 21.08.1991 appellant Rajinder came in a drunken state and picked up a quarrel with Rakesh. He abused Rakesh. Their mother intervened. Accused Surinder came from his house and rushed towards the place where the fighting was going on. What happened thereafter was not seen by her.

12. Hori Lal PW-5 deposed that it was about 11 PM on 21.08.1991 when Rajinder came from somewhere and started hurling abuses. Rakesh objected. Rajinder and Rakesh started quarrelling, Surinder joined them. Their mother also came there. During the course of altercation and abusing, Surinder went inside his house and came out with something. Rakesh entered the house of Maya Devi and bolted the door from inside. Both accused broke the door and entered. They came out after 2-3 minutes. He saw Rakesh dead.

13. Smt. Sarla, mother of the appellants and deceased appeared as PW-11 but disclaimed any knowledge of how her son Rakesh died. She was declared hostile and was cross-examined by the learned APP. She denied having told police the facts which were sustainably recorded in her statement under Section 161 Cr. P.C.

14. With reference to the testimony of PW-2 and PW-5, it is apparent that the appellants did not come together to assault

Rakesh. It is apparent that appellant Rajinder came to the street. He was drunk at that point of time. He picked up a quarrel with Rakesh. The reason for the quarrel was not any personal enmity but the fact that the Rakesh was opposed to the proposed matrimonial alliance of the Uma with a boy to which other family members were agreeable to. It is apparent that Rajinder was angry with Rakesh for opposing the marriage of Uma with a boy who was to the liking of the rest of the family members. Abuses between the two turned into a scuffle. Their mother Sarla intervened. Probably, she was slapped. At that point of time Surinder joined the fight which was already taking place between Rajinder and Rakesh.

15. It is not clear from the testimony of the witness Surinder came armed with a knife, for the reason two witnesses deposed that he went back and returned with a knife in his hand. Two witnesses did not state that Surinder went to his house and returned with a knife.

16. All witnesses speak in harmony that when Rakesh entered the house of Maya Devi and bolted the same from inside Rajinder broke the door and he and Surinder went inside. What happened inside is not deposed to by any witness.

17. There is thus probability that either Surinder or Rajinder

picked up a knife inside the house of Maya Devi and inflicted two incised injuries on the person of the deceased.

18. It assumes significance to note that when Rakesh entered the house of Maya Devi followed soon thereafter by Surinder and Rajinder, all other eye-witness continue to stand on the street outside. The appellants who were 2 in number could have, if they had desired to kill the deceased, inflicted as many stab injuries as they desired. The fact that only two stab injuries were inflicted and only one of them is on the vital part of the body suggests that intention of the appellants was to simply injure Rakesh and do no more.

19. It is settled law that if it is established that the accused intended to cause the injuries which were actually inflicted and if the injuries inflicted are opined to be sufficient in the ordinary course of nature to cause death, whatever be the intention, the act would be that of murder.

20. It is equally settled law that to attract the third part of Section 300 IPC, Section 313 Cr.P.C. the prosecution must lead evidence that the accused intended to cause the injuries which were actually caused.

21. When incidents take place in night or in darkness and witnesses did not speak with clarity with reference to the body part injured, Courts have been hesitant to hold that in said

cases Section 300 thirdly IPC. is attracted. The reason is obvious. When it is dark it becomes difficult for anyone to speak with certainty that the blow was directed on that part of the body where it actually fell.

22. It assumes importance that Rajinder came in drunken condition. He was unarmed. A verbal dual took place between Rakesh and Rajinder. The verbal dual resulted into physical fighting with each other. Surinder joined little later. Thus prior meeting of the minds is completely ruled out.

23. Whatever happened; happened at the spur of the moment.

24. Noting that the appellants had an opportunity to inflict more than two injuries; noting that knife was used only twice; nothing that the incident took place at around 11 PM in the dark, we hold that the evidence on record probablizes the commission of an offence punishable under Section 304 Part I IPC and not to offence punishable under Section 302 IPC.

25. A perusal of the case law would show that unless extremely aggravated circumstances are found for offence punishable under Section 304 Part I IPC, the normal sentence imposed is to undergo RI for 10 years.

26. We intend to make a departure in the peculiar facts of the instant case. The reason for our departure is that the

appeals filed in the year 1997 are being disposed of after nearly 13 years. Save and except the instant incident, the appellants have no history of being involved in any other offence. When admitted to bail, Rajinder had undergone an actual sentence of 7 years and 11 months. He had earned remission of sentence of 8 months and 11 days. If we impose the sentence to undergo 10 years RI, Rajinder would have to surrender and suffer a remaining sentence of about 1 year. As regards Surinder, when admitted to bail he had suffered an actual sentence of 7 years, 7 months and 19 days. He had earned remission for a period of 7 years and 7 months and 3 days. If we impose the sentence to undergo RI for 10 years, Surinder would have to suffer a remaining sentence of approximately 14 months.

27. There is no evidence that after they were admitted to bail the appellants have committed any other offence.

28. In our opinion ends of justice would be met if we direct that the appellants shall undergo sentence for the period already undergone.

29. The appeals are partially allowed. The conviction of the appellants for the offence punishable under Section 302/34 IPC is set aside. The appellants are convicted for the offence punishable under Section 304 Part I IPC, for which offence we

direct that the appellants shall undergo imprisonment for the period they have already spent in jail.

30. In view of the sentence imposed upon the appellants, we discharge the bail bond and surety bonds furnished by the appellants.

PRADEEP NANDRAJOG, J

SURESH KAIT, J

JANUARY 11, 2010
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