

Rakesh @ Commando Vs. State

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Court : Delhi

Decided On : Aug-30-2013

Judge : Indermeet Kaur

Appellant : Rakesh @ Commando

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment reserved on:

26. 8.2013 Judgment delivered on:30.8.2013 + CRL.A. 724/2009 RAKESH @ COMMANDO Through: Appellant Mr.Pramod Kumar Dubey, Mr.Siddhartha Das, Mr.Nitin Saluja, Mr.Shiv Pande, Mr.Shiv Chopra and Mr.Amit Singh Rathor, Advocates. versus STATE Through: Respondent Sunil Sharma, APP for the State. Inspector Kuldeep Singh, SHO, Defence Colony. CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

1 The appellant is aggrieved by the impugned judgment and order of sentence dated 18.7.2009 and 31.7.2009 vide which he had been convicted for the offence under Section 302 IPC and had been sentenced to undergo imprisonment for life and pay a fine of Rs.3000/- in default of payment of fine to undergo SI for three months. 2 Briefly stated the case of the prosecution is that on 25.7.2007 Kamal Kishore (PW-9) was celebrating his birthday at his residence A-25, Sadiq Nagar.

He had invited his friends which included accused Rakesh @ Commando as also the deceased Bunty @ Rohit; his other friends Kamal Kishore (PW-1), Umesh (PW-2), Pramod Rawat (PW-3), Naveen (PW-4), Virender (PW-5) and Deepak (PW-10) had also been invited; they had all joined the party. At about 10-10.30 PM while food and drinks were being served it was noted that the appellant Rakesh was wielding a knife which he was repeatedly opening and closing; since the appellant, the deceased Bunty and Pramod Rawat were all in a state of intoxication, the appellant also holding a knife, the brother of their host asked them to leave the party. Outside the house an altercation took place between the appellant and the deceased. In this scuffle appellant Rakesh attacked the deceased with a knife on his abdomen. Blood started oozing out from his wound. The deceased fell to the ground. This incident was witnessed by Pramod Rawat (PW-3). PW-1 and PW-5 were also informed about the incident; parents of Bunty were also intimidated. The deceased was removed to the AIIMS hospital in a three wheeler scooter where he was declared dead. 3 Post mortem on the deceased was conducted by Dr. B.L.Chaudhary; it was proved by Dr.Sanjeev Lalwani (PW-20). Five injuries were noted on the person of the deceased and read herein as under: A slit shaped wound horizontally placed on the left of abdomen in parallel to the umbilicus. The length of wound is 1.5 cm. The maximum width at the centre of wound is 0.5 cm. Both the angles of wound are acute and margins of wound are clean cut. The medial end of the wound is 6 cm lateral to the midline, 22 cm below to the left nipple and 117 cm above to left heel. On dissection a track of wound is established on the left abdominal wall passes through the peritoneum. Peritoneal cavity and piercing through mesentery and then penetrating into the left side of the abdominal aorta at the level of L-4 vertebrae. The mesentery is showing large size haematoma. Peritoneal cavity is containing about 3 litre frank blood

2. A metallic stitched wound of 3 cm length is present on the right of chin. Medial end is on the midline. Both margins approached to each other and in process of healing. 3 A abrasion with reddish brown colour slab is present on the (R) lateral malleolus measuring 15x.1 cm in size.. 4 Abrasions two in number with brownish seas is present on the postero lateral aspect of right elbow measuring 2x1 cm of size each. 5 B/L surgical venepuncture wounds present on medial surface of both ankle region measuring 1 cm in length of each with two in number intact sutures

on each. Cause of death was opined as haemorrhagic shock due to injury no.1 which has been caused by a sharp pointed weapon. Injury no.1 was sufficient to cause death in the ordinary course of nature; Injuries were ante-mortem in nature; injury no.1 was found to be fresh in duration whereas the other injuries i.e. injuries no.2 to 4 were found to be three/four days back in duration. Post mortem had been conducted on 26.7.2007; incident had taken place in the intervening night of 25/26.7.2007. Thus injury no.1 was alone attributable to the incident. 4 There was an eye-witness to the incident who was examined as PW-3. He had detailed the eye-witness account in its entirety. This was not only before the police in his statement under Section 161 Cr. P.C. but was also fully corroborated on oath. He deposed that on the date of incident he along with his friend Bunty had gone to attend the birthday of his friend Kamal Kishore (PW-9) at Sadiq Nagar; they reached there at about 9.00 PM; other friends of Kamal Kishore were also in the party including the appellant Rakesh. Rakesh was having a knife. The fact that Rakesh was having a knife was informed by the brother of their host Johny to PW-9. Rakesh and Bunty were asked to leave the party. Outside the house a scuffle took place between Rakesh and Bunty on the point as to who is the badmaash. Rakesh took out a knife and stabbed Bunty on his stomach from which blood started oozing out. PW-3 got perplexed and left the place. He informed Virender and Kamal Kishore about this incident who went to the spot. Parents of Bunty were also informed. PW-3 went to the hospital where he learnt that Bunty had already died. On his pointing out the appellant Rakesh was arrested vide memo Ex. PW-3/A. 5 This witness was cross-examined at length. He admitted that he knew both the deceased and the accused since the last five to six years; he had no fight or enmity with either of them; liquor was also being served in the party. PW-3 admitted that they had had drinks; the friends were enjoying music at the time when they were asked to leave the party; he reiterated that accused was having a knife which he had noted; he reiterated that Rakesh and Bunty were asked to leave the party by their host; he admitted that he had seen Rakesh stab Bunty and thereafter he told Kamal Kishore and Virender about the incident. He further deposed that the knife was got recovered by the accused from the bushes in his presence. 6 Other friends of Kamal Kishore have been examined as PW-1, PW-4, PW-5, and PW-10. 7 In his statement recorded under Section 313 Cr. P.C.

the appellant did not deny the fact that he was present at the party. He denied any inimical relations between himself and the deceased; he denied that he had given a stab wound to the deceased which had led to his death; his defence being that he has been falsely implicated in this case. 8 No evidence was, however, led in defence. 9 The trial judge on the basis of the eye-witness account coupled with the last seen evidence which had been testified by PW-1, PW-5 and PW-9 together with the recovery of knife and the motive projected by the prosecution that there was a previous enmity between accused and the deceased, concluded that the prosecution has proved its case beyond all reasonable doubt. The accused was convicted under Section 302 IPC. 10 On behalf of the appellant arguments have been addressed at length. Learned counsel for the appellant has sought to assail the judgment primarily on the prosecution having failed to prove the recovery of the knife and motive. Submission being that the trial judge has concluded that the motive for the crime that is the enmity between the deceased and the accused has not been proved; the recovery of the knife is also doubtful as different versions had been given by different witnesses; whereas PW-3 has stated that knife was recovered at the instance of the appellant near the DMS Booth, PW-16 SI Manoj Kumar stated that knife has been recovered from the pant pocket of the accused, the version of the PW-3 is discrepant for the reason that in his statement before the police he had stated that the knife had been recovered from the pant pocket of the accused. No public witness has been joined. The trial judge had thus rightly disbelieved the recovery. The motive of the crime has also not been proved. Submission being that on all counts appellant is entitled to a benefit of doubt and a consequent acquittal. 11 Learned counsel for the appellant has, however, failed to dislodge the version of PW-3. A weak submission has been made that PW-3 was not really present at the spot but in the entire cross-examination of PW-3 no suggestion has been given to him that he was not present at the spot or that he was not a part of the celebration party in the house of PW-9. In fact, to questions no.2 and 3 put to the appellant (in his statement under Section 313 Cr. P.C.) he has admitted that on the fateful day he had gone to attend the birth day party of Kamal Kishore where he had also consumed liquor. Testimony of PW-3 as noted supra is clear and categorical. He has not shifted his stand even in his cross-examination. Thus the presence of PW-3 at the spot is fortified and substantiated.

12 Argument of the learned counsel for the appellant that the testimony of PW-3 is not in conformity with the testimonies of PW-5 and PW-1 on the aspect as to who had informed PW-5 and PW-1 about the incident is also not substantiated. PW-5 and PW-1 are admittedly not eye-witnesses. PW-5 has categorically stated that after the accused, deceased and PW-3 had left the party within 15-20 minutes PW-3 informed him and Kamal Kishore that the deceased had been stabbed by the appellant with a knife. PW-5 along with PW-1 had accompanied the deceased to the AIIMS hospital, where the deceased had been declared dead. 13 PW-1 has also not given any contrary version. His version is also corroborative of PW-3 and PW-5. He has also deposed that after the accused, deceased and PW-3 left the party he came to know that appellant had stabbed Bunty with knife; they saw people gathered at the spot. This witness was cross-examined by the learned Public Prosecutor and in his cross-examination admitted the presence of PW-3 at the spot; reference to one part of his version wherein he stated that he had not seen the accused at the spot does not dislodge his version as already noted supra this witness was not an eye-witness; his deposition is on the last seen circumstance. 14 There is no discrepancy in the aforementioned versions. It has been established by the prosecution that the deceased and the accused along with PW-3 had left the party together; they were last seen in the company of one another and it was about 20-25 minutes later that the deceased had died; the credible eye-witness account by PW-3 has proved that it was the appellant who had caused the death of the deceased. Testimony of PW-3 which is clear, unambiguous and inspires confidence would in fact by itself be sufficient to nail the accused. 15 The fact that both the appellant and the deceased were under the effect of liquor had also been admitted not only by the appellant in his statement under Section 313 but also stands testified in the versions of PW-1, PW-3 and PW-10. 16 In this background the conviction of the appellant for having caused the death of the deceased cannot be faulted with. It was the appellant who was responsible for this act. 17 The question, however, which arises is whether in the facts and circumstances of this case, the appellant should have been convicted for the offence under Section 302 IPC or whether he could get the benefit of the lesser offence i.e. culpable homicide not amounting to murder which is punishable under Section 304 IPC. 18 The alternate argument of the learned counsel for the

appellant borders on this submission; he has placed reliance upon the judgment 1983 Cri.L.J.

852 Jagtar Singh Vs. State of Punjab, 1999 Cri L.J.

2537 Udhmi Ram Vs. State of Rajasthan, 1983 Cri.L.J.

346 Hari Ram Vs. State of Haryana and 2001 Cri. L.J.

3531 Vishnu Mohan Vs. State (NCT of Delhi) to support his stand. Submission is that his case falls squarely under Exception 4 to Section 300 IPC. 19 Exception 4 to Section 300 IPC reads as under: 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 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. 20 The facts of the case as culled out show that both the accused and the deceased were in the same age group i.e. in the age group of 18-20 years; they were friends; they were known to each other since the last five to six years; they had gone to attend the birthday party of Pw-9 at his residence. There were joined by other friends also. There was no motive for the crime; previous enmity between the appellant and deceased could not be established. It is also an admitted fact that both the appellant and deceased were under the influence of liquor. They had had food and drinks, it was a dance party; they were in high spirits. However, since the appellant was found wielding a knife, which he was opening and closing repeatedly at the party, he and the deceased were asked by their host to leave the party. This had probably touched a raw nerve of the appellant; he was upset. He along with the deceased and PW-3 left the party together. PW-3 has testified that a scuffle took place between both the appellant and the deceased; the scuffle was on the issue of as to who is the badmaash. It is not known as who was the offender and who was on the defence. It appears to be a mutual quarrel which had erupted suddenly between the parties, however, the appellant who was armed with a knife, in the course of this scuffle stabbed the victim on his abdomen. It was a single injury but was responsible for the death of the victim which is evident from the post mortem report. 21 As per medical evidence, the length of the wound is 1.5 cm; the

maximum width at the centre of the wound being 0.5 cm; both the angles of the wound were acute and margins of the wound were clean cut; the medial end of the wound was 6 cm lateral to the midline, 22 cm below to the left nipple and 117 cm above to left heel. It was this injury alone which had caused the death of the victim. The other injuries were more than 3 to 4 days old and since the post mortem of the victim had been conducted on the following day these other injuries could not be related to this incident. 22 On this count, learned Public Prosecutor has argued that the piercing nature of injury no.1 which went up 6 cm in the midline of the abdomen shows that the appellant did have the intention to cause the death of the victim. 23 Admittedly, it was late in the intervening night of 25-26.7.2007 when the incident had occurred; the appellant and the victim who were friends having no previous enmity had come out of the party together after a spate of food and liquor; they were in an intoxicated and inebriated state of mind. The appellant appeared to have become upset when he was asked to leave the party; he probably felt insulted; who was the badmaash between the two of them had become a bone of contention; this had led to their sudden scuffle which had erupted in the heat of passion and the incident finally culminated in the death of the victim. In this background keeping in view the factual scenario that there was a sudden arousal of passion; there being only one injury on a non-vital part of the body supports the argument of the learned counsel for the appellant that his case falls under Section 304 IPC being covered by Exception 4 to Section 300 IPC. 24 However, the next question which arises for consideration is whether the case of the appellant would fall under Section 304 Part-I or Section 304 Part-II of the IPC. 25 Section 304 of the IPC reads as under:

304. Punishment for culpable homicide not amounting to murder. Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. 26 Part-I applies where

the accused causes bodily injury with the intention to cause death; or with intention to cause such bodily injury as is likely to cause death. Part-II, on the other hand, comes into play when death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death. 27 The Apex Court in (2006) 11 SCC 44. Pulicherla Nagaraju@Nagaraja Reddy v. State of Andhra had observed as under:It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. 28 The post mortem has evidenced that the death in this case had taken place with a sharp pointed weapon. The recovery of the knife has not been effected but that cannot wash away the fact that the victim had been attacked by a sharp edged weapon and the impact of injury no.1 had led to his death. Keeping in mind the fact that the appellant admittedly was in possession of the weapon of offence; the depth and the nature of injury no.1 being deep and piercing, it is a fit case where the case of the appellant falls under Section 304 Part I of the IPC. 29 The judgments relied upon by the learned counsel for the appellant are all distinct on their own facts and have no application in this scenario. 30 The impugned

judgment and conviction is accordingly set aside. The appellant is convicted under Section 304 Part-I IPC. He is sentenced to undergo RI for ten years and to pay a fine of Rs.25,000/which amount shall be payable to the legal representatives of the deceased victim within a period of six weeks. In case of default of payment of fine, he shall undergo further RI for one year. We are informed that the appellant has already suffered incarceration for about seven years; he shall undergo the remaining sentence. 31 With these observations, this appeal stands disposed of. INDERMEET KAUR, J KAILASH GAMBHIR, J AUGUST 30 2013 nandan

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