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**Dharmender & Anr vs.state**

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**SooperKanoon Citation** : sooperkanoon.com/1213637

**Court** : Delhi

**Decided On :** Mar-19-2018

**Appellant** : Dharmender & Anr

**Respondent** : State

**Advocate for Pet/Ap.** : Mr. Y.P. Sirohi, Mr. Sirohi

**Judgement** :

$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI + DHARMENDER & ANR CRL.A. 888/2016

... APPELLANTS
Through: Mr. Y.P. Sirohi along with Ms. versus Neha, Advocates STATE CORAM: JUSTICE S.MURALIDHAR Through: Mr. Kewal Singh Ahuja, APP. .... Respondent JUSTICE I.S. MEHTA

ORDER
1903.2018 %

1. This appeal is directed against the impugned judgment dated 22nd July 2016 passed by the learned Additional Sessions Judge, (South-West)-02 Dwarka Courts, Delhi (ASJ) in Sessions Case No.61 of 2015 arising out of the FIR No.13 of 2012 registered at Police Station (PS) Najafgarh convicting the two Appellants i.e. Dharmender [Accused No.1 (A-1)]. and Jitender [Accused No.2 (A-2)]. for the offence punishable under Section 3of the Indian Penal Code (IPC) and under

Section 3IPC and the order on sentence dated 29th July 2016 whereby for the offence under Section 3IPC each of the Appellants were sentenced to undergo imprisonment for life with a fine of Rs.20,000/- each; and in default of payment of fine, to undergo simple imprisonment (SI) for six months each; and for the offence under Section 3IPC they were also sentenced to undergo RI for seven years and to pay a fine of Rs. 10,000 each and in default, to undergo SI for three months each Crl. A8882016 Page 1 of 9 The charge

2. Both the Appellants were charged with assaulting, in furtherance of their common intention and with the help of dandas and lathis, one Monu on 8th January 2012 at about 7.45 pm at Nangli Dairy Bus stand, Najafgarh, New Delhi as a result of which he suffered injuries and remained admitted at the hospital from 8th to 22nd January 2012 and ultimately died on 23rd January 2012. The Appellants were accordingly charged with committing the offence of murder punishable under Section 3IPC. They were also charged with giving blows to Ravi (PW-3) with dandas and lathis at the same time, date and place thereby causing him injuries with the knowledge that they could have been guilty of culpable homicide not amounting to murder had the said person died, thereby committing an offence punishable under Section 3IPC. The eye witness account

3. An independent eye-witness to this incident was Mukesh (PW-2). He stated that on 8th January 2012 between 7 and 7.30 pm he was standing at Nangli Dairy bus stand toward Dwarka side. The deceased, Monu, and Ravi (PW-3) were selling momos near the bus stand. The two accused, i.e. A-1 and A-2, who were residents of jhuggi at Najafgarh along with some others were eating momos. Both the accused were having wooden dandas/baseball bats. The deceased (Monu) demanded the payment for the momos. Immediately, both the accused assaulted him on the head with a gas cylinder while PW-3 was assaulted with a baseball bat/danda. Both the deceased and PW-3 fell down on the road and both the accused ran away. Crl. A8882016 Page 2 of 9 Investigation

4. PW-2 called the police at 100 number from his mobile phone. This information was recorded as DD No.22A (Ex.PW-10/A) at 8.18 pm at PS Najafgarh. The information was to the effect that near the bus stand, a fight was ongoing. Further

information at 9.25 pm (DD No.22B; Ex.PW-10/B) was in respect of admission of an injured person to RTRM Hospital, Jaffarpur Kalan. The names of the injured were disclosed as Monu and Ravi.

5. According to PW-10, on receiving the above information, the police reached RTRM hospital, Jaffarpur Kalan where the deceased and PW-3 were found admitted. Both the injured persons were declared unfit for statements by the doctor concerned.

6. Thereafter, they came to the house of PW-2 upon being informed by the wife of PW-3 that he was an eye-witness. The statement of PW-2 was recorded by Sub Inspector (SI) Gajender (PW-17). On that basis, a rukka was prepared and sent for registration of FIR. Medical evidence 7. Dr. Bikash Sinha (PW-8) was present at the RTRM hospital when the deceased and PW-3 were brought there at around 9 pm by Jyoti (PW-7), wife of PW-3, for getting medical treatment. After the medical examination of the deceased, he was referred to AIIMS Trauma Centre for further medical treatment. The MLC of the deceased (Ex.PW-8/A) noted that he had contused blunt wounds on the mid forehead. As far as PW-3 was concerned, after medical examination, he was referred to Higher Centre for CT scan. His MLC also showed to contused blunt wounds on the parietal region. Crl. A8882016 Page 3 of 9 8. PW-8 confirmed that at the time of his medical examination, PW-3 was found under the influence of smell of alcohol in excessive, aggressive and uncontrollable. He stated that the injuries mentioned in the MLC of the deceased were possible by falling down with head facing towards the ground.

9. As it transpired, Monu succumbed to his injuries on 23rd January 2012 one day after his discharge from the Safdarjung hospital on 22nd January 2012. He was taken to the RTRM hospital where he was brought dead. Thereafter, the post-mortem was conducted by Dr. Parvinder Singh (PW-6). He was found a stitched surgical wound measuring 30 cm situated over left fronto temporo parietal region of skull (left); scar mark 2.5 x 1.2 cm situated over middle part of the mid forehead region and a brownish colour injury mark of six 2.5 x 0.2 cm situated in the middle of above scar mark; and old healed injury mark of six 2.5 x 2 cm present over left temporo parietal area of skull. On the internal examination, he found effusion of

blood present under the scalp over front (mid), vertex area, right temporo parietal area and mid upper occipital area of skull. Subduaral and subrachnoid haemorrhage present over left fronto temporo parietal lobes of brain. The death was due to cranio cerebral damage consequent to the injuries mentioned in the report.

10. On 13th April 2012, PW-8 gave a further opinion that the injuries on the deceased could have been caused by the wooden dandas shown to him by the police. Trial 11. On the completion of the investigation, a charge sheet was filed and the Crl. A8882016 Page 4 of 9 charges were framed against both the accused by an order dated 31st August 2012 of the trial Court. Eighteen witnesses were examined by the prosecution.

12. As far as A-1 is concerned, his defence was that he has been falsely implicated by PW-2. The son of PW-2 had tried to run a bike over A-2, the brother of A-1, under the influence of liquor. According to A-1, his brother abused the son of PW-2 and an altercation took place between two of them. A-2 also claimed likewise in his defence.

13. Saidan (DW-1) was examined on behalf of the defence. She was the neighbour of the accused. She was, however, unhelpful to the accused as she could not remember even the date and time when the quarrel supposedly took place between the accused and the mama-bhanja (Ravi and Monu) who ran the rehdi selling momos.

14. The trial Court has, on the basis of the deposition of PW-2 and the other medical and forensic evidence that corroborated his testimony, convicted both the accused in the manner indicated hereinabove.

15. This Court has heard the submission of Mr. Y.P. Sirohi, learned counsel for the Appellants, and Mr. Kewal Singh Ahuja, learned APP for the State. The testimony of PW-2 16. In the first instance, Mr. Sirohi, learned counsel for the Appellants, submitted that PW-2 was not a natural witness and there were major inconsistencies in his deposition when compared with the initial statement to Crl. A8882016 Page 5 of 9 the police under Section 161 Cr PC. Mr. Sirohi pointed out

that in his first statement, he did not mention that the deceased was attacked by the accused with a gas cylinder whereas he made that improvement in the Court. He also did not mention to the police about making a call from his mobile phone to the police 100 number. He also did not mention that he along with PW-7, wife of PW-3, took PW-3 and the deceased to the Jaffarpur Kalan hospital On the other hand, in his first statement, he stated that he first went to the house of the deceased to tell about the incident whereas PW-7 removed PW-3 to the hospital.

17. In the considered view of the Court, the above omissions or improvements by PW-2 are not material enough to discredit his entire testimony. In appreciating the evidence of eye-witnesses the Court has to separate the chaff from the grain and examine what is the core element of the testimony. In State v. Saravanan AIR 2009 SC152 the Supreme Court held that minor discrepancies on trivial matters which do not affect the core of the prosecution case can be overlooked. In State of U.P. v. Krishna Master AIR 2010 SC3071 it was emphasised that it is the duty of the Court to separate falsehood from the truth, in sifting the evidence.

18. In the present case, the core element of the testimony of PW-2 is the attack on both the deceased and PW-3 by the accused with the dandas and lathis resulting in blunt force injuries to both. On that score, the testimony of PW-2 has been unshaken in his cross-examination. He was witnessing the incident between 7 and 7.30 pm from a certain distance and therefore, the description of the weapons of attack as wooden dandas/baseball bat does not Crl. A8882016 Page 6 of 9 make much difference.

19. On the other hand, the ocular testimony of PW-2 is fully corroborated by the medical evidence which has been discussed in great detail hereinbefore. Both PW-3 and the deceased suffered injuries on account of which, both had to be hospitalized. The deceased was hospitalized for a much longer time than PW-3. Evidence of the injured eye witness 20. Then we have the injured eye-witness, PW-3, who was present there and got injured. His testimony is sought to be discredited on the ground that he was an interested witness and that he was himself drunk. He was found by the doctor treating him to be displaying aggressive behaviour. The fact remains that PW-3 was attacked by the accused and suffered

head injuries. This is corroborated by the medical evidence. It is not in dispute that he was, with the deceased, removed to the RTRM hospital in Jaffarpur Kalan. Whether he was standing next to the deceased selling momos or he noticed the accused beating the deceased soon after the altercation started is not such a material discrepancy in this context. What has been unable to be disputed is that he is an injured witness present at the spot.

21. The accused have no defence as regards where each of them might have been present at the time of the incident. Both accused then surrendered before the Court on 2nd February 2012 and made disclosure statements that led to the recovery of the weapons of assault. The Court is, therefore, not persuaded that the trial Court has committed any error in holding that the prosecution has proved the guilt of both the accused as far as killing of Crl. A8882016 Page 7 of 9 Monu is concerned and causing head injuries to PW-3 beyond reasonable doubt. Culpable homicide 22. Learned counsel for the Appellant then submitted that the offence should be considered to be culpable homicide not amounting to murder since there was a single head injury to the deceased to which he succumbed 15 days after the incident. It is pointed out that the altercation ensued the moment the deceased demanded payment for the momos and the accused refused. The incident was not premeditated.

23. The Court finds merit in the above contention. The incident, as described by PW-2, which formed the basis of the FIR, clearly indicated that the attack on the deceased and PW-3 by the accused was preceded by an altercation which in turn arose as a result of the deceased demanding money for the momos and being refused by the accused. Therefore, the attack by the accused on the deceased was not premeditated. It was on the spur of the moment in the heat of passion. Further, it was a single blow which did not immediately result in the death of the deceased. After undergoing treatment for 15 days for the single head injury the deceased succumbed to it. All these factors collectively considered persuade the Court to hold that the offence was one of culpable homicide not amounting to murder.

24. Further, the Court is satisfied that given the manner in which the attack on the deceased took place, it cannot be said that the accused intended to kill him although they should be attributed the knowledge that the injury on the head of the deceased with the dandas and lathis would in all likelihood Crl. A8882016 Page 8 of 9 cause his death. Therefore, the offence attracted in the present case is one punishable under Section 304 Part II IPC. Conclusion 25. Both the accused were of a young age at the time of the incident. Further they were not involved earlier in any criminal activity. Their conduct in the jail has been found to be satisfactory. Keeping in view the above factors, the Court: (i) converts the offence for which two accused found guilty qua the deceased from Section 3
IPC to Section 304 Part II/34 IPC; (ii) sentences for the said offence each of the accused to seven years RI with fine of Rs. 20,000 each, and in default of payment of fine, to undergo SI for three months; (iii) affirms the conviction of the two accused for the offence under Section 3
IPC. However, the sentence for the said offence is reduced to five years RI with fine of Rs. 10,000 each and in default of payment of fine, to undergo SI for three months; (iv) directs both the sentences to run concurrently.

26. The appeal is disposed of in the above terms. The trial Court record be returned together with a certified copy of this judgment. MARCH19 2018 Rm S. MURALIDHAR, J.

**I.S. MEHTA, J.**



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