

**Rakesh Kumar Vs. State**

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**Court :** Delhi

**Decided On :** May-31-2007

**Reported in :** 2007(96)DRJ448

**Judge :** R.S. Sodhi and; H.R. Malhotra, JJ.

**Acts :** Arms Act - Sections 27; Indian Penal Code (IPC) - Sections 34, 300, 302, 304 and 324; Code of Criminal Procedure (CrPC) - Sections 173

**Appeal No. :** Crl. Appeal No. 535/2002

**Appellant :** Rakesh Kumar

**Respondent :** State

**Advocate for Def. :** Richa Kapur, Adv.

**Advocate for Pet/Ap. :** Sandeep Sethi, Sr. Adv. and; Anurag Jain, Adv. in Crl. Appeal No. 535/2002 and;

**Disposition :** Appeal allowed

**Judgement :**

**H.R. Malhotra, J.**

1. These appeals are directed against the judgment rendered by the Additional Sessions Judge in Sessions case No. 80 of 2001, arising out of FIR No. 88/92

registered at police station Krishna Nagar, New Delhi dated 7th May, 2002 convicting the appellants for commission of offence punishable under Section 302/34 IPC and also under Section 324/34 IPC besides under Section 27 of the Arms Act and subsequently sentenced them vide separate order of the same date to imprisonment for life and a fine of Rs. 2,000/- each and in default of payment of fine for further imprisonment for two months for the offence under Section 302 IPC. They were further sentenced to rigorous imprisonment for one year each for commission of offence punishable under Section 324/34 IPC. The appellants were further sentenced to undergo R.I. for one year and a fine of Rs. 2000/ each under Section 27 of the Arms Act and in default R.I. for one month each. All the sentences were, however, ordered to be run concurrently.

2. Feeling aggrieved the appellants have preferred separate appeals assailing their conviction and sentence.

3. The prosecution case as set out in the police report sent under Section 173 Cr.P.C. and also incorporated in the impugned judgment is that on 31st March, 1992 Hanumant Singh (the maker of the FIR) and his friend Sunil Choudhary were taking food in Surahi restaurant at 4.15 P.M. A young couple had also come there for snacks and was sitting right in front of the seat of Hanumant Singh and Sunil Choudhary. The accused persons, whose names came to be Rakesh Kumar and Preet Kumar, subsequently started teasing the lady. This led to the exchange of hot words between the couple and the accused persons. Hanumant Singh and Sunil Choudhary intervened and asked the accused persons as to why they were harassing the gentle persons. The accused persons now focus their attention to Hanumant Singh and his friend Sunil Choudhary. The accused Preet Kumar asked accused Rakesh Kumar to settle their score first with them as they were trying to be Dada. The accused Rakesh reacted and pushed Hanumant Singh who as a result of this push fell on the ground. Preet Kumar caught hold of Sunil Choudhary from collar and while quarreling they came out of the restaurant. In the meantime Hanumant Singh also came out of the restaurant. Accused Rakesh as per prosecution case took out a knife and assaulted Hanumant Singh from the front. Hanumant Singh managed to hold the blade of the knife with his right hand and in this process he sustained knife injury on his small finger. The knife broke in the

process of snatching. The accused Rakesh then ran towards Sunil Choudhary and caught hold of him from behind whereas the accused Preet Kumar hit Sunil Choudhary at his chest with knife and thereafter both of them ran towards their scooter No. DL -36-B-7782. Since they were not able to unlock their scooter, therefore, in haste they left their scooter on the spot and took to their heels. Hanumant Singh lifted Sunil Choudhary and removed him to SDN Hospital where he was declared brought dead. On receiving information about the incident, DD No. 11/A was recorded by SI Bageshwar Kaushik who Along with Head Constable Yogender and Constable Satpal went towards the Surahi Restaurant where they learnt that the victim had been removed to hospital. SI Bageshwar Kaushik with his team went to the hospital where they collected MLC of Hanumant Singh and obtained information about the complainant being fit for statement and recorded his statement and sent rukka to the police station on the basis of which FIR of this case was registered.

4. The police came into action and commenced investigation which included getting the post mortem conducted of the deceased, preparing of site plan and taking into possession clothes and shoe of the deceased, blood sample of the deceased and the scooter belonging to the accused persons was also taken into possession. Accused, Rakesh, was arrested on 3rd April, 1992 and made a disclosure statement implicating Preet Kumar as co accused and also got recovered the knife from the bushes at Railway line near Kanti Nagar Colony and also got recovered his blood stained shirt from his house. Accused, Preet Kumar, was also arrested on the disclosure statement of the accused, Rakesh. He also got recovered his own shirt bearing some stains and the dagger with which the offence was committed. It was got recovered by this accused from his buffalo dairy. Both the accused persons refused to take part in the test identification pared on the ground that they had earlier been shown to the witnesses while at the police station. After completion of investigation, charge sheet was filed in the court of the Metropolitan Magistrate who in turn committed the case to the court of Sessions, it being triable by that Court and charges were framed.

5. The prosecution in order to establish the case examined 29 witnesses, of which statements of PW2 Amit Choudhary PW3 Hanumant Singh and PW6 Kuldip

Sharma are of great relevance and importance as the prosecution case primarily hinges on their testimonies, they being the eye witnesses. Besides these witnesses the prosecution also examined PW5 Dr. L.T. Ramni who conducted the autopsy of the deceased. The other police official such as PW7 Inspector Davender Singh, PW. 18 S.I. Narinder Singh Rana, P.W. 23 ASI Sultan Singh, PW 13, Head Constable Yogender and PW 15 Constable Kalu Ram, were examined. The prosecution also examined Raghu Nandan as PW 19 and Constable Lala Ram as PW 25. These persons were the witnesses of recovery of the dagger.

6. We have heard the learned Counsel appearing for the appellant and have also been taken through the judicial record including the testimonies of the prosecution witnesses.

7. We have also looked into the impugned judgment. Learned Counsel appearing for the accused persons assailed the testimonies of PW2, PW3 and PW6 primarily on the ground that their testimonies should not have been believed by the trial court they being not the natural witnesses but witnesses of chance as their presence at the scene of occurrence was not fully established by the prosecution.

8. Our attention was drawn to the testimonies particularly the cross examination part of these witnesses. We do not find any substantial contradictions or improvement in the statement of PW3, the maker of the FIR, in whose presence the alleged occurrence had taken place. Reading of his testimony in its entirety clearly goes to show that he was present there and he had witnessed the occurrence. This witness withstood the test of cross-examination as nothing advantageous to the prosecution could be derived from his cross- examination. This witness narrated the manner in which the crime was committed. His presence at the scene of crime clearly stands established as he too had received injury while quarreling with the accused, Rakesh Kumar, who had taken out the knife and attacked this witness but he managed to save himself as he had held the blade of the knife to thwart the attack and in this way he received injury on his small finger of the right hand and the knife broke into two pieces and the blade was separated from the handle. therefore, to say that this witness was not present, would be a fallacy.

9. Though learned Counsel appearing for the accused persons also addressed their arguments on the aspect of ante timing of the FIR, but were not able to substantiate this part of the arguments with any cogent reasons and, therefore, finally confined their arguments for bringing the case under Section 304 IPC in place of under Section 302 IPC as according to them there was no pre-meditation on the part of the accused person in committing the crime and the offence was committed in the heat of the moment because of intervention of Hanumant Singh and deceased Sunil Choudhary which intervention was not to the liking of the accused persons and this led to the quarrel between the two parties and the occurrence took place so suddenly that there was hardly any time with the accused persons to gather intention to kill the deceased and, therefore, according to them it is a case where the accused persons should have been held guilty under Section 304 IPC and not under Section 302 IPC. These arguments were supported by an authority reported in : [2002]1SCR1152 Sukhbir Singh v. State of Haryana where too similar question came for consideration before the Apex Court. Their Lordships while dealing with the exceptions of Section 300 IPC observed as under:

To avail the benefit of Exception 4, the defense is required to probilise that the offence was committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual manner. The exception is based upon the principle that in the absence of premeditations and on account of total deprivation of self-control but on account of heat of passion, the offence was committed which, normally a man of sober urges would not resort to. Sudden fight, though not defined under the Act, implies mutual provocation. It has been held by the courts that a fight is not per se palliating circumstance and only unpremeditated fight is such. The time gap between quarrel and the fight is an important consideration to decide the applicability of the incident. If there intervenes a sufficient time for passion to subside, giving the accused time to come to normalcy and the fight takes place thereafter, the killing would be murder but if the time gap is not sufficient, the accused may be held entitled to the benefit of this exception.

10. On the strength of the judgment referred to above learned Counsel appearing for the accused persons urged that their case squarely fits into the principles laid down by the Supreme Court in the aforesaid case. Let us now look into the case of the accused persons whether it can be brought into the exception as provided in Section 300 IPC.

11. Looking to the nature and the manner in which the offence was committed, it is manifest that the accused persons had come to the restaurant for dining. Though they appeared to be desperate as they were carrying knife with them but the prosecution story does not speak that they had come to the restaurant with the intention to cause death of any person. They teased the lady on which the lady and her husband felt offended. The deceased and PW- 3, who were also dining in the same restaurant, intervened in the objectionable acts of the accused persons. This led to quarrel between the complainant and the accused persons.

12. It is thus evident that there was a sudden fight between the two over the issue of teasing the lady and that it was not a premeditated fight nor the accused persons had any intention to do away with the deceased as they had not come to the restaurant with that motive.

13. True, they inflicted injury on the persons of the deceased on a vital part but it was a single blow which resulted in the death of the deceased. Looking to the sequence of events and taking into consideration that the incident happened on the spur of moment and also there being lack of intention on the part of the accused persons to commit murder though with knowledge that such acts in all probability might cause death of the accused, bring their case within the purview of Section 304 IPC as means read is not visible in this case. Although there is a thin line between the murder and culpable homicide not amounting to murder, but each case has to be judged from its own facts and circumstances. Though the accused persons in this case appear to be of desperate and of criminal character as they were carrying knife while entering the restaurant yet their act cannot be termed as murder but it is a case where they should be held guilty for culpable homicide not amounting to murder as their case better fits in the purview of Section 304 IPC than under Section 302 IPC.

14. therefore, for these reasons we are of the view that the appellants committed offence punishable under Section 304 IPC and not under Section 302 IPC and this being so the conviction recorded against them by the Additional Sessions Judge is required to be modified to that extent and needs to be converted under Section 304 IPC in place of under Section 302 IPC.

15. We are told that they have already undergone about 8 years of imprisonment. They have no criminal history, as is indicated from their nominal roll. They are young offenders. They have been in jail for quite sometime. The sentence of imprisonment prescribed for an offence punishable under Section 304 IPC is 10 years. Since they have already undergone about 8 years of sentence, we are of the view that end of justice shall be met if their sentence is reduced to the period already undergone. Accordingly while converting their conviction from Section 302 IPC to Section 304 IPC, we sentence them for the period already undergone by them in jail. Both the appeals are accordingly allowed. The appellants be set at liberty forthwith if not required in any other case. CrI. Appeal No. 535/2002 and CrI. Appeal No. 481/2002 are disposed of accordingly.

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