THE HIGH COURT OF MADHYA PRADESH BENCH GWALIOR

Division Bench:

(Rajendra Mahajan & G.S. Ahluwalia, J.J.)

CRIMINAL APPEAL No.320 of 2006

Manoj @ Bablu S/o Jankiprasad Tiwari aged about 26 years R/o village Behruka under Police Station Goraghat district Datia (M.P.). **Appellant**

Versus

The State of Madhya Pradesh through Police Station Kotwali Datia (M.P.) **Respondent**

For appellant	:-	Shri Sushil Goswami, Ld. Counsel assisted by Shri Amit Goswami, Ld. Counsel.
For respondent/State	:-	Shri J.M. Sahni, Ld. Public Prosecutor.

J U D G M E N T

(Pronounced on 12th day of January 2018)

Per: RAJENDRA MAHAJAN, J.

Challenge in this appeal under Section 374 (2) of the CrPC is to the judgment and order dated 15/2/2006 delivered by the Sessions Judge Sessions Division Datia

in Sessions Trial No. 61/2005, whereby and whereunder appellant Manoj @ Bablu has been convicted under Section 302 of the IPC and 25 (1-B) (A) read with 27 of the Arms Act and sentenced thereunder in the former count to suffer rigorous imprisonment for life with a fine of Rs. 5,000/- (Five Thousand) in default thereof to further undergo simple imprisonment for six months and in the latter count to suffer rigorous imprisonment for one year with a fine of Rs.1,000/- (One Thousand) in default thereof to further undergo simple imprisonment for two months with the direction that the substantive jail sentences awarded in the aforesaid Sections of law shall run concurrently.

2. A synoptical resume of the prosecution case is as under:-

(2.1) On the night of 20/12/2004 at about 9:50 pm complainant Sachanand (PW-2) made an oral FIR at Police Station Kotwali Datia to D.N. Sharma (PW-15), the SHO, to the effect that he runs a hotel in the name of

"Poonam Hotel" (for short "the Hotel") at Kila Chowk Datia. On that night Sharad (PW-1) placed an order to prepare dinner with a chicken for 6 to 7 persons. At about 8:30 pm appellant Manoj @ Bablu asked him to serve him dinner. He told him that the chicken would take 10 to 15 minutes more to cook properly. But, he insisted to serve him the dinner forthwith. Thereupon, the dinner was served to him. At about 9:00 pm, Sharad (PW-1), Ashok, Mathura, Omprakash @ Lalla and Tappe @ Razzak (who are not examined) came, and they sat at a dinner table close to the dinner table where the appellant was eating the dinner. Some minutes later, Ashok and the appellant came to blows while they were making fun. Omprakash, who is the maternal uncle of the appellant, separated Ashok and the appellant. Thereafter, the appellant went

out of the hotel leaving the dinner in the midway. When he was about to start his motorcycle to go, Omprakash made an attempt to mollify him, and he also persuaded him not leave the dinner. For this purpose, he took out the key of his motorcycle but in vain, because he left his hotel on foot. Thereafter, Sharad, Mathura, Ashok, Tappe and Omprakash left his hotel without taking the dinner. Some minutes later, deceased Mahaveer, Latif (not examined) and Murari @ Dauua Rawat (PW-4) came to his hotel to have dinner. Meanwhile, the appellant came with Upendra and Dinesh, who are acquitted accused persons, to his hotel. They asked deceased Mahaveer the whereabouts of his companions. He replied them that they had left the hotel. Upendra and Dinesh exhorted him by saying that deceased Mahaveer was solely

responsible for his quarrel with Ashok. Moments later, the appellant fired at deceased Mahaveer. The bullet pierced through his right shoulder and he fell to the ground. Thereafter, the appellant, Upendra and Dinesh fled away from his hotel. Deceased Mahaveer was profusely bleeding. At the time of the incident, 3 to 4 unknown customers were taking dinner in his hotel. Seeing the incident, the customers and the employees of his hotel fled away. When the incident occurred, the deceased's son Vivek @ Bablu (PW-3) was present in his hotel. D.N. Sharma reduced the oral FIR of the complainant into writing being Ex.P-1, and he registered a case at Crime No. 392/2004 under Section 307 read with 34 IPC against the appellant and acquitted accused Upendra and Dinesh.

(2.2) After hearing a bust of gunfire and noise of

commotion, the policeman of Police Station Kotwali Datia, which is located about 200 to 250 feet away from the hotel, reached the hotel, and they made an arrangement to send deceased Mahaveer in an injured condition to District Hospital Datia for treatment, where Dr. S.K. Khangar (PW-9) medico-legally examined deceased Mahaveer upon an application of the police Ex.P-9. He treated deceased Mahaveer and gave MLC report Ex.P-10. He found the condition of deceased Mahaveer very critical. He referred him for further treatment to Medical College Jhansi. But, he succumbed to his injuries on the way. Thereupon, he was brought dead to District Hospital Datia. Dr. S.K. Khangar informed the police of Police Station Kotwali Datia vide letter Ex.P-15 that deceased Mahaveer succumbed to injuries

on 20/12/2004 at 11:40 pm. Head Constable Premnarayan (PW-12) registered Merg Report Ex.P-16 of deceased Mahaveer.

(2.3) On 21/12/2004, A.S.I. B.L. Bansal (PW-14) held the inquest proceedings in the presence of Surendra Singh (PW-7) and four other witnesses who are not examined by the prosecution, and he prepared Inquest Report Ex.P-2. Thereafter, he gave an application Ex.P-11 for postmortem of dead body of deceased Mahvaeer. On the same day, Dr. Vishal (PW-10) held postmortem examination on his dead body and gave postmortem report Ex.P-12 in which he has opined that deceased Mahaveer had died of Syncope due to excessive bleeding from the gunshot wounds as the bullet passed through his body making entry and exit wounds.

(2.4) D.N. Sharma took up the investigation. On 21/12/2004, he prepared Spot Map Ex.P-18 at the instance of the complainant, and he also seized from the place of occurrence samples of plain earth and blood smeared earth by scratching the floor of the place of crime in the presence of Ajay (PW-6) and Johnny (not examined) vide Seizure Memo Ex.P-3. On 10/1/2005, he arrested the appellant with a country-made firearm of .315 bore with an empty cartridge (which was embedded in the barrel of it) and a live cartridge in the presence of Ajay and Radhakrishna (not examined). He seized the aforestated articles in their presence vide Seizure Memo Ex.P-5. He also arrested acquitted accused Dinesh and Upedra. On various dates, he recorded the case diary statements of the prosecution witnesses. He sent the seized firearm and cartridges

in a sealed condition with an application Ex.P-13 to the Reserve Police Inspector, Police Lines Datia for the examination by an Armorer. On 16/3/2005. Armorer Hotam Singh (PW-11) examined the firearm and the cartridges and gave report Ex.P-14. According to him, the firearm is a country-made and it is in working condition. The empty cartridge was fired from a .315 bore firearm and another cartridge was live.

(2.5) Later, D.N. Sharma sent the seized firearm with both the cartridges and the report of Armorer Ex.P-14 to the District Magistrate Datia seeking prosecution sanction under Section 39 of the Arms Act against the appellant for prosecuting him under Sections 25 and 27 of the Arms Act. The District Magistrate gave prosecution sanction vide Ex.P-17. The prosecution sanction was proved by the

then Arms Clerk Madhav Rao Shinde (PW-13) before the trial Court.

(2.6) D.N. Sharma also sent all the articles collected in the course of investigation for forensic examinations to the Forensic Science Laboratory Sagar. The laboratory gave its report Ex.P-19.

(2.7) Upon completion of the investigation, the police presented a charge-sheet against the appellant and acquitted accused Dinesh and Upendra for being prosecuted under Sections 302 read with 34 IPC and 25 and 27 of the Arms Act in the Court of Chief Judicial Magistrate Datia. The learned CJM committed the case to the Court of Sessions Judge Datia vide committal order dated 4/5/2005.

3. The learned Sessions Judge framed the charges against the appellant under Section 302 in alternative 302 read with 34 IPC and 25 (1-B)(A) read with 27 Arms Act and both the acquitted accused under

Section 302 read with 34 IPC. They abjured their guilt and pleaded not guilty to the charges. Thereupon, they were put to trial.

4. Upon the completion of the prosecution evidence, the learned Sessions Judge put incriminating evidence and circumstances appearing on record to the appellant and both the acquitted accused for eliciting their explanation thereto as per the provisions of Section 313 CrPC, but they denied them. The appellant took the defence that all the eye-witness of the prosecution are close friends of deceased Mahaveer. Which is why, they have deposed against him, and they have falsely implicated him in the case, whereas he had not committed the murder of deceased Mahaveer as he was not present at the place of occurrence at the time of alleged incident. He examined in his defence Dinesh (DW-1). Both the acquitted accused took the defence that they have been implicated in the case because they are friends of the appellant.

5. The learned Sessions Judge, having examined

critically and meticulously evidence on record, held the appellant guilty for committing the murder of deceased Mahaveer by firing at him and for possessing illegally a country-made firearm with cartridges and convicted him under Sections 302 IPC and 25 (1-B) (A) r.w. 27 Arms Act and sentenced under the aforesaid Sections of law as stated in para 1 of this judgment. But, he acquitted Upendra and Dinesh of the charge under Section 302 read with 34 IPC. Feeling aggrieved by the verdict of the Sessions Judge, the appellant is before us in this appeal.

6. At the time of hearing of final arguments, upon our query, learned Public Prosecutor made a statement that the respondent/State had not filed appeal against the acquittals of both the acquitted accused. As such, the impugned judgment insofar as relates to acquitted accused has attained finality.

7. We have heard arguments at length canvassed before us by learned counsel for the parties.

8. At the outset of arguments, learned counsel for the appellant has fairly conceded that the following

findings recorded by the learned Sessions Judge in the impugned judgment are factually and legally correct as they are based upon proper appreciation of evidence on record and the relevant provisions of law. The findings are First – It was appellant who had fired at deceased Mahaveer in the hotel, the place of occurrence at the time of incident, with a country-made firearm; Second – Deceased Mahaveer succumbed to the gunshot injury within few hours; Third – The Investigating Officer D.N. Sharma seized from the possession of the appellant a country-made firearm of .315 bore with two cartridges which he had kept illegally with him; Fourth – The seized firearm was found in working condition and the seized cartridge is alive; Fifth – The District Magistrate Datia had granted prosecution sanction in accordance with law to prosecute the appellant under Sections 25 (1-B) A and 27 Arms Act; and Sixth – The conviction recorded against the appellant under Sections 25 (1-B) read with 27 Arms Act is right and proper. However, he would contend that the appropriate conviction of the

appellant is under Section 304 (part II) IPC, but not under Section 302 IPC as recorded by the learned Sessions Judge. In support of the contention, he argued that as per the evidence on record just before the firing at deceased Mahaveer by the appellant, he (appellant) came to blows with his companion Ashok while making fun with him and later he left the hotel in the fit of rage without finishing his dinner. After his anger had worn off, he came back to the hotel. At that time, he did not find Ashok and his other companions. Thereupon, he simply inquired about his companions from deceased Mahaveer because the appellant knew him long before. Deceased Mahaveer told him that his companions left the hotel without eating the dinner and he asked the appellant to have dinner with him. The appellant misunderstood deceased Mahaveer's gesture as if he were teasing him. Consequently, he lost his temper and in a heat of passion, he fired at deceased Mahaveer without knowing the consequence of his act of firing. He further submitted that as per the evidence on record, deceased Mahaveer sustained only

one gunshot injury on his shoulder. He contended that in the fact situation of the case, it is crystal clear that the appellant had no intention to murder deceased Mahaveer. At the most, he had knowledge that upon his firing at deceased Mahaveer he may suffer a gun shot injury or die. Thus, the offence of killing of deceased Mahaveer by the appellant falls squarely under Section 304 (part II) IPC. He further submitted that the appellant has been in the prison since 10/1/2005, the date of arrest of the appellant. He has so far suffered jail sentence of 12 years 10 months and 15 days till the date of final arguments (25/11/2017) having remained for short periods on temporary bail. He further submitted that as per the record, the appellant has no criminal antecedents. Having referred to para 7 of the deposition of Vivek (PW-3), the son of the deceased, he further submitted that deceased Mahaveer and the appellant both are the residents of one and the same village Behruka and they had friendly relations. Thus, it is not a case of murder due to enmity. He further submitted that the

appellant is ready to deposit the fine amounts. He lastly submitted that in the facts and circumstances of the case, the ends of justice would be met if the appellant is awarded jail sentence in Section 304 IPC and 25 (1-B) (A) read with 27 Arms Act to the period he had already undergone. In support of the submissions, learned counsel placed reliance mainly upon a decision rendered in Dayanand Vs. State of Haryana, 2008 (15) SCC 717 and a few unreported decisions of this High Court rendered in CRA No. 563/2007 title Nirmal Singh Vs. State of M.P. date of judgment 16/9/2010, CRA No. 216/2002 title Mohan Singh and another Vs. State of M.P. date of judgment 10/8/2010 and CRA No. 435/2000 title Radhakishan Vs. State of M.P. date of judgment 10/11/2017.

9. In reply, learned Public Prosecutor submitted that when the appellant came to blows with his companion Ashok, deceased Mahaveer along with his two companions, was not present in the hotel. When the appellant came back to the hotel after some time, deceased Mahaveer invited him innocently to dine with

him as they knew each other long before without knowing the fact that the appellant had scuffled with Ashok before his coming to the hotel. Thus, the appellant fired at deceased Mahaveer without any provocation on his part. It was wrongly argued on behalf of the appellant that deceased Mahaveer teased him as a result the appellant flew into a rage and fired at him. He submitted that deceased Mahaveer died within hours of being shot by the appellant. In these background facts, the appellant committed murder of deceased Mahaveer as per clause (3) of Section 300 IPC. Thus, the learned Sessions Judge has rightly convicted the appellant under Section 302 IPC. He contended that it is not a case of alteration of conviction of the appellant into Section 304 (part II) IPC as prayed by learned counsel for the appellant. He also drew our attention to an affidavit Ex.D-7 submitted by complainant Sachanand before the trial court in which he has stated in paras 3 and 4 that in the night of the incident, the appellant did not come to his hotel for dinner and he did not see him firing at

deceased Mahaveer in his hotel as he had gone out of his hotel at the relevant time of firing for urination. The learned Sessions Judge has examined the complainant on his affidavit. Thereupon, he stated in para 18 of his evidence that on account of threats being given by the appellant, he gave affidavit Ex.D-7 in favour of the appellant. Learned counsel contended that the aforesaid evidence of the complainant shows that the appellant is a man of criminal mindset. He further contended that the rulings cited by learned counsel for the appellant are not applicable in the present case simply on the ground that upon the perusal of the decisions of the case-laws it is crystal clear that before the accused persons committed the murders of the victims, there were altercations between them. But in the present case, there was no altercation before the incident between the appellant and deceased Mahaveer. Upon these submissions, learned Public Prosecutor prayed that the appeal being devoid of merits and substance is liable to be set aside upholding the impugned judgment.

10. We have given our anxious considerations to the submissions made by learned counsel for the parties and perused the impugned judgment and material on record.

11. In para 8 of this judgment, those findings of the learned Sessions Judge are given, the correctness and legality of which have been conceded by learned counsel for the appellant before us in the course of arguments. Notwithstanding that, this Court being the last appellate court of facts in general, we have carefully and meticulously gone through the evidence on record in respect of all the six findings and we hold that these findings are based upon proper appreciation of evidence on record and they are proved beyond all reasonable doubts. Therefore, we affirm these findings.

12. In view of the above, the only point for our consideration is that the appropriate conviction of the appellant would be in Section 302 or 304 (part II) IPC?

13. In the case of Dayanand (supra), the Supreme Court has graphically and elaborately discussed how to

distinguish whether an accused committed the offence of murder or culpable homicide not amounting to murder punishable under Section 302 and 304 IPC respectively. In this respect, sub paras 15 to 25 of para 14 of the decision are relevant. They are reproduced below:-

> "(15). The crucial question is as to which was the appropriate provision to be applied. In the scheme of IPC culpable homicide is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The

second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

(16). The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the Legislature in these Sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating

the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done--	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done--
INTENTION	
(a) with the intention of causing death; or (b) with the intention of causing such bodily injury as is likely to cause death; or (c) with the knowledge that the act is likely to cause death.	(1) with the intention of causing death; or (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or (3) with the

	intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

(17.) Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to Section 300.

(18). Clause (b) of Section 299 does not postulate any such knowledge on

the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or impaired heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death was intentionally given. In clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words 'sufficient in the ordinary course of nature to cause death' have been used. Obviously, the distinction lies between a bodily

injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degrees of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in clause (b) of Section 299 conveys the sense of probability as distinguished from a mere possibility. The words 'bodily injury.....sufficient in the ordinary course of nature to cause death' mean that death will be the 'most probable' result of the injury, having regard to the ordinary course of nature.

(19). For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as

the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant Singh v. State of Kerala, (AIR 1966 SC 1874) is an apt illustration of this point.

(20). In Virsa Singh v. State of Punjab, AIR 1958 SC 465, Vivian Bose, J. speaking for the Court, explained the meaning and scope of clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300, 'thirdly'. First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds

further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

(21). The ingredients of clause 'Thirdly' of Section 300 IPC were brought out by the illustrious Judge in his terse language as follows:

'"To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 'thirdly'.

First, it must establish, quite objectively, that a bodily injury is present.

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or

unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.'

(22). The learned Judge explained the third ingredient in the following words in Virsa Singh's case in para 16 of the decision:

"The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then of course, the intent that the section requires

is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion."

(23). These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh's case (supra) for the applicability of clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300, I.P.C., culpable homicide is murder, if both the following conditions are satisfied

: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing bodily injury ; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz., that the injury found to be present was the injury that was intended to be inflicted.

(24). Thus, according to the rule laid down in Virsa Singh's case (supra), even if the intention of accused was limited to the infliction of a bodily injury, sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would not be murder. Illustration (c) appended to Section 300 clearly brings out this point.

(25). Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons – being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid."

14. The Supreme Court reiterated the same views for drawing a distinction between the offence of murder and the offence of culpable homicide not amounting to

murder in the paras 26 to 30 of the decision rendered in Jagriti Devi Vs. State of Himachal Pradesh, (2009) 14 SCC 771.

15. On the touchstone of aforestated principles of law, we shall proceed to test the evidence on record in the case at hand to adjudge whether the act of the appellant falls under Section 302 or 304 (part II) IPC. For this purpose, we shall minutely see the sequence of events which led to the incident resulting into the death of deceased Mahaveer. As per the evidence on record, on the fateful night of the incident, Sharad (PW-1) had arranged a dinner party for his companions in the hotel. In the party, the appellant and Ashok were also invitees. The appellant was in hurry to go, therefore, the dinner was first served to him without chicken. While taking dinner, the appellant was making jokes with Ashok at each other's expense. During which, they came to blows, certainly they hurt each other's feelings. The appellant's maternal uncle Omprakash separated them. Thereafter, the appellant left the hotel in anger without finishing his meal,

although Omprakash pacified and persuaded him not to leave his dinner in midway, and he also took out the key of his motorcycle, but all in vain. Later, Sharad and his companions also left the hotel without taking dinner. When the appellant came back after some time with the acquitted accused Upendra and Dinesh, he found annoying that his companions had already left the hotel. Thereupon, the appellant inquired about his companions from deceased Mahaveer because he knew him and his companions. Deceased Mahaveer replied that his companions had left the hotel without taking meals. Deceased Mahaveer invited the appellant to dine with him. Thereupon, as per FIR Ex.P-1, both the acquitted accused had exhorted him that deceased Mahaveer was the root cause behind his fight with Ashok. At this, he fired at deceased Mahaveer. However, the learned Sessions Judge had not found sufficient evidence to convict both the acquitted accused under Sections 302 read with 34 IPC and acquitted them thereunder. Vivek (PW-3) is the son of deceased Mahaveer. In para 7 of his cross-

examination, he has admitted that the appellant and his father/the deceased are the residents of one and the same village Behruka and they had friendly relations. Thus, the appellant and deceased Mahaveer had no previous enmity. As per the medical evidence on record, the appellant fired one shot at deceased Mahaveer on his shoulder resulting into his death because of excessive bleeding therefrom. From the aforesaid evidence, we could say without an iota of doubt that the appellant fired at him in a bad mood without any intention to cause his death but he had knowledge that the firing of gun-shot may cause his death if it hit on his vital part of his body. Considering the aforesaid evidence vis-a-vis the aforenoted principles of law, the inevitable conclusion is that the appropriate conviction of the appellant would be under Section 304 (part II) IPC in place of 302 IPC. The conviction is accordingly altered.

16. Now, we will consider the imposition of sentence upon the appellant under Section 304 (part II) IPC. This Section provides maximum imprisonment for 10

years or fine or both. As per the record, the appellant has so far undergone jail sentence for a period over 13 years having remained for short periods on temporary bail in between. As such, the appellant had suffered jail sentence more than the maximum imprisonment prescribed under Section 304 (part II) IPC. For the said reasons, in our opinion, the period of jail sentence the appellant has already undergone would be sufficient without imposing fine sentence under Section 304 (part II) IPC.

17. The appellant is convicted and sentenced under Sections 25 (1-B) (A) read with 27 Arms Act to suffer rigorous imprisonment for one year with a fine of Rs.1,000/- (one thousand) with default jail sentence of simple imprisonment for two months. The awarded jail sentence is minimum in that Section. Looking to the total period of jail sentence the appellant had already suffered, we hold that the appellant had already suffered default jail sentence as well in that Section.

18. Our hearts heavily bleed the way hapless Mahaveer had suffered totally unexpected homicidal

death without any provocation on his part at the hands of the appellant. Therefore, we deem it proper and just in the interest of justice to cause the appellant to pay compensation to the dependents of deceased Mahaveer in terms of Section 357 (3) CrPC. As per the evidence on record, at the time of death of deceased Mahaveer, he was near about 55 years old, and as per the record the appellant has some what sound financial position. Considering the aforesaid facts, we order that the appellant shall pay a compensation of Rs.75,000/- (Seventy Five Thousand) to the dependents of deceased Mahaveer. In default thereof, he shall suffer rigorous imprisonment for a period of one year.

19. In the result, we allow and dispose of the appeal in following terms:-

(i) The appellant is held guilty under Section 304 (part II) instead of Section 302 IPC, therefore, the conviction and the sentences imposed upon him under Section 302 IPC are set aside and he is convicted under Section

304 (part II) IPC and is sentenced thereunder to the period of jail sentence he had already suffered.

(ii) The conviction and sentences imposed upon the appellant under Sections 25 (1-B) (A) read with 27 Arms Act are affirmed.

(iii) The jail sentence which the appellant had undergone shall also include the jail sentence and default jail sentence awarded to him under Section 25 (1-B) (A) read with 27 Arms Act.

(iv) The appellant shall be released if his custody in jail is not required in any other case subject to depositing compensation amount Rs.75,000/- (Seventy Five Thousand) on his behalf before the Court of Sessions Judge Datia. Otherwise, he shall suffer default rigorous jail sentence for a period of one year which shall run from the date of this judgment subject to the provisions of Sections 68 and 69 IPC.

20. The Sessions Judge Datia is directed that in case of depositing the said compensation by the appellant, steps shall be taken forthwith to hand over the compensation amount to the wife of deceased Mahaveer, if she is alive, otherwise the compensation shall be distributed among the dependents of deceased Mahaveer exercising judicial discretion.

(Rajendra Mahajan)
Judge

(G.S. Ahluwalia)
Judge

AKS