HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

DIVISION BENCH

PRESENT:

HON'BLE MR. JUSTICE RAJENDRA MAHAJAN

&

HON'BLE MR. JUSTICE G.S. AHLUWALIA

CRIMINAL APPEAL NO.491 OF 2008

Pintu alias Vinod Singh

-Vs-

State of M.P.

Shri A.K. Jain, Counsel for the appellant.

Shri R.K. Awasthi, Public Prosecutor for the respondent/State.

Date of hearing : 25.11.2017

Date of Judgment : 01.12.2017

Whether approved for reporting : Yes

J U D G M E N T
(01/12/2017)

PER JUSTICE G.S. AHLUWALIA:

This Criminal Appeal under Section 374 of Cr.P.C. has been filed against the judgment and sentence dated 5-5-2008 passed by Sessions Judge, Bhind in Sessions Trial No. 174/2006 by which the appellant has been convicted under Sections 302, 294, 341, 506 Part II of I.P.C. and has been sentenced to undergo the Life Imprisonment and a fine of Rs. 1000/-, simple imprisonment of 2 months, simple imprisonment of 1 month and rigorous imprisonment of 2 years, respectively. All the sentences have been directed to

run concurrently.

2. The necessary facts for the disposal of the present appeal in short are that on 25-3-2006, at about 10 P.M., the complainant Ram Kishore was in his house. The appellant came there along with his 12 bore single barrel licensed gun and asked for C.D. The complainant replied that the T.V. has been taken by Jaiveer Singh and C.D. has been kept inside the house by his father. On hearing the reply of the complainant, the appellant started abusing the complainant. The deceased objected to it, then the appellant with an intention to kill Surendra Singh, fired a gun shot causing injury in the stomach of the deceased as a result of which the deceased fell down on the ground. The appellant thereafter again fired two gun shots and threatened that no one should go to lodge the F.I.R. and sat on the road. As a result of which the complainant could not go to the Police Station for lodging the F.I.R. In the morning, an information was given to the S.H.O., on telephone. The police party came to the village. Dehati Nalishi Ex. P.6 was lodged by the complainant and F.I.R. Ex. P.18 was lodged. The offence was registered. The appellant was arrested. After completing the investigation, the police filed the charge sheet against the appellant for offence under Sections 302,294,341 of I.P.C.

3. The Trial Court framed charges under Sections 302,506 Part II, 341, and 294 of I.P.C.

4. The appellant abjured his guilt and pleaded not guilty.

5. The prosecution examined Dr. D.K. Pandeya (P.W.1), Pratap Bhan Khanna (P.W.2), Head Constable Raghvendra Singh (P.W.3), Dr. C.R. Raje (P.W.4), Anandswaroop Shrivastava (P.W.5), Ramkishore Singh Bhadoriya (P.W.6), Head Constable Indrapal Singh (P.W.7), Harikishore @ Guddu (P.W.8), Constable Dharmendra Singh (P.W.9), S.I. P.S.Parmar (P.W.10), Jagdish Singh (P.W.11), S.I. Shailendra Singh

(P.W.12) and Head Constable Brijraj Singh (PW-13). The appellant did not examine any witness in his defence.

6. The Trial Court by judgment and sentence dated 5-5-2008 passed by Sessions Judge, Bhind in Sessions Trial No. 174/2006, convicted the appellant under Sections 302, 294, 341, 506 Part II of I.P.C.

7. Challenging the judgment of conviction and sentence passed by the Trial Court , it is submitted by the Counsel for the appellant that the prosecution has failed to prove the guilt of the appellant beyond reasonable doubt. Even otherwise, the incident is alleged to have taken place all of a sudden without any premeditation. The appellant is alleged to have fired a single gun shot because of sudden and grave provocation. At the most, the act of the appellant would be an offence under Section 304 Part I of I.P.C. and the appellant is in jail from the date of arrest and has undergone near about 11 years of actual jail sentence.

8. *Per contra,* it is submitted by the Counsel for the State that the appellant went to the house of the complainant and demanded for C.D. When the complainant informed that his father (Deceased) has kept the C.D. inside the house, then without there being any provocation, the appellant started hurling abuses. When the act of the appellant was objected by Surendra Singh (deceased), then a gun shot was fired causing injury in the stomach of the deceased. The deceased immediately fell down. Thereafter the appellant not only restrained the complainant from lodging the Police Report but also did not allow them to shift the deceased to a Hospital and sat on the road and in order to threaten the witnesses, had fired two more gun shots in air. Thus, if the entire allegations are considered, then it would be clear that the act of the appellant would be " murder" only.

9. Heard the learned Counsel for the parties.

10. The first question for determination would be that whether the death of deceased Surendra Singh was homicidal in nature or not?

11. Dr. C.R. Raje (P.W.4) had conducted the postmortem of the dead body of the deceased Surendra Singh. He had found the following injuries :

> "A part of intestine present over the abdominal wall. Present of a lacerated rounded in shape, Margin are burnt and inverted 2 1/2 cms. In diameter that is entry wound. Lt. Scrotum swollen and full of blood. No any other external injury detected. Above entry wound is antimortem in nature and dangerous to life. Duration with 24 hours.
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> The abdominal muscles and small intestine and large intestine were ruptured. Pelvic bone was found fractured. Left scrotum was full of blood.
>
> The cause of death of hemorrhage and shock due to injury to abdomen by some fire arm. Duration since death within 23 hours and mode of death is homicidal.
>
> The Postmortem report is Ex. P.4.

12. This witness was cross examined in short. In cross examination, Dr. Raje (P.W.4) has stated that the gun shot was fired from a distance of 8 feets as blackening was not found. He has explained that since at the time of entry, the bullet was hot therefore, the margins of entry wound were found burnt. He further explained that since blackening was not found therefore, the gun shot was fired from a distance of more than 8 feets.

13. Thus, it is clear that the deceased Surendra Singh had died a homicidal death due to gun shot injury in his stomach.

14. The next question for determination is that whether the appellant had caused gun shot injury to the deceased Surendra Singh or not?

15. Ram Kishore Bhadoriya (P.W.6), Harikishore @ Guddu

(P.W.8), Jagdish Singh (P.W.11) are the eye witnesses.

16. It is submitted by the Counsel for the appellant, that all the three eye witnesses are related to each other. Ram Kishore Bhadoriya (P.W.6) and Harikishore @ Guddu (P.W.8) are real brothers and are the sons of the deceased whereas Jagdish Singh (P.W.11) is their uncle, therefore, their evidence is not trust worthy.

17. The submission made by the Counsel for the appellant cannot be accepted because the evidence of a "related witness" cannot be rejected merely on the ground that he is related to the deceased. On the contrary, in the present case, the incident is alleged to have taken place in the house of the witnesses and their presence in the house is natural. Merely a witness is a related to the deceased, cannot be said to be "interested witness". On the contrary, why a related witness would falsely implicate the accused by sparing the real culprit? Further more, the F.S.L. report also shows that the empty cartridge found on the spot was fired from the licensed gun of the appellant.

18. The Supreme Court in the case of **Raju v. State of T.N.,** reported in **(2012) 12 SCC 701,** has held as under :

> **"21.** What is the difference between a related witness and an interested witness? This has been brought out in *State of Rajasthan* v. *Kalki [(1981) 2 SCC 752]*. It was held that: (SCC p. 754, para 7)
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> "*7.* … True, it is, she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be 'interested'."

> **22.** In light of the Constitution Bench decision in *State of Bihar* v. *Basawan Singh [AIR 1958 SC 500]*, the view that a "natural witness" or "the only possible eyewitness" cannot be an interested witness may not be, with respect, correct. In *Basawan Singh [AIR 1958 SC 500]*, a trap witness (who would be a natural eyewitness) was considered an interested witness since he was "concerned in the success of the trap". The Constitution Bench held: (AIR p. 506, para 15)
> "*15.* … The correct rule is this: if any of the witnesses are accomplices who are *particeps criminis* in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case, the court may even look for independent corroboration before convicting the accused person."

19. Ram Kishore Bhadoriya (P.W.6), Harikishore @ Guddu (P.W.8), Jagdish Singh (P.W.11), have stated that on 25-3-2006 at about 10 P.M., the appellant came to their house and asked for C.D. Ram Kishore Bhadoriya (P.W.6) replied that the T.V. has been taken by Jaiveer Singh and the C.D. has been kept by his father (deceased) in the house. The appellant started hurling abuses. When his father objected to it, the appellant fired a gun shot causing injury in the abdomen of Surendra Singh, who fell down on the ground. Thereafter, the appellant fired two more gun shots from a distance and threatened that he would see that who will lodge the F.I.R. As this witness was frightened, therefore, didnot go for lodging the F.I.R. His brother Harikishore @ Guddu (P.W.8) and his wife were also present on the spot. On the next day, he informed the police on phone and then the police came

there. Dehati Nalishi Ex. P.5 was lodged. Spot Map Ex. P.8, Safina form Ex. P.9, Inquest Report Ex.P.10, seizure memo Ex. P.11 and receipt of dead body Ex. P.12 bears his signatures. In cross examination, Ram Kishore Bhadoriya (P.W.6) has explained that as he was not aware of the phone number of the police, therefore, could not inform the police in the night. On next day at about 6-6:15 A.M., he informed Umari Police Station from the house of Bhikam Master as he was not aware of the phone number of Bhikam Master also. The phone number of the police station was told by Indu, who is running a S.T.D. Shop. He had a talk with some constable posted in the police station. The police had reached on the spot at around 7-7:15 A.M. An empty cartridge was also recovered from the spot. The plain and blood stained blood was also seized by the investigating officer. The spot map was also prepared. He had not disclosed the place where he was standing or his father was standing. However, he had informed the police that at the time of firing, he, his brother and his wife were present on the spot. He had also informed the police about the place from where the gun shot was fired by the appellant. Although this witness was cross examined in detail but nothing could be elicited from his cross examination, which may make his evidence unreliable. The evidence of Harikishore @ Guddu (P.W.8), and Jagdish Singh (P.W.11) is almost in similar lines. The Counsel for the appellant could not point out that how the evidence of these witnesses is unreliable.

20. P.S. Parmar (P.W.10) has stated that on 26-3-2006, he was posted as S.I., in police station Umari. An information was given by Rakishore Singh of village Kotaknavar that the appellant after hurling abuses, has killed Surendra Singh by causing gun shot injury, which was registered at “Zero”. They went to the spot and recorded the Dehati Nalishi Ex. P.2. The

telephonic information given by Ramkishore is Ex. P.7. The spot map Ex. P.8 was prepared. Safina form Ex. P.15 was prepared. Inquest report Ex. P.10 was prepared. The blood stained and plain earth and empty cartridge were seized by seizure memo Ex. P.11. Application for Postmortem is Ex. P.16. In cross examination, this witness has stated that he had received the information in the police station at about 6 A.M., which was recorded in the Rojnamcha sanha. The dead body was lying at a distance of about 5-6 feets away from the house of the complainant. The house of Jagdish is situated at a distance of 8-10 feets and is situated on the other side of the street. The empty cartridge was seized from a place which is about 20 meters away from the place of incident. The complainant had disclosed the place from where the appellant had fired the gun shot and that is also mentioned in the spot map. He had not measured the distance between the place where the appellant was standing and the place of incident.

21. Constable Makhanlal Khanna (P.W.2) had brought the cloths of the deceased as well as bullet recovered from the body of the deceased from the hospital and had handed over to Head constable Brijraj Singh and the said articles were seized by seizure memo Ex. P.2.

22. The 12 bore single barrel licensed gun, two live cartridges, two empty cartridges, photo copy of the license was seized and were sealed in different cloths. The seizure memo is Ex P.3.

23. Dharmendra Singh (P.W.9) is the witness of seizure. He has stated that a confessional statement was made by the appellant to the investigating officer Ex. P.13.

24. The licensed gun and the empty cartridges, including the cartridge which was found on the spot were sent to F.S.L. Sagar. By report dated 29-9-2006, the Senior Scientific Officer had opined that the empty cartridges were fired from the

seized gun and the gun powder was present in the barrel of the gun, which clearly shows that the gun shots were fired from the licensed gun. Although the prosecution has failed to prove that how the gun was seized from the possession of the appellant, but the fact that licensed gun was used in committing offence and the appellant was the custodian of the said gun, therefore, the burden was on him to prove that he had not used the said gun. The burden has not been discharged by the appellant. Thus, it is proved scientifically also, that the licensed gun of the appellant was used for committing offence. Further, it is well established principle of law that a faulty investigation or lapse on the part of the investigating officer, would not be sufficient to throw out a credible prosecution version.

25. Thus, this Court is of the considered opinion that the prosecution has succeeded in establishing beyond reasonable doubt that the appellant went to the house of Ramkishore (P.W.6) along with his licensed gun and asked for C.D. When Ramkishore (P.W.6) informed that T.V. has been taken away by Jaiveer Singh and his father has kept the C.D. inside the house, then the appellant started hurling abuses. When the father of Ramkishore (P.W.6) objected to it, the appellant fired a gun shot causing injury in the abdominal region of the deceased, who fell down. Thereafter, the appellant fired two more gunshots for some distance and had threatened that no one should lodge the report. On the next day, a telephonic information was given by Ram Kishore to the police. The police came on the spot and completed the formalities, including seizure of one empty cartridge. The seized gun, empty cartridges were sent to F.S.L. Sagar and it was found that the empty cartridges were fired from the licensed gun of the appellant.

26. Now the question for determination is that what is the

nature of offence committed by the appellant.

27. It is submitted by the Counsel for the appellant that according to the prosecution case, the appellant had gone to the house of Ramkishore for taking C.D. and some hot altercation took place and under sudden and grave provocation, he caused single gun shot injury to the deceased. Therefore, the act of the appellant would fall under explanation 4 of Section 300 of I.P.C. and would be culpable homicide not amounting to murder and therefore, the offence is liable to converted under Section 304 Part I of I.P.C. from offence under Section 302 of I.P.C.

28. To buttress his contentions, the Counsel for the appellant has relied upon the judgments passed by the Supreme Court in the case of **Dayanand Vs. State of Haryana** reported in **2008 AIR SCW 2515, Mankeram Vs. State of Haryan** reported in **2004 SCC (Cri) 106, Surendra Singh Vs. State of Uttaranchal** reported in **(2006) 9 SCC 531.** Heard the learned Counsel for the appellant.

29. The Supreme Court in the case of **Raj Kumar Vs. State of Punjab** reported in **(2015) 16 SCC 337** has held as under:

> **"7.** After having considered the material on record, the High Court concluded that the prosecution was successful in establishing that the deceased died as a result of shots fired by the appellant. While considering whether the instant matter came within the purview of "sudden and grave provocation", the High Court found that there was nothing on record to indicate in what circumstances and what was the cause for the deceased to have abused the appellant. It was further observed that if the appellant wanted to derive benefit or advantage under the first Exception to Section 300 IPC, then the onus squarely rested on his shoulder, which onus was not discharged by the appellant at all. The High Court further observed that given the eyewitness account, four shots were fired

> by the appellant which could again be inconsistent with the theory of any instantaneous reaction to any sudden and grave provocation. Allowing the appeal preferred by the State, the High Court thus convicted and sentenced the appellant for the offence punishable under Section 302 IPC.
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> 9. We have considered the rival submissions. It is worthwhile to note that in his statement under Section 313 of the Code of Criminal Procedure, the accused has come out with complete denial including the denial of his presence at the place of occurrence itself. He has chosen not to lead any positive evidence from his side. It is true that the plea of sudden and grave provocation can still be proved by him provided there is material on record. In that view of the matter, if we analyse the material, both the eyewitnesses, namely, PW 2 Anil Chhabra and PW 3 Gurbachan Singh are quite cogent and consistent that there was an altercation and that soon thereafter the appellant took out his licensed weapon and fired upon the deceased. Even if we were to accept that any abuses were hurled by the deceased, questions such as who was responsible for such verbal altercation, who had initiated such verbal altercation, what was the extent of such abuse, whether such abuses would, in normal circumstances, have provoked a reasonable minded person still remain unanswered. These are issues which ought to have been proved by way of positive evidence or inferences clearly discernible from the record. We do not find any material even suggesting such inferences. In our view, the High Court was completely right and justified in negating the plea of "sudden and grave provocation". We, therefore, affirm the view taken by the High Court and dismiss the present appeal."

30. Thus, if the facts of the present case are considered in the light of the facts of the case of **Rajkumar (Supra)**, it is clear that in fact it was the appellant who started the

altercation and abuses, and even assuming that some abusive language was also used by deceased in reply, it cannot be said that the deceased had provoked the accused.

31. The Supreme Court in the case of **State of M.P. Vs. Shivshankar** reported in **(2014) 10 SCC 366** has held as under:

> **"9.** After due consideration of the rival submissions, we are of the view that the High Court has clearly erred in holding that the offence falls under Section 304 Part I IPC. It is clear from the case of the prosecution mentioned above that the accused first slapped the complainant which was followed by verbal abuses and thereafter the accused brought the licensed gun and fired at the deceased, who died. It was, thus, a voluntary and intentional act of the accused which caused the death. Intention is a matter of inference and when death is as a result of intentional firing, intention to cause death is patent unless the case falls under any of the exceptions. We are unable to hold that the case falls under Exception 4 to Section 300 IPC as submitted by the learned counsel for the respondent. Exception 4 is attracted only when there is a fight or quarrel which requires mutual provocation and blows by both sides in which the offender does not take undue advantage. In the present case, there is no giving of any blow by the complainant side. The complainant side did not have any weapon. The accused went to his house and brought a gun. There is neither sudden fight nor a case where the accused has not taken undue advantage.
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> **10.** In *State of A.P.* v. *Rayavarapu Punnayya [(1976) 4 SCC 382]* it was held:
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> "*12*. In the scheme of the Penal Code, '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 this generic offence, the Code practically

recognises three degrees of culpable homicide. The *first* is, what may be called, 'culpable homicide of the first degree'. This is the greatest 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.

13. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has vexed the courts for more than a century. 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."

11. In *Bhagwan Munjaji Pawade* v. *State of Maharashtra [(1978) 3 SCC 330]* this Court held as under:

"*6*. … It is true that some of the conditions for the applicability of Exception 4 to Section 300 exist here, but not all. The quarrel had broken out suddenly, but there was no sudden *fight* between the deceased and the appellant. 'Fight' postulates a bilateral transaction in which blows are exchanged. The deceased was unarmed. He did not cause any injury to the appellant or his companions. Furthermore, no less than three fatal injuries were inflicted by the appellant with an axe, which is a formidable weapon on the unarmed victim. The appellant, is therefore, not entitled to the benefit of Exception 4, either."

12. In *Sridhar Bhuyan* v. *State of Orissa [(2004) 11 SCC 395]* this Court held as under: (SCC pp. 396-97, paras 7-8)

"*7*. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

8. The fourth exception to Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused: (*a*) without

premeditation; (*b*) in a sudden fight; (*c*) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (*d*) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'."

13. Similar observations were made in *State of Orissa* v. *Khaga [(2013) 14 SCC 649]*, which reads as under:

"*8*. The rival submission necessitates examination of Exception 4 to Section 300 IPC, same reads as follows:

'**300. *Murder.***— * * *

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's 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.'

From a plain reading of the aforesaid Exception it is evident that it shall be attracted only if the death is caused (*i*) without premeditation, (*ii*) in a sudden fight and (*iii*) in a heat of passion upon a sudden quarrel. If all these ingredients are satisfied, the Exception will come into play only when the court comes to the conclusion that the offender had not taken undue advantage or acted in a cruel or unusual manner. Above all, this section would be attracted when the fight had taken place with the person killed.

9. The aforesaid view finds support from a judgment of this Court in *Pappu* v. *State of M.P. [(2006) 7 SCC 391]*in which it has been held as follows:

'*13*. … The help of Exception 4 can be invoked if death is caused (*a*) without premeditation; (*b*) in a sudden fight; (*c*) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (*d*) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case.'

* * *

11. Then, can it be said that the crime has been committed in a heat of passion? If time is taken to cool down, then the crime cannot be said to have been committed in a heat of passion. It is the specific case of the prosecution, which in fact, has also been accepted by the High Court that 'when her father Tikeswar abused them, the accused

> Khageswar being annoyed brought a *budia* from his house, which is nearby, and dealt blows to her father and the accused Dusasan brought a lathi and assaulted her father'. This clearly shows that both the convicts had sufficient time to cool down and therefore, it cannot be said that the crime was committed in a heat of passion."

32. The Supreme Court in the case of **Nankaunoo Vs. State of U.P.** reported in **(2016) 3 SCC 317** has held as under:-

> **"11.** Intention is different from motive. It is the intention with which the act is done that makes a difference in arriving at a conclusion whether the offence is culpable homicide or murder. The third clause of Section 300 IPC consists of two parts. Under the first part it must be proved that there was an intention to inflict the injury that is present and under the second part it must be proved that the injury was sufficient in the ordinary course of nature to cause death. Considering clause Thirdly of Section 300 IPC and reiterating the principles stated in *Virsa Singh case [AIR 1958 SC 465]*, in *Jai Prakash* v. *State (Delhi Admn.) [(1991) 2 SCC 32]*, para 12, this Court held as under: (SCC p. 41)
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> "*12*. Referring to these observations, Division Bench of this Court in *Jagrup Singh case [(1981) 3 SCC 616]*, observed thus: (SCC p. 620, para 7)
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> '*7*. … These observations of Vivian Bose, J. have become locus classicus. The test laid down in *Virsa Singh case [[AIR 1958 SC 465]]*, for the applicability of clause Thirdly is now ingrained in our legal system and has become part of the rule of law.'
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> The Division Bench also further held that the decision in *Virsa Singh case [[AIR 1958 SC 465]* has throughout been followed as laying down the guiding principles. In both these cases it is clearly laid down that the prosecution must prove (1) that the body injury is present, (2) that the injury is sufficient in the ordinary course of nature to cause death, (3) that the accused intended

to inflict that particular injury, that is to say it was not accidental or unintentional or that some other kind of injury was intended. In other words clause Thirdly consists of two parts. The first part is that there was an intention to inflict the injury that is found to be present and the second part that the said injury is sufficient to cause death in the ordinary course of nature. Under the first part the prosecution has to prove from the given facts and circumstances that the intention of the accused was to cause that particular injury. Whereas under the second part whether it was sufficient to cause death, is an objective enquiry and it is a matter of inference or deduction from the particulars of the injury. The language of clause Thirdly of Section 300 speaks of intention at two places and in each the sequence is to be established by the prosecution before the case can fall in that clause. The 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances. The framers of the Code designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue. Firstly, when an act is done by a person, it is presumed that he must have been aware that certain specified harmful consequences would or could follow. But that knowledge is bare awareness and not the same thing as intention that such consequences should ensue. As compared to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, namely, the purposeful doing of a thing to achieve a particular end."

12. The emphasis in clause three of Section 300 IPC is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary course of nature. When

> the sufficiency exists and death follows, causing of such injury is intended and causing of such offence is murder. For ascertaining the sufficiency of the injury, sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused and sometimes both are relevant. Depending on the nature of weapon used and situs of the injury, in some cases, the sufficiency of injury to cause death in the ordinary course of nature must be proved and cannot be inferred from the fact that death has, in fact, taken place."

33. Thus, if the facts of this case are considered, then it would be clear that the appellant went to the house of deceased along with his licensed gun, for taking C.D. As the T.V. was already taken away by Jaiveer Singh, therefore, Ram Kishore (P.W.1) informed that Jaiveer Singh has taken away the T.V. and the C.D. has been kept by his father inside the house. It is not the case, that the appellant had gone to take his C.D. back from Ramkishore. If Ramkishore was not inclined to give his C.D. to the appellant, then the appellant had no business to start hurling abuses. The deceased was inside the house and he objected to the act of the appellant and without any provocation on the part of the deceased or prosecution witnesses, the appellant fired a gun shot causing injury in the stomach of the deceased. The deceased fell down. Thereafter, the appellant again fired two gun shots from some distance and threatened that no body should go to lodge the report. The manner in which the incident is said to have taken place, it is clear that the appellant had fired gun shot with an intention to cause death and the injury sustained by the deceased was sufficient to cause death in ordinary course of nature. Thus, the act of the appellant cannot be converted into Section 304 Part I of I.P.C. from Section 302 of I.P.C.

34. Accordingly, it is held that the appellant is guilty of committing murder under Section 302 of I.P.C.

35. So far as the other offences for which the appellant has been convicted, no submissions were advanced by the Counsel for the appellant. Even otherwise, the evidence which has come on record, clearly establishes beyond reasonable doubt that the appellant is also guilty of committing offence under Sections 294,341 and 506 Part II of I.P.C.

36. The minimum sentence provided for offence under Section 302 of I.P.C. is Life imprisonment and therefore, no interference can be made on the question of sentence.

37. Accordingly, the judgment and sentence dated 5-5-2008 passed by Sessions Judge, Bhind in Sessions Trial No. 174/2006 is hereby affirmed.

38. The appellant is in jail as he was never released on bail.

39. The appeal fails and is hereby **Dismissed.**

(RAJENDRA MAHAJAN)
Judge
(01/12/2017)

(G.S. AHLUWALIA)
Judge
(01/12/2017)

(alok)