HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR
DIVISION BENCH
BEFORE: G.S.AHLUWALIA
AND
RAJEEV KUMAR SHRIVASTAVA, JJ.
Criminal Appeal No. 153 of 2010
Morari
vs.
State of MP

Shri SS Gautam and Shri Deependra Singh Raghuvanshi, Counsel for the appellant.
Shri RK Awasthi, Public Prosecutor for the respondent/ State

Reserved on : 05/10/2021
Whether approved for reporting: Yes

J U D G E M E N T
(Delivered on 22/10/2021)

Per Rajeev Kumar Shrivastava, J.:

The present jail appeal has been preferred by appellant Morari, son of Harivilas Sakhwar challenging the judgment of conviction and sentence dated 24/12/2009 passed by Additional Sessions Judge, Ambah, District Morena in Sessions Trial No.06/2009, by which he has been convicted u/S. 302 of IPC and sentenced to undergo Life Imprisonment with fine of Rs.1,000/- and in default thereof, he has been further directed to undergo six months' Rigorous Imprisonment.

(2) It is an admitted fact that deceased Anguri Devi was the wife of the appellant- accused.

(3) Prosecution case, in brief, are that on 17-09-2008 at around 09:00 pm, Complainant Raghuveer Sakhwar (PW1) lodged a verbal report at Police Station Nagra, District Morena stating therein that his aunt Anguri Devi had returned back from her parental house two- three days back on the occasion of death of his grandfather. Other relatives had also come to the house of the complainant. On the date of incident i.e. 17-09-2008, all of a sudden, accused-appellant Morari, who is a habitual drunkard, started quarelling and beating his wife Anguri Devi. After sometime, on hearing screaming of Priyanka, who is the daughter of Anguri Devi and appellant- accused Morari, Complainant along with his sister Munni and brother Balveer and reached inside the room and saw that appellant-accused Morar was strangulating deceased Anguri with the help of one scarf (safi) and thereafter, absconded from the spot and Anguri was found dead. Then, complainant informed the parents of deceased Anguri. On the basis of merg no.16/2008 recorded u/S. 174 of CrPC, the matter was investigated and Crime No.81/2008 for offence u/S. 302 of IPC vide Ex.P1 was registered and after due completion of investigation, charge sheet was filed before the Court and thereafter, case was committed to the Court of Session.

(4) Appellant-accused pleaded not guilty and claimed to be tried and the prosecution proceeded to examine its witnesses. Complainant Raghuveer Singh (PW1), Balveer Singh (PW2), Havaldar Singh (PW3), Priyanka, daughter of deceased (PW4), Sunil (PW5), Chatur Singh (PW6), SHO DS Sengar (PW7), Head Constable Devendra Singh (PW8), Patwari Kalicharan (PW9) & Dr. S.N. Mevafarosh (PW10) were examined by the Prosecution in its support.

(5) The statements of accused u/S. 313 of CrPC were recorded and in order to lead any defence evidence, the appellant- accused did not examine any witness. In the statement recorded u/S. 313 of CrPC, the appellant-accused has stated that he has an agricultural land and a house. His family members are interested in getting the possession of agricultural land as well as house, therefore, they have falsely implicate him. It is further stated that he is having two minor daughters and nobody in his family is available to look after them, therefore, they were tutored witnesses to speak against him.

(6) The trial Court, after marshalling the evidence available on record, found the appellant guilty u/S. 302 of IPC and accordingly, convicted and sentenced him, as described in paragraph 1 of this judgment.

(7) Challenging the impugned judgment of conviction and sentence, it is submitted by the learned Counsel for the appellant

that the trial Court has erred in considering the evidence produced before it as there were various contradictions and omissions in the statements of the prosecution witnesses. It is further submitted that the doctor, who conducted the postmortem of the deceased, has not opined what was the cause of death of the deceased, rather he referred the matter for further investigation, which shows that the deceased was not died due to strangulation, but the deceased who was carrying near about eight and half months of pregnancy, got injury on her stomach whereby she was died. It is further submitted that there was no intention of the appellant-accused to commit murder of his wife-deceased, therefore, the trial Court has wrongly convicted the appellant u/S. 302 of IPC. As there was no motive or intention of the appellant-accused of committing death of his wife- deceased, therefore, the case falls within the purview of Section 304, Part-I of IPC. Further, it is submitted that the seized scarf (safi) was of cotton and the scarf (safi) which was sent for FSL Examination, was not of cotton. There is no eye-witness to the incident. Priyanka, who is the daughter of deceased came out of the room when quarrel was started, therefore, the trial Court has erred in considering the evidence of Priyanka. Hence, prayed that the impugned judgment of conviction and sentence passed by trial Court deserves to be set aside.

(8) On the other hand, learned Counsel for the State supported

the impugned judgment of conviction and sentence and submitted that there being no infirmity in the impugned judgment of conviction and sentence and the findings arrived at by the trial Court do not require any inference by this Court. Hence, prayed for dismissal of this appeal.

(9) Heard the learned counsel for the rival parties and perused the record.

(10) In the present case, the following questions emerge for consideration:-

(1) Whether the death of deceased was homicidal in nature?

(2) Whether the case comes within the purview of culpable homicide that amounts to murder ?

(3) Whether the case comes within the purview of Section 304 Part I of IPC ?

(11) Before considering the merits of the case, it would be appropriate to throw light on relevant provisions of Sections 299 and 300 of Indian Penal Code.

(12) The Law Commission of United Kingdom in its 11th Report proposed the following test :

> "The standard test of 'knowledge' is, Did the person whose conduct is in issue, either knows of the relevant circumstances or has no substantial doubt of their existence?"

[See Text Book of Criminal Law by Glanville Wiliams (p.125)]

"Therefore, having regard to the meaning assigned in

criminal law the word "knowledge" occurring in clause Secondly of Section 300 IPC imports some kind of certainty and not merely a probability. Consequently, it cannot be held that the appellant caused the injury with the intention of causing such bodily injury as the appellant knew to be likely to cause the death of Shri Ahirwar. So, clause Secondly of Section 300 IPC will also not apply."

(13) The enquiry is then limited to the question whether the offence is covered by clause Thirdly of Section 300 IPC. This clause, namely, clause Thirdly of Section 300 IPC reads as under: -

> "Culpable homicide is murder, if the act by which the death is caused is done 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."

The argument that the accused had no intention to cause death is wholly fallacious for judging the scope of clause Thirdly of Section 300 IPC as the words "intention of causing death" occur in clause Firstly and not in clause Thirdly. An offence would still fall within clause Thirdly even though the offender did not intend to cause death so long as the death ensues from the intentional bodily injury and the injuries are sufficient to cause death in the ordinary course of nature. This is also borne out from illustration (c) to Section 300 IPC which is being reproduced below: -

> "(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death."

Therefore, the contention advanced in the present case and which is frequently advanced that the accused had no intention of causing death is wholly irrelevant for deciding whether the case falls in clause Thirdly of Section 300 IPC.

(14) The scope and ambit of clause Thirdly of Section 300 IPC was considered in the decision in **Virsa Singh vs. State of Punjab**, [**AIR 1958 SC 465]**, and the principle enunciated therein explains the legal position succinctly. The accused Virsa Singh was alleged to have given a single spear blow and the injury sustained by the deceased was "a punctured wound 2" x =" transverse in direction on the left side of the abdominal wall in the lower part of the iliac region just above the inguinal canal. Three coils of intestines were coming out of the wound." After analysis of the clause Thirdly, it was held: -

> "The prosecution must prove the following facts before it can bring a case under S. 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. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout), the offence is murder under S. 300 "Thirdly". It does not matter that there was no intention to cause death, or that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (there is no real distinction between the two), or even that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death."

(15) In **Arun Nivalaji More vs. State of Maharashtra (Case No. Appeal (Cri.) 1078-1079 of 2005)**, it has been observed as under :-

> “11. First it has to be seen whether the offence falls within the ambit of Section 299 IPC. If the offence falls under Section 299 IPC, a further enquiry has to be made whether it falls in any of the clauses, namely, clauses 'Firstly' to 'Fourthly' of Section 300 IPC. If the offence falls in any one of these clauses, it will be murder as defined in Section 300IPC, which will be punishable under Section 302 IPC. The offence may fall in any one of the four clauses

of Section 300 IPC yet if it is covered by any one of the five exceptions mentioned therein, the culpable homicide committed by the offender would not be murder and the offender would not be liable for conviction under Section 302 IPC. A plain reading of Section 299 IPC will show that it contains three clauses, in two clauses it is the intention of the offender which is relevant and is the dominant factor and in the third clause the knowledge of the offender which is relevant and is the dominant factor. Analyzing Section 299 as aforesaid, it becomes clear that a person commits culpable homicide if the act by which the death is caused is done

(i) with the intention of causing death; or

(ii) with the intention of causing such bodily injury as is likely to cause death; or

(iii) with the knowledge that the act is likely to cause death."

If the offence is such which is covered by any one of the clauses enumerated above, but does not fall within the ambit of clauses Firstly to Fourthly of Section 300 IPC, it will not be murder and the offender would not be liable to be convicted under Section 302 IPC. In such a case if the offence is such which is covered by clauses (i) or (ii) mentioned above, the offender would be liable to be convicted under Section 304 Part I IPC as it uses the expression "if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death" where intention is the dominant factor. However, if the offence is such which is covered by clause (iii) mentioned above, the offender would be liable to be convicted under Section 304 Part II IPC because of the use of the expression "if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to

cause such bodily injury as is likely to cause death" where knowledge is the dominant factor.

12. What is required to be considered here is whether the offence committed by the appellant falls within any of the clauses of Section 300 IPC.

13. Having regard to the facts of the case it can legitimately be urged that clauses Firstly and Fourthly of Section 300 IPC were not attracted. The expression "the offender knows to be likely to cause death" occurring in clause Secondly of Section 300 IPC lays emphasis on knowledge. The dictionary meaning of the word 'knowledge' is the fact or condition of being cognizant, conscious or aware of something; to be assured or being acquainted with. In the context of criminal law the meaning of the word in Black's Law Dictionary is as under: -

> "An awareness or understanding of a fact or circumstances; a state of mind in which a person has no substantial doubt about the existence of a fact. It is necessary ... to distinguish between producing a result intentionally and producing it knowingly. Intention and knowledge commonly go together, for he who intends a result usually knows that it will follow, and he who knows the consequences of his act usually intends them. But there may be intention without knowledge, the consequence being desired but not foreknown as certain or even probable. Conversely, there may be knowledge without intention, the consequence being foreknown as the inevitable concomitant of that which is desired, but being itself an object of repugnance rather than desire, and therefore not intended."

In Blackstone's Criminal Practice the import of the word 'knowledge' has been described as under: -

> "'Knowledge' can be seen in many ways as playing the same role in relation to circumstances as intention plays in relation to consequences. One knows something if one is absolutely sure that it is so although, unlike intention, it is of no relevance whether one wants or desires the thing to be so. Since it is difficult ever to be absolutely certain of anything, it has to be accepted that a person who feels 'virtually certain' about something can equally be regarded as knowing it."

(16) Section 299 of Indian Penal Code runs as under :-

> "299. Culpable homicide.-- Wheoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

(17) Section 299 of IPC says, whoever causes death by doing an act with the bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Culpable homicide is the first kind of unlawful homicide. It is the causing of death by doing :

(i) an act with the intention of causing death;
(ii) an act with the intention of causing such bodily injury as is likely to cause death; or
(iii) an act with the knowledge that it is was likely to cause death.

Without one of these elements, an act, though it may be by

its nature criminal and may occasion death, will not amount to the offence of culpable homicide. 'Intent and knowledge' as the ingredients of Section 299 postulate, the existence of a positive mental attitude and the mental condition is the special *mens rea* necessary for the offence. The knowledge of third condition contemplates knowledge of the likelihood of the death of the person. Culpable homicide is of two kinds : one, culpable homicide amounting to murder, and another, culpable homicide not amounting to murder. In the scheme of the Indian Penal Code, culpable homicide is genus and murder is species. All murders are culpable homicide, but not *vice versa*. Generally speaking, culpable homicide *sans* the special characteristics of murder is culpable homicide not amounting to murder. In this section, both the expressions 'intent' and 'knowledge' postulate the existence of a positive mental attitude which is of different degrees.

(18) Section 300 of Indian Penal Code runs as under :-

> "300. Murder.-- Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--
>
> *Secondly*.-- If it is done 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--
>
> *Thirdly*.-- If it is done 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--

> *Fourthly.*-- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

(19) "Culpable Homicide" is the first kind of unlawful homicide. It is the causing of death by doing ;(i) an act with the intention to cause death; (ii) an act with the intention of causing such bodily injury as is likely to cause death; or, (iii) an act with the knowledge that it was likely to cause death.

(20) Indian Penal Code recognizes two kinds of homicide :(1) Culpable homicide, dealt with between Sections 299 and 304 of IPC (2) Not-culpable homicide, dealt with by Section 304-A of IPC. There are two kinds of culpable homicide; (i) Culpable homicide amounting to murder (Section 300 read with Section 302 of IPC), and (ii) Culpable homicide not amounting to murder (Section 304 of IPC).

(21) A bare perusal of the Section makes it crystal clear that the first and the second clauses of the section refer to intention apart from the knowledge and the third clause refers to knowledge alone and not the intention. Both the expression "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degrees. The mental element in culpable homicide i.e., mental attitude towards the consequences of conduct

is one of intention and knowledge. If that is caused in any of the aforesaid three circumstances, the offence of culpable homicide is said to have been committed.

(22) There are three species of *mens rea* in culpable homicide. (1) An intention to cause death; (2) An intention to cause a dangerous injury; (3) Knowledge that death is likely to happen.

(23) The fact that the death of a human being is caused is not enough unless one of the mental sates mentioned in ingredient of the Section is present. An act is said to cause death results either from the act directly or results from some consequences necessarily or naturally flowing from such act and reasonably contemplated as its result. Nature of offence does not only depend upon the location of injury by the accused, this intention is to be gathered from all facts and circumstances of the case. If injury is on the vital part, i.e., chest or head, according to medical evidence this injury proved fatal. It is relevant to mention here that intention is question of fact which is to be gathered from the act of the party. Along with the aforesaid, ingredient of Section 300 of IPC are also required to be fulfilled for commission of offence of murder.

(24) In the scheme of Indian Penal Code, “Culpable homicide” is genus and “murder” is its specie. All “Murder” is “culpable homicide” but not vice versa. Speaking generally 'culpable homicide sans special characteristics of murder' if culpable

homicide is not amounting to murder.

(25) In **Anda vs. State of Rajasthan [1966 CrLJ 171],** while considering "third" clause of Section 300 of IPC, it has been observed as follows :-

> "It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The emphasis here is on sufficiency of injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and causing of such injury was intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature."

(26) In **Mahesh Balmiki vs. State of M.P. [(2000) 1 SCC 319,** while deciding whether a single blow with a knife on the chest of the deceased would attract Section 302 of IPC, it has been held thus :-

> "There is no principle that in all cases of single blow Section 302 I.P.C. is not attracted. Single blow may, in some cases, entail conviction under Section 302 I.P.C., in some cases under Section 304 I.P.C and in some other cases under Section 326 I.P.C. The question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender

> and the offence committed by him. In the instant case, the deceased was disabled from saving himself because he was held by the associates of the appellant who inflicted though a single yet a fatal blow of the description noted above. These facts clearly establish that the appellant had intention to kill the deceased. In any event, he can safely be attributed knowledge that the knife blow given by him is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death."

(27) In **Dhirajbhai Gorakhbhai Nayak vs. State of Gujarat [(2003) 9 SCC 322]**, it has been observed as under :-

> "The Fourth Exception of 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 the 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 cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

(28) In **Pulicherla Nagaraju @ Nagaraja vs. State of AP [(2006) 11 SCC 444**, while deciding whether a case falls under Section 302 or 304 Part-I or 304 Part-II, IPC, it was held thus :-

> “Therefore, the court should proceed to decide the pivotal question of intention, with care and

caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under section 302, are not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre- meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may."

(29) In **Sangapagu Anjaiah v. State of A.P. (2010) 9 SCC 799,** Hon'ble Apex Court while deciding the question whether a blow on the skull of the deceased with a crowbar would attract Section 302 IPC, held thus**:**

> "16. In our opinion, as nobody can enter into the mind of the accused, his intention has to be gathered from the weapon used, the part of the body chosen for the assault and the nature of the injuries caused. Here, the appellant had chosen a crowbar as the weapon of offence. He has further chosen a vital part of the body i.e. the head for causing the injury which had caused multiple fractures of skull. This clearly shows the force with which the appellant had used the weapon. The cumulative effect of all these factors irresistibly leads to one and the only conclusion that the appellant intended to cause death of the deceased."

(30) In **State of Rajasthan v. Kanhaiyalal (2019) 5 SCC 639,** this it has been held as follows:

> "7.3 In **Arun Raj [Arun Raj v. Union of India, (2010) 6 SCC 457 : (2010) 3 SCC (Cri) 155]** this Court observed and held that there is no fixed rule that whenever a single blow is inflicted, Section 302 would not be attracted. It is observed and held by this Court in the aforesaid decision that nature of weapon used and vital part of the body where blow was struck, prove beyond reasonable doubt the intention of the accused to cause death of the deceased. It is further observed and held by this Court that once these ingredients are proved, it is irrelevant whether there was a single blow struck or multiple blows.
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> 7.4 ***In Ashokkumar Magabhai Vankar [Ashokkumar Magabhai Vankar v. State of Gujarat,*** **(2011) 10 SCC 604 : (2012) 1 SCC**

(Cri) 397] , the death was caused by single blow on head of the deceased with a wooden pestle. It was found that the accused used pestle with such force that head of the deceased was broken into pieces. This Court considered whether the case would fall under Section 302 or Exception 4 to Section 300 IPC. It is held by this Court that the injury sustained by the deceased, not only exhibits intention of the accused in causing death of victim, but also knowledge of the accused in that regard. It is further observed by this Court that such attack could be none other than for causing death of victim. It is observed that any reasonable person, with any stretch of imagination can come to conclusion that such injury on such a vital part of the body, with such a weapon, would cause death.

7.5 A similar view is taken by this Court in the recent decision in Leela Ram (supra) and after considering catena of decisions of this Court on the issue on hand i.e. in case of a single blow, whether case falls under Section 302 or Section 304 Part I or Section 304 Part II, this Court reversed the judgment and convicted the accused for the offence under Section 302 IPC. In the same decision, this Court also considered Exception 4 of Section 300 IPC and observed in para 21 as under: (SCC para 21)

> "21. Under Exception 4, culpable homicide is not murder if the stipulations contained in that provision are fulfilled. They are: (i) that the act was committed without premeditation; (ii) that there was a sudden fight; (iii) the act must be in the heat of passion upon a sudden quarrel; and (iv) the offender should not have taken undue advantage or acted in a cruel or unusual manner."

(31) In the case of **Bavisetti Kameswara Rao v. State of A.P. (2008) 15 SCC 725,** it is observed in paragraphs 13 and 14 as under:

> "13. It is seen that where in the murder case there is only a single injury, there is always a tendency to advance an argument that the offence would invariably be covered under Section 304 Part II IPC. The nature of offence where there is a single injury could not be decided merely on the basis of the single injury and thus in a mechanical fashion. The nature of the offence would certainly depend upon the other attendant circumstances which would help the court to find out definitely about the intention on the part of the accused. Such attendant circumstances could be very many, they being (i) whether the act was premeditated; (ii) the nature of weapon used; (iii) the nature of assault on the accused. This is certainly not an exhaustive list and every case has to necessarily depend upon the evidence available. As regards the user of screwdriver, the learned counsel urged that it was only an accidental use on the spur of the moment and, therefore, there could be no intention to either cause death or cause such bodily injury as would be sufficient to cause death. Merely because the screwdriver was a usual tool used by the accused in his business, it could not be as if its user would be innocuous.
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> 14. In **State of Karnataka v. Vedanayagam [(1995) 1 SCC 326 : 1995 SCC (Cri) 231]** this Court considered the usual argument of a single injury not being sufficient to invite a conviction under Section 302 IPC. In that case the injury was caused by a knife. The medical evidence supported the version of the prosecution that the injury was sufficient, in the ordinary course of nature to cause death. The High Court had convicted the accused for the offence under Section 304 Part II IPC relying on the fact that

there is only a single injury. However, after a detailed discussion regarding the nature of injury, the part of the body chosen by the accused to inflict the same and other attendant circumstances and after discussing clause Thirdly of Section 300 IPC and further relying on the decision in Virsa Singh vs. State of Punjab [AIR 1958 SC 465] , the Court set aside the acquittal under Section 302 IPC and convicted the accused for that offence. The Court (in **Vedanayagam case [(1995) 1 SCC 326 : 1995 SCC (Cri) 231] , SCC p. 330, para 4)** relied on the observation by Bose, J. in Virsa Singh case **[AIR 1958 SC 465]** to suggest that: (Virsa Singh case **[AIR 1958 SC 465],** AIR p. 468, para 16)

> "16. With due respect to the learned Judge he has linked up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes overlap."

The further observation in the above case were: **(Virsa Singh case [AIR 1958 SC 465]** , AIR p. 468, paras 16 & 17)

> "16. 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. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.
>
> 17. … It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact."

(32) Dr.S. N. Mevafarosh (PW10) in his evidence has stated that on 18/09/2008, he was posted as Medical Officer at CHC, Porsa. On the aforesaid date, Constable Harnath brought the dead body of deceased Anguri Devi (wife of appellant Morari) for conduction of postmortem. The postmortem report is Ex.P8. The postmortem was conducted by him along with his Assistant Dr. Shilpi Sharma

whose signature is also at Ex.P8. The dead body of deceased was identified by Raghuveer, son of Puran Singh, who is the nephew of the deceased and Balveer Singh who is also the nephew of the deceased, had also identified the deceased. This witness stated that the dead body of the deceased was of average height and there was a *rigor mortis* on her body. Her mouth was shut and there was foam in her nose. On medical examination, following injuries were found over the body of the deceased:-

(1) Four abrasions on the right side of neck size ¼ x 1/6 cm.

(2) Five abrasions on the backside of neck size ¼ x 1/6 cm.

(3) One abrasion on the left side of forehead size 3x2 cm.

The aforesaid injuries were ante-mortem in nature. Injury No.3 was caused due to hard and blunt object and injury Nos.1 & 2 were sent for expert opinion. This witness has stated that in the uterus of deceased, one dead male child of eight and five months was found. For getting an opinion about the cause of death of deceased, sealed clothes as well as as viscera collected, went sent to Police Station Nagra for FSL examination. The duration of death of deceased was within 6-24 hours. His report is Ex.P14. This witnesses has stated that they have verified their signatures on the report. The statements of this witness remain unchallenged in cross-examination. This witness in his evidence has specifically stated that over the neck of deceased, abrasion marks as mentioned

above, were found, therefore, the cause of death of deceased Anguri Devi was homicidal in nature.

(33) As discussed above, under the Indian Penal Code, there are two kinds of homicide. First, "Culpable homicide" and another is "not culpable homicide". "Culpable homicide" deals with between Section Sections 299 and 304 of IPC and "not culpable homicide" deals with by Section 304-A of IPC. There are two kinds of culpable homicide; (i) Culpable homicide amounting to murder (Sections 300 and 302 of IPC), and (ii) Culpable homicide not amounting to murder (Section 304 of IPC).

Under this Section, punishment for culpable homicide not amounting to murder are two kinds, which are applicable to two different circumstances:-

> (1) If the act by which death is cause is done *with intention* of causing death or such bodily injury as is like to cause death, the punishment for life, or imprisonment of either description for a term which may extend to ten years and fine.
>
> (2) If the act is done *with knowledge* that it is likely to cause death bout *without any intention* to cause death or such bodily injury as is likely to cause death, the punishment is imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Furthermore, if there is any intent, then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not intention to cause murder and bodily injury, then the same would fall under Section 304 Part II of IPC.

(34) In the case of **Mirza Ghani Baig vs. State of Andhra Pradesh represented by Public Prosecutor** reported in **1997 (2) Crimes 19 (AP),** it has been held as under:-

> "Deceased, wife of appellant died of burn injuries. Appellant had set deceased on fire. Defence plea that at the time of incident accused was drunk and was not in a position to understand what he was doing. Drunkenness differs from insanity. Test would be whether accused was incapable of knowing the nature of act & that thing which intoxicated him was administered to him without his knowledge. Initial burden will be on accused that he was in such a drunken state that he could not form any intention of alleged offence. Appellant had poured kerosene & set deceased on fire. He however tried to extinguish the fire and sustained burn injuries & remained in hospital for two months. Offence is of culpable homicide not amounting to murder. Conviction altered u/s 304 Part II I.P.C."

(35) In the case in hand, the evidence produced against the accused does not show that the appellant accused had not any motive/intention to cause death of deceased, rather the evidence available on record establishes that the injuries caused on the body of the deceased, where in all probabilities, are sufficient to cause death of the deceased or likely to cause her death. There is no evidence that the incident had taken place on the spur of the moment and it is also not established that during the heat of exchange of words, the accused- appellant caused injuries on the body of the deceased, which is likely to cause her death. Therefore, the ingredients of "murder" as defined in Section 300 of IPC are

are fully established against the accused-appellant.

(36) It is submitted by learned Counsel for the appellant that the case is fully covered u/S. 85 of IPC. At the time of commission of offence, appellant-accused was intoxicated, therefore, no offence is made out against him.

(37) Learned Counsel for the State vehemently opposed the same and has submitted that the case does not cover u/S. 85 of IPC as intoxication was not done by other than the accused appellant, therefore, no defence can be raised by the appellant.

(38) Learned Counsel for the appellant has submitted that no case is made out under Section 302 of IPC, rather the case is fully covered by Section 304 Part I of IPC. The act done by the appellant- accused is not amounting to murder as there was no common intention of causing death or such bodily injury, as is likely to cause death of deceased. As the appellant was intoxicated, therefore, the act done by him was under intoxication.

(39) Section 85 of IPC reads as under:-

> **"S 85.** Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge."

Section 85 of IPC comes under Chapter IV of General Exception of Indian Penal Code. The benefit of this Section can

only be extended and a person may be exonerated from his liability while in a state of intoxication act was done. Furthermore, it is the primary requirement that the person by reason of intoxication was incapable of knowing the nature of act, or that he was doing what was either wrong or contrary to law. Provided that the thing which intoxicated him was **"administered to him without his knowledge or against his will"**. A person cannot become himself drunk with liquor and commit an offence and then come and say that he had consumed the liquor and, therefore, the benefit of Section 85 should be given to him. Voluntary drunkenness is no excuse for commission of crime.***[Chet Ram vs. State, 1971 CrLJ 1246(HP)]***

Explaining the principle underlying this section, **KENNY** states "the older law regarded intoxication as aggravating the guilt of any crimes whose predisposing cause it was, and in no way affording an excuse for the commission of a criminal deed, for unlike insanity, it had been produced voluntarily, and to produce it was wrong, both morally and also legally. But at the present day the effects of drunkenness upon criminal liability must be considered in the light of the ordinary rules as to *actus reus* and *mens rea,* in the same way as the effects of illness produced by any other kind of poison. Thus actual insanity produced by drunken habits (as in some cases of *delirium tremens)* exempts from

criminal responsibility to the same extent as if it had originated from less reprobated causes. And where a man is intoxicated through no fault of his own- for example, as the result of medical treatment or the fraud of malicious companions- this was, even under the older law, regarded as carrying the full exemptive effect. ***[KENNY on Outlines of Criminal Law, 19th Edition]***

As stated in **HALSBURY,** where, in a criminal charge, it must be proved that the defendant intended or foresaw a particular result of his actions, evidence of intoxication, which might render the defendant incapable of forming the intent required, must be considered together with the other facts proved in order to determine whether he had the necessary intent but where the offence charged does not require proof of a specific intent, intoxication, whether by drink or drugs or both, cannot amount to a defence. Where the essence of the crime consists in negligence, it seems that drunkenness can never excuse. Nor will drunkenness be a defence in cases of strict liability, since, if an honest and reasonable mistake by a sober person cannot afford a defence, a mistake while drunk cannot do so. Self induced drunkenness at the time of committing an offence causing death can at most operate to reduce the crime from murder to manslaughter. ***[HALSBURY's Law of England, 4th Edition, Vol. 11, para 28].*** For the last proposition, HALSBURY relied on the leading case on the point

[Director of Public Prosecution v. Beard (1920) AC 479 HL]. In this case a prisoner ravished a girl of thirteen years of age and in aid of the act of rape he placed his hand upon her mouth to stop her from screaming, at the same time pressing his thumb over her throat with the result that she died of suffocation.

Drunkenness was pleaded as a defence. **BAILHACHE J.** directed the jury that the defence of drunkenness could only prevail if the accused by reason of it did not know what he was doing or did not know that he was doing wrong. The jury brought in a verdict of murder and the man was sentenced to death. The Court of Criminal Appeal (Earl of Reading C.J. Lord COLERIDGE AND SANKEY J) quashed this conviction on the ground of misdirection following the decision in *Rex v. Meade* ***[(1909) 1 KB 895 (B)]***which established that the presumption that a man intended the natural consequences of his acts might be rebutted in the case of drunkenness by showing that his mind was so affected by the drink that he had taken that he was incapable of knowing that what he was doing was dangerous.

The conviction was therefore reduced to manslaughter. The Crown preferred an appeal to the House of Lords and it was head by a Bench consisting of Lord CHANCELLOR Lord Birkenhead, Earl of Reading C. J. VISCOUNT HALDANE, Lord DUNEDIN, Lord ATKINSON, Lord SUMNER, Lord BUCKMASTER and

Lord PHILLIMORE. The Lord CHANCELLOR delivered the judgment of the Court. He examined the earlier authority in a lengthy judgment and reached the following conclusions:-

> 1. that insanity whether produced by drunkenness or otherwise is a defence to the crime charged;
> 2. that evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had his intent ; and
> 3. that evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts.

These guidelines were followed in a Supreme Court case followed by an Allahabad case ***[Basdev vs. State of Pepsu, AIR 1956 SC 488].*** The principle behind the law relating to immunity for criminal act due to drunkenness as culled from English cases are as follows:-

> (a) Where the prosecution has to prove recklessness as an element of the offence, if due to self-induced intoxication the accused was unaware of a risk of which he would have been aware had he been sober, he is to be treated as if he had been aware of that risk.
> (b) This applies whether intoxication has been induced by drink or drugs.
> (c) This applies where recklessness is charged as an alternative to intent or knowledge.
> (d) It is immaterial whether the recklessness which the prosecution have to prove relates to the act and its consequences as defined in the *actus reus* or not.
> (e) Where, however, the prosecution has to prove

> any other mental element, such an intent or knowledge, without the option of proving recklessness as an alternative, the jury must consider any evidence of intoxication in determining whether the necessary mental element has been proved. "In cases where drunkenness and its possible effect upon the defendant's *mens rea* are in issue, the proper direction to a jury is first to warn them that the defendant's mind was affected by drink so that he acted in a way which would not have done had he been sober did not assist him at all, provided that the necessary intention was here. A drunken intent was nevertheless an intent. Secondly, subject to that, the jury should merely be told to have regard to all the evidence, including that relating to drink, to draw such inferences as they thought proper from the evidence, and on that basis to ask themselves whether they felt sure that at the material time the defendant had the requisite intent. *[R. v. Sheehan and Moore (1975) 60 Cr App R 308]*. When the question of drunkenness arises, it is not a question of the capacity of the defendant to form the particular intent which is in issue, what is in issue is simple whether he did form such an intent.***[R. v. Garlick, The Times, December 3, 1980 C.A.]***

When an offence is found committed by one who is drunk under influence of liquor, voluntary drunkenness is not an excuse ***[State of Orissa v. Kabasi (1978) 45 Cut LT 533].***

As held in a Himachal Pradesh case voluntary intoxication is not a plea recognized as an exception to criminal liability. It may be different if some drug is administered to a person against his will and he then loses his balance of mind to such an extent that he is unable to see at the time when an act is committed, that he is doing some wrong. *[Chet Ram v. State of H.P.1971 CrLJ 1246]*

(40) In the case of **Basdev vs. State of Pepsu** reported in **AIR 1956 SC 488,** it has been held as under:-

> "**(4)** It is no doubt true that while the first part of the section speaks of intent or knowledge, the latter part deals only with knowledge and a certain element of doubt in interpretation may possibly be felt by reason of this omission. If in voluntary drunkenness knowledge is to be presumed in the same manner as if there was no drunkenness, what about those cases where mens rea is required.
>
> Are we at liberty to place intent on the same footing, and if so, why has the section omitted intent in its latter part ? This is not the first time that the question comes up for consideration. It has been discussed at length in many decisions and the result may be briefly summarised as follows :-
>
> (5) So far as knowledge is concerned, we must attribute to the intoxicated man the same knowledge as if he was quite sober. But so far as intent or intention is concerned, we must gather it from the attending general circumstances of the case paying due regard to the degree of intoxication. Was the man beside his mind altogether for the time being ?
>
> If so it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking, and from the facts it could be found that he knew what he was about, we can apply the rule that a man is presumed to intend the natural consequences of his act or acts.

(41) In the case in hand, there is no evidence that any intoxication was administered by other than the accused appellant. Therefore, the accused- appellant cannot claim any right of private defence u/S. 85 of IPC.

(42) As discussed above, the appellant has failed to establish that intoxication was done by some other person without knowledge of

accused appellant, therefore, it cannot be said that there was no any intention behind the act and the act done by him covers u/S. 304 Part I of IPC.

(43) The present case mainly depends upon the testimony of child witness, which requires thorough scrutiny of the evidence available on record.

(44) India has adopted adversarial system used in the common law countries where two advocates advance their rival contentions or represent their position before a Judge, who analyzes it to determine the truth of the case and passes judgment accordingly. It is in contrast to the inquisitorial system, where a Judge investigates the case. It is well settled that no one can compel the accused to give evidence against him in a criminal adversarial proceeding, even he may not be questioned by the prosecutor or Judge unless he opts to do so.

(45) Judges in an adversarial system are impartial in ensuring the fair play of due process or fundamental justice. In such system, the Judges decide, often when called upon by counsel rather than of their own motion, what evidence is to be admitted where there is a dispute. In an adversarial system if a dispute arises with regard to admission of evidence, it is always decided by the Judges. That means, the Judges play more of a role in deciding what evidence is to admit into the record or reject. It is true that improper

application of judicial discretion may pave the way to a biased decision, rendering obsolete the judicial process in question. The rules of evidence are also developed based upon the system of objections of adversaries but the Presiding Officer/Judge of the Court is having powers to ask questions whether relevant or irrelevant under Section 165 of the Indian Evidence Act, 1872, which is reproduced below:-

> **"165. Judge's power to put questions or order production**. – The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question **he pleases**, in any form, at any time, of any witness, or of the parties, about **any fact relevant or irrelevant**, and may order the production of any document or thing; and ***neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.***
>
> Provided that the Judgment must be based upon facts declared by this Act to be relevant, and duly proved;
>
> Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

(46) In **Sidhartha Vashist v. State (NCT of Delhi), [AIR 2010 SC 2352]**, the Apex Court observed that the Judge cannot ask

questions which may confuse, coerce or intimidate the witness. That means, the Judge should not sit in the Court as a silent spectator rather he should involve himself for quest of the truth under the provisions of law.

> (49) Section 118 of the Indian Evidence Act reads as follows:- "**118. Who may testify.**-- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. *Explanation* . – A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

From the aforesaid provision, it is clear that all persons shall be competent to testify before the Court subject to provisions made under Section 118 of the Indian Evidence Act.

(47) Now in the present case the question required to be determined is as to whether the child can understand the nature of an oath; has sufficient capacity or intelligence to give reliable evidence; and, distinguish between what's right or wrong.

(48) According to Blacks Law dictionary, 'a witness is one who sees, knows, or vouches for something or one who gives a testimony under oath or affirmation in person by oral or written deposition. A witness must be legally competent to testify.'

(49) The Courts have made some reconciliation between taking

oath before a Court and facing the consequences of breaching the same on the one hand and on the other hand, the competency of giving testimony before the Court. In the interest of justice, Courts have held that a child witness is competent to give evidence though it may not be permissible to administer oath before giving such evidence. It is, in this context, there are several rulings of the Supreme Court as to competency of a child witness and necessary precautions to be taken in sifting of evidence given by such a child witness. A reference to these decisions is relevant in the present case for the admissibility or desirability of a child witness's evidence.

(50) In **Mohamed Sugal Esa v. The King [AIR 1946 P.C. 3]**, it has been held as under:-

> "Once there is admissible evidence a court can act upon it; corroboration, unless required by a statute, goes only to the weight and value of the evidence. It is a sound rule not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

(51) In **Rameshwar vs. State of Rajasthan [AIR 1952 SC 54]**, the Apex Court held as under:

> "The rule, which according to cases has hardened into one of law, is not that corroboration is essential before there can be a conviction, but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge... The only rule of law is that this rule of prudence must be present to the mind of the

> judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

(52) In The **State and others vs. Dukhi Dei and others [AIR 1963 ORISSA 144],** the Orissa High Court observed in paragraph 8 of the judgment as follows:

> "8. The question therefore is whether the evidence of P.W.2 as an eye-witness is reliable for conviction of the appellants. No doubt the evidence of a child witness is to be taken with great caution. Normally evidence of Child witnesses should not be accepted as it is notoriously dangerous unless immediately available and unless narrated before any possibility of coaching is eliminated; there should be closer scrutiny of the evidence of child witnesses before the same is accepted by a court of law."

(53) In **Arbind Singh v. State of Bihar [1995 (Supp) 4 SCC 416]**, in paragraph 3 of the judgment, the Apex Court observed as follows:

> "3. ..... It is well-settled that a child witness is prone to tutoring and hence the court should look for corroboration particularly when the evidence betrays traces of tutoring....."

(54) In **Jibhau Vishnu Wagh vs. State of Maharashtra [1996 (1) CRI.L.J. 803],** it was held in paragraph 15 of the judgment as follows:

> 15. ..... He firstly urged that the prosecutrix was a young girl aged about 8 years and the learned trial Judge should have conducted her preliminary examination in order to ascertain in the level of

> understanding and only thereafter should have proceeded to record her statement. There can be no dispute that it would have been certainly better for the learned Judge to have first conducted a preliminary examination of the prosecutrix by putting some questions to her and on the basis of answers given by her in reply to them satisfied himself whether she was possessed of sufficient understanding. However, the failure to hold a preliminary examination of a child witness does not introduce a fatal infirmity in the evidence....."

(55) In **Panchhi and others vs. State of UP [(1998) 7 SCC 177]** in paragraphs 11 and 12, the Apex Court observed as follows:

> "11. ..... But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring.
>
> 12. Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law **[Prakash v. State of MP (1992) 4 SCC 225 : (AIR 1993 SC 65)]; [Baby Kandayanathil v. State of Kerala, 1993 Suppl (3) SCC 667 : (1993 AIR SCW 2192)]; [Raja Ram Yadav v. State of Bihar, AIR 1996 SC 1613 : (1996 AIR SCW 1882)] and [Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341]."**

(56) In **Dhani alias Dhaneswar Naik vs. The State [1999 (3) CRI.L.J. 2712]** in paragraph 6 it has been held as under:

> "6. P.W.4 undoubtedly is a child of ten years at the time his examination was made. So far as acceptability of evidence of P.W.4 is concerned, undisputedly he was a minor boy at the time of

> alleged commission of offence and while deposing in Court. Under Section 118 of the Indian Evidence Act, 1872 (in short, Evidence Act) all persons are competent to testify unless the Court considers that because of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind they are prevented from understanding questions put to them, or from giving rational answers. All grounds of incompetency have been swept away by Section 118 under which competency of witnesses is the rule and their incompetency is the exception. Only incompetency that the section highlights is incompetency from premature or defective intellect. As to infancy, it is not so much the age as the capacity to understand which is the determining factor. No precise age-limit can be given, as persons of the same age differ in mental growth and their ability to understand questions and giving rational answers. The sole test is whether witness has sufficient intelligence to depose or whether he can appreciate the duty of speaking truth. The general rule is that the capacity of the person offered as a witness is presumed, i.e. to exclude a witness on the ground of mental or moral capacity, the existence of the incapacity must be made to appear. Under Section 118, a child is competent to testify, if it can understand the questions put to it, and give rational answers thereto.....

(57) In **Bhagwan Singh and others vs. State of MP [(2003) 3 SCC 21],** the Apex Court observed as follows:

> "19. The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the Court to be a witness whose sole testimony can be relied without other corroborative evidence. The evidence of child is required to be evaluated carefully because he is

> an easy prey to tutoring. Therefore, always the Court looks for adequate corroboration from other evidence to his testimony."

(58) In **Ratansingh Dalsukhbhai Nayak vs. State of Gujarat [(2004) 1 SCC 64]**, the Apex Court held in paragraph 7 as follows:

> "7. ..... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaked and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

(59) In **Sakshi vs. Union of India and others [(2004) 5 SCC 518],** the Apex Court took extra precaution in examining child witnesses before various forums especially in a criminal forum and it dealt with at length the desirability of recording certain statements in an atmosphere conducive for such recording. Paragraphs 27 and 28 of the judgment are extracted below:

"27. The other aspect which has been highlighted and needs consideration relates to providing protection to a victim of sexual abuse at the time of recording his statement in Court. The main suggestions made by the petitioner are for incorporating special provisions in child sexual abuse cases to the following effect :

(i) permitting use of a videotaped interview of the child's statement by the judge (in the presence of a child support person).

(ii) allow a child to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of.

(iii) The cross-examination of a minor should only be carried out by the judge based on written questions submitted by the defence upon perusal of the testimony of the minor.

(iv) Whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.

28. The Law Commission, in its response, did not accept the said request in view of Section 273, Cr.P.C. as in its opinion the principle of the said Section which is founded upon natural justice , cannot be done away in trials and inquiries concerning sexual offences. The Commission, however, observed that in an appropriate case it may be open to the prosecution to request the Court to provide a screen in such a manner that the victim does not see the accused while at the same time provide an opportunity to the accused to listen to the testimony of the victim and give appropriate instructions to his counsel for an effective cross-examination. The law Commission suggested that with a view to allay any apprehensions on this score, a proviso can be placed above the Explanation to Section 273 of the Criminal Procedure Code to the following effect:

"Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take

> appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused."

(60) Regarding credibility of evidence of child witness, the Apex Court in **Golla Yelugu Govindu v. State of A.P. [(2008) 16 SCC 769]** in para 11 held as under:-

> "11. The Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease--whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto."

(61) From the aforementioned legal position, following factors must be considered at the time of recording of evidence of a child witness :-

> (i) There is no disqualification for a child witness;
>
> (ii) The Court must conduct a preliminary enquiry before allowing a child witness to be examined;
>
> (iii) The Court must be satisfied about the mental capability of a child before giving evidence;
>
> (iv) While sifting the evidence, the possibility of a bias or the child being tutored should be taken note of;
>
> (v) The evidence of a child witness should be corroborated;

> (vi) The child cannot be administered oath or affirmation and it is incompetent to do so;
>
> (vii) The Court cannot allow a minor to make an affirmation;

(62) In **Ratan Singh Dalsukhbai Nayak (supra),** it has also been observed as under:-

> "The law with regard to the testimony of child witnesses can be summed up thus. The conviction on the sole evidence of a child witness is permissible if such witness is found competent to testify and the court after careful scrutiny of its evidence is convinced about the quality and reliability of the same."

(63) On the basis of above, the evidence of a child witness is not required to be discarded per se, but as a rule of prudence the Court can consider such evidence with close scrutiny and only on being convicted about the quality thereof and reliability can record conviction, based thereon.

(64) All that is required in consideration of evidence of a child witness, if on scanning it carefully it is found that there is no infirmity or contradiction in the evidence of a child, then there is no impediment in accepting the evidence of a child. Normally a Court should look for corroboration in such cases but that is more by way of caution and prudence than as a rule of law.

(65) It is relevant to mention that the reliability of a child witness is very important in the cases of domestic violence and other offences, which take place within the four walls of a home, where

no outsider may be present, a child can be very important witness, especially being the sole eye-witness. Furthermore, in cases where a child may not always be a natural witness, children tend to have a very strong memory and may actually paint a clear picture of the alleged scene of crime. There are probabilities of exaggeration, but here again the role of the Court is important.

(66) Raghuveer Singh (PW1) and Balveer Singh (PW2) are the witnesses to the last seen theory. They immediately reached the house of accused-appellant where accused-appellant committed murder of his wife and as soon as Raghuveer Singh (PW1) and Balveer Singh (PW2) reached there, the accused had absconded. The place of incident is the house of the appellant- accused and it is undisputed fact that the deceased was his wife. These two witnesses are eye-witnesses to the incident along with daughter of deceased and appellant-accused, namely, Priyanka (PW4). At the time of incident, Priyanka (PW4), who is aged around 12 years, was inside the room and she is the child witness. Priyanka (PW4) in her Court statement has specifically stated that around one year back at about 09:00 pm, her father committed murder of her mother with the help of scarf (safi). This witness had also identified her father while recording of her statement before the trial Court. The statement of this witness remained unchanged in her cross-examination. Further, the statements given by Priyanka

(PW4) are supported by the statements of Raghuveer Singh (PW1) and Balveer Singh (PW2). Similarly, the statements of Raghuveer Singh (PW1) and Balveer Singh (PW2) also remain unchanged in their cross-examination. Thus, the statement of Priyanka (PW4) cannot be discarded. Therefore, the trial Court has rightly considered the evidence of Priyanka (PW4) along with the evidence of Raghuveer Singh (PW1) and Balveer Singh (PW2).

(67) From the date of incident, the accused appellant remained absent from his house, rather he remained absconded till the date of his arrest. This *modus operandi* also reflects that the appellant-accused had committed offence. Even otherwise, it is a natural phenomenon that if the couple is having a minor girl child and murder of the wife has been committed by her husband, then definitely such husband shall remain continuously present in his house to look after his minor girl child. But such *modus operandi* is also relevant in the present case to implicate the appellant. In the present case, as the motive/intention/knowledge is required to be gathered from the act of appellant-accused, therefore, considering the aforesaid evidence, the trial Court has rightly presumed the guilt of the appellant-accused.

(68) Havaldar Singh (PW3) in his statement deposed that on the basis of his statement, police had prepared spot map Ex.P4 carrying his signature from "B to B". Safina Form Ex.P2 was

prepared carrying his signature from "C to C". Panchnama of the dead body of deceased Ex.P3 was also prepared carrying his signature from "C to C". After one-two days of the incident, police arrested appellant-accused vide arrest memo Ex.P5 carrying his signature from "A to A". Similarly, Chatur Singh (PW6) in his statement deposed that police had prepared Safina Form Ex.P2 carrying his thumb impression on it. Panchnama of the dead body of the deceased was prepared vide Ex.P3 carrying his thumb impression on it. Scarf (safi) was seized by the police vide seizure memo Ex.P6 carrying his signature on it. Sunil (PW5) in his statement deposed that he has proved seizure of scarf (safi) and the seizure memo is Ex.P6 carrying his signature from "A to A".

(69) DS Sengar, Sub-Inspector (PW7) has proved the investigation. Devendra Singh (PW8) in his statement stated that on 19/09/2008 he was posted as Head Constable (Writer) in Police Station Nagra and during the course of investigation, he received one sealed packet containing clothes, viscera, kidney etc. which were brought from the hospital by Police Constable Upendra Singh No.170 and seizure memo Ex.P12 was prepared carrying his signature from "A to A". Kalicharan (PW9), who was posted as Patwari of Mouza Kochal, has proved spot map Ex.13 carrying his signature from "A to A".

(70) In the light of the foregoing discussion, we are of the

considered opinion that the trial Court has properly and legally analyzed and appreciated the entire evidence available on record and did not err in convicting and sentencing the present appellant. Therefore, the trial Court has rightly found the appellant-accused guilty of committing murder of his wife and accordingly, convicted and sentenced him u/S. 302 of IPC. The appeal filed by the appellant appears to be devoid of any substance.

(71) Consequently, the jail appeal by appellant against his above-mentioned conviction and sentence as recorded by the Trial Court is dismissed and his conviction and sentence are affirmed. Appellant is in jail. He be intimated with the result of this appeal through relating Jail Superintendent.

With a copy of this judgment record of the trial Court be sent back immediately.

(G.S.Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge

MKB