

HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

DIVISION BENCH

BEFORE: G.S.AHLUWALIA

AND

RAJEEV KUMAR SHRIVASTAVA, JJ.

Criminal Appeal No. 263/2010

1. Jhabbu S/o Mohan Singh Bhadoria
2. Kamal S/o Mohan Singh Bhadoria
3. Babloo S/o Mohan Singh Bhadoria

All Residents of Purani Basti Bhind, P.S. Bhind
District Bhind (MP)

Versus

State of Madhya Pradesh

Shri Ashok Kumar Jain, counsel for the appellants.
Shri R.K. Awasthi, Public Prosecutor, for the respondent/ State.

Reserved on : 17th November, 2021

Whether approved for reporting: Yes

J U D G E M E N T

(24/11/2021)

Per Rajeev Kumar Shrivastava, J.:

1. The instant Criminal Appeal is preferred under Section 374 of CrPC, against the judgment of conviction and sentence dated 22.03.2010 passed by Third Additional Sessions Judge, Bhind, District Bhind in Sessions Trial No.212/2009, whereby appellant No.1-Jhabbu has been convicted under Section 302 of IPC and sentenced to undergo life imprisonment with fine of Rs.500/-, in default of payment of fine, to undergo RI for three months, and under Section 25/27 of Arms Act, to undergo RI for three years with fine of Rs.500/-, in default of payment of fine, to

undergo rigorous imprisonment of three months and appellant No.2-Kamal and appellant No.3- Babloo have been convicted under Section 302 read with Section 34 of IPC and sentenced to undergo life imprisonment with fine of Rs.500/- each, in default of payment of fine, to undergo RI for three months each respectively.

2. The prosecution case in short is that on 28.08.2008 at around 12.30 pm in front of hotel of Kallu Batham Jail Road Bhind when complainant Ajeem Khan his elder brother Chanda Khan were sitting in the hotel of Kallu Batham, their father Imam Khan @ Immy Musalman was returning back after meeting with his son Shahjad Khan, who is the elder brother of complainants. When their father Imam Khan reached in front of hotel of Kallu Batham, accused/appellants Ghambheer Singh @ Gambare Bhadoriya, Jhabbu Singh Bhadoriya, Ballu Bhadoriya and Kamal Singh Bhadoriya reached there, all were armed with mouser and confined their father Imam Khan to kill him. When their father tried to escape from the place, Gambheer Singh fired upon their father by mouser Katta which resulted injuries over the right side of waist of Imam Khan. Thereafter, Jhabbu Singh fired over the head of Imam Khan by means of mouser katta which resulted in death of Imam Khan. Chanda Khan, Mohd. Wasim etc. were the eyewitnesses to the incident. The accused/appellants committed the aforesaid offence considering the previous enmity was due to murder of elder brother of Gambheer Singh named Lallu Bhadoriya. FIR was lodged. Investigation was done. After completion of investigation charge sheet was filed.

3. Appellants were tried for the offences under Sections 302 of IPC and Section 25/27 of Arms Act and 302/34 of IPC. The trial Court convicted and sentenced the appellants as under :-

Name of accused	Section	Punishment	Fine	In default, punishment
Jhabbu Singh @ Murat Singh	302 IPC	Life Imprisonment	500/-	3 months Addl. RI
	25/27 Arms Act	Three years RI	500/-	3 months Addl. RI
Babloo Singh	302/34	Life Imprisonment	500/-	3 months Addl. RI
Kamal Singh	302/34	Life Imprisonment	500/-	3 months Addl. RI

4. The grounds raised are that the judgment of conviction and sentence is bad in law and against settled principles of law. There are various contradictions in prosecution evidence. The appellants have been falsely implicated in this case due to previous enmity. On the date of incident eyewitnesses were not present on the place of incident as they reside at Itawa and the incident took place at Bhind. Defence has produced the visiting register of jail wherein no such fact has been mentioned that on the date of incident deceased Imam Khan met his son Shahjad Khan in jail. The learned trial Court has erred in disbelieving the defence evidence. There was no motive of committing murder of the deceased. There are lots of variations in the statement of the prosecution witnesses. Hence, prayed for acquittal.

5. Per Contra, learned State Counsel opposed the submissions and submitted that the trial Court has rightly convicted the appellants and awarded sentence. Hence, no case is made out for interference.

6. Heard the learned counsel for the rival parties and perused the record.

7. In the present case, the following question emerges

for consideration :

- “(i) Whether, on 28.08.2008 at about 12.30 pm the death of Imam Khan was culpable homicide?
- (ii) Whether, the culpable homicide of deceased Imam Khan comes within the purview of murder?
- (iii) Whether the accused persons caused firearm injuries to the deceased Imam Khan?
- (iv) Whether the accused/appellants possessed firearm without valid licence?

8. 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.

9. 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 Williams (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.”

10. 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.

11. 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."

12. 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."

13. Section 299 of Indian Penal Code runs as under :-
"299. Culpable homicide.-- Whoever 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."
14. 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.

15. 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.”

16. '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.

17. Indian Penal Code recognizes two kinds of homicides : (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).

18. 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.

19. 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.

20. The fact that the death of a human being is caused is not enough unless one of the mental states 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.

21. 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.

22. 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.”

23. 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.”

24. 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'.

25. 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.”

26. 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.”

27. 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.

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.”

28. 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.

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.”

29. Section 34 of Indian Penal Code runs as under :-

“34.-- Acts done by several persons in furtherance of common intention.-- When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

30. Section 34 of the Indian Penal Code recognises the principle of vacarious liability in criminal jurisprudence. A bare reading of this Section shows that the Section could be dissected as follows :

- (a) Criminal act is done by several persons;
- (b) Such act is done in furtherance of the common intention of all; and
- (c) Each of such persons is liable for that act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court in determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved then by fiction of law, criminal liability of

having done that act by each person individually would arise. The criminal act, according to Section 34 I.P.C. Must be done by several persons. The emphasis in this part of the Section is on the word 'done'. It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity. The Section does not envisage a separate act by all of the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

31. Section 34 is intended to meet a situation wherein all the co-accused have also done something to constitute the commission of a criminal act. Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34 e.g., the co-accused can remain a little away and supply weapons to the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this; One of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. The act mentioned in Section 34 I.P.C., need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act e.g., a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to

inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the Section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 I.P.C., cannot be invoked for convicting that person. This Section deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the Section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. This Section refers to cases in which several persons both intend to do and do an act. It does not refer to cases where several persons intended to an act and some one or more of them do an entirely different act. In the latter class of cases, Section 149 may be applicable if the number of the persons be five or more and the other act was done in prosecution of the common object of all.

32. In **Suresh Sankharam Nangare vs. State of Maharashtra [2012 (9) SCALE 345]**, it has been held that “if common intention is proved but no overt act is attributed to the individual accused, section 34 of the Code will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, section 34 cannot be involved. In other words, it requires a pre-arranged plan and pre-supposes prior concert, therefore, there must be prior meeting of minds.”

33. In **Shyamal Ghosh vs. State of West Bengal [AIR 2012 SC 3539]**, it is observed that “ Common intention means a pre-oriented plan and acting in pursuance to the plan, thus common intention must exist prior to the commission of the act in a point of time.”

34. In **Mrinal Das vs. State of Tripura [AIR 2011 SC 3753]**, it is held that “the burden lies on prosecution to prove that actual participation of more than one person for commission of criminal act was done in furtherance of common intention at a prior concert.”

35. In **Ramashish Yadav v. State of Bihar [AIR 1999 SC 1083]**, it is observed that “it requires a pre-arranged plan and pre-supposes prior concert therefore there must be prior meeting of mind. It can also be developed at the spur of moment but there must be pre-arrangement or premeditated concert.”

36. Mainly two elements are necessary to fulfill the requirements of Section 34 of IPC. One is that the person must be present on the scene of occurrence and second is that there must be a prior concert or a pre-arranged plan. Unless these two conditions are fulfilled, a person cannot be held guilty of an offence by the operation of Section 34 of IPC. Kindly see, **Bijay Singh v. State of M.B. [1956 CrLJ 897]**.

37. In a murder case a few accused persons were sought to be roped by Section 34 I.P.C. It was found that one of the accused persons alone inflicted injuries on the deceased and the participation of the other accused persons was disbelieved. The person who alone inflicted injuries was held liable for murder and others were acquitted. Kindly see, **Hem Raj vs. Delhi (Administration) [AIR 1990 SC 2252]**.

38. In **Dashrathlal v. State of Gujarat [1979 CrLJ 1078 (SC)]**, it has been observed that “by merely accompanying the accused one does not become liable for the crime committed by the accused within the meaning of Section 34 I.P.C.”

39. In **Rajagopalswamy Konar vs. State of Tamil Nadu [1994 CrLJ 2195 (SC)]**, there was land dispute between the members of a family, as a result of which deceased persons were attacked by the accused persons, in which one accused stabbed both the deceased persons and other caused simple injuries with a stick. It was held that the conviction of both the accused under Section 34 read with Section 302 IPC was not proper. Other accused was convicted under Section 324 of IPC. Kindly see, .

40. In **Sheikh Nabab v. State of Maharashtra [1993 CrLJ 43(SC)]**, it is observed that “the overtact on the part of accused could not be proved and it was held that the order of the conviction was not proper.”

41. On a perusal of the evidence on record, we are of the view that the offence committed by the appellant is clearly one of murder and squarely comes within clause “thirdly” of Section 300 of IPC, which runs as under :-

“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.”

42. In the present case, the bodily injury is caused by gunshot and was sufficient in the ordinary course of nature to cause death. It is in two parts, first part is subjective one which indicates that the injury must be intentional and not accidental and, second part is objective, in that, looking to the injury caused the Court must be satisfied that it was sufficient in the ordinary course of nature to cause death.

43. Prosecution has examined (PW/1) Dr. Ajeet Mishra, Medical Officer who conducted the postmortem of deceased Imam Khan, Yogendra Singh Kushwah, Arms Clerk (PW/2), Akhlesh (PW/3) and Vipendra (PW/4) who are the witnesses of the arrest memo Ex-P/3, seizure memo Ex-P/4, Ajeem Khan (PW/5) and Chanda Khan (PW/6) who are the sons of deceased Imam Khan and Baseem Khan (PW/7) were the eyewitnesses to the incident, Hukum Singh Yadav, Inspector (PW/8) who conducted investigation, D.S. Bhadauriya, Station Incharge Kotwali Bhind (PW/9) who arrested the accused persons and recovered firearm from the possession of Jhabbu and accused persons have examined defence witnesses Bobby Chouhan (DW/1), Om Singh Tomar (jail prahari) (DW/2) and Kallu Batham (DW/3).

44. Dr. Ajeet Mishra (PW/1) has stated in his statement that on 28.08.2008 he was Medical Officer in District Hospital Bhind. On that date Constable Ashish Tiwari No.81 brought the dead body of Imam Khan S/o Abdulla Khan aged 65 years for postmortem. He conducted postmortem of dead body of deceased Immy Khan and he found following injuries on the body of deceased:-

- “(i) Entrance wound 2 cm x 1/2x cavity deep up to L.5 vertebra over right side of back surrounded by blackening.
- (ii) One exit wound 3½ cm x 4 cm x cavity deep over the left side of stomach from where intestine were coming out.
- (iii) Entrance wound 2½ cm x 2 cm x cavity deep above the right scapula bone over the head.
- (iv) One exit wound 7x5 inch over occipital bone and parietal bone. The brain matter and blood was coming out. Half portion of occipital bone was missing.

On Internal Examination, he found that half portion of

occipital bone was missing and brain material was coming out from the exit wound. Both lungs were yellowish. Both chambers of heart were empty. Blood was found inside of stomach. Membranes of intestine were lacerated. Gas as well undigested food was found in the intestines and right kidney was filled with blood and left was ruptured. He sealed the clothing of the deceased and handed over it to the constable. He further opined that the death was homicidal in nature which was the result of injury caused by firearm over the vital organ. Death was caused within six hours of postmortem. Postmortem report is Ex-P/1. The aforesaid statement remain unchanged in his cross-examination. The injuries caused were sufficient to cause death and were caused by gunshot, therefore, the death of deceased was culpable homicide.

45. Now it has to be seen whether the aforesaid act was done by the accused/appellants in furtherance of common intention.

46. Ajeem Khan (PW/5) who is the son of deceased Imam Khan has stated in his statement that on 28.08.2008 at around 12.30 pm his father deceased Imam Khan was coming back after meeting to his son Shahjad Khan(elder brother of Ajeem Khan) in jail, when he reached in front of the hotel of Kallu, accused persons Gambheer Singh, Jhabbu Singh, Kamal Singh and Babloo Singh reached there and stopped his father Imam Khan and told to kill him and thereafter they fired upon Imam Khan by means of katta mouser and caused injuries on the right side of hip and over the head which resulted into death of Imam Khan. He further stated that the aforesaid act was done due to previous enmity. He has further stated that all the accused/appellants are brothers and criminal trial was conducted against his father for commission of

murder of Lallu Singh brother of accused/appellants. Chanda Khan (PW/6), Baseem Khan (PW/7) have supported the evidence given by Ajeem Khan (PW/5) and their statements remain unchanged in their cross-examination.

47. Hukum Singh Yadav (PW/8) has proved the investigation as well as arrest and seizure memo. The prosecution witnesses relating to arrest memo and seizure memo have not corroborated the story of prosecution, but is not fatal to the prosecution case.

48. D.S. Bhadauriya (PW/9) has stated in his statement that he arrested Jhabbu Singh by Ex-P/3 and one desi katta of 315 bore with one live round of 315 bore were recovered from the possession of the accused. He has also proved the arrest of other accused/appellants. Defence has produced defence witness Bobby Chauhan who alleged to be a chance witness to the incident but his statement is not trustworthy and the fact from where the eyewitnesses were coming on the spot of incident is not relevant.

49. In the light of the foregoing discussion, we are of the considered opinion that the trial Court did not err in convicting and sentencing the accused/appellants. Hence, the appeal filed by the appellants appear to be devoid of any substance.

50. Consequently, **Criminal Appeal No. 263/2010** filed by appellants Jhabbu, Kamal, and Babloo is hereby dismissed and their conviction and sentence are hereby affirmed. Since, appellant No. 2 Kamal and appellant No.3 Babloo are on bail after suspending their jail sentence by this Court, therefore, their bail bonds are cancelled and they are directed to immediately surrender before the trial Court to serve out their remaining jail sentence.

51. As per report dated 26.8.2021 received from Superintendent, Central Jail, Gwalior, Appellant No.1 Jhabbu is in

jail but he has been released on parole. Trial Court is directed to take steps to ensure the custody of the appellant No.1 Jhabbu to serve out his remaining sentence.

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

(G.S.Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge