High Court of Madhya Pradesh
Bench at Gwalior
****
DB:- Hon'ble Shri G.S.Ahluwalia &
Hon'ble Shri Rajeev Kumar Shrivastava, JJ

CRA 381 of 2010

Shivram Singh Rajawat
S/o. Jagmohan Singh, Aged 58 years,
R/o. Village Parsala, PS Raun, District Bhind ----Appellant

Vs.

State of Madhya Pradesh ----Respondent

A N D

CRA No. 390 of 2010

(1) Pappu alias Jitendra Rajawat
S/o. Udaiveer Singh, Aged 40 years

(2) Raju alias Ravindra Rajawat, ----Appellants
S/o. Balveer Singh, Aged 45 years

Both residents of Village Parsala,
PS:- Raun, District Bhind

Vs.

State of Madhya Pradesh -------- Respondent

Shri Rinkesh Goyal, counsel for appellant Shivram Singh Rajawat in CRA No.381 of 2010 & for appellant No.1 Pappu alias Jitendra Rajawat in CRA No.390 of 2010.
Shri Ajeet Singh Bhadoriya, counsel for appellant No.2 Raju @ Ravindra Rajawat in CRA No.390 of 2010.
Shri Rajeev Upadhyay, Public Prosecutor for the State in both CRA Nos.381 of 2010 & 390 of 201.0

Reserved on : 22/11/2021
Whether approved for reporting : …Yes./.....

J U D G M E N T
(Delivered on 08/12/2021)

Per Rajeev Kumar Shrivastava, J:-.

This judgment shall govern disposal of **Criminal Appeal No.390 of 2010** filed by appellant No.1 Pappu alias Jitendra Rajawat and appellant No.2 Raju alias Ravindra Rajawat against the judgment of conviction & sentence dated 06/05/2010, passed by Special Judge (MPDVPK Act), Bhind (MP) in Sessions Trial No.92/2007, by which appellant No.1 Pappu alias Jitendra Rajawat has been convicted under Section 302 r/w Section 34 of IPC and sentenced to undergo Life Imprisonment with fine of Rs.5,000/-, whereas appellant No.2 Raju alias Ravindra Rajawat has been convicted under Section 302 of IPC and sentenced to undergo Life Imprisonment with fine of Rs.5,000/-. **Criminal Appeal No.381 of 2010** has been filed by appellant Shivram Singh Rajawat against the same judgment of conviction and sentence, by which he has been convicted under Section 302 r/w Section 34 of IPC and sentenced to undergo Life Imprisonment with fine of Rs.5,000/-. Since both the criminal appeals arise from the common judgment of conviction and sentence passed by the Special Judge, therefore, we have heard both the criminal appeals together.

(2) From the order dated 17/11/2021 passed by this Court in Criminal Appeal No. 573 of 2010, it is clear that Criminal Appeal No.573/2010 filed by appellant Raju alias Ravindra Rajawat against the same judgment of conviction and sentence was dismissed as not maintainable, because Criminal Appeal No.390 of 2010 was filed prior in time.

(3) In brevity, the prosecution story is that on 03/08/2007 at around 07:05 pm on the basis of merg intimation (Ex.D2) received from complainant PW1 Surendra (son of Gangole Rathore), a *Dehati Nalishi* was recorded at Police Station Raun, District Bhind with the allegation that on 03/08/2007 at around 06:00 pm, complainant Surendra was coming to his house and saw that near the platform of his house, accused Pappu son of Chhotelal had caught hold of his father Gangole. When he tried to rescue him, accused Raju and Shivram who were standing nearby the place, instigated accused Pappu to kill his father by saying that *"Budha Maan Nehein Raha Khatam Kar Do"*. Thereafter, accused Raju who was having a 12 bore country-made Katta, caused fire as a result of which, the pellets of said gun hit on thigh and leg of his father by which his father fell down on the ground and died on the spot. Afterwards, accused Raju, Pappu and Shivram fled away from the spot. It is alleged that when the complainant entered into the house, he saw that all the articles kept in suitcase were scattered here and there, and his wife told him that accused Raju, Pappu and Shivram robbed a gold necklace & cash of Rs.50,000/- total worth Rs.60,000/-. It is alleged that his neighbours and uncle had also seen the incident. On the basis of *Dehati Nalishi,* FIR was registered at Police Station Raun, vide Ex.P9A. Statements of the witnesses were recorded and matter was investigated. Spot map (Ex.P3) was prepared. Panchnama of the dead body of deceased was prepared and the same was brought to the Health Centre, Raun vide requisition Ex.P11. Dr. Kapil Dev Singh (PW10)conducted postmortem of the deceased and found pellet injuries on the body of deceased. The doctor also found blackening and charring on the right thigh and near all the injuries of the

deceased. According to doctor, cause of death of deceased was acute and extensive hemorrhage and death of the deceased was homicidal in nature. Blood-stained clothes and plain soil were seized by Head Constable Narendra Singh (PW8) on 04/08/2007 vide seizure memo Ex.P9. As per opinion of Dr. Singh (PW10), all the injuries sustained by the deceased on his thigh were sufficient to cause his death. During investigation, SI Bhanwar Singh Jadon (PW9) on 17/08/2007 arrested all the accused persons vide arrest memo Ex.P4 to Ex.P6 and thereafter, on 18/08/2007 seized a 12 bore country-made katta along with a live cartridge vide seizure memo Ex.P8 from illegal possession of accused Raju, who was having no valid licence.

(4) After completion of investigation, police filed charge sheet against accused persons for commission of offences punishable under Sections 302, 394, 34 of IPC and Section 25/27 of Arms Act r/w Section 11/13 of MPDVPK Act before the Court, from where the case committed to the Trial Court/ Special Court.

(5) Statements of the accused were recorded. In order to lead defence evidence, all the accused persons abjured guilty and pleaded complete innocence. Accused persons did not examine any witness in support of their evidence.

(6) In order to bring home the charges, the Prosecution in support of its case, has examined as many as thirteen witnesses i.e. PW1 Surendra, PW2 Munnesh, PW3 Gangacharan, PW4 Mataru, PW5 Ramsanehi, PW6 Sudha PW7 Suman, PW8 Narendra Singh, PW9 Bhanwar Singh Jadon, PW10 Dr. Kapil Dev Singh, PW11 Satnam Singh, PW12 Yogendra Bhadoriya and PW13

Manoj Jain.

(7) Learned trial Court after appreciating oral and documentary evidence as well as medical evidence placed on record, passed the impugned judgment of conviction and sentence against the appellants as stated in paragraph 1 of this judgment.

(8) Challenging the impugned judgment of conviction and sentence, it is submitted by the learned Counsel for the appellants that the impugned judgment of conviction and sentence passed against the appellants is arbitrary and same suffers from improper evaluation of evidence available on record. It is further submitted that no site plan/spot map in regard to commission of daocity by the appellants was prepared. So far as commission of dacoity is concerned, learned trial Court has disbelieved the evidence of prosecution witnesses and has rightly acquitted accused persons from offence under Section 11/13 of the MPDVPK Act. So far as commission of offence under Section 25/27 of the Arms Act is concerned, learned trial Court did not find any reliable evidence on record and has rightly acquitted accused persons from offence under Section 25/27 of the Arms Act. It is further submitted that the alleged incident had taken place outside the house of the deceased. PW1 Surendra (son), PW2 Munnesh (son), PW6 Sudha(daughter), PW5 Ramsanehi (real brother), PW3 Gangacharan (cousin) and PW7 Suman (daughter-in-law) of the deceased are the relative witnesses and their evidence is not reliable and trustworthy, as the entire prosecution case rests upon heavy doubt. PW5 Ramsanehi who is real brother of deceased, did not support the prosecution case. He in his examination-in-chief has specifically stated that he did not see

anybody firing at the deceased. PW1 Surendra and PW2 Munnesh who are sons of the deceased in their examination-in-chief have stated that they saw the accused persons firing at deceased, but in their statements recorded under Section 161 CrPC, this fact did not reveal. Therefore, learned trial Court has erred in not appreciating the evidence of witnesses in its right perspective. It is further submitted that some unknown persons have committed murder of the deceased and the accused persons have been falsely implicated. So far as commission of murder of the deceased is concerned, there is no sharing common intention of the accused and therefore, in absence of common intention or motive, commission of murder is not found to be established. The finding arrived at by the learned Trial Court in its paragraph 37 is perverse regarding commission of murder of the deceased by means of country- made katta which was in possession of accused Raju. Learned counsel for the appellants further submitted that the ingredients of murder as per Section 300 IPC are missing. There was no intention of accused to commit murder of deceased or to cause him any bodily injury as is likely to cause death of deceased. It is further submitted that use of alleged weapon i.e. firearm is not found to be proved. In support of contention, the learned counsel for the appellants has relied upon the judgment passed by the Supreme Court in the case of **Tularam vs. State of MP,** reported in **ILR (2018) MP 2789 (SC).** Under these circumstances, the appeals filed by appellants-accused assailing their conviction and sentence deserve to be set aside and it is prayed that by allowing the appeals, appellants be acquitted from the charges levelled against them.

(9) On the other hand, the learned counsel for the State supported the impugned judgment of conviction and sentence and submitted that the evidence of prosecution witnesses is fully corroborated by medical evidence and autopsy/postmortem report in which gunshot injuries were found on the body of the deceased and, therefore, there is no infirmity in the judgment of conviction and sentence passed by learned trial Court and learned Trial Court did not err in convicting and sentencing the accused for the offence as indicated above.

(10) The first question for determination of appeals is as to whether the death of deceased Gangole was homicidal in nature and offence falls within the purview of "murder" or not ?

(11) Before considering the arguments advanced by learned Counsel for the appellants,it would be appropriate to throw light on the relevant provisions of Sections 299 and 300 of IPC.

(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."

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."

(13) 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.-- 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.”

(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 causding 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 reconizes 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).

(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 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.

(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.

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.
>
> 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. Kapil Dev Singh (PW10) in his evidence deposed that he was posted as Medical Officer at Lahar, District Bhind since 1994. On 04/08/2007, the dead body of deceased Gangole, son of Roshan Rathore, aged around 55 years, was brought to the hospital through Police Constable Rakesh, No.61 vide requisition Ex.P11. At about 08:00 in the morning, he had conducted postmortem of deceased. Ramkishan, Gangacharan and Bahadur identified the dead body of deceased. Postmortem report is Ex.P12 carrying his signature on it. This witness in his examination-in-chief has deposed that *rigor mortis* were found all over the body of deceased. A white baniyan and a towel were wearing by the deceased which were found blood-stained. There was no external injury found over the head of deceased. Face was pale. Remaining parts of the body of deceased were healthy. On postmortem examination, he found following injuries on the body of deceased:-

> (1) Punctured wound with blackening and charring was present all around and that injury was present in 7.5 cm on frontal part of right thigh. It was of semi-circle in shape wherein 27 hole of pea shape were scattered from frontal part to internal part of thigh around 9 cm. There was huge bleeding from that wound and blot was clotted.
> (2) Punctured wound on the frontal upper part of left thigh containing blackening and swelling and the wound was of pea shape wherein huge bleeding was found and wound being dissected, four pellets of gunshot were removed. Said pellets were

below the skin in the wound. Injuries were inverted.
(3) Punctured wound of small pea shape in upper part of testicles wherein blackening and charring all around. Injuries were inverted.

The remaining external and internal organs of deceased were found healthy. Both the chambers of heart were found empty. The artery was found ruptured on both sides of thigh. Abdomen was empty.

According to this witness, all injuries were ante-mortem in nature and the ruptured artery and head were sufficient for cause of death of deceased in the ordinary course of nature. Duration of death of deceased was within 24 hours. This witness stated that four pellets removed from the body of deceased and clothes of deceased containing underwear, baniyan and lungi having been sealed and packed and handed over the same to the constable for chemical examination.

(33) The next question for determination of both the appeals is as to whether accused can be convicted under Section 302 of IPC with the aid of Section 34 of IPC or not ?

(34) We have heard learned counsel for both sides and perused materials available on record and also gone through evidence of following prosecution witnesses:-

(35) Complainant/son of deceased Surendra (PW1) in his evidence deposed that before the incident, there was no enmity with accused persons. This witness denied that father of accused Raju had taken Rs.10,000/- from his father. At the time of incident, his wife, sister and Ramsaheni were present. After the incident neighbours Gangacharan and Ramsharan had come and seen the incident. This witness denied that his wife was preparing food and his sister

was serving food to children. This witness in para 18 has stated that he had disclosed in merg intimation Ex.D2 that when he tried to rescue his father, accused Raju and Shivram were standing hereby place and instigating to kill his father by saying that "*Budha Maan Nehein Raha, Sale Ko Khatam Kar Do".* He could not say as to why this fact has not been mentioned in Ex.D2. Gold necklace and cash of Rs.50,000/- were robbed by the accused and this fact was told to him by his wife. He could not say as to why this fact has not been mentioned by police in Ex.D2.

(36) Munnesh (PW2) who is son of the deceased, in his evidence, deposed that his brother told him that accused Raju, Pappu and Shivram have killed his father by means of firearms. His father had sustained injuries on his leg and abdomen and saw that all accused persons are fleeing towards the agricultural field. He tried to catch them, but could not succeed. When he reached near his father, he saw that his father has fallen on the platform of his house. The police had reached the village at about 07:15 pm and prepared spot map in his presence. This witness in para 10 of his examination-in-chief denied that accused had gone for demanding their money due to which there was a quarrel with his father Gangole and brother Surendra.

(37) Gangacharan (PW3) in his evidence deposed that he is the brother of deceased in relation. He had seen accused persons going towards agricultural field after committing murder of deceased and deceased had fallen on the platform of his house after sustaining injuries on his thigh and abdomen and blood was also oozing. After death of deceased, police reached village and safina form Ex.P2 was prepared carrying his signature from "A to A". This

witness in para 5 stated that Surendra had told that accused Raju, Shivram and Pappu committed murder of deceased by firearms and this fact has been narrated by him to police but he could not say as to why this fact has not been mentioned in Ex.D4. This witness in paragraph 6 deposed that prior to the incident, there was no dispute between accused persons and deceased and he had no knowledge as to why the quarrel had taken place all of a sudden. This witness in paragraph 8 denied that accused Shivram was usually lending money. This fact was narrated by him to the police and he could not say as to why this fact has not been mentioned in his police diary statement Ex.D4. This witness in paragraph 9 denied that he had not seen the incident and he is giving false evidence because of relationship with the deceased.

(38) Ramsanehi (PW5), who is the brother of the deceased, in his evidence deposed that deceased told him that he had caught hold of accused because accused were taking suitcase containing Rs.50,000/- and necklace and accused Shivram was telling that deceased is not agreeing and instigating to kill him. This witness further deposed that at the time of incident, he, his nephew Surendra, daughter-in-law Suman and niece Sudha were present and no other persons were present. This witness in paragraph 5 deposed that accused Shivram, Pappu and Raju had caught hold of deceased and on the instigation of accused Shivram, accused Raju had caused fire at the deceased by means of adhiya and he had seen the incident. He could not say as to why this fact has not been mentioned in his police diary statement Ex.D5. He had narrated to police that on hearing hue and cry, when he reached the spot he saw all three accused persons fleeing from place of occurrence and his brother deceased

Gangole told him that Rs.50,000/- and necklace had taken by accused. After five- ten minutes of the incident, Gangacharan, Ramsharan, Ramkishan and other people reached the spot. At the time of causing fire, accused Shivram and Pappu had caught hold of the deceased and he was standing two-four hands away, i.e. from the backside of deceased. This witness in para 9 deposed that he had told accused Pappu for not taking away money. He could not say as to why this fact has not been mentioned by police in Ex.D5.

(39) Sudha (PW6),who is the daughter of deceased, in her evidence deposed that her father had tried to caught hold of accused Pappu and objected for not taking away money and necklace. At the time of incident, she, her brother Surendra, sister-in-law (Bhavi) Suman and uncle Ramsanehi were present. Police reached the spot after one hour of the incident. At the time of sustaining firearm injuries by her father, accused Pappu and Shivram had caught hold of him. This witness in paragraph 10 deposed that all the accused persons entered in the house and taken away cash and necklace and he could not say as to why this fact has not been mentioned by in her police diary statement Ex.D6. The evidence of Suman (PW7), who is daughter-in-law of the deceased is also supported the same version as narrated by Sudha.

(40) Narendra Singh (PW8) in his evidence deposed that on 03/08/2007 he was posted as Head Constable (Writer) at Police Station Raun. He had registered FIR Ex.P9-A against accused persons on the basis of Dehati Nalishi Ex.P1 carrying his signature from "B to B". This witness stated that after receiving merg intimation, FIR vide Crime No.107 of 2007 was lodged for offence under Sections 302, 394, 34 of IPC. This witness deposed that on

production of packet containing sealed clothes, pellets etc. by Rakesh Goyal, Constable No.61, he seized the same, vide seizure memo Ex. P10.

(41) Bhanwar Singh Jadon (PW9) in his evidence deposed that he was posted as Sub-Inspector at police station Raun. During investigation, he had arrested accused Pappu on 17/08/2007 vide arrest memo Ex.P6 and in the presence of witnesses Yogendra Bhadoriya and Mataru from the possession of accused Pappu, a 12 bore country-made katta with one live cartridge vide seizure memo Ex.P8 was seized. On 17/07/2008 at around 22:40 accused Raju vide was arrested arrest memo Ex.P5. This witness in his cross-examination admitted that investigation was earlier conducted by Satnam Singh and he had no knowledge about date of taking charge by him. During investigation, the statements of witnesses were recorded. This witness in paragraph 16 deposed that during investigation, he could not attach any information to the effect that which property was sold by deceased and from which sources, money had come. This witness further denied that he has falsely implicated the accused.

(42) Satnam Singh (PW11) in his evidence deposed that on 03/08/2007, he was posted as Sub-Inspector at Police Station Raun. This witness stated that merg intimation was received at about 06:40 pm regarding the murder of deceased Gangole and at the time of giving information, the person who had given information disclosed only his name as Raju, son of Gangacharan. On the basis of merg intimation, *Dehati Nalishi* Ex.P1 was recorded and thereafter, he reached on the spot and crime details Ex.P13 was prepared. Blood-stained and plain soil were seized vide seizure memo Ex.P9. One empty cartridge of 12 bore country-made katta lying on the platform of house of deceased was seized

by him and *Panchnama* of the same was prepared vide Ex.P10. Thereafter, statements of the witnesses were recorded and *Panchnama* of the dead body of deceased was prepared vide Ex.P3 and then, the dead body of deceased was sent for postmortem/autopsy vide requisition Ex.P11. This witness in paragraph 8 admitted that at the time of preparation of *Panchnama* of the dead body of deceased, witnesses Ramkishan and Gangacharan were present. This witness in paragraph 11 further stated that information given by Raju, was received by Head Constable Narendra and this information was recorded on *Rojnamcha Sanha* No.89.

(43) Yogendra Bhadoriya (PW12) in his evidence deposed that in his presence, three accused persons were arrested vide arrest memo Ex.P4 to Ex.P6. This witness further stated that in his presence neither there was any interrogation of the accused Raju nor there was any article seized by police.

(44) Learned counsel for the appellants submitted that the prosecution did not bring any evidence that there was any prior meeting of minds and the evidence adduced by the prosecution is not convincing to hold that the accused persons were also shared common intention in committing murder of deceased Gangole. Therefore, conviction of the accused under Section 302 read with Section 34 of IPC is liable to set aside. Prosecution has to establish by evidence whether direct or circumstantial that there was a plan or meeting of minds of all accused to commit murder of deceased Gangole for which they are charged with the aid of Section 34 of IPC, be it prearranged or on the spur of the moment, but it must necessarily be before the commission of crime. In support of contentions, learned counsel for the appellants has relied upon the

judgments passed by Supreme Court in the case of **Balvir Singh vs. State of MP** reported in **ILR (2019) MP 1200(SC)** and in the case of **Sonu alias Sunil vs. State of MP,** reported in **ILR (2020) MP 1816 (SC).**

(45) 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.**"**

(46) Section 34 of the Indian Penal Code recognizes the principle of vicarious 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.

(47) 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.

(48) 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.”

(49) 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.”

(50) 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."

(51) In **Ramashish Yadav vs. 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."

(52) 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 vs. State of M.B. [1956 CrLJ 897]**.

(53) 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]**.

(54) 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."

(55) 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.

(56) 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."

(57) On a perusal of the evidence on record, we are of the view that the offence committed by appellants- accused 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."

(58) It is well-established principle of law that where the case is based on direct evidence and the evidence led by prosecution is worth-reliance, then same cannot be discarded merely on the ground of absence of any motive or intention of accused. The Hon'ble Supreme Court in the matter of **Yogesh Singh vs. Mahabeer Singh and Others,** reported in **(2017) 11 SCC 195,** has held as under:-

> **"46.**.....It is a settled legal proposition that even if the absence of motive, as alleged, is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as

> to commission of an offence, motive loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. "

(59) 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 of the deceased. As per the opinion of the doctor, the cause of death of the deceased was homicidal in nature. The injuries sustained by the deceased were sufficient to cause his death in the ordinary course of nature.

(60) Learned Counsel for the appellants submitted that the presence of eye-witnesses on the place of incident is doubtful because PW1 Surendra, PW2 Munnesh and PW5 Ramsanehi in their statements deposed that when they reached the spot, they saw the accused persons fleeing from the spot. The incident is alleged to have taken place outside the house which is visible from all corners of the village. Those persons who were living in surroundings would have not witnessed the incident. The circumstances warrant application of due care and caution in appreciating the statements of eye-witnesses because of the fact that all the eye-witnesses are related *inter se* and to the deceased. Prosecution has failed to put a strong case which cannot attach more credence to the statements of eye-witnesses. The trial Court has erred in not applying the principle of strict scrutiny in assessing the evidence of eye-witnesses. Further,

there are material contractions and omissions as well as improvements in the statements of eye-witnesses recorded under Section 161 of CrPC as well as in their deposition before the Court. The independent witnesses from the village, who rushed to place of occurrence on hearing hue and cry of the complainant, did not support prosecution case. In support of contentions, learned Counsel for the appellants has relied upon the judgments passed by the Supreme Court in the case of **Parvat Singh and Ors. vs. State of MP** reported in **ILR (2020) MP 1515 (SC), Imrat Singh and Ors. Vs. State of MP,** reported in **ILR (2020) MP 548 (SC) and Baliraj Singh vs. State of MP,** reported in **ILR (2017) MP 2614.**

(61) So far as the submission of learned counsel for the appellants that there are various discrepancies in the statements of the prosecution witnesses is concerned, in the opinion of this Court, there are only minor discrepancies in the statements of the witnesses and their evidence is firm on material aspect.

(62) The Hon'ble Supreme Court in the case of **Mallikarjun & Others vs. State of Karnataka,** reported in **(2019) 8 SCC 359** has held as under :-

> "**14.** Observing that minor discrepancies and inconsistent version do not necessarily demolish the prosecution case if it is otherwise found to be creditworthy, in **Bakhshish Singh v. State of Punjab and another, (2013) 12 SCC 187**, it was held as under:-
>
> > 32. In **Sunil Kumar Sambhudaya Gupta v. State of Maharashtra, (2010) 13 SCC 657** this Court observed as follows: (SCC p. 671, para 30)
> >
> > > "30. While appreciating the evidence, the court has to take into consideration whether the contradictions/ omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence,

> must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide State v. Saravanan (2008) 17 SCC 587.)"

33. ……. this Court in **Raj Kumar Singh v. State of Rajasthan, (2013) 5 SCC 722** has observed as under: (SCC p. 740, para43)

> "43. … It is a settled legal proposition that, while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the case of the prosecution, must not prompt the court to reject the evidence thus provided, in its entirety. The irrelevant details which do not in any way corrode the credibility of a witness, cannot be labelled as omissions or contradictions. Therefore, the courts must be cautious and very particular in their exercise of appreciating evidence. The approach to be adopted is, if the evidence of a witness is read in its entirety, and the same appears to have in it, a ring of truth, then it may become necessary for the court to scrutinise the evidence more particularly, keeping in mind the deficiencies, drawbacks and infirmities pointed out in the said evidence as a whole, and evaluate them separately, to determine whether the same are completely against the nature of the evidence provided by the witnesses, and whether the validity of such evidence is shaken by virtue of such evaluation, rendering it unworthy of belief." *(Emphasis supplied)*

Thus, it is clear that while appreciating the evidence of witnesses, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution.

(63) So far as the argument advanced by learned counsel for the appellants- that all the relevant witnesses are relative witnesses and credibility of witnesses cannot be believed is concerned, there is no force in the said argument. The Supreme Court in the case of **Harbeer Singh Vs. Sheeshpal and others,** reported in **(2016) 16 SCC 418** has held as under :-

> **"18.** Further, the High Court has also concluded that these witnesses were interested witnesses and their testimony was

not corroborated by independent witnesses. We are fully in agreement with the reasons recorded by the High Court in coming to this conclusion.

19. In *Darya Singh* v. *State of Punjab*, this Court was of the opinion that a related or interested witness may not be hostile to the assailant, but if he is, then his evidence must be examined very carefully and all the infirmities must be taken into account. This is what this Court said: (AIR p. 331, para 6)

> "*6*. There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. … But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence, courts naturally begin with the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence. … If the criminal court is satisfied that the witness who is related to the victim was not a chance witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinized."

20. However, we do not wish to emphasize that the corroboration by independent witnesses is an indispensable rule in cases where the prosecution is primarily based on the evidence of seemingly interested witnesses. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the Court to place credence on the statement.

21. Further, in *Raghubir Singh* v. *State of U.P.*, it has been held that: (SCC p. 84, para 10)

> "*10*. … the prosecution is not bound to produce all the witnesses said to have seen the occurrence. Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need to be produced without unnecessary and redundant multiplication of witnesses. … In this connection general reluctance of an average villager to appear as a witness and get himself involved in cases of rival village factions when spirits on both

sides are running high has to be borne in mind."

(64) Thus, it is clear that although the evidence of related witnesses cannot be discarded or disbelieved on this sole ground but their evidence must be examined very carefully and all infirmities must be taken into consideration.

(65) As discussed above, PW Surendra in his evidence deposed about the incident and his evidence is fully corroborated by the prosecution witnesses Munnesh (PW2), Gangacharan (PW3) & Ramsanehi (PW5) whose statements remained unchanged in their cross-examination. From the evidence of Dr. Kapil Dev Singh (PW10), who had conducted the autopsy/postmortem of the deceased, it is also apparent that the cause of death of deceased was homicidal in nature and *rigor mortis* were found all over the body of the deceased. The *modus operandi* of accused also reflects that they had committed the alleged offence. It is proved beyond shadow of doubt that deceased Gangole was murdered and the prosecution has rightly established guilt of the accused. Therefore, Trial Court has rightly held appellants guilty of committing alleged offence.

(66) 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 present appellants. Therefore, the Trial Court has rightly found the appellants guilty of committing murder of deceased Gangole and accordingly, convicted and sentenced him as stated above. Both the appeals filed by appellants appear to be devoid of any substance.

(67) Consequently, both the appeals are **dismissed** and their conviction and

sentence are hereby affirmed. In Criminal Appeal No.390 of 2010, since appellant No.1 Pappu alias Jitendra Rajawat and in Criminal Appeal No.381 of 2010, appellant Shivam Singh Rajawat are on bail, therefore, their bail bonds stand cancelled and they are directed to immediately surrender before Trial Court concerned for serving out the jail sentence. Since appellant No.2 Raju is in jail and he be intimated with the result of his appeal, through the Jail Superintendent concerned.

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

(G. S. Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge

MKB