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

CRA 502 of 2011

Kuldeep Singh Rajawat

Vs.

State of Madhya Pradesh

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Shri Sarvesh Sharma, Counsel for appellant.
Shri Naval Kishore Gupta, Counsel for the State.

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Reserved on 26/11/2021
Whether approved for reporting Yes./....

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JUDGMENT
(Delivered on 13/12/2021)

Per Rajeev Kumar Shrivastava, J:-

Present criminal appeal has been filed by appellant Kuldeep Singh Rajawat, challenging the judgment of conviction and sentence dated 13th May, 2011, passed by First Additional Sessions Judge to the Court of Special Judge & First Additional Sessions Judge, Bhind (MP) in Sessions Trial No.164 of 2007, by which he has been convicted under Section 302 IPC and sentenced to undergo Life Imprisonment with a fine of Rs.2,000/-; with default stipulation.

(2) Prosecution case, in short, is that on 01/05/2007 at about 11:00 am, Pramod Kumar Sharma (PW9) along with his brother (deceased Sanju alias Shyamsunder) and one of relatives, namely, Ramesh Kumar Sharma (PW6) had gone from his house situated at Chaturvedi Nagar, Bhind to Lahar and after

he left deceased Sanju and Ramesh Kumar Sharma, at Lahar Chaurah, he proceeded to his Office. At that time, accused Kuldeep along with co-accused persons Mauni and Toni, on a motorcycle came there and juvenile co-accused Kuldeep, who was having a mouser rifle (315 bore gun) and Mauni Tomar, who was having a gun, got off from said motorcycle and told to the deceased Sanju to discuss something with him and took him away to an empty shop of one Mahendra Sharma. At there, accused Kuldeep caused fire at the right side of chest of deceased Sanju and co-accused Mauni caused fire by means of gun at the right side of deceased Sanju. On hearing hue and cry of Pramod Kumar Sharma (PW9) and Ramesh Kumar Sharma (PW8), accused Kuldeep along with juvenile co-accused Mauni and Toni, thereafter, fled away from the spot on the motorcycle. When both Pramod and Ramesh saw the incident, they found Sanju in dead condition. At that time, Brajendra Sharma (PW5) and Rakesh Kumar Sharma (PW7) who reached there, saw all the accused were fleeing from the spot. There was a distance of half kilometers from the place of occurrence to the Police Station Dehat, District Bhind and after 15 minutes of the incident, Sub-Inspector of Police RS Kushwah (PW10) reached the spot along with Head Constable Devprakash (PW1) and Constable Ramkishore. On receiving information from Pramod Kumar Sharma (PW9), a *Dehati Nalishi* was recorded at about 11:20 am and on basis of *Dehati Nalishi,* Crime No.127/2007 was registered at Police Station Dehat, District Bhind at about 11:45 am. Head Constable Gaurishankar (PW11) on 01/5/2007 at about 11:50 am, also recorded *Merg* No. 31/2007.

(3) The matter was investigated by Sub-Inspector of Police, RS Kushwah

(PW10) and during investigation, spot map was prepared. In the presence of witnesses Pramod Kumar Sharma (PW9), Ramlakhan, Homsingh, Neeraj and Uday Shankar, *Panchnama* of dead body of the deceased was prepared. Blood-stained soil and plain soil were seized from the spot and bullet of 315 bore gun/pistol was seized and sealed the same. Thereafter, the dead body of deceased was brought to Bhind Hospital through Constable Devprakash (PW1) along with the application form for conduction of postmortem of deceased. On the same day, at about 01:15 pm, Dr. Ravindra Chaudhary (PW4) conducted postmortem of deceased in District Hospital Bhind and he found an entry wound on the outer part of right arm of the deceased, an exit wound on the internal part of arm, an entry wound caused by firearms below the armpit towards the right side of the chest and ruptured wound on the chin and the right elbow. On internal dissection, the lungs, liver, intestine, abdomen and kidney were found ruptured and their pieces found scattered inside of the body of deceased. Sixth, seventh and eighth ribs of right side of chest of the deceased were found fractured and six particles of bullet were found inside the chest of deceased. The said particles were taken out from the body of the deceased and sealed and packed. There were also holes of gunshots on the shirt of the deceased and said shirt and other clothes were handed over to the constable which were produced by Constable Devprakash (PW1) at about 04:50 pm at Police Station Dehat Bhind and seized by Head Constable Gaurishankar (PW11).

(4) During investigation, on 01/05/2007 statements of the witnesses, namely, RS Kushwah (PW10) Pramod Kumar Sharma (PW9), Brajendra Sharma

(PW5), Rakesh Kumar Sharma (PW7), Ramesh Kumar Sharma (PW8), Ashok Gupta and Dharmendra were recorded. On 14/05/2007, juvenile co-accused Mauni was arrested. During interrogation, a 315 bore country-made pistol/ gun and shell were seized from the possession of Mauni, which was kept hiding in the house and the seizure memo was prepared. Thereafter, clothes of deceased, particles of bullet recovered from his body and recovered country-made pistol and cartridge were sent to Forensic Science Laboratory for chemical examination, where the Arms Expert certified after their examination that the said country-made pistol/gun is in working condition, whereby a cartridge of 315 bore pistol/gun may be fired. The six particles taken out from the body of the deceased are the same particles of bullet of brass of same cartridge of 315 bore gun/pistol which was fired from the rifle revolving towards the right side (groove) and three holes which were found on the right arm and right side of the chest in the shirt of the deceased were caused from the bullet of gun/gun.

(5) Accused Kuldeep along with juvenile co-accused Mauni had an enmity with deceased Sanju alias Shyamsunder and one year prior to his death, they had fired at deceased in respect of which a case was pending in the Court and accused Kuldeep & juvenile co-accused Mauni were on bail in that matter. In continuance of that enmity, accused and juvenile co-accused Mauni and Toni unanimously committed murder of deceased.

(6) Statements of accused were recorded. Accused pleaded not guilty and claimed to be tried. Accused Kuldeep pleaded that on 01/05/2007, he had not committed murder of deceased and he denied the charges framed against him under Arms Act and the murder of deceased. He has specifically stated in his

defence evidence that a case of firing at deceased Sanju alias Shyamsunder in the year 2006 against him and co-accused Mauni was filed in the Court but that case was false and he did not cause any fire at deceased. His presence at the place of incident in causing fire has been falsely mentioned in *Dehati Nalishi.* At the time of incident, he was present in Village Baknasa, the house of his relative in regard to attending marriage ceremony and after 15-20 days, he had returned from his sister's house. In order to lead the defence evidence, accused did not examine any defence witness.

(7) After completion of investigation, the police filed charge sheet against accused for commission of offence under Section 302 of IPC and Sections 25/27 and 30 of Arms Act before the Magistrate concerned. In absence of evidence produced by the prosecution, appellant-accused was acquitted from offence under Sections 25/27 & 30 of the Arms Act. Thereafter, the case was committed to Sessions Court/Trial Court and after marshalling the evidence available on record, learned Trial Court by the impugned judgment found appellant accused guilty and accordingly, convicted and sentenced him, as described in paragraph 1 of this judgment.

(8) Challenging the impugned judgment of conviction and sentence, the learned counsel for the appellant submitted that the impugned judgment passed by trial Court is perverse and contrary to law. Eye-witnesses PW5 Brajendra Sharma, PW9 Pramod Kumar Sharma, PW8 Ramesh Kumar Sharma, are the interested witnesses, therefore, their evidence cannot be reliable. It is not natural about the presence of these said witnesses at the place of occurrence because they all are said to be chance witnesses on the place of occurrence.

There is major contraction and omission in respect of presence of these witnesses on the spot and they have been falsely made as witnesses to the alleged incident. There is a variation in the medical report and the prosecution witnesses regarding the injuries sustained by the deceased. The learned trial Court has committed an error in considering the fact of causing injuries by accused Kuldeep by means of mouser rifle (315 bore gun) to the deceased. There is a contraction between the Court statement and the statements recorded under Section 161 CrPC. Therefore, conviction of the appellant accused for aforesaid offence is unsustainable in the eyes of law and prayed that the impugned judgment of conviction and sentence passed by Trial Court deserves to be set aside.

(9) On the other hand, it is submitted by learned Counsel for the State that the prosecution has proved the guilt of accused beyond reasonable doubt. There is no infirmity in the impugned judgment of conviction and sentence and the findings arrived at by the learned Trial Court do not require any interference by this Court. Hence, prayed for dismissal of this appeal.

(10) We have heard learned counsel for the rival parties and perused materials available on record and also gone through evidence of following prosecution witnesses.

(11) Prosecution, in order to prove its case examined as many as eleven witness viz. PW1 Devprakash, PW2 Guddu Batham, PW3 Dwarika Prasad, PW4 Dr. Ravindra Choudhary, PW5 Brajendra Sharma, PW6Rajveer Singh Bhadoriya, PW7Rakesh Kumar Sharma, PW8 Ramesh Kumar Sharma, PW9 Pramod Kumar Sharma, PW10 RS Kushwah and PW11 Gourishankar

Parashar.

(12) From the evidence of PW2 Guddu Batham and PW3 Dwarika Prasad, it is clear that Guddu was running a sugar cane juice shop while Dwarika Prasad was running a betel shop and both are the independent witnesses to the alleged incident but, they have not supported the prosecution version and have declared hostile.

(13) PW9 Pramod Kumar Sharma, in his evidence, deposed that he is the real brother of the deceased. On the alleged date of incident, he had seen that accused Kuldeep opened fire at the deceased as a result of which the deceased fell down on the spot and another gunshot fire was caused by juvenile co-accused Mauni. At the time of incident, he was posted as Sainik in Nagar Sena and posted in the Prosecution Office. One year prior to the incident, accused Kuldeep had caused a fire at deceased Sanju, but the gunshot fire was not hit and in that regard a case was pending in the Court of CJM, Bhind and on 02/05/2007, the matter was fixed for presence of the accused in the Court of CJM, Bhind. He himself stated that co-accused Mauni had appeared in that case and a warrant of arrest was issued against accused Kuldeep. Co-accused Toni and deceased Sanju were the friends and residing the nearby place and on the alleged incident, on being called by co-accused Toni, deceased Sanju had gone to the shop of one Dwarika Prasad along with them. In his cross-examination, this witness deposed that he had gone along with Ramesh to the place of incident. PW5 Brajendra Sharma, who the real brother of deceased Sanju alias Shyamsunder, has also supported the same version as given by PW9 Pramod Kumar Sharma. PW8 Ramesh Kumar Sharma, who is father-in-

law of deceased's brother, in his evidence, deposed that on calling when deceased Sanju reached the shop of one Mahendra, accused Kuldeep opened fire at deceased Sanju as a result of which deceased Sanju sustained gunshot injuries below his armpit and thereafter, people of the locality were gathered. This witness has also supported the version of prosecution story.

(14) PW6 Rajveer Singh Bhadoriya, Revenue Inspector posted at Halka No. 52/2002,Tahsil Bhind had prepared Ex.P6 spot map. PW7 Rakesh Kumar Sharma, who is said to a hearsay witness, did not support prosecution story.

(15) Sub-Inspector of Police RS Kushwah (PW10) had conducted investigation of matter and recorded statements of the prosecution witnesses under Section 161 of CrPC and arrested juvenile co-accused Mauni on 14/05/2007 vide arrest memo Ex.P13. This witness in his cross-examination denied that he had prepared a false case against accused Kuldeep and co-accused Toni and Mauni. PW11 Gaurishankar Parashar, Head Constable No.839, posted at the Office of SP, Bhind in his evidence deposed that he had received *Dehati Nalishi* ExP7 on 01/05/2007 at about 11:45 am, at Police Station Dehat Bhind through Constable Gambirsingh and on the basis of *Dehati Nalishi,* FIR vide Crime No.127/2007 for commission of offence under Section 302 read with Section 34 of IPC was registered against accused vide Ex.P16.

(16) The first question for determination of the present appeal is whether appellant- accused has committed murder of deceased Sanju by means of firearms or not?

(17) It would be appropriate to throw light on the relevant provisions of

Sections 299 and 300 of Indian Penal Code.

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 Shivprasad. 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."

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 contentions advanced in the present case and which are frequently advanced that the accused- appellants had no intention of causing death of deceased Sheoprasad (Shivprsasad) is wholly irrelevant for deciding whether the case falls in clause Thirdly of Section 300 IPC.

(18) The scope and ambit of clause Thirdly of Section 300 IPC was considered by the Supreme Court in the decision in **Virsa Singh vs. State of Punjab** reported in **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."

(19) In the case of **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."

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

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

(21) 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.

(22) 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."

(23) "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.

(24) Indian Penal Code recognizes two kinds of homicide :(1) Culpable

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

(25) 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.

(26) 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.

(27) The fact that the death of a human being is caused is not enough unless one of the mental sates mentioned in ingredient of the Section is present. An act is said to cause death results either from the act directly or results from some consequences necessarily or naturally flowing from such act and reasonably contemplated as its result. Nature of offence does not only depend upon the location of injury by the accused, this intention is to be gathered from all facts and circumstances of the case. If injury is on the vital part, i.e., chest

or head, according to medical evidence this injury proved fatal. It is relevant to mention here that intention is question of fact which is to be gathered from the act of the party. Along with the aforesaid, ingredient of Section 300 of IPC are also required to be fulfilled for commission of offence of murder.

(28) 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.

(29) In the case of **Anda vs. State of Rajasthan** reported in **1966 CrLJ 171,** while considering "third" clause of Section 300 of IPC, it has been observed as under:-

> "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."

(30) In the case of **Mahesh Balmiki vs. State of M.P.** reported in **(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."

(31) In the case of **Dhirajbhai Gorakhbhai Nayak vs. State of Gujarat** reported in **(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'."

(32) In the case of **Pulicherla Nagaraju @ Nagaraja vs. State of AP** reported in **(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."

(33) In the case of **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."

(34) In the case of **State of Rajasthan v. Kanhaiyalal** reported in **(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."

(35) In the case of **Bavisetti Kameswara Rao v. State of A.P.** reported in **(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 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."

(36) From the perusal of evidence of prosecution witnesses, PW5 Brajendra Sharma, PW8 Ramesh Kumar Sharma and PW9 Pramod Kumar Sharma, it is apparent that although PW5 Brajendra Sharma and PW9 Pramod Kumar Sharma are the real brothers of deceased and PW8 Ramesh Kumar Sharma, is the father-in-law of brother of deceased and they are relative witnesses, but it is true that they have supported the prosecution version and credibility of these witnesses cannot be disbelieved, as they had seen the alleged incident regarding committing murder of the deceased. Although there is some minor contradiction and omission regarding description of the incident which has

been given in deposition of said witnesses and in *Dehati Nalishi Ex.P7,* but their evidence cannot be disbelieved, as the said witnesses were present on the place of incident with the deceased Sanju and witness Brajendra had come to the nearby place, for purchasing the vegetables and thereafter, accused Kuldeep along with co-accused taken away deceased Sanju towards a shop and opened fire from the rifle at him. Although there is some contraction and omission in evidence of aforesaid witnesses but they are the eye-witnesses to the incident and, therefore, their evidence is trustworthy and correct. So far as the argument advanced by learned counsel for the appellant that the aforesaid witnesses are the relative witnesses, therefore, their credibility cannot be believed is concerned, the said argument has no force.

(37) It is settled principle of law that merely because the witnesses may be related to the victim or the deceased, their testimony may not be rejected. There is no legal canon that only unrelated witnesses shall be considered credible. On the contrary, we are of the view that it is not natural for the related witnesses to implicate a person falsely leaving aside the actual culprit. It is pertinent to mention here that only the interested witnesses want to see the real culprit is brought to book. In this regard, the Hon'ble Supreme Court in the case of **Jayabalan vs. UT of Pondicherry** reported in **(2010) 1 SCC 199** has held as under:-

> "**23.** We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to

> look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

(38) In the another judgment rendered by the Hon'ble Supreme Court in the case of **Seeman vs. State** reported in **(2005) 11 SCC 142**, the following observation has been made:-

> "**4**. It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness or the sole witness, or both, if otherwise the same is found credible. The witness could be a relative but that does not mean to reject his statement in totality. In such a case, it is the paramount duty of the court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested sole witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinising the evidence of the interested sole witness. The prosecution's non-production of one independent witness who has been named in the FIR by itself cannot be taken to be a circumstance to discredit the evidence of the interested witness and disbelieve the prosecution case. 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."

(39) In the another judgment rendered by the Hon'ble Supreme Court in the case of **Jodhan v. State of M.P.**,**reported in (2015) 11 SCC 52**, it has been observed as under:-

> "**28.** Tested on the backdrop of the aforesaid enunciation of law, we are unable to accept the submission of the learned counsel for the appellant that the High Court has fallen into error by placing reliance on the evidence of the said prosecution witnesses. The submission that when other witnesses have turned hostile, the version of these witnesses also should have been discredited does not commend acceptance, for there is no rule of evidence that the testimony of the interested witnesses is to be rejected solely because other independent witnesses who have been cited by the prosecution have turned hostile. Additionally, we may note with profit that these witnesses had sustained injuries and their evidence as we find is cogent and

reliable. A testimony of an injured witness stands on a higher pedestal than other witnesses. In Abdul Sayeed v. State of M.P. [Abdul Sayeed v. State of M.P., (2010) 10 SCC 259 : (2010) 3 SCC (Cri) 1262] , it has been observed that: (SCC p. 271, para 28)

> "28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone."

It has been also reiterated that convincing evidence is required to discredit an injured witness. Be it stated, the opinion was expressed by placing reliance upon Ramlagan Singh v. State of Bihar [Ramlagan Singh v. State of Bihar, (1973) 3 SCC 881 : 1973 SCC (Cri) 563] , Malkhan Singh v. State of U.P. [Malkhan Singh v. State of U.P., (1975) 3 SCC 311 : 1974 SCC (Cri) 919] , Vishnu v. State of Rajasthan [Vishnu v. State of Rajasthan, (2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302] , Balraje v. State of Maharashtra [Balraje v. State of Maharashtra, (2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] and Jarnail Singh v. State of Punjab [Jarnail Singh v. State of Punjab, (2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] .

From the aforesaid summarisation of the legal principles, it is beyond doubt that the testimony of the injured witness has its own significance and it has to be placed reliance upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and inconsistencies. As has been stated, the injured witness has been conferred special status in law and the injury sustained by him is an inbuilt guarantee of his presence at the place of occurrence. Thus perceived, we really do not find any substance in the submission of the learned counsel for the appellant that the evidence of the injured witnesses have been appositely discarded being treated as untrustworthy by the learned trial Judge."

(40) Further, in the case of **Appabhai & Another Vs. State of Gujarat,** reported in **AIR 1988 SC 696,** the Hon'ble Apex Court has held that failure of prosecution to examine the independent witness, cannot be thrown out on that

ground alone. Contradictions and omissions in the evidence of victim of assault is not a ground to reject entire testimony. The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basis version of the prosecution may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The Court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses now-a-days go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the Court. The Courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.

(41) It is also true that the independent witnesses have not supported the prosecution case, but now-a-days, it has become a tendency of the witnesses not to depose anything due to fear of accused persons. Therefore, their evidence would not adversely affect the prosecution case. Dr. Ravindra Choudhary (PW4) in his medical deposition also supported the death of deceased Sanju caused by gunshot injuries of rifle/gun. Although PW8 Ramesh Kumar Sharma, who is alleged to be a distant relative of deceased, in his evidence has deposed that he heard the sound of second gunshot fire which was caused immediately, but he could not know that the second gunshot fire

was caused by juvenile co-accused Mauni. PW9 Pramod Kumar Sharma in his evidence deposed that accused Kuldeep had caused fire from a distance of about 10 ft. and the barrel of rifle/gun was about 7ft away from deceased Sanju and immediately after sustaining gunshot injuries deceased Sanju fell down on the spot and thereafter, co-accused Mauni caused fire from a distance of 10ft at the right arm of deceased. As per opinion of Dr. Ravindra Choudhary (PW4), the cause of death of deceased was culpable homicide in nature. He, in his evidence, deposed that the wounds on the right arm and right side of chest of deceased were caused by gunshot fires and and due to gunshot fires, the chest and the internal organs of deceased were damaged and excessive bleeding was found prior to six hours of postmortem of deceased. The act of accused also reflects clear motive/ intention of committing murder of the deceased. The prosecution has not produced any shopkeeper as an independent witness except Guddu Batham (PW2) and Dwarika Prasad (PW3) to establish its case beyond reasonable doubt. PW9 Pramod Kumar Sharma, in his evidence, deposed that accused Kuldeep caused firearms injuries to deceased as a result of which deceased fell down on the spot and thereafter, juvenile co-accused Mauni also caused another gunshot fire. This witness in para 2, 12 and 13 deposed that accused Kuldeep had caused fire from a distance of about 10 ft and the barrel of said rifle was about 7 ft. distance from the deceased and as soon as the bullet of the gun hit to deceased he fell down and thereafter, the juvenile co-accused Mauni caused fire from a distance of 10ft which hit on the armpit of right elbow of deceased. Although there is a variation between Ex.P6 and Ex.P11 but the Investigating Officer RS Kushwah (PW10), who had prepared spot map

Ex.P11, deposed that the dead body of deceased Sanju was lying on the spot when he reached there and the situation he saw is shown to be the same place, therefore, he had made an entry in Ex.P11, which is admissible in evidence.

(42) Having regard to the postmortem of deceased and the evidence of PW5 Brajendra Sharma, PW8 Ramesh Kumar Sharma and PW9 Pramod Kumar Sharma, the nature of injuries noticed as explained by the deposition of Dr. Ravindra Choudhary (PW4), unerringly point towards death of the deceased being caused by firearm injuries, as opined by doctor. Having regard to the circumstance of the case, we find ourselves in complete agreement with the findings arrived at by learned Trial Court in convicting the appellant for commission of murder of deceased Sanju. Therefore, the prosecution has rightly proved in establishing the offence under Section 302 of IPC against appellant accused. Considering the nature and gravity of offence as well as the evidence available on record thereto, the prosecution has succeeded in establishing the appellant- accused guilty in committing murder of the deceased and, therefore, he is liable to be convicted under Section 302 of IPC and the prosecution has rightly proved the charge of murder of deceased Sanju against appellant-accused. As the injures caused by the accused to the deceased were intentionally and they were found to be sufficient in the ordinary course of nature to cause death of the deceased, therefore, the appellant was rightly held guilty of offence under Section 302 of IPC. It is held that the finding recorded by learned Trial Court regarding causing of gunshot injuries by the appellant-accused to the deceased is also proper.

(43) After scrutinizing the entire evidence with great care of all the

prosecution evidence, this Court is of the opinion that all the circumstances point towards guilt of appellant accused. Therefore, the trial Court has rightly convicted appellant-accused for commission of offence under Section 302 of IPC. Hence, the judgment of conviction and sentence dated 13th May, 2011, passed by First Additional Sessions Judge to the Court of Special Judge & First Additional Sessions Judge, Bhind (MP) in Sessions Trial No.164 of 2007, is hereby affirmed. As a consequence thereof, the present appeal fails and is hereby **dismissed.**

(44) Since appellant Kuldeep Singh Rajawat is in Central Jail, Gwalior, therefore, he be intimated with the result of his appeal through the concerning Jail Superintendent.

(45) The trial Court record be returned back along with certified copy of this judgment, for information and compliance.

(G. S.Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge

MKB