IN THE HIGH COURT OF MADHYA PRADESH

AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

&

HON'BLE SHRI JUSTICE RAJEEV KUMAR SHRIVASTAVA

ON THE 22nd JUNE, 2022

CRIMINAL APPEAL NO. 51 OF 2012

Between:-

SURESH AHIRWAR, SON OF LATE SHRI KANCHHEDI AHIRWAR, AGED 22 YEARS, OCCUPATION- LABOUR, RESIDENT OF VILLAGE HINOTA, P.S. KURWAI, DISTRICT VIDISHA (MP)

…. APPELLANT

(SHRI J.P. MISHRA -ADVOCATE)

AND

STATE OF MADHYA PRADESH, THROUGH POLICE STATION KURWAI,

DISTRICT VIDISHA (MP)

….RESPONDENT

(BY SHRI RAJEEV UPADHYAY, PUBLIC PROSECUTOR)

Reserved on : 15TH JUNE, 2022
Delivered on : 22nd OF JUNE, 2022

This appeal coming on for final hearing, ***Hon'ble Shri Justice Rajeev Kumar Shrivastava,*** *passed the following:*

JUDGMENT

The present appeal has been preferred by appellant challenging the judgment of conviction and sentence dated 30-11-2011 passed by Second Additional Sessions Judge, Vidisha (MP) in Sessions Trial No.333 of 2010, whereby appellant has been convicted u/S 302 of IPC and sentenced to undergo rigorous life imprisonment with fine of Rs.1,000/-, with default stipulation.

(2) Prosecution case, in short, is that complainant Jitendra Kumar (PW1) lodged a report at Police Station Kurwai, District Vidisha on 25-08-2010 at around 23:30 hours stating therein that a previous enmity was going on with co-accused

persons Parma, Asharam, Gulab and appellant Suresh in regard to murder of Kanchhedi Lal, father of appellant-accused Suresh and usually, a threat was given to him and his father Jamuna. On the date of alleged incident, appellant accused along with other co-accused persons started assaulting his father Jamuna by means of lathi and axe and an information was given by Makhan Singh (PW2) and thereafter, the complainant along with her mother & other persons, namely, Veer Singh, Makhan and Preetam reached the spot where they saw that all accused persons were assaulting his father Jamuna by means of axe and lathi. On seeing them, all the accused persons fled away from the spot and after the incident, when they rushed towards the field of one Lallu Malli, they saw that near the canal of road side, his father Jamuna was found in unconscious and found dead. Thereafter, Hari, the bother of Lallu Malli and Dinesh reached there and brought Jamuna to the hospital where, after examining, doctor found him dead. On the basis of information of complainant

Jitendra, a *Merg* No. 47 of 2010 was got recorded and the matter was investigated and the statements of the witnesses were recorded by Police and an FIR was got registered vide Crime No.282 of 2010 at Police Station Kurwai, District Vidisha for offence u/S 302 read with Section 34 of IPC. During investigation, after preparation of seizure memo, memorandum, *Panchnama* of the dead body of deceased, spot map and postmortem of deceased and after sending all incriminating materials to the FSL Sagar for examination as well as other formalities, the police filed a charge sheet before the Court of JMFC, Kurwai, from where case was committed to the Sessions Court for its trial.

(3) The statements of accused were recorded under Section 313 of CrPC, who denied the charges. The appellant accused in his plea stated that he has been falsely implicated in the case due to previous enmity with deceased Jamuna along with other co-accused persons, namely, Gudda and Hari, who had killed father of accused Suresh. The appellant accused abjured his

guilt and pleaded his complete innocence. It is further pleaded on behalf of appellant accused that the mother of complainant and Makhan Singh (PW2) came to the house of complainant and pressurized him to compromise the matter. Co-accused Parma and Gulab are neighbours of complainant and co-accused Asharam is the brother-in-law of the complainant. In support of his defence, the appellant-accused has examined Ramswaroop, Bhag Chandra, accused Suresh and Parikshit as DW1, DW2, DW3 & DW4 respectively. Similarly, prosecution in support of its case, has examined as many as nine prosecution witnesses and produced relevant documents i.e. *merg* intimation, FIR, *Safina Forms*, Spot Map, Postmortem Report, seizure memo as well as arrest memo and FSL report etc. etc.

(4) The learned Trial Judge, after appreciating the entire evidence led by the Prosecution and relying on the same, found charges against appellant as proved and accordingly, convicted and sentenced him for offence as mentioned above in

paragraph (1) of this judgment and acquitted co-accused, namely, Parma, Gulab and Asharam of charges levelled against them.

(5) It is the say of Shri Mishra, counsel for the appellant that the learned trial Court has committed an error in convicting and sentencing the appellant as there is some contradiction and omissions in the statements of complainant Jitendra (PW1), Makhan Singh (PW2), Veersingh (PW3) and the mother of complainant Kunwar Bai (PW4). It is further contended that Jitendra (PW1) and Makhan (PW2) who are stated to be eye-witness of the incident, have not fully supported the prosecution case and the learned trial Court without considering this aspect, has passed the impugned judgment which is not sustainable in the eyes of law. It is further contended that the present appellant has been convicted only on the basis of previous enmity and there is no direct or indirect evidence available against him, moreover, other circumstantial evidence are available for proving the alleged

offence. Both the alleged aforesaid eye-witnesses, namely, Jitendra and Makhan Singh, who in their Court statements, have specifically stated that they had not seen the incident. Even other witnesses, namely, Veersingh (PW4) and Kunwar Bai PW-5 (wife of the deceased) have not supported the prosecution version. As per the *merg* intimation, the incident took place on 25-08-2010 at around 09:00 pm and information was received at 11:35 pm. On the one hand, as per evidence of Makhan Singh, the incident was happened at around 08:00 pm, as per evidence of Veer Singh, the incident was happened at around 09:30 pm and as per evidence of Kunwar Bai (PW5), the mother of the complainant, the incident was happened at around 07:00-08:00 pm and, therefore, there is some contradiction and omission in regard to time and place of incident and prosecution story rests upon suspicious by which appellant has been falsely implicated and the same is not sustainable in the eyes of law. Veersingh (PW4) is not the eye-witness of incident and he is a hearsay witness. Therefore,

without considering the evidence of above-said witnesses, the learned trial Court has given its findings in para 61 of the judgment holding the appellant guilty of alleged offence, which is totally perverse and contrary to law. Hence, it is prayed that appellant deserves acquittal and impugned judgment deserves to be set aside.

(6) In support of his contention, it is contended by Shri Mishra, learned counsel appearing on behalf of the appellant that the conviction of appellant rests only on the oral testimony of complainant Jitendra who is alleged to be eye-witness of murder of deceased and there is no other eye-witness to the incident whereon an appreciation of evidence, the prosecution version is found highly improbable and inconsistent in nature. In support of contention, Shri Mishra, has relied on the judgment dated 12th October, 2020 of Hon'ble Supreme Court in the case of **Amar Singh vs. The State (NCT of Delhi)** passed in Criminal Appeal No.335 of 2015. It is further contended that since Jitendra Kumar (PW1) is the relative of

deceased as a witness of murder, whose evidence is not acceptable being fraught with great doubts and oddities, therefore, it cannot be acted upon as the basis of conviction of appellant and the appellant accused is entitled for benefit of doubt. In support of contention, Shri Mishra has relied on the judgment of Hon'ble Apex Court in the case of **Kuna alias Sanjay Behera vs. State of Odisha, (2018) 1 SCC 296.** It is further contended that there was a previous enmity between the deceased and the accused persons and the incident took place in the night during darkness and there was no source of light, therefore, it was not possible for the complainant or any other person to see the actual assailant(s) who has/have caused injury to the deceased and the testimony of complainant comes under serious cloud of doubt. Hence, the evidence of sole eye-witness is not reliable and the appellant is entitled for acquittal. In support of contention, Shri Mishra has relied on the judgment of Hon'ble Supreme Court in the case of **State of Rajasthan vs. Bhola Singh & Another, AIR 1994 SC 542** as

well as the judgment of this Court in the case of **Ramadhar alias Pappan Khamparia Vs. State of Madhya Pradesh** passed in Criminal Appeal No. 923 of 2007 on 11th Day of October, 2010. It is further contended that trial Court has adopted *"pick and choose method"* while acquitting three co-accused persons and convicting the present appellant. Since the evidence of complainant Jitendra Kumar (PW1) is not reliable, therefore, the appellant also deserves acquittal. In support of contention, Shri Mishra has relied on the judgment of this Court in the matter of **Rewaram vs. State of MP 1997 Volume 1 MPWN 574.** It is further contended that since the testimony of eye-witnesses does not corroborate the medical evidence and there is no premeditation for commission of the alleged offence, therefore, the offence falls under category of either Section 304 Part 1 or Part II of IPC. In support of contention, Shri Mishra has relied on the judgment of Hon'ble Supreme Court in the case of **Stalin vs. State represented by Inspector of Police, AIR 2020 SC 4195.** It is further

contended that there are suppression of material facts by the witnesses and the trial Court did not give any reason for convicting only the present appellant while acquitting other three co-accused persons. There are major contradictions and omissions in the evidence of the material witnesses regarding time and place of incident. The prosecution has utterly failed to prove its case beyond reasonable doubt. The above fact together casts a serious doubt on the credibility of prosecution case. In support of contention, Shri Mishra has also relied on the judgments of the Hon'ble Apex Court in the case of **State of MP vs. Ratan Singh and Others, (2018) 3 Crimes 319 (SC).**

(7) *Per contra,* counsel for the State supported the impugned judgment and *s*ubmitted that there is no infirmity in the impugned judgment and the learned trial Court has not committed any error in convicting and sentencing the appellant for the offence aforesaid. Hence, prayed for dismissal of this appeal.

(8) Before adverting to the merits of case, it would be necessary to dilate on the questions mentioned under for determination of resent appeal are:-

> (I) As to whether the cause of death of deceased falls within the ambit of homicidal death or not ?
>
> (II) As to whether there was any intention of appellant for causing the death of deceased or not ?

(9) It would be appropriate to throw light on 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 me4aning 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 of the deceased 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 had no intention of causing death of deceased is wholly irrelevant for deciding whether the case falls in clause Thirdly of Section 300 IPC.

(10) 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, 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."

(11) 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."

(12) 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."

(13) 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.

(14) 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."

(15) "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.

(16) 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).

(17) 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.

(18) 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.

(19) The fact that the death of a human being is caused is not enough unless one of the mental state 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.

(20) 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.

(21) 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."

(22) 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."

(23) In the case of **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'."

(24) In the case of **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."

(25) 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."

(26) 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."

(27) 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."

(28) We have heard the learned counsel for the parties at length and perused the impugned record as well as the evidence of material witnesses.

(29) Complainant Jitendra Kumar (PW1) who is the son of deceased Jamuna, in para 1 of his examination-in-chief deposed that on the date of incident, Makhan (PW2) had

brought his father deceased Jamuna to Kurwai for marketing at around 04:00 pm and at around 09:00 pm, Makhan came his house and told that four accused persons are inflicting injury to his father-deceased and thereafter, the complainant rushed towards field of one Lallu Malli and saw that accused Suresh, Parma, Asharam and Gulab are inflicting his father by means of axe and lathi. On haring his hue and cry, all accused persons fled away from spot. This witness further deposed that thereafter, they brought his father deceased Jamuna in the police vehicle to hospital where his father declared dead and afterwards, on the basis of *merg* intimation, an FIR was lodged. This witness in para 4 of his statement deposed that the Police had recorded his statement on the next day. This witness in para 5 deposed that due to previous enmity with co-accused Suresh, the murder of his father was committed. This witness in para 6 of his cross-examination deposed that a criminal case was going on against his father in regard to commission of murder of father of co-accused Suresh and co-accused Parma

was the witness in that case. Prior to incident, a quarrel had also taken place between his children and children of co-accused Gulab. This witness in para 10 of his cross-examination deposed that he had gone alone with Makhan Singh to the field of Lallu Malli and no other person was accompanied him. This witness in para 11 of his cross-examination denied that there was any previous enmity with co-accused Parma and Gulab. This witness in para 13 of his deposition deposed that on the date of incident, his father had taken drink and gone with Makhan Singh by foot. The information regarding incident had given by Home-guard. This witness in para 15 of his examination-in-chief deposed that Hari and Dinesh had brought his father deceased Jamuna from the spot to the hospital. This witness in para 26 of his cross-examination admitted that there was no report lodged by him regarding threat given by accused persons to kill him and his father.

(30) Makhan (PW2) in para 2 of his evidence deposed that

he along with complainant Jitendra, Preetam and Veer Singh reached back to the same place by bicycles. This witness deposed that Jitendra and Veersingh were ahead and both of us were followed them. The corpus of Jamuna was found there and no one was present there. When they went to the bus-stand to see them and returned back from there, the police jeep arrived at spot and the police brought Jamuna in jeep and took him to Kurwai Hospital and they reached thereafter. The corpus was kept in the police station and they went to police station and complainant Jitendra lodged report in police station thereafter. This witness in para 3 stated that there was an enmity of Jamuna with accused persons because of commission of murder of father accused Suresh and he had no knowledge about commission of murder of father of accused Suresh. This witness in para 5 of his cross-examination denied the information given by him regarding assaults by four accused persons to the father of complainant Jitendra and it is also denied that on reaching back to the spot, they saw that the

accused persons were inflicting deceased and it is further denied that he is making a false statement to save the accused persons. In para 7 of his cross-examination this witness deposed since he was an illiterate, therefore, he cannot explain that the had police conducted written formalities of his memorandum or not. He also denied that co-accused Asharam had given any information about wielding lathi to the police. This witness in para 15 of his cross-examination admitted that when he again reached the spot, the police were carrying deceased Jamuna in a jeep and it is also admitted that he along with complainant Jitendra, Veer Singh and Preetam had gone to the police station on cycles behind the police jeep. In para 19 of his cross-examination, this witness admitted that there was a dispute regarding the land between Kanchhedi (father of accused Suresh) and deceased Jamuna. It is also admitted that on account of dispute of the land, murder of Kanchhedi was done. It is also admitted that a murder case of Kanchhedi is pending against one Gudda and deceased Jamuna. This witness

denied that family members of Jamuna discussed about the compromise and also denied that on account of compromise in that case, complainant Jitendra has falsely implicated appellant- accused Suresh, who was of his friend as he wanted that the murder case of Kanchhedi be compromised. It is denied that on non-arriving at the compromise, he is making a false statement in collusion with complainant Jitendra. It is also denied that on the date of incident, he along with Jamuna were returning back from Kurwai after having taken drink.

(31) Dr. AK Shrivastava (PW3) in his evidence deposed that on 27-08-2010 at around 09:30 in the morning, he had conducted postmortem of deceased Jamuna and found the following injuries over the body of deceased:-

> "Injury No.1:- Lacerated wound size 15x13 cm on mid-parietal region x bone deep with fracture of skull bones.
>
> Injury No.2:- Contusion on the right ankle size 23 cm x 13 cm.
>
> Injury No.3:- Incised wound size 17 cm x 9 cm x bone deep on right scapula region.
>
> Injury No.4:- Punctured wound on right thigh

5x1x2 cm."

As per opinion of doctor, the death of deceased Jamuna was homicidal in nature and cause of death was due to injury to the vital organ i.e. brain with form of mangled. Death of deceased was within 12-24 hours of the postmortem. PM report is Ex.P7-A.

This witness in para 7 of his examination-in-chief deposed that if somebody meets an accident and falls on a sharp-edged stone lying on the culvert, then injuries may be sustained. Injury no.1 as mentioned in the report may be caused due to falling upon some sharp-edged weapon with force.

(32) Veer Singh (PW4) in para 2 of his cross-examination denied that on the date of incident, he along with Makhan (PW2) and complainant Jamuna (PW1) had gone for marketing to Kurwai at 03:00 PM. He also denied that at around 09:30 in the night on the date of incident, Makhan arrived home by crying that accused persons are inflicting

deceased Jamuna and this witness also did not support the prosecution story and declared hostile by the prosecution.

(33) Kunwar Bai (PW5) who is the wife of deceased Jamuma in para 5 of her cross-examination deposed that she had come to known about death of her husband Jamuna at 07:00 in the evening. She reached spot within an half an hour on receiving information. When she reached spot, she found that her husband was lying in the culvert near a road. In para 6 of her cross-examination this witness denied that police recorded her statement next day. In para 10 of her cross-examination, this witness admitted that at 07:00 in the night, Makhan told her that her husband Jamuna was murdered and told her to reach hospital. It is also admitted that she along with Makhan reached Kurwai Hospital by foot from his Village. They took half an hour to reach the hospital. In para 11 of her cross-examination, this witness denied that on the date of incident, her husband had taken drink and she herself stated that sometime her husband used to take drink but on the date

of incident he has not taken drink. This witness further deposed that Makhan in conspiracy with accused persons has committed murder of her husband Jamuna.

(34) Mahendra Singh Thakur (PW9) is the Investigating Officer of the case. In his evidence, this witness deposed that on the basis of memorandum of accused an *axe* was seized from possession of appellant Suresh vide seizure memo Ex15. On the basis of memorandum of other co-accused persons, Parma, Gulab and Asharam vide Ex.P10 to Ex.12, *lathis* were also seized. Bloods-stained and plain soil was prepared by police vide Ex.P13. Appellant accused along with other co-accused were arrested vide arrest memo Ex.P18 to Ex.21 and the statements of witnesses were recorded. In para 20 of his cross-examination, this witness deposed that on 26-08-2010 at 07:00 am, he had spot map was prepared at the instance of witness Makhan. This witness admitted that he had marked "A" i.e. a drain where corpus of deceased Jamuna was found, vide seizure memo Ex.P24. This witness also deposed that he has

not shown any culvert in Ex.P24 in regard to place of incident and if there would have been any culvert, then it would have been necessary for him to mention it. When he had gone to inspect the place of incident, then Corpus was not on the spot because the Corpus was already taken in the night.

(35) Defence has examined four witnesses including appellant accused Suresh and defence has tried to prove that the deceased Jamuna died due to fall in the culvert while he was in a drunken condition but the defence witness DW1 Ram Swaroop and DW4 Parikshit Ahirwar have have failed to prove the fact that the deceased fell down in the culvert at the time of incident and the accused were not present on the spot. They pleaded that neither they had seen incident nor they had gone to place of incident. Similarly, the statement of DW2 Bhag Chandra is also an hearsay witness, therefore, his evidence is inadmissible in evidence. DW3 Suresh (principal/main/present accused) in his defence has stated that the documents Ex.D1 to D4 relating to statement of complainant Jitendra and statement

of Kunwar Bai, mother of complainant, Final Report as well as regarding murder case of his father and FIR. Ex.D5 & Ex.D6 spot map and seizure memo of axe have not been found proved in support of defence of accused. Since the defence witnesses have not stated anything about the incident, therefore, on that basis, it could not said that that no crime had taken place on the alleged incident. Although considering over-all evidence of defence witnesses, blood stain has been found on Ex.-A,C, D, E, F, G, H, I-1, I-2 and blood was not found on Ex.B and blood found on Ex.A,C, D, I-A and I-2 is of human blood of group B, but looking to overall evidence of prosecution witnesses, it appears that the trial Court has not committed any error in discarding the medical evidence as well as FSL report. The axe found from the possession of appellant is found proved regarding commission of murder of deceased Jamuna.

(36) So far as defence of the appellant that there was no sunlight or there was some darkness while incident had taken place and culprits cannot be identified is concerned, this

arguments of learned counsel for the appellant has no force as in the month of August at around 7:00 pm there is sufficient sunlight and any person can be identified by anyone.

(37) Even otherwise, considering the provisions of Section 302 IPC, we fail to appreciate how the case would fall under category of either Secion 304 Part 1 or Part II o IPC when the deceased actually died due to serious injuries on the vital part of body of the deceased brain. Although there is some contradiction and omission in statements of prosecution witnesses looking to the overall evidence of prosecution as well as the medical evidence, it is clear that appellant went to the field of one Lallu Malli, where the complaint's father deceased Jamuna was murdered by the appellant by means of an axe and the evidence of prosecution evidence is fully corroborated by medical evidence.

(38) So far as contention of counsel for the appellant that there was previous enmity going on with co-accused persons Parma, Asharam, Gulab and appellant Suresh in regard to

murder of Kanchhedi Lal, the father of appellant Suresh that's why appellant has been falsely implicated is concerned, the Hon'ble Supreme Court in the case of **Kunwarpal alias Surajpal & Others vs. State of Uttarakhand & Another, (2014) 16 SCC 560** has held that enmity or animosity is a double-edged weapon. While it can be a basis for false implication, it can also be a basis for the crime. Therefore, the conviction and sentence imposed on the appellant is based on proper appreciation of evidence on record and does not call for any any interference.

(39) Further, it is well-established principle of law that the enmity or animosity is a double-edged weapon. It could cut both sides. It could be a ground for false implication and it could also be a ground for assault. Just because the witnesses are related to deceased would be no ground to discard their testimony, if otherwise their testimony inspires confidence. In the given facts of the present case, we have no reason to disbelieve the testimony of the eye-witnesses. Similarly, being

relatives, it would be their endeavour to see that real culprits are punished and normally, they would not implicate wrong persons in the crime so as to allow the real culprits to escape unpunished. It is, therefore, not a safe rule to reject their testimony merely on the ground that the complainant party and the accused party were on inimical terms. Similarly, the evidence could not be rejected merely on the basis of relationship of witnesses with the deceased. In such a situation, it only puts the Court with solemn duty to make a deeper probe and scrutinize evidence with more than ordinary care which precaution has already been taken by the trial Court while analyzing and accepting the evidence.

(40) In view of above discussion, we find that there is no grave error committed by the learned trial Court in convicting the appellant accused for aforesaid alleged offence. Since persecution has rightly established the appellant guilty of aforesaid offence, therefore, impugned judgment of conviction and sentence dated 30-11-2011 passed by Second Additional

Sessions Judge, Vidisha in Sessions Trial No.333 of 2010 whereby the appellant has been convicted u/S 302 of IPC, is hereby affirmed. The appeal being devoid of merits, is hereby **dismissed.**

(41) Since the appellant is in jail, therefore, he be directed to serve out the remaining part of jail sentence awarded by Trial Court.

Let a copy of this judgment be sent to concerning jail authorities and also a copy of this judgment along with record be sent to concerning trial Court for information and compliance.

(G. S. Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge

MKB