

HIGH COURT OF M.P. : BENCH AT INDORE

1. Case No.	Cr.A. No.241/2012
2. Parties Name	Himanshu Kuril S/o Vasudev vs. State of Madhya Pradesh
3. Date of Judgment	____/03/2021
4. Bench Constituted of Hon'ble Justice	Division Bench Hon'ble Shri Justice Sujoy Paul and Hon'ble Shri Justice Shailendra Shukla
5. Judgment delivered by Hon. Justice	Hon'ble Shri Justice Shailendra Shukla
6. Whether approved for reporting	Yes
7. Name of counsels for parties	Shri Virendra Sharma, Advocate for Appellant. Ms. Mamta Shandilya, Government Advocate for respondent/State.
8. Law laid down	<p>Appellant convicted by trial Court under Section 302 of IPC. The question was whether there was intention to cause death ?</p> <p>Appellant had dealt knife injuries on the thigh of the deceased resulting in his death and before inflicting knife injuries, had told the deceased that “ आज मैं तेरा हिसाब कर देता हूँ ” (“today I will settled the score with you”). After the incidence, he called (PW/2) on Mobile saying that “आज मैंने नीरज को निपटा दिया है”.</p> <p>Held - Intention may be gathered from the part of the body aimed at and the words spoken by appellant. The words “ आज मैं तेरा हिसाब कर देता हूँ ” may mean that he would cause such harm to the injured, which would amount to appropriate retribution. Words “ निपटा दिया है ” may have different meanings.</p>

	It may mean that he has finished the injured or done away with the injured or it may also mean that he has dealt with the injured. The injuries were caused on non-vital part, i.e thigh. This shows that there was no intention to cause death. Appellant liable to be convicted under Section 304 (Part-I) of IPC instead of Section 302 of IPC. (Apex Court judgment relied upon Jage Ram vs State of Haryana reported in 2015(11) SCC 366.)
9.Significant paragraph number	44 and 45.

J U D G M E N T**(Delivered on 17th day of March 2021)****As per Shailendra Shukla, J:**

The present appeal has been preferred under Section 374 of Criminal Procedure Code, 1973 against judgment dated 13.02.2012 pronounced by Fourth Additional Sessions Judge, Ujjain, in Session Trial No.302/2010, wherein the appellant has been convicted under Section 302 IPC and sentenced to Life Imprisonment along with fine of Rs.1000/- with default stipulation.

2. The prosecution story in short was that on 01.04.2010 at about 10:30 pm, the deceased Neeraj Bhadoriya was talking to Rohit Bhadoriya (PW/1) near Mehak Chicken Centre at Mahanadda Nagar, Ujjain and at that point of time, the appellant arrived on motorcycle and told Neeraj that he has not returned a single penny out of an amount of Rs.6000/- loaned to him. The appellant then inflicted 3–4 knife blows on the left thigh of Neeraj (deceased). Thereafter, the appellant called up one Veenu Kushwaha (PW/2) on his mobile

phone from the spot and told him that he has duly dealt with (निपटा दिया है) his confidante' i.e. Neeraj Bhadoriya (deceased) and told him to pick him up. Thereafter, appellant went away on his motorcycle. At that point of time, the deceased was still breathing. Neeraj was taken in police van to District Hospital where he was examined by Dr. R.C. Pandya (PW/8). This was followed by lodging of Dehati Nalishi (Ex.P/1) at 11:45 pm. Neeraj however succumbed to his injuries on the same night and his postmortem was conducted by Dr. Kumawat (PW/7) who found that the death was on account of excessive blood loss from the injuries sustained on the upper part of left thigh of the deceased. Spot Map (Ex.P/2) was then prepared, accused was arrested on the basis of his memorandum statements, a knife, a mobile SIM and trousers allegedly worn at the time of incident were recovered by IO (PW/15).

3. After investigation, charge-sheet was filed before CJM, Ujjain. The trial Court framed charge under Section 302 IPC. The appellant abjured his guilt and claimed innocence.

4. Prosecution examined as many as fifteen witnesses in all including eye-witnesses. In his accused statements, the appellant took a defense that he has been falsely implicated by Veenu Kushwaha for whom the appellant's father had stood guarantor in respect of a JCB Machine purchased by Veenu Kushwaha. When the bank could not

recover the loan amount from the guarantor i.e. the father of appellant, the appellant was falsely implicated in order to wreck vengeance. The appellant has examined four defense witnesses in his support.

5. In the appeal filed under Section 374 of Cr.PC, it has been stated that the trial Court failed to see that the injury was not caused on the vital part of the body and if there was an intention of appellant to commit murder of the deceased, he could have stabbed the deceased on his chest or neck or other vital organs. It is further submitted that in the FSL report, there is no conclusion regarding the presence of human blood on the knife.

6. Learned counsel for the appellant in his oral submission has stated that if at all the prosecution evidence were to be believed as it stands, then also no case is made out under Section 302 IPC and at the most the appellant can be convicted only under Section 304 (Part 1) of IPC.

7. Submissions of learned counsel for the appellant as well as State were heard.

8. The question is whether in view of the evidence available on record, the appellant can be said to have been wrongly convicted under Section 302 IPC ?

9. In order to answer the aforesaid question, the trial court was

required to give its opinion in respect of following questions:

- (i) Whether deceased Neeraj had died due to injuries found on his person ?.
- (ii) Whether appellant Himanshu had inflicted the aforesaid injuries to Neeraj ?.
- (iii) Whether the appellant is guilty of committing culpable homicidal of Neeraj ?.
- (iv) Whether in this case the culpable homicidal amounted to murder ?.

10. Dr. R.C. Pandya (PW/8) had found six injuries on the person of deceased (Rahul) in his MLC Examination. These are as under:

- (i) One incised wound 2x1/2 cm in the middle of left thigh. The depth of this injury could not be depicted.
- (ii) One incised wound 2x1/2x1.4 cm on the anterior part of left thigh.
- (iii) One incised wound 1x1/2/x1/4 cm on the above knee of left thigh.
- (iv) One incised wound 2x1/2x1/4 cm on the interior part of left thigh.
- (v) One incised wound 1x1/2x1/4 cm on the left thigh in its interior part of above knee.
- (vi) One friction injury 2x1/4 cm above right eye.

11. The witness has stated that the injuries No.2 to 6 were of simple nature and were caused by hard and sharp object.

12. Dr. P.M. Kumawat (PW/7) who conducted the postmortem examination has stated that the fourth injury, in the form of incised wound found on the interior part of left thigh had resulted in severing of great saphenous vein. He further submits that as a result of stab injury, other smaller veins had also been severed. The postmortem report is Ex.P/4 and the cause of death was owing to haemorrhagic

shock resulting from excessive bleeding.

13. The evidence of Dr. P.M. Kumawat (PW7) and Dr. R.C. Pandya (PW8) shows that Neeraj died due to excessive blood loss from the injuries found on his person.

14. Now the question is whether it was the appellant who had caused such injuries to the deceased.

15. The prosecution story is based on eyewitness accounts as well as circumstantial evidence. The eyewitnesses are Rohit Singh Bhadoriya (PW1), Javed (PW3) and Ravi Jethiya (PW6). The circumstantial evidence is regarding the phone call made by the appellant from the spot to a close confidante of the deceased, namely Veenu Kushwaha (PW2) and the FSL report Exhibit P/20.

16. It would be appropriate to first consider the evidence of eyewitnesses. Rohit Singh Bhadoriya (PW1) has stated that deceased was his friend and on 1.4.2010 at around 11.00 PM, he had been coming from the house of his friend Monu Bhadoriya on foot and was going towards the house and on way, near Mehak Chicken Centre, deceased Neeraj met him and they started conversing with each other. At that point of time, the appellant came on motorcycle, disembarked from the same and told the deceased that he has not been returning Rs.6000/- and that he would have to pay for it and thereafter he inflicted many knife injuries on the left thigh of the

deceased. The witness states that the appellant also tried to attack the witness, who however, escaped being hurt. In the cross examination, this witness states that he knows the appellant only by his name and was not familiarly acquainted with him. He admits to have been any contact with the Corporator Veenu Kushwaha (PW2) whom the appellant had called from the spot. This witness has been given suggestion that he was not on the spot at the time of incident and was in fact, consuming liquor with Pradeep Jaiswal at that point of time and it was Pradeep Jaiswal who had escorted him to his house at about 11.15 PM. This suggestion had been denied by the witness. The appellant has examined Pradeep Jaiswal (DW1) in support of his submissions. He states that on the date of incident, i.e. on 01.04.2020, at around 9.00 PM, when he was in his shop, Rohit (PW1) had come to him and had asked him to accompany him to Nanakheda. The witness states that he went with Rohit. They bought liquor from a liquor shop. There Rohit had seen Veenu Kushwaha (PW2) and on seeing him Rohit had hid himself because he did not want to be seen in the liquor shop in front of Veenu Kushwaha (PW2). The witness states that he then purchased liquor and was asked by Veenu Kushwaha (PW2) to accompany him, but he declined stating that the witness is having his friends with whom he is consuming liquor. Thereafter, he and Rohit both consumed liquor and he had dropped

Rohit to his house at about 11.15 PM. However, this defence evidence is not reliable because of the fact that it was Rohit who within minutes after the incident had lodged the Dehatinalishi Exhibit P/1. Rohit was not a family member of Neeraj and unless the incident would not have occurred before him, there would have been no reason for him to record Dehatinalishi. Rohit (PW1) states that after appellant went away on his motor-cycle, after the incident, the witness immediately went to the house of the uncle of Neeraj namely Gabbar Singh and told him about the incident.

17. Gabbar Singh (PW4) has stated that Rohit had come to his house at about 11.15 PM and had told him about the incident. In cross examination there is no substantial discrepancy in the evidence of Gabbar Singh (PW4).

18. Further Rohit (PW1) has stated that after committing the crime, the appellant had called Veenu Kushwaha (PW2) from the spot telling him that he has done away with Neeraj and has asked Veenu Kushwaha (PW2) to pickup Neeraj. Veenu Kushwaha (PW2) has supported these statements of Rohit stating that he had received missed calls on his Mobile No.9425195966 from another Mobile No.9425093019 and when the witness ultimately picked up the phone, it was appellant Himanshu from the other side who had told him that he has done away with Neeraj.

19. The factum of conversation between the two has been sought to be proved by I.O. K.K. Upadhyaya (PW15) who has exhibited the call details as Exhibit P/14, showing establishment of contact between these two mobile numbers and the contact has been made from near Mahananda Square at Ujjain.

20. Learned counsel however, has pointed out that these call records are not admissible in view of no certificate under Section 65(2)(B) of Evidence Act, which is a pre-requisite for admitting the call record for evidence.

21. This submission was considered.

22. There is substance in the submission of the learned counsel for the appellant, in view of the latest judgment delivered by the Supreme Court in the case of Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal, reported as 2020 SCC Online Pg. 571 (S.C.).

23. Although the aforesaid call records are not admissible but the appellant himself gives such inexplicable defence in respect of such mobile contacts, which in fact, justify the prosecution story. The defence witness Vasudev Kuril (DW2) is the father of appellant Himanshu. He states that Mobile No.9425093019 is the mobile number of his wife and not that of his son Himanshu and on the night of the incident this witness had gone with Veenu Kushwaha (PW2) to settle some dispute which he had with Veenu Kushwaha (PW2) and when they were together, the wife of this witness had called Veenu Kushwaha (PW2)

from her mobile number asking him about the whereabouts of her husband.

24. This kind of statement appears to be unnatural. Why a wife would call another person and not her own husband to know about his whereabouts. This itself shows that a call was indeed made from Mobile No.9425093019 to Veenu Kushwaha (PW2). The prosecution story was that it was Himanshu who had made a call to Veenu Kushwaha (PW2). Looking to such unnatural statements of Vasudev Kuril (DW2), in all probability it appears that it was appellant who had called from the spot of the incident to Veenu Kushwaha (PW2).

25. Thus, the presence of Rohit (PW1) as an eyewitness at the spot at the time of incident is established from the statement of Gabbar (PW4) and the proof that Himanshu had made a call to Veenu Kushwaha (PW2) from the spot only in presence of Rohit Bhadoriya (PW1).

26. The other eyewitness is Javed (PW-3). He states that on 1.4.2010 at about 10.30 to 11.00 P.M. he was sitting inside his house, at that point of time he saw appellant Himanshu wielding a knife and attacking Neeraj Bhadoriya with the same. On seeing the knife he stepped aside and he also saw the appellant calling up someone on phone. When appellant went away, the witness came to the spot and Rohit Bhadoriya was also present and the injured Neeraj was taken to

the hospital. This is the witness who runs a shop in the name of Mehak Chicken Centre, which has been discussed in the evidence of Rohit (PW-1). These statements have not been controverted with the police statements Ex.D/4. The only contradiction is that in Ex.D/4 there is no mention of Rohit to be present on the spot. Thus, there is nothing to discriminate this witness.

27. The last eyewitness is Ravi Jethiya (PW-6). He states that on the night of the incident he had been going to his house and saw Himanshu dealing knife blows on the leg of Neeraj Bhadoriya. The witness states that he had seen the whole incident and also saw police arriving at the spot and taking Neeraj to the hospital. In cross-examination, he states that his house is situated in the back lane to Mehak Chicken Centre. He admits that he did not narrate the incident to the police for two days from the date of the incident, however there is no other statements in his deposition which run contrary to his police statements and there is no material to disbelieve this witness as well.

28. Thus, all the eyewitnesses namely Rohit Singh (PW-1), Javed (PW-3) and Ravi (PW-6) are reliable eyewitnesses. As far as the circumstantial evidence is concerned, the investigating officer Shri K.K. Upadhyaya (PW-15) has stated that on the basis of memorandum of appellant Himanshu, a blood stained knife and

clothes worn at the time of incident as also the motorcycle used by him were recovered from his house. The memorandum statements are Ex.P/15. The seizure memo of Jeans, T-shirt and knife is Ex.P/8 and seizure memo of motorcycle is Ex.P/9. He states that the seized knife was sent to the medical officer with a query as to whether the injuries could have been caused by the aforesaid knife.

29. Dr. P.M. Kumawat (PW-7) has submitted his query report, which is Ex.P/5 and has stated that on inspecting the knife he was of the opinion that the injuries to Neeraj could be caused by the aforesaid weapon. Shri K.K. Upadhyaya (PW-15) states that the aforesaid articles were sent to the FSL vide letter Ex.P/19 and the FSL report was received which is Ex.P/20. A perusal of the FSL report Ex.P/20 shows that the Jeans worn by the appellant which is article D/2 contains human blood, whose group was 'A'. The knife Article 'E' also contained blood. The appellant was thus required to show that his blood group was not 'A', having failed to do so, the presumption is that the blood found on his Jeans was that of the deceased.

30. Thus, from the aforesaid eyewitnesses as also from circumstantial evidence, it is found proved that it was the appellant who had inflicted the knife injuries to Neeraj, consequent to which Neeraj had died.

31. Learned counsel for the appellant has submitted that Dr. Kumawat (PW-7) has stated that if timely treatment was made available, then the death due to leg injuries would not have occurred. In this regard it would be appropriate to quote Explanation 2 of Section 299 of IPC, which is reproduced as under:-

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

*Explanation 2.—*Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment the death might have been prevented.”

32. In view of the aforesaid provision, it is proved that appellant had caused the death of Neeraj by inflicting knife injuries to him.

33. Now the question is as to whether the appellant is guilty of committing culpable homicide?

34. For determining the aforesaid, one of the following ingredients of Section 299 of IPC need to be proven-

- (i) That the act was done with an 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 he is likely, by such act, to cause death.

35. As it has already been found that after committing the aforesaid act, the appellant had called up Veenu Kushwaha (PW-2) and had told

him that he has done away with Neeraj “निपटा दिया है”. This itself shows that the appellant was having the knowledge that he was likely to cause death by such act. Thus, the appellant was found to have committed culpable homicide of Neeraj.

36. The next question is, whether the aforesaid culpable homicide is amounting to murder?

37. Section 300 of IPC needs to be reproduced for determining the aforesaid question :-

“**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—

2ndly.—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—

3rdly.—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—

4thly.—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.”

38. In view of the statements of Dr. Kumawat (PW-7), the injuries on the leg would not have resulted in death, if timely treatment was made available. Thus, it does not appear that provisions of Section 300 (3rdly) of IPC would be applicable. Further, all the injuries were caused on leg only and Dr. P.M. Kumawat (PW-7) has stated that leg

is not a vital part of the body. Thus, it cannot be stated that it was in the knowledge of the appellant that the injuries were so imminently dangerous that in all probability death would have resulted. Hence, Section 300 (4thly) of IPC would also not be applicable.

39. Now, it has to be seen as to whether the appellant dealt injuries to Neeraj with the intention of causing death or whether he had intention of causing such bodily injury as the appellant knew to be likely to cause the death of the person to whom the harm is caused?

40. Learned counsel for the appellant has submitted that the intention of causing death was not there on the part of the appellant because he had deliberately caused injuries on the thigh, which is a non vital part. He has referred to the citation of **State of M.P. Vs. Gangabishan reported in 2018(9) SCC 574**. In this judgment it was held that the death due to gun-shot injury on the thigh which was a non vital part, would result in conviction under Section 304 Part-I and not under Section 302 of IPC. He has referred to the statement of Dr. P.M. Kumawat (PW-7), in which he has stated that the leg is not a vital part of the body.

41. The aforesaid submission was considered.

42. In the case of **Jage Ram Vs. State of Haryana reported in 2015(11) SCC 366** it has been laid down that although the nature of injury may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other

circumstances, which includes the words used by the accused at the time of the incident, motive of the accused, part of the body where the injury was caused.

43. Learned counsel for the State has submitted that although a non vital part was used by the accused but at the same time the words used by him on mobile call made to Veenu Kushwaha (PW-2) assumes importance. He has drawn the Court's attention to Ex.P/1 Dehati Nalishi, in which he had uttered the words "मैने नीरज को निपटा दिया है". He has further submitted that these words itself show that there was intention to kill Neeraj. As already found these words are contained in the evidence of eyewitness Rohit (PW-1) as well. Thus, it is clear that such words were spoken by the appellant after the incident.

44. The words "निपटा दिया है", however may have different meanings. On the one hand it may mean that he has finished the injured or he has done away with the injured and on the other hand it may also mean that he has dealt with the injured. Thus, it cannot be stated for sure as to in what manner the words were used by the appellant. Rohit (PW-1) has stated that before attacking Neeraj, the appellant had uttered the words "आज मै तेरा हिसाब कर देता हूँ". Such words would mean that "today I will settle the score with you". Such words also do not show that settling the score would only mean that

he would kill him. It may also mean that he would cause such harm to the injured which would amount to appropriate retribution. Thus, usage of such words before inflicting injury and after inflicting injury do not show that intention of the appellant was invariably to cause death of Neeraj or to cause such injury as the appellant knew to be likely to cause the death of Neeraj. This apart, in view of the fact that despite having opportunity to cause injuries on vital parts of Neeraj, the appellant chose to repeatedly cause injury on the thigh, a non vital part, itself shows that there was no intention to cause death of Neeraj. Thus, provisions of Section 300 (1stly) of IPC is missing.

45. For the applicability of Section 300 (2ndly) of IPC “*with the intention of causing such bodily injury as the offender knows to be likely to cause death*”, the prosecution has to prove that there was subjective knowledge that death will be the likely consequence of the intended injury. The Hon'ble Apex Court in the case of *Anda and Others vs State of Rajasthan reported in AIR 1966 SC 148* has observed as under:

“The 2ndly in [Section 300](#) mentions one special circumstance which renders culpable homicide into murder. Putting aside the exceptions in [Section 300](#) which reduce the offence of murder to culpable homicide not amounting to murder, culpable homicide is again murder if the offender does the act with the intention of causing such bodily injury which he knows to be likely to cause the death of the person to whom harm is caused. This knowledge must be in relation to the person harmed and the offence is murder even if the injury may not be generally fatal but is so only in his special case, provided the knowledge exists in relation to the particular

person. If the element of knowledge be wanting the offence would not be murder but only culpable homicide not amounting to murder or even a lesser offence”.

46. It would be appurtenant to quote from page 1391 of law of crimes (*26th Edition of Ratanlal and Dhirajlal*) which is as under:

“In order to convict a person of the offence of murder under this clause it has to be found that he had the intention of causing the injury and also that he had the knowledge that the injury which he intended to inflict was likely to cause death. The word 'knowledge' imports a certainty and not merely a probability”.

47. Thus, it can be seen that the aforesaid ingredients of Section 300 (2ndly) of IPC are also missing.

48. After duly considering the material available on record, it can only be stated that the appellant had caused the death of Neeraj with the intention of causing such bodily injury as was likely to cause death and therefore the provisions of Section 304 (Part-1) of IPC would be attracted instead of Section 302 of IPC.

49. Consequently the appeal as to conviction under Section 302 of IPC is acceptable in part and instead of the aforesaid Section, the appellant would be liable to be convicted under Section 304 (Part-I) of IPC. He is sentenced to 10 years of R.I. with no change in fine amount of Rs.1,000/- with default stipulation of two months of R.I.

50. Thus, the appeal succeeds partly in respect of conviction and quantum of sentence.

51. A copy of this judgment along with the record of the trial Court

be sent to the trial Court for compliance.

52. The disposal of property would be as per the judgment of the trial Court.

53. A copy of the judgment be supplied to the parties free of cost.

54. Certified copy as per Rules.

(SUJOY PAUL)
JUDGE

(SHAIENDRA SHUKLA)
JUDGE

Arun/-