

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. Appeal No.470 of 2006**

% **Date of Decision: 18.3.2011**

Lalit Kumar Appellant

Through: Mr.Siddharth Luthra Sr. Advocate with
Ms. Arundhati Katju Advocate.

Versus

State Respondent

Through: Mr. M.N.Dudeja APP for the State.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE V.K.SHALI

- | | | |
|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

*

1. The appellant, Lalit Kumar has challenged the order and judgment of the Trial court dated 13th March, 2006 and 16th March, 2006 whereby he was convicted of the offence u/s 302 IPC and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 1000/- and in default of payment of fine, to further undergo rigorous imprisonment for one month.

2. Relevant facts for the purpose of the present appeal are that on 26th February, 2003 a telephonic information was received from the Duty Constable in AIIMS at P.S. Ambedkar Nagar about the admission of one Shyam Bir Singh, s/o Ram Bir Singh, r/o B-3, Subash Camp, Dakshin Puri aged 18 years, by his mother in an unconscious condition. He was declared by the doctor as brought dead vide MLC No. 18350/03. This information was recorded as DD No. 18A at P.S. Ambedkar Nagar at 11.35 PM and a copy of the same was handed over to SI Balraj Singh, who reached the hospital along with Constable Pratap Singh where he found one Bir Singh (PW1) present who made a statement. On the basis of this statement SI Balraj Singh made an endorsement for the registration of an FIR u/s 302 IPC, on the basis of which FIR No. 87/03 was registered at P.S. Ambedkar Nagar.

3. In the meantime ASI Roshan Lal (PW 13), who had reached block No.3, Dakshinpuri pursuant to a call regarding quarrel in that block, came to know that some people had gathered near block No. 5 and 6, Dakshinpuri and a quarrel had taken place and one injured had already been removed and another injured was in his house. He went to the house of the injured person and found that the injured was the appellant/accused, Lalit Kumar. Thereafter the appellant was sent to AIIMS hospital through Constable Ved Prakash. ASI Roshan Lal had

observed a pair of chappal and some blood lying at the spot and a blood stained knife lying near the place of occurrence.

4. SI Balraj also reached the scene of the crime from AIIMS after collecting the MLC of the deceased and took over the investigation of the case. He prepared the site plan of the place of occurrence in Subash Camp and got the scene photographed. Blood stained earth and a pair of hawai chappal were lifted from the scene of the crime and were sent to the FSL for expert opinion along with the clothes worn by the deceased Shyam Bir and his blood sample. The clothes worn by the accused, Lalit Kumar were also taken from him. The knife alleged to have been used in the crime was also recovered from a khatta. The CFSL report was submitted in Court and charges were framed against the accused u/s 302 IPC to which the accused pleaded not guilty.

5. The case of the prosecution before the trial court was that on 26th February, 2003 the deceased Shyam Bir was present in his jhuggi along with his mother Ramwati (PW-7) and Mause (uncle) Bir Singh (PW-1). At about 9.30 PM, the accused Lalit came to the jhuggi of Ramwati and called the deceased out. The deceased then went with the accused and after some time PW-1 and PW-7 were informed by one lady that a quarrel was taking place on the road between the deceased and the accused in which the accused stabbed the deceased, because of

which the deceased fell on the ground and the accused fled the scene after throwing the knife in the nearby khatta. The prosecution examined 18 witnesses to prove the case against the accused.

6. In his statement u/s 313 Cr.P.C. the accused denied the prosecution case and stated that on 26th February, 2003 he was present in his house and when he came out of his house on hearing some noise, someone threw stones on his head as a result of which he fell down and sustained injuries. The accused examined two witnesses in his defense. It was also contended by the accused before the trial court that he was in his house when the deceased along with one of his friends came to his house, as the deceased was having a grudge against the accused and a scuffle took place between the two. When the deceased took out a knife for inflicting injuries upon the accused, the accused tried to snatch the knife from the deceased by twisting his arm towards his back which resulted in the deceased receiving injuries from the knife he was holding. It was also contended that the person accompanying the deceased had hit the accused on his head with a stick. So the version of the defense was that the incident had occurred near the house of the accused and the deceased received stab injuries when the accused tried to snatch the knife from the deceased for defending himself.

7. The trial court after perusing the evidence of the witnesses and considering the submissions of the counsel for the state as well as the counsel for the accused came to the conclusion that the testimony of the eyewitnesses, PW-1 and PW-2 are reliable and trustworthy and that the testimonies of DW-1 and DW-2 does not create any doubt on the prosecution case. The trial court opined that the three stab wounds inflicted by the accused were of such a nature so as to show that the accused inflicted the wounds with an intention to cause death. Accordingly, the trial court held that the prosecution had proved beyond reasonable doubt that the accused/appellant committed the murder of the deceased Shyam Bir.

8. Mr.Siddharth Luthra, Sr.Advocate, learned counsel for the appellant has relied on (2005) 9 SCC 71, Shankar Narayan Bhadolkar v. State of Maharashtra; (2004) 11 SCC 395 Sridhar Bhuyan v. State of Orissa; (2006) 10 SCC 524, Lachman Singh v. State of Harayan; AIR 1958 SC 465, Virsa Singh v. State of Punjab ; AIR 2008 SC 462, Gali Venkataiah v. State Andhra Pradesh and (2002) 1 SCC 351, Munshi Prasad and Others v. State of Bihar in support of pleas and contentions on behalf of the appellant.

9. In Munshi Prasad & Ors (Supra) the Supreme Court had held that the evidence tendered by the defense witnesses cannot always be

termed to be a tainted one by reason of the factum of the witnesses being examined by the defense. The defense witnesses are entitled to equal respect and treatment as that of the prosecution's and the issue of credibility and the trustworthiness ought also to be attributed to the defense witnesses at par with that of the prosecution's. It was further held that a lapse on the part of the defense witness cannot be differentiated and be treated differently than that of the prosecution's witnesses.

10. The learned counsel for the appellant has also relied on Virsa Singh (Supra) which had laid down the applicability of Clause "Thirdly" of Section 300. Under the said section, culpable homicide is murder if both the conditions are satisfied i.e. the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury and the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It was held that it must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death viz. that the injury found to be present was the injury that was intended to be inflicted.

11. The plea of the learned counsel for the appellant is that the injuries were sustained by the deceased as well as appellant on account

of scuffle between the appellant and the deceased. In the circumstances it has to be ascertained whether there was an intention to strike at a vital or a dangerous spot with sufficient force to cause the kind of injury found to have been inflicted. Taking the entire evidence into consideration the inevitable conclusion is that there was no intention to inflict the injury which was sustained by the deceased and the injury to the deceased was accidental or unintentional. In the circumstances it is submitted that the conviction of the appellant could not be under Section 302 of the Indian Penal Code.

12. In *Virsa Singh* (Supra), it was held by the Supreme Court that once it is proved that there was a bodily injury, then nature of injury must be proved. Thereafter it must be proved that there was an intention to inflict that particular bodily injury, that is to say it was not accidental or unintentional or that some other kind of injury was intended. Once these three factors are established then it is to be established that injury intended to be inflicted was sufficient to cause death in the ordinary course of nature and once these elements are established by the prosecution, the offence is murder under Section 300 "thirdly". It would not matter that there was no intention to cause death or that there was no intention even to cause injury of a kind that is sufficient to cause death in the ordinary course of nature. In this case cited by the learned counsel for the appellant, the accused had stabbed

a spear into the abdomen of the deceased with such forces that it penetrated the bowels and three coils of intestines came out of the wound and the digested food came oozing out from the cut in three places. In the circumstances, it was held that it would be perverse to conclude that he did not intend to inflict injury that he did and whether the intention was there or not was one of fact and not of law. The Supreme Court had also clarified that in given circumstances if it can be proved that the accused only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then the offence would not be murder. This 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.

13. In *Lachman Singh* (Supra), the Supreme Court had laid down the difference between Section 300, exceptions 1 and 4. It was held that for bringing the applicability of Exception 4 to Section 300 of Indian Penal Code, it is to be established that the act was committed without premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner. The Supreme Court held that Section 300, 4th Exception, covers acts done in a sudden fight. Exception 4 deals with a case of prosecution not covered by the 1st

exception. It was further held that the said exception is founded upon the same principle i.e there is absence of premeditation. Whereas in the case of exception 1, there is a total deprivation of self control but in case of exception 4, there is only that heat of passion which clouds men's sober reason and urges him to deeds which he would not otherwise do. The difference in exception 4 and 1 of Section 300 was enunciated by the Court in para 11 of the said judgment at page 528 which is as under.

11. 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 IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passion 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".

14. In this case, on account of issue of flow of water, accused Dev Singh had got infuriated and had asked his son Lachman Singh to bring the revolver from inside, which was brought and accused Dev Singh asked his son Lachman Singh to shoot whereupon Lachman Singh fired and the shot hit the deceased whereafter the accused Dev Singh took the revolver from his son Lachman Singh and started firing shots which hit other persons. The Supreme Court had held that the Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof. After analyzing the

evidence in this case, the conviction of Lachman Singh who had fired from the revolver at the instance of his father, was altered from Section 302 of IPC to Section 304 part I IPC in order to meet the ends of justice, and custodial sentence of 10 years with a fine of Rs.1000/- was imposed.

15. It was thus held that a sudden fight implies mutual provocation and blows on each side. In the circumstances, 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 no. 1. A fight which suddenly takes place, for which both the parties are more or less to be blamed, then there is a mutual provocation and aggravation and in the circumstances, it will be difficult to apportion the share of blame which attaches to each fighter.

16. Defining the scope of Exception 4 to Section 300 in Sridhar Bhuyan (Supra), the Apex Court had held that the said exception covers acts done without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel with the deceased without the offender having taken undue advantage and not having acted in a cruel or unusual manner. For applicability of exception 4, it was held that all the ingredients of exception 4 must be satisfied. In this case Umakanta,

brother of Sridhar Bhuyan had teased Jayanti on 21st August, 1988. On 22nd August, 1988, deceased's son complained about the previous incident and in the evening when Jayanti's father returned, the deceased along with Jayanti's father went to the house of Sridhar Bhuyan, however, nothing could be decided as Umakanta was absent. On 23rd August, 1988 the deceased again went to the house of Sridhar Bhuyan and insisted that he should come with his brother Umakanta to settle the matter regarding teasing of Jayanti and on refusal a quarrel ensued in which Sridhar Bhuyan went inside and came out with the knife and inflicted blows with knife on the back of the deceased and when the deceased turned his face, the knife was also inflicted into the chest of the deceased. Two persons present tried to save the deceased but could not succeed. Thereafter, deceased fell down and he was taken to the village library where he succumbed to his injuries. In these circumstances, it was held that the act was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in cruel or unusual manner. Therefore, the act of Sridhar Bhuyan was held to be covered under the 4th exception to Section 300 of Indian Penal Code and the case was not covered under Section 302 of the Indian Penal Code and in the circumstances, the conviction was altered to Section 304 Part-I of the Indian Penal Code and custodial sentence of 10 years was awarded in place of life imprisonment awarded by the lower court.

17. In *Shanker Narayan Bhadolkar (Supra)*, the Supreme Court had dealt with the difference between culpable homicide and murder. It was held that every murder is culpable homicide but vice versa is not true. Generally speaking, it was held that culpable homicide without special characteristic of murder is culpable homicide not amounting to murder. In para 24 of the judgment, the Supreme Court had tabulated the distinction between the Section 299 and Section 300 of Indian Penal Code which is as under:

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done-
INTENTION	
(a)with the intention of causing death; or (b)with the intention of causing such bodily injury as is likely to cause death; or	(1)with the intention of causing death; or (2) 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 (3)with the intention of causing bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
KNOWLEDGE	
(c)with the knowledge that the act is likely to cause death	(4) with the knowledge that the act is so imminently dangerous that it

	must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.
--	---

18. In this case, deceased and some other persons were invited by the appellant Shankar Narayan Bhadolkar to attend dinner at his house and after finishing meal, the deceased was standing on the threshold of the house. Appellant lifted the gun, unlocked it, loaded it with cartridge and shot the gun from a close range aiming at the chest of the deceased. The version of the appellant was that the deceased was heavily drunk and was not paying any heed to what was being said to him and, therefore, in order to scare him appellant had picked up a gun, loaded with blank cartridges which only created noises, but in the scuffle the said gun got fired and the deceased sustained injuries. In the circumstances, analyzing the evidence it was held that there was no element of culpability to bring home accusations of Section 302 and at the most it was covered by Section 304A. It was further held that Section 304A applies to cases where death is caused by doing a rash or negligent act and is not applicable where the act is done with the intention or knowledge to cause death.

19. In Gali Venkataiah (Supra), relied by the learned counsel for the appellant, the accused was convicted by the trial court for committing

offence under Section 302 of Indian Penal Code and the appeal filed by the accused was dismissed. The Supreme Court considering the facts that the relation between the accused and the deceased were strained and that there was exchange of heated words before the assault and that they quarreled with each other, held that murder was committed without premeditation in the heat of passion upon a sudden quarrel and without the accused taking undue advantage and not having acted in a cruel or unusual manner. Consequently, ingredients of exception 4 to Section 300 of Indian Penal Code were established and the accused was held liable for conviction under Section 304 Part-I of Indian Penal Code and not Section 302 of Indian Penal Code.

20. Learned counsel for the appellant has also contended that the evidence of the defense witnesses requires consideration which has been ignored by the trial court without any rationale. In *Munshi Prasad and others* (Supra), the Supreme Court had held that the evidence tendered by the defense witnesses cannot always be termed to be a tainted one, by reasons of the factum of the witnesses being examined by the defense. It was held that the defense witnesses are entitled to equal respect and treatment as that of the prosecution and the credibility and trustworthiness should also be considered in respect of defense witnesses at par with that of prosecution before rejecting their testimony. It is more so because a lapse on the part of defense

witnesses cannot be differentiated and be treated differently than that of prosecution witnesses.

21. Per contra, the learned counsel for the respondent/State, Mr. Dudeja has relied on AIR 2000 SC 160, Rajesh Govind Jagesha v. State of Maharashtra; AIR 1983 SC 680, Rana Pratap and others v. State of Haryana; AIR 2003 SC 1074, State of Karanataka v. Shariif; 2002 (1) Crimes 322, Allarakha K. Mansuri v. State of Gujarat; 2002 IV AD (SC) 203, Dharamendrasinh @ Mansing Ratansinh v. State of Gujarat; AIR 2004 SC 1264, State of Rajasthan v. Dhool Singh; (2003) 12 SCC 792, Badam Singh v. State of Madhya Pradesh and (2003) 12 SCC 241, Hem Raj and another v. State of Punjab, in respect of his contention.

22. This Court has heard the learned counsel for the appellant and the learned Additional Public Prosecutor. In Rana Pratap (Supra) relied on by the learned Additional Public Prosecutor, the Supreme Court had held that in a murder trial by describing an independent witness as chance witnesses it cannot be implied that their evidence is suspicious and his presence at the scene shall be doubtful. It was further held that every person who witnesses the murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. There is no such rule of natural reaction. To discard the evidence of witnesses on the ground that he did

not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

23. The other precedent, *State of Karnataka v. Shariff* (Supra) is not relevant for the present case. In the precedent relied on by the Additional Public Prosecutor, the matter pertained to the evidence of the witnesses to whom the deceased had made statement regarding her husband tying her hands and legs and thereafter pouring kerosene on her and setting her on fire. Whether that can be construed as dying declaration or not was under consideration, which is not the dispute in the present case.

24. In *Allarakha K.Mansuri* (Supra) it was held that where a view taken by the trial Court was uncalled for, not based upon the facts of the case or legal evidence tendered in the case and was a result of conjectures, imagination and hypothesis, in such a case High Court would be justified in re-examining the whole evidence and convicting the accused. It was further held that defective investigation by itself cannot be made a ground for acquitting the accused. In *Dharmendrasinh* (Supra) the wife of the accused was herself an eye witness and her testimony had contradictions as to the nature of weapon used, axe or dhari. It was held that such minor contradictions are insignificant and on the basis of minor discrepancies an accused

cannot seek acquittal. Minor contradictions only entail close and careful examination.

25. In Dhool Singh (Supra) it was held by the Supreme Court that a single blow will not always be determinative of intention. In this case the accused had inflicted cut wound on the neck of the deceased which had caused excessive bleeding and heart failure. It was held that the injury though solitary, exhibits intention and knowledge of the attacker to cause death. Under Section 300, words “likely to cause death” indicates such facts where miraculous survival is not contemplated. Such an injury on the neck which led to excessive bleeding and heart failure would rather reflect intention and knowledge of the accused. In Hemraj & Anr (Supra) the Supreme Court had rejected the observation of the High Court that unless the manner in which the occurrence took place is stated in the report, the same cannot be treated as FIR. In Badam Singh (Supra) referred to by the learned Additional Public Prosecutor it was held that the existence of motive loses significance when there is reliable ocular testimony but where the ocular testimony appears to be suspect, the existence or absence of motive acquires some significance regarding the probability of the prosecution case. The precedents relied on by the learned Additional Public Prosecutor appears to be not very relevant for the decision of present appeal.

26. The learned counsel, Sh.Luthra has contended that there are major contradictions and discrepancies in the statements of the prosecution witnesses, PW-1, Bir Singh; PW-2 Shanti Lal and PW-7 Ramwati. According to him the recovery of weapon was not at the instance or attributable to the appellant and there are contradictions in the statement of PW-1 & PW-2 who had deposed that the weapon was thrown in Kuredaan (dustbin) whereas PW-7 & PW-13 stated that it was thrown in khatta. No finger prints of the appellant were found on the alleged weapon of offence and the blood on the weapon could not be connected to the blood group of the deceased. The learned counsel also emphasized that FSL report had not been proved as no FSL witness was examined rather it is apparent from the evidence that the knife was rusted. Referring to Exhibit 2/A it is asserted that the knife sketch does not mark any blood on it nor could PW-14 say that he had noticed blood stains at the initial stage. The learned counsel has also pointed out the discrepancies between the statements of ASI Roshan Lal PW-13 and Bir Singh PW-1, about the time of recovery. It is contended that the recovery of weapon was not made in the appellant's presence and the weapon was allegedly recovered from an open plot underneath bricks and not from a dustbin (Kuredaan). In the circumstances it is emphasized that the recovery cannot be attributed to the appellant and it has not been established that the weapon recovered was the weapon of offence.

27. The contradictions in the statements of PW-1 Bir Singh; PW-2 Shanti Lal and PW-7 Ramwati cannot be construed to be major contradictions so as to disbelieve the entire prosecution version. The plea of the appellant that recovery of weapon was not attributable to him also cannot be accepted in the facts and circumstances on account of alleged contradictions in the statements of PW-1 and PW-2 on the ground that PW1 & 2 had deposed that the weapon was thrown in kuredaan (dustbin) whereas PW7 & 13 had stated that it was thrown in khatta. Photographs of PW 12/8 to PW 12/10 are the photographs of the Khatta from where the knife used by the appellant was recovered. The photographs show garbage of building material lying there. It appears khatta is an open place where garbage is thrown and accumulates. In the circumstances, the description of the same place by two sets of witnesses in different words will not result into major contradictions as has been contended by the learned counsel for the appellant. Similarly on the ground that the knife which was recovered at the instance of the appellant did not have the finger prints will not negate the recovery of the knife at the instance of the appellant. The sketch of knife exhibit PW2/A also reveals that the blade of the knife was only 9.3 cm which is less than 4 inches and the handle was 11.7 cm which is also less than 5 inches. The knife did not have any spring and appears to be an ordinary knife which could be carried by anyone. The knife was also identified by PW-2 Shri Shanti Lal when it was shown to him during his testimony and he had identified the knife as

the one that was used by the appellant. The Bombay High Court in a case reported as 1993 Cr.L.J. 1957, Machindra Namdeo Deokar v. State of Maharashtra in which case the deceased had picked up a quarrel with the accused by unlawfully demanding money from him and attempting to search his pockets. When he was stopped no money was found, he had stabbed with a knife. It was held that the knife was not carried with the intention of murder, rather slapping of the accused was held to be grave and sudden provocation and accused was held guilty under Section 304 Part II and not under Section 302. In the circumstances, the plea of the learned counsel for the appellant that the knife was not the weapon of offence and was not recovered at the instance of appellant cannot be accepted. Also the FSL report can be tendered into evidence and not producing any witness from the Forensic Science Laboratory will not lead to rejecting the said report.

28. The learned counsel has also pointed out that there are discrepancies in respect of the place of arrest and time of arrest. Whereas PW-6 had stated that the accused was arrested from his house. PW-1 did not depose anything about it whereas Exhibit PW6/H, arrest memo of the appellant reflects that he was arrested at the spot. Regarding the time of arrest also there are discrepancies in as much as PW-1 stated that the appellant was arrested after he returned from the hospital whereas according to PW-2 appellant was already arrested when he returned from the hospital. The time of arrest has been shown

as 5.30 A.M however, Constable Pratap Singh, PW-6 stated that the appellant was arrested at 4.30 A.M. A different version is given by PW-13 and PW-16. According to them appellant was found injured at his house and was taken to the hospital and was brought back and handed over by PW-16 to PW-13.

29. Regarding the time of quarrel also certain inconsistencies have been pointed out by contending that as per PW-2 the incident took place at 9.00 P.M whereas according to PW-1 Bir Singh the incident took place at 9.30 P.M. Constable Ved Prakash gave the time of incident as 9.05 P.M and the rukka stipulates 9 P.M. ASI Roshan Lal, PW-13 deposed that the quarrel took place at 8.30 P.M however, he did not specify as to for how long the altercation between the deceased and the appellant continued whereas PW-2 Shanti Lal's version is that the quarrel/altercation continued for 3-4 minutes after he reached the spot. In the circumstances, the plea of the learned counsel for the appellant is that the place of arrest, time of arrest and duration of altercation has not been established beyond reasonable doubt and in the circumstances it cannot be held that the incident was pre meditated so as to convict the appellant under Section 302 of IPC and this casts a grave doubt about the veracity of the prosecution case.

30. Regarding the contradictions in the statements of PW-1, PW-2 and PW-7 on behalf of appellant it is pointed out that PW-1 is related to

the deceased being the mausa (mother's sister's husband) and, therefore, his testimony has to be viewed with caution. Though he was related and reached the spot when altercation was going on but he did not endeavour to stop the quarrel or to extricate the deceased. Referring to the testimony of PW-1, the learned senior counsel has pointed out that he is silent about the presence of PW-2 Shanti Lal although the site plan, Exhibit PW11/A reflects that Bir Singh was standing adjacent to Shanti Lal. PW-1 Sh. Bir Singh rather stated that he was not aware as to when Shanti Lal came to the spot. The learned counsel has also pointed out that PW1 Bir Singh had stated that the appellant had caught hold of the collar of Shyam Bir and stabbed him whereas PW-2 Shanti Lal had stated that the appellant was holding his head after being hit by the brick. PW-1 Bir Singh also deposed that he did not intervene in the quarrel to save the deceased whereas Ramwati, PW-7 had deposed that Bir Singh had chased the appellant.

31. On behalf of the appellant the emphasis is also laid on the fact that PW-2, Shanti Lal had neither revealed that he was living in the house of deceased nor did he disclosed his relationship with the mother of the deceased. However, the fact that he was living in the house of the deceased and that he is the brother of the mother of the deceased has been established from the statement of Smt. Ramwati, PW-7. Thus PW-2, Shanti Lal is also a related witness and much reliance cannot be placed on his deposition in view of the inconsistencies between these

three witnesses. PW-2 Shanti Lal had claimed that he was present during the argument preceding the incident for 3/4minutes but surprisingly he did not intercede. In his cross examination he had stated that the quarrel started on the issue of the deceased's sister, however, he could not depose as to which sister. Impeaching the testimony of PW-2 it has been argued that though he is a resident of the same area and the incident had occurred at the market place, but still he could not tell as to who had the shops in the area near the place of incident.

32. Doubt is also cast on the testimony of PW-7 on the ground that she is not an eye witness as she had only seen the accused running after the incident and she therefore, could not depose as to what happened during the alleged altercation. She did not name the appellant at the time of admission to the hospital, in the MLC Exhibit PW4/A which is the first record by the said witness of the incident. Inconsistency in her statement has also been pointed out to the fact that she stated that she met the appellant at the hospital but PW-6 Pratap Singh stated that he met her at the spot at 3-4 A.M. Even PW-1 Bir Singh and PW-2 Shanti Lal had mentioned the presence of PW-7, Ramwati during the investigation at the spot. In the circumstances, it is contended that on the conjoint reading of the statements of these three witnesses culpability of the appellant is not made out. The learned counsel for the appellant has also pointed out that from the testimonies

of PWs 1, 2, 13 & 16 and from the MLC of the appellant (Exhibit PW4/D) the injury on the head of the appellant has been established, however, no explanation is offered by the prosecution as to who had caused the injuries. The brick which caused the injury on the head of the appellant was not recovered. Sh.Shanti Lal had confirmed that there was blood on the cloth of the appellant, however, neither PW-6 noticed the same nor was it incorporated in the seizure memo of clothes of the accused (Exhibit PW6/C). The emphasis is also laid by the learned counsel in the delay in filing the FIR as according to him the delay of 5 hours has not been satisfactorily explained.

33. On behalf of appellant it is also contended that material witnesses have not been examined. According to the learned counsel Gauri, sister of the deceased who was allegedly teased by the accused was a material witness who had not been examined nor was any explanation given for the same. The woman who had informed Ramwati regarding the incident pursuant to which she had gone towards the spot and had seen the appellant running away has not been named nor examined. The said woman might have witnessed the quarrel and her testimony would have been very material in the circumstances. Also none of the public persons who were in the crowd at the time of the altercation have been examined. It has been contended that the statements of 4-5 public persons were recorded but none of these witnesses were examined nor were their statements under Section 161 of the Criminal Procedure

Code placed on record. No effort was made to locate the person from the crowd who threw the stone at the appellant nor was the owner of khatta from where the knife was recovered been examined. The learned counsel has contended that since FSL expert Srivastava was not examined, reliance could not be placed on the report of FSL.

34. Regarding the chappals it is submitted that if these were left by the accused/appellant and he had ran 10 steps to his house, they could have been connected with the appellant to show his presence and the role attributed to him. Though the chappals were recovered and were covered with blood, however, from the FSL report it cannot be established that the blood on the chappals was that of the appellant. PW-2 Sh.Shanti Lal had not identified the chappals as that of appellant and even Bir Singh, PW-1 is silent about the identity of the chappals. Consequently, it is contended that the prosecution has not been able to establish its case and the conviction of the appellant is liable to be set aside.

35. The learned counsel has also pointed out contradictions in the statement of PW-3 ASI Roshan Lal who stated that he received a call regarding the quarrel at 8.30 PM whereas PW-16 Constable Ved Prakash had stated that the call was received at 9.05 P.M. Inconsistencies in the statements of PW-6 and PW-11 has also been referred to in as much as PW-6 had deposed that SI Balraj Singh

(deceased) Investigating Officer had prepared the site plan at the spot whereas PW-11 SI Mahesh had stated that he had visited the spot on 7th April, 2003 and prepared the site plan on being pointed out by PW-1 Sh. Bir Singh. Setting aside the order of conviction is also sought on the ground that the testimony of the witnesses DW-1 Awdesk Kumar and DW-2 Ghanshyam has not at all been considered though equal credence must be given to the testimonies of the defence witnesses. In the circumstances, the plea is that the prosecution has failed to make out the charge against the appellant beyond reasonable doubt and consequently the conviction and sentence of the appellant is liable to set aside.

36. The inconsistencies pointed out regarding the time of arrest would also not belie the prosecution version. As has been pointed out PW-2 had deposed that the incident took place at 9 PM whereas PW-1 gave the time of incident as 9.30 PM. Constable Ved Prakash had given the time of incident as 9.05 PM and the rukka stipulates 9 PM. From the testimony of these witnesses it is apparent that the time of incident is about 9 PM. Variation about the time of incident in minutes in the present facts and circumstances of the case cannot be construed to be such major contradictions as to disbelieve all these witnesses. This cannot be disputed in the facts and circumstances that the incident had taken place and the weapon is the knife that caused the injuries on the deceased. Similarly, variation in respect of place of arrest would also

not discredit the entire prosecution version. PW-6 Constable Pratap Singh had deposed that the appellant was arrested by IO and he was present when the appellant was arrested from gali just in front of his house. The plea of the learned counsel for the appellant that according to PW-6 appellant was arrested from his house is not in consonance with the deposition of PW-6. Perusal of exhibit PW-6/H arrest memo reflects that the appellant was arrested from the spot. From the plan exhibit PW-11/A reveals the house of the accused at point H whereas the Jhuggi of the deceased is at point B3 and their Jhuggi and houses are almost opposite to each other. The place of incident where the appellant is alleged to have stabbed the deceased is also about 3 jhuggis away. In the circumstances PW-6 had deposed that the accused was arrested from the gali just in front of his house and arrest memo discloses that the appellant was arrested from the spot, hence there is no major contradiction or such contradiction which will not be reconcilable. The place of incident, the jhuggi of the deceased and the house of the appellant are in the vicinity of each other and in the circumstances the appellant cannot discredit the prosecution version on these minor variations. On behalf of appellant the testimony of PW-1 is attempted to be discredited on the ground that he being the mausa (mother's sister husband) did not even endeavour to stop the quarrel or to extricate the deceased though he had reached the spot when the altercation was going on. The plea of the learned counsel for the appellant is based on an assumption that every person who witnesses

the murder would react in a similar way. This assumption cannot be countenanced as every persons who witnesses murder reacts in a different way as some are stunned and become speechless and stand rooted to the spot whereas some become hysteric and start wailing. There is no such rule of natural reaction and the testimony of a witness cannot be discarded on the ground that the particular witness did not react in a particular manner. Discrediting the testimony of PW-1 Mause of the deceased (mother's sister husband) would be wholly unrealistic and unimaginative on this ground. The testimony of PW-1 also cannot be discredited on the ground that he did not depose about the presence of Sh.Shanti Lal although the site plan exhibit PW-11/A shows that he was standing adjacent to Shanti Lal. Sh.Bir Singh PW-1 in his deposition had stated that he was not aware as to when Shanti Lal came to the spot. This deposition in our opinion will not discredit his testimony in any manner as at the time he was witnessing the scuffle which had taken place between the deceased and the appellant and the stabbing of the deceased. Being related to the deceased if his attention was solely on the incident of stabbing, that he had not noticed as to when Shanti Lal came there, on this ground it cannot be inferred that his deposition suffers from such material inadequacy or would be so unnatural so as to be unreliable. According to the testimony of PW-7 Smt.Ramwati, Bir Singh, PW-1 after the incident was chasing the appellant and in the circumstances if he had not noticed as to when Shanti Lal came at the spot his testimony cannot be doubted.

37. The plea of the learned counsel for the appellant that the testimony of Shanti Lal, PW-2 would also be doubtful as he did not disclose that he was living in the house of the deceased and his relationship with the mother of the deceased will also be not sustainable. PW-7 mother of the deceased did not say that Shanti Lal is her brother but rather deposed that he is related like a brother. PW-7 had deposed that he lives about 200-205 yards away in his house. Shanti Lal, PW-2 had rather deposed that he does the job of preparing locks and keys and his house was in Block A. He had deposed that deceased was not related to him, however, the mother of the deceased was treating him like a brother. In the circumstances, the plea of the learned counsel for the appellant that the deposition of PW-2 Shanti Lal is not creditworthy as he is related to the deceased and that he had not disclosed his relationship is not to be accepted.

38. The testimony of PW-7 is unimpeachable and categorical to the extent that when she came to the Jhuggi she found that the appellant after stabbing her son was running away and Bir Singh, PW-1 was chasing him. She had also deposed that appellant had stabbed deceased on his back and thereafter he ran to his house and closed the door. The place of incident where the stabbing took place is very near to the Jhuggi of PW-7 which is apparent from the site plan exhibit PW-11/A. From the testimonies of the witnesses it is also apparent that

before the stabbing incident, a verbal altercation had taken place between the deceased and the appellant. The deceased had told the appellant that “Yadi Tumne Meri Behan Ke Taraf Dekha To Achha Nahi Hoga”. The appellant had retorted “Yadi Tu Mere Beech Me Aayega To Tera Kaam Tamam Kar Dunga”. This verbal altercation rather reveals that the appellant had not come to the Jhuggi of the deceased and taken the deceased slightly at a distance from his Jhuggi with the intention to attack him there, because had this been the intention of the appellant there wouldn't have been any verbal altercation and he would have stabbed the deceased immediately after taking him to a certain distance. Had the intention of the appellant been to take him away from the Jhuggi and then to stab him he wouldn't have done it in the middle of the market which was bustling with activity, as has been borne out from the evidence. The plea of the learned counsel for the appellant that PW-7 did not name appellant at the time of admission in the hospital in the MLC exhibit PW-4/C is also not of much consequence. The appellant is not a complete stranger to PW-7 as his house is almost opposite to the Jhuggi of the PW-7. In the circumstances, PW-7 not mentioning the name of the appellant in the hospital in the MLC exhibit PW-4/A is not of much consequence as on the conjoint reading of the testimonies of the witnesses including the defence witnesses it is apparent that it was the appellant who was involved in the incident of stabbing the deceased after a verbal altercation had taken place between the deceased and the appellant

after which he threw the knife in the khatta while running away and thereafter locked himself in the room.

39. The plea of the appellant that though the statement under Section 161 of the Criminal Procedure Code of 4-5 public persons were recorded, however, none of those witnesses were examined will not affect the prosecution version. If the testimony of PW-1, PW-2 and PW-7 is reliable and cannot be rejected mainly on the ground that they were interested or related witnesses, non examination of other 4-5 public witnesses will not be very material. The plea that the chappals which were left at the spot could not be connected to the appellant also does not impact the prosecution version in such a manner so as to infer that the appellant was not involved in the altercation with the deceased and subsequently in stabbing him. The other contradictions pointed out by the learned counsel for the appellant in the testimonies of PW-3 ASI Roshan Lal and PW-16 Constable Ved Prakash are also minor in the facts and circumstances and do not dislodge the prosecution version completely so as to give any benefit to the appellant. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accuse as was held by the Apex Court in *Rajesh Kumar Vs State of H.P.*, AIR 2008 SCW 6833.

Relationship would not result in the mechanical rejection of the testimony of the witnesses. Settled norms of appreciation of evidence require that the evidence of such witnesses is to be assessed with caution as was held in (2007) 2 SCC 310, Amitsingh Bhikamsingh Thakur Vs State of Maharashtra.

40. Non examination of Gauri, sister of the deceased would also not exculpate the appellant in any manner. The dispute is not whether the appellant had teased Gauri or not which is apparent from the verbal altercation about which PW-1 Sh.Bir Singh and PW-2 Shanti Lal have deposed. Certain facts which are apparent in the case on the basis of testimony of various witnesses is that the appellant lives almost across the jhuggi of deceased where Gauri was also living. Either the appellant was teasing the sister or was trying to develop a relationship with her which was not accepted and consented to by the deceased. The appellant had come to the Jhuggi of the deceased and had called him and thereafter both went to some distance from the Jhuggi where the verbal altercation had taken place. The deceased was of the opinion that the appellant should not have any relation with his sister whereas the appellant emphasized that he is no one to come between him and his sister Gauri. In the circumstances the non examination of Gauri by the prosecution will not impact substantially the prosecution version as the fact about the verbal altercation and thereafter the deceased receiving

the stab injuries and the appellant running away from the scene being chased by Bir Singh, PW-1 cannot be denied. In the circumstances, the testimony of Gauri would not have been so material so as to exculpate the appellant completely in absence of her testimony.

41. On the conjoint reading of the testimonies it is inevitable to infer that exception 4 to Section 300 can be invoked in the present facts and circumstances as the fight was without pre-meditation. The appellant had called the deceased from the Jhuggi and both of them had gone to a little distance from the Jhuggi and the verbal altercation had taken place in the market in the presence of a number of people around. Had the intention of the appellant been to stab the deceased pursuant to a pre-meditated plan he would not have done it in an open market in the presence of so many other people near the house of the deceased. The other ingredient for invoking Exception 4 to Section 300 is also apparent as there was a verbal altercation which led to the incident of stabbing. Verbal altercation unequivocally reflects the sudden fight. The fact that the appellant had also received the injuries cannot be doubted. Whether the appellant got an injury before the stabbing or afterwards cannot be inferred conclusively from the evidence, however, this is sufficient to establish the elements of sudden fight between the appellant and the deceased. Though in view of the ocular evidence alternative medical opinion is not to be given preference but such

evidence will not rule out completely that the injuries were caused to the deceased in the course of the sudden fight. Dr.Millo Tabin, PW-5 had categorically deposed that injuries No.2 and 3 i.e the stab wound in the left side of back in the scapular region 1.5/0.7 cm size, 8 cm from midline and 20 cm from shoulder tip which was muscle deep and stab wound in the left side of back below scapular 2/1 cm size and 14/5 cm from mid axillary line and 6 cm from midline and 8.5 cm could be caused in a scuffle. The testimony of Dr.Millo Tabin is as under :-

“Injury No.1 can be possible by a fall while walking. It is wrong to suggest that injury no.2 is a superficial injury. Muscle deep injury which I have mentioned it is generally more ½ cm in depth. Possibility cannot be ruled out that injury no.2 can be a result when a person holding a knife is opposed by the other person by twisting the arm to snatch the knife and may be caused in a scuffle. Vol. But it cannot be a self inflicted injury. Injury no.2 and no.3 are on the back side. I cannot comment on the law of physics that action and reaction are opposite and equal. It is correct that injury no.3 punctured vena cava which is blood vessel and death was caused by excessive bleeding. It is correct that injury no.3 can also be a result of a scuffle. The distance between injury no.2 and 4 was roughly about 10 to 15 cms. All the three injury were on the left side of the back. It is correct that possibility cannot be ruled out that injury no.3 and 4 caused by twisting of hand of the person holding knife by other person to snatch the knife.”

42. Since there was a verbal altercation in which the deceased had challenged the appellant by saying “Yadi Tumne Meri Behan Ke Taraf Dekha To Achha Nahi Hoga” and the appellant had retorted stating “Yadi Tu Mere Beech Me Aayega To Tera Kaam Tamam Kar Dunga” reflects that they must have been facing each other at the time. It is

inconvincible that this verbal duet was going on when the appellant was looking at the back of the deceased and the deceased was looking not towards the appellant facing him and rather facing in some other direction. In these circumstances the injury inflicted in the back of the deceased must be on account of scuffle in which the deceased suffered the injuries on his back which proved to be fatal. In the present scenario, considering the testimonies of Sh.Bir Singh PW-1 and Sh.Shanti Lal PW-2 and the mother of the deceased Ramwati PW-7 it cannot be held that no undue advantage of the situation was taken by the appellant. The verbal altercation and stabbing which took place in the market was rather over within a short time whereafter the appellant/ accused ran from the place of incident in a hurry and threw the knife in the khatta nearby. The incident as has happened cannot be termed to be unusual nor can it be inferred that the appellant had acted in a cruel manner.

43. The defense put up by the appellant that the deceased had brought the knife and had come with another person cannot be inferred and believed on the basis of cogent evidence by PW-1 Bir Singh and PW-2 Sh.Shanti Lal. PW-1 had very categorically deposed that the appellant had taken out the knife from his right pant pocket which version was also supported by PW-2 Sh.Shanti Lal who also had categorically

deposed that the accused/appellant took out a knife from his right pant pocket and had given the blows to the deceased.

44. The other relevant factor for applicability of 4th exception is that the fight must have been with the person killed. Though “fight” occurring in exception 4 is not defined in IPC, however, it cannot be denied that it has to be between the two persons. The utterances made by the deceased to the appellant and the appellant to the deceased and thereafter stabbing will constitute fight in the facts and circumstances in which the deceased Shyam Bir died and consequently another factor to bring the incident under 4th exception of Section 300 of IPC also cannot be ruled out.

45. Another factor which is relevant is that in the fight which ensues on account of heat of passion there must not be enough time for passion to cool down. In the present case the appellant and the deceased had worked themselves into a fiery state on account of the verbal altercation and consequently this cannot be held that there was ample time for the appellant and the deceased to cool down. Taking all the facts into consideration on the basis of the testimonies of various witnesses and other documents this Court has no doubt in inferring that the 4th exception to Section 300 of IPC would cover the facts of the present case.

46. Therefore, considering the factual position and the reasons as discussed hereinabove in the background of the legal principles the inevitable inference is that the case is not covered under Section 302 of IPC and the ingredients necessary to bring in application of Exception 4 to Section 300 IPC are present.

47 Consequently, the conviction of the appellant is altered to Section 304 Part I of IPC and custodial sentence of the appellant is also modified from life sentence to 10 years of sentence which would meet the ends of justice. The appeal is, therefore, allowed to the extent as indicated hereinabove. The appellant in the circumstances shall be entitled to be set free on completion of 10 years of custodial sentence, if not required in any other case. The sentence regarding the fine imposed by the Sessions Court is however, upheld. The fine if not paid be also paid by the appellant and in default to undergo imprisonment as ordered by Session Court.

ANIL KUMAR J.

March 18th , 2011
'vk'

V.K.SHALI J