

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

**RESERVED ON: 24.05.2011
PRONOUNCED ON: 31.05.2011**

+ **CRIMINAL APPEAL NO. 31/2011**

SAGAR @ GYANENDER Appellant
Through: Ms. Sahila Lamba, Advocate.

versus

STATE Respondent
Through: Mr. Lovkesh Sawhney, APP.

**CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE G.P. MITTAL**

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

MR. JUSTICE S.RAVINDRA BHAT

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1. This judgment would dispose of an appeal directed against the judgment and order of the learned Additional Sessions Judge dated 19.04.2010 in SC No.64/2008. By the impugned judgment, the Trial Court convicted the appellant for the offences punishable under Section 302 IPC. The appellant was sentenced to undergo imprisonment for life with a fine of Rs.10,000/- in default of which he was to undergo rigorous imprisonment for three months.

2. The prosecution's case is that at about 8.40 PM on 23.12.2007, a PCR Constable- PW-9- received information regarding a stabbing incident at Gali No.8, Kanti Nagar, which was duly recorded in the form Ex.PW-9/A. The police reached the spot and gathered that the injured has been taken to the G.T.B. Hospital. The injured (Ashok Kumar "the deceased") was declared as dead in the MLC prepared at 9:40 PM. That document was exhibited in the trial as Ex.PW-25/D.

The sole eye witness was deceased's uncle; his statement was recorded at 11:40 PM (Ex.PW-2/A); the FIR was later registered at 12:10 AM. PW-2 stated that he used to reside at the place where the incident occurred and worked in a jeans manufacturing unit at West Kanti Nagar. His nephew, the deceased, lived in the same premises and used to work in another factory in the same street. Ashok Kumar was involved in a quarrel, a few months before the incident, with one Shakti (arrayed as co-accused in the present case, but since he was a juvenile, sent for trial under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000). Shakti used to reside in Gali No.11, West Kanti Nagar. In that (previous) incident, Shakti had sustained injuries; the matter was compromised on that occasion. PW-2 further narrated that Shakti had later threatened the deceased once or twice about wrecking revenge. PW-2 mentioned about the incident which occurred on 23.12.2007 when Shakti, along with an accomplice went to the premises. Shakti allegedly caught hold of the deceased from the back, while his companion, i.e., the present appellant gave a knife blow to the deceased, who collapsed. Thereafter, the appellant and Shakti fled the spot.

3. On the basis of the PW -2's statement, the FIR was registered and the matter was referred for investigation; PW-22 reached the spot and prepared a site plan Ex.PW-22/A. The scene of occurrence was photographed; the photos were produced during the trial as Ex.PW-14/1 to Ex.PW-14/3. Shakti was allegedly arrested by the PW-22 with the help of SI Rajiv Kumar, PW-19 and another Constable PW-17. He led the police party to a place near Shyam Lal College from where the appellant was arrested by memo Ex.PW-17/A. On the basis of the appellant's disclosure statement Ex.PW-2/D, a knife, Ex.P.1 was recovered and sealed which was recorded by memo Ex.PW-2/G. The police prepared inquest papers PW-22/B to PW-22/D and sent the body for autopsy. The autopsy surgeon was not available during the trial and the post mortem report was proved by another doctor PW-20. The accused was charged with having committed the offences; he pleaded not guilty and claimed trial. Shakti was sent to trial by the Juvenile Justice Board.

4. During the trial, the prosecution examined 25 witnesses and also produced several exhibits. On consideration of these, the Trial Court concluded that the appellant was guilty as charged and handed down the sentence noticed in the earlier part of this judgment.

5. Ms. Sahila Lamba, learned counsel for the appellant argued that the entire prosecution version which culminated in the findings of guilt against the appellant hinged on the sole eye

witnesses' testimony of PW-2, the deceased's uncle. It was urged that the said eye witness's testimony could not have been relied upon since he was untrustworthy. It was submitted that if one compares the injury inflicted on the deceased, which find corroboration in the postmortem report (Ex.PW-20/A which mentioned about the incised stab wound present on the "*right side lower chest placed obliquely*") with the eye witnesses testimony of PW-2 who too stated about the injury being sustained by the appellant, the contradiction would become obvious. Learned counsel argued that if, in fact, the incident had been truthfully narrated, there was no reason why the appellant should have suffered an injury on his left palm, which was spoken to by the witness and also corroborated by MLC-Ex.18/A. It was further urged that the first information or intimation received by the police was at 8:40 PM - Ex.PW-17/A mentioned about a quarrel in the premises. However, the case made out by the prosecution was one of unprovoked attack upon the deceased.

6. It was urged that the prosecution had not explained why it delayed recording of the FIR. PW-2's testimony was that incident occurred at 7:30 PM; the intimation of the incident was given to the police at 8:40 PM through phone - mentioned in Ex.PW-9/A. The testimony of PW-8 was that the police reached the hospital at 9:30 PM. Even though, the MLC recorded at around 9:40 PM stated that the deceased had been brought dead, the police recorded the PW-2's statement only at 11:40 PM and finally the FIR was registered at 12:10 AM. Counsel urged that this delay of 4½ hours was inexplicable and prosecution preferred no argument on this. Contending that the recording of the delayed information report is a highly suspicious circumstances, learned counsel urged that this assume significance if one tests the credibility of PW-2's deposition which contains several gaps. It is further submitted that the matter gets compounded if one considers that PW-1 Babloo who was informed by PW-2 about the stabbing incident at 7:30 PM and in fact who allegedly intimated the police from a PCO and even accompanied PW-2 to the hospital with the deceased, did not even inform about the assailant's identity. Learned counsel submitted that there was no explanation why PW-2 delayed taking the deceased to the hospital. All indications were that the injured person was taken to the hospital and declared dead at 9:40 PM. The occurrence took place at 7:30 PM according to PW-1 & PW-2. However, the prosecution version of receipt of intimation by the police is at 8:40 PM. If all these are taken into consideration, the explanation given by the police that he was trying to save

the deceased from injury and, therefore, sustained a wound on his left palm is credible and reasonable.

7. It was submitted that the recovery of the knife Ex.P-1 could not be believed for the reason that it was not witnessed by any member of the public; the only witness was PW-2 who was interested in the outcome of the case, being the deceased's uncle. Furthermore, the alleged weapon of incident, a 27 cm long knife was recovered from a public place. There was no corroboration by the Forensic Science Laboratory about the blood stains on the knife matching the deceased's blood group.

8. It was argued that even if the facts were to be held as proved by the prosecution, a careful reading of the PCR intimation Ex.PW-9/A which mentioned about quarrel and beating, reported by PW-1 and the injury found on the appellant's left palm, which was established by his MLC Ex.PW-18/A, pointed to a sudden quarrel. It was submitted that only motive alleged on the part of the assailant was Shakti's desire for revenge. So far as the appellant is concerned, the prosecution admittedly did not allege any motive. Therefore, if there indeed was a quarrel and the deceased received a knife blow on the lower part of the right side of his chest, the appellant's explanation that he was trying to save the injured was reasonable and could not be ruled out. In these circumstances, argued the learned counsel, the case fell within the four corners of the fourth exception of Section-300 which clarifies that such attacks- if they lead to death as a result of injuries caused during quarrel, would amount to culpable homicide but not murder. Learned counsel relied upon several decisions i.e. *Tholan v. State of Tamilnadu*, 1984 (2) SCC 133; *Dashrath Singh v. State of U.P.*, 2004 (7) SCC 408, *Kulwant Singh v. State of Punjab*, 1981 (4) SCC 245, *Kashi Ram v. State of M.P.* 2002 (1) SCC 71 and the judgment of the Division Bench of this Court in *Chamela v. GNCTD* (Crl. A. No.545/2004, decided on 13.04.2010).

9. Mr. Lovkesh Sawhney, learned APP urged that the eye witnesses testimony of PW-2 was credible and not challenged in material particulars. The witnesses consistently maintained that a quarrel had taken place between the Shakti and the deceased a few months prior to the incident; Shakti had even threatened harm in order to wreck vengeance. The sequence of events whereby the appellant accompanied Shakti; proceeded to give knife blow to the deceased when Shakti held or restrained him; the assailants later fleeing from the spot, and the description of the injury, found corroboration by the fact that even the injury suffered by the appellant during the course of his attack on the deceased was noticed and spoken to by PW-2.

10. It was submitted that too much cannot be made about the description of the attack given in the earliest intimation Ex.PW-9/A since concededly PW-1 who was not an eye witness called the police. It was urged that mention of the time (of the attack) as 7:30 PM cannot be pin down with exactitude since witnesses cannot be expected to note the precise time when such attack occurs. There would also be an approximation and the time could well have been about 8:00 PM. So if such was the case, the intimation to the police at 8:40 PM, the time taken to reach the hospital and the Doctor's determination that the injured was brought dead, leading to mental trauma and shock experienced by the relatives i.e. PW-2 had to be also taken into consideration. Therefore, the recording of PW-2's statement under Section-161 Cr.P.C. at 11:40 PM and the subsequent registration of the FIR at 12:10 AM which clearly mentioned the names of Shakti and the present appellant, are not only credible but actually established the correct sequence of events.

11. Learned counsel urged that there was no question of any sudden quarrel or provocation because according to the PW-2's deposition, previous incident had ended into compromise even though Shakti had suffered a worst of the attack by the deceased. However, Shakti nurtured a grudge and even threatened the deceased once or twice. The appellant who was Shakti's friend or accomplice did not offer any explanation for his presence at the site or how the quarrel, if any, allegedly took place. His statement under Section-313 Cr. PC, established his presence. If indeed, he was trying to save the deceased from injury and had sustained a palm injury, it was necessary for him to give the explanation or lead evidence. His silence in this regard was significant and the Court correctly inferred that his intention as well as that of Shakti in meeting the deceased in the latter's premises with a knife was with the motive of killing him. The nature of weapon and the kind of injury inflicted upon the deceased was such as to rule out every possibility of applicability of Section-300 Exception 4. Learned counsel distinguished the judgments relied upon by the appellant and urged the Court to maintain the conviction recorded in the impugned judgment.

12. There is no doubt that a prosecution is under a duty to record or register the first information report at the earliest point, to avoid embellishment. In *Thulika Kali v. State of Tamil Nadu*, (1972) 3 SCC 393, the Supreme Court held that the FIR is an extremely vital and valuable

piece of evidence for the purpose corroborating the oral evidence adduced at the trial. The importance of the report, stated the court

“can hardly be overestimated from the stand point of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed the names of the actual culprits and the part played by them as well as the names of eye-witness present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought...”

It is evident from the above narration of facts that the prosecution alleged about the incident having occurred at 07.30 pm. PW-1 corroborated the version of PW-2 in this regard. PW-9/A is the earliest PCR intimation, received by the police – it was at 08.40 pm. The testimony of PW-1 would disclose that he informed the police. PW-8 deposed that the police reached hospital at 09.30 PM. The FIR records that the incident took-place at 07.30 PM; the FIR was registered at 12.10 AM, after the statement of PW-2 was recorded. The Postmortem Report (Ex. 20/A) states that the deceased was declared “Brought Dead” on 23.12.2007 at 09.40 pm. The Postmortem started at 01.05 pm; it stated that the approximate time of death was about 2/3rd of a day (i.e. about 16 hours). If all these facts are taken into consideration, it would be apparent that all indications are that the death occurred at 10.00 PM, The recording of PW-2’s statement was at 11.40 PM. The registration of FIR was at 12.10 PM. In these circumstances, there is no unreasonable delay in recording the FIR so as to raise any suspicion about embellishment or introduction of coloured version.

13. Turning next to the appellant’s objection about the findings being untenable, being based on the sole testimony of PW-2, while there can be no doubt that the witness was related to the deceased, that fact itself is insufficient to exclude his testimony. Consistently, in decisions from *Dalip Singh v. State of Punjab*, AIR 1953 SC 364, *Lehna vs. State of Haryana*, (2002) 3 SCC 76, and *Ashok Kumar Chaudhary v State of Bihar* 2008 (114) Cr. LJ 3030 (SC) the Supreme Court while rejecting a similar contention by the convicted accused, in respect of the deceased’s relatives’ testimony held that even if there was some hostility between the accused and the family members of the deceased (who had deposed against the accused during the trial) that would not be a ground to reject their deposition since it is inconceivable that they would shield

the actual culprit and falsely implicate an innocent person. The people present at a crime scene are not witnesses by choice. The prosecution has to present witnesses who saw the alleged incident and can depose about it. That, in many circumstances, the witnesses turn-out to be related to the deceased or victim, someone connected to her (or him), cannot be a factor to discredit their version. The Court has a duty to their testimony by applying the same standard, i.e. of credibility and trustworthiness. PW-2 speaks about a previous fight between the accused Shakti and the deceased, in which he (Shakti) had been beaten-up. He also speaks about Shakti threatening the deceased with dire consequences and that he would take revenge. There is no effective cross-examination by the appellant about these statements. Further, speaking about the incident, PW-2 clearly testified that at 07.30 PM, when he was sitting with the deceased, in his room, the Appellant, along with Shakti reached there. Shakti pointed at the deceased and told the appellant that he ought to be finished that day and caught hold of the deceased. The appellant stabbed him with a knife on the chest. PW-2 also added that the appellant sustained injuries on his left hand. The deceased fell down. PW-2 laid him on a cot outside the room, brought an auto-rickshaw and took the injured Ashok to GTB Hospital with Babloo, PW-1. PW-1 also corroborates this. He also stated that the police were informed about the incident. This fact finds corroboration in the PCR Form recorded as PW-9/A. As regards the previous incident, there was no effective cross-examination except to elicit that no police complaint had been made by the deceased against Ashok. He explained why he could not intervene, stating that he feared being stabbed. PW-2 further acknowledged that the appellant had no past enmity with the deceased. Having regard to the totality of these circumstances, the attempts of the appellant's counsel to impeach the credibility of PW-2, in the opinion of the Court, are insubstantial. He clearly deposed being alone with the deceased in the room when both the assailants went there and attacked. He deposed that the appellant had no history of past enmity with the deceased; equally, he mentioned that the appellant sustained injury. The latter fact finds corroboration in the MLC, Ex. PW-18/A. If the attempt of PW-2 was to falsely implicate anyone, he could easily have attributed a motive to the appellant which he did not. Having regard to these overall circumstances and the reasonable proximity of time within which the FIR was registered, the Court is of the opinion that the PW-2's testimony is credible and reliable.

14. As far as the recovery of the knife is concerned, the only independent eyewitness in this regard is PW-2. The Trial Court in para 41 of its judgment, in this regard, stated that recovery of knife, Ex. PW-1 at the instance of appellant, might be in doubt.

15. It would be relevant, at this stage, to examine the nature of the injury found by the Doctor, on the deceased. The Postmortem Report, Ex. PW-20/A, described the injury as an incised stab placed on the right-side of the lower chest, placed obliquely. The Upper medial angle of the injury was sharp and present 4.5 cms lateral to the midline and 14 cm below a line joining both the nipples. The lower lateral angle was blunt and present 6.5 cm from the midline and 16.5 cms below level of right nipple. The dimensions of the wound were 3cms x 0.2 cm x 13 cm with upper medial end showing a tailing of 0.3 cm length. The wound went through skin cuts through the coastal margin at the level of 8th rib and entered the parietal cavity. It perforated the liver on the anterior aspect. The doctor's opinion was that the cause of death was hemorrhagic shock due to the injury, sufficient to cause death in the ordinary cause of nature.

16. The evidence of PW-2 establishes that it was Shakti and not the appellant, who nursed a grudge against the deceased. The previous quarrel between the two of them was settled. Shakti, nevertheless, allegedly held-out threats against the deceased. If one takes into account the circumstance that both PW-1 and 2 mentioned the time of attack as 7.30 PM, and further that the deceased was inflicted with a single knife blow, after which the accused fled the spot, the time taken in informing the police – (the earliest intimation being at 08.40 PM), is not sufficiently explained. PW-2 only stated that after the attack the deceased fell-down and he lifted him and kept him on a cot. In such circumstances, the effort of the relatives of the victim of the attack would be to first rush him to the hospital. There is a delay of almost two hours in this regard. If this delay is seen along with the intimation made to the police at 08.40 PM, the possibility of the attack being the culmination of a fight cannot be ruled-out. While the homicidal nature of the injury and the attack cannot be doubted, equally, there is no explanation forthcoming why the appellant had sustained an injury on the left palm. The prosecution's case is that the knife, Ex. P-1 was wielded to inflict the injury. Ex. PW-21/B is the sketch of the alleged weapon of offence; the blade of the knife is 15.9 cm long. The hilt or handle is 11.2 cm. The depth of the injury, according to the Postmortem Report is 13 cm. Having regard to such a weapon, which was wielded on the right-side chest of the deceased (the details of how the attack took place), the palm injury of the appellant assumes some significance. In the decision reported as *Ram Pat &*

Ors. v. State of Haryana 2009 (7) SCC 614; *Hari v. State of Maharashtra* 2009 (11) SCC 96 and *Lakshmi Singh & Ors. v. State of Bihar* 1976 (4) SCC 394, it was held that the prosecution has a duty to the Court to explain the injuries of an accused and that absence of such explanation assumes importance about the fullness or correctness of the version presented to the Court. Having regard to the nature of this injury, the time taken to intimate the police (1 hour) and the time taken to reach the hospital (2 hours), there is an element of uncertainty about whether the assault was entirely described by PW-2 or whether something preceded it.

17. There can be no universal rule that infliction of a single knife blow would or would not attract Section 302 IPC. It depends on the manner in which the blow is inflicted and the surrounding circumstances. In this case, the appellant has made an alternative submission that the rulings in *Tholan v. State of Tamil Nadu* 1984 (2) SCC 133; *Dashrath Singh v. State of U.P.* 2004 (7) SCC 408; *Kulwant Rai v. State of Punjab* 1981 (4) SCC 245; *Kashiram v. State of M.P.* 2002 (1) SCC 71 and *Chamela v. Govt. of NCT* (Crl. A. No. 545/2004 dated 13.04.2010) are applicable. In *Tholan (supra)*, while converting the conviction for murder into one under Section 304 Part-II IPC, in a case involving one knife-blow, the Supreme Court held as follows:

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9. *Learned Counsel for the appellant contended that having regard to the genesis of the occurrence and the surrounding circumstances and the fact that one blow with a knife was given which happened to land on the chest it cannot be said with reasonable certainty that appellant intended to commit murder of deceased Sampat or appellant intended to cause the particular injury and the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.*

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12. *It is equally not in dispute that appellant gave only one blow with a knife. Appellant had no quarrel or dispute with deceased Sampat. It is not shown that deceased Sampat had anything to do with the chit organised by K.G. Rajan. No malice has been alleged to have been entertained by the accused towards deceased Sampat. The incident occurred on the spur of the moment. It appears that the house of the deceased Sampat was somewhere near the house in which the organisers or at least one of them was residing. Appellant had his dispute and grievance with the organisers of the chit. It is the prosecution case that accused abused organisers of the chit. Deceased Sampat is not shown to be the organiser of the chit. Probably when the deceased Sampat told the accused not to misbehave in the presence of ladies and not to use vulgar and filthy language the appellant*

retorted by questioning the authority of Sampat to ask him to leave the place. Presence of Sampat is wholly accidental. Altercation with Sampat was on the spur of the moment. Even the meeting was accidental. There arose a situation in which appellant probably misguided by his own egocentric nature objected as to why Sampat should ask him to leave the place and in this background he gave one blow with a knife which landed on the right side chest of the deceased, which has proved fatal. Could the appellant be said to have committed murder! In other words, whether Part I or Part III of Section [300](#), I.P.C. would be attracted in the facts of this case. Even Mr. Rangam learned Counsel for the State of Tamil Nadu could not very seriously contend that the appellant intended to commit murder of Sampat. His submission was that at any rate appellant when he wielded a weapon like a knife and gave a blow on the chest, a vital part of the body, must have intended to cause that particular injury and this injury is objectively found by the medical evidence to be fatal and therefore Part III of Section [300](#) would be attracted. On this aspect, the decisions are legion and it is not necessary to recapitulate them here merely to cover idle parade of familiar knowledge. One can profitably refer to Jagrup Singh v. State of Haryana AIR 1981 Randhir Singh v. State of Punjab AIR 1982 ; Kulwant Rai v. State of Punjab AIR 1982 and Hari Ram v. State of Haryana AIR 1983. To this list two more cases can be added Jagtar Singh v. State of Punjab 1983 Cri LJ 852 and Ram Sunder v. State of U.P. Crl. A. No. 555/83 decided on 24-10-83. Having regard to the ratio of each of these decisions, we are satisfied that even if exception I is not attracted the requisite intention cannot be attributed to the appellant. But in the circumstances herein discussed he wielded a weapon like a knife and therefore he can be attributed with the knowledge that he was likely to cause an injury which was likely to cause death. In such a situation he would be guilty of committing an offence under Section 304 Part II of the Penal Code. Having regard to the circumstances of the case a sentence of 5 years would be quite adequate.

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18. In Kulwant Rai (*supra*), the Court observed that:

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3. When the matter was before the High Court it was strenuously urged that in the circumstances of the case part I of Section 300 would not be attracted because it cannot be said that the accused had the intention to commit the murder of the deceased. In fact, that is conceded. More often, a suggestion is made that the case would be covered by part 3 of Section 300 Penal Code in that not only the accused intended to inflict that particular injury but the injury intended to be inflicted was by objective medical test found to be sufficient in the ordinary course of nature to cause death. The question is in the circumstances in which the offence came to be committed, could it ever be said that the accused intended to inflict that injury which proved to be fatal. To repeat, there was an altercation.

There was no premeditation. It was something like hit and run. In such a case, part 3 of Section [300](#) would not be attracted because it cannot be said that the accused intended to inflict that particular injury which was ultimately found to have been inflicted. In the circumstances herein discussed, it would appear that the accused inflicted an injury which he knew to be -likely to cause death and the case would accordingly fall under Section [304](#) Part II Penal Code.

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19. Likewise, in *Dashrath Singh (supra)*, the Supreme Court held as follows:

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24. Firstly, it must be noted that the intention to cause the death of Pratap Singh cannot be imputed to the accused Raja Ram. Apart from the finding of both the Courts that the common object of the unlawful assembly was not to kill Pratap Singh or any other member of his family but only to cause hurt or apply criminal force in order to desist them from asserting the rights over the disputed site, one more circumstance that rules out the intention on the part or any of the accused to kill Pratap Singh is that after the single blow inflicted on the victim with the kanta, there was no further move to attack him. PW1 made this clear in his deposition. If Raja Ram intended to kill him, he would not have stopped at injuring him once only. Still, the question remains whether the offensive act done by the appellant Raja Ram falls within clause thirdly of Section 300. That the appellant intended to cause bodily injury to the victim by striking him on his head with a sharp-edged weapon the appellant was carrying cannot be denied in view of the sequence of events deposed to by PWs 1 to 4. From the medical evidence of PWs 6 & 8 coupled with the magnitude of the injury caused on head with a dangerous weapon, it can be presumed that the injury which was inflicted and intended to be inflicted is sufficient in the ordinary course of nature to cause death. PW 8 who performed the surgery on 13.8.1977 noted the pre-operative diagnosis on Exhibit ka-9 as follows:

"Right fronto-parietal infected compound commutated fracture of skull with brain heriniates, underneath: brain abscess and cerebrates with heriniation."

25. He prescribed post-operative treatment. PW 8 stated that the death was on account of the head injury which caused brain abscess and such injury could lead to the occurrence of death in the ordinary course of nature. The evidence of PW 8 leaves no doubt that the skull and brain injury caused to the victim was sufficient in the ordinary course of nature to cause death. PW6 who attended on the victim on the day of occurrence itself noticed the incised wound of 15 cm x 5 cm x brain tissue deep found on the head of the patient. He stated that the injury was appearing to be dangerous to life and the injury must have been inflicted by a sharp-edged object thrust with sufficient force.

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20. *Kashiram (supra)* relied upon by the appellant was really in the context of a plea of self-defence.

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Though Section 105 of the Evidence Act enacts a rule regarding burden of proof but it does not follow therefrom that the plea of private defence should be specifically taken and if not taken shall not be available to be considered though made out from the evidence available in the case. A plea of self defence can be taken by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused persons recorded under Section 313 Cr. P.C. or by adducing defence evidence. And, even if the plea is not introduced in any one of these three modes still it can be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case as held by this Court in Vijayee Singh's case (supra). It is basic criminal jurisprudence that an accused cannot be compelled to be examined as a witness and no adverse inference can be drawn against the defence merely because an accused person has chosen to abstain from the witness box.

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21. *Chamela (supra)*, a Division Bench ruling, was a case involving infliction of a single stab wound on the chest of the deceased. The quarrel in that case between two parties had taken place 10-15 days prior to the incident. The Division Bench ruled as follows:

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9. *As per the case set up by the prosecution, Ram Prasad was in jail when deceased Kunwar Pal had teased Chamela, wife of Ram Prasad. On being set free, 10-15 days prior to 28.9.2001, alleges the prosecution, Ram Prasad accompanied by Chamela, Raj Kumar and Narender Pal came to the jhuggi cluster along the railway line at Azadpur. The time was around 9:00 PM. On the exhortation of Chamela who allegedly said ‘meri bezati ka badla tab hoga jab iska kaam tamam kar do’, co-accused Raj Kumar and Narender caught hold of Kunwar Pal and facilitated Ram Prasad to inflict a single stab blow on the chest of Kunwar Pal, who died.*

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17. *As per the site plan the distance between spot ‘A’ and spot ‘C’ is about 40 meters. The distance between spot ‘C’ and spot ‘D’ is about 15 meters.*

18. *It is apparent that some racing and chasing has taken place, which has not been deposed to by the eye-witnesses.*

19. *It is thus apparent that the eye-witness account of what actually transpired has not come out with purity.*

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22. *Suffice would it be to state that it is very easy to falsely implicate somebody by alleging exhortation. Since the manner in which the offence has taken place as reflected in the site plan has not been stated through the eye-witness account we are of the opinion that Chamela should be entitled to some benefit as was extended to Narender and Raj Kumar. Thus, we hold that the evidence on record, at best, makes out the commission of an offence punishable under Section 304 (II) IPC read with Section 34 as far as even Chamela is concerned.*

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24. *If two people had caught the deceased and Ram Prasad assaulted the deceased, had the intention been to kill the deceased, surely, given the opportunity, Ram Prasad would have inflicted more than a single stab wound.*

25. *Infliction of a single stab wound though opportunity available was to stab much more, evidences that Ram Prasad's intention was to cause injury upon the deceased.*

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22. In the present case too, this Court is of the opinion that although PW-2 witnessed the event, his testimony mentioned the role of the appellants. PW-1 also corroborates it. Further PW-2 himself attributed no motive, yet, the time in rushing the injured Ashok to the hospital was about two hours from the incident. Furthermore, Shakti had been beaten by the deceased in the previous incident. The deceased had been threatened by Shakti. The Appellant admittedly had no motive against the deceased. The injuries on the Appellant's palm have not been explained. Read together with PW-9/A (which mentions about a quarrel) one can reasonably infer that something preceded the attack.

23. Having regard to the overall circumstances, the absence of motive and the possibility that there was a quarrel which escalated into a serious fight which finally resulted in PW-2 wielding a knife and causing the injury on the deceased, cannot be ruled-out. Here too, as in the decisions

noted above, the appellant had occasion to inflict more than one injury. He did not do so. Further, the appellant himself suffered a palm injury. Taking an overview of all these facts, it cannot be said that the appellant had the intention of causing injury that would have in the normal course of nature, resulted in a death. All indications are that the intention of causing such bodily injury as was likely to cause death.

24. In view of the above findings, the conviction of the appellant is altered to one under Section 304 Part-I and the sentence substituted to eight years' imprisonment. The appellant shall be entitled to the benefit of Section 428 Cr.PC as well as the period undergone by him post-conviction with remissions, if any.

25. The appeal is partly allowed in the above terms.

**S. RAVINDRA BHAT
(JUDGE)**

**G.P.MITTAL
(JUDGE)**

May 31, 2011
'vks/ajk'