

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

DATE OF DECISION: 24th MAY, 2013

+

CRL.A. No.897/2010

SANJEEV ALIAS SONU & BIRENDER @ BOYA ... Appellants
Through: Ms. Kamna Vohra, Adv.

Versus

STATE OF NCT OF DELHI Respondent
Through: Ms. Ritu Gauba, APP.

+

CRL.A. No.900/2010

YAD RAM & BABLOO ... Appellants
Through: Ms. Kamna Vohra, Adv.

Versus

STATE NCT OF DELHI Respondent
Through: Ms. Ritu Gauba, APP.

+

**CRL.A. No.487/2012, CRL.M(BAIL) 822/2012 &
CRL.M.A.5241/2012**

RAJIV ALIAS RAJU ... Appellant
Through: Ms. Kamna Vohra, Adv.

Versus

STATE Respondent
Through: Ms. Ritu Gauba, APP

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE V.K. SHALI

GITA MITTAL, I

Crl.A.897/2010 & 900/2010

1. These three appeals have been filed by the appellants assailing the judgment dated 28th May, 2010 arising out of the same incident whereby Yad Ram and Babloo (Appellants in Crl.App.900/2010) have been found guilty of commission of offences punishable under Section 302/34 of the Indian Penal Code while they have been acquitted of the charge of commission of offences punishable under Section 307/34 with which also they had been charged as well as the order of sentence dated 31st of May, 2010 whereby they have been sentenced to suffer imprisonment for life as well as payment of fine of Rs.5000/- each and in default of payment of fine, to suffer simple imprisonment for a period of six months each..

2. Sanjeev @ Sonu and Birender @ Boya (appellant in Crl.App.897/2010) also assail the judgment dated 28th of May, 2010 whereby they have been found guilty of commission of offences punishable under Section 307/34 of the Indian Penal Code as well as the order of sentence dated 31st of May, 2010 whereby they have been sentenced to undergo rigorous imprisonment for a period of four years each for commission of the offence punishable under Section 307/34 IPC

as well as payment of fine of Rs.2000/- each; in default of which they are required to undergo simple imprisonment for a period of six months each.

3. Rajiv @ Raju appellant in Crl.Appeal No.487/2012 was also arraigned for trial along with the other co-accused. He was admitted on bail on 24th May, 2005. However, he absconded thereafter when the trial was at the stage of recording his statement under Section 313 of the Cr.P.C. He was subsequently declared as a proclaimed offender by the trial court by an order dated 22nd December, 2008.

4. The trial was completed against accused Yad Ram, Babloo, Sanjeev @ Sonu, Birender @ Boya and Manju wife of Yad Ram. After considering the evidence and hearing the contentions of the parties, the trial court by order dated 28th May, 2010 convicted Yad Ram and Babloo under Section 302/34 IPC and acquitted them for commission of offences under Section 307/34 IPC. Virender @ Boya and Sanjeev @ Sonu though convicted under Section 307/34 IPC stand acquitted for offences under Section 302/34 IPC. Co-accused Manju (who is the wife of Yad Ram and sister of the other appellants) stood acquitted for all the charges for which she was tried.

5. During the course of hearing of these appeals, the factum of abscondance of Rajiv @ Raju was brought to the notice of this Court. An order was consequently passed by this court on 12th January, 2012, directing Sh. Hari Chand (who had stood surety for Rajiv @ Raju) and was present in the court was directed to ascertain the whereabouts of Rajiv @ Raju. The surety was also directed to produce Rajiv @ Raju. Pursuant to the order passed on 12th January, 2013, Rajiv @ Raju was rearrested on 25th February, 2013. He was thereafter produced before this court and by an order dated 28th February, 2012 directed to be produced before the concerned trial court on 2nd March, 2012.

6. After production before the trial court, Rajiv @ Raju stood trial from the stage of recording of his statement under Section 313 of the Cr.P.C. at which stage he had absconded. The charge was also amended under Section 302/34 and 307/34 IPC by the trial court on 3rd March, 2012. The trial court considered the evidence on record and heard the arguments of the learned counsel appearing for Rajiv @ Raju. By a judgment dated 27th March, 2012, the trial court held Rajiv @ Raju not guilty for offences under Section 302/34 and 307/34 IPC and acquitted him for the same. However, the trial court held him guilty for

commission of an offence under Section 324/34 IPC by the same judgment and Rajiv @ Raju was awarded a sentence for rigorous imprisonment of two years and fine of Rs.1,000/- and in default of payment of fine, simple imprisonment of one month by order of sentence dated 29th March, 2012. Rajiv @ Raju assailed the judgment dated 27th March, 2012 and order of sentence dated 29th March, 2012 by way of Crl.A.No.487/2012.

7. Inasmuch as the appeals lay a challenge to the judgments which relate to the same incident on the night of 25th February, 2004 and have been rendered on common evidence, the **three** appeals are taken up together for the purposes of consideration.

8. The proceedings in the case commenced upon a wireless message received by the police station Kotla Mubarakpur, Delhi at 11.39 p.m. on the 25th of February, 2004 which was recorded as DD No.21A (Exhibit PW16/A) to the effect that there had been a fight in House No.737, Bhagwan Gali, Gurudwara Road, Kotla Mubarakpur.

9. The details of the incident stand narrated in a statement (Exhibit PW1/A) attributed to Rizwan Khan, son of the deceased Mohd Rashid Ahmed Khan recorded by SI Fateh Singh (PW 16). Briefly summed up,

Rizwan Khan had disclosed that his deceased father Mohd Rashid Ahmed Khan was having an illicit relationship with Manju, wife of the appellant-Yad Ram - a tenant on the second floor of the building wherein the deceased was residing with his family on the ground floor. Kamrunisa (wife of the deceased) had commiserated with Yad Ram (Manju's husband) as well as her four brothers Babloo, Rajiv @ Raju, Sanjeev @ Sonu and Birender @ Boya about this illicit relationship in this regard and asked them to reason with Manju about the same. For this reason, Manju's relatives started nursing a vengeance against the family of Rizwan Khan and were frequently abusing and threatening them. On the 25th of February, 2004 at about 11.15 p.m., when the deceased and his family were at home, Yad Ram came to the courtyard of the building with an iron rod in his hand and started abusing Kamrunisa and her daughter and levelled unfounded allegations against them. Rizwan, along with his elder brother Imran, younger brother Ijaz, sister Kiran and parents went out into the courtyard. Manju also reached there and supported her husband in levelling false allegations against Rizwan's sister. All of them tried to reason with Yadram & Manju. At this, Manju called out to her four brothers (Babloo; Sanjeev@Sonu; Birender@Boya

and Rajiv@Raju) who lived on the first floor of the opposite house and exhorted them that this was a good occasion to finish these people. Manju grabbed his (Rizwan's) sister-Kiran's hair and started beating her. Yad Ram beat the deceased Mohd. Rashid Ahmed Khan giving fist blows, and also beat him with his leg as well as the iron rod. In the meantime, Babloo, Rajiv @ Raju, Sanjeev @ Sonu and Birender @ Boya (four brothers of Manju), came down to the courtyard wielding and waving knives. With one object, these persons stated that they would not leave them alive. Yad Ram held Mohd Rashid Ahmed Khan and Babloo attacked him on the neck with a knife. Sonu attacked Rizwan Khan from the front while Rajiv @ Raju and Birender @ Boya attacked Rizwan Khan's younger brother Ijaz with their knives. Manju threw his sister Kiran by her hair. Their father starting bleeding from the injury on his neck inflicted by Babloo's knife and fell near the cycles in the courtyard. At that time, a lot of people from the neighbourhood gathered. On seeing the crowd and taking advantage of the same, the assailants ran away from the spot. Rizwan Khan also suffered injury on his hand because of the knife attack and his father on the neck and brother Ijaz who was attacked with knives, suffered injury on his back

and on the back side of his right thigh. Rizwan Khan and his younger brother removed their father Mohd Rashed Ahmed Khan in a three wheeler vehicle to the All India Institute of Medical Sciencies. He was declared brought dead by the doctor in the hospital. MLC no.1928 was recorded at 11.42 p.m. regarding the same (Exhibit PW11/A).

10. SI Fateh Singh, PW-16 was posted on emergency duty on the intervening night of 25th and 26th February, 2004 at PS Kotla Mubarakpur. On receipt of DD-21A (Exhibit PW-16/A), SI Fateh Singh accompanied by Constables Satya Narain and Virender proceeded to the spot in House No.737 Bhagwan Gali, Gurudwara Road, Kotla Mubarakpur where they were informed that the injured had been shifted to the hospital. PW-9-Ct. Virender was left at the spot. PW 16-SI Fateh Singh accompanied by Ct. Satya Narayan (PW3), proceeded to the All India Institute of Medical Sciences ('AIIMS'). He collected the MLC of Mohd Rashid Khan and found Mohd Rizwan and Mohd Ijaz also injured at the hospital whose medical had also been conducted.

11. PW-16 moved an application seeking the doctor's opinion with regard to the fitness of the injured brothers. Upon the doctor declaring them fit for statement, he recorded the statement of Rizwan vide memo

PW-1/A gave his endorsement (Exhibit PW-16/B) thereon; prepared the rukka which was handed over to Constable Satya Narayan for registration of the FIR and intimation to the crime branch.

Based on this rukka, FIR No.86/2004 (Exhibit PW2/A) was registered on 26th February, 2004 under Sections 302/307/34 of the Indian Penal Code and Section 27 of the Arms Act at the police station Kotla Mubarakpur.

12. PW-16 SI Fateh Singh returned to the spot, where the crime team was already present. At the spot, the police lifted blood from four different places as well as from cycles which were standing near a tree at the spot; vide memo Exhibit PW9/A, a blood stained piece of earth; vide memo Exhibit PW9/B, one blood stained iron rod from the roof top of the house; vide memo Exhibit PW9/C, a blood stained curtain; vide memo Exhibit PW9/D, clothes of Mohd Rizwan ; vide memo Ex.PW9/E, blood stained t-shirt of Javed; vide memo Exhibit PW9/F; blood stained clothes of Ijaz and vide memo Exhibit PW9/G, clothes of Kamrunisha and Kehkhasa.

13. A post mortem was conducted on the body of deceased Md. Rashid Khan on 26th February, 2004 by Dr.Parthasarthi Pramanik who gave a detailed report dated 26th February, 2004.

14. At this stage during the investigation, information was received that the accused Yadram was present in the area and was arrested on 26th February, 2004. A disclosure statement given by him was recorded as (exhibit PW-16/C) and his personal search was conducted (Ex.PW 9/H). Yadram was found having injuries over his head and was sent to the hospital for his medical examination in custody with Constable Balbir. The other accused persons could not be traced.

15. During the course of the investigation, PW-5 SI Mahesh Kumar visited the place of occurrence, which was the open chowk in the Bhagwan Gali, Bhola Nagar, K.M. Pur on 5th March, 2004 and on the pointing out of PW-15 Imran, took rough notes and measurements based whereon he prepared the scaled site plan exhibit PW-5/A. The site plan shows the position of the place where the assailants attacked the deceased, Mohd. Rashid Khan; injured Rizwan Khan and his brother as well as the place where blood was found on the site; the position of the

cycles which had blood stains as well as the place where the blood stained iron rod was recovered.

16. On completion of the investigation, the police filed a chargesheet on 21st May, 2004 against Yadram (who had been arrested) while Surinder @ Babloo, Rajiv @ Raju, Sanjeev @ Sonu, Birender @ Boya (accused) and Manju were shown as absconding. The challan stated that the proceedings under Section 82/83 had been initiated against absconders. A perusal of the impugned judgment of the trial court would show that on 20th June, 2004, Surinder @ Babloo and Sanjeev @ Sonu were present in Court. They were arrested and their personal search was effected vide memo exhibit PW-18/A and exhibit PW-18/B.

17. Manju (wife of Yadram); Birender @ Boya & Rajiv @ Raju also surrendered on 24th June, 2004 and were taken into custody.

18. The learned trial judge framed the following charges on 28th September, 2004 against appellant Yad Ram for commission of the offence under Section 302/307/34 of the Indian Penal Code:-

“CHARGE

That on 25/2/04 at about 11.15 pm at courtyard of House No.737, Bhagwan Gali, Bholi Nagar, Kotla Mubarak Pur, New Delhi, you alongwith your co-accused Babloo, Rajiv, Sanjiv, Virender and Manju (all Pos) in furtherance of

your common intention and object committed murder of Md. Rashid Khan and thereby committed an offence punishable u/s 302 IPC r/w Section 34 IPC and within my cognizance.

Secondly, on the abovesaid date, time and place you alongwith your co-accused in furtherance of common intention of you all voluntarily caused injuries with knife on the person of Md. Azad with such intention and knowledge under such circumstances that if the death of said Md. Azad is caused you all will be guilty of murder and thereby committed an offence punishable u/s 307 IPC r/w Section 34 IPC.”

19. The charges were amended by an order dated 18th May, 2010 when the name of the co-accused Rajiv @ Raju was added.

20. Rajiv @ Raju appeared in the matter when the prosecution evidence was recorded. But on 20th of December, 2008, at the stage when his statement under Section 313 Cr.P.C. was to be recorded, he stopped appearing and was declared a proclaimed offender.

21. Apart from the account given by these witnesses, the prosecution has placed reliance on the medical legal cases of the deceased as well as PW1-Rizwan Khan; PW4-Mohd Ijaz and the post mortem report of the deceased.

22. With regard to the same incident, the prosecution has also proved the MLC of PW 1 Rizwan @ Kushu (Exhibit PW7/A recorded at 1 a.m.

on the 26th of February, 2004 by Dr. Parvez who has noted a lacerated wound on the right ring finger and index finger and opined that the injuries were simple in nature and inflicted with a blunt object. The prosecution has also proved the MLC of Aizaj/Ijaz @ Bholu recorded at 12.45 a.m. (Exhibit PW7/B) wherein the doctor has noted a punctured sharp wound on the back of the right thigh and on his back and opined that the injuries were simple in nature and inflicted with a sharp weapon. The prosecution has examined Dr. Parvez as PW 7 to prove the aforementioned MLCs.

23. The prosecution has also examined Dr. Tarun Jain as PW6 who was the radiologist at the All India Institute of Medical Sciences who examined the X-ray of Mohd Rizwan Khan @ Kushu and gave a report (Exhibit PW6/A) stating that there were no fractures on his person.

24. The report of the post-mortem conducted on the body of deceased Rashid Khan was filed on record. It is noteworthy that this post mortem report was filed by the prosecution but not proved in evidence by the prosecution. The prosecution evidence was closed on 31st January, 2008 and the matter was posted for recording of the statement of the accused/defence evidence on 22nd February, 2008. It appears that at this

stage, the prosecution realised that the post-mortem report had not been proved on record as is evident from the following proceedings of the trial court.

"22.02.08

Present : Addl.PP for the state.

Accused Manju, Virender and Rajiv present on bail with Ms. Manjeet Arya

Other accused in JC with counsels Ms. Manjet Arya

Ld Addl.PP states that post-mortem report could not be proved due to inadvertence. Ld counsel for the accused persons Ms Manjeet Arya has no objection if the post-mortem report is exhibited without formal proof.

In view of this post-mortem report of the deceased Rashid Ahmed is exhibited as PW PX2.

Statement of the accused persons under dictation. Not completed.

To come up for statement of accused/defence if any for 11.3.08.

Sd/-

ASJ/ND"

The post mortem report was thus marked Exhibit PX2.

25. The relevant extract of Exhibit PX reads as follows :-

"1. A stab wound of size 3.5cm x 3 cm, horizontally placed is present in the middle third of the lateral neck in the left side. It is 160 cm away from the left heel 7 cm away from left mastoid prominence, 4 cm from the midline and 23 cm from the top of the head. A track is established of length of 10 cm in downward and lateral direction piercing left sternocleido mastoid muscle and left jugular vein and puncturing left pleural cavity (upper part). The left pleural cavity is filled with blood and the left lung is collapsed. The upper and medical margins of the above mentioned stab wound is contused.

2. *An abrasion of size 2 cm x 1 cm in lateral side of left knee 30 cm from heel (left side).*

3. *An abrasion of size 3 cm x 1 cm in the outer aspect of middle third of the abdomen. It is 24 cm from left iliac crest 27 cm from shoulder top and 10 cm from the midline.*

Opinion : The cause of death in this case is haemorrhagic shock due to injury no.1 caused by sharp edged weapon which is sufficient to cause death in ordinary course of nature. Injury nos. 2 and 3 are caused by blunt force. All injuries are ante mortem in nature."

26. The prosecution produced 18 witnesses out of 22 witnesses cited by it. The case of the prosecution hinges primarily on the eye-witness testimony of six witnesses, which includes three sons of the deceased being, PW-1 Rizwan Khan; PW-4 Izaj Mohd. Khan; PW-15 Imran; his daughter PW-12 Kiran and widow PW-14 Smt Kamronissa as well as one stranger PW-17 Gaurav Gupta, who was residing in the area, a chance witness. The statements of the appellants in Crl.Appeal Nos.897 & 900/2010 were recorded under the provisions of Section 313 of the Code of Criminal Procedure in which they asserted that they have been falsely implicated in the case. These appellants chose to set up a defence and examined three witnesses, DW-1 Dinesh Kumar, DW-2 Smt. Suman and DW-3 Gulab in their defence.

27. After a careful consideration of the matter, the learned Trial Judge has passed the judgment dated 28th May, 2010 holding Yadram and

Babloo guilty of the offences punishable under Section 302/34 of the Indian Penal Code (IPC) and convicted them of the same. Yadram and Babloo were acquitted for commission of offences punishable under Section 307/34 IPC giving them the benefit of doubt. By the same judgment, Sanjeev @ Sonu and Birender @ Boya have been found guilty for commission of offences punishable under Section 307/34 IPC with which they were charged, while acquitting them of the charge for commission of offences punishable under Section 302/34 IPC. The court acquitted Manju of the charges of commission of the offence punishable under Section 302/307/34 IPC for which she was tried. The State has not challenged her acquittal or the acquittal of Sanjeev@Sonu and Birender@Boya for commission of offences punishable under Section 302/34 IPC.

28. The appellants Yad Ram, Babloo, Birender @ Boya and Sanjeev @ Sonu were heard on the point of sentence and by an order dated 31st May, 2010, the trial judge imposed the afore-noticed sentences upon them.

Conviction of Rajiv @ Raju

29. As noted above, by a separate judgment dated 27th March, 2012, Rajiv @ Raju has been held guilty for commission of an offence under Section 324/34 IPC and by an order of sentence of the same date, awarded rigorous imprisonment of two years and fine of Rs.1,000/-.

Challenge to testimonies - on the ground of contradictions in the statements

30. It is urged by Ms. Kamna Vohra, learned counsel for the appellants that the prosecution witnesses have contradicted themselves in all material particulars.

31. Learned counsel for the appellants has pointed out that the oral testimony of PW1 Mohd Rizwan contradicts the rukka Exhibit PW1/A as to the place where it was recorded is concerned. In his deposition in court, he has stated that the police recorded his statement at the spot that is the situs of the incident. However Exhibit PW1/A has recorded that the statement was recorded in the hospital. In his further cross examination, he has stated that the statement was recorded outside the hospital building.

32. We are unable to find any major contradiction between the statement given by PW 1 and the statement attributed to him as Exhibit

PW1/A. Human memory with regard to an incident, especially one
Crl.A. Nos.897/2010, 900/2010 & 487/2012

which must have been painful to recollect, suffers from such blurring. However, there is no material contradiction between the statement Exhibit PW1/A made by PW1 to the police and his deposition in court.

33. The challenge by Ms.Kamna Vohra, learned counsel for the appellants rests primarily on a close reading and examination of the testimony of the six eye-witnesses. It was urged by learned counsel for the appellants that the deposition of the six eye-witnesses in the instant case suffered from material contradictions and that they were not credible. It is urged that PW-17 Gaurav Gupta is a stock witness and his very presence at the spot was doubtful, and therefore his deposition with regard to the occurrence ought not to be relied. Learned counsel for the appellants urges that the testimony of eye-witnesses, PW-1, 4, 12, 14 and 15 would be motivated on account of their being close relatives of the deceased. It is urged that their testimony cannot be relied upon without corroboration in material particulars for this reason.

34. So far as the sequence of events is concerned, Exhibit PW1/A which records the statement of Mohd Rizwan Khan as to the efforts to reason with Yad Ram, stands corroborated by the statement of PW12 Kiran; PW 14 Smt. Kamrunisha, widow of the deceased. PW15 Imran,

son of deceased also refers to Mohd Rashid Khan trying to calm down accused Yad Ram. PW 12, 14 and 15 all refer to Yad Ram being under the influence of liquor and armed with a rod on the fateful day. PW 12, 14 and 15 referred to the exhortation by Manju while PW1 Mohd Rizwan has made a categorical statement that it was Yad Ram who had called out his brothers-in-laws with the exhortation that it was a good occasion to finish the other side.

35. The learned trial judge has disbelieved the case of the prosecution to the extent of the attribution of the role to Manju of calling her brothers and exhorting them to kill. It requires to be borne in mind that the occurrence took place in a crowded locality in the night time. While there were seven or more people from the family of the deceased and six accused persons all present in the confined space. In the melee which would have ensued, it is reasonably possible to be mistaken about the exhortation. However, in the given facts, nothing much would turn on the question of who gave the exhortation.

36. Ms. Kamna Vohra has also emphasised that the post mortem report of deceased Mohd Rashid Khan contradicts the statement of PW1 to the effect that Yad Ram had given an iron rod blow on the head of the

deceased. It is urged that no such injury is reported in the post mortem report.

37. The prosecution has claimed to have effected a seizure (Exhibit PW9/B) of an iron rod upon the disclosure made by accused Yad Ram. As per PW 9-Ct. Virender, the iron rod was lying inside one room occupied by accused Yad Ram. Be that as it may, apart from its recovery, the iron rod has not been connected by the prosecution to the injuries suffered by the deceased person. The charge against the appellants is that in furtherance of their common intention and object, they committed the murder of Mohd Rashid Khan by causing knife injuries. Even otherwise, there is no reference to an iron rod blow by Yad Ram to the deceased. If it had been, it is not implausible that the iron rod blow was not sufficient to cause physical injury to the deceased person, or for it to have left a mark on his person.

38. The appellants have vehemently challenged the presence of PW4 - Ijaz Khan. We find that it is not disputed that Ijaz Khan was a son of the deceased Mohd Rashid Khan. His presence in his residence in the night or the scene of occurrence, given the hour of the night when the incident took place is therefore natural. PW-1 Ijaz was also injured in the

incident. His MLC and injuries stand proved in the testimony of the doctor. However, even if the contention of learned counsel for the appellants to the effect that his presence at the spot is doubtful was to be accepted, the appellants have not been able to challenge the testimony of PW 1, 12 and 14 who were eye witnesses.

39. In this regard, the trial judge has carefully noticed that the testimonies of the prosecution witnesses with regard to the violence against them is corroborated by the injuries not only on the person of the deceased but also on PW-1 Rizwan Khan, PW-4 Ijaz Mohd. Khan, as mentioned in their MLCs exhibit PW-7/ A and 7/B.

40. It is noteworthy that with regard to the occurrence of the intervening night of 25th and 26th February, 2004, the court commenced recording of the deposition of PW-1 Rizwan Khan on 2nd May, 2005. The recording of his evidence did not end that day. As per the record, on 11th August, 2005 a fifty six page deposition of PW 1 was recorded. The testimony of PW-4 Ijaz Mohd. Khan was recorded on 12th September, 2006 and went on till 18th July, 2007, that is for almost ten months. The statement of PW-12 Kiran, daughter of the deceased was recorded on 21st July, 2006; PW-14 Smt. Kamrunisha was recorded on

12.9.2006; PW-15 Imran was recorded on 13th September, 2006, more than two years seven months after the incident.

41. The ability of the human mind to recollect events which have occurred even a few days prior varies from person to person. Passage of time has a definite and sombre effect on memories, especially those recollection whereof would be painful. The date when the occurrence took place is separated from the making of the deposition in the court of law by, not a few days or months, but by over a year. Human mind has a tendency to block out the unpleasant or painful events. It is also to be noted that the instant case is not concerned with one or two eye-witnesses but involves the testimony of six eye-witnesses to the occurrence, two of whom also received injuries on their person in the occurrence as is supported by the evidence of the doctor at AIIMS and their MLCs. Their testimony relates not only to injuries suffered by them but involves deposing about the traumatic and fatal injury to their father.

42. Ms.Kamna Vohra, learned counsel for the appellants has taken us carefully through the entire deposition of the eye-witnesses. Inconsistencies and contradictions pointed out by learned counsel for

the appellant in the testimonies of the eye witnesses are natural and would happen if different persons are asked to describe the same incident after passage of any length of time. The important aspect of the matter is that all the eye witnesses were categorical on Yad Ram holding the deceased while Babloo stabbed him. The injured persons also categorically named their assailants.

43. It is trite that contradictions in matters of detail does not impact the truthfulness of the witnesses. In the instant case, in our view, apart from minor matters of detail, Ms.Kamna Vohra, learned counsel for the appellants could not point out any contradictions in material particulars. The evidence of the witnesses stand corroborated in material particulars and it is not possible to hold that contradictions go to the very basis of the prosecution case in the instant case.

44. On the issue of contradictions in the deposition of witnesses, reference can usefully be made to the decision of the Supreme Court in the AIR 1986 SC ***Luxman Kumar vs. State***. The court has observed as follows:-

“43. xxx It is common human experience that different persons admittedly seeing an event give varying accounts of the same. That is because the perceptiveness

varies and a recount of the same incident is usually at variance to a considerable extent. Ordinarily, if several persons give the same account of an event, even with reference to minor details, the evidence is branded as parrot like and is considered to be the outcome of tutoring. Having read the evidence of these witnesses with great care, we are of the view that the same has the touch of intrinsic truth and the variations are within reasonable limits and the variations instead of providing the ground for rejection, add to the quality of being near to truth."

It has been held that identical testimonies without any kind of contradictions may render them suspect sometimes.

45. In the judgment of the Supreme Court reported at *AIR 1973 SC 262 Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra, Justice V.R. Krishna Iyer* made the following observations on evaluation of evidence of a witness which may not be found to be completely credible:-

"We must observe that even if a witness is not reliable, he need not be false and even if the Police have trumped up one witness or two or has embroidered the story to give a credible look to their case that cannot defeat justice if there is clear and unimpeachable evidence making out the guilt of the accused. Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

46. These very observations apply to the present case as well, though no improvements in deposition have been pointed out to us. We hold that the defence has not been able to shake the testimony of these witnesses in their cross-examination and that the testimonies stand corroborated in all material particulars.

47. Learned counsel for the appellant has also vehemently assailed the testimony of the witnesses on the ground that they are all family members of deceased Mohd Rashid Khan. It is urged that for this reason, their testimony needs to be closely scrutinised and in fact, given the nature of contradictions, deserves to be discarded.

48. So far as some of the eye-witnesses being close relatives of the deceased person is concerned, there is no absolute proposition that related witnesses must be disbelieved.

49. Ms. Ritu Gauba, learned APP has drawn our attention to the pronouncement of the Supreme Court in *(2010) 3 SCC (Cri) 211 Balaraje alias Trimbak vs. State of Maharashtra* and *(2009) 3 SCC (Cri) 1254 Hari vs State of Maharashtra*. In paras 29 to 31, the court dealt with a similar objection taken by the appellants against the prosecution. In this case, the court found that the evidence of the PWs 1 and 2 - who were

sons of the deceased and eye-witnesses to the incident as that of PW 8 (wife of PW 1) was consistent, categorical and unfolded the prosecution version. Their presence at the place of occurrence, which was within their house, was natural. After exercising due care and caution, considering the fact that they were related witnesses their evidence was found acceptable.

50. On the issue of witnesses who are related, reference may usefully be made to the judicial pronouncement authored by Vivian Bose, J reported at *AIR 1953 SC 364 Dalip Singh vs. State of Punjab* (at para 26 at pg 366) wherein the court had observed as follows :-

“26. ...Ordinarily, a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that here is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.”

This pronouncement was reiterated in *(1974) 3 SCC 698 : 1974 SCC (Cri) 222 Guli Chand vs. State of Rajasthan*.

51. The Constitution Bench pronouncement of the Supreme Court in *AIR 1965 SC 202 Masalti vs. State of U.P.* approved the decision in *Dalip Singh (supra)* observing as follows :-

“14. ...But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.”

52. So far as an incident which has occurred inside a dwelling house is concerned, in *(1999) 3 SCC 507 : 1999 SCC (Cri) 436 State of Rajasthan vs. Teja Ram*, Thomas, J speaking for the Bench observed that “*over insistence on witnesses having no relation with the victim will result in the criminal justice system going awry*”. In para 20 at page 513, the court observed that “*in such an incident , the most natural witnesses would be the*

inmates of the house and in such a situation "it is unpragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen anything". The learned Judge further clarified; "The prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighborhood may be replete with other residents also."

53. *Dalip Singh (supra)* was extracted again in the judgment reported at (2007) 1 SCC 699 : (2007) 1 SCC (Cri) 425 *Salim Sahab vs State of M.P.* and in (2008) 15 SCC 65 : AIR 2009 SC 157 *Bur Singh vs State of Punjab* (para 7).

It needs no elaboration therefore, that with regard to an occurrence inside a dwelling house, relatives may be the only witnesses.

54. So far as the contention that the relatives in the present case would be partisan and biased, because of their antagonism against Manju and her doings, we find that in (2010) 3 SCC (Cri) 211 *Balraje alias Trimbak vs. State of Maharashtra (supra)*, on a similar objection the court in para 30 has stated as follows :-

"30. it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The Court would be required to analyse the

evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence.”

55. This aspect was also considered by the Supreme Court in the judgment reported at (2009) 3 SCC (Cri) 1254 *Hari vs State of Maharashtra*. The court held that relationship by itself cannot be a ground to discard their evidence. In this case, the evidence of the eye witnesses who were sons and wife of the deceased was found consistent. On the aspect of eye witnesses who was alleged to be interested and inimically disposed towards the accused. The relevant portion of the judgment is reproduced hereunder:-

“24. On the question of appreciating the evidence of witnesses, who are related, this court in *Dalip Singh vs. State of Punjab*, AIR 1953 SC 364 spoke very eloquently through Vivian Bose, J. In that case the learned Judge clearly laid down the law relating to appreciation of evidence by relations with such lucidity that it deserves to be quoted:-

“26. ... Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a

foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.”

The principle laid down in the aforesaid passage has been subsequently reiterated by this Court in *Gulli Chand vs. State of Rajasthan*, (1974) 3 SCC 698. Beg, J., as His Lordship then was, quoted the said passage in para 11 of the said report.

25. The said principle was also followed by a Constitution Bench of this Court in *Masalti vs. State of U.P.*, AIR 1965 SC 202. The Constitution Bench speaking through Gajendragadkar, C.J., approved the decision in *Dalip Singh* (Supra) and held as under :

“14. ... But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.”

56. The record of the case also shows that the testimony of the only eye witness to the incident who is not related to the injured stands corroborated by the statement of PW-1 Rizwan Khan (exhibit PW-1/A), which was recorded by the police resulting in the registration of the FIR. The learned Trial Judge also found that there was no material contradiction or deviation in his testimony on oath in court from the contents of the exhibit PW-1/A. Learned counsel for the appellants was unable to point out any contradiction in his statements even before us. The trial court has also found that all the witnesses were honest and truthful and their testimonies stand corroborated not only by the contents of exhibit (PW-1/A) but by the unshaken deposition of PW-17 Gaurav Gupta who was also residing in the area.

57. In the instant case, two of the related eye witnesses have suffered injuries as well. The principles laid down in these judicial precedents squarely apply to the present case. Therefore, the objection to the testimony of the sons, widow and daughter of the deceased is of no legal significance given the clear deposition by these witnesses as to the manner in which the events unfolded themselves and the occurrence which took place.

58. The objection on behalf of the appellants resting on relationship to the deceased thus is untenable and hereby rejected.

Failure to explain injuries on accused person

59. Ms.Kamna Vohra, learned counsel for the appellants has urged this court to disbelieve the prosecution also for the reason that Yadram had suffered serious injuries on his head and that the prosecution had withheld the MLC of Yadram deliberately and with mala fide intention.

60. It is also urged that in the light of the omission of the prosecution to explain the injuries on accused Yad Ram, the case against Yad Ram has failed. The prosecution deserves to be completely disbelieved. This submission is vehemently opposed by Ms. Ritu Gauba, learned APP who has submitted that in the instant case, the failure to explain the injuries on the accused would be inconsequential.

We find that no plea of self-defence has been set up by any of the appellants. It is also not the case of the appellants that they were beaten by the other party.

61. On the contrary, the appellants have disputed their very presence on the spot. An examination of the defence set up by the accused persons would show that Yadram set up a plea that he was working in

the flower shop of DW-1 Dinesh Kumar and DW-3 Gulab on the fateful night and that he had left their shop only in the midnight of 25th June, 2004 and was therefore not present at the alleged place of incident.

62. The accused persons denied all allegations made against them in their statements under Section 313 of the CrPC and have stated that they have been falsely implicated. This being the position, it would be for the appellants to further suggest to the court and explain the circumstances in which the injuries were received by Yadram and to satisfy it that such injuries had resulted on his person during the occurrence in the intervening night of 25th and 26th February, 2004.

63. It is also important to note that Yadram was not arrested at the spot immediately after the occurrence but ran away from there. The appellant, Yadram, has been arrested on 26th February, 2004, the day following the occurrence.

64. We find that this issue was also considered by the Supreme Court in *(2009) 111 SCC 96 Hari vs. State of Maharashtra*. Here also the prosecution had failed to explain the injuries on the accused. The Supreme Court held that there is no general or absolute principle that non-explanation of an injury on an accused person shall in all cases

vitiating the prosecution case and that it would depend on the facts and circumstances of this case. The prior adjudication in *(1976) 4 SCC 394 : 1976 SCC (Cri) 671 Lakshmi Singh vs. State of Bihar* and *(1975) 2 SCC 7 : 1975 SCCD (Cri) 384 State of Gujarat vs Bai Fatima* was reiterated by the Supreme Court in *Hari vs. State of Maharashtra* (supra).

65. We may usefully reproduce the following principles laid down by the Supreme Court on this aspect in para 17 of *(1975) 2 SCC 7 : 1975 SCC (Cri) 384 State of Gujarat vs Bai Fatima*:-

“17. In a situation like this when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow:

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self- defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all.”

66. In the instant case, the appellants had set up a plea of alibi which has been disbelieved. The appellants also led evidence in support of this plea before the trial court but failed to prove the same. Therefore, in case the defence of the appellants was accepted, Yad Ram could not

have been injured in the incident as he has claimed that he was not there. Nothing turns in the instant case on the failure of the prosecution to prove the MLC of Yad Ram. It would be for Yad Ram to prove when the injuries were received by him as they surface only after his arrest, which was long after the incident.

67. Given the defence set up by Yadram, the challenge raised by him on the failure of the police to prove his MLC on record or explain his injuries is devoid of any legal merit.

Effect of acquittal of a co-accused

68. Ms. Kamna Vohra has also urged that Manju was a co-accused and facing the same charge. In the face of her acquittal, the conviction against the other persons cannot be sustained. It is submitted that the case of the prosecution against the appellants is based on the same evidence as was placed against Manju, such evidence having been disbelieved qua Manju, it is contended cannot be therefore believed so far as the appellants are concerned.

69. In this regard, in para 29 of *Balraje alias Trimbak (supra)* the court held as follows :-

“29. Law is fairly well settled that even if acquittal is recorded in respect of the co-accused on the ground

that there were exaggerations and embellishments, yet conviction can be recorded if the evidence is found cogent, credible and truthful in respect of another accused.”

70. The trial court has carefully analysed the evidence placed on record so far as the allegations against Manju, who was a co-accused, is concerned. It was found that PW-4 Ijaz-an injured eye-witness; PW-12 Kiran (daughter of the deceased) and PW-14 Smt.Kamrunisa, widow of the deceased as well as PW-15 Imran, son of the deceased have deposed on oath that it was the co-accused Manju who had called her four brothers, Surinder @ Babloo, Rajiv @ Raju, Sanjeev @ Sonu, Birender @ Boya to the spot. As against their deposition, their brother PW-1 Rizwan Khan also an eye witness made a statement (exhibit PW-1/A), which was the first statement in time, that it was the accused Yadram who had called his four brothers-in-law to the spot and exhorted them against the deceased Mohd. Rashid Khan. Other than this, there is nothing in the testimony of PW-1, 4, 12 and 14 that Manju had exhorted her brothers to kill the deceased Mohd. Rashid Khan. Only PW-15 Imran has made the allegations in this regard against the accused Manju. PW-14 Smt.Kamrunisa has alleged that Manju had got hold of her daughter,

Kiran (PW-12), by her hair and thrown her on the ground, giving beatings to her.

71. The learned trial judge has thus held that the prosecution had failed to prove the requisite intention on the part of the accused Manju to cause the death of the deceased Mohd. Rashid Khan as also of inflicting of injuries upon the injured PW-1 and 4. The trial court also held that the prosecution was unable to prove the case against Manju beyond reasonable doubt.

In view of the above, Manju was acquitted of the charge for commission of offences punishable under Section 302/307/34 IPC of which she was charged. However, all the eye witnesses have categorically named the appellants as present at the spot. Specific roles in the incident are also assigned to them. Therefore, the acquittal of Manju would by itself not impact the case against the other appellants. The evidence against them has to be separately considered.

Abscondance

72. The learned trial court has also noticed the conduct of the accused persons in not being found at the normal place of their residence immediately after the incident. It was held that in case they were

innocent, there was no warrant for them to run away from their houses for a long period of almost four months and having surrendered in the instant case on 20th and 24th June, 2004 respectively or when they have been arrested.

Whether the prosecution has established common intention (Section 34 of the IPC) to commit an offence of murder (Section 302 IPC)

73. It is now necessary to examine the primary contention of learned counsel for the appellants. Ms.Vohra has urged that Yad Ram and Babloo have been found guilty of commission of the offence under Section 302/34 of the IPC and have been acquitted for offences under Section 307/34 of the IPC while Sanjeev @ Sonu and Birender @ Boya found guilty of commission of the offence punishable under Section 307/34 IPC with which they stand charged and acquitted for commission of offences punishable under Section 302/34 of the IPC.

74. Ms.Kamna Vohra, learned counsel for the appellants has vehemently contended that even if this Court was to accept the correctness of the evidence in its totality, the prosecution had failed to prove that the accused persons had the common intention of murdering and causing death of Mohd. Rashid Khan. It is further specifically

submitted by Ms.Kamna Vohra, learned counsel that there is no

evidence at all of any common intention between Yadram and Babloo to commit an offence under Section 302 of the IPC. Learned counsel urges that the prosecution has in fact made allegations of common intention against six persons.

75. On this, we find that this material aspect of the matter has completely escaped attention of the learned Trial Judge and has not been considered in the impugned judgment.

76. Ms. Kamna Vohra has also relied on the pronouncement of the Supreme Court reported at *AIR 2000 SC 1876 Masumsha Hasanasha Musalman vs. State of Maharashtra; (2000) 10 SCC 307 Kunhayippu vs. State of Kerala* in which it was held that the accused cannot be said to have had the necessary intention of causing murder of the deceased while giving a particular blow though ultimately the blow had become fatal. Ms. Vohra has also placed reliance on *(1998) 9 SCC 497 Ram Prakash Singh vs. State of Bihar* and *AIR 1994 SC 1060 Ranjitsinh Chandrasinh Atodaria vs. State of Gujarat*.

77. Ms. Vohra, learned counsel points out that even PW 1 - Rizwan Khan states that at about 11.15 p.m., a drunken Yad Ram, who was carrying an iron rod, came to the spot shouting abuses to his sister and

making false allegations against her. Hearing these abuses, they came out and his father Mohd Rashid Khad asked Yad Ram as to why he was abusing at this time of the night. Despite the admonition by his father, Yad Ram continued with the same. Mohd Rashid Khan (who was living on the first floor), came down from the first floor with his family. As soon as Mohd Rashid Khan reached down, Yad Ram hit him on the head with the iron rod. He then exhorted his four brothers-in-law that *"aaj mauka achcha hai, aaj saale ko khatam kar do."* Babloo, Sonu, Rajiv and Boya came carrying knives. While Yad Ram held Md. Rashid Khan from the back and Babloo attacked him on the neck; Sonu allegedly attacked Mohd Rizwan and his hand got injured; Rajiv and Boya attacked Izaj while Manju who was standing there took his sister by her hair and threw her on the ground. Mohd Rashed Khan started bleeding from the injury on his neck and he fell over on the cycles which were standing there. At that time, a lot of neighbours gathered there and seeing the crowd, the accused persons ran away from there.

78. The pronouncement of the Supreme Court in *Ranjitsinh (Supra)* is similar on facts to the instant case where three of the accused were alleged to have caught hold of the deceased while the fourth accused is

stated to have inflicted a knife blow on the deceased. It was stated that the whole incident took place because of a quarrel that preceded it. The dispute was regarding a house which has been under the occupation of the brothers sometime or the other. Under the circumstances the court observed that it was difficult to hold that the accused intended to cause that particular injury which was found to be sufficient in the ordinary course of nature to cause death by the doctor. The court accordingly set aside the conviction of the appellant under Section 302 IPC and the sentence of imprisonment for life awarded thereunder. Instead, the appellant was convicted under Section 304 Part II of the IPC and sentenced to undergo ten years rigorous imprisonment.

79. Our attention has also been drawn to the Division Bench pronouncement reported at 23 (1983) DLT 338 *Paramjit Singh & Anr. Vs. The State* wherein A and B were charged with murder under Section 302. As per the prosecution case, B was alleged to have only exhorted A "to teach lesson" to deceased. The injury was caused by A resulting in the death of a person. The court considered the issue as to whether there was any common intention and held that "*teaching of lesson does not spell out any intention to cause death or to kill. Teaching of lesson could be confined*

only to causing of simple hurt. It was by chance that the appellants met the deceased. There was, therefore no pre-arranged plan on their part. The mere fact that one of the appellant caught hold of the deceased would not make him guilty of murder, when he did not know that the other had a knife with him. He could only be convicted of causing simple hurt under S.323.” On the issue as to whether the acts were done with the intention of causing death in paras 18 and 19, the following observations of the court may usefully be adverted to in extenso and read as follows:-

“18. However, we have to see if there was any common intention on the part of the appellants and whether the provisions of Section 34 IPC are applicable or not. So that there should be a common intention there must be meeting of minds to commit a particular offence. The common intention pre-supposes prior concert. There should be some pre-arranged plan, even though the said plan is formed hastily or all of a sudden. In the present case, as it appears from the evidence of prosecution, the intention of the appellants was to teach a lesson to Hardev Singh and Anil on account of the latter having indulged in sharp practice in gambling. Teaching of lesson does not spell out any intention to cause death or kill. Teaching of lesson could be confined only to causing of simple hurt. It was by chance that the appellants happened to meet Hardev Singh. There was, therefore, no prearranged plan on their part. Surinder Singh did catch hold of Hardev Singh from behind but it cannot be said that he knew that Paramjit Singh would give knife stabs. Paramjit Singh was not carrying open knife. He took out the knife from his pocket. Therefore, Surinder Singh could

not imagine that Paramjit Singh would take out the knife. It was only one blow which was given. Had repeated blows by knife been inflicted it could be said that although Surinder Singh did not have any meeting of mind with Paramjit Singh for causing injuries by knife, yet plan or meeting of mind between him and Paramjit Singh was formed at the spot and then there could be existence of common intention. But there could be no such formation of plan with single injury only. Under these circumstances Surinder Singh is guilty of causing simple hurt punishable under Section 323 read with Section 34 IPC.

19. The definition of 'murder' is given in Section 300 IPC. That definition, inter alia, says that culpable homicide is murder if the act by which the death is caused is done with the intention of causing death. According to the learned Additional Sessions Judge, Delhi there was an intention on the part of the appellants to kill Hardev Singh. We have already held that there is no indication of existence of such an intention. Therefore, it is to be seen if any of the other parts of definition of 'murder' can be applicable. Clause '3rdly' of the said definition says that culpable homicide is murder if the act by which the death is caused, is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In *Virsa Singh v. The State of Punjab* : 1958Cri LJ 818 the following was held by the Supreme Court while interpreting clause '3rdly' of Section 300 IPC :

"To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300. "3rdly" ;

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved ; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution (and of course, the burden is on the prosecution throughout) the offence is murder under Section 300, 3rdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature not that there is any real distinction between the two)."

80. Learned counsel for the appellants has also placed reliance on the pronouncement of the Supreme Court reported at 2006 (2) JCC 775 *Rajpal & Ors. Vs. State of Haryana* wherein it was observed that the

accused persons did not repeat the blows on the head of the deceased
Crl.A. Nos.897/2010, 900/2010 & 487/2012 Page 44 of 66

which showed that there was no intention to commit murder. In this case the Supreme Court changed the conviction of the appellant from the conviction under Section 301/34 to 304 Part II. The pronouncement deals at length with the distinction between “murder” and “culpable homicide not amounting to murder”.

81. On the same aspect, our attention has been drawn to the pronouncement of the Supreme Court reported at **(2006) 2 SCC (Crl.) 394 Sandhya Jadhav vs. State of Maharashtra**. In this case the court explained the conditions for applicability of section 300 Exception 4 of the IPC. The court laid down the circumstances which are necessary to be satisfied for invocation of the Exception 4 and held as follows :-

“8. For bringing in operation of Exception 4 to Section 300 IPC, it has 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.

9. 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

reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any

general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'."

82. On the same aspect learned counsel has placed the pronouncement of the Division Bench of this court reported at **123 (2005) DLT 487 Subhash Kumar vs. State of NCT of Delhi** before this court.

83. We may caution that the plea that because only a single blow was given has to lead to only one conclusion that the case falls under the Exception 4 to Section 300, is not an absolute proposition of law and must be tested in the facts and circumstances of each case.

84. On the issue of whether there existed common intention to do the alleged acts in the instant case, learned counsel for the appellants has relied on **89 (2001) DLT 237 Raj Kumar vs. State** wherein the overt act attributed to appellant was that he caught hold of the arms of Tara Chand and Sunil, the deceased. It was alleged that Dharamvir stabbed Sunil and there was nothing to show that the appellant had known that Dharamvir was carrying a knife. The exhortation was only to teach him

a lesson and not to kill him. In this background, it was held that the conviction of the appellant under Section 302/34 IPC could not be sustained.

85. It is pointed out that the occurrence, as portrayed by the prosecution, was a sudden occurrence on the spur of the moment without any pre-meditation and without any common intention. It is urged that Yadram did not even know whether any of his brothers-in-law would come, or, that any of them would be, armed. He had no knowledge that they were bringing knives with them. It is urged that the brothers-in-law came from a different direction. There is no evidence that other than Yad Ram, the appellants had knowledge of the presence of the deceased at that place. The post mortem report shows that a single blow to the deceased Mohd. Rashid Khan resulted in his death. The prosecution has alleged that the appellant Babloo inflicted this fatal injury.

86. Learned counsel contends that the prosecution witnesses have attributed exhortation to Manju; that as per the exhortation attributed to her, she only called out to her brothers and did not say that they should kill the appellant. Learned counsel points out that as against this the

star witness of the prosecution PW 1 - Rizwan Khan has deposed that it was Yadram who has given the exhortation to his brothers-in-law to kill Mohd. Rashid Khan, that there was no exhortation to any particular person and that the exhortation did not refer to Babloo in particular to kill the deceased. The four brothers (including Babloo) came from the other house and did not even know who was the object of the exhortation. In this background, learned counsel has urged that there was no evidence at all to show that either Yadram or Babloo or any of the other appellants had intended to inflict a particular injury which resulted in his death or to kill Mohd. Rashid Khan. It is urged by learned counsel that there is no evidence at all that the appellants have acted in furtherance of a common intention of all of them.

87. So far as Yad Ram is concerned, Ms. Kamna Vohra, learned counsel for the appellant has submitted that the role ascribed to him was exhortation of the co-accused and holding the deceased. In the pronouncement of the Supreme Court **122 (2005) DLT 399 Laxman vs. State**, it is urged that other than using the exhorting words "*maar saale ko*" and catching the deceased from behind, no other role was ascribed in

the evidence against Shyam while the fatal blow was alleged to have been given by Laxman.

88. Learned counsel has drawn our attention to a decision dated 15th January, 2010 of the Division Bench of this court in *Crl.App.No.304/2005 Chhote Lal vs. State and Crl.App.No.578/2005 Bhurey Lal vs. State*. The court observed that the appellants had a chance to inflict much more than one injury but were satisfied by causing a single injury. Placing reliance on the pronouncement of the Supreme Court reported at 1984 SC 759 *Tholan vs. State of Tamil Nadu* and 1982 SC 1466 *Gurmail Singh & Ors vs. State of Punjab*, it was observed that there was only a single injury and the incident happened on the spur of the moment. In this background, the conviction under Section 302 IPC was altered to one under Section 304 Part II of the Indian Penal Code.

89. It is asserted by Ms. Vohra that even the exhortation attributed to Yad Ram does not exhort to kill but refers only to “*maar*” which when translated reads “beat”. From the facts on record in the present case as well it could not be said that there was prior meeting of mind, pre-concert and pre-determination to murder the deceased.

90. In this regard, reference can also be made to the pronouncement of the Supreme Court reported at *(1998) 7 SCC 216 Matadin & Anr. Vs. State of Maharashtra* wherein also the allegation that Matadin had exhorted his fellows by saying “*maaro saale ko*” whereafter other accused stabbed the deceased resulting in his death. Here conviction of Matadin under Section 302/34 IPC was varied to a conviction under Section 324/34 of the IPC and his sentence was reduced to imprisonment for the period already undergone by him.

91. In the case reported at *1999 SCC (Cri) 74, Ajay Sharma vs. State of Rajasthan*, the expression used by one of the accused was ‘*maaro*’. On the said facts, the Supreme Court held that by saying ‘*maaro*’, it cannot be said that common intention to kill the deceased and since the appellant only said ‘*maaro*’ which did not mean to kill, therefore he ought not to have been convicted under section 302 read with section 34 IPC and was accordingly convicted under section 324 read with Section 34 IPC and sentenced to the period already undergone.

92. Yad Ram and Babloo have been convicted for commission of offence punishable under Section 302/34 IPC. Before examining the factual matrix which has been established by the prosecution before us,

the critical question which has to be answered is as to whether the conviction of these appellants under Section 302 of the Indian Penal Code is contrary to law or whether they could, at the most, have been held guilty for culpable homicide not amounting to murder. In this regard, we may usefully refer to the authoritative pronouncement of the Supreme Court in the judgment reported at (2005) 9 SCC 71, *Shanker Narayan Bhadolkar vs. State of Maharashtra* wherein the binding principles which would guide consideration on this issue have been authoritatively laid down. The discussion and the findings of the Supreme Court deserve to be considered in extenso and reads as follows:-

“24. The academic distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299

A person commits culpable homicide if the act by which the death is caused is done-

Section 300

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 causing death; or

(b) with the intention of causing such bodily injury as is likely to cause death; or

(c) with the knowledge that the act is likely to cause death.

(1) with the intention of

(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 to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(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

25. Clause (b) of Section 299 corresponds with Clause (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under Clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of Clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of Clause (2) is borne out by illustration (b) appended to Section 300.

26. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under Clause (2) of Section 300 can be where the assailant causes death by a first blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In Clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding Clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between Clause (b) of Section 299 and Clause (3) of Section 300 is one of the degrees of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in Clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words "bodily injury..... sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

27. For cases to fall within Clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Rajwant and Anr. v. State of Kerala*, AIR 1966 SC 1874 is an apt illustration of this point."

93. The Supreme Court thereafter discussed the principles laid down by Vivian Bose, J. in the well known prior pronouncement reported at *1958 SC 465, Virsa Singh vs. State of Punjab* in para 29 thus:-

29. The ingredients of clause "Thirdly" of Section 300, IPC were brought out by the illustrious Judge in his terse language as follows:

"12. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly".

First, it must establish, quite objectively, that a bodily injury is present.

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or unintentional, of that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the

enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

94. In para 30, the Supreme Court has also reiterated the explanation of Vivian Bose, J. in para 16 of *Virsa Singh* (Supra) in the following terms:-

"30. The learned Judge explained the third ingredient in the following words (at page 468):

"The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness or intended serious consequences, is neither here or there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion."

95. In para 31, the Supreme Court finally thereafter culled out the following applicable principles:-

“31. These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh's case (supra) for the applicability of clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that 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 (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. 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.”

96. The above principles have been reiterated by the Supreme Court in the subsequent pronouncement reported at *(2007)9SCC129, Abbas Ali vs. State of Rajasthan*.

97. In the instant case, it is the case of the prosecution that it was Yad Ram alone who was abusing the daughter of the deceased and that the other appellants were called from their residence. There remains an area of doubt even as to who exhorted or whether there was exhortation. While Manju was charged with exhortation, she has been acquitted of charge. There remains the testimony of PW 1 who attributes the exhortation to Yad Ram. As noted above, the exhortation was made generally and not specifically to Babloo. The other appellants could not

have known as to who was the object of the exhortation. The case of the prosecution itself shows that there was no pre-meditation in the incident. Yad Ram and the other appellants did not come together but came from different directions. There is thus no evidence that anybody exhorted any person to kill the deceased. There is no evidence that Babloo was exhorted to kill Mohd. Rashid Khan.

98. The record placed before this court would show that there is no evidence to show that the accused persons harboured intention, let alone common intention to cause such injury to Mohd. Rashid Khan which would result in his death. There is also no evidence that the appellants acted in furtherance of such intention. There is also nothing to show that Yad Ram and Babloo had a common intention to cause the death of the deceased. When Yad Ram caught the deceased he would not have known as to whether anyone would attack Mohd Rashid Khan or where the blow would be given. It is, therefore, not possible to hold that the prosecution has satisfied the requirement of Section 34 of the Indian Penal Code against the appellants.

99. It is the case of the prosecution that Yad Ram held the deceased and that Babloo had inflicted the single blow which resulted in the death of Mohd Rashid Khan.

100. A single blow, not aimed at a particular part of body, has resulted in the death of Mohd Rashid Khan. There is no evidence that Babloo or any of the appellants were aware that Mohd. Rashid Khan is to be finished or killed. It is also in evidence that there were several persons from both sides and there was a squabble in a small place. The prosecution has led no evidence that Babloo intended to inflict the particular injury and that the same was not accidental or unintentional. There is thus no evidence of intention of any person to kill the deceased.

101. In the light of the judicial pronouncements noted above, we are therefore of the view that in the present case, in order to bring home the guilt for commission of an offence of murder, the prosecution was required to establish beyond reasonable doubt all the conditions of Section 300 of the IPC. The prosecution has established that the deceased Mohd. Rizwan Khan had a bodily injury (Section 300 of the IPC 'firstly'); that the injury was a stab wound caused by a sharp edged weapon ('Section 300 of the IPC secondly'). However, the prosecution

could not establish that there was an intention to inflict that particular injury and that it was not accidental or unintentional, or even that some other kind of injury was intended (i.e, the requirement of Section 300 of the IPC 'thirdly'). It is only if all three elements stood proved that the injury would proceed to the last clause of Section 300 of the IPC. (Ref. **1958 CrLJ 818, Virsa Singh vs. State of Punjab**). The case therefore falls within Exception 4 to Section 300 of the IPC.

102. We, therefore, find it is not possible to sustain the conviction of Yad Ram and Babloo under Section 302 of the Indian Penal Code.

103. It remains, however, an established fact that the appellants action resulted in injuries as discussed above. The question is whether these appellants could be punished for an offence with which they were not charged. In paras 27 and 28 **Balaraje alias Trimbak vs. State of Maharashtra** (supra) and (2006) 2 SCC 450 : 2006 (1) SCC (Cri) 661 **Radha Mohan Singh vs. State of U.P.**, the court had occasion to consider the effect of an omission to frame or error in the charge framed against the accused persons. It has been held that an accused can be convicted for an offence for which no charge was framed unless the Court is of the opinion that the failure of justice would in fact occasion.

104. A scrutiny of the examination of Yad Ram and Babloo under section 313 of the CrPC would show that they had been made aware of the basic ingredients of the offence of culpable homicide not amounting to murder and given an opportunity to explain the incriminating evidence which had been recorded against him. The facts sought to be established by the prosecution against them were also put to them.

In this background the appellants could be convicted for commission of such offence under the IPC, ingredients whereof he had been put to notice.

105. In the present case, there is unimpeachable evidence that Yad Ram and Babloo were responsible for causing the death of Mohd. Rizwan Khan. They are, therefore, guilty of commission of the offence of culpable homicide not amounting to murder.

106. We also find that in the instant case, the trial court has rightly held that the failure to recover or seize the weapons of offence is of no consequence inasmuch as the case of the prosecution rests on the testimony of eye-witnesses.

107. So far as the appellant Rajiv@ Raju is concerned, as noted above by the judgment dated 27th March, 2012, on the same evidence, he has been

held guilty for commission of the offence under Section 320/34 of the IPC. He has been acquitted of the charge framed against him under Section 302/34 & 307/34 of the IPC.

108. In the light of the above discussion, we also find that there is no evidence that appellants Sanjeev @ Sonu and Rajiv @ Raju were at all involved in the attack on Yad Ram. However, they are alleged to have attacked PW1 Mohd Rizwan. Sanjeev @ Sonu resulting in recording of MLC Exhibit PW7/A wherein the doctor has opined that his injuries were simple in nature and inflicted by a blunt weapon. Ijaz is alleged to have been injured similarly by Birender @ Boya. These three appellants were armed with knives.

109. The above narration would show that there is also no evidence at all that Sanjeev @ Sonu, Birender @ Boya or Rajiv @ Raju acted in furtherance of a common intention.

110. We may also examine the prosecution's case so far as Sanjeev @ Sonu, Birender @ Boya and Rajiv @ Raju is concerned. As per the medical examination, the injuries of Ijaz and Mohd. Rizwan have been found to be simple in nature and inflicted by blunt force. Again there is no evidence at all that the injuries were the result of pre-meditation or

planning. The prosecution has not led any evidence about any circumstances on record which would even suggest that the appellants acted with intentions or had knowledge that any act on their part could cause death.

In this background the conviction of Sanjeev @ Sonu and Birender @ Boya for commission of offences punishable under Section 307/34 IPC is not sustainable.

111. We find that all incriminating circumstances in the evidence against them have been put to them and they have been given opportunity under Section 313 of the Cr.P.C. to explain the same. Given the settled legal position, they can thus be convicted for commission of such offences as are disclosed in the evidence on record. We are satisfied that the prosecution has established commission of offences under Section 324 of the Indian Penal Code.

112. We therefore hold that the conviction of Sanjeev @ Sonu, Birender @ Boya for commission of an offence under Section 307/34 of the Indian Penal Code are not sustainable and is hereby set aside and quashed. They are held guilty for commission of the offence under Section 324 of

the Indian Penal Code and each of them is held guilty for commission of offences under Section 324 of the IPC.

The conviction of Rajiv@Raju for the commission of offence under Section 324 of the IPC is unassailable.

113. As discussed above, there is also no evidence of common intention being nursed by Rajiv @ Raju. His conviction for commission of offence punishable under Section 34 of the Indian Penal Code is therefore unsustainable. However there is sufficient evidence to support his conviction for commission of offences punishable under Section 324 of the Indian Penal Code.

114. As a result of the above, we are required to modify the judgment dated 28th May, 2010 on conviction and the order of sentence dated 31st May, 2010 imposed upon the appellants in Crl.Appeal Nos.897/2010 & 900/2010 which shall stand substituted by the following:-

- (i) The appellants Yad Ram and Babloo in Crl.Appeal No.900/2010 are held guilty for commission of offences under Section 299 read with Section 304 of the Indian Penal Code and are sentenced to rigorous imprisonment for a term of ten years and fine for a sum of Rs.5,000/- each. In default of payment of fine,

these appellants shall undergo further simple imprisonment of six months.

- (ii) The appellants Sanjeev @ Sonu and Birender @ Boya in Crl.Appeal No.897/2010 are convicted for commission of an offence under Section 324 of the Indian Penal Code and sentenced to rigorous imprisonment of two years each and fine of Rs.2,000/- each. In default of payment of fine, these appellants shall undergo further simple imprisonment of two months.

115. We are further required to modify the judgment dated 27th March, 2012 finding Rajiv @ Raju guilty of commission of an offence under Section 324/34 IPC. The appellant Rajiv @ Raju shall stand convicted for commission of an offence under Section 324 of the Indian Penal Code.

116. The challenge to the order of sentence dated 29th March, 2012 by Rajiv @ Raju is hereby rejected.

117. In view of the disposal of Crl.Appeal No.487/2012, Crl.Misc.(Bail) No.822/2012 & Crl.M.A. No.5241/2012 do not survive

for adjudication. These applications are disposed of in the above terms.

(GITA MITTAL)
JUDGE

(V.K. SHALI)
JUDGE

MAY 24th, 2013
aa