

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

Judgment pronounced on : November 21, 2013

+ CRL.A. 1061/2010
TAYYAB

..... Appellant

Through Mr.G.S.Singh, Advocate

versus

STATE NCT OF DELHI

..... Respondent

Through: Mr.Sunil Sharma, Additional Public
for the State

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE INDERMEET KAUR

JUDGMENT

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KAILASH GAMBHIR, J.

1. By this appeal filed under Section 374 of Criminal Procedure Code, 1973 (hereinafter referred to as “Cr.P.C.”), the appellant seeks to challenge the impugned judgment and order on sentence dated 28.07.2010 and 03.08.2010, respectively, whereby the learned Additional Sessions Judge, Delhi, has convicted the appellant for committing an offence punishable under Sections 302/323/34 Indian Penal Code, 1860(hereinafter referred to as “IPC”) and sentenced him to undergo rigorous imprisonment for life together with imposition of fine of Rs.20,000/- and in default of payment of

fine, the appellant was directed to undergo further simple imprisonment for a period of one year. The appellant was also sentenced to undergo simple imprisonment for a period of six months for committing an offence punishable under Section 323 of IPC. Both the sentences were directed to run concurrently.

2. Before we deal with the contentions raised by learned counsel for the parties, it would be appropriate to give a brief narration of the prosecution case, which is as under:-

“A PCR call was received at PS: Shahadra Delhi vide DD No. 64-B that a young boy was stabbed in the Gali No.3, Kaardampuri Extension Delhi. The PCR call was marked to ASI Shiv Charan who alongwith Head Ct. Luv Raj reached the spot and found that injured Rashid s/o Abdul Qayyum who was stabbed during quarrel was already removed to hospital. A large crowd was gathered at the spot. Ct. Deepak who was on patrolling duty came at the spot, ASI Shiv Charan deputed Ct. Deepak for the safety and protection of the scene of crime and he rushed to the hospital. He reached at GTB Hospital where he met Mohd. Saleem and Mohd. Ansar who stated that their younger brother Rashid died due to stab injuries inflicted on him. ASI Shiv Charan inspected the dead body of Rashid. Rashid was declared dead by the doctor. ASI Shiv Charan made enquiries from Mohd. Saleem and his statement was recorded at the GTB Hospital. Mohd. Saleem gave his statement that his brother Rashid (now deceased) was running general store situated at Gali no. 16. Near Goldline Public School, Kadampuri Extension, Delhi. At about 9:00 p.m. , he alongwith his elder brother Ansaar Ahmed were present at their shop at Gali

No. 14. One boy came to their shop and told that someone is quarrelling with Rashid. Thereafter, he alongwith his elder brother run towards the Rashid's shop, after reaching the spot, they saw that Tayyab, Qayyun and Javed and their maternal uncle Mohd. Rafiq were quarrelling with their brother over money matter and told that they would not pay their debt to Rashid. Rashid insisted for the same. At the same time, Tayyab brought one knife from their house and shouted that you all three caught Rashid and he will kill Rashid and pay all his debts. Rafiq, Qayyam and Javed caught hold of Rashid and Tayyab and stabbed his with knife on the right side of abdomen. Rafiq was holding an iron rod and when he tried to free his brother Rashid, Rafiq also assaulted his on his right hand with iron rod. Blood was oozing out from the abdomen of Rashid and Rashid fell down on the ground. He and his brother, took injured Rashid to GTB Hospital in a TSR. On the way, Rasid who was in pain, uttered that Tayyab, Qayyum, Rafiq and Javed tried to kill him and they are not doing right. Their clothes were blood stained. At GTB Hospital, Rashid was declared brought dead by the Doctors. He stated that Rashid was murdered by Tayyab with knife and Rafiq, Qayyum and Javed caught hold of him with intention to kill him. Thereafter ASI, Shiv Charan made his endorsement on the statement of Mohd. Saleem for registration of the case and rukka was sent to PS Shahadra through H.C. Omender who got the FIR registered."

3. To bring home the charges, the prosecution in all examined 17 witnesses. In their statements recorded under Section 313 Cr.P.C., the accused denied their complicity in the crime and pleaded that they were falsely implicated in the case. In defence, the accused persons had examined

3 witnesses.

4. Based on the evidence led by the prosecution and the defence, the learned trial court did not find that the other accused persons had shared common intention with the present appellant – Tayyab, in inflicting the stab injuries on the person of the deceased. So far as the present appellant is concerned, the learned trial court held him guilty for committing an offence punishable under Section 302 IPC taking a view that the nature of injuries inflicted by the appellant were sufficient to cause death and the same were not as a result of sudden fight and the appellant also acted in a cruel manner and used a deadly weapon in the commission of crime. Learned trial court also held that the case of the appellant would fall under Section 302 of IPC and not under Section 304 (Part I) IPC.

5. At the outset, Mr. G.S. Singh, counsel appearing for the appellant submitted that he does not wish to challenge the conviction of the appellant and will confine his arguments to challenge the order on sentence.

6. Assailing the impugned order on sentence, learned counsel for the appellant submitted that even as per the prosecution case, a sudden fight had taken place between the complainant party on the one hand and the accused persons on the other hand and in such a sudden fight the injuries sustained

by the victim proved fatal and ultimately resulted his in death. Learned counsel for the appellant also submitted that as per the admitted case of the prosecution, the deceased was running a kirana shop and at the time of the alleged incident, a quarrel arose between the parties because the accused persons refused to return back the money to the deceased – Rashid. In fact, the accused persons clearly told the deceased that they would not be paying any outstanding amount in respect of the purchases made by them from his shop. During this sudden quarrel, the accused asked the other co-accused persons to catch hold the deceased and in the meanwhile he went to his house to bring a knife. Since the house of the appellant, perhaps was near to the Kirana Shop, the appellant immediately returned with a knife (Chhura) and inflicted a stab injury on the right side of the abdomen of the deceased.

7. The contention raised by learned counsel for the appellant was that, in the sudden fight, even one of the accused – Rafiq had also received injuries and he was medically examined on 22.12.2006 and as per his MLC Report (Ex.PW-6/DA), he had suffered sharp injuries on his person. Learned counsel for the appellant submitted that Rafiq could not lodge any report because of his immediate arrest in the present FIR. Learned counsel for the appellant also submitted that due to refusal of the police to register the cross

FIR, Mohd. Rafiq had filed a private complaint which is still pending consideration before the concerned Magistrate. Learned counsel for the appellant further argued that the recovery of weapon of offence, at the instance of accused, was not believed by the learned trial court and the learned trial court clearly held that the recovery of the weapon of offence was effected from an open area accessible to public, thus it cannot be said that the recovery was effected from the place within exclusive knowledge of the accused. Therefore the recovery of weapon of offence made at the instance of the appellant did not inspire confidence. Contention raised by learned counsel for the appellant was that with the said finding of the learned trial court, the appellant cannot be associated with the weapon of offence produced by the prosecution in their evidence, sketch of which was proved on record as Ex.PW-17/F.

8. Learned counsel for the appellant further submitted that the appellant was a young boy of 25 years on the date of commission of the offence and he has already suffered incarceration for a period of around 8 years 4 months and his conduct in jail has been assessed as satisfactory. Learned counsel for the appellant also submitted that the antecedents of the appellant are clean and he was not involved in any other criminal case and such a person should

be given at least one chance to reform himself.

9. Based on the above submissions, learned counsel for the appellant submitted that the case of the appellant falls under exception IV of Section 300 of IPC and is punishable under Section 304 of IPC.

10. Countering the said submissions of learned counsel for the appellant, Mr. Sunil Sharma, learned Additional Public Prosecutor strongly contended that the case in hand does not fall within Exception IV of Section 300 of IPC as it is a clear case of cold blooded murder at the hands of the appellant in a most brutal and cruel manner by the use of sharp edged weapon like a big chhura. Ld. APP submitted that the Appellant had inflicted four injuries to the deceased, one of which was on the vital part of the body of the deceased, inflicting incised wedge shape stab wound of size 2.5 x 0.3 cms placed in right lumbar region 9 cms below the right costal margin in almost mid clavicular line and 102.5 cms from right heel in an oblique fashion.

11. Learned APP for the State invited the attention of this court to the post mortem report proved on record as Ex.PW-5/A and the testimony of PW-5 who had conducted the post mortem of the deceased. To support his argument learned APP submits that the nature of injuries as sustained by the deceased clearly depicts that the appellant had acted in a most cruel and

unusual manner while the deceased was totally unarmed and with no help from any corner. To support his contention learned APP placed reliance on judgment of the Hon'ble Apex Court in the case of ***Kikar Singh vs. State of Rajasthan*** reported in ***AIR 1993 SC 2426*** wherein it was held that the injury sustained by the deceased was not as a result of sudden fight and the accused had acted in a cruel manner by using a deadly weapon. Learned APP further argued that it was a well-designed and thoughtful act as the appellant had rushed to his house to bring a knife and thereafter had inflicted four stab injuries on the body of the deceased. Learned APP further submitted that there was a clear intention on the part of the appellant to murder the deceased and had it not been so, then the appellant would not have inflicted stab injuries on such a vital part of the body of the deceased. Based on these submissions, learned APP submits that exception IV of Section 300 IPC is not attracted to the facts of the present case and the offence committed by the appellant squarely falls under Section 302 of IPC and the appellant has been rightly sentenced by the learned trial court for life imprisonment.

12. We have heard learned counsel for the parties at considerable length and given our anxious consideration to the arguments advanced by them. We have also gone through the record of the learned trial court, and

scrutinised the material on record.

13. In the present case, we have to first analyse as to whether the prosecution has succeeded to prove that the injury caused by the appellant was with intention of causing such bodily injury, which was sufficient in the ordinary course of nature to cause death and therefore, falls under clause thirdly of Section 300 IPC.

14. PW-1, Mohd. Salim and PW-4, Mohd. Ansar Ahmed are the eye witnesses of the crime. PW-1 in his examination-in-chief, deposed that he along with his elder brother, PW-4, were present at another kiriyana shop at Gali No.16. One child came to him and informed that a quarrel was taking place between Rashid and some other persons. On this he, alongwith PW-4 proceeded to the shop, Gali No.16, where he saw that the accused persons were quarrelling with his brother Rashid on account of money. His brother – Rashid told him that accused persons were not giving money. On this, accused persons told his brother that they would not pay any amount in respect of purchases made by them from his shop and in the meanwhile, the appellant went to his house and brought a chhura (knife) with him and gave a churra blow in the right side of abdomen of his brother, Rashid. PW-4 also deposed on the same lines confirming the fact that the appellant went to his

house and brought a chhura with him and gave a blow with the chhura in the right side of abdomen of Rashid.

15. PW-5 Dr. S.K Verma, who conducted the autopsy of the deceased, stated that he had noted the following injuries:

- i. Reddish contusion over Lt. side frontal region of size 2 x 1.5 cm (oval in shape) placed over above the Lt. eye brow.
- ii. A small reddish abrasion on the base of Lt. index finger of size 0.5 x 0.4 cms.
- iii. Incised wedge shaped stat wound of size 2.5 x 0.3 cms placed in Rt. Lumbar region 9 cms below the right costal margin in almost clavicular line and 102.5 cms from Rt. Heel, in an oblique fashion.
- iv. The aorta was cut from anterior lateral aspect having an incised wound of size 1x 0.2 cms. (4) incised that wound of size 2.8 x 0.4 x 4.0 cm wedge shaped placed 10.4 cms posterior and rightly below injury No. (3).

16. According to PW-5, the cause of death is shock due to haemorrhage as a result of injury No.3 produced by sharp edged weapon and is sufficient to cause death in ordinary course of nature.

17. In the landmark judgment of *Virsa Singh v. State of Punjab* reported in (1958) 1 SCR 1495, the Hon'ble Supreme Court held that the following are the four steps of inquiry involved in the offence of Murder under section

300 IPC, clause *thirdly*::

- “i. first, whether bodily injury is present;*
- ii. second, what is the nature of the injury;*
- iii. third, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended; and*
- iv. fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature.”*

18. In the present case all the above elements are fulfilled, there is an injury on the body of the accused; it is a fatal injury; the injury is the one which the accused intended to inflict and also the injury has been proved to be sufficient to cause death in the ordinary course of nature .Thus it has sufficiently been proved that the accused has committed murder of the deceased under Section 300 IPC.

19. Thus based on the testimonies of PW-1 and PW-4 duly supported by the medical evidence proved on record and the post mortem report disclosing the cause of death as a result of shock due to haemorrhage and the same being sufficient to cause death in the ordinary course of nature, we are of the view that the learned trial court has rightly convicted the appellant for

committing an offence of murder falling under Clause thirdly of Section 300 IPC. To this extent, we do not find any perversity or infirmity in the findings arrived at by the learned Sessions Judge.

20. Now dealing with the moot question raised by the counsel for the appellant whether the offence committed by the appellant would only be culpable homicide amounting to murder under Section 300 IPC or would be culpable homicide not amounting to murder, under Exception 4 section 300 IPC. Let us first reproduce the said provision which reads as under:-

“Exception 4 to Section **300** of the Code, reads as follows:

“Exception 4.- *Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.*

Explanation.-*It is immaterial in such cases which party offers the provocation or commits the first assault.”*

21. If the case falls under Exception 4, then the further inquiry should be as to whether the case falls under the first part of Section 304 or the second part, which reads as follows:

“304-Punishment for culpable homicide not amounting to murder.-*Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either*

description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

22. In order to bring the offence under this exception IV of Section 300 IPC, four things shall be proved by the accused:

- I. That the act was without premeditation.
- II. There was a sudden quarrel
- III. In the heat of passion upon a sudden quarrel there was a sudden fight.
- IV. Offender did not take undue advantage or acted in a cruel or unusual manner.

23. In ***Pappu v. State of Madhya Pradesh*** reported in (2006) 7 SCC 391 the Hon’ble Apex Court almost exhaustively dealt with the parameters of Exception IV to Section 300 of the Code. The relevant paras of the judgment are reproduced as under:

“13...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 Indian Penal Code is not defined in Indian Penal Code. 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".

It cannot be laid down as a rule of universal application that whenever one blow is given, Section 302 Indian Penal Code is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body on which it was given and several such relevant factors. “

24. In the present case, PW-1 in his examination-in-chief, had admitted the fact that he was not aware as to how the quarrel had started and at whose instance. He volunteered to say in his cross-examination that the quarrel was continuing when he had reached the spot. PW-4, Mohd. Ansar Ahmed also deposed on the same lines confirming the fact that some hot talks were in progress between the accused persons and his brother on the point of money

and the deceased Rashid told him and his brother (PW-1) that the accused persons had to give money but they were not willing to return the same. With the deposition of said two eye witnesses, one thing becomes crystal clear, that a sudden quarrel had taken place between the deceased and the accused persons. It also becomes clear that both the said witnesses were not exactly aware as to how the said quarrel had begun but they are consistent in their stand that the quarrel was on the issue of money which the accused owned to the deceased but they were not willing to return back. From their deposition, another vital fact that emerges is that the appellant was not carrying any weapon of offence with him as amidst quarrel he had rushed to his house to bring chhura with which he had inflicted stab injury on the body of the deceased. Further a time gap between the said quarrel and the bringing of the murder weapon by the appellant was also quite narrow, as the house of the appellant was located very nearby and within two-three minutes he could bring the said chhura from his house to inflict the stab injuries, which ultimately resulted in the death of the deceased. Thus there was no time for the accused to cool down or plan his action.

25. In the background of the aforesaid facts, it cannot be said that the accused had any premeditation to kill the deceased. In almost similar facts in

Mohd. Sultan vs. State reported in 2011 Cri.LJ 4680, where also the accused had gone to his brother's factory nearby the same gali and within a gap of 2-3 minutes between the heated exchange of words, he brought the weapon and murdered the deceased, the Division Bench of this court took a view that the case is clearly of culpable homicide not amounting to murder and will fall under exception 4 of Section 300 IPC. Relevant paragraphs of the judgment is reproduced as under:-

*It is clear from the testimonies of P Ws 8, 9 and 10 that there was no previous enmity between the Appellant Mohd. Sultan @ Kallu and Yamin and his brothers and cousin. It is also apparent from their testimonies that a theft had taken place in the night intervening 17/18.09.1992 in the factory of Mohd. Farukh and his brothers. There was a heated exchange of words on the next night around 9:15 pm between Mohd. Sultan @ Kallu and PW8 Mohd. Farukh, in which the Appellant Mohd. Sultan is said to have questioned Mohd. Farukh as to why the former's name was being dragged in connection with the theft of the previous night. **The altercation between the two escalated and resulted in Mohd. Sultan @ Kallu slapping Mohd. Farukh 2/3 times. On the intervention of the other brothers and cousin Mumtaz, Mohd. Sultan left the premises threatening to teach them a lesson. He went to his brother's factory nearby in the same gali and returned with a knife within 2-3 minutes and immediately thereupon stabbed Yamin who was standing outside the factory with PW9 Yasin. This incident was, of course, seen by PW9 Yasin. Immediately thereafter, Mohd. Sultan @ Kallu ran away from the scene. This is clearly a case of culpable homicide. It would not be murder***

and would fall under Exception 4 if it was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. There is no doubt in our minds that the incident took place without premeditation and the time gap between the heated exchange of words and the second incident of stabbing is only of 2-3 minutes, which clearly indicates that it was a sudden fight and there was no time for the tempers to have cooled so as to allow in the concept of premeditation. The tempers had not cooled and, therefore, in our view, the stabbing incident has to be regarded as in the course of a sudden fight in the heat of passion upon a sudden quarrel.

A similar situation had arisen in the case of Sukhbir Singh v. State of Haryana (2002) 3 SCC 327. In that case also there was no enmity between the parties. The occurrence had taken place when Sukhbir Singh got mud splashes on account of sweeping of a street by Ram Niwas and a quarrel ensued. The deceased slapped the Appellant for no fault of his. The quarrel was sudden and on account of the heat of passion. The accused went home and came armed in the company of others without telling them of his intention. The time gap between the quarrel and the fight was a few minutes only. The Supreme Court observed that it was, therefore, probable that there was insufficient lapse of time between the quarrel and the fight which meant that the occurrence was sudden within the meaning of Exception 4 of Section 300 IPC.

26. In ***Krishna Tiwary and Anr Vs. State of Bihar***, reported in **AIR 2001 SC 2410**, where also the accused had inflicted knife blows in the heat of passion without any premeditation and without any intention that he would

cause that injury, the Hon'ble Apex Court held that the case was covered by Exception 4 to Section 300 of the IPC; the accused was convicted under Section 304-I of the IPC. Relevant paragraph of the said judgment is reproduced as under:-

“the accused had inflicted knife blows in the heat of passion without any premeditation and without any intention that he would cause that injury, his case was covered within Exception 4 to Section 300 of the IPC; he had been convicted under Section 304-I of the IPC. 21 Applying the test laid down in this case, there is no reason as to why the appellants should also not be accorded the benefit of Explanation 4 of Section 300 of the IPC. The conviction of the appellants for the offence of murder is accordingly modified for the offence of culpable homicide not amounting to murder. They are all accordingly convicted under Section 304-I of the IPC.”

27. In ***State of H.P. vs. Wazir Chand and others*** reported in ***AIR 1978 SC 315*** dealing with the sudden fight between two groups wherein one person in such fight was vitally wounded by the appellant by knife, the Hon'ble Apex Court took a view that this case falls in exception 4 of Section 300 as there was no pre-meditation. Relevant paras of the said judgment are as under:-

“Therefore, when Parshottam Lal appeared there was a sudden fight upon a sudden quarrel flowing from the earlier incident and in this both sides attacked each other. All the ingredients to attract Exception 4 to Section 300, I.P.C. are established. There is no

premeditation. Parshottam Lal left the theatre and came over there. There was a fight that ensued in a sudden quarrel. The previous incident between Om Parkash alias Pashi and accused No. 3 Joginder was the cause and in that heat of passion and sudden quarrel parties grappled and attacked each other and it cannot be said in the circumstances that any undue advantage was taken. It may be recalled here that Parshottam Lal was a hefty well built fellow and if accused No. 1 alone was to attack him he could not have escaped with few abrasions. Therefore, all the ingredients to attract Exception 4 of Section 300, I.P.C. are fully established.

26. As injury No. 1 was fatal in the ordinary course of nature and accused No. 1 had wielded a dangerous weapon and caused an injury on the vital part of the body and the blows were repeated inasmuch as four injuries were caused the offence but for the application of Exception 4 would be one under Section 302, I.P.C. but as Exception 4 is attracted, it would be reduced to Section 304, Part I, I.P.C. and the conviction of accused No. 1 would be modified to one under Section 304, Part I, I.P.C. maintaining the sentence as awarded by the High Court as in our opinion that is adequate.”

28. In the facts of the present case also what we find is that a sudden quarrel between the accused persons and the deceased had taken place over some money transaction and the sudden quarrel ultimately turned ugly, resulting into a sudden fight and ultimately, the murder of the deceased at the hands of the appellant. There was neither any premeditated plan or common intention of the accused persons to carry out the murder of the

deceased nor there was any cooling time between the said fight and the act of the appellant, as the house of the appellant was nearby from where he brought the weapon of offence just within two-three minutes. The recovery of weapon of offence was also not believed by the learned trial court and therefore, it cannot be said whether the chhura used by the appellant was a small knife or was a big dagger, as per the sketch of the same proved on record as Ex.PW-17/F. Further the injuries sustained by the co-accused, Mohd. Rafiq may be simple in nature but they cannot be completely overlooked at least to prove the fact that there was a quarrel taken place between the accused persons on the one hand and the deceased on the other hand.

29. Learned APP for the state contended that the case in hand does not fall within Exception IV of Section 300 of IPC as it is a clear case of cold blooded murder at the hands of the appellant in a most brutal and cruel manner by the use of sharp edged weapon like a big chhura. Ld. APP submitted that the Appellant had inflicted four injuries on the deceased and one of them was at the vital part of the body of the deceased, being an incise wedge shape stab wound of size 2.5 x 0.3 cms placed in right lumbar region 9 cms below the right costal margin in almost mid clavicular line and 102.5

cms from right heel in an oblique fashion. To support his contention learned APP placed reliance on judgment of the Hon'ble Apex Court in the case of ***Kikar Singh vs. State of Rajasthan(supra)***. In the present case, as per the MLC report of the deceased, four injuries have been inflicted on him, two of them being marks of abrasion, one is the incise wedge shape stab wound of size 2.5 x 0.3 cms and one is incised stab wound of size 2.8 x 0.4 x 4.0 cm. Out of these four injuries, third injury being incise wedge shape stab wound of size 2.5 x 0.3 cms proved fatal and resulted in death of the deceased. It is a fairly well settled legal position that all fatal injuries resulting in death of the victim cannot be termed as cruel or unusual for the purpose of not availing the benefit of Exception 4 of Section 300IPC. It has been held by the Hon'ble Apex Court in the matter of ***Ankush Shivaji Gaikwad v. State of Maharashtra*** reported in **AIR 2013 SC 2454**, that all fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of not availing the benefit of Exception 4 of Section 300 IPC.

30. In ***Surinder Kumar v. Union Territory, Chandigarh*** reported in **(1989) 2 SCC 217**, the Hon'ble Apex Court held that if on a sudden quarrel a person in the heat of the moment picks up a weapon which is handy and causes injuries out of which only one proves fatal, he would be entitled to

the benefit of the Exception provided he has not acted cruelly. The Court held that the number of wounds caused during the occurrence in such a situation was not the decisive factor. What was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a fit of anger. Dealing with the provision of Exception 4 to Section [300](#) this Court observed:

*“...To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. of course, the offender must not have taken any undue advantage or acted in a cruel manner. **Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly.**”*

31. It shall be noted that it is not the case of prosecution that after the appellant inflicted the injury and the injured had fallen down, the appellant inflicted any other injury upon the accused. It is also proved that in the heat of passion upon a sudden quarrel followed by a fight, the accused who was

unarmed otherwise, brought a knife from his house and caused injuries at random. Thus in the light of above stated facts, it cannot be said that the accused acted in a very cruel or in an unusual manner.

32. Further the case cited by the Learned APP, *Kikar Singh vs. State of Rajasthan(supra)* in support of his contention is not applicable to the present case. As per the facts of that case, the accused did not stop with the first blow. Even though the victim fell down, the accused inflicted two or more blows on a fallen man. The third one proved fatal. It was held that “he acted with no justification” and was not entitled to benefit of Exception IV. This case is not applicable to the present case, as it is not the case of the prosecution that the accused inflicted more injuries even after inflicting the incise wound in the stomach of the deceased. Thus in the light of the above we find no merit in the contention of the Ld. APP that the accused acted in a most cruel and unusual manner.

33. In view of the aforesaid discussion, we find that it is a clear case of culpable homicide not amounting to murder falling under Exception 4 of Section 300 IPC, as the act was committed without premeditation, in a heat of passion upon sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

34. Now it has to be examined whether the case of the Appellant falls under first part of section 304 or second part of section 304. When and if there is intent and knowledge, then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304.

35. In *Gurmukh Singh v. State of Haryana* reported in (2009) 15 SCC 635 after scanning all the previous decisions where the death was caused by a single blow, the Hon'ble Apex Court indicated, though not exhaustively, a few factors to be taken into consideration while awarding the sentence. To quote:

“23. These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:

- (a) Motive or previous enmity;*
- (b) Whether the incident had taken place on the spur of the moment;*
- (c) The intention/knowledge of the accused while inflicting the blow or injury;*
- (d) Whether the death ensued instantaneously or the victim died after several days;*

- (e) *The gravity, dimension and nature of injury;*
- (f) *The age and general health condition of the accused;*
- (g) *Whether the injury was caused without premeditation in a sudden fight;*
- (h) *The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;*
- (i) *The criminal background and adverse history of the accused;*
- (j) *Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;*
- (k) *Number of other criminal cases pending against the accused;*
- (l) *Incident occurred within the family members or close relations;*
- (m) *The conduct and behavior of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?*

These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused.”

36. The list of circumstances enumerated above is only illustrative and not exhaustive. In our considered view, proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavor of the court must be to ensure that the accused receives appropriate

sentence, in other words, sentence should be according to the gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused.

37. In the present case although the appellant had given a single blow to the deceased which proved fatal, but it was sufficiently proved on record that the appellant was not just having knowledge as to what he was doing but also he intended to do the same. The testimony of PW-1 and PW-2 were consistent that the accused ran towards his house asking the co-accused “*tum isko pakadlo, aaj iska kaam tamam karke udhar hi chukka dete hain*”, and thereafter he went to his house and brought the murder weapon being churra(knife) and gave a fatal blow in the vital part of the body of the deceased being abdomen. Thus his act makes it amply clear that the accused intentionally committed the said act and therefore it will fall under Section 304 first part and not section 304 second part.

38. In the view of the aforesaid, the judgment and the order of the learned Additional Sessions Judge dated 28.07.2010 and 03.08.2010, respectively, convicting the appellant for the offence punishable under Section 302 IPC is modified to the extent that the appellant is convicted under Section 304 IPC first part and accordingly the sentence of life

imprisonment imposed upon him by the Ld. trial court is converted to the Sentence of period of 8 years and 5 months i.e. the period already undergone by him.

39. It is ordered accordingly.

40. Copy of this order be sent to jail Superintendent for information and compliance.

KAILASH GAMBHIR, J.

INDERMEET KAUR, J.

NOVEMBER 21, 2013

pkb