

\$~R-23.

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

+ CRIMINAL APPEAL NO. 22/2009

Date of decision: 16th May, 2013

SURAJ AND OTHERS

..... Appellants

Through Ms. Anu Narula, Advocate.
Mr. Avninder Singh, Advocate.

versus

STATE

..... Respondent

Through Ms. Richa Kapoor, APP for the
State.

**CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE VED PRAKASH VAISH**

SANJIV KHANNA, J. (ORAL):

Suraj, his father Kanhiya Lal and his maternal grandfather Badlu Ram have filed the present appeal challenging their conviction vide judgment dated 19th August, 2008 under Section 302 of the Indian Penal Code, 1860 (IPC, for short) for murder of Maya Ram in the intervening night of 28th/29th March, 2007, in a case arising out of FIR No. 213/07. By order of sentence dated 29th August, 2008 they have been sentenced to life imprisonment and fine of Rs.15,000/- each, in default of which, they shall undergo Simple Imprisonment for five

months.

2. The deceased Maya Ram was brother of the appellant-Kanhiya Lal.

3. The prosecution case relies upon four eye witnesses, Shyam Sunder (PW-14), Sunita (PW-15), Prem (PW-17) and Rani Devi (PW-18). PWs-15, 17 and 18 are residents of jhuggi No. 28/134, Block G, Mangol Puri, Delhi. PW-15 and 17 are the daughters of the deceased Maya Ram and PW-18 is his wife/widow. Shyam Sunder (PW-14) is the neighbour, who was residing in jhuggi No. G-140, Mangol Puri, Delhi.

4. Sunita (PW-15) has deposed that on 28th March, 2007, Punnu brother of Guddi (wife of the appellant Kahniya Lal) had come to their house and sat on their roof. Guddi had objected and insinuated that Punnu should not sit on the roof of the enemies. PW-15's mother had tried to reason out with Roshni (daughter of Guddi) but Roshni got agitated and said she would slap Rani (PW-18) in case she intervenes. PW-15 has even deposed that Roshni came and pushed PW-18 Rani, who fell down into a "naali". Roshni, it is further alleged, tried to catch hold of PW-15's younger brother Neeraj by neck but the neighbours saved him. Rani (PW-18), wife of the deceased, has not deposed in detail anything that occurred prior to the occurrence. She has stated on 28th March, 2007 that she along with her family

members, including the deceased, her daughters Sunita and Geeta, Prem and Perm's husband Jaswant and son Satya Prakash had visited various temples and had returned at about 10.30 P.M. While they were having dinner, Punnu brother of Guddi, came and sat with them. In the meanwhile, Guddi came there and abused her and her family members and she left along with her brother Punnu. PW-18 has, therefore, not deposed about any physical violence by Guddi or involvement of Roshni. Similarly, Prem (PW-17) daughter of Rani, has stated that she along with her husband Jaswant had come to her parental home on 28th March, 2007 and had gone to temples. She has deposed that they returned at 1 A.M. at night. In the cross-examination, she has stated that they started the return journey from the temples at 10.30 P.M. and thereafter they had dinner at their jhuggi. In the cross-examination, she has stated that Punnu used to visit their Jhuggi and on the said night after they returned from the temples, Punnu was found sitting in the jhuggi. Guddi came there, abused them and left with Punnu. PW-17 has, therefore, not deposed about any violence, which was indulged in by Guddi or Roshni.

5. The occurrence in question took place on 29th March, 2007 at about 1 A.M. as deposed to by PW-15, 17 and 18. PW-15, in her chief statement, has averred that at 1 P.M. (sic) A.M., when they were sleeping, the three appellants started abusing them and on hearing the

abuses they came out. Thereafter, the appellants started quarrelling with her father. Kanhiya caught hold of Maya Ram's leg, Badlu caught hold of his hand and Suraj hit her father with a saria from back. Her father Maya Ram became unconscious. Police was called to the spot and took Maya Ram to the hospital. She identified the iron saria as Exhibit P-1. In her cross-examination, PW-15 repeatedly reiterated that Suraj had given the saria blow on Maya Ram's head and Suraj had brought the iron saria in his hand. There was a dispute between the deceased Maya Ram and Kanhiya Lal on account of land in the village. She has attributed act and spoken words to appellant-Kanhiya Lal to the effect that he had caught hold of her father from the back and had asked Suraj to kill her father.

6. PW-17 Prem has stated that at about 1 A.M. appellants Kanhiya, Badlu and Suraj came to their jhuggi and threatened her father Maya Ram and called out that they would kill him and today they would not leave him. Maya Ram did not say anything as he was going to the house of their relatives (Mausi) to inform her about the conduct and threats extended by the appellant-Kanhiya. However, before he could reach the house of the relatives (Mausi), the appellant-Kanhiya caught hold of her father from the back side and appellant-Badlu caught hold of his hands. Appellant-Suraj hit her father on the head with the saria. She, her mother and sister tried to save her father but were

apprehended by Gunia, Guddi and Roshni (Kanthiya's mother-in-law, wife and daughter, respectively). Maya Ram fell on the ground and became unconscious.

7. PW-18 has averred that the three appellants came to the jhuggi and started abusing Maya Ram, stating that the deceased had already disowned him from property, so he won't leave him today. Appellant-Kanthiya had caught hold of Maya Ram from behind and the appellant-Badlu had caught hold of his hands. Thereupon, appellant-Kanthiya asked appellant-Suraj to finish him. Appellant-Suraj hit the saria, which he was carrying, on the head of Maya Ram. She has deposed that he had hit the saria number of times on the head of Maya Ram. The children rushed to save Maya Ram. At that time, the witnesses were apprehended by Kunni, Guddi and Roshni. PW-18 has alleged that her daughters Geeta, Sunita and Prem were beaten up.

8. At this stage, it would be relevant to notice that Sunita (PW-15) in her examination-in-chief did not attribute any specific words to the appellants-Kanthiya and Badlu or Suraj. She was cross-examined by the Additional Public Prosecutor and then accepted that the appellant Kanhiya had asked Suraj to kill her father. We notice that no injuries were suffered by Sunita (PW-15), Prem (PW-17) and Rani Devi (PW-18). They were not medically examined. Therefore, it is apparent that PW-15, 17 and 18 have exaggerated and inflated the occurrence and

had tried to implicate the lady members, i.e., Kunni, Guddi, Roshni etc. We agree with the counsel for the appellants that we have to carefully examine their testimonies on the role and involvement of the three appellants specially Kanhiya and Badlu before we accept their versions.

9. Learned counsel have, therefore, rightly referred to the statement of Shyam Sunder (PW-14), a neighbour. He has stated that on 28th March, 2007 he say Guddi, Kunia (Kuna) and Roshni were quarrelling with each other. He had tried to intervene and prevail upon them not to quarrel after which they dispersed. Kunia Guddi, and Roshni are family members of the appellants and are not the immediate family members of Maya Ram. The said quarrel deposed to by PW-14 is of no consequence and relevance. PW-14 has further deposed that at 1.00 A.M. midnight he heard noise outside his house and saw the three appellants whom he identified along with some ladies, which included Kunia, Guddi and Roshni were beating Maya Ram, his daughters Sunita, Prem and Geeta and his wife Rani. Maya Ram was hit on his head by Suraj with a saria. Maya Ram fell on the spot and expired immediately. PW-14 then made a call at number 100. He identified the saria as Exhibit P-1. In the cross-examination by the Learned APP, PW-14 has clarified that the deceased did not die immediately, it only appeared so. In the cross-examination, PW-14 again stated that he had

seen Roshni, Guddi and Poonam beating Prem, Sunita and Geeta. He has further stated that Suraj had hit Maya Ram with the saria from the front side. He had tried to save him but before he could take any step, saria had already been hit. Police had immediately recorded his statement at the spot and they simultaneously took the injured to the hospital. When Maya Ram was hit by the Suraj, PW14 was standing at a distance of 4/5 feet away. PW-14 has also stated that he did not know from where Suraj had got the saria. On the question of injuries to Prem, Guddi and Roshni deposed to in PW-14's cross-examination, it has already been noticed that there is no MLC of the said persons. Possibly, the three ladies were present and after the occurrence the tempers had heated up, resulting in minor altercation.

10. Learned counsel appearing for the appellants Kanhiya and Badlu have submitted that PW-14 has deposed that Suraj had given the blow with the saria on the head of Maya Ram. He has not attributed any act or stated that Kanhiya and Badlu had caught hold of Maya Ram at that time, as deposed to and as stated by Sunita (PW-15), Prem (PW-17) and Rani Devi (PW-18). This is undoubtedly correct but PW-14 has also deposed that Kanhiya and Badlu were present at the spot. The site plan Exhibit PW-5/1 (scaled site plan) and PW-8/7 (site plan without scale), indicate the residence, i.e., jhuggi of Maya Ram. The jhuggi of the three appellants was located at a short distance. Guddi, Roshni and

Kunia were present at the spot, as deposed to by PW-14. Thus presence of Kanhiya and Badlu at the spot is certain. The same has been uniformly deposed to. There is also consistency that Suraj had brought saria with him. Kanhiya in his statement under Section 313 Cr.P.C. has accepted that he was present at the site of occurrence. He has stated that deceased was drunk. There was a dispute between him and his wife when Maya Ram's wife pushed him and the deceased head hit the board resulting in injuries. He took Maya Ram to the hospital but was arrested there on the basis of statement made by wife of Maya Ram. The appellant Badlu Ram, on the other hand, has stated that he was not present at the place of occurrence. The appellant Suraj has stated that he was innocent and studying in his room when the quarrel had taken place in the house of Maya Ram with his wife Rani Devi. He has been falsely implicated.

11. At this stage, we may note that the appellant-Kanhiya was arrested on 29th March, 2007 at 5.10 A.M. in the morning from the jhuggi. Suraj and Badlu were absconding. The two of them surrendered in the court and were arrested on 11th April, 2007 vide arrest memo Exhibit PW-8/3 and PW-8/1 respectively.

12. The MLC of Maya Ram (Exhibit PW-1/A) records that he was brought to the hospital by Head Constable Ashok Kumar but his name, parentage and address are mentioned. It is also recorded that there was

alleged history of physical assault and the patient was unconscious. The said MLC was prepared at about 1.45 A.M. The rukka, i.e., the statement of Rani (PW-18) Exhibit PW-10/1 was purportedly recorded on 29th March, 2007 at 2.30 A.M. and, thereafter, DD entry No. 4A was recorded at 2.45 A.M. and FIR No. 213/2007 under Section 308/34 IPC was recorded. This is the first statement which was made by PW-18 about the occurrence. In the said statement Exhibit PW-10/1 it is recorded that at 1 A.M. in the night the occurrence had taken place. Suraj had iron rod in his hand and Badlu and Kanhiya had caught hold of her husband Maya Ram and Suraj had hit Maya Ram on his head while Suraj was uttering the words that he would not leave him.

13. At this stage, we must deal with two contentions raised by the appellants. It is stated that first Daily Diary Entry 5B (Ex. PW-4/3) was recorded on 29th March, 2007 at 1.25 A.M. does not mention or give names of the appellants and their role and refers only to a quarrel. The said DD entry Exhibit PW-4/3 does not help the case of the appellants and does not show that the appellants were not involved. The said DD entry merely records what was communicated and stated by the person concerned. We also record that this entry was recorded at 1.25 A.M. whereas Head Constable Ashok Kumar (PW-6) has stated that he had received a call at 1.10 A.M. regarding a quarrel and had

reached the jhuggi at 1.15 A.M. and found a person lying on the road. The said person was bleeding from his head and had already vomitted. One-two other ladies were also present. DD Entry 5B (Ex.PW4/3) does not mention that the appellants were not involved in the occurrence. It is a short message which gives incomplete but some information. Another submission made was that PW-18, in her court deposition, has stated that her statement was recorded at the spot and was not recorded in the hospital and she had gone to the hospital at 4 A.M. PW-18's actual deposition in cross-examination is that her neighbour Shyam Sunder called the police by dialing No. 100 and her husband was removed to the hospital and simultaneously her statement Exhibit PW-10/1 was recorded by the police which she signed at point 'A' and put her thumb impression at point 'A1'. She has averred that she had gone to the hospital at 4 A.M. PW-18 is a rustic and illiterate witness who could barely sign. Her deposition in court was recorded on 30th August, 2007. The slight variation and discrepancy in the statement does not compel us to disbelieve and disregard the entire notings made on the rukka and DD entry No. 4A dated 29th March, 2007 which was recorded at 2.45 A.M. at the police station. Immediately after the occurrence, Maya Ram the deceased was taken to the hospital. Action was taking place at a very fast pace with the police coming to the spot, the deceased being taken to the hospital etc.

Some discrepancy and difference in narration of facts is plausible and expected. This does not affect the credibility of the statements made by the witnesses.

14. This brings us to the two contentious issues. Firstly, whether Suraj alone is guilty or the appellants Kanhiya and Badlu also shared the common intention under Section 34 IPC. The second aspect is whether the three appellants have been rightly convicted under Section 302 IPC or a lesser offence is made out.

15. We have partly dealt with the first question in the earlier part of this judgment and noticed the facts and certain discrepancies/differences in the statement of PW-14 and the version given by PW-15, 17 and 18. We have accepted the position that Badlu and Kanhiya were present at the spot and Suraj had come to the jhuggi of Maya Ram with a saria in his hand. The time of occurrence is 1.00 A.M. at night. It is apparent that three appellants were agitated and there was a history or a cause which compelled them to come out, one hour past midnight. Suraj was youngest in the family and was studying in class 12. (It is not disputed before us that on the date of the occurrence Suraj was more than 18 years of age). The three appellants had come to the house (jhuggi) of Maya Ram and the place of occurrence as shown in site plans (Exhibit PW-5/1 and PW8/7) shows that the occurrence had taken place small distance outside the jhuggi of

Maya Ram. The three of them had come after midnight with Suraj who had saria with him. There is evidence to show that women members of the family of Badlu had also reached the spot. The post-mortem report Exhibit PW-16/A records that there were abrasions in right arm and elbow and there was a bruise over the right wrist on the body of the deceased Maya Ram. These two injuries are in addition to the injury on the head. In these circumstances, we are inclined to accept the prosecution version that the appellant Kanhiya and Badlu shared the common intention under Section 34 when they reached the spot and these abrasions and bruises on the deceased's elbow and the wrist establish that there was some physical violence, in addition to the injury which was given by the iron rod/saria. This corroborates with the ocular testimony of PW-15, 17 and 18 (On applicability and law relating to Section 34 IPC see judgment of R.P. Sethi, J. In ***Suresh v. State of U.P.***, (2001) 3 SCC 673).

16. Learned counsel for the appellants have submitted that in the statements under Section 313 Cr.P.C. no specific questions were put to appellants Kanhiya and Badlu with reference to evidence of common intention under Section 34 IPC. We find that this contention is not correct as question No. 1 put to Kanhiya and Badlu refers to common intention and the fact that they, in the furtherance of common intention, along with Suraj, who was armed with iron rod, had gone to the

residence/jhuggi of Maya Ram at 1 A.M. on 29th March, 2007. Testimonies of PW-15, 17 and 18 that the appellant Kanhiya and Badlu had caught hold of Maya Ram was not specifically put but we feel this is a mere irregularity and no prejudice has been caused to the said appellants, which justifies a acquittal for the said reason. Appellants Kanahiya and Badlu were aware that they were being tried on the basis of common intention. The witnesses were cross-examined on the said basis. We have already referred to their explanations in the statement under Section 313 Cr.P.C. In *Alister Anthony Pereira v. State of Maharashtra*, (2012) 2 SCC 648 it was observed that:

“58. The words of P.B. Gajendragadkar, J. (as he then was) in *Jai Dev v. State of Punjab* [AIR 1963 SC 612 : (1963) 1 Cri LJ 495] speaking for the three-Judge Bench with reference to Section 342 of the 1898 Code (corresponding to Section 313 of the 1973 Code) may be usefully quoted: (AIR p. 620, para 21)

“21. ... The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.”

59. In *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033] a three-Judge Bench of this Court stated: (SCC p. 806, para 16)

“16. ... It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every

inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction.”

60. The above decisions have been referred in *Asraf Ali v. State of Assam* [(2008) 16 SCC 328 : (2010) 4 SCC (Cri) 278] . The Court stated: (SCC pp. 334 & 336, paras 21-22 & 24)

“21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the

accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to the rider whether they have caused miscarriage of justice or prejudice. ...

24. In certain cases when there is perfunctory examination under Section 313 of the Code, the matter is remanded to the trial court, with a direction to retry from the stage at which the prosecution was closed.”

61. From the above, the legal position appears to be this: the accused must be apprised of incriminating evidence and materials brought in by the prosecution against him to enable him to explain and respond to such evidence and material. Failure in not drawing the attention of the accused to the incriminating evidence and inculpatory materials brought in by the prosecution specifically, distinctly and separately may not by itself render the trial against the accused void and bad in law; firstly, if having regard to all the questions put to him, he was afforded an opportunity to explain what he wanted to say in respect of the prosecution case against him and secondly, such omission has not caused prejudice to him resulting in failure of justice. The burden is on the accused to establish that by not apprising him of the incriminating evidence and the inculpatory materials that had come in the prosecution evidence against him, a prejudice has been caused resulting in miscarriage of justice.

17. The next question is whether appellant-Suraj has been rightly convicted under Section 302 IPC or he should have been convicted under Section 304 Part-I or Part-II IPC. This question also relates to conviction of appellants Kanhiya and Badlu for offence under Section

302 read with Section 34 IPC.

18. Maya Ram was admitted to the hospital in coma on 29th March, 2007 at 1.45 A.M. He succumbed and died while in coma on 4th April, 2007 at 1.00 A.M., i.e., after nearly six days. As per the post-mortem report (Exhibit PW-16/A), the deceased had an incised wound on the occipital region of 1 x .5 x .5 cm. He also had an abrasion on the zygomatic region. The contention of the Learned Additional Public Prosecutor is that in view of the injury caused on the vital part of the body i.e. the head, conviction under Section 302 IPC is justified and correct. She has relied upon decisions of the Supreme Court in ***Gudar Dusadh Vs. State of Bihar***, AIR 1972 SC 952, ***Ramesh Singh @ Photti Vs. State of A.P.*** (2004) 11 SCC 305 and ***Israr Vs. State of U.P.***, AIR 2005 SC 249. Her contention is that even in cases of single injury on the vital part of the body conviction under Section 302 IPC is sustainable. *Per contra*, learned counsel for the appellant submitted that at best and as per the case of the prosecution, clause III of Section 300 IPC is being applied but the prosecution evidence does not satisfy the objective requirement of the said clause that the injury caused was sufficient to cause death in ordinary course of nature. It is stated that the injury was not sufficient in ordinary course of nature to cause death. There is no such deposition or statement to the said effect by the doctors, who had examined the deceased or had conducted the post

mortem. It is submitted that the present case would not be, therefore covered by clause III to Section 300 IPC. Secondly, and in alternative reliance is placed on Exception IV to Section 300 IPC.

19. In *Virsa Singh Vs. State of Punjab*, AIR 1958 SC 465 the Supreme Court examined the difference between clause III of Section 300 and Section 304 IPC. The Supreme Court expounded upon the requisites of clause (3), Sections 300, 302 and 304, Part-I IPC. It was observed as under:-

“14. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 “thirdly”;

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

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

17. 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.

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

19. 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.”

20. Similarly, in *State of U.P. v. Virendra Prasad* (2004) 9 SCC 37, the distinction between the two sections was elucidated and tabulated as under:-

“7. 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—

Intention

(a) with the intention of causing death; or

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

Section 300

Subject to certain exceptions culpable homicide is murder, if the act by which the death is caused is done—

(1) with the intention of causing death; or

(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of

nature to cause death; or

Knowledge

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

(4) with the knowledge that the act is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as is mentioned above.

8. Clause (b) of Section 299 corresponds with clauses (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.

9. 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 fist-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 degree 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 probability 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.”

21. In *Virsa Singh (supra)* the Supreme Court had expounded that it is not the number of injuries which matters but the test to be applied is whether the offence falls under Section 302 or Section 304, Part-I IPC.

It was elucidated and explained:-

“23. The learned counsel for the appellant referred us to *Emperor v. Sardarkhan Jaridkhan* [(1917) ILR 41 Bom 27, 29] where Beaman, J., says that—

“where death is caused by a single blow, it is always much more difficult to be absolutely certain what degree of bodily injury the offender intended”.

With due respect to the learned Judge he has linked up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes overlap. 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 nor 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. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.

24. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not

intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact; and whether the conclusion should be one way or the other is a matter of proof, where necessary, by calling in aid all reasonable inferences of fact in the absence of direct testimony. It is not one for guesswork and fanciful conjecture.”

The aforesaid paragraphs show that the question whether Section 302 or Section 304, Part-I IPC is applicable requires determination of two aspects. Firstly, whether the injury caused was injury intended and, secondly, whether the injury suffered, when examined objectively, can be categorized as sufficient in ordinary course of nature to cause death or was likely to cause death. The injuries of the first type are far more serious as compared to the second type of injuries. Thus, we have to examine whether the wound/injury was serious, if so, how serious. It is in this context that we should examine the judgments, which have been relied upon by the State. In *Gudar Dusadh (supra)*, the Supreme Court had observed that clause III of Section 300 IPC was applicable as it was a case of pre-meditated and not an accidental attack and the injuries inflicted in ordinary course of nature were sufficient to cause death. The injuries in the said case had been caused by a Lathi hit on the head but it was observed that it would not mitigate the offence and convert it into culpable homicide not amounting to murder. The Supreme Court, in fact, had relied upon the evidence of

the doctor, who had conducted the post mortem and opined that the injuries caused were sufficient in ordinary course of nature to cause death and had actually resulted in death. Reliance placed by the accused on Exception IV to Section 300 IPC in the said case was rejected.

22. In the present case, the death certificate (Ex.PW12/B) records that Maya Ram had died on 4th April, 2007 at 1.00 a.m. after he had suffered cardiac arrest due to head injury. Duration of disease (sic. Illness) was stated to be 7 days. Thus, the death certificate specifically records that the immediate cause of death was cardiac arrest. The post mortem report (Ex.PW16/A), on the other hand, records the cause of death was Coma as a result of head injury subsequent to blunt force impact. There is, therefore, some difference in the post mortem report (Ex.PW16/A) and death certificate (Ex.PW12/B). The post mortem report does not refer to the fact that the death certificate mentions that the cause of death was cardiac arrest. The aforesaid discrepancy and difference goes to the benefit of the appellant. Counsel for the appellants have highlighted and in our opinion rightly that the post mortem report does not specifically state that the injury caused was sufficient in ordinary course of nature to cause death. This omission, it is urged, is a clear indicator that the injury in question was not as serious and did not fall in clause III to Section 300 IPC. The said lapse

becomes relevant in the facts of the present case in view of the long hospitalization, different versions on the immediate cause of death etc. We notice that Dr Brijesh Singh (PW-1), CMO, Sanjay Gandhi Memorial Hospital, who had examined Maya Ram on 29th March, 2007 at 1.45 a.m. has not stated that the injuries were sufficient in ordinary course of nature to cause death. He has stated that he had called a surgeon for management. Dr. Brijesh Kumar Yadav (PW-2) on 29th March, 2007, had examined and treated Maya Ram when he was admitted to Sanjay Gandhi Memorial Hospital. He has stated that he had medically examined the patient and noted pulse rate, blood pressure, respiratory rate etc. The wound was stitched under local anesthesia and the patient was referred to Shushrut Trauma Centre for neuro surgical opinion. He has also not deposed that the injuries suffered were sufficient in ordinary course of nature to cause death. Dr. Manoj Dhingra (PW-16) has conducted the post mortem on the body of Maya Ram. In his testimony he has deposed that the death was caused due to Coma as a result of head injury subsequent to blunt force impact. He opined that the injury in question could have been caused by the Saria (iron rod) produced before him or by any other similar weapon. Size of the Saria (iron rod) was 83.82 cm (33.5 inches) and it was having a diameter of 1 cm. He has also not deposed whether the injuries in question were sufficient in ordinary course of

nature to cause death.

23. In *State of Rajasthan Vs. Shera Ram*, (2012) 1 SCC 602, the Supreme Court referred to the following paragraphs of an earlier decision in the case of *Ram Jattan Vs. State of U.P.*, 1995 SCC (Cri) 169:-

“4. The learned counsel, however, further submitted that in any event the offence committed by the members of unlawful assembly cannot be held to be one of murder and therefore the common object of unlawful assembly was not one which attracts the provision of Section 302 read with Section 149 IPC. We find considerable force in this submission. Though, in general, right from the first report onwards the prosecution case is that all the 12 accused armed with sharp-edged weapons and lathis surrounded the three persons and inflicted the injuries but from the doctor's report we find that no injury was caused on the vital organs. So far as Patroo is concerned, who got the report written by PW 7 and gave it in the police station, we find 13 injuries but all of them were abrasions and lacerated injuries on the legs and hands. The doctor opined that all the injuries were simple. On Balli, PW 8, the doctor found 12 injuries and they were also on arms and legs. There was only one punctured wound, injury No. 8 and it was not a serious injury and it was also a simple injury. Now, coming to the injuries on the deceased, the doctor who first examined him, when he was alive, found 11 injuries. Out of them, injuries Nos. 1 and 2 were punctured wounds. Injury No. 5 was an incised wound and injury No. 6 was a penetrating wound. All these injuries were on the upper part of the right forearm and outer and lower part of right upper arm. The remaining injuries were abrasions and contusions. The doctor opined that except injuries Nos. 7 and 9 all other

injuries were simple. He did not say whether injuries Nos. 7 and 9 were grievous but simply stated that they were to be kept under observation. The deceased, however, died the next day i.e. 9-4-1974 and the post-mortem was conducted on the same day. In the post-mortem examination 11 external injuries were noted but on the internal examination the doctor did not find any injury to the vital organs. He, however, noted that 8th and 9th ribs were fractured. Now, coming to the cause of death, he opined that death was due to shock and haemorrhage. It is not noted that any of the injuries was sufficient to cause death in the ordinary course of nature. It could thus be seen that neither clause 1stly nor clause 3rdly of Section 300 are attracted to the facts of this case. This contention was also put forward before the High Court but the learned Judges rejected this contention observing that the fracture of 8th and 9th ribs must have resulted in causing death and therefore these injuries must be held to be sufficient in the ordinary course of nature to cause death. We are unable to agree with this reasoning. In the absence of proof by the prosecution in an objective manner that the injuries caused were sufficient in the ordinary course of nature to cause death, the same cannot be interfered with unless the injuries are so patent. As we have noted above except fracture of ribs there was no other injury to any of the vital organs. As a matter of fact internally the doctor did not notice any damage either to the heart or lungs. Even in respect of these two injuries resulting in fracture of the ribs, there were no corresponding external injuries. Again as already noted all the injuries were on the non-vital parts of the body. The learned counsel for the State, however, submitted that a forceful blow dealt on the arm might have in turn caused the fracture of the two ribs. Even assuming for a moment it to be so, it is difficult to hold that from that circumstance alone the common object of the unlawful assembly of 12 persons to cause the death of the deceased is established.

5. The common object has to be gathered or inferred from the various circumstances like nature of the weapons, the force used and the injuries that are caused. After carefully going through the medical evidence we find that it is difficult to conclude that the common object was to cause the death. The injuries on Patroo, PW 8 as well as on the deceased were more or less of the same nature except that in the case of deceased, there were few punctured wounds which were not serious but only simple. He died due to shock and haemorrhage the next day. In any event there is no indication anywhere in the evidence of the doctor or in the post-mortem certificate that any of the injuries was sufficient in the ordinary course of nature to cause death. No doubt in his deposition the doctor, PW 4 has stated in the general way that these injuries were sufficient to cause death in the ordinary course of nature. We have already held that there was no external injury which resulted in the fracture of the ribs. In such an event clause 3rdly of Section 300 IPC is not attracted. Likewise clause 1stly of Section 300 IPC is also not attracted i.e. intentionally causing death. If their intention was to cause death, they would have used the lethal weapons in a different way and would not have merely inflicted simple injuries on the non-vital parts like legs and hands.”

24. The Supreme Court then referred to the testimony of the doctor in the Shera’s case, who had nowhere stated that the injuries caused were sufficient in ordinary course of nature to cause death. It was recorded that the post mortem report was silent on the said aspect and no other piece of evidence had been led by the prosecution. The Supreme Court accepted the position that the case would not fall under Section 302/295/449 IPC observing that this was not an absolute

proposition of law, but decision in each case depends upon the facts and circumstances of the individual case. However, after examining the post mortem report and statement of witnesses it was observed that it could not be said that the injuries were such that they would have certainly resulted in death of the victim. It was also observed that this was a matter of expert evidence. Accordingly, it was held in Shera's case as under:-

“ **34.** In the present case also, there is no documentary or oral evidence to prove the fact that the injuries caused by the respondent to the deceased were sufficient in the ordinary course of nature to cause death. This, however, cannot be stated as an absolute proposition of law and the question whether the particular injury was sufficient in the ordinary course of nature to cause death or not is a question of fact which will have to be determined in light of the facts, circumstances and evidence produced in a given case. (Ref. *Halsbury's Laws of India*, 5(2), Criminal Law II.)

35. There could be cases where injuries caused upon the body of the deceased per se can irresistibly lead to the conclusion that the injuries were sufficient to cause death in the ordinary course of nature, while there may be other cases where it is required to be proved by documentary and oral evidence. Resultantly, it will always depend on the facts of each case. Thus, in such cases, it may neither be permissible nor possible to state any absolute principle of law universally applicable to all such cases.”

25. Earlier in *Laxman Kalu Nikalje Vs. State of Maharashtra*, AIR

1968 SC 1390, it was expounded:-

“ 11. That section requires that the bodily injury must be intended and the bodily injury intended to be caused must be sufficient in the ordinary course of nature to cause death. This clause is in two parts; the first part is a subjective one which indicates that the injury must be an intentional one and not an accidental one; the second part is objective in that looking at the injury intended to be caused, the court must be satisfied that it was sufficient in the ordinary course of nature to cause death. We think that the first part is complied with, because the injury which was intended to be caused was the one which was found on the person of Ramrao. But the second part in our opinion is not fulfilled, because but for the fact that the injury caused the severing of artery, death might not have ensued. In other words, looking at the matter objectively, the injury which Laxman intended to cause did not include specifically the cutting of the artery but to wound Ramrao in the neighbourhood of the clavicle. Therefore, we are of opinion that the *thirdly* of Section 300 does not cover the case. Inasmuch as death has been caused, the matter must still come within at least culpable homicide not amounting to murder. There again, Section 299 is in three parts. The first part takes in the doing of an act with the intention of causing death. As we have shown above, Laxman did not intend causing death and the first part of Section 299 does not apply. The second part deals with the intention of causing such bodily injury as is likely to cause death. Here again, the intention must be to cause the precise injury likely to cause death and that also, as we have shown above, was not the intention of Laxman. The matter therefore comes within the third part. The act which was done was done with the knowledge that Laxman was likely by such act to cause the death of Ramrao. The case falls within the third part of Section 299 and will be punishable under the second part of Section 304 of the Indian Penal Code as culpable homicide not

amounting to murder. We accordingly alter the conviction of Laxman from Section 302 to Section 304 of the Indian Penal Code and in lieu of the sentence of imprisonment for life imposed on him, we impose a sentence of rigorous imprisonment for 7 years. With this modification, the appeal shall stand dismissed.”

In the said case injury was suffered on the chest and in the case of *Shera Ram (supra)* injury was suffered by the victim on the head.

26. In *Willie William (Slaney) Vs. State of M.P.*, AIR 1956 SC 116,

Bose, J. has opined:-

“ **66.** Where there is a charge against an accused under Section 302, read with Section 149, if Section 149 of the Indian Penal Code is inapplicable to the facts, can the accused be convicted under Section 302 without a separate charge? In the first case, it was held that the omission to have a specific charge under Section 302 amounted to an illegality. In the latter case, the view was taken that it was a mere irregularity, curable if no prejudice was caused to the accused.

68. This conflict does not arise in the case before us where the offence charged against two brothers, William and Ronnie for the murder of Donald was under Section 302, read with Section 34 of the Indian Penal Code. Ronnie was acquitted. But William was found guilty and sentenced to transportation for life. As pointed out by Lord Sumner in his classic judgment in *Barendra Kumar Ghosh v. King-Emperor* [(1924) LR 52 IA 40] , there is much difference in the scope and applicability of Sections 34 and 149, though they have some resemblance and are to some extent overlapping. The two sections are again compared and contrasted in *Karnail Singh v. State of Punjab* [(1954) SCR 904, 911] . Section 34 does not by itself create any offence,

whereas it has been held that Section 149 does. In a charge under Section 34, there is active participation in the commission of the criminal act; under Section 149, the liability arises by reason of the membership of the unlawful assembly with a common object, and there may be no active participation at all in the perpetration or commission of the crime. The overlapping arises in those cases where two or more persons commit a murder in furtherance of the common intention, but it is not possible to say which of them was responsible for the fatal injury, or whether any one injury by itself was responsible for the death. There may also be a case where it is known that out of the assailants one in particular was responsible for the fatal injury and the others are sought to be made liable for the result owing to the common intention involved. But whereas in this case, the appellant has been individually charged with murder and there is proof that his hand caused the injury, the fact that his brother was also sought to be made liable owing to the existence of a common intention, is neither here nor there, so far as the legality of the conviction is concerned, as there has been no prejudice by way of failure of justice.

69. It is, however, necessary having regard to the lengthy arguments addressed to us, to consider the main question arising on the reference. Though the two cases which gave rise to this reference were cases relating to Section 149 of the Indian Penal Code and not to Section 34 of the Indian Penal Code, as the present case is, the order of reference was occasioned by the fact that in *Nanak Chand case* [(1955) 1 SCR 1201] it was stated specifically that the parallel case under Section 34 also stood on the same footing. In our attempt to resolve the conflict, we covered a wide area of sections and decisions. A detailed discussion of all the decisions cited at the Bar is not of much use as it is not possible to gather from a study of those cases anything very decisive by way of any guiding principle. But a few of them, more important than the rest, must be noticed.”

The said judgment also records that all blows on the head do not necessarily cause death and another factor noticed was that the deceased after the injuries had lived for 10 days.

27. A Division Bench of the Delhi High Court in ***Dewan Chand & Another Vs. State, 1984, Crl.L.J. 1045*** had occasion to observe:-

(9) There is no reason to disbelieve Pw 3, Pw 7 and Pw 9. Statement of Daulat Ram was recorded and on the basis of the same, first information report was recorded with promptness. However, the case against Gopal is not free from doubt. Daulat Ram in his statement merely stated that Gopal had conspired with Dewan Chand. No overt act showing his common intention was alleged. During evidence, however, some improvement had been made and it has been stated by Pw 3, Pw 7 and Pw 9 that he caught hold of Dwarka Prasad and exhorted Dewan by saying "Maro Sale Ko". In view of the fact that the aforesaid was not mentioned in the statement of Daulat Ram casts doubt about the making of the exhortation and catching hold of Dwarka by Gopal. So that there should be a common intention there must be meeting of minds to commit a particular offence. There should be some pre-arranged plan even though the said plan is formed all of a sudden or at the spur of the moment. Existence of such pre-arranged plan does not stand established and, Therefore, it cannot be said that the injury to Dwarka Parshad was caused in furtherance of common intention of the appellants. That being so, Gopal must be given benefit of doubt. 11. Then we are confronted with the question as to what offence was committed by Dewan Chand, appellant. Definition of murder is given in Section [300](#) IPC. The first clause of that definition says that culpable homicide is murder if the act by which the death is caused is done with the intention of causing death. In the present case there is no circumstance leading to the conclusion that Dewan Chand wanted to cause the death of Dwarka Parshad. It is only clause 3rdly which can have the possibility of application and that clause reads 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 the present case, cutting of femoral artery was sufficient in the ordinary course to have caused death but it cannot be said that the appellant Dewan Chand had the intention to inflict the particular injury of cutting of femoral artery. He only inflicted knife blow on thigh which is not vital part and it was only co-incidence that the aforesaid artery was cut. In a similar case in *Paramjit Singh and another v. The State*: 23(1983)DLT338 , we held that the offence committed was one punishable under second part of Section [304](#) IPC.

(10) We, Therefore, accept the appeal of Gopal, give him benefit of doubt, set aside the conviction and sentence and acquit him. The conviction of appellant Dewan Chand is altered from 302 Ipc to the second part of Section [304](#) IPC.

(11) The appellant Dewan Chand was aged little more than 16 years at the time of the commission of the offence. According to Section [6\(1\)](#) of the Probation of Offenders Act, 1958, when a person under 21 years of age is found guilty of having committed an offence punishable with imprisonment but not with imprisonment for life, he shall be given the benefit of being released on probation of good conduct unless the court, for reasons to be recorded, is of the opinion that course should not be adopted. For the purpose of forming the opinion, as Sub-section (2) of Section [6](#) of the said Act says, it is necessary to call for the report of the probation officer. Therefore, the report of the probation officer should be obtained within ten days and the matter of either releasing Dewan Chand on probation of good conduct or sending him to imprisonment will be considered on May 26, 1983.”

28. In view of the aforesaid position, we are inclined to give benefit of doubt to the three appellants and their conviction under Section 302 IPC is modified to Section 304, Part-I IPC. As already held above, all

the appellants are equally guilty as they had shared common intention as mandated under Section 34 IPC.

29. The last question pertains to the quantum of sentence, which should be awarded to the appellants. Appellants Kanahiya and Badlu had already suffered incarceration of about 4 years and 5 years, respectively. Their sentences were suspended after filing of the present appeal vide orders dated 30th March, 2011 and 22nd February, 2012. Keeping in view the role attributed to them, we are inclined to sentence them to the period already undergone. As far as appellant Suraj is concerned, it is pointed out that at the time of occurrence, he was studying in class-XII and had just attained the age of 18 years. It is stated that Suraj has already suffered incarceration of about six years and two months. He is sentenced to Rigorous Imprisonment for a period of 7 years and fine of Rs.15,000/-. In default of payment of fine, he shall undergo simple imprisonment of 4 months. Fine, if collected, will be paid to the legal heirs of Maya Ram.

30. The appeals are accordingly disposed of.

SANJIV KHANNA, J.

VED PRAKASH VAISH, J.

MAY 16, 2013
VKR/NA