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

% *Date of Judgment: 14th July, 2017*

\+ **CRL.A. 983/2015**

ARJUN ..... Appellant

Through : Mr. Harsh Prabhakar, Advocate (DHCLSC) and Mr. Anirudh Tanwar, Advocate

versus

THE STATE(GOVT OF NCT OF DELHI) ..... Respondent

Through : Mr. Rajat Katyal, APP for the State along with Inspector Pawan Kumar and SI Pranesh Kumar, P.S. Geeta Colony.

\+ **CRL.A. 1103/2016**

MALKEET SINGH @ LOLIYA ..... Appellant

Through : Ms. Inderjeet Sidhu, Advocate

versus

STATE ..... Respondent

Through : Mr. Rajat Katyal, APP for the State along with Inspector Pawan Kumar and SI Pranesh Kumar, P.S. Geeta Colony.

\+ **CRL.L.P. 2/2016**

STATE ..... Petitioner

Through : Mr. Rajat Katyal, APP for the State along with Inspector Pawan Kumar and SI Pranesh Kumar, P.S. Geeta Colony.

versus

MALKEET SINGH @ LOLIYA & ANR. ..... Respondents

Through : Ms. Inderjeet Sidhu, Advocate for respondent no.1.
Mr. Harsh Prabhakar, Advocate (DHCLSC) and Mr. Anirudh

Tanwar, Advocate for respondent no.2.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MR. JUSTICE C.HARI SHANKAR

G.S.SISTANI, J. ***(ORAL)***

1. Two appeals (Crl.A. 983/2015 and 1103/2016) have been filed under Section 374 (2) of the Code of Criminal Procedure, 1973 ('Cr.P.C.') against the judgment of the Trial Court dated 05.06.2015 in SC 33/2013 arising out of FIR 119/2013 PS Geeta Colony and the order on sentence dated 04.07.2015, by which the appellants have been convicted under Section 304/34 and Section 323/34 of the Indian Penal Code, 1860 ('IPC'). By the impugned order on sentence, the appellants stand sentenced to rigorous imprisonment for a period of 5 years with fine of Rs.10,000/- each and in default of payment of fine, to undergo simple imprisonment for two months; and sentenced to rigorous imprisonment of 1 year with fine of Rs.1,000/- each for the offence punishable under Sections 323/34 IPC and in default of payment of fine, to undergo simple imprisonment for a period of 15 days.
2. The State has also filed a leave to appeal (Crl.L.P. 2/2016) assailing the same judgment and order on sentence on the ground that the appellants should have been convicted under Section 302 IPC and consequently, a sentence of imprisonment for life should have been awarded.
3. For the sake of convenience, the parties shall be addressed according to their position in Crl. L.P.2/2016. The State will be referred to as the appellant; appellant in Crl.A. 983/2015 Arjun as respondent no.2

or '*respondent Arjun*'; and appellant in Crl.A. 1103/2016 as respondent no.1 or '*respondent Loliya*'.

4. Though separate appeals had been filed, common arguments were addressed by the counsel for the respondents Arjun and Loliya. After some hearing in the matter, learned counsel for the respondents have submitted that the respondents have been in incarceration for a period of more than 4 years and they have instructions not to contest their appeals on merit. However, both the counsel for the respondents have strongly contested the leave to appeal filed by the State. Mr. Katyal, learned counsel for the State, has addressed arguments in the leave to appeal.

5. Before the rival submissions of the learned counsel for the parties can be noticed, we deem it appropriate to state the case of the prosecution as noticed by the Trial Court, which is as under:

> "*... Case of the prosecution in brief is that on 27.03.2013 on receipt of a PCR call, SI Praveen Chauhan reached at the spot i.e. Jhuggi, 6 Block, Geeta Colony where it was revealed that injured persons had been removed to hospital. Statement of the complainant Raju Dubey was recorded in Hospital. In his statement, he stated that on 27.03.2013, being festival of Holi, he was present at his house. At about 3.30 p.m., some altercation took place between his brother Sonu and his neighbour accused Arjun and both of them were pacified by the neighbours. Accused Arjun threatened Sonu while leaving by saying "Tu Mujhe Nahi Janta Hai, Mujhse Dusmani Mehngi Padegi (You do not know me, enmity with me will cost you a lot).*
>
> *2. Complainant further stated that after sometime, his brother Sonu was going to the nearby tap to have a bath, when accused Arjun and accused Loliya, whom he knew from earlier, came there. Accused Loliya, was having danda in his hand. Both the accused persons started beating his brother Sonu and when Sonu protested, accused Loliya caught Sonu and accused Arjun took out a knife from Dub of his pant and stabbed Sonu by uttering that he would finish*

him that day. When the complainant tried to save his brother, accused Loliya and Arjun also attacked him. He raised alarm and people gathered at the spot. Someone gave a ring to police at number 100. PCR van came and removed both the injured to the hospital.

3. On the basis of statement of complainant Raju Dubey, FIR under section 323/307/34 IPC was registered. Later on, injured Sonu succumbed to his injuries on 30.03.2013 and Section 302 IPC was added. Postmortem on the dead body of Sonu was got conducted. On 3.4.2013, accused Arjun surrendered and he was arrested. During his police custody, he confessed his guilt in the present case and got weapon of offence i.e. knife and clothes, which he was wearing at the time of incident, recovered. On 10.05.2013, accused Malkeet Singh @ Loliya was also arrested and he also confessed to his guilt. Site plan was prepared. Accused pointed out the place of incident. Exhibits were sent to FSL. On completion of the investigation, challan was filed."

6. Charges were framed under the Sections 302/323/34 IPC against both the accused/respondents, to which they pleaded not guilty and claimed trial. To bring home the guilt of the respondents, the prosecution examined 16 witnesses. The statements of the accused were recorded under Section 313 Cr.P.C. wherein they denied the case of the prosecution *in toto* and claimed false implication. The accused did not lead any evidence in defence.

7. Analysing the evidence before it, the Trial Court convicted the respondents/accused as noticed in paragraph 1 aforegoing. The Trial Court found that as the case was not one of pre-meditated murder and the incident had taken place suddenly when the accused/respondents herein reached the spot to teach a lesson to Sonu ('deceased') for quarrelling with respondent Arjun earlier and held that the offence was only of culpable homicide not amounting to murder.

8. Mr.Katyal, learned counsel for the State, contends that the judgment passed by the Trial Court is bad in law and against the evidence brought on record and, thus resulted in gross miscarriage of justice. Learned counsel contends that the Trial Court has failed to appreciate that a quarrel took place between the deceased and respondent Arjun. The matter was pacified by the presence of persons staying in the locality and thereafter, respondent Arjun left the spot. Counsel contends that while leaving the spot, Arjun had threatened the deceased by saying "*Tu mujhe nahi janta hai, mujhse dusmani mehngi padegi*" (You do not know me, enmity with me will cost you a lot). Thereafter, he along with the respondent Loliya armed with a *danda* came at the spot and started beating the deceased and when the deceased resisted, respondent Loliya caught hold of him and respondent Arjun gave a knife blow challenging him and stating "*Saale aaj tera kaam tamam kar deta hoon*" (I'll do away with you today itself). It is contended by Mr.Katyal that it cannot be said that a quarrel took place in the heat of the moment, to the contrary after the quarrel and after the respondent Arjun was pacified by the persons of the locality, he left the spot only to come back armed with a *danda* and assaulted the deceased without any provocation and thus, a case under Section 302 IPC would be made out and it cannot be said that the fight took place in the heat of the moment. The very fact that the respondents returned armed with deadly weapons after the first scuffle would show that there was an intention to do away with the deceased. The intention of the respondents can also be gauged from the dimensions of the knife recovered at the instance of the appellant Arjun. Reliance is placed on ***State of Rajasthan* v. *Islam*, (2011) 6**

SCC 343 (paragraphs 11 and 12) and ***Hukam Chand* v. *State of Haryana*, (2002) 8 SCC 421** (paragraph 16).

9. Mr.Katyal has also relied upon the post-mortem report and statement of Dr. Neha Gupta (PW-13) in support of his submission that injury no.2 sustained by the deceased was sufficient to cause death in ordinary course of nature. It is submitted that the Trial Court had failed to consider the ingredients of Exception 1 to Section 300 IPC in its correct perspective. Reliance is placed on the judgment in the case of ***K.M. Nanavati* v. *State of Maharashtra*, 1962 Supp (1) SCR 567 : AIR 1962 SC 605** (paragraph 86).

10. Mr.Katyal submitted that the Trial Court had also failed to appreciate that the respondents were armed with a *danda* and a knife and were well aware that the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death in ordinary course. Learned counsel submitted that the case would be clearly covered under Thirdly to Section 300 IPC. Reliance was also framed on Illustration (c) to Section 300 IPC, which reads as under:

> "*A intentionally gives Z a sword-cut or club-would sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.*"

11. Alternatively, Mr.Katyal submitted that the punishment imposed by the Trial Court is inadequate and should be enhanced by this Court. Relying upon the judgment in ***Prithipal Singh* v. *State of Punjab*, (2012) 1 SCC 10** (paragraphs 35 - 38), learned counsel submitted that this Court is vested with the power to *suo moto* enhance the punishment after giving an opportunity of hearing to the respondents.

12. *Per contra*, learned counsel for the respondents, submit that there is no infirmity in the judgment and order on sentence passed by the Trial

Court. Mr.Prabhakar and Ms.Sidhu submitted that the acquittal recorded by the Trial Court for the offence punishable under Section 302 IPC is based on sound appreciation of the factual conspectus unravelled by the prosecution. The finding of the Trial Court cannot be termed as perverse to warrant interference by this Court. Reliance is placed on ***Arulvelu* v. *State*, (2009) 10 SCC 206**.

13. Learned counsel submitted that the present case would be covered under Exception 4 of Section 300 and hence, the Trial Court rightly found the respondents to be guilty of culpable homicide not amounting to murder. It is submitted that the incident was not a consequence of any prior enmity, but a quarrel that suddenly erupted between the parties on the festive occasion of *Holi*. The evidence led by the prosecution demonstrated that the deceased had an altercation with the respondent Arjun in the lane outside his house and they were pacified by neighbours. The respondent Arjun left the site while extending threats to the deceased and presumably went to his home. The deceased also went to his home and immediately thereafter, proceeded to take a bath at the common bathing area located barely at a distance of about 10-13 yards from his house. The house of the appellant Arjun was also located in close proximity to the *locus in quo* as given in the Scaled Site Plan (Ex.PW-10/A). Our attention was also drawn to the testimony of Jokhu Ram (PW-5) (father of the deceased) wherein he stated that the respondent Arjun had returned within a period of 1-2 minutes in the company of his confederate respondent Loliya, who was armed with a *danda*. Accordingly, learned counsel submitted that the offence was committed in the heat of passion and without any premeditation resulting in the solitary knife blow to the deceased. The respondents neither acted in a cruel

nor unusual manner. Learned counsel submitted that the judgment of the Apex Court in ***Islam* (Supra)** would not be applicable as the time gap in procuring the weapon of offence, i.e. *farsa*, has not been stated and further as the accused therein had given three blows to the deceased on his head.

14. In response to the dimensions of the knife relied upon by Mr.Katyal to show the intention of the respondents, learned counsel for the respondents submitted that the knife (Ex.P-1) recovered had not been proved to be used in the offence as neither the eyewitnesses identified the knife (Ex.P-1) while deposing before the Trial Court nor the doctor (PW-13) has given any definitive opinion in this regard.

15. As regards to the enhancement of sentence, Mr.Prabhakar and Ms.Sidhu submitted that the sentence imposed by the Trial Court is not grossly inadequate so as to shock the conscience of this Court warranting *suo moto* exercise of revisional powers. Reliance was placed on the judgments in ***Bed Raj* v. *State of U.P.*, AIR 1955 SC 778** and ***Shiv Govind* v. *The State of Madhya Pradesh*, (1972) 3 SCC 399**. Learned counsel next submitted that no reliance can be placed on the judgment of the Apex Court in ***Prithipal Singh* (Supra)** as the same was delivered in a wholly distinct factual setting. It was also submitted that the State has not filed an appeal in terms of Section 377 Cr.P.C. and only preferred a leave to appeal under Section 378 Cr.P.C.

16. We have heard the learned counsel for the parties and examined the Trial Court record. Though the appeals preferred by the respondents have not been contested before us, we deem it appropriate to analyse the order of conviction in order to satisfy our conscience. PWs-3, 5 and 7 were the eyewitnesses to the incident.

17. Raju Dubey (PW-3) (brother of the deceased) deposed that on 27.03.2013, which was the day of *Holi* festival, he was present in his *jhuggi* and on that day at about 3:30 PM, some quarrel had taken place between the respondent Arjun and the deceased. The respondent Arjun used to reside in *Jhuggi* No.7. The neighbours intervened and they separated both the deceased and the respondent Arjun and stopped them from further quarrelling. Thereafter, the respondent Arjun challenged the deceased that "*Saale tu mujhe janta nahi, mujhse dushmani bahut mahangi padegi*" (You do not know me, enmity with me will cost you a lot) and went away from there. After about 5-7 minutes, the respondent Arjun again came there alongwith his associate respondent Loliya, who was armed with a *danda*. PW-3 further deposed that when his brother/deceased was going to take a bath at the Government Hand Pump installed in around the *jhuggis*, both the respondents/accused came there and started giving beatings to the deceased. The deceased resisted, meanwhile the respondent Loliya caught hold of the deceased from both hands and respondent Arjun took out a knife from his dub (*aanth*) and gave knife blow on his lower chest portion (above the waist), challenging that "*saale aaj tera kaam tamam kar deta hun*" (I'll do away with you today itself). PW-3 intervened to save his brother, meanwhile the respondent Arjun assaulted him with the knife and respondent Loliya gave *danda* blows on his back. He raised alarm and public persons rushed towards them to save them. Meanwhile, both the respondents ran away brandishing the knife in the air. Someone informed the police; but before the police could arrive, their neighbour Pradeep alongwith some other neighbour took the deceased to the hospital. The PCR van took PW-3

to SDN Hospital and then he reached GTB Hospital as the deceased was referred to GTB Hospital.

18. The witness was thoroughly cross-examined wherein he stated that at about 3:30 PM, the deceased was present at home and further voluntarily stated that he had brought him after a manhandling with the respondent Arjun. He stated that he went outside and saw that at a little distance, there was a hot exchange between the deceased and respondent Arjun and then he had brought the deceased back to home. He further stated that after the deceased was brought home, he went out again to take bath on the handpump located outside the house. The hand pump was located at about 10-13 yards from the outer door of the house. Hardly about 1 minute after the deceased went out for bath, PW-3 also went out and saw 4-5 persons in the street and saw that the respondents were beating the deceased. At the time of the incident, PW-3 was at a distance of about 1-1 ½ meters.

19. Jokhu Ram (PW-5) (father of the deceased) was also an eyewitness to the incident. He deposed before the Trial Court that on 27.03.2013, he was present at his house and it was the *Holi* festival. On the day, at about 3:30 PM, some hot exchange of words took place between the deceased and respondent Arjun. They intervened and pacified. Thereafter, the respondent Arjun returned back from there. When the respondent Arjun left, he challenged the deceased that *mujhse dusmani mehangi padegi* (enmity with me, will cost you). His son/deceased went to take water from the tap installed infront of their *jhuggi*. At about 1-2 minutes, the respondent Arjun again came there along with his friend respondent Loliya. Respondent Loliya was armed with a *danda*. Both the respondents gave beatings to the deceased. The deceased resisted. Meanwhile, the respondent Loliya

apprehended the deceased from the back side, respondent Arjun took out a knife/*churi* from right dub and then assaulted the deceased with the knife and gave knife blows on the stomach of his son. PW-5 along with his son tried to save the deceased. Then both the respondents assaulted his son Raju (PW-3) as well, who sustained injuries on his head. In his cross-examination, PW-5 affirmed the suggestion that he was not present in the *jhuggi* when the deceased went to take a bath from tap and volunteered that he was present on the roof and the dispute was visible to him. PW-5 further stated that when the deceased was assaulted, the deceased was present at the water tap with the basket. He had seen only one blow being inflicted by the respondents to the deceased on his stomach.

20. Dev Narain (PW-7) (resident of *Jhuggi* J-10) was an independent eyewitness to the incident. He also deposed that on 27.03.2013, a quarrel took place between Raju and the deceased, and respondent Arjun and the deceased in the morning. He and other neighbours intervened and they separated them. Respondent Arjun left challenging the deceased and Raju that *tum mujhe jante nahi ho, mujhse dusmani mehngi padegi* (you don't know me, enmity with me will cost you). This incident took place at about 12 Noon. Thereafter, at about 3-3:30 PM, the deceased was going to take bath on tap, meanwhile the respondents came there. Respondent Loliya was armed with a *danda*. Meanwhile, the respondent Arjun slapped Suraj, brother of the deceased, who fell down. Thereafter, the respondents assaulted the deceased. The respondent Arjun took out knife and gave knife blow to the person of the deceased, while the respondent Loliya had caught hold of the deceased. PW-7 raised alarm immediately. Raju (PW-3), brother of the deceased, also rushed from his house.

When Raju rushed to the spot and intervened, both the respondents assaulted him also. Public persons gathered there and both the respondents ran away from there. In his cross-examination, PW-7 stated that the water tap was installed at the distance of 10-15 feet from his *jhuggi* and the distance between the house of the deceased and the water tap is less than that. He further stated that a quarrel had taken place between the deceased and the respondent Arjun about 1 ½ hours prior to the stabbing.

21. Pradeep (PW-8) was another eyewitness, who turned hostile and did not support the case of the prosecution and merely deposed that he had removed the deceased to hospital in a TSR.

22. Though a different story is projected in the testimony of Dev Narain (PW-7) with regard to the involvement of the third brother namely Suraj, he remained consistent to other prosecution witnesses to the extent of the stabbing incident of the deceased.

23. The weapon of the offence, i.e. knife (Ex.P-1), was also recovered pursuant to the disclosure statement of the respondent Arjun (Ex.PW-11/C). In this regard, SI Praveen Chauhan (PW-11) deposed that the respondent Arjun had taken the police party to Geeta Colony Flyover, where he pointed to bushes beneath the flyover and told that he had disposed of the weapon (Ex.P-1) and his blood stained shirt (Ex.P-2) there; which were seized vide Ex.PW-11/F. Ins.Vivek Kumar (PW-15) (IO) has also deposed on similar lines. The knife (Ex.P-1) and the blood stained shirt (Ex.P-2) were sent to FSL, which by its report dated 04.03.2014 (Ex.P-Y) detected blood on the metallic knife (Exhibit '1') and blood stained shirt (Exhibit '2'). However, for reasons best known to the prosecution, the knife (Ex.P-1) and his blood stained shirt (Ex.P-2) were never produced before either of the

eyewitnesses (PWs-3, 5 and 7) for identification nor any conclusive medical opinion was obtained and hence, we are unable to believe in the recovery. Mere presence of blood on the knife (Ex.P-1) is not sufficient to link it with the offence in question.

MEDICAL EVIDENCE

24. The deceased was first medically examined by Dr.A.Saha (PW-9), Casualty Medical Officer, Dr.Hedgewar Arogya Sansthan vide MLC No.988/2013 (Ex.PW-9/A). During cross-examination, he denied the suggestion that the patient/deceased was under the influence of liquor. As per the MLC (Ex.PW-9/A), there was one incised wound on left flank of 10 cms x 5 cms below the xiphisternum.

25. The deceased expired on 30.03.2013 during the course of treatment. The postmortem on the body of the deceased was conducted by Dr.Neha Gupta (PW-13), who, in her report (Ex.PW-13/A), found the following external *ante mortem* injuries on the body of the deceased:

    (i) Surgically created stapled laparotomy wound of size 23x0.1 cm present vertically over abdomen in midline, upper end 1 cm below the xiphisternum with 27 staples *in situ*.

    (ii) Surgically altered stab wound of size 9x0.1 cm x 15 cm deep with 13 staples *in situ* obliquely over left flank, medial end 16 cm from midlines and 13 cm above left anterior iliac spine. Margins of the wound were deep throughout. The direction of the wound was upwards, backwards and medically.

26. The cause of death was opined to be haemorrhagic shock as a result of *ante mortem* injury to spleen produced by sharpedged weapon. Injury no. 2 was found sufficient to cause death in the ordinary course of nature. In her subsequent opinion (Ex.PW-13/B), PW-13 stated that no definite opinion could be given as to whether injury no.2 could

have been caused by the weapon of offence, i.e. knife (Ex.P-1), as the wound had been surgically altered.

27. Raju (PW-3) was medically examined by Dr.Parvej Iqbal (PW-12), who was working as a Casualty Medical Officer in SDN Hospital, who in his MLC (Ex.PW-12/A), found the following injuries on the body of Raju:

    (i) Multiple bruises over back-upper side

    (ii) Abrasion over left forehead seen about 1.5 cm x 0.5 cm area.

    The nature of the injuries was opined to be 'Simple'.

28. In view of the aforegoing ocular testimonies which remain consistent to the extent of the stabbing of the deceased by the respondent Arjun, while he was held by the respondent Loliya and having been corroborated by the medical evidence, we find no infirmity in the order of the Trial Court recording the conviction of the accused/respondents herein.

29. We proceed to analyse the remaining bone of contention between the parties, i.e. whether the offence would amount to murder under Section 300 IPC?

30. The controversy arises primarily owing to the manner in which the judgment of the Trial Court is worded. The judgment is not clear as to which Exception to Section 300 was applied by the Trial Court to exclude a case under Section 300 IPC. We deem it appropriate to extract paragraph 35 of the judgment of the Trial Court in this regard in extenso:

> "*35 Case of the prosecution is that after the initial quarrel accused Arjun came back with accused Malkeet Singh @ Loliya armed with a Danda. The initial quarrel was on a minor issue and none of the witnesses has given any description of the said tiff. It appears that when both the accused were fighting with Sonu and PW3 Raju Dubey, at*

that time, the matter aggravated suddenly and accusd Arjun gave a knife blow on the body of Sonu. In my view, it is not a case of pre-meditated murder and the incident had taken place suddenly when both the accused persons came to the spot just to teach a lesson to Sonu for quarreling with accused Arjun earlier. The present case is not covered in the definition of Section 302 IPC, rather same falls under Section 304/34 IPC as there was no pre-meditated intention to kill when both the accused persons had arrived at the spot. Accused Arjun had stabbed Sonu during quarrel which was going on in which PW3 Raju Dubey had also suffered injury and the injuries on the person of injured Sonu had later on resulted in his death after about 3 days. Had there been any pre-meditated intention, then as per version of the prosecution, accused Malkeet Singh @ Loliya had already caught hold of both the hands of injured Sonu, then accused Arjun could have given knife blows on the chest/heart of Sonu. But in the present case, injuries were caused in the abdominal region, so I am of the view that this case is covered under culpable homicide not amounting to murder in case of deceased Sonu."

(Emphasis Supplied)

31. Though the Trial Court found that there was no pre-meditated intention to kill as the incident took place when the accused/respondents reached the spot, that is neither here nor there. The ingredients of none of the Exceptions to Section 300 stand satisfied. The Trial Court has not specified which Exception the case fell into; it further failed to specify whether the case was covered under Part I or Part II of Section 304 IPC. In this background, we deem it appropriate to analyse the case afresh.

32. We are of the opinion that the present case would be covered under Exception 4 of Section 300 and hence, a case for murder was not made out. A coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in respect of Exception 4 of Section 300 in ***Kamaljeet* v. *State*, MANU/DE/1752/2017** has observed that "[*t*]*o*

bring a case under the exception, fourfold requirements must be satisfied: first, there must be a sudden fight; second, absence of pre-meditation; third, the accused must have been overcome with the heat of passion; and fourth, the accused must not have taken undue advantage or acted in a cruel or unusual manner."

33. The testimonies of the brother (PW-3) and father (PW-5) of the deceased as well as Dev Narain (PW-7) are clear that an initial quarrel had taken place between the deceased and respondent Arjun, which was pacified and Raju (PW-3) had brought the deceased back home. Now as per PW-3 and PW-5, within few minutes, the deceased went to take a bath at the hand pump infront of their *jhuggis*, when the respondent Arjun returned with respondent Loliya to teach the deceased a lesson. Respondent Loliya was armed with a *danda*. When the deceased remonstrated, the respondent Loliya caught hold of him, while the respondent Arjun took out a knife and stabbed him in the abdomen. The brother of Raju (PW-3) tried to intervene, who sustained injuries on his own person. The primary question which arises is whether there was sufficient cooling off period between the two incidents.

34. In a recent judgment, a coordinate bench of this Court, of which one of us (G.S.Sistani, J.) was a member, in ***Jite* v. *State*, MANU/DE/1791/2017** had extensively discussed the law with regard to 'cooling off' period. The facts therein were similar to ones before us, after a first altercation, all the parties rushed to their homes (2-4 minutes away), the appellant procured the weapon of offence, i.e. knife, and returned to stab the deceased. The bench modified the conviction from Section 302 to Section 304 Part I IPC finding insufficient cooling off period. The relevant portion reads as under:

"38. In respect of cooling off period, we may refer to the judgment of a coordinate bench in Mohd. Sultan @ Kallu v. State, MANU/DE/2530/2011 : 2011 Cri. L.J. 4680, wherein the accused had returned in 2-3 minutes after a heated exchange of words with a knife and stabbed the deceased, the conviction of the appellant was changed from one under Section 302 IPC to Section 304 Part I IPC. The relevant paragraphs read as under:

> *"14. 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. <u>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.</u> On the intervention of the other brothers and cousin Mumtaz, Mohd. Sultan left the premises threatening to teach them a lesson. <u>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.</u> 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. <u>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,</u>*

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.

15. 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."

(Emphasis Supplied)

[See also Darshan Singh (Supra) (paragraphs 20 - 24)]

39. In Tayyab v. State NCT of Delhi, MANU/DE/4258/2013 : 2014 (1) JCC 271 the accused persons had hot talks with the deceased on the issue of money, when the accused rushed to his house to bring a chhura, with which he had inflicted the stab injury on the body of the deceased, this Court had converted the conviction from one under Section 302 to Section 304 Part I IPC, observing that:

"23. 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.

…

27. 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."

(Emphasis Supplied)

40. Similarly, a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in Vinod Kumar. v.

State, MANU/DE/1351/2016 : 2016 Cri. L.J. 4810 had while converting the conviction from Section 302 to Section 304 Part I, observed as under:

> "*39. From the evidence on record, it is very clear that the appellants intended to cause bodily injuries which culminated into the death after 7 days. In our opinion, there was a sudden altercation which ensued in the heat of the moment and there is no deliberate planning. In the present case, as stated above there was no due deliberation on the part of the appellants and they assaulted the deceased almost immediately after the fact of the quarrel between the children came to their knowledge. It was further established that there was no cooling off period as the gap was short and they were in the same state of mind and wanted to take revenge with the deceased. The quarrel between the children was lingering in their mind and tormented them mentally. Treating the time gap between the quarrel and the incident which resulted in the death of the deceased to be negligible, we conclude that the appellants had not committed the crime with any pre-meditation. It is very likely that the intervention of the deceased between the quarrel of the children provoked the appellants to such an extent that they chose to take this extreme step. The entire incident happened within a very short span of time. The intention probably was to merely cause such bodily injuries.*"
>
> (*Emphasis Supplied*)

41. We may also fruitfully refer to the judgment of the Apex Court in B.D. Khunte v. Union of India, (2015) 1 SCC 286 wherein in respect of Exception I to Section 300, it was observed as under:

> "*19. ...Between 1400 hrs when the appellant was given a grave provocation and 2130 hrs, the time when the appellant shot the deceased there were seven hours which period was sufficient for the appellant to cool down. A person who is under a grave and sudden provocation can regain his cool and composure. Grave provocation after all is a momentary loss of one's capacity to differentiate between what is right and what is not. So long as that critical moment does not result in any damage, the incident lapses into realm of memories to fuel his desire to take*

revenge and thus act as a motivation for the commission of a crime in future. But any such memory of a past event does not qualify as a grave and sudden provocation for mitigating the offence. The beating and humiliation which the accused had suffered may have acted as a motive for revenge against the deceased who had caused such humiliation but that is not what falls in Exception 1 to Section 300 IPC which is identical to Exception 1 to Section 300 of the Ranbir Penal Code applicable to the State of Jammu and Kashmir where the offence in question was committed by the appellant."

(*Emphasis Supplied*)

42. From the aforegoing, it is clear that for a case to fall within Exception IV of Section 300, the incident must have taken place in a sudden fight in the heat of passion. There must not be any time gap or the time gap should be insufficient to allowed tempers to cool off. If the tempers continued to run high, then the case would fall within Exception IV; but if they cool down, then the heat of passion gives way and retribution/revenge may bear in the mind of the culprit.

43. In the present case as well, we find that there was no cooling off period between the two incidents, it has come in evidence that the distance between the piao/water tank and the house of the deceased could be covered in 2-4 minutes on foot. After the first altercation, all parties had hurried to Balmiki Basti, where the incident of stabbing took place. It cannot be said that there was a sufficient cooling off period. Thus, all the four essentials of Exception 4 stand satisfied: the offence was committed pursuant to a sudden fight, there was no premeditation, the single solitary blow was inflicted in the heat of passion without sufficient time to cool down, the appellant did not carry with him the weapon of offence and procured the same after the first altercation, and the appellant neither acted in a cruel nor unusual manner. [See Sandhya Jadhav v. State of Maharashtra, MANU/SC/8086/2006 : (2006) 4 SCC 653 (paragraphs 8 - 9)]."

35. The law is well-settled, if there is sufficient cooling off period then the tempers may thaw and the desire of vengeance may overwhelm the

accused establishing a clear intention to kill the deceased. However, if the tempers continue to run high, the incident might take place in the heat of passion. Coming to the case at hand, as per the account of Raju (PW-3), the time gap between the two incidents was about 5-7 minutes, while as per the father of the deceased (PW-5) it was 1-2 minutes. We have also gone through the Scale Site Plan (Ex.PW-10/A), as per which the distances between the *jhuggis* of the respondent Arjun and the deceased and the bathing area/hand pump is meagre. The distance between the *jhuggi* of the deceased and the *locus in quo* is 685 cms, while the distance between the spot and *jhuggi* of respondent Arjun is about 345 cms. It is clear that there was no cooling off period to allow tempers heat to cool and open the scope of premeditation. Though PW-7 had stated that there was a difference of about 1 ½ hours between the two incidents, the same is belied by Ex.PW-10/A and even otherwise, whenever two views are possible, the one favourable to the appellant must be believed.

36. Mr.Katyal had placed reliance upon the judgment in ***Islam* (Supra)** to submit that the intention can develop at the spot and the fact that the respondent Arjun had gone to fetch the knife showed some amount of pre-meditation. We are unable to subscribe to the view as in ***Islam* (Supra)**, the Supreme Court had found that there was an interval of time between the first altercation and when the accused came back armed with a *farsa*. Though the exact time gap is not mentioned, it is clear that the interval was found sufficient to allow the development of intention and show premeditation, which is not the case before us.

37. Learned counsel for the State had also relied upon the judgment in ***Hukam Chand* (Supra)** to submit the very fact the respondent Arjun had returned armed with a deadly weapon (Ex.P-1), which was no

ordinary knife, would show that he harboured an intention to cause the death of the deceased. In the case, the Apex Court had gauged the intent of the accused by the fact that he had arrived at the place of occurrence armed with a *pharsa* in hand. Indubitably, the weapon of offence (Ex.P-1) is no ordinary knife and had a blade of more than 19 cms as evidenced by Ex.PW-11/E and Ex.PW-13/B, however, the weapon was never identified by any of the eyewitnesses to the incident as the one used to stab the deceased. It is not clear whether the respondent Arjun had procured an ordinary kitchen knife or a deadly one. Further, the fact that the deceased succumbed to his injuries after 3 days hints towards the former. In such circumstances, the vary fact that the respondent Arjun had procured the knife cannot be used to impute the intention to cause death upon him.

38. All the essentials of Exception 4 to Section 300 stand satisfied. The offence was committed in a sudden fight having been erupted between the deceased and respondent Arjun; which was pacified, however, there was no time to allow cooling of tempers. Within a couple of minutes, the respondent Arjun returned alongwith respondent Loliya armed with a *danda* and a knife. Now neither the *danda* was recovered nor Ex.P-1 was identified as the knife used by the respondent Arjun. The deceased protested and the fight resumed and in the heat of passion, the respondent Arjun took out a knife, which was procured in the little time between the two incidents, and gave a solitary blow on the abdomen of the deceased while the respondent Loliya immobilized him. Had there been any premeditation, the respondent Arjun might have stabbed the deceased in the first altercation or at a vital part. Finally, it cannot be said that the respondents had acted in a cruel or unusual manner. Accordingly, the

offence punishable under Section 302 was not made out [See ***Sandhya Jadhav* v. *State of Maharashtra*, (2006) 4 SCC 653** (paragraphs 8 - 9)].

39. The judgment in the case of ***K.M. Nanavati* (Supra)** being in respect of Exception 1 and not Exception 4 of Section 300 IPC has no application in the present case.

40. The question which remains is whether the present case would be covered under Section 304 Part I or Part II IPC. In this regard, we may notice that the Apex Court in ***Bhera* v. *State of Rajasthan*, (2000) 10 SCC 225** had found that the offence of stabbing the deceased in the chest with a knife during the course of a quarrel to be one under Section 304 Part II and sentenced the accused/appellant therein to imprisonment for 5 years. Similarly in the present case, the respondents cannot be imputed with the intention to cause such bodily injury as is likely to cause death and hence, only the offence under Section 304 Part II was made out.

41. The final aspect to be considered is whether the sentence imposed upon by the Trial Court was commensurate to the culpability of the respondents? Sentencing vests great discretion in the hands of the judge, which is to be exercised in a sound manner while balancing the aggravating and mitigating circumstances of a case. There cannot be any uniform policy which may be resorted to as sentencing involves a comprehensive view of both the crime and the criminal allowing for a myriad situations or questions which may fall for the Court. All the while the doctrine of proportionality must be adhered as both deficient and excessive punishments undermine the criminal justice system [***Nandan* v. *State*, MANU/DE/2154/2015** (paragraphs 12 and 21) and

***Ramjee Lal* v. *State (Govt. of NCT) Delhi*, 2017 SCC OnLine Del 8581** (paragraph 21)].

42. Learned counsel for the respondents had raised a technical objection that in the absence of any appeal under Section 377 Cr.P.C., this Court cannot enhance the sentence. Though it is correct that the State had not preferred any appeal under Section 377 Cr.P.C. and there is no ground alleging inadequacy of sentence in Crl.L.P. 02/2016, even then, we find no force in the submission as the appellate court is always vested with the power under Section 386 (e) to enhance the sentence *suo moto* as held in ***Prithipal Singh* (Supra)** (paragraphs 35 - 38 and 84).

43. At the same time, the appellate court may only enhance the sentence where the one imposed by the Trial Court is found to be grossly inadequate. In ***Bed Raj* (Supra)**, the appellant had been convicted under Section 304 IPC and sentenced to 3 years rigorous imprisonment by the Sessions Court, which was enhanced to 10 years by the High Court. This did not find favour with the Supreme Court, which set-aside the sentence imposed by the High Court and restored the sentence of the Sessions Court, while observing as under:

> "*15. A question of a sentence is a matter of discretion and it is well settled that when discretion has been properly exercised along accepted judicial lines, an appellate court should not interfere to the detriment of an accused person except for very strong reasons which must be disclosed on the face of the judgment; see for example, the observations in Dalip Singh v. State of Punjab [1954 SCR 145 at 156] and Nar Singh v. State of Uttar Pradesh[(1955) 1 SCR 238 at 241] .*
>
> *In a matter of enhancement there should not be interference when the sentence passed imposes substantial punishment. Interference is only called for when it is manifestly inadequate. In our opinion, these principles have not been observed. It is impossible to hold in the*

> *circumstances described that the Sessions Judge did not impose a substantial sentence, and no adequate reason has been assigned by the learned High Court Judges for considering the sentence manifestly inadequate.*"
>
> (Emphasis Supplied)

44. The case was followed in ***Shiv Govind* (Supra)** (paragraphs 9 - 11). Similarly, the Apex Court in ***Ram Sanjiwan Singh* v. *State of Bihar*, (1996) 8 SCC 552** (paragraph 20) found the enhancement of the sentence by the High Court for the offence punishable under Section 304 Part I IPC to be unwarranted and observed that "[*i*]*t is now well settled that imposing of sentence is in the realm of discretion of the court and unless this sentence is found to be grossly inadequate the appellate court would not be justified in interfering with the discretionary order of sentence.*"

45. Further in ***Ravindra Tukaram Hiwale* v. *State of Maharashtra*, AIR 2010 SC 3492** (paragraph 4), the Supreme Court once again while setting aside the order of the High Court enhancing the punishment under Section 306 from 4 years to 6 years stated that "*the interference of the appellate court on the quantum of sentence should be rare and only in exceptional cases.*"

46. In the present case, the Trial Court has sentenced the respondents to rigorous imprisonment for a period of 5 years for the offence under Section 304/34 IPC. Does the sentence seem to be so grossly inadequate to warrant interference by this Court? We think not. We find that the Trial Court has rightly considered all the factors and sentenced the respondents in accordance with their guilt. Accordingly, no infirmity is found in the sentence imposed by the Trial Court.

47. Even otherwise, it is settled law that the appellate court may only interfere in an appeal against acquittal when there are substantial and compelling reasons to do so [See ***Sheo Swarup* v. *King-Emperor*, AIR 1934 PC 227 (2)**; ***M.G. Agarwal* v. *State of Maharashtra*, AIR 1963 SC 200** (paragraph 16 and 17); ***Tota Singh and Anr.* v. *State of Punjab*, AIR 1987 SC 108: (1987) 2 SCC 529** (paragraph 6); ***State of Rajasthan* v. *Raja Ram*, (2003) 8 SCC 180** (paragraph 7); ***Chandrappa* v. *State of Karnataka*, (2007) 4 SCC 415** (paragraph 42); ***Ghurey Lal* v. *State of U.P.*, (2008) 10 SCC 450** (paragraph 73); ***Aruvelu* (Supra)** (paragraph 36); ***Muralidhar @ Gidda* v. *State of Karnataka*, (2014) 5 SCC 730** (paragraph 12); and ***Arun Kumar* v. *State of Bihar*, (2017) 6 SCC 765** (paragraph 15)].

48. Thus, both the appeals and the leave to appeal are dismissed.

49. Trial Court record be returned along with copy of this judgment.

50. The sentence of respondent Loliya had been suspended during the pendency of the appeal by order dated 08.03.2017 and he is stated to be on bail. He will surrender before the Central Jail, Tihar concerned within six weeks from today.

G. S. SISTANI, J.

C.HARI SHANKAR, J.

JULY 14, 2017
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