

AFR
Reserved

Court No. 1.

Case :- CRIMINAL APPEAL No. - 1185 of 2019

Appellant :- Rahul

Respondent :- State of U.P.

Counsel for Appellant :- Shyam Kinkar Pandey, Atul Verma, Hari Krishna Verma, Himanshu Tiwari, Rajesh Kumar, Rajeshwar

Counsel for Respondent :- Govt. Advocate

Hon'ble Attau Rahman Masoodi, J.

Hon'ble Umesh Chandra Sharma, J.

(Per : Hon'ble Umesh Chandra Sharma, J.)

- (1) Heard Sri Atul Verma, learned counsel for the appellant, learned Additional Government Advocate for the State and perused the record.
- (2) This appeal has been preferred by the appellant against the order passed by the Sessions Judge, Lucknow dated 30.04.2019 in Sessions Trial No. 215 of 2012 (State Vs. Rahul) arising out of Case Crime No. 219 of 2011, under Sections 354, 452, 307, 302 IPC, Police Station Wazirganj, District Lucknow whereby the appellant has been convicted under Section 452 IPC, 307/34 IPC, 354 IPC, 307/34 IPC, 302/34 IPC and Section 4/25 Arms Act. The appellant has been sentenced to undergo four years imprisonment and alongwith fine of Rs.1,000/- under Section 452 IPC; one year imprisonment and alongwith payment of fine of Rs.1,000/- under Section 354 IPC, five years rigorous imprisonment alongwith fine of Rs. 2,000/- under Section 307/34 IPC and life imprisonment alongwith fine of Rs.2,000/- under Section 302/34 IPC with default stipulation. Under Sections 4/25 Arms Act he has been sentenced to undergo one year imprisonment alongwith fine of Rs.1,000/- with default stipulation. It was also directed that the period already spent under incarceration would be adjusted in the ultimate sentence and all the sentences shall run concurrently.

- (3) In brief, facts of the case are that the informant Jitendra lodged an FIR alleging that on 19.07.2011 at about 02:15 p.m. when his sister Kumari Santoshi and mother Smt. Savitri Devi were in the house, Rahul (the appellant) and Bablu @ Anand resident of Lukarganj, Police Station Khuldabad, Allahabad entered his house and started molesting his sister and when it was opposed by his mother, Rahul attacked his sister Santoshi and Bablu attacked his mother Savitri Devi with an intention to kill her with the knife. On commotion when the informant and neighbours reached, they escaped from the spot. Both these accused used to visit his house 2-3 times and used to talk with his sister on mobile prior to the incident and therefore the complainant knew them very well. As a result of the sudden attack blood started oozing from the neck of his mother and was serious. His sister also sustained injuries. He had admitted his injured mother at Trauma Center. Complaint was reduced in writing by Narsingh Sengar for lodging of FIR and necessary action.
- (4) On the basis of written complaint of the informant, a case under Section 354, 452, 307 IPC was lodged at Crime No. 219 of 2011 against the accused Rahul and Bablu. The Investigating Officer (IO) started investigation and prepared the site plan. During the course of treatment Smt. Savitri Devi died. After recording the statements of the witnesses and collecting the evidence, a charge sheet under Sections 354, 452, 307, 302 IPC was submitted to the Court concerned. During the trial, co-accused Bablu was declared to be juvenile. Hence, his case was segregated and tried separately. A charge under Sections 354, 452, 307/34, 302/34 IPC was framed against the accused Rahul who denied the charge and sought for trial.
- (5) Prosecution has examined following witnesses:-

1	PW-1	Jitendra, informant
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2	PW-2	Kumar Santoshi
3	PW-3	Dr. Shiv Shankar Singh
4	PW-4	Dr. Sunil Kumar Yadav
5	PW-5	SI Dharmveer Saroj
6	PW-6	SSI Manoj Kumar Pathak
7	PW-7	SI Pankaj Singh
8	PW-8	SI Adarsh Kumar Singh
9	PW-9	Constable Vachan Singh
10	PW-10	Head Constable Adarsh Kumar
11	PW-11	Dr. Avanish Kumar

(6) Following documentary evidences have been adduced by the prosecution:-

1	Ex.Ka-1	Written complaint
2	Ex.Ka-2	Injury report of Santoshi
3	Ex.Ka-3	Post mortem report of the dead body of the deceased
4	Ex.Ka-4	Inquest report
5	Ex.Ka-5	Police Form-13
6	Ex.Ka-6	Police Form-33
7	Ex.Ka-7	Photonash
8	Ex.Ka-8	Map
9	Ex.Ka-9	Recovery memo of blood stained and plain soil
10	Ex.Ka-10	Recover memo of knife
11	Ex.Ka-11A	Chik FIR under Section 4/25 Arms Act
12	Ex.Ka-12	Charge sheet under Section 4/25 Arms Act
13	Ex.Ka-12A	Kaymi GD of case under Section 4/25 Arms Act
14	Ex.Ka-13	Charge sheet
15	Ex.Ka-14	Chik FIR of Crime No.219 of 2011, under Sections 354, 452, 307 IPC
16	Ex.Ka-15	Kaymi GD of case under Section 354, 452, 307 IPC
17	Ex.Ka-16	Injury report of Smt. Savitri Devi (before her death)
18	M.Ex.1	Truss of the blood stained and plain soil

19	M.Ex.2	Cloth truss with regard to the knife
20	M.Ex.3	Paper wrapped over the knife
21	M.Ex.4	Knife
22	M.Ex.5	Box with regard to plain soil
23	M.Ex.6	Box with regard to blood stained soil

- (7) After closure of evidence, statement of accused Rahul was recorded in which he denied the charge and allegations levelled against him and stated himself to be innocent.
- (8) In defence following witnesses have been produced by the appellant:-

1	DW-1	Sunil Kumar Pal
2	DW-2	Sangeet Kumar
3	DW-3	Mamta sister of the accused

Grounds of Appeal

- (9) The appellant had taken grounds that: (i) the learned Sessions Judge did not consider the evidence led by the defence as well as prosecution; (ii) there are contradictions in the evidence of witnesses but the same has not been considered by the trial court and the appellant has been convicted without considering the factual and legal aspects of the case; (iii) there was no motive of the appellant to kill the deceased which was also proved from the statement of PW-2 and this aspect has not been considered by the trial court; (iv) PW-2 has admitted that the appellant was known to her and he used to come to her home and there was no previous enmity between the appellant and the deceased as well as PW-2; and (v) it was a case of sudden provocation between the accused and PW-2.
- (10) In the cross-examination PW-2 has deposed that the appellant had caught hold of her and co-accused Bablu had assaulted and

injured her as well as her mother (deceased). There was neither any motive to quarrel with PW-2 and her mother nor to kill the deceased, therefore, there was no occasion to convict the appellant. Before recording statement of the deceased, Smt. Savitri Devi, no medical opinion was obtained as to whether the deceased was in a position to give statement under Section 161 CrPC or not. The knife by which injuries are said to have been caused was of domestic use and the incident occurred as a consequence of sudden quarrel. The knife was sent to the FSL as also the blood sample collected by the IO. The blood on the knife does not match with the blood stained in soil as per the forensic report. This important aspect has not been considered by the trial court.

- (11) The co-accused Bablu has been declared juvenile by the Juvenile Justice Board, Lucknow and his case has been separated.
- (12) The size/depth of the injuries sustained by the deceased has not been mentioned in the Medical Report and the cause of death has been shown as septicemia on which basis the impugned judgment and order ought to have not been passed. The trial Court has failed to consider the observations made by the Apex Court and as well as the High Court in a number of cases.
- (13) The appellant is an orphan and a youngster. He is behind the bars since 19.07.2011 and has never flouted the rules and regulations of the Jail Manual. There was no ulterior motive to kill the deceased. The trial court has not applied its judicial mind and the conclusion arrived at is therefore, illegal, erroneous and bad in law in the given facts and circumstances of the case. The findings of the trial court are merely based on conjunctures and surmises. In the background of aforesaid submissions, learned counsel for the appellant has submitted that the appeal deserves to be allowed and order of conviction and sentence be set aside.

Brief discussion on statements of prosecution witnesses

- (14) PW-1, Jitendra has deposed that on 19.07.2011 at about 02:15 p.m. when his sister Kumari Santoshi and his mother were in his house, accused Rahul and Bablu residents of Allahabad entered the house and started molesting his sister. When his mother resisted the move of Rahul (the appellant), who attacked his sister and Bablu attacked his mother with knife with the intention to kill. On hearing commotion, he and the neighbours reached there. Bablu succeeded in escaping from the spot while pushing him. He caught hold of Rahul but when he was taking his mother to the hospital, Rahul also managed to escape from his clutches, who was latter arrested by the police.
- (15) The injury caused on the neck of his mother was bleeding profusely and her condition was critical and that his sister was also injured. He took his mother and sister to the hospital and also got the report of the incident written by Narsingh Sengar on his narration. He recognized his signature and proved the written complaint Ex.Ka-1. Both the accused were known to him as he had met with them earlier as they had already visited his house. After about 12 days his mother died. Police prepared the panchnama and got signed by him also. Therefore, post-mortem was performed and thereafter it was provided to him. They conducted the last rituals of his mother. The Inspector had asked about the incident and then he informed the same facts to him as were deposed before the court. Doctor had also taken statement of his mother before him.
- (16) In cross-examination the witness withstood his statement as deposed in examination-in-chief. In addition to that he admitted that there was no conversation about the incident between him and his sister. He has also admitted that when the accused ran away from the spot, he had reached there and had taken his mother to Trauma Centre of Medical College. He has also admitted that even before the incident these two accused used to

visit his house and he had met with them 2-3 times. There was no enmity between the accused persons and him or his family members. His sister had not conveyed the reason as to why these two boys visited his house. He cannot tell the reason behind the incident. On the basis of the information given by the persons who reached at the place of occurrence, he had lodged the FIR. He does not remember their names. On the date of incident, the Investigating Officer had inquired him and thereafter he did not meet to the Investigating Officer. His mother remained under treatment for 12 days at the Medical College.

- (17) PW-2, Santoshi, sister of the informant, deposed that on 19.07.2011 at about 02:15 p.m. she and her mother were in the house. Her brother was not there. By that time, Rahul came to her house with his friend, Bablu and started molesting her and insisted for marriage. When she opposed and cried, both the accused persons Rahul and Bablu started attacking with the knife with the intention to kill her. In the meantime, when her mother reached there, they attacked her mother also and tried to slit her throat. Hearing the commotion, neighbours and her brother reached there. Rahul was caught there whereas Bablu fled from the place of occurrence. Her mother was severely injured and while her mother was taken to the hospital, Rahul also escaped but was arrested by the police afterwards. In this incident, she suffered several injuries on her throat, fingers and on her body. Her brother-informant lodged the report at Police Station Wazirganj. She recognized the accused persons as as they were known to her before the incident and with one of them, she used to talk on phone and they had also visited her house 2-3 times. The Investigating Officer had inquired her and had recorded her statement. Her mother's statement was recorded in the hospital. Both the persons had injured her and her mother as she had refused to marry the accused Rahul and her mother

had opposed it. After about 12 days of treatment, her mother died in the hospital due to septicaemia.

(18) In the cross-examination, PW-2 deposed that she knows Bablu as friend of Rahul. There was no enmity prior to the incident. This incident had occurred all of sudden. Bablu had attacked upon her with knife with the intention to kill her. She cannot tell the number of assaults made by the accused by knife upon her and her mother. When Bablu was attacking upon her and her mother, she cried. Rahul had only caught hold of her. Several persons alongwith her brother had reached at the spot. She was discharged after the first aid was given. The Investigating Officer had visited her house 2-3 times. She could not tell as to the persons who had intervened to save them. She could not tell who had provided her phone number to Bablu. She used to talk with Rahul on phone. This incident had occurred all of sudden while talking about their marriage. The offence was committed by a vegetable knife which was kept in kitchen. She cannot tell the measurement of knife. It's edge would be six inch.

(19) PW-3, Dr. Shiv Shankar Singh has deposed that he had examined Santoshi Kumari at about 03:15 p.m. on 19.07.2011 and had found following injuries on her person:-

(i) Lacerated wound 01cm x 0.5 cm muscle deep right side of upper lips and there was profuse bleeding.

(ii) Abrasion 03 cm x 02cm towards the neck 4cm above sternal notch.

(iii) Lacerated wound 1.5cm x 0.5cm on the ring finger in the right hand.

(iv) Lacerated wound 01cm x 0.50cm on little finger in the left hand.

(v) Lacerated wound 01cm x 0.2cm 1cm below injury no. (iv).

(vi) Cut wound 01cm x 0.2cm at distal end of left little finger.

(vii) Cut wound 01 cm x 0.2 cm on the dorsum of middle finger of the left hand.

- (20) According to PW-3, injury nos. (iv), (v) and (vii) were simple in nature caused by sharp-edged weapon, whereas injury nos. (i), (ii), (iii) and (vi) were also simple in nature but were caused by a blunt object. This witness verified the injury report Ex.Ka-2.
- (21) In cross-examination PW-3 deposed that he had not prepared any supplementary injury report. There was no stab wound on the body of the victim. Injury no. (ii) was abrasion which may occur after fall by grazing. These injuries may have occurred after 12 o'clock. There was visible bleeding from all the injuries except injury no. (ii) without any blood clot.
- (22) PW-4, Dr. Sunil Kumar Yadav has deposed that on 01.08.2011 he had conducted post-mortem on the dead body of the deceased Savitri Devi, aged about 60 years. The body was thin. The deceased died in Gandhi Memorial Hospital on 01.08.2011 at about 10:05 a.m. There was *rigour mortis* on the upper part of the body. Half of the mouth was open. There was clotting in the upper membrane of the brain and also in the pleural upper membrane of the lungs. Right part of the heart was filled up with blood. There were six stitched wounds on the left part of the neck above the chin and five stitched wounds 1.5 cm before the first wound. Trachea was stitched and artificial tube was lying there. There were spots of pus everywhere including the lung, heart, liver, kidney and spleen. The death of the deceased had occurred due to septicemia arisen out of the aforesaid injuries. This witness has proved the post mortem report Ex. Ka-3.
- (23) In cross-examination also PW-4 has deposed that the death of the deceased had occurred due to septicaemia. He cannot tell the weapon from which these injuries were caused. When he opened the dead body he found pus which was caused by the poisoning outbreak. He cannot tell that whether the life of the deceased could be saved by a better treatment or not.

Septicaemia may occur during the treatment and prior to the treatment also. The witness denied that the death of the deceased occurred due to improper treatment.

- (24) PW-5, SI Dharmveer Saroj has proved the inquest report Ex.Ka-4 and other related papers such as police Form-13 Ex.Ka-5 and police Form-33 Ex.Ka-6.
- (25) In the cross-examination, PW-5 deposed that death memo had been received on 01.08.2011 at 10:30 p.m. At the time of preparation of inquest, he had not received the FIR. He admitted that till closure of inquest, witnesses had not been conveyed the names of accused persons.
- (26) PW-6, SI Manoj Kumar Pathak has deposed that on 19.07.2011 he was posted as Chauki In-charge and had received the investigation of this case same day. He collected the chik FIR, carbon GD, kaymi GD, statement of the informant and arrested the accused and also recovered the weapon used in commission of the said crime. He collected blood stained and plain soil, injury report, visited the place of occurrence and had recorded the statement of the witnesses and injured Kumari Santoshi. He proved site plan Ex.Ka-8, memo of blood stained and plain soil Ex.Ka-9, recovery memo of knife Ex.Ka-10. On 28.07.2011 he recorded the statement of the injured Smt. Savitri Devi. On 03.08.2011 he received the inquest and post mortem reports from the police station and added Section 302 IPC. Thereafter the investigation was transferred to the Station House Officer. This witness has also proved the blood-stained cloth and plain soil M.Ex.1; cloth covered knife M.Ex.2; wrapped paper on the knife M.Ex.3; knife M.Ex.4; box containing plain soil M.Ex.5 and box containing blood stained soil M.Ex.6.
- (27) PW-7, SI Pankaj Kumar Singh has deposed that on 04.08.2011 he had assumed investigation. He copied the inquest report and recorded the statement of the inquest witnesses and produced

parcha no. 5 in the court regarding addition of Section 302 IPC on 08.08.2011. He took the accused on remand for 14 days through parcha no.6 dated 17.08.2011. In parcha no.7 dated 18.08.2011, he copied the medico legal report of the deceased Savitri Devi. He arrested the accused Bablu and recorded his statement as per parcha no.8 dated 23.08.2011. On 29.08.2011 he prepared parcha no. 9 by which the knife alleged to be used in commission of crime and plain and blood stained soil were sent to the FSL. According to parcha no.10 dated 11.10.2011, he recorded the statement of the inquest witnesses. As per CD paper no.11 dated 12.10.2011, he sent reminder for report to FSL. In parcha no.11A dated 12.10.2011 he recorded the statement of Dr. Shiv Shankar after visiting Balrampur Hospital. On 15.10.2011 he prepared paper no.12 and recorded the statement of the witnesses regarding the recovery memo of blood stained and plain soil.

- (28) PW-8, Adarsh Kumar Singh deposed that on 17.07.2011 he had received the investigation as SI Police Station Wazirganj and has copied the chik FIR, kaymi GD, statement of the FIR scribe and accused. On 21.07.2011 he recorded the statement of the informant, witnesses and visited the place of occurrence and the witnesses and had submitted the charge sheet in the court. This witness has proved site plan Ex.Ka-11 in his own hand writing and signature and also the charge sheet Ex.Ka-12.
- (29) PW-9, Constable Vachan Singh has deposed that on 19.07.2011 when he was posted as Constable Moharrir at Police Station Wazirganj, SI Manoj Kumar Pathak alongwith his companions produced a sealed knife with recovery memo on the basis of which he had lodged a case bearing Case Crime No. 220 of 2011, under Section 4/25 Arms Act, Police Station Wazirganj at chik no. 205 of 2011 against the accused Rahul. This witness has proved the chik FIR Ex.Ka-11A and carbon copy, kaymi GD as Ex.Ka-12A.

- (30) PW-10, HCP Adarsh Kumar has deposed that on 12.07.2011 when he was posted as Constable Moharrir at Police Station Wazirganj, Lucknow, he had prepared chik no. 204 of 2011 at Crime No. 291 of 2011, under Sections 354, 452, 307 IPC against the accused Rahul and another at 14:50 p.m. on the basis of the written complaint produced by the informant Jitendra. This witness has proved chik FIR Ex.Ka-1 and carbon GD Ex.Ka-15.
- (31) PW-11, Dr. Avanish Kumar has deposed that on 19.07.2011 when he was posted as Associate Professor in KGMU. His team had admitted Smt. Savitri Devi at 03:00 p.m, who was shifted to the ENT Department on 22.07.2011. This witness has proved bed head ticket (BHT) Ex.Ka-16 written by Dr. Ajay Kapoor in which the description of the injuries of Smt Savitri Devi were written. According to this witness, such injuries may have occurred with the knife at about 02:15 p.m. on 19.07.2011.

Defence witnesses

- (32) DW-1, Suneel Kumar Pal has deposed that Rahul is his neighbour. Bablu and Rahul were friends and were involved in catering. On 19.07.2011 he, Rahul and his sister Mamta had gone to the house of Santoshi to talk about their marriage as there was love affair between both of them. Rahul and Santoshi used to talk to each other on phone. They also used to talk to her mother. In the meantime, heated arguments took place between Rahul and Santoshi and when the situation became untoward, they returned from the house of Santoshi. Rahul did not kill any one with any weapon. There was no enmity amongst Santoshi, her mother, Rahul and Bablu. The accused used to visit the house of Santoshi. Thereafter, when he and sister of Rahul were at the bus station and were waiting for the bus, police reached there and arrested Rahul.
- (33) In the cross-examination this witness deposed that he was working at the shop of Raj Garments at Zero Road, Allahabad

from 10:00 a.m. to 07/08:00 p.m. They both stay near Karbala. During the course of incident, he used to teach children at Allahabad. It is wrong to say that he had not gone to Lucknow on the day of incident. This witness denied that police had arrested accused Rahul from Rakabganj Tempo Stand. This witness denied that being neighbour of Rahul he was deposing wrongly in his favour.

- (34) DW-2, Sangeet Kumar, cousin of the accused Rahul has deposed that there was love affair between Santoshi and Rahul. On 19.07.2011 he had also gone to Lucknow with Sunil, Rahul and his elder sister Mamta to the house of Santoshi to arrange their marriage. Rahul and Santoshi were talking to each other. They were also sitting at some distance in her house. After some time hot talk took place between them and soon it converted into a fight. Thereafter they came out of the house of Santoshi with Rahul. Rahul had not killed any one with any weapon. It is true that Rahul and Bablu used to visit the house of Santoshi. Santoshi and her mother were well aware of Rahul and Bablu. There was no enmity between both families. It is true that police has falsely implicated accused Rahul and after coming from the house of Santoshi and waiting for the bus at the bus station, the police reached there and arrested Rahul. This witness stated that it is incorrect to say that he had not visited Lucknow regarding marriage of Rahul and that Rahul was not arrested from Rakabganj Tempo Stand.

- (35) DW-3, Mamta, elder sister of accused Rahul has deposed that on 19.07.2011 she had gone to Lucknow with Rahul and Sangeet for fixing the marriage of Rahul with Santoshi at her house where her mother was also present and conversation had taken place. Later, they came to the bus stand with Rahul where the police reached and arrested him. He had not killed any one. There was no enmity with the family of Santoshi. None had

attacked Santoshi with knife. They had come together to the bus stand.

- (36) In the cross-examination DW-3 deposed that at present neither her father nor mother is alive. Her mother had passed away long back. At the time of incident, her father was alive. Her another sister was already married. At the time when occurrence took place Rahul was engaged in the work of catering in the marriages. She had visited Lucknow first time by train. After coming out of tempo they had gone to the house on foot. This witness denied the suggestion that she had not come to Lucknow with Rahul in connection with marriage. She also denied that Rahul was arrested from Rakabganj Tempo Stand.
- (37) After closure of the evidence, the statement of the accused was recorded under Section 313 CrPC in which he denied the charges levelled against him and alleged that Santoshi had an affair with Bablu and when her mother opposed, Bablu killed her.
- (38) The trial court has convicted the accused under Sections 452, 354, 307/34, 302/34 IPC and has also imposed fine with default stipulation as stated above.
- (39) Learned counsel for the appellant vehemently argued that for the sake of argument if it is accepted that the crime had been committed by the accused persons then the evidence once appreciated in the correct perspective would indicate the possibility that it was Bablu who had killed the deceased Savitri Devi and not the accused Rahul. It is also argued that there was no *mens rea* to commit murder and the accused persons had not visited the house of the deceased with any weapon. The incident had occurred in a spur of moment due to sudden provocation and not with a premeditated mind. The knife alleged to be used in the commission of offence was simply a knife used in home for cutting the vegetables and the death of the deceased had occurred due to septicaemia after 12 days of the incident.

Hence, this case is squarely covered under Exception 4 of Section 300 IPC read with Section 299 IPC which describes an offence of culpable homicide not amounting to murder. It was also pointed out that PW-2 is only an eye-witness who has deposed that Bablu had attacked upon her and her mother. Rahul had been assigned only the role of catching hold of PW-2 and she has also accepted that this incident had occurred all of sudden in connection with marriage.

- (40) Before considering into the merits of the case, it is necessary to look into the relevant aspects of the matter and the relevant provisions of law.

Mens rea and Section 34 IPC

- (41) In this case, according to the prosecution, the accused Rahul and Bablu have committed the offence. Offence of any nature is not acceptable in a civilized society. The offence of criminal nature causing death or threat to a human life is an unpardonable breach of law which has punishment under the law attached to it, i.e. prosecution by the State in the criminal court and the respective punishment being imposed to the culprit on the offence being proved by following due procedure of criminal law. The concept of crime is dynamic in nature and it keeps on redefining with the change in social norms, values and perceptions about wrongful human conduct in a society, such as in case of live-in relationship.

- (42) There are following elements of crime:

- (i) there should be an overt act (actus reus) or omission;*
- (ii) it should have been done with criminal intent (mens rea);*
- (iii) the act or omission, as the case may be, should be a prohibited conduct under the existing criminal law; and*
- (iv) it should carry some kind of sanction by way of punishment.*

- (43) So far as the overt act or omission is concerned, mere intention or *mens rea* shall not by itself constitute a crime unless it is

accompanied by an external overt act. The criminal law not only holds the person who has committed a crime liable to be punished, but also an attempt to commit a crime is an offence punishable under Section 511 and 307 IPC.

- (44) So far as the second ingredient is concerned, *mens rea* or guilty mind is an essential ingredient of a crime which may be direct, indirect or implied. The implied *mens rea* is also termed as constructive *mens rea* which imposes absolute liability on the offender irrespective of the fact whether he knew that what he was doing was a crime or not.
- (45) In the context of *mens rea* a distinction has to be drawn between intention and motive. Mens rea means guilty mind. What is relevant in deciding the guilt of the offender is his intention of doing the particular act i.e. crime and not the motive behind doing that act. An act to be treated as crime should be prohibited or forbidden under the existing penal law.
- (46) As a general rule, the burden of proof in a criminal case lies on the prosecution due to the principle that an accused is presumed to be innocent until he is proved guilty. In case of any doubt regarding participation or involvement of the accused in the crime, he is entitled to the benefit of such doubt and may be discharged or acquitted. Where two similar possibilities of guilty of offence exist, the benefit shall go to the accused and he shall be acquitted.
- (47) The normal rule is that a person should be held liable for an act and no one can be penalized for an act committed by other but there are certain exceptions that on the basis of collective responsibility another person participating slightly in the offence may be punished.
- (48) Here, it is the case of the prosecution that both the accused persons entered the house of the deceased and started molesting her daughter and upon her commotion the deceased reached

there, they attacked her and her daughter Santoshi. Santoshi was discharged 2-3 hours after receiving medical aid, whereas the deceased was admitted to the hospital where she passed away after 12 days due to septicaemia.

(49) In this context Sections 34-38 IPC are relevant which deal with joint criminal liability on the persons when they jointly participate or contribute to the commission of an offence.

(50) The main ingredients of **Section 34 IPC** are as under:-

(i) A criminal act must be involving more than one person;

(ii) It must be in furtherance of the common intention of all; and

(iii) There must be participation of all persons in furtherance of the common intention.

(51) In **Nand Kishore Vs. State of MP, (2011) 4 CrLJ 4243 (SC)** the Apex Court held that where a criminal act is done by several persons in furtherance of common intention of all, each of such person would be liable in the same manner as if it was done by him alone.

(52) In **Lallan Rai Vs. State of Bihar, (2003) 1 SCC 268** it has been held that the essence of common intention under Section 34 IPC is simultaneous meeting of the mind of persons participating in the criminal act to bring about a particular desired result.

(53) In **Pyarelal Vs. State of UP, AIR 1987 SC 852** it is held that even in regard to offence involving physical violence it is not necessary that every accused must have taken active participation in the occurrence on the victim.

(54) In **Mahesh and another vs. State of MP, AIR 2012 SC 2172** the Apex Court reiterated that Section 34 IPC provides that if two or more persons intentionally do an act jointly, the position in law would be just the same as each of them has done the offence individually by himself. The section is based on the doctrine of

constructive criminal liability which is well settled principle of law. However, in some cases the Court did not apply Section 34 IPC in respect of another accused when *mens rea* and common intention of rest of the accused persons were not same.

- (55) In **Chhotu Vs. State of Maharashtra, AIR 1997 SC 3501**, it has been held that three persons repeatedly gave blows upon the deceased for some time. One of the accused was seen standing with knife in his hand. The Apex Court held that he could not be said to have a common intention on the ground of such facts only and, therefore, he was entitled to benefit of doubt.
- (56) In this case the accused appellant has been convicted with the aid of Section 34 IPC under Section 302 IPC for causing the death of the deceased Savitri Devi.
- (57) Keeping in view the above legal propositions, it has to be seen as to whether there was a common intention of both the accused persons to kill the deceased Savitri Devi and to cause injury to Santoshi.
- (58) Here, it is established that both the accused persons used to visit the house of the deceased and they used to talk with Santoshi on phone. Thus, the accused, the injured and the deceased were familiar with each other. This fact was also in the knowledge of the informant, Jitendra. Here Bablu was a juvenile, whereas the present accused Rahul was also a person of tender age.
- (59) Even if the statement of all the defence witnesses are not taken to be true, it has been established from the evidence of the injured PW-2, Kumari Santoshi and also from the statement of the IO recorded under Section 161 CrPC that the accused-appellant, Rahul and Bablu had visited the house of the deceased where the accused Rahul had initiated talk with her about their marriage.
- (60) In the examination-in-chief, PW-2, Santoshi has deposed that after entering into the house accused Rahul started molesting her

and insisted for marriage and when she opposed and shouted, both the accused persons started attacking upon her with the intention to kill her. In the meantime, when her mother arrived there, they also started stabbing her and after dragging her down and slit her throat. Contrary to the examination-in-chief, this witness has deposed in cross-examination that this quarrel had occurred suddenly. Bablu had stabbed her with the intention to kill her. When Bablu was attacking her and her mother, Rahul was only catching hold of her. In the cross-examination she has also accepted that this incident had occurred suddenly on account of rage and accused Rahul had only caught hold of her whereas accused Bablu caused injuries by the use of vegetable knife.

- (61) From the above discussion, there remains no doubt that the accused had entered into the house without any premeditation of mind or with the intention to force Km. Santoshi to agree for marriage with Rahul.
- (62) It needs no discussion that *mens rea* arises on the spot and is not pre-meditated. In several decisions, it has been held that even devil cannot read the mind of a human being be it an accused or otherwise. It is also borne from the record that the informant was having the knowledge about the visit of the accused persons and also that the accused was in talking terms with his sister and he had never objected or stopped them from visiting his house or talking to his sister.
- (63) It has also been established that the accused persons had not trespassed the house of the informant for causing hurt or assaulting Kumari Santoshi or the deceased nor it is the case of the prosecution that the accused had entered the house forcibly or in a manner so as to infer any ill motive; rather they were permitted by Santoshi (PW-2) and also by her mother as they were the usual visitors of their house. Therefore, this Court is of

the view that the ingredients of Section 452 IPC are not made out against the appellant as his entry in the house was not resisted and nor he entered the house forcibly or stealthily, rather was permitted voluntarily.

- (64) So far as the death of the deceased Smt. Savitri Devi is concerned, it has been proved that there were two injuries on her body and just after the incident she was taken to trauma centre KGMU, Lucknow where she remained under treatment and after 12 days, she succumbed to the injuries sustained on 31.07.2011.
- (65) PW-4 Dr. Sunil Kumar Yadav had conducted autopsy on the dead body of the deceased. He opined that there were spots of pus in the lungs, liver, kidney and spleen. The cause of death was stated to be spread of poison throughout the body (septicaemia) due ante mortem injuries.
- (66) In view of above, there remains no iota of doubt that the accused-appellant was a frequent visitor of the house of the deceased and wanted to marry Km. Santoshi and had visited her house without any weapon and it was only on account of altercation amongst them, the incident in question had occurred and that the deceased had died due to septicaemia which was an effect of the injury which may not have been fatal had the infection been controlled from getting into the bloodstream.
- (67) On the basis of above facts and circumstances, learned counsel for the appellant argued that it was not a case of murder as defined under Section 300 IPC but at the most it is a case of culpable homicide not amounting to murder as envisaged under Section 299 IPC which is punishable under Section 304 IPC. In support of his submission, he has relied upon the following judicial pronouncements:-

(i) In Atul Thakur Vs. State of Himachal Pradesh and others, (2018) 2 SCC 496, the Apex Court has observed that sudden physical fights have taken place between the accused the

deceased. Multiple knife blow was given by the appellant to the deceased. The Apex Court held that because there was no premeditation, the act done by the appellant was in a heat of passion and the appellant had not taken any undue advantage or not taken any cruel manner. It was further observed that the conviction awarded under Section 302 IPC by the High Court was set aside and the conviction under Section 304 Part II IPC which was awarded by the trial court was restored and accordingly the appeal was allowed. The trial court did not accept this citation.

(ii) In **Arvind Sharma Vs. State of UP, 2017 (3) JIC 787 All**, it has been observed that the accused had hit several times on the neck of the deceased due to which she died. In the said case, a Division Bench of this Court relying on the pronouncement of the Apex Court in **Veeran and others Vs. State of MP, (2011) 5 SCR 300** held that there was no intention of the accused to cause death of the deceased, hence the offence committed by the accused falls under Section 304 Part I IPC and accordingly altered the conviction from Section 302 IPC to Section 304 Part I IPC and allowed the appeal partly. It was also held that the accused was not premeditated and had no intention to cause the death of the deceased though the injuries were not sufficient in ordinary course of nature to cause death but since the accused had no intention to do away with the deceased the case was covered under Section 304 Part I IPC. The trial court also declined to apply the principle laid by the Division Bench of this Court and that of the Apex Court.

(iii) In the case of **Kusha Laxman Waghmare Vs. State of Maharashtra, (2015) 1 SCC (Crl) 100**, the Apex Court has held that the accused used wooden bar to cause hurt to the deceased and there was no cogent evidence to show that the appellant had beaten the deceased with an intention to cause her death. Learned counsel for the accused had also relied on the judicial pronouncement in **Harishankar Shukla Vs. State of UP, 2017 (2) JIC 433 SC** in which the trial court had acquitted the accused person considering the contradictions in the statement of the witness. The High Court reverts the finding of trial court. He has further relied on **Jeet Singh and another Vs. State, 2015 (3) JIC 184 All** wherein it has been held that at the spur of moment the deceased was killed. It was found that none of the injuries was sufficient in ordinary course of nature to cause death. The genesis of occurrence was somewhat shrouded in mystery. It was held that the case falls under Section 304 Part II IPC and the conviction was altered from Section 302

IPC to Section 304 Part II IPC and the sentence of life imprisonment was modified to eight years rigorous imprisonment with fine.

Whether it is a murder or culpable homicide?

(68) Now the question remains as to whether the offence committed by the accused-appellant which resulted into the death of Savitri Devi is an offence under Section 302 IPC or Section 304 IPC.

(69) In this regard, it is necessary to look into the provisions of Sections 299 and 300 IPC which are as under:-

"299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

(Secondly)—If it is done 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—

(Thirdly)—If it 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, or—

(Fourthly)—If the person committing the act knows that it 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 aforesaid."

(70) The ingredients of **Section 299 IPC** are:—

(I) Causing of death of a human being;

(II) Such death must have been caused by doing an act or omission:

(i) There should be intention to cause death; or

(ii) With the intention of causing death, some bodily injury must have been caused which is likely to result in death; or

(iii) It should be within the knowledge that by such an act, death is likely to be caused.

(71) The three explanations appended to Section 300 IPC describe three situations when presence or absence of certain factors in

causing death are vital to decide as to whether the offence committed comes within the realm of culpable homicide not amounting to murder or not.

1. Act or omission.—On the basis of fact it can be decided that an act or omission of the accused is covered under the definition of culpable homicide or not and whether death is direct result of such act or omission.

2. Intention.—Intention or mens rea is an essential ingredient of offence of culpable homicide which can be determined on the basis of fact and circumstances of the case. In **Jagroop Singh Vs. State of Haryana, AIR 1981 SC 1552** the Supreme Court held that while deciding cases involving the offence of culpable homicide, the weapons used by the accused, the injuries caused by him to the victim and their gravity etc. along with his mens rea should also be taken into consideration. In **Prabhu Vs. State of Madhya Pradesh , AIR 1991 SC 1069** injuries caused to the daughter-in-law were held to be sufficient for her death, therefore, the husband and in-laws were convicted for the offence of culpable homicide under Section 299 IPC.

3. Intentionally causing such bodily injury as is likely to cause death.—Whether the injuries caused to the victim were sufficient for causing death of the victim can be inferred from the nature of injuries and act of the accused. Where the injury is caused on vital part of the body, therefore, death is more likely to result than an injury caused on a non-vital part of the body. An injury may be simple, grievous or superficial. The nature of weapon used by the accused is also taken into consideration while deciding his guilt [**Jagrup Singh (supra)**]. Lethal weapons such as gun, pistol, revolver, sword, spear, dagger etc. may prove more fatal than the non-lethal weapons such as lathi, stick, bamboo, fist-blow etc. Whether the bodily injury caused by the accused was likely to cause death has to be decided objectively keeping in view the facts and circumstances of the case. In this case, accused had attacked his deceased mother with the blunt part of the axe not from the sharp edged part of the axe.

4. With knowledge that he (accused) is likely to cause death by such act.—Clause third of Section 299 IPC provides that causing death with the knowledge that the accused by such act is likely to cause death makes him liable for culpable homicide. In this connection, where such probability is almost **certain** then fourth clause of Section 300 IPC would be applicable making the accused liable for murder. As soon as it is proved that the incident was not accidental or due to rashness but was caused deliberately, the accused shall be convicted for the offence of culpable homicide under Section 299 IPC, as has been held in **Afrahim Sheikh and others Vs. State, AIR 1964 SC 1263**.

- (72) Insofar as the submission of learned AGA that the death of the deceased is direct result of the act of the accused and the appellant cannot take a plea that the death could have been prevented on the injured or affected victim getting medical treatment timely which would have saved the life of the victim (deceased) is concerned, it is submitted by the learned counsel for the appellant that the defence of the appellant rests on a different footing viz. the incident occurred on the spur of moment during normal conversation and that he had no intention to cause harm or to kill the deceased besides the fact that the death caused due to septicaemia after 12 days of the incident.
- (73) In the case at hand, two injuries were caused by the accused out of which injury no.1 was on the neck. No medical papers of Trauma Centre, KGMU have been produced. The doctor who conducted autopsy found six stitched wounds.
- (74) In **State of Andhra Pradesh Vs. Rayavarpu Punneya**, AIR 1997 SC 45, the Apex Court has drawn a distinction between the clause (2) of Section 299 IPC and Clause (3) of Section 300 IPC. Elaborating the scheme of the Penal Code relating to culpable homicide, the Supreme Court observed as follows:-

"In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not the vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder, is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment proportionate to the gravity of this generic offence, the IPC practically recognises three degrees of culpable homicide. The first is, what may be called "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree", which is punishable under Section 304, Part I. Then, there is "culpable homicide of the third degree", which is the lowest type of culpable homicide and is punishable under Section 304, Part II.

The question to be considered by the Court is whether the accused has done an act by doing which he has caused death of another. The question whether it is murder or culpable homicide will on proof of such casual connection between the act of the accused and the resultant death."

- (75) In other words, it is the degree of probability of death which determines whether a culpable homicide is of a gravest nature or of lowest degree. The word "likely" used in Section 299(2) conveys a sense of probability as distinguished from mere possibility. The expression "bodily injury.....sufficient in ordinary course of nature to cause death", used in clause 'Third' of Section 300, connotes that death is the most probable result of the injury having regard to the ordinary course of nature.
- (76) On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in **Tukaram and others Vs. State of Maharashtra, (2011) 4 SCC 250** and in **BN Kavatakar and another Vs. State of Karnataka, 1994 Supp (1) SCC 304**, we are of the considered opinion that the offence would be one punishable under Section 304 Part-I of the IPC.
- (77) From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated. Though the accused had knowledge and intention to cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced here-in-above the offence in question will fall under Section 304 Part-I as per the observations of the apex court in ***Veeran and others* (supra)** and other judicial pronouncements referred to above.
- (78) As regard the reliance having been placed on the dying declaration of the deceased, we would like to refer a recent judgement rendered by the Hon'ble Supreme Court in the case of ***Irfan @ Naka Vs The State of U.P.*** reported in **2023 SCC OnLine SC 1060** (decided on 23.08.2023).

- (79) In the case of *Irfan @ Naka* (supra) the Hon'ble Supreme Court has laid down the certain features in order to determine the admissibility of the dying declaration. The relevant paragraph 62 reads as under:-

“62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility : -

(i) Whether the person making the statement was in expectation of death?

(ii) Whether the dying declaration was made at the earliest opportunity? “Rule of First Opportunity”

(iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?

(iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?

(v) Whether the statement was not recorded properly? (vi) Whether, the dying declarant had opportunity to clearly observe the incident?

(vii) Whether, the dying declaration has been consistent throughout?

(viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?

(ix) Whether, the dying declaration was itself voluntary?

(x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?

(xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?”

- (80) In the instant case, before recording the statement of the deceased, Smt. Savitri Devi, no medical opinion was obtained as to whether the deceased was in a position to give statement under Section 161 CrPC or not. Even otherwise the statement made by the deceased does not bring the case of the accused appellant within the ambit of Section 302 IPC.
- (81) There is another aspect of the matter regarding age of the appellant. In this regard reliance has been placed on a latest decision in *Khokan @ Khokhan Vishwas Vs. State of*

Chhattisgarh, (2021) 3 SCC 365 where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant. The decision of the Apex Court in **Anversinh Vs. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardianship, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In this case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty Vs. State of Odisha, (2021) 3 SCC 529** and in **Pardeshiram Vs. State of MP, (2021) 3 SCC 238** will also ensure for the benefit of the accused.

- (82) On 03.04.2018 in the statement recorded under Section 313 CrPC accused Rahul has said himself to be 23 years old and the offence had occurred on 19.07.2011 which seems that he was juvenile at the time of commission of offence. However, he has not claimed himself to be a juvenile and he is still not claiming himself to be a juvenile, a plea which is open for him.
- (83) It is principal duty of the trial court to see this fact and if on the basis of statement under section 313 Cr.P.C, the accused falls under the age of 18 years, an age certificate should be obtained from him and he should be asked whether he claims himself to be Juvenile. In such a situation, the trial court should also observe the age of the accused and should write accordingly. However, why only Bablu had prayed for juvenility and no prayer was made by the accused appellant and when he has also not produced any evidence in this regard, it is assumed that the statement regarding age made by him is incorrect. It is also material that according to the accused appellant on the day and time of occurrence he had visited the house of the deceased with his friend, cousin and elder sister with regard to arrange

his marriage with Kumari Santoshi, therefore, certainly he would have been above 21 years.

- (84) In this case, a charge under Section 452 IPC has been framed. If the prosecution case is that of a house trespass being committed with preparation for causing hurt or for assaulting any person for wrongfully restraining any person or for putting any person in fear of hurt or for assaulting or of wrongfully restraining such person, only then section 452 IPC would come into picture. Here since the accused persons had not entered the house with a preparation for doing such an unlawful act, Section 452 IPC would not be attracted. However, if for the sake of argument it is admitted that an offence of house trespass has been committed by the accused persons to have committed murder, a charge under Section 449 IPC would have to be framed instead of framing a charge under Section 452 IPC. Thus, this Court is of the view that the trial court had wrongly framed a charge under Section 452 IPC and has convicted the accused under this Section. In every case where an offence has been committed by entering into the house, Section 452 IPC would not attract in a routine manner.

- (85) So far as Section 354 IPC is concerned it would be proper to reproduce Section 354 IPC which reads as under:-

“354. Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

- (86) So far as the charge under Section 354 IPC is concerned, it has been deposed by PW-2 that after entering the house, accused Rahul started outraging her modesty and insisted to marry him. On this point no cross-examination has been made from the side of the accused-appellant. Therefore, the deposition with regard to Section 354 IPC remains intact and the charge under Section

354 IPC is proved against the accused-appellant beyond any reasonable doubt

- (87) So far the conviction under Section 4/25 Arms Act is concerned, a knife is allegedly recovered on the pointing of the accused-appellant Rahul which has been proved by PW-6, Manoj Kumar Pathak.
- (88) According to this witness, the alleged weapon was recovered from the left pocket of the pant of the accused. Though there is no FSL report regarding this knife as to whether it was containing human blood or not, but mere non-delivering of knife to FSL is not fatal for the prosecution and it does not become the sole realm under the category of faulty investigation in order to doubt the prosecution story. It is also material that no cross-examination has been made on this point from this witness and no suggestion has been given that no such knife had been recovered from the possession of the accused, therefore, the evidence deposed in the examination-in-chief by PW-6 remains intact and it would be presumed and deemed to be proved that the alleged knife recovered from the left pocket of the pant of the accused-appellant was used in commission of the crime. Hence, according to this Court, the charge under Section 4/25 of Arms Act is found to be proved beyond reasonable doubt against the accused-appellant.
- (89) It is evident from the injury report of Kumari Santoshi that she had received simple injuries. None of the injuries sustained had been reported to be grievous in nature; none of the injuries were kept in observation, no injury was placed under X-Ray and no supplementary medical report has been produced by the doctor. She was relieved just after 2-3 hours after giving first aid. Hence, considering the nature of injuries caused to her, the case falls under Section 323 IPC and not under Section 307 IPC. Therefore, six months simple imprisonment would be sufficient

to meet the ends of justice which has already been served by the accused, in place of five years rigorous imprisonment and Rs. 2,000/- fine as awarded under Section 307/34 IPC.

- (90) Thus, we come to a definite conclusion that the death occurred due to septicaemia. In view of the facts and circumstances of the case and the manner in which the death has occurred coupled with the judgments referred to hereinabove we conclusively hold that the offence is not covered under Section 302 IPC and amounts to be a culpable homicide under Section 304 IPC and, therefore, sentence of the accused appellant is reduced to the period he has already undergone. The appellant shall be released forthwith if he is not wanted in any other case. The total fine imposed by the trial court shall be deposited by the appellant within 30 days from the date of release otherwise he shall undergo to the additional period of incarceration as directed by the trial court.
- (91) Accordingly, this appeal is **partly allowed**. Record and proceedings be remitted to the Court below forthwith.
- (92) A copy of this judgment be sent to the concerned court for compliance and keeping it with original records.

[Umesh Chandra Sharma, J.] [Attau Rahman Masoodi, J.]

Order Date :- Oct. 19, 2023
Shahroz/Fahim/-