

**HIGH COURT OF JUDICATURE AT ALLAHABAD
(LUCKNOW)**

Neutral Citation No. - 2024:AHC-LKO:39404-DB

Reserved on :- 14.03.2024
Pronounced on :- 24.05.2024

Court No.-3

Case :- CRIMINAL APPEAL No. - 180 of 1991

Appellant :- Idrees Alias Pandey

Respondent :- State

Counsel for Appellant :- Sri R.N.S. Chauhan

Counsel for Respondent :- G.A.

Hon'ble Mrs. Sangeeta Chandra, J.

Hon'ble Ajai Kumar Srivastava-I, J.

(Per :- Ajai Kumar Srivastava-I, J.)

1. Heard Sri R.N.S. Chauhan, learned counsel for the appellant, Sri Arunendra, learned A.G.A. for the State and perused the entire record.

2. Under challenge in this criminal appeal is the impugned judgment and order dated 23.03.1991 passed by the learned Additional Sessions Judge Vth, Unnao in Sessions Trial No.345 of 1989 titled as State vs. Idrees and another arising out of Crime No.54 of 1989, under Section 302 the Indian Penal Code¹, Police Station Bangarmau, District Unnao whereby the appellant,

1 hereinafter referred to as "I.P.C."

Idrees alias Pandey has been convicted and sentenced to undergo life imprisonment for the offence under Section 302 I.P.C. However, the co-accused, Jafar Ali has been acquitted of charge under Section 302/34 I.P.C.

3. The case of the prosecution in nutshell is that a written report was submitted by the first informant, Shamshad at Police Station Bangarmau, District Unnao stating therein that the informant, Shamshad is the resident of Gram Bhatkuri, Police station Bangarmau, District Unnao. On 18.03.1989 at about 6:30 P.M., the informant's cousin, Idrees alias Pandey, who is the accused/ appellant herein, was going to fetch water for his buffalo. The informant, Shamshad told Idrees alias Pandey that there is very little space in front of his door, therefore, he should bring the buffalo to his place. Upon an altercation, Idrees alias Pandey's father, Jafar Ali came with a *lathi* and said that he also has land there and the informant cannot obstruct his way. The co-accused, Jafar Ali told his son, Idrees @ Pandey to go and bring his gun from his house. He further said that he will decide this matter on that day only. The accused, Idrees @ Pandey went to his home and brought his father's gun. Meanwhile, the informant's younger brother, Irshad came to the spot, who tried to pacify the parties. However, the accused, Idrees @ Pandey with an intention to kill opened fire, which hit the informant's brother, Irshad on his temporal region of his skull (*kanpati*), who, consequently, fell down. On hearing commotion, the villagers, namely, Ibrahim S/o Ali Raja, Siddique S/o Mastana , RamSwarup

S/o Ram Charan came to the scene of occurrence, due to which, the accused persons, namely, Idrees @ Pandey and Jafar Ali fled away towards Southern direction, who were carrying gun and *lathi* respectively. Thereafter, the informant, Shamshad brought his brother, Irshad, who was in a serious condition, to the police station on an animal driven cart (*kharkhada*) in getting the first information report lodged.

4. The inquest proceedings were conducted and a report thereof has been proved as Ex. Ka-6.

5. According to postmortem report of the deceased, Irshad Ali, which has been proved by P.W.-5, Dr. Y.K. Jalote as Ex. Ka-2, the cause of death is reported to be ante-mortem head injury. One firearm injury was reported on the body of the deceased.

6. On the basis of aforesaid written report submitted by the first informant, Shamshad, the first information report, Ex. Ka-1 came to be lodged against the present appellant and co-accused, Jafar Ali on 18.03.1989 for the offence under Section 307 I.P.C.

7. The Investigating Officer recorded the statements of the witnesses under Section 161 of the Code of Criminal Procedure². He visited the place of occurrence and prepared a site plan thereof as Ex. Ka-4.

8. Upon conclusion of investigation, the Investigating Officer submitted a charge sheet, Ex. Ka-3

² hereinafter referred to as "Cr.P.C."

against the accused/ appellant and the co-accused, Jafar ali for the offence under Section 302 I.P.C.

9. Charge for the offence under Sections 302 I.P.C. was framed against the present accused/ appellant and charge for the offence under Section 302/34 I.P.C. was framed against the co-accused, Jafar Ali, who denied the charges and claimed to be tried.

10. In order to bring home guilt of the accused, the prosecution has examined Shamshad, who is the first informant, as PW-1, Ibrahim as PW-2, Siddique @ Mastan as PW-3, Ram Swaroop as PW-4, and Dr. Y.K. Jalote as PW-5.

11. The accused in their statements recorded under Section Section 313 Cr.P.C. have stated the prosecution story to be false. They have also stated to have been falsely implicated in this case and they claimed to be innocent.

12. No evidence in defence was adduced by the accused/ appellant before the learned trial court.

13. The learned trial court, after appreciating the evidence available on record adduced by the prosecution, convicted and sentenced the appellant as stated herein above and acquitted the co-accused, Jafar Ali for the offence under Section 302/ 34 I.P.C.

14. In such circumstances referred to above, the accused-appellant is before this Court with the present appeal.

15. Learned counsel for the appellant has submitted that the appellant is innocent, who has been falsely implicated in this case. The finding of guilt of the appellant recorded by the learned trial court is against the weight of evidence, therefore, the same cannot be sustained.

16. His further submission is that the prosecution story is unbelievable. The appellant has been falsely implicated on the basis of false and fabricated facts. The prosecution witnesses did not prove and corroborate the prosecution case. The statements of witnesses of fact have not been considered in their right perspective and, therefore, the appellant wrongly came to be convicted by the impugned judgment and order dated 23.03.1991. He has also submitted that in the facts of the case, unduly harsh sentence has been awarded to the appellant.

17. His next submission is that in order to prove its case, four witnesses of facts were examined by the prosecution. However, except P.W.-1, Shamshad, who is the first informant and elder brother of the deceased, all other witnesses of facts, namely, P.W.-2, Ibrahim, P.W.-3, Siddique @ Mastan and P.W.-4, Ram Swaroop, who were examined by the prosecution, turned hostile. They did not support the prosecution case. He, thus, submits that in a situation, when other witnesses of facts turned hostile,

the learned trial court ought not have recorded the finding of guilt of the accused/ appellant without seeking corroboration of testimony of P.W.-1, Shamshad, who was a related and interested witness.

18. His further submission is that in this case, the Investigating Officer was not examined and other police witnesses were also not examined to prove the lodging of the first information report causing prejudice to the accused and despite prejudice having been caused to the accused/ appellant, the accused/ appellant was not given benefit of such serious lapse on the part of the prosecution.

19. Learned counsel for the appellant has also drawn attention of this Court to the fact that had this incident been true, the dying declaration of the deceased would have been recorded, who died after about four days of the incident, while he was being treated. Absence of any dying declaration clearly indicates that the appellant was falsely implicated in this case due to some ulterior motive.

20. His further submission is that on the basis of same set of evidence, the learned trial court has acquitted the co-accused, Jafar Ali, while convicting the present accused/ appellant, which renders the impugned judgment and order dated 23.03.1991 unsustainable in want of any distinguishing evidence insofar as the present appellant is concerned.

21. Learned counsel for the appellant has, thus, prayed to set aside the impugned judgment and order dated 23.03.1991 and to acquit the appellant accordingly.

22. On the other hand, learned A.G.A. for the State has vehemently opposed the submissions advanced by the learned counsel for the appellant by submitting that the accused/ appellant, who was named in the first information report, rightly came to be convicted vide impugned judgment and order dated 23.03.1991, which is well discussed and reasoned.

23. His further submission is that a prompt first information report came to be lodged about this incident on 18.03.1989 at 08:30 P.M. He submits that though, the prosecution has examined four witnesses of facts, namely, P.W.-1, Shamshad, who is the first informant and elder brother of the deceased, P.W.-2, Ibrahim, P.W.-3, Siddique @ Mastan and P.W.-4, Ram Swaroop. Three witnesses of facts, namely, P.W.-2, Ibrahim, P.W.-3, Siddique @ Mastan and P.W.-4, Ram Swaroop, have turned hostile for various reasons, which does not come in way of convicting the present appellant because Shamshad, who is the first informant of this case and an eye witness, deposed in the court as P.W.-1 and whose testimony has been found to be fully reliable by the learned trial court. He also submits that it is no more *res integra* that conviction can be based on sole testimony of a reliable witness. He has also submitted that the postmortem report, Ex. Ka-2, also corroborates the

manner of commission of offence. He, thus, submits that though this Court is fully entitled to even re-appreciate the entire evidence available on record, however, any interference with the impugned judgment and order dated 23.03.1991 is not warranted in the facts of this case as the same is well discussed and reasoned.

24. Having heard the learned counsel for the appellant, learned A.G.A. for the State and upon perusal of record, it transpires that according to the first information report, Ex. Ka-1, the first informant is Shamshad S/o Nanhe Fakeer R/o Village Bhatkuri, Police Station Bangarmau, District Unnao. This incident, according to first information report, Ex. Ka-1, occurred on 18.03.1989 at about 06:30 P.M. and a first information report about this incident came to be lodged on the same day i.e. on 18.03.1989 at 20:30 PM. The distance of police station from the place of occurrence is six miles towards North. We notice that in this incident, according to first information report, Ex. Ka-1, younger brother of the first informant, Irshad Ali was shot dead by the named accused persons and Irshad Ali bled profusely, who was brought to the police station on an animal driven cart (*kharkhada*). In view of aforesaid facts, we do not find any unexplained delay in lodging the first information report.

25. We also find from records that initially the first information report, Ex. Ka-1 came to be lodged against the accused for offence under Section 307 I.P.C. The

injured, Irshad Ali was sent to Bangarmau Hospital, who was referred to a Higher Medical Centre at Lucknow and ultimately was referred to K.G.M.U., Lucknow. The injured succumbed to his injuries in Lucknow Medical College, Lucknow on 22.03.1989, therefore, the case was converted to one under Section 302 I.P.C. It shows that the deceased died after about four days of this incident, which, according to prosecution story, occurred on 18.03.1989 at about 06:30 P.M.

26. Dr. Y.K. Jalote has been examined as P.W.-5, who conducted the postmortem on the cadaver of the deceased. He has proved the postmortem report of the deceased as Ex. Ka-2. The postmortem report of the deceased, Ex. Ka-2 reveals one firearm injury and cause of death is reported to be antemortem head injury due to firearm.

27. We also notice that P.W.-1, Shamshad is the first informant and an eye witness of this incident, who has stated in his testimony that on 18.03.1989, his cousin, the appellant, Idrees alias Pandey, was going to fetch water for his buffalo. The first informant, P.W.-1, Shamshad interrupted him and asked the appellant not to take route in front of his house, which led to a verbal altercation between the two. Meanwhile, the co-accused, Jafar Ali, who is the father of the present appellant, also appeared at the scene of occurrence, who was carrying a *lathi*. The co-accused, Jafar Ali said that he had also owns land at the place and exhorted his son, who is the

present appellant, to bring a gun from his house so that the matter could be resolved forever. This led the appellant to go to his house and bring the licensed gun of his father. By the time appellant returned from his house after taking his father's gun, the younger brother of the first informant, namely, Irshad Ali had also reached at the spot, who was shot by the present appellant, Idrees alias Pandey on temporal region of his skull (*kanpati*). The injured fell down after receiving gun shot injury, and was brought to the police station by the first informant on a *kharkhada*. According to first information report, witnesses, Ibrahim S/o Alrija, Siddique @ Mastan S/o Abdul Rahman and Ram Swaroop S/o Ram Charan had also reached at the spot on hearing commotion, whereafter the accused persons fled towards the Southern direction.

28. While scanning testimonies of Ibrahim, Siddique @ Mastan and Ram Swaroop, who are stated to have reached at the spot on hearing commotion, we find that they have been examined as P.W.-2, P.W.-3 and P.W.-4 respectively. P.W.-2, Ibrahim stated on oath that when he reached at the spot, he saw the injured lying on the ground. However, he had not seen the appellant or the co-accused, Jafar Ali assaulting the deceased, Irshad Ali. He has also stated that he had not given any statement under Section 161 Cr.P.C. in the form in which it is being shown to have been recorded by the Investigating Officer. He has also denied the suggestion that he is not stating truth because he has connived with the accused persons.

Siddique @ Mastan has been examined as P.W.-3, who has stated on oath that during this incident, Iliyas, who is the brother of the present appellant, had opened fire. He had not seen the present appellant, Idrees alias Pandey firing at the injured. Ram Swaroop has been examined as P.W.-4, who has also not supported the prosecution case. He has stated that he had not seen this incident. When he reached the spot, he had not seen Idrees alias Pandey and Iliyas at the place of occurrence. He has also denied the suggestion that he has not stated truth because he wants to help the accused persons.

29. Hon'ble the Supreme Court in **Sidhartha Vashist alias Manu Sharma vs. State (NCT of Delhi)**³ has held that if the prosecution witness turns hostile, the Court may rely upon so much of his testimonies, which supports the case of prosecution and which is corroborated by other evidence.

30. Keeping in view of aforesaid settled legal position, if we go through the testimonies of witnesses, namely, P.W.-2, Ibrahim, P.W.-3, Siddique @ Mastan and P.W.-4, Ram Swaroop, we find that though P.W.-2 has stated that he had not seen that the appellant shot at the deceased causing his death, however, in his examination-in-chief, P.W.-2, Ibrahim has stated that when he reached at the spot at about 06:30 PM, he saw the deceased, Irshad lying on the ground. Similarly, P.W.-3, Siddique @ Mastan, who has been declared hostile, has stated in his

³ (2008) 5 SCC 230

cross-examination that while the appellant, Idrees alias Pandey and Shamshad, who is the first informant and an eye witness also, were quarreling with each other, then fire was opened, which hit the deceased, Irshad on temporal region of his skull. P.W.-4, Ram Swaroop had also stated in his testimony that he had not seen the deceased, Irshad being killed by the appellant, however, he has stated that when he reached the scene of occurrence, he was told by other people that the appellant had shot the deceased.

31. On a careful examination of testimonies of aforesaid hostile witnesses, namely, P.W.-2, Ibrahim, P.W.-3, Siddique @ Mastan and P.W.-4, Ram Swaroop, it reveals that the place of occurrence is the same, which has been shown in the site plan, Ex. Ka-4. Therefore, part of testimonies of aforesaid hostile witnesses, reveals that the place of occurrence was the same, where, according to prosecution story the deceased was shot dead. It also transpires from their testimonies that on the date of incident, the appellant, Idrees alias Pandey was also present at the place of occurrence.

32. It is in this background that when we examine testimony of P.W.-1, Shamshad, who is the first informant and an eye witness of this incident in its entirety, we find that despite he being related to the deceased, his testimony is cogent and reliable so far as the manner of commission of the offence and place of occurrence are concerned. His testimony finds substantial corroboration

from the testimonies of hostile witnesses of facts, namely, P.W.-2, Ibrahim, P.W.-3, Siddique @ Mastan and P.W.-4, Ram Swaroop in this regard.

33. Hon'ble the Supreme court in **Veer Singh and others vs. State of Uttar Pradesh**⁴ has held that in a criminal trial, quality of evidence and not the quantity matters. In paragraph No.21 of **Veer Singh's case (supra)**, the Hon'ble Supreme Court has held as under :-

"21. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is not the number of witnesses but quality of their evidence which is important as there is no requirement under the law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. The evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided under Section 134 of the Evidence Act. As a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. (Vide *Vadivelu Thevar v. State of Madras* [AIR 1957 SC 614 : 1957 Cri LJ 1000] , *Kunju v. State of T.N.* [(2008) 2 SCC 151 : (2008) 1 SCC (Cri) 331 : AIR 2008 SC 1381] , *Bipin Kumar Mondal v. State of W.B.* [(2010) 12 SCC 91 : (2011) 2 SCC (Cri) 150 : AIR 2010 SC 3638] , *Mahesh v. State of M.P.* [(2011) 9 SCC 626 : (2011) 3 SCC (Cri) 783] , *Prithipal Singh v. State of Punjab* [(2012) 1 SCC 10 : (2012) 1 SCC (Cri) 1] , *Kishan Chand v. State of Haryana* [(2013) 2 SCC 502 : (2013) 2 SCC (Cri) 807 : JT (2013) 1 SC 222] and *Gulam Sarbar v. State of Jharkhand* [(2014) 3 SCC 401 : (2013) 12 Scale 504] .)"

(emphasis supplied by us)

⁴ (2014) 2 SCC 455

34. It is, thus, clear that the entire prosecution story rests on the testimony of sole eye witness, P.W.-1/ Shamshad, who is admittedly elder brother of the deceased and, thus, a related witness. It is no more *res-integra* that though testimony of a related witness cannot be discarded only on the ground of his being related to the deceased or the victim, however as held by Hon'ble the Supreme Court in **Dahari and others vs. State of Uttar Pradesh**⁵, testimony of such a witness needs to be scrutinized carefully before placing reliance upon his testimony.

35. Keeping in view the law laid down by Hon'ble the Supreme Court in **Raj Kishore Jha vs. State of Bihar and others**⁶, we are of the considered view that non-examination of investigating officer in this case does not, in any way, create any dent in the prosecution case, which otherwise stands proved in the light of aforesaid discussion.

36. Thus, on the basis of aforesaid overall discussion, we find that the prosecution has succeeded in proving the fact that on 18.03.1989, the present appellant shot the deceased causing his death subsequently. However, whether this action was due to sudden and unprovoked altercation, which does not appear to be premeditated, remains to be seen by us.

⁵ (2012) 10 SCC 256

⁶ (2003) 11 SCC 519

37. However, so far as the conviction of the present appellant under Section 302 I.P.C., in the light of aforesaid proven facts of this case is concerned, we may usefully refer to paragraph No.66 of a recent judgment of Hon'ble the Supreme Court in **Anbazhagan vs. State Represented by the Inspector of Police**⁷ as under :-

"**66.** Few important principles of law discernible from the aforesaid discussion may be summed up thus:—

(1) When the court is confronted with the question, what offence the accused could be said to have committed, the true test is to find out the intention or knowledge of the accused in doing the act. If the intention or knowledge was such as is described in Clauses (1) to (4) of Section 300 of the IPC, the act will be murder even though only a single injury was caused. To illustrate: 'A' is bound hand and foot. 'B' comes and placing his revolver against the head of 'A', shoots 'A' in his head killing him instantaneously. Here, there will be no difficulty in holding that the intention of 'B' in shooting 'A' was to kill him, though only single injury was caused. The case would, therefore, be of murder falling within Clause (1) of Section 300 of the IPC. Taking another instance, 'B' sneaks into the bed room of his enemy 'A' while the latter is asleep on his bed. Taking aim at the left chest of 'A', 'B' forcibly plunges a sword in the left chest of 'A' and runs away. 'A' dies shortly thereafter. The injury to 'A' was found to be sufficient in ordinary course of nature to cause death. There may be no difficulty in holding that 'B' intentionally inflicted the particular injury found to be caused and that the said injury was objectively sufficient in the ordinary course of nature to cause death. This would bring the act of 'B' within Clause (3) of Section 300 of the IPC and render him guilty of the offence of murder although only single injury was caused.

⁷ **2023 SCC OnLine SC 857**

(2) Even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that section. In the event of the case falling within any of those exceptions, the offence would be culpable homicide not amounting to murder, falling within Part 1 of Section 304 of the IPC, if the case of the accused is such as to fall within Clauses (1) to (3) of Section 300 of the IPC. It would be offence under Part II of Section 304 if the case is such as to fall within Clause (4) of Section 300 of the IPC. Again, the intention or knowledge of the accused may be such that only 2nd or 3rd part of Section 299 of the IPC, may be attracted but not any of the clauses of Section 300 of the IPC. In that situation also, the offence would be culpable homicide not amounting to murder under Section 304 of the IPC. It would be an offence under Part I of that section, if the case fall within 2nd part of Section 299, while it would be an offence under Part II of Section 304 if the case fall within 3rd part of Section 299 of the IPC.

(3) To put it in other words, if the act of an accused person falls within the first two clauses of cases of culpable homicide as described in Section 299 of the IPC it is punishable under the first part of Section 304. If, however, it falls within the third clause, it is punishable under the second part of Section 304. In effect, therefore, the first part of this section would apply when there is 'guilty intention,' whereas the second part would apply when there is no such intention, but there is 'guilty knowledge'.

(4) Even if single injury is inflicted, if that particular injury was intended, and objectively that injury was sufficient in the ordinary course of nature to cause death, the requirements of Clause 3rdly to Section 300 of the IPC, are fulfilled and the offence would be murder.

(5) Section 304 of the IPC will apply to the following classes of cases : (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death.

To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.

(6) The word 'likely' means probably and it is distinguished from more 'possibly'. When chances of happening are even or greater than its not happening, we may say that the thing will 'probably happen'. In reaching the conclusion, the court has to place itself in the situation of the accused and then judge whether the accused had the knowledge that by the act he was likely to cause death.

(7) The distinction between culpable homicide (Section 299 of the IPC) and murder (Section 300 of the IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 of the IPC. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to

murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. But, even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.

(8) The court must address itself to the question of mens rea. If Clause thirdly of Section 300 is to be applied, the assailant must intend the particular injury inflicted on the deceased. This ingredient could rarely be proved by direct evidence. Inevitably, it is a matter of inference to be drawn from the proved circumstances of the case. The court must necessarily have regard to the nature of the weapon used, part of the body injured, extent of the injury, degree of force used in causing the injury, the manner of attack, the circumstances preceding and attendant on the attack.

(9) Intention to kill is not the only intention that makes a culpable homicide a murder. The intention to cause injury or injuries sufficient in the ordinary course of nature to cause death also makes a culpable homicide a murder if death has actually been caused and intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.

(10) When single injury inflicted by the accused results in the death of the victim, no inference, as a general principle, can be drawn that the accused did not have the intention to cause the death or that particular injury which resulted in the death of the victim. Whether an accused had the

required guilty intention or not, is a question of fact which has to be determined on the facts of each case.

(11) Where the prosecution proves that the accused had the intention to cause death of any person or to cause bodily injury to him and the intended injury is sufficient in the ordinary course of nature to cause death, then, even if he inflicts a single injury which results in the death of the victim, the offence squarely falls under Clause thirdly of Section 300 of the IPC unless one of the exceptions applies.

(12) In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that injury is sufficient in the ordinary course of nature to cause death, the fact that the act is done without premeditation in a sudden fight or quarrel, or that the circumstances justify that the injury was accidental or unintentional, or that he only intended a simple injury, would lead to the inference of guilty knowledge, and the offence would be one under Section 304 Part II of the IPC."

38. What is meant by intention has also been elucidated by Hon'ble the Supreme Court in **Anbazhagan's case (supra)** in paragraph No.21 in following words:-

"21. Intention, which is a state of mind, can never be precisely proved by direct evidence as a fact; it can only be deduced or inferred from other facts which are proved. The intention may be proved by *res gestae*, by acts or events previous or subsequent to the incident or occurrence, on admission. Intention of a person cannot be proved by direct evidence but is to be deduced from the facts and circumstances of a case. There are various relevant circumstances from which the

intention can be gathered. Some relevant considerations are the following:—

1. The nature of the weapon used.
2. The place where the injuries were inflicted.
3. The nature of the injuries caused.
4. The opportunity available which the accused gets.”

39. Now adverting to the case in hand in the light of aforesaid principles, we find that according to prosecution story, the sole appellant had fired at the deceased only once. Keeping in view the postmortem report of the deceased, Ex. Ka-2, which has been proved by P.W.-5, Dr. Y.K. Jalote, we find the sole antemortem firearm injury sufficient in ordinary course of nature to cause death of the deceased. It is the case of the prosecution that before the appellant shot the deceased dead, an altercation had taken place amongst the first informant/ P.W.-1, Shamshad and Idrees alias Pandey, appellant herein, and Jafar Ali, who is the father of the appellant. The altercation was verbal and not physical. There is nothing on record to show that the act of opening fire by the appellant was premeditated. All the aforesaid facts go to show that this incident occurred in the heat of passion upon a sudden quarrel. Though, the appellant did not intend to kill the deceased, however, he had knowledge that gun shot injury might cause death of the deceased. Thus, it was a case of culpable homicide not amounting to murder, for which, the appellant, Idrees alias Pandey deserved to be convicted under Section 304

Part-II I.P.C. His conviction under Section 302 I.P.C. recorded by the learned trial Court, without adverting to the aforesaid facts and circumstances, in which this incident occurred, appears to be unsustainable and the same deserves to be set aside.

40. For the aforesaid overall reasons, the present criminal appeal is **partly allowed**. The conviction of the appellant, Idrees alias Pandey and sentence awarded to him under Section 302 I.P.C. is altered to one under Section 304 Part-II I.P.C., for which, the appellant, Idrees alias Pandey is awarded five years' simple imprisonment. The conviction of the appellant, Idrees alias Pandey under Section 302 I.P.C. and sentence awarded therefor are hereby set aside.

41. The appellant, Idrees alias Pandey is on bail. His bail bonds are cancelled. Sureties are discharged. The sole surviving appellant, Idrees alias Pandey is directed to surrender before the concerned Court to serve out the remaining sentence within six weeks from today, failing which, learned trial court concerned shall issue warrant for his arrest for serving out the remaining sentence.

42. It is also directed that the period already undergone by the appellant, Idrees alias Pandey, in Sessions Trial No.345 of 1989 titled as State vs. Idrees and another arising out of Crime No.54 of 1989, under Section 302 I.P.C., Police Station Bangarmau, District Unnao, either as under trial or post-conviction, shall be

adjusted towards the sentence awarded by this Court in terms of Section 428 Cr.P.C.

43. Let the record of trial court alongwith a copy of this order be transmitted forthwith to the learned trial court concerned for necessary information and compliance.

(Justice Ajai Kumar Srivastava-I) (Justice Sangeeta Chandra)

Order Date :- 24.05.2024
cks/-