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

+ CRL.A. 992/2011

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Judgment reserved on 6th January, 2015
Judgment produced on 30th January, 2015

VIKAS alias VICKY alias PONGA Appellant
Through: Mr.M.L. Yadav, Advocate

versus

STATE GOVT OF NCT OF DELHI Respondent
Through: Mr.Sunil Sharma, APP for State

CORAM :

HON'BLE MR. JUSTICE G. S. SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J

1. Present appeal has been filed by the appellant under Section 374 of the Code of Criminal Procedure Code, 1973, against the judgment and order on sentence dated 4.6.2011 passed by learned Additional Sessions Judge-01 (Outer), Rohini, Delhi, by which the appellant has been directed to undergo life imprisonment with fine of Rs.4,000/- and in default of payment of fine Simple Imprisonment for two months for the offence punishable under Section 302 of the Indian Penal Code; Rigorous Imprisonment for two years with fine of Rs.1000/- and in default of payment of fine Simple Imprisonment for one month for the offence punishable under Section 201 of the Indian Penal Code; and Rigorous Imprisonment for three years with fine of Rs.2000/- and in default of payment of fine Simple Imprisonment for one month for the offence punishable under Sections 25/27 of the Arms Act, 1959. It was further

directed that all the sentences would run concurrently. It was also directed that benefit of Section 428 of the Indian Penal Code would be given to the appellant.

2. The case of the prosecution, as noticed by the learned trial court, is as under:

“Manu was residing at house no.D-3/154, Sultanpuri, Delhi. Manu was the brother of Ashok. Manu on 5.12.2009 at about 9.15 pm had gone to a park situated near to his house where 4-5 boys were playing with cards. Manu asked them not to play cards there. On this Vikas @ Vicky @ Ponga took out a sharp edged knife and inflicted knife blows in the stomach and other body parts of Manu. Ashok was standing near the park and heard the cries “maar diya maar diya” made by Manu. Manu came out from the park and fell down on the gate. Manu was bleeding at that time. Ashok removed the Manu to Sanjay Gandhi Memorial Hospital. The police was informed.

2. SI Praveen Kumar after receipt of DD No.44A regarding the admission of injured by his brother at Sanjay Gandhi Memorial Hospital along with PSI Deepak reached at Sanjay Gandhi Memorial Hospital. SI Parveen Kumar collected the MLC of Manu. Manu was medically examined by Dr.Sanjay Kaushik with the history of physical assault. The general condition of the Manu was stated to be poor due to the multiple sharp injuries. Dr.Sanjay Kaushik declared Manu fit for statement. SI Parveen Kumar recorded the statement of Manu which was signed by Manu. Ashok, brother of Manu also signed on the statement made by Manu and recorded by SI Parveen Kumar. Manu in his statement stated that when he asked 4/5 boys who were playing cards, not to play cards in the park then Vikas @ Vicky @ Ponga inflicted knife injuries to him. Rukka was prepared. FIR No.384/09 u/s 307 IPC was registered. Manu (hereinafter referred to as “deceased”) expired in hospital. Thereafter the investigation was handed over to Inspector Mahesh Kumar. The case was converted u/s 302 IPC.

3. Inspector Mahesh Kumar got conducted the post mortem

on the dead body of the Manu. The cause of death was opined as haemorrhage and shock consequent to penetrating injuries in the chest. Exhibits were collected. Vikas @ Vicky @ Ponga was arrested. Subsequent investigation was handed over to Inspector Samarjeet Singh. Inspector Samarjeet Singh during investigation and at the instance of the accused got recovered knife stated to be used as a weapon of offence from the jhuggi bearing no. 8, Railway Phatak, Sanjay Gandhi Transport Nagar, Delhi, belonged to Jagiro. Knife was seized. Jagiro was also arrested. Inspector Samarjeet Singh during investigation collected Post Mortem Report, obtained subsequent opinion regarding weapon of offence, got prepared the scaled site plan, sent exhibits to FSL and completed other formalities of investigation. Inspector Samarjeet Singh (hereinafter referred to as “Investigating Officer”) after completion of investigation charge sheeted the accused u/s 302/201/212/34 IPC and u/s 25/27 Arms Act, 1959. The charge sheet was submitted to the court of concerned Metropolitan Magistrate. The accused were put to trial.”

3. The prosecution has examined twenty two witnesses. The statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure. The appellant denied the allegations made against him. He stated that no such incident took place and that he was falsely arrested and his signatures were obtained on blank paper.
4. The learned trial court after considering the entire material on record convicted and sentenced the appellant as stated above.
5. The contentions raised by the Sh. M. L. Yadav, learned counsel for the appellant are that :
 - a) The trial Court lost track of the settled position of law while deciding the case against the appellant and the judgment of the trial Court is contrary to law and facts.

- b) There is no legal evidence against the appellant justifying his conviction.
- c) The appellant was falsely arrested at the instance of PW-1 Ashok, brother of the deceased and implicated in the present case though no such incident took place.
- d) The trial Court failed to consider that the prosecution witnesses PW-6 Vijay and PW-7 Manish @ Mannu have not supported the case of the prosecution.
- e) The knife was planted on the appellant and no recovery had been effected.
- f) The statement Ex. PW-1/A made by the deceased cannot be relied upon and treated as a dying declaration under Section 32 of the Indian Evidence Act, 1872 for convicting the appellant as the same has neither been signed by any doctor nor the same was recorded in the presence of the Sub Divisional Magistrate.
- g) No case under Section 302 of the Indian Penal Code is made out and at best the appellant could have been convicted under Section 304, Part II of the Indian Penal Code. The incident took place on account of a minor issue and the appellant had no intention to kill the deceased.

In support of this submission counsel for the appellant relied upon ***Jagtar Singh @ Jagga @ Ganja v. State of Delhi***, reported at 2012 (2) JCC 950 in which it has been held that :

“10. It would now be relevant to discuss the main submission on behalf of the Appellant, i.e. that the offence in question was not Section 302, IPC, but was Section 304 IPC. In such cases, it has been held that the nature of intention must be gathered from the kind of weapon used, the part of the body hit, the amount of force

employed and the circumstances attendant upon the death.

*The distinction between culpable homicide and murder was aptly drawn by the Hon'ble Supreme Court in **Kandaswamy v. State of Tamil Nadu** (2008) 11 SCC 97. It was held that:*

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whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder,' on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third Clause of Section 299 is applicable. If this question is found in the positive, but the case comes, within any of the Exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the First Part of Section 304, Penal Code."

6. On the other hand, Sh. Sunil Sharma, learned APP for the State argued that :

(a) PW-1 Ashok Kumar, brother of the deceased is an eye-

witness and was present at the spot. According to PW-1 Ashok Kumar, Manu, his brother on 5.12.2009 at about 2.15 p.m. had gone to the nearby park where 2-3 boys were playing cards which were objected to by Manu, the deceased. He asked one of the boys, namely, Vikas alias Vicky alias Ponga not to play cards near their house on which the appellant took out a knife and gave blows on the body of the deceased. According to PW-1, he was standing near the park when he heard the noise of “*maar diya maar diya*” and he saw his brother fall down near the gate of the park. He immediately removed him to the hospital where his statement was also recorded. Counsel further submits that there was no reason either for the deceased or his brother to falsely implicate the appellant. It is further submitted that the appellant was named at the first available opportunity.

- (b) That the knife Ex. P12/1 was recovered at the instance of the appellant from the jhuggi of accused Jagiro (acquitted) and the same was produced for opinion before Dr. Manoj Dhingra, PW-14 who also examined the Post Mortem Report Ex. PW17/A and has opined that the injuries mentioned in Post Mortem Report Ex. PW17/A were caused by the knife produced before him.
- (c) That the guilt of the appellant has been proved beyond reasonable doubt as Ex. PW-1/A was a statement made to PW-9 SI Parveen Kumar and is a dying declaration as per Section 32 of the Indian Evidence Act, 1872 which can be relied upon. Moreover it is corroborated from the other sequence of events. The incident took place around 9.30

p.m. and the victim was rushed to the hospital and his MLC was recorded at 10.00 p.m.; Manu, the deceased was declared fit for statement at 10.40 p.m. and he died around 1.20 a.m.

Mr. Sharma, APP for the State relied upon **Munna Raja Vs. State of M. P., 1976 SC 2199** in which it has been held that it is neither a rule of law nor of prudence that a dying declaration cannot be acted upon without corroboration. In yet another case i.e. **State of U. P. Vs. Ram Sagar Yadav, AIR 1985 SC 416**, Supreme Court held that if the court is satisfied that dying declaration is true and voluntary, it can base conviction on it without corroboration.

- (d) That the trial court has rightly convicted the appellant under Section 302 of the Indian Penal Code in view of the fact that the appellant had every intention to kill the deceased, which is evident from the fact that there are four stab injuries on the body of the deceased and the appellant had used a knife of 36 cms., having a blade of 17.6 cms and that the injuries were on the vital parts of the deceased from where the intention of the appellant to murder the deceased can be gathered.

FACTS

7. Returning to the material available on record, the case of the prosecution is that the incident took place on 05.12.2009 when the deceased Manu went to the park near his house and saw that few boys were playing cards. He asked the appellant not to play cards near his house on which the appellant took out a knife and gave blows to the deceased. The deceased was removed to Sanjay Gandhi Memorial Hospital by his brother PW-1 Ashok which finds support from the MLC Ex. PW-8/A.
8. The MLC of the deceased Ex. PW-8/A has been prepared by Dr. Sanjay

Kaushik who declared the deceased fit for statement with an endorsement regarding the fitness of the deceased as Ex. PW-8/B.

9. The deceased gave the details of the incident to PW-9 SI Parveen Kumar. The fact that the deceased was in a fit condition to make a statement was endorsed by PW-8 Dr. Sanjay Kaushik which is reflected in the MLC Ex. PW-8/A and the MLC Ex. PW-8/A also reflects that the deceased was conscious, oriented with normal blood pressure and heart beats was in pain but in his senses. There is nothing on record to suggest that the deceased was not in a fit statement of mind at the time of making the statement Ex. PW-1/A.

FALSE ARREST

10. PW-1 Ashok, brother of the deceased deposed that the deceased was in injured condition and was running towards the gate when he came there and immediately removed him to the Sanjay Gandhi Memorial Hospital. PW-1 has been named in the MLC Ex. PW-8/A. There is nothing on record to suggest that there was any enmity between the deceased and the appellant and no reason for falsely implicating the appellant has emerged on record.

PW-6 AND PW-7 ARE HOSTILE

11. It is a matter of record that prosecution witnesses PW-6 Vijay and PW-7 Manish @ Mannu turned hostile and failed to support the case of the prosecution.

RECOVERY OF KNIFE

12. The deceased died of knife blows. The knife blows were inflicted by the appellant as stated by him in his statement Ex. PW-1/A. The statement made by the deceased finds support from the MLC Ex. PW-8/A and the Post Mortem Report Ex. PW17/A. The knife Ex. P12/1 was recovered from the appellant in the presence of PW-12 Ct. Vijender from the jhuggi

of accused Jagiro (acquitted) after the appellant made a disclosure statement. The knife was seized by PW-15 Insp. Samarjeet Singh. The fact that the knife was recovered in the presence of police officials and that no public person was present at time of the recovery of the knife cannot be a reason to disbelieve the testimony of the two police officials who have stood the test of cross-examination.

13. The knife Ex. P12/1 recovered at the instance of the appellant from the jhuggi of accused Jagiro (acquitted) was produced for opinion before Dr. Manoj Dhingra, PW-14 and he also examined the Post Mortem Report Ex. PW17/A and has opined that the injuries mentioned in Post Mortem Report Ex. PW17/A were caused by the knife produced before him. Dr. Manoj Dhingra. Dr. J. V. Kiran, PW-17 also opined that the injuries were caused by a sharp edged weapon so it is proved that the knife Ex. P12/1 was the weapon of offence and the same was got recovered at the instance of the appellant from the jhuggi of accused Jagiro (acquitted).

DYING DECLARATION

14. It is matter of record that PW-9 SI Parveen Kumar recorded the statement of the deceased when he was fit to make the same. The prosecution relied upon the statement of deceased Ex. PW-1/A recorded by PW-9 SI Parveen Kumar before his death and treated the same as dying declaration. The question, therefore, is whether the statement of the deceased Ex. PW-1/A can be relied upon.
15. The law relating to dying declaration is settled in **Umakant Vs. State of Chattisgarh**, reported at (2014) 7 SCC 405, it has been held as under:

“18. The philosophy of law which signifies the importance of a dying declaration is based on the maxim "nemo moriturus prasumitur mennre", which means, "no one at the time of death is presumed to lie and he will not meet his maker with a lie in

his mouth". Though a dying declaration is not recorded in the Court in the presence of accused nor it is put to strict proof of cross-examination by the accused, still it is admitted in evidence against the general rule that hearsay evidence is not admissible in evidence. The dying declaration does not even require any corroboration as long as it inspires confidence in the mind of the Court and that it is free from any form of tutoring. At the same time, dying declaration has to be judged and appreciated in the light of surrounding circumstances. The whole point in giving lot of credence and importance to the piece of dying declaration, deviating from the rule of evidence is that such declaration is made by the victim when he/she is on the verge of death.

*20. The legal position about the admissibility of a dying declaration is settled by this Court in several judgments. This Court in **Atbir v. Government of NCT of Delhi** - 2010 (9) SCC 1, taking into consideration the earlier judgments of this Court in **Paniben v. State of Gujarat** - 1992 (2) SCC 474 and another judgment of this Court in **Panneerselvam v. State of Tamilnadu** - 2008 (17) SCC 190 has given certain guidelines while considering a dying declaration:*

- 1. Dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.*
- 2. The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.*
- 3. Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.*
- 4. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborative. The rule requiring corroboration is merely a rule of prudence.*
- 5. Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.*

6. *A dying declaration which suffers from infirmities, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.*
7. *Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.*
8. *Even if it is a brief statement, it is not to be discarded.*
9. *When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.*
10. *If after careful scrutiny the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.”*

16. In **Khushal Rao Vs. The State of Bombay**, reported at AIR 1958 SC 2, it has been held as under:

“15. The Legislature in its wisdom has enacted in s. 32(1) of the Evidence Act that "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question", such a statement written or verbal made by a person who is dead (omitting the unnecessary words) is itself a relevant fact..... Thus, a statement made by a dying person as to the cause of death has been accorded by the Legislature a special sanctity which should, on first principles, be respected unless there are clear circumstances brought out in the evidence to show that the person making the statement was not in expectation of death, not that that circumstance would affect the admissibility of the statement, but only its weight. It may also be shown by evidence that a dying declaration is not reliable because it was not made at the earliest opportunity, and, thus, there was a

reasonable ground to believe its having been put into the mouth of the dying man, when his power of resistance against telling a falsehood was ebbing away; or because the statement has not been properly recorded, for example, the statement had been recorded as a result of prompting by some interested parties or was in answer to leading questions put by the recording officer, or, by the person purporting to reproduce that statement. These may be some of the circumstances which can be said to detract from the value of a dying declaration. But in our opinion, there is no absolute rule of law, or even a rule of prudence which has ripened into a rule of law, that a dying declaration unless corroborated by other independent evidence, is not fit to be acted upon, and made the basis of a conviction.

..... in the case of the King v. Maung Po Thi A.I.R. 1938 Rang. 282. In that case, the positive evidence led on behalf of the prosecution was found to have been tampered with and unreliable. The Court set aside the order of acquittal passed by the trial judge, and recorded an order of conviction for murder, practically on the dying declaration of the victim of the crime. The Court observed that there was no such rule of prudence as had been invoked in aid of the accused by the trial judge who had observed that an accusation by a dying man, without corroboration from an independent source, could not be the sole basis for conviction. The learned Judges of the High Court further observed that in order to found on a dying declaration alone, a judgment of conviction of an accused person, the Court must be fully satisfied that the dying declaration has the impress of truth on it, after examining all the circumstances in which the dying person made his statement ex-parte and without the accused having the opportunity of cross-examining him. If, on such an examination, the Court was satisfied that the dying declaration was the true version of the occurrence, conviction could be based solely upon it.

22. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the

assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case.”

17. In **Laxman Vs.State of Maharashtra**, reported at AIR 2002 SC 2973, it has been held as under:

“3..... The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or promoting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant.

..... In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement

necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind.”

18. In **Sunder Lal Vs. State of Rajasthan**, reported at (2007) 10 SCC 371, it has been held as under:

“11. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.”

19. Applying the abovesaid principles of law to the facts of the present case, it is clear that :

- i) The deceased at the time of making the dying declaration Ex. PW-1/A was in a fit state of mind.
- ii) The deceased clearly narrated all the relevant facts of the transaction leading to his death caused by the deceased.
- iii) The dying declaration Ex. PW-1/A is not result of any tutoring, imagination or being made with a motive to falsely implicate the appellant.
- iv) The dying declaration Ex. PW-1/A was recorded without delay. There was no occasion time for PW-9 SI Parveen Kumar to call Magistrate.

v) The deceased in dying declaration properly identified the appellant Vikas alias Vicky alias Ponga as assailant.

vi) The dying declaration Ex. PW-1/A is also corroborated and supported by the evidence of recovery of knife Ex. P12/1 at the instance of appellant from the jhuggi of accused Jagiro (acquitted) and subsequent opinion given by PW-14 Dr. Manoj Dhingra Ex. PW-14/B that the knife Ex.P12/1 was the weapon of offence and used by the appellant in inflicting stab injuries to the deceased.

20. From the above discussion, it therefore, falls that the incident as alleged by the prosecution occurred on 05.12.2009, the deceased received knife blows and before his death made a statement Ex. PW1/A to PW-9 SI Parveen Kumar. The statement Ex. PW-1/A was made to PW-9 SI Parveen Kumar by the deceased in a fit state of mind as opined by PW-8 Dr. Sanjay Kaushik. It is true that the Sub Divisional Magistrate was not present at the time when the deceased made Ex. PW-1/A. Ex. PW-1/A has been signed by the deceased. The sequence of events go to prove that not much time was available to the investigating authorities to summon the Sub Divisional Magistrate.

21. To our mind, the dying declaration Ex. PW-1/A inspires full confidence about its truthfulness and correctness and can be safely acted upon as the deceased in dying declaration has mentioned all the necessary facts leading to the transaction resulting into his death.

WHETHER THE CASE FALLS UNDER SECTION 302 OF THE INDIAN PENAL CODE OR 304 I OR II OF THE INDIAN PENAL CODE.

22. The question now therefore is whether the case of the appellant falls under Section 302 or Section 304 of Indian Penal Code and the punishment to be awarded to the appellant.

23. Section 304 of the Indian Penal Code, reads as under:

“304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, **or** of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

24. In **Rajendra Singh Vs. State of Bihar** AIR 2000 SC 1779 it has been held that :

*“In order to bring the case within Exception 4 to Section 300 of Indian Penal Code all the following conditions have to be fulfilled, namely, (1) The act must be committed without pre-meditation in a sudden fight in the heat of passion; (2) when there was a sudden quarrel; (3) without the offender taking undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual conduct or exchanging of blows on each other. When the deceased was armed and did not cause any injury to the accused even following a sudden quarrel and the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted” – In **Kikar Singh Vs. State of Rajasthan** AIR 1993 SC 2426, it was held that :*

“If the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that giving the blows with the knowledge that they were likely to cause death, he had taken undue advantage.

14. Considering the background facts in the light of the principle set out above, the inevitable conclusion is that Exception 4 to Section 300 IPC is applicable and the offence

is relatable to Section 304 Part I and not Section 302 IPC. That being, so the conviction is altered. Custodial sentence of 10 years would meet the ends of justice.

15. The appeal is allowed to the aforesaid extent.”

25. In **Kulesh Mondal Vs. State of West Bengal** AIR 2007 SC 3228, it has been held that :

“12. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted

in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

13. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken."

26. In the present case during post mortem the doctor found the following injuries on the dead body of the deceased :

(1)Stitched stab wound 4 cm. X 1.5 cm. X 16 cm. deep vertically placed on front of left shoulder joint present 9 cm. Above and outer to left nipple. The wound is acute angled at one end and obtuse at other wound. The track of the wound is directed downward, backward and inward piercing through the 2nd intercostals space and through the interior aspect of upper to be lobe of left lung upto the hilum.

(2)Stab wound 4 cm. X 1.4 cm. X 5 cm. deep horizontally placed

on back of upper left arm 3.5 cm. from the tip of left shoulder with one end acute angle and the other end obtuse. The wound is directed forward, downward and inward causing cut fracture in upper part of the humerus at its outer aspect.

(3) Stab wound 4 cm. X 1 cm. X 16 cm. deep on back of right lower chest 4.5 cm. right to midline back from a point that is 24 cm. below 7th cervical spine prominence, with one end acute angled and the other obtuse and the wound is obliquely placed. The track is directed forward, downward and inward piercing through 8th intercostals space through outer posterior aspect of right diaphragm, right lobe of liver, across the parenchyma of the liver obliquely upto the inferior surface of liver.

(4) Stab wound 4 cm. X 1.8 cm X cavity deep on left upper abdomen, lower end of wound placed 12 cm. from umbilicus and upper end 20 cm. below nipple, obliquely placed with one end acute angled and the other obtuse. The wound is directed backward, upward and inward piercing the abdominal wall and causing laceration and effusion in middle part of mesentery of transverse colon.

27. According to the counsel for the appellant, the appellant committed the offence on the spur of the moment when quarrel ensued between him and the deceased. So, in heat of passion and on the spur of moment without premeditation, the appellant inflicted injuries on the deceased. He had no intention to cause particular injuries though later the same proved to be fatal. Since he had no intention to cause such injuries as is likely to cause death and there was no premeditation nor intention to kill, the case would fall under Exception 4 of Section 300 of the Indian Penal Code.

28. The principle of law is that culpable homicide by intentionally causing bodily injury which is found to be sufficient in the ordinary course of nature to cause death attracts clause 'thirdly' of Section 300 of the Indian Penal Code. It would be murder unless it is brought in any one of the exceptions.

29. In order to bring the case within Exception 4 to Section 300 of Indian Penal Code all the following conditions have to be fulfilled :
- i) The act must be committed without pre-meditation in a sudden fight in the heat of passion;
 - ii) When there was a sudden quarrel;
 - iii) Without the offender taking undue advantage;
 - iv) The accused had not acted in a cruel or unusual manner.
 - v) Therefore, there must be a mutual conduct or exchanging of blows on each other.
 - vi) When the deceased was armed and did not cause any injury to the accused even following a sudden quarrel and the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted.
30. It is not necessary that death must be inevitable or in all circumstances the injury inflicted must cause death. If the probability of death is very great the requirement of clause third of Section 300 of the Indian Penal Code is satisfied. If there is probability in a lesser degree of death ensuing from the act committed the finding should be of culpable homicide not amounting to murder. The emphasis is on sufficiency of injury to cause death. The court must always try to find whether the bodily injury inflicted was that which the accused intended to inflict. The intention has to be gathered from a careful examination of all the facts and circumstances in a given case. The situs at which the injury was inflicted, nature of the injury, weapon used, force with which it was used are all relevant facts. In **Panduranga Narayan Jawalekar Vs. State of Maharashtra**, reported at [1979] 1 SCC 132, the accused used deadly weapon against the unarmed man and struck him a blow on the head. He had taken undue advantage. He did not stop with the first blow, he

inflicted two more blows on the fallen man and the third one proved to be fatal. He acted crudely with no justification. By his conduct the appellant denied himself of the benefit of Exception 4 to Section 300 of the Indian Penal Code and it was held that Exception 4 does not apply though there was sudden quarrel and that the fight was not premeditated to cause death. It must be shown that the injury caused was not the cruel one.

31. In the present case, undoubtedly the appellant inflicted fatal blow on the chest of the deceased. As per the post mortem report Ex. PW17/A, cause of death is haemorrhage and shock consequent to penetrating injuries to the chest via injuries No. 1 and 3 caused by single edged sharp stabbing weapon. Injuries No. 1 and 3 are sufficient to cause death in combination as well as independently in the ordinary course of nature. The weapon used in the present case and the manner of attack by the appellant is out of proportion to the offence and the appellant took undue advantage of his position and acted in a cruel manner in using the deadly weapon. The appellant used the knife against an unarmed person and inflicted the blows with the knowledge that they would likely to cause death. He did not stop with the first blow and inflicted as many as four blows. He acted cruelly with no justification. The appellant denied himself with Exception 4 of Section 300 of the Indian Penal Code.
32. Thus, we hold that the offence is one of murder and the appellant was rightly convicted and sentenced to imprisonment for life under Section 302 of the Indian Penal Code.
33. The appellant Vikas alias Vicky alias Ponga was also charged for Section 201 of the Indian Penal Code. The appellant after committing the offence ran away from the spot and hid the weapon of offence in the jhuggi of accused Jagiro (acquitted) which was recovered at the instance of the appellant. The recovery of knife has already been proved on record. The

learned trial court rightly convicted the appellant under Section 201 of the Indian Penal Code against the appellant for causing the disappearance of evidence i.e. knife from the scene of crime. The appellant was found in possession of knife Ex. P12/1 in contravention of notification No. F/13/451/79-Home (G) dated 29.10.1980 issued by Deputy Secretary, Home (G), Delhi Administration, Delhi. The prosecution has proved its case for the offence under Section 25/27 Arms Act.

34. We are, therefore, of the view that there is no infirmity in the judgment of the trial court holding the appellant guilty for Sections 302 of the Indian Penal Code, 201 of the Indian Penal Code and 25/27 of the Arms Act.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

30th JANUARY 2015
msr/sc