

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

+ **CRL.A. 1653/2014**

% *Judgment delivered on 05 February, 2015*

VIJAY PAL

.....APPELLANT

Through : Mr. Ramesh Gupta, Senior Advocate with
Mr. Nagendra Kasana, Advocate

Versus

STATE(GOVT.OF NCTOF DELHI)

.....RESPONDENT

Through : Mr. Varun Goswami, APP for State

CORAM :

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

1. Present appeal u/s 374 Cr.P.C. on behalf of the appellant has been filed against the impugned judgment and order dated 03.09.2014 & 06.09.2014 of the ASJ-03, South District, Saket Courts, New Delhi. The learned ASJ has convicted and sentenced the Appellant to undergo imprisonment for life and to pay a fine of Rs. 5000/- in default of payment of further S.I. in the above said case.

2. The case of the prosecution as noticed by the learned Trial Court is as under:

i) Accused Vijay Pal has faced this trial on the charge of having murdered Isabelle Dessoy, a Belgium national, on 23.09.2006 at about 8.30 pm at her residence i.e. E-9/12 Vasant Vihar, New Delhi. Accused took the plea of alibi and his defence is that actually the murder had been committed by Donatien Konig, who is son of the deceased as he did not like the proximity of the accused, who was working as a Driver, with his mother and Donatien insisted that the accused should reach the spot so that he

can be framed in this case. Donatien Konig was 14-15 years of age at the time of the offence.

ii) State machinery came into motion on 23.09.2006 at 8:47 p.m when an information regarding quarrel at House No. E-9/12, Vasant Vihar, was received vide DD No. 34A. This DD was marked to S.I S.S. Yadav, who moved to the spot alongwith Ct. Suresh Kumar. Duty Officer gave information to Inspector Jai Kishan, who also moved to the spot. When Inspector Jai Kishan reached at House No. E-9/12, Vasant Vihar, Ct. Suresh met him and informed him that SI S.S. Yadav had gone to Safdarjung Hospital.

iii) S.I S.S. Yadav came back at the spot from the hospital, where Isabelle Dessoy was declared brought dead. SI S.S. Yadav recorded the statement of Donatien Konig, who is son of the deceased. In his statement, which he gave in writing, he stated that he alongwith his mother Isabelle were living at E-9/12, Vasant Vihar, Ground Floor since February, 2006. His mother worked as Personal Secretary to the Ambassador of Belgium. Vijay Pal was their Car Driver for more than a year. His mother had gone with Vijay Pal in his Santro Car No. DL 9CM 0038 for swimming at Ashoka Country Resort, Kapashera, Delhi, at about 12:00 noon. She came back alone at around 5:30 p.m and told him that she had an altercation with Vijay Pal on the way back as the Driver was behaving in a very crazy manner and was driving the Santro Car at a high speed, so she got down from the car, came in a Taxi while Vijay Pal tried to drag her again in the car. At about 6:00 p.m, he (Donatien Konig) left for Priya Complex, Vasant Vihar and met his friend Niko Santkin there. At about 8:30 p.m, he received a call of his mother from residential telephone No. 41661088 on his mobile No. 9871861030 and his mother was screaming and told him that Vijay Pal had injured her with knife and she asked him to come fast at home to save her from Vijay Pal and between conversation, he heard Vijay Pal shouting at her and thereafter the phone was disconnected. He came back home with his friend Niko Santkin in a Rickshaw and after reaching home, he found his mother to be lying unconscious on the floor in a small room next to drawing room in a pool of blood and a

blood stained kitchen knife was lying near his mother. Vijay Pal and his Santro Car were not there. His friend Niko Santkin called his father Eric Santkin, who reached his house along with Jean Louis Van Belle. He (Donatien Konig) rang for ambulance which took his mother to the Safdarjung Hospital. Jean Louis Van Belle and Eric Santkin went in the ambulance. On this statement, Rukka was prepared by SI S.S. Yadav and the case was got registered. The scene of crime was inspected and a site-plan was prepared. Photographer took photos of the scene. Crime Team lifted chance prints. The exhibits were lifted. The statements of the witnesses were recorded.

iv) On 24.09.2006, on an information given by the informer, Vijay Pal was apprehended and his Santro Car was also taken into possession. He made a disclosure and thereafter on his pointing out, his blood stained clothes were also recovered.

v) After completion of the investigation, charge-sheet was filed and as the offence under Section 302 IPC is exclusively triable by the court of Session, the case was committed to this court. On 17.04.2007, charge under Section 302 IPC was framed against the accused, to which he pleaded not guilty and claimed trial.

Arguments on behalf of the Appellant

3. The counsel for the appellant, Mr. Ramesh Gupta, Senior Advocate assisted by Mr. Kasana contends that the appellant is innocent and has been wrongly convicted by the learned Trial Court. He claims that the appellant has been framed by the police under pressure from the Belgian Authorities in order to save the true offender, Donatien Konig, the son of the deceased. The son of the deceased, Donatien Konig was not happy with the appellant's relationship with the deceased and had threatened him with dire consequences if he did not cease the relationship. He further contends that it was the son of the deceased who had killed his mother.

4. The counsel for the appellant contends that the deceased and the accused had gone to Ashoka Country Resort, Kapashera, Delhi, in the deceased's car, a Tata Sumo bearing No. 8 CD 5, which she had driven. It is further contended that PW4 Donatien Konig had falsely concocted the tale of a quarrel between the deceased and the appellant and deceased returned home alone in a taxi. There is no evidence that the deceased took a taxi back to her house except the statement under Section 161 of Code of Criminal Procedure of the PW4 Donatien Konig, who stated to the police that “.....*My mother came in the evening at around 5:30 PM at home alone and told me that she had an altercation with driver Vijay Pal on the way when she was returning home as the driver was behaving in a very crazy manner and was driving his Santro car at a high speed, so she got down from the car and came in a taxi while driver tried to drag her in the car again....*’ The counsel states that this phrase ‘in a crazy manner’ is not admissible evidence per section 32 of the Indian Evidence Act.
5. The counsel for the appellant further contends that the appellant and the deceased were very much on good terms on 23.09.2006, they were even getting ready to go for a get together at Panchsheel Club and had purchased flowers and a gift from INA Market. After dropping the deceased off at her residence, she asked the appellant to deliver a gift to Mr. John at Panchsheel Park. After delivering the gift, the appellant received two calls from the son of the deceased, whereafter he was asked to reach Vasant Vihar, i.e. the residence of the deceased. Learned counsel for the appellant further submits that upon reaching there, he found the door locked and when he did not get any response, he broke the glass of the door with a brick/rock lying nearby, entered the house and injured his hand in the process. Upon entering, the appellant found the deceased

lying in a pool of blood, and thereafter called the son of the deceased from the landline and informed PW4 Donatien Konig about the condition of his mother and asking him to reach home immediately. The son of the deceased called the appellant back asking a lot of questions, delaying returning home. Thereafter, when the appellant tried to console the deceased by holding her hand, he was covered in her blood.

6. The counsel for the appellant, Mr. Gupta contends that the instant case is based on circumstantial evidence as there is no direct evidence against the appellant. There is no eyewitness to the offense but the son of the deceased claimed to have heard the cries of his mother and the voice of the appellant in the call that was made from the landline to his mobile phone. Further there is no depiction of the position of the landline in the site plan. The landline when examined was clean and without any blood stains. The counsel states that it was the appellant who had called the son of the deceased PW4 from the landline, to inform him of the deceased's critical state.
7. The counsel for the appellant states that PW4 Donatien Konig, the son of the deceased took an inordinately long time to arrive at the residence from Priya Complex which was hardly a 5 minute walk as stated by PW4 Donatien Konig in his testimony. The counsel further states that there is no evidence of the son of the deceased having been at Priya Complex other than the corroborating testimony of his friend, PW2 Nico Santkin. There are no records of any calls between Nico Santkin and Donatien Konig. If PW4 Donatien Konig had wanted, he could have informed the police of the incident at Priya Complex itself, as there was a Police Booth situated there.
8. The learned counsel for the appellant further submits that there were five domestic servants employed in the household of the deceased, none of

them have been questioned by the police. Further the police had not taken note of or questioned PW4 Donatien Konig on the matter of the phone calls made by him to the appellant, a short while prior to the crime. This is a gross negligence on the part of the investigating authorities, and goes to show the intention of the police to frame the appellant.

9. The Learned counsel for the appellant States that similar weightage and consideration has not been given to the defence witnesses as has been given to the Prosecution witness, which shows the predetermination of the learned Trial Court to convict and sentence the appellant. DW3 Laxmi Devi deposed that she spotted the appellant outside the house at 9:00pm on the night on 23.09.2006.
10. The learned counsel contends that the appellant and the deceased had very cordial relations of friendship and deep intimacy, as can be seen from the fact that they would go out to parties and for fun. The deceased had taken the appellant along with her on vacation to Bangkok and Hong Kong. PW4 Donatien Konig has himself admitted to this fact. On the day of the crime, the appellant and the deceased had enjoyed swimming together, as can be seen from the testimony of the PW10 Jagdish Yadav, the swimming pool attendant. It can thus be seen that the appellant had no motive for the crime.
11. The Learned Counsel for the appellant has relied upon **Pakala Narayana Swami V. The King Emperor (1939) 41 BOMLR 428**, wherein it has been held that one cannot pick and choose statements recorded under Section 313 of Code of Criminal Procedure. It must either be completely relied on or completely rejected. Further, that everything except the recovery of clothes is inadmissible as evidence under Section 32 of the Indian Evidence Act.

Arguments on behalf of the Respondent

12. Mr. Varun Goswami, Additional Public Prosecutor for the State contends that PW5 Ram Avtaar and PW6 Gaya Prasad Mishra, Security Guards of nearby houses saw Vijay Pal leaving the house of the deceased in his Santro car, after which the son of the deceased PW4 entered the house and later came out crying and wailing that his mother had been killed by the appellant.
13. Learned counsel for the respondent contends that the appellant Vijay Pal made two calls to the police, first wherein he reported a murder and the second wherein he reported a quarrel, both anonymously, with the intention of misleading the police. The appellant was absconding after the crime and was only arrested the next day outside Patiala House Court, following which the appellant made a disclosure that he could get recovered his t-shirt and pants which he had hidden in the bushes near Olaf Palme Marg, Vasant Gaon.
14. Learned counsel for the respondent contends that the blood stains on the clothes and other samples at the crime scene, matched the blood group B of the deceased. The palm prints of the appellant matched a chance print lifted from the broken blood stained glass piece found on the washing machine in the kitchen of the House no E-9/12, Vasant Vihar on 23.09.06. Further during the MLC of the appellant, it was observed that there was one injury on the right hand thumb of the appellant.
15. Prosecution examined 32 witnesses to prove its case. PW4 Donatien Konig , PW2 Niko Santkin, the friend of the son of the deceased, PW5 Ram Avtar, Watchman, PW6 Gaya Prasad Mishra, Security Guard, PW31 SI S. S. Yadav and PW31A Dr. Alexander Khaka are the material

witnesses whereas appellant examined 6 witnesses to prove his innocence.

16. We have heard learned counsel for the parties and considered their rival submissions.
17. The case of the prosecution is that after having been dismissed for rash driving, the appellant Vijay Pal went to the deceased's house to speak with her. When he reached there, found the door locked and having no response, he broke open the glass of the door with a brick/rock and entered in the house. A quarrel ensued between the deceased and the appellant. The appellant using the kitchen knife stabbed the deceased 27 times. During the occurrence of the crime the deceased managed to call her son PW4 Donatien Konig, who was at Priya Complex nearby and asked for help stating that Vijay Pal was stabbing her. The appellant fled away from the scene and later when PW4 Donatien Konig reached the spot, he found his mother in a pool of blood. The police soon arrived with an ambulance having been informed by the appellant of a quarrel. The next day the appellant was arrested outside Patiala House Court based on secret information.
18. The contention of the appellant is that he was asked by PW4 Donatien Konig to reach the house of the deceased. Upon finding the door locked and hearing no response, he broke the door and entered. There he found the deceased lying in a pool of blood and called Donatien Konig from the landline informing him of such occurrence asking him to come home fast. The appellant contends that he was there till the deceased was removed in the ambulance and later when the police interrogated the appellant. The police asked him to report to the police station the next day. The appellant states that during the enquiry on 24.09.2006, his clothes were seized and he was tortured into signing on blank documents, and his fingerprints

were forcibly obtained on a piece of glass. The appellant further contends that the PW4 Donatien Konig is the true perpetrator of the crime, that the police are hand in hand and the Belgium embassy is protecting the true accused.

19. The Learned Trial Court has convicted the appellant on the basis of circumstantial and electronic evidence.
20. In the impugned judgment and order dated 03.09.2014 & 06.09.2014 the learned Trial Court has observed that the instant case is not completely circumstantial despite there being no eye witness to the crime, as PW4 Donatien Konig claims to have heard of the cries of his mother on the call to his mobile. Evidence of the son is very material.
21. In the instant case the deceased Ms. Isabelle M.L.A.G. Dessoy received 27 stab wounds upon her person with a kitchen knife whose tip was found broken. The tip of the knife was recovered from the body of the deceased during the post mortem. The cause of death as stated in the post mortem report is shock and haemorrhaging due to the multiple injuries suffered, injury no 19 on the neck by itself sufficient in the ordinary course of nature to cause death. The FSL reports and call records of the phone numbers used in this case are provided by the Airtel Nodal Officers - PW18 and PW19, are further evidences which have been considered.
22. While there was no direct eyewitness, PW6 Gaya Prasad, the security guard of a neighbouring house heard the sound of glass breaking and saw the appellant exiting the house in his car. He then saw the son of the deceased enter the house and later come out and cry that his mother had been killed by the appellant. PW5 Ramavatar, a security guard at a nearby house deposes to have seen the appellant exiting the house of the deceased in his Santro car and going towards DPS School.

23. Relying on the witnesses' testimony and other evidences, it has been seen that the deceased went swimming with appellant at around 12 noon to Ashoka Country Resort, Kapashera following which the deceased returned to her house at around 5:30 pm. The deceased per PW4 Donatien Konig's deposition stated the appellant's 'crazy behaviour', his reckless driving and his refusal to slow down. It states in Ex. PW30/A the disclosure statement of the appellant that this lead to the deceased dismissing him.
24. Per the disclosure statement Ex.30/A the appellant admits to have broken the glass door of the house and entered, finding the deceased he had a heated quarrel with her where she succinctly dismissed him and refused to pay him any more money. The appellant then deposes to have taken a kitchen knife and stabbed her at first, then decided to kill her after which he left in his car.
25. The call records show that there was a call from the landline of the deceased to PW4 Donatien Konig's number wherein the deceased cried for help stating that the appellant was stabbing her; the voice of the appellant shouting could be heard in the background.
26. The appellant in his appeal states that the defence witnesses were not given due weightage and consideration. The Learned ASJ in the impugned judgment finds that the defense witnesses are found to be unreliable. DW2 Arun Patel @Tinku the flower seller admits to have seen a foreigner named Isabella and Vijay Pal at 6:00PM at INA market. He mentioned that Vijay Pal was wearing nice clothes, but on further examination he could not even recall what he himself was wearing on that day. DW3 Laxmi Devi the domestic servant who deposes to have seen Vijay Pal and his Santro car outside the residence of the deceased at 9 pm could not tell the name of her employer. DW4 Radhey Shyam is the

shopkeeper to whose shop “Ms. Aliza Bel’ is said to have visited with Vijay Pal at around 6:30 PM. When asked in the cross examination if he remembers the names of all the foreigners who visit his shop, he could not recall any of their names. Further, he did not provide the details of the transactions in his shop on 23.09.2006. In addition, no such information was reported to the police by DW4 Radhey Shyam regarding the crime. The Learned ASJ has rightly held the above defense witnesses to be unreliable.

27. With regard to the contention of the appellant that PW4 Donatien Konig killed his mother, it must be carefully considered. The appellant states that PW4 Donatien Konig did not like the intimate relationship shared by the deceased and the appellant and had threatened the appellant with dire consequences if he did not discontinue the relationship. We must appreciate the call records that have been placed before us as evidence- Ex. PW-18/DB, Ex.PW-19/D, Ex. PW-19/E.
28. The relevant call records are as follows:
 - On 23.09.2006 at 8:05:07 PM Vijay Pal from his mobile number called the deceased on her mobile for 26 seconds, at 8:05:47 PM he called the deceased for 3 seconds, at 8:09 PM, he called the deceased for 2 seconds. For the entire duration of all of the above calls, the appellant’s call location was Soami Nagar, Panchsheel Park. The deceased was still alive and well at this point.
 - At 8:11 PM the appellant Vijay Pal who was at S.D.A. called the son of the deceased PW4 Donatien Konig who was at Priya Cinemas lasting 83 seconds. By the end of the call the appellant was at Jia Sarai suggesting that he was on the move.
 - At 8:15 PM PW4 Donatien Konig located at and around Priya Cinema called his mother the deceased for 86 seconds.

- At 8:17:22 PM the appellant called the deceased for 8 seconds. Throughout the call the appellant was located at Sector 3, R.K. Puram.
- At 8:17:54 PM Vijay Pal called the deceased on her mobile for 12 seconds. By the end of the call the appellant was located at Munirka. That the deceased answered her phone shows that she was still alive at the time.
- At 8:27 PM a call lasting 22 seconds was made from the residential landline of the deceased to her son PW4 Donatien Konig who was located at Priya Cinemas.
- At 8:28 PM PW4 Donatien Konig located at Priya Cinemas called the appellant located at Vasant Vihar on his mobile for 61 seconds.
- At 8:30 PM the appellant located at Vasant Vihar called PW4 Donatien Konig located at Priya Cinemas for 14 seconds.
- At 8:31 PM a call was made from the residential landline of the deceased to PW4 Donatien Konig located at Munirka for 6 seconds.
- At 8:35 PM, the appellant Vijay Pal called the PW4 Donatien Konig for 11 seconds, both were located at Vasant Vihar.
- At 8:39:08 PM the appellant located at Vasant Vihar called the PCR for 74 seconds, by the end of the call the appellant was at Basant Enclave.
- At 8:40:33 PM PW4 Donatien Konig located at Vasant Vihar called the ambulance from his mobile.
- At 8:40:52 PM the appellant called the PCR for 10 seconds.
- At 8:42 PM PW4 Donatien Konig located at called the appellant Vijay Pal, located at Anand Niketan, for 33 seconds.
- At 9:05 PW4 Donatien Konig located at Vasant Vihar called the appellant whose location was changing throughout the call for 10 seconds.

29. After analysing the above call records we find that the deceased located at her residence in Vasant Vihar was alive till 8:17 PM when she received the call from the appellant who was at Munirka i.e. near the residence of the deceased. The call made to PW4 Donatien Konig from the landline was at 8:27 PM in which the deceased was crying for help as the appellant was stabbing her. PW4 Donatien Konig was at Priya Cinemas during this call. The location of PW4 was Priya Cinemas since 8:14 PM and at 8.04 PM he was at Munirka. The contention of the appellant that he found the deceased lying in a pool of blood and that PW4 Donatien Konig killed her seems improbable as he was present elsewhere than the residence at the time of the crime.
30. If we rely on the testimony of PW4 Donatien Konig, at 8:27 PM the deceased who was alive at the time called him crying and stated that the appellant Vijay Pal was stabbing her. At 8:28 PM, when PW4 called from Priya Cinemas the appellant was located at Vasant Vihar. Therefore at the approximate time of the crime the appellant was present at the scene, whereas PW4 was located elsewhere. It has been observed in ***Dudh Nath Pandey vs State of UP 1981 AIR SC 911*** that,

‘...The plea of alibi postulates the physical impossibility of presence of accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed....’

Relying on the above said judgment, we may conclude PW4 Donatien Konig did not commit the offense.

31. When we look at the contention of the appellant that the deceased was already lying in a pool of blood when he reached there and that it was the

appellant who made the call at 8:27 PM to PW4, it is improbable. At 8:17 PM the appellant was at Sector 3, R.K. Puram. He was at Munirka at 8:18 PM when the call ended. After the appellant spoke to the deceased, for him to have reached Vasant Vihar, rung the bell a few times, broke open the door, found the deceased already stabbed and to have called PW4 at 8:27 PM is impossible. Especially since the security guards of nearby houses PW 5 Ram Avtaar and PW6 Gaya Prasad Mishra saw no one else except the appellant exiting the house. The story of the prosecution is more befitting the above evidence that Ms. Isabelle Dessoy called PW4 while she was being stabbed by the appellant. The fact that only the appellant was present at the scene of the crime during the time of the crime strengthens the case of the prosecution.

32. The defense witness 3 Laxmi Devi deposes to have seen the appellant in his car outside the residence of the deceased at 9:00 PM. It is proven false by the above call records which state that by 8:42 PM the appellant was at Anand Niketan. Further, the statement of the appellant that he was present at Vasant Vihar throughout the night even after PW4, when the police arrived and during questioning is proven false.
33. After detailed arguments, Mr. Ramesh Gupta, learned senior counsel for the appellant has drawn attention of the Court to the cross-examination of the I.O., PW-32 (Inspector Jai Kishan) wherein he has testified that 'the incident appears to have been started in a sudden quarrel due to grave and sudden provocation', in support of his alternate argument that at best a case under Section 304 Part-I of the Indian Penal Code would be made out and not the case under Section 302 of the Indian Penal Code. Counsel for the appellant has also drawn attention of the Court to the post mortem report, which shows that although number of injuries were

inflicted but there is only one fatal injury which resulted into the death of the victim.

34. Mr. Ramesh Gupta, learned senior counsel for the appellant has also drawn attention of the Court to the weapon used in commission of the offence, which was a small *kitchen* knife. It has also been argued that the appellant has already undergone the sentence of almost 8 years (7 years and 10 months); and the conduct of the appellant in jail is also satisfactory and at no stage he misused the liberty granted to him, and thus the appellant prays that the order on sentence be modified to the period already undergone and in that case appellant would not challenge the judgment on conviction.

Whether the offence falls under the purview of Section 304 Part-I

35. In *Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh (2006) 11 SCC 444* the Supreme Court enumerated some of the circumstances relevant to find out whether there was any intention to cause death on the part of the accused. The Court observed:

...Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls Under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable Under Section 302, are not converted into offences punishable Under Section 304 Part I/II, or cases of culpable homicide not amounting to

murder, are treated as murder punishable Under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention...

36. The Appellant was convicted u/s 302 of the IPC in which he was convicted by the Learned ASJ Sh. Rajeev Bansal in the impugned judgment, but on further evaluation and as contended by the appellant the crime in the instant case does not fully fall within the ambit of section 300 of the IPC which reads as under:

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 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, 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.

Exception 1- When culpable homicide is not murder- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:-

First- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly- That the provocation is not given by anything done in the lawful exercise of the right of private defense.

Exception 2- Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defense of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defense without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defense.

Exception 3- Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the

offender having taken undue advantage or acted in a cruel or unusual manner.

Exception 5- Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

302. Punishment for murder.—Whoever commits murder shall be punished with death, or 1[imprisonment for life], and shall also be liable to fine.

The crime committed by the appellant may be said to have been committed without premeditation in a sudden fight in the heat of passion.

37. In *Chacko @ Aniyam Kunju and Ors. Vs. State of Kerala (2004) 12 SCC 269* it was held that :

All "murder" is "culpable homicide" but not 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 the generic offence, IPC practically recognizes 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". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type

10. The academic of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304. Distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the courts. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of

approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences:

1. Clause (b) of Section 299 corresponds with Clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under Clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of Clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim is sufficient to bring the killing within the ambit of this clause.

2. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under Clause (2) of Section 300 can be where the assailant causes death by a fist-blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In Clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding Clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked,

may result in miscarriage of justice. The difference between Clause (b) of Section 299 and Clause (3) of Section 300 is one of degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in Clause (b) of Section 299 conveys the sense of probability as distinguished from a mere possibility. The words "bodily injury ... sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

38. For cases to fall under Clause (3) it is not necessary that the offender intended to cause death so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. ***Rajwant Singh v. State of Kerala AIR 1966 SC 1874*** is an apt illustration of this point. In ***Virsa Singh v. State of Punjab 1958CriLJ818*** Vivian Bose, J. speaking for the Court, explained the meaning and scope of Clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300 "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

39. In *Shiv Kumar Vs. State (NCT) of Delhi 2014(2) JCC1 282*, it was held that in dealing with Exception 4 to section 300 in *Mahesh Balmiki versus State of Madhya Pradesh, (2000) 1 SCC 310*, it has been observed:-

“7. Now Exception 4 to Section 300 IPC is in the following terms:

Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.--It is immaterial in such cases which party offers the provocation or commits the first assault.

The requirements of this exception are:

- (a) without premeditation in a sudden fight;*
- (b) in the heat of passion upon a sudden quarrel;*
- (c) the offender has not taken undue advantage;*
- and*
- (d) the offender has not acted in a cruel or unusual manner.*

Where these requirements are satisfied, culpable homicide would not be murder.”

40. In the instant case all the requirements of the exception are met. As to whether the offender has not acted in a cruel or unusual manner, we must consider the actions of the appellant before and after the crime. The crime itself may be said to have been committed suddenly in the heat of the moment, but his act of fleeing immediately after committing the offence and later informing the police and requesting them to send an ambulance to the location must be considered. Nothing unusual can be found in his actions, there was no premeditation, and he cannot be said to have taken undue advantage. Vide *Ankush Shivaji Gaikwad Vs.State of Maharashtra AIR 2013 SC 2454: 2013 Cri J 3044*.

41. In *Ghapoo Yadav and Ors. v. State of M.P. (2003) 3 SCC 528* and *Sukbhir Singh v. State of Haryana (2002) 3 SCC 327*, it was seen that :

...After the injuries were inflicted the injured has fallen down, but there is no material to show that thereafter any injury was inflicted when he was in a helpless condition. The assaults were made at random. Even the previous altercations were verbal and not physical. It is not the case of the prosecution that the accused Appellants had come prepared and armed for attacking the deceased....This goes to show that in the heat of passion upon a sudden quarrel followed by a fight the accused persons had caused injuries on the deceased, but had not acted in cruel or unusual manner. That being so, Exception 4 to Section 300 Indian Penal Code is clearly applicable...

Thus we may say that the offence is not murder, but culpable homicide not amounting to murder as under section 304.

42. Section 304 of the IPC is 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.

Section 304 consists of two parts, the first dealing with second degree culpable homicide and the second dealing with third degree culpable homicide as has been noted above. The distinction between 304 Part I and Part II has been drawn by the Hon'ble Supreme Court in

Alister Anthony Pareira v. State of Maharashtra (2012) 2 SCC 648,
in the following words:

..... For punishment Under Section 304 Part I, the prosecution must prove: the death of the person in question; that such death was caused by the act of the accused and that the accused intended by such act to cause death or cause such bodily injury as was likely to cause death. As regards punishment for Section 304 Part II, the prosecution has to prove the death of the person in question; that such death was caused by the act of the accused and that he knew that such act of his was likely to cause death....

43. In ***Vijay Ramkrishan Gaikwas V. State of Maharashtra (2012) 11 SCC 592***, it was observed that

*The occurrence thus has the features of an incident in which an injury is inflicted in a sudden fight without pre-meditation in the heat of passion upon a sudden quarrel within the contemplation of exception 4 to Section 300 of the Indian Penal Code, which takes the case out of the purview of murder as defined in the said section. It is true that only one injury was caused to the deceased but the same is not conclusive by itself, for even a single injury can in a given case constitute murder, having regard to the weapon used and the part of the body chosen for inflicting the injury. The legal position in this regard is well settled by the decision of this Court in ***Bavisetti Kameshwara Rao alias Babai v. State of Andhra Pradesh : 2008 (15) SCC 725***:*

(Para 13) It is seen that where in the murder case there only a single injury is, there is always a tendency to advance an argument that the offence would invariably be covered under Section 304 Part II Indian Penal Code. The nature of offence where there is a single injury could not be decided merely on the basis of the single injury and thus in a mechanical fashion. The nature of the offence would certainly depend upon the other attendant circumstances which would help the court to find out definitely about the intention on the part of the accused. Such attendant circumstances could be very many, they being (i) whether the act was premeditated; (ii) the nature

of weapon used; (iii) the nature of assault on the accused. This is certainly not an exhaustive list and every case has to necessarily depend upon the evidence available. As regards the user of screwdriver, the Learned Counsel urged that it was only an accidental use on the spur of the moment and, therefore, there could be no intention to either cause death or cause such bodily injury as would be sufficient to cause death. Merely because the screwdriver was a usual tool used by the accused in his business, it could not be as if its user would be innocuous.

44. In the instant case a kitchen knife was used to stab the deceased, not once but a repeated 27 times with such force that the tip of the knife broke inside her body. The injury inflicted on the neck alone was deemed sufficient in the ordinary course of nature to cause death.

In *Jai Prakash v. State (Delhi Administration)*, 1991 (2) SCC 32:

*(para13)...when a person commits an act, he is presumed to expect the natural consequences. But from the mere fact that the injury caused is sufficient in the ordinary course of nature to cause death, it does not necessarily follow that the offender intended to cause the injury of that nature. However, the presumption arises that he intended to cause that particular injury. In such a situation the court has to ascertain whether the facts and circumstances in the case are such as to rebut the presumption and such facts and circumstances cannot be laid down in an abstract rule and they will vary from case to case. However, as pointed out in *Virsa Singh* case the weapon used, the **degree of force released in wielding it, the antecedent relations of the parties, the manner in which the attack was made that is to say sudden or premeditated, whether the injury was inflicted during a struggle or grappling, the number of injuries inflicted and their nature and the part of the body where the injury was inflicted are some of the relevant factors.** These and other factors which may arise in a case have to be considered and if on a totality of these circumstances a doubt arises as to the nature of the offence, the benefit has to go to the accused.*

45. Thus having considered all the incumbent factors, this court finds the appellant guilty under section 304 part 1 of the IPC. Consequently, we modify the sentence awarded to the appellant to the period already undergone, which is 7 years and 10 months. Trial Court record be returned to the concerned court.

G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

FEBRUARY 05, 2015