

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.776 of 2009

[Against the judgment of conviction dated 24th June, 2009, and the order of sentence dated 30th June, 2009, passed by the Additional Sessions Judge, VIII, Patna, in Sessions Trial No.1463 of 2007 arising out of Kotwali P.S. Case No.218 of 2007]

Pawan Singh @ Vikash Singh @ Vikash, son of Chandrama Singh, resident of village/Mohalla- Road No.6, Prince Colony, P.S.-Gardanibagh, P.O.- Anisabad, District- Patna.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

With

Criminal Appeal (DB) No. 159 of 2010

[Against the judgment of conviction dated 24th June, 2009, and the order of sentence dated 30th June, 2009, passed by the Additional Sessions Judge, VIII, Patna, in Sessions Trial No.1463 of 2007 arising out of Kotwali P.S. Case No.218 of 2007]

Anil Singh @ Sanny, S/O Shri Mharana Pratap Singh, R/O village- Taranpur, P.S.- Gaurichak, District - Patna

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance:

(In CR. APP (DB) No. 776 of 2009)

For the Appellant/s : Mr. Surendra Singh, Sr. Advocate with
Mr. Abhay Shankar Singh, Advocate
Mr. Amit Kumar Mishra, Advocate

For the Respondent/s : Mr. Ashwani Kumar Sinha, APP

(In CR. APP (DB) No. 159 of 2010)

For the Appellant/s : Ms. Soni Shrivastava, Advocate
Mr. Ravi Bhardwaj, Advocate
Mr. Madhuri Kumari, Advocate

For the Respondent/s : Mr. L. K. B. Prasad, APP

CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH

&

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA PRAKASH)

Date: 18-03-2016

1. By the judgment of conviction dated 24th June, 2009, and the order of sentence dated 30th June, 2009, passed by the Additional Sessions Judge, VIII, Patna, in Sessions Trial No.1463 of 2007 arising out of Kotwali P.S. Case No.218 of 2007, both the Appellants have been convicted under Section(s) 302/34, 120-B, 394 and 412 Indian Penal Code and sentenced to undergo rigorous imprisonment for life with fine of ₹40,000/- each and in default of payment to further undergo rigorous imprisonment for six months under Section 302/34 Indian Penal Code, rigorous imprisonment for ten years under Section 394 Indian Penal Code, rigorous imprisonment for ten years under Section 412 Indian Penal Code. No separate sentence was passed under Section 120-B Indian Penal Code. All the sentences were directed to run concurrently.

2. The case of the Informant, Sadhna Srivastava, PW 14, is that while she was entertaining a guest Suresh Kumar Mahto, the deceased, in her Flat No.802 in the White House Apartment on 20.05.2007 at about 11.30 AM some body came and rang the bell. When her servant Jagan went to open the door, he did not find any one. Once again the bell rang and two unknown persons aged about



30-32 years entered into the flat whom she described with some details. They started to ask where C. B. Singh was and pointing to Suresh Kumar Mahto said that it was C. B. Singh. Then they demanded ₹Seventeen lacs from her which she had allegedly taken in the case of Narain Mishra. When she denied, they started to intimidate her. They asked them to take off their clothes but she did not do so. However, Suresh Kumar Mahto was forced to take off his clothes. They then took photographs and threatened to print them in the newspaper to defame her. In course of this transaction, they also took away the ATM Card, purse, mobile phones as also her personal jewellery which she was wearing and also which was kept in the Almirah. Thereafter, one of the persons left saying that he was leaving to withdraw money on the ATM Card. After his departure, remaining accused repeatedly started demanding money and was looking around. In this course, suddenly Suresh Kumar Mahto, the deceased, pushed the pistol out of the hands of the accused which she caught hold of and then the accused started grappling with the deceased. Taking advantage, she ran and locked herself in the room and started raising cries. When she finally came out of the room, she was told by Jagan (PW 13) that Suresh Kumar Mahto had been pushed out of the window. The police immediately arrived and apprehended Pawan Singh, who was found hiding in the car parking.



He confessed his guilt and from his possession some incriminating articles were recovered. He also disclosed the name of his colleague Anil Singh @ Sanny, who was arrested later on. The Informant alleged that accused persons had been repeatedly asking for one C.B. Singh and that she should change the judgment of Narain Mishra and committed robbery with the help of a toy pistol and took away their mobile phones. This statement was recorded by PW 20 at 4.00 PM

3. During trial, the prosecution examined twenty witnesses. The sequence of events appears that after the occurrence a number of persons gathered at the Apartment and apprehended Appellant, Pawan Singh in the car park from whose possession several articles were recovered. Appellant, Anil Singh, was apprehended later on. During investigation, finger prints from the place of the occurrence and blood stains were seized and sample finger prints of the accused were taken by a Magistrate deputed for this purpose and matched by an Expert and Appellant Anil Singh alias Sanny was also put on Test Identification Parade. On the basis of recoveries and identification in Test Identification Parade, the present Appellants as also some other accused were put on trial but the rest were acquitted.

4. The defence examined five witnesses mainly on the point that Appellant, Anil Singh, was separate from his family, who



had also been put on trial for alleged recovery as also that D.W.1 stated that photographs of Anil Singh had been published in the newspaper before hand, thus, making the Test Identification Parade a mere formality. The newspaper clipping has been marked “X” for identification.

5. In sequence of examination of the witnesses, PW 1 (Mani Kant Mishra) was a Security Guard of the White House Apartment, who stated about the factum of occurrence and arrest of Pawan Singh as also seizure of blood stained curtain of which seizure list was prepared and he signed on the same which is Ext.1. He also stated that on 17.04.2007 Anil Singh had come to visit the Informant in the flat and introduced himself as a Police Officer from Delhi and promised him gratification if the whereabouts of the Informant is given to him. He identified the Appellant, Anil Singh, in the dock.

In cross-examination, he denied that he had not stated the factum of disclosure about the earlier instance involving Anil Singh. He admitted the fact that in his examination recorded on 20.05.2007 he had not taken the name of Anil Singh. This cross-examination does not seem to be of any purpose since there is no mention of the Appellant, Anil Singh, having introduced himself by his name in the earlier statement. Evidently, when he was put on

trial, the witness identified Anil Singh as the person, who had come three days before the occurrence looking for the Informant.

6. PW 2 (Mritunjay Kumar) is another Security Guard of the White House Apartment, who stated that on 20.05.2007 he heard some body falling on the ground and learnt about the factum of occurrence as also arrest of Pawan Singh from the car park. He signed on the recovery memo which is Ext.2 but contents of which he did not know. He also proved the signature of Dharmenda Tiwary on the seizure list which is Ext.3 and his signature on the Inquest Report of the deceased which is Ext.4.

There is nothing notable in his cross-examination.

7. PW 3 (Dharmendra Tiwary) did not support the prosecution case and was declared hostile and, therefore, there is no need to discuss his evidence.

8. PW 4 (Shiva Nand Prasad Singh) was the ASI of Kotwali P.S., who stated that on 20.05.2007 suddenly he received information on telephone that some occurrence had taken place at White House Apartment, Budha Marg, Patna, on which information he along with rest of the police party reached there. He saw a person lying dead near the gate and prepared the Inquest Report. At that point in time itself, he learnt that one of the accused persons Pawan Singh was hiding in the parking space who was apprehended and



confessed his crime. He searched the person of Pawan Singh and recovered some document pertaining to the deceased Suresh Kumar Mahto as also jewellery which the Informant was wearing and prepared the seizure list. He proves the seizure list which is Ext.7 as also Inquest Report which is Ext.8.

From his cross-examination, it appears that immediately after occurrence he had reached the place of occurrence, thus, connecting the sequence of events. On recall, he proved Ext.10 which was list of material Exhibit which had been produced before the Court.

9. PW 5 (Upendra Kumar Singh) was an employee of the Central Administrative Tribunal, Patna Bench, and he stated that on 20.05.2007 he got information from the uncle of the Informant that some untoward incident had happened in her house and he asked for the phone number of the Vice Chairman of Central Administrative Tribunal. He immediately informed the Vice-Chairman and reached the place of occurrence and learnt about it as also saw the apprehended accused Pawan Singh. He also saw all the articles in the flat scattered around, thus, supporting the factum of occurrence. He was witness to the seizure list of the articles recovered from the possession of Pawan Singh. He identified both Pawan Singh and Anil Singh in the dock.

It is noteworthy that Anil Singh was relative of this witness and, therefore, identification of Anil Singh was probably for that reason.

10. PW 6 (Wajimuddin Ansari) was the Circle Officer of Patna Sadar Block and on the orders of the Court on 27.06.2007 he had conducted the Test Identification Parade of certain articles which were recovered from the person of Appellant, Anil Singh. He says that the Informant had identified all the articles mentioned in the Test Identification Parade Chart which he proves as Ext.11. He further stated that he had been directed to take blood samples of the Appellant Pawan Singh by the Chief Judicial Magistrate so he had accompanied PW 15, Judicial Magistrate, to Beur Jail for procuring the same and submitted it in Court. He proved the document which is marked as Ext.12.

In cross-examination, several questions were targeted to him with regard to irregularities in the manner in which Test Identification Parade was conducted but none of them seems to be noteworthy.

11. PW 7 (Dr. Sanjay Kumar) had examined the Informant Sadhna Srivastava (PW 14) and found the following injuries on her person:

- I. Bruise on fore head joint above eye brow.
- II. Multiple abrasions, scratch mark over

face and cheek 3-4 in numbers especially over right eye and joint below left ear and some scratch mark over fore arm.

Nature of injury was simple.

He proved the Injury Report as Ext.13.

Several questions were directed to him that actually Injury Report (Ext.13) was ante dated but on examination of the document it does not change the fate of the case either way.

On its perusal, it appears that the Doctor had noted on top that he had examined PW 14 on 20.05.2007 at 4.30 PM and signed at the bottom putting the date as 20.05.2007. However, there is a certain cutting below it which according to the Appellants was whitened and it appears the date mentioned earlier was 13.08.2007 i.e. three months after the occurrence.

Be that as it may, since on the top of the Medical Report it has been mentioned in running hand and in complete sequence that the Informant was being examined on 20.05.2007 at 4.30 PM, this cutting at the bottom does not have any significance.

12. PW 8 (Dr. Vishnudeo Prasad) held autopsy of the deceased and found following injuries on his person:

- (I) Abrasion of size 14"x 10" was present on chest and abdomen
- (II) Bleeding from nose and mouth was present,
- (III) Fracture of tibia and fibular bone of both legs was present,
- (IV) Abrasion of size 4"x 3" was present at

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- left knee,
(V) Dissection of head chest was done. The Stomach contains of 100 ML of semi digested food. The urinary bladder was found empty. Both right and left humerous bone was found fractured. The skull bones were found fractured. The brain matter was found lacerated. The liver, lungs, kidney, and spleen were found pale. Blood clots were present in the chest cavity.

Cause of death was due to shock and hemorrhage due to above injuries.

In cross-examination, surprisingly it was asked of him as to whether injuries could have been caused on account of fall and he supported the fact that the injuries which had been mentioned may be possible, if the person falls, thus, further nailing the prosecution case.

13. PW 9 (Baidyanath Mishra) failed to identify Appellant, Pawan Singh. However, he supported the factum of occurrence to the extent that the deceased was found dead near the gate and one person was arrested from the parking space.

14. PW 10 (Parwej Alam) is the neighbour of the Informant, who stated that on the date of occurrence he suddenly heard some sounds at which he came out of the flat and found the Informant screaming and learnt that a robbery had been committed in her house and her guest had been thrown out from the flat. He confirmed that the police came within 5-10 minutes and

apprehended one of the accused along with some documents of the Informant and the deceased as also her jewellery. He found all the articles in the flat of the Informant were in scattered condition.

In cross-examination, there is nothing which is of note.

15. PW 11 (Chand Bihari Agrawal) is also a neighbour of the Informant, who repeated the story given out by PW 10 as also that he was a witness to the seizure of articles from the person of Appellant, Pawan Singh, which had already been marked as Ext.9/1.

In his cross-examination also, we do not find anything which is of note.

16. PW 12 (Dina Nath Choubey) was the Director-cum-Chief State Examiner of Finger Prints in the CID. He stated that he had tested some finger prints and palm prints which were found on the Wall and Allmirah with the finger prints of the Appellants. He was of the opinion that out of finger prints taken one of each of the accused matched. He proved the report as Ext.16 and his signatures as Ext.16/1, Ext.18, Ext.18/1 as also Ext.19, 19/1 and Ext.20 series.

In cross-examination, he explained that sample finger prints had not been taken in his presence and he had forwarded the 17 finger prints with one which matched, to the Court.

17. PW 13 (Jaggan Singh) is the main witness of the





case. He stated that on 20.05.2007 suddenly at about 12.30 PM, the door bell rang, so, at the instruction of PW 14, his employer, he opened the door but did not find any one. When another bell rang, he opened the door and found two persons standing there. They asked as to whether the Informant was at home and while he was answering two persons entered into the room; one sat on the Sofa and another hid himself behind the Almirah. He was holding pistol in his hand. When the Informant came out asking as to what was the matter, one of the accused persons pointed a pistol on her and took her inside and on seeing Mahto uncle (deceased), exclaimed that he was C. B. Singh. The Informant told them to go out and that they had come to a wrong place. Then they started demanding ₹Seventeen lacs from her and took him to another room. The Informant did not give them any money so they took jewellery, ATM card etc. from the Almirah and once again started pressurizing her to part with ₹Seventeen lacs. The person, who was pointing pistol on her, took away the jewellery forcibly which she was wearing and started to scatter all the articles kept in the Almirah. Then, they told them to take off their clothes and if they were not given ₹Seventeen lacs, they would publish dirty pictures in the newspapers. Both the accused got the deceased to take off his clothes but the Informant did not do so. They also took away ATM Card,

mobile phone from the pocket of the deceased's trouser. One of them left saying that he was going to withdraw money from ATM and in case there was no money they would be killed. Saying so, he left.

The remaining accused person started to take the Informant towards the Bed Room but she did not go. Finding an opportunity, the deceased grabbed at the pistol of the accused which fell down in course of which both of them started grappling. In the meanwhile, the Informant fled to her Bed Room and locked herself. Then the miscreant pulled away the deceased and threw him out of the window. He attempted to pull him as well but he caught hold of the exercise cycle and saved himself. The accused then ran away. In the meanwhile, the neighbours gathered as also the police came and caught hold of one of the miscreants. He identified Pawan Singh in the dock but fails to identify Anil Singh explaining that he could not do so because the other accused was wearing dark glasses.

In cross-examination, he stated that he was living in the Apartment since last 1½ years and describes the topography of the Apartment as also the Flat in which they were living. It appears from his description that there was an office room also in the Flat which was used by the Informant. He also stated that he was never taken for attending Test Identification Parade.

18. PW 14 (Sadhna Srivastava) is the Informant, who



fully corroborates the *fard-e-bayan* saying on 20.05.2007 while she was sitting in the Flat with her visitor, the deceased Suresh Kumar Mahto, the bell rang and two unknown persons entered into the Flat and asked for her. She gives full description of the two persons as one of them being tall, whereas, the other was short. One of them pointed a pistol on her and demanded ₹Seventeen lacs as also started to identify Suresh Mahto as one C. B. Singh. The miscreants assaulted them and alleged that she had taken ₹Seventeen lacs in the file of Narain Mishra which should be given to them. In this transaction, her personal jewellery was taken by the miscreants and also from the Almirah.

PW 13 was taken inside the Bed Room and immediately thereafter they returned from there and came to office and said that they had come to conduct raid also informed somebody on the mobile that recovery had been made. The miscreants came down to the demand of ₹one lac but when demand was not satisfied they were asked to take off their clothes so that photographs could be printed in the newspapers. Mr. Mahto was forced to take off his clothes and from his pocket his ATM Card etc. was taken away. The miscreants asked for the PIN number which he disclosed, so, the short person left the place saying that he was going to ATM to withdraw money and in case PIN was wrong, they would be shot

dead.



While, one of the miscreants was in the room, Suresh Mahto grabbed at him on account of which the pistol fell down. The miscreants then started to grapple with the deceased in course of which she went into the Bed Room and locked herself in the room and started to scream. When she learnt that the miscreants had left, she came out and then PW 13 told her that the person, who was holding pistol, had pushed Mr. Mahto from the window. She immediately informed the Vice Chairman of the Central Administrative Tribunal and was taken to the Dispensary for treatment. She also learnt that one of accused persons, namely, Appellant Pawan Singh was caught in the parking space and the dead body of Suresh Mahto was recovered. She proved her signature on the *fard-e-bayan* as Ext.21 and signature of the Vice Chairman, Central Administrative Tribunal, as Ext.22. She identified both the Appellants in the dock.

In cross-examination, she explained as to how the Apartment had a security system and about the files of which she had differed with Vice Chairman on 10.05.2007 and gave different opinion in regard to Narain Mishra. It appears that Suresh Mahto had come to her Flat in response to matrimonial advertisement given by both of them. She also stated that about 15-20 minutes, police, Vice

Chairman and others including PW 10 had arrived.

Surprisingly, she has not stated about attending the Test Identification Parade of articles which were recovered from Anil Singh. This was elicited in cross-examination which goes against the interest of the Appellant Anil Singh.

19. PW 15 (Sahab Kausher) is the Judicial Magistrate, who was deputed to take the blood sample of Pawan Singh which he did. He proved the document as Ext.23 to 23/11. He identified the Appellant, Pawan Singh, whose blood sample had been taken. However, the evidence of this witness is of no value because there was no corresponding report of matching the blood sample.

20. PW 16 (Ramautar) is the Police Officer of New Delhi, who stated that on 05.06.2007 he apprehended Appellant, Anil Singh, and from his possession some incriminating articles had been recovered. He also recorded confession of the accused. The seizure list, search memo and the confessional statement are proved as Ext.24 series.

In cross-examination, details of the articles which had been recovered from Anil Singh have been given. Even though several questions were targeted at this witness with regard to veracity of the seizure but when the same is based on documentary proof and by an independent person and also having been identified



by the Informant which was elicited by the accused in the cross-examination has to be considered as authentic.

21. PW 17 (Rajbir Singh) is also a Police Officer of New Delhi Police, who stated that on 05.06.2007 he apprehended Appellant, Anil Singh, along with PW 16 (Ramautar) and from his possession some incriminating articles had been recovered. Confessional statement of Appellant, Anil Singh, was recorded by PW 16 in his presence upon which he also signed as a witness. He proved his signature on the confessional statement as Ext.24/4. He has also proved his signature on personal search memo and arrest memo as Ext.24/5 and 24/6 respectively.

In cross-examination, several questions were put to this witness with regard to veracity of seizure but there is nothing which can be taken note thereof.

22. PW 18 (Krishna Mohan Tiwary) is another Judicial Magistrate, who conducted Test Identification Parade of Anil Singh and it appears that the Informant Sadhna Srivastava (PW 14) had identified Appellant, Anil Singh, which report is proved Ext.25. He is also said to have taken finger prints of Appellant, Anil Singh, which is marked as Ext.26 to 26/6.

23. PW 19 (Anand Kumar) is the main Investigating Officer, who stated that on 20.05.2007, he got information that some





person had fallen from White House Apartment at which he came there after recording *Sanha* in the police record along with rest of the Police force. On arriving at the While House, he found a person fallen near the gate and was bleeding profusely. One police personnel was deputed there and the he proceeded to the Flat of the Informant and recorded *fard-e-bayan* and further statement and prepared the seizure list of the articles including the blood stained curtain which was marked as Ext.26/1. He also arrested Pawan Singh, who was found at the place of occurrence and recorded the statement of the other witnesses present there. He further stated that he learnt about the complicity of the Appellant, Anil Singh, from the confessional statement of Pawan Singh. He inspected the place of occurrence which was a Flat having Dinning Room, Bed Room, Bath Room, Kitchen and found several articles scattered therein. He found the Almirah which the miscreants had ransacked. He also found the exercise cycle which PW 13 had held in order to save his life. He arranged to pick up the chance finger prints of the two Appellants from the Room, Almirah, and sent the same for testing before the Finger Print Expert. He also found that some money had been withdrawn from the ATM of the Informant soon after the occurrence, statement of which he obtained. He further investigated the matter and checked into criminal antecedents of the Appellants

which is of no value.

In cross-examination, he conceded that Anil Singh had been taken on police remand for five days before he was put on Test Identification Parade.

24. PW 20 (Yatindra Kumar Singh) stated that on 31.01.2008 he had done some investigation in Delhi and thereafter submitted charge-sheet. He appears to be more or less formal in nature except that he had collected FSL report in respect to the blood and finger print samples and submitted charge-sheet.

25. On going through the evidence which have enumerated above, the circumstances which have been emerged against the Appellants are as follows:

- I. Both the Appellants were named in the First Information Report.
- II. The Appellant, Pawan Singh, was caught soon after the occurrence from the parking space of the Apartment, along with incriminating articles of which Seizure List Ext.7 was prepared.
- III. The name of the Appellant, Anil Singh @ Sanny, was disclosed by Appellant, Pawan Singh, in his disclosure statement when he was arrested,
- IV. PW 1 identified the Appellant, Anil Singh @ Sanny, as the person, who had come to enquire about the Informant three days earlier,



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- V. PW 4 and 5 identified both the Appellants in the Court, whereas, PW 14, the Informant, identified the Appellant Anil Singh in Test Identification Parade as well as both Appellants in dock and PW 13 identified Pawan Singh in the dock, PW 18 confirms that the Appellant, Anil Singh, had been identified in the Test Identification Parade by PW 14,
- VI. PW 16 had recovered articles from the possessions of Anil Singh, which were put on Test Identification Parade and identified by the PW 14
- VII. PW 6 proved the factum of identification of the articles recovered from the person of Anil Singh by the Informant,
- VIII. PW 12 opined conclusively about matching of the finger prints of the Appellants with the sample finger prints.

26. Counsel for the Appellant, Anil Singh, submits that even while he does not dispute the factum of occurrence his implication is only to the extent of robbery. As per the prosecution witnesses after the first part of the transaction in which robbery was committed, he had left the Flat and, hence, he cannot be fastened with liability of the act of Appellant, Pawan Singh, who had later pushed the deceased to his death. In the

circumstances of the case as against him, at best, a case under Section 392 Indian Penal Code would be made out since he was not armed with any dangerous weapon.

27. As discussed above, there does not seem to be any dispute that Appellant, Anil Singh, had left the Apartment taking the ATM card and some other articles of value on the plea that he was going to withdraw money. He had instructed the Appellant Pawan Singh that if the ATM PIN number was found incorrect, all the persons would be killed. It appears from the evidence of the Investigating Officer that money was immediately withdrawn from the ATM meaning thereby that if, at all, the threat which had been meted out by the Appellant, was conditional and did not hold good after withdrawal of the money. In such circumstances, we feel he cannot be held to be having common intention to commit murder of deceased and hence, conviction of the Appellant, Anil Singh @ Sanny, under Section 302/34 Indian Penal Code is set aside and he is acquitted of the charge under Section 302/34 Indian Penal Code.

28. As for the offence under Section 394 Indian Penal Code, as per the evidence of the Informant, even though she and PW 13 did not state that the deceased and she were assaulted by the Appellants in course of robbery, but it is evident from the evidence



of the Doctor (PW 7) discussed above that PW 14 had sustained injuries.

29. Resultantly, conviction and sentence of both the Appellants under Section 394 Indian Penal Code is maintained.

30. The conviction and sentence of both the Appellants under Section 412 Indian Penal Code is also maintained since the jewellery of the Informant was recovered on immediate apprehension of Pawan Singh of which Ext. 7 was prepared, whereas, the articles recovered from Anil Singh belonging to the Informant was identified by her in Test Identification Parade.

31. Now to deal with the case of the Appellant, Pawan Singh.

32. Counsel for the Appellant, Pawan Singh, also does not dispute the factum of occurrence and confines his submission only to the extent that in the manner of occurrence depicted by the prosecution witnesses no offence under Section 302/34 Indian Penal Code is made out and his case is squarely covered under Exception 4 of Section 300 Indian Penal Code which is quoted below:

"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.”

He submits since the occurrence had taken place without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and the Appellant had not taken undue advantage or acted in a cruel or unusual manner, he cannot be convicted under Section 302/34 Indian Penal Code.

He relies upon the decision reported in **AIR 2013 SC 2454** (*Ankush Shivaji Gaikwad Vs. State of Maharashtra*), to buttress his submission.

33. On a reading of the decision, we find that the facts of the case there was that when dog of the deceased barked upon the Appellant, he got enraged and threw an iron rod upon it which led to an exchange of hot words, which escalated into a physical fight between the deceased and the accused in course of which the accused persons assaulted the deceased with fists and kicks and also with iron pipes on the head causing his death. In course of discussion, Hon’ble Supreme Court referred to various decisions on *Exception 4* of Section 300 Indian Penal Code.

34. Ironically, we would also like to rely upon the same decision for arriving at a conclusion that in the facts of the present case *Exception 4* of Section 300 Indian Penal Code would not be applicable, but it is essential to firstly deal with the facts of



the instant case.



35. The undisputed position is that the Appellant Pawan Singh along with Anil Singh @ Sanny had entered the Flat of the Informant and intimidated her and the deceased. After the co-appellant, Anil Singh @ Sanny, left the Flat with some articles, a sudden grappling ensued in which course the Informant went and locked herself in the Bed Room. PW 13, the sole eye witness on this part of the occurrence stated that the Appellant pulled the deceased towards the window of the 8th floor around 91' above ground level and thereafter deliberately pushed him out from there on account of which he fell down dead. This witness was also attempted to be pulled towards the window but he somehow saved himself by holding on to an exercise cycle which was found there by the Investigating Officer, thus, confirming this part of the manner of occurrence.

36. Now, let us go through the judgment to understand the principle of the Exception 4. Firstly, para 10 is quoted below:

“10. Time now to refer to a few decisions of this Court where in similar circumstances this Court has held Exception 4 to Section 300 of the Indian Penal Code to be applicable and converted the offence against the Appellant in those cases from murder to culpable homicide not amounting to murder. In *Surinder Kumar v. Union Territory, Chandigarh* (1989) 2 SCC 217: (AIR 1989



SC 1094), this Court held that if on a sudden quarrel a person in the heat of the moment picks up a weapon which is handy and causes injuries out of which only one proves fatal, he would be entitled to the benefit of the Exception provided he has not acted cruelly. This Court held that the number of wounds caused during the occurrence in such a situation was not the decisive factor. What was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a fit of anger. Dealing with the provision of Exception 4 to Section 300 this Court observed:

“... To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly.”

(Italics ours)

(Emphasis supplied)

11. We may also refer to the decision of this Court in ***Ghapoo Yadav and Ors. v. State of M.P.*** (2003) 3 SCC 528: AIR 2003 SC 1620:



2003 AIR SCW 1009, where this Court held that in a heat of passion there must be no time for the passions to cool down and that the parties had in that case before the Court worked themselves into a fury on account of the verbal altercation in the beginning. Apart from the incident being the result of a sudden quarrel without premeditation, the law requires that the offender should not have taken undue advantage or acted in a cruel or unusual manner to be able to claim the benefit of Exception 4 to Section 300 Indian Penal Code. Whether or not the fight was sudden, was declared by the Court to be decided in the facts and circumstances of each case. The following passage from the decision is apposite:

“...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, Indian Penal Code is not defined in the Indian Penal Code. 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'.*

(Italics ours)

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18. This Court in the above decisions quoted the following passage from **Reg. v. Monkhouse** (1849) 4 Cox C.C. 55 where Coleridge J. speaking for the Court observed:

“The inquiry as to intent is far less simple than that as to whether an act has been committed, because you cannot look into a man's mind to see what was passing there at any given time. What he intends can only be judged of by what he does or says, and if he says nothing, then his act alone must guide you to your decision. It is a general rule in criminal law, and one founded on common sense, that juries are to presume a man to do what is the natural consequence of his act. The consequence is sometimes so apparent as to leave no doubt of the intention. A man could not put a pistol which he knew to be loaded to another's head, and fire it off, without intending to kill him; but even there the state of mind of the party is most material to be considered...”

(Italics ours)

(Emphasis supplied)

23. We may lastly refer to the decision of this Court in **Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh** (2006) 11 SCC 444: (AIR 2006 SC 3010; 2006 AIR SCW 4143) where this Court enumerated some of the circumstances relevant to finding out whether there was any intention to cause death on the part of the accused. This 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 a 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...”

(Italics ours)

(Emphasis supplied)

37. Thus, we find that that the principles enunciated, contain certain catch words such as “sudden”, “premeditated”, “fit of anger”, “without undue advantage”, “without cruelty”, “a consequence which is apparent from the act”.

38. It is trite to remark at this stage that principles of law in a criminal case is largely dependent on the facts of the case in hand and facts of two cases cannot ever be the same. Principles cited above have to be applied with a certain amount of caution, circumspection and care so as to ensure undue favours are not doled out to the undeserving. It is not that in every situation when a sudden fight erupts Exception 4 would apply. The case facts as a whole have to be viewed and only thereafter principle be applied so as to ensure no prejudice is caused to any party and justice is done.

39. The present case does not describe a situation when a sudden fight ensued on account of a petty reason. As narrated by PW 13 and PW 14, the Appellants had forced



themselves into the Flat with a view to take unfair advantage and commit robbery. It is in its course when the Appellant Pawan Singh was left alone he was caught unawares by the deceased and the Informant grabbed his pistol and attempted to overpower him when the grappling started. What PW 13 says is that the Appellant then pulled the deceased to the window which the Investigating Officer finds to be more than 3' above the ground level and pushed him out of it. In our opinion, it is evident that the intent of the Appellant while pulling the deceased, who was himself a full grown man and must have offered resistance, and pushing him out of the window of the 8th floor was a cold blooded and deliberate act with the sole intent to cause his death. His act reveals a cruel and unusual manner and he certainly took undue advantage of the situation when he himself proved stronger than the middle-aged deceased. And not only did the Appellant stop at that, he also attempted to pull PW 13 to his death but he somehow saved himself and hence, in our view, Exception 4 would not apply to the facts of this case.

40. As a result, conviction of the Appellant, Pawan Singh is converted to one under Section 302 Indian Penal Code from one under Section 302/34 Indian Penal Code. We are duly conscious that such conversion will not prejudice him in any

manner because charge read out to him was “*Firstly---* That you, on or about the 20th day of May, 2007, at White House Apartment, Flat No.802, Block A, P.S.-Kotwali, District-Patna in furtherance of common intention of you all committed murder by intentionally causing the death of Suresh Kumar Mahto and thereby committed an offence punishable under Section 302/34 of Indian Penal Code, which means that due notice was given to him that he had to meet the charge of murder.

41. In the result, both the appeals are dismissed but with modification as mentioned above.

(Anjana Prakash, J)

AFR
J.Alam/-

(Rajendra Kumar Mishra, J)

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