

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

Reserved on: 5th August, 2016
Pronounced on: 24th August, 2016

+ **CRL.A. 516/2000**

RAJINDER @ LALU & ANR. Appellants
Through: Ms. Usha Mann, *Amicus Curiae*.

versus

STATE Respondent
Through: Mr. Varun Goswami, APP with
Insp. Sudhir Kumar, PS Model Town.

+ **CRL.A. 518/2000**

VIJAY PAL & ANR. Appellants
Through: Mr. M.L. Yadav, Adv.

Versus

STATE Respondent
Through: Mr. Varun Goswami, APP with
Insp. Sudhir Kumar, PS Model Town.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K. GAUBA, J:

1. The four appellants before us were prosecuted on the basis of report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) submitted on 28.08.1996 by the Station House Officer (SHO) of police station Model Town (police station) on conclusion of investigation into the first information report (FIR) No.255/1996 that had been registered on

06.06.1996. Upon the case being committed by the concerned Metropolitan Magistrate, they stood trial on the basis of evidence submitted with the said police report, on the charge for offence under Section 302 read with Section 34 of Indian Penal Code, 1860 (IPC), the gravamen of which was that on 05.06.1996, at about 10:30 p.m., on a public road near Ambedkar Park, Lal Bagh within the jurisdiction of said police station, in furtherance of their common intention, they had committed the murder of Baiju son of Bhola (PW-4), aged about 23 years. On the consideration of the evidence adduced by the prosecution, essentially through the mouthpiece of twenty one witnesses, that would include Noor Mohammad (PW-7) and Vijender (PW-11), both presented as witnesses to the occurrence, the court of sessions, by judgment dated 29.07.2000, held all the four appellants guilty, as charged, and by order dated 31.07.2000 awarded sentence of imprisonment for life with fine of Rs.25,000/- each, in default further simple imprisonment for two years' each, also directing that the amount of fine, if realized, would be paid as compensation to the legal heirs of the deceased person.

2. Feeling aggrieved with the judgment returning finding of guilty, and the order on sentence, these appeals have been filed assailing the view of the trial Court, contending primarily that the prosecution evidence, in general, and that of the aforementioned two eye witnesses, in particular, was not worthy of reliance and, further, that the appellants have been falsely implicated.

3. Before coming in grips with the contentions urged on behalf of the appellants, it would be proper to have a brief overview of the facts and evidence leading to the impugned judgment. But, even before we come to

the contentious parts, certain area which is indisputable may be taken note of.

4. Baiju son of Bhola (the victim) was an ordinary resident of House No.10071, Gali No.1, Multani Dhanda, Pahar Ganj, New Delhi, Vijender (PW-11), also a resident of Pahar Ganj area (though in another locality known as Krishna Gali near New Delhi Railway Station) was an acquaintance of Baiju (the victim). Sometime before 10:30 p.m. on 05.06.1996, both had met each other in a local bus going towards Lal Bagh (within the jurisdiction of PS Model Town), a locality separated by several kilometers, per PW-11 the victim having confided in him that he was going to recover some money from appellant Vijay Pal (A1). Since that has been the premise of the prosecution case presented before the Court, as reflected in the FIR (Ex.PW-6/A), registered by Head Constable Rattan Lal (PW-6), the Duty Officer in the police station at 02:50 hours on 06.06.1996, on the basis of statement Ex.PW-7/A of Noor Mohammad (PW-7), made before Sub-Inspector Om Prakash (PW-12), and forming part of his *rukka* (Ex.PW-12/A), it may be noted here itself that the money which the victim intended to realize from appellant Vijay Pal (A1) was an amount of rupees one lac which he (A1) allegedly had fled away with, after committing theft in the area of Pahar Ganj. It may further be observed here itself that during the investigation there was no probe into the allegation of theft of such amount of money by A1 from Pahar Ganj. Thus, no evidence worth the name supporting the said theory has come on board at any stage of the process.

5. There is unimpeachable evidence presented to substantiate the prosecution case that Baiju (the victim) sustained serious injuries sometime

around 10:30 p.m. on 05.06.1996 at the above mentioned place in the area of Lal Bagh within the jurisdiction of police station Model Town and further that he died as a consequence of such injuries. Head Constable Geeta (PW-19), then posted in the Police Control Room (PCR), proved PCR form (Ex.PW-19/A) which reflects that a telephonic information had been received at 22:41 hours on 05.06.1996 about a quarrel (*jhagra*) in the area of Lal Bagh, B-400, Ambedkar Park. It is not clarified as to whom the property B-400, Ambedkar Park belongs. It is also not proved nor clarified as to who was the source of this input received by PCR. The PCR form contains some further input received from a PCR van (which had been activated in the process) stating that one of the assailants had been apprehended, the others (10 to 15 persons who were associates of Vijay Pal) having fled away after giving beatings to certain individual. The PCR van incharge also reported at 22:42 hours that the injured was being shifted to Hindu Rao Hospital (hospital). This input, we may note, was given by Head Constable Rajender Singh (PW-14), Incharge of the PCR van (with call sign '*Commander 8*'). His deposition shows that when the PCR van arrived at the scene of occurrence two persons in injured state were found there, one of them being appellant Vijay Pal (A1) and the other, whose identity was then not known, he being Baiju (the victim).

6. The PCR input was passed on to the local police station at 11:02 p.m. on wireless network whereupon it was logged vide DD No.25 (Ex.PW-18/A) by Head Constable Munny Singh PW-18), the then duty officer in the police station . The matter arising out of this DD entry was entrusted for an inquiry to SI Om Prakash (PW-12), the first Investigating Officer (IO).

PW-12 accompanied, amongst others, by Constable Om Singh (PW-8) reached the place of occurrence and upon learning that two persons had been taken to the hospital proceeded there and found A1 having been examined as per medico legal certificate (MLC) (Ex.PW-1/DA), besides the victim (identity then unknown) as per the MLC (Ex.PW-1/A), each of them having been brought there by the PCR van under the control of PW-14. The subsequent investigation brought out that the deceased was Baiju son of Bhola, a resident of Pahar Ganj area.

7. As per the MLC (Ex.PW-1/A) of Baiju (the victim), proved by its author Dr. Rakesh Gupta (PW-1), the medical examination in the casualty had showed he to have suffered one lacerated wound about 3 cm long on the occipital region and one incised wound about 4 cm long on the posterior aspect/back of the neck, the said injuries having been suffered by blunt and sharp objects. According to PW-1, Baiju (the victim) was reeking of alcohol. He was referred to surgery department for opinion and further management. He died during medical treatment in the hospital - per the death report (Ex.PW-20/B) at 08:35 p.m. on 06.06.1996. It is clear that he remained unfit for giving any statement to the IO right from the time of arrival in the hospital till death. After the death, his dead body was sent for post-mortem examination on the basis of the application (Ex.PW-20/A), it having been conducted by Dr. Shri C.B. Dabas (PW-5) in the mortuary of the hospital.

8. The autopsy report (Ex.PW-5/A), proved by Dr. C.B. Dabas (PW-5), reflects that the deceased had suffered as many as twenty one external injuries. They include (i) lacerated wound 2.5 x 1.5 cm over the left occipital

region, (ii) lacerated wound 2.5 cm x 1.0 cm over left parietal occipital region, and (iii) one incised wound 4.5 cm x 0.3 cm over back of neck, 2.5 cm below hairline over middle part. The other injuries included abrasions over forehead, right cheek, right mandible, inner aspect of right elbow, front part of right forearm and near right thumb, right thumb, right palm, outer upper part of right thigh, middle part of right thigh, lower front of right thigh, outer part of right ankle, on the back of left hand over middle finger, outer middle part of left forearm, left side back of chest in scapular region, back of right chest in scapular region, back of chest on right side about 3 cm outer to middle line. The other injuries included an incised wound 2 cm x 0.2 cm over right palm and stab wounds over right side gluteal region and right buttock besides lacerated wound over upper part of the left thigh and in front of left knee.

9. It is, however, the internal examination of the dead body of Baiju which revealed the cause of death. The autopsy report and the testimony of PW-5 show that he had found effusion of blood present under scalp in the parieto and right occipital region. Though the scalp bone was intact, there was massive subdural haemorrhage over left cerebral hemisphere and right parietal lobe. Haemorrhages were present over both parietal lobes. In the opinion of the autopsy doctor, the incised wound on the back of the neck had been caused by a sharp edged object (it also being the weapon of offence used for the other incised/stabbing injuries), the first two injuries mentioned earlier (the lacerated wounds on the left occipital region and left parietal occipital region) as indeed others, having been caused by blunt object/force, the death having occurred *“due to cerebral damage (head injury).”*

10. The autopsy doctor had preserved viscera but since the FSL result (Ex.PW-20/E) gave negative result for common poisons, there being no other theory propounded by either side, conclusions about the cause of death have to be reached on the basis of facts noted in the autopsy report and in the light of medical opinion.

11. We must pause here for one observation. In the FIR, the first informant (PW-7) had mentioned the use of knife for injury to be inflicted on the neck of the victim, this, of course, besides bricks and stones being used in the assault one directed against the scalp. Upon perusal of the trial court record, it appears to us that the investigating agency, the prosecution and the trial court proceeded on the assumption that the injury caused on the neck with knife was the prime injury having a bearing on the cause of death. This, in our view, was wholly an erroneous approach. The injury inflicted on the neck (undoubtedly a vital part of the body) with a knife (undoubtedly a dangerous weapon specially when put against such vital part of the body) was, of course, grave, serious and possibly life threatening. But, in the instant case, everyone, including the defence, seems to have forgotten the observations of the autopsy doctor in his report based on the examination of the dead body. The death occurred due to cerebral damage, relatable to the first two injuries mentioned above (lacerated wounds on the left occipital and left parietal occipital region). This connects with the evidence, which we shall note in due course, relating to assault on the head with a stone. We do not wish to say more on the error because such gross misreading of the material on record in a criminal case, possibly due to preconceived notions

(use of knife against neck could be fatal), as appears to have happened here, is hopefully an exception, and a stray instance of its kind.

12. We would reserve for later part of the judgment comment on the question as to whether there was intention to cause death or such bodily injury as was likely to cause death within the meaning of first and second clause of Section 299 IPC (culpable homicide).

13. Twenty one injuries including two lacerated wounds on the scalp leading to cerebral damage caused by blunt object/force and incised wounds including one on the back of the neck with a sharp object undoubtedly reveal not merely a very vicious attack but an assault committed with the object and intent of causing hurt. The medical opinion itself is sufficient to conclude that the death of Baiju was a case of culpable homicide for the reason that the injuries which proved fatal, as also the incised wound caused by the knife on the neck, were such as from which knowledge may be imputed the author of such injuries that thereby he was likely to cause death (as in third clause of Section 299 IPC).

14. That Baiju suffered the injuries (including those which proved fatal), at the time, date and place mentioned in the charge is borne out from the testimonies of PW-7 and PW-11 as indeed the evidence of the first IO (PW-12), corroborated by Constable Om Singh (PW-8), based on their observations of the scene of crime and evidence gathered from there. Since there is no dispute with regard to the date, time and place of the incident in these proceedings before us, particularly when Kishan (DW-2) examined by the defence before the trial court also spoke about the incident connecting it to the same date, time and place while narrating the sequence wherein Vijay

Pal (A1) had also suffered injuries. We recall here that PCR van led by Head Constable Rajender Singh (PW-14) had transported to the hospital not only Baiju (the victim) but also the appellant Vijay Pal (A1), picking them up in injured state from the same place at the same time.

15. The prosecution charge was founded on the evidence of Noor Mohammad (PW-7) and Vijender (PW-11). While PW-7 is the first informant who, per the first Investigating Officer (PW-12), had offered his own evidence by coming forward from amongst the people that had gathered at the scene of incident, PW-11 had come up during the course of investigation. Thus, the FIR is based on the version of PW-7 (vide Ex.PW-7/A) and the evidence of PW-11 was gathered during investigation through his statements (Ex.PW-11/A and B) recorded under Section 161 Cr.P.C. In the FIR, PW-7 had projected that he knew each of the four appellants as residents of Lal Bagh from before. The manner in which he narrated the sequence in court gives the impression that he, however, was not acquainted with the 3-4 persons (which would include the deceased Baiju) who had come to the place asking for Vijay Pal (A1). In contrast, PW-11, as already noted, knew the deceased Baiju, and also the purpose of his visit to the locality where he suffered injuries as also the four appellants on account of his earlier visits to the area (since his sister resides there).

16. As per the prosecution case, based on the versions of PW-7 and PW-11, statedly given during investigation, Baiju wanted to realize the amount of rupees one lac from appellant Vijay Pal (A1) and had gone to the place in question accompanied by PW-11 and some other persons. The prosecution case was that Baiju asked for information regarding the whereabouts of

Vijay Pal and when it was learnt that Vijay Pal (A1) was present, the talk of return of money stolen from Pahar Ganj led, first to a verbal exchange, and thereafter, an assault on the person of Vijay Pal (A1) in which the others, including the three other appellants had joined. The first informant reported (as per the FIR) that the four appellants had dragged the victim on the ground and Vijay Pal (A1) had picked up and used a stone to inflict injury on his head, in which assault he was joined by appellant Rajinder @ Lalu (A2) and appellant Ranjit (A3) who had also used stone pieces and that when Baiju was about to get free from their control, appellant Naresh (A4) had caused an injury on his neck with knife consequent to which Baiju had fallen down. In this process, per the FIR, Vijay Pal (A1) had also suffered injuries and, while his three other associates (A2, A3 and A4) had fled away, the police upon arrival had shifted Baiju (the victim) and Vijay Pal (A1) to the hospital.

17. Noor Mohammad (PW-7), in his court deposition, narrating the incident affirming the prosecution case about the injury caused on the neck of the victim with knife, turned hostile about identity or role of any person other than appellant Naresh (A4). He spoke about the 3-4 boys (which clearly would include the victim) having come to the place (shop of Yadgaar tailor), where he (PW-7) was present on some personal errand, and having enquired about Vijay Pal (A1), followed by an altercation and the assault with knife. He showed ignorance about the identity of others or about the part played by each of them in the assault explaining his inability to do so on account of presence of a large crowd. The cross examination by the public prosecutor, including on the basis of he being confronted with his statement

(Ex.PW-7/A), leading to FIR would not budge him from the said position. He, however, admitted his signatures on the said statement (Ex.PW-7/A) forming the basis of the FIR, also affirming the prosecution case that he had assisted the Investigating Officer in effecting the arrest of the appellant Naresh (A4) and further that he is an attesting witness to the seizure memos (Ex.PW-8/A, Ex.PW-10/C and Ex.PW-8/B), all prepared at the spot and the interrogation of the appellants leading to preparation of documents described as disclosure statements (Ex.PW-7/B and Ex.PW-7/C) respecting appellant Naresh (A4) and appellant Vijay Pal (A1) respectively.

18. Vijender (PW-11) while testifying at trial also made some departure from his version appearing in the police report. Instead of stating that he had accompanied the victim to the place of incident, he described his visit to the area as one meant for calling on his sister, though affirming that he had met the victim during the bus journey and had learnt from him that he (the victim) was going to the area to recover some amount of money from appellant Vijay Pal (A1). Nonetheless, he testified that when he was returning and had come in front of Vijay Cinema in Lal Bagh he had seen four persons beating Baiju on the road. He identified the four appellants as the said assailants and the other one hitting him with a knife. He identified Vijay Pal (A1) as the one who was holding a knife and giving injury with the said weapon to Baiju and appellant Naresh (A4) as the person who had hit Baiju with stones, the other two, Rajinder @ Lalu (A2) and Ranjit (A3), having assisted by holding on to the victim.

19. PW-11 was also declared hostile and subjected to cross examination by the public prosecutor and, confronted with his statements under Section

161 Cr.P.C. (Ex.PW-11/A and Ex.PW-11/B). He refused to affirm the prosecution case that all the four appellants collectively had made Baiju fall on the ground, appellant Vijay Pal (A1) hitting him with stone on the head and appellant Naresh (A4) giving the knife blow on the neck, at a stage when Baiju had become uncontrollable.

20. The learned trial court, by the impugned judgment, found the above testimonies of PW-7 and PW-11 to be sufficient to return finding of guilty accepting the charge of the prosecution that the four appellants had collectively assaulted Baiju and, in furtherance of common intention, committing his murder. The trial judge rejected the defence argument that the evidence of PW-7 and PW-11 could not be relied upon due to discrepancies and contradictions vis-à-vis their original statements observing that even the testimony of a hostile witness can be acted upon if the same is corroborated in material particulars by the other evidence on record noting, in this context, the statement of PW-11 during cross examination by the defence that he had been threatened by appellant Vijay Pal (A1) that his entire family would be finished.

21. It has been argued by the learned counsel for the appellants that the ocular evidence brought on record through PW-7 and PW-11 is inconsistent and full of material contradictions and not on the lines of the prosecution case, as originally set up and, therefore, does not deserve to be acted upon. Reliance was placed in this context on *Dahyabhai Chhaganbhai Thakkar vs. State of Gujrat AIR 1964 SC 1563*. It was argued that the ocular evidence is contradicted by the medical evidence for which reason the prosecution cannot be held to have proved the cause of death much less the role or

complicity of any specific assailant. Reference was made to judgment of a division bench of this Court reported as *Kishan Pal vs. State* 2004 (2) JCC 1149. The learned counsel also submitted that the prosecution evidence does not evince clearly as to what was the root cause or the genesis of the quarrel leading to injuries being sustained not only by the victim but also by Vijay Pal (A-1) and, referring to the decision in *Laxmi Singh & Ors. etc. vs. State of Bihar* AIR 1976 SC 2263, that the prosecution story cannot be assumed to be the entire truth. Placing reliance on the rulings in *Wassan Singh vs. State of Punjab* (1996) 1 SCC 458; *V.S. Naidu vs. State of A.P* (2004) 10 SCC 152 and *Raj Pal & Anr. vs. State of Haryana* (2007) 13 SCC 554, it was argued that since injuries suffered by the appellant Vijay Pal (A-1) have not been explained by the prosecution, benefit of doubt should go to the accused as possibility cannot be ruled out that the injuries were inflicted on the person of Baiju (the victim) in exercise of right to private defence. The counsel further submitted, with reference to the ruling in *Kanbi Nanjji vs. State of Gujrat*, AIR 1970 SC 219, that the case at hand at best appears to be one of a free fight resulting in injuries being suffered by members of the two groups, in which view each of the appellants must be set at liberty on benefit of doubt since only such persons who are proved to have caused injuries or death can be held guilty for the offence individually caused by them. The submission was that in view of inconsistencies in the statements of PW-7 and PW-11 with regard to the identity of the author of the injuries in the skull and neck, a conclusion with certainty cannot be reached regarding culpability of any specific individual. Pointing out that the post-mortem report (Ex.PW-5/A), and the court testimony of the autopsy doctor (PW-5), does not say that any of the injuries suffered by the victim were

likely to cause death or sufficient in the ordinary course of nature to cause death, leave alone it being a case involving act(s) so imminently dangerous that the same must “in all probability” result in death, the counsel submitted that in absence of such medical opinion, most of the injuries noticed on the dead body (excluding those on the skull and the incised wound on the neck) seen individually and collectively were such that they were indicative of intent merely to cause hurt rather than any mortal harm.

22. We must grant it in favour of the defence that PW-11 has made a statement contradictory to the prosecution story about appellant Vijay Pal (A-1) having first hit the victim Baiju on his head with a piece of stone after he had been caught hold of and made to fall on the ground. According to him, it was Vijay Pal (A-1) who had used the knife to inflict injury, which, per the original version, was a wound inflicted later by Naresh (A-4) after Baiju had fallen down and his head had been smashed with a piece of stone by appellant Vijay Pal (A-1). PW-11 instead spoke about appellant Naresh (A-4) having used the stone. This variation in the statement of PW-11, not only in contrast to the prosecution story but also his own original version in the statements under Section 161 Cr.P.C. (Ex.PW-11/A and Ex.PW-11/B), in our view, is on account of natural wear and tear of human memory. Noticeably, he identified each of the four appellants as the persons who had caught hold of Baiju and were giving him beatings leading to the injuries suffered, consequent whereupon Baiju eventually died. PW-11 may have been a close friend of Baiju but this does not make him a person interested in false implication. As noted above, at the time of the deposition at trial PW-11 was under pressure from the defence and informed the court about

intimidatory tactics that had been employed to deter him from deposing in favour of the prosecution case. Other than the discrepancy about the nature of respective weapon used by Vijay Pal (A-1) and Naresh (A-4), his deposition brings out vividly the scene wherein Baiju was collectively assaulted by the four persons wherein most active role was played by Vijay Pal (A-1) and Naresh (A-4). His deposition is fully corroborated by PW-7, particularly with regard to the role played by appellant Naresh (A-4), he having used a knife to cause stab injury on the neck. The inability of PW-7 to identify the other three appellants cannot come in the way as the deposition of PW-11 about their involvement in the assault, in our opinion, is sufficient.

23. We do not find it to be a case where there is contradiction between the ocular evidence and medical opinion as to the cause of death. Neither of the two witnesses from the scene (PW-7 and PW-11) has spoken about any particular injury having proved fatal. The evidence brings out assault by fisticuffs and with stone and knife. It is clear that knife was used by appellant Naresh (A-4) while the stone was used by appellant Vijay Pal (A-4). Whilst it is true that the prosecution failed to muster any clear medical opinion with regard to the sufficiency or otherwise of the injuries leading to death, absence of such medical opinion cannot come in the way of the court forming an opinion on the basis of available material. The injuries and their nature have been graphically and elaborately noted in the autopsy report which also shows that it was the cerebral damage caused by the two above mentioned injuries in the head which had resulted in death.

24. We accept the defence submission that the genesis or root cause of the quarrel has not been properly proved. But then, there is some indication available on the subject in the testimony of PW-11. The deceased had met him during the bus journey on way to the locality where assault took place that he had to recover some amount of money from appellant Vijay Pal (A-1). In the FIR, it had been indicated that the amount involved was rupees one lakh which appellant Vijay Pal (A-1) had allegedly stolen from Pahar Ganj area. As observed earlier, this angle was not even probed by the investigating agency. Investigation in this regard would possibly have thrown better light on the issue. Baiju having died, with no other witness connected to such claim of money as was alluded to having been brought forth, we cannot proceed on the assumption that Baiju had some legitimate claim against appellant Vijay Pal (A-1).

25. The fact, however, remains that the evidence clearly shows that Baiju had not come alone. FIR (Ex.PW-6/A) and the testimony of PW-7 in the court clearly show that he was accompanied by two or three other associates. That Baiju and his associates had some serious business to be taken up with appellant Vijay Pal (A-1) is clear from the version of PW-7 showing that on arrival at the shop of Yadgar Tailor (where the witness was present) Baiju and his companions had asked for appellant Vijay Pal (A-1). PW-7 would not confirm in the court the subject which Baiju and his associates had raised with appellant Vijay Pal (A-1). He would only speak about the assault which took place immediately thereafter.

26. As mentioned earlier, the evidence of PW-14 and PW-1 read together also reveals that appellant Vijay Pal had been taken to the hospital in injured

state from the scene of crime. The MLC (Ex.PW-1/DA) of appellant Vijay Pal (A-1) indicates that he had suffered three lacerated wounds one on the right side of forehead (2cm x 0.5 cm), second on the left side of forehead (1cm x 0.5cm) and the third on the occipital region (1cm x 0.5 cm), these in addition to an abrasion on the dorsum of the left hand phalanges. These injuries, when compared to those suffered by Baiju (the victim), are clearly very minor. These injuries only confirm the ocular testimony about appellant Vijay Pal (A-1) having engaged himself in a brawl. These injuries definitely are not such as would be indicative of, even remotely, any intention on the part of their author (assuming they were voluntarily inflicted by the person with whom he was fighting) to cause any serious harm or grave bodily injury. These injuries of appellant Vijay Pal (A-1) were not such as could have conceivably given rise to any right to private defence, muchless one extending to the right to cause death. Pertinent to note here that the right of private defence was not even suggested as a defence theory at the trial.

27. While it may be true that the prosecution has not brought out, with clarity, the reason for the quarrel, it cannot be said that Baiju or his associates had come to the scene with intention to cause physical harm to appellant Vijay Pal (A-1). At the same time, it cannot be said on the basis of evidence adduced that the appellants had collected on the scene with a prior concert or sharing of common intention to pick up fight with Baiju or cause physical harm to him. After all, it was Baiju who had come to the locality with his associates rather than the appellants approaching Baiju at their convenience.

28. From the above noted facts and circumstances, it can be safely concluded that the physical fight was a sudden eruption between the two sides, one definitely involving the four appellants and the other Baiju (the victim). He may have come with two-three other associates but no evidence on record shows any participation in the fight by the companions of Baiju. What was the trigger for the sudden fight is left by the evidence to imagination.

29. It thus emerges that the four appellants had collectively pounced on Baiju forcing him on the ground. In the melee that followed, Vijay Pal (A-1) used a piece of stone to hit on the head of Baiju. While Baiju, having been pinned down on the ground, was grappling with his assailants, appellant Naresh (A-4) gave him the knife injury on the nape of his neck. All that can be safely said as to the role of the other two appellants is that they were aiding and assisting in belaboring Baiju. From these facts, it can be safely inferred that all the four appellants had joined in common intention to cause physical harm to Baiju. In the course of the assault, Baiju suffered a number of injuries which include three which were serious in nature, they being first three injuries noted in the autopsy report discussed in detail above.

30. The questions which now need to be addressed are as to whether the above said injuries fall in the requisite category, or indicative of the requisite state of mind on the part of their respective author, for bringing home the charge of culpable homicide, (whether amounting or not amounting to murder), and as to whether sharing of common intention by all the four appellants in causing such injuries can be gathered in this case.

31. There can be no two opinions as to the fact that the cut injury on the back of the neck with a knife was life threatening. A cut deeper than what was inflicted would have caused havoc with insides and that by itself might have rendered the victim beyond medical help. Ideally, we agree, the investigating agency should have mustered medical opinion as to the sufficiency or otherwise of the injuries, particularly the grave ones, found on the dead body to cause fatality. But omission or failure on its part cannot be an insurmountable handicap. The evidence on record clearly shows that a heavy stone piece was hit on the head of Baiju with great force resulting in cerebral damage. We do not have the least doubt that such wound inflicted with such blunt and hard object as a stone is one which was likely to cause death. Further, on the facts and in the circumstances at hand, knowledge that such injury was likely to result in death has to be attributed to the author. Since the evidence clearly shows that the above said injury on the head with stone was inflicted intentionally by the appellant Vijay Pal (A-1), and since the same actually resulted in death of Baiju, the case is covered – atleast in so far as the appellant Vijay Pal (A-1) is concerned – within the second and third clauses of Section 299 IPC, rendering it a case of culpable homicide.

32. There is no clear evidence from which it can be gathered that the appellant Vijay Pal (A-1) or his associates intended to cause the death of Baiju. The injuries inflicted on the person of Baiju cannot be described as so imminently dangerous that they “in all probability” would have led to death. There is no material available on which it can be inferred that the bodily injuries suffered by Baiju were of such nature as to particularly cause

his death, to the knowledge of the assailants. In these circumstances, the first, fourth and second clauses (in that order) of Section 300 IPC do not get attracted. The case at hand requires scrutiny from the perspective of third clause of Section 300 IPC, according to which a case of “culpable homicide is murder” :

“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..”

33. The above quoted clause (“thirdly” in Section 300 IPC) requires two tests to be applied to ascertain: first, whether the bodily injury (necessarily the one which proved fatal) was intended by the assailant and, second, whether it was “sufficient in the ordinary course of nature” to cause death. The first test is subjective wherein the court gathers the intention (or the mental state) from the facts and circumstances brought out by the evidence and the second is objective, having regard to the nature of the injury, its *situs* and the weapon used.

34. The *locus classicus* on the subject at hand is the decision in *Virsa Singh Vs. State of Punjab*, [1958 SCR 1495, AIR 1958 SC 465, 1958 Crl. LJ 818] which laid down the guiding principles that have been followed ever since. In *Virsa Singh*, while construing the ingredients of the third clause of Section 300 IPC, it was ruled thus :

“...It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to

be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional..."

35. Reiterating the above view in *Jai Prakash Vs. State (Delhi Administration)*, (1991) 2 SCC 32, the court observed thus :

"12. ...The language of clause Thirdly of Section 300 speaks of intention at two places and in each the sequence is to be established by the prosecution before the case can fall in that clause. The 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances. The framers of the Code designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue. Firstly, when an act is done by a person, it is presumed that he must have been aware that certain specified harmful consequences would or could follow. But that knowledge is bare awareness and not the same thing as intention that such consequences should ensue. As compared to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, namely, the purposeful doing of a thing to achieve a particular end."

36. Again in *Nankaunoo Vs. State of UP*, (2016) 3 SCC 317, it has been observed as under :-

"12. The emphasis in clause three of Section 300 IPC is on the sufficiency of the injury in the ordinary course of nature to

cause death. The sufficiency is the high probability of death in the ordinary course of nature. When the sufficiency exists and death follows, causing of such injury is intended and causing of such offence is murder. For ascertaining the sufficiency of the injury, sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused and sometimes both are relevant. Depending on the nature of weapon used and situs of the injury, in some cases, the sufficiency of injury to cause death in the ordinary course of nature must be proved and cannot be inferred from the fact that death has, in fact, taken place.”

37. We have already concluded that Vijay Pal (A-1) intended to cause the injuries on the head by hitting Baiju with a piece of heavy stone. It is the impact of the said assault which caused cerebral damage leading to the death. Smashing the head (a vital part of the body) of a person using great force is undoubtedly a bodily injury as is sufficient in the ordinary course of nature to cause death. Thus, we uphold the conclusion of the trial court that the prosecution has proved that the death of Baiju was a case of culpable homicide amounting to murder within the meaning of third clause of Section 300 IPC.

38. But, the case cannot end here. Since the evidence brings out circumstances meriting such further consideration, it remains to be examined whether the case would fall within the fourth exception to Section 300 IPC. The relevant exception clause reads as under :-

“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.

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

39. It bears repetition here to note that it was not the case of the prosecution that the appellants had converged at the scene of incident after a prior concert to commit the murder of Baiju. The appellant Vijay Pal (A-1) who is proved to have given the blow with the piece of stone that proved fatal had not approached Baiju. Rather, Baiju with his associates had come to the place demanding payment of some amount of money. He led evidence by examining Kishan (DW-2) to prove that Baiju was accompanied by 8 / 10 boys who had started beating him, making him fall down unconscious alongside one of the assailants (apparently referring to Baiju). The evidence of the prosecution witnesses (PW-7 and PW-11), read with the FIR, shows that Baiju was accompanied by at least 2 or 3 associates. The MLC (Ex. PW1/DA) of appellant Vijay Pal (A-1) reveals he was also wounded in the process. It needs further to be added here that the MLC (Ex. PW1/DA) of the deceased shows he was in inebriated state apparently having consumed alcohol before confronting Vijay Pal (A-1). In the facts and circumstances narrated by PW-7 and PW-11, as indeed that by Kishan (DW-2), it being a case of sudden quarrel and fight occurring in the heat of passion is rendered highly probable. Both sides were grappling with each other and there is nothing on record to show that any undue advantage was taken or any unusual or cruel conduct indulged in. There being no evidence available to even remotely show pre-meditation, the defence plea for benefit of fourth exception to Section 300 IPC must be accepted. This would mean that the culpability of appellant Vijay Pal (A-1) is proved for the offence of culpable homicide not amounting to murder falling within first part of Section 304 IPC.

40. The evidence shows that at the time of assault on the person of Baiju (the victim) leading to injuries that included those which caused his death, the appellant Vijay Pal (A-1) was actively aided and assisted by other three appellants. While Rajinder @ Lalu (A-2) and Ranjit (A-3) were helping in belaboring Baiju, also using stone pieces to cause various injuries, Naresh (A-4) had whipped out a knife to inflict an injury on his neck. These facts by themselves are sufficient to infer sharing of common intention on their part with appellant Vijay Pal (A-1) and, thus, they are also liable to be held guilty for the same offence for which the appellant Vijay Pal (A-1) has been held to be accountable.

41. For the foregoing reasons, we conclude that a case has been made out for the conviction for offence under Section 302 read with Section 34 IPC recorded by the learned trial court to be converted into conviction of the four appellants for offence under Section 304 (first part) read with Section 34 IPC. We hold accordingly.

42. The offence was committed on 05.06.1996. The appellants and the deceased were in the prime of their youth at that point of time. As held by us, the incident occurred without pre-meditation, in a sudden quarrel, upon free fight and in the heat of passion. Baiju (the victim) himself was apparently responsible for the initial provocation. In these circumstances, award of the maximum punishment demanded by the State will not be justified. The record shows that appellants Vijay Pal (A-1), Rajinder @ Lalu (A-2) and Ranjit (A-3) were arrested on 06.06.1996 while appellant Naresh (A-4) was arrested on 09.07.1996. After their conviction by judgment dated 29.07.2000, during the pendency of these appeals, Vijay Pal

(A-1) and Ranjit (A-3) remained in custody till 26.02.2001 before their sentences were suspended and they were released on bail pending consideration of appeals. Similarly, the other two appellants remained in custody till 23.08.2001 when their sentences were also suspended and they were released on bail pending hearing on the appeals. In our considered opinion, at this distance of time in relation to the commission of the offence, the period of detention already undergone by these appellants would suffice as punishment for the offence for which they have been held guilty by us. We, thus, modify the order on sentence accordingly.

43. The bail bonds are discharged.

44. The appeals stand partly allowed in above terms.

(R.K. GAUBA)
JUDGE

(GITA MITTAL)
JUDGE

AUGUST 24, 2016

Vk/nk/yg