

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

+ **CRL.A. No.785/2000**

Judgment reserved on : 17th November, 2016

Date of decision : 28th November, 2016

JAI BHAGWAN

..... Appellant
Through: Mr.Sumeet Verma and Mr. Abhijeet
Sharma, Advs.

versus

STATE OF DELHI

..... Respondent
Through: Ms. Aashaa Tiwari, Addl.P.P. for the
State

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. This appeal has been instituted by the appellant Jai Bhagwan son of Sh.Hukum Singh assailing the impugned judgment dated 13.11.2000 and impugned order on sentence dated 15.11.2000 of the learned Additional Sessions Judge, New Delhi in Sessions Case No. 102/96 in relation to FIR No. 616/95, P.S. Ambedkar Nagar. Vide the impugned judgment dated 13.11.2000, the accused/the appellant herein was convicted for the commission of the offence punishable under Section 302 of Indian Penal Code (IPC), 1860 and vide the impugned order on sentence dated 15.11.2000, he was sentenced to imprisonment for life and to pay a fine of Rs.10,000/- and in default of the

payment of fine to further undergo simple imprisonment for one year. The record reveals that the appellant has been in custody for six years eleven months and twenty five days and has earned remission of a period of 10 months and 12 days and is presently on bail since 24.12.2003.

2. The notice of the appeal was issued to the State. The trial court record has been requisitioned, received and perused. Arguments were addressed on behalf of the appellant by Mr.Sumeet Verma, learned counsel for the appellant and on behalf of the State by the learned Additional Public Prosecutor Ms.Aashaa Tiwari. The trial court record indicates that the charge of allegations was framed against the accused/the appellant herein on 24.07.1996 to the effect that on the date 19.09.1995 at about 8:00 p.m. at Gali No. 4, opposite House No. 286, Sangam Vihar, New Delhi the accused/the appellant herein committed the murder of Desh Raj by inflicting knife injuries with an intention to commit murder and that the said injuries were sufficient in the ordinary course of nature to cause death and thereby committed the offence punishable under Section 302 IPC, 1860. The accused/the appellant herein pleaded not guilty to charge of allegations and claimed trial. The trial court record indicates that in support of the prosecution version, the State examined 14 prosecution witnesses.

3. The accused/the appellant herein through the statement under Section 313 Cr.P.C, 1973 denied the incriminating evidence led against him and stated

to the effect that the witnesses were interested witnesses and had deposed falsely due to enimical terms with him because of a quarrel between his wife and the mother of the two prosecution witnesses i.e. Sushil Kumar and Ashok, who had falsely implicated him in the case with the connivance of the police.

FACTUAL MATRIX

4. As per the trial court record on 19.09.1995 at about 10:10 p.m. Constable Shyam Dhari No.2910/SD through a wireless message from PS Ambedkar Nagar informed that the Duty Constable at the AIIMS Hospital had given information that Desh Raj son of Sangat Ram r/o L-28, Sangam Vihar had been got admitted to the hospital in an injured condition by Sushil Kumar and that the police should be sent, on which Ct. Jai Pal Singh No. 2119/SD, Duty Officer recorded the DD No.20 dated 19.09.95 at Police Post Devli Pahari, Sangam Vihar, PS Ambedkar Nagar, New Delhi. The said DD entry Ex.PW-9/A further indicates that Constable Chand Singh No. 1439/SD was sent with the copy of the DD entry to be delivered to ASI Badu Ram for further investigation.

5. Ex.PW-14/A, the endorsement made on the *rukka* recorded on the statement of Sh.Sushil Kumar (who got the injured Desh Raj admitted to the hospital) indicates that on receipt of DD entry No. 20 at the Police Post Devli Pahari, Sangam Vihar, PS Ambedkar Nagar, SI Surender Singh reached the AIIMS hospital where he was handed over MLC No. 769/1995 by the doctor,

who had, on examination, declared the patient dead and had also observed that there were four knife injuries on the person of the deceased. It is also indicated through Ex.PW-14/A that the complainant Sushil Kumar son of Late Tilak Ram also met the police at the hospital and gave his statement which was recorded by SI Surender Singh Incharge of PP Devli Pahari, PS Ambedkar Nagar, who after recording the same as Ex.PW-3/A made his endorsement Ex.PW-14/A and sent the same through Ct. Jai Pal Singh to the police station for registration of the FIR and also sent the special report through a special messenger to the senior officers.

AVERMENTS IN THE FIRST INFORMATION REPORT

6. The statement Ex.PW-3/A of Sushil Kumar S/o Tilak Ram indicates that at about 8:00 p.m. on 19.09.1995 when Sushil Kumar, the complainant was returning home after giving tuitions via gali No. 4 and was going to his house i.e. House No. 28 situated at Gali No. 1, Sangam Vihar, he saw Jai Bhagwan (accused/the appellant herein) r/o 286, L-Block Gali No. 4, quarrelling with his maternal uncle Desh Raj. As per Ex.PW-3/A the complainant intervened and took his maternal uncle Desh Raj to leave him at his room and then Jai Bhagwan the accused/the appellant herein started abusing loudly and he was saying “*tu mujhe police wale ki tadi deta hai aaj me tera kaam tamam karke tera jhanjhat hi khatam kar deta hu*” i.e. Jai Bhagwan stated to Desh Raj that

he would finish Desh Raj that day as he i.e Desh Raj used to show his powers of being a policeman. As per Ex.PW-3/A, on this Desh Raj came out of his room and went towards Gali No. 4 towards Jai Bhagwan. Sushil Kumar, the complainant as per Ex.PW-3/A is indicated to have followed his maternal uncle to prevent any further quarrel. He further stated that in the meantime, Ashok Kumar, younger brother of Sushil Kumar also came and reached near Jai Bhagwan and asked him why he was abusing on which Jai Bhagwan accused/the appellant herein again abused and said that as he as a home-guard used to keep threatening him that he was a policeman, he would finish him that day i.e. he said *“tu mujhe home-guard me hone ke karan police ki tadi deta hai aaj me tujhe khatam karke mita deta hu”*.

7. It is further stated through Ex.PW-3/A that thereupon Jai Bhagwan i.e. the accused/the appellant herein assaulted Desh Raj on his chest with a knife which he, Jai Bhagwan was holding in his hand, as a consequence of which Desh Raj fell down on the cot (*Charpai*) lying there and then when Desh Raj fell down on the cot the accused Jai Bhagwan again assaulted Desh Raj on his chest and his stomach repeatedly. It is further stated through Ex.PW-3/A that when Sushil Kumar, the complainant tried to prevent Jai Bhagwan, the accused Jai Bhagwan (the appellant herein) fled away from the spot and he i.e. Sushil Kumar put his maternal uncle with the help of his brother Ashok Kumar into a

three-wheeler/auto rickshaw and took the injured Desh Raj to the AIIMS hospital where the doctor examined Desh Raj and gave some treatment and some time thereafter, the doctor declared Desh Raj, - dead.

8. As per Ex.PW-3/A the complainant stated that the accused/the appellant herein in his complete senses assaulted Desh Raj, the maternal uncle of the complainant on his stomach and on his chest with a knife and had intentionally caused him grievous injuries. As per Ex.PW-3/A, persons in the lane had also witnessed the incident. FIR No. 616/1995 dated 20.09.1995 U/s 302 , PS Ambedkar Nagar is thus indicated to have been registered vide DD No. 29A at 12:50 a.m. on 20.09.1995. Copy of the said DD entry is on record as Ex.PW-5/C.

FURTHER INVESTIGATION CONDUCTED

9. It is further indicated through the charge-sheet that further investigation of the case was entrusted to SI Surender Singh who thereafter reached the spot and called the photographer and Crime Team and sent the special report to the senior officers. The investigating officer is indicated to have prepared the site plan at the pointing out of PW-3 Sushil Kumar, the complainant. The spot is stated to have been photographed and the exhibits seized were put into a pullanda which were sealed with the seal of 'SSY'. As per the charge-sheet, though the IO made an effort to trace the weapon of offence the same could not

be traced out and statements of witnesses were recorded under Section 161 Cr.P.C. and the IO got the post-mortem done on the body of the deceased. The charge-sheet further indicates that the accused who was learnt to be in custody in another case, was got produced pursuant to the production warrants on 30.09.95. The charge-sheet further indicates that on arrest of the accused, police custody remand of the accused/the appellant herein was obtained, during which on 02.10.1995 at the pointing out of the accused/the appellant herein a vegetable cutting knife was recovered which was also sealed with the seal of 'SSY'. As per the charge-sheet submitted, the exhibits had been sent to the FSL. The said FSL result is placed on record as Ex.PW-14/L and Ex.PW14/M.

OBSERVATIONS IN THE IMPUGNED JUDGMENT

10. Vide the impugned judgment, the learned trial court while placing reliance on the testimony of Sushil Kumar PW-3, (on whose complaint the FIR is indicated to have been registered and who was put forth by the prosecution as being an eye-witness), held that the testimony of PW-3 was corroborated by the statement of PW-4 Ashok Kumar, his brother.

11. As observed by the learned trial Court PW-4 Ashok Kumar stated that on 19.09.1995 at about 8:00 p.m. when he was returning from his tuition job, he reached street No. 4 and saw that several other persons collected and he also saw his brother Sushil Kumar PW-3 present with his maternal uncle who was in

an injured condition and that his brother told him that the accused Jai Bhagwan had inflicted knife blows on his maternal uncle. PW-4 also stated that the accused Jai Bhagwan was escaping from the spot. PW-4 Ashok Kumar also testified to the effect that he along with his brother Sushil Kumar took the injured Desh Raj to the AIIMS hospital where he died. The learned trial court repelled the contentions raised on behalf of the accused, i.e., the appellant herein, to the effect that PW-3 and PW-4 were inimical towards the accused/the appellant herein or that they were interested witnesses in view of the testimony of PW-3 being corroborative of the testimony of PW-4. The testimonies of PW-3 and PW-4 were thus held by the learned trial court to be reliable.

12. The learned trial also held that the testimony of PW-1 Dr. S.K.Gupta, who conducted the post-mortem on the body of the Desh Raj on 20.09.1995 and who proved the post-mortem report Ex.PW-1/A established that the injuries on the body of the person of the deceased Desh Raj was due to stabbing by a sharp cutting weapon. It was also observed by the learned trial court that as per Ex.PW-1/A, the post-mortem report, the injuries found on the body of the deceased were caused by a sharp cutting weapon on the body of the deceased and that injury Nos. 1 and 7 were sufficient to cause death in the ordinary course of nature as testified by PW-1. Injury Nos. 1 to 7 are detailed in the post-mortem report to the following effect:

- (i) *“ Stab wound 3 cm x 1 cm cavity deep situated 19 cm. blow S.S. Notch, 2 cm lateral to mid line on the front of left chest.*
- (ii) *Stab wound 5 cm x 3 cm into abdomen deep situated 8 cm medial to the anterior superior iliac spine margin condused exposing intestine.*
- (iii) *Stab wound 3 cm x 1 cm. abdominal cavity deep situated 14 cm. below anterior axillary fold on the lateral aspect of left chest.*
- (iv) *Stab wound 3 cm x 1 cm situated 14 cm. below interior axillary fold 2 cm medial to injury No.3.*
- (v) *Incised wound 4 cm x 1/2 cm x skull bone deep above right eyes brow present tangential.*
- (vi) *Abraded compassion over lateral aspect of hand extensor aspect of palm an area of 18 X 9 cm.*
- (vii) *Punctured wound 1.5 cm x 1/2 cm x 5cm deep on the left lung.”*

13. The learned trial court also held to the effect that there were eight stab wounds caused on the body of the deceased with the sharp cutting weapon and held that the barbaric act of stabbing with the knife on the person of the deceased by the accused/the appellant herein was clear from the injuries shown in the post-mortem report Ex.PW-1/A which indicated that the accused/the appellant herein intentionally stabbed the deceased Desh Raj to kill him. The learned trial court also held to the effect that the accused was named in the FIR,

that the FIR was prompt, that there was no dispute in relation to the identity of the accused and that the prosecution had proved beyond a reasonable doubt that the accused/the appellant herein had committed the murder of the deceased.

CONTENTIONS OF APPELLANT

14. Through the present appeal it was submitted on behalf of the appellant that there was no legal evidence in the case justifying the conviction of the appellant;

- That the testimonies of PW-3 Sushil Kumar and PW-4 Ashok Kumar were tainted and unreliable and contrary;
- That PW-3 and PW-4 were nephews of the deceased and because of their relationship a close scrutiny was required;
- That neither PW-3 nor PW-4 tried to save their maternal uncle, the deceased at the time of the alleged offence and it was contended that the said aspect cannot be overlooked;
- That neither PW-3 nor PW-4 tried to apprehend the appellant at the scene of the occurrence;
- That both the witnesses lifted the deceased from the spot as per the prosecution version and took him to the hospital and in that process their clothes would have become blood stained but the police did

not take their clothes into possession;

- That PW-3 Sushil Kumar was cross-examined by the learned Addl.P.P. for the State which itself indicated that he was not a wholly reliable witness;
- That there were improvements in the testimonies on oath made by the witnesses in variation to the statements made under Section 161 Cr.P.C.;
- That the testimony of PW-3 Sushil Kumar was not corroborated by medical evidence;
- That there was inordinate delay in lodging the FIR which has not been explained;
- That the weapon of offence Ex.P-1 was not shown to the doctor who conducted the post-mortem on the body of Desh Raj. It was also submitted on behalf of the appellant that Ex.P1 itself shows that it could not have been utilized for causing the stab injuries found on the body of the deceased;
- That the learned trial court ignored the material contradictions in the prosecution evidence;
- That the medical evidence in the instant case did not support the prosecution version;

- That there was no evidence that the substance of the FIR was incorporated in the daily diary entry;
- That there was no evidence on record to show that copy of the said report was sent at the earliest to the concerned MM.

15. It was thus submitted on behalf of the appellant that the impugned judgment was based on a conjectures and surmises and was liable to be set aside. During the course of the arguments addressed on behalf of the appellant, the submissions made in the appeal were reiterated.

16. It was further submitted on behalf of the appellant that though PW-13 Ct.Girdhar Singh had testified to the effect that he had taken six photographs from different angles of the spot and that he had handed over all the six photographs to SI Surender Singh on 07.10.1997 for the development of the photographs, SI Surender Singh had neither returned the negatives nor the developed photographs to him. It was thus submitted on behalf of the appellant that the non-production of the six photographs taken by PW-13 Ct.Girdhar Singh also cast a grave doubt on the veracity of the prosecution version.

17. It was also submitted on behalf of the appellant that though the recovery of the kitchen knife EX-P1, the alleged weapon of offence was stated by the prosecution to have been recovered at the pointing out of the appellant, the same was recovered on 02.10.1995 in relation to an alleged incident which took place

on 19.09.1995 and that it was recovered from a vacant plot which was open and accessible to all and no public witnesses were associated, which all belied the veracity of the prosecution claim in relation to the recovery of the knife Ex.P-1 at the pointing out of the appellant. It was further submitted that the factum that the allegedly recovered knife was not sent by the IO to Dr. S.K.Gupta who conducted the post-mortem for eliciting his opinion in relation to the weapon of offence, was also fatal to the prosecution version.

18. It was further submitted on behalf of the appellant, that the testimony of PW-1 Dr. S.K.Gupta who testified to the effect that injury Nos. 1 and 7 and the fatal injuries were not possible by a kitchen knife Ex.P-1, cannot be doubted. The appellant further contended that though on cross-examination the witness PW-1 had stated that the depth of the injury Nos.1 and 7 were the chest cavity deep and puncturing the heart respectively, but the same could only be possible by this knife if it was thrust with force on the chest and due to absence of hilt injury of the knife on the chest, the witness suggested that the whole blade upto the hilt had not entered in the chest as injury No.7 was on left side ventricle of the heart.

19. It was also submitted on behalf of the appellant that the cross-examination of PW-1 Dr.S.K.Gupta also stated that injury No. 7 was possible only if the blow of the knife was given straight to the heart up to the end of the

blade and that in the cross-examination PW-1 has categorically stated as under:

“The depth of the injury No.1 and 7 are the chest cavity deep and puncturing the heart could only be possible by this knife if it will be thrust with force on the chest due to absence of hilt injury of the knife on the chest, it suggests that the whole blade upto the hilt has not entered in the chest as injury No.7 which is left side ventricle of the heart”

Significantly, the examination-in-chief of this witness was also categorical to the effect that:

“In my opinion, only Injury No. 6, 4 and 5 can be possible with weapon shown to me today in the Court, i.e., small knife Ex.P-1. The deep injuries, i.e., Injury No. 1, 2 3, 7 and 8 are not possible by the type of weapon of offence shown to me in the court today, ie., Ex.P-1, small knife.”

20. It was thus contended on behalf of the appellant that even as per the testimony of PW-1 Dr. S.K.Gupta the deep injury Nos. 1, 2,3,7 and 8 were not possible by the type of weapon of offence Ex.P-1, a small knife. It was further submitted on behalf of the appellant that the FSL result Ex.PW-14/L and Ex.PW-14/M showed that there was no reaction in relation to the knife in relation to the human blood found on the same, whereas the blood stained earth and blood stained gauze and the knife as per the FSL result Ex.PW-14/L was indicated to bear blood on the same, though the blood stained earth and blood stained gauze were opined to be of the blood group ‘A’, there were no such

reaction brought forth in relation to the knife and it was thus contended on behalf of the appellant that the injuries sustained by the deceased thus were not caused by the knife Ex.P-1.

21. It was thus submitted on behalf of the appellant that the allegations levelled against the appellant of the commission of the murder of the deceased did not stand even remotely established.

ALTERNATIVE SUBMISSION OF APPELLANT

22. An alternative submission was also made on behalf of the appellant that the testimony of PW-4, the nephew of the deceased brought forth that before the date of the incident there had never been any quarrel between the appellant and the deceased and that the quarrel on the day of incident had erupted suddenly. It was further submitted on behalf of the appellant that in the instant case after the initial quarrel, the deceased went away and later again came back to the house of the appellant at a distance of 150 meters to settle the quarrel and in the heat of the moment, the appellant without pre-meditation lost the control over his senses and attacked the deceased with a kitchen knife and that thus at best the appellant could be convicted under Section 304-I of the IPC, 1860 and it is thus submitted that the appellant be released on the period already undergone.

23. Reliance in this regard was placed on behalf of the appellant on the verdicts of the Hon'ble Apex Court in the cases *Surinder Kumar vs. Union*

Territory Chandigarh AIR 1989 SC 1094 and *Bivash Chandra Debnath @ Bivash vs. State of West Bengal (2015) 11 SCC 283* verdicts of this court in the cases titled as *Jagtar Singh @ Goggi and Anr. Vs. State 2011(3) JCC 1995* and *in Mahender vs. State 2009 (2) JCC 895* to contend that where the quarrel took place in the heat of the moment and the circumstances of the case brought forth that there was a sudden quarrel without any evidence being brought forth that there was any intent to kill that could be attributed to the accused, and where the injuries could not be said to have been inflicted in a cruel manner, the accused was entitled to the benefit of the Exception 4 to Section 300 of the IPC and can thus be convicted under Section 304 Part-I/II of the IPC.

CONTENTIONS OF THE STATE

24. On behalf of the State it was submitted that the testimonies of PW-3, the complainant Sh.Sushil Kumar, PW-4 Ashok Kumar, (both nephews of the deceased) and Dr.S.K.Gupta, PW-1 established the commission of the offence of culpable homicide amounting to murder by the appellant qua the deceased. It was submitted on behalf of the State that the multiple assaults on the injured and the stab injuries at Sl. Nos. 1 to 7 were of such nature, that the intention of the appellant in inflicting the said knife blows on the chest and abdomen of the deceased with intent to eliminate the deceased, was apparent. It was further submitted on behalf of the State that the utterances made by the appellant even

at the time of the first quarrel and in the subsequent quarrel that he would eliminate the deceased because the deceased used to show off his power of being a policeman as was a home-guard and that he would thus finish him, - also brought forth the culpable intent of the appellant.

25. It was also submitted on behalf of the State that the testimonies of PW-3 and PW-4 were categorical and consistent in relation to all material particulars and that the presence of PW-3 Sushil Kumar at the spot stood established through the testimonies of PW-3 and PW-4. It was further submitted on behalf of the State that the presence of the witness Sushil Kumar at the spot of occurrence was not challenged during the cross-examination conducted of the witness PW-3 Sushil Kumar, the complainant. It is also submitted on behalf of the State that the testimony of PW-4 Ashok Kumar, brother of the complainant Sushil Kumar also brought forth that the accused was escaping from the spot.

ANALYSIS

26. On a perusal of trial court record and on consideration of the rival submissions made on behalf of either side and observations made in the impugned judgment, it is brought forth as follows :-

PRESENCE OF EYE WITNESS SUSHIL KUMAR, PW3 AT THE SPOT, AND OF PW-4 SH. ASHOK KUMAR THEREAFTER AT THE SPOT

- (i) The testimony of PW3 Sushil Kumar, the complainant and nephew of the deceased Desh Raj categorically asserts his presence at the

spot of he having witnessed the accused i.e. the appellant herein abusing his maternal uncle on 19.09.1995 at about 08:00 PM in the street no.4 in front of house No. 286, Sangam Vihar where the appellant was quarrelling with Desh Raj, maternal uncle of PW3. The testimony of PW3 also brings forth that he had taken his maternal uncle to his room;

- (ii) it is also brought forth through the testimony of PW3 that the accused i.e. the appellant herein had been abusing Desh Raj, maternal uncle of PW3 loudly saying, that as Desh Raj was threatening him being a police official, he i.e. the appellant would finish him that day;
- (iii) that the maternal uncle of PW3 i.e. Desh Raj came back to house L-286 belonging to the accused i.e. the appellant herein and he, Sushil Kumar, followed his maternal uncle;
- (iv) that the maternal uncle of PW-3 Desh Raj (since deceased) asked the accused i.e. the appellant herein, not to abuse but the appellant again abused Desh Raj;
- (v) that thereafter the appellant gave a knife blow on the stomach of Desh Raj, due to which, he fell down on a cot lying there and thereafter the appellant again gave knife blows several times i.e. four times on the chest and abdomen of the maternal uncle of PW3 i.e. Desh Raj;
- (vi) that he (PW3) became perplexed after seeing the knife and blood and in the meantime the brother of PW3, Ashok Kumar i.e. PW4 also reached;
- (vii) that he (PW3) with help of his brother Ashok Kumar removed the maternal uncle Desh Raj to the AIIMS Hospital;

- (viii) that the accused i.e. the appellant herein fled away from the spot and that Desh Raj expired at the hospital;
- (ix) that the police came to the hospital but his statement Ex.PW3/A was recorded at the police station and that the police lifted blood stains from the spot in a *dibbi* and the same was seized vide a seizure memo Ex.PW3/B-as testified by PW3 in his examination-in-chief.

27. The cross-examination of PW3 Sushil Kumar, the complainant is equally categorical and consistent in relation to all material particulars on the record as he categorically states:-

- (i) the distance between his house and house of the accused i.e. appellant, was about 100-150 meters;
- (ii) he (PW3) knew the accused i.e. the appellant herein before the incident and they also used to talk to each other;
- (iii) that he had first noticed from a distance of 50 feet the accused i.e. the appellant herein, and Desh Raj (since deceased) quarrelling and that many people collected there;
- (iv) that the incident had taken place in front of the house of the accused i.e. the appellant and that he (PW3) noticed the quarrel between Desh Raj (since the deceased), his maternal uncle and the accused i.e. the appellant herein for 10-12 minutes;
- (v) that the injured Desh Raj was taken to the AIIMS Hospital in a three wheeler scooter driven by Mohd. Ishfaq s/o Sharafuddin who used to live in front of the house of the accused i.e. the appellant herein;
- (vi) that Desh Raj was taken in a three wheeler scooter by PW3 along

with his brother Ashok Kumar, PW4;

- (vii) that the clothes of PW3 & PW4 were blood stained and so were the hands of PW3 and so was the seat of the scooter;
 - (viii) that when the accused i.e. the appellant herein gave a knife blow, he was at a distance of 3-4 feet;
 - (ix) that when the accused i.e. the appellant herein gave the first knife blow to the deceased, he did not try to intervene nor stopped him in order to save his uncle;
 - (x) that PW3 volunteered everything happened so quickly, it was difficult to decide at that time and stated:
“After seeing the knife and blood stain, I had become scared”;
 - (xi) that PW3 denied also that he had not noticed the accused stabbing his maternal uncle;
 - (xii) PW3 denied that he had not removed the deceased to the hospital and denied that the police had got the injured admitted to the hospital;
- all brings forth that there is not a whisper of suggestion in the cross-examination of PW3 put forth on behalf of accused i.e. the appellant herein before the learned Trial Court to disclaim and repel the presence of PW3 at the spot.

The entire testimony of PW3 both in examination-in-chief and cross-examination brings forth the natural course of human conduct including in relation to the aspect that he stated that he did not try to intervene when the second incident took place and could not stop the accused i.e. the appellant when the accused/appellant gave the first knife blow to the deceased and

that he had not at that time intervened to save his maternal uncle in as much as he stated that everything happened so quickly, it was difficult to decide at that time and after seeing the knife and blood and he had become scared.

28. The testimony of PW4 Ashok Kumar, brother of PW3 is categorical in his assertion that on 19.09.1995 at about 08:15 PM when he was returning from the tuition job when he reached in street no.4, he saw several persons had collected there and also found his brother Sushil Kumar present there and found his maternal uncle Desh Raj lying there in injured condition. PW4 further testified to the effect that his brother told him that the accused Jai Bhagwan had given a knife blow on his maternal uncle Desh Raj and at that the time accused, i.e., the appellant herein Jai Bhagwan was escaping from the spot.

29. PW4 further corroborated the testimony of PW3 that he along with PW4 took his maternal uncle in a TSR to AIIMS Hospital where his maternal uncle after some time was declared dead by the doctor. The cross-examination of PW4 is categorical that when he reached the spot, his brother Sushil Kumar was trying to lift his maternal uncle Desh Raj. He (PW4) further stated that he had helped him lifting Desh Raj; PW4 through cross-examination corroborates the testimony of PW3 that Desh Raj was taken in a three wheeler scooter of Ishfaq to the hospital; PW3 also corroborates the testimony of PW4 Ashok Kumar that the house of Ishfaq is in front of the house of accused Jai Bhagwan i.e. the

appellant herein; PW4 through cross-examination corroborated that when they were shifting the injured in a three wheeler scooter, his clothes as well as the clothes of Sushil were also blood stained; the testimony of PW4 that before the incident there was no quarrel between the accused (the appellant herein) and the maternal uncle of PW4, Desh Raj (since deceased), coupled with the categorical denial by PW4 that he had not seen his maternal uncle in an injured condition at the spot or that he along with his brother Sushil had not removed the injured to the hospital, all brings forth the presence of PW3 and PW4 also at the spot. Further the testimony of PW4 categorically brings forth that PW4 Ashok Kumar himself was not an eye witness of the occurrence of stabbing but had reached when the quarrel had already taken place.

30. Significantly, the statement of the accused/appellant under Section 313 of the Code of Criminal Procedure, 1973 to query No.29 which is to the effect that why the PWs had deposed against him, the accused/appellant responded that they were interested witnesses and that the witnesses Sushil Kumar and Ashok Kumar had deposed falsely against him because a quarrel took place between his wife and the mother of Sushil and Ashok so they had enmity with him.

31. There is nothing in the statement under Section 313 of the Code of Criminal Procedure, 1973 also to claim that PW3, the eye witness was not

present at the spot and significantly there is not a whisper of a suggestion in the testimony of PW3 nor PW4 put forth by the accused/appellant that the witnesses PW3 & PW4 were testifying falsely against the accused/appellant because a quarrel took place between the wife the of the accused and the mother of Sushil & Ashok Kumar as a consequence of which they had enemical terms with the accused/appellant. Rather, both PW3 & PW4 have categorically stated that they had never quarrelled with the accused prior to the incident and that they were not on enemical terms with the accused/appellant and rather used to talk to him before the date of incident.

CONDUCT OF PW-3 AND PW-4 AT THE SPOT

32. The contention raised on behalf of the appellant to the effect that neither PW-3 nor PW-4 tried to save their maternal uncle Desh Raj, the deceased, at the time of the alleged offence and they did not try to apprehend the accused/the appellant at the scene of the occurrence and that this was fatal to the prosecution version, was repelled on behalf of the State submitting that in a quarrel or any other incident an event takes place rapidly and the perception of those who witness the event, may alter according to their powers of observation, age and state of mind and state of shock on witnessing the incident.

33. As laid down by the Apex Court in **Rajesh Singh & Ors. V. State of Uttar Pradesh**; 2011 (11) SCC 444, merely because the witnesses had not tried to stop the accused/the appellant when he fled, there is no ground to disbelieve

the testimony of the witnesses inasmuch as it has been laid down in paragraph 24 thereof to that effect

“ 24. The trial court has also found fault with the fact that none of the witnesses tried to stop the accused persons when they fled. That is hardly any reason to disbelieve the prosecution case. One of the accused persons was already facing a murder case. The witness Virendra Kumar (PW-1) has also spoken about that. It should be seen that the accused were viewed as bullies and, therefore, nobody might have tried to apprehend them.”

34. The verdict of the Apex Court in *State of Rajasthan v. Chandgi Ram*; 014 (14) SCC 596, also makes it apparent that there cannot be any strait jacket conduct to be followed by the witnesses when they see an onslaught or an attack or a murder. The observations of the Apex Court in paragraphs 15 and 16 of the said verdict are reproduced herein below:

“15. The learned Counsel for the Respondents-accused was repeatedly contending that the version of the above witnesses was wholly unnatural by pointing out that when the head of the family was being attacked mercilessly by the four accused persons, the witnesses were not taking any effort to seek the help of their neighbours in the village, where all the houses were closely situated. Here again, we are not able to accept or appreciate the said contention for more than one reason. In the first place, Choti (PW-1) is the wife of the deceased who at that point of time was more concerned in rescuing her husband from the attack of the Respondents-accused who were four in number and who were fully armed with iron rod, iron pipe and lathis. Therefore, when her husband was being beaten mercilessly by four different persons, as rightly deposed by her, she could only make a hue and cry

while taking every possible effort to rescue him from the merciless onslaught of the assailants. If at all anything can be said based on such cries of Choti (PW-1), those who were living nearby could have come for her rescue in saving her husband. If no one came and were not prepared to extend a helping hand, then Choti (PW-1) cannot be blamed for that reason. On seeing the plight of Choti (PW-1), Bhateri (PW-8) her niece, who happened to come at the place of occurrence appeared to have rushed back to inform her uncle, namely, Subhash (PW-12) who is the elder brother of the deceased and who tried to intervene and save the deceased from the ruthless attack of the Respondents-accused.

16. According to Choti (PW-1) and Subhash (PW-12), the Respondents-accused were so keen in eliminating the deceased that they were stated to have warded off any attempt made by Choti (PW-1) and Subhash (PW-12) in saving the deceased from the dreadful attack by them. Therefore, we do not find any conduct which is not normal or unnatural from what was stated by Choti (PW-1) or Subhash (PW-12). As far as Kumari Sarita (PW-3) and Vikram (PW-15) are concerned, they are children of the deceased and when they witnessed the gruesome attack of the Respondents-accused on their father, they could have made noise and being children of a very tender age, it cannot be stated as to in what manner they were expected to behave at that point of time. But on that score, it cannot be held that the whole of their evidence should be eschewed from consideration. While witnessing such an inhuman behaviour of the assailants, the young children might have become paralysed out of shock and fear. Therefore, the contention made on behalf of the Respondents-accused that the behaviour of the eye witnesses was unnatural, does not stand to any reason and, therefore, the said contention deserves to be rejected.”

35. Significantly, the learned Trial Court vide the impugned judgment has categorically observed to the effect that the statement of PW-3 Sushil Kumar, who had seen the incident of stabbing with his own eyes cannot be brushed aside, taking into account that the FIR in the instant case was prompt and that there was no dispute in relation to the identification of the accused/the appellant. The testimony of PW-3 Sushil Kumar is also categorical to the effect that when the accused gave the knife blows to the deceased, he, PW-3, was at a distance of three to four feet and when the accused gave the first knife blow to the deceased, PW-3 Sushil Kumar did not try to intervene and stop him nor save his uncle Desh Raj. He volunteered that “ *everything happened so quickly that it was difficult to decide at that time. After seeing the knife and the blood I had become scared at the place where the knife blows were given.*” It was also testified by PW3 in his examination-in-chief that he had become perplexed after seeing the knife and blood. This testimony of the witness PW-3 Sushil Kumar who categorically states that he did not make any attempt to intervene when his maternal uncle was given the first blow by the accused/the appellant and that he did not do so as everything happened so quickly and it was difficult for him to decide at that time and that after seeing the knife and blood he had become scared, is a conduct which is a natural course of human conduct and rather lends credence to the testimony of PW-3 Sushil Kumar in relation to his being present

at the time of the alleged occurrence and having seen the incident at a distance of three to four feet.

36. The testimony of PW-4 Ashok Kumar S/o Tilak Ram, indicates clearly that PW-4 had reached the spot only when the attack on his maternal uncle Desh Raj had already been made by the accused/the appellant.

37. The testimony of PW-3 categorically asserts that the accused/the appellant had fled away from the spot after the incident and the testimony of PW-4 Ashok Kumar likewise categorically states that at that time when he reached the spot, the accused/the appellant Jai Bhagwan was escaping from the spot. There is not a whisper of a suggestion in the cross-examination on behalf of the accused/the appellant claiming that PW-3 and PW-4 were not present at the spot as they made no attempt to apprehend the accused/the appellant. The conduct of PW3 at the time of the alleged commission of the offence and of PW-4 who reached the spot immediately after the commission of the offence, in the facts and circumstance of the instant case where they immediately thereafter put the injured Desh Raj since deceased in a three wheeler driven by Ishfaq S/o Shariffuddin and took him to the AIIMS hospital for treatment, is an apparent course of normal human conduct and does not detract from the veracity of the prosecution version.

***NON SEIZURE OF THE BLOOD STAINED CLOTHES OF
PW-3 AND PW-4 BY THE POLICE***

38. It was contended on behalf of the appellant that the non-seizure of the blood stained clothes of PW3 and PW-4 who state that their clothes got stained with the blood of the injured Desh Raj, since deceased, when they lifted him from the spot and put him into a three wheeler scooter and took him to the AIIMS hospital belied their presence at the spot, cannot be accepted as the MLC EX.PW-12/A categorically brings forth that the injured Desh Raj was brought to the AIIMS hospital by Sushil Kumar, i.e., PW-3. The learned trial Court record also indicates that at the time of conducting of the autopsy on 20.9.1995 at about 12:45 p.m. it had been recorded that the time since death of the injured Desh Raj, since deceased, was approximately 18 hours and the presence of both Sushil Kumar S/o Tilak Ram and Ashok Kumar S/o Tilak Ram is also mentioned on the post-mortem report Ex.PW-1/A which *per se* belies the contention raised on behalf of the appellant that in the absence of the blood stained clothes of PW-3 and PW-4 having been seized by the police, their testimonies that they took their maternal uncle Desh Raj, since deceased, to the hospital, were false, - cannot be accepted.

STATED VARIATIONS IN THE TESTIMONY OF PW-3

39. The contention raised on behalf of the appellant was that the testimony of PW-3 Sushil Kumar, the sole eye-witness put forth was unworthy of credit in as much as the learned Additional Public Prosecutor had cross-examined the

witness in relation to the aspect that the police had lifted blood stains from the spot which they had seized vide seizure memo EXPW-3/B, the witness has not testified in his examination-in-chief.

40. It was also contended on behalf of the appellant that there was improvement in the testimonies of statements made by the witnesses under Section 161 of the Cr.P.C. and that these improvements itself indicated that PW-3 and PW-4 and all prosecution witnesses examined, were interested witnesses and that the accused/appellant had been falsely implicated.

41. In relation to this aspect, it is essential to observe the testimonies of PW-3 and PW-4 and all other prosecution witnesses examined by the State are consistent in relation to all material particulars in relation to the incident having taken place, i.e., of the assault on the maternal uncle of PW-3 and PW-4, Sh. Desh Raj by the accused/the appellant herein with a knife both on his chest and on his abdomen, which injuries on the chest and abdomen are also corroborated by the details put forth in the post-mortem report, Ex.PW-1/A, which details the injuries caused to the injured since deceased as follows:

“(i) Stab wound 3 cm x 1 cm x cavity deep situated 19 cm below supra sterna notch 2cm laeral to the midline on the front of left chest.

(ii) stab wound 5cm x 3 cm x abdominal viscera deep situated 8 cm medial to the anterior superior eliace spine margin condusede exposing intestine;

(iii) 3cm x 1 cm x abdominal cavity, stab wound situated 14 cm bellow anterior axillary fold on the lateral aspect of left chest.

(iv) stab wound 3cm x 1cm situated 14 cm bellow anterior axillary fold on the lateral aspect of left chest 2cm medial to injury No.3.

(v) Incised wound 4 x 0.5 cm x skull bone deep above right eye brow present tangential

(vi) Abraded contusions over lateral aspect hand, extensor aspect of palm in an area of 18 x 9 cm.

(vii) punctured wound 1.5cm x 1/2 cm x muscle deep in the left ventricle of heart.

(viii) punctured wound 1.5 cm x 1/2cm x 5 cm deep on left lung.”

42. Injuries No.1,2,3 and 4 are stab wounds on the chest, abdomen, and injury nos. 7 and 8 are punctured wounds in the left ventricle of the heart and on the left lung. It is also essential to observe that the minor variations in the testimonies of prosecution witnesses from statements recorded under Section 161 of the Cr.P.C. do not *per se* suffice to dislodge the prosecution version and are only variations as per human memories.

TIME OF LODGING OF FIR

43. A contention was raised on behalf of the appellant that there was an inordinate delay in lodging the FIR which had not been explained, in as much as though the incident took place at about 8 p.m., the FIR is indicated to have been

lodged only at 12:55 a.m. on receipt of DD No.20 as indicated by Ex.PW-5/A, the copy of the FIR.

44. The MLC on the record indicates that the injured was brought to the AIIMS hospital on 19.9.1995 at 21:40 hours.

45. The incident is alleged to have taken place at 8 p.m. at Sangam Vihar and PW-3 and PW-4 have explained that after the assault on the injured by the accused/the appellant, they had to go first to Khanpur from their house and then from there either through Chirag Delhi or through Saket to the AIIMS hospital and on the date of the incident they had gone to the AIIMS hospital via Chirag Delhi. The Court can take into account that the said distance is approximately 11.3 kms and takes about 49 to 50 minutes to cover.

46. Taking the said aspect into account and the factum that the MLC indicates that the injured was got admitted to the hospital at 21:40 hours, the time taken by PW-3 and PW-4 to arrange the auto in front of the house of the appellant at the spot of the incident and thereafter to bring the injured to the hospital, stands explained.

47. The application for conducting post-mortem, i.e., Ex.PW-14/C issued by the AIIMS also indicates that the injured was admitted in the casualty and thereafter succumbed to the injuries at 11:20 p.m. in the casualty ward.

48. PW-9, Ct. Shyam Dhari, through his unchallenged testimony has testified

to the effect that on 19.9.1995 he was posted as Duty Constable in the AIIMS hospital and on that day at about 9:40 p.m. one injured, Desh Raj, since deceased was admitted to the hospital with a knife injury and he had informed P.S.Ambedkar Nagar on telephone which was recorded vide DD No.20. Copy of the said DD entry is Ex.PW-9/A.

49. Ex.PW9/A, DD No.20 dated 19.9.1995, Police Post Devli Pahari, Sangam Vihar, indicates that the duty officer Ct. Shyam Dhari telephonically informed at 10:10 pm of the injured having been admitted to the hospital and also indicates that ASI Badu Ram had sent the copy of the DD entry. It has been testified by PW14 SI Surender Singh, the Investigating Officer of the case, that ASI Badu Ram had told him that there had been an incident of stabbing of a knife on a person; that he made entry in the DD register and that along with Ct. Jaipal reached the spot, i.e., L-Block, Gali No.4, Sangam Vihar, New Delhi, where he learned that the injured had been taken in a hospital in a TSR and Constable Chand Ram and ASI Badu Ram remained at the spot for safety he along with Ct. Jaipal reached the hospital in the emergency ward and he obtained the MLC of the injured and it was learned that he had been declared dead by the doctor and that thereafter he met Sushil Kumar, the nephew of the deceased also at the hospital where he recorded his statement and made an endorsement Ex.PW-21/A and sent the same through Ct.Jaipal for registration

of the FIR which testimony of SI Surender Singh is also corroborated by PW7 Ct. Jaipal that he took the rukka to the police station for the registration of the FIR after the statement of the nephew of the deceased was recorded at the hospital. *It is, thus, apparent that there is no inordinate delay in the registration of the FIR.*

MEDICAL EVIDENCE

50. It was contended on behalf of the appellant that the medical evidence in the instant case does not support the prosecution version and that the testimony of PW-1, Dr.S.K.Gupta, itself was to the effect that injuries No.1 to 7 which were fatal injuries, were not possible by the kitchen knife, Ex.P-1, which is stated to have been recovered at the pointing out of the appellant. It was also submitted on behalf of the appellant that the said knife was allegedly recovered on 2.10.1995 in relation to an incident which took place on 19.9.1995 and that it was recovered from a vacant plot which was open and accessible to all and no public witness was associated, and that the veracity of the prosecution claim in relation thereto have not been established.

51. Qua this aspect of the ante-mortem injuries, it is essential to observe that the injuries caused to the deceased, as reflected in Ex.PW-1/A, the post-mortem report have already been detailed herein above in paragraph35.

52. PW-1 has categorically testified to the effect that the cause of death to the

best of his knowledge and belief was the haemorrhagic shock as a result of stab injuries to the chest and heart and lung caused by a sharp cutting weapon, and that injury Nos. 1 and 7, i.e., the stab wound 3cm x 1cm cavity deep situated 19 cm below on the front of the left chest and the punctured wound 1.5 cm x 5 cm to left vertical of heart, were sufficient to cause death in the ordinary course of nature.

53. Significantly, injury Nos. 6, 4 and 5, as detailed in the post-mortem report were also testified by PW1 to be possible with a weapon Ex.P-1. Undoubtedly, in his examination-in-chief, PW1 Dr. S.K.Gupta, deposed that the deep injuries No.1,2,3, 7 and 8 were not possible by the type of weapon of offence Ex.P-1 a small knife. On being cross-examined, however, by the learned Additional Public Prosecutor for the State, PW-1, Dr.S.K.Gupta deposed that injury No.7 was heart muscle deep, i.e., it should have been about 3 cm, deep and he further stated that length of the blade of the knife shown to him in Court, Ex.P-1, was five to six centimetres. He further stated that it was possible that if the blade of the knife was given straight into the heart upto the end of the blade, then it could reach the muscle of the heart and could puncture it. PW1 stated that this was his response also in relation to injury No.1.

54. Significantly, on being cross-examined on behalf of the accused/the appellant,. PW-1, stated that the wound dimensions suggested that the knife had

entered into the cavity upto 3 cm width of the knife. He also categorically denied that the width of knife was not more than 1 cm and denied that the injury was not possible with a knife Ex.P-1. He stated that the injury caused could be possible with the knife Ex.P-1. He further stated that if at the time of stabbing the blade of the knife was not straight, then the injury could not have been caused. He also stated that depth of the injury Nos. 1 and 7 was chest cavity deep and had punctured the heart which could be possible by this knife Ex.P-1 if it was thrust with force on to the chest. He also stated that due the absence of the hilt injury of the knife on the chest, it suggested that whole blade upto the hilt had not entered the chest as injury no.7 was on the left side ventricle of the heart. He also categorically denied that the post-mortem report and opinion regarding injuries with a knife ExP-1 had been given by him at the instance of the Investigating Officer. It is, thus, apparent that the testimony of PW1 when read in *toto* makes it apparent that the injuries No. 1 to 8 caused to the deceased were possible and due to the knife Ex.P-1 and as testified by PW-3 Sushil Kumar, had been inflicted with a knife by the accused/the appellant giving knife blows on the stomach and chest and abdomen of his maternal uncle, Desh Raj, since deceased.

55. Further more, even if the contention of the appellant that Ex.P-1 was not the knife utilized in the infliction of injuries on the person of Desh Raj is

accepted, the factum that the injuries No.1,2,3,4 were not stab wounds and injury Nos. 7 and 8 were punctured wounds which were muscle deep coupled with the factum that Ex.PW-1/A the post mortem report indicates that all the injuries 1 to 8 were ante- mortem in nature and sufficient to cause death in the ordinary course of nature and all the injuries were caused by a sharp cutting weapon, coupled with the categorical testimony of PW1 that the injuries inflicted and caused on Desh Raj, the maternal uncle of PW1, were blows with a knife by the accused/the appellant, the ocular testimony on record corroborates the medical evidence on record in relation to the nature of injuries sustained by the injured, since deceased. The medical evidence on record also thus corroborates the prosecution version set forth in the FIR through the complaint of the complainant Ex.PW-3/A made by PW-3 Sushil Kumar. It is also essential to observe that PW-14 SI Surender Singh, the Investigating Officer of the case, denied the suggestion that no opinion regarding the weapon of offence was taken because it had not been used. As already observed herein above, the infliction of injuries on the person of the injured, since deceased, with a knife is established through the testimony of PW1 Dr. S.K.Gupta and PW3 Sushil Kumar, the eye-witness

OTHER CONTENTIONS RAISED

56. It was also contended on behalf of the appellant:

- That there was no evidence on record to show that the copy of the said report was sent at the earliest to the concerned Metropolitan Magistrate. In relation thereto it is indicated through the original endorsement Ex.PW-5/A of the learned Metropolitan Magistrate concerned that the copy of the FIR was delivered at the residence of the Metropolitan Magistrate on 20.9.1995 at 9:05 a.m.;
- the factum that photographs taken by PW-13 Ct. Girdhar Singh were not placed on record, despite the photographs having been taken, as testified by SI Surender Singh and Ct. Girdhar Singh, *per se* does not suffice to dislodge the veracity of the prosecution version, in view of the consistent testimonies of PW-3 and PW-4 and the testimony of SI Surender Singh, the Investigating Officer of the case, which is corroborated through the testimony of Ct. Jaipal and by the medical evidence through the testimony of Dr.S.K.Gupta;
- This is so inasmuch as Ct.Girdhar who had taken six photographs from different angles at the spot stated that he had handed over the negatives of six photographs to SI Surender Singh on 7.10.1997 for the developing of the photographs but SI Surender Singh did not return the negatives nor the developed photographs to him, yet this witness categorically denied that he had not taken the photographs at the spot and thus, they had not

been produced in Court;

- The Investigating Officer through his testimony has categorically explained that the photographer had reached the spot and had taken the photographs but the developed photographs could not be placed on record as the negatives were given to the photographer for developing but he had left the shop and his whereabouts were not known,
- *The entire available record, thus, establishes that injuries No.1,2,3,4,7 and 8 are stab injuries and incised injuries and as indicated from Ex.PW1/A all injuries 1 to 8 were ante mortem in nature and sufficient to cause death in the ordinary course of nature and all were caused by a sharp cutting weapon and that injuries No.1 and 7 were sufficient to cause death in the ordinary course of nature.*

APPLICABILITY OF EXCEPTION 4 TO SECTION 300 OF THE IPC

57. It has been observed by the learned trial Court that the infliction of injuries was barbaric and intentional with intent to kill Desh Raj and thus the accused/the appellant was convicted for the commission of an offence punishable under Section 302 IPC, 1860.

58. During the course of the arguments addressed, an alternative submission was made on behalf of the accused/the appellant that even if the injuries had been inflicted on the injured Desh Raj, since deceased, by the accused/appellant

in the manner as testified by PW-3 were held to be established, in that event too the accused/the appellant herein cannot be held guilty of the commission of culpable homicide amounting to murder, in as much as the infliction of injuries on the injured, since deceased, had not been caused or done by the accused/the appellant with the intention of causing death. It was, thus, submitted on behalf of the accused/appellant that the appellant was entitled to the benefit of Exception 4 to Section 300 of the IPC, 1860.

59. The Exception 4 to Section 300 of the IPC, 1860 is as follows:

“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—

.....

.....

.....

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 case which party offers the provocation or commits the first assault.

60. As held by the Apex Court in *Samuthram @ Samudra Rajan v. State of Tamil Nadu*, (1997) 2 Crimes 185 (Mad.)

To invoke Exception 4 to section 300, four requirements must be satisfied, namely (i) it was a sudden fight, (ii) there is 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 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;"

61. It was, thus, submitted on behalf of the appellant that in the instant case that it was the injured/the deceased himself who came back to the spot of the occurrence after he had left the spot initially, in as much as PW-3 had stated that at about 8 p.m. on 19.9.1995 when he was coming back after attending his tuition job, he had seen that at house No.286 a quarrel was going on between the accused and the deceased Desh Raj and that, he, PW-3 intervened and took his uncle into his room whereof the accused continued to abuse his maternal uncle loudly saying that Desh Raj used to show off his powers of being a policeman and that, he, i.e., the accused/the appellant would finish him that day and that thereafter *after sometime Desh Raj, the maternal uncle of PW-3, again came back to the house No.L-286 belonging to the accused/the appellant,*

whereupon he, PW3, followed his maternal uncle Desh Raj, Desh Raj asked the accused/the appellant not to abuse on which appellant again abused the injured, whereafter the accused/the appellant gave a knife blow on Desh Raj, the injured due to which he fell on a cot and thereafter the accused gave knife blows several times, i.e., four times in the abdomen of his maternal uncle Desh Raj, all brought forth that the assaults with the knife on stomach, chest and abdomen of the injured by the accused/the appellant had been caused on the spur of the moment and were not pre-meditated and, in fact, have been caused due to Desh Raj having come back to the spot in front of the house of the accused after the initial quarrel had ended and after PW-3 had already taken his maternal uncle Desh Raj, since deceased, to his house.

62. It was, thus, submitted on behalf of the appellant that there was no pre-meditation in the quarrel, which took place in the instant case due to Desh Raj, the injured, since deceased having come back to the spot and having asked the accused, i.e., the appellant not to abuse him whereupon without any pre-meditation the accused/the appellant in the heat of passion on a sudden quarrel assaulted the injured.

63. On a consideration of the testimony of PW3 and the verdicts relied upon on behalf of the appellant, *Surinder Kumar vs. Union Territory Chandigarh AIR 1989 SC 1094 ;Bivash Chandra Debnath @ Bivash vs. State of West*

Bengal (2015) 11 SCC 283; *Jagtar Singh @ Goggi and Anr. Vs. State* 2011(3) JCC 1995 and; *Mahender vs. State* 2009 (2) JCC 895, taking into account the factum that the fatal attack in the instant case was a culmination of a quarrel between the accused/the appellant and the injured, since deceased, in as much as the accused/the appellant claimed that the injured, since deceased, used to show his power of being a policeman in as much as he belonged to the Home Guards which resulted into the quarrel, so much so that after the end of the initial spat the deceased again went to the house of the appellant as brought forth through the testimony of PW3 as if to incite him, it is established that there was no pre-meditated intent to murder brought through the testimony of PW3 against the accused/the appellant in as much as it was a case of a sudden fight.

64. As laid down by the Hon'ble Supreme Court in the *Pulicherla Nagaraju @ Nagaraj v. State of Andhra Pradesh: 2006 (11) SCC 444*

“ 29. 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 and 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 premeditation; (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. Be that as it may.”

65. The factum that the knife utilized was a small knife Ex.P-1 as also brought forth through the testimony of PW-1 Dr.S.K.Gupta, it is apparent that the choice of the weapon utilized by the accused/the appellant in the commission of the offence was also not of a nature to attribute pre-meditated intent before the commission of the murder and, thus, the

injuries inflicted on the accused/the appellant cannot be held to have been inflicted by the accused/the appellant by taking undue advantage or by acting in a cruel or unusual manner.

CONCLUSION

66. In view of the verdicts of the Supreme Court relied upon on behalf the accused/the appellant though the conviction of the appellant in infliction of injuries, as detailed in Ex.PW1/A, is upheld, and the factum of the accused/the appellant having thereby caused the culpable homicide of Desh Raj, the injured, since deceased, is also upheld, however, in the facts and circumstances of the instant case, the impugned conviction of the accused/the appellant under Section 302, IPC 1860 in relation to FIR No.616/95 Police Station Ambedkar Nagar is modified and converted to a conviction under Section 304 II of the IPC, 1860, in as much as Section 304 II of the IPC, 1860 penalizes culpable homicide not amounting to murder, 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.

67. It was submitted on behalf of the appellant that the appellant has been in custody for long and that the appellant be, thus, released on the period of detention undergone. The nominal roll dated 21.11.2016 received indicates that the appellant has been in custody for a period of 6 years 11 months and 26 days

as on 23.12.2003 and had been on bail during the period 3.6.2002 to 4.7.2002 and 9.4.2003 to 10.6.2003 and had been released on bail on 24.12.2003. During this period the appellant has also earned remission of 10 months 12 days.

68. In view thereof, the appellant, thus having undergone the detention for a period of 6 years 11 months and 25 days and having earned remission of 10 months 12 days, taking into account the factum that the offence has been committed without any premeditation, the order dated 15.11.2000 of sentence is modified and the appellant/offender is allowed to be released on the period of detention already undergone in relation to the commission of an offence punishable under Section 304 Part II of the IPC, 1860 in FIR No.616/95, Police Station Ambedkar Nagar, and the fine imposed vide the impugned judgment dated 13.11.2000 and order on sentence dated 15.11.2000 is set aside.

69. A copy of the judgment to the Superintendent, Central Jail, Tihar, New Delhi be sent for compliance, and copy be supplied to the appellant and be placed on the trial Court record which be returned.

ANU MALHOTRA, J

GITA MITTAL, J

NOVEMBER 28, 2016

mr/ssc/sv