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

+ **CRL. A. 20/2015**

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Judgment reserved on : 18th May, 2016
Judgment pronounced on : 30th May, 2016

VINOD KUMAR & ORS Appellants
Through: Mr. K. Singhal, Advocate

Versus

STATE (GOVT OF NCT OF DELHI) Respondent
Through: Ms. Anita Abraham, APP for State

CORAM:

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. The present Criminal Appeal has been filed under Section 374 of the Code of Criminal Procedure against the impugned judgment dated 26.11.2014 and order on sentence dated 28.11.2014 passed by the Additional Sessions Judge, Rohini Courts, New Delhi in Sessions Case No. 20/2014, by virtue of which all the appellants have been convicted and sentenced to undergo rigorous imprisonment for six months and to pay Rs. 200/- each as fine and in default of payment of fine to further undergo simple imprisonment for a period of two days for the offence punishable under Section 323/34 of the Indian Penal Code, rigorous imprisonment for one year and to pay Rs. 500/- each as fine and in default of payment of fine to further undergo simple imprisonment for a period of five days for the offence punishable

under Section 325/34 of the Indian Penal Code, rigorous imprisonment for two years and to pay Rs. 500/- each as fine and in default of payment of fine to further undergo simple imprisonment for a period of five days for the offence punishable under Section 452/34 of the Indian Penal Code and to undergo imprisonment for life and to pay Rs. 5,000/- each as fine and in default of payment of fine to further undergo simple imprisonment for a period of one month for the offence punishable under Section 302/34 of the Indian Penal Code. All the sentences were ordered to run concurrently.

2. It would be necessary to set out the brief facts of the case which gave rise to the present criminal appeal. The brief facts as noted by the trial court are as under:

“On 20.8.2010, Mohar Singh (deceased) along with his wife Raj Shree(PW1), his sons Satender , Jitender(PW2) , Pratap (PW13) were present at their house situated at A23/29, 36 Prem Nagar-III, Delhi. All of a sudden, accused Hari Chand along with his sons Manoj, Vinod and Jitender entered their house and started abusing. Accused Hari Chand instigated his sons by saying “ ye sale jyada bante hein inko chhorna nahi”. Accused Hari Chand and Manoj were carrying iron “saria” in their hands . Accused Jitender caught hold Mohar Singh (deceased) and accused Vinod caught hold Pratap (injured) and started beating them with fists and kicks. Accused Hari Chand and Manoj were beating Mohar Singh and Pratap with “sarias”. Accused persons also gave beatings to Raj Shree(PW1) and Jitender(PW2), wife and son of Mohar Singh (deceased) with kicks and fists.

It is the further case of the prosecution that accused Kuldeep Singh Rathor @ Pintu and Kamal

Kashyap(already expired) , friends of accused Manoj, also came there and started beating the complainant Raj Shree(PW1) and her aforesaid family members with fists and kicks alone with other accused persons. Jitender sustained injuries on his nose and Mohar Singh and Pratap Singh sustained injuries on their head. Thereafter, accused persons fled away from the spot. Someone from the public informed the PCR and DD no.27 A was recorded at P.S Aman Vihar in this regard. PCR van reached there and removed the injured persons to SGM hospital. Said DD was marked to ASI Sajjan(PW21) Singh for investigation.

ASI Sajjan Singh reached at SGM hospital where he found the patients unfit for statement. In the meanwhile, injured persons were shifted to Pratap Singh was declared fit for statement by the doctors and his statement was recorded by ASI Sajjan Singh. ASI Sajjan Singh prepared the rukka and got registered the FIR. The blood stained clothes of Mohar Singh were received by Raj Shree from the doctors on 23.8.2010 and she handed over the same to the IO, who sealed and seized the same. Raj Shree also handed over the blood stained vest and pant of Pratap(injured) to ASI Sajjan Singh which were also sealed and seized. MLC's of the injured persons were collected by the IO.

It is alleged that on 27.8.2010 injured Mohar Singh expired in the hospital . Accused persons were arrested . Weapons of offence i.e iron pipe and iron rod (sariya) are shown to have been recovered at the instance of accused Hari Chand and Manoj . Postmortem on the body of Mohar Singh(deceased) was got conducted and PM report along with subsequent opinion was collected wherein it was mentioned that the injuries mentioned in the postmortem report were possible by said weapons of offence.

According to the prosecution on 20.8.2010, at about 10:00 pm, Satender s/o deceased Mohar Singh was playing outside his house in gali . Grandson of Harichand was also playing with Satender . A quarrel took place between Satender and grandson of accused Harichand . Mohar Singh (deceased) separated them and scolded both of them . Grandson of accused Hari chand went away from there and he was crying. Prosecution has come with this as motive for committing the offences.

Leveling a variety of allegations and narrating the sequence of events, in all, the prosecution claimed that on 20-08-2010, all the accused persons with their common intention after having made preparation for causing hurt trespassed into the house no. A-23/29 , 36 Prem Nagar - III, Delhi and voluntarily caused grievous hurt on the person of Pratap , simple injury on the person of Jitender and also committed murder of Mohar Singh by giving beatings to them with the help of Iron rods. In the background of these allegations and in the wake of statement of the complainant/witnesses , the present criminal case was registered against the accused persons, on accusation of having committed the offences punishable under sections 452/323/325/302/34 IPC at the Police Station Aman Vihar , in the manner depicted herein-above.

After completion of the investigation, the final police report (challan) was submitted by the police against the accused persons to face trial for the offences in question.”

3. After the investigation was complete, charges under Section 452/302/325/323/34 of the Indian Penal Code were framed against the appellants, to which they pleaded not guilty and claimed trial.

4. To bring home the guilt of the appellants and to prove its case, the prosecution examined as many as 24 witnesses in all. Thereafter, the statements of the appellants were recorded under Section 313 of the Code of Criminal Procedure wherein they denied all the incriminating evidence and their involvement in the commission of the said offence and claimed to be falsely implicated in the case. The accused persons examined 4 witnesses to substantiate their defense.
5. The learned trial court, after scrutinising the arguments addressed by the counsel for the parties and evidence adduced by them, concluded that the prosecution has been successful in establishing the guilt of the accused persons beyond reasonable doubt and held them guilty for the offences mentioned above.
6. Mr. K Singhal, learned counsel appearing on behalf of the appellants during the course of arguments conceded that the appellants would not challenge the appeal on merits but challenge the order on sentence as no case under Section 302 of the Indian Penal Code was made out and the case was covered under Section 304 Part I or Part II.
7. To substantiate his argument that the present case falls under Section 304, the learned counsel drew the attention of this Court to Exception 4 of Section 300 of the Indian Penal Code
8. Learned counsel for the appellant argued that the unfortunate incident transpired without premeditation in a sudden fight and on the spur of the moment, upon a sudden quarrel that erupted between the son of appellant No. 3 and the son of the deceased. Further, the intention of the appellants was not to cause death of the deceased but only to settle

scores between them as there was no previous enmity between the appellants and the deceased.

9. The learned counsel vehemently argued that the trial court had failed to consider the major contradictions in the testimonies of the material witnesses i.e. PW-1, PW-2 and PW-13 with regard as to the circumstances in which the crime was committed.
10. The learned counsel fervently urged that the weapon used in the commission of the offence was not a deadly weapon such as a gun or a knife but an iron rod which is easily available. Moreover, the recovery of the said weapon was made after 15 days of the alleged incident from an area accessible to public with no independent witness. He also submitted that no blood was found on the iron rods as per the FSL report.
11. The learned counsel submitted that the injuries which resulted in the unfortunate death of the deceased were not grave and injury No. 2, which has been considered grievous in nature was only a Craniotomy wound which is a medical intervention and merely a scar on account of the surgery and not by the weapon of offence. He also submitted that it is in evidence that the death of the deceased took place after a period of 7 days from the date of the incident and therefore, the intention of the appellants was not to cause death of the deceased.
12. Lastly, the learned counsel for the appellant also contended that it was a free for all fight where both the sides had to bear the consequences as one Kamal Kashyap (since expired) had also received head injuries which could have been fatal and the family of the deceased ought to have been booked for the appropriate offences. Moreover, initially the

police also did not find it fit to register a case under Section 307 of the Indian Penal Code i.e. attempt to murder.

13. To substantiate his arguments, the learned counsel relied upon a decision of this court titled as ***Karamjeet @ Titu Vs. State (Crl.Appeal No. 596/2008)*** wherein it was held as under:

“8. It is apparent that the incised wounds on the person of the deceased, which are non fatal, are the result of the deceased being hit with the jharna. It is apparent that the head injury No.4 is the result of a single blow being struck on the head of the deceased with the bottle of sauce.

9. From the testimony of Gopal Singh it is apparent that the appellant did not act with any pre-meditation. It is apparent that everything happened upon a sudden quarrel.

10. During the course of the sudden quarrel a sauce bottle was picked up and was hit upon the head of the deceased causing subdural haemorrhage, meaning thereby, the dura mater i.e. the outer most membrane of the brain got affected probably due to extravasation of the blood vessels.

11. We accordingly hold that the offence committed by the appellant is not murder but culpable homicide not amounting to murder.

13. Considering the fact that the appellant has no past history of any criminal activity; further taking note of the circumstances under which the appellant inflicted the injury on the person of the deceased, we are of the opinion that ends of justice would be met if the appellant is sentenced to undergo imprisonment for the period already undergone.”

14. Reliance was also placed by the counsel for the appellants on the decision of this court in ***Parween Vs. State*** reported in **2015 SCC OnLine Del 7459**, wherein it was held as under:

“31. Applying the law laid down by the Apex Court to the facts of this case and having regard to the evidence of the witnesses, it is firmly established that the prime objective of the appellant was to commit theft and in the process ear rings of the deceased were removed and only when victim made a noise the appellant gagged her mouth and the co-accused hit a brick on her head thus it cannot be said that the act committed is with premeditation. It is also not the case of the prosecution that the accused had carried brick to hit the deceased on her head. Thus, it can be said that when the deceased made a noise the present appellant gagged her mouth to silence her.

32. In the light of the above circumstances, we are of the view that the submissions of counsel for the appellant are without any merit, however, we are inclined to accept the alternate argument of counsel for the appellant and hold that the present appellant is liable to be convicted under Section 304 Part-I IPC and not under section 302 IPC, having regard to the above factors.”

15. On the converse, Ms. Anita Abraham, learned Additional Public Prosecutor appearing on behalf of the State submits that the judgment does not call for any interference and the trial court has rightly convicted the appellants for the said offences.
16. Learned Additional Public Prosecutor argued that the evidence adduced on record clearly establishes the guilt of the appellants which is duly corroborated by the medical evidence and the testimonies of the witnesses. It was further clarified by the counsel that as per the postmortem report, the cause of death was due to cerebral damage consequent to blunt force trauma to the head which was sufficient to cause death in ordinary course of nature and that such injuries were caused by the said weapon of offence.

17. The learned Additional Public Prosecutor concluded her arguments by drawing our attention to the intention of the appellants as the incident did not happen on the spur of the moment and was a premeditated act because they took sufficient time to procure the weapons. She also pointed out that the appellant No. 4 further exhorted his sons after entering the house of the deceased by saying “*ye sale jyada bante hein inko chhorna nahi*” which proves the intention of the appellants to the fact that they took sufficient time to procure the weapons and cause the death of the deceased.
18. Further, to substantiate her argument that common intention was present amongst the appellants, she relied upon a decision of the Apex Court titled as ***Lalai Vs. State of Uttar Pradesh*** reported in ***AIR 1974 SC 2118***, wherein the Hon’ble Supreme Court observed as under:

“7. It was finally urged that in any case Ram Ajore was a silent spectator, took no part in the assault and cannot, therefore, be held guilty of having entertained a common intention with Lalai to commit the murder of Paras Nath. On this aspect, the time at which Paras Nath was murdered, the place of murder, the weapons carried by the appellants their relationship and finally their concerted conduct in the wake of murder are all relevant. The offence took place at about 10.30 p.m. and unless the appellants had sought their victim, he was not likely to have crossed their path. Paras Nath was murdered in his own habitation and there can be no doubt that the appellants sought him purposefully. Ram Ajore did not participate in the assault on Paras Nath but he played his part truly by his brother by carrying a spear so as to overcome any outside interference with the attainment of their object. Lastly, immediately after Paras Nath was murdered the appellants ran away together. These facts

have a sufficient bearing on the existence of common intention in the commission of Paras Nath's murder.”

19. Furthermore, reliance was also placed on ***Banta Singh Vs. State of Punjab*** reported in ***AIR 1991 SC 1379***, wherein the Hon’ble Supreme Court upheld the conviction under Section 300 with aid of Section 34 while holding that some infirmities in prosecution evidence are immaterial. It was held as under:

“4. Learned Counsel for the appellant submitted that the Trial Court had doubted the presence of PW 3 - Kartar Singh in the field on that date. He also pointed out that according to the Trial Court PW 3 - Kartar Singh was not an eye-witness to the occurrence. We have perused the evidence of PWs 3, 4 and 5 carefully. Counsel for the appellant stated that the story of the appellant having given a blow on the back of the deceased was an improvement, as no such version was to be found in the First Information Report. We will assume this for the sake of argument. We will also assume for the sake of argument that the presence of PW 3 at the place of occurrence on that night is doubtful. Even so, if the evidence of PW 4 - Nanak Singh as corroborated by the evidence of PW 5 - Niranjan Singh in regard to the presence of the appellant and his participation in the commission of the crime is accepted as reliable and trustworthy, the conviction of the appellant cannot be assailed. Shorn of improvement and embellishment, the evidence of PW 4 establishes that the appellant, Jagir Singh and Nanta Singh had gone to the field armed with birches (spears) and Jagir Singh had opened the assault by giving a blow on the chest of Santa Singh. The fact that the incident occurred in the field of the deceased cannot be disputed. The presence of the deceased and PW 4 - Nanak Singh equally cannot be disputed. PW 4 - Nanak Singh received the blow on his wrist which is

established from medical evidence. Therefore PW 4 - Nanak Singh's statement that he was injured by a barchhi blow given by the appellant is unassailable. That barchhi blow was given in the course of the incident in question. The appellant and his companions had come armed with deadly weapons to assault Santa Singh as he was suspected to be a police informer. Therefore, even if it is assumed for the sake of argument that PW 3 was not present and that the story regarding the appellant having given the blow on the back of Santa Singh is a subsequent improvement not found in the F.I. R., the involvement of the appellant in the incident and his giving of a barchhi blow to PW4 -Nanak Singh when the latter tried to go to the rescue of his grandfather is sufficient to convict him with the aid of Section 34, I.P.C.

5. In the result, we see no merit in this appeal. We uphold the conviction and sentence of the appellant. The appellant will surrender to his bail and serve out the remaining sentence. The appeal is disposed of accordingly.”

20. Lastly, the learned Additional Public Prosecutor relied upon a judgment titled as ***Ramesh Singh Vs. State of Andhra Pradesh*** reported in (2004) 11 SCC 305, wherein the Hon’ble Supreme Court held that it is very difficult to procure direct evidence to prove common intention as it is a state of mind, therefore, in most cases it has to be inferred from the circumstances like the conduct of the accused. The Apex Court held as under:

“11. xxxx For example, if we notice the judgment relied upon by the learned counsel for the respondent i.e. the case of Hamlet alias Sasi v. State of Kerala (supra), this Court held that the fact that one accused held the deceased by his waist and toppled him down while the other accused attacked him with iron rods and oars was

held to be sufficient to base a conviction with the aid of Section 34 IPC. The fact of holding the victim is similar in the cases of Vencil Pushpraj and Hamlet alias Sasi (supra) but the conclusions reached by this Court differ because the circumstances of the two cases were different. In Nandu Rastogi alias Nandji Rustogi and Anr. v. State of Bihar (supra) this Court held that to attract Section 34 IPC it is not necessary that each one of the accused must assault the deceased. It was held in that case that it was sufficient if it is shown that they had shared the common intention to commit the offence and in furtherance thereof each one of them played his assigned role. On that principle, this Court held that the role played by one of the accused in preventing the witnesses from going to the rescue of the deceased indicated that they also shared the common intention of the other accused who actually caused the fatal injury.

12. To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Indian Penal Code. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to guilty. By introducing Section 34 in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred

from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (See Noor Mohammad Yusuf Momin 1971 CriLJ793.)

21. We have heard learned counsel for the parties and considered their rival submissions and also carefully examined the impugned judgment, the testimonies of various witnesses and the documents placed on record.
22. At the outset, we would discuss the medical evidence on record to ascertain whether the death was caused due to injuries caused by the appellants or it was due to an operative procedure.
23. As far as the medical evidence is concerned, the testimony of PW-7 Dr. Manoj Dhingra (who conducted the post mortem of the deceased) assumes importance. PW-7 in his cross examination stated as under:

“It is correct that injuries mentioned in PM report can be possible inflicted with any other wooden danda and iron rod of similar type.”
24. Further, PW-17 Dr. J.V. Kiran (who conducted the post mortem of the deceased) in his testimony deposed as under:

“There were four external injuries (2 stitched and 2 stabbed abrasion) as mentioned in PM report. Injury no. 2 was due to operative procedure.”

25. In the light of the above discussed testimonies of PW-7 and PW-17, we are inclined to infer that the injuries received by the deceased were not very grave in nature. Moreover, injury No. 2 was caused due to an operative procedure. The fact that the death of the deceased took place 7 days after the alleged incident also shows that the said injuries were not serious in nature so as to cause death of the deceased. This, further points out that the intention of the appellants was not to cause death but only to settle scores with the deceased due to a quarrel between the children.
26. As far as the nature of weapon used in the commission of the offence is concerned, it has emerged that the nature of the weapons used i.e. an iron rod and an iron pipe are not as deadly as a knife or a gun and are commonly available. The relevant portion of the FSL report is as under:

*“Exhibit ‘5’: One metallic pipe app. 3 feet in length.
Exhibit ‘6’: One metallic rod app. 2.14 feet in length.*

RESULT OF ANALYSIS

2. Blood could not be detected on exhibits ‘5’ and ‘6’.”

27. On such basis, we therefore hold that no blood was found on the said weapons of offence which makes it difficult to connect such weapons with the weapons used in commission of the offence.

28. To ascertain whether Kamal Kashyap (since expired), friend of the appellant no. 3, also received head injuries during the quarrel, testimony of DW-1 Rajesh Kumar assumes importance. DW-1 deposed as under:

“As per record, patient Kamal Kashyap was brought to SGM Hospital on 20.08.2010 at about 11:10PM by the PCR with alleged history of physical assault as told by the patient.”

29. After perusal of the testimony of DW-1 and the MLC Ex. DW-1/A of Kamal Kashyap, we are of the considered view that he had also received injuries during the altercation, which shows that both sides suffered the consequences of the altercation.
30. Moreover, the manner in which the recovery of the said weapons was made makes the recovery even more doubtful. The weapons were recovered almost 15 days after the date of the incident from an open area which is easily accessible to anyone and without any independent witness being present on the spot.
31. From the above reading of the medical evidence, it has been ascertained that there was no blood found on the weapon of offence and also the injury which was opined as the cause of death was an operative injury. Since the medical/scientific evidence does not support the case of the prosecution, it would be relevant to discuss the testimonies of the material witnesses.
32. PW-13 Pratap (brother of the deceased) in his deposition deposed as under:

“Accused Hari Chand and Accused Manoj were carrying iron sariyas (rods) in their hands. On this, accused Hari

Chand hurled filthy abuse and also said “saley bahut Bante hain, inko theek kar do.” On this, accused Vinod caught hold of me and accused Jitender had caught hold of my brother Mohar Singh and started beating us with legs and punches. Accused Hari Chand and his son had beaten me and Mohar Singh with the sariya.”

33. PW-13 Pratap in his cross examination stated as under:

“It is correct that there was no quarrel amongst us and the family of the accused prior to the incident.

xxxx

Kamal Kashyap did not receive injury in this incident. None of the accused had received injury in this incident.

xxxx

Accused Kuldeep did not cause injury to anybody else except Mohar Singh. Accused party was armed with 10 iron sariyas. Accused Kuldeep had given 5-6 blows on the head on Mohar Singh. Only accused Kuldeep had given sariya blows on the head of Mohar Singh and no other accused had given such blow to him.”

34. On the converse PW-1 Raj Shree (wife of the deceased) in her deposition deposed as under:

“On hearing the such words of his father Hari Chand, accused Jitender had caught hold of my husband from his waist. Accused Manoj had caught hold of my devar Pratap. All of them had started beating my husband and my devar. Accused Manoj and Hari Chand were hitting with saria to my devar Pratap and husband and other accused had also started beating my husband and my devar with fists and kicks.

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At this stage, Ld. APP requests to put one leading question to the witness

Heard. Allowed.

Q. Is it correct that accused Vinod had caught hold of Pratap and not accused Manoj?

Ans. It is correct.”

35. PW-1 Raj Shree in her cross examination stated as under:

“It is correct that Kamal Kashyap had also received injuries. He received injuries as I escaped myself behind the door from the blows of accused persons and such blow had hit Kamal Kashyap. I also inquired to him as to why he had come when there was a quarrel only between children. Accused Kamal was also inflicted injuries. Kamal Kashyap was very good boy. His behavior was good with others. ”

36. Whereas, PW-2 Jitender (son of the deceased) in his testimony deposed as under:

“At that time accused Manoj and Hari Chand were carrying sarias in their hands. Accused Jitender had caught hold of my father. Accused Vinod had caught hold of my chacha Pratap. Accused Vinod and Jitender had started beating my father and chacha with fists and kicks. Accused Hari Chand and Vinod were beating my father and chacha with sarias. ”

37. PW-2 Jitender in his cross examination stated that:

“It is correct that accused Kamal Kashyap (since expired) had also received injuries during that quarrel.

I do not know as to how he sustained injuries. He sustained injuries on his head.”

38. It is clear from the testimonies of the above discussed prosecution witnesses that there are contradictions in the role of the appellants in the crime and the manner in which the crime was executed. There are major discrepancies with regard to the role of the appellant No. 1 Vinod, the appellant No. 3 Manoj and the appellant No. 4 Hari Chand. It is not clear as to who caught hold of PW-13 Pratap and who gave blows with the iron rod to the deceased. However, admittedly there was no previous enmity between the families of the appellants and the deceased.
39. From the evidence on record, it is very clear that the appellants intended to cause bodily injuries which culminated into the death after 7 days. In our opinion, there was a sudden altercation which ensued in the heat of the moment and there is no deliberate planning. In the present case, as stated above there was no due deliberation on the part of the appellants and they assaulted the deceased almost immediately after the fact of the quarrel between the children came to their knowledge. It was further established that there was no cooling off period as the gap was short and they were in the same state of mind and wanted to take revenge with the deceased. The quarrel between the children was lingering in their mind and tormented them mentally. Treating the time gap between the quarrel and the incident which resulted in the death of the deceased to be negligible, we conclude that the appellants had not committed the crime with any pre-meditation. It is very likely that the intervention of the deceased between the quarrel

of the children provoked the appellants to such an extent that they chose to take this extreme step. The entire incident happened within a very short span of time. The intention probably was to merely cause such bodily injuries.

40. The prosecution was not able to prove its case against the appellant no. 1 Vinod for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. No cogent evidence was produced by the prosecution to prove his involvement in commission of the crime. However, this fact has emerged on record that he was present at the spot and he gave fist blows to the other injured person. In view of this fact, we are of the opinion that his conviction under Section 302 read with Section 34 of the Indian Penal Code is not sustainable in the eyes of law and the benefit of doubt is to be given to the appellant No. 1. ***Accordingly, the appellant No. 1 Vinod is hereby acquitted of the charges levelled against him under Section 302/34 and Section 325 of the Indian Penal Code. However, the offence under Section 323/452 of the Indian Penal Code is upheld. The trial court has convicted appellant no. 1 Vinod for a period of 6 months for the offence punishable under Section 323 and for a period of 2 years for the offence punishable under Section 452. The appellant no. 1 Vinod has already undergone a period of 3 years and 2 months which is more than the sentence awarded by the trial court under Section 323/452 of the Indian Penal Code and upheld by this court. The appellant no. 1 Vinod is ordered to be released forthwith.***
41. Similarly, on perusal of the evidence in relation to the role assigned to the appellant No. 3 Manoj is concerned, we find that as per the

testimony of PW-1 and PW-2, appellant Manoj was carrying an iron rod in his hand and he started hitting PW-13 with the rod. But, PW-13 Pradip (injured witness) himself has not specifically named appellant No. 3 Manoj to be the person who gave iron rod blows to him. Except these three witnesses, no other evidence was produced by the prosecution which lends support to its case that the intention of appellant No. 3 Manoj was to eliminate the deceased. Due to lack of evidence against the *appellant No. 3 Manoj, he is hereby acquitted of the charges levelled against him under Section 302/34 of the Indian Penal Code. However, the offence under Section 323/325/452 of the Indian Penal Code is upheld. The trial court has convicted the appellant no. 3 Manoj for a period of 6 months for the offence punishable under Section 323, for a period of 1 year for the offence punishable under Section 325 and for a period of 2 years for the offence punishable under Section 452. Since the appellant no. 3 Manoj has already undergone a period of 6 years and 1 month which is much more than the sentence awarded by the trial court under Section 323/325/452 of the Indian Penal Code, the appellant No. 3 Manoj is ordered to be released forthwith.*

42. Jail Superintendent, Tihar Jail is directed that both the appellants i.e. the appellant No. 1 Vinod Kumar and the appellant No. 3 Manoj be released forthwith if not wanted in any other case.
43. Now the question which remains before the court is whether the appellant no. 2 Jitender and appellant no. 4 Hari Chand are guilty of the offence punishable under Section 302 read with Section 34 and Section 323/325/452 of the Indian Penal Code.

44. Learned counsel for the appellants vehemently argued that the case of all the appellants specifically appellant no. 2 Jitender and appellant no. 4 Hari Chand would fall under Section 304 of the Indian Penal Code and not under Section 302 of the Indian Penal Code. The following circumstances have emerged on the basis of which it is to be decided whether the case falls under Section 302 or Section 304 Part I or Part II of the Indian Penal Code:

- a) There was no previous enmity between the families prior to the incident.
- b) That there was a quarrel between the children of the appellant No. 3 and the deceased in the evening of 20.08.2010, although the exact time is not known to us. At that time, the matter got pacified due to the intervention of the deceased.
- c) At around 10 PM, all the appellants entered the house of the deceased where the altercation took place between the appellants and the deceased along with his family members.
- d) One Kamal Kashyap (since expired), who was accompanying the appellants also received head injuries.
- e) The First Information Report was registered on 23.08.2010 under Section 452/323/34 of the Indian Penal Code.
- f) The death of the deceased occurred on 27.08.2010 i.e. 7 days after the date of incident.
- g) Injury no. 2 was due to an operative procedure.
- h) The recovery of the weapon of offence i.e. iron rod was made 15 days after the date of incident from an open area with no independent witness present on the spot.

45. Now, the sole question which we need to ponder upon in this appeal is limited to the propriety of the conviction and sentence awarded to the appellant No. 2 Jitender and appellant No. 4 Hari Chand for the offence under Section 302 of the Indian Penal Code. At the outset, it is relevant to notice Section 300 of the Indian Penal Code which is as under:

Section 300: Murder

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

2ndly

If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

3rdly

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-

4thly

If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

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

The above exception is subject to the following provisos:

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

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

***Thirdly-** That the provocations not given by anything done in the lawful exercise of the right of private defence.*

***Explanation-** Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.*

46. The aforesaid Section provides five exceptions wherein the culpable homicide would not amount to murder. Under **Exception I**, an injury resulting into death of the person would not be considered as murder when the offender has lost his self-control due to the grave and sudden provocation. It is also important to mention at this stage that the provision itself makes it clear by the Explanation provided, what would constitute grave and sudden provocation, which would be enough to prevent the offence from amounting to murder, is a question of fact. Provocation is an external stimulus which can result into loss of self-control. Such provocation and the resulting reaction need to be measured from the surrounding circumstances. Here the provocation must be such as will upset not merely a hasty, hot tempered and hypersensitive person but also a person with calm nature and ordinary sense. What is sought by the law by creating the exception is that to

take into consideration situations wherein a person with normal behaviour reacting to the given incidence of provocation. Thus, the protection extended by the exception is to the normal person acting normally in the given situation.

47. In ***R v. Duffy*** reported in ***1949 (1) All ER 932***, the English Court of Appeal, put the common law defence of provocation as under:

“Provocation is some act, or series of acts, done by the dead man to the Accused, which would cause in any reasonable person, and actually causes in the Accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.”

48. In ***K.M. Nanavati v. State of Maharashtra, 1962 (1) MLJ (Crl.) 531 (SC)***, the leading case on provocation, the Hon'ble Supreme Court read into the Exception the following propositions:

"1. The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society to which the accused belongs, and placed in the situation in which the accused was placed, would be so provoked as to lose his self-control.

2. In India, words gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the First Exception to Section 300 of the Indian Penal Code.

3. The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.

4. The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise

giving room and scope for premeditation and calculation."

49. In *State of Andhra Pradesh v. Rayavarapu Punnayya and Anr*, reported in (1976) 4 SCC 382, where the Hon'ble Supreme Court stated the factors which are to be considered by the court before deciding whether a case falls under Section 299 or Section 300 of the Indian Penal Code.

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

punishable under the first part of Section 304, of the Penal Code.”

50. In ***Rampal Singh v. State of U.P.*** reported in (2012) 8 SCC 289, the Hon’ble Supreme Court while altering the conviction from Section 302 of the Indian Penal Code to Section 304 Part-I of the Indian Penal Code observed as under:

“20. In order to hold whether an offence would fall under Section 302 or Section 304 Part I of the Code, the courts have to be extremely cautious in examining whether the same falls under Section 300 of the Code which states whether a culpable homicide is murder, or would it fall under its five exceptions which lay down when culpable homicide is not murder.

21. Sections 302 and 304 of the Code are primarily the punitive provisions. They declare what punishment a person would be liable to be awarded, if he commits either of the offences. An analysis of these two Sections must be done having regard to what is common to the offences and what is special to each one of them. The offence of culpable homicide is thus an offence which may or may not be murder. If it is murder, then it is culpable homicide amounting to murder, for which punishment is prescribed in Section 302 of the Code. Section 304 deals with cases not covered by Section 302 and it divides the offence into two distinct classes, that is (a) those in which the death is intentionally caused; and (b) those in which the death is caused unintentionally but knowingly. In the former case the sentence of imprisonment is compulsory and the maximum sentence admissible is imprisonment for life. In the latter case, imprisonment is only optional, and the maximum sentence only extends to imprisonment for 10 years. The first clause of this section includes only those cases in which offence is really 'murder', but mitigated by the presence of circumstances recognized in the exceptions to

Section 300 of the Code, the second clause deals only with the cases in which the accused has no intention of injuring anyone in particular.

*25. Classification of an offence into either Part of Section 304 is primarily a matter of fact. This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of pre-meditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be punished. This can also be decided from another point of view, i.e., by applying the 'principle of exclusion'. This principle could be applied while taking recourse to a two-stage process of determination. **Firstly**, the Court may record a preliminary finding if the accused had committed an offence punishable under the substantive provisions of Section 302 of the Code, that is, 'culpable homicide amounting to murder'. Then **secondly**, it may proceed to examine if the case fell in any of the exceptions detailed in Section 300 of the Code. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law. We are stating such a proposition to indicate that such a determination would better serve the ends of criminal justice delivery. This is more so because presumption of innocence and right to fair trial are the essence of our criminal jurisprudence and are accepted as rights of the accused.*

30. ...It is clear that the Appellant had not committed the crime with any pre-meditation. There was no intention on his part to kill. The entire incident happened within a very short span of time. It is true that there was knowledge on the part of the Appellant that if he used the

rifle and shot at the deceased, the possibility of the deceased being killed could not be ruled out. He was a person from the armed forces and was fully aware of consequences of use of fire arms. But this is not necessarily conclusive of the fact that there was intention on the part of the Appellant to kill his brother, the deceased. The intention probably was to merely cause bodily injury. However, the Court cannot overlook the fact that the Appellant had the knowledge that such injury could result in death of the deceased.”

51. Now, to ascertain whether a case under Part I or Part II is made out, it would be necessary to look into the ingredients of the relevant Section 304 of the Indian Penal Code reads:

Section 304: Punishment for culpable homicide not amounting to murder

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

OR

with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

52. Thus, essential the ingredients for bringing an act under Part I of the Section 304 of the Indian Penal Code are as under:
- i) The Act is done with the intention of causing death, or
 - ii) The Act is done with the intention of causing such bodily injury as is likely to cause death,

53. Similarly, the essential ingredients for bringing an act under Part II of the said section are as under:
- i) The Act is done with the knowledge that it is likely to cause death.
 - ii) There is no intention to cause death, or cause such bodily injury as is likely to cause death.
54. Therefore, applying the above discussed settled position of law to the facts of the present case, we are of the view that to convict the appellants under Section 300 of the Indian Penal Code it is necessary to prove, first that there was an intention of causing bodily injury; and that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. As discussed by us in detail in the preceding paragraphs, we are of the considered view that this would bring the offence within the ambit of exception 1 of Section 300 Indian Penal Code and hence provisions of Section 304 of the Indian Penal Code would be attracted as the appellants had caused such bodily injuries to the deceased which, to their knowledge, were likely to cause death.
55. Now we can examine the applicability of Section 304 Part I or Part II of the Indian Penal Code. The fact that there was no previous enmity between the families, the appellants made no preparation to procure the weapons of offence, that Kamal Kashyap (since expired), friend of the appellant no. 3 also received head injuries and that the death of the deceased took place 7 days after the date of the incident points towards their intention which was not to cause death of the deceased but only to cause bodily injuries so as to settle scores between them. Furthermore, the FIR reflects that initially Section 307 was not added

to the FIR. It proves that the police also did not find it a case of attempt to murder which is covered under Section 307 of the Indian Penal Code. Moreover, the fact that there was no sufficient cooling period between the time of the quarrel of the children and the said incident which caused the death of the deceased fails in proving beyond reasonable doubt, the intention of the appellants to cause death of the deceased. Undoubtedly, a reasonable person with any stretch of imagination can come to the conclusion that under the facts and circumstance of the present case the intention was to cause bodily injuries only. Henceforth, in our opinion, the injury caused to the deceased only proves the intention of the appellants in causing injuries to the deceased.

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

“...Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid

the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable Under Section 302, are not converted into offences punishable Under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable Under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention...”

57. In another case of **Jai Prakash v. State (Delhi Administration)**, reported in **1991 (2) SCC 32**, the Apex Court held as under:

“...when a person commits an act, he is presumed to expect the natural consequences. But from the mere fact that the injury caused is sufficient in the ordinary course of nature to cause death, it does not necessarily follow that the offender intended to cause the injury of that nature. However, the presumption arises that he intended

to cause that particular injury. In such a situation the court has to ascertain whether the facts and circumstances in the case are such as to rebut the presumption and such facts and circumstances cannot be laid down in an abstract rule and they will vary from case to case. However, as pointed out in Virsa Singh case the weapon used, the degree of force released in wielding it, the antecedent relations of the parties, the manner in which the attack was made that is to say sudden or premeditated, whether the injury was inflicted during a struggle or grappling, the number of injuries inflicted and their nature and the part of the body where the injury was inflicted are some of the relevant factors. These and other factors which may arise in a case have to be considered and if on a totality of these circumstances a doubt arises as to the nature of the offence, the benefit has to go to the accused...”

58. Applying the above settled position of law to the peculiar facts of the present case, it is an established fact that the appellant No. 4 Hari Chand gave the fatal blow to the deceased and the appellant No. 2 Jitender assisted Hari Chand in the commission of the crime. Though, their intention as discussed above in detail was to cause bodily injury to the deceased, we hold that the appellants are guilty of the offence punishable under Section 304 Part I of the Indian Penal Code instead of Section 302 of the Indian Penal Code.
59. For the purpose of sentencing, it would be pertinent to discuss the role of the appellant No. 2 Jitender and the appellant No. 4 Hari Chand in the commission of the said offence.
60. Accordingly, the conviction of *the appellant No. 2 Jitender and the appellant No. 4 Hari Chand should be altered from Section 302 of the Indian Penal Code to one under Section 304 Part I of the*

Indian Penal Code thereof. We have been informed by the learned counsel for the appellants that both the appellants have already undergone a period of 6 years and 1 month. In view of the statement made by learned Counsel for the appellants, *we modify the sentence awarded to the appellants and sentence them to undergo rigorous imprisonment for a period of seven years. The fine imposed upon the appellants and the default sentence awarded to them and the sentence awarded to them under Section 323/325/452 of the Indian Penal Code shall remain unaltered. The appellants are directed to undergo the remaining period of sentence.*

61. The appeal is partly allowed in terms of paras No. 40, 41, 42 and 60 of this judgment.
62. Copy of this judgment be sent to the Jail Superintendent, Tihar Jail.
63. Trial Court record be returned.

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64. In light of the above judgment, the present application is rendered infructuous.

SANGITA DHINGRA SEHGAL, J

G. S. SISTANI, J

MAY 30, 2016 / gr//