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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL. A. 1528/2014 & CRL. M. (BAIL) 318/2016**

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Judgment dated: 27th April, 2016

ABHIJEET RAJ

..... Appellant

Through: Mr. Jaspreet Singh Rai, Mr. Ishan Rohan and
Mr. Amit Sharma, Advocates

Versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Through: Ms. Anita Abraham, APP for State with
Inspector C.P. Bhardwaj and ASI Shyam
Sunder, PS – Mukherjee Nagar

CORAM:

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J. (ORAL)

CRL. A. 1528/2014

1. Although an application seeking regular bail during the pendency of the appeal is listed, both the parties urged that they are ready with the matter and instead of hearing the bail application appeal be heard finally. On request of both the parties the appeal is set down for final hearing.
2. The present appeal has been filed under Section 374 of the Code of Criminal Procedure against the impugned Judgment dated 05.07.2014 and Order on Sentence dated 24.07.2014 passed by the Additional Sessions Judge, Rohini Courts in Sessions Case No. 91/2013, by virtue of which the appellant has been convicted and sentenced to

undergo rigorous imprisonment for life and to pay a fine of Rs.1,00,000/- and in default of payment of fine to further undergo simple imprisonment for a period of six months for the offence punishable under Section 302 of the Indian Penal Code.

3. The brief facts of the case as noted by the trial court are as under:

“(2) During the intervening night of 26-27.02.2012 at about 12:45 AM (midnight) DD No. 7A was received at Police Station Mukherjee Nagar regarding stabbing of one boy on which SI Hemant along with PSI Pawan Kumar reached the spot i.e. near Hanuman Mandir, Vijay Nagar at around 1:00 AM where on the one side of the road they found blood scattered, two coins of one and two rupees smeared with blood, half blade and a pair of chappals. At about 1:45 AM SI Hemant DD No.12A was received from Hindu Rao Hospital regarding any injured being brought dead, on which PSI Pawan was left for preserving the spot of the incident whereas SI Hemant reached Hindu Rao Hospital where and obtained the MLC of injured Ashish who was declared brought dead by the doctors and the deceased had already been shifted to the mortuary by that time. Thereafter SI Hemant reached the mortuary where he inspected the body and found visible injuries on the left eye of the injured. SI Hemant then met one Rohit Negi in the hospital and recorded his statement.

(3) Rohit Negi informed the Investigating officer that he along with his friend Ashish Kumar Sharma went to the house of their common friend Vijay at Patel Chest, Christian Colony, North Campus but Vijay was not found present there and other boys namely Abhijeet, Ranjeet and Sagar were present at the room of Vijay where they were consuming liquor and they were joined by Ashish (deceased) and Rohit Negi. During the drinking session there was a hot discussion between Abhijeet (accused) and Ashish Kumar Sharma (deceased) on the the quality

of cars but the matter was pacified by their friends. Thereafter Ashish and Abhijeet put their hands on each other and went away from the gali. Rohit Negi had some suspicions on which he followed both of them but they could not be traced on which he (Rohit Negi) again returned back to the outside of the colony where Nitin met him and informed that Abhijeet caused the death of Ashish. Thereafter Rohit Negi ran towards the left side of nala where he found Ashish in injured condition and blood was oozing out from the backside of his head and from his eyes, on which he along with Bharat and Nitin put Ashish in the Ascent Car and took him to Hindu Rao Hospital where he was declared dead by the doctors.

(4) On the basis of statement of Rohit Negi the present case was registered. During investigations the accused Abhijeet Raj was arrested from his native village at Motihari, Bihar and was interrogated wherein he disclosed his involvement in the present case. On 07.03.2012 the accused Abhijeet Raj led the police party to Agra at Tundla Road and then led them to fields near Kalpana Hotel, which is situated on the main highway i.e. NH2 and from the corner of the wheat field, the accused got recovered a knife which he had used in the commission of present offence. After completion of investigations charge sheet was filed against the accused Abhijeet Raj.

(5) Charge under Section 302 Indian Penal Code has been settled against the accused Abhijeet Raj to which he pleaded not guilty and claimed trial.”

4. To bring home the guilt of the appellant/accused and to prove its case, the prosecution examined as many as 31 witnesses in all. Thereafter, the statement of the accused was recorded under Section 313 of the Code of Criminal Procedure wherein he denied all the incriminating

evidence and his involvement in the commission of the said offence and claimed to have been falsely implicated in the case. The accused admitted his presence at the spot but denied the factum of a quarrel between him and the deceased.

5. During the course of arguments Mr. Jaspreet Singh Rai, learned counsel appearing on behalf of the appellant concedes that he does not challenge the judgment of conviction on merits but only challenges 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 II of the Indian Penal Code.
6. The counsel for the appellant drew the attention of this court to Exception 4 of Section 300 of the Indian Penal Code and argued that it was squarely covered under the exception of Section 300 which reads as under:

"300. Murder-

Exception 1. - xxxx xxxx xxxx xxxx

Exception 2. - xxxx xxxx xxxx xxxx

Exception 3. - xxxx xxxx xxxx xxxx

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

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

7. Learned counsel for the appellant argued that the unfortunate incident transpired without premeditation in a sudden fight and in the heat of the moment upon a sudden quarrel that erupted between the appellant and the deceased. He did not take undue advantage nor acted in a cruel or unusual manner.
8. 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 appellant for the offence punishable under Section 302 of the Indian Penal Code.
9. Learned Additional Public Prosecutor argued that the evidence produced on record clearly establishes the guilt of the appellant which is duly corroborated by the medical and forensic evidence. It was further clarified by the counsel that as per the postmortem report, the cause of death was due to shock and hemorrhage consequent to the injuries sustained by the deceased and Injury No. 15 was sufficient to cause death in the ordinary course of nature.
10. We have carefully examined the judgment, the testimonies of various witnesses and the documents placed on record along with the arguments advanced by the counsel for the parties.
11. As the learned counsel for the appellant has limited his arguments to assail the order on sentence, the question which arises before us is whether the conviction of the appellant under Section 302 of the Indian Penal Code is sustainable or whether the case of the appellant falls within the purview of Section 304 Part II of the Indian Penal Code as submitted by the counsel for the appellant.

12. In this case, on consideration of evidence and materials on record and after considering the arguments advanced, we have found that the following circumstances are relied upon by the prosecution to prove the guilt of the appellant:

1. *The circumstance of last seen of the appellant corroborated by the testimonies of PW16 Rohit Negi and PW20 Jai Mishra.*
2. *The subsequent conduct of the appellant in hurriedly fleeing away from Delhi by leaving his belongings in the room.*
3. *Weapon of offence used in commission of crime got recovered at the instance of the appellant.*
4. *Medical Evidence.*
5. *Forensic evidence establishing the spot and presence of human blood on the weapon of offence.*

13. Based on the testimonies of PW16 Rohit Negi; PW20 Jai Mishra; the circumstance no. 1 i.e. the presence of the appellant at the spot was proved. PW16 is the material witness in the present case who deposed as under:

“Ashish and Abhijeet put their hands on each other and went away from the gali. I was waiting for them but after 10 minutes I was having some suspicion and I followed both of them. I searched both of them but they could not be traced out then I again returned back to the outside of the colony and Nitin met me and he informed me that Abhijeet caused the death of Ashish (Abhijeet ne Ashish ko mar diya). I ran towards the left side towards the nala and I found Ashish in injured condition and blood was oozing out from the backside of his head and from his eyes. I took out the keys of the car from his pocket and brought his car at the said place near nala. I along with Bharat and Nitin put Ashish in the Car and took him to Hindu Rao Hospital but he was declared dead by the

doctors. I made a call to the brother of Ashish about the incident. Police also came at Hindu Rao Hospital. I also went to the police station Mukherjee Nagar with the car of Ashish.”

14. PW16 in his cross examination stated as under:

“I had my suspicions on Abhijeet because the manner in which they had quarrel prior to their leaving together it appeared doubtful that they could have gone together and more over both of them were drunk. I had only told the police in my statement that I had my doubts and suspicion on Abhijeet when he and Ashish were going together but did not tell them that both of them were drunk. I cannot tell the exact time when Abhijeet and Ashish were going. Vol. It was around 11-11:10 PM.”

15. PW20 Jai Mishra in his testimony deposed as under:

“I had told the police that I was at a little distance from Bharat and Nitin who were standing on the road in front of the gate of Christian Colony when I saw Abhijeet come to them with a blood stained knife in his hand and I saw him talking to Bharat and Nitin but what he was telling them I could not hear. I had seen Abhijeet with the knife in his hand which knife was blood stained and his hand also was having blood but I am not sure about his clothes, if they were of the blood stained.”

16. It is also worthy to mention here that the weapon used in the offence i.e. a knife was examined by Dr. C.B. Dabas, who also prepared a diagrammatic sketch of the weapon vide Ex.PW13/C. It records as under:

<i>“Length of the Blade</i>	<i>=</i>	<i>12.5 cm</i>
<i>Width of Blade of ‘A’</i>	<i>=</i>	<i>0.7 cm</i>
<i>Width of Blade of ‘B’</i>	<i>=</i>	<i>1.5 cm</i>

Thickness of Blade = 0.2 cm

17. As far as the medical evidence is concerned, PW13 Dr. Abhishek Pachauri proved the post mortem report of the deceased and testified as under:

“According to the postmortem report, Dr. C.B. Dabas gave his opinion that the cause of death in this case was due to shock and haemorrhage consequent to injuries, all the injuries except injury no. 1, 10 and 11 have been caused by sharp edged weapon and injury no. 1,10 and 11 have been caused by blunt force impact with a hard surface/ object. All the injuries were antemortem and recent, Injury no. 15 is individually sufficient to cause death in ordinary course of nature and time since death was approximately 13 to 15 hours.”

18. Furthermore, the other incriminating circumstances that guide us to the guilt of the appellant are that the subsequent conduct of the appellant in hurriedly fleeing away from Delhi by leaving his belongings in the room of PW22 Khir Sagar Patel including his watch, mobile phone, Metro Card, SIM cards etc. provides corroboration and confirmation to the prosecution version pointing towards the guilt of the appellant. Except the appellant, no other person absconded from the spot and it is this conduct of the appellant which raises a finger of suspicion upon him and made him a suspect in the eyes of law coupled with the last seen evidence. There appears no possibility of any other person to commit the offence as there is a proximity between the last seen and the time of death of the deceased and it stands established

that the deceased was last seen alive in the company of the appellant who took the deceased with him towards gate of Christian Colony, Patel Chest by putting his arms around his neck and it was after 10-15 minutes that he was seen coming back from the same direction with his hands stained in blood and when other boys rushed towards the said direction they found the deceased lying smeared in blood. Furthermore, the appellant has failed to give any explanation in his statement under Section 313 of the Code of Criminal Procedure that when he parted the company of the deceased. All these circumstances clearly and cogently form a chain which points towards the guilt of the appellant herein.

19. The next question for consideration is whether the evidence brought on record by the prosecution, establishes a case of “***murder***” against the appellant or in the alternative a case of “***culpable homicide not amounting to murder***”?
20. Both the said offences involve killing of a person. “***Murder***” is an aggravated form of “***culpable homicide***”. Section 299 of the Indian Penal Code defines the offence of culpable homicide and Section 300 deals with murder. Section 299 explains “***culpable homicide***” and sets out the circumstances when culpable homicide amounts to murder and when it does not amount to murder. As per Section 300, existence of one of the four conditions, enumerated therein, which basically reflect four mental attitudes, turns “culpable homicide” into “murder”, while the three exceptions therein again reduce the offence of “murder” to “culpable homicide not amounting to murder”. The distinction between “murder” and “culpable homicide not amounting to murder”

is very thin and in fact has always been a vexed question. Therefore, the question posed has to be examined carefully in the light of the broad principles laid down in the judicial pronouncements.

21. In the leading case of *State of Andhra Pradesh Vs. Ravavarapu Punnayya and Anr. AIR 1977 SC 45* their Lordships of the Hon'ble Supreme Court said that in the scheme of the Penal Code, "**culpable homicide**" is genus and "**murder**" is specie. All "murders" are "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder" is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognizes three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as "culpable homicide of the second degree". This is punishable under the 1st part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304 of the Indian Penal Code.
22. It was also observed that the safest way to approach the problem and appreciate the points of distinction between the two offences is to keep in focus the key words used in the various clauses of Sections 299 and 300 of the Indian Penal Code. Analysing the two Sections threadbare, their Lordships in State of Andhra Pradesh

(supra) said 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 the case, it will be convenient to approach the problem in three stages. 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 of the Indian Penal Code. If the answer to this question is, prima facie, found in the affirmative, the stage for considering the operation of Section 300 of the Indian 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 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 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 Indian Penal Code. However, the Court observed that these were only broad principles and if applied, would facilitate the task of the Court but in some cases the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to

give a separate treatment to the matters involved in the second and third stages.

23. There is no gain saying that the onus lies on the prosecution to prove the ingredients mentioned in Section 300 of the Indian Penal Code and bring the case under any one of the four clauses of the said provision, namely, 'firstly' to 'fourthly', to sustain the charge of murder. If it fails to do so, the charge of murder would not be made out and the case may be one of "culpable homicide not amounting to murder" as described under Section 299 of the Indian Penal Code.
24. At this stage, it is relevant to notice Section 300 of the Indian Penal Code which reads 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-

Secondly-

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

Thirdly-

If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

Fourthly-

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

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

sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

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

25. The aforesaid Section provides five such exceptions wherein the culpable homicide would not amount to murder. Under ***Exception 4***, death of a person would not be considered murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender has taken undue advantage or acted in a cruel or unusual manner. The ***Explanation*** provided makes it clear that it is immaterial as to which party offers provocation or commits the first assault.
26. It is contended by the learned counsel for the appellant that there was no intention on the part of the appellant to cause death of the deceased and, hence, attracts the provisions of Section 304 Part II of the Indian Penal Code which deals with culpable homicide not amounting to murder. It is contended that the quarrel took place on the spur of the moment and the prosecution has failed to prove any prior enmity between them. The counsel further contended that the unfortunate incident took place in the heat of the moment without the appellant having taken undue advantage or acting in a cruel or unusual manner and therefore, intention to cause death cannot be attributed to the appellant. Hence, the act of the appellant will not fall under Section 302 of the Indian Penal Code but under Section 304 Part II. In light of these contentions, it is necessary to look into the ingredients of

the relevant provision. Section 304 of the Indian Penal Code reads as under:

"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."

27. In ***Sukhbir Singh v. State of Haryana: (2002) 1 SCR 1152***, wherein two fatal blows were inflicted by the appellant therein by a bhala on the upper right portion of chest of the deceased, the Hon'ble Apex Court opined as under:

"19. The High Court has also found that the occurrence had taken place upon a sudden quarrel but as the appellant was found to have acted in a cruel and unusual manner, he was not given, the benefit of such exception. For holding him to have acted in a cruel and unusual manner, the High Court relied upon the number of injuries and their location on the body of the deceased. In the absence of the existence of common object, the appellant cannot be held responsible for the other injuries caused to the person of the deceased. He is proved to have inflicted two blows on the person of the deceased which were sufficient in the ordinary course of nature to cause his death. The infliction of the injuries and their nature proves the intention of the appellant but

causing of such two injuries cannot be termed to be either in a cruel or unusual manner. All fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of not availing the benefit of Exception 4 of Section 300 IPC. After the injuries were inflicted and the injured had fallen down, the appellant is not shown to have inflicted any other injury upon his person when he was in a helpless position. It is proved that in the heat of passion upon a sudden quarrel followed by a fight, the accused who was armed with bhala caused injuries at random and thus did not act in a cruel or unusual manner.”

28. In ***Sandhya Jadhav v. State of Maharashtra*** reported in **2006 Cri LJ 2111**, the Hon'ble Supreme Court came to the conclusion that the Courts are bound to consider a large number of factors for arriving at an opinion as to whether the fight was sudden or not and/or whether the accused has taken undue advantage of the situation in the following words:

“9. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation.....

.... The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a

fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed, to be sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage."

29. In the case decided by this Court in *Crl. A. No. 134/2009* titled as *Jagtar Singh @ Jagga @ Ganja Vs. State of Delhi*, there were two injuries on the neck and two on the chest, of the deceased, caused by a sharp edged weapon. There were other minor injuries and abrasions; in all there were nine injuries. According to the doctor who conducted the post mortem of the deceased, the shock caused as a result of the injuries to the neck and chest was sufficient to cause death in the ordinary course of nature. The surrounding circumstances in the case pointed to some previous quarrel between the deceased and the appellant; the latter was agitated and confronted the deceased in the first part of the incident; on the day of occurrence. It was held by this Court that though the appellant inflicted several blows some of which were fatal, it is clear that he did not set out with a pre-mediated intention to kill the deceased. The facts clearly established an offence under Section 304 Part I of the Indian Penal Code in which intention was to cause such bodily

injuries as would have resulted in death in the ordinary course of nature.

30. However, upon anxious consideration of the matter we are persuaded to accept the alternative limb of submission advanced by the learned counsel for the appellant that the present case would fall within the ambit of Section 304 Part I of the Indian Penal Code.
31. It is in evidence that the appellant met the deceased for the first time on 26.02.2012 and there is no evidence to establish the motive of the appellant to commit the above said crime. The unfortunate incident seems to have erupted at the spur of the moment. There were heated arguments on the performance and quality of the car exchanged between the two after consuming liquor and the unfortunate incident took place in the heat of passion upon a sudden quarrel without any premeditation. The appellant did not take undue advantage or act in a cruel or unusual manner and in a fit of rage during the sudden quarrel, the appellant attacked the deceased.
32. Applying the broad guidelines laid down by the Hon'ble Supreme Court and this court in the afore-mentioned cases, we are of the considered view that the evidence adduced by the prosecution falls short of bringing the case within the ambit of Section 300 of the Indian Penal Code and the offence committed by the appellant is covered by Section 304 Part I of the Indian Penal Code. It, thus, stands proved that unfortunate incident took place on account of sudden quarrel between the deceased and the appellant; there was no pre-mediation; no animus and motive to kill the deceased.

Therefore, having regard to the totality of the evidence on record, we have no hesitation in coming to the conclusion that the present case does not fall within the ambit of Section 300 of the Indian Penal Code. The aforesaid facts when analyzed in conjunction with the attending circumstances enwombing the present incident, strongly dispels the possibility that the appellant harboured an intention to kill the deceased.

33. Keeping in view the above, we are of the opinion that the conviction of the appellant should be altered from Section 302 to one under Section 304 Part I of the Indian Penal Code. We are being informed by the learned counsel for the appellant that the appellant has continuously been in jail for about 4 years and 6 months. In view of the statement made by learned Counsel for the appellant, we are of the opinion that the ends of justice would be met if we modify the sentence awarded to the appellant and sentence him to undergo rigorous imprisonment for a period of eight years. The fine imposed upon the appellant Abhijeet Raj and the default sentence awarded to him shall remain unaltered.
34. The appeal is partly allowed and orders of conviction and sentence are modified in the above terms.
35. Trial Court Record be returned.
36. Copy of this Judgment be sent to the Superintendent- Central Jail, Tihar for updating the jail record.

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37. In view of the order passed in the appeal, the present application is rendered infructuous.

G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

April 27, 2016
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