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

% *Date of Judgment: 17th March, 2017*

+ CRL.A. 755/2014

MOHAN SINGH @ BUNTY Appellant
Through Mr. R.M. Tufail with Mr. Anwar A.
Khan, Mr. Farooq Chaudhary, Mr.
Vishal Raj Sehhipal, Ms. Meenakshi
Joshi and Ms. Astha, Advocates

versus

STATE Respondent
Through Mr. Varun Goswami, APP

+ CRL.A. 1480/2014

BHAGWAN SAHAI @ CHINTU Appellant
Through Mr. Anup Kumar and Mrs. Neha
Jaiswal, Advocates

versus

STATE Respondent
Through Mr. Varun Goswami, APP

+ CRL.A. 762/2014

SANJAY DHANKAD @ NAKLI Appellant
Through Mr. R.M. Tufail with Mr. Anwar A.
Khan, Mr. Farooq Chaudhary, Mr.
Vishal Raj Sehhipal, Ms. Meenakshi
Joshi and Ms. Astha, Advocates

versus

STATE Respondent
Through Mr. Varun Goswami, APP

CORAM:

**HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MR. JUSTICE VINOD GOEL**

G.S.SISTANI, J. (ORAL)

1. All the three appeals have been heard together. Arguments have been addressed by the learned counsel for the parties in all the three appeals and the same are being disposed of by a common judgment.
2. All the three appeals, being Crl.A. Nos.755/2014, 1480/2014 and 762/2014 have been filed under Section 374 of the Code of Criminal Procedure and are directed against the judgment dated 07.05.2014 and order on sentence dated 20.05.2014 passed by the learned Additional Sessions Judge in Sessions Case No.51/2013, arising out of FIR No.440/2010 registered at Police Station Mukherjee Nagar. By virtue of the order of conviction, all the appellants were convicted under Section 302 of the Indian Penal Code (hereinafter referred to as 'IPC') and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 1,00,000/- each, and in default of the payment of fine to further undergo simple imprisonment for a period of six months.
3. The case of the prosecution as noticed by the learned Trial Court are as under:

“(2) The case of the prosecution is that on 10.12.2010 at 3:34 PM vide DD No. 25A an information regarding a quarrel at Hudson Lane Complex, DDA Market was received in the Police Station Mukherjee Nagar. At 3:55PM DD No. 26A another information was received from PCR Call that a snatcher had been beaten by the police and he

was bleeding. Both the said DDs were entrusted to SI Inderpal who along with Ct. Parmod reached near the place of incident i.e. Hudson Lane, DDA Market where they came to know that the PCR Van had taken the injured to BJRM Hospital and there was no eye witness at the spot. Thereafter SI Inderpal along with Ct. Parmod reached BJRM Hospital where they found the injured Manoj @ Vicky admitted and the doctor declared him fit for statement. SI Inderpal then recorded the statement of Manoj @ Vicky wherein he informed the police that on 10.12.2010 at about 3:00 PM he along with his friends Kapil Dagar and Anis Raj were standing on the road of Hudson Lane Complex Market when Bhagwan Sahai @ Chintu and Sanjay @ Nakli came there and assaulted him with dandas on his forearms and legs after which the PCR shifted him to the BJRM Hospital. On the basis of the above statement of Manoj @ Vicky initially the FIR was registered under Section 325/34 IPC.”

4. After completion of investigation, charge sheet for the offence under Section 302 read with Section 34 IPC was filed. The prosecution examined 27 witnesses in all, besides the exhibits produced during the trial. The statements of the appellants were recorded under Section 313 of the Code of Criminal Procedure whereby all the appellants entered the plea of not guilty and claimed trial. No evidence was led by the appellants in their defence.
5. Mr. Tufail, learned counsel appearing on behalf of the appellants Mohan Singh @ Bunty and Sanjay Dhankad @ Nakli submits that the Trial Court has committed grave error by not taking into account the contradictions in the testimony of various witnesses and the judgment has resulted in gross miscarriage of justice. He contends that the order

of conviction is based on surmises and conjectures, prosecution has miserably failed to prove the chain of events and circumstances against each appellants. The Trial Court has exceeded its jurisdiction and has gone beyond the evidence placed on record. It is contended that there is no ocular testimony in the present case. Moreover, the prosecution has miserably failed to establish the necessary intent and knowledge as contemplated under Section 299 of the IPC on the part of the appellants to bring home their case under the ambit of Section 302 IPC. It is contended that the police had received information regarding a snatcher being beaten up by the public vide DD no.26-A which matter was not investigated by the police and the appellants have been falsely convicted under Section 302/34 IPC when no cogent evidence and only on the basis of shoddy inadmissible evidence. Counsel submit that the Trial Court has failed to appreciate that the statement of the deceased Manoj @ Vicky was recorded by the police on the alleged date of the incident itself, *i.e.*, 10.12.2010 at the hospital where he was declared fit in the statement Ex.PW-22/A. The deceased had himself categorically stated that he had received injuries on his arms and legs by a *danda* and in this statement, the appellant Mohan Singh had not been named, resultantly the conviction of the appellant is not sustainable. Counsel also contend that the Trial Court has relied strongly on the statements of PW5 Anis Raj, PW6 Kapil Dagar and PW21 Chandan Kumar, who were all interested witnesses, being friends of the deceased. The statements so made by these witnesses are full of improvements and their statements are highly exaggerated and have created a false version of assault which was not even made

by the deceased in his statement recorded on the fateful day. Counsel contend that if there had been any covert act by the appellants, the same would have been reflected in the statement of the deceased himself and there was no occasion for him to conceal the name of the appellant Mohan Singh when he was in his senses and declared fit for making the statement. Counsel contend that the Investigating Officer had sought for an opinion of the Doctor with regard to the nature of injuries only on 13.12.2010, *i.e.*, after three days of the incident and after two days, Section 308 IPC was added on 15.12.2010 which would show that the injuries suffered by the deceased on 10.12.2010 were simple in nature and apparently the Investigating Officer did not consider it necessary to seek the opinion of the Doctor. Counsel also contend that even as per the initial MLC, there was no injury on the head of the deceased and in the absence thereof, the appellants cannot be convicted under Section 302 IPC for the reason that he did not succumb to the injuries inflicted by the appellants.

6. Mr. Tufail contends that the previous animosity between the parties is a double-edged weapon; it may be a motive for commission of crime; it may also be a motive for false implication. In the instant case, the complainant party had a clear motive to falsely implicate the appellants herein, which aspect was not weighed meticulously and judicially by the learned Trial Court. Learned counsel contends that the Trial Court has failed to take into account the testimony of PW-18 Ajay Kumar that the deceased was a member of the Ajay S/o Bali Ram group and had animosity with the appellants and an FIR

No.186/2008, P.S. Model Town was registered against the deceased and others by the appellant. Learned counsel also contends that the Trial Court has ignored the fact that there are series of FIRs and complaints against the parties and thus, there was a strong motive to implicate the appellants in a false case.

7. Additionally, Mr. Tufail contends that the first information given to the PCR also reveals a quarrel on the road. Learned counsel contends that the Trial Court has failed to take into account that the deceased did not receive any head injury in the alleged incident of 10.12.2010, which is also evident from the fact that the deceased was in a fit state of mind on the date of the incident, *i.e.*, 10.12.2010. He was conscious and declared fit for making a statement. Learned counsel for the appellants have placed strong reliance on the testimony of PW-1 Dr. Neeraj Mishra, Senior Orthopaedics, BJRM Hospital. In his statement, he has deposed that he examined the patient who had a swelling on both forearm, both hands and left leg. X-ray was conducted which showed a fracture of bilateral ulna (both forearms) and fracture on middle phalanx right little finger from Orthopaedics and the nature of injury was grievous from Ortho side.
8. Counsel contends that the testimony of PW1 would show that when the deceased was admitted to the hospital, he did not suffer from any head injury and thus, the appellant could not have been convicted under Section 302 IPC. The MLC does not show any head injury or any bleeding from the head, neither the prosecution has been able to show that the deceased was at all treated for head injury or was given

any medicine for the same. Counsel further contends that the Trial Court has failed to take into account that in the present case, there is no weapon of offence, neither any alleged weapon of offence is recovered at the instance of the appellants. Neither the alleged *dandas* nor the cemented flower pot (*Gamla*) had been recovered. It is highly unusual considering the fact that the appellants had removed the deceased in a *rickshaw* to the police station. Counsel contend that another witnesses being PW7 B.S. Mehta, PW20 Raju Mathur and PW27 Rajender Singh, who were working at the alleged place of occurrence, had not supported the case of the prosecution and also failed to identify the appellants before Court. It is also the case of the appellants that PW4 Devraj and PW19 Rajiv Saini, who as per the version of the police voluntarily came forward to give the statement for the first time on 05.01.2011, which delay has been left unexplained by the prosecution.

9. In the alternate, the learned counsel also contends that the Trial Court has failed to take into account that the prosecution has failed to establish any prior motive, meeting of minds, conspiracy or intent between the appellants to murder the deceased. The Trial Court has failed to consider that there is no evidence on record that the appellants were armed with any weapon or even *dandas*. It is the case of the prosecution that after the fight or scuffle, *danda* was picked up from a nearby *thia of dhobi* and the cemented flower pot which was lying there. Thus, the theory of the prosecution with regard to the alleged murder would fail on this ground alone. Counsel also

contends that the Trial Court has lost sight of the fact that on account of the scuffle, both the parties sustained injuries, which is evident from the MLC of Bhagwan Sahai @ Chintu (Ex.PW17/A) of the same day and from the same hospital where the deceased was removed. Attention of the Court is also drawn to the rukka, which is Ex.PW2/B wherein the deceased had made a statement to the effect that Bhagwan Sahai @ Chintu and Sanjay Dhankad @ Nakli had beat him without any reason. Even at that time, the deceased himself did not allege that the intention of the appellants was to kill him.

10. The counsels submit that the Trial Court has failed to take into account the settled position of law that in this case, there was no pre-meditation, no alleged weapon of offence, no conspiracy, no meeting of minds. Counsels strongly urge that the Court should have taken into account that the incident pertains to 10.12.2010 and the deceased died after nine days of the incident i.e. on 18.12.2010. Thus, no case under Section 302 IPC would be made out.
11. At this stage, Mr. Tufail and Mr. Kumar, learned counsel for the appellants state, on instructions, that the appellants do not wish to contest the matter on merits, but submit that no case under Section 302 IPC is made out and at best the appellants could have been convicted under Section 304 Part II IPC and the appellants should be released on the period already undergone, which is more than six years each.
12. Per contra, Mr. Goswami, learned APP for the State submits that the prosecution has been able to prove its case beyond any shadow of doubt. He submits that the deceased in his statement has named the

appellants. The presence of the appellants at the spot of the incident is not denied and disputed; one of the appellants had sustained injury. His presence is thus, established without any doubt. Moreover, the factum of scuffle is duly proved by the presence of the eye witnesses, PW4 Devraj, PW5 Anis Raj, PW6 Kapil Dagar, PW19 Rajiv Saini and PW21 Chandan Kumar. PW1 Dr. Neeraj Mishra had recommended X-ray of the scalp. The mere fact that a flower pot was used would leave no room for doubt to show that the appellants intended to kill the deceased. Thus, there is no infirmity in the judgment and order on sentence of the Trial Court. Counsel contends that the intent of the appellants also stands established by the fact that they did not allow the bye-standers to come to the aid and rescue of the deceased.

13. We have heard learned counsel for the parties, considered their rival submissions, carefully examined the testimonies of the witnesses on record and the impugned judgment rendered by the Trial Court. In order to deal with the contentions of both the parties, it would be appropriate to examine the testimonies of material witnesses. The prosecution has relied upon PW4 Devraj, PW5 Anis Raj, PW6 Kapil Dagar, PW19 Rajiv Saini and PW21 Chandan Kumar as eye witnesses.
14. PW4 Devraj in his examination-in-chief deposed that on the fateful day of 10.12.2010, at about 3.00 PM, he alongwith his friend Rajeev Saini (PW19) was taking tea at Sainik Snacks, Hudson Lane, DDA Market where he saw that just in front of the Sainik Snacks shop, some hot talks were going on between some boys and thereafter he

saw that two boys started beating one boy with *dandas* and that boy was trying to save himself from the *danda* blows with his hands. PW4 further deposed that two other boys tried to rescue the said boy and the owner of Sainik Snacks and one more shopkeeper also tried to intervene. Meanwhile, one more associate of the assailants came there and joined the assailants and started giving beatings to the said boy. The witness has further deposed that the persons, who tried to intervene to rescue the said boy, were threatened by the said three assailants and *dandas* were shown to them as a result of which none came forward for the rescue of the boy and they all gave beatings to the said boy mercilessly. He has also deposed that the third boy, who had joined his associates later on, lifted a cemented flower pot (Gamla) having a plant in it and hit the same on the head of the said boy, who after receiving number of *danda* injuries was lying on the Road. According to him, someone informed the police and the said three boys (assailants) put the injured boy in a rickshaw and took him away, saying that he was trying to snatch their gold chain. The three assailants continued to give beatings to the injured boy even after putting him in the rickshaw.

15. PW19 Rajiv Saini, another eye witness to the occurrence deposed on similar lines as deposed by PW4 Dev Raj. PW19 deposed that on the fateful day of 10.12.2010 at about 3:00 PM he along with his friend Dev Raj (PW4) were present at the Sainik Snacks at Hudson Lane, DDA Market for taking tea etc. and when they were taking tea in front of the Sainik Snacks they heard noise of quarrel and there were two

boys who were abusing another boy (*since deceased*) and also gave beatings to him by the fist and leg blows. It was further deposed by PW19 that after some time one more person reached to the spot and gave beatings to the deceased and brought him to the *thia* of washer-man where one assailant (appellant herein) took out a *danda* from the roof of hut of the washer-man and gave *danda* blows to the deceased and another assailant (appellant herein) also took one *danda* from the same place and gave *danda* blows to the deceased. PW19 further deposed that the deceased was requesting assailants (the appellants herein) not to give *danda* blows to him but all the three appellants continued to give *danda* blows to the deceased. It was also deposed by PW19 that one appellant took a cemented pot (Gamla) from the outside of the nearby house and hit the same on the head of the deceased and the cemented pot (Gamla) had broken into pieces after which one of the friend of the deceased made a call to the Police. Thereafter, the aforesaid three appellants put the deceased in a rickshaw and took away the deceased on the pretext that the deceased had snatched their golden chain and they were taking him to the Police Station. It was further deposed by PW19 that after ten minutes a PCR van came there and police made inquiries from them and they told the aforesaid facts to them. PW19 also deposed that three friends of the deceased were also present there and he came to know their names as Kapil (PW6), Anis (PW5) and Chandan (PW21) and he also came to know the name of appellants as Nakli, Chintu and Bunty.

16. In this case, it is the case of the prosecution that at the time of scuffle, the deceased was accompanied by his friends namely PW5 Anis Raj, PW6 Kapil Dagar and PW21 Chandan Kumar. The testimonies of all the aforesaid witnesses remained consistent as to the presence of the appellants at the spot who corroborated the case of the prosecution on all material aspects. There are no discrepancies in their statements about the presence of the appellants on the fateful day. They all spoke in one voice that it was the appellants who were present at the spot and there were heated arguments which resulted in a scuffle and led to the unfortunate incident. All the witnesses deposed that on 10.12.2010 at about 3.00 PM, they alongwith the deceased Manoj reached DDA Market, Hudson Lane for tea. In the meantime, PW21 Chandan Kumar received a call on his mobile phone and he went towards the gate to attend the call in privacy and left PW5 Anis Raj, PW6 Kapil Dagar along with the deceased Manoj. As per the testimony of all the witnesses, the appellants Sanjay Dhankad and Bhagwan Sahai who were known to them came there and started an argument with the deceased and said "*Aaj tujhe nahi chhorenge, tu bahut dino se bach raha tha*". It was also deposed by all the witnesses that the appellant Bhagwan Sahai brought a *danda* from a nearby kiosk (*thia*) of a washer-man and gave *danda* blows to the deceased. The witnesses testified that the deceased tried to save his head by his hands and sustained injuries. The witnesses further deposed that in the meanwhile, the appellant Sanjay @ Nakli also brought a *danda* from the same place and gave *danda* blows to the deceased and threatened people who were around by saying "*Jo beech me aaya, uska bhi yahi*

haal karenge”. Thereafter, the appellant Mohan Singh @ Bunti came there and also joined other appellants and gave beatings to the deceased and said “*Aaj nahi chorenge ise*”. They have further deposed that thereafter, the appellant Mohan Singh picked up a cemented flower pot (Gamla) which was kept there and hit the same on the head of the deceased who was lying on the road. It was deposed by PW21 Chandan Kumar that he made a call to 100 number. PCR reached to the spot and interrogated the people found at the spot. It is noteworthy that the deceased was already removed to the BJRM hospital by the appellants before arrival of PCR officials at the spot.

17. Besides the above public witnesses, PW3 W/HC Ranjana proved copies of DD No. 25A and 26A which are Ex.PW3/A and Ex. PW3/B respectively. PW2 HC Arvind Kumar proved the computer generated copy of FIR which is Ex.PW2/A and his endorsement on rukka which is Ex.PW2/B. PW8 SI Prem Singh has proved PCR Forms, copy of which are Ex.PW8/A, Ex.PW8/B, Ex.PW8/C and Ex.PW8/D. PW26 SI Inderpal Singh was the initial Investigating Officer who recorded the statement of the deceased, which is Ex. PW22/A. The statement of the deceased was proved by PW22 Ct. Pramod Kumar and his endorsement on the statement is Ex. PW22/B. PW24 Ins. Rajesh Dahiya was the subsequent Investigating Officer of the present case who has proved the arrest memo of the appellant Mohan Singh which is Ex.PW24/D. PW12 SI Ranbir Singh proved the arrest memos of the appellants Bhagwan Sahai and Sanjay Dhankad, copies of which are Ex.PW12/A and Ex.PW12/C respectively.

18. In the present case, the prosecution has produced convincing evidence to establish the guilt of the appellants. It is on record that the incident took place at about 3:00 PM and PCR calls were made at 3:28 PM after which the injured were shifted to BJRM Hospital and the information was given to the local police and after treatment the statement of the deceased Manoj was recorded by SI Inderpal (PW26), the Rukka (Ex.PW22/A) was prepared at 7:45 PM and the FIR (Ex.PW2/A) was promptly registered at 8:05 PM as is evident from the copy of FIR (Ex.PW2/A) wherein the appellants have been specifically named particularly Sanjay Dhankad and Bhagwan Sahai. It is evident from the MLC (Ex.PW1/A) that on 10.12.2010 at 6:30 PM the deceased Manoj was declared fit for statement and thereafter the statement of the deceased was recorded by PW26 SI Inderpal Singh (initial Investigating Officer) which is Ex.PW22/A, which formed the basis of rukka (Ex.PW22/A) and FIR (Ex.PW2/A).
19. Before deciding the appeals in hand, we deem it appropriate to analyse the medical evidence in detail. In this regard testimonies of PW1 Dr. Neeraj Mishra and PW16 Dr. V. K. Jha assume importance. PW1 Dr. Neeraj Mishra, who has proved the MLC of the deceased in his examination-in-chief deposed that on 10.12.2010, the deceased was referred by the CMO to Ortho SR and Surgery SR where he examined the deceased. PW1 further deposed that the deceased was having swelling on both forearm, both hands and left leg, as a result X Ray of both forearms, both hands, bilateral foot and left leg was conducted and after going through the X Ray and physical examination of the

patient, as per the report given by Radiologist Dr. Shipra Rampal, it was observed by PW1 that the deceased had fracture of bilateral ulna (both forearms) and fracture middle phalanx right little finger from Orthopedics. PW1 opined that the nature of injury was grievous from Ortho side and the deceased was referred to SR Surgery for giving the final opinion. PW1 also proved his opinion dated 16.12.2010 on the MLC Ex.PW1/A. It is noteworthy to mention that a specific court question which was put to PW1 in his cross-examination with respect to the head injuries reads as under:

“Court Question: It is put to you that when you examined whole body of the patient, did you find any injury on the head of the patient, if yes, did you mention in the MLC?”

Answer: After going through the MLC, the witness replies that as per record, abrasions and bruises were present on the forehead, for which I referred the patient to Surgery SR to rule out head injury.”

20. On the nature and type of injury suffered by the deceased, we have already referred to the statement of Dr. Neeraj Mishra (PW1). However, to complete the medical evidence, we would like to refer to the post mortem report (Ex.PW16/A) which was proved by Dr. V. K. Jha (PW16), who had conducted the post mortem on the deceased on 19.12.2010 and had found the following injuries on the body of the deceased:

General examination:

- 1. Multiple healed abrasions on front of left leg, right leg, right medial malleolus, left arm and face, right face and right arm.*
- 2. Fracture deformity upper end left forearm.*

3. *Fracture deformity proximal phalanges of ring finger right hand.*

4. *Healed bruise on upper lip.*

On internal examination:

There was subscalp hemotoma on frontal region, fracture left frontal bone and fracture anterior cranial fossae and in stomach there was yellowish fluid was present.

21. After post-mortem examination, PW16 Dr. V. K. Jha opined the cause of death as shock and craniocerebral damage as a result of multiple fracture sustained and head injury subsequent to blunt force diverted upon head by other party and all the injuries were ante-mortem in nature .
22. PW16 Dr. V. K. Jha, the Autopsy Surgeon has not opined as to whether the injuries were sufficient to cause death in the ordinary course of nature. It is noteworthy to mention that PW16 in his cross-examination stated that he cannot give any definite opinion with regard to the age of the head injury i.e. subscalp haematoma on frontal region, fracture left frontal bone and fracture anterior cranial fossae.
23. The opinion of the Autopsy Surgeon is to be appreciated in the light of the circumstance that the death occurred nine days after the receipt of the injuries, and during this period the deceased had been operated upon in the Hospital. The aforesaid medical opinion, corroborates that the appellants did not act in a cruel manner, on the contrary, the appellants put the deceased in a *rickshaw* and took him to Police Station Mukherjee Nagar and in case their intention was to kill the deceased, they would not have taken the injured to the hospital when

he was alive and conscious, which is also evident from the fact that the statement of the deceased was recorded in the hospital the same day. The MLC did not show that there was any grievous injury which is evident upon reading the testimony of PW1 Dr. Neeraj Mishra, who did not even recommend X-ray, MRI or a Scan of the head. Materially, even the deceased in his statement recorded on the same day did not complain of any head injury and in case even not named the appellant Mohan Singh @ Buntty. There is, therefore, no escape from the conclusion that the prosecution had failed to prove beyond all manner of doubt that the injuries on the body of the deceased, was sufficient to cause death in the ordinary course of nature.

24. Chapter XVI of the Code deals with the offences affecting the human body. Section 299 defines '*culpable homicide*'. Section 300, on the other hand, defines '*murder*'. IPC recognises and categories culpable homicide into three categories. Section 299 which defines "culpable homicide." This offence consists in the doing of an act:

(a) with the intention of causing death; or

(b) with the intention of causing such bodily injury as is likely to cause death; or

(c) with the knowledge that the act is likely to cause death.

25. Knowledge and intention should not be confused. Section 299 in defining first two categories does not deal with the knowledge whereas it does in relation to the third category. Also, the import of the term 'likely by such act to cause death'. Here 'likely' would mean

probably and not possibly. When an intended injury is likely to cause death, the same would mean an injury which is sufficient in the ordinary course of nature to cause death and the death will be the most probable result.

26. Also, the first clause of Section 300 reproduces the first part of Section 299. Therefore, ordinarily if the case comes within Clause (a) of Section 299, it would amount to murder. However, if one of the special exceptions in Section 300 applies, the offence would be culpable homicide not amounting to murder. Several exceptions are carved out therefrom. Exceptions specified therein are also subject to certain exceptions as contained in the provisos appended thereto; one of them is Exception 4 which reads as under:

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

27. This brings us to the moot question whether the present case is one of deliberate or intentional killing resulting in the injuries, which would be a case of murder under Section 302, IPC; or, unintentional. Further, if it is a case of unintentional and not premeditated act, whether the appellants had requisite and required knowledge to invoke and punish the appellants for murder by applying the Clause Four, or

the appellants had committed a lesser offence, i.e. culpable homicide not amounting to murder or an offence of an even lower degree.

28. In the case of ***Virsa Singh v. State of Punjab*** reported in ***1958 Cri LJ 818***, it was held by the Hon'ble Supreme Court that the prosecution must prove the following facts before it can bring a case under Section 300 of IPC, which reads as under:

“First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; these are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.”

29. In ***Jai Prakash vs. State (Delhi Admn.)*** reported at ***(1991) 2 SCC 32***, it was elucidated by the Hon'ble Supreme Court that knowledge is bare awareness and not something as intention, for the latter requires something more than a mere foresight of the consequences namely, the purposeful doing of a thing to achieve a particular end. The relevant para 13 reads as under:

“13.....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..”

30. 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:

“....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".

(Emphasis Supplied)

31. In a recent judgment of this Court, *Shiv Kumar Vs. State (NCT) of Delhi* reported at **2014 (2) JCC 1282**, this court relied upon the view taken by the Hon'ble Supreme Court in *Mahesh Balmiki versus State of Madhya Pradesh, (2000) 1 SCC 310* wherein the requirements of Exception 4 to Section 300 IPC were discussed and reads as under:

"...The requirements of this exception are:

- (a) without premeditation in a sudden fight;*
- (b) in the heat of passion upon a sudden quarrel;*
- (c) the offender has not taken undue advantage;*
- and*
- (d) the offender has not acted in a cruel or unusual manner.*

Where these requirements are satisfied, culpable homicide would not be murder."

32. The present appeals are to be decided on the touchstone of the law laid down by the Hon'ble Supreme Court in the foregoing para. After analysing the evidence on record, it is evidently clear that the occurrence has the features of an incident in which the injuries are inflicted in a sudden fight without pre-meditation in the heat of passion upon a sudden quarrel within the contemplation of Exception 4 to Section 300 of IPC, which takes the case out of the purview of murder.
33. As defined in the Exception 4, there was no premeditation on the part of the appellants; the appellants were not armed with any weapon. There is no evidence that the appellants made special preparation for assaulting the deceased with the intent to kill him. There is no dispute that the appellants assaulted deceased in such a manner that the deceased suffered grievous injuries, but considering the weapon of offence in mind i.e. *danda*, which was picked up after the scuffle from a nearby *thia of dhobi* and the cemented flower pot which was lying there and the fact that the appellants did not act in a cruel or unusual manner, did not take undue advantage. The medical evidence further establishes that when the deceased Manoj was brought to BJRM Hospital and also when he was shifted to Sushruta Trauma Center, he was conscious and oriented. Furthermore, it may be noticed that the appellants had driven the deceased to the BJRM Hospital and did not run away. In case the appellants had any intention or desire to kill the deceased Manoj, and had intentionally beaten him, their conduct post the occurrence would have been different. The aforesaid facts when

analyzed in conjunction with the attending circumstances enwombing the present incident, strongly dispels the possibility that the appellants harboured an intention to kill the deceased. Therefore, the act of the appellants did not amount to murder; the nature of the offence committed would be culpable homicide not amounting to murder. Hence, the present case is squarely covered under Section 304 of IPC which reads as under:

“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.”

(Emphasis Supplied)

34. In the case of ***Jharmal and Others Vs. State of Haryana*** reported in ***1994 SCC (Crl.) 593***, wherein the Hon'ble Apex Court held that where the deceased sustained injuries on the head due to blow with an iron pipe and died after 17 days due to septicimia, the appellant could have been convicted only under Section 304 Part II of IPC.
35. Applying the law to the facts of the present case, we are persuaded to accept the alternative limb of submission advanced by the learned counsel for the appellants that the present case would fall within the

ambit of Section 304 Part II of IPC. The ends of justice would be met if we modify the sentence awarded to the appellants and sentence them to undergo rigorous imprisonment for a period of 7 years and 6 months.

36. Consequently, the appeals are allowed in part, the conviction and order on sentence recorded by the Trial Court is modified to the extent indicated hereinabove. The appeals stand disposed of. The fine imposed upon the appellants and the default sentence awarded to them shall remain unaltered.
37. The Trial Court record be sent back along with a copy of this judgment.
38. Copy of this judgment also be sent to the Superintendent-Central Jail, Tihar for updating the jail record.

G. S. SISTANI, J.

VINOD GOEL, J.

MARCH 17, 2017

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