

\$~R-2 & R-3

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

+ **CRL. A. 1193/2015 & Crl. M. (Bail). No. 680/2017**

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Date of Judgment: 5th June, 2017

BRIJ MOHAN @ BRIJESH

..... Appellant

Through: Mr. Dhan Mohan, Advocate with
Ms.Tanu, Mr. Sarthak Maggon and
Mr. Jitender, Advocates.

Versus

STATE (THE NCT OF DELHI)

..... Respondent

Through: Mr. Rajat Katyal, APP for the State
with SI Amit Kumar, PS Amar
Colony, Delhi.

+ **CRL. A. 1130/2015**

NISHA PANDEY

..... Appellant

Through: Mr. V.S. Chauhan, Advocate with Mr.
G.P. Singh, Advocate.

Versus

STATE OF NCT DELHI

..... Respondent

Through: Mr. Rajat Katyal, APP for the State
with SI Amit Kumar, PS Amar
Colony, Delhi.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. The present criminal appeal No. 1193/2015 has been filed under Section 374 of the Code of Criminal Procedure by the appellant Brij Mohan against the judgment dated 11.09.2015 by which the appellant has been convicted under Section 302/201/120-B of the Indian Penal Code (hereinafter referred to as 'IPC') and sentenced in the following manner:
 - (a) For the offence punishable under Section 302 of IPC, the appellant Brij Mohan was sentenced to imprisonment for life and a fine of Rs.50,000/-. In default of payment of fine, simple imprisonment for a period of two years;
 - (b) For the offence punishable under Section 201 of IPC, the appellant Brij Mohan is sentenced to rigorous imprisonment for a period of five years and a fine of Rs.25,000/-. In default of payment of fine, simple imprisonment for a period of six months; and
 - (c) For the offence punishable under Section 120B of the IPC, the appellant Brij Mohan is sentenced to rigorous imprisonment for a period of five years and a fine of Rs.25,000/-. In default of payment of fine, simple imprisonment for a period of six months.
2. The criminal appeal No. 1130/2015 has been filed by the appellant Nisha Pandey assailing the common judgment dated 11.09.2015 by which the appellant Nisha Pandey has been convicted for the offence

punishable under Section 201/120-B/404 of IPC and sentenced in the following manner:

(a) For the offence punishable under Section 201 of IPC, the appellant Nisha Pandey is sentenced to rigorous imprisonment for a period of five years and a fine of Rs.25,000/-. In default of payment of fine, simple imprisonment for a period of six months;

(b) For the offence punishable under Section 120B of IPC, the appellant Nisha Pandey is sentenced to rigorous imprisonment for a period of five years and a fine of Rs.25,000/-. In default of payment of fine, simple imprisonment for a period of six months; and

(c) For the offence punishable under Section 404 of the IPC, Nisha Pandey is sentenced to a rigorous imprisonment for a period of two years and a fine of Rs.15,000/-. In default of payment of fine, simple imprisonment for a period of three years.

3. Since both the appeals arise out of the common judgment and order on sentence, the appeal filed by the appellant Nisha Pandey pending before the Single Judge has been called and listed for hearing with the consent of the counsel for the parties.
4. The case of the prosecution as noticed by the trial Court is that the appellant Brij Mohan was romantically involved with the appellant Nisha Pandey. At the same time, the appellant Nisha Pandey had a relationship with Joginder Singh. The appellant Brij Mohan could not tolerate this fact. The appellant Brij Mohan along with the appellant Nisha Pandey planned to eliminate Joginder Singh. Both decided to lure Joginder Singh to a Guest House of Narmada Valley Development Authority (NVDA) of the Government of Madhya

Pradesh operating from premises No. 28, Ring Road, Lajpat Nagar, Part-IV, New Delhi. The appellant Nisha Pandey called Joginder Singh to the said guest house in the evening of 05.02.2008 to meet her along with the appellant Brij Mohan. Joginder Singh and the appellant Brij Mohan reached the NVDA Guest House but the appellant Nisha Pandey did not reach, as pre-planned. Joginder Singh kept asking the appellant Nisha Pandey when she would reach and she kept on telling him that she would be reaching in a short while. In the mean time, the appellant Brij Mohan made Joginder Singh consume excessive amount of alcohol. Joginder Singh became drunk. The appellant Brij Mohan attacked him with a knife and an iron rod which he had brought with him, causing his death. In order to remove any trace of the offence, the appellant Brij Mohan sprinkled the remaining alcohol on the bed and mattresses and set the room on fire and left the guest house with the personal belongings of Joginder Singh.

5. The manner in which the crime was detected and investigated stands detailed in the police report filed under Section 173 (2) of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.'). In the intervening night of 5/6.02.2008, a PCR call recorded vide DD No. 28A was received in police station (PS), Amar Colony reporting a fire breaking out in premises No. 28, Ring Road, Lajpat Nagar, Part-IV, New Delhi i.e. the NVDA Guest House. The call was attended by SI K.C. Kaushik and Const. Rajesh. Subsequently, Inspector Virender Singh, SI Pramod Gupta, Const. Balraj, Const. Sirmohar and the SHO of PS Amar Colony also proceeded to the place of the incident vide DD No. 29A. By that time fire brigade officials had already reached. It was found that the fire had broken out in room No. 5 of the said

guest house. After the fire was extinguished, a dead burnt body of a male was found lying on the bed of room No. 5. Inspection of the room revealed an empty broken half bottle of Aristocrat Premium Whiskey lying on the bed. Mattresses, blankets and bed sheets were also burnt and lying on the body of the deceased.

6. To bring home the guilt of the appellants, the prosecution examined 43 witnesses in all. Statements of the appellants were recorded under Section 313 of Cr.P.C. wherein they pleaded false implication. The appellant Brij Mohan did not wish to lead any evidence in his defence. The appellant Nisha Pandey had examined her sister as DW-1.
7. Learned counsel for both the appellants have strongly urged before this court that the trial Court has based the judgment of conviction on surmises, conjectures and improbabilities.
8. Mr. Dhan Mohan, learned counsel appearing for the appellant Brij Mohan has strongly urged before this Court that the appellant has been falsely implicated. The evidence on record show that PW-1, the cousin brother of the deceased, was working as a watch-man at the guest-house, PW-2, the brother of the deceased, was working as a waiter at the guest-house and PW-14, who was working as a cook at the guest-house and belong to the same village and all of whom were present on the day of the incident.
9. Learned counsel seeks to urge that knowing that close family members of the deceased were working at the guest house; it would be highly improbable to plan a murder of the deceased at the said guest house. Additionally, it is contended that there was no weapon of offence. Neither the appellant was seen entering the guest house with a knife or with an iron rod.

10. Mr. V.S. Chauhan, learned counsel for the appellant Nisha Pandey submits that in the entire impugned judgment the only role ascribed to the appellant Nisha Pandey finds mention in para 195 and 196 of the judgment. Even assuming that the mobile phone was recovered at her instance from PW-16, the proprietor of M/s. Mithila Communication cannot be a ground to convict her for the offence punishable under Section 201 of IPC and Section 120-B of IPC.
11. Counsel for the appellant Nisha Pandey submits that Nisha Pandey stands acquitted for the offence punishable under Section 302 read with Section 120-B of IPC as there was no meeting of minds. Nisha Pandey did not visit the place of occurrence. Neither any material recovery was made from her and the judgment by which she has been held guilty is liable to be set-aside.
12. Counsel contended that the appellant Nisha Pandey is a widow with one child. She has already undergone sentence of 02 years, 06 months and 06 days. It is strongly prayed that the sentence of the appellant Nisha Pandey be modified to the period already undergone by her.
13. Lastly, both the counsels submit that as far as conviction is concerned, they did not wish to contest the matter on merits but wish to contest the matter on the quantum of punishment awarded in the case of appellant Nisha Pandey and on the ground that Section 302 of IPC is not made out in the case of appellant Brij Mohan.
14. Per contra, Mr. Rajat Katyal, learned counsel for the State submits that the prosecution has been able to prove its case beyond any shadow of doubt.
15. Counsel for the State submits that there was ample evidence available on record to bring home the charges against the appellants warranting

their conviction. He submitted that the prosecution witnesses PW1 and PW2 had duly identified the appellant Brij Mohan who had accompanied the deceased Joginder Singh in the night of 05.02.2008 and the deceased was last seen in his company.

16. Learned counsel further contends that the appellant Nisha Pandey was part of the conspiracy to eliminate the deceased. She had played an active role. Thus, there is no infirmity in the judgment and the order on sentence passed by the trial Court.
17. We have heard learned counsel for the parties, examined the trial Court record and considered the impugned judgment rendered by the trial Court.
18. In this case, on consideration of evidence and material on record and after considering the arguments advanced, we have found that the following circumstances were relied upon by the trial Court to convict the appellants:
 - i) The circumstance of last seen of the appellant Brij Mohan in the company of the deceased in the NVDA Guest house at about 10-10:15 pm on the fateful night of 05.02.2008 which was duly corroborated by the testimonies of PW1 Mahender Singh Negi (cousin of the deceased) and PW2 Kesar Singh Negi (younger brother of the deceased).
 - ii) At about 12 midnight, fire was reported in room No.5 of the NVDA guest house which was occupied by the appellant and the deceased.
 - iii) Burnt body of the deceased was recovered from room No.5.
 - iv) Weapon of offence used in the commission of crime got recovered at the instance of the appellant Brij Mohan and the

injuries found on the body of the deceased could have been caused by the same.

- v) Medical Evidence which proves that the death of the deceased Joginder Singh was proximate to the time he was last seen in the company of the appellant.
- vi) The appellant Brij Mohan sustained bite and knife injuries on his body which could not be explained by him and was also found in possession of the personal belongings of the deceased.
- vii) Forensic evidence establishing the spot and presence of human blood on the woollen hand glove which belonged to the appellant Brij Mohan and was found in room No.5 of the guest house and its other pair was found in the house of the appellant Brij Mohan. Results of FSL examination show presence of human blood on hand glove but the blood group could not be established.
- viii) Recoveries were made at the instance of the appellant Brij Mohan and Nisha Pandey which duly connect with the crime.

19. In order to deal with the contentions of both the parties, it would be appropriate to examine the testimonies of the material witnesses including the testimonies of PW1 Mahender Singh Negi (cousin of the deceased), PW2 Kesar Singh Negi (younger brother of the deceased) and PW14 Khem Singh. Their testimonies were strongly relied by the trial Court to convict the appellants. The present case hinges on circumstantial evidence including the circumstance of the deceased being last seen in the company of the appellant Brij Mohan.

20. PW1 Mahender Singh Negi testified that on 05.02.2008 at about 12:30 pm in the afternoon, a phone call was made by the deceased to the NVDA Guest House which was attended initially by PW14 Khem Singh Negi. PW14 had informed him (PW1) that the deceased told that he would be coming to the guest house in the evening to sleep because there was repair work going on and that the deceased would find it convenient to spend night in the guest house. He deposed that at 6 pm another phone call was made by the deceased to the guest house which was attended by him and the deceased told him that he would spend night in the guest house alongwith his friend. He deposed that the deceased came to the guest house at 10:15 pm along with a person who was introduced as Brij Mohan (the appellant herein) by the deceased. PW1 identified the appellant Brij Mohan correctly in the Court to be the person who had come to the guest house with the deceased. He deposed that the deceased had told him that the appellant Brij Mohan was working in a security office at Sarita Vihar. He deposed that PW14 (Khem Singh) was present in the guest house at that time and he had seen the deceased carrying his helmet and that he had parked his motorcycle outside the guest house. He further deposed that he saw the appellant Brij Mohan carrying a half bottle of liquor bearing label of Aristocrat. He further deposed that the appellant Brij Mohan was wearing blue coloured jacket, cream coloured trousers and grey coloured gloves. PW1 further deposed that he told the deceased and the appellant Brij Mohan to go to sleep in room No.5 and the deceased took two glasses and a jug of water from the kitchen and thereafter both went to the said room. He further deposed that

thereafter he alongwith PW14 went to sleep in the hall on the ground floor and room No.5 was on the first floor.

21. PW1 further deposed that about 12:15 am in the midnight, landlord of the building who was residing on the first floor (rear portion) knocked on the glass door of the guest house where he and PW14 were sleeping. He woke up and saw that there was fire in the first floor above the hall. He deposed that they called the fire brigade to extinguish the fire. He deposed that fire had broken out in room No.5 and police had also arrived there. He deposed that he went to room No.5 and saw the deceased lying on the bed and found burn marks on his body. He deposed that the mattresses, blankets and bed-sheet were in burnt condition and he did not find the appellant Brij Mohan in the room. He found a wrist watch lying on the bed which was not working and which belonged to the deceased. He also saw two glasses lying in the room and a half bottle of liquor was on the bed but it was empty. He also saw a glove which the appellant Brij Mohan was wearing when he entered in house which had blood on it. He also found helmet in the room. He deposed that in his presence the police seized the said articles and took photographs of the spot. PW1 deposed that mobile phone and purse of the deceased were missing when he tried to find them. PW1 correctly identified the appellant Nisha Pandey in the Court and deposed that in December, 2007 she had come with the deceased and spent whole night in the guest house. In his cross-examination by the counsel for the State, PW1 stated that while entering the guest house, the deceased had introduced the appellant Brij Mohan to all of them including PW2 (Kesar Singh) and had also introduced the appellant Brij Mohan as a guard who was working in a

Security Agency at Ali Mor, Sarita Vihar. In his cross-examination, PW1 stated about the series of events which took place after the incident and his testimony remained consistent to the one deposed in his examination-in-chief.

22. PW2 Kesar Singh Negi testified that on 05.02.2008, he was working as a waiter in NVDA Guest House at Lajpat Nagar, Delhi. He had come to the Guest House as directed by H.S. Kataria, Manager and he reached there at 6:30 pm where he met Mahinder Singh (PW1) and Dev Bahadur. He deposed that they four sat together and consumed liquor till 8:30 pm and Dev Bahadur left the house at around 9:30 pm. PW14 Khem Singh went upstairs for dinner and came downstairs after having dinner and slept in the hall on the ground floor. He deposed that he and Mahinder Singh (PW1) were sitting in the hall on the ground floor of the guest house and at about 10 pm, the appellant Brij Mohan (described as Bijender Prasad initially by PW2) along with his elder brother Joginder came to the guest house and thereafter he (PW2) left the guest house for his residence at Mayur Vihar. In his cross-examination by the learned counsel for the State, PW2 stated that the name of the accused as disclosed while entering the guest house was Brij Mohan but due to confusion he had revealed his name as Bijender Prasad. He had duly identified the appellant Brij Mohan in Court. In his cross-examination by the defence counsel he stated that when the deceased had arrived in the guest house, Khem Singh (PW14) had gone to sleep. He further deposed that he was leaving guest house when the deceased and the appellant Brij Mohan came to the guest house and met the deceased hardly for a minute.

23. Although, PW14 Khem Singh is not a witness of last seen as he had gone to sleep when the deceased along with the appellant Brij Mohan reached the guest house. However, he deposed the other chain of events which took place on the fateful day. His testimony remained consistent on all material particulars with PW1 and PW2. He witnessed the fire incident which took place at about 12-12:30 am in the night; he found fire and smoke coming from the first floor of the guest house. He deposed that fire brigade had come and extinguished the same. He deposed that police officials had also arrived. He stated that the fire broke out in room No.5 where he saw the dead body of Joginder in burnt condition lying on the bed with burn marks on his head and face. He deposed that the bed, mattress, blanket and bed sheet were burnt and half Aristocrat Premium liquor bottle was found on another bed in the same room.
24. Based on the evidence on record, the presence of PW1, PW2 and PW14 at the guest house stands established on 05.02.2008. All three were present when the incident took place and their testimonies remain consistent on all material particulars. PW1 and PW2 are witness of last seen and saw the deceased with the appellant Brij Mohan while going to room No.5 of the guest house at about 10-10:15pm. We are of the considered view that the trial Court has rightly convicted the appellant Brij Mohan primarily on the basis of the testimonies of PW1, PW2 and PW14.
25. Besides the above public witnesses, PW5 HC Tek Chand Sharma was the duty officer, PS Amar Colony, who recorded DD No. 28A, 29A, 31A and 32A and also recorded FIR on the basis of *rukka* sent by Insp. Virender Singh. PW9 SI Nafe Singh was In-charge of the

Mobile Crime Team, Distt. South and proved his report as Ex.PW9/A. PW40 Insp. Virender Singh was the Investigating Officer in the present case.

26. In the present case, since the order on conviction has not been challenged and after examining the evidence on record, we find no infirmity in the same, the only issue which remains to be decided is as to whether the case of the appellants would fall under Section 302 of IPC or Section 304 of IPC.
27. As noted above, on instructions, the learned counsels for the appellants have argued that no case under Section 302 of IPC is made out, as the incident had occurred on the spur of the moment; in a heat of passion and without premeditation between the two who were heavily drunk. The altercation ensued between them and the incident happened in a grave and sudden provocation due to which the deceased as well as the appellant Brij Mohan sustained injuries. This resulted in the present unfortunate incident which resulted in loss of life of the deceased Joginder. It has been strongly urged that the appellant Brij Mohan has already been incarceration for about 9 years and 8 months and his conduct in Jail has been satisfactory. Counsel for the appellant Brij Mohan has relied upon the case of **Krishan Kumar @ Monu; Anil Kumar** reported at **MANU/DE/2114/2014**, wherein the division bench of this Court modified the order of conviction of the appellants from Section 302 of IPC to under Section 304 Part I of IPC and sentenced them to undergo rigorous imprisonment for a period of 10 years.

28. To deal with the foregoing submission made by the counsel for the appellant Brij Mohan, it would be necessary to discuss the medical evidence in detail.

Medical Evidence:

29. Dr. B.L. Chaudhary, Senior Resident AIIMS, who had conducted the post mortem on the deceased on 07.02.2008. His detailed report is Ex.PW6/A, which was proved by PW6 Dr. Sunay Mahesh. Dr. B.L. Chaudhary had found following injuries on the body of the deceased:

“Ante mortem injuries:

1. *A vertical spindle shaped stab wound is present over back of chest on the right at upper portion. The length of wound is 2 cm and maximum width at middle is 0.7 cm and 8 cm deep in chest wall. The medial border of the wound is 2 cm lateral from the midline and upper end of wound is 17 cm below from external occipital protuberance. Both the angle of wound are acute, margins are clean cut. On exploration a track wound is established running inward, downwards and medially.*
2. *An obliquely placed incised looking wound of size 7 x 1.5 cm bone deep is present over left parieto-occipital region. The anterior end is 7 cm above from left mastoid process.*
3. *Two in number incised wounds perpendicular present over pinna of left ear. Upper one is present over helix of pinna and measuring 1 X 0.5 cm in size. Lower incised wound is in middle of ear pinna cutting in full thickness and measuring in size 2 X 0.5 cm.*
4. *An obliquely placed incised k looking wound of size 4 X 1.5 X bone deep is present over right parietal region posteriorly. The anterior end of the wound is lower. The lower border of wound of 11 cm above from right mastoid process. The upper margin of wound is 4 cm k lateral from mid line.*

5. *An obliquely placed incised wound of size 4 X 1.5 cm X bone deep is present over left malar region of the face. The lower end of wound is medially, and upper end is laterally. The upper end of wound is 8 cm from left tragus. Both the angles of wound are acute.*
6. *An incised wound of size 3 X 0.3 cm X bone deep is present along with the left eye brows at lateral portion.*
7. *A stab wound is present over inferior border of left eye brows and upper eye lid on the medical portion. The wound is measuring 3 X 0.3 cm on exploration of wound a track of wound is established running medially and backward, passing through eye ball and penetrating of apex of left orbit with fracture of anterior cranial fossa (2X1 cm) and then penetrating to meninges and brain matter of frontal cerebral upto 1.5 cm deep.*
8. *A vertical stab wound of size 2 X 0.3 cm X Cavity deep is present over left of the face. The medial margin of the wound is 2 cm lateral from left angle of the mouth and 2.5 cm above from inferior border of mandible. Both the angles of wound are acute.*
9. *A vertical stab wound of size 2 X 0.5 cm and Cavity deep is present over left cheek 6 cm in front from left tragus and 6 cm above from inferior border of left mandible.*
10. *A horizontal stab wound of size 2 X 0.5 cm and penetrating full thickness of lower lip.*
11. *A vertical stab wound of size 1 X 0.3 cm X cavity deep is present over right of the face 3 cm lateral from right angle of mouth and 3 cm above from inferior border mandible.*
12. *An incised wound of size 1.5 X 0.7 cm X Bone deep vertically placed is present over forehead in between eye brows. Both angles are acute.*
13. *A stab wound of size 1.5 X 0.5 cm X Cavity deep is present over medial end of right eye on exploration the wound*

track is piercing right eye ball towards backward, inwards, posteriously, and also piercing the roof of right orbit near apex which is measuring 1 X 0.8 cm.

14. An incised wound horizontal placed over ventral aspect of right wrist measuring 1.5 X 0.5 cm X muscle deep.

Post- mortem injuries:

There is evidence of post mortem charred burn (deep burns) injuries seen involving upper limb, almost half of the trunk on the left side, left lower limbs including gluteal and inguinal region, perineum and right lower limb including gluteal and injuries region, except area which sparing from burn is right foot and lower 1/5 portion of the leg. There is also the evidence of singeing of scalp hair and pubic hair and right axillary hair. There is superficial post mortem burns injury over back arm. There is presence of smoke over posterior lumbar region and lateral surface of right side of trunk.”

30. Dr. B.L. Chaudhary opined the cause of death as injury to vital organ brain as mentioned in the post-mortem report caused by sharp edged pointed weapon. The injuries No. 7 to 13 were sufficient to cause death in the ordinary course of nature individually as well as collectively. From above it is evident that the deceased sustained 14 ante-mortem injuries excluding post-mortem burn injuries.
31. As to the weapon of offence, a subsequent opinion was sought by showing the knife and iron rod used in the commission of crime. The opinion was proved as Ex.PW6/B and states that the ante-mortem injuries No. 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 could have been caused by the knife and injuries No. 2 and 4 could have been caused by the iron rod which was shown to him.

32. The appellant Brij Mohan was also medically examined by Dr. B.L. Chaudhary on 09.02.2008. His detailed report is Ex.PW39/A which details the following observation:

“1. An infected incised wound of size 1 x .3cm seen over middle phalanx at posterior aspect near inter phalangeal of left middle finger and obliquely placed.

2. An infected incised wound of 1.5 x .5 cm is present over ventral aspect of middle phalanx of right little finger and obliquely placed.

3. An incised wound of size 1.5 x .2 cm is present over ventral aspect of distal phalanx of right ring finger and obliquely placed.

4. An infected lacerated wound of size 1.5 x .5 cm is present over ventral aspect of distal phalanx of middle finger.

5. An infected lacerated wound of size 1x .3 cm is present over dorsal aspect of distal phalanx of right.”

33. Dr. B.L. Chaudhary further opined that the injuries No. 1, 2 and 3 sustained by the appellant were possible by sharp edged weapon. However, injuries No. 4 and 5 were bite injuries and duration of injuries were more than two days prior to the examination.
34. From the evidence discussed in foregoing para, it has been established by the prosecution that the injuries sustained by the appellant Brij Mohan have been caused by a sharp object and also resulted from teeth bite. The opinion of Dr. B.L. Chaudhary show that the injuries found on the body of the deceased could have been caused by the knife and iron rod recovered at the instance of the appellant Brij Mohan.

FSL Results:

35. PW34 Kavita Goyal, Senior Scientific Officer, Chemistry, FSL Delhi examined the blood sample of the deceased and confirmed the presence of ethyl alcohol in the blood of the deceased. The detailed report Ex.PW34/A show presence of 205.8 mg of alcohol per 100ml of blood and proves that the deceased consumed alcohol prior to his death.
36. We may also notice that the weapon of offence, i.e. knife and metallic rod used in the commission of the offence were sent to FSL for examination. As per the FSL report Ex.PW-35/A, no blood could be detected on it.
37. The counsel for the appellant Brij Mohan has relied upon the case of **Krishan Kumar @ Monu; Anil Kumar** reported at **MANU/DE/2114/2014**, wherein the division bench of this Court while giving benefit of Exception I of Section 300 of IPC modified the conviction of the appellants to Section 304 Part I of IPC. The facts of the case are almost similar to the case in hand. The appellant Krishan Kumar being desirous of love of one Tamanna, wanted to marry her and thus killed Bhupinder, who was engaged to Tamanna. The deceased Bhupinder sustained 21 stab injuries and also sustained 3 injuries which were caused by blunt force impact. The relevant paras read as under:

“15. In the context of where an accused sustains an injury of a serious nature in the same occurrence, the prosecution would be obliged to explain the injury and failure to do so would cast a cloud on the case of the prosecution, if not in full, at least as regards the true contours of the incident as drawn by the prosecution.

....

20. We cannot loose sight of the fact that the backdrop to the unfortunate incident is the past, of Krishan Kumar being in love with Tamanna and she being engaged to Bhupinder. This troubled Krishan Kumar and thus Krishan Kumar and Bhupinder turning bitter friends. The fight was over the affection of a girl. Krishan Kumar was still hoping to win over Tamanna's affection and Bhupinder was wanting him to get out of the path of Tamanna. In this backdrop, when Krishan Kumar, who was in the company of Anil Kumar met Bhupinder who was in the company of Umit Singh, the possibility of Bhupinder and Umit Singh converting a hot verbal dialogue in to a physical fight and teaching Krishan Kumar a lesson of his life by chopping of the ring finger of his left hand cannot be ruled out. The physical manifestation would be of the intention to teach a lesson to Krishan Kumar: 'Lo and behold, we have chopped off your ring finger. We have incapacitated you for your life to enjoy the pleasure of a wedding ring put on your ring finger'. The injuries on the hands of Krishan Kumar would show that he caught hold of the knife. This explains a deep cut on the four fingers of the right hand and the ring finger of the left hand being decapitated. The retaliation was the assault on Bhupinder. It is apparent that this is what had happened which led Krishan Kumar to run away in panic and thereafter speak a nugget of truth by weaving with a lot of lies. It indeed is a difficult task for a Judge to separate lies which is interwoven with truth for the reason so inextricably linked are the two that removing one scars the other. Seldom do Judges come across cases of the kind where lies can be neatly severed from the truth and the truth retained.

21. It is trite that if the attendant circumstances of a case probabilize a version, whether put or not to witnesses during cross-examination, or when examined under Section 313 Cr.P.C., it is the duty of the Court, as any other rational and prudent person would so do, to find the true version of what happened.

...

26. Thus, we have to take our decision ahead by considering whether a young man aged around 20 years, in love with a girl

whom he finds is marrying his friend, is unable to convince his friend to call off the relationship with the girl and tries to meet the girl inviting a response from his friend in the form of the ring finger being cut off. The message by the act would be the one we have recorded in paragraph 19 above: 'Lo and behold, we have chopped off your ring finger. We have incapacitated you for your life to enjoy the pleasure of a wedding ring put on your ring finger'. The question would be whether this act would be a sudden and a grave provocation.

31. A loss of self control caused by fear, panic, sheer bad temper or circumstances has to be distinguished from a provocation which results in loss of self control. The provocation therefore must be such as would upset not merely a hasty, hot-temper and hyper-sensitive person but would upset also a person of ordinary sense and calmness. It must be something heard or seen by the offender so as to derange the offender. After all, anger is a passion to which good and bad man are both subject, and mere human frailty and infirmity ought not to be punished equally with ferocity or other evil feelings. The standard of conduct, being that of a reasonable person, to be expected has to keep in mind the age of the offender, the cultural, the social and the emotional background of the society to which the offender belongs because the conduct expected of a young person cannot be measured on the standard of a mature adult. A Judge has not to be influenced by considerations of exemplary restraint or exceptional, ideal behaviour of highly cultured people. The test of whether provocation is entitled to succeed is a dual one: the alleged provocative conduct must be as such as (a) actually caused in the accused, and (b) might cause in a reasonable person, a sudden and temporary loss of self-control as the result of which the offender kills the one who gave the provocation. Since provocation is an external stimulus it can be objectively gauged. But loss of self-control is a subjective phenomenon and can be inferred from the surrounding circumstances alone. What may amount to a grave and sudden provocation is a question of fact. It is a misnomer to believe the defence of provocation has to be raised by the defence with onus of proof on the defence that the situation was not one of provocation, lies on the prosecution to

establish. The numbers of wounds caused during the occurrence are not a decisive factor. The Courts have to be careful when provocation takes the form of physical assault of such a nature as would be expected to arouse overwhelming passion in the person attacked, for it will not always be easy to distinguish the victim immediate retaliation from a resistance by way of self-defence. As has been noted by KENNY on Outlines of Criminal Law, 19th Edition para 118 (P.172) it is therefore not surprising that the early authorities did not always keep homicide under provocation separate from homicide in self-defence. In 1917 there was a judgment of the Court of Criminal Appeal which did not clearly distinguish the two: (1917) 12 Cr.App.R 221 **R vs. Letenock**. In the decision reported as AIR 1978 SC 768 **Tarseem Ali vs. State of Haryana**, the facts were that the victim and the two accused went out for hunting and they were drunk. The accused killed the victim by gunshot and before the occurrence some quarrel took place between them. It was held that the death occurred either because of a sudden quarrel or on a sudden provocation. The accused were convicted for the offence punishable under Section 304 Part I IPC. The Supreme Court held that the case attracted exception I or IV to Section 300 IPC.

32. The provocation has to be not only grave but even sudden. Since the desire of measured revenge distinguishes a revenge under a provocation, the distance of time between the provocation and the assault has to be kept in mind.”

(Emphasis Supplied)

38. In the present case, there is no evidence on record which could establish that the appellant Brij Mohan carried the weapon of offence i.e. knife and the iron rod at the time of entering the guest house. Further PW1 and PW2 have not deposed that on the fateful night the appellant Brij Mohan was seen carrying the said weapon. It is highly improbable that the appellant Brij Mohan would have planned the said crime at a place where the two family members of the deceased

and also the third person who belong from the same village as of the deceased were working. In the facts and circumstance of the present case, we find force in the argument raised by the learned counsel for the appellant Brij Mohan that during the course of drinking a fight had erupted between the appellant and the deceased which resulted in the injuries to both the deceased as well as the appellant Brij Mohan. We are also persuaded with the argument of the learned counsel for the appellant Brij Mohan that if the present act was pre-planned then the appellant Brij Mohan would not have chosen a place where other persons including PW14 from his native village and brothers of the deceased were present. If the appellant Brij Mohan had to eliminate the deceased, he would have chosen a place where none would be able to identify him. Thus, the prosecution is unable to establish any prior planning to commit the present offence.

39. Furthermore, it is evident from the MLC of the appellant Brij Mohan that he had sustained 3 incised wounds i.e. injury No.1 on left middle finger, injury No.2 on right little finger and injury No.3 on right ring finger. Besides this, the appellant also sustained 2 lacerated wounds which were apparently bite marks and were present dorsal as well as ventral aspect of right middle finger. The injuries 1 to 3 were opined by Dr. B. L. Chaudhary to be caused by sharp edged weapon and 4 to 5 were bite injuries. We concur with the view taken in ***Krishan Kumar @ Monu (supra)*** that in the cases of grave and sudden provocation what may amount to a grave and sudden provocation is a question of fact. The provocation has to be not only grave but even sudden. The numbers of wounds caused during the occurrence are not

a decisive factor. The Courts have to be careful while returning the guilt of the accused persons.

40. 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 appellant Brij Mohan and are of the considered view that the conviction of the appellant Brij Mohan should be altered from Section 302 to one under Section 304 Part I of the Indian Penal Code. In the light of the aforesaid dicta, while giving the benefit of Exception I of Section 300 of IPC, we modify the conviction of the appellant Brij Mohan from Section 302 of IPC to Section 304 Part I. We are of the opinion that the ends of justice would be met if we sentence him to undergo rigorous imprisonment for a period of 10 years.
41. So far as the conviction of the appellant Nisha Pandey is concerned, the learned trial Court convicted her under Section 201 read with Section 120B of IPC. She was also convicted under Section 404 of IPC for pledging the mobile phone of the deceased with PW16 (proprietor of M/s. Mithila Communication) and getting a SIM card issued against the same. We are being informed by the learned counsel for the appellant Nisha Pandey that she has undergone 2 years, 6 months and 6 days. Taking into account that she is a widow and having a minor child to look after. The ends of justice would be met if we modify the sentence of the appellant Nisha Pandey to the period already undergone by her.
42. 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.

43. The Trial Court record be sent back along with a copy of this judgment.
44. Copy of this judgment also be sent to the Superintendent-Central Jail, Tihar for updating the jail record.

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45. In view of the above, the application stands infructuous.



G. S. SISTANI, J.
(VACATION JUDGE)

VINOD GOEL, J.
(VACATION JUDGE)

JUNE 05, 2017

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