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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 21st February, 2018

Decided on: 6th March, 2018

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ASLAM

CRL.A. 336/2002

...Appellant

Through: Mr. Sumeet Verma with Mr. Mohin
Khan and Mr. S. Sagar, Advocates

versus

STATE N.C.T. OF DELHI

...Respondent

Through: Ms. Radhika Kolluru, APP for State.

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KALLU & ORS.

CRL.A. 393/2002

..Appellants

Through: Mr. Sumeet Verma with Mr. Mohin
Khan and Mr. S. Sagar, Advocates

versus

STATE

...Respondent

Through: Ms. Radhika Kolluru, APP for State.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE I.S. MEHTA

JUDGMENT

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Dr. S. Muralidhar, J.:

1. These two appeals are directed against the impugned judgment dated 15th April, 2002 passed by the learned Additional Sessions Judge ('ASJ') in Sessions Case No.71/99 arising out of FIR No.106/98 registered at Police Station ('PS') Nabi Karim convicting the four Appellants i.e. Aslam –

Accused No.1 ('A-1'), Kallu (A-2), Shamim Ahmed (A-3) and Rafiq Ahmed ('A-4') for the offence under Section 302/34 Indian Penal Code ('IPC') and acquitting them for the offence under Section 308/34 IPC. The appeals are also directed against the order on sentence dated 17th April, 2002 whereby each of the Appellants was sentenced to undergo rigorous imprisonment ('RI') for life and to pay fine of Rs.5,000/- each; and in default of payment of fine to undergo RI for six months.

2. The four accused were charged with committing the murder of Jameel Ahmed ('deceased') on 10th March, 1998 at around 4.50 pm near Qila Kadam Sharif, Nabi Karim, Delhi. They were also charged with assaulting Shamim Ahmed (PW-5) in furtherance of their common intention or knowledge that such act would result in injuries that were likely to cause his death thereby committing the offence under Section 308/34 IPC. By the impugned judgment, all the four Appellants were acquitted for the offence under Section 308/34 IPC.

3. While Aslam (A-1) has filed Crl. Appeal No.336/2002, A-2, A-3 and A-4 have filed Crl. Appeal No.393/2002.

Case of the prosecution

4. Shamim Ahmed (PW-5) and Shakeel Ahmed (PW-6) are the brothers of Jameel Ahmed (the deceased). PW-6 was present on 10th March, 1998 at his house in Qila Kadam Sharif, Nabi Karim when at about 10 am, his wife told Akram, the brother of Aslam (A-1), to lower the volume of his deck as he lived very near to their house. Akram, however, started abusing the wife of PW-6. This led to PW-6 coming out and intervening but Akram misbehaved

with PW-6 as well and started beating him. Someone in the neighbourhood telephoned number 100. The police came and took PW-6 and Akram to PS Nabi Karim. PW-6 was asked to undergo medical examination as he was injured. So, he went to the Lady Harding Hospital and was there till around 4 pm. Thereafter, he returned to the PS and waited there till 6.30 pm.

5. It appears that in the meanwhile, Shamim Ahmed (PW-5) was present in his house on 10th March, 1998 at Kalyan Puri when one of his neighbours, Abad Ali (PW-11), informed him that there had been a fight involving his brother PW-6. PW-5, accompanied by the deceased, went to Qila Kadam Sharif, Nabi Karim. When they reached near the gate, they noticed Aslam (A-1), who was known to PW-5 from before, present with three of his companions, i.e. A-2 to A-4. At that time, however, PW-5 did not know the names of the three associates of A-1. Upon seeing PW-5 and the deceased, Aslam remarked that they had come to defend their brother. A-1 then assaulted the deceased with a *lathi* on his head. The deceased fell down. Thereafter, all four grabbed PW-5 and also started assaulting him with the *lathi* and *dandas*. He was hit on his head, back as well as near his left eye. All four thereafter ran away.

Investigation

6. PW-5 then took the deceased to LNJP Hospital. The MLC of the deceased shows that he was brought there by PW-5 at 5.20 pm on 10th March, 1998 with alleged history of being assaulted by sticks on his head. He was brought in an unconscious state. There is a noting on the MLC at 6.15 pm that the patient was unfit for statement. Even at that time, the deceased was

not responding to verbal commands. Although there was no external injury, there was a head injury.

7. As far as the police is concerned, Assistant Sub Inspector ('ASI') Safiq Ahmed (PW-1) was the Duty Officer at PS Nabi Karim. He received information at 4.53 pm from the PCR that at House No.6833 at Qila Kadam Sharif a fight was going on. DD No.33-A was recorded and ASI Raj Kumar (PW-3) was deputed to inquire. On the same day at 5.10 pm, PW-1 received information from the duty constable at LNJP Hospital that the deceased had been admitted by PW-5. This information recorded as DD No.5-A (Ex.PW1/B) was sent to PW-3 through constable Kamal Ram (PW-2).

8. On the basis of the statement of PW-5 recorded at the hospital, the *rukka* was prepared. At 6.45 pm, PW-1 received *rukka* (Ex.PW1/C) from PW-3 brought again by PW-2 on the basis of which he registered FIR No.106/1998 under Section 308/34 IPC.

9. At the same LNJP Hospital PW-5 was examined at around 6.30 pm on the same day. His MLC noted three injuries – one was an incised wound on the cheek; the second was a bite mark on the back on the left scapular region and the third was a lacerated wound on the scalp 1 cm x .5 cm in the occipital region. It appears that the injuries were not considered serious. PW-5 was immediately discharged and came back to the spot along with PW-3.

10. PW-3 prepared a rough site plan (Ex.PW3/B) at the instance of PW-5. Letter 'A' in the site plan was described as the place where the fight had

taken place. This was near the gate. The four accused were arrested on 11th March, 1998 and made disclosure statements. Pursuant to the disclosure statement of A-1, a *lathi* was recovered from his house which was seized under memo (Ex.PW3/J)

11. The deceased expired at the LNJP Hospital on 11th March, 1998. Section 302 was added to the offence in the FIR. The case was thereafter assigned to Inspector M.S. Dwivedi, SHO PS Nabi Karim (PW-15).

Post mortem

12. On 12th March, 1998, the post-mortem of the deceased was performed by Dr. Anil Kumar Mittal (PW-4). He noticed the following injuries:

- “1. Round swelling 6x6 over right Side of head 3 cm above right ear.
2. Contusion with swelling 6x5 cm over right side face.”

13. The following observations were noted upon an internal examination:

“The head showed extra vassation of blood over right side, right side front in right side back of head. The skull showed multiple fracture over right parietal bone, frontal bone extending to the right temporal and occipital bone and base of middle cranial fossa (right) and interior cranial fossa (right). The brain showed patchy extra developed haemorrhage over right parietal lob. Thick subdural present over both parieto temporal and both frontal lobe. The defused subarachnoid haemorrhage present over both cerebral hemisphere. Contusion haemorrhage and laceration present over frontal lops and temporal lobes. Intra cerebral haemorrhage present over both frontal lobes.

14. The cause of death was given as under:

“The death in this case was due to crania cerebral damage as a result of blunt force impact on head. The injuries were ante-mortem and

recent in duration. The injuries No.1 and 2 are sufficient to cause death in the ordinary course of nature.”

15. Subsequently, on 7th August, 1998, the *lathi* was shown to PW-4 and his observations were as under:

“On 07.08.1998 a sealed parcel having four seals of MSD all intact were received in the office on 7.8.1998 from SHO Nabi Karim the parcel was opened on 28.8.1998 which contains a bamboo (Lathi) 104 cm x 3 cm diameter in cylindrical shape with nine knots. The lathies was close at one end and hallow at another and after seeing the post-mortem report and the weapon of offence and examining thoroughly I opined that the injury No. 1. and 2 mentioned in my post-mortem report on the body of the deceased could be caused by said weapon i.e. lathi examined by me.”

Charge and trial

16. On completion of the investigation, a charge-sheet was filed. By an order dated 4th October, 1999, charges were framed against the four accused for the offence under Section 302/34 IPC, for the murder of Jameel Ahmed and under Section 308/34 IPC for causing injuries to PW-5. The accused pleaded not guilty and claimed trial.

17. Sixteen prosecution witnesses were examined. In their respective statements under Section 313 of the Code of Criminal Procedure (‘Cr PC’) each of the accused claimed to have been falsely implicated. According to them, they were sitting in the PS with PW-6 after the incident that had initially occurred in the morning and left the PS late in the night. However, none of them proved the said alibi as no defence evidence was led on their behalf.

Impugned judgment of the trial Court

18. By the impugned judgment dated 15th April 2002, the learned trial Judge held that the eye witness account of PW-5, who was also an injured eye witness, was trustworthy. The presence of the four accused persons at the spot stood proved and the fact that A-1 gave the *lathi* blow on the deceased was also proved. As far as Abad Ali (PW-11) was concerned, he too had partly supported the prosecution regarding the quarrel having taken place and A-1 having given a *lathi* blow on the head of the deceased. The medical evidence corroborated the ocular evidence. Accordingly, the trial Court held that as far as the offence under Section 302/34 IPC is concerned, the prosecution had proved its case beyond reasonable doubt.

19. However, as regards the injuries to PW-5 were concerned, it was held that the prosecution had not proved the case beyond reasonable doubt. Accordingly, all the four accused were acquitted of that offence. By a separate order on sentence dated 17th April, 2002, the four Appellants were sentenced as indicated hereinabove.

20. This Court has heard the submissions of Mr Sumeet Verma, learned counsel appearing for the Appellants and Ms Radhika Kolluru, learned APP for the State.

Evidence of PW-5

21. The star eye witness in the present case was PW-5. Being an interested witness, related to the deceased, but at the same time injured, his testimony requires careful scrutiny for contradictions and inconsistencies. The Court has perused PW-5's first statement to the police at the hospital (Ex.PW1/C).

In that statement, on the basis of which the *rukka* was drawn up, PW-5 states that at around 3 pm in the afternoon when he was present at his house, PW-11 informed him that his brother PW-6 who was at House No.6834 Qila Kadam Sharif, Nabi Karim, was involved in a fight. As a result, PW-5, accompanied by the deceased, went to the house of PW-6 near the gate of Kadam Sharif, where he noticed A-1, whom he knew from before, along with three of his associates, coming there. After noticing them, A-1 stated that '*salo apne bhai ki himayat mein ayen hai*'. After saying that, A-1 gave a forceful blow with his *lathi* on the head of the deceased, upon which the deceased fell unconscious there itself. The three associates whom he subsequently came to know as A-2, A-3 and A-4 also started raining blows on PW-5 with their *lathis* and *dandas* as a result of which he was injured near the left eye, on the head and on the back. Noticing that the deceased had fallen unconscious, all four of them ran away. He then picked up the deceased and went to the LNJP Hospital.

22. The cross-examination of PW-5 was minimal. What is significant is the following statement made by him:

“Aslam assaulted only once on the head of my brother. There was no other assault on his body by anyone.”

23. PW-5, therefore, proves the presence of all of the accused at the scene of occurrence. It is settled law that it is not the number of eye witnesses that matters but the quality of their testimony which does. PW-5 is by and large consistent in his version. There are no major improvements and inconsistencies when his deposition in Court is compared with his previous

statement to the police. The evidence of PW-11 as well as the medical evidence corroborates the version of PW-5. He is a truthful and reliable witness.

Evidence of PW-11

24. Abad Ali (PW-11) stated in his examination-in-chief stated that he lives in the neighbourhood of the house of the deceased. On 10th March, 1988, he had come to Pan Mandi, Nai Sarak and he had gone to see a shop in the property of Shakil Ahmed (PW-6), who is the brother of PW-5, and saw that PW-6 was involved in a fight. PW-11 then claims to have stood in a corner so no one would attack him. He then went to the house of PW-5 and informed them of the incident. He also informed the deceased. When he returned to Nabi Karim, PW-11 noticed that PW-5 and deceased had also come on a three wheeler. He clearly stated that “Aslam present in the Court gave a lathi blow to Jamil Ahmed on his head. Jamil fell down and I ran away from that place”.

25. PW-11 could not see the faces of persons who were with A-1 because he was in a hurry to run away from the spot. He did not, however, see PW-5 receiving any injury. He explains this on account of his having run away from the spot in haste. He turned hostile only to the extent of implicating the other accused in the occurrence. There was nothing elicited from the cross-examination of PW-11 by the counsel for the accused. He denied that he knew A-1 earlier and there was enmity or friendship between the two of them. In the considered view of the Court, on the material aspect of A-1 assaulting the deceased with *lathi* on his head, PW-11 has fully corroborated

PW-5.

Case against A-2 to A-4 not proved

26. The Court is, however, satisfied that it is only A-1 who could be held guilty of the offence under Section 302 IPC on the basis of deposition of PW-5 and not A-2 to A-4. The consistent version of PW-5 is that when A-1 attacked the deceased, none of the other accused was either holding the deceased or attacking him in any manner. The evidence is only to the fact that while the deceased fell down unconscious, they began attacking PW-5. In any event, the accused were granted the benefit of doubt as far as the evidence under Section 308/34 IPC is concerned for causing injuries to PW-5.

27. The Court is, therefore, unable to concur with the conclusion reached by the trial Court that A-2 to A-4 shared a common intention with A-1 to cause such injuries to the deceased as would likely cause his death. The evidence on record does not support such a conclusion. No overt act *qua* the deceased has been attributed to A-2, A-3 or A-4. Not even an exhortation. Consequently, the Court acquits A-2 to A-4 of the offence under Section 302/34 IPC.

Submissions of learned counsel for A-1

28. Now turning to A-1. His role in the killing of the deceased is clearly spoken to both by PW-5 and PW-11. It is earnestly pleaded by Mr. Sumeet Verma, learned counsel for A-1, that the manner in which the events occurred and the nature of the injuries are such that the offence can at best

be culpable homicide not amounting to murder. He began by placing reliance on the decision in *State of Andhra Pradesh v. Rayavarapu Punnayya* (1976) 4 SCC 382. He pointed out that even *de hors* the exceptions to Section 300 IPC, an accused cannot be convicted for the offence of murder punishable under Section 302 IPC if the offence was only one of culpable homicide. He also relied upon the decisions in *Joseph v. State of Kerala* AIR 1994 SC 34, *Tholan v. State of Tamil Nadu* 1984 SCC (Cri) 164, *Jagtar Singh v. State of Punjab* (1983) 2 SCC 342, and *Gurmukh Singh v. State of Haryana* (2009) 15 SCC 635.

29. Mr. Verma's alternative submission was that there was grave and sudden provocation which led to A-1 assaulting the deceased and therefore Exception 4 to Section 300 IPC stood attracted. Therefore, the offence by this route was one of culpable homicide not amounting to murder punishable under Part-II of Section 304 IPC. In support of his submission, he relied on the decisions in *Jagrup Singh v. State of Haryana* (1981) 3 SCC 616, *Ashok Bind v. The State (Govt. of NCT of Delhi)* 2017 (3) JCC 1602, *State of Orissa v. Bhagaban Barik* (1987) 2 SCC 498, *Surain Singh v. State of Punjab* AIR 2017 SC 1904 and *Chhotu v. State of Haryana* 2009 (14) SCALE 136.

Submissions of the APP

30. Countering the above submissions, Ms. Radhika Kolluru, the learned APP appearing for the State relied on the decision in *Pulicherla Nagaraju @ Nagaraja Reddy v. State of A.P.* (2006) 11 SCC 444. She pointed out that the facts of that case are more or less similar to the facts on hand. Therefore,

the definition of culpable homicide not amounting to murder, even if that was reached by the route of Exception-4 to Section 300, was not attracted. In other words, the learned APP submitted that the trial Court was right in convicting the Appellants under Section 302/34 IPC.

Analysis and reasons

31. The discussion has to begin with examining Section 300 IPC which reads as under:

“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.”

32. What is culpable homicide and when it amounts to murder and when it does not, in the context of Section 300 IPC ‘Thirdly’, was articulated by the Supreme Court in ***Virsa Singh v. State of Punjab AIR 1958 SC 465*** as under:

“The prosecution must prove the following facts before it can bring a case under Section 300, "thirdly". 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. It must be proved that there was an intention to inflict that particular 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 was 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.”

33. Relying on the above decision, the Supreme Court in *State of Andhra Pradesh v. Rayavarapu Punnayya* (*supra*) held:

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

amounting to murder' punishable under the First Part of Section 304, Penal Code.”

34. The four step test that the prosecution has to fulfil in order to prove that the offence is murder, in terms of the above exposition in ***Virsa Singh*** (*supra*) ***Rayavarapu Punneyya*** (*supra*) is as under:

(i) The first step is proving that a bodily injury is present and whether it has resulted in the death of the deceased. The question further is whether the accused has caused the said injury?

(ii) If the answer to the question at (i) is *prima facie* in the affirmative, the Court should ask whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of murder' contained in Section 300 IPC? This will require proving the nature of the injury and the intention to inflict that particular bodily injury viz. that it was neither accidental nor unintentional or that some other kind of injury was inflicted. It will have to be shown that the injury inflicted was sufficient in the ordinary course of nature to cause death.

(iii) If the answer to the question at (ii) 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 IPC, depending respectively, on whether the second or the third Clause of Section 299 IPC is applicable.

(iv) If the answer to the question at (ii) is in the affirmative, but the case comes within any of the Exceptions in Section 300 IPC, the offence would

still be 'culpable homicide not amounting to murder' punishable under the Section 304 Part I IPC.

35. The decisions in *Joseph v. State of Kerala* (*supra*), *Tholan v. State of Tamil Nadu* (*supra*) and *Gurmukh Singh v. State of Haryana* (*supra*) were cases where the Court found that there was no intention on the part of the accused to inflict such injury as was likely to cause the death. In those cases, the offence was converted into one of culpable homicide not amounting to murder. It was found that there was a previous dispute involving the accused and his presence at the scene of occurrence was wholly accidental. It was found that there was a single injury inflicted on the deceased and it was inflicted at the spur of moment. There was no premeditation. Therefore the offence was held to be one punishable under Section 304 Part-II IPC.

36. In the present case, the prosecution has proved that A-1 inflicted the bodily injuries which resulted in the death of the deceased. To recapitulate the sequence of events, when A-1 and his three associates met PW-5 and the deceased at the gate near Qila Kadam Sharif, Nabi Karim, A-1 intended to attack the deceased and PW-5. A-1 was not waiting there with his associates to attack somebody else. When he struck the head of the deceased, A-1 intended to cause such bodily injury as he knew would likely cause his death.

37. It would be erroneous to view the injury in the present case to be a single injury. The blow may have been a single blow but the injuries as a result thereof were multiple. The blow was so severe that it fractured the skull and

caused such a severe haemorrhage with extravasation of blood that the death was almost instantaneous. In this regard, it is important to refer once more to the post-mortem of the deceased performed by PW4 and the external and internal injuries noted by him. While there was two visible external injuries, viz., a swelling on the right side of the head and a contusion and swelling on the right side of the face, the impact of the *lathi* blow on the head of the deceased was so severe that the internal examination of the “skull showed multiple fracture over right parietal bone, frontal bone extending to the right temporal and occipital bone and base of middle cranial fossa (right) and interior cranial fossa (right). The brain showed patchy extra developed haemorrhage over the right parietal lobe. Thick subdural present over both parieto-temporal and frontal lobe. The defused subarachnoid haemorrhage present over both cerebral hemispheres. Contusion haemorrhage and laceration present over frontal lobes and temporal lobes. Intra cerebral haemorrhage present over both frontal lobes”. Therefore, it is not as if the single blow was not serious enough to attract the offence of murder.

38. The Court, therefore, rejects the submission of Mr. Verma that in the present case, there was no intention on the part of A-1 to inflict upon the deceased such injuries as were likely to cause his death. In other words, the answer to the question at 34 (ii) above is in the affirmative.

39. That then takes us to the question at para 34 (iv) viz., is the offence covered by any of the Exceptions to Section 300 IPC. Section 300 IPC opens with the words “Except in cases hereinafter excepted” which qualify the words that immediately follow viz., “culpable homicide is murder”. In

other words, there are only five exceptions to the actual act of murder which will bring the offence into the ambit of culpable homicide. Outside of this, the offence will be one of murder.

40. Mr. Verma, learned counsel for A-1 submitted that the present case was covered by Exception 4 which reads thus:

“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.”

41. In ***Ghapoo Yadav v. State of M.P. (2003) 3 SCC 528*** the Supreme Court held:

“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 the Indian Penal Code. 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 and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a 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 the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

42. In the present case, the quarrel if at all was between Akram, the brother

of A-1 and PW-6 the brother of the deceased. There was no quarrel, much less a sudden quarrel, between A-1 and the deceased. It has been time and again explained by the Supreme Court that in order to attract Exception 4 to Section 300 IPC it is not enough to show that there was not any premeditation but it must also be shown that there was some provocation by the person who was attacked. Additionally, the accused has to show that he did not act in a cruel and unusual manner and did not take advantage of the vulnerability of the victim. Here the deceased was totally unarmed. His vulnerable position was taken advantage of by A-1. Further, although the *lathi* was shown to be not more than 3 ft and made of a bamboo, the medical evidence clearly shows that the impact of the blow was so severe that it caused multiple fractures of the skull and extra-vassation of blood in the entire area of the brain. There was absolutely no justification for such a severe reaction from the side of the accused.

43. The Court is, therefore, not persuaded that the offence in the present case, as far as A1 is concerned, is culpable homicide not amounting to murder. The facts of the present case or more or less similar to those in ***Pulicherla Nagaraju @ Nagaraja Reddy v. State of A.P.*** (*supra*), where the Supreme Court discussed the entire case law and observed in paragraph 29 as under:

“29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be

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

44. In that case, it was held that the circumstances to bring the case under Exception 4 to Section 300 IPC did not exist. The stabbing there was with great force causing an injury on the vital part of the body. There was no provocation, sudden quarrel or fight. Therefore, the conviction under Section 302 IPC was upheld.

45. In the present case it is clear that A1 knew who he was attacking and why. There was an element of premeditation inasmuch as A1 appears to

have anticipated a reaction to his own brother Akram attacking PW6. In fact, A-1 is supposed to have remarked to A-2 to A-4 that they (i.e. the deceased and PW-5) had come to avenge the beating up of their brother PW-6 by Akram (brother of A1). The *lathi* with which A-1 beat the deceased on the head was not simply picked up from the ground. Having the *lathi* and standing at the gate and reacting in this manner when the deceased and PW5 came there shows that the attack by A-1 on the deceased was not at the spur of the moment. More importantly, there was no provocation at all given to A1 by the deceased. The provocation came from the brother of A1 to begin with. It was with a sense of transferred malice that A1 decided to avenge Akram being taken to the PS after the altercation with PW6.

46. The decision in *Jagtar Singh v. State of Punjab* (*supra*) is distinguishable on facts. Even in *Jagrup Singh v. State of Haryana* (*supra*), a single blow was inflicted on the head of the victim in a sudden fight. There is no sudden fight in the present case.

Conclusion

47. For all of the aforementioned reasons, the Court is satisfied that as far as A-1 is concerned, his guilt for the offence punishable under Section 302 IPC has been proved by the prosecution beyond reasonable doubt. The impugned judgment of the trial Court convicting A-1 for the offence punishable under Section 302 IPC and the consequent order on sentence of the trial Court are hereby affirmed.

48. The bail bonds and surety bonds furnished by A-1 stand cancelled and he is directed to surrender forthwith to serve out the remainder of the

sentence. If A-1 does not surrender on or before 13th March 2018, the SHO of the concerned police station will take immediate steps to have him apprehended and sent to jail. Crl. A. No. 336 of 2002 is dismissed.

49. As far as A-2 to A-4 are concerned, they are acquitted of offence under Section 302/34 IPC. Their appeal Crl A 393 of 2002 is allowed. The impugned judgment and order on sentence of the trial Court *qua* A-2 to A-4 is set aside. Their bail bonds and surety bonds stand discharged. Each of A-2 to A-4 will fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest.

50. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 06, 2018

rd/anb