

\$~R-68 & 69

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

Judgment reserved on: 13th February, 2020
Judgment pronounced on: 20th February, 2020

+ CRL.A. 1084/2018

TINKU SINGH

..... Appellant

Through: Mr.Joginder Tuli and Ms.Joshini Tuli,
Advocates.

versus

STATE

..... Respondent

Through: Ms.Neelam Sharma, APP for State with
Inspector Jitender, PS Prashant Vihar

+ CRL.A. 4/2018

SHASHI

..... Appellant

Through: Mr.Joginder Tuli and Ms.Joshini Tuli,
Advocates.

versus

THE STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Ms.Neelam Sharma, APP for State with
Inspector Jitender, PS Prashant Vihar

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J

1. Present appeals are directed against judgment dated 23.09.2017 and order of sentence dated 12.10.2017 passed by the learned Additional Sessions Judge, North East, Karkardooma Courts, Delhi in Sessions case No. 44453/2015 arising out of FIR No. 282/2014, under

Sections 302/201/182/34 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') registered at Police Station New Usmanpur, Delhi whereby the learned Sessions Judge found the appellants-accused persons namely Tinku Singh and Shashi Bala guilty and sentenced them to undergo rigorous imprisonment for life and to pay a fine of Rs.5,000/- (each) for offence under Section 302 IPC, and to undergo further simple imprisonment for six months (each) in default to pay the fine. Convict Shashi Bala was further sentenced to undergo rigorous imprisonment for six months for the offence punishable under Section 182 of the IPC. However, the learned Trial Court acquitted Sandeep (the third accused before the trial court) for the offence under Section 201 of the IPC and the state has not preferred any appeal against the said acquittal.

2. The brief facts of the case, as mentioned by the learned Trial Court are reproduced as under:

“1. Prosecution case: it is the case of prosecution that on 20.03.2014, a DD No. 26A was lodged by accused Shashi Bala that her husband namely Inder Pal, R/o K-296, Street No. 5, Gautam Vihar, Delhi was missing since 18.3.2014. DD was assigned to HC Shri Pal. On 23.3.2014, accused Tinku Singh was called to PS as suspect to interrogate in missing of deceased. He was produced before Inspector and during interrogation, he confessed that on 17.3.2014, he committed the murder of deceased Inder Pal in his room and thereafter, dead body wrapped in plastic and jute bags was thrown in the area of 3½ pusta, Usmanpur near bushes, Yamuna Khadar. He further disclosed that he could get recovered dead body. On the basis of this information, Inspector constituted a police team comprising of police officials and relatives of deceased namely Dinesh and Sanjay

Kumar. Accused led police team to the spot between 3 - 3½ pusta, near IGL Board and pointed out a plastic bag near bushes and disclosed that the same was containing the dead body of deceased. Foul smell was emitting of that bag. Crime team was called to the spot. On arrival of crime team bag was opened and was found containing five plastic bags and two jute bags besides one red and yellow colour printed cloth in which dead body was wrapped and then was put in that bags. Head of body was missing one chocolate colour underwear was on the body and body was tied by a rope. After recovery of torso, accused Tinku Singh was interrogated again and further disclosed and pointed out the spot where a big plastic bag was lying in water log which was recovered from some distance ahead of the recovery of torso. Accused Tinku Singh disclosed that it was the head of deceased Inder Pal. Meanwhile, Inspector called a private photographer Amal Chand Tiwari for videography of recovery proceedings. Body was identified by Dinesh and Sanjay Kumar to be of deceased. Body was sent to mortuary of GTB Hospital through Ct. Sachin. Thereafter, police team went to the spot of incident i.e. at ground floor room at K-296, Street No. 5, Gautam Vihar thereby leaving HC Shri Pal at the spot of recovery of body. Crime team also inspected the room. A case u/s 302/201 IPC was lodged. Accused was arrested.

1.1. It is further alleged that during investigation, accused disclosed that he had illicit relations with the wife of deceased Inder Pal namely Shashi Bala and they also developed physical intimacy between them, but deceased was suspicion about this relation and used to quarrel with Shashi Bala under the influence of liquor. It is further disclosed that on 17.3.2014, on the occasion of Holi, Inder Pal quarreled with Shashi Bala under the influence of liquor and scuffled with her. In the meanwhile, Tinku Singh who was also there intervened and during that scuffle, at the instance of Shashi Bala he

strangled the deceased, and Shashi Bala asked him to remove the dead body and she was going to house of her sister. Tinku Singh called his friend Sandeep and both of them beheaded the body of Inder Pal and packed inside plastic bags and jute bags and threw at two spots wherefrom it was recovered. Accused Sandeep and Shashi Bala were also arrested. During investigation, accused Tinku Singh led police to the house of Sandeep wherefrom blood stain clothes of Tinku Singh and Sandeep worn at the time of incident were recovered besides a briefcase containing two photographs of Tinku Singh with Shashi Bala were also recovered. Accused Tinku Singh vacated the tenanted premises and put his briefcase at the house of Sandeep as he leave Delhi. One weapon of offence i.e. dav / choppar was also recovered from the area of Titiksha Model Public School in pursuance of his disclosures statement. Postmortem was conducted on the dead body and viscera was preserved. Subsequent opinion about use of weapon was also sought. Mobile phone of deceased was recovered from Sandeep and, all the accused were in contact with each other by mobile phone. CDRs of those mobiles were also collected. All the accused were chargesheeted u/s 302/201/182/34 IPC.

3. Accused persons/appellants Tinku Singh and Shashi Bala were charged under Section 302 read with Section 34 of the IPC and an additional charge u/s 182 IPC was also framed against the accused/appellant Shashi Bala. All accused persons/appellants pleaded not guilty and claimed trial.
4. In order to bring home the guilt of the accused persons/appellants, the prosecution examined 26 witnesses in all. Thereafter, statement of the accused persons/appellants was recorded under Section 313 Cr.P.C.

5. **Mr. Joginder Tuli** appeared for both the appellants in the present case. For the appellant Shashi Bala, the learned counsel contended that the prosecution has failed to prove beyond reasonable doubt the involvement of the appellant Shashi Bala in the present crime; that the appellant Shashi Bala was living with her sister during the relevant period and she was occasionally visiting the house where the deceased and the appellant Tinku Singh were residing; that no incriminating article has been recovered at the instance of the appellant Shashi Bala in order to connect her with the murder of the deceased; that the only allegation against her is the illicit relationship with the appellant Tinku Singh which the prosecution has alleged on the basis of two photographs (**Mark PW-7/2**) and (**Mark PW-7/3**) of the appellant Shashi with the appellant Tinku Singh; that the prosecution has failed to prove the photographs (**Mark PW-7/2**) and (**Mark PW-7/3**) on record, hence, the appellant Shashi should be acquitted for the said offence.
6. So far as the appellant Tinku Singh is concerned, the learned counsel confined his arguments only to the quantum of sentence contending that as per the confessional statement of the appellant Tinku Singh, the death of the deceased was caused due to a sudden quarrel between the deceased and the appellant Tinku Singh wherein the appellant Tinku Singh throttled the deceased which led to the death of the deceased, hence, the case of the appellant Tinku Singh falls within the **exception 4 of Section 300** of the IPC, consequently, the appellant Tinku Singh should be convicted for a lesser offence under Section 304 of the IPC.

7. On the other hand, learned APP for the State ***Ms. Neelam Sharma*** contended that the case of the prosecution has been established beyond reasonable doubt; that the body of the deceased was recovered at the instance of the appellant Tinku Singh from 3 ½ Pusta, near IGL Board; that the appellant Tinku Singh has confessed that he was having an illicit relationship with the appellant Shashi Bala; that the deceased Inderpal quarreled with the appellant Shashi Bala on the day of Holi i.e. 17.03.2014 and on her instance, the appellant Tinku Singh throttled the deceased; that the appellant Tinku Singh at the instance of the appellant Shashi Bala beheaded the deceased in order to get rid of his body; that two photographs of the appellant Tinku Singh with the appellant Shashi Bala were recovered at the instance of the appellant Tinku Singh from a brief case which was at the house of the appellant Tinku Singh; that the appellant Tinku Singh further led to the recovery of the weapon of offence from the area of Titiksha Model Public School, Sadatpur, Delhi.
8. So far as the appellant Shashi Bala is concerned, the learned APP for the state contended that the conduct of the appellant Shashi Bala is unnatural as she lodged a *missing report* of her husband on 20.03.2014 even though she was aware that he was missing since 17.03.2014 i.e. the day of Holi; that the prosecution witnesses prove that there was close proximity between the two appellants as the appellant Shashi Bala herself got inducted the appellant Tinku Singh as a tenant, the latter shared no blood relation with the former; that the perusal of the record reflects that the deceased was murdered in

furtherance of the common intention of both the appellants and pleaded that the judgment of the Trial Court be upheld.

9. We have heard the learned counsel for both the sides and perused the material on record.
10. The case of the prosecution originates from the filing of a missing report by the appellant Shashi Bala that her husband i.e. the deceased went missing on 18.03.2014. The missing report was lodged with the investigating agency as DD No. 26A and proved on record as *Ex. PW-3/I*. Further, in pursuance of the missing report, the investigating agency arrested the appellant Tinku Singh vide arrest memo *Ex. PW-16/B* and pursuant to his disclosure statement *Ex. PW-23/A*, the dead body of the deceased was recovered from 3 1/2 Pusta which was identified by the brother of the deceased vide memo *Ex. PW-8/A*. Further, the appellant Tinku Singh led to recovery of weapon of offence from the road in front of the Titiksha Model Public School, Sadatpur, Delhi and was seized vide pointing out and seizure memo of weapon *Ex. PW-16/E*. So far as the appellant Tinku Singh is concerned, the counsel for the appellants submitted that he does not dispute the said incriminating evidence against him and also the findings of the learned Trial Court in these aspects.
11. However, the main thrust of the arguments of the learned counsel for the appellant is that there is no incriminating evidence on record against the appellant Shashi Bala. On the other hand, the learned APP for the State has argued that the appellant Shashi Bala was having

illicit relations with the appellant Tinku Singh and this relationship of the two appellants paved the way for commission of the said offence.

12. In order to ascertain the role of the appellant Shashi Bala, we deem it appropriate to refer to the evidence on record. The elder brother of the deceased Sh. Mahipal Singh was examined in the court as PW-7 who deposed that:

“On 18.03.2014, at about 9 PM, I received phone call of Shashi Bala at my phone. It was told to us by Shashi Bala that her husband Inder Pal Singh is missing and he had left the house under influence of liquor and he is not traceable. On 19.03.2014, I along with my nephew Amardeep came to Delhi at house of my brother Inder Pal at K-296, Gali No 5, Gautam Vihar, Usmanpur, Delhi. Room of Inder Pal and his wife Shashi Bala was situated at second floor of the aforesaid premises which was found lock. I made inquiries about the presence of Shashi Bala. One boy took me and my nephew at the house of sister of Shashi Bala which was at a distance of 200 meter away from the rented accommodation of my brother Inder Pal Singh. We reached there. Shashi Bala met us at the house of her sister namely Sushma. I asked about the presence of my brother Inder Pal Singh. She replied that Inder Pal is missing and he had left the house under influence of liquor on 18.03.2014 also made inquiries here and there in Delhi but no clue come forward about my brother Inder Pal Singh. I and my nephew returned to my native village.”

13. The landlord of the deceased, Sh. Pawan Sharma was examined as PW-10 who deposed that:

“I am registered owner of H.No.K-296, Gali No.4, Gautam Vihar, Delhi About 2 years prior to present date, one Inder Pal had joint tenancy in aforesaid house. I had let out two rooms at the ground floor of aforesaid

house. He was residing alongwith his wife and two children. Wife of Inder Pal is present in court and standing in dock (correctly identified by face). Inder Pal used to pay rent Rs.2.500/- per month excluding electricity charges. There was one room at first floor of my aforesaid house. Student Shivam was residing as tenant at the first floor in those days.

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Tinku was earlier known to me as he was residing in my house along with Inder Pal and Shashi Bala. Once, I had gone to my house to take rent from Inder Pal Singh where Tinku and Shashi Bala had met me and accused Shashi Pal got introduced me to Tinku saying that he is known to her. In those days, Tinku was residing in one room out of two which had been let out the Inder Pal Singh.

On 23.03.2014, police took me to my aforesaid house and at that time accused Tinku was with police officials. At that time, the room of Inder Pal and room of Tinku both were locked. It also came into my notice on reaching at aforesaid house that accused Shashi Bala used to visit her rented accommodation for a short period for last 2/3 days. It also came into my notice that accused Shashi Bala had lodged missing report of her husband Inder Pal at P.S. Usmanpur. Inder Pal was lastly seen by me on the day of Holi and thereafter, he found disappeared. Police had recovered dead body of Inder Pal in parts as it was told to me.”

In his cross-examination PW-10 (Pawan Sharma) deposed that:

“... I had not taken any ID Proof of tenant either Inder Pal Singh and accused Tinku. Vol. Inder Pal was rickshaw puller and earlier known to me and my family and accused Tinku got introduced by wife of Inder Pal. I am not aware whether there was dispute / quarrel between Inder Pal and his wife Shashi Bala on petty

Issues. I have no personal knowledge about the murder of Inder Pal.”

14. Sh. Shubham Singh who was a tenant at the first floor of the house at which the deceased was residing was examined as PW-11 who deposed that:

“I had joined my tenancy at the first floor of house no. K 296, gali no. 5, Gautam Vihar, Usmanpur, Delhi in the month of August, 2013. The said house belongs to one Pawan Sharma. I used to pay rent Rs. 2000 per month to landlord Pawan Sharma. In those days, accused Tinku present in court (correctly identified) was residing in a one room of ground floor of aforesaid house which belongs to Pawan Sharma. Another room of ground floor was being used as tenant by Inder Pal Singh and his family comprising of his wife Smt. Shashi bala (accused) present in court (correctly identified) and his two daughters aged about 5 years and 2 years. Prior to my joining the tenancy, Inder Pal and his family and accused Tinku were residing in two rooms of ground floor of the house. On the day of Holi i.e. 17.03.2014, I had seen Inder Pal in noon hours in his room alongwith family. Inder Pal used to take liquor occasionally and he was rickshaw puller.

On the day of Holi, a quarrel had taken place between Inder Pal and his wife accused Shashi Bala on the issue of consuming liquor by Inder Pal. At that time, accused Tinku was at the first floor of house and both the daughters of Inder Pal were also with him. I left my room at about 3 PM and went to the house of my relative. As far as I Remember, accused Tinku had vacated his room on the next day of Holi.

After 3 or 4 days from Holi of year 2014, two police officials had visited the premises where I was residing. At that time, neither accused Shashi Bala nor accused Tinku were present and their rooms were locked.

Police officials made inquiries from house owner Pawan Kumar about the presence of Shashi Bala and Tinku.

During aforesaid 3/4 days, in day hours, accused Shashi Bala used to visit her tenanted room for a short while. As far as I remember, in aforesaid 3/4 days, accused Shashi Bala was residing at the house of her sister who was residing in the same locality.

In his cross-examination PW-11 (Shubham Singh) deposed that:

Police had recorded my statement after 3-4 days from the day of Holi. I do not remember the exact date of recording of my statement. I heard the altercation (kaha suni) between accused Shashi Bala and her husband Inder Pal on the day of Holi when I was going to take bath, I had not gone to pacify the matter between both. I had not gone in the room where altercation was going on between accused Shashi Bala and Inder Pal. I heard the altercation for about 15minutes.”

15. HC Shripal Sharma was examined as PW-15 who deposed that:

“On 20.03.2014. I was posted at P.S. N.U.Pur. On that day, at about 3 or 4 P.M., copy of DD no.26A already Ex PW-3/1 was assigned to me to take action in matter which was missing report lodged by Smt Shashi Bala. I had read over the contents of DD no 26A. I came into my notice that Shashi Bala lodged a missing report for her husband Inderpal Singh saying that her husband is missing from 18.03.2014. I took steps regarding missing person with the help of other authorities. Carbon copy of missing person form is Ex.PW-15/A which bears signatures of SHO Insp. Mahavir Singh at point A.

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On 23.03.2014 I was at P.S. and at about 7 or 8 A.M., relatives of Inderpal namely Dinesh Kumar (chacha of Inderpal), Sanjay Kumar (cousin brother of Inderpal) along with other persons came at P.S. They met me and disclosed that they have suspicion against Tinku

for missing/disappearance of Inderpal who was residing as a tenant in adjacent room of Inderpal. I called Tinku from his tenanted room through Ct. Sonu. He came at P.S. I interrogated him. It was told to me by Tinku that on 17.03.2014, he and Shashi Bala committed murder of Inderpal in their room and he had thrown the dead body in the area of Khajuri Pushta at Yamuna Khadar. I narrated the aforesaid facts of incident to Insp. Jitender Singh and produced Tinku before him. He also verified the aforesaid facts from Tinku.

In his cross-examination PW-15 (Shripal Sharma) deposed that:

The dead body was lying at a place in bushes at a distance of 15-20 feet ahead from IGL Board in between Pushta No. 3 and 3½, New Usmanpur. Firstly torso was recovered then head of the deceased was recovered. The distance between the place where torso was lying and place where head was lying was about 100 meter. We were seven police officials besides driver. Accused Tinku was also with us. Dinesh Kumar, chacha of deceased and Sanjay, cousin of deceased were also with us at the time of recovery of torso and head.”

16. From the aforesaid testimonies, the following facts are culled out:

- That the appellant Shashi Bala got the appellant Tinku Singh inducted as a tenant in the same house where she was residing with her husband as well as two daughters even though the appellant Tinku Singh was not related to her through consanguinity or any other relation made out of law;
- That a quarrel took place between the deceased and the appellant Shashi Bala on 17.03.2014 which is evident from the testimony of PW-11 (Shubham Singh) who has deposed that On the day of Holi, a quarrel had taken place between Inder

Pal and his wife accused Shashi Bala on the issue of consuming liquor by Inder Pal. However, she did not disclose the said fact in the missing complaint (*Ex. PW-3/1*) made to the investigation agency;

- That it was the case of the appellant Shashi Bala in the Trial Court that she was residing in her matrimonial home with the deceased during the relevant period and it was the deceased who had gone missing from the said house. Consequently, the contention advanced by the learned counsel for the appellant Shashi Bala that she was not residing with the deceased at the relevant time is contrary to the record;
- That a lackadaisical attitude was adopted by the appellant Shashi Bala in filing the missing complaint as she was aware of the absence of the deceased since the day of Holi which is evident from the missing complaint (*Ex. PW-3/1*) and filed it only on 20.03.2014 stating that her husband was missing since 18.03.2014;
- That she kept visiting the tenanted house even after the quarrel which took place on the day of Holi and was aware of the absence of her husband i.e. the deceased which is evident from the testimony of PW-10 (Pawan Sharma) who deposed that It also came into my notice on reaching at aforesaid house that accused Shashi Bala used to visit her rented accommodation for a short period for last 2/3 days and PW-11 (Shubham Singh) who deposed that During aforesaid 3/4 days, in day hours, accused Shashi Bala used to visit her tenanted room for

a short while. As far as I remember, in aforesaid 3/4 days, accused Shashi Bala was residing at the house of her sister who was residing in the same locality, however, she made no efforts to trace her husband and remained calm.

- That the appellant Shashi Bala in the missing complaint (*Ex. PW-3/1*) filed by her clearly mentioned that she had no doubt on any person even though she was aware of the fact that the deceased was last seen along with the appellant Tinku Singh on the 17.03.2014 (as the festival of Holi was on 17th March in the year 2014 and not 18.03.2014) which emerges from the testimony of PW-11 (Shubham Singh) who deposed that On the day of Holi, a quarrel had taken place between Inder Pal and his wife accused Shashi Bala on the issue of consuming liquor by Inder Pal. At that time, accused Tinku was at the first floor of house and both the daughters of Inder Pal were also with him, still she did not mention the said fact in her missing report (*Ex. PW-3/1*). The said conduct of the appellant Shashi Bala gives reason to draw adverse inference against her that she was trying to protect the appellant Tinku Singh being aware of the fate of her husband.

17. Hence from the aforesaid discussion, we are of the view that the overall conduct of the appellant Shashi Bala is unnatural. The acts of the appellant reflect that she was aware about the happening of the unfortunate incident with her husband, which led to the concocting of a story in order to protect the other appellant Tinku Singh.

18. Moreover, we are in consonance with the findings of the Trial Court to the extent of recovery of two photographs which are (*Mark PW-7/2*) and (*Mark PW-7/3*). The photographs were recovered at the instance of the appellant Tinku Singh from House No. C-136, Chandan Vihar, Nangloi and seized vide memo (*Ex. PW-16/K*) wherein the appellant Shashi Bala and the appellant Tinku Singh have been portrayed as a newly wedded couple. The recovery of the said photographs has not been disputed by the counsel for the appellants in the present proceedings. The only contention is that the prosecution has failed to prove them on record for want of negatives. It is an established fact that the photographs were recovered at the instance of the appellant Tinku Singh and only he could have elaborated upon the fact as to the place where the negatives could have been procured. The presumption under Section 106 of the Indian Evidence Act is applicable as to this particular fact as the whereabouts of the two photographs were within the exclusive knowledge of the appellant Tinku Singh. Moreso, it was for both the appellants to explain the demonstration being done in the said two photographs as the appellant Tinku Singh was well aware of the marital status of the appellant Shashi Bala.
19. It is settled law that the common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or *by inference from the acts or attending circumstances of the case and conduct of the parties*. Direct proof of common intention is seldom available and, therefore, *such intention can only be inferred from the circumstances appearing*

from the proved facts of the case and the proved circumstances.

In ***Asif Khan vs. State of Maharashtra and Ors.*** reported at ***AIR 2019 SC 1286*** the Apex Court while reiterating the principles of common intention as covered under Section 34 of the IPC has held as under:

“21. The judgment of Privy Council in Mehbub Shah v. Emperor AIR 1945 PC 118 has elaborately considered the ingredients Under Section 34 and the said judgment of Privy Council has been relied on and approved by this Court time and again. The Privy Council in above case laid down that Under Section 34, the essence of that liability is to be found in the existence of a common intention animating the Accused leading to the doing of a criminal act in furtherance of such intention. In Paragraph No. 13, following has been laid down:

13. In 1870, it was amended by the insertion of the words "in furtherance of the common intention of all" after the word "persons" and before the word "each," so as to make the object of the Section clear. Section 34 lays down a principle of joint liability in the doing of a criminal act. The Section does not say "the common intentions of all" nor does it say "an intention common to all." Under the section, the essence of that liability is to be found in the existence of a common intention animating the Accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the Accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This

being the principle, it is clear to their Lordships that common intention within the meaning of the Section implies a pre-arranged plan, and to convict the Accused of an offence applying the Section it should be proved that the criminal act was done in concert pursuant to the prearranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.”

20. In terms of the aforesaid discussion, we are of the considered view that the incident which took place on the day of Holi in the year 2014 which led to the death of the deceased Inderpal was committed in furtherance of the common intention of both the appellants Shashi Bala and Tinku Singh and taking into consideration the dicta of the Apex Court in *Asif Khan (Supra)*, the contention of the counsel for the appellants that there is no incriminating evidence against the appellant Shashi Bala is answered in the negative.
21. As discussed above, the counsel for the appellant has not disputed the incriminating evidence against the appellant Tinku Singh, however, the counsel contends that even though the death was caused, the same was caused due to sudden quarrel which took place between the appellant Tinku Singh and the deceased, which is evident from the confessional statement made by the appellant Tinku Singh before the Investigating Officer. For bringing in operation of *Exception 4 to Section 300 IPC*, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage

and not having acted in a cruel or unusual manner. Moreover, the onus is upon the appellant to prove that his case falls within the said exception. The said position of law has been reiterated by the Apex Court in *Nandlal v. State of Maharashtra* reported at (2019) 5 SCC 224 wherein it has been held that:

“12. The only point falling for consideration is whether the appellant-accused has made out a case for modification of his conviction under Section 304 Part II IPC instead of Section 302 IPC?

13. In order to bring the case within Exception 4 to Section 300 IPC, the following conditions enumerated therein must be satisfied: (i) The act must be committed without premeditation in a sudden fight in the heat of passion; (ii) upon a sudden quarrel; (iii) without the offenders having taken undue advantage; and (iv) the accused had not acted in a cruel or unusual manner.

*14. Even if the fight is unpremeditated and sudden, if the weapon or manner of retaliation is disproportionate to the offence and if the accused had taken undue advantage of the deceased, the accused cannot be protected under Exception 4 to Section 300 IPC. Considering the scope of Exception 4 to Section 300 IPC, in *Sridhar Bhuyan v. State of Orissa* (2004) 11 SCC 395 , this Court held as under: (SCC pp. 396-97, paras 7-8)*

7. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

8. The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have

been more appropriate. ... There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused: (a) without premeditation; (b) in a sudden fight; (c) without the offenders 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 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”.”

(emphasis supplied)

22. The facts of the case are clear that the appellant Tinku Singh at the instance of the appellant Shashi Bala caused death of the deceased and the causing of harm to the deceased did not stop there, who went on to brutally behead the body of the deceased. Keeping in view the manner in which the appellant Tinku Singh acted at the instance of the appellant Shashi Bala, we are of the view that the present case fails to fulfill the requisites as enunciated in *Nandlal (Supra)* in order to give the benefit of *exception 4 of Section 300* of the IPC.
23. Having considered the material on record, we are of the view that the prosecution has been able to prove the incriminating evidence against both the appellants Shashi Bala and Tinku Singh for the offence punishable under Section 302 read with Section 34 of the IPC. Further, the charge for the offence under Section 182 of the IPC against the appellant Shashi Bala is also upheld. Accordingly, the appeals are dismissed.
24. Copy of the judgment be sent to the Jail Superintendent, Tihar Jail.
25. Trial Court record be sent back along with a copy of this judgment.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

FEBRUARY 20th, 2020
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