# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## R/CRIMINAL APPEAL NO. 1075 of 2013

**FOR APPROVAL AND SIGNATURE:**
**HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI : Sd/-**
**and**
**HONOURABLE MR. JUSTICE SANDEEP N. BHATT : Sd/-**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | NO |
| 2 | To be referred to the Reporter or not ? | NO |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | NO |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | NO |

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NARVATBHAI KALUBHAI PATEL
Versus
STATE OF GUJARAT

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Appearance:
MR PRATIK B BAROT(3711) for the Appellant(s) No. 1
MR HK PATEL APP for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI**
and
**HONOURABLE MR. JUSTICE SANDEEP N. BHATT**

**Date : 07/07/2022**

**ORAL JUDGMENT**

**(PER : HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)**

1. This appeal has been directed against the judgment and order of conviction and sentence

dated 16.05.2013 passed by the learned Additional Sessions Judge, Panchmahals at Godhra in Sessions Case No.151/2012, by which, the present appellant – accused has been convicted for the offences punishable under Section 302 of the Indian Penal Code and sentenced him to undergo life imprisonment and imposed fine of Rs.5,000/-, in default, to undergo three months simple imprisonment.

2. The brief facts leading to the filing of the present Criminal Appeal are as under,

2.1 The original first informant is the husband of the deceased and the father of the appellant – accused. He filed FIR on 04.06.2012 before Godhara Taluka Police Station, District : Panchmahal. Mainly it has been alleged that on the date of incident i.e. on 02.06.2012 at evening hours, while the deceased, Shantaben was scolding the wife of the

appellant – accused, Kokilaben by saying why is she not collecting the separate cow dung, in turn, the said Kokilaben telephoned the appellant – accused complaining of such episode, therefore, the appellant – accused on the date of incident i.e. on 04.06.2012 returned back from Siddhpur in the morning hours to his house and started speaking abusive language towards the first informant and his wife (the deceased) by saying that who is she to scold his wife and immediately thereafter, the appellant – accused allegedly picked up a chimney and a matchstick lying near a Chula, thereafter, he poured kerosene from the chimney over the body of the deceased and, thereafter, set her ablaze and immediately thereafter, the appellant – accused ran away from the scene of offence. The first informant thereafter with the help of neighbours,

who rushed at the place of incident, called 108 ambulance and, thereafter, took the deceased to civil Hospital, Godhra for treatment

2.2 On the basis of the FIR lodged by the father of the appellant and husband of the deceased, the Investigating Officer started investigation, recorded the statements of the witnesses, prepared various panchnamas and after the investigation was over, the Investigating Officer filed chargesheet against the appellant – accused before the concerned Magistrate Court. The case was exclusively triable by the Court of Sessions and, therefore, the concerned Magistrate Court committed the case to the Sessions Court, Panchmahals at Godhra, where it was registered as Sessions Case No.151/2012.

2.3 Before the Sessions Court, the charge,

Exh.2 was framed against the appellant – accused and, thereafter, the prosecution has examined 13 witnesses and also produced documentary evidence before the Sessions Court as observed in Paragraph No.5 of the impugned judgment and order of conviction.

2.4 Thereafter, further statement of the appellant – accused under Section 313 of the Code of Criminal Procedure, 1973 was recorded and after conclusion of the trial, the appellant has been convicted as observed hereinabove and, therefore, the appellant – accused has preferred the present appeal.

3. Heard learned advocate, Mr. Pratik Barot for the appellant – accused and learned APP Mr. H.K. Patel for the respondents.

4. Learned advocate, Mr. Pratik Barot for the appellant mainly contended that all the panch witnesses have turned hostile. Similarly, PW

No.7, PW No.8, PW No.9, PW No.10 and PW No.11, who are near relatives of the appellant as well as the deceased, have also not supported the case of the prosecution. It is submitted that the concerned trial court has recorded the order of conviction only on the basis of the dying declarations produced at Exh.28 recorded by the Executive Magistrate and Exh.37 recorded by the concerned Investigating Officer. Learned advocate has referred to the deposition given by PW No.6, Sanjaysinh Kanaksinh Lakod at Exh.25, who was working as Executive Magistrate and who has recorded the dying declaration of the deceased. It is submitted that there is no endorsement of the doctor on the said dying declaration that at the time of recording dying declaration, the patient was conscious. It is further submitted that no care was taken by the Executive Magistrate to see to it that before recording of dying declaration at Exh.28, inquiring into whether

any relatives were already present in the burns ward or not. Similarly, there was no presence of Nurse all throughout the process of recording the dying declaration. It is also not inquired into from the Medical Officer concerned as to whether the deceased was under treatment or not. The thumb impression of the deceased was also not identified by the independent witness and, therefore, such dying declaration is not inpiring any confidence. Learned advocate has also referred to the deposition given by PW No.12, Jayantilal Harjivandsas Pandya at Exh.36, who has carried out investigation. It is submitted that the said witness has also recorded the dying declaration of the deceased, Shantaben. Learned advocate has referred to the dying declaration, Exh.37. It is submitted that in the deposition of the said witness, he has categorically deposed that at the time of recording dying declaration, the doctor was not present nor

he had procured any certificate from the doctor concerned. Learned advocate has also referred to the deposition of PW No.13, Dilipbhai Nathabhai Gharwal at Exh.46, who was working as ASI and who has also recorded the statement of the deceased, copy of which is produced at Exh.31/A. After referring to all three dying declarations, it is contended that all these three dying declarations do not inspire any confidence.

5. At this stage, learned advocate has referred to and relied upon the decision rendered by the Hon'ble Surpeme Court in case of **Purshottam Chopra Vs. State (Govt. of NCT Delhi)**, reported in **(2020) 11 SCC 489.** Learned advocate has more particularly relied upon Paragraph No.21 of the said decision.

6. Learned advocate, therefore, urged that the conviction recorded by the concerned trial court only on the basis of the dying declarations given by the deceased is

required to be quashed and set aside. However, at this stage, learned advocate has alternatively submitted that even assuming that this Court believes the story of the prosecution that the incident has taken place in the manner in which the prosecution has leveled against the appellant even then, the case of the appellant falls under Exception 4 of Section 300 of the IPC and, therefore, the appellant may be convicted under Section 304 of the IPC and not under Section 302 of the IPC. Learned advocate, at this stage, mainly argued for substitution of conviction from 302 of the IPC to Section 304 of the IPC. It is mainly contended that the appellant – accused and the deceased happens to be son and mother in relation and the prosecution has failed to prove by leading cogent evidence that there was deep rooted enmity exist between the appellant and the deceased. Even from the dying declarations, Exhs.28 and 37, it can be said that quarrel ensued

between the appellant and the deceased in a spur of moment and in the said sudden quarrel, the appellant picked up the chimney lying in the house and utilized as a murder weapon in the eyes of law with the help of which, kerosene was poured on the deceased and as a consequence thereof, the deceased passed away. In fact, when the complaint was made by the wife of the appellant viz., Kokilaben about her being scolded by the deceased, the appellant – accused had all time opportunities available to come with the weapon and with the help of which, he could have killed the deceased but because of the quarrel ensued between son and mother, the incident in question took place. Learned advocate, thereafter, contended that the incident had taken place on 04.06.2012 and the deceased was taken immediately to Civil Hospital, Godhra for treatment, however, she passed away after a period of 9 days i.e. on 11.06.2012. It is contended that the

prosecution has not examined treating doctor of the deceased so as to demonstrate the nature of treatment offered to the deceased nor any treatment related documents have come on record of the Court, which would have given a fair idea to the learned court below as to the reason for the death of the deceased.

7. Learned advocate would contend that PW No.5, Dr. Mohammad Asikkhan at Exh.21, who had conducted the postmortem of the deceased, had not deposed with certainty as to whether the death was homicidal, suicidal or accidental. Learned advocate also submitted that PW No.12, Jayantilal Harjivandas Pandya at Exh.36, who is an Investigating Officer, has also confirmed that he had not recorded the statement of the treating doctor nor he has made any attempt to bring on record the treatment papers of the deceased. Thus after a period of 9 long days, the deceased,

Shantaben died.

8. Learned advocate, thereafter, contended that there is no opinion elicited by the prosecution from PW No.5, Medical Officer, who has conducted the postmortem to say and suggests that the burn injuries sustained by the deceased in ordinary course was sufficient enough to cause her death. In absence thereof, in a case where deceased had sustained two to three degree of total burns is one another factor available with the appellant to contend that if it has not come on record with certainty that in all probabilities, deceased would and could have succumbed to death because of burn injuries, benefit be given to the appellant – accused by bringing down the case from Section 302 of the IPC to Section 304 of the IPC.

9. Learned advocate has also referred to the provisions contained in Exception 4 of Section 300 of the Indian Penal Code for

reduction of the sentence and relied upon various factors for reduction of sentence.

10. Learned advocate has placed reliance upon following decisions,

(1) the judgment in case of **Nankaunoo Vs. state of Uttar Pradesh**, reported in **(2016) 3 SCC 317;**

(2) the judgment in case of **Surain Singh Vs. State of Punjab**, reported in **(2017) 5 SCC 796;**

(3) the judgment in case of **Govind Singh Vs. State of Chhattisgarh**, reported in **(2019) 17 SCC 812;**

(4) the judgment in case of **Kalabai Vs. State of Madhya Prades**, reported in **(2019) 20 SCC 502;**

(5) the judgment in case of **Mohd. Rafiq @ Kallu Vs. State of Madhya Pradesh**, reported in **(2021) 10 SCC 706;**

(6) the judgment in case of **Maniben Vs.**

**State of Gujarat**, reported in **2010 (1) GLR 662 (SC);**

11. Learned advocate, therefore, urged that the conviction be substituted from Section 302 of the IPC to Section 304 of the IPC. The appellant is in jail since last more than 10 years and, therefore, this appeal be partly allowed.

12. On the other hand, learned APP has opposed this Appeal and mainly placed reliance upon three dying declarations given by the deceased, Shantaben. Learned APP has also referred to the depositions given by PW No.6, who is Executive Magistrate and who has recorded the dying declaration of the deceased, PW No.12, who is Investigating Officer and who has also recorded the dying declaration and PW No.13, who is ASI and who has also recorded the dying declaration. After referring to all three dying declarations, it is contended that the

deceased has given same story in all dying declarations recorded by different authorities. It is further submitted that the dying declaration given by the deceased has been corroborated by other evidence produced by the prosecution before the concerned trial court. Learned APP has referred to the panchnama of the place of incident and also placed reliance upon the report submitted by the FSL Officer. It is submitted that from the clothes of the deceased, soil, which was collected from the place of incident and the clothes of the appellant – accused, the petroleum hydrocarbon was found. Learned APP, therefore, urged that the incident has taken place in the manner in which the deceased has stated before the concerned different authorities including the Executive Magistrate.

13. Learned APP, thereafter, referred to the FIR given by the husband of the deceased and the

father of the appellant. After referring to the same, it is contended that the deceased scolded the wife of the appellant viz., Kokilaben on 02.06.2012 and on the same day, she telephoned the appellant, who at the relevant time was at Siddhpur. The appellant came to house on 04.06.2012 during morning hours and immediately started quarrel with the complainant and the deceased and, thereafter, he picked up chimney, which was lying there and poured kerosene over the body of the deceased and, thereafter, set her ablaze. Thus, it is contended that the case of the appellant does not fall under Exception 4 of Section 300 of the IPC as contended by learned advocate for the appellant. Learned APP, therefore, urged that no error is committed by the Sessions Court while recording conviction under Section 302 of the IPC and, therefore, the same may not be substituted as urged by learned advocate for the appellant.

14. Having heard learned advocates appearing for the parties and having gone through the material placed on record, it would emerge that PW No.7, Kalubhai Gamabhai Patel, Exh.13 has lodged FIR before concerned Police Station against his son i.e. the present appellant – accused, in which, he has narrated about the incident, which has taken place on 02.06.2012 between his wife, Shantaben and wife of the appellant. In the said FIR, the complainant has stated that because of the said incident which had taken place on 02.06.2012 between Kokilaben and Shantaben, the said Kokilaben telephoned the appellant – accused and complained about the episode, which took place on 02.06.2012, therefore on the day of occurrence i.e. on 04.06.2012, the appellant returned back to his house and, thereafter, used abusive language towards the complainant and his wife and during the said quarrel, he picked up chimney and match stick lying near the chula

and, thereafter, poured kerosene over the body of deceased and set her ablaze. As observed hereinabove, after the registration of the FIR, the investigation was carried out and on conclusion of the same, chargesheet came to be filed against the appellant accused. From the evidence produced before the concerned trial court, it is revealed that the prosecution witnesses viz., PW No.7 viz., Kalubhai Gamabhai Pate, Exh.30, PW No.8 viz., Jerabhai Kalubhai Patel, Exh.32 (son of the deceased), PW No.9 viz., Satiben Jerabhai Patel (daughter-in-law of the deceased), Exh.33, PW No.10 viz., Bhavinbhai Kalubhai Patel at Exh.34 (son of the deceased) and PW No.11 viz., Mavsing Kanjibhai Patel at Exh.35 (cousin of the complainant) have not supported the case of the prosecution and they declared hostile. Similarly, PW No.1 viz., Amarsinh Somabhai Patel at Exh.7, who is first panch witness of the inquest panchnama as well as place of incident and PW

No.2 viz., Abhesingbhai Kanjibhai Patel, who is second panch witness of the aforesaid panchnamas, have turned hostile. Similarly, PW No.3 viz., Hirabhai Galabhai Patel at Exh.16 and PW No.4 viz., Kadvabhai Rupabhai Patel at Exh.20, who are the panch witnesses of recovery of the clothes of the accused have also not supported the case of the prosecution. Thus, as the witnesses have turned hostile, the case of the prosecution rest mainly on the deposition of PW No.5 viz., Dr. Mohamad Asikkhan at Exh.21, who has conducted postmortem of the deceased, PW No.6 viz., Sanjaysinh Kanaksinh Lakod at Exh.25, who is Executive Magistrate and who has recorded the dying declaration of the deceased, PW No.12 viz., Jayantilal Harjivandas Pandya at Exh.36, who is Investigating Officer, PW No.13 viz., Dilipbhai Nathabhai Gharwal at Exh.46, who was working as ASI and FSL report produced at Exh.43.

15. We have carefully examined the dying declarations given by the deceased and in all three dying declarations, she has specifically stated that the appellant came to the house in the morning and picked up a quarrel and, thereafter, immediately picked up chimney from which kerosene was poured on her and, thereafter, she was set ablaze on fire. We have carefully examined the deposition given by PW No.5 viz., Dr. Mohammad Asikkhan at Exh.21 and the nature of injuries sustained by the deceased. We have also perused the deposition given by PW No.6 viz., Sanjaysinh Kanaksinh Lakod at Exh.25, who has recorded the dying declaration while working as Executive Magistrate. After recording the dying declaration, right thumb impression of the deceased was also taken and the said witness has countersigned the same, copy of which was also sent to Investigating Officer. We have perused the panchnama of place of incident and also considered FSL

report, Exh.43. From the FSL report produced at Exh.43, it is revealed that the presence of petroleum hydrocarbon was found in Mark – A, B, C, D, E, F & G. The said articles are collected from the place of incident i.e. the clothes of the deceased, soil, chimney, match stick and also clothes of the appellant – accused. Thus from the clothes of the appellant – accused, kerosene was found. Thus, the dying declaration given by the deceased is corroborated by other evidence produced by the prosecution.

16. At this stage, this Court would like to refer to the decision rendered by the Hon'ble Supreme Court in case of **Purshottam Chopra (supra),** wherein the Hon'ble Supreme Court has observed in Paragraph No.21 as under,

> 21. For what has been noticed hereinabove, some of the principles relating to recording of dying declaration and its admissibility and reliability could be usefully summed up as under:-

i) A dying declaration could be the sole basis of conviction even without corroboration, if it inspires confidence of the Court.

ii) The Court should be satisfied that the declarant was in a fit state of mind at the time of making the statement; and that it was a voluntary statement, which was not the result of tutoring, prompting or imagination.

iii) Where a dying declaration is suspicious or is suffering from any infirmity such as want of fit state of mind of the declarant or of like nature, it should not be acted upon without corroborative evidence.

iv) When the eye-witnesses affirm that the deceased was not in a fit and conscious state to make the statement, the medical opinion cannot prevail.

v) The law does not provide as to who could record dying declaration nor there is any prescribed format or procedure for the same but the

person recording dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making the statement

vi) Although presence of a Magistrate is not absolutely necessary for recording of a dying declaration but to ensure authenticity and credibility, it is expected that a Magistrate be requested to record such dying declaration and/or attestation be obtained from other persons present at the time of recording the dying declaration.

vii) As regards a burns case, the percentage and degree of burns would not, by itself, be decisive of the credibility of dying declaration; and the decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.

viii) If after careful scrutiny, the Court finds the statement placed as dying declaration to be

> voluntary and also finds it coherent and consistent, there is no legal impediment in recording conviction on its basis even without corroboration.

17. Keeping in view the aforesaid principles laid down by the Hon'ble Supreme Court, if the facts of the present case, are examined, this Court is of the view that dying declaration given by the deceased can be relied upon and the conviction of the appellant – accused can be recorded on the basis of the said dying declaration, which is corroborated by other evidence produced by the prosecution.

18. However at this stage, alternate submission canvassed by learned advocate for the appellant is also required to be considered by this Court. Learned advocate for the appellant has alternatively submitted that the case of the appellant falls under Exception 4 of Section 300 of the IPC and, therefore, the sentence imposed by the

concerned trial court be reduced.

19. For considering the aforesaid submission, this Court would like to once again refer to the evidence produced by the prosecution. It would be relevant to note that the appellant is the son of the complainant as well as the deceased. From the deposition given by the prosecution witnesses, who are the relatives of the complainant, it cannot be said that there was deep rooted enmity, which existed between the appellant and the deceased. There is no material produced by the prosecution that there was any enmity nurtured over a period of time between the parties. Once again, it is required to be noted that all relatives of the deceased have not supported the case of the prosecution and they have turned hospital.

20. For invocation of Exception 4 of Section 300, relevant aspects are required to be kept in view. Exception 4 of Section 300 reads as

under,

> "Exception 4. Culpable homicide is 'not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

21. At this stage, this Court would like to refer to the decision rendered by the Hon'ble Supreme Court in case of **Surain Singh (supra)**, wherein the Hon'ble Supreme Court has observed in Paragraph Nos.7 and 15 as under,

> 7. Exception 4 to Section 300 of the IPC applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The exception contemplates that the sudden fight shall start upon the heat of passion on a sudden quarrel. The fourth exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of provocation not covered by the

first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side.

For if it were so, the Exception more appropriately applicable would be Exception 1. 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 had 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".

15. The weapon used in the fight between the parties is ‘Kirpan' which is used by ‘Amritdhari Sikhs' as a spiritual tool. In the present case, the Kirpan used by the appellant-accused was a small Kirpan. In order to find out

whether the instrument or manner of retaliation was cruel and dangerous in its nature, it is clear from the deposition of the Doctor who conducted autopsy on the body of the deceased that stab wounds were present on the right side of the chest and of the back of abdomen which implies that in the spur of the moment, the appellant-accused inflicted injuries using Kirpan though not on the vital organs of the body of the deceased but he stabbed the deceased which proved fatal. The injury intended by the accused and actually inflicted by him is sufficient in the ordinary course of nature to cause death or not, must be determined in each case on the basis of the facts and circumstances. In the instant case, the injuries caused were the result of blow with a small Kirpan and it cannot be presumed that the accused had intended to cause the inflicted injuries. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a

fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. It is clear from the materials on record that the incident was in a sudden fight and we are of the opinion that the appellant-accused had not taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this Exception provided he has not acted cruelly."

22. The Hon'ble Supreme Court in case of **Kalabai (supra)** has observed in Paragraph Nos.13 and 16 as under,

13. It is relevant to notice that husband of the deceased, Vijay Singh was also charged under Section 302 read with Section 34 IPC and 114 IPC who has been acquitted by the trial court. In the evidence which was led before the Courts below, there are no evidence of any strained relations between the

appellant and deceased. The entire incident which happened has been elaborately described by the deceased herself in her dying declaration. There is no evidence to come to conclusion that the appellant had any intention to kill the deceased. As per statement of deceased herself that a quarrel was going on between herself and her husband, Vijay Singh and during that quarrel, the appellant who is living in the lower floor of house arrived at the scene. There cannot be any issue that when a person throws a burning stove on a person there is knowledge that the act is likely to cause death.

16. Learned counsel for the appellant has placed reliance on the judgment of this Court in Hari Shankar (supra). In the above case the appellant had also picked up a burning kerosene wick-stove and threw it on the deceased. Kerosene from stove spilled over the clothes they caught the fire. The deceased in the said case also died as a result of the burns received by him. This Court held that since the

appellant had thrown a burning stove on the deceased, he would have known that his act was likely to cause burns resulting in death. It is useful to extract paragraphs 2,3 and 4 of the judgment which is to the following effect:

2. Only question that we have to consider in this appeal is what offence can be said to have been committed by the appellant on the basis of the facts found by the High Court. It has been held that while the appellant, deceased Bheem Singh and one Shah Megan were taking tea in the tea-club of the Air Force, 32 Wing (MT Section), an exchange of words took place between the appellant and the deceased on account of the demand made by the appellant for returning Rs 50,000 which he had advanced to the deceased. The appellant became angry and picked up the burning kerosene wick-stove and threw it on the deceased. Kerosene from the stove spilled over the clothes of the deceased

and as the burning wicks came in contact with his clothes they caught fire. The deceased ultimately died as a result of the burns received by him.

3. What was submitted by the learned counsel for the appellant was that the appellant had no enmity with the deceased. He had no intention to kill the deceased as by killing him he could not have recovered the amount of Rs 50,000 which he had advanced to the deceased. He further submitted that the quarrel between the two took place all of a sudden and in the heat of the moment the appellant had picked the stove and had thrown it towards the deceased. He, therefore, submitted that it was merely a rash and negligent act on the part of the appellant. We cannot agree with the submission of the learned counsel. Since the appellant had thrown a burning stove on the deceased, he would have known that his act was likely to cause burns resulting in death.

In view of the facts and circumstances of the case, he can be said to have committed an offence under Section 304 Part II IPC.

4. We, therefore, allow this appeal partly, alter the conviction of the appellant from under Section 302 to Section 304 Part II IPC and reduce the sentence of imprisonment for life to rigorous imprisonment for five years.

23. The Hon'ble Supreme Court in case of **Govind Singh (supra)** has observed in Paragraph Nos.3, 6, 7 and 8 as under,

"3. Case of prosecution is that on 23.05.2007 at 07.30 PM, deceased Lalita was sitting in her room along with her friend Dev Kumari (PW-1); while her mother Indra Kunwar (PW-2) was cooking food inside the house. At that time, the appellant-father of the deceased came to her room and took out the bulb saying that he wanted to connect the same in the courtyard. When deceased asked her father Govind

Singh not to do so, he disconnected the wire. When deceased started reconnecting the wire, the appellant asked her not to do and abused her which resulted in wordy quarrel. Out of anger, the appellant-accused threw burning chimney lamp on the deceased Lalita causing her burn injuries. Upon hearing the cries of the deceased, her mother (PW-2) and her friend Dev Kumari (PW-1) rushed near her. Ram Dayal (PW-4) and Mannu (PW-3) extinguished the fire by pouring water on the deceased. Immediately thereafter, deceased was taken to Community Health Centre, Odgi where she was attended by Dr. P.K. Patel (PW-9). After giving her the preliminary treatment, deceased was referred to District Hospital, Ambikapur. While deceased was taking treatment at District Hospital, Ambikapur, she succumbed to her injuries on 30.05.2007. Initially the case was registered under Section 307 IPC which was subsequently altered into Section 302 IPC. The dying declaration of the deceased (Ex.P-16) was recorded by PW-21-Executive

Magistrate in the presence of Dr. P.K. Patel (PW-9) who certified as to the fit, mental condition of the deceased. The eye witnesses Dev Kumari (PW-1), mother Indira Kunwar (PW-2), Manu Singh (PW-3) and Ram Dayal (PW-4) did not support the case of the prosecution and turned hostile. Mainly relying upon the dying declaration (Ex.P-16), the trial court convicted the appellant accused under Section 302 IPC and sentenced him to undergo life imprisonment. The High Court affirmed the conviction under Section 302 IPC and also the sentence of imprisonment imposed upon the appellant. Being aggrieved, the appellant is before us.

6. The occurrence was at 07.30 PM. While the deceased was talking with her friend Dev Kumari (PW-1), the appellant accused wanted to take out the bulb as he wanted to connect the same in the courtyard for which the deceased objected. There was a wordy quarrel between the appellant-father and his daughter-deceased. In the wordy quarrel, the appellant-accused

threw chimney lamp on the deceased causing her burn injuries. She sustained injuries on her face, chest and stomach and parts below the legs. The deceased succumbed to injuries seven days after the occurrence.

7. The entire occurrence was in a spur of moment. There was quarrel between the father and daughter as to where the bulb is to be put on. In the sudden quarrel and in spur of the moment, the appellant threw the chimney lamp on his daughter. The occurrence was sudden and there was no premeditation. The chimney lamp was burning there which the appellant had picked up and thrown on the deceased. Since the occurrence was in sudden quarrel and there was no premeditation, the act of the accused would fall under Exception 4 to Section 300.

8. The conviction of the appellant-accused under Section 302 IPC is modified as the one under Section 304 Part-II IPC. As per jail certificate, the appellant-accused had undergone about 10 years, 2 months and 25 days as on 26.08.2017. By now, the

appellant-accused has undergone about eleven years and eight months of imprisonment. Considering the facts and circumstances of the case and the period of imprisonment which the appellant-accused has undergone, the sentence of imprisonment is modified to the period already undergone."

24. The Hon'ble Supreme Court in case of **Mohd. Rafiq @ Kallu (supra)** has observed in Paragraph Nos.11, 13 and 16 as under,

11. The question of whether in a given case, a homicide is murder 3, punishable under Section 302 IPC, or culpable homicide, of either description, punishable under Section 304 IPC has engaged the attention of courts in this country for over one and a half century, since the enactment of the IPC; a welter of case law, on this aspect exists, including perhaps several hundred rulings by this court. The use of the term "likely" in several places in respect of culpable homicide, highlights the element of uncertainty that the act of the accused may or may not have killed

the person. Section 300 IPC which defines murder, however refrains from the use of the term likely, which reveals absence of ambiguity left on behalf of the accused. The accused is for sure that his act will definitely cause death. It is often difficult to distinguish between culpable homicide and murder as both involve death. Yet, there is a subtle distinction of intention and knowledge involved in both the crimes. This difference lies in the degree of the act. There is a very wide variance of degree of intention and knowledge among both the crimes.

13. The considerations that should weigh with courts, in discerning whether an act is punishable as murder, or culpable homicide, not amounting to murder, were outlined in Pulicherla Nagaraju @ Nagaraja Reddy v State of Andhra Pradesh, (2006) 11 SCC 444. This court observed that:

"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 premeditation. 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 underSection 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 premeditation; (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."

16. Section 304 IPC Code provides punishment for culpable homicide not amounting to murder (under Section 299 IPC). In the facts of the present case, this court is of the opinion that the appellants should be convicted for the offence punishable under the first part of Section 304 IPC, as he had the intention of causing such bodily harm, to the deceased, as was likely to result in his death, as it did. Having regard to these circumstances, the conviction recorded by the courts below, is altered to one under Section 304 Part I, IPC. The sentence too is therefore modified - instead of rigorous imprisonment ("RI") for life, the appellant is hereby sentenced to 10

years' RI. The direction to pay fine, is however, left undisturbed."

25. The Hon'ble Supreme Court in case of **Nankaunoo (supra)** has observed in Paragraph Nos.11, 12 and 13 as under,

> 11. Intention is different from motive. It is the intention with which the act is done that makes a difference in arriving at a conclusion whether the offence is culpable homicide or murder. The third clause of Section 300 IPC consists of two parts. Under the first part it must be proved that there was an intention to inflict the injury that is present and under the second part it must be proved that the injury was sufficient in the ordinary course of nature to cause death. Considering the clause thirdly of Section 300 IPC and reiterating the principles in Virsa Singh's case, in Jai Prakash v. State (Delhi Administration) (1991) 2 SCC 32, para (12), this Court held as under:-
>
> "12. Referring to these observations, Division Bench of this Court in

Jagrup Singh case, (1981) 3 SCC 616 observed thus: (SCC p. 620, para 7)

"These observations of Vivian Bose, J. have become locus classicus. The test laid down in Virsa Singh case, AIR 1958 SC 465 for the applicability of Clause Thirdly is now ingrained in our legal system and has become part of the rule of law."

The Division Bench also further held that the decision in Virsa Singh case AIR 1958 SC 465 has throughout been followed as laying down the guiding principles. In both these cases it is clearly laid down that the prosecution must prove (1) that the body injury is present, (2) that the injury is sufficient in the ordinary course of nature to cause death, (3) that the accused intended to inflict that particular injury that is to say it was not accidental or unintentional or that some other kind of injury was intended. In

other words Clause Thirdly consists of two parts. The first part is that there was an intention to inflict the injury that is found to be present and the second part that the said injury is sufficient to cause death in the ordinary course of nature. Under the first part the prosecution has to prove from the given facts and circumstances that the intention of the accused was to cause that particular injury. Whereas the second part whether it was sufficient to cause death is an objective enquiry and it is a matter of inference or deduction from the particulars of the injury. The language of Clause Thirdly of Section 300 speaks of intention at two places and in each the sequence is to be established by the prosecution before the case can fall in that clause. The 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances,

such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances. The framers of the Code designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue. Firstly, when an act is done by a person, it is presumed that he must have been aware that certain specified harmful consequences would or could follow. But that knowledge is bare awareness and not the same thing as intention that such consequences should ensue. As compared to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, namely the purposeful doing of a thing to achieve a particular end."

12. The emphasis in clause three of Section 300 IPC is on the sufficiency

of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary course of nature. When the sufficiency exists and death follows, causing of such injury is intended and causing of such offence is murder. For ascertaining the sufficiency of the injury, sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused and sometimes both are relevant. Depending on the nature of weapon used and situs of the injury, in some cases, the sufficiency of injury to cause death in the ordinary course of nature must be proved and cannot be inferred from the fact that death has, in fact, taken place.

13. Keeping in view the above principles, when we examine the facts of the present case, the deceased sustained gunshot wound of entry 1-1/2" x 1-1/2" on the back and inner part of left thigh, six gunshot wounds of exit each 1/3" x 1/3" in size in front and middle left thigh. Due to the

occurrence in the morning at the barber shop of the deceased, the appellant emerged from the northern side of the grove carrying pistol in his hand and fired at the deceased. The weapon used and the manner in which attack was made and the injury was inflicted due to premeditation clearly establish that the appellant intended to cause the injury. Once it is established that the accused intentionally inflicted the injury, then the offence would be murder, if it is sufficient in the ordinary course of nature to cause the death. We find substance in the contention of the learned counsel for the appellant the injury was on the inner part of left thigh, which is the non-vital organ. Having regard to the facts and circumstances of the case that the gunshot injury was caused in the inner part of left thigh, the sufficiency of injury to cause death must be proved and cannot be inferred from the fact that death has taken place. But the prosecution has not elicited from the doctors that the gunshot injury on the inner part of left thigh caused

rupture of any important blood vessel and that it was sufficient in the ordinary course of nature to cause the death. Keeping in view the situs and nature of injury and in the absence of evidence elicited from the doctor that the said injury was sufficient in the ordinary course of nature to cause death, we are of the view that it is a fit case where the conviction of the appellant under Section 302 IPC should be under Section 304 Part 1 IPC."

26. From the aforesaid decisions rendered by the Hon'ble Supreme Court, it can be said that for invoking the provision contained in Exception 4 of Section 300, following aspects are required to be kept in view,

(i) an act committed without premeditation;

(ii) act is committed in a sudden fight in the heat of passion;

(iii) act is committed upon a sudden quarrel; and

(iv) act is committed by offenders having taken undue advantage or acted in a cruel or unusual manner.

27. Keeping in view the aforesaid decisions, if the facts of the present case as discussed hereinabove, are carefully examined, it is revealed from the evidence produced by the prosecution that in the present case, the act of the appellant is without premeditation and in a sudden fight in the heat of passion. From the dying declaration given by the deceased, it can be said that on the date of incident, the appellant – accused came to the house early in the morning and started quarrel because of the incident which has taken place on 02.06.2012 between the wife of the appellant and the deceased in a heat of passion, the appellant – accused picked up chimney, which was lying in the house itself and, thereafter, poured kerosene on the body of the deceased and set her ablaze. Thus from

the chain of events, this Court is of the view that the case of the appellant falls under Exception 4 of Section 300 of the IPC.

28. From the evidence produced by the prosecution before the concerned trial court, it can be said that the appellant was having knowledge that because of his act, it is likely to cause death of his mother or to cause such bodily injury as is likely to cause death. Therefore in view of the aforesaid facts of the case as discussed hereinabove, the case of the appellant – accused falls under Section 304 Part – II of the Indian Penal Code. As per jail remarks, the appellant – accused is in jail since last 10 years and 2 months. Therefore considering the facts and circumstances of the case and the period imprisonment which the appellant – accused has undergone, the sentence of imprisonment is modified to the period already undergone.

29. In the result, the present Criminal Appeal

stands allowed party. The judgment and order of conviction dated 16.05.2013 passed by the learned Additional Sessions Judge, Panchmahals at Godhra in Sessions Case No.151/2012 is hereby modified to conviction under Section 304 Part-II of the Indian Penal Code instead of Section 302 of the Indian Penal Code. Therefore, the appellant – accused is ordered to be set at liberty forthwith, if not required in any other offence. Record and Proceedings are ordered to be sent back to the concerned trial Court forthwith.

**Sd/-**
**(VIPUL M. PANCHOLI, J.)**

**Sd/-**
**(SANDEEP N. BHATT, J.)**

Gautam