

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.314 OF 2017

Amol Subhash Gaikwad,
Age 19 yrs., Occ. Labour,
R/o Late Vasti, Ashoknagar,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar.

... Appellant

... **Versus** ...

The State of Maharashtra

... Respondent

...

Mr. V.R. Dhorde, Advocate for the appellant

Mr. S.D. Ghayal, APP for the respondent

...

CORAM : SMT. VIBHA KANKANWADI
ABHAY S. WAGHWASE, JJ.

RESERVED ON : 15th SEPTEMBER, 2023

PRONOUNCED ON : 05th OCTOBER, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present appeal has been filed by original accused No.2 to challenge the conviction awarded to him by learned District Judge-1 and

Additional Sessions Judge, Newasa, Dist. Ahmednagar in Sessions Case No.5/2016 on 20.06.2017 after holding him guilty of committing offence punishable under Sections 302 and 324 of the Indian Penal Code, 1860.

2 Before we proceed, it will not be out of place to mention here that in all three accused stood prosecuted in Sessions Case No.5/2016. Accused No.1 is the father of accused No.2 and husband of accused No.3. In other words, accused No.3 is the mother of present appellant. All of them stood prosecuted for committing offence punishable under Section 302, 323, 506, 506 read with Section 34 of the Indian Penal Code and under Section 4 punishable under Section 25 of the Indian Arms Act. Accused Nos.1 and 3 have been acquitted from all the charges by the learned trial Judge, so also the present appellant came to be acquitted of the offence punishable under Section 504 and 506 of the Indian Penal Code and under Section 4 punishable under Section 25 of the Indian Arms Act. Neither the prosecution nor the original informant PW 1 Pandu Rakhpasare challenged the acquittal of accused Nos.1 and 3 as well as accused No.2 – present appellant from the sections under which they have been acquitted.

3 The prosecution had come with a case that Pandu Rakhpasare is resident of village Chanda, Tq. Newasa, Dist. Ahmednagar. He, his family

and certain persons from his community as well as relatives reside in a Mohalla on Miri Road. Informant Pandu's wife Anita and son Sunny as well as daughter Priya used to reside with him, so also, his parents used to reside with him. He had four brothers, out of whom one Shankar committed suicide by consuming poison two years prior to 01.10.2015. Other two brothers reside at different place in connection with the livelihood. Original accused No.3 Savitra is the cousin sister of the informant. She has two sons and five daughters. Two years prior to the First Information Report she had shifted to Shrirampur, but prior to that she as well as her entire family used to reside in the neighbourhood of the informant. The informant and his brothers had given the land owned by their grandfather to accused No.3 for residence. She resided at Chanda for about 15 years but her behaviour was not good and, therefore, all the people from the Mohalla asked her not to indulge in illegal activities, however, she was not listening. Two years prior to the First Information Report informant had evicted accused persons from Chanda and, therefore, she was annoyed with him. She used to give threats to him. It is then stated that niece of accused No.3 was responsible for death of informant's brother Shankar. Complaint in respect of the same had also been given with Police Station. Informant's cousin brother Prakash Vasant Rakhpasare expired around 10.00 a.m. due to illness on 01.10.2015. All the

family members had gone to cremation ground for the last rites and it was over by 2.30 p.m. Informant and his family members came back to the house. All the accused had come in a car of black colour from Shrirampur. They went towards the house of informant following them. Around 3.00 p.m. informant was washing his hands and legs on the hand pump near the house, at that time, the accused persons went there and started asking informant, as to why he had evicted them from the said place. Informant told that it is not a right time to talk about the same. Then, accused No.3 started abusing the informant. There was altercation between them. At that time, informant's wife Anita came and asked, as to what is the purpose for which the accused have come. She started saying to accused No.3 that she should not abuse her husband. At that time, accused No.2 took out big knife from the pocket of jeans pant and gave blow of the same on the chest of Anita. Anita fell down on the ground and when informant tried to rescue, he was pushed by accused Nos.1 and 2. Informant is handicapped by right leg. He fell down near his wife. When informant's brother Shrawan came to rescue, he was assaulted by accused No.2 with knife. So also, their cousin brother Babasaheb was also assaulted when he had come to rescue them. Accused No.2 was moving the knife in the air with force. In the meantime, all the accused persons went from the car they had brought. Thereafter, all

the injured were taken to hospital, but Anita was declared dead before treatment could be given. Thereafter informant Pandu lodged First Information Report Exh.35, on the basis of which offence was registered vide Crime No.172/2015.

4 After the First Information Report was registered, inquest panchnama was executed and dead body was sent for postmortem, panchnama of the spot was carried out and certain articles were seized from the spot, statements of witnesses were recorded, accused came to be arrested and after completion of the investigation charge sheet was filed. Prosecution has examined in all six witnesses to bring home the guilt of the accused and as aforesaid, the present appellant has been held liable for committing offence. The appellant has been directed to undergo imprisonment for life and pay fine of Rs.10,000/- (Rupees Ten Thousand only), in default to suffer simple imprisonment for six months for the offence punishable under 302 of the Indian Penal Code. He has been sentenced to suffer rigorous imprisonment for six months for the offence punishable under Section 324 of the Indian Penal Code. Both the sentences were directed to run concurrently. The said conviction is under challenge.

5 Heard learned Advocate Mr. V.R. Dhorde for the appellant and

learned APP Mr. S.D. Ghayal for the respondent.

6 It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. It had come on record that accused No.2 i.e. present appellant had sustained head injury, so also, accused No.1 had also received injury to his finger/palm. There is absolutely no explanation by any of the prosecution witnesses on this point. No independent witness has been examined. Interested version of PW 1 and his family members cannot be considered as it is not free of doubt. It is admitted by both the witnesses that accused persons had come to attend the funeral of cousin brother of the informant as well as herself. The water tap was a public water tap and, therefore, she was also waiting for washing her hands and legs on the hand pump. The informant appears to have started the quarrel which has been then carried forward by his wife Anita. It was the defence of the accused that when they had gone near the hand pump, unnecessarily informant and his wife as well as family members started picking quarrels and then in order to save themselves accused No.2 had given blow or caused injury. Therefore, whatever he has done is prima facie a right in private defence. The said angle of right of private defence has not been properly considered at all. The testimony of interested witnesses has been believed. Even if we consider that such incident has taken place;

yet, the accused was merely 18 years of age and there were every chances of reformation and it was not considered that the case would fall under Section 304-II of the Indian Penal Code and not under Section 302 of the Indian Penal Code. The incident had started all of a sudden. He has, therefore, relied on the decision in **Anbzhagan vs. State represented by the Inspector of Police** [2023 SCC OnLine SC 857] wherein the principles for alteration of conviction under part I to part II of Section 304 and under Section 302 and 304 of the Indian Penal Code have been enumerated. He also relied on the decision in **Premchand vs. State of Maharashtra** [(2003) 5 SCC 522] wherein also those principles have been clarified. The accused persons had given their own story about how the incident had taken place, but that has not been considered. It has been reiterated by the learned Advocate for the appellant that the injuries on the person of accused No.2 i.e. present appellant were not explained by the prosecution. Though the Investigating Officer admits that he had the knowledge about the injuries; yet, had not collected the necessary papers. Learned Advocate for the appellant has taken us through the entire record and especially the discrepancies in the testimonies and at the end he would request for allowing the appeal. He also submitted that since the date of arrest the appellant is in jail and he be acquitted.

7 To refute those submissions by the learned APP, he would submit that the learned trial Judge has appreciated each and every aspect and the part of the evidence. To arrive at a conclusion that it was a clear case of murder, that too well planned as it can be seen that the accused i.e. present appellant had carried the weapon with him from Shrirampur, there was no such occasion to apprehend for the accused persons that there is danger to their life. None of the eye witnesses or even the deceased were armed with any deadly weapon. The testimony of the informant and his brother stands corroborated. The brother being the injured has supported the testimony of PW 1. The testimony of PW 3 Dr. Pandit Shirsat would show that the death of Anita was homicidal in nature. The seized articles were sent for chemical analysis and the report is positive. The testimony of PW 1 and PW 2 is trustworthy and, therefore, from the cross-examination we cannot say that there was right to private defence available to the accused persons. He relied on the decision of this Court (to which one of the member SMT. JUSTICE VIBHA KANKANWADI was party) in **Manohar Uttamrao Sadavarte and another vs. The State of Maharashtra** in Criminal Appeal No.30 of 2016 decided on 13.09.2023, wherein this Court had taken review of law of private defence. Learned APP would submit that there is no merit in the present appeal, it deserves to be dismissed.

8 From the submissions on behalf of the appellant it appears that the first stand he wants to take is regarding his prayer for acquittal i.e. clear cut acquittal and in the alternative he wants to bring the case under Section 304-I or II of the Indian Penal Code and since he is in jail since 05.10.2015 he wants to take benefit under Section 428 of the Code of Criminal Procedure and pray for the conviction for already undergone. For that purpose he has raised the defence of right of private defence and even in respect of exceeding the right of private defence he wants to maintain his stand that the case would fall under Section 304-I of the Indian Penal Code.

9 We would like to start the discussion with the testimony of PW 3 Dr. Pandit Shirsath, who had conducted the autopsy on the dead body of Anita. Anita's dead body was referred to him on 02.10.2015 and he carried out autopsy between 10.00 to 11.00 a.m. on that day. He found four external injuries on the dead body which were as follows :

- 1) Incised stab injury at left 6th inter-costal space anteriorly on chest and breast, lower left side 15 c.m. from sternum oblique in direction. Its length was about 4 c.ms. and width was about 2 c.ms., tapering on both the side, edges of injury was sharp cutting. Skin was retracted and everted. There was gaping. Depth of injury was measured by probe it was found to be 12 c.ms. towards medial and above. On dissection the skin subcutaneous tissues, inter costal muscles, pleura, all layers of heart at left ventricle were found cut and

left ventricle was open on antro/lateral wall. Its size was 2 x 1 cm incised. Pericardium cut over corresponding stab injury to heart.

2) Incised wound on left little finger dorsally on 1st interphallangeal joint, size $\frac{1}{2}$ x $\frac{1}{2}$ cms bevelled, clean borders, tapering towards ring finger.

3) Incised wound on base of ring finger left side dorsally, size $\frac{1}{4}$ th x $\frac{1}{4}$ cms, tapering towards knuckle of left middle finger, edges clean.

4) Tiny incised wound size nearly $\frac{1}{4}$ cms x 1 cm ahead of injury No.2 mentioned above. It was tapering forward and above.

The age of the injuries is stated to be within 24 hours and can be caused by sharp cutting object. Those were antemortem and the internal examination showed corresponding internal injuries which he has mentioned in column No.20 of the postmortem report Exh.45. The probable cause of death that has been given is “due to the injury to the heart as mentioned above”. Article ‘M’ knife was shown to him and he has opined that the injuries which he noted on the dead body of Anita were possible by such weapon. In the cross-examination as regards the autopsy is concerned he has answered that injury Nos.2, 3 and 4 were possible due to single blow. This answer is rather supporting the prosecution and not the accused, but then he says that injury Nos.2 to 4 were not fatal injuries. He denied the suggestion that injury No.1 noted on the dead body is possible due to broken glass. It is

to be noted that there was no specific suggestion that, that injury would be possible due to fall on broken glass, but then he has denied the suggestion that injury Nos.2 to 4 are possible due to fall on broken glass. Thus, in all he has denied that the injuries which he has noted in column No.17 are possible by fall on broken glass. Though there was corresponding suggestion to the eye witness i.e. PW 1 informant suggesting that Anita had fallen on a broken glass at the site, there is no meaning to the suggestion to the Medical Officer because his testimony is basically opinion based and not based on the facts i.e. events. Therefore, from the testimony of PW 3 Dr. Shirsath it is very much clear that death of Anita is homicidal in nature.

10 Now, coming to the testimony of informant PW 1 Pandu, his examination-in-chief is the replica of his First Information Report which is already narrated while narrating the story of the prosecution and, therefore, we do not want to reproduce the same. It is then required to be seen as to what he has deposed in his cross. Some part of the cross-examination covers the situation at the location, which in the nutshell can be said that the hand pump was near the house of informant and it is surrounded by houses, which turns out to be the houses of the relatives of informant as well as accused as they themselves are the relatives. No doubt, one fact has come on record that there were strained relations between the accused persons and the

informant, his family members and even it appears from the relatives who were residing in the Mohalla. The person who had expired and for whose last rites the accused had come, informant had gone, was also their common relative. It appears that there was no dispute till the funeral was over. The distance between the funeral place and the Mohalla has not come on record in specific, but in the cross-examination informant says that the accused persons were sitting at some distance from the hand pump, in front of the house of the person whose funeral had taken place on that day. But the place of funeral would be definitely different. It has not been extracted as to whether it was necessary for the accused to come to the house of the said relative, who had expired, but we cannot take objection for that also since they are the relatives. The fact remains is that the accused persons had come there and there is no question of informant's side attacking the accused persons.

11 The testimony of the informant stood corroborated by his brother PW 2 Shrawan and in his cross-examination he has admitted that when they all had gathered at the hand pump, there was altercation between accused No.3 and informant. At one place he has admitted that Anita had asked accused No.3 as to why she has come in the Mohalla and accused No.3 had replied that she had come to attend the funeral. In fact, they had seen

each other at the time of funeral and, therefore, the intention behind asking the said question that after the funeral why she had come in the Mohalla is not clear. But when it is only the verbal exchanges of words, PW 1 Pandu and PW 2 Shrawan consistently say that the present appellant – accused took out the knife and gave a blow near the chest of Anita. Here, it is to be noted that there is no suggestion to these two witnesses that in any manner they had attacked the accused persons first. There is also no suggestion that either one of them or they were armed with deadly weapon. The question, therefore, arises – What was then the reason for the accused to take out the knife from the pocket of his pant and inflict a blow on Anita ? It appears that he had carried the said knife with him since the place of his residence or the place from where they had come on that day. This is, therefore, not a case of sudden fight. Even if quarrel would have taken place, there was no reason for the present appellant to take out the knife which he was already carried with him and inflict a blow. The cross-examination of PW 1 Pandu would suggest that the land on which the Mohalla was erected or the houses in the Mohalla were erected belongs to the the grandmother of accused No.3 and in spite of that she appears to have been evicted from the said place. This shows that accused persons were having inimical grounds against the informant and the other family members. It is not vice versa. Though PW 1

Pandu has stated that niece of accused No.3 was responsible for the death of his brother Shankar, but it has not come on record that when Shankar had committed suicide. The proximity definitely matters in such case. But as regards the eviction of the accused persons from the Mohalla, though had taken place about 2-3 years prior to the incident; yet, the accused put thought of something and bring the deadly weapon along with him, it cannot be with some other intention. In his statement under Section 313 of the Code of Criminal Procedure he has not stated that he was apprehending some attack by the informant and his family members and, therefore, he took the knife with him from his pocket. In his statement under Section 313 of the Code of Criminal Procedure he has stated that all the accused persons were assaulted by informant and injured witnesses. The accused persons were attacked with stick, knife and stone. Accused No.1 received injury to his finger with the knife and he himself was assaulted by stone by deceased and witness. He became unconscious, vomited and he was defending himself. The people thought that he has expired and then he was lifted in the car and took to hospital. He has intentionally not stated by which he was defending himself. Secondly, if this statement or answer to the question in the statement under Section 313 of the Code of Criminal Procedure is to be believed, then the injuries that would have been sustained by the accused

persons would have been of severe nature.

12 PW 3 Dr. Pandit Shirsath in his cross-examination has admitted that accused Nos.1 and 2 had come to the Rural Hospital, Newasa around 4.00 p.m. on 01.10.2015 and he himself had examined them. He had referred them to Civil Hospital, Ahmednagar for further treatment after giving preliminary treatment. He says that one of them had sustained incised wound on her dorsal size of palm. He was not asked to bring the examination record of the accused and, therefore, he has not stated anything about the same. There was no attempt by the accused to bring the nature of injuries sustained by him. Exh.64 is the arrest panchnama of present appellant, wherein it has been mentioned that there is fresh injury to which there is bandage on the forehead of the appellant and he says that he was assaulted by PW 1 Pandu by throwing something on 01.10.2015. His said statement has been recorded and he was taken in custody from Nobel Hospital, Ahmednagar on 05.10.2015. No doubt, his medical certificate has not been collected by the prosecution, but every injury to the accused is not to be explained. At Exh.63 there is station diary entry of Tophkhana Police Station, Ahmednagar, wherein it is said that on 01.10.2015 when he was admitted at 21.30 hours, police had gone to take his statement, at that time he made a statement that he has received minor injury to his forehead, but

he is not in a mental state to give statement and, therefore, his statement could not be recorded. Then, again at 13.30 hours on 02.10.2015 the police person had gone to record his statement and at that time it was found that he was intentionally avoiding giving statement and, therefore, it was told to him that he should come to Police Station and lodge a report, if he wants after discharge. There is no explanation by the appellant as to why he had not filed any report to the police against the informant and other persons, who had allegedly attacked him and his father. None of the accused persons had entered the witness box to give their own version of the story and, therefore, it can be certainly said that there was no such circumstance which could be interpreted that the circumstances forced the appellant to use the knife. If we consider the injuries on the persons of Anita, especially injury No.1, it cannot be said that it could have been caused accidentally. It has gone up to heart, which could be by piercing. In the cross-examination PW 1 and PW 2 have admitted that the present appellant was waving the knife in the air. It was tried to be submitted on the basis of this admission that it was the act in defence, however, if we consider the nature of the injury sustained by Babasaheb Rakhpasare and PW 2 Shrawan, which has been proved through PW 5 Dr. Bhupendra Panhale, it cannot be said that it can be caused because of the waving of the knife in the air. No doubt, this Doctor has admitted that

the nature of the injury sustained by them is possible because of the broken glass, but mere suggestion is not enough. How many persons would fall on the glass, is a question and the said fact is not then supported by the spot panchnama Exh.47 which came to be proved through PW 4 Walmik Rakhpasare. There was no suggestion to him that there were pieces of glasses on the ground near the spot.

13 In **Anbazhagan** (supra) after taking into consideration the various decisions of the Hon'ble Apex Court, the Hon'ble Apex Court has sum up the principles as to which cases would fall under Section 302, 304-I, 304-II of the Indian Penal Code, which are as follows :

“(1) When the court is confronted with the question, what offence the accused could be said to have committed, the true test is to find out the intention or knowledge of the accused in doing the act. If the intention or knowledge was such as is described in Clauses (1) to (4) of Section 300 of the IPC, the act will be murder even though only a single injury was caused. To illustrate : 'A' is bound hand and foot. 'B' comes and placing his revolver against the head of 'A', shoots 'A' in his head killing him instantaneously. Here, there will be no difficulty in holding that the intention of 'B' in shooting 'A' was to kill him, though only single injury was caused. The case would, therefore, be of murder falling within Clause (1) of Section 300 of the IPC. Taking another instance, 'B' sneaks into the bed room of his enemy 'A' while the latter is asleep on his bed. Taking aim at the left chest of 'A', 'B' forcibly plunges a sword in the left chest of 'A' and runs away. 'A' dies

shortly thereafter. The injury to 'A' was found to be sufficient in ordinary course of nature to cause death. There may be no difficulty in holding that 'B' intentionally inflicted the particular injury found to be caused and that the said injury was objectively sufficient in the ordinary course of nature to cause death. This would bring the act of 'B' within Clause (3) of Section 300 of the IPC and render him guilty of the offence of murder although only single injury was caused.

(2) Even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that section. In the event of the case falling within any of those exceptions, the offence would be culpable homicide not amounting to murder, falling within Part 1 of Section 304 of the IPC, if the case of the accused is such as to fall within Clauses (1) to (3) of Section 300 of the IPC. It would be offence under Part II of Section 304 if the case is such as to fall within Clause (4) of Section 300 of the IPC. Again, the intention or knowledge of the accused may be such that only 2nd or 3rd part of Section 299 of the IPC, may be attracted but not any of the clauses of Section 300 of the IPC. In that situation also, the offence would be culpable homicide not amounting to murder under Section 304 of the IPC. It would be an offence under Part I of that section, if the case fall within 2nd part of Section 299, while it would be an offence under Part II of Section 304 if the case fall within 3rd part of Section 299 of the IPC.

(3) To put it in other words, if the act of an accused person falls within the first two clauses of cases of culpable homicide as described in Section 299 of the IPC it is punishable under the first part of

Section 304. If, however, it falls within the third clause, it is punishable under the second part of Section 304. In effect, therefore, the first part of this section would apply when there is 'guilty intention,' whereas the second part would apply when there is no such intention, but there is 'guilty knowledge'.

(4) Even if single injury is inflicted, if that particular injury was intended, and objectively that injury was sufficient in the ordinary course of nature to cause death, the requirements of Clause 3rdly to Section 300 of the IPC, are fulfilled and the offence would be murder.

(5) Section 304 of the IPC will apply to the following classes of cases: (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death. To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.

(6) The word 'likely' means probably and it is distinguished from

more 'possibly'. When chances of happening are even or greater than its not happening, we may say that the thing will 'probably happen'. In reaching the conclusion, the court has to place itself in the situation of the accused and then judge whether the accused had the knowledge that by the act he was likely to cause death.

(7) The distinction between culpable homicide (Section 299 of the IPC) and murder (Section 300 of the IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 of the IPC. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. But, even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.

(8) The court must address itself to the question of *mens rea*. If Clause thirdly of Section 300 is to be applied, the assailant must intend the particular injury inflicted on the deceased. This ingredient could rarely be proved by direct evidence. Inevitably, it is a matter of inference to be drawn from the proved circumstances of the case. The court must necessarily have regard to the nature of the weapon used, part of the body injured, extent of the injury, degree of force

used in causing the injury, the manner of attack, the circumstances preceding and attendant on the attack.

(9) Intention to kill is not the only intention that makes a culpable homicide a murder. The intention to cause injury or injuries sufficient in the ordinary course of nature to cause death also makes a culpable homicide a murder if death has actually been caused and intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.

(10) When single injury inflicted by the accused results in the death of the victim, no inference, as a general principle, can be drawn that the accused did not have the intention to cause the death or that particular injury which resulted in the death of the victim. Whether an accused had the required guilty intention or not, is a question of fact which has to be determined on the facts of each case.

(11) Where the prosecution proves that the accused had the intention to cause death of any person or to cause bodily injury to him and the intended injury is sufficient in the ordinary course of nature to cause death, then, even if he inflicts a single injury which results in the death of the victim, the offence squarely falls under Clause thirdly of Section 300 of the IPC unless one of the exceptions applies.

(12) In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that injury is sufficient in the ordinary course of nature to cause death, the fact that the act is done without premeditation in a sudden fight or quarrel, or that the circumstances justify that the injury was accidental or unintentional, or that he only

intended a simple injury, would lead to the inference of guilty knowledge, and the offence would be one under Section 304 Part II of the IPC.

Taking into consideration those principles also, as aforesaid, the facts which are being emerging in this case are that the present appellant was armed and he carried the said weapon from his house/the place from where he had come, therefore, the intention can be gathered, so also, the situs chosen was the heart.

14 In **Premchand** (supra) also the same principles have been reiterated and in order to bring the case under Exception 4 to Section 300 of the Indian Penal Code the necessary requirements have been held to be (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel or unusual manner. Out of those two are not attracted here; one is, it was a premeditation and it cannot be said that the act was done in a heat of passion. It was only abuses those were going on and the informant's side was not armed at all. Therefore, the case will not fall under any of the exceptions to Section 300 of the Indian Penal Code.

15 As regards right to private defence is concerned, reliance can be placed on the decision in **Premchand** (supra), wherein in paragraph Nos.27

and 28 it has been observed that -

“27 In the normal run of events, the victim as well as P.W.2 and the appellant were not supposed to interact with each other on 26th September, 2013. P.W.2 opened the shop of the victim because the victim had not returned from the field. If P.W.2 had not opened the shop, the appellant would probably not have met him. It was by chance that the appellant and P.W.2 met each other. The victim and the appellant had no quarrel with each other; whatever was there, it was between the appellant and P.W.2. The *inter se* quarrel between the two had long subsided. There is a missing link in the prosecution case as to the motive of the appellant to inflict the blow on P.W.2 first. It is in the evidence of P.W.2 that he was reading a newspaper sitting in front of the shop of the victim and that the appellant was sitting in the saloon of Baburao Sawarkar (not examined), which was opposite to the shop of the victim. The appellant, as per P.W.2, was unarmed initially. P.W.2's further version was that the appellant went to his house, fetched a knife and then stabbed P.W.2 on his left shoulder, neck and left-hand finger resulting in serious bleeding injuries. The reason why the appellant suddenly on seeing the septuagenarian P.W.2 would go to his house and return with a knife is not there in the evidence. We shall, for the present, assume that there were heated exchanges and that the appellant gave a blow to P.W.2 first, and thereafter to the others one by one. Then again, the victim who, according to P.W.2, was supposed to be in the field but appeared in the scene from some other place all on a sudden, was the third in the series to be stabbed by the appellant and, thus, was not his target.

28 Though there is no specific admission by the appellant that he had stabbed the victim or the other injured witnesses, reading of the

contents of Ext.96 does evince an act of retaliation spurred by sudden provocation resulting in a quarrel as well as a scuffle which ultimately, most unfortunately, cost the victim his life and left some others injured. The appellant too sustained injuries in the scuffle and there is evidence on record that one of the injuries was grievous, yet, the criminal law was surprisingly not set in motion to bring to book those responsible for inflicting such injury. It was in a sudden quarrel, which could have been provoked by the victim and P.W.2, that blows followed from each side. Most importantly, the circumstances in which the incident occurred does clearly negate any suggestion of premeditation in mind.”

16 This Court also observed in **Manohar Sadavarte** (supra) that the right of private defence should always be proportionate. If the other person is armed, then so much of the assault is permitted which will disarm him. Deceased Anita was certainly not armed. Evidence has not been brought by the accused to that effect. Therefore, question of attacking her with knife cannot be as a result of or in view of right of private defence.

17 As regards right of private defence is concerned, the burden is on the accused to establish that no doubt, the law is settled stating that the said defence can be rested on the available evidence i.e. the evidence led by the prosecution and/or there can be independent evidence by the accused. Here, except the suggestions as regards the story from the side of the accused to the prosecution witnesses, there is nothing. The appellant has not entered the

witness box nor he has examined anybody, who had seen the incident. Thus, the said burden to prove the private defence has not been discharged by the accused.

18 The knife was found near the place of incident and as aforesaid, it has certainly come on record that it was the knife brought and used by accused No.2 i.e. present appellant. The spot panchnama has been got proved through PW 4 Walmik and the I.O. PW 6 PSI Mr. Sanap.

19 Therefore, taking into consideration the entire discussion we are of the opinion that the prosecution had proved that the present appellant has committed murder of deceased Anita and has also caused grievous injuries to Babasaheb and PW 2 Shrawan with the help of knife. The learned trial Judge has rightly convicted him. There is no merit in the present appeal. It deserves to be dismissed. Accordingly, it is dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)