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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 11th November, 2024

+ CRL.A. 764/2024 & CRL.M.(BAIL) 1396/2024

LOKESH @MACHCHHAR

.....Appellant

Through: Mr. Abhinav Bajaj (DHCLSC), Mr.
Saksham Ojha and Ms. Geetashi
Chandna, Advocates.
(M: 9051667855)

versus

STATE OF NCT OF DELHI

.....Respondent

Through: Mr. Ritesh Kumar Bahri, APP for the
State with Mr. Lalit Luthra and Ms.
Divya Yadav, Advocates.
Inspector Rajesh Vijay, SHO/PS
Bharat Nagar.

CORAM:**JUSTICE PRATHIBA M. SINGH****JUSTICE AMIT SHARMA****JUDGMENT****Prathiba M. Singh, J.**

1. This hearing has been done through hybrid mode.

Background:

2. The present appeal has been filed on behalf of the Appellant – Lokesh @ Machchhar under Section 415(2) of the Bharatiya Nagarik Suraksha Sanhita, 2023 ('BNSS') challenging the impugned judgment dated 27th February, 2024 (*hereinafter, the 'impugned judgment'*) and order on sentence dated 10th July, 2024 passed by the Id. ASJ-05, North-West District, Rohini Courts, Delhi in *Sessions Case No. 106/2018* arising out of *FIR No.275/2017*,



under Sections 302/34/109/506 of the IPC, registered at P.S. Bharat Nagar.

3. *Vide* the impugned judgment, the Appellant herein was convicted under Section 302 IPC and acquitted of the charges under Section 506 IPC. The relevant portion of the impugned judgment is extracted hereinunder:

“18 In this regard, Ld. APP for the State argued that the very fact that the accused Dinesh @ Cheji alongwith co-accused Lokesh @ Machacchar committed the murder of Shahrukh, is a sufficient proof of the common intention between them. It is argued that from the facts and circumstances, it can be gathered that both the accused persons shared a common intention to commit the murder.

19. In view of the foregoing discussion and on the basis of evidence proved on record, the prosecution has proved the charge was 302 against accused Lokesh @ Machacchar beyond reasonable doubts. I hold the accused Lokesh @ Machacchar guilty and accordingly convict him w/s 302 IPC and acquitted of the charges u/s.506 IPC.

20. The charge ws.302/109 IPC could not be proved against accused Dinesh @ Cheji heyond shadow of doubts. Accused Dinesh @ Chegji is accordingly held not guilty and acquitted of the charges framed against him.”

4. The relevant portion of the order on sentence dated 10th July, 2024 reads as under:

“8. After considering all the relevant facts and circumstances, I am of the view that the present case does not qualify the test of rarest of the rare case in which the death sentence can be imposed. The convict is accordingly sentenced w/s 302 IPC for imprisonment for life and a fine of Rs.1 lac. In default of payment of fine, the convict shall undergo a further simple imprisonment for a term of 6 months.

The sentence shall run concurrently. Benefit of section 428 CrPC be given to the convict as per law. Sentenced accordingly.”

Facts:

5. Brief facts of the present case are that the deceased *i.e.*, Shahrukh aged



16 years and the Appellant were residents of Jhuggi Pratap Nagar Kabir Nagar, Delhi. On 31st August, 2017 Shahrukh was brought declared dead to the Hindu Rao Hospital, Delhi.

6. It is the case of the complainant *i.e.*, Shakila (PW1), mother of the deceased that on 31st August, 2017 the Appellant-Lokesh @ Machchhar and co-accused, Dinesh @ Cheji got into a physical confrontation with her son and inflicted several injuries on him, which caused the death of her son. It is stated by the complainant that, on 31st August, 2017 she was informed that a quarrel had taken place between the deceased and the accused persons on the railway track. Thereafter, when she reached the place of incident, she saw that the Appellant and the co-accused were in a physical fight with her son. She further states that she saw that her son and the Appellant herein were fighting as the co-accused Dinesh @ Cheji was exhorting Lokesh @ Machchhar to kill Shahrukh and he would not let anyone come close.

7. It is recorded in the **FIR No.275/2017**, that the mother of the deceased claims to have seen the Appellant herein pick up a broken bottle and stab it in the neck of Shahrukh while the co-accused Dinesh @ Cheji pelted stones in a manner so as to ensure that no one came to her son's rescue.

8. Pursuant to **FIR No.275/2017**, dated 31st August, 2017 under Sections 302/34/109/506 of the IPC, registered at P.S. Bharat Nagar the concerned police officials arrested both the accused persons. Investigation was conducted and chargesheet was then filed. Charges were framed under Sections 302/34 of the IPC *vide* order dated 22nd February, 2018.

9. The prosecution examined a total of 19 witnesses out of whom 4 claimed to be eye-witnesses, *i.e.*, PW-1, Ms. Shakila, PW-3, Babu Lal, PW-5, Inderjeet and PW-7, Bittoo @ Leeladhar. The statements under Sections



161 and 164 Cr.P.C. were also recorded.

10. The Trial Court, after analysing the evidence, held that the charge under Section 302/109 of the IPC against Dinesh @ Cheji was not proved beyond reasonable doubt. Accordingly, the said Accused was acquitted. Insofar as the accused, Lokesh @ Machchhar was concerned, the Trial Court held him guilty and convicted him under Section 302 IPC. Further, the said Accused was acquitted of the charges under Section 506 IPC. The operative portion of the impugned judgment reads as under:

19. In view of the foregoing discussion and on the basis of evidence proved on record, the prosecution has proved the charge u/s 302 against accused Lokesh @ Machacchar beyond reasonable doubts. I hold the accused Lokesh @ Machacchar guilty and accordingly convict him u/s 302 IPC and acquitted of the charges u/s.506 IPC.

20. The charge u/s 302/109 IPC could not be proved against accused Dinesh @ Cheji beyond shadow of doubts. Accused Dinesh @ Chegji is accordingly held not guilty and acquitted of the charges framed against him.”

Submissions:

11. The submissions of Id. Counsel, Mr. Abhinav Bajaj appearing on behalf of the Appellant, are broadly as under: -

- (i) There is a substantial delay in registration of the FIR in the present case. The incident took place on 31st August, 2017 at 11:45 am and the DD entry was registered at 12:45 pm. However, the FIR was not registered till 5 pm. This was despite the fact that the victim was identified by name and it has been claimed by the prosecution that apart from the mother of the deceased, there were three eye-witnesses. This according to Id. Counsel for the Appellant constitutes inordinate delay and renders the story of the prosecution unreliable.



- (ii) Even though the mother of the deceased, Shakila *i.e.*, PW-1 had initially claimed to be an eye-witness, it is clear from her deposition that she was not an eye-witness to the incident. In her deposition, she claims to have been informed by another boy about the quarrel that had taken place between her son and the Accused. This shows that the mother of the deceased cannot be treated as an eye-witness and any evidence given by her is primarily hearsay evidence. Moreover, the evidence given by her is also in variance with her statement under Section 161 Cr.P.C.
- (iii) The evidence of the other three witnesses is also not reliable as testimonies of PW-3, PW-5 and PW-7 would show that they have claimed in their statements under Section 161 Cr.P.C. that A-1 and A-2 had run away from the spot, however, this was contradicted clearly in the testimony given before the Court.
- (iv) The glass bottle which was allegedly the weapon used by the Accused to commit the murder of the deceased was not properly examined by the Forensic Science Laboratory, Chanakyapuri. Further, no evidence or statement of the doctor who conducted the postmortem of the deceased, *i.e.*, Dr. Varun Garg was recorded. Though human blood was found on the bottle, it did not match with the deceased. The fingerprints of the Accused Lokesh were also not found on the said glass bottle. The alleged weapon was not shown to the doctor during his testimony to see if the injury was caused by the bottle. This coupled with the variance in the earlier statements shows that the testimonies of other eye witnesses being, PW-3, PW-5 and PW-7 is completely unreliable. The prosecution has also not established any motive.



(v) Finally, it is submitted that the present case is covered under Exception 4 of Section 300 IPC.

12. On the other hand, Id. APP for the State, Mr. Bahri submits the following:

- (i) Motive of the Accused is made out in the present case. It is clear from the testimony of PW-1 that 3-4 days prior to the incident, there was a quarrel between the accused persons and the deceased, Shahrukh. This was sufficient motive for the accused persons to plan the murder of the deceased.
- (ii) The three eye witnesses of the incident, *i.e.*, PW-3, PW-5 and PW-7 were declared hostile in respect of A-2 but not in respect of A-1. It is submitted that all the 3 witnesses are independent witnesses and they have no interest in the case itself. Thus, even if PW-1's testimony is disbelieved, the testimony of the other 3 witnesses is sufficient to convict the Accused.
- (iii) The fact that the e-rickshaw, in which the deceased was taken to the hospital was not examined, would not in any manner create any doubt in the conviction, as in the present case, apart from the mother of the deceased, there are already three other eye-witnesses and also PW-6 who was the driver of the said e-rickshaw.
- (iv) One of the witnesses who has testified as PW-5 stated that the alleged weapon used by the accused to commit the murder of the deceased *i.e.*, a glass bottle, was specifically brought by the accused with him to the place of the incident from a nearby *jhuggi* and the injury was caused on the neck of the deceased, which is a vital body part. Thus, it cannot be stated that there was no pre-meditation.



- (v) The lack of physical evidence would also not give any benefit of doubt to the Appellant, in light of the consistent eye-witness accounts which have been proved before the Trial Court.

Analysis:

13. The Court has considered the matter. A perusal of the judgment of the Trial Court would show that there is hardly any analysis of the evidence in the present case. The Accused has been convicted in a sketchy and cryptic manner.

14. The testimony of PW-1 shows that she stated that a boy had come to her house and told her about a quarrel that took place between her son and the accused persons near the railway track. The said testimony clearly reveals that PW-1 was not an eye-witness to the incident. The relevant extract of the testimony of PW-2 is set out below:

“When one boy had come to my house and told me that a quarrel had taken place between my son Shahrukh and Machchhar. Then I arrived at the spot”

15. Further, there are inconsistencies between PW-1’s testimony in the Court with her earlier statement given to the police, wherein she had stated that the Accused had fled from the spot.

16. Insofar as motive is concerned, PW-1 has stated that there was a quarrel between her son and the accused persons three to four days prior to the murder. However, PW-1 is unable to name the boy who had told her about the quarrel which took place on the date of the murder. She also candidly states that she did not mention this fact to the police when her statement was recorded. Thus, there are clear inconsistencies between her earlier statements given to the police and the evidence which was revealed during her cross-examination.



17. Insofar as PW-3 is concerned, it is his testimony that he was present at the spot but at a distance. PW-3 clearly contradicts PW-1 insofar as A-2 is concerned who is acquitted by the Trial Court. He also did not remember as to what was the weapon used by A-1 for causing the injury. The relevant portion is set out below:

“ During August, 2017 I was running grosary shop at T-225, Kabir Nagar, Rana Pratap Bagh. I know Shahrukh and on dated 31.08.2017 at about 11:45 AM a quarrel took place near Railway Line between Shahrukh and accused Lokesh (accused Lokesh correctly identified by the witness in the court) and Lokesh had attacked on the neck of Shahraukh but I do not remember as to which weapon was used by Lokesh and when after such attack Shahrukh fell down on the earth and accused Lokesh fled away from the spot. Blood also oozed out from the wound of the neck of the deceased. At the time of this occurrence the barber was cutting my hair in view of demise of my mother. Nobody has tried to rescue Shahrukh when he was attacked by the accused. I do not know Dinesh @ Cheji. On the day of occurrence, it was raining. I was inquired by the police.

At this stage, ld. APP for state has submitted that this witness has resiled from his statement recorded by the IO, during the investigation so he may be allowed to cross examine this witness. Heard. This witness is declared hospital and Ld. APP for State is allowed to cross examine this witness”

18. In the testimony of PW-5, it has clearly emerged that PW-1 reached the spot after the deceased was removed to the hospital. Thus, the entire testimony of PW-1 has been shaken by the testimony of PW-5. PW-5 also states clearly that a broken bottle of glass from a nearby *jhuggi* was brought to attack the deceased. However, this is in contradiction to the statement given by him under Section 161 Cr.P.C. which was confronted to him by the Ld. APP where he had stated that the bottle was present at the spot and he picked it up. Thus,



this inconsistency renders the testimony of PW-5 insofar as it relates to the manner in which the bottle was picked, as suspicious and not reliable.

19. PW-7, Bittoo @Leeladhar who was also an eye-witness in the present case, is the person who had accompanied the deceased to the hospital which was duly corroborated by MLC (Ex. PW-14/A). It was stated by him that the Accused had caused injury to the deceased with a broken bottle as some quarrel had erupted between the Accused and the deceased, Shahrukh. Similarly, testimony of PW3 and PW5 clearly proves the case of the prosecution that the Appellant had assaulted the deceased with a broken bottle due to which he died.

20. The issue for consideration is whether the case of the Appellant would be covered under Section 304 Part II of the IPC. A perusal of the testimony of PW-1 shows that there may have been a quarrel between the accused persons and the deceased prior to the date of the incident, which was the cause for the fight which took place on the date of the incident. However, it is clear from a perusal of evidence in the present case, that the weapon was not carried in a premeditated manner and neither the injury which was caused was premeditated. At the time of the incident, the Accused was also in an intoxicated condition and so was the deceased. This is clear from a reading of the testimony of PW-7 who states that both the Accused and the deceased were in an intoxicating condition. The relevant extract is as under:

“ On dated 31.08.2017 at about 11:30 AM /12:00 Noon, in front of Dhaba of Sukhi near railway line Lokesh @ Machchhar had caused injury with the broken bottle of wine on the neck of Shahrukh as a result of the said injury he expired. Nobody had rescued Shahrukh in this incident as many children were there and some adult passersby were also passing there at the time of this occurrence. Vol.



Shahruk and Lokesh @ Machchhar both were in the influence in some intoxicated substance as Shahrukh used to smell fluid. When Lokesh @ Machchhar had given blow on the neck of the Shahrukh with the broken bottle then the blood oozed out from his neck and he fell down on the earth then I , Dinesh @ Cheji, Abhishek(minor child) and Arun (minor child) picked Shahrukh and took him to the Hindu Rao Hospital. When Lokesh @ Machchhar had given such blow on the person of Shahrukh I was present at the distance of about 10-12 feet from the place where the Shahrukh was given such blow by Lokesh @ Machchhar. ”

21. Under such circumstances, while the acquittal of Dinesh @ Cheji has been not challenged by the prosecution, the Appellant- Lokesh @ Machchhar, has challenged his conviction under Section 302 IPC.

22. The settled position of law, as is clear from the principles highlighted in the judgment of ***Pulicherla Nagaraju v. State of A.P. (2006) 11 SCC 444***, is that the intention of the Accused is a pivotal question in deciding whether the case falls under Sections 302, 304 Part I or 304 Part II of IPC. Further, to gather the Accused’s intention to cause death, a perusal of the following circumstances are essential:

*“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 under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any 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. Be that as it may."

23. The settled position in law as is clear from the judgment discussed above is that if there is no premeditation, the case would get covered under Exception 4 of Section 300 IPC. This position of law is further reiterated in a judgment of the Supreme Court in **Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770**, wherein the death was caused by an iron pipe due to exchange of hot words in a heated situation. The Supreme Court in the said judgment held that whenever there is a sudden fight without premeditation, it cannot be held to be an offence under Section 302. The relevant portion of the judgment has been extracted below:



“3. The prosecution story is that the appellant, Ankush Shivaji Gaikwad accompanied by Madhav Shivaji Gaikwad (Accused 2) and Shivaji Bhivaji Gaikwad (Accused 3) were walking past the field of the deceased when a dog owned by the deceased started barking at them. Angered by the barking of the animal, the appellant is alleged to have hit the dog with the iron pipe that he was carrying in his hand. The deceased objected to the appellant beating the dog, whereupon the appellant started abusing the former and told him to keep quiet or else he too would be beaten like a dog. The exchange of hot words, it appears, led to a scuffle between the deceased and the accused persons in the course whereof, while Accused 2 and 3 beat the deceased with fist and kicks, the appellant hit the deceased with the iron pipe on the head.

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11. It was argued that the incident in question took place on a sudden fight without any premeditation and the act of the appellant hitting the deceased was committed in the heat of passion upon a sudden quarrel without the appellant having taken undue advantage or acting in a cruel or unusual manner. There is, in our opinion, considerable merit in that contention. We say so for three distinct reasons:

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27. Coming back to the case at hand, we are of the opinion that the nature of the simple injury inflicted by the accused, the part of the body on which it was inflicted, the weapon used to inflict the same and the circumstances in which the injury was inflicted do not suggest that the appellant had the intention to kill the deceased. All that can be said is that the appellant had the knowledge that the injury inflicted by him was likely to cause the death of the deceased. The case would, therefore, more appropriately fall under Section 304 Part II IPC.

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68. In the result, we allow this appeal but only to the extent that instead of Section 302 IPC the appellant shall stand convicted for the offence of culpable homicide not amounting to murder punishable under Section 304 Part II IPC and sentenced to undergo rigorous imprisonment for a period of five years. The fine imposed upon the



appellant and the default sentence awarded to him shall remain unaltered. The appeal is disposed of in the above terms in modification of the order passed by the courts below. A copy of this order be forwarded to the Registrars General of the High Courts in the country for circulation among the Judges handling criminal trials and hearing appeals.”

24. In a recently decided case of *Ata Ullah v State of Madhya Pradesh (MANU/MP/0353/2024)* wherein, akin to the present case, a quarrel took place between the Accused therein and the deceased under the influence of alcohol. The Court altered the sentence of the Accused from Section 302 IPC to Section 304 Part-II of the IPC, and *inter alia* observed that the act was committed without premeditation in a sudden fight. Therefore, the Appellant therein had no intention to cause the death of the deceased. The relevant portion of the judgment reads as under:

“23. In the instant case, it is not shown by the prosecution that the appellant had brought the piece of wood from his home with an intention of assaulting the deceased. Rather it is clearly established from material evidence on record that it was a sudden quarrel when both the persons were under influence of alcohol and the weapon used in the present case is a commonly found piece of wood. There was a quarrel under the influence of alcohol, the appellant picked up the piece of wood and gave repeated blows to the deceased because of which he succumbed to the injuries. In this backdrop, we are of the considered opinion that appellant at best, had knowledge that such blows may cause death but had no intention to cause death.

24. 4. The aspect of giving repeated blows to the deceased has been raised by learned counsel for State. A three Judge Bench of Hon'ble Supreme Court in the case of *Atul Thakur Vs. State of Himachal Pradesh & others* MANU/SC/0018/2018 : 2018:INSC:37 : 2018 (2) SCC 496 had the occasion to consider the case involving identical facts. In the said case also there was sudden altercation and quarrel between two persons and the accused gave repeated



6 blows of knife to the deceased under influence of alcohol. In the said case also the fight was sudden without any premeditation or preparation. In the said case Hon'ble Supreme Court has held the case can at best be covered under Section 304 Part II of IPC and cannot be said to be a case in terms of Section 302 of IPC. Following has been held therein.

“8. Notably, the evidence on record plainly establishes that a sudden fight took place between the appellant and Hitesh Thakur and in the heat of passion, the appellant assaulted Hitesh Thakur causing serious bodily injuries. There is no shred of evidence, much less even a remote suggestion that the appellant had assaulted Hitesh Thakur with an intention to cause his death. Though the High Court found the appellant guilty, it has not held that the bodily injuries caused by the appellant were with an intention to cause the death of Hitesh Thakur. The High Court overturned the finding recorded by the trial court regarding the nature of offence, principally on the ground that the appellant gave repeated knife-blows to Hitesh Thakur and Hitesh Thakur could not defend himself as he was unarmed. Thus, the appellant was found guilty of offence punishable under Section 302 IPC.

9. In other words, the controversy in these appeals boils down to the nature of offence and the sentence to be awarded in that behalf. As aforesaid, the evidence on record, as held by the two courts below and with which finding we are in full agreement, is that the appellant gave six knife-blows to Hitesh Thakur on the fateful night to which he succumbed. Thus, it is a case of homicidal death. However, there is no evidence that the injuries inflicted by the appellant were with an intention to cause the murder of Hitesh Thakur. On the other hand, the evidence clearly establishes that the appellant assaulted Hitesh Thakur without any premeditation. The whole incident took place suddenly and, in the heat of



passion a sudden quarrel started as Hitesh Thakur, while smoking, blew smoke on the face of the appellant. Resultantly, the appellant got enraged. He told him that he was senior in age and thus should not smoke in his presence much less blow the smoke towards him. Then a sudden physical fight started between them, in which the appellant, in heat of passion, gave six knife-blows to Hitesh Thakur on different parts of his body.

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12. Taking overall view of the matter, the facts of the present case warrant invocation of Exception 4 to Section 300 IPC. For, it is a case of culpable homicide not amounting to murder inasmuch as the incident happened on account of sudden fight between the friends who had gathered for a drink party arranged at the behest of Hitesh Thakur. There was no premeditation and the act done by the appellant was in the heat of passion without the appellant taking any undue advantage or acted in a cruel manner. The number of wounds caused by the appellant, it is a well-established position, by itself cannot be a decisive factor. The High Court committed manifest error in being influenced by the said fact. What is relevant is that the occurrence was sudden and not premeditated and the offender acted in the heat of passion. The evidence supports the case of the appellant in this behalf. The fact that the appellant used weapon such as knife, is also not a decisive factor to attract Section 302 IPC. Neither the use of a knife in the commission of offence nor the factum of multiple injuries given by the appellant would deny the appellant of the benefit of Exception 4.

13. Dealing with a somewhat similar situation, in Surain Singh v. State of Punjab [Surain Singh v. State of Punjab, MANU/SC/0399/2017 : 2017:INSC:323 : (2017) 5 SCC 796 : (2017) 3 SCC (Cri) 461], this Court has restated the settled legal position about the purport of



Exception 4 to Section 300 IPC. Even in that case, the accused had repeatedly assaulted the deceased with a kirpan and caused injuries resulting into death. After restating the legal position, the Court converted the offence to one under Section 304 Part II instead of Section 302 IPC. Following the same legal principle and keeping in mind the factual position as unfolded, the view taken by the trial court of convicting the appellant for the offence punishable under Section 304 Part II, is unexceptionable.”

25. Thus, we are of the considered opinion that the overall circumstances of the case do not make out a case of culpable homicide amounting to murder so as to attract punishment in terms of Section 302 of IPC.

26. Accordingly, we find substance in the argument of learned counsel for appellant that conviction deserves to be altered to Section 304 Part-II of IPC. The appellant has undergone actual jail sentence of 9 years and 9 months, as against the maximum sentence of 10 years under Section 304 Part-II of IPC. This incident is of the year 2014. Thus the sentence of the appellant is converted to the period already undergone by him. He deserves to be released.

27. Resultantly, the impugned judgment dated 28.08.2015 passed in S.T. No. 230/2014 is altered to the extent appellant was held guilty under Section 302 of IPC. Instead, appellant shall be treated to be convicted under Section 304 Part-II of IPC and the sentence shall be treated to be the one already undergone by him. If presence of appellant in custody is not required in any other matter, he be released forthwith.

28. The appeal is partly allowed to the extent indicated above.”

25. The Hon’ble Supreme Court has further analysed the law on converting the conviction and sentence from the offence punishable under Section 302



IPC to Section 304 of the IPC in *Anbazhagan v. State Represented by the Inspector of Police, 2023 SCC OnLine SC 857*, wherein it has been observed and held as under:

“66. Few important principles of law discernible from the aforesaid discussion may be summed up thus: -

(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.”

(emphasis supplied)

26. The Hon’ble Supreme Court in ***Balu Sudam Khalde and Another v. State of Maharashtra, 2023 SCC OnLine SC 355***, while discussing the scope of Sections 299 and 300 of the IPC, has observed as under: -

“54. At this stage, it will **also** be profitable to refer to the following observations of this Court in the case of **State of Andhra Pradesh v. Rayavarapu Punnayya reported in (1976) 4 SCC 382** where this Court laid down the distinction



between murder and the culpable homicide not amounting to murder in the following way:

**** ***

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

27. In view of the above discussion, it is clear that in the absence of any pre-meditation and clear evidence, as also several contradictions and inconsistencies, though the presence of the Appellant could be taken as being there, in these facts, the case of the Appellant would be covered under Section 304 Part II of the IPC. Accordingly, the conviction of the Appellant is converted to Section 304 Part II of the IPC.

28. It is further submitted by the Ld. APP, that due to the conduct of the



Accused No.1/Appellant in jail, the maximum sentence deserves to be awarded to him in the present case.

29. The Court has considered the matter, the Appellant has already served more than 7 years in custody as per the nominal roll dated 10th October, 2024.

30. Under these circumstances and the conduct of the Appellant herein which has been perused in the nominal roll, the Appellant-Lokesh @ Machchhar is sentenced to rigorous imprisonment for 8 years with fine of Rs. 25,000/-. In default of payment of fine, further sentenced to simple imprisonment for a period of 3 months.

31. The appeal is disposed of in the above terms. All pending application(s) are also disposed of.

32. Order be sent to the concerned Jail Superintendent for necessary information and compliance.

33. Order be uploaded on the website *forthwith*.

PRATHIBA M. SINGH
JUDGE

AMIT SHARMA
JUDGE

NOVEMBER 11, 2024
sn/dj/sc/rks