



2025:DHC:468-DB



*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
Judgment reserved on: 23rd January 2025
Judgment pronounced on: 28th January 2025

+ CRL.A. 740/2024 & CRL.M.(BAIL) 1361/2024

RAJU @ CHANAKYA

.....Appellant

Through: Mr. Arman Sharma & Mr. Mohd.
Aman Khan Afghani, Advs. (M:
8178126667)

versus

THE STATE (GOVT. OF NCT) DELHI

.....Respondent

Through: Mr. Ritesh Kumar Bahri, APP with Mr.
Lalit Luthra & Ms. Divya Yadav,
Advs. with IO/Insp. Sanjay Singh,
PHQ & Insp. Om Prakash, PS Vivek
Vihar.

+ CRL.A. 1025/2024 & CRL.M.(BAIL) 1820/2024

MUKESH KUMAR

.....Appellant

Through: Mr. Harsh Prabhakar Adv (DHCLSC),
Mr. Dhruv Chaudhry, Mr. Adeeb
Ahmad, and Ms. Eshita Pallavi, Advs.
(M: 7531946786)

versus

STATE OF (NCT OF DELHI)

.....Respondent

Through: Mr. Ritesh Kumar Bahri, APP with Mr.
Lalit Luthra & Ms. Divya Yadav,
Advs. with IO/Insp. Sanjay Singh,
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Vihar.



2025:DHC:468-DB



CORAM:
HON'BLE MS. JUSTICE PRATHIBA M. SINGH
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G E M E N T

DHARMESH SHARMA, J.

1. This common order shall decide the above-noted criminal appeals preferred under Section 415 (2) of the Bharatiya Nagarik Suraksha Sanhita, 2023 instituted by both the Appellants/convicted persons thereby challenging the judgement dated 26.09.2023 passed by the learned Additional Sessions Judge-02, Shahdara District, Karkardooma Courts, Delhi, whereby the Appellants have been found guilty for committing offence under Section 302 read with Section 34 of the IPC¹ and consequentially assailing the order on sentence dated 10.05.2024 whereby both have been awarded life imprisonment besides a fine of ₹10,000/- each for the offence punishable under Section 302 read with the Section 34 of the IPC. In default of payment of fine, the Appellants have been directed to undergo simple imprisonment for a period of six months each. Both the appeals raise somewhat common questions of law and facts and can be disposed of together.

BACKGROUND

2. In a nutshell, the prosecution case brought out during the trial is that on 27.08.2013, DD No.3A at 12.35 am was lodged at P. S. Vivek Vihar exhibit PW-6/C to the effect that a dead body of a male had been found lying on the bench in Kasturba Gandhi Park. The investigation was entrusted to PW-7 SI

¹ Indian Penal Code



2025:DHC:468-DB



Manish, who along with Ct. Devi Ram reached the place of occurrence where they met PW-16 HC Arun and Ct. Yash Pal and found that the dead body of a male person was lying in a pool of blood on the bench having cut marks on his neck with injuries near his ears as well as his head as reflected in the sketch site plan Ex. PW-15/A.

3. On searching the clothes on the body, a wallet/purse Ex. PW-10 was taken out from the pocket of the deceased containing his driving license and from the photograph, the name of the deceased was identified as Manoj Dixit s/o Swam Dixit. SHO along with PW-29 IO/Inspector Sanjay Sinha reached the spot and called the Crime Team and 21 photographs of the dead body as well as the place of occurrence were taken which photographs are marked Ex.PW8/A1-A21 along with the negatives which are Ex.PW8/B1-B21 and the report by the mobile crime team is Ex.PW10/A.

4. In the meanwhile, the present FIR Ex. PW6/A was recorded at 3:30 a.m. As per the case of the prosecution, one transparent disposal glass and one empty bottle of bestow whiskey apart from paper plates were recovered and seized *vide* seizure memo Ex.PW7/E as well as the two empty bottles of kingfisher beer and two more broken bottles of such beer which were seized *vide* memo Ex.PW7/F.

5. Suffice to state that during the course of the investigation, the statements of the witnesses were recorded and the post mortem of the body of the deceased was conducted on 28.08.2013 at 12.40 p.m. Ex. PW-20/A, which opined that the cause of the death was due to haemorrhage and shock consequent to ante-mortem cut throat injury which were sufficient in ordinary



2025:DHC:468-DB



course of nature to cause death. The viscera of the deceased was preserved and sent for medical examination which was obtained *vide* report dated 23.12.2013 Ex.PW-20/B. Both the Appellants were arrested on 29.08.2013 at about 5.00 p.m. The prosecution case is that on the recording of the disclosure statement of the Appellant/Mukesh Ex. PW-17/C, blood stained shirt pant and sleepers were recovered from the almirah of his house which are Ex.PW-17/Article 1 to 3 respectively. Both the accused were produced before the PW-19, the then learned MM Central District. PW-19 was Sh. Ankur Jain, ADJ-10, Central District, Tis Hazari Courts who conducted the TIP² proceedings of both the Appellants. Before whom an application was moved for conducting TIP of both the Appellants and he deposed that both of them were produced before him in muffled faces and on being apprised about the purpose of their production, both refused to participate in the TIP, which documents are Ex. PW19/A to PW19/I. During the course of the investigation, the statement of PW3 and Jokhan Lal Mishra were also recorded under Section 164 of the Cr.P.C.³ before the Magistrate.

6. On completion of the investigation, the chargesheet was filed against both the accused persons on 26.11.2013 and by way of the supplementary final report dated 09.07.2016, the FSL report was also placed on the record.

7. Both the Appellants were charged for committing offence under Section 302 read with Section 34 of the IPC for committing murder of Manoj

² Test Identification Parade

³ Code of Criminal Procedure



2025:DHC:468-DB



Dixit with the help of a juvenile/CCL⁴, who was tried separately, by causing injury on the throat of the deceased using a broken beer bottle. Both the accused plead not guilty and claim trial.

8. The prosecution in order to prove its case examined as many as 29 witnesses. The main witnesses for the prosecution were PW-1 Rahul Kumar Gupta, PW-2 Budh Singh, PW-3 Sunil, PW-11 Jokhan Lal Mishra and PW-13 HC Naresh Kumar, and this Court shall delve into their respective testimony later on in this judgment. PW-4 was Anup Kumar Dixit, the elder brother of the deceased who testified about identifying the dead body of his brother in the mortuary *vide* memo Ex. PW4/A.

9. PW-14 was the Dr. Reetesh Ranjan who medically examined the Appellants post their arrest and took their saliva and blood samples. PW-20 was Dr. S Lal who deposed about the post mortem report. PW-24 was Indresh Kumar Mishra, Asst. Director Biology, FSL, Rohini who deposed about the DNA report. PW-27 was M. L Meena, Senior Scientific Officer Chemistry, FSL, Rohini who prepared the FSL/Chemistry report of the viscera. Rest of the witnesses were police witnesses including IO/PW-29 Inspector Sanjay Sinha.

10. On the close of prosecution evidence, both the Appellants were examined in terms of Section 313 of Cr.P.C. and each of the Appellants were separately put incriminating evidence appearing against them on the record. Both the appellants either denied any knowledge about the evidence on the

⁴ Child in conflict with law



2025:DHC:468-DB



record or replied that the evidence produced was incorrect. They deposed that the witnesses have deposed falsely against them and that they were innocent and filing falsely by the prosecution. Appellant/Mukesh did not elect to lead any evidence. However, Appellant/Raju elected to lead evidence in his defence and examined his sister DW1. Smt. Kajal who deposed that her brother used to take care of the agriculture land in village since her husband had met with an accident and was bedridden and the police arrested the Appellant/Raju from the village.

IMPUGNED JUDGMENT BY THE TRIAL COURT

11. Suffice to state that the learned Trial Court on a cumulative appreciation of testimony of PW-1 Rahul Gupta that the deceased was seen in the company of the Appellant/Raju on the fateful evening in an inebriated condition and PW-3 Sh. Sunil testified that he had seen the mobile phone of the deceased in the custody of the Appellant/Mukesh coupled with the fact that the PW-11 Jokhan Lal Mishra and PW-13 HC Naresh Kumar had categorically testified that they had seen the deceased in the company of both the Appellants and the juvenile soon before the incident, relied upon the theory of “last seen evidence” and also finding that the shirt of Appellant/Mukesh was stained with the blood the deceased in terms of the forensic report Ex.PW-24/A drew the following conclusions.

“In view of above discussion as well as in the light of cogent and convincing oral and documentary evidence, prosecution has been able to prove beyond reasonable doubt the following facts:

The deceased Manoj Dixit was earlier working as chowkidar at the godown of PW1 Rahul Kumar Gupta and accused Raju along with deceased



2025:DHC:468-DB



went to the godown on 26.08.13 in drunken condition and asked for more payment.

Accused Mukesh reached Kasturba Gandhi Park at 3pm on 26.08.13 and showed PW3 Sunil@ Matru a mobile having screen on both sides and at 5 pm deceased met the said witness Sunil in the park and told him that his mobile having screen on both sides and money has been stolen from his pocket. Testimony of this witness has indicated the motive behind the offence to a certain extent. Statement of said witness in this regard was recorded u/s 164 Cr. PC.

The body of deceased was found lying on a bench in a pool of blood at the park with sharp injuries on the neck and head on the intervening night of 26/27.08.13 by PW2 Budh Singh.

Accused persons along with one JCL and deceased were seen together by PW 13 HC Naresh on the day/ place of incident at 9 pm in the park in drunken condition having heated arguments in relation to some monetary issue.

Accused persons along with one JCL and deceased were last seen together when they came to the shop of PW 11 Jokhan Lal Mishra near the said park at 9.30 pm to buy cold drink, cigarette and water bottle. Statement of said witness in this regard was recorded u/s 164 Cr. PC.

As per the Post Mortem report, time since death was about 1 '12 days and cause of death was haemorrhagic shock due to ante-mortem cut throat injury, which is sufficient in ordinary course of nature to cause death. All injuries were opined as ante-mortem in nature, fresh in duration and could possibly have been caused by broken glass especially injury no.1,2,3 & 10. Further, alcohol was found in the blood of deceased.

Circumstances proved were put to the accused persons through their examination under Section 313 CrPC and they merely denied the same, such denial is an additional link in the chain of circumstances to bring home the charge against the accused.

Accused persons failed to offer any explanation, much less cogent explanation, as to what transpired in the intervening night of 26/27.08.13 and how did deceased die. Further, accused also failed to prove anything on record that they were not present at the spot at the relevant time. Also, TIP was refused by accused persons.



2025:DHC:468-DB



Upon disclosure of accused Mukesh after his arrest, blood- stained shirt was recovered at his instance from his house in an almirah. As per DNA analysis report, blood on the said shirt was found to be that of deceased and no explanation was given for the same by him in his statement. Accused Mukesh has not taken any defence or has not denied that he was not at the spot at the relevant time.

Accused Raju @ Chanakya has taken false and contradictory pleas including defence of alibi, which serves as additional link in the chain of circumstances. Defence evidence led by accused Raju has also failed to disprove the case of prosecution by any stretch of imagination.”

ANALYSIS AND DECISION

12. Having given our thoughtful consideration to the submissions advanced by the learned counsel for the Appellants as well as the learned APP⁵ for the State. On perusal of the oral and documentary evidence adduced before the learned Trial Court we find that the testimony of PW-1 Rahul Kumar Gupta is reliable to the effect that he was the care taker at Ganesh Telecom Company where the deceased was employed till 15.08.2013 and whose services were terminated due to having been found in a drunken state during duty hours; and PW-1 testified that the deceased came to the godown on 26.08.2013 at around 6 pm along with his associate his Raju, who was identified in the Court, and the deceased demanded some more money consequent to termination of his services. This claim was supported by the Appellant/Raju and the latter rather threatened him too with physical harm for ignoring their claim. He deposed that since both of them i.e. the deceased as well as Raju were in drunken condition, he asked them to leave the godown. There is nothing in the

⁵ Additional Public Prosecutor



2025:DHC:468-DB



statement of PW1 so as to indicate that he had any motive to depose falsely against the Appellant/Raju @ Chanakya.

13. Insofar as the testimony of PW-2 is concerned, he was a rickshaw-puller who testified that when he came sometime in the midnight around 12.15 a.m., he went to Kasturba Gandhi Park in search of his mattress and then found a person lying dead on the iron bench in the park and affirmed the identity of the deceased from the photographs at the place of occurrence which are Ex.PW-8/A1 to A5. He testified that he informed about the said fact to the two police officials who were patrolling in the area which fact was corroborated by the testimony of PW-16 ASI Arun Kumar. The testimony of PW-3 is to the fact that on 26/27.08.2013 at about 3.00 p.m., when he was sitting in the Kasturba Gandhi Park, the Appellant/Mukesh came there and flaunted a mobile phone in his possession and on being asked, he stated that it belonged to his mausa (material uncle) but then at about 5.00 p.m. one person met him in the park who told him that his mobile phone and money had been stolen from his pocket and on that he went to the house of the Appellant/Mukesh and called upon him to return the mobile phone to a person who would be found in the park. He testified that the Appellant/Mukesh was heavily drunk and told him that he had given the mobile to somebody else and he came back to the park and narrated such facts to that person whose things had been stolen and he went away.

14. It appears that during the investigation, PW-3 had stated to the police that the Appellant/Mukesh was confronted by him since the deceased had requested him to get back his mobile phone but the Appellant/Mukesh stated



2025:DHC:468-DB



that he had given the mobile phone to his cousin Raju @ Chanakya. Although this witness did not support the prosecution case *in toto* but at the same he was confronted with the statement under Section 164 of Cr.P.C. recorded before the learned MM wherein he had *inter alia* stated that he had apprised the Appellant/Mukesh that a person whose mobile phone had been stolen was sleeping in the park.

15. The prosecution case hinges then on the testimony of PW-11 Jokhan Lal Mishra who, without any blemish deposed to the effect that he was present at his paan beedi/cold drink shop near Shamshan Ghat, near Kasturba Nagar bus stand when at about 9.30 p.m. on 26.08.2013 both the Appellants/Mukesh and Raju came to him along with one juvenile as well as the deceased and purchased cold drinks, cigarettes and a water bottle, and went away. The fact that both the accused along with the juvenile were seen together in the evening on 26.08.2013 was then corroborated by the testimony of PW-13 HC Naresh Kumar that while patrolling as a beat constable, he had heard some noises and use of filthy language emanating from the park at about 9.00 p.m. and he saw both the Appellants/Mukesh as well as Raju @ Chanakya along with the juvenile and also the deceased who were all under the influence of liquor and quarrelling with each other apparently on account of expenditure on liquor etc. and when he intervened, they told him that it was a personal matter and they would get the same resolved amongst themselves and on their assurance he left the site.

16. The plea by the learned counsels for the Appellants that the testimony of PW-13 HC Naresh Kumar is not fathomable as the police official did not



2025:DHC:468-DB



take any action against the persons for taking liquor at public place belies common sense. PW-13 HC Naresh Kumar being the beat constable was probably acquainted with many people in the area. He testified that he knew the two of them as well as their workplace before the incident, and thus, he intervened in the matter and finding that the parties assured that they would settle their quarrel amicably and would leave the park without any delay, he left the spot. PW-11 and PW-13 had no reason to depose falsely against the Appellant persons and there is nothing in their cross-examination to disbelieve their version. It is also brought out that both the appellants refused to undergo TIP and there is no challenge to the testimony of IO PW-29 Sanjay Sinha that the appellants were shown to the witnesses during police custody or otherwise elsewhere.

17. It is also in evidence that broken glass bottles were seized from the place of occurrence among other things and the same were sealed and sent to FSL, Rohini. It is also brought on the record that during the investigation, the accused Mukesh was arrested and at his instance, his blood stained clothes were recovered, which recovery is hardly challenged, and as per the report Ex. PW-24/A, it has been brought out that the blood on the broken glass bottle collected from the place of occurrence besides t-shirt, baniyan and pant with the belt of the deceased Ex.1, 2, 8, 27a, 27b and 27c respectively matched with the DNA profile of the blood traced on the shirt of the Appellant accused Ex.11. Incidentally, in the FSL/viscera report Ex.PW20/A, there are findings



2025:DHC:468-DB

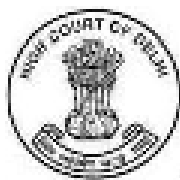


to the effect of presence of ethyl as well as methyl alcohol in the blood⁶ and in the stomach of the deceased, that raises the inference that the deceased was heavily drunk.

18. At this stage, it would also be expedient to refer to the findings of the post mortem report as testified by PW-20, which goes as under:

1. Multiple cut laceration resulting cut throat injury intermingling to each other to form a wound of size 16 x 5 cm into tracheal deep in middle front of neck extend from right side of neck to left side of neck. The upper border of wound is placed 7 cm below tip of chin and lower border place 4.5 cm above the suprasternal notch. The wound more extend to left side of neck upto 10 cm and upto 6 cm on right side of neck. The wound was horizontally placed and the underlying soft tissues, muscles, neck vessels of left side, trachea in middle were cut. Blood clot seen in trachea. The margins of the wound were contused.
2. Cut lacerated wound 5 x 1.5 cm into muscle deep over middle upper front of chest placed more on left side. The wound was placed 2.5 cm below suprasternal notch.
3. Superficial cut laceration 2.5 x 0.3 cm into skin deep over right side front of upper chest over medial end of clavicle.
4. Reddish bruise 3 x 2.5 cm over right side mandibular area placed 5 cm right to tip of chin.
5. Reddish bruise 3 x 1 cm over left side mandibular area placed 8 cm left to tip of chin.
6. Linear reddish abrasion 14 x 0.5 cm present over upper front of neck more on left side of neck placed 6 cm below the tip of chin and 1 cm above the upper border of injury No.1. The wound extend 8 cm on left side of neck and 6 cm on the right side of neck.

⁶ 16.1 MG/100 ML of blood & 51.9 MG/100 of blood respectively



2025:DHC:468-DB



7. Reddish bruise 3 x 2 cm over right side forehead placed 1.5 cm above the eyebrow and 5 cm from midline.
8. Reddish bruise 2.5 cm x 1 cm on left side inner aspect of upper lip.
9. Reddish bruise 5 x 3 cm over left pinna.
10. Cut laceration 2.5 x 3.5 cm into cartilage deep over right pinna.
11. Multiple reddish bruise varies in size from 2 x 1.5 cm to 1 x 0.5 cm over right forearm at place.

Opinion : The cause of death was haemorrhagic shock due to ante mortem cut throat injury and sufficient to cause death in ordinary course of nature. All injuries were ante mortem in nature, fresh in duration and could be possible to cause by broken glass (injury no.1, 2, 3 & 10), injury no.6 caused by ligature and injury No.4,5,7,8, 9 & 11 caused by blunt force impact.”

19. In summary, it appears to be a case where there was no pre-meditation on the part of the appellants in committing the murder of the deceased. As testified by PW-20, Injury no.1 on the neck was sufficient in the ordinary course of nature to cause death.⁷ It is highly probable that, while in an inebriated state, the parties engaged in a heated conversation, exchanging abusive words, amidst their drinking spree. In the heat of the moment, something triggered an uncontrollable impulse in the appellants, who confronted the deceased and tried to overpower him and in the ensuing melee, the Appellants in all probability inflicted blows upon the deceased with a beer

⁷ PW-20/A, Post Mortem Report - Multiple Cut lacerations resulting cut throat injury



2025:DHC:468-DB



bottle causing injury No.4,5,7,8, 9 & 11 and in the process inflicted one or two horizontal blows on the deceased's neck, which ultimately proved fatal.

20. Considering the preceding discussion, while the Trial Court's conclusion that the accused are responsible for the deceased's death, who was about 38 years of age, is sound, but at the same time it appears that the appellants' actions were not premeditated. None of the appellants arrived at the scene armed when the Beat Constable PW-13 met them also, their intention was to resolve their squabble. There is no evidence to suggest that the appellants had prior criminal records. At the time of the incident, Appellant Mukesh was approximately 23 years old, and Appellant Raju alias Chanakya was about 27 years old. Furthermore, there is no evidence of any prior animosity between the appellants and the deceased.

21. In light of the facts and circumstances of the case, it is inconsequential to determine who was the aggressor or provoked the Appellants into behaving and acting in the manner they did. It is well-established through a series of judicial decisions that merely failing to establish a defense under Section 300 of the IPC does not preclude the accused from relying on the exceptions.

22. Incidentally, while initially the learned counsels for the parties sought to canvass for an outright acquittal of the appellants, midway during the course of arguments they shifted stand and have urged that instead the offence of the appellants under section 302 of the IPC may be converted to offence under Part II of section 304 of the IPC⁸. The learned counsel for the

⁸ 304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with 1 [imprisonment for life], or imprisonment of either



2025:DHC:468-DB



Appellants in this regard relied on the decision in the case of **State of U.P. v. Lakhmi**⁹; **Attar Singh v. State of Maharashtra**¹⁰, **Sanjay Shah v. State**¹¹ and lastly a recent decision by the Supreme Court in the case of **Vijay @ Vijaykumar v. State Represented by Inspector of Police**¹².

23. Avoiding long academic discussion on the subject, the Supreme Court in the case of **Kailash v. State of M.P.**¹³ it was held that the entire attending circumstances must be taken into consideration for the purpose of finding out the nature of the actual offence committed. In the said case, the accused inflicted a single blow with the help of axe on the head of victim on a sudden provocation and without any pre-meditation which resulted in the death of the victim; the injury received by the co-accused was not explained by the prosecution and under such circumstances the sentence under section 302 Penal Code, 1860 was altered to section 304 Part II Penal Code, 1860. In the case of **Pappu v. State of M.P.**(2006) 7 SCC 391, there was a single blow on the head given by the appellant by picking up a lathi in course of sudden quarrel without any premeditation and without taking advantage or acting in a cruel manner. It was held that the appellant was liable to be convicted under section 304 Part-II and not under section 302 IPC, 1860. In another case, titled

description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

⁹ (1998) 4 SCC 336

¹⁰ (2013) 11 SCC 719

¹¹ 2018 SCC OnLine Del 9603

¹² Criminal Appeal No.1049/2021 decided on 16th January, 2025

¹³ (2006) 11 SCC 420



2025:DHC:468-DB



Ankush Shivaji Gaikwad v. State of Maharashtra¹⁴, the Supreme Court dealt with a case where the death was caused by an iron pipe and due to exchange of hot words or similar circumstances and it was held that the murder would be punishable under Section 304 Part II.

24. Similarly, in **Ebadat Mondal & Ors. v. The State of West Bengal**¹⁵, where death was caused by using an iron rod that was lying near the place of occurrence, the offence was converted into conviction under Section 304 Part II of the Indian Penal Code. In **Surain Singh v. State of Punjab**¹⁶, injuries were caused by a *kirpan* and Supreme Court observed that the number of wounds would by itself not be a decisive factor, the observation of the Supreme Court is as under:-

“22. 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

¹⁴ (2013) 6 SCC 770

¹⁵ 2011 SCC OnLine Cal 72

¹⁶ (2017) 5 SCC 796



2025:DHC:468-DB



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.

23. Thus, if there is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not intention to cause murder and bodily injury then the same would fall under Section 304 Part II. We are inclined to the view that in the facts and circumstances of the present case, it cannot be said that the appellant-accused had any intention of causing the death of the deceased when he committed the act in question. **The incident took place out of grave and sudden provocation and hence the accused is entitled to the benefit of Section 300 Exception 4 IPC.**

24. Thus, in entirety, considering the factual scenario of the case on hand, the legal evidence on record and in the background of legal principles laid down by this Court in the cases referred to supra, the inevitable conclusion is that the act of the appellant-accused was not a cruel act and the accused did not take undue advantage of the deceased. The scuffle took place in the heat of passion and all the requirements under Section 300 Exception 4 IPC have been satisfied. Therefore, the benefit of Exception 4 under Section 300 IPC is attracted to the fact situations and the appellant-accused is entitled to this benefit.

25. Thus, considering the factual background and the legal position set out above, the inevitable conclusion is that the appropriate conviction of the appellant-accused would be under Section 304 Part II IPC instead of Section 302 IPC. Hence, the sentence of imprisonment for 10 years would meet the ends of justice.

{Bold underline portions emphasized}

25. In the case of **Dauvaram Nirmalkar v. State of Chattisgarh**¹⁷, the Court observed as to how loss of self-control by grave provocation is a question of fact and is also an exception to exclude the acts of violence which

¹⁷ 2022 SCC OnLine SC 955



2025:DHC:468-DB



are premediated, but not negate consideration of circumstances. The relevant portion of the judgment is set out below:

“12. The question of loss of self-control by grave and sudden provocation is a question of fact. Act of provocation and loss of self-control, must be actual and reasonable. The law attaches great importance to two things when defence of provocation is taken under Exception 1 to Section 300 of the IPC. **First, whether there was an intervening period for the passion to cool and for the accused to regain dominance and control over his mind. Secondly, the mode of resentment should bear some relationship to the sort of provocation that has been given. The retaliation should be proportionate to the provocation.**¹² The first part lays emphasis on whether the accused **acting as a reasonable man had time to reflect and cool down.** The offender is presumed to possess the general power of self-control of an ordinary or reasonable man, belonging to the same class of society as the accused, placed in the same situation in which the accused is placed, to temporarily lose the power of self-control. The second part emphasises that the offender's reaction to the provocation is to be judged on the basis of whether the provocation was sufficient to bring about a loss of self-control in the fact situation. Here again, the court would have to apply the test of a reasonable person in the circumstances. **While examining these questions, we should not be short-sighted, and must take into account the whole of the events, including the events on the day of the fatality, as these are relevant for deciding whether the accused was acting under the cumulative and continuing stress of provocation. Gravity of provocation turns upon the whole of the victim's abusive behaviour towards the accused. Gravity does not hinge upon a single or last act of provocation deemed sufficient by itself to trigger the punitive action. Last provocation has to be considered in light of the previous provocative acts or words, serious enough to cause the accused to lose his self-control.** The cumulative or sustained provocation test would be satisfied when the accused's retaliation was immediately preceded and precipitated by some sort of provocative conduct, which would satisfy the requirement of sudden or immediate provocation.

13. Thus, the gravity of the provocation can be assessed by taking into account the history of the abuse and need not be confined to the gravity of the final provocative act in the form of acts, words or gestures. The final wrongdoing, triggering off the accused's reaction, should be identified to show that there was temporary loss of self-control and



2025:DHC:468-DB



the accused had acted without planning and premeditation. This has been aptly summarised by Ashworth¹³ in the following words:

“[T]he significance of the deceased's final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add colour to the final act. This is not to argue that the basic distinction between sudden provoked killings and revenge killings should be blurred, for the lapse of time between the deceased's final act and the accused's retaliation should continue to tell against him. **The point is that the significance of the deceased's final act and its effect upon the accused - and indeed the relation of the retaliation to that act - can be neither understood nor evaluated without reference to previous dealings between the parties.**”

15. Following the view expressed in K.M. Nanavati (supra), this Court in Budhi Singh v. State of Himachal Pradesh¹⁴ observed that in the test for application of Exception 1 to Section 300 of the IPC, the primary obligation of the court is to examine the circumstances from the point of view of a person of reasonable prudence, if there was such grave and sudden provocation, as to reasonably conclude that a person placed in such circumstances can temporarily lose self-control and commit the offence in the proximity to the time of provocation. A significant observation in Budhi Singh (supra) is that the provocation may be an act or series of acts done by the deceased to the accused resulting in inflicting of the injury. **The idea behind this exception is to exclude the acts of violence which are premeditated, and not to deny consideration of circumstances such as prior animosity between the deceased and the accused, arising as a result of incidents in the past and subsequently resulting in sudden and grave provocation.** In support of the aforesaid proposition and to convert the conviction from Section 302 to Section 304 Part I of the IPC in Budhi Singh (supra), the Court also relied upon Rampal Singh v. State of Uttar Pradesh¹⁵.

{bold and underlines portions emphasized}

26. Winding up our discussion on the propositions of law, we lastly invite reference to the cited case of **Vijay @ Vijaykumar v. State Represented by Inspector of Police (Supra)**, wherein the Appellant along with his friend was returning home after watching a movie late at midnight and while they were



2025:DHC:468-DB



sleeping beneath a bridge, the deceased came to spot in an inebriated condition and picked up an altercation with the Appellant who picked up a cement brick that was lying at the place of occurrence and hit the deceased on his head and as a result of which, the deceased succumbed to head injuries. On his conviction by the Trial Court, an appeal was filed before the High Court which was dismissed holding the Appellant guilty of the offence punishable under Section 304 Part 1 of the IPC and sentencing him to undergo five years of rigorous imprisonment. The Supreme Court while setting aside the judgment of the High Court held as under:-

“24. In order to bring his case under Exception 1 to Section 300 IPC the following ingredients:

(i) The provocation was sudden; (ii) the provocation was grave; and (iii) loss of self-control. These three ingredients may be considered one by one:

(i) Whether the provocation was sudden or not does not present much difficulty. The word ‘sudden’ involves two elements. First, the provocation must be unexpected. If an accused plans in advance to receive a provocation in order to justify the subsequent homicide, the provocation cannot be said to be sudden. Secondly, the interval between the provocation and the homicide should be brief. If the man giving the provocation is killed within a minute after the provocation, it is a case of sudden provocation. If the man is killed six hours after the provocation, it is not a case of sudden provocation.

(ii) the main difficulty lies in deciding whether a certain provocation was grave or not. A bare statement by the accused that he regarded the provocation as grave will not be accepted by the court. The court has to apply an objective test for deciding whether the provocation was grave or not. A good test for deciding whether a certain provocation was grave or not is this: “Is a reasonable man likely to lose self-control as a result of such provocation?” If the answer is in the affirmative, the provocation will be classed as grave. If the answer is in the negative, the provocation is not grave. In this context, the expression ‘reasonable man’ means a normal or an average person. A reasonable man is not the ideal man or the perfect



2025:DHC:468-DB



being. A normal man sometimes loses temper. There is, therefore no inconsistency in saying that, a reasonable man may lose self-control as a result of grave provocation. A reasonable or normal or average man is a legal fiction. The reasonable man will vary from society to society. A Judge should not impose his personal standards in this matter. By training, a Judge is a patient man. **But the reasonable man or the normal man need not have the same standard of behaviour as the judge himself. The reasonable man under consideration is a member of the society, in which the accused was living. So, education and social conditions of the accused are relevant factors. An ordinary exchange of abuse is a matter of common occurrence.** A reasonable man does not lose self-control merely on account of an ordinary exchange of abuses. So, courts do not treat an ordinary exchange of abuses as a basis for grave provocation. On the other hand, in most societies, adultery is looked upon as a very serious matter. So, courts are prepared to treat adultery as a basis for grave provocation.

(iii) **the question of loss of self-control comes up indirectly in deciding whether a particular provocation was grave or not.** So, if it is proved that the accused did receive grave and sudden provocation, the court is generally prepared to assume that homicide was committed while the accused was deprived of the power of self-control. In some cases, it may be possible for the prosecution to prove that the accused committed the murder with a cool head in spite of grave provocation. But such cases will be rare. So, when the accused has established grave and sudden provocation, the court will generally hold that he has discharged the burden that lay upon him under Exception 1 to Section 300 IPC.

25. What should be the approach of the court? The provocation must be such as will upset not merely a hasty and hot-tempered or hypersensitive person, but one of ordinary sense and calmness. The Court has to consider whether a reasonable person placed in the same position as accused would have behaved in the manner in which the accused behaved on receiving the same provocation. **If it appears that the action of the accused was out of all proportion to the gravity or magnitude of the provocation offered, the case will not fall under the exception.** The case can only fall under the exception when the court is able to hold that provided the alleged provocation is given, every normal person would behave or act in the same way as the accused in the circumstances in which the accused was placed, acted.



2025:DHC:468-DB



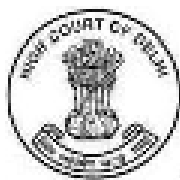
27. Section 105 of the India Evidence Act, 1872 casts burden of proof on the accused. Being an exception, the burden of proving the circumstances covered by Exception 1 is on the accused. Where the prosecution prima facie proves that the act was committed by the accused which had resulted in the death of the deceased and the accused pleads that the case falls within one of the exceptions, it is for him to prove that.

28. It is for the accused who seeks to reduce the nature of his crime by bringing his case under Exception 1; to prove that the provocation received by him was such as might reasonably be deemed sufficient to deprive him of self- control, and that the act of killing took place whilst that absence of control was in existence and may fairly be attributed to it. (*Ref.:Ratanlal and Dhirajlal's Law of Crimes, 24th Edition*)

29. **If at all, the Trial Court and the High Court wanted to bring the case within the ambit of culpable homicide not amounting to murder, then it could have invoked exception 4 of Section 300 of the IPC. We say so because the incident was not pre-planned or pre-meditated.** The appellant and his friends had gone to watch a movie. They were returning back home in the late night hours. It appears that after the movie was over and while returning, they decided to take some rest beneath the bridge. The deceased also happened to be sleeping beneath the bridge. **However, it is the case of the prosecution that the deceased was in a drunken condition. In fact, there is nothing to indicate that the deceased was drunk. However, the eye-witnesses to the incident and that too none other than the friends of the appellant who were examined by the prosecution deposed that the deceased was in a drunken condition.**

{bold and underlines portions emphasized}

27. Considering the foregoing discussion, this Court opines that the present case warrants conviction under Section 304 Part II, despite the appellants' culpability in the deceased's death. It is undeniable that the appellants likely belong to the lower socio-economic strata, where the use of foul language is common parlance. However, something went awry during their drinking spree,



2025:DHC:468-DB



leading to a heated argument that ultimately resulted in the deceased sustaining fatal injuries.

28. The nominal roll of the Appellant/Raju alias Chanakya would show that he has been in judicial custody for a total period of five years and nine months¹⁸. Similarly, the nominal roll of the Appellant/Mukesh would show that he has been in judicial custody for a period of eight years and eight days¹⁹.

29. To our mind both the Appellants have suffered enough punishment for their acts. Accordingly, both the Appeals are partly allowed to the effect that both the Appellants on being convicted under Section 304 Part II of the IPC are sentenced to the period already undergone by them. No fine is imposed. Both the appeals are partly allowed and disposed of in the above terms with the pending application.

30. A copy of the judgment be sent to the concerned Jail Superintendent for necessary information and compliance. Order be uploaded on the website forthwith. The physical record from the Trial Court be sent back and the same be weeded out in accordance with the rule.

DHARMESH SHARMA, J

PRATHIBA M. SINGH, J

JANUARY 28, 2025/Ch

¹⁸ Counted up to 20.09.2024

¹⁹ Counted up to 11.11.2024