Madhya Pradesh High Court
Ramprakash vs State Of M.P. on 13 May, 2022
Author: Rajeev Kumar Shrivastava

1 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012

IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR
BEFORE
HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA
&
HON'BLE SHRI JUSTICE RAJEEV KUMAR SHRIVASTAVA
ON THE 13th OF MAY, 2022

CRIMINAL APPEAL NO. 1049 OF 2011

BETWEEN

CHANDRABHAN SON OF SHRI KALYAN SINGH YADAV, AGE 28 YEARS, RESIDENT OF HOUSING BOARD COLONY DATIA (M.P)

.....APPELLANT

(BY SHRI S.S. KUSHWAH - ADVOCATE)

AND

STATE OF MADHYA PRADESH THROUGH POLICE STATION CIVIL LINE, DATIA, DISTRICT DATIA (M.P)

.....RESPONDENT

(BY SHRI C. P. SINGH-PUBLIC PROSECUTOR)

CRIMINAL APPEAL NO. 102 OF 2012

BETWEEN
1. RAVI SON OF HUKAM SINGH, AGED ABOUT 28 YEARS, RESIDENT OF BEHIND GALLA MANDI, DATIA (MP)
2. SANTOSH, SON OF HUKAM SINGH

2 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012

GHANOURIYA, AGED ABOUT 32 YEARS, RESIDENT OF UNAV ROAD, BALAJI NAGAR, DATIA (MP)

.....APPELLANTS

(BY SHRI R. K.S. KUSHWAH - ADVOCATE)

AND

STATE OF MADHYA PRADESH
THROUGH POLICE STATION CIVIL
LINE, DATIA (M.P)

.....RESPONDENT

(BY SHRI C. P. SINGH- PUBLIC PROSECUTOR)

AND

CRIMINAL APPEAL NO. 160 OF 2012

BETWEEN

1.ASHISH SON OF RAMPRAKASH
ADJARIYA, AGED 28 YEARS,
REISDNET OF BEHIND GALLA
MANDI, DATIA (MP)

2.RAMPRAKASH SON OF RAGHUVIR
PRASAD SHARMA, AGED 76 YEARS,
RESIDENT OF UNAV ROAD BALAJI
NAGAR, DATIA

.....APPELLANTS

(BY SHRI R.K.S. KUSHWAH - ADVOCATE)

AND
STATE OF MADHYA PRADESH
THROUGH POLICE STATION CIVIL
LINE, DATIA, DISTRICT DATIA (M.P)

.....RESPONDENT

(BY SHRI C. P. SINGH- PUBLIC PROSECUTOR)

Reserved on : 9th May, 2022
Delivered on : 13th of May, 2022

This appeal coming on for final hearing, Hon'ble Shri Justice

Rajeev Kumar Shrivastava, passed the following:

JUDGMENT

This common judgment shall also govern disposal of Criminal Appeal No.102 of 2012 filed by appellants Ravi & Santosh and Criminal Appeal No.160 of 2012 filed by appellants Ashish and Ramprakash. Since the facts and circumstances of all the criminal appeals are the same, therefore, for the sake of convenience, they are heard simultaneously. (2) Being dissatisfied with the impugned

judgment of conviction and sentence dated 16-12-2021 passed by Special and Additional Sessions Judge, Datia (MP) in Sessions Trial No.1 of 2007, the present Criminal Appeals under Section 374(2) of CrPC have been preferred by the appellants by which, they have been convicted and sentenced as under:-

Names of accused	Conviction	Sentence
Chandrabhan	Section 148 of IPC	3 years RI
	Section 302/149 of IPC	LI with fine of Rs.2,000/-
Ravi	Section 148 of IPC	3 years RI
	Section 302 of IPC	LI with fine of Rs. 2,000/-

Santosh	Section 148 of IPC	3 years RI
	Section 302/149 of IPC	LI with fine of Rs. 2,000/-
Ashish	Section 148 of IPC	3 years RI
	Section 302 of IPC	LI with fine of Rs.2,000/-
Ramprakash	Section 148 of IPC	3 years RI
	Section 302/149 of IPC	LI with fine of Rs.2,000/-

On deposit of fine amount, as per provisions of Section 357 of CrPC, it was directed that Rs.5,000/- Rs.5,000/- shall be paid to legal heirs of deceased Mahesh Chaurasiya and Munnalal Chaurasiya.

All the sentences have been directed to run concurrently. (3) Prosecution case, in brief is that on 09-04-2006 at around 07:30 pm Deepak Chaurasiya (PW4) lodged a Dehati Nalishi at Police Station Civil Line, Datia alleging therein that on Saturday, a Bhandara was organized at the Temple of Bumb Mahadev and when Bhandara was going on, one old lady, namely, Ramrati who was residing behind the Mandi, was beaten by accused Ghanshyam, therefore, accused Ghanshyam was also beaten by the complainant party and on account of said incident, in the morning of 09-04-2006, accused Rakesh, Ravi, Ashish, Santosh, Chandrabhan Yadav, Govind Singh, came there and asked the complainant Deepak Chaurasiya as to why Ghanshyam was beaten and at that time, they assaulted him and at that juncture, uncle of complainant Mahesh Chaurasiya intervened the matter. Thereafter, all accused persons went 5 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 from the place of occurrence by giving a threat to complainant Deepak Chaurasiya to kill him. Thereafter, in the afternoon of 09-04-2006 accused Ashish, Ghanshyam and Ramprakash came to the house of old lady Ramrati and beaten her and this fact was narrated by Ramrati to Mahesh Chaurasiya, uncle of the complainant. Again, accused Ashish and Ramprakash came to handcart shop of Mahesh Chaurasiya and some hot talks took place there and thereafter, went from there by giving a threat to kill him. On the same day, at around 07:30 pm, complainant Deepak Chaurasiya, his uncle Mahesh Chaurasiya and brother Arjun were standing on the said shop, all accused persons come there on Suzuki motorcycle. Accused Ravi, Ashish and Rakesh were armed with katta and thereafter, surrounded the uncle of complainant Mahesh Chaurasiya and on

the exhortation of accused Ramprakash, accused Rakesh caused a gunshot fire from his Katta on the head of Mahesh Chaurasiya and at the same time, when other uncle of complainant Munnalal Chaurasiya who was doing Chowkidar at the shop of one Ratanlal, also came there for rescue, then accused Ashish fired a gunshot from his katta which hit on the chest of Munnalal Chaurasiya as a result of which, he fell down on the ground. When they tried to caught hold of the accused, accused Ravi also caused gunshot fire but they saved themselves. Both Mehesh Chaurasiya 6 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 and Munnalal Chaurasiya died on the spot due to gunshot injuries sustained by them.

(4) On the basis of Dehati Nalishi recorded at Crime No.06 of 2006 under Sections 147, 148, 149, 302, 109, 115 of IPC and under Section 25/27 of Arms Act, FIR was got registered at Crime No.33 of 2006 and after completion of investigation and other formalities, the police filed charge sheet before the Court from where the case was committed to the trial Court for its trial.

(5) Charges were framed and read over against the accused who denied the charges and they abjured their guilt and pleaded complete innocence. Statement of accused were recorded under Section 313 of CrPC. In their defence, they did not examine any witness. Prosecution, in order to support its case, examined as many as 18 witnesses. After conclusion of trial, the Trial Court by the impugned judgment, convicted and sentenced the appellants for aforesaid offences as mentioned in para 2 of this judgment.

(6) It is submitted on behalf of appellants that the impugned judgment passed by trial Court suffers gross error of law. The trial Court did not consider properly Dehati Nalishi recorded by complainant Deepak Chaurasiya (PW4) as the complainant did not support the prosecution 7 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 case and only on the basis of statements of hearsay witnesses, appellants cannot be convicted. There are major contradictions and omissions in the evidence of witnesses but trial Court has failed in considering the same. Merely on the basis of presence of appellants on the place of occurrence, it cannot be presumed that they were unlawfully assembled and with common object caused gunshot fires at deceased. Therefore, no offence under Section 149 of IPC for which appellants can be convicted under Section 302 read with Section 149 of IPC. Neither there is any overt act on the part of appellants nor there is any active participation of appellants for committing murder of both the deceased. Therefore, the impugned judgment passed by trial Court is bad in law as well as against the settled principle of law and the same is unsustainable in the eyes of law. The trial Court has not properly evaluated and appreciated the prosecution evidence and has wrongly convicted and sentenced appellants vide impugned judgment, which deserves to be set aside and appellants deserves acquittal.

(7) In response, Counsel for the State supported impugned judgment and submitted that there being no infirmity in passing the impugned judgment of conviction and sentence and the findings arrived at by the Trial Court do not require any inference by this Court. It is further 8 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 submitted that although incident in question took place on a pity dispute, but appellants unlawfully assembled the place of occurrence and with common object committed murder of both the deceased by means of firearms. Hence, no interference is warranted in the impugned judgment by this Court. Therefore, both the criminal appeals deserve

dismissal. (8) Before adverting to the merits of the case, it would be appropriate to throw light on the relevant provisions of Sections 299 and 300 of Indian Penal Code.

The Law Commission of United Kingdom in its 11th Report proposed the following test :

> "The standard test of 'knowledge' is, Did the person whose conduct is in issue, either knows of the relevant circumstances or has no substantial doubt of their existence?"

[See Text Book of Criminal Law by Glanville Wiliams (p.125)] "Therefore, having regard to the meaning assigned in criminal law the word "knowledge" occurring in clause Secondly of Section 300 IPC imports some kind of certainty and not merely a probability. Consequently, it cannot be held that the appellant caused the injury with the intention of causing such bodily injury as the appellant knew to be likely to cause the death of deceased. So, clause Secondly of Section 300 IPC will also not apply."

The enquiry is then limited to the question whether the offence is 9 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 covered by clause Thirdly of Section 300 IPC. This clause, namely, clause Thirdly of Section 300 IPC reads as under:-

> "Culpable homicide is murder, if the act by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

(9) The argument that the accused had no intention to cause death is wholly fallacious for judging the scope of clause Thirdly of Section 300 IPC as the words "intention of causing death" occur in clause Firstly and not in clause Thirdly. An offence would still fall within clause Thirdly even though the offender did not intend to cause death so long as the death ensues from the intentional bodily injury and the injuries are sufficient to cause death of the deceased in the ordinary course of nature. This is also borne out from illustration (c) to Section 300 IPC which is being reproduced below:-

> "(c) A intentionally gives Z a sword-cut or club- wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death."

Therefore, the contentions advanced in the present case and which are frequently advanced that the accused had no intention of causing death of deceased is wholly irrelevant for deciding whether the case falls in clause Thirdly of Section 300 IPC.

10 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 (10) The scope and ambit of clause Thirdly of Section 300 IPC was considered by the Supreme Court in the decision in Virsa Singh Vs. State of Punjab AIR 1958 SC 465 and the principle enunciated therein explains the legal position succinctly. The accused Virsa Singh was alleged to have given a single spear blow and the injury sustained by the deceased was "a punctured wound 2"x =" transverse in direction on the left side of the abdominal wall in the lower part of the iliac region just above the inguinal canal. Three

coils of intestines were coming out of the wound." After analysis of the clause Thirdly, it was held: -

> "The prosecution must prove the following facts before it can bring a case under S. 300 "Thirdly"; First, it must establish, quite objectively, that a bodily injury is present; Secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and, Fourthly, it must be proved that the injury of the type, just described, made up of the three elements set out above, is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout), 11 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 the offence is murder under S. 300 "Thirdly". It does not matter that there was no intention to cause death, or that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (there is no real distinction between the two), or even that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death." (11) In the case of Arun Nivalaji More vs. State of Maharashtra (Case No.Appeal (Cri.) 1078-1079 of 2005), it has been observed as under :-

> "11. First it has to be seen whether the offence falls within the ambit of Section 299 IPC. If the offence falls under Section 299 IPC, a further enquiry has to be made whether it falls in any of the clauses, namely, clauses 'Firstly' to 'Fourthly' of Section 300 IPC. If the offence falls in any one of these clauses, it will be murder as defined in Section 300IPC, which will be punishable under Section 302 IPC. The offence may fall in any one of the four clauses of Section 300 IPC yet if it is covered by any one of the five exceptions mentioned therein, the culpable homicide committed by the offender would not be murder and the offender would not be liable for conviction under Section 302 IPC. A plain reading of Section 299 IPC will show that it contains three clauses, in two clauses it is the intention of the offender which is relevant and is the dominant factor and in the third clause the knowledge of the offender which is relevant and is the dominant factor.

12 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 Analyzing Section 299 as aforesaid, it becomes clear that a person commits culpable homicide if the act by which the death is caused is done

(i) with the intention of causing death; or

(ii) with the intention of causing such bodily injury as is likely to cause death; or

(iii) with the knowledge that the act is likely to cause death."

If the offence is such which is covered by any one of the clauses enumerated above, but does not fall within the ambit of clauses Firstly to Fourthly of Section 300 IPC, it will not be murder and the offender would not be liable to be convicted under Section 302 IPC. In such a case if the offence is such which is covered by clauses (i) or (ii) mentioned above, the offender would be liable to be convicted under Section 304 Part I IPC as it uses the expression "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" where intention is the dominant factor. However, if the offence is such which is covered by clause (iii) mentioned above, the offender would be liable to be convicted under Section 304 Part II IPC because of the use of the expression "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" where knowledge is the dominant factor.

What is required to be considered here is whether the offence 13 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 committed by the appellant falls within any of the clauses of Section 300 IPC.

Having regard to the facts of the case it can legitimately be urged that clauses Firstly and Fourthly of Section 300 IPC were not attracted. The expression "the offender knows to be likely to cause death" occurring in clause Secondly of Section 300 IPC lays emphasis on knowledge. The dictionary meaning of the word 'knowledge' is the fact or condition of being cognizant, conscious or aware of something; to be assured or being acquainted with. In the context of criminal law the meaning of the word in Black's Law Dictionary is as under: -

> "An awareness or understanding of a fact or circumstances; a state of mind in which a person has no substantial doubt about the existence of a fact. It is necessary ... to distinguish between producing a result intentionally and producing it knowingly. Intention and knowledge commonly go together, for he who intends a result usually knows that it will follow, and he who knows the consequences of his act usually intends them. But there may be intention without knowledge, the consequence being desired but not foreknown as certain or even probable. Conversely, there may be knowledge without intention, the consequence being foreknown as the inevitable concomitant of that which is desired, but being itself an object of repugnance rather than desire, and therefore not intended."

In Blackstone's Criminal Practice the import of the word 'knowledge' has been described as under: -

'Knowledge' can be seen in many ways as playing the 14 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 same role in relation to circumstances as intention plays in relation to consequences. One knows something if one is absolutely sure that it is so although, unlike intention, it is of no relevance whether one wants or desires the thing to be so. Since it is difficult ever to be absolutely certain of anything, it has to be accepted that a person who feels 'virtually certain' about something can equally be regarded as knowing it."

(12) Section 299 of Indian Penal Code runs as under :-

> "299. Culpable homicide.-- Wheoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." (13) Section 299 of IPC says, whoever causes death by doing an act with the bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Culpable homicide is the first kind of unlawful homicide. It is the causing of death by doing :

(i)an act with the intention of causing death;

> (ii)an act with the intention of causing such bodily injury as is likely to cause death; or
>
> (iii)an act with the knowledge that it is was likely to cause death. Without one of these elements, an act, though it may be by its nature criminal and may occasion death, will not amount to the offence of culpable homicide. 'Intent and knowledge' as the ingredients of Section 299 postulate, the existence of a positive mental attitude and the mental condition is the special mens rea necessary for the offence.The knowledge of third condition contemplates knowledge of the likelihood of the death of the person. Culpable homicide is of two kinds : one, culpable homicide amounting to murder, and another, culpable 15 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 homicide not amounting to murder. In the scheme of the Indian Penal Code, culpable homicide is genus and murder is species. All murders are culpable homicide, but not vice versa. Generally speaking, culpable homicide sans the special characteristics of murder is culpable homicide not amounting to murder. In this section, both the expressions 'intent' and 'knowledge' postulate the existence of a positive mental attitude which is of different degrees.

(14) Section 300 of Indian Penal Code runs as under :-

> "300. Murder.-- Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--
>
> Secondly.-- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--
>
> Thirdly.-- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

> Fourthly.-- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

(15) "Culpable Homicide" is the first kind of unlawful homicide. It is the causing of death by doing ;(i) an act with the intention to cause death;

(ii) an act with the intention of causing such bodily injury as is likely to cause death; or, (iii) an act with the knowledge that it was likely to cause death.

(16) Indian Penal Code recognizes two kinds of homicide :(1) Culpable homicide, dealt with between Sections 299 and 304 of IPC (2) Not-

16 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 culpable homicide, dealt with by Section 304-A of IPC. There are two kinds of culpable homicide; (i) Culpable homicide amounting to murder (Section 300 read with Section 302 of IPC), and (ii) Culpable homicide not amounting to murder (Section 304 of IPC).

(17) A bare perusal of the Section makes it crystal clear that the first and the second clauses of the section refer to intention apart from the knowledge and the third clause refers to knowledge alone and not the intention. Both the expression "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degrees. The mental element in culpable homicide i.e., mental attitude towards the consequences of conduct is one of intention and knowledge. If that is caused in any of the aforesaid three circumstances, the offence of culpable homicide is said to have been committed.

(18) There are three species of mens rea in culpable homicide(1) An intention to cause death; (2) An intention to cause a dangerous injury; (3) Knowledge that death is likely to happen.

(19) The fact that the death of a human being is caused is not enough unless one of the mental state mentioned in ingredient of the Section is present. An act is said to cause death results either from the act directly or results from some consequences necessarily or naturally flowing from such act and reasonably contemplated as its result. Nature of offence does 17 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 not only depend upon the location of injury by the accused, this intention is to be gathered from all facts and circumstances of the case. If injury is on the vital part, i.e., chest or head, according to medical evidence this injury proved fatal. It is relevant to mention here that intention is question of fact which is to be gathered from the act of the party. Along with the aforesaid, ingredient of Section 300 of IPC are also required to be fulfilled for commission of offence of murder.

(20) In the scheme of Indian Penal Code, "Culpable homicide" is genus and "murder" is its specie. All "Murder" is "culpable homicide" but not vice versa. Speaking generally 'culpable homicide sans special characteristics of murder' if culpable homicide is not amounting to murder.

(21) In the case of Anda vs. State of Rajasthan reported in 1966 CrLJ 171, while considering "third" clause of Section 300 of IPC, it has been observed as under:-

> "It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The emphasis here is on sufficiency of injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and causing of such injury was intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature."

18 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 (22) In the case of Mahesh Balmiki vs. State of M.P. reported in (2000) 1 SCC 319, while deciding whether a single blow with a knife on the chest of the deceased would attract Section 302 of IPC, it has been held thus :-

> "There is no principle that in all cases of single blow Section 302 I.P.C. is not attracted. Single blow may, in some cases, entail conviction under Section 302 I.P.C., in some cases under Section 304 I.P.C and in some other cases under Section 326 I.P.C. The question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him. In the instant case, the deceased was disabled from saving himself because he was held by the associates of the appellant who inflicted though a single yet a fatal blow of the description noted above. These facts clearly establish that the appellant had intention to kill the deceased. In any event, he can safely be attributed knowledge that the knife blow given by him is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death."

(23) In the case of Dhirajbhai Gorakhbhai Nayak vs. State of Gujarat reported in (2003) 9 SCC 322, it has been observed as under :-

> "The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case 19 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact

Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a 20 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'." (24) In the case of Pulicherla Nagaraju @ Nagaraja vs. State of AP reported in (2006) 11 SCC 444, while deciding whether a case falls under Section 302 or 304 Part-I or 304 Part-II, IPC, it was held thus :-

"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 a 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 pre-meditation. 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 21 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 any pre- meditation; (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."

(25) In the case of Sangapagu Anjaiah v. State of A.P. (2010) 9 SCC 799, Hon'ble Apex Court while deciding the question whether a blow on the skull of the deceased with a crowbar would attract Section 302 IPC, held thus:-

> "16. In our opinion, as nobody can enter into the mind of the accused, his intention has to be gathered from the weapon used, the part of the body chosen for the assault and the nature of the injuries caused. Here, the appellant had chosen a crowbar as the weapon of offence. He has further chosen a vital part of the body i.e. the head for causing the injury which had caused multiple fractures of skull. This clearly shows the force with which the appellant had used the weapon. The cumulative effect of all these factors irresistibly leads to one and the only conclusion that the appellant intended to cause death of the deceased."

(26) In the case of State of Rajasthan v. Kanhaiyalal reported in (2019) 5 SCC 639, this it has been held as follows:-

> "7.3 In Arun Raj [Arun Raj v. Union of India, (2010) 6 SCC 457 : (2010) 3 SCC (Cri) 155] this Court observed and held that there is no fixed rule that whenever a single blow is inflicted, Section 302 would not be attracted. It is observed and held by this Court in the aforesaid decision that nature of 22 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 weapon used and vital part of the body where blow was struck, prove beyond reasonable doubt the intention of the accused to cause death of the deceased. It is further observed and held by this Court that once these ingredients

are proved, it is irrelevant whether there was a single blow struck or multiple blows.

7.4 In Ashokkumar Magabhai Vankar [Ashokkumar Magabhai Vankar v. State of Gujarat, (2011) 10 SCC 604 : (2012) 1 SCC (Cri) 397] , the death was caused by single blow on head of the deceased with a wooden pestle. It was found that the accused used pestle with such force that head of the deceased was broken into pieces. This Court considered whether the case would fall under Section 302 or Exception 4 to Section 300 IPC. It is held by this Court that the injury sustained by the deceased, not only exhibits intention of the accused in causing death of victim, but also knowledge of the accused in that regard. It is further observed by this Court that such attack could be none other than for causing death of victim. It is observed that any reasonable person, with any stretch of imagination can come to conclusion that such injury on such a vital part of the body, with such a weapon, would cause death.

7.5 A similar view is taken by this Court in the recent decision in Leela Ram (supra) and after considering catena of decisions of this Court on the issue on hand i.e. in case of a single blow, whether case falls under Section 302 or Section 304 Part I or Section 304 Part II, this Court reversed the judgment and convicted the accused for the offence under Section 302 IPC. In the same decision, this Court also considered Exception 4 of Section 300 IPC and observed in para 21 as under: (SCC para 21) "21. Under Exception 4, culpable homicide is not murder if the stipulations contained in that provision are fulfilled. They are: (i) that the act was committed without premeditation; (ii) that there was a sudden fight; (iii) the act must be in the heat of passion upon a sudden quarrel; and (iv) the offender should not have taken undue advantage or acted in a cruel or unusual manner."

(27) In the case of Bavisetti Kameswara Rao v. State of A.P. reported 23 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 in (2008) 15 SCC 725, it is observed in paragraphs 13 and 14 as under:-

"13. It is seen that where in the murder case there is only a single injury, there is always a tendency to advance an argument that the offence would invariably be covered under Section 304 Part II IPC. The nature of offence where there is a single injury could not be decided merely on the basis of the single injury and thus in a mechanical fashion. The nature of the offence would certainly depend upon the other attendant circumstances which would help the court to find out definitely about the intention on the part of the accused. Such attendant circumstances could be very many, they being (i) whether the act was premeditated; (ii) the nature of weapon used; (iii) the nature of assault on the accused. This is certainly not an exhaustive list and every case has to necessarily depend upon the evidence available. As regards the user of screwdriver, the learned counsel urged that it was only an accidental use on the spur of the moment and, therefore, there could be no intention to either cause death or cause such bodily injury as would be sufficient to cause death. Merely because the screwdriver was a usual tool used by the accused in his business, it could

not be as if its user would be innocuous.

In State of Karnataka Vedanayagam [(1995) 1 SCC 326 : 1995 SCC (Cri) 231] this Court considered the usual argument of a single injury not being sufficient to invite a conviction under Section 302 IPC. In that case the injury was caused by a knife. The medical evidence supported the version of the prosecution that the injury was sufficient, in the ordinary course of nature to cause death. The High Court had convicted the accused for the offence under Section 304 Part II IPC relying on the fact that there is only a single injury. However, after a detailed discussion regarding the nature of injury, the part of the body chosen by the accused to inflict the same and other attendant circumstances and after discussing clause Thirdly of Section 300 IPC and further relying on the decision in Virsa Singh vs. State of Punjab [AIR 1958 SC 465], the Court set aside the acquittal under Section 302 IPC and convicted the accused for that offence.

The Court (in Vedanayagam case [(1995) 1 SCC 326 :

24 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 1995 SCC (Cri) 231] , SCC p. 330, para 4) relied on the observation by Bose, J. in Virsa Singh case [AIR 1958 SC 465] to suggest that: (Virsa Singh case [AIR 1958 SC 465], AIR p. 468, para 16) "16. With due respect to the learned Judge he has linked up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes overlap."

The further observation in the above case were: (Virsa Singh case [AIR 1958 SC 465] , AIR p. 468, paras 16 & 17) "16. The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question....

It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned 25 Criminal

Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact."

(28) Section 149 of Indian Penal Code runs as under :-

> "149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.-- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

(29) There are two essential elements covering the act under Section 149 of Indian Penal Code, which are as under:- (i) The assembly should consist of at least five persons; and (ii) They should have a common object to commit an offence or achieve any one of the objects enumerated therein.

(30) For recording a conclusion that a person is guilty of any offence under Section 149 of IPC, it must be proved that such person is a member of an "unlawful assembly" consisting of not less than five persons irrespective of the fact whether the identity of each one of the five persons is proved or not. If that fact is proved, the next step of inquiry is whether the common object of the unlawful assembly is one of the five enumerated objects specified under Section 141 of IPC.

26 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 (31) The common object of assembly is normally to be gathered from the circumstances of each case such as the time and place of the gathering of the assembly, the conduct of the gathering as distinguished from the conduct of the individual members are indicative of the common object of the gathering. Assessing the common object of an assembly only on the basis of overt acts committed by such individual members of the assembly is not permissible.

(32) In the matter of Dani Singh v. State of Bihar [(2004) 13 SCC 203], the Hon'ble Apex Court has observed as under :-

> "The emphasis in Section 149 IPC is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section
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> 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member

> of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but 27 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly."

(33) In the case of Mahadev Sharma v. State of Bihar [(1966) 1 SCR 18], the Hon'ble Apex Court has discussed about applicability of Section 149 of IPC and observed as under :-

> "The fallacy in the cases which hold that a charge under Section 147 is compulsory arises because they overlook that the ingredients of Section 143 are implied in Section 147 and the ingredients of Section 147 are implied when a charge under Section 149 is included. An examination of Section 141 shows that the common object which renders an assembly unlawful may involve the use of criminal force or show of criminal force, the commission of mischief or criminal trespass or other offence, or resistance to the execution of any law or of any legal process. Offenses under Sections 143 and 147 must always he present when the charge is laid for an offence like murder with the aid of Section 149, but the other two charges need not be framed -separately unless it is sought to secure a conviction under them. It is thus that Section 143 is not used 28 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 when the charge is under Section 147 or Section 148, and Section 147 is not used when the charge is under Section 148. Section 147 may be dispensed with when the charge is under Section 149 read with an offence under the Indian Penal Code."

(34) It is relevant to mention here that if all the necessary ingredients are present in a case when charges were framed under Section 149 of IPC, each member of unlawful assembly shall be held liable. The condition precedent is that the prosecution proves the existence of unlawful assembly

with a common object, which is the offence. (35) In Kuldip Yadav vs. State of Bihar [(2011) 5 SCC 324], it is held that a clear finding regarding nature of the common object of the assembly must be given and the evidence discussed must show not only the common object, but also that the object was unlawful, before recording a conviction under Section 149 of IPC. Foremost essential ingredient of Section 141 of IPC must be established.

(36) We have heard learned counsel for the parties at length and perused the impugned record as well as evidence of following witnesses. (37) Complainant Deepak Chauraiya (PW4) who is the author of Dehati Nalishi in para 1 and 2 of his examination-in-chief deposed that at the main gate of Nagar Palika, he saw that accused Ghanshyam, Chandrabhan, Ramprakash, Santosh, Rakesh were inflicting injuries to his 29 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 both uncles by means of iron rod as well as by means of kicks and fists and thereafter, accused persons caused gunshot fires at the head of his uncle Mahesh and at the chest of his uncle Munnalal as a result of which, both of them died on the spot. Police has recorded Dehati Nalishi Ex.P4 and spot map was prepared vide Ex.P5. This witness in para 5 of his cross-examination deposed that at the time of incident he was not present on the spot and has not seen incident and incident had taken place at the back of Nagar Palika Complex. This witness further admitted that the scene of occurrence was visible to him and on hearing hue and cry, all accused persons fled away from the place of occurrence and thereafter, he reached the spot. In the Dehati Nalishi and police statement, it is stated by the complainant that on the exhortation of Ramprakash, accused Rakesh and Ashish fired gunshots on the head of his uncles and Ravi fired but it did not hit to anybody. In the Court statement, this witness deposed that Ghanshyam, Chandrabhan, Ramprakash, Santosh, Rakesh inflicted injuries by means of iron rod as well as by means of kicks and fists and thereafter caused gunshot fires at their uncle. Further, this witness in para 17 of his cross-examination deposed that accused Ravi and Ashish caused gunshot fires at the head and on the chest of his uncles Mahesh and Munnalal.

30 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 (38) Anil Chaurasiya (PW5) in para 2 of his statement deposed that Ramrati had told him that accused persons have committed marpeet with her, therefore, accused Ghanshyam had gone to his brother Mahesh and nephew and gave a threat. This witness in para 5 of his cross-examination admitted that at the time of incident, he was in his house and prior to the incident, he had neither any knowledge nor Mahesh and Munnalal had told anything. This witness in para 9 of his cross-examination deposed that at around 08:00 in the night, Ravi had come to him and told that accused fired gunshots at his uncle (chacha and tau) due to dispute took place. This witness in para 11 of his cross-examination on the one hand deposed that they were in the hospital whole night and on the other hand deposed that on the next day, he met Raju and Deepak. This hearsay witness further in his para 14 of his cross-examination deposed that accused Ravi fired gunshot which hit on the head of Mahesh and accused Ashish fired a gunshot which hit on the chest of Munnalal and thereafter, accused Ravi caused fire, but it did not hit to anybody. (39) Ravi Chaurasiya (PW9) who is alleged to be eyewitness to the incident, in para 1 of his deposition, stated that accused Ravi, Ashish, Santosh, Govind Singh, Chandrbhan, Shankar, Narendra, Gajju alias Ghanshyam, Ramprakash all were armed with katta and unlawfully 31 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 assembled the place of occurrence and surrounded his uncle Mahesh and gave a threat to kill him. On the exhortation of Ramprakash,

accused caused a gunshot fire at his uncle Mahesh which hit on his head as a result of which, he fell down on the ground. Thereafter, when his uncle Munnalal came for rescue, accused Ashish caused a gunshot fire which hit at his chest as result of which he also fell down on the ground. Afterwards, when his younger brothers Deepak and Anjun came there, accused Ravi caused gunshot fire but it did not hit to anybody and they saved their lives. All the accused thereafter fled away from the place of occurrence. This witness in para 3 of his cross-examination deposed that there was no dispute in the morning of the said date of incident in his presence and this fact was narrated by family members to him later on. This witness deposed that at the time of incident he could not hear what type of talks were going on between deceased Mahesh and accused. This witness deposed that according to his disclosure, Ex.P25 was recorded by police on 12-04-2006. This witness in para 4 of his cross-examination denied that there was any dispute on the question of election ticket between accused Chandrabhan and deceased Mahesh. This witness in para 5 of his cross-examination denied that some unknown persons have committed murder of deceased Mahesh by means of firearms. This 32 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 witness in para 6 of his cross-examination deposed that in his presence at around 1:30 O'clock in the afternoon Ramrati had come before his uncle Mahesh for raising her grievance. This witness further deposed that on the date of incident, prior to his arrival on spot, Arjun and Deepak were already there and due to fear he could not intervene the matter and rescue them. This witness in para 7 of his cross-examination stated that accused Ravi had caused gunshot fire at his uncle Mahesh and this fact was narrated by him to police and he could not say as to why police did not record the same in his police diary statement Ex.P25. This witness further in para 8 of his cross-examination denied that his aunt Anita had told him that some unknown persons have caused murder of Mahesh. This witness in para 21 of his cross-examination denied that when he reached the spot, all accused have already fled away from there.

(40) Arjun (PW11) in para 3 of his evidence deposed that accused Ravi caused gunshot fire at the head of his uncle Mahesh. Accused Ashish caught hold of hands and legs of his uncle Mahesh. Thereafter, his uncle Munnalal when came to rescue, accused Ashish also caused gunshot fire which hit at his chest. This witness deposed that accused Ravi, Ashish, Chandrabhan and Govind Singh were armed with katta and some of accused were armed with lathi, some with lathi and some with hockey 33 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 stick. This witness in para 8 of his cross-examination deposed that at the time of incident, his brother Deepak was sitting at his handcart shop. This witness further in para 12 of his cross-examination deposed that accused Govind Singh was having both katta and lathi and at the time of fleeing away from the scene of occurrence, he had also caused fire by means of katta and this fact has been narrated by him to police and he could not say as to why police did not record this fact in his police diary statement Ex.P29. This witness in para 17 of his cross-examination denied that accused has not caused any gunshot fire at his uncle and accused Ashish caught hold of legs and hands of his uncle and this fact has been narrated by him to police and as to why police did not record this fact in his police diary statement Ex.P29. In para 18 of his cross-examination deposed that prior to alleged incident there was a quarrel and at that time, he was not present. This witness in para 19 of his cross-examination denied that at the time of incident his aunt Anita was present and admitted that he and Deepak were present at the time of incident.

(41) Hargovind Chaurasiya (PW12) in his evidence deposed that on the date of incident i.e. 9th April, 2006 Ravi came to him and told that Ravi has caused gunshot fire at his uncle Mehesh and accused Ashish has caused a gunshot fire at his uncle Munnalal. This witness is the hearsay 34 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 witness and he is not the eyewitness of incident.

(42) Vijay Chaurasiya (PW13) in his evidence deposed that at the time of incident he was not present. This witness in para 10 of his cross- examination deposed that he came to know about the incident from Ravi. This witness is a hearsay witness.

(43) Dr.KS Parihar (PW8) in his evidence deposed that on 10-04-2006 he was posted as Medical Officer at District Hospital Datia. On the said date, constable Premnarayan brought deceased Mahesh for conduction of autopsy. On postmortem examination, he found following injuries on the body of deceased Mahesh:-

> "(1) Firearm wound on left side of head, extending from left side forehead,(02 cm above to left eye brow) to left occipital region. Wound size 10 ½ "'x 03 ¾ '' x 04" margins. Whole skull inside empty exceptionally 05% brain matter present under skull, margins of wound are slightly irregular. No bullet or pallets found in and under skull and in brain matter which has been brought in polythene bag with the body. It may have caused somewhere near place of incident or gone away.'' According to opinion of doctor, death of deceased was due to excessive haemorrhage and shock and also severely injured brain, which is a vital organ resulted due to firearm injury to the head. Although the cause of death seems to be homicidal, but circumstantial evidence should be considered. Duration of death of deceased was four to 24 hours since 35 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 postmortem examination.

(44) Dr.Parihar further deposed that on the same day, he had also conducted postmortem of deceased Munnalal Chaurasiya brought by the same Constable and found following injuries on the body of deceased Munnalal Chaurasiya:-

> "(1) Lacerated wound, oval in shape, transversely situated over front of right chest, in 2 nd inter-costal space, 05.5 cm. Lateral to mid-line, having length 04 cm, breath 01 ¾ cm, deep to the length of right lung and liver margins of wound inverted. No blackening found. The wound present. This is a wound of entry. There is no wound of exit present.

Scratching of lower border of second rib is present. " According to the opinion of doctor, the death of deceased Munnalal was due to intra-thoracic and intra-abdominal haemorrhage and shock and also injury to vital organs such as lung right and liver which was a result of firearm injury on right chest. It seems to be homicidal but circumstantial evidence should be considered.

(45) Ramprakash Maloutiya (PW1) in his evidence deposed that on 19- 06-2006 he had produced unlicensed katta with cartridge and the case diary before District Magistrate concerned seeking permission for framing charge under Section 25/27 of Arms Act against accused Rakesh from whose possession it was seized. Hotam Singh (PW2) who was posted as Arms Moharrair deposed that he had conducted the examination 36 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 of firearms and thereafter, with a sealed cover, he had given on Supurdig to TI Raghuvanshi vide Ex.P2. Premnarayan (PW3) who was posted as Constable at Police Station Civil Line, Datia deposed that after conduction of postmortem of both deceased, he had brought bloodstained clothes along with bullet from hospital, on the basis of which, Head Constable Harisingh Baghel had prepared seizure memo Ex.P3. Ashok Kumar (PW6) is the Halka Patwari of Datia Gird in his evidence stated that naksha panchnama was prepared by him in the presence of complainant vide Ex.P12. OP Pandey (PW7) who was posted as ASI in Police Station Civil Line Datia deposed that on 04-11-2006, a formal arrest of Santosh was made by him from the District Jail Datia and produced the accused before the JMFC Court. The arrest memo is Ex.P13. Harisingh Baghel (PW10) who was posted as Head Constable in Police Station Civil Line Datia deposed that on 09-04-2006 on the basis of Dehati Nalishi Ex.P4, merg intimation of deceased was recorded vide Ex.P27 and Ex.P28 respectively. Bhanupratap Singh Tomar (PW16) who was Town Inspector in Police Station Civil Line deposed that on 09-04- 2006 he had seized blood-strained and plain soil from spot vide seizure memo Ex.P6. Panchnama of dead body of deceased was prepared vide Ex.P8 and Ex. P9 and thereafter prepared safina forms Ex.P10 and Ex.11 37 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 and thereafter sent requisition forms for conduction of postmortem of deceased vide Ex.P15 and Ex.P16. During investigation, accused were arrested vide arrest memo Ex.P17 to Ex.P22 and seized the firearms vide Ex.P24 and same was sent to FSL, Sagar for examination. FSL reports were received by him vide Ex.P28A and Ex.P29A. Suresh Singh (PW17) and Rambabu Singh (PW18) both have proved the arrest memo Ex.P27A and Ex. P28B and memorandum of Arjun Chaurasiya Ex.P29. (46) It is contended by learned counsel for the appellants that if eye- witnesses of entire incident are omitting the names of some of accused persons who has caused by which type of injuries to deceased by which type of weapon, then testimony of eye-witnesses is clouded with grave suspicion and discrepancy in material particulars. Therefore, recording conviction of accused on the basis of evidence of eye-witnesses is improper. In support of this contention, learned counsel for the appellants relied on the judgment of Apex Court in the case of Bawan Kumar vs. State of MP reported in AIR 1994 SC 1251.

(47) Further, it is contended by learned counsel for appellants that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, then the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of 38 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 special circumstances, no conviction can be based on the evidence of such witnesses. In support of contention, counsel for the appellants relied upon the judgment of Supreme Court in the Suraj Mal vs. The State (Delhi Administration), reported in AIR 1979 SC 1408 .

(48) As far as submission of learned counsel for the appellants that there are various discrepancies in statements of witnesses is concerned, in the opinion of this Court, there are only minor discrepancies in the statements of witnesses and their evidence is firm on material aspect and same

would not be fatal to prosecution case. In this regard, the Hon'ble Supreme Court in the case of Mallikarjun and Others vs. State of Karnataka, reported in (2019) 8 SCC 359 has held as under :-

> "14. Observing that minor discrepancies and inconsistent version do not necessarily demolish the prosecution case if it is otherwise found to be creditworthy, in Bakhshish Singh v. State of Punjab and another, (2013) 12 SCC 187, it was held as under:-
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> 32. In Sunil Kumar Sambhudaya Gupta v. State of Maharashtra, (2010) 13 SCC 657 this Court observed as follows: (SCC p. 671, para 30) "30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same 39 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 again without justifiable reasons. (Vide State v. Saravanan (2008) 17 SCC 587.)"
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> 33. ..... this Court in Raj Kumar Singh v. State of Rajasthan, (2013) 5 SCC 722 has observed as under: (SCC p. 740, para43) "43. ... It is a settled legal proposition that, while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the case of the prosecution, must not prompt the court to reject the evidence thus provided, in its entirety. The irrelevant details which do not in any way corrode the credibility of a witness, cannot be labelled as omissions or contradictions. Therefore, the courts must be cautious and very particular in their exercise of appreciating evidence. The approach to be adopted is, if the evidence of a witness is read in its entirety, and the same appears to have in it, a ring of truth, then it may become necessary for the court to scrutinise the evidence more particularly, keeping in mind the deficiencies, drawbacks and infirmities pointed out in the said evidence as a whole, and evaluate them separately, to determine whether the same are completely against the nature of the evidence provided by the witnesses, and whether the validity of such evidence is shaken by virtue of such evaluation, rendering it unworthy of belief."
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> (Emphasis supplied) (49) By relying on the judgment of this Court in the case of Ganpat vs. State of MP reported in ILR (2008) MP 1235, it is contended by counsel for the appellants that the evidence of Anil Chaurasiya (PW5), Hargovind Chourariya (PW12) and Vijay Chaurasiya (PW13) is not admissible as per the Indian Evidence Act as they are hearsay witnesses. Although, the above-said witnesses are hearsay witnesses but apart from them, all other prosecution witnesses have supported prosecution case and stated that 40 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 accused persons were unlawfully assembled on the spot by means of

> firearms as well as other deadly weapons and surrounded the deceased and with intention of common object committed murder of both deceased by means of firearms and their evidence is fully corroborated by medical evidence. Therefore, the argument advanced by counsel for the appellants has no force and same is hereby rejected.

(50) By relying upon the judgment of Hon'ble Supreme Court in the case of Bunnilal Chaudhary vs. State of Bihar reported in AIR 2006 SC 2531, it is contended by learned counsel for the appellants that the death of deceased was due to gunshot fires caused by two accused i.e. one Rakesh fired gunshot at the head of deceased Mahesh and other Ashish fired gunshot at the chest of deceased as per the Dehati Nalishi lodged by complainant Deepak Chaurasiya, who is alleged to be one of eye-witnesses of incident. No other witness has proved that other accused persons had come at the scene of occurrence with intention to commit murder of both the deceased. None of them had given any blow to deceased with their weapons they allegedly were carrying with them. Further, there is no material available on record to show that other accused persons knew that the offence actually committed is likely to be committed in prosecution of common object. Therefore, conviction of 41 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 other co-accused is also not proper. But, the trial Court has committed an error in convicting and sentencing them. The aforesaid contention raised by counsel for the appellants has no force as on the alleged date of incident, on a pity dispute of committing "marpeet" with one old lady namely, Ramrati by accused Ghanshyam, at the morning of 09-04-2006 accused Rakesh, Ravi, Ashish, Santosh, Chandrabhan Yadav, Govind Singh, came and assaulted the complainant by giving a threat to kill him. Thereafter, after some time, in the afternoon of 09-04-2006 accused Ashish, Ghanshyam and Ramprakash came to house of old lady Ramrati and beaten her and this fact was narrated by Ramrati to the uncle of complainant Mahesh Chaurasiya.Again, accused Ashish and Ramprakash came to handcart shop of Mahesh Chaurasiya where some hot talks took place and thereafter, went from there by giving a threat to kill him. On the same day, at around 07:30 pm, complainant Deepak Chaurasiya, his uncle Mahesh Chaurasiya and brother Arjun were standing on the said shop, all accused persons came there on Suzuki motorcycle. Accused Ravi, Ashish and Rakesh armed with katta surrounded the uncle of complainant Mahesh Chaurasiya and on the exhortation of accused Ramprakash, accused Rakesh caused a gunshot fire from his Katta on the head of Mahesh Chaurasiya and at the same time, when uncle of complainant 42 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 Munnalal Chaurasiya who was doing the Chowkidar at the shop of one Ratanlal, also came there for rescue, then accused Ashish fired gunshot from his katta which hit at the chest of Munnalal Chaurasiya as a result of which, he fell down on the ground. When they tried to caught hold of the accused, accused Ravi also caused gunshot fire but they saved themselves. Both Mahesh Chaurasiya and Munnalal Chaurasiya died on the spot. As per opinion of doctor, the cause of death of deceased was the result of firearm injuries on the head and on the right chest of Mahesh and Munnalal respectively and cause of death of both deceased seems to be homicidal in nature but on the basis of circumstantial evidence, it appears that the accused persons unlawfully assembled the spot and with common object committed murder of both deceased by means of firearm. (51) The next contention of learned counsel for the appellants that there is delay in lodging the FIR as well as investigation is concerned, the said contention of the counsel for the appellants has no force as if there is any delay in investigation that would not sufficient to discard the credible the oral evidence of prosecution

witnesses. The evidence of all the prosecution witnesses cannot be said to be totally false implication so that accused can be acquitted from the charges aforesaid. In this regard, a reliance can be placed in the case of Jayaseelan vs. State of Tamil Nadu, 43 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 reported in (2009) 12 SCC 275.

(52) On going through the entire evidence available on record, this Court is of the considered opinion that the learned trial Court has rightly convicted and sentenced the present appellants-accused and the prosecution has rightly established the appellants guilty of aforesaid offences. There is no infirmity in passing the impugned judgment passed by trial Court. Accordingly, the both the appeals being devoid of substance, are hereby dismissed.

(53) As a consequence thereof, the impugned judgment of conviction and sentence dated 16-12-2021 passed by Special and Additional Sessions Judge, Datia (MP) in Sessions Trial No.1 of 2007 is hereby affirmed.

(54) Since appellants Chandrabhan, Ravi and Santosh are stated to be on bail, therefore, their bail bonds and surety bonds are cancelled and they are directed to surrender before the Trial Court concerned to serve out the remaining jail sentence. Similarly, since appellant No.2 Ramprakash (Criminal Appeal No.160 of 2012) is on bail on the ground of old-age, therefore, his bail bonds and surety bonds are cancelled and he is directed to surrender before the trial Court to serve out the remaining jail sentence. Appellant No.1 Ashish (Criminal Appeal No.160 of 2012) is 44 Criminal Appeal Nos. 1049 of 2011, 102 of 2012 and 160 of 2012 reported to be in jail, therefore, he shall remain in jail to serve out the remaining jail sentence.

A copy of this judgment be sent to the jail authorities concerned as well as a copy of this judgment along with record be sent to the trial Court concerned for information and compliance.

(G.S. AHLUWALIA)
JUDGE

(RAJEEV KUMAR SHRIVASTAVA)
JUDGE

MKB

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