HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

DIVISION BENCH

BEFORE: G.S.AHLUWALIA

AND

RAJEEV KUMAR SHRIVASTAVA, JJ.

Criminal Appeal No. 196/2003

Murarilal (since dead) and Ashok

Versus

State of Madhya Pradesh

Shri R.K.Singh Kushwaha, learned counsel for the appellants.
Shri B.P.S.Chouhan, learned Public Prosecutor, for the respondent/ State.

J U D G E M E N T
(30/04/2021)

Per Rajeev Kumar Shrivastava, J.:

The instant Criminal Appeal is preferred under Section 374 of CrPC, challenging the conviction and sentence dated 4.2.2003 passed by Sixth Additional Sessions Judge (Fast Track Court), District Bhind in Sessions Trial No. 347/2000, whereby appellants have been convicted under Sections 302, 302 and 302 read with Section 34, and Section 302 read with Section 34 of IPC and sentenced them to undergo RI for life and fine of Rs.5000/- each and in default of payment of fine, to undergo further RI for six months.

2. Appellant No.1-Murarilal S/o Badelal Sharma died during pendency of appeal, therefore, his name has been deleted from the array of cause title in compliance of order dated 9.3.2011.

3. The trial Court has acquitted accused Subhash and Ramavtar from the offences under Sections 148 and 302 read with

Section 149 of IPC but has convicted the accused/appellant Ashok under Section 302 read with Section 34 of IPC for the murder of Mataprasad and under Section 302 read with Section 34 of IPC for the murder of Tejraj, considering the fact that there was common intention.

4. State has also filed appeal against the acquittal of co-accused Ram Outar and Subhash under Section 378 of CrPC, bearing Criminal Appeal No. 542/2003 (State of Madhya Pradesh vs. Ramavtar and another). As per the request of learned counsel for the parties, both the appeals (Criminal Appeal No.196/2003 and Criminal Appeal No. 542/2003) are being decided simultaneously by passing separate judgment in each appeal. It is further pertinent to note that the appeal filed by Kishan Dutt, Ramvaran and Ramkishore against their conviction has been delinked from the present appeal as the aforesaid accused persons were absonder and they were separately tried and judgment was passed on 23.1.2019.

5. The facts necessary to be stated for disposal of the instant appeal are that as per prosecution version, on 16.10.1999 deceased Mataprasad and Tejram left their houses at about 5-6 am for the purpose of ploughing the field asking the family members to bring breakfast at the field itself. Harendra Kumar (PW-4) and Shailendra (PW-9), son and daughter of deceased Tejram, and Dharmendra, son of deceased Mataprasad reached at the field in order to serve the breakfast. When they reached there, the deceased Mataprasad and Tejram were cutting grass, in the meantime, accused persons reached on the spot by their tractor-trolley. The tractor was driven by accused Subhash and other accused persons were loaded with fire-arms. Seeing the aforesaid situation, Tejram and Mataprasad tried to run away from the spot,

they tried to start tractor, at that time, all the accused persons surrounded them and Murari fired a gunshot which hit Mataprasad's chest. Mataprasad fell down from the tractor. Harendra, Shailendri and Dharmendra being afraid of that hide themselves in Bajra field. All the accused persons caused various injuries to Mataprasad and Tejram. Shriprakash, Ramkumar, Jaiprakash and Sitaram, who were working in their adjoining fields reached on the spot. Thereafter, accused persons went away. As a result to aforesaid, Mataprasad and Tejram died on the spot.

6. First Information Report was lodged on 16.10.1999 at Police Station Pawai, District Bhind by Harendra Kumar (PW-4). Lash Panchnama was prepared and map was also prepared. Statements under Section 161 of CrPC were recorded and after completion of investigation charge sheet was filed.

7. Appellant Ashok was tried for the offences under Sections 148, 302, 302 read with Section 149 of IPC and has been convicted and sentenced as under :-

Name of accused	Section	Punishment	Fine	In default, punishment
Ashok	302 read with 34 IP(On two counts)	Life Imprison-ment on each count	5000/- on each count	6 Months RI on each count

8. The grounds raised are that the judgment and order of conviction and sentence is bad in law and against settled principles of law. There are material discrepancies in the statements of the witnesses but the same have been ignored and overlooked by the trial Court. Factum of previous enmity between the parties in respect of agricultural land was possible reason to

falsely implicate the appellant-accused. Witnesses Sitaram and Dharmendra, who are said to be eye-witnesses, have been left un-examined which creates doubt over the prosecution case. Shailendri (PW-9) has stated in her statement recorded in Court that Jaiprakash, Sitaram, Shriprakash and Ramkumar came on the spot after half an hour of the incident. Thus, it is clear that they were not eye-witnesses to the incident despite prosecution has presented them as eye-witnesses. Therefore, their statements are not reliable despite considering improvements, omissions and deliberations in the statements of the witnesses the trial Court has erred in relying on them. The weapons which are said to have been used in the incident had already been deposited in Crime No. 291/1990 on 22.6.1990. In the present case, there is no recovery of weapons from the appellant. As per the prosecution story, the son and daughter of deceased persons took their breakfast at the field but there is no recovery of breakfast articles from the place of incident and also not shown in the spot map. Therefore, the prosecution story is concocted one. Hence, prayed for setting aside the impugned judgement of conviction and sentence.

9. Per Contra, learned State Counsel opposed the submissions and submitted that the trial Court has rightly convicted the appellants and awarded sentence. Hence, no case is made out for interference.

10. Heard the learned counsel for the rival parties and perused the record.

11. From perusal of the record, it is evident that Dr. O.P.Kashtwar (PW-5), has stated that on 16.10.1999, Constable No.3 Vishambhar Dayal of Police Station Pawai, had brought the body of deceased Mata Prasad S/o Dashrath R/o Birgawa. Post-mortem of body of Mataprasad was done and vide post-mortem

report (Ex.P/10) following injuries were found on the body of deceased Mataprasad :-

(i) Lacerated wound 4cm x 4cm x muscle deep on left side of neck below lobule of left ear, blackening around wound present;
(ii) Lacerated wound 4cm x 4cm x muscle deep, margin everted, blunt probang could be passed through injury No.(i) to injury No.(ii);
(iii) Lacerated wound 2.5cm x 2cm. Oval in shape over right side of chest at right steno clavicle joint margin invert, blackening present over the wound;
(iv) Lacerated wound 15cm x 12cm x muscle deep on right side upper scapula region, muscle tissues coming out, ribs No.4,5,6 were fractured. Thoracic cavity was filled with blood.
(v) Lacerated wound 2.5cm x 2cm posterior over rear of neck, blackening around wound present;
(vi) Lacerated wound 3cm x 2cm over right side back of chest, margin everted;
(vii) Lacerated wound 12cm x 12cm x muscle deep over middle of left forearm and one third part of muscle absent.

The aforesaid injuries were anti-mortem injuries and were caused prior to 18 hours of death. The cause of death was shock due to excessive external and internal bleeding owing to injuries over the body.

12. On the same day, Dr. O.P.Kashtwar (PW-5) has also conducted post-mortem of deceased Tejram S/o Dashrath, R/o Village Birgawa, and found following injuries on the body of deceased Tejraj vide post-mortem report (Ex.P/11):-

(i) Lacerated wound, left scapular region, size 2.5 cm squire in shape, margin inverted, blackening around wound present;
(ii) Lacerated wound 1.5 cm squire in shape over right ear, blackening over the wound present and banks were inverted;

(iii) Lacerated wound 8cm x 3cm x muscle deep, far from injury No.(ii) and wound banks were everted.

The aforesaid injuries were anti-mortem and were caused prior to 18 hours of death of deceased. The cause of death was shock due to excessive external and internal bleeding owing to injuries over the body.

13. Dr. Kashtwar (PW-5) has also stated that on 8.3.2000, S.O. Police Station, Pawai sent a query report, wherein he informed the police that the injuries found over bodies of deceased Mataprasad and Tejram were caused by firearm. Injuries No.(i), (iii) and (v) were entry wounds and injuries No. (ii), (iv) and (vi) were exit wound found over the body of deceased Mataprasad, and injuries No.(i) and (ii) were entry wounds and injury No.(iii) was exit wound found over the body of deceased Tejram. The foreign bodies found in the body of Mataprasad and Tejram were sealed by him and handed over to the Police Constable. The death of deceased Mataprasad and Tejram was due to gunshot injury.

14. During trial, prosecution witness (PW) No.1 Ramlal, Constable, who is the witness to seizure memo (Ex.P/1) proved the recovery of metal particles, extracted from the body of the deceased Mataprasad and Tejram. Shriprakash (PW-2), the Eye-witness, Rampujan (PW-3) and Sukhdev Sharma (PW-6), are the witnesses of Ex.P/6 spot map, Ex.P/7 and P/8, seizure memos, whereby soil stained with blood, two covers of 12 bore cartridge and 2 brass cover of 315 bore cartridges. Harendra Kumar Sharma (PW-4), eye-witness, Dr. O.P.Kashtwar (PW-5), who did postmortem of the bodies of deceased Mataprasad and Tejram, Ram Kumar (PW-7), Jaiprakash Sharma (PW-8) and Shailendri (PW-9), who are the eye-witnesses, were examined.

P.K.Chaturvedi (PW-10), Station Officer Police Station Surpura, who investigated the matter, Keshav Singh Tomar (PW-11), Head Constable, who lodged FIR (Ex.P/9), J.D.Verma (PW-12), who recorded statements under Section 161 of CrPC of witnesses Shriprakash, Ramkumar, Jaiprakash; Mahesh Shrivastava (PW-13), the-then S.O., Police Station Pawai, were examined. On the basis of statements given by the aforesaid witnesses the trial Court convicted and sentenced Murari (now dead) and Ashok, as aforesaid. Eye-witnesses of this case, namely, Shriprakash, Ramkumar, Jaiprakash and Sitaram are the independent witnesses and Harendra Kumar (PW-9) and Shailendri (PW-9) are son and daughter of deceased Tejram. Another witness Dharmendra, who is the son of deceased Mataprasad, has not been examined. Shriprakash (PW-2), Ramkumar (PW-7), Jaiprakash (PW-8) have specifically stated that Murari caused gun shot injury on the chest of Mataprasad and also caused gunshot injury on the head of deceased Tejram and accused Ashok was also having 12 bore double barrel gun. Sitaram, who is also said to be the eye-witness, has not been examined by the prosecution and the statements given by the aforesaid prosecution witnesses remained unrebutted in cross-examination.

15. 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 Shri Ahirwar. So, clause Secondly of Section 300 IPC will also not apply."

16. The enquiry is then limited to the question whether the offence is 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."

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 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 contention advanced in the present case and which is frequently advanced that the accused had no intention of

causing death is wholly irrelevant for deciding whether the case falls in clause Thirdly of Section 300 IPC.

17. The scope and ambit of clause Thirdly of Section 300 IPC was considered 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), 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."

18. In **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. 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.

12. What is required to be considered here is whether the offence committed by the appellant falls within any of the clauses of Section 300 IPC.

13. 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 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."

19. 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."

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."

20. Now, the question for consideration is, whether having regard to the body part involved, nature, location of injuries and nature of weapon used, the Court below was justified in convicting the appellant under Section 302 of IPC read with Section 34 of IPC.

21. 'Culpable Homicide' is the first kind of unlawful homicide. It is the causding 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.

22. Indian Penal Code reconizes two kinds of homicides :

(1) Culpable homicide, dealt with between Sections 299 and 304 of IPC (2) Not-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).

23. 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.

24. 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.

25. The fact that the death of a human being is caused is not enough unless one of the mental staes 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 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.

26. 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.

27. In **Anda vs. State of Rajasthan [1966 CrLJ 171),** while considering “third” clause of Section 300 of IPC, it has been observed as follows :-

> “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.”

28. In **Mahesh Balmiki vs. State of M.P. [(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."

29. In **Dhirajbhai Gorakhbhai Nayak vs. State of Gujarat [(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 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 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'.

30. In **Pulicherla Nagaraju @ Nagaraja vs. State of AP**

[(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 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."

31. In **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."

32. In **State of Rajasthan v. Kanhaiyalal (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 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."

33. In the case of **Bavisetti Kameswara Rao v. State of A.P. (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.
>
> 14. In State of Karnataka v. 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 : 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.

17. … 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 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."

34. Section 34 of Indian Penal Code runs as under :-

"34.-- Acts done by several persons in furtherance of common intention.-- When a criminal act is done by several persons in furtherance of the common intention of all,

> each of such persons is liable for that act in the same manner as if it were done by him alone.**"**

35. Section 34 of the Indian Penal Code recognises the principle of vacarious liability in criminal jurisprudence. A bare reading of this Section shows that the Section could be dissected as follows :

> (a) Criminal act is done by several persons;
> (b) Such act is done in furtherance of the common intention of all; and
> (c) Each of such persons is liable for that act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court in determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 I.P.C. Must be done by several persons. The emphasis in this part of the Section is on the word 'done'. It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity. The Section does not envisage a separate act by all of the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

36. Section 34 is intended to meet a situation wherein all the co-accused have also done something to constitute the commission of a criminal act. Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34 e.g., the co-accused can remain a little away and supply weapons to the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this; One of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. The act mentioned in Section 34 I.P.C., need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act e.g., a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the Section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 I.P.C., cannot be invoked for convicting that person. This Section deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the Section must include the whole action covered by

'a criminal act' in the first part, because they refer to it. This Section refers to cases in which several persons both intend to do and do an act. It does not refer to cases where several persons intended to an act and some one or more of them do an entirely different act. In the latter class of cases, Section 149 may be applicable if the number of the persons be five or more and the other act was done in prosecution of the common object of all.

37. In **Suresh Sankharam Nangare vs. State of Maharashtra [2012 (9) SCALE 345]**, it has been held that "if common intention is proved but no overt act is attributed to the individual accused, section 34 of the Code will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, section 34 cannot be involved. In other words, it requires a pre-arranged plan and pre-supposes prior concert, therefore, there must be prior meeting of minds."

38. In **Shyamal Ghosh vs. State of West Bengal [AIR 2012 SC 3539]**, it is observed that " Common intention means a pre-oriented plan and acting in pursuance to the plan, thus common intention must exist prior to the commission of the act in a point of time."

39. In **Mrinal Das vs. State of Tripura [AIR 2011 SC 3753]**, it is held that "the burden lies on prosecution to prove that actual participation of more than one person for commission of criminal act was done in furtherance of common intention at a prior concert."

40. In **Ramashish Yadav v. State of Bihar [AIR 1999 SC 1083]**, it is observed that "it requires a pre-arranged plan and pre-supposes prior concert therefore there must be prior meeting

of mind. It can also be developed at the spur of moment but there must be pre-arrangement or premeditated concert."

41. Mainly two elements are necessary to fulfill the requirements of Section 34 of IPC. One is that the person must be present on the scene of occurrence and second is that there must be a prior concert or a pre-arranged plan. Unless these two conditions are fulfilled, a person cannot be held guilty of an offence by the operation of Section 34 of IPC. Kindly see, **Bijay Singh v. State of M.B. [1956 CrLJ 897]**.

42. In a murder case a few accused persons were sought to be roped by Section 34 I.P.C. It was found that one of the accused persons alone inflicted injuries on the deceased and the participation of the other accused persons was disbelieved. The person who alone inflicted injuries was held liable for murder and others were acquitted. Kindly see, **Hem Raj vs. Delhi (Administration) [AIR 1990 SC 2252]**.

43. In **Dashrathlal v. State of Gujarat [1979 CrLJ 1078 (SC)]**, it has been observed that "by merely accompanying the accused one does not become liable for the crime committed by the accused within the meaning of Section 34 I.P.C."

44. In **Rajagopalswamy Konar vs. State of Tamil Nadu [1994 CrLJ 2195 (SC)]**, there was land dispute between the members of a family, as a result of which deceased persons were attacked by the accused persons, in which one accused stabbed both the deceased persons and other caused simple injuries with a stick. It was held that the conviction of both the accused under Section 34 read with Section 302 IPC was not proper. Other accused was convicted under Section 324 of IPC. Kindly see, **.**

45. In **Sheikh Nabab v. State of Maharashtra [1993**

CrLJ 43(SC)], it is observed that "the overtact on the part of accused could not be proved and it was held that the order of the conviction was not proper."

46. On a perusal of the evidence on record, we are of the view that the offence committed by the appellant is clearly one of murder and squarely comes within clause "thirdly" of Section 300 of IPC, which runs as under :-

> "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."

47. In the present case, the bodily injury is caused by gunshot and was sufficient in the ordinary course of nature to cause death. It is in two parts, first part is subjective one which indicates that the injury must be intentional and not accidental and, second part is objective, in that, looking to the injury caused the Court must be satisfied that it was sufficient in the ordinary course of nature to cause death.

48. Three independent eye-witnesses namely Shriprakash (PW-2), Ramkumar (PW-7), and Jaiprakash (PW-8) have supported the prosecution case and have specifically stated that the murder was caused by Murarilal and Ashok. There is sufficient evidence of common intention between Murarilal and Ashok. It is true that three witnesses were in blood relation/interested witnesses despite the statements given by them are very natural. They have specifically stated that the death of Mataprasad was caused by gunshot injury by the accused Murari and another accused Ashok was having 12 bore double barrel gun in his hand and as per PW-5 Dr. O.P.Kashtwar, it is apparent that three entry and three exit wounds were found on the body of deceased Mataprasad and similarly two entry wounds and one exit wound

was found on the body of deceased Tejram, which reflects that the gunshot injuries were caused on the vital part, i.e., on head and chest. The independent witnesses Shriprakash (PW-2), Ramkumar (PW-7) and Jaiprakash (PW-8) have specifically supported the prosecution case. The injuries were caused by gunshot which reflects the intention of causing bodily injury to cause death.

49. As per PW-5 Dr. O.P.Kashtwar, as mentioned above, the death of the deceased Mataprasad and Tejram is not a natural death, rather it is the result of injuries caused to them. In the present case, PW-4 Harendra Kumar Sharma is the son of deceased Tejraj and PW-9 is the daughter of Tejram. Therefore, both the aforesaid witnesses are the interested witnesses, hence their evidence has to be scrutinized minutely. PW-2 Shriprakash, PW-7 Ramkumar and PW-8 Jaiprakash are independent witnesses As per prosecution, PW-4 Harendra Kumar, who lodged the FIR Ex./9, was eye-witness and immediately after incident Harendra Kumar had lodged the report, has supported the story of prosecution. Therefore, the case under Section 302 of IPC is made out against accused Ashok and taking into account the aforesaid facts and circumstances of the case coupled with the fact that co-accused Ashok was having 12 bore double barrel gun, the trial Court has rightly held that there was common intention between accused Murari & Ashok and has rightly convicted the accused Ashok under Section 302 read with Section 34 of IPC.

50. The present case is of double murder and total five gunshot wounds were found on the body of deceased persons. As discussed above, there is sufficient evidence that there was prior meeting of minds of accused Murari and Ashok and accused Ashok was also having firearm. Fire-arm injuries had been caused, therefore, inference can only be drawn on the basis of nature of

injury, the part of the body where it is caused, the weapon used in causing such injury, which reflects that the accused caused the death of the deceased with an intention of causing death or not. Therefore, under the aforementioned facts and circumstances of the case, offence under Section 302 read with Section 34 of IPC is proved against the accused Ashok.

51. In the light of the foregoing discussion, we are of the considered opinion that the trial Court did not err in convicting and sentencing the present appellant Ashok. Hence, the appeal filed by the appellant is devoid of merits.

52. Consequently, the appeal filed by appellant Ashok is hereby dismissed and his conviction and sentence passed by the trial Court under Section 302 read with Section 34 I.P.C. is hereby confirmed. Appellant-Ashok is in jail. He be intimated with the result of this appeal through the Jail Superintendent.

With a copy of this judgement record of the trial Court be sent back immediately.

(G.S.Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge

(Yog)