

(2024) 11 GUJ CK 0022

In the Gujarat High Court

Case No : Criminal Appeal (Against Conviction) No. 131 of 2016, Criminal Appeal No. 990 of 2017

Arjunbhai Kadiyabhai Gamit Versus

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 28-11-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 207, 209, 313, 374
Indian Penal Code, 1860 — Section 34, 299, 300, 302, 304

Citation : (2024) 11 GUJ CK 0022

Hon'ble Judges : Ilesh J. Vora, J; S.V. Pinto, J

Bench : Division Bench

Advocate : Hcls Committee, Gajendra P Baghel, Jay Mehta

Final Decision : Partly Allowed

Judgement

S.V. Pinto, J

1. These appeals have been filed by the appellants - original accused Nos. 1 and 2 and 3 respectively under Section 374 of the Code of Criminal Procedure against the judgement and order dated 18.09.2014 passed by the learned Sessions Judge, Tapi at Vyara (here in after referred to as the "learned Trial Court") in Sessions Case No. 09 of 2014. Both the appeals have arisen out of the same impugned judgement and order and hence, are disposed off by this common judgement.

The appellants are referred to as the accused in the rank and file as they stood in the original case for the sake of convenience, clarity and brevity.

2. The brief facts necessary to decide the appeal are in a nutshell as under:

2.1 As per the case of the prosecution on 01.12.2013, at around 06.30 hours in the Big Street at Village Karanjvel, Taluka Vyara, District Tapi, all the accused demanded the two vighas land belonging to Kadiyabhai Dhanjibhai Gamit for cultivation and as he refused to give the land for cultivation to them, all the

accused took sticks and hit him on his back, hands, legs, and other parts of his body and he sustained fracture injuries on his left hand and left leg and the accused No. 1 caught the private part of Kadiyabhai Dhanjibhai Gamit and pulled and twisted it and as he shouted and made a hue and cry, all the accused ran away. The injured was taken to Referral Hospital, Vyara where he was treated and as the injuries were more serious, he was referred to the Higher Centre for further management but his son Jayantibhai Kadiyabhai Gamit did not have money for his treatment and did not take him to the Higher Centre for treatment but brought him home and on the same day at around 5:30 PM, he succumbed to his injuries. The complaint was filed by Jayantibhai Kadiyabhai Gamit at Vyara Police Station under Sections 302, 34 of the IPC which was registered at I C R No. 178 of 2013.

2.2 The Investigating Officer drew the necessary panchanamas, recorded the statements of the connected witnesses, collected the muddamal, sent the dead body of the deceased for postmortem, sent the Muddamal to the Forensic Science Laboratory, Ahmedabad for analysis, arrested all the accused and after the FSL analysis reports were received a chargesheet came to be filed before the Court of the learned Chief Judicial Magistrate Tapi at Vyara and as the case was exclusively triable by the Sessions Court, Tapi at Vyara, a committal order was passed by the learned Chief Judicial Magistrate under Section 209 of the Code of Criminal Procedure and the case was registered as Sessions Case No. 09 of 2014.

2.3 The accused were produced before the learned Trial Court and it was verified whether the procedure under Section 207 of the Code of Criminal Procedure was followed and a charge was framed against all the accused at Exh. 6 and the statements of the accused were recorded at Exhs. 7, 8 and 9 respectively. The accused denied all the contents of the charge and the prosecution examined 13 witnesses and produced 13 documentary evidences in support of their case. After the learned APP filed the closing pursis at Exh. 42, the further statement of the accused under Section 313 of the Code of Criminal Procedure were recorded wherein all the accused denied all the evidences of the prosecution and refused to step into the witness box or examine witnesses on their behalf and stated that they were innocent. The learned Trial Court heard the arguments of the learned APP and the learned advocate for the accused and by the impugned judgement and order was pleased to find all the accused guilty for the offence under Section 302 read with Section 34 of the IPC and sentenced all the accused to simple imprisonment for life and fine of ₹ 20000/- (Rupees Twenty Thousand only) each and in default to simple imprisonment for three years.

3. Being aggrieved and dissatisfied with the judgement and order of conviction, the appellant - original accused no. 1 has filed Criminal Appeal No. 131 of 2016 and appellants - original accused nos. 2 and 3 have filed Criminal Appeal No. 990 of 2017 mainly stating that the learned Trial Court has committed a serious error in law in passing the order of conviction. The complainant is not an eye witness to the incident and he came to know about the incident from his father and the

whole case is based upon the deposition of the witnesses recorded at Exhs. 12, 16, 18, 19 and 22 and none of the witnesses state that the appellants have given any blow to the deceased. There is no discussion of the wooden sticks in the entire judgement and there is no evidences as to where the muddamal wooden sticks have been produced. That all the witnesses are interested witnesses and their depositions have not been appreciated in the proper manner and the learned Session Judge has not dealt with the cross-examination of the witnesses examined during the course of trial. That in fact, the complainant who is the brother of the accused no. 1 is an interested witness and is a beneficiary of his fathers ancestral agricultural land and if the appellant is in jail, he would be benefited. That all the witnesses are chance witnesses and their evidence has not been appreciated properly by the learned Trial Court. The impugned judgement and order passed by the learned Trial Court is contrary to law and the evidence on record and the learned Trial Court has committed a grave error in holding the appellants guilty for the offence punishable under Section 302 of the IPC, as no clear evidence has emerged on record as to which of the appellant had inflicted blows to the deceased. The case of the prosecution suffers from basic infirmities and there are major contradictions about the place of offence and the learned Trial Court ought to have granted the benefit of doubt in favour of the appellants and hence, the impugned judgement and order is required to be quashed and set aside.

4. We have heard learned Advocate Gajendrasinh Baghel for the appellants and learned APP Mr. Jay Mehta for the respondent state. We have also perused the impugned judgement and order and the evidence produced by the prosecution before the learned Trial Court

5. At the outset, learned advocate Mr. Gajendrasinh Baghel for the appellants submits that he is not pressing these appeals on merits and his only endeavour is to persuade this Court to alter the conviction of the appellants from the offence punishable under Section 302 of the IPC to Section 304 Part II of the IPC and reduce the sentence accordingly. Learned Advocate for the appellants has further submitted that as per the case of the prosecution, the incident has occurred suddenly early in the morning and there is no evidence that there was any pre-mediation on the part of the accused where they came armed with deadly weapons to assault and cause the death of the deceased. The muddamal wooden sticks are the sticks used as firewood to cook food and were lying at the place and picked up by the appellants as the sudden quarrel had taken place. That the deceased succumbed to his injuries as he was not taken to the Higher Centre for further treatment, and the Medical Officer has admitted during cross-examination that if the deceased was given proper medical treatment at the relevant time, he would have survived. Learned Advocate fairly submits that looking to the evidence on record, a case under Section 302 of the IPC would not be made out but it is a case of culpable homicide not amounting to murder and the case would squarely fall under Section 304 Part II of the Indian Penal Code and learned Advocate has urged this Court to consider the case of the appellant

in that respect and allow the appeal.

6. Learned APP Mr. Jay Mehta has taken this court through the entire evidence of the prosecution on record and has submitted that the learned Trial Court has appreciated each and every evidence on record and there are eye witnesses to the incident. The eye witness who was present at the place of the incident and the complainant has clearly stated that the deceased and the appellants suddenly had a quarrel, and they have seen the appellants assaulting the deceased. There is no reason to disbelieve the evidence of these witnesses and they are not chance witnesses but residing around the place of incident and came to the spot as they heard the shouts of the deceased while he was being assaulted by the appellants. That merely because the witnesses are family members and interested witnesses, their evidence is not required to be thrust aside. The intention and knowledge of the appellants to cause death of the deceased, their presence at the place of incident at the time of the offence and the collective role played by them is proved by the prosecution beyond reasonable doubts and learned APP has urged this Court to reject the appeal of the appellants.

7. Before we proceed to decide the appeal on merits, it would be appropriate to refer to the evidence led by the prosecution on record of the case.

7. 1 PW1 – Dr. Rajeshbhai Natubhai Chaudhary is the medical officer who has conducted the post-mortem on the dead body of deceased Kadiyabhai Dhanjibhai Gamit and he has stated that the dead body was brought to the Primary Health Centre, Lakhali by the Vyara Police Station and the postmortem was conducted by himself and Panel Doctor Dr. Nutanben Chaudhary, the Medical Officer of Primary Health Centre, Chapawadi on 2.12.2013 between 10. 45 and 11.50 hours. In column No 17 the following injuries were found on the dead body :

1. White bandage over the middle part of right forearm, after removing the bandage, black coloured three stitches present over posteriomedial aspect of the right forearm 3 stitches present.

2. Bandage over the middle part of right leg over stir of tibia 22 cm below the right knee, on removing the bandage, three stitches present with black thread.

3. Bandage over the upper part left leg, on opening the bandage about 9 cm below the left knee, two stitches present with black thread. On palpation closed fracture present over the left tibial bone (on upper part).

4. Bandage present over lower part of the left forearm, on opening the bandage 4 stitches present over the dorso - lateral aspect of lower part of forearm.

5. On right arm from 7 cm of right shoulder joint on lateral aspect bruise present in size 8 cm X 4 cm.

6. On postero - lateral aspect of right arm 5 cm above the right elbow joint 1 lacerated wound, present in size 2.5 cm X 2 cm X 0.3 cm.

7. 1 bruise present over lateral aspect of right elbow joint in size 4 cm X 4 cm.
8. On right thigh one bruise present over the postero - lateral aspect of lower part of the right thigh, 3 cm X 8 centimetre in size above 14 cm above the right knee joint.
9. On right knee joint multiple abrasions present 7 in number.
10. On right leg abrasion present, which is 1.5 cm X 1 cm in size: 8 cm above the right ankle joint on anterolateral aspect.
11. On left arm, 1 bruise present at lateral part of left arm 3 cm X 4 cm in size.
12. 1 bruise on lower part of the left arm 11 cm X 6 cm in size on lateral aspect 4 cm above the left elbow joint.
13. On left cubital fossa bruise present 3.5 cm X 4 cm in size
14. On left hand on dorsal aspect swelling present. No fracture on palpation.
15. On left forearm on middle part of postero - media aspect bruise present with swelling size 9 cm X 8 cm.
16. On left thigh, 1 bruise present over the middle part of left thigh 8 cm X 3 cm in size.
17. Multiple abrasions on left knee : 5 in No.
18. Abrasions on medial aspect of knee joint.

During the internal examination, fracture of Manubrium Sterni bone on chest was found and the right and left lungs were ruptured. Bruises were present over shaft of penis and all the injuries were antemortem. The opinion of cause of death was cardio respiratory arrest due to haemorrhagic shock and neurogenic shock secondary to multiple injury and closed fractures.

During the cross-examination, the witness has admitted that if treatment would be provided to the deceased at the relevant time he could have been saved.

7.2 PW2 - Jayantibhai Kadiyabhai Gamit is the complainant and son of the deceased Kadiyabhai Dhanjibhai Gamit and he has stated that at the time of the incident, it was around 6:30 hours and he was at home with his wife and son, when he heard his father shouting 'Save me, Save me' and he, his wife and son ran out and saw all the accused hitting his father with wooden sticks on his hands, legs and back and the accused no. 1 caught his father's private part and pulled it and after they went, all the accused ran away. That they lifted his father and brought him home and his father was conscious but was profusely bleeding and he called 108 ambulance and took his father to Referral Hospital, Vyara for treatment where stitches were taken and bandages were applied. His father had told him that while he was going to the field for labour work, the accused had caught him and assaulted him. The Medical Officers at Referral Hospital had

referred his father for further treatment to Surat but as he did not have money, he put his father in a rickshaw and took him home and thereafter at around 5:30 pm his father breathed his last. The complaint was filed at Vyara Police Station, which is produced at Exh. 15. The witness has also identified the muddamal sticks.

7.3 PW3 - Lilaben Jayantibhai Gamit, PW4 - Yakubbhai Jayantibhai Gamit and PW5 - Kishanbhai Bhikhabhai Gamit are the daughter in law, grandson and nephew of the deceased Kadiyabhai Dhanjibhai Gamit respectively and are all eye witnesses to the incident and they have fully supported the case of the prosecution and narrated all the details as stated by the complainant. All three witnesses have stated that they were present at home and heard the shouts of the deceased and ran to the place of incident and saw the accused assaulting the deceased with the wooden sticks. The deceased was taken to hospital by Jayantibhai and was brought home and thereafter he expired in the evening.

7.4 The panchnama of the place of offence is produced at Exh. 24, inquest panchnama at Exh. 27, arrest panchnama at Exh. 29 and the panchnama by which the wooden sticks were recovered from the house of the accused nos. 2 and 3 is produced at Exh. 31. As per the panchnama produced at Exh. 31 three wooden sticks measuring 2 feet 8 inches, 2 feet 3 inches and 4 feet 8 inches respectively with blood stains on them were recovered by the discovery panchnama from the house of the accused nos. 2 and 3.

7.5 PW12 - Amrabhai Premjibhai Bathwar is the Investigating Officer and the FSL Analysis Biological Report and Serological Report are produced at Exhs. 38 and 39 respectively.

8. We have minutely perused the evidence of the prosecution produced on record and find that the prosecution has proved that on the date of the incident at around 6.30 hours, all the accused took wooden sticks generally used as firewood in their homes and assaulted Kadiyabhai Dhanjibhai Gamit and caused serious injuries on his hands, legs and chest and as he shouted the witnesses residing nearby the place came and all the accused ran away. That he was taken to the Referral Hospital, Vyara for treatment where he was treated and as his injuries were grievous, he was referred to the Higher Centre for further management but his son Jayantibhai Kadiyabhai Gamit did not have the money for his treatment and hence, he was not taken for treatment but was brought back home. The Medical Officer has admitted that if medical treatment was provided to the deceased he would have survived but as he was not provided treatment, he succumbed to his injuries.

9. The short question which falls for consideration of this court is whether on consideration of the peculiar facts and circumstances of the case, the conviction of the appellants under Section 302 of the IPC should be upheld or the conviction must be converted to under Section 304 Part II of the IPC?

10. Learned Advocate for the appellants has fairly submitted that the facts of the

case projected by the prosecution clearly show that the incident has occurred in the course of a sudden quarrel and there was no pre-meditation on the part of the accused and they did not take advantage nor acted in a cruel manner. The accused have used the sticks which are generally used by persons residing in that area as firewood and they were not armed with any dangerous weapons in any manner. It is submitted that the case does not fall under Section 302 of the IPC but in essence, the fourth Exception of Section 300 of IPC applies.

11. The pivotal plea of the learned Advocate for the appellants relates to the applicability of Exception 4 of Section 300 of the IPC and for bringing it into operation, it has to be established that the act was committed by the accused without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and the accused did not take undue advantage and did not act in a cruel or unusual manner.

12. The Apex Court in *Pappu vs State of Madhya Pradesh* reported in (2006) 7 SCC 391 has 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'.

It cannot be laid down as a rule of universal application that whenever one blow is given, Section 302 IPC is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body it was given and several such relevant factors."

13. The Apex Court in *Anbazhagan vs The State Represented By The Inspector Of Police in Criminal Appeal No. 2043 of 2023* (Arising out of S.L.P. (Criminal) No. 9289 of 2019) has observed in Para 60, 61 and 62 as under :

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

1. When the court is confronted with the question, what offence the accused could be said to have committed, the true test is to find out the intention or knowledge of the accused in doing the act. If the intention or knowledge was such as is described in Clauses (1) to (4) of Section 300 of the IPC, the act will be murder even though only a single injury was caused. To illustrate : 'A' is bound hand and foot. 'B' comes and placing his revolver against the head of 'A', shoots 'A' in his head killing him instantaneously. Here, there will be no difficulty in holding that the intention of 'B' in shooting 'A' was to kill him, though only single injury was caused. The case would, therefore, be of murder falling within Clause (1) of Section 300 of the IPC. Taking another instance, 'B' sneaks into the bed room of his enemy 'A' while the latter is asleep on his bed. Taking aim at the left chest of 'A', 'B' forcibly plunges a sword in the left chest of 'A' and runs away. 'A' dies shortly thereafter. The injury to 'A' was found to be sufficient in ordinary course of nature to cause death. There may be no difficulty in holding that 'B' intentionally inflicted the particular injury found to be caused and that the said injury was objectively sufficient in the ordinary course of nature to cause death. This would bring the act of 'B' within Clause (3) of Section 300 of the IPC and render him guilty of the offence of murder although only single injury was caused.

2. Even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that section. In the

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

3. To put it in other words, if the act of an accused person falls within the first two clauses of cases of culpable homicide as described in Section 299 of the IPC it is punishable under the first part of Section 304. If, however, it falls within the third clause, it is punishable under the second part of Section 304. In effect, therefore, the first part of this section would apply when there is 'guilty intention,' whereas the second part would apply when there is no such intention, but there is 'guilty knowledge'.

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

5. Section 304 of the IPC will apply to the following classes of cases: (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death.

To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.

6. The word 'likely' means probably and it is distinguished from more 'possibly'. When chances of happening are even or greater than its not happening, we may say that the thing will 'probably happen'. In reaching the conclusion, the court

has to place itself in the situation of the accused and then judge whether the accused had the knowledge that by the act he was likely to cause death.

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

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

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

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

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

12. In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that

injury is sufficient in the ordinary course of nature to cause death, the fact that the act is done without premeditation in a sudden fight or quarrel, or that the circumstances justify that the injury was accidental or unintentional, or that he only intended a simple injury, would lead to the inference of guilty knowledge, and the offence would be one under Section 304 Part II of the IPC.

61. We once again recapitulate the facts of this case. On the fateful day of the incident, the father and son were working in their agricultural field early in the morning. They wanted to transport the crop, they had harvested and for that purpose they had called for a lorry. The lorry arrived, however, the deceased did not allow the driver of the lorry to use the disputed pathway. This led to a verbal altercation between the appellant and the deceased. After quite some time of the verbal altercation, the appellant hit a blow on the head of the deceased with the weapon of offence (weed axe) resulting in his death in the hospital.

62. Looking at the overall evidence on record, we find it difficult to come to the conclusion that when the appellant struck the deceased with the weapon of offence, he intended to cause such bodily injury as was sufficient in the ordinary course of nature to cause death. The weapon of offence in the present case is a common agriculture tool. If a man is hit with a weed axe on the head with sufficient force, it is bound to cause, as here, death. It is true that the injuries shown in the post mortem report are fracture of the parietal bone as well as the temporal bone. The deceased died on account of the cerebral compression i.e. internal head injuries. However, the moot question is – whether that by itself is sufficient to draw an inference that the appellant intended to cause such bodily injury as was sufficient to cause death. We are of the view that the appellant could only be attributed with the knowledge that it was likely to cause an injury which was likely to cause the death. It is in such circumstances that we are inclined to take the view that the case on hand does not fall within clause thirdly of Section 300 of the IPC.

12. in light of the observations of the Apex Court in the case of Pappu (supra) and Anbazhagan (supra) and on perusal of the evidence of the case on hand, we find that as per the case of the prosecution, the incident has occurred on 01.12.2013 at around 06.30 am when the deceased Kadiyabhai Dhanjibhai Gamit was going to his field and the accused demanded the two vighas land belonging to him for cultivation and as he refused, a sudden quarrel took place and the accused took the sticks that they used as firewood and assaulted him. As per the evidence of the complainant - Jayantibhai Kadiyabhai Gamit he took his father for treatment to the Referral Hospital at Vyara and as the injuries were serious he was referred to the Higher Centre for further management but as he did not have the money for the treatment of his father, he did not take him to the Higher Centre, but brought him home, where he succumbed to his injuries on the same day at around 5:30 pm. The Medical Officer has stated that if proper treatment would have been given at the relevant time to the deceased, he would have survived. There is no evidence of previous enmity between the parties and the

weapon that was used by the accused were the sticks which were generally used as firewood and available in all the houses and there was no pre-meditation on the part of the accused to be armed with deadly weapons to assault the deceased. It is also pertinent to note that the accused no. 1 was the son of the deceased and there cannot be any intention on his part to cause the death of his father.

13. Considering the peculiar facts and circumstances and the manner in which the incident has taken place and applying the settled principles of law in the aforementioned cases, we find that the conviction of the appellants under Section 302 cannot be sustained and we deem it appropriate to convict the accused under Section 304 Part II of the IPC instead of Section 302 of the IPC.

14. Consequently the conviction of the appellants under Section 302 and 34 of the IPC is set aside and they are convicted under Section 304 Part II of the IPC and sentenced to undergo simple imprisonment for the period already undergone. The fine as imposed by the learned Trial Court is maintained. With this modification, the appeal is partly allowed. The appellants shall be released forthwith if they are not required in any other case. Registry is directed to place a copy of this order in Criminal Appeal No. 990 of 2017. R & P be sent back to the learned Trial Court forthwith.