

(2017) 08 AHC CK 0025
In the Allahabad High Court
Case No : 61 of 1997

Manjoor, & Ors.

APPELLANT

Vs

State Of U.P.

RESPONDENT

Date of Decision : 11-08-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 161](#), [Section 313](#), [Section 374\(2\)](#) - Examination of witnesses by police - Power to examine the accused - Appeals from convictions
[Indian Penal Code, 1860](#), [Section 302](#), [Section 304](#), [Section 34](#), [Section 300](#), [Section 323](#), [Section 304\(1\)](#), [Section 304\(2\)](#) - Punishment for murder - Punishment for culpable homicide not amounting to murder - Acts done by several persons in furtherance of common intention - Murder - Punishment for voluntarily causing hurt - Punishment for culpable homicide not amounting to murder - Punishment for culpable homicide not amounting to murder
[Evidence Act, 1872](#), [Section 32\(1\)](#) - Case in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant

Citation : (2017) 08 AHC CK 0025

Hon'ble Judges : Sheo Kumar Singh-I

Bench : Single Bench

Advocate : Amit Srivastava, Amit Tripathi, Avinesh Srivastava, G.M.Kamil, Pramod Kumar Pandey, Rakesh Kumar Nayak, Sumit Kumar Srivastava

Final Decision : Allowed

Judgement

1. This Criminal Appeal has been filed under Section 374(2) Cr.P.C. against judgment and order dated 5.2.1997 passed by Sessions Judge, Faizabad in Session Trial No.411 of 1989 whereby and hereunder the appellants Manjoor, Faqeeroo, Labedi and Roshan were found guilty under Section 304 of Indian Penal Code read with Section 34 IPC and 323 IPC and were sentenced to undergo rigorous imprisonment for 10 years and six months respectively.

2. Brief facts giving rise to the present appeal are narrated as follows:-

That on fateful day i.e. on 27.7.1988 at about 11.00 A.M. children of accused/ appellants and informant were playing together and in the matter of playing some quarrel took place and in the mean time accused Manjoor reached there and slapped the children of the informant. The informant came out after hearing noise and inquired about cause of quarrel. Immediately after inquiry, all the four accused came there and started beating to the complainant with lathis and slaps. After hearing the alarm, his younger brother Ayub and his father Abdul Rahman came to rescue him, where they were also beaten.

3. Taufiq, the injured, who later on died lodged the first information report before the police station which was registered as N.C.R. case under Section 323 IPC and later on due to injuries found on the body of Taufiq and looking to his serious health condition, he was taken to hospital at Varanasi where he died on 29.7.1988. The matter was communicated to the police station through Ex. K-11 on 2.8.1988 resulting to initiate the investigation against the accused. After completing investigation and recording the statement under Section 161 Cr.P.C. and also examining the panchayatnama and post mortem report, the investigating officer submitted charge sheet under Section 302 IPC whereupon Magistrate took cognizance and committed the case to the court of Session.

4. After hearing the learned counsel for parties, learned trial court below framed charge under Sections 302, 323/34 IPC against all the accused for which they pleaded not guilty and claimed for trial. In order to prove the prosecution case, the prosecution has examined the following witnesses:-

(1) P.W.1 Abdul Rahman }

(ii) P.W.2 Shamim } witnesses of facts

(iii) P.W.3 Abdul }

(iv) P.W.4 Constable Chhote Lal who proved copy of G.D. and entries

(v) P.W.5 Ayub

(vi) P.W.6 Dr. A.N. Singh who proved medication examination report as Ex.Ka-2, Ka-3 and Ex. K-4

(vii) P.W.7 Constable Shanti Shukla who proved Ex.Ka-5

(viii) P.W.8 Constable Kailash Nath Pandey

(ix) P.W.9 Jag Narain Pathak, I.O. who proved G.D. Ex. ka-6, Ka-7, Ka-8 and Ka-9 i.e. charge sheet

(x) P.W.10 Ram Tirath Gautam, Pharmacist

(xi) P.W.11 Dr. S.K. Tripathi who proved the post mortem report Ex.Ka-10

(xii) P.W.12 Asha Ram Tripathi who proved panchayatnama Ex.K-12 and other

papers of the dead body Ex.Ka-13 to K-19

5. In the statement under Section 313 Cr.P.C. the accused denied the charges levelled against them and alleged that they have been implicated due to previous enmity. They have further stated that the children of Mistaul, Jokhan and Taufiq were playing and some quarrel took place in which an information was given to the police station where accused accompanied with Mistaul and Jokhan. This fact annoyed Mohd. Ayub and after death of Taufiq, the appellants had been falsely implicated in this case.

6. I have heard learned counsel for appellants Sri Amit Srivastava, Sri Amit Tripathi, Sri Avinesh Srivastava, Sri G.M.Kamil, Sri Pramod Kumar Pandey, Sri Rakesh Kumar Nayak, Sri Sumit Kumar Srivastava and learned A.G.A. for the State.

7. It is not in dispute that some quarrel took place between children and when Manjoor slapped the children of the informant, informant came there where he was beaten by the accused with lathi and slaps and on making noise by the complainant when his younger brother Ayub and Rahman came to rescue him, they were also beaten by the accused. During incident three persons were injured and Taufiq, when he was brought to the hospital at Varanasi, died during the treatment. His body was taken to hospital for post mortem and after medical examination, it came to the knowledge that Taufiq had received three injuries. In the opinion of the doctor mortem injuries were sufficient in the ordinary course of nature to cause death. It has also been suggested by the doctor that these injuries could be caused by lathis on 27.8.1988 at about 11.00 A.M. Due to the injuries of lathis caused by the accused-appellants, there was haemorrhage in the brain of the deceased and it was not possible to stop it because it was big size. The injuries as noted by the doctor were of head injuries causing brain haemorrhage resulting in the death of the deceased.

8. The prosecution witnesses also reveal that just after the incident the injured Taufiq was taken to the medical hospital/PHC at Jalalpur where three injuries reported as Ex.Ka-3 were found on the body of the deceased on which he was advised for x-ray because the deceased was feeling restlessness and had tendency to vomit indicating the serious type of brain injury.

According to the medical report Ex.Ka-2, following injuries were found on the body of Ayub:-

- (i) lacerated wound 3 cm x 6 cm x scalp deep, right side of head
- (ii) Contusion 5 cm x 3 cm in the right elbow joint for which x-ray was advised.
- (iii) Contusion 2 cm x 1 cm on the back of right hand side.

On the basis of medical report Ex. Ka-3, which was proved by the doctor, following injuries were found on the body of Taufiq:-

- (i) Lacerated wound 3 cm x 1 cm x scalp deep on the central of head

- (ii) 5cm x 5 cm on back side
- (iii) Contusion 3 cm x 1 cm on the front side of forehead
- (iv) Contusion 6 cm x 2.5 cm on the left arm above the elbow joint.

Since the person was feeling restlessness and revealing the tendency of vomiting, thus x-ray of scalp was advised.

The medical report Ex.Ka-4 reveals following injuries on the body of Abdul Rahman:-

- (i) Contusion 8.00 cm x 3.00 cm on the left side of fore arm above the wrist joint
- (ii) Contusion 4.00 cm x 2.5 cm on the back of left wrist joint After the death of Taufiq, two injuries were also found on the body of the deceased as noted in post mortem.

9. Learned counsel for appellant has submitted that the incident took place on 27.7.1988 at about 11.00 A.M. and it was reported by the deceased himself on the same day about 4.30 P.M. It has been narrated in the first information report that during the quarrel of children, all accused came there and started to beat by means of lathi and slapping to the informant Taufiq.

10. Learned counsel for appellants has submitted that first information report was delayed and thus there is a chance of lodging the information with certain consultation. The facts of the case reveal that injury report Ex.Ka-2 to Ex. Ka-4 were prepared at PHC Jalalpur by P.W.6 Dr. A.N. Singh at about 1.50 P.M. to 2.20 P.M. It is natural phenomena that after the incident, wherein injuries caused to the deceased and other members, they were firstly taken to the hospital and thereafter first information report was lodged. In this way, it can not be said that the first information report was lodged after some delay.

11. Learned counsel for appellants had submitted that F.I.R. is delayed and thus becomes doubtful. It is well settled that delay in lodging the F.I.R. can not be a ground of doubt on the claimants case as held in Ravi versus Badri Narain and others (2011) 2 SCC (Criminal) Supreme Court page 751.

12. Learned counsel for State has submitted that in this case, N.C.R. was lodged on 27.7.1988 just after the incident at about 4.30 P.M. by Taufik, who was injured in this case and later on he died due to the injuries sustained in the incident. Thus this information, which was in writing, is relevant because it was made by a person who is dead and the statement/information were circumstances of the prosecution which resulted in his death. It has further been submitted that this statement is relevant where the person who made them was or was not at the time when they were made, no expectation of death, whatever the nature of the proceeding in which the cause of his death comes into question. Section 32(1) of the Evidence Act provides the admissibility of the statement written or verbal made by person who is dead.

13. Learned Additional Government Advocate has submitted that F.I.R. can be treated as dying declaration in the case where the informant died after lodging the first information report due to injuries sustained as narrated in the first information report.

14. In *Sukhar versus State of U.P.* (1999) 9 SCC 502, it was held that the FIR made by the injured and the statement made under Section 161, Cr.P.C. can not be treated as dying declaration when during pendency of the trial under Section 307, IPC the injured died and the prosecution could not relate that the injuries sustained were the cause of death. However, in *Babulal versus State of MP*, AIR 2004 SC 846, it was held that an FIR made by deceased relating to cause of his injuries is admissible as a dying declaration. Also, in *Patel Hiralal Joitaram versus State of Gujarat*, AIR 2001 SC 2944, the deceased woman in the FIR mentioned part of the name of the accused wrongly. In a classificatory statement under Section 161 Cr.P.C. can be treated as dying declaration admissible under Section 32(1) of the Evidence Act.

15. The most famous decision on this aspect was delivered by the Privy Council which is still treated by the Courts in this Country as a Land Mark decisions stated as *Pakalanarain Swami*, AIR 1939 PC 47 which has been relied upon by the Hon"ble Supreme Court in many cases. So it is imperative to mention here the full facts of the case. The deceased was a managed about 40. He had been a peon in the service of the Dewan of Pithapur. *Pakala Narain Swami*, the main accused in this case was married to one of the daughters of the Dewan of Pithapur. *Pakala* and his wife after marriage shifted to *Berhampur* which is located about 250 miles from Pithapur. But in 1933 they again shifted back to Pithapur to stay with Dewan. At this point of time, they were under financial duress and in 1936 the wife of the accused took at various times a debt of Rs. 3000 from the deceased. It was on Saturday 20th March, 1937 that the deceased had received a letter from the accused wherein he was invited to come that same day or next day to *Berhampur* to catch the train from *Berhampur*, the deceased left his house on Saturday 21st March. IT was on Tuesday 23rd March, 1937 at about noon that the body of the deceased was traced in a steel trunk in a third class compartment at *Puri* and it was cut into seven portions. Later his window identified the deceased"s body. On the commencement of the trial, the window of the deceased told the Court that on that day her husband had shown her a letter and stated that he was leaving for *Berhampur* as the appellant"s wife wrote to him to come and get payment of his dues. The accused objected to this evidence being recorded. But the objection was overruled. It was held by the privy Council that this statement related to the circumstances of the transaction which resulted in his death and so it was relevant. The accused was tried and convicted for murder and was sentenced to death. This case thus makes it crystal clear that a dying declaration would be admissible even it if was made at a time whey the deceased was not even injured and the element of death was not even remotely present in his mind while making the declaration. The Supreme Court of *Kushal Rao versus state of Bombay*, AIR 1958 SC 22 followed

the historic decision rendered in Pakalanarain's case.

16. Learned counsel for appellant has submitted that all the four accused persons are related to each other while all the witnesses belong to one family and related to each other and can not be relied upon.

17. Learned counsel for the appellants has challenged the judgment on the ground that the alleged witnesses produced by the prosecution are family members of the deceased, as such, they are interested witnesses. The conviction of the appellants is primarily based on the statement of these witnesses, which, as such, is liable to be set-aside. It has also been submitted that the prosecution has failed to prove its case beyond any reasonable doubt. The conduct and role of the accused/appellants as attributed by the prosecution is not only improbable but is impossible to be believed.

18. On the contrary, learned counsel appearing for the State has argued that there was sufficient documentary and expert evidence on record. The version of the eyewitnesses cannot be doubted. Their presence on the site was natural and they had no reason to falsely implicate all or any of the accused in the case. It is contended that the version of the eyewitnesses is fully supported by the evidence of the expert and the statement of the Investigating Officer.

19. In light of above facts, the natural witnesses who were present at the spot at the time of occurrence and who sustained injuries were examined by the prosecution. There is no hard and fast rule that family members can never be true witnesses to the occurrence and they will always depose falsely before the Court. It will always depends upon the facts and circumstances of a given case. In the case of *Jayabalan vs. Union Territory of Pondicherry* reported in (2010) 1 SCC 199, the Court took a view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim.

20. The only requirement to scrutinize the evidence of related witnesses, under law, is that their evidence should be scrutinized with extra care and caution but the same cannot be discarded only on the ground of their relationship. On this point, reference may be made to the pronouncement of Hon'ble the Apex Court in the case of *Appa v. State of Gujarat*, AIR 1988 SC 698, wherein Hon'ble Apex Court has observed that "Experience reminds us that civilized people are generally insensitive when crime is committed even in their presence. They withdraw from both, victim and vigilant. They keep themselves away from the Court. They take crime as a civil dispute. This kind of apathy of general public is indeed unfortunate but it is everywhere whether in village life or town and city. One cannot ignore this handicap. Evidence of witnesses has to be appreciated keeping in view such ground realities. Therefore, the Court instead of doubting the prosecution case where no independent witness has been examined must consider the broad spectrum of the prosecution version and then search for the

nugget of truth with due regard to probability, if any suggested by the accused".

21. Reference may be made on the pronouncement of Hon"ble the Apex Court in the case of Sahabuddin & Anr. Vs. State of Assam passed in Criminal Appeal No. 629 of 2010. In this case Hon"ble the Apex Court has discussed the legal position on this point in paragraph no. 16. Relevant portion of the aforesaid judgment reads as under:-

"16. At this stage, we may refer to the judgment of this Court in the case of Gajoo V. State of Uttarakhand [JT 2012 (9) SC 10], where the Court while referring to various previous judgments of this Court, held as under:-

We are not impressed with this argument. The appreciation of evidence of such related witnesses has been discussed by this Court in its various judgments. In the case of Dalip Singh v. State of Punjab [(1954) SCR 145], while rejecting the argument that witnesses who are close-relatives of the victim should not be relied upon, the Court held as under:-

26.A Witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts." Similar view was taken by this Court in the case of State of A.P. v. S. Rayappa and Others [(2006) 4 SCC 512]. The court observed that it is now almost a fashion that public is reluctant to appear and depose before the court especially in criminal cases and the cases for that reason itself are dragged for years and years. The Court also stated the principle that, "by now, it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons." This Court has also taken the view that related witness does not necessarily mean or is equivalent to an interested witness.

A witness may be called interested only when he or she derives some benefit from the result of litigation; in the decree in a civil case, or in seeing an accused

person punished. {Ref. State of Uttar Pradesh v. Kishanpal and Others [(2008) 16 SCC 73]} In the case of Darya Singh & Ors Vs. State of Punjab [AIR 1965 SC 328], the Court held as under:-

6. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."

22. It will be useful to make a reference of another judgment of Hon"ble the Apex Court, in the case of Satbir Singh & Ors. Vs. State of Uttar Pradesh reported in [(2009) 13 SCC 790], wherein Hon"ble the Apex Court has held as under:-

"26. It is now a well-settled principle of law that only because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case. If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be based thereupon....."

23. Again in a recent judgment in the case of Balraje @ Trimbak v. State of Maharashtra [(2010) 6 SCC 673], Hon"ble the Apex Court has held that when the eye-witnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent person. The truth or otherwise of the evidence has to be weighed pragmatically. The Court would be required to analyse the evidence of related witnesses and those witnesses who are inimical towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.

24. The Hon"ble Apex Court, in the case of ""Pulicherla Nagaraju @ Nagaraja Reddy v. State of A.P." (2007) 1 SCC (Cri) 500, has held in paragraph no.16 as under:-

"In this case, we find that the trial court had rejected the evidence of PW1 and PW2 merely because they were interested witnesses being the brother and father of the deceased. But it is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise, found to be trustworthy and credible. It only requires scrutiny with more care and caution, so that neither the guilty escape nor the innocent wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted. (Vide Hari Obula Reddy Vs. State of A.P., Ashok Kumar Pandey, Vs. State of Delhi, and Bijoy Singh Vs. State of Bihar). Nothing had been elicited in the cross-examination of PW1 and PW2 to

discredit their evidence. Their evidence finds corroboration in Ex.P-1 and the evidence of the doctors (PW11 and PW12) and the MOs seized on the disclosures made by A-1 and A-3. Therefore, the High Court rightly held that the evidence of PWs1 and 2 could not be rejected, even though they were closely related to the deceased and inimically disposed towards the accused. There is no infirmity in the decision of the High Court by re-appreciating the evidence and reaching independent conclusions."

25. The Apex Court in the case of "Dharnidhar Vs. State of Uttar Pradesh and others" reported in (2010), 7 SCC 759, in paragraph nos.12 to 14, has held as under:-

"12. There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of Jayabalan v. U.T. of Pondicherry [(2010)1 SCC 199], this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under:

" 23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.

24. From a perusal of the record, we find that the evidence of PWs 1 to 4 is clear and categorical in reference to the frequent quarrels between the deceased and the appellant. They have clearly and consistently supported the prosecution version with regard to the beating and the ill-treatment meted out to the deceased by the appellant on several occasions which compelled the deceased to leave the appellant's house and take shelter in her parental house with an intention to live there permanently. PWs 1 to 4 have unequivocally stated that the deceased feared threat to her life from the appellant. The aforesaid version narrated by the prosecution witnesses, viz. PWs 1 to 4 also finds corroboration from the facts stated in the complaint."

13. Similar view was taken by this Court in Ram Bharosey v. State of U.P. [AIR 2010 SC 917], where the Court stated the dictum of law that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with

that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown overboard, but has to be examined carefully before accepting the same.

14. In the light of the above judgments, it is clear that the statements of the alleged interested witnesses can be safely relied upon by the Court in support of the prosecution's story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons, who are closely related to the deceased. When their statements find corroboration by other witnesses, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then we see no reason why the statement of so called 'interested witnesses' cannot be relied upon by the Court."

26. As per the dictum of the Apex Court, it is now a settled position of law that the statements of the alleged interested witnesses can be safely relied upon by the court in support of the prosecution's story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons, who are closely related to the deceased. When their statements find corroboration by other witnesses, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then there is no reason as to why the statement of so-called "interested witnesses" cannot be relied upon by the Court. It would be hard to believe that the close relatives shall leave the real culprit and shall implicate innocent persons falsely simply because they have enmity with the accused persons.

27. By examining the witnesses, P.W.1 Abdul Rahman, P.W.2 Shamim and P.W.5 Ayub, prosecution has placed the injured witness and other witnesses to prove the story where it reveals that the quarrel between the boys during the play invited the intervention of accused Manjoor who chased Shamim P.W.2 and Shamim ran towards Rahman who was residing there and Taufiq was also sitting there. P.W.2, Shamim requested Taufiq, who succumbed to injuries, to save him and Taufiq also inquired from accused Manjoor as to why he was beating Shamim and others. All the accused started beating Taufiq with lathi who fell down and raised alarm and later on, Abdul Rahman and his son Ayub ran to save Taufiq but they were also beaten by the accused. They were medically examined and thereafter went to police station Jalalpur where Taufiq lodged the first information report at police station. When the condition of Taufiq did not improve, he was taken to the hospital at Varanasi where he died due to injuries sustained in the occurrence.

28. Learned counsel for appellant has submitted that Mistaul and Jokhan were also there and they quarreled with the complainant party and both side sustained some injuries where Mistaul and Jokhan were also injured and medically examined in the hospital and later on a compromise was entered into between

the parties but after the death of Taufiq, the criminal proceeding was initiated on the application of Ayub.

29. The record reveals that just after the incident, the deceased himself visited the police station to lodge first information report while he was injured and the accused were named in the first information report. Thus the theory that there was compromise or the injuries caused by Mistaul and Jokhan is not tenable in this case. There is no evidence from the side of complainant that such incident took place between the complainant party and Mistaul and Jokhan. Thus theory of defence as narrated is not tenable.

30. Learned counsel for the appellants had further submitted that when the injured was taken to hospital at Varanasi and after death, they were coming, they met with an accident and the anti mortem injuries, which were found on the body of the deceased during the post mortem, were of accident. The theory is not tenable and is not acceptable because there is no evidence at all. Secondly, the informant/deceased himself has narrated the story before the police station and after that he was taken to the hospital where those injuries were found on the body of the deceased. Thus it can not be said that the injuries on the body of deceased were of the accident, which occurred during the return from hospital though there is no evidence with regard to accident. Lastly learned counsel for appellants has submitted that there was no intention of causing death or there was no pre-planning. Thus the offence, if found, comes within category of 304(ii) IPC.

31. The pivotal plea relates to the applicability of Exception 4 of Section 300 IPC.

32. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

33. 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".

34. In the scheme of the IPC culpable homicide is genus and "murder" its specie. All "murder" is "culpable homicide" but not viceversa. Speaking generally, "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognize three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". Culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304. The academic distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the Courts. The confusion is caused, if Courts start losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299 Section 300 A person commits culpable homicide if the act by which the death is caused is done-

Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.

Clause (b) of section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to section 300. Clause(b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause(3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words "bodily injury..." sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the internal bodily injury or injuries sufficient to cause death in the ordinary course of nature.

35. Learned counsel for appellant has relied on Pappu versus state of M.P.

2006(7) SCC page 391 and Misri Lal and others versus The State of U.P. .

36. On the basis of above discussion and considering the factual background of the case at hand and nature of injury, this court is of the view that in the circumstances where there is only blow of lathi in sudden quarrel without any premeditation or pre-planning, it is a case which comes under the provisions of Section 304(ii) IPC instead of Section 304(i) IPC. Since the appellants have been found guilty as above for causing injuries thus it would not be just and proper to again convict and punish them under section 323 IPC. Thus, they are acquitted from the charges levelled against them under Section 323 IPC.

37. Considering the factual background of the case at hand, it will be appropriate to convict the appellants under Section 304(ii) IPC instead of Section 304(i) IPC as has been done by the trial court. Their conviction is modified to the extent that the accused are found guilty under Section 304(ii) IPC and are sentenced to 5 years of simple imprisonment. The appellants-accused are on bail. The bail is cancelled. They are directed to surrender before the court of learned Chief Judicial Magistrate Faizabad. They shall be taken into custody within 15 days from the date of order to serve out the sentences. In case of default, the learned Chief Judicial Magistrate will ensure the custody of the appellants-accused and to send them in jail to serve out the sentence as mentioned above.

38. In view of the above, the appeal is partly allowed. Copy of this judgment with L.C.R. be immediately sent to court below for compliance.