

(2017) 08 AHC CK 0015
In the Allahabad High Court
Case No : 7032 of 2006

Pappi Yadav, & Anr.

APPELLANT

Vs

State Of U.P.

RESPONDENT

Date of Decision : 04-08-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 313, Section 311 - Power to examine the accused - Power to summon material witness, or examine person present
Indian Penal Code, 1860, Section 302, Section 34, Section 300, Section 304(2) - Punishment for murder - Acts done by several persons in furtherance of common intention - Murder - Punishment for culpable homicide not amounting to murder
Arms Act, 1959, Section 25, Section 27 - Punishment for certain offences - Punishment for using arms, etc

Citation : (2017) 08 AHC CK 0015

Hon'ble Judges : Shashi Kant Gupta, Abhai Kumar

Bench : Division Bench

Advocate : Nisar Uddin, Adarsh Kumar, Jitendra Singh, P.C.Srivastva, Usha Srivastava, A.K.Awasthi, Ajatshatru Pandey, Manish Tiwari, Nisaruddin, Vidhu Bhushan Singh, Vivek Mishra

Judgement

1. Both the aforesaid criminal appeals are connected and are being decided together.
2. These appeals are directed against the judgment of conviction and sentence dated 18.10.2006 passed by Additional Sessions Judge, Court No. 12, Kanpur Nagar in Session Trial No. 445 of 2003 (State Vs. Sonu Pathak @ Vishal and another), under Sections 302 and 302/34 IPC, Police Station - Nazirabad, District Kanpur Nagar, whereby accused Sonu Pathak @ Vishal and accused Pappi Yadav were convicted and sentenced for life imprisonment under Section 302 and Section 302/34 IPC respectively whereas in Session Trial No. 444 of 2003 (State Vs. Sonu Pathak @ Vishal), the accused Sonu Pathak @ Vishal was convicted and

sentenced for three years imprisonment under Section 25 of Arms Act.

3. Both the session trials being related, were consolidated and tried together and finally decided by the impugned judgment.

4. The facts of the case may be noticed in brief:-

5. A first information report, Exhibit - K-1, was presented at the Police Station - Nazirabad, Kanpur Nagar at 11.15 P.M. on 30.10.2002 with the allegation that PW-2 Viresh Tripathi alongwith the brother (deceased) of complainant and P.W.-3, Babu Singh Rajput had come to the house of his cousin, wife of P.W.-8 (Jagdish Shukla). When they started leaving her house at about 10.00 P.M., appellants Sonu Pathak and Pappi Yadav alongwith one unknown person arrived there and started abusing them when PW 2 & PW 3 protested and told them not to abuse and desist from exhorting money, both the appellants pulled out their weapons. Seeing this they started running for shelter. The accused started chasing them and on reaching Mariampur Road, near the House No. 120/500, Lajpat Nagar, they encircled the deceased and Pappi Yadav exhorted them to shoot Sushil Kumar @ Dabbu, upon which Sonu Pathak shot down Dabbu, who died on the spot.

6. On the basis of this, a chik FIR was registered at the police station as Exhibit K-3. Relevant G.D. Entries were also made. Accordingly, the police immediately proceeded to the place of incident. Inquest report was made. Site plan of the incident was also made and thereafter the dead body was sealed and sent to the Police Lines for further recourse.

7. During the investigation a country-made pistol was allegedly recovered from the possession of appellant Sonu Pathak. After the investigation, charge-sheet was submitted against both the appellants under Section 302 IPC and a separate charge-sheet was submitted against Sonu Pathak under Section 25 of Arms Act. As stated above, both these cases were consolidated by the trial court vide order dated 18.3.2004.

8. During the trial as many as twelve witnesses were produced by the prosecution, out of which PW-1 is a complainant, who is not an eye-witness. PW-2 Viresh Tripathi and PW-3 Babu Singh Rajput, are said to be witnesses of the incident and they are said to be accompanying the deceased at the time of incident. Rest of the witnesses are formal in nature, out of which PW-4 Constable Raziulla Khan, scribed the chik FIR as Exhibit K-3 and entered the registration of FIR in G.D. as Exhibit K-4 whereas PW-5 Head Constable Vinod Kumar is the writer of Chik FIR and has made a G.D. Entry in regard to Case Crime No. 214 of 2002 (Session Trial No. 444 of 2003) related to Section 25/27 Arms Act and has proved the Chik FIR Exhibit K-5 and G.D. Entry Exhibit K-6. PW-6 is Dr. Y.K. Nigam, who did the postmortem of the deceased Sushil Kumar @ Dabbu and has proved the postmortem report Exhibit K-7 and found only one fire arm injury on the back of the deceased whereas the second injury is a lacerated wound on the chin of the deceased. Cause of death is shown as loss of blood and shock as a

result of ante-mortem injuries caused due to fire arm. PW-7 Sub-Inspector, Mohd. Hashim prepared the inquest report and sent the dead body for postmortem after preparing all the relevant papers in this regard. He also prepared a memo regarding the pistol as well as licence alongwith magazines and cartridges that were recovered from the body of the deceased. This witness has also proved the recovery of weapons of murder and has proved the recovery memo Exhibit-16. PW-8 is Jagdish Chandra Shukla, who is witness of Panchnama. It is relevant to mention here that deceased alongwith other witnesses had gone to the house of this witness, whose wife is said to be the cousin of PW-2 Viresh Tripathi and incident took place when deceased alongwith witnesses PW-2 and PW-3 were returning from there. Rest of the witnesses are formal in nature and not necessarily to be mentioned here.

9. In the statement under Section 313 Cr.P.C., no specific instance has been taken by the appellants. Further although there is a vague and unsubstantiated claim of false implication, the accused have failed to substantiate by attributing reasons for such false implication. It is also stated by Sonu Pathak that the deceased had various enemies and might have been killed by any one of them. Appellant- Pappi Yadav did produce two witnesses in defence, DW-1 Chhallu and DW-2 Ved Prakash in support of his plea of alibi, although no such stand was taken in the statement under Section 313 Cr.P.C.

10. Trial Court after considering the evidence produced before it, found the story of prosecution trustworthy and arrived at the conclusion that Sonu Pathak had by inflicting fire arm injury to the deceased Dabbu, committed his murder and further held Pappi Yadav responsible for commission of the offence of murder, in furtherance of common intention. Recovery of the murder weapon was also found trustworthy and the appellants were sentenced accordingly.

11. Learned counsel for the appellant has submitted that the entire allegation levelled in the impugned FIR is false, frivolous and has no legs to stand on. The statement of PW 1 is highly improbable since it is difficult to believe that the first informant Anil Kumar Singh, would reach the place of occurrence all of a sudden on his own, without being informed about the incident by anyone. Hence, it appears that the entire prosecution story is an afterthought, with an intention to falsely implicate the appellant in the present case. In the FIR, the names of the accused persons and their fathers along with their addresses were disclosed even though they had never met PW 1, PW 2 and PW 3 before as admitted by PW 1 in his statement in terms of which it was stated that he never visited Santosh Shukla's house earlier and had seen the appellants-accused only at the time of occurrence. PW 2 had also stated in his statement that Sonu Pathak and Pappi Yadav were not known to him and on the day of occurrence, when he went to the house of Smt. Santosh Shukla, his sister told him to lodge an FIR against the accused persons. On this he said that he would lodge it on some other day.

12. Learned counsel for appellants further stated that from the statement of PW 2 and PW 3 it is apparent that both the alleged eye-witnesses were totally

unreliable as there are material contradictions in their statements. It is highly improbable for PW 2 and PW 3 to have known the addresses and fathers' names of both the accused person since the witnesses were not previously acquainted with accused person. The testimony of PW 1 along with PW 2 and PW 3 is under the cloud of doubt since there is a serious question as to how PW 1 had lodged the FIR mentioning therein the parentage and addresses of the accused persons. PW 2 and PW 3 who had allegedly informed P.W. 1 about the incident were themselves not aware about the parentage and accurate address of the accused persons; there is no independent eye-witness of the alleged occurrence although the occurrence had taken place on a busy public road and not even a single independent witness has been produced to support the prosecution story which further falsifies the case of the prosecution.

13. Learned counsel for the appellant further submitted that the statements of PW-2, Viresh Tripathi and PW-3, Babu Singh Rajput, eye-witnesses of the occurrence who were accompanying the deceased shows that they neither tried to rescue him nor tried to provide medical aid to the deceased although there was a hospital near the place of occurrence, which further creates a grave doubt regarding the presence of PW 2 and PW 3 at the place of occurrence. He further submitted that Smt. Santosh Shukla to whom the deceased Sushil Kumar @ Dabbu, PW-2, Viresh Tripathi and PW-3, Babu Singh Rajput had allegedly gone to meet, has not been examined which also creates doubt about the truthfulness of the prosecution story.

14. Learned counsel for the appellant further submitted that Jagdish Chandra Shukla, who was the husband of Smt. Santosh Shukla, has been examined as PW 8. He is not an eye-witness of the present occurrence. PW 8 was totally unaware of the incident and stated that he came to know about it only after 1 1/2 hours of the incident. Upon reaching the place of occurrence and seeing the dead body he came to know that he was the same person who had visited his house about 1 1/2 hours ago with PW 2 and PW 3.

15. It was further submitted by the learned counsel for the appellants that the alleged conduct of P.W. 8, Jagdish Chandra Shukla was most improbable and untrustworthy. It cannot be believed that after seeing off P.W. 2, Viresh Tripathi, P.W. 3, Babu Singh Rajput and the deceased outside his house, P.W. 8, Jagdish Chandra Shukla would immediately go inside his house without giving any heed to the heated arguments which allegedly took place between the appellants on one side and P.W. 2, Viresh Tripathi, P.W. 3, Babu Singh Rajput on the other side outside the house of P.W. 8, Jagdish Chandra Shukla.

16. The inquest of the dead body was completed on 31.10.2002 at 1.15 PM at night but very surprisingly the body of the deceased Sushil Kumar @ Dabbu reached the police head quarters only at 10.30 AM the next morning despite the distance between the place of incident and the police station being only 8 kms. This shows the investigation conducted by the police was highly tainted and perfunctory as no explanation was given as to the inordinate delay of the body

reaching the police headquarters.

17. Learned counsel for the appellant further submitted that the witnesses of fact, PW 2 and PW 3 have deposed that the appellants tried to take out the pistol from the person of the deceased Sushil Kumar @ Dabbu when he fell down after receiving gun shot injury, but when they failed in doing so they kept the pistol upon the back of the body of the deceased. This vital fact has not been mentioned in the FIR even though PW 1 has stated in his testimony that when he had arrived at the spot, he had seen the pistol lying upon the back of the deceased.

18. It was further submitted that the respondent has failed to establish motive of the accused persons in committing the alleged offence.

19. It was further submitted that the alleged recovery of the country-made pistol at the pointing out of the appellant Sonu Pathak is highly suspicious and not worthy of credence.

20. It was also submitted that if the alleged verbal altercation actually had taken place in front of the house of Smt. Santosh Shukla between the accused persons and PW-2, Viresh Tripathi, PW-3, Babu Singh Rajput and the deceased Sushil Kumar @ Dabbu, then there was no occasion for the accused to have chased the deceased and other eye witnesses for about 400 metres before firing the shot. This creates doubt upon the story of the prosecution. Had there been any intention to kill, they would have fired at the deceased in front of the house of PW 8, Jagdish Chandra Shukla. He further submitted that the presence of PW 2 and PW 3 at the place of occurrence was highly doubtful and in fact no one had witnessed the alleged incident. He further submitted that except the present case, there is no other criminal case pending against the appellants in any court of law.

21. Learned counsel for the appellants has further submitted that even if the prosecution story is taken as the gospel truth, the case of the appellants would not fall under Section 302/34 IPC but at the most it would fall under Section 304 Part II IPC, culpable homicide not amounting to murder.

22. It was further submitted that PW 1, Anil Kumar Singh is not an eye-witness and his presence on the spot is highly doubtful. PW 3, Babu Singh Rajpoot was very thick and thin with the complainant Anil Kumar Singh. PW 3 who was earlier closely associated with Ex-Chief Minister of U.P. had influenced the investigation and claimed himself to be an eye-witness. PW 2, Viresh Tripathi was a police constable posted in the office of IG Zone Kanpur. He is not a witness of inquest and his presence on the spot is highly doubtful. No identification parade was conducted by the Investigating Officer, because the witnesses clearly stated that they have named the appellants on the basis of name disclosed by Smt. Santosh Shukla and her husband PW 8 Jagdish Chandra Shukla. The alleged role of the appellant Pappi Yadav is only of exhortation. He neither opened any fire nor is there any allegation of him using his fire arm in the aforesaid incident. Further

when all the accused persons were armed with fire arms it remains unexplained as to why the deceased received only one fire arm injury. It was also submitted that evidence on record does not show that there was pre-meditation or prior concert on the part of the accused-appellant to commit the alleged crime in this incident. The deceased himself was a powerful person, and carrying a licensed pistol and live cartridge at the time of the alleged incident.

23. Per contra, Sri Rajiv Gupta, learned AGA has supported the impugned judgment and order passed by the court below. He submitted that no motive has been attributed to the witnesses for falsely implicating the appellants. The post-mortem report fully corroborates the ocular evidence and the court below has rightly convicted the appellants under Sections 302 and 302/34 IPC and under Section 25/27 Arms Act.

24. It was further submitted that there is no material contradiction in the testimonies of the prosecution witnesses. The prosecution has proved the presence of eye-witnesses PW-2, Viresh Tripathi and PW-3, Babu Singh Rajput on the spot at the time of the occurrence. The prosecution has also proved the arrival of PW 1, Anil Kumar Singh (brother of the deceased) soon after the occurrence. He further submitted that the names, fathers' names and address of the accused persons were disclosed by PW 8, Jagdish Chandra Shukla and his wife at his house when they were discussing how to deal with the situation and decided to lodge a first information report against the accused who were trying to extort money from them. It was further submitted that the FIR was lodged at 11.15 PM at the police station. The name of PW 1, Anil Kumar Singh was also mentioned in the GD Entry of the concerned police station. PW 1, Anil Kumar Singh and PW-3, Babu Singh Rajput were also the witnesses of Panchayatnama. Therefore, their presence on the spot cannot be doubted.

25. Heard Sri Gopal Chaturvedi, Senior Counsel assisted by Sri Ajatshatru Pandey, learned counsel appearing on behalf of the appellant Sonu Pathak @ Vishal & Sri Vinod Kumar Srivastava and Smt. Usha Srivastava, learned counsel appearing on behalf of the accused Pappi Yadav, learned AGA and perused the entire material available on record.

26. The incident is said to have occurred on 30.10.2002 at 22.30 hours. The FIR was lodged by the informant, Anil Kumar Singh (brother of deceased Sushil Kumar @ Dabbu) on 30.10.2002 at 23.15 hours alleging that the incident had occurred in front of the House No. 120/500, situated at Mariyam Nagar, Lajpat Nagar, Kanpur.

27. The allegation against the appellant Sonu Pathak alias Vishal is that he fired a shot at the deceased upon exhortation of the appellant Pappi Yadav and one unknown person which resulted in the instant death of Sushil Kumar @ Dabbu. The inquest report was prepared by S.I. Mohd. Hashim, PW 7 on 30.10.2002 at 1.15 AM on the same night. PW 1, Anil Kumar Singh (brother of the deceased) and PW-3, Babu Singh Rajput were the witnesses of the inquest report. Post-

mortem was conducted on the body of the deceased by PW-6, Dr. Y.K. Nigam on 31.10.2002 at 13.15 hours at LLR Hospital, Kanpur Nagar. According to post-mortem report, one fire arm wound at the back and one lacerated wound on the chin of the deceased was found. On 23.11.2002, a 315 bore country-made pistol and empty cartridge were recovered at the pointing out of the accused-appellant Sonu Pathak alias Vishal, from the bush near the Radha Krishna Temple, Dharmshala.

28. The main argument of the learned counsel for the appellants was that the PW 1, Anil Kumar Singh (brother of the deceased) was not present on the spot and in fact he had been set up by the prosecution. It was further submitted that Kanpur is a very big and crowded city and it is improbable that PW 1, Anil Kumar Singh (brother of the deceased) would reach the place of occurrence all on his own without being called by any one. Perusal of the record shows that PW 1 had allegedly reached the spot on his own after the incident on a motor cycle but merely because he reached the spot on his own, his testimony cannot be discarded. The record further shows that the FIR was lodged by PW 1, Anil Kumar Singh (brother of the deceased) at the police station at 11.15 P.M. on the same day and his name was also mentioned in the case diary. This apart, he along with PW 3, Babu Singh Rajput was also one of the witnesses to the inquest which had commenced on 31.10.2002 at 1.15 AM. The defence has not challenged his signatures either on the FIR or the inquest memo. This fact clearly shows that after the incident, which had taken place at 10.30 PM, he immediately reached the spot and the FIR was lodged by him at the police station at 11.15 PM. Moreover, even if it is presumed that PW 1 did not reach the place on his own but was called by the witnesses or someone else at the spot after the incident, it would not help the appellants in any manner because PW 1, Anil Kumar Singh (brother of the deceased) has not claimed himself to be an eye-witness of the incident but has admitted that the entire incident was narrated to him by PW-2, Viresh Tripathi and PW-3, Babu Singh Rajput who were the alleged, eye-witnesses of the occurrence and it was on their information that he had lodged the FIR against the appellants. Therefore, in view of the above, we do not see any force in the argument of the learned counsel for the appellants in this regard. Presence of PW 1, Anil Kumar Singh (brother of the deceased) immediately after the incident on the spot cannot be said to be doubtful.

29. Next contention of the learned counsel for the appellant is that PW-3, Babu Singh Rajput was not present on the spot at the time of the occurrence and this witness was set up by the prosecution to bolster its case. He further submitted that PW-3, Babu Singh Rajput had no concern either with Santosh Shukla or his wife who were allegedly having a tiff with the accused-appellants.

30. We have closely scrutinized the evidence available on record particularly the testimony of PW-3, Babu Singh Rajput. A perusal of his testimony shows that he narrated the manner in which the assault had taken place in detail. It has also come on record that he had very categorically stated that before the incident, he

had met PW 2 and the deceased on the same day at Rahul Sweet House, Vijay Nagar, as his office was situated at the first floor above Rahul Sweet House from where he was running his property dealing business. It has been further stated that when PW 3, Babu Singh met PW 2, Viresh Tripathi, he told him that his sister is being harassed by some persons and asked him to accompany him to her place. Rahul Sweet House was 2 kms. Away from the house of PW 8, Jagdish Chandra Shukla and on his request he accompanied him to her house. The defense has not challenged the location of the office of PW 3 which was alleged to be above Rahul Sweet House in any manner.

31. It has been categorically stated by PW 3, Babu Singh that the name of the accused were disclosed by Smt. Santosh Shukla, wife of PW 8, Jagdish Chandra Shukla and when all three persons were leaving the house of PW 8, Jagdish Chandra Shukla at around 10 PM alongwith Smt. Santosh Shukla, wife of PW 8 Jagdish Chandra Shukla, the accused persons who were found standing near the gate, started abusing them and stated as follows:-

"VERNACULAR MATTER OMITTED"

32. The learned counsel for the appellant has not been able to pin point any illegality or any material contradiction in the statement of PW-3, Babu Singh Rajput which may convince us to discard or disbelieve the testimony of PW-3, Babu Singh Rajput. This apart, PW-3, Babu Singh Rajput is also the witness of inquest and his signature on the inquest report has not been challenged. Thus, his presence at the time of occurrence cannot be doubted merely because he was a property dealer and was working under the Former Chief Minister Kalyan Singh at some point of time. This by itself would not make him a liar or an untrustworthy witness. Thus, in view of the above discussion, we do not see any discrepancy or contradiction to discard the evidence of PW-3, Babu Singh Rajput.

33. We have also gone through the evidence of PW-2, Viresh Tripathi, who is a constable working in the office of IG Police. He has categorically stated in his testimony that Smt. Santosh Shukla was his cousin and his relationship with her has not been seriously disputed by the defence. It is very natural for any brother who is in police department to help his sister if she or any member of his family is being threatened or extorted The story set up by the prosecution does not appear to be unreliable and it was not improbable for PW 2 to visit her place along with PW 3 and the deceased, in order to help her. It has also come on record (in her testimony) that during the course of the conversation at her house, she narrated the details of the accused-persons. It was here that they decided there to file the complaint against the accused in the police station, after working out the strategy to deal with them. When they were coming out from the house of Smt. Santosh Shukla, they saw the accused-appellants standing near the gate and threatening them with dire consequences. The details about the incident have already been discussed in the earlier part of this judgment. Therefore, the testimony of informant PW 1, Anil Kumar Singh, PW-2, Viresh Tripathi and PW-3, Babu Singh Rajput (the alleged eye witnesses of the incident)

does not in any manner create suspicion or doubt about the prosecution story.

34. Next submission of the learned counsel for the appellant is that the inquest report could not have been completed at 1.15 AM on 31.10.2002, as alleged, since the body of deceased Sushil Kumar @ Dabbu had reached the police line at 10.30 AM in the morning. The constable who had taken the dead body of the deceased Sushil Kumar @ Dabbu has not been examined. The prosecution side too have not given any application under Section 311 CrPC for summoning them. In fact, he would have been the best person to disclose/explain the delay in taking the dead body to the police lines. But even if it is presumed that there was inordinate delay in taking the body of the deceased Sushil Kumar @ Dabbu, this fact will not demolish the case of the prosecution as the body was sealed after preparation of the inquest report and was taken away by the concerned constables. The lodging of the FIR at 11.15 PM and the preparation of inquest report is nowhere under cloud and merely because there was a delay in taking the dead body to police line will not in any way prejudice the case of the prosecution since the deceased had died instantly on the spot, therefore, there was no need for the witnesses to take the dead body to any medical college or hospital. It may also be noted that it is not very unnatural for PW 8, Jagdish Chandra Shukla and his wife Smt. Santosh Shukla to return to their house after seeing off all the witnesses at their gate. Hence merely because they did not stay long enough near the gate along with the witnesses will not in any way make the testimony of PW 8 unworthy.

35. Lastly learned counsel for the appellants had contended that even if the story set up by the prosecution was to be taken as gospel truth, the case of the appellants would not fall under Section 302 IPC but at the most it would fall under Section 304 IPC, within the purview of culpable homicide not amounting to murder and under no circumstances, he could have been convicted under Section 302 IPC.

36. We find substance in this argument of the learned counsel for the appellants.

37. In order to appreciate the argument of the learned counsel for the appellants, the provisions of Explanation 4 of Section 300 IPC is quoted hereinbelow;

"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."

38. In order to invoke the applicability of Exception 4 to Section 300 IPC, the following conditions are to be satisfied namely:

(i) that it is not premeditated;

(ii) in a sudden fight;

(iii) in the heat of passion;

(iv) upon a sudden quarrel and

(v) without the offender having taken undue advantage or acted in a cruel or unusual manner.

39. Facts and circumstance of the case clearly shows that entire act of the accused-appellants was not premeditated and the incident appears to have occurred suddenly in the heat of passion after a quarrel. It appears that when the prosecution witnesses i.e. P.W. 2 and PW 3 were leaving the house of Smt. Santosh Shukla wife of PW 8, they saw the accused persons standing near the gate and it appears that some heated arguments and some verbal altercation took place between them as a result of which the accused-appellant Sonu Pathak got enraged and took out the pistol in the heat of passion and committed the alleged offence upon the exhortation of other co-accused.

40. Admittedly, only a single shot was fired by the appellant Sonu Pathak alias Vishal, that too, on the back of the deceased Sushil Kumar @ Dabbu, causing his death. There is no allegation that after the deceased fell down on the ground the accused persons had fired another shot. Even though the accused persons who were allegedly three in number were all carrying pistols but only Sonu Pathak alias Vishal had fired at the deceased upon the exhortation of the other co-accused Pappi Yadav. There is no evidence of pre-planning. The alleged crime appears to have been committed without premeditation, in the heat of passion, upon a sudden quarrel.

41. The post-mortem examination report reveals that the deceased Sushil Kumar @ Dabbu received only one fire arm injury on his back. The second shot was not fired and repeated by the appellant Sonu Pathak alias Vishal and this fact clearly shows that the accused had not taken undue advantage or acted in a cruel or unusual manner or with the intention to cause death of the deceased. Thus, we find considerable merit in the contention of the counsel for the appellant that the case of appellants at the most would fall under Section 304 IPC and are entitled to claim benefit of Exception IV of Section 300 IPC. Even according to the prosecution version, there was no pre-meditation in the commission of the crime. There is not even a suggestion that the appellants due to enmity or motive had committed the alleged offence. The exchange of hot words in the quarrel lead to sudden fight which in turn culminated in the deceased Sushil Kumar @ Dabbu being hit with a fire shot on his back by the accused-appellant No. 1, Sonu Pathak alias Vishal. It may be further noticed that the deceased was also carrying the fire arm and PW 2, Viresh Tripathi himself was a police personnel. It has also come on record that PW 3 also had a gun licence. No second shot was fired. Thus, the circumstances show that the appellants have not acted in a cruel and unusual manner in the prevailing situation so as to deprive him of the benefit of Exception 4 of Section 300 IPC.

42. Even according to the prosecution version, there was no pre-meditation in

the commission of the crime. There is not even a suggestion that the appellants due to enmity or motive had committed the alleged offence. The exchange of hot words in the quarrel led to some fight which in turn culminated into a serious incident in which the deceased Sushil Kumar @ Dabbu fell down after being hit by a gun shot. Thus the circumstances shows that the appellants have not acted in a cruel and unusual manner in the prevailing situation so as to deprive them of the benefit of Exception 4 of Section 300 IPC.

43. At this juncture, it would be appropriate to refer to the decision of the apex court in the case of Ankush Shivaji Gaikward Vs. State of Maharashtra, (2013) 6 Supreme Court Cases 770 wherein in paragraphs 14, 15 and 16 it has been held by the apex court as follows;

"14. We may also refer to the decision of this Court in Ghapoo Yadav and Ors. v. State of M.P. (2003) 3 SCC 528, where this Court held that in a heat of passion there must be no time for the passions to cool down and that the parties had in that case before the Court worked themselves into a fury on account of the verbal altercation in the beginning. Apart from the incident being the result of a sudden quarrel without premeditation, the law requires that the offender should not have taken undue advantage or acted in a cruel or unusual manner to be able to claim the benefit of Exception 4 to Section 300 IPC. Whether or not the fight was sudden, was declared by the Court to be decided in the facts and circumstances of each case. The following passage from the decision is apposite:

"...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)11. We may also refer to the decision of this Court in Ghapoo Yadav and Ors. v. State of M.P. (2003) 3 SCC 528, where this Court held that in a heat of passion there must be no time for the passions to cool down and that the parties had in that case before the Court worked themselves into a fury on account of the verbal altercation in the beginning. Apart from the incident being the result of a sudden quarrel without premeditation, the law requires that the offender should not have taken undue advantage or acted in a cruel or unusual manner to be able to claim the benefit of Exception 4 to Section 300 IPC. Whether or not the fight was sudden, was declared by the Court to be decided in the facts and circumstances of each case. The following passage from the decision is apposite:

"...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". xxx xxx xxx ...After the injuries were inflicted the injured has fallen down, but there is no material to show that thereafter any injury was inflicted when he was in a helpless condition. The assaults were made at random. Even the previous altercations were verbal and not physical. It is not the case of the prosecution that the accused appellants had come prepared and armed for attacking the deceased....This goes to show that in the heat of passion upon a sudden quarrel followed by a fight the accused persons had caused injuries on the deceased, but had not acted in cruel or unusual manner. That being so, Exception 4 to Section 300 IPC is clearly applicable..." (emphasis supplied)

15. In *Sukbhir Singh v. State of Haryana* (2002) 3 SCC 327, the appellant caused two Bhala blows on the vital part of the body of the deceased that was sufficient in the ordinary course of nature to cause death. The High Court held that the appellant had acted in a cruel and unusual manner. Reversing the view taken by the High Court this Court held that all fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of Exception 4 of Section 300 IPC. In cases where after the injured had fallen down, the appellant did not inflict any further injury when he was in a helpless position, it may indicate that he had not acted in a cruel or unusual manner. The Court observed:

"...All fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of not availing the benefit of Exception 4 of Section 300 IPC. After the injuries were inflicted and the injured had fallen down, the appellant is not shown to have inflicted any other injury upon his person when he was in a helpless position. It is proved that in the heat of passion upon a sudden quarrel followed by a fight, the accused who was armed with Bhala caused injuries at random and thus did not act in a cruel or unusual manner." (emphasis supplied)

16. Reference may also be made to the decision in *Mahesh v. State of MP* (1996) 10 SCC 668, where the appellant had assaulted the deceased in a sudden fight and after giving him one blow he had not caused any further injury to the deceased which fact situation was held by this Court to be sufficient to bring the case under Exception 4 to Section 300 IPC. This Court held:

"4....Thus, placed as the appellant and the deceased were at the time of the occurrence, it appears to us that the appellant assaulted the deceased in that sudden fight and after giving him one blow took to his heels. He did not cause any other injury to the deceased and therefore it cannot be said that he acted in

any cruel or unusual manner. Admittedly, he did not assault PW-2 or PW-6 who were also present also with the deceased and who had also requested the appellant not to allow his cattle to graze in the field of PW-1. This fortifies our belief that the assault on the deceased was made during a sudden quarrel without any premeditation. In this fact situation, we are of the opinion that Exception-4 to Section 300 IPC is clearly attracted to the case of the appellant and the offence of which the appellant can be said to be guilty would squarely fall under Section 304 (Part- I) IPC..."

(emphasis supplied)".

44. Now, next question before us is whether the case of appellants would fall under Section 304 Part I or Part II of the IPC.

45. As already discussed herein above, the incident in question took place in a sudden fight without pre-meditation and the act of firing by the appellant Sonu Pathak alias Vishal on the exhortation of the appellant Pappi Yadav at the deceased with a pistol was committed in the heat of passion upon a sudden quarrel without the appellants having taken any undue advantage or acted in a cruel and unusual manner. The fire, admittedly, was not repeated by the appellant Sonu Pathak alias Vishal. Had there been any intention of causing death of the deceased Sushil Kumar @ Dabbua, Sonu Pathak alias Vishal along with other accused persons who were also allegedly carrying fire arms, he would have definitely repeated the shot. The deceased Sushil Kumar @ Dabbua had suffered only one fire arm injury inflicted by Sonu Pathak alias Vishal which proved to be fatal.

46. Facts and circumstances of the present case clearly shows that there was no intention of the appellants to cause death of the deceased but since the injury was being inflicted by a lethal weapon on the body of the deceased Sushil Kumar @ Dabbua, the person ought to have known that such assault may result in his death. If that is done with knowledge that it is likely to cause death or to cause such bodily injury as is likely to cause death, the matter would fall within the purview of II of Section 304 IPC.

47. We are also fortified in our view by the decision of the apex court in the case of Ankush Shivaji Gaikwad (supra) wherein in paragraphs 22 and 23 it has been held as follows;

"22. In *Camilo Vaz v. State of Goa* (2000) 9 SCC 1, the accused had hit the deceased with a danda during a premeditated gang-fight, resulting in the death of the victim. Both the Trial Court and the Bombay High Court convicted the appellant under Section 302 I.P.C. This Court, however, converted the conviction to one under Section 304, Part II, I.P.C. and observed:

"....When a person hits another with a danda on a vital part of the body with such a force that the person hit meets his death, knowledge has to be imputed to the accused. In that situation case will fall in Part II of Section 304, IPC as in the

present case..." (emphasis supplied)

23. In *Jagrup Singh v. State of Haryana* (1981) 3 SCC 616 the accused had given a blow on the head of the deceased with the blunt side of a gandhala during a sudden fight causing a fracture to the skull and consequent death. This Court altered the conviction from Section 302 to Section 304, Part II IPC placing reliance upon the decision in *Chamru Budhwa v. State of Madhya Pradesh* AIR 1954 SC 652 in which case also the exchange of abuses had led both the parties to use lathis in a fight that ensued in which the deceased was hit on the head by one of the lathi blows causing a fracture of the skull and his ultimate death. The accused was convicted for the offence of culpable homicide not amounting to murder under Section 304 Part II IPC".

48. In Criminal Appeal No. 3710 of 2012, the appellant Sonu Pathak alias Vishal has also challenged the judgment and order dated 18.2.2006 passed in Sessions Trial No. 444 of 2003 (State Vs. Sonu Pathak alias Vishal) whereby the court below by its impugned order and judgment has convicted the appellant Sonu Pathak under Section 25 Arms Act and has been sentenced to undergo three years imprisonment.

49. The recovery of one 315 bore one country-made pistol and an empty cartridge are said to have been recovered at the pointing out of the appellant Sonu Pathak alias Vishal on 23.11.2002 at 3.15 P.M. Fard has also been prepared of the said recovery.

50. A perusal of the recovery memo shows that there were public witnesses also of the recovery namely Jitendra Gupta son of Harishchandra Gupta and Munna son of late Sri Munshi Singh. It is notable that one of the public witness namely Munna Singh was also produced as PW 9 along with other prosecution witnesses to prove the recovery. PW 11, Inspector Tejpal Singh was also examined by the trial court and he has also supported the recovery of 315 bore country-made pistol and an empty cartridge at the pointing out of Sonu Pathak alias Vishal. It is also notable that the alleged country made pistol as well as the cartridge which were recovered at the pointing out of the accused Sonu Pathak alias Vishal were also sent to the Forensic Science Laboratory and according to the report received from the said lab, the shot was fired from the pistol which was recovered at the pointing out of Sonu Pathak alias Vishal.

51. Learned counsel for the appellants could not point out any illegality in the recovery of the alleged pistol and cartridge. The court below has given cogent and convincing reason for convicting the accused-appellant Sonu Pathak alias Vishal under Section 25 of the Arms Act. We do not see any illegality or infirmity in the impugned order dated 18.10.2006 passed in Sessions Trial No. 444 of 2003 (State Vs. Sonu Pathak alias Vishal) convicting and sentencing Sonu Pathak alias Vishal to undergo three years imprisonment under Section 25 Arms Act.

52. Thus on the basis of the foregoing discussions, the Criminal Appeal No. 7032 of 2006 (Pappi Yadav) is allowed in part only to the extent that instead of Section

302 IPC, the accused appellant Pappi Yadav shall stand convicted under Section 304 Part II of the IPC read with Section 34 IPC.

53. A perusal of the record shows that the appellant Pappi Yadav has been assigned the role of mere exhortation. Even though the appellant Pappi Yadav has been attributed the role of carrying a fire arm, but admittedly he has not used the fire arm, and he simply exhorted the accused to open fire at the deceased. Thus, the case of the appellant Pappi Yadav is quite distinguishable from the other appellant Sonu Pathak alias Vishal.

54. In view of the above, the appellant Pappi Yadav is sentenced to undergo rigorous imprisonment for a period of five years under Section 304 Part II of the IPC along with fine of Rs. 5,000/-. In default of payment of fine, the appellant Pappi Yadav shall further undergo rigorous imprisonment for six months.

55. The Criminal Appeal No. 3710 of 2012 directed against the impugned judgment and order dated 18.10.2006 passed in Sessions Trial No. 445 of 2003 (State Vs. Sonu Pathak alias Vishal and another) also deserves to be allowed in part and accordingly the same is partly allowed only to the extent that instead of Section 302 IPC, the accused-appellant Sonu Pathak alias Vishal shall stand convicted under Section 304 Part II IPC and sentenced to undergo rigorous imprisonment for a period of ten years along with fine of Rs. 5,000/-. In default of payment of fine, the appellant Sonu Pathak alias Vishal shall undergo further rigorous imprisonment for six months.

56. As already stated hereinabove, the Appeal No. 3710 of 2012 directed against the impugned judgment and order dated 18.10.2006 passed in Sessions Trial No. 444 of 2003 (State Vs. Sonu Pathak alias Vishal) under Section 25 Arms Act is hereby dismissed.

57. All the sentences shall run concurrently. The period spent previously by the accused appellants in jail be adjusted against the period of their sentences.

58. Appellants namely Sonu Pathak alias Vishal and Pappi Yadav respectively are on bail. Their personal and surety bonds are cancelled and they are directed to surrender before the Chief Judicial Magistrate concerned immediately to serve out the remaining sentence imposed upon them by this Court. In case, they fail to surrender, as directed above, the Chief Judicial Magistrate concerned is directed to take coercive action against them in this regard.

59. Copy of this judgment along with lower court record be sent immediately to the concerned Sessions Judge and Chief Judicial Magistrate for compliance.

60. Compliance report be also sent to this Court.

61. Let a copy of this order be placed in the record of Criminal Appeal No. 3710 of 2012 (Sonu Pathak alias Vishal Vs. State of UP).