courtkutchehry.com

Company : CourtKutchehry
Website : www.courtkutchehry.com
Printed For :
Date : 13/09/2026

(2013) 03 DEL CK 0212

In the Delhi High Court

Case No : Criminal Appeal 1348 of 2012

Radhey Shyam — APPELLANT

Vs

State NCT of Delhi — RESPONDENT

Date of Decision : 22-03-2013

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 173, 313
Penal Code, 1860 (IPC) — Section 148, 299, 300, 302, 304

Citation : (2013) CriLJ 2426

Hon'ble Judges : Siddharth Mridul, J;Sanjiv Khanna, J

Bench : Division Bench

Advocate : G.K. Srivastava, for the Appellant; Sanjay Lao, APP, for the Respondent

Judgement

Siddharth Mridul, J.—The appellant Radhey Shyam, along with Raghu Raj and Giri Raj was sent up for trial under Sections 302/ 323/ 324 read with Section 34 of the Indian Penal Code, 1860 (for short ''IPC'') for committing the murder of Hari Prasad @ Babu, the deceased. Vide judgment dated 17.07.2012, the Additional Sessions Judge, Rohini Courts, Delhi convicted the appellant Radhey Shyam for offences u/s 302/ 324 IPC for stabbing the deceased with a knife and thereby committing murder. By virtue of order on sentence dated 31.07.2012, the appellant was to undergo rigorous imprisonment for life and fine of Rs. 10,000/- was imposed. In default of payment of fine, he was to undergo further rigorous imprisonment for six months.

2. Accused Raghu Raj and Giri Raj were given benefit of doubt and acquitted of all the charges. We note that the State has not preferred appeals challenging the acquittal of Raghu Raj and Giri Raj.

3. By way of the present appeal, the appellant has challenged his conviction and sentenced awarded by the trial court.

4. The prosecution case, in brief, is as under:-

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

(i) On 04.03.2007, the police recorded D.D. No. 32 (Ex. PW 10/A) indicating that a telephonic information has been received about a quarrel near DSM Public School, Prem Nagar II, Delhi. On receiving the said information, police team consisting of SI Puran Pant (PW-18) along with Constable Dinesh (not examined) and Head Constable Surender Singh (PW-19) reached the spot. SI Krishan Kumar (PW-16) and Constable Rajbir (not examined) were already present on the spot. The Police Team found that the injured persons were already removed to the Sanjay Gandhi Memorial Hospital (SGHM), Mongol Puri, Delhi-110083 by private persons. Thereafter, SI Puran Pant (PW-18) went to the SGHM Hospital and found from the MLC of Babu @ Hari Prasad (Ex. PW-8/A) that he was declared brought dead by Dr. Brijesh Singh (PW-8). The other injured persons namely, Netrapal (PW-2), Ravi (PW-5) and Dharambir (PW-7) were also admitted in the Hospital.

(ii) During the investigation, Shambhu Nath (PW-1) made a statement (Ex. PW-1/A) before SI Puran Pant (PW-18) on the basis of which ruqqa Ex. PW-18/A was prepared. In his statement, PW-1 stated that he was an eye witness to the incident and a resident of House No. 305, Z-Block Extension, Narain Vihar, Prem Nagar II, Delhi. He stated that his native village was Jaunpur, Uttar Pradesh and that he was presently residing in the aforesaid premises as a tenant. He further stated that on the day of the incident i.e., 04.03.2007 it was ''Holi'' Festival. After celebrating ''Holi'', he took a bath around 5:00 p.m. and was shaving outside his house. The deceased who was his neighbour came to him and started talking to him. In the interregnum, accused Giri Raj and Raghu Raj residing in the same colony came to PW-1. They told him that on account of him and Gulle @ Avdesh (PW-18) driving the vehicle in the gali, the slab of the drain in front of their (Giri Raj and Raghu Raj) house got broken. PW-1 in reply told them that he had not broken the same. On this, Raghu Raj slapped PW-1. Both Giri Raj and Raghu Raj were armed with dandas. The deceased tried to pacify Giri Raj and Raghu Raj who told the deceased that he was unnecessarily favouring PW-1 and would be taught a lesson. Both of them pushed the deceased on the floor and started beating him with the dandas. In the meantime, the appellant armed with a churra (knife) also arrived at the spot. Raghu Raj on arrival of the appellant shouted that they will not leave Babu (deceased) alive. PW-1 stated that on this both accused Giri Raj and Raghu Raj got hold of the deceased and the appellant inflicted an injury with the knife on the neck of the deceased. When the deceased tried to raise alarm, the other people from mohalla namely Dharambir (PW-7), Ravi (PW-5), Netrapal (PW-2) and Gopal (PW-9 and the father of the deceased) gathered there and tried to save the deceased. On this, the appellant waved his knife in all directions blindly which resulted in injuries to Dharambir (PW-7), Netrapal (PW-2) and Ravi (PW-5). Subsequently, Gulle @ Avdesh (PW-4) reached the spot and took the deceased, Dharambir, Netrapal and Ravi to the hospital in his Maruti Esteem car. PW-9 Gopal also reached the hospital thereafter, and found that his son had died.

(iii) The ruqqa (Ex. PW-18/A) led to the registration of FIR No. 359/1007 (Ex.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

PW-12/A) dated 04.03.2007 under Sections 302/ 323/ 34 IPC against the appellant, Giri Raj and Raghu Raj. After the registration of the FIR, the investigation was hand over to Inspector Ravinder Singh (PW-23). The crime team visited the spot and prepared a report which is Ex. PW-14/A. Photographs of the crime spot were taken. Site plan Ex. PW-23/A (without scale) of the crime spot was prepared at pointing out by Shambhu Nath (PW-1) which showed ''B'' as the place of occurrence. ''B'' as per the site plan connotes corner of House No. 334/335, Z-Block, Prem Nagar. As per the prosecution, a "gatta" Ex. P-1 (card board) smeared with blood was also present at site where the deceased allegedly fell down after being stabbed by the appellant. The same was seized vide seizure memo Ex. PW-18/B.

(iv) It is further the case of the prosecution that the appellant and Raghu Raj got admitted into ESI Hospital, Basai Darapur, Delhi after the incident to receive treatment for the injuries suffered by them. The appellant was arrested on 11.03.2007 at 12:20 p.m. vide arrest memo Ex. PW-23/N. Raghu Raj was arrested on 05.03.2007 at 3:40 p.m. vide arrest memo Ex. PW-23/D and Giri Raj was arrested on 05.03.2007 at 6:30 p.m. vide arrest memo Ex. PW-23/G.

HOMICIDAL DEATH

5. The homicidal death of the deceased is not under challenge. PW-8 Dr. Brijesh Singh who examined the deceased declared him as brought dead. PW-8 prepared the MLC (Ex. PW-8/A) of the deceased and proved the same by way of his testimony.

6. On 05.05.2007, the post-mortem of the dead body was conducted by PW-15 Dr. Manoj Dhingra. The post-mortem report is Ex. PW-15/A records that the body of the deceased was brought by Inspector Ravinder Singh (PW-23) with alleged history of incised wound found over the right side of the neck and being brought dead in the casualty. The following injury is delineated in the post-mortem report:-

External injury:

Stab incised wound of size 51/2 x 3 cm present over supraclavicular region near neck. 4 cm from mid line. 20 cm above and medial to right nipple. 11 cm from left nipple and below from tip of right shoulder on exploration wound was entering into chest cavity after cutting muscle and subcutaneous tissue and blood vessels and entered into the upper lobe of right lung with the cutting lung tissues of size 3 x 1 x 1 cm. Margins of the wound are clear cut and well defined one end is acute and one blunt.

7. PW-15 opined the cause of death to be shock as a result of haemorrhage consequent to stab incised wound. According to the post-mortem report Ex. PW-15/A, a single injury was present on the neck of the deceased which proved to be fatal. All the injuries were ante-mortem in nature. Time of death was opined to be nearly 18 hours before the autopsy was conducted. Vide subsequent

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

opinion dated 23.06.2007 (Ex. PW-15/B), PW-15 opined that injury mentioned by him the post-mortem report Ex. PW-15/A could have been caused by the knife (Ex. P-3) produced before him by the police or any such similar weapon.

OCULAR TESTIMONIES

8. The prosecution in order to establish its case produced as many as 23 witnesses out which PW-1 Shambu Nath, PW-2 Netra Pal, PW-5 Ravi, PW-7 Dharambir and PW-9 Gopal are stated to be the eye witnesses to the incident. The other witnesses examined by the prosecution were formal witness.

9. Shambu Nath, the complainant and an eye witness was examined by the prosecution as PW-1. In Court, PW-1 has corroborated all the material facts which he had mentioned in his earlier statement Ex. PW-1/A given to the police on the basis of which ruqqa (Ex. PW-18/A) was prepared. He stated that on the date of the incident i.e., 04.03.2007 he was residing at Z-Block, Naraina Vihar, Prem Nagar, Delhi. Thereafter, he narrated the entire incident in his examination in chief in the following manner:-

That day being the day of Holi Festival, after playing with the colours, I had taken late bath and was standing outside my house and shaving a about 5.00 p.m. Hari Pd. @ Babu who was neighbour came and sat near me and we started talking. In the meantime, accused Girraj and Raghuraj (Present in Court and correctly identified) came there and told me that I had damaged the slab which covered the drain outside their house. They accused me of breaking the slab as I used to drive my vehicle in the gali. Accused Giriraj slapped me. They were both carrying dandas in their hand. Hari Pd. who was present with me tried to counsel the accused persons. Accused persons told him that he was taking undue favour of me and said that they will teach him a lesson. They started beating Hari Pd. with dandas. Hari Pd. was pushed down by the accused persons and he was lying on the floor. In the meantime accused Radhey Shyam (present in court correctly identified) reached there carrying a knife. Radhey Shyam said that Hari Pd. should not be spared and he stabbed with knife on the right side of his neck. Accused Raghuraj and Giriraj had caught hold of Hari Pd, when Radhey Shyam had stabbed him. I raised alarm and Dharamvir, Ravi, Netrapal and Gopal reached there. They tried to save Babu but Radhey Shyam threatened them by waiving the knife blindly in all directions. Dharamvir, Neterpal and Ravi received injuries by the knife at the hands of Radhey Shyam. In the meantime Bulle @ Avdesh took out his Maruti Esteem car and took myself, Dharamvir, Ravi, Hari Pd. and Neterpal to SGM hospital. At the hospital Hari Pd. @ Babu was declared brought dead. My statement was recorded in the hospital, same is Ex. PW-1/A.

10. In his cross examination, PW-1 stated that the place of occurrence was opposite his house in the gali. He was sitting on the boundary wall of his house along with the deceased when Giri Raj and Rishi Raj came there. He admitted that Giri Raj and Raghu Raj blamed him and Gulle @ Avdesh (PW-4) for breaking the slab in front of his house by driving the vehicle in the gali. He further stated

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

that Raghu Raj slapped him. Thereafter, the appellant reached the spot and Raghu Raj exhorted him not to spare the deceased. The deceased after being stabbed by the appellant fell on the ground and a "gatta" was lying there. The "gatta" got stained with blood. The "gatta" was thereafter seized by the police and is Ex. P-1. He further deposed that accused persons and the deceased had some previous enmity but he did not know the reason behind the same. He was not injured by dandas by the accused persons. He deposed that place of occurrence was opposite his house in the gali and that the house of Gopal (PW-9), the father of the deceased was separated by a five feet wide gali from his house. He stated that the appellant had received injuries by falling into the sewer drain while trying to escape from the crime scene but did not remember the places where the injuries were suffered.

11. PW-2 Netrapal is an injured eye witness. In his examination in chief, he deposed that on 04.03.2007, at about 5 p.m. he was celebrating Holi and was sitting at the place where Holika was burnt. He heard some noises near the house of the deceased. When he reached the spot, he saw that Giriraj and Raghuraj were hitting the deceased with fists and kicks. The appellant also reached the spot. He was armed with a knife. The appellant stabbed the deceased and thereafter, moved the knife randomly in all directions which caused injury to PW-2 as well. Ravi (PW-5) and Dharambir (PW-7) were also present at the spot and they also received stab injuries at the hand of the appellant. PW-2 has deposed that he, Dharambir (PW-7), Ravi (PW-5) and Gopal (PW-9) tried to save the deceased. However, after receiving injuries PW-2 lost his consciousness. On cross-examination, PW-2 has stated that the place of occurrence was the third parallel gali and he reached the spot after hearing noises. He further stated that appellant attacked the deceased with the knife but he did not remember the hand in which the appellant held the knife.

12. PW-5 Ravi is stated be an injured eye witness. He deposed before the court that he was working in a shoe factory, situated at Village Kirari. On 04.03.2007, it was Holi festival and he was in his house after playing Holi. At about 5:00 p.m. he heard noises coming from the gali and after coming out saw that Raghu Raj and Giri Raj were beating the deceased with dandas. He along with Netrapal (PW-2) and Dharambir (PW-7) tried to save the deceased. He further deposed that the appellant came with a knife and on being exhorted by Raghu Raj and Giri Raj stabbed the deceased with the knife. Thereafter, the appellant started attacking them and in the process PW-5 along with Netrapal and Dharambir received injuries. He mentioned that Gopal (PW-9), father of the deceased was also present at the spot. PW-5 stated that one Gulle @ Avdesh (PW-4) took him, the deceased, Dharambir and Netrapal to the hospital in is Maruti Esteem car. The appellant along with Raghu Raj and Giri Raj fled from the scene as public had gathered there and in the process of fleeing they fell down and received injuries. In his cross-examination he stated that the place of occurrence was one gali away from his house and he took him two minutes to reach the spot.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

13. PW-7 Dharambir is also an injured eye witness. He deposed that on the day of Holi festival in the year 2007, he was present at his house after playing colours. He was standing near the gate of his house when heard a noise from the gali. Thereafter, he rushed towards the gali and that the deceased lying on the ground was being beaten up by Raghu Raj and Giri Raj with dandas. Then PW-7 along with Ravi (PW-5) and Netrapal (PW-2) tried to save the deceased. The appellant subsequently reached the spot and was armed with a churra in his hand. On being exhorted by Raghu Raj and Giri Raj the appellant stabbed the deceased and also attacked him when he tried to rescue the deceased. PW-7 deposed that he suffered injuries on his right forearm near the elbow joint. Ravi and Netrapal also suffered injuries. The appellant fled from the scene. PW-7 state that Gulle @ Avdesh (PW-4) took him to the hospital in his car and he fell unconscious in the car. On cross-examination, PW-7 stated that the place of occurrence was one gali away from his house and it took him two minutes to reach the spot. He stated the time of incident to be between 4:30 p.m. to 5:00 p.m.

14. PW-9 Gopal is the father of the deceased and also an eye witness. He has deposed that on 04.03.2007 after playing Holi he was present at his house and at about 5:00 p.m. heard noises coming from the gali. He came out of the house and saw that his son (the deceased) being beaten up with kicks and fists by Raghu Raj and Giri Raj. PW-9 deposed that the appellant stabbed his son in his presence and some other people were trying to save the deceased. His son was shifted to the Hospital in Gulle''s (PW-4) car where the doctor declared him as brought dead. PW-9 identified the dead body of his son vide his statement which Ex. PW-9/A. In cross-examination, PW-9 stated that the distance between the crime spot and his house was about 50-60 feet. He mentioned that there were two build houses and a vacant plot in the line of the houses up to the spot. PW-9 admitted his presence at the spot as also the fact that he did not receive any injuries.

15. We note that there may be minor discrepancies in the statements of the several eye witnesses but a clear and categorical statement which emerges is that the appellant armed with a knife had stabbed the deceased. All the eye witnesses namely, Shambu (PW-1), Netrapal (PW-2), Ravi (PW-5), Dharambir (PW-7) and Gopal (PW-9) are consistent in their respective testimonies on the aspect that it was the appellant who had stabbed the deceased with the knife.

DISCLOSURE OF THE APPELLANT AND RECOVERY

16. As per the prosecution, churri/knife (Ex. P-3), the weapon of offence was recovered pursuant to the disclosure statement Ex. PW-23/P made by the appellant. The knife, according to the prosecution was recovered from the water filled near the house of the appellant i.e. Z-307, Narain Vihar, Prem Nagar-II, Delhi. The seizure memo of the knife is Ex. PW-23/R. The testimony of PW-23 Inspector Ravinder Singh, the Investigating Officer, in this regard is significant. PW-23 deposed that the appellant on 11.03.2007 was apprehended from his

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

house vide arrest memo Ex. PW-23/N. The appellant made a disclosure statement in his presence on 11.03.2007 itself and the same is Ex. PW-23/P. PW-23 stated that a churra was recovered from the water near the house of the appellant pursuant to the said disclosure. In his cross-examination, PW-23 deposed that he met Head Constable Gyan (not examined) at about 1:00-1:30 a.m. in the night intervening between 04.03.2007/05.03.2007. Head Constable Gyan had informed PW-23 that on the day of the incident i.e., 04.03.2007, the appellant and Raghu Raj had suffered injuries and were admitted in ESI Hospital, Basai Darapur. He admitted information recorded in D.D. No. 44 (Ex. PW-10/B) by Head Constable Gyan. He did not inquire from the doctors treating the appellant regarding his condition or about the nature of injuries suffered by the appellant and Raghu Raj. PW-23 saw the MLC report of the appellant (Ex. PW-21/DA) and accused Raghu Raj. He was not able to record the statement of the appellant as the appellant was not in a fit condition. However, subsequently PW-23 mentions that on 05.03.2007, when he visited ESI Hospital, the appellant refused to give a statement on the ground that he was in terrible pain but verbally confessed his guilt. PW-23 has stated that he had not arrested the appellant from the hospital but had deputed two constables at ESI Hospital for keeping the appellant under surveillance only for 05.03.2007. He could not, however, say whether the surveillance was continued up to 11.03.2007 or not.

17. PW-18 SI Puran Pant deposed that during investigation a telephonic message was received by the Investigating Officer Inspector Ravinder Singh (PW-23) regarding the admission of the appellant and Raghu Raj who were the accused in the present FIR at ESI Hospital Basai Darapur. PW-18 deposed that he along with PW-23 Inspector Ravinder Singh reached the Hospital and was informed that the appellant and Raghu Raj was undergoing treatment. The MLC''s of the said persons were also handed over to PW-23 in his presence. Thereafter, PW-23 deputed two constables at ESI Hospital. In his cross-examination, PW-18 deposed that the information about the appellant and Raghu Raj being admitted to the Hospital was received by Inspector Ravinder Singh (PW-23) at about 1:00 a.m. in the night and MLC''s were handed over at about 2:30 a.m. in the night intervening between 04.03.2007/05.03.2007. He further stated that D.D. No. 44 (Ex. PW-10/B) regarding information received from the ESI Hospital was already registered and he verified the contents of the same on reaching back police station Prem Nagar.

18. We find that the testimony of PW-23 Inspector Ravinder Singh regarding the arrest of the appellant from his house and recovery of the churra (knife) at the instance of the appellant after his arrest cannot be accepted. We say so for the following reason. As per the first MLC report of the appellant which is Ex. PW-21/DA, the appellant was admitted to the ESI Hospital on the 04.03.2005 at about 6:45 p.m. by one Rohit (Nephew of the Appellant) with alleged history assault by 15 persons. From the testimony of PW-23 Inspector Ravinder Singh, the Investigating Officer, it is clear that that he had full knowledge about the admission of the appellant for treatment at ESI Hospital. PW-23 in fact left them

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

under surveillance. It is highly implausible that the PW-23 placed the appellant under surveillance but did not arrest him despite the statement (Ex. PW-1/A) made by PW-1 Shambhu Nath in which he certainly named the appellant as the person who stabbed the deceased.

19. At this stage, it is also relevant to note that the discharge slip (Ex. DW-4/A) of the appellant demonstrates that the he was admitted to the ESI hospital on 04.03.2007 and discharged on 10.03.2007. Further the record of Tihar Jail Hospital which is Ex. DW-8/A reveals that the appellant remain admitted in the Tihar Jail Hospital from 11.03.2007 till his discharge on 04.05.2007. The said record has been proved by DW-8 Sh. Munna Thakur who was working as an Orderly in the Tihar Jail at the relevant point of time. These documents indicate that soon after being released from the ESI Hospital the appellant was admitted to the Tihar Jail Hospital though both the discharge slip (Ex. DW-4/A) and the medical record of Tihar Jail (Ex. DW-8/A) do not mention any specific time as to discharge and admission respectively. Now as per arrest memo Ex. PW-23/N, the appellant was apprehended on 11.03.2007 at 12:30 p.m. and on 11.03.2007 itself the appellant was admitted in to Tihar Jail Hospital by the police themselves and therefore, the place of arrest mentioned in the arrest memo (Ex. PW-23/N) to be the house of the appellant does not appear to be correct. However, even if the place of arrest is mentioned incorrectly, it cannot be disbelieved that the appellant was arrested only on 11.03.2007.

20. The factum of recovery of churra/knife (Ex. P-3) as per the disclosure statement of the appellant (Ex. PW-23/P) is improbable and suspicious. PW-23 Inspector Ravinder Singh in his testimony stated that on 05.03.2007 when he reached the ESI hospital, the appellant was not in a fit condition to be interrogated by him but despite his deleterious condition he confessed his guilt orally before him. What prevented PW-23 from reducing the disclosure of the appellant in to a written form? It is also unlikely that the appellant confessed his guilt but did not disclose where he had hidden the weapon of offence. There is no indication in the testimony of PW-23 that whether after 05.03.2007 he made any efforts to record the statement of the appellant who continued to remain admitted in the ESI Hospital till 10.03.2007. The fact the as soon as the appellant was released from the ESI hospital he made a disclosure statement and instantly led the police to the place where he had hidden the knife (Ex. P-3) is strange when as per PW-23 no such disclosure was made by the appellant from 04.03.2007 till 10.03.2007. What is also noticeable is that as per Ex. PW-23/P, the disclosure was made in the presence HC Surender No. 1404 who has not been produced by the prosecution as a witness. In these circumstances, the possibility of churra being implanted cannot be ruled out completely and hence the recovery of the knife/churra (Ex. P-3) at the instance of the appellant is disbelieved and rejected.

SEIZURE OF CARD BOARD (EX PW-18/B)

21. As per prosecution, a "gatta" (card board) (Ex. P-1) stained in blood was

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

seized from the spot ''B'' as indicated in the Site plan (Ex. PW-23/A). At the same spot deceased had fell after being stabbed. The CFSL Report Ex. PW-22/B postulates that blood was detected on the "gatta". It is the case of the prosecution that the when the appellant stabbed the deceased on the neck, he fell on the card board or "gatta" which in turn got stained by blood. In order to establish the presence of blood stained "gatta" Ex. P-1, the prosecution relied on the testimony of PW-1 Shambhu Nath, PW-23 Inspector Ravinder Singh, PW-18 SI Puran Pant. According to PW-1''s testimony the deceased fell on the "gatta" when the appellant stabbed him and that is how the "gatta" got tarnished by blood. PW-23 Insp. Ravinder Singh has deposed that on reaching the site of the incident i.e. Z-Block, Narain Vihar, Prem Nagar-II, Sultanpuri, Delhi, ASI Krishan (PW-16), Ct. Surender (PW-19) and Ct. Rajbir (not examined) were already present at the spot. Thereafter, SI Puran Pant (PW-18) reached the spot and handed over the MLC of the deceased and other injured Ravi (PW-5), Netrapal (PW-2) and Dharambir (PW-7). He stated that the crime team arrived at the spot and handed him the crime team report Ex. PW-14/A prepared on the spot. One blood stained "gatta" was kept in the polythene bag and converted into a cloth parcel. The "gatta" was seized vide memo Ex. PW-14/A. PW-18 SI Puran Pant has deposed that the crime team inspected the spot. One empty cartoon piece stained with blood was found lying at the spot which sealed by the Insp. Ravinder Singh (PW-23).

22. The learned counsel for the petitioner has urged that statements made PW-23 Inspector Ravinder Singh and PW-18 SI Puran Pant are contradicted by the Crime Team Report (Ex. PW-14/A) which does not indicate about the presence of the any "gatta" at the crime spot.

23. We find that the in the column 12 of the Crime Team Report (Ex. PW-14/A) which provides space for mentioning the articles which may be seized by the Investigating Officer it is written as NIL. The contents of the crime team report are clearly contrary to the testimonies of PW-1 Shambhu Nath, PW-23 Inspector Ravinder Singh and PW-18 SI Puran Pant. However, even if we disregard the recovery and presence of the "gatta" (Ex. P-1) at the crime spot, it would not be an irregularity or a lapse fatal to the entire version put forward by the prosecution.

24. On merits, there can be hardly any doubt about the fact that the appellant inflicted a blow with the churra near the neck of the deceased. The said singular blow proved to be fatal. The affirmation that the aforesaid blow was inflicted by the appellant emerges from the statements of PW-1 Shambhu Nath, PW-2 Netrapal, PW-5 Ravi, PW-9 Gopal and PW-7 Dharambir. All the aforesaid witnesses were present at the place of occurrence and Ravi (PW-5), Dharambir (PW-7) and Netrapal (PW-2) sustained injuries as well. There is no reason to doubt the veracity of the said eyewitnesses regarding the fact that the appellant stabbed the deceased.

NON EXPLANATION OF INJURIES ON THE PERSON OF THE APPELLANT.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

25. The learned counsel for the appellant has urged that the alleged incident did not take place in the manner as it is being projected by the prosecution. He submitted that the occurrence took place on account of a sudden fight between the parties and hence, the appellant is entitled to the benefit of the Exception 4 to Section 300 IPC. The counsel for the appellant further contended that the Trial Court while convicting the appellant u/s 302 IPC has not taken into consideration the injuries suffered by the appellant as also the defence testimonies put forth on behalf of the appellant. The counsel has stressed that the appellant suffered injuries of grievous nature which could not have been caused by mere falling as stated by PW-1 Shambhu Nath and PW-5 Ravi. He further submitted that the prosecution has nowhere explained the reason behind the injuries suffered by the appellant and it was for the prosecution to illuminate the cause of injuries on appellant''s person. The grievous nature of injuries on the appellant''s body soon after the incident clearly evince the fact that the unfortunate incident occurred on account of a sudden fight/quarrel between the parties with no scheming on behalf of the appellant To buttress this contention, the counsel for the appellant has relied upon the decision of the Supreme Court in Nagarathinam and Others Vs. State rep. by Inspector of Police, . He also urged that the due weightage has not been accorded to the defence put forth by the appellant in his statement u/s 313 of the Code of Criminal Procedure, 1973 (for short ''Cr.P.C.'').

26. The learned counsel for the appellant next contended that even if the singular blow from the knife/churra is taken to have been inflicted by the appellant, which proved fatal and resulted in death of Hari Prasad, the appellant could only be punished for the offence u/s 304 IPC, and not for an offence u/s 302 IPC. The Counsel contended that the appellant had no intention cause death of the deceased as the incident in which death ensued was a result of sudden fight which erupted at the spur of the moment and in heat of passion the deceased got killed. It was further pointed out that the evidence produced by the prosecution does not reveal any prior enmity between the deceased and appellant. There was no premeditation, deliberation or malice on the part of the appellant to commit the offence. It is further submitted that the appellant has not acted in an unusually cruel manner by inflicting a single blow with a knife on the neck of the deceased. In order to substantiate this contention, the appellant has relied on the decision of Supreme Court in Satish Narayan Sawant Vs. State of Goa, and R.P. Tyagi Vs. State (Govt. of NCT of Delhi), . In Satish Narayan Sawant (supra), the Supreme Court held:-

40. That being the well-settled legal position, when we test the factual background of the present case on the principles laid down by this Court in the aforesaid decisions, we are unable to agree with the views taken by the High Court. As already noted, it is quite clear from the record that there was an altercation preceding the incident. The place of occurrence is a residence inhabited by both the parties and there is no evidence on record that the deceased was armed with any weapon. Initially the appellant-accused also did not have any weapon with him but during the course of the incident he went

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

inside and got a knife with the help of which he stabbed the deceased. PW-7 in his cross-examination has categorically stated that death due to stab injury was in consequence of Injury 1 and all other injuries were superficial in nature. So, it was only Injury 1 which was fatal in nature. Factually therefore, there was only one main injury caused due to stabbing and that also was given on the back side of the deceased and therefore, it cannot be said that there was any intention to kill or to inflict an injury of a particular degree of seriousness.

41. Records clearly establish that there was indeed a scuffle between the parties with regard to the availability of electricity in a particular room and during the course of scuffle the appellant also received an injury which was simple in nature and that there was heated exchange of words and scuffle between the parties before the actual incident of stabbing took place. There is, therefore, provocation and the incident happened on the spur of the moment. That being the factual position, we are of the considered view that the present case cannot be said to be a case u/s 302 IPC but it is a case falling u/s 304 Part II IPC. It is trite law that Section 304 Part II comes into play when the death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death.

27. The learned Additional Public Prosecutor appearing for the State has vehemently opposed the conversion of conviction from Section 302 IPC to Section 304 IPC. It is submitted that the appellant had intended to cause the injury which resulted in death of Babu @ Hari Prasad. The said injury was sufficient to cause death in ordinary course of nature and therefore, the appellant has rightly been convicted under Clause 3 to Section 300 IPC. The learned APP further submitted that the said injury was neither accidental nor unintentional and the same is apparent from the fact that the appellant was armed with a knife and the deceased was unarmed. He submitted that all the eye witnesses in unison have stated that the appellant stabbed the deceased after being exhorted. The learned APP further submitted that the appellant had inflicted the singular blow with great force. The force invested by appellant in inflicting the single injury is palpable from the post mortem report Ex. PW-15/A which indicated that single injury on the supraclavicular region near the neck was found entering in to the chest cavity and after cutting the muscles and sub cutaneous tissue had entered into the upper lobe of the right lung cutting the lung tissues. To substantiate his contention, the learned APP has relied upon the decision of the Supreme Court in Pulicherla Nagaraju @ Nagaraja Reddy Vs. State of Andhra Pradesh, . In said case the accused gave only one dagger blow near the neck of the victim causing his death. The accused was held guilty u/s 302 IPC. The Supreme Court observed:-

29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls u/s 302 or 304 Part I or 304 Part II. Many petty or insignificant matters--plucking of

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable u/s 302, are not converted into offences punishable u/s 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable u/s 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention....

30. In this case, as noticed above, the appellant was carrying a barisa, a dangerous weapon. There was previous enmity. There was an earlier incident, about half an hour earlier when the father and brother of the deceased had been attacked by the appellant and his father. The deceased was unarmed. There was no provocation, sudden quarrel or fight. There was no indication of any cause for an apprehension on the part of the appellant that the deceased may attack him. The stabbing was with great force, causing an injury on a vital part of the body, sufficient in the ordinary course of nature to cause death. The description of the injury and cause for death given by PW 11, who conducted the post-mortem is telling:

An incised injury 5 cm x 3 cm x 12 cm deep over right supra clavicular fossa above the medial end of right clavicle ... sub-clavian artery is severed.... An incised injury 4 cm x 1 cm x 2 cm deep over the apex of right lung ... deceased would appear to have died due to haemorrhage and shock due to injuries to right sub-clavian artery and upper lobe of right lung.

The intention to cause death or at all events intention of causing bodily injury which is sufficient in the ordinary course of nature to cause death was made out. The circumstances to bring the case under Exception 4 to Section 300 do not

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

exist.

(Underlining added)

28. In order to appreciate the contentions advanced by the learned counsel for the Appellant, it is essential to discuss the testimony of significant defence witnesses and statement of the appellant u/s 313 Cr.P.C.

29. The material defence witnesses are DW-3 Dr. P.K. Jain and DW-4 Dr. JP Singh. DW-3 Dr. P.K. Jain was produced to substantiate the fact the appellant himself had received injuries. DW-3 prepared the MLC of the appellant which is Ex. PW-21/DA and proved the same. DW-3 has deposed that on 04.03.2007, he was posted in casualty in the ESI Hospital and at about 6:45 p.m. one patient namely Radhey Shyam, the appellant herein was brought to the Hospital with alleged history of physical assault by about 15 persons with iron rod. DW-3 deposed that he medically examined the appellant and found CLW (Clear Lacerated Wound) on the forehead and injury on the right leg. The appellant complained of pain in chest (lower side). After examining the appellant, DW-3 referred him to the surgical department. In his cross examination he denied that the MLC Ex. PW-21/DA was manipulated later on.

30. DW-4 Dr. J.P. Singh is a surgical specialist in the ESI Hospital. He deposed that he had treated the appellant and Dr. B. Sakia prepared the discharge summary pertaining to the appellant under his supervision. The same is Ex. DW-4/A dated 10.03.2007 which bears the signature of Dr. Sakia. DW-4 stated that the appellant had suffered a fracture on his right leg and on account of that he was unable to move till his discharge from the Hospital.

31. We have perused the discharge slip Ex. DW-4/A which point towards injury on the right shoulder and Right tibia of the appellant. The said discharge summary does not indicate that the appellant suffered from a fracture. However, DW-4 Dr. J.P. Singh under whose supervision the discharge summary was prepared has in clear and categorical terms deposed that the appellant suffered a fracture in his right leg. We do not find any reason that creates a doubt or suspicion with regard to the said testimony. Nothing inconsistent has appeared in the cross examination either. The medicals records (Ex. DW-8/A) maintained by Tihar Jail Hospital reveal that for approximately two months, i.e., from 11.03.2007 till 01.05.2007, the appellant was continuously undergoing treatment. From the aforesaid discussion, it is apparent that the appellant had suffered injuries on his person which were grievous and dangerous so as to hamper the appellant from following his routine course in life.

32. In his statement u/s 313 Cr.P.C. the appellant explained the cause of injuries and about the incident in the following manner:-

Q. 45. It is further in evidence against you that PW-11 SI Rama Devi who was posted at PCR ITI on 4.3.2007 at about 5:08/5:09 p.m. was attending channel no. 113 received an information from Ramesh from telephone no. 9312634110

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

that a quarrel at Z-Block, Sukhi Nehar, near DSM School, Prem Nagar-II and he filled up PCR from Ex. PW-11/A and thereafter he forwarded the same to the communication cell of PCR. What have you to say?

Ans. It is correct that aforesaid information might have been given by aforesaid person Ramesh as Shambhu and Avdesh alongwith his others accomplices have come to my house and after breaking the door of my house beaten me, Raghu Raj, my nephew Rohit and other family members with lathis, dandas and other weapons as my house is near at Z-Block, Sukhi Nehar, near DSM School, Prem Nagar-II. We had sustained severe injuries.

Q. 61. Do you want to say anything else?

Ans. I am innocent and falsely implicated in this case along with my brother at the instance Sambhu and Avdesh and SI Puran Pant. On 4.3.2007 at about 5:00 p.m. Sambhu, Avdesh, Netrapal, Ravi, Dharamvir along with other accomplices had come to my house which is at Z-Block, Sukhi Nehar, near DSM School, Prem Nagar-II and after breaking the door of my house beaten me, Raghu Raj, my nephew Rohit and other family members with lathis, dandas and other weapons. We had sustained severe injuries. We were immediately admitted in ESI Hospital by my nephew Rohit. Sambhu to save himself and his aforesaid accomplices, falsely implicated me and my brother for the murder of Hari Prasad. He along with his accomplices would have killed Hari Prasad.

33. From the statement tendered by the appellant u/s 313 Cr. P.C., it appears that on 04.03.2007 at about 5:00 p.m. there was a scuffle between two parties with the deceased, Shambhu (PW-1), Ravi (PW-5), Avdesh (PW-4), Netrapal (PW-2) and Dharambir (PW-7) on one side and appellant along with Raghu Raj, Giri Raj and one Rohit on the other side. The appellant in fact stated that it was the deceased who along with his companions attacked at the appellant''s residence and on this fight erupted between the two groups. Resultantly, mutual blows were exchanged. The appellant has stated that injuries were inflicted on him by the deceased along with his companions.

34. We shall first deal with the aspect as to what would be the effect of non-explanation of injuries by the prosecution.

In the case of Takhaji Hiraji Vs. Thakore Kubersing Chamansing and Others, , the Supreme Court dealt with the question of non-explanation of injuries sustained by the appellant by the prosecution. The Supreme Court observed that in Rajendra Singh and Others Vs. The State of Bihar, : Ram Sunder Yadav and Others Vs. The State of Bihar, and Vijayee Singh and others Vs. State of U.P., , all three Judge Bench decisions, the view taken consistently is that it cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before the non-explanation of the injuries on the person of the accused by the prosecution witnesses may affect the prosecution case, the court

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

has to be satisfied of the existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case.

In Amarjit Singh Vs. State of Haryana, the Supreme Court observed that it is true that every injury is not liable to be explained when the accused pleads a defence but contrarily an obligation does lie on the prosecution to explain the presence of a serious injury.

In State of Gujarat Vs. Bai Fatima and Another, the Supreme Court held that there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. (See Lakshmi Singh and Others Vs. State of Bihar, .)

In the decision of Nagarathinam (supra) the Supreme Court has held as under:-

20. The genesis of the occurrence is, therefore, shrouded in mystery. This occurrence, admittedly, took place, but who were thus initial aggressors i.e. the prosecution witnesses or the appellants, is difficult to say. The High Court has found that the prosecution had not been able to prove the charge of rioting. The appellants and others did not have any common object to cause death of the accused of (sic) the prosecution witnesses. We have noticed hereinbefore the nature of injuries on the persons of the appellants. The first appellant received two stab wounds and also an incised wound over the scalp at frontal region. Appellant 2 received deep-cut wound and an incised wound over the scalp left side parietal region. Appellant 3 also received an incised scalp wound over frontal parietal region. It is not denied and disputed that they were in the hospital as indoor patients for a few days. We have furthermore noticed hereinbefore that they were also arrested after a few days.

xxx xxxx xxx

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

30. How and in what manner the appellants came to have such bamboo sticks in their possession had not been disclosed. All the appellants have suffered at least three injuries each.

31. Whereas only one injury is said to have been caused by Appellant 2 in the stomach of the first deceased by a knife, all other injuries have been caused by hard-and-blunt substance, whereas the appellants suffered injuries inflicted on them by knife and bottles.

32. The investigating officer did not explain as to why the appellants were not put under arrest on the date of occurrence itself, despite the fact that they were admitted in the hospital. The cause for delay in arresting the accused has not been explained at all.

33. In the facts and circumstances of this case and keeping in view the defence raised by them, we are of the view that it was obligatory on the part of the prosecution to explain the injuries on the persons of the appellants. In Bishna @ Bhiswadeb Mahato and Others Vs. State of West Bengal,] this Court held: (SCC pp. 674-75, para 50) "50. The fact as regards failure to explain injuries on the accused vary from case to case. Whereas non-explanation of injuries suffered by the accused probabilises the defence version that the prosecution side attacked first, in a given situation it may also be possible to hold that the explanation given by the accused about his injury is not satisfactory and the statements of the prosecution witnesses fully explain the same and, thus, it is possible to hold that the accused had committed a crime for which he was charged. Where injuries were sustained by both sides and when both the parties suppressed the genesis in the incident, or were coming out with the partial truth, the prosecution may fail. But, no law in general terms can be laid down to the effect that each and every case where prosecution fails to explain the injuries on the person of the accused, the same should be rejected without any further probe. (See Bankey Lal and Others Vs. State of U.P.,] and Mohar Rai and Bharath Rai Vs. The State of Bihar,].)

34. In that case, however, the injuries were held to have not been necessary to be explained as the appellants therein were found to have been guilty of commission of an offence u/s 148 of the Penal Code. In the instant case, the prosecution has not been able to show beyond all reasonable doubt that the appellants were the aggressors. The prosecution has also not been able to establish any common intention on the part of the appellants to cause the death of that person.

(Underlining added)

In Nagarathinam (supra), the Supreme Court, in a nut shell, has held that consequences of failure on part of the prosecution to explain injuries on the accused will vary according to the facts and circumstances of each case. In cases where the genesis of an incident is under cloud, if the prosecution witnesses fully explain as to how the accused received injury/injuries, then the prosecution need

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

not to probe further into the matter. However, no straitjacket formula can be laid down and each case has to be considered on its own facts and circumstances.

35. In the present case, PW-23 Inspector Ravinder Singh has deposed that he was aware about the appellant''s admission in the ESI Hospital for treatment of several injuries on the night intervening between 04.03.2007/5.03.2007. He stated that no interrogation could be made from the appellant as he was under treatment. In cross examination, PW-23 deposed that he had seen the MLC of the appellant (Ex. PW-21/DA) and other accused Raghu Raj but did not remember what injuries were mentioned in the same. PW-23 further admitted that he did not remember whether he mentioned about the injuries and fracture on the body of the appellant and Raghu Raj at time submitting the challan u/s 173 Cr.P.C. He did not inquire or look into the medical records or x-ray report of the either the appellant of the co-accused Raghu Raj. PW-23 interrogated the appellant on 05.03.2007 but the appellant denied making a statement although he verbally confessed his guilt. The statement made by PW-23 with respect to the investigation conducted by him about the injuries suffered by the appellant is highly unsatisfactory and disappointing. It appears from his statement that he made no efforts to inquire in to cause of injuries or the manner in which injuries of such serious nature could have been suffered by the appellant soon after the alleged incident. Even after the transfer of the appellant from ESI Hospital to Tihar Jail Hospital on 11.03.2007, no efforts have been made by PW-23 to find out actual cause behind the injuries suffered by the appellant. It is relevant to mention that the appellant underwent treatment at Tihar Jail Hospital for nearly two months. Such a long period treatment would not have been necessary in case the appellant had suffered a simple injury or a mere abrasion. It was incumbent upon PW-23, the investigating officer to probe into the cause of the injuries suffered by the appellant as there were not minor or superficial injuries. The appellant sustained fracture in his right leg which cannot be said to be a superficial injury and it was obligatory on part of the prosecution witnesses to explain the cause of injury sustained by the appellant. Such an inquiry would have been beneficial in finding the truth as to how the incident took place. Further, the explanation put forth by PW-1 Shambhu Nath and PW-5 Ravi in their respective testimonies that the appellant suffered injuries because of falling while he was fleeing from the scene of crime is unacceptable.

36. We shall now scrutinize whether the appellant is entitled to benefit under Exception 4 to 300 IPC in view of the injuries sustained by the appellant and his statement u/s 313 Cr.P.C.

For bringing in operation Exception 4 to Section 300 IPC, 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.

In Surinder Kumar Vs. Union Territory, Chandigarh, , the supreme Court discussed the import of Exception 4 to Section 300 IPC in the following manner:-

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

7. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly....

In Babulal Bhagwan Khandare and Another Vs. State of Maharashtra, the Supreme Court held as under:-

18. 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 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 had 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 a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage.

37. At this stage it is relevant to note the testimony of DW-7 Head Constable Ranbir Singh. DW-7 Head Constable Ranbir Singh was examined by the appellant to show that a complaint (Ex. PW-7/B) had been lodged on 12.04.2007 by the one Rohit alleging attack on the appellant. DW-7 produced the complaint register and proved the same. The relevant entries Ex. DW-7/A and DW-7/C indicate that complaint No. 4158 was filed by Sh. Rohit and according to DW-7, the said complaint was referred to Police Station Sultanpuri on 12.04.2007 for appropriate action. In the complaint Ex. DW-7/B, it is recorded that on 04.03.2007 some assailants attacked the house of the appellant and tried to put it on fire. A call on 100 number was also made by Rohit giving information about alleged attack to the police. The said PCR form is Ex. DY. and it records that the complaint was received from Mobile Phone Number 9873313255 which as per Ex.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

DW-7/B belonged to the complainant Rohit. From the aforesaid defence evidence, it can be seen that the appellant''s nephew Rohit had made a complaint about the attack on the house of the appellant to the police. However, the said complaint was lodged on 12.04.2007 nearly after 8 days of the incident and there is a possibility that the said complaint was lodged as a counter blast.

Nevertheless, as already noted above, the appellant had suffered injuries of grievous nature and the same cannot be disputed. This fact cannot be lost sight of. We find that the impugned judgment has not at all considered the injuries suffered by the appellant and has proceeded to convict the appellant u/s 302 IPC on the premise of the ocular testimonies of the various eye witnesses who in clear and categorical terms deposed that the appellant stabbed the deceased. We are of the opinion that the trial court committed a manifest error by not reflecting upon the injuries caused to the appellant.

What is also noticeable is the fact that the dispute is alleged between PW-1 Shambhu Nath and Raghu Raj (the brother of the appellant) but there is no material on record to show that whether any injuries were inflicted on PW-1 himself. No MLC pertaining to PW-1 is on record. It is strange that the PW-1 Shambhu Nath before court stated that Raghu Raj and Giri Raj blamed him and Gulle @ Avdesh (PW-4) for breaking the slab in front of their house but PW-1 himself was not attacked by either the appellant or Raghu Raj and Giri Raj. It is difficult to accept that the complainant who was the bone of contention escaped unscathed from such a perilous assault in which the deceased lost his life and the appellant also received grievous injuries. Another fact which raises an eye brow about prosecution''s version as to how the alleged incident took place is that the appellant suffered injuries of serious nature whereas except the deceased the other witnesses namely Netrapal (PW-2), Ravi (PW-5) and Dharambir (PW-7) only suffered slight injuries. The MLC of Netrapal (PW-2) is Ex PW-8/C which indicates that he was having an incised wound over the right lumbar region sized 3 cm x 1 cm x 1 cm. PW-8 Dr. Brijesh Singh opined that the injuries were of simple nature and weapon used was sharp. MLC of Ravi (PW-5) is Ex. PW-8/D which indicates a CLW 3 cm x 0.5 cm x 0.5 cm. MLC of Dharambir (PW-7) is Ex. PW-8/B which is proved by PW-8 Dr. Brijesh Singh. PW-8 opined that Dharambir had an incised wound size about 3 cm x 1 cm x 1 cm on the right elbow. The injury was simple and sharp. The MLC''s demonstrate that Netrapal (PW-2), Ravi (PW-5) and Dharambir (PW-7) had suffered mere abrasions and no other significant injury was found on their bodies. We also note that from the site plan Ex. PW-23/A it appears that the houses of all the involved persons, including the deceased and the appellant, are closely located and therefore, it was easily possible for the parties involved to reach the spot within a short span of time. In view of the aforesaid discussion above, it can be inferred that the manner in which the incident took place is not clear and is cloaked with different versions. It can further be inferred that injuries resulted on both parties and therefore, the possibility of the incident resulting on account of sudden fight between the parties is palpably correct and merits acceptance.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

38. However, the prosecution has been able to establish beyond reasonable doubt that the deceased died due the a stab injury meted out by the appellant and same stands proved in view of the ocular testimonies of PW-1 Shambhu Nath, PW-2 Netrapal, PW-5 Ravi, PW-7 Dharambir and PW-9 Gopal which have stood through the test of cross examination without being demolished.

39. Now we shall deal with the aspect of singular blow inflicted with the knife by the appellant. In State of Andhra Pradesh Vs. Rayavarapu Punnayya and Another, , the Supreme Court has set out the distinction between Section 299 and Section 300 IPC. While relying upon the decision in Virsa Singh Vs. The State of Punjab, , it has been held as under:-

12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. 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 this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest 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". This is the lowest type of 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.

13. The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minutiae 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 Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

14. 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)

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

appended to Section 300.

15. 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.

16. 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.

17. 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 intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Kalarimadathil Unni Vs. State of Kerala, .] is an apt illustration of this point.

18. In Virsa Singh Vs. The State of Punjab,] Vivian Bose, J. speaking for this Court, explained the meaning and scope of clause (3), thus (at p.1500):

The prosecution must prove the following facts before it can bring a case u/s 300, ''thirdly''. First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

19. Thus according to the rule laid down in Virsa Singh case of even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be "murder". Illustration (c) appended to Section 300 clearly brings out this point.

20. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general--as distinguished from a particular person or persons--being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code.

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

(Underlining added)

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

From a perusal of the aforesaid judgment it becomes clear that if the intended injury is sufficient to cause death in the ordinary course of nature, the offence will fall under murder. Under Clause 3 of Section 300 IPC, the factum of presence of bodily injury and nature of the injury are purely objective investigations. Thereafter, it has to be discerned whether the injury is either intentional or accidental. The next question is whether the injury is sufficient to cause death in ordinary course of nature. This enquiry is also objective in nature and has nothing to do with the intention of the offender. Once it is established that the offence falls under Clause 3 of Section 300 IPC, the next thing which has to be considered is whether the offence falls under any one of the five exceptions to Section 300 IPC. If the offence is committed under one the circumstances mentioned under Exceptions to Section 300, the offender would be entitled to be punished u/s 304 Part I IPC and not u/s 302 IPC. If the offence under any of the clauses u/s 300 itself is not made out, the offender would be liable for committing an offence of culpable homicide not amounting to murder u/s 299 IPC punishable under either Section 304 Part I or Part II of the IPC.

In Jagrup Singh Vs. State of Haryana, the Supreme Court while dealing with the aspect of death cause by a singular blow observed:

5. In assailing the conviction, learned Counsel for the appellant contends that the appellant having struck a solitary blow on the head of the deceased with the blunt side of the gandhala, can be attributed with the knowledge that it would cause an injury which was likely to cause death and not with any intention to cause the death of the deceased. The offence committed by the appellant, therefore, amounted to culpable homicide not amounting to murder, punishable u/s 304, Part II of the Code. He further contends, in the alternative, that there could be no doubt that the appellant acted in the heat of the moment when he hit the deceased and is, therefore, entitled to the benefit of Exception 4 of Section 300 of the Code. On the other hand, learned Counsel for the State contends that the matter squarely falls within clause Thirdly of Section 300 of the Code. He submits that merely because the appellant rendered a solitary blow with the blunt side of the gandhala on the head would not necessarily imply that the offence amounted to culpable homicide not amounting to murder punishable u/s 304, Part II of the Code.

6. There is no justification for the assertion that the giving of a solitary blow on a vital part of the body resulting the death must always necessarily reduce the offence to culpable homicide not amounting to murder punishable u/s 304, Part II of the Code. If a man deliberately strikes another on the head with a heavy log of wood or an iron rod or even a lathi so as to cause a fracture of the skull, he must, in the absence of any circumstances negativing the presumption, be deemed to have intended to cause the death of the victim or such bodily injury as is sufficient to cause death. The whole thing depends upon the intention to cause death, and the case may be covered by either clause Firstly or clause Thirdly. The nature of intention must be gathered from the kind of weapon used,

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

the part of the body hit, the amount of force employed and the circumstances attendant upon the death.

Similarly, in decision reported as Jagtar Singh Vs. State of Punjab, , it has been held that:

5. The only question that we are called upon to examine in the facts and circumstances of this case is whether the appellant could be said to have committed murder of deceased Narinder Singh punishable u/s 302 of the Indian Penal Code.

6. A quarrel took place on the spur of the moment. The appellant never expected to meet the deceased. When the deceased was just passing by the road in front of the house of the appellant, his forehead dashed with the parnala of the house of the appellant which provoked the deceased to remonstrate the appellant. It is in evidence that there was exchange of abuses and at that time appellant gave a blow with a knife which landed on the chest of the deceased.

7. Undoubtedly, PW 2 Dr. H.S. Gill opined that the blow on the chest pierced deep inside the chest cavity resulting in the injury to the heart and this injury was sufficient in the ordinary course of nature to cause death. The question is whether in the circumstances in which the appellant gave a blow with a knife on the chest, he could be said to have intended to cause death or he could be imputed the intention to cause that particular injury which has proved fatal? The circumstances in which the incident occurred would clearly negative any suggestion of premeditation. It was in a sudden quarrel to some extent provoked by the deceased, that the appellant gave one blow with a knife. Could it be said that para 3 of Section 300 is attracted. We have considerable doubt about the conclusion reached by the High Court. We cannot confidently say that the appellant intended to cause that particular injury which is shown to have caused death. There was no premeditation. There was no malice. The meeting was a chance meeting. The cause of quarrel though trivial was just sudden and in this background the appellant, a very young man gave one blow. He could not be imputed with the intention to cause death or the intention to cause that particular injury which has proved fatal. Neither para 1 nor para 3 of Section 300 would be attracted. We are fortified in this view by the decision of this Court in Jagrup Singh Vs. State of Haryana,]. It was subsequently followed in Randhir Singh alias Dhire Vs. State of Punjab,] and Kulwant Rai Vs. State of Punjab,]. Following the ratio of the aforementioned decisions, we are of the opinion that the appellant could not be convicted for having committed murder of the deceased Narinder Singh. His conviction for an offence u/s 302 IPC and sentence of imprisonment for life are liable to be set aside.

8. The next question is what offence the appellant is shown to have committed? In a trivial quarrel the appellant wielded a weapon like a knife. The incident occurred around 1.45 noon. The quarrel was of a trivial nature and even in such a trivial quarrel the appellant wielded a weapon like a knife and landed a blow in

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…

the chest. In these circumstances, it is a permissible inference that the appellant at least could be imputed with a knowledge that he was likely to cause an injury which was likely to cause death. Therefore, the appellant is shown to have committed an offence u/s 304 Part II of the IPC and a sentence of imprisonment for five years will meet the ends of justice.

40. Now let us consider the facts and circumstances in the instant case in view of the law laid down by the Supreme Court. As noted above the genesis of the occurrence is blurred. It is uncertain as to who were the aggressors. The appellant has also suffered severe injuries. The occurrence appears to be an outcome of sudden fight. There is no cogent evidence on record to demonstrate that there was previous enmity or animosity between the appellant and deceased. As per PW-1 Shambhu Nath, the quarrel happened because PW-1 and PW-4 Gulle had broken the slab in front of the house of the appellant by driving their bikes in the gali. The dispute regarding breaking of slab on the street was a trifle and not the basis of the fatal attack. It is apparent that this was the basis/ foundation of the quarrel but not the motive to cause or commit murder. There were heated arguments and exchange of words and the tempers soured with both sides loosing self control and physically attacking each other. Apparently, there was no premeditation or scheming to cause death of the deceased as from the Site plan (Ex. PW-23/A) it is evident that the houses of the deceased, appellant as well as the eye witnesses were closely located. The crime spot was also within close vicinity. Burst of anger and rage resulted in sudden violence which went out of control. The possibility of appellant getting hold of knife from his house at the spur of the moment is apparent and demonstrable. Undoubtedly, the appellant has inflicted a deep injury on the neck of the deceased which pierced through the muscles and reached the lung, but it must also be borne in mind that a person while quarrelling in heat of passion in a sudden physical or violent fight can act in a manner to which can result into death. Here the injuries suffered by the appellant are relevant and have to be noticed. Further others belonging to the deceased group did not suffer serious injuries. As per the Supreme Court each case has to be weighed on its own merit and a holistic view of the entire transaction has to be taken into consideration in order to find out the nature of the actual offence committed. From the totality of the circumstances as narrated above coupled with the nature of the guilt, we hold that the appellant entitled to benefit of Exception 4 to Section 300 IPC. The punishment is converted from Section 302 IPC to one u/s 304, Part I of the IPC. Accordingly, we convict the appellant u/s 304 Part I IPC and sentence him to undergo rigorous imprisonment for a period of seven years. The quantum of fine imposed by the trial court is upheld. It is noted that the appellant has already undergone incarceration approximately for a period of 5 years and 11 months. The appeal is partly allowed in aforesaid terms.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/radhey-shyam-appellant-hash-state-…