

(2016) 02 GUJ CK 0020
In the Gujarat High Court

Case No : Criminal Appeal Nos. 65 of 2013 and 1962 of 2012

Rambhai Manubhai Gohil

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 03-02-2016

Acts Referred:

Bombay Police Act, 1951 — Section 135, Section 135(1)
Criminal Procedure Code, 1973 (CrPC) — Section 209, Section 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 107, Section 114, Section 299, Section 300,

Citation : (2016) 02 GUJ CK 0020

Hon'ble Judges : Harsha Devani and G.R. Udhwani, JJ.

Bench : Division Bench

Advocate : S.M. Vatsa, Advocate, for the Appellant; Hardik Soni, Additional Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

G.R. Udhwani, J.—1. Criminal Appeals No. 1962 of 2012 and 65 of 2013 respectively preferred by the State of Gujarat and one Rambhai Manubhai Gohil, original accused No. 1, arise out of the judgment and order dated 24.9.2012 passed by learned Additional Sessions Judge, Court No. 13, Ahmedabad, in Sessions Case No. 90 of 2011. While the first mentioned appeal assails the judgment and order aforesaid recording acquittal of Jembhai @ Kanubhai Bajubhai Padhiyar and Jinkubhai Mahribhai Gohil, original accused Nos. 2 and 3 respectively, in respect of the offence punishable under sections 324, 302 and 114 of the Indian Penal Code (hereinafter referred to as "the IPC" for short) as also section 135 of the Bombay Police Act (hereinafter referred to as "the B.P. Act" for short), the other appeal preferred by Rambhai Manubhai Gohil, original accused No. 1, assails the above stated judgment and order of conviction and sentence whereby he has been sentenced to suffer rigorous imprisonment for life qua the offence punishable under section 302 of the IPC and pay fine of Rs. 2000/- and in default of payment of fine, to further undergo simple

imprisonment for six months. The accused No. 1 was also ordered to suffer rigorous imprisonment for one year for the offence punishable under section 324 of the IPC and pay fine of Rs. 500/- and in default of payment of fine; to suffer simple imprisonment for two months. For the offence punishable under section 135 of the B.P. Act, the accused No. 1 was sentenced to undergo rigorous imprisonment for six months and pay fine of Rs. 500/- and in default of payment of fine, to further undergo simple imprisonment for two months. However, during the course of argument, learned advocate for the accused No. 1 confined his arguments to the quantum of sentence and the nature of offence contending that the offence in question was not murder but it was culpable homicide not amounting to murder. Therefore, this court has referred to the facts and considered the case in the above limited context qua accused No. 1.

2. It was the prosecution case that at about 20.30 hours i.e. 8.30 p.m. on 15.1.2009 at the shop of one Ashokbhai Rabari, PW-8, accused No. 1 had purchased pan masala and at that point of time PW-7 was also there and he asked accused No. 1 to deliver a cigarette to a person named "Chhaka"; whereupon the quarrel ensued between accused No. 1 and PW-7. Both of them then left the place. Accused No. 1, thereafter, returned at about 9.00 p.m. enquiring about PW-7 with PW-8 whereupon he informed him that PW-7 had gone towards Leelanagar.

3. At about 10 p.m. while PW-7 was heading to his home and had reached near Sangvi grain shop, accused Nos. 1, 2 and 3 came there, picked up quarrel with him, abused him and accused No. 1 opened knife and gave one blow with it on the left eye brow and other on the left thigh of PW-7 whereupon PW-7 started shouting and gave a call to nab accused No. 1 who was running away towards Leelanagar ground/Highway. On hearing the shouts from PW-7, four persons, namely, Vikas @ Viki Babubhai, PW-10; Rahul Bahadursinh Tomar, PW-5; Mukesh Kesaji Rathod, PW-11 and the deceased Sandeepsinh Chhatrapalsinh Chauhan who were sitting on a camel cart in the Leelanagar ground, chased the accused and Sandeepsinh being the first amongst the chasers, could nab accused No. 1 whereupon, in order to wriggle out of his clutches, accused No. 1 gave a knife blow on his chest and another blow on his waist because of which Sandeepsinh, after walking few steps, fell down profusely bleeding and accused Nos. 2 and 3 entered into a free fight with other chasers and ultimately, all the accused fled the scene and Sandeepsinh was taken to Shardaben hospital where he was declared dead at about 10.30 p.m.

4. An FIR was lodged by one Jayramsinh Bhikhamsinh Chauhan, PW-6, Exh. 28 on 15.1.2009 in Shardaben hospital with the police official of Odhav Police Station. A bare perusal of the FIR indicates that the informant learnt about the incident of assault on his nephew, deceased Sandeepsinh Chhatrapalsinh Chauhan from his employer who in turn had learnt about the incident through a telephonic message. As the facts stated in the FIR reveal only above limited aspect, it is not necessary to refer to in greater detail at this stage.

5. Upon registration of the FIR, investigation was handed over to one Jaswantsinh Bababhai Rana, PW-23. During the course of investigation, he collected incriminating material against the accused, drew various panchnamas in that regard, discovered the scene of offence through accused No. 1 and had also recovered the offending weapon i.e. knife during the panchnama under section 27 of the Evidence Act. After collecting other necessary material and following the required procedure, he laid chargesheet against all the three accused in the court of competent Magistrate. Since, the learned Magistrate had no jurisdiction to try the offence as indicated in the chargesheet, the case was committed to the Sessions Court, Ahmedabad, under section 209 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C.") which was ultimately registered as Sessions Case No. 90 of 2011. The charge Exh. 7 came to be framed against the accused which was read over and explained to the accused who pleaded not guilty to the charge and opted for trial. The accused were accordingly tried and on conclusion of the evidence adduced by the prosecution, their statements under Section 313 of the Cr.P.C. came to be recorded. The accused did not examine themselves nor any evidence in the defence was led by them.

6. Thereafter, the rival arguments were heard and upon consideration of the evidence and the arguments, the impugned judgment and order as above was pronounced.

7. During the course of hearing before the Court below, the following documentary and oral evidence was adduced by the prosecution:

8. The learned counsel for the accused No. 1 would contend that the nature of offence alleged to have been committed by accused No. 1 cannot, by any stretch of imagination, be said to be murder as defined in section 300 of the IPC but at the best, it can be said to be culpable homicide not amounting to murder under section 299 of the IPC for which the punishment lesser than the life imprisonment may be imposed on accused No. 1. Reference was made to Exception 4 to section 300 of the IPC which postulates that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage or acted in a cruel or unusual manner. It was contended that at the best the testimonies of the witnesses and emerging circumstances from the record make it evident that there was no premeditation and there was a sudden quarrel and sudden fight and the incident occurred in the heat of passion whereupon two blows, one of which ultimately proved to be fatal, were inflicted on the person of deceased Sandeepsinh, after the said deceased nabbed accused No. 1. It was pointed out that the incident occurred in the darkness during which it was not possible for accused No. 1 to select or identify a specific part of the body of deceased Sandeepsinh for inflicting the blows on him. It was submitted that despite being armed with knife, accused No. 1 kept on running ahead of Sandeepsinh and other chasers and at no point of time during such chase any

blow was given to any of the chasers but it was only when he was nabbed by the deceased that the blow in the darkness, out of fear of being nabbed and lynched by other chasers, was dealt unintentionally to the deceased which unfortunately, landed on the vital part of the body of the deceased. While drawing the attention of this court to the charge Exh. 7, it was argued that the intention of accused No. 1 to wriggle out of the clutches of the deceased after he was nabbed, is clearly spelt out therein. It was also contended that even if this court were to conclude that benefit of Exception 4 to section 300 of the IPC was not available to the accused, still in the absence of proof of necessary ingredients as are referred to in clause firstly to fourthly of section 300 of the IPC, the act of accused No. 1 would not amount to murder but culpable homicide not amounting to murder within the meaning of section 299 of the IPC. In support of his submission, learned counsel for accused No. 1 has relied on the following decisions of the Supreme Court:

- "1. Kulesh Mondal v. State of W.B. reported in , (2007) 8 SCC 578
2. Harjinder Singh v. Delhi Administration reported in , AIR 1968 SC 867
3. Tholan v. State of Tamil Nadu reported in , (1984) 2 SCC 133
4. Pulicherla Nagaraju alias Nagaraja Reddy v. State of A.P. reported in , (2006) 11 SCC 444
5. Abdulkadar Mansurmiya Malek v. State of Gujarat reported in 1998 Supreme Court Cases (Cri.) 569"

8.1 Learned counsel for accused No. 1 urged this Court to treat the sentence already undergone as the sentence for the purpose of offence under Section 299 of the IPC.

9. On the other hand, learned Additional Public Prosecutor supported the impugned judgment and order by submitting that all the parameters necessary for conviction of accused No. 1 for the offence under section 300 of the IPC were duly established and no error whatsoever worth the name was committed by the court below. Referring to the deposition of the witnesses, it was submitted that the present case would not fall within Exception 4 to section 300 or section 299 of the IPC inasmuch as while murder was not premeditated, there was certainly no evidence of fight between accused No. 1 and the deceased. It was argued that none of the ingredients of Exception 4 to section 300 of the IPC were attracted in the facts of the case and that accused No. 1 who was laced with knife gave a fatal blow intentionally and deliberately on the vital part of the body of the deceased with such a great amount of force that it punctured the heart of the deceased and pierced through his lungs. It was argued that if really accused No. 1 intended to wriggle out of the clutches of the deceased, he would not have used such a force and would have dealt only single blow on non-vital part of the body of the deceased. However, two blows, one of which proved fatal, were given to the deceased. It was argued that though the existence of darkness at the

place of offence has been deposed to by two witnesses, 15th January, being the night next to full moon night, there was light sufficient enough to see a person and therefore, accused No. 1, even after being able to see the deceased, intentionally dealt a fatal blow on the vital part of the body of the deceased.

10. As regards accused Nos. 2 and 3, it was argued that they were accomplices of accused No. 1, accompanied and associated themselves in the criminal act of accused No. 1 and thus abetted the offence within the meaning of section 107 of the IPC. It was argued that both the accused were duly identified by the witness in the court as well as during test identification parade. It was argued that the court below ignored the evidence qua accused Nos. 2 and 3 and thus rendered a perverse finding while recording the acquittal of the said accused.

11. The learned counsel for accused Nos. 2 and 3, while referring to the evidence of the witnesses, would contend that there was no evidence establishing complicity of accused Nos. 2 and 3 in the offence in question. That none of the witnesses have attributed any overt act to accused Nos. 2 and 3 within the meaning of section 107 of the IPC and therefore, no offence against them was made out and the trial court was justified in recording their acquittal. It was argued while relying upon the testimony of PW-7, that there was no credible evidence establishing the identity of accused Nos. 2 and 3 inasmuch as, admittedly, before about two and half hours of identification parade which was held at about 1.00 p.m. on 27th May, PW-7 was called in the police station and was confronted with two accused i.e. accused No. 1 and 3 and that the witness fumbled in the identification of the accused in the court inasmuch as two persons who were not arrayed as accused were identified by him.

12. Having considered the rival contentions and having carefully examined the record of the case and having perused the impugned judgment as well as the authorities cited at the bar, this court records the following reasons for its judgment.

13. As regards the death of the deceased being homicidal one, the same having not been disputed by the learned counsel for the accused, it is not necessary to delve upon it in greater detail. Suffice it to say that the prosecution has succeeded in establishing the homicidal death of the deceased through Medical Officer, who while performing autopsy of the dead body of deceased Sandeepsinh, found the above stated fatal injury on the person of the deceased which was sufficient enough in the ordinary course of the nature to cause death of a person and in fact, the death of Sandeepsinh was caused on account of the said injury as deposed by him.

14. The culpability of accused No. 1 is not required to be examined in extenso in view of the confinement of the submissions of the learned counsel for the said accused as indicated to the extent above. Suffice it to say that PW-7 is the person who was initially present at the pan shop of PW-8 and to whom two simple injuries were caused by accused No. 1 as pointed out hereinabove and

who raised alarm calling to nab the accused. PW-8 is the owner of pan shop and witnesses Rahul Bahadursinh Tomar Exh. 32, PW-10 and PW-11 who was declared hostile, were the persons who were occupying the camel cart parked in Leelanagar ground and who picked up the call given by PW-7 to nab the accused. Except PW-11, all other aforesaid witnesses bore testimony to the facts indicated in the charge Exh. 7 without any material contradiction, omission or improvement. PW-7, PW-8 and PW-10 deposed the identification of accused No. 1 amongst others, in the court. PW-12 is the panch witness bearing testimony to the recovery of the knife during the discovery through accused No. 1. Similarly, PW-15 bears the testimony to the discovery of the weapon of offence under section 27 of the Evidence Act through accused No. 1. PW-23 bears testimony to his investigating the case and laying the chargesheet before the court. The testimony of the other witnesses as regards recovery of articles like slippers, shirt of accused No. 1 and other material is not that significant for the purpose of rendering decision in these appeals and therefore, no detailed discussion is made.

15. In the backdrop of the aforesaid evidence on record, the culpability of accused Nos. 1, 2 and 3 is required to be examined.

16. The first question is as to whether accused No. 1 committed the offence on the spur of the moment during the quarrel, in the heat of passion and during the fight that ensued the quarrel and that he did not take unfair advantage of the situation as provided in Exception 4 to section 300 of the IPC. In the facts and circumstances noticed from the testimony of the witnesses, it is although true that the offence was committed by accused No. 1 without premeditation inasmuch as he had no axe to grind against deceased Sandeepsinh who was chasing him while all the three accused were trying to flee after accused No. 1 caused injuries to PW-7 as duly proved by Dr. Manish, PW-21, it cannot be disputed that intention of the accused was to escape after causing injuries to PW-7 as aforesaid. It is also not disputed and it is borne out from the evidence on record that at no point of time during the course of occurrence between 8.30 p.m. and before the last occurrence at 10.00 p.m., fatal injuries were caused by any of the accused to any person and or to PW-7 with whom accused No. 1 had animosity. Concededly, PW-7 was not armed with any weapon when accused No. 1 was armed with knife and dealt simple injuries on the person of PW-7, despite animosity with him. Further, at no point of time before he was nabbed, accused No. 1 caused any injury to his chasers despite being armed with open knife. Thus, the above facts would indicate lack of intention with accused No. 1 to kill or cause serious injuries to any of the persons, despite his possessing deadly weapon. Concededly, Sandeepsinh with whom accused No. 1 had no axe to grind, was the first person amongst the chasers to reach accused No. 1 and he could successfully nab him and as is evident from the charge levelled against the accused that two blows were dealt by accused No. 1 on the person of deceased Sandeepsinh with an intention to wriggle out of his clutches. Can it be said, under such circumstances, that accused No. 1 intended a fatal blow on the vital part of the body of the deceased with an intention to cause his death? This court

will revert to this question a little later as at this stage it is material to answer the question in reference to Exception 4 to section 300 of the IPC.

17. Before delving upon the above question, it will be beneficial to refer to two decisions rendered in *Harjinder Singh v. Delhi Administration* (supra) and *Pulicherla Nagaraju alias Nagaraja Reddy* (supra) relied on by the learned counsel for accused No. 1 as also the decision dated 11.1.2016 rendered in Criminal Appeal No. 539 of 2011 in the case of *Umeshbhai Premabhai Ahir v. State of Gujarat* by this court where one of us (Harsha Devani, J) was a party. In *Pulicherla Nagaraju alias Nagaraja Reddy* (supra) the Apex Court after referring to the facts of the case before it as also number of decisions addressing Explanation 4 to section 300 as also section 302 and section 304 Part-I and II of the IPC, ruled in paragraph No. 29, thus:

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

18. In *Harjinder Singh v. Delhi Administration* (supra), the Apex Court was confronted with clause "thirdly" of section 300 as also section 304 Part I and II

of the IPC. The Apex Court after referring to the observations made in the case of Virsa Singh v. State of Punjab, , AIR 1958 SC 465 and Rajwant Singh v. State of Kerala , AIR 1966 SC 1874, respectively, observed in paragraph Nos. 8 and 9 thus:

"para 8 - It seems to us that all the ingredients which were laid down this Court in that case have not been established in this case. Bose, J., speaking for the Court observed:

"To put it shortly, the prosecution must prove the following facts before it can bring a case under s. 300, "3rdly";

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,.

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender." The learned Judge further explained the third ingredient at p. 1503 in the following words:

"The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict "the injury" that is proved to be present. If he can show that he did not, or if the totality of" the circumstances justify such an inference, then, of "course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor, there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion."

9. In Rajwant Singh v. State of Kerala, , AIR 1966 SC 1874. 1878 Hidayatullah, J. referring to , 1958 SCR 1495 : (AIR 1958 SC 465) observed:

"As was laid down in , 1958 SCR 1495 : AIR 1958 SC 465) for the application of this clause it must be first established that an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is

satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is satisfied." It seems to us that the High Court has not considered whether the third ingredient laid down by Bose, J. in , 1958 SCR 1495 : (AIR 1958 SC 465) has been proved in this case or not. In our opinion the circumstances justify the inference that the accused did not intend to cause an injury on this particular portion of the thigh. The evidence indicates that while the appellant was trying to assault Dalip Kumar and the deceased intervened, the appellant finding himself one against two took out the knife and stabbed the deceased. It also indicates that the deceased at that stage was in a crouching position presumably to intervene and separate the two. It cannot, therefore, be said With any definiteness that the appellant aimed the blow at this particular part of the thigh knowing that it would cut the artery. It may be observed that the appellant had not used the knife While he was engaged in the fight with Dalip Kumar. It was only when he felt that the deceased also came up against him that he whipped out the knife in these circumstances it cannot be said that it has been proved that it was the intention of the appellant to inflict this particular injury on this particular place. It is, therefore, not possible to apply Clause 3 of Section 300 to the act of the accused."

19. This court in *Umeshbhai Premabhai Ahir v. State of Gujarat* (supra) decided on 11.1.2016 addressed itself qua Exception 4 to section 300 of the IPC and observed in paragraph Nos. 31 thus:

"Exception 4 to section 300, IPC provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. From the facts as emerging from the record, it is manifest that the incident took place suddenly and was not a premeditated one. However, on a plain reading of Exception 4 it is clear that the mere fact that the culpable homicide was not a premeditated one would not amount to the offence not being murder. The other ingredients of Exception 4 would also be required to be satisfied."

20. This court in the aforesaid judgment, after referring two decisions on the point in paragraph Nos. 32 and 33 respectively, further observed at paragraph No. 34 thus:

"From the principles propounded in the above decisions, Exception to section 300, IPC can be invoked if the death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or having acted in a cruel or unusual manner; and (d) the fight must be with the person killed. It is not sufficient to show that there was a sudden quarrel and there was no premeditation. In the present case, undisputedly the offence was committed without any premeditation. Therefore, the first condition for invoking Exception 4 is duly satisfied."

21. Thus, it is required to be seen that as to whether in the light of the evidence on record, the principles emerging as regards the applicability of Exception 4 to section 300 of the IPC are attracted in the facts of the present case. As indicated above, the act attributed to accused No. 1 was done without premeditation. The next ingredient of Exception 4 to section 300 is "sudden fight". No material evidencing sudden fight was brought on record. No evidence supports the quarrel or fight or combat between accused No. 1 and the deceased. The evidence indicates that immediately after accused No. 1 was nabbed by the deceased, two knife blows, one of which was proved to be fatal, were dealt by accused No. 1 without even warning the deceased. Therefore, the action of accused No. 1 cannot be said to be in the heat of passion during the quarrel or sudden fight. Even the next ingredient of Exception 4 to section 300 i.e. "the accused should not have taken advantage or acted in a cruel or unusual manner" is not satisfied inasmuch as he was armed with deadly weapon knife and the deceased was not, and still a fatal blow was dealt by him. Thus none of the ingredients as emerging from Exception 4 to section 300 of the IPC as explained and reiterated in plethora of authorities pronounced by this court and the Apex Court were attracted in the present case. Accused No. 1, therefore, by his conduct, has denied himself the benefit of Exception 4 to section 300 of the IPC.

22. Referring to the next question as to whether the act of accused No. 1 can still be construed as culpable homicide not amounting to murder, it is required to be noticed that cases of culpable homicide amounting to murder and those not amounting to murder, both fall under the category of unlawful homicides. Culpable homicide is not murder when the case falls within one of the Exceptions to section 300 of the IPC. Thus, even in the absence of attraction of one of such five Exceptions, the prosecution still must be required to prove the case within one of the four clauses of section 300 of the IPC to sustain the charge of murder, in the absence of which, charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described in section 299 of the IPC.

23. In the aforesaid backdrop, the principal question that now falls for consideration is whether the offence disclosed by the facts and circumstances, established by the prosecution against accused No. 1 is murder or culpable homicide not amounting to murder. This court in the case of Umeshbhai Premabhai Ahir (supra) after referring to the decision of the Apex Court in the case of Virsa Singh v. State of Punjab (supra) held in paragraph No. 40 thus:

"Thus, according to the rule laid down in the above case, even if the intention of the 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"."

24. In the above case, a reference was also made to a decision of the Apex Court in the case of State of Andhra Pradesh v. Rayavarapu Punnayya, reported in , (1976) 4 SCC 382, which pointed out the distinction between section 299 and

section 300 of the IPC. It was held in the facts and circumstances of that case, that in order to sustain the charge under section 302 of the IPC, the prosecution has to establish the ingredients of clause "thirdly" to section 300 of the IPC, namely, that the act by which death is caused was done with the intention of causing bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. The court also held, after viewing the case in light of the principles enunciated in *Virsa Singh v. State of Punjab* (supra) that for the purpose of proving that the case falls under clause "thirdly" to section 300 of the IPC, the prosecution must establish objectively that the bodily injury is present. It was also held that the prosecution must also prove the nature of the injury as also the intention to inflict that particular injury i.e. to say that the injury was not accidental or unintentional or that some other injury was intended.

25. Thus, bearing in mind the principles of law deduced from various authorities as above, the question whether the case would fall under section 299 or section 300 is required to be appreciated.

26. As regards existence of injury on the person of the deceased, as indicated above, there is no dispute and the medical evidence as deposed by the Doctor convincingly brings home the fact that the injury existed on the person of the deceased. The nature of injury is also duly proved through the aforesaid evidence.

27. As to whether the injury was intentional, detailed facts are pointed out in paragraph No. 16 above. It is discerned from the said facts and evidence that despite animosity with PW-7, at no point of time, accused No. 1 dealt a fatal blow to him, though he himself was armed with the knife and PW-7 was not. This fact would indicate the state of mind of accused No. 1 of not using the knife for fatal blow. The blow was dealt by accused No. 1 to the deceased not before his being nabbed by the deceased. He had no animosity with the deceased and thus before being nabbed, he had no intention to deliver any fatal blow to the deceased. After dealing the blows causing two simple injuries to PW-7, the accused persons intended to flee after they were being chased by the witnesses as above. Had they been successful in fleeing, accused No. 1 would not have, in all probabilities, dealt any blow to the deceased. He had, thus, no intention to cause injury to any of the chasers including the deceased before he was nabbed. If a person is chased by more than one person and has no intention to challenge the chasers, the spontaneous reaction after being nabbed would be to wriggle out of the clutches of the chaser and in the process, though not justified, may spontaneously inflict injury with the weapon he is possessed of. The fear of being nabbed and lynched by the chasers can also be one of the unjustifiable reasons to cause injury to his chaser, of course, if not otherwise intended to cause his death.

28. Apart from the facts discussed in greater detail hereinabove, as conceded by PW-7 and witness Rahul Bahadursinh Tomar Exh. 32 that the surroundings of the

spot at which the blows were dealt by accused No. 1 to the deceased were in darkness. There is no evidence justifying the acceptance of the argument of learned Additional Public Prosecutor that in the light of moon, it was possible for accused No. 1 to see and intentionally select the vital part of the body of the deceased for a fatal blow. It, thus, appears that accused No. 1 had no opportunity to intentionally select the vital part of the body for a fatal blow to the deceased. All the facts and circumstances discussed hereinabove would show that the criminal act of accused No. 1 in dealing the two blows by means of knife to the deceased, one of which later proved fatal, was not, in fact, intended on the vital part of the body of the deceased but unfortunately and accidentally, it landed on such part resulting into death of Sandeepsinh. Under the circumstances, this court is of the opinion that the act of accused No. 1 cannot be construed as murder but it must be construed as culpable homicide not amounting to murder. The trial court appears to have been swayed away by the facts that accused No. 1 was armed with deadly weapon whereas the deceased was not and that the blow was dealt by accused No. 1 on the vital part of the body for holding that the ingredients of section 299 of the IPC were not attracted and the act of accused No. 1 amounted to murder. It, however, failed to consider the relevant legal provisions in their true perspective as explained and reiterated by this court and the Apex Court in plethora of decisions discussed hereinabove. The findings of the trial court to that extent, therefore, cannot be sustained.

29. As regards accused Nos. 2 and 3, it is noticed from the evidence on record that except their being in the company of accused No. 1 all throughout no accusation of any overt act of causing or aiding accused No. 1 to cause fatal bodily injuries to the deceased was brought on record. Even exhortation encouraging accused No. 1 to kill the deceased is not attributed to any of the said accused. They were charged with section 114 of the IPC stating that they aided the act of accused No. 1. There is no indication or whisper in the evidence of their instigating or engaging in the conspiracy or intentionally aiding the doing of act in question by accused No. 1, as necessitated by section 107 of the IPC to sustain charge under section 114 of the IPC. That apart, as is evident from the testimony of PW 7, the investigation was not honest in seeking identification of the accused inasmuch as before about one and half hours of holding the test identification parade, PW 7 was summoned to the police station and was shown accused Nos. 1 and 3. Further as is evident from the testimony of PW 7, he fumbled in identifying the accused except accused No. 1 during his testimony in the court. Assuming that identification of the accused was properly done, at the most the said identification would only establish the accompaniment of accused Nos. 2 and 3 with accused No. 1. That fact by itself, in the absence of proof of other ingredients of section 107 of the IPC in the evidence as indicated above, would not be sufficient to bring home the guilt of accused Nos. 2 and 3 for the charge under section 114 of the IPC. This court is, therefore, of the opinion that the trial court was justified in recording acquittal of accused Nos. 2 and 3. No case for the interference is, therefore, made out and the State appeal No. 1962

of 2012 must fail. The State appeal, therefore, fails and is accordingly, dismissed. Bail bonds stand cancelled.

30. As regards appeal No. 65 of 2013, in view of above discussion, the conviction of accused No. 1 is required to be altered from section 300 to one under Section 299 of the IPC and the punishment is accordingly required to be altered to one under section 304 Part II of the IPC which provides imprisonment with or without fine extending to 10 years. Accordingly ordered.

31. Accused No. 1 was arrested on 21.1.2009. Since then he has suffered imprisonment for 6 years, 10 months and 20 days. It is not the prosecution case that accused No. 1 is a hardened criminal or habitual offender or that he has antecedents of criminal offence. In absence of such a case, this court is of the opinion that the sentence already undergone by accused No. 1 should be the sentence imposed upon him under Section 304 Part-II in addition to the fine and sentence in default thereof, as imposed by the trial court. Accordingly ordered. Other sentence upon accused No. 1 imposed by the trial court under section 324 of the IPC and under section 135(1) of the B.P. Act is maintained.

32. Under the above circumstances, Criminal Appeal No. 65 of 2013 filed by accused No. 1 succeeds in part and is allowed accordingly.