

(2014) 03 AHC CK 0139

In the Allahabad High Court

Case No : Government Appeal No. 1659 of 1982 and Criminal Appeal No. 1097 of 1982

State

APPELLANT

Vs

Naushad

RESPONDENT

Date of Decision : 25-03-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374, 378
Penal Code, 1860 (IPC) — Section 109, 147, 148, 149, 299

Citation : (2014) 2 ACR 1548 : (2014) 85 ALLCC 818

Hon'ble Judges : Rakesh Tiwari, J; Kalimullah Khan, J

Bench : Division Bench

Advocate : Vivek Prasad Mathur, Advocate for the Respondent

Judgement

Kalimullah Khan, J.—These two appeals connected arise out of the impugned judgment and order dated 5.4.1982 and are entwined by same set of facts and law, therefore, they are being decided together by this common judgment. Government Appeal No. 1659 of 1982 u/s 378 Cr.P.C. "State of Uttar Pradesh v. Nausad and five others", as well as criminal appeal No. 1097 of 1982 u/s 374 Cr.P.C. have been filed by accused appellants Yamin and five others challenging the impugned judgment and order dated 5.4.1982 whereby the learned Trial Court has acquitted the accused Yamin u/s 302 I.P.C. and rest of the accused acquitted u/s 302/149 I.P.C. but convicted accused Naushad, Akhlaq, Yamin, Maqsood u/s 148 I.P.C. while accused Mahfooz and Shahroz u/s 147 I.P.C. Accused Yamin was convicted u/s 304 Part II of I.P.C. and u/s 324/149 I.P.C. Accused Naushad, Akhlaq and Maqsood were held guilty u/s 324 I.P.C., Mahfooz and Shahroz were convicted u/s 324/149 I.P.C. Accused Naushad was further convicted u/s 324/149. Akhlaq was convicted u/s 324/149 I.P.C. while Maqsood was convicted u/s 324/149 I.P.C. Accused Yamin was awarded sentence of three years rigorous imprisonment u/s 304 Part II of I.P.C. and he was further sentenced to undergo rigorous imprisonment for six months u/s 324/149 I.P.C. He was further sentenced to undergo rigorous imprisonment for six months u/s

148 I.P.C. However, all the sentences were directed to run concurrently.

2. Accused Naushad, Akhalaq, Maqsood, Mahfooq and Shahroz were granted benefit of section 4 of U.P. Probation of First Offenders Act. Instead of sentencing them to any punishment at once learned Trial Court released them on probation of good conduct on their entering into a bond of Rs. 3000/- with two sureties each in the like amount to appear and receive sentence whenever called upon during a period of two years and in the meantime to keep the peace and be of good behaviour.

3. Against the aforesaid judgment and order, Government Appeal was filed to set aside the order of acquittal of all the accused for an offence punishable under sections 147, 148, 302/149 & 324/149 I.P.C. and convict & sentence them according to law whereas criminal appeal was filed with prayer to set aside the conviction and sentence of the appellants and acquit them of the charges levelled against them.

4. During the pendency of these appeal, accused Naushad, Maqsood and Mahfooz (respondents No. 1, 4 & 6) have died, therefore, appeal filed against them has been abated vide order dated 2.2.2012. This appeal pertains to respondents No. 2, 3 & 5.

5. Khizar Mohammad S/o Sharif Khan, Muslim Rajpoot, R/o village Raghunathpur, P.S. Narsaina, District Bulandshahar lodged a written report Exhibit Ka-1 with Police Station Narsaina, District Bulandshahar on 19.5.1979 at about 9:30 P.M. after covering a distance of 5 KM from the scene of incident to the police station concerned with an accusation that on 19.5.1979 the Buggi (Bullock-cart) of accused-Yamin stucked in the mud in thorough fair near mosque of the village. Yamin hurled abuses to Niaz Mohammad (deceased) which was objected to by him. After extending threats that "Tera Dimag Kharab Hai Tujhe Bhugutuga" went to his house. The same day after some time at about 6:30 p.m. on 19.5.1979, he (Yamin), Naushad, Akhalaq & Maqsood armed with knife, Shahroz empty handed and Mahfooz having lathi came to the shop of Niaz Mohammad wherein his brother first informant Khizar Mohammad, Ishtikhar S/o first informant and Anwar S/o Khairati were already there in the shop and were talking to each other. Accused Mahfooz wielding lathi stood outside the shop of the door and exhorted "Mar do salon ko" whereupon Shahroz caught hold off Niaz Mohammad and Yamin attacked him with knife in his stomach. Informant was attacked with knife by Maqsood; Naushad attacked Anwar and Akhlaq attacked Ishtikhar with knife. Niaz Mohammad died at spot while other three injured persons received knife injuries.

6. Brahm S/o Leela Singh, Gani S/o Bakhsi, Abdul Sami S/o Chhote Khan, Rafakat S/o Mohd. Ishak Khan, Chand Khan S/o Akhtar Ali, Faiyaz Khan S/o Gulam Rasul Khan, Khan Chnad S/o Prabhu reached the spot and saw the incident and rescued them. The first informant took the dead body of Niaz Mohammad in Buggi to the police station Narsaina and lodged a written report

Exhibit Ka-1.

7. Chik report was drawn and case was registered in the general diary dated 19.5.1979 at 9:30 p.m. Investigation followed. Injured persons were medically examined. After preparing inquest, the dead body was subjected to post-mortem examination. After completing investigation, I.O. submitted charge sheet against all the six accused under sections 147, 148, 149, 452, 307, 324, 109 and 302/34 I.P.C. (Exhibit Ka-16).

8. Case was committed to the Court of Sessions. Learned Trial Court framed charge against accused Naushad, Akhlaq, Yamin and Maksbod under sections 148 I.P.C. and Mahfooz and Shahroz u/s 147 I.P.C. Accused Yamin was charged u/s 302 I.P.C. Accused Naushad, Akhlaq, Maqsood, Mahfooz & Shahroz were charged for the offence punishable u/s 302/149 I.P.C. Accused Naushad was separately charged u/s 324 I.P.C. for causing injury to Anwar, Accused Akhlaq was separately charged u/s 324 I.P.C. for causing injury, to Ishtikhar and accused Maqsood was separately charged u/s 324 I.P.C. for causing injury to Khizar Mohammad. Accused Akhlaq, Yamin, Maqsood, Mahfooz and Shahroz alongwith Naushad were charged u/s 324/149 I.P.C. Accused Yamin, Maqsood, Mahfooz, Naushad and Shahroz alongwith Akhlaq charged for the offence punishable u/s 324/149 I.P.C. for causing injury to Ishtikhar and accused Naushad, Akhlaq, Yamin, Mahfooz and Shahroz alongwith co-accused Maqsood were further charged u/s 324/149 I.P.C. for causing injury to Khizar Mohammad. They denied the charges and claimed their trial.

9. In order to prove its case, prosecution examined nine witnesses in all.

10. Khizar Mohammad, P.W. 1 is the informant. He is a witness of fact. He has proved his written report Exhibit Ka-1 and deposed that on account of previous enmity remote as well as immediate Yamin, Naushad, Akhlaq and Maqsood armed with knife, Mahfooz armed with lathi alongwith Shahroz rushed at the shop of deceased. Shahroz, Yamin, Akhlaq, Naushad and Maqsood accused persons entered into shop while accused Mahfooz was standing outside the shop of the door and made exhortation to all the accused "Mar do salon ko mai sab bhugat lunga". At once, accused Shahroz caught Niaz Mohammad hold off from his back with his chest and accused Yamin stabbed knife in the stomach of Niaz Mohammad (deceased). Accused Maqsood caused injury with knife to informant; accused Naushad caused injury with knife to Anwar and accused Akhlaq caused knife injury to Ishtikhar. All of them sustained injury and Niaz Mohammad succumbed to his injury at spot. Brahm S/o Leela Singh, Gani S/o Bakhsi, Abdul Sami S/o Chhote Khan, Rafakat S/o Mohd. Ishak Khan, Chand Khan S/o Akhtar Ali, Faiyaz Khan S/o Gulam Rasul Khan, Khan Chnad S/o Prabhu witnessed the incident. Keeping the dead body of deceased Niaz Mohammad in the Buggi, informant went to police station to lodge the F.I.R. with written report Exhibit Ka-1 scribed by Dilshad. He claims to have reached the police station at about 9:00 p.m., thereafter, he lodged the F.I.R. He alongwith injured Anwar and Ishtikhar was sent to P.H.C., Ucha Gaon for medical examination where they

were medically examined. His blood stained shirt, baniyan and paizama were identified by him in the Court which is marked as material Exhibits 1, 2 & 3. The blood stained kamij, paizama of Niaz Mohammad deceased were marked as material Exhibits 4 to 6.

11. Anwar, P.W. 2 is an injured witness. He has deposed on facts and supported the testimony of first informant. He deposed that a little prior to the incident, Buggi of Yamin stucked in the mud near the mosque in the village whereupon, he hurled abuses to Niaz Mohammad who protested whereupon alongwith Buggi, Yamin went to his house and after half an hour, he came to the shop of Niaz Mohammad alongwith Naushad, Akhlaq, Maqsood armed with knife and Mahfooz armed with lathi while Shahroz was accompanying him but he was empty handed. All the five accused except Mahfooz entered into the shop of Niaz Mohammad while Mahfooz was outside the shop and exhorted threatening that "Mar do salo ko" whereupon Shahroz caught Niaz Mohammad hold off and Yamin stabbed knife in the stomach of Niaz Mohammad. Naushad inflicted knife injury to this witness Anwar, Akhlaq caused knife injury to Ishtikhar while Maqsood inflicted knife injury to Khizar Mohammad, informant. On alarm, Brahm S/o Leela Singh, Gani S/o Bakhsi, Abdul Sand S/o Chhote Khan, Rafakat S/o Mohd. Ishak Khan, Chand Khan S/o Akhtar Ali, Faiyaz Khan S/o Gulam Rasul Khan, Khan Chand S/o Prabhu reached there and witnessed the incident. When the witnesses reached there, all the accused ran away towards their house in the same village. Niaz Mohammad died at spot at once. This witness claims that he, Khizar Mohammad and Ishtikhar sustained knife injuries. He was sent to P.H.C. Ucha Gaon for medical examination. He identified in the Court his blood stained shirt, baniyan and proved it as material Exhibits 7 & 8. He has further proved the blood stained bushirt and baniyan of Ishtikhar which is material Exhibits 9 & 10 which were taken by the I.O. in police custody during the investigation.

12. Rifaqat, P.W. 3 is a witness of eye account and he has deposed that prior to 2-1/2 years at 6:30 p.m., he reached at the shop of Niaz Mohammad for purchase of Bidi and saw that accused Maqsood, Naushad, Akhlaq, Yamin armed with knife, Shahroz was empty handed entered into the shop of Niaz Mohammad while accused Mahfooz armed with lathi stood outside the shop. At that time, Khizar Mohammad, Ishtikhar and Anwar were also sitting in the shop of Niaz Mohammad. After entering of aforesaid five accused in the shop, accused Mahfooz extended threat that "Mar do salo ko mai sab bhugat lunga" whereupon accused Shahroz caught hold off Niaz Mohammad and Yamin inflicted knife injury in the stomach of Niaz Mohammad. Soon after sustaining injury, Niaz Mohammad fell down on the earth and died at spot. Accused Maqsood caused knife injury to Khizar Mohammad, Naushad caused knife injury to Anwar and Akhlaq caused knife injury to Ishtikhar. This witness claims that he alongwith Brahm S/o Leela Singh, Gani S/o Bakhsi, Abdul Sami S/o Chhote Khan, Rafakat S/o Mohd. Ishak Khan, Chand Khan S/o Akhtar Ali, Faiyaz Khan S/o Gulam Rasul Khan, Khan Chnad S/o Prabhu witnessed the incident. After the incident, the accused ran away towards their house. Maqsood had 9 inch long knife having one blade

therein. When accused left the scene, thereafter, he entered into the shop and found Niaz Mohammad died and the rest of the persons were injured.

13. Constable Sukhbir Singh, P.W. 4 is the person who carried the dead body and the papers to mortuary after the inquest of the dead body. He has proved the same. Dr. P.C. Agarwal, P.W. 5 is a witness, who had conducted the post-mortem examination on the dead body of deceased and prepared the post-mortem examination report which has been marked as Exhibit Ka-2. Dr. A.K. Garg, P.W. 6 is a witness, who has medically examined Isthikhar, Khizar Mohammad and Anwar. Their injury reports was prepared by him in his own handwriting and signature which are Exhibits Ka-3, 4 & 5. Constable Sukhbir Singh, P.W.7 is a formal witness who has deposed that on 13.9.1979, he was a constable posted at P.S. Narsaina. On that day, he had taken four bundles of case property to Chemical Examiner, Agra and handed them over there in the office of Chemical Examiner, Agra on 14.9.1979. SX Ram Pratap Singh, P.W. 8 is the I.O. of the case and he has proved the investigation. H.C. Manohar Singh, P.W. 9 has deposed that he was Head Moharrir at P.S. Narsaina, District Bulandshahar on 19.5.1979 at 9:30 p.m. On that day, on the basis of the report Exhibit Ka-1 lodged by first informant Khizar Mohammad, he drew the chik report Exhibit Ka 17 and registered the case in the general diary at rapat No. 27. True copy thereof has been proved by him as Exhibit Ka-18. On 20.5.1979, he had sent the special report vide rapat No. 5 at 5:15 a.m. through constable 218 Babu Singh. Entry in the G.D. to the effect has been proved by him as Exhibit Ka-19.

14. Accused persons were examined u/s 313 Cr.P.C. They denied the prosecution allegation and attributed their false implication in this case. Accused Naushad stated that prosecution witness belongs to one pedegree but all the time they used to pressurize him. First of all, they generated Marpeet inter se ; accused became prosecution witness for him and then deposed against him whereas accused Shahroz stated that Kumba (family) of informant and deceased is a long family. They used pressurize him. A criminal case was initiated first of all by them. Khizar Mohammad was a witness for him in a case but he deposed against him. He has given five bigha land on Batai to Khizar Mohammad (Khizzu) but when Khizar Mohammad deposed against him then this witness took his land from Khizar Mohammad which caused annoyance to him and that is the reason of his false implication in this case by Khizar Mohammad, informant. He further stated that a quarrel took place in between the prosecution witnesses inter se on the point of partition of land and they himself killed Niaz Mohammad and out of enmity falsely implicated him. Mahfooz stated that prosecution witnesses have long family. We have given them land on Batai but when they deposed against us, we took the land back causing annoyance to them. He claims to be uncle of Yamin. Accused Yamin stated that a quarrel has taken place in between prosecution witness inter se on the point of partition of their own land and house. Deceased was inimical to prosecution witnesses. He was in military service. He used to send money orders. Prosecution witness used to misappropriate the same. When he asked for accountancy it resulted into a quarrel. Khizar

Mohammad himself killed him. Khizar Mohammad was a witness for Yamin in a murder case of his father and uncle Firoz Ali and Babu Khan respectively. But he did not give his evidence in his favour. Since, his land was with Khizar Mohammad on Batai and when he deposed against him, the said land was taken back by him from Khizar Mohammad as a result of which Khizar Mohammad had enmity and that is the reason that he has been falsely implicated in this case.

15. The accused persons were called upon to enter into their defence. They examined Sri Nand Kishore, Assistant Judicial Record Keeper, Collector-ate, Bulandshahar, D.W. 1. He deposed that he has brought the bundle of special reports pertaining to May, 1979 but no report concerning crime No. 112 of 1982 under sections 147, 148, 149 and 302 I.P.C. "State v. Naushad and others" dated 19.5.1979 is there in the said bundle. However, in cross-examination, he stated that he has not brought the index and he cannot say about the index because he was not on duty during the relevant time. Since, on the day of his deposition itself he got the summon and at once rushed upto the Court. Since index was not at the appropriate place, hence he has deposed that there was no index. He admitted that without index no paper is filed. Without index if any paper comes then Badar report is prepared which is entered into Badar Register. He claims to have seen the Badar Register. There was no such entry. The learned Trial Court has put questions to him in this regard to clarify the matter whereupon, he answered that he cannot say as to whether special report had come alongwith the bundle and likewise, he cannot say how many paper from the bundle was missing.

16. Sri Krishna Gupta, Reader, Ist Additional Munsif Magistrate, Bulandshahar, D.W.2 has deposed that he was first Ahlmad in the office of C.J.M., Bulandshahar on 22.5.1979. F.I.R. case crime No. 112 of 1979 under sections 147, 148, 149, 452, 324, 302, 109 and section 34 I.P.C. "State v. Naushad and others" was received to him from the office of C.O., City which he registered the same day at serial No. 962 and kept it in the bundle of P.S. Narsaina. At the time of his deposition, he had brought the original register and copy of the said entry prepared in his own handwriting and signature was filed on record as Exhibit Kha-2.

17. After hearing the learned Counsel for the parties and making appraisal of the record, learned Trial Court delivered the impugned judgment and order dated 5.4.1982 and convicted the accused-respondents as aforesaid.

18. Feeling aggrieved, State of Uttar Pradesh has preferred Government Appeal No. 1659 of 1982 on the ground that learned Trial Judge erred in not convicting all the accused for the offence u/s 302 I.P.C. read with, section 149 IPC as they had formed an unlawful assembly and in prosecution of their common object had committed murder of Niaz Mohammad. The impugned judgment is also challenged on the ground that the accused persons had caused injuries to his brother Khizar Mohd., Ishtikhar and Anwar and the learned trial Judge rightly relied on those evidence which is corroborated by the independent evidence of

Rifaqat, P.W.3 but erred in acquitting all of them from the offence of murder mainly on the ground that one solitary fatal injury was given to the deceased, hence the case squarely falls u/s 304 Part II of I.P.C.; injuries sustained by Niaz Mohammad was sufficient in the ordinary course of nature to cause death and the learned Sessions Judge erred in holding that the accused had no intention to kill Niaz Mohammad and no offence u/s 302 I.P.C. is made out; acquittal of all the accused under sections 147, 148, 302 and 149 I.P.C. is contrary to the weight of evidence on record, bad in law and has resulted in miscarriage of justice.

19. As regard convicted accused Yamin, Naushad, Akhlaq, Maqsood, Mahfooz and Shahroz they have preferred the connected criminal appeal u/s 374 Cr.P.C. challenging the aforesaid judgment and order dated 5.4.1982 on the ground that the conviction of the appellants is against the weight of evidence on record; conviction of the appellants is illegal and contrary to law and at any rate the awarded sentence to the appellants is too severe.

20. We have heard learned A.G.A. and learned Counsel for the respondents-accused. Perused the record.

21. On perusal of the impugned judgment and order it transpires that the learned Trial Court has found that motive is strong. The date, time and place of occurrence are proved. All the prosecution witnesses examined for prosecution are reliable. Their evidence is corroborated with the evidence of each other which is supported by the medical evidence; the evidence of first informant is further corroborated by the contents of F.I.R.; the presence of injured witness is proved at spot beyond doubt and their presence there at spot is natural. Under the facts and circumstances of the case, non-examination of other remaining witnesses cited in the F.I.R. is not fatal to the prosecution. Special report of the incident was sent in time. Rifaqat, P.W. 3 is related to both the parties equally and, therefore, it cannot be said that he has any special interest with the prosecution and it cannot be said that any material witness has been withheld by the prosecution and the testimony of all the three witnesses examined on facts should not be rejected merely on the ground of their being interested and related; the lapses on the part of the investigating agency in not mentioning the time of preparation of inquest in the panchnama is not fatal to the prosecution and there is no reason for the false implication of the accused persons in this case.

22. Learned Trial Court held that in prosecution of their common object all the six accused armed with knife and lathi reached there at spot and on the exhortation made by the accused Mahfooz all the remaining accused assaulted the victims. Shahroz caught hold of Niaz Mohammad and Yamin accused stabbed with knife in his stomach who sustained injury and died at spot. But in the opinion of the learned Trial Court, accused persons had no common object to commit his murder, although they were sharing common object to inflict injuries on the victims. Non-repetition of the fatal blow by Yamin and other accused persons on

the person of deceased weighed much to the learned Trial Court to form the aforesaid opinion and, therefore, he held accused Yamin guilty u/s 304 Part II of IPC holding that it was not a case of murder rather it was a case of culpable homicide not amounting to murder punishable u/s 304 Part II of IPC. Since the other prosecution witnesses informant Khizar Mohammad, Anwar, Ishtikhar have been inflicted injuries with knife, therefore, accused persons were held guilty for the offence punishable under sections 147, 148, 324 and 324/149 IPC as well.

23. Learned A.G.A. has submitted that a long drawn enmity in between the parties are admitted to accused. According to the respondent-accused themselves, Khizar Mohammad had stood prosecution witness in the case of murder of the father and uncle of Yamin. He had given five bigha land on Batai to Khizar Mohammad but still Khizar Mohammad did not support the case of Yamin and deposed against him in the Court whereupon the aforesaid land of five bigha was taken back by Yamin which resulted into enmity in between the first informant and Yamin. The aforesaid fact has not been challenged by prosecution. This was remote motive for committing this incident. As immediate motive there is a consistent evidence of P.Ws. 1, 2 & 3 that about half an hour earlier to the incident of murder, Buggi of Yamin was stucked in the mud near the mosque which is there in front of house of Niaz Mohammad and, therefore, Yamin hurled abuses to Niaz Mohammad, who protested and then after extending threat for dire consequences, he alongwith his Buggi went towards his house lying towards west of scene of incident and thereafter, with a cool calculated manner with prearranged plan, all the six accused armed with knives and lathis as stated above, reached there at the shop of Niaz Mohammad where he alongwith witnesses were already sitting. On the exhortation of Mahfooz, accused, Shahroz caught Niaz Mohammad hold off and Yamin stabbed with knife in his stomach while rest of the accused except Mahfooz and Shahroz inflicted knife injuries to Khizar Mohammad, Ishtikhar and Anwar. Inviting our attention towards the medical examination reports and post-mortem reports, he submitted that the prosecution witnesses are wholly reliable witnesses and the learned Trial Court has rightly believed their evidence but erred in holding that it was not a case of murder but it was a case of culpable homicide not amounting to murder. Therefore, all the accused are liable to be convicted for the offence of murder.

24. On the other hand, learned Counsel for the accused-appellant has submitted that prosecution has failed to prove the date, time and place of incident; special report was not sent promptly; inquest does not contain the time of its preparation; no independent witness has been examined and there was no common object of all the accused to commit the murder of Niaz Mohammad; there is no reliable evidence on record to hold accused-appellants guilty for the offence alleged and they have been falsely implicated in this case on account of enmity suggested by them, therefore, the impugned judgment and order is bad in law.

25. Post-mortem examination report Exhibit Ka-2 has been proved by Dr. P.C.

Agarwal, P.W. 5. He has deposed that on 20.5.1979, he conducted the post-mortem examination on the body of Niaz Mohammad which was produced before me by constable Subba Singh and constable Sukhbir Singh, P.S. Narsaina and they have identified the dead body which was in the sealed cover and alongwith dead body, the papers and sample seal were also received. Following ante-mortem injury was noticed by him on the body of deceased:

Penetrating wound 1 1/2 cm. x 1 cm. x cavity on the lower part of left abdomen 5 inch below and lateral to umbilicus spindle shaped wound. Margin clean cut. Blood clot present around wound. Omentum coming out of wound gap. Half-full clotted blood was found in the stomach and below the intestine the injury was found cut. Bladder was also cut. The death might have occurred on 19.5.1979 at 6:30 p.m. The cause of death was shock and hemorrhage due to aforesaid ante-mortem injuries. The injuries sustained by him was sufficient in the ordinary course of nature to cause death and the said injury might have been caused by knife.

26. Dr. A.K. Garg, P.W. 6 has deposed that on 20.5.1979, he was Medical Officer Incharge, P.H.C., Ucha Gaon, District Bulandshahar at 2:00 a.m. at that time he had medically examined Ishtikhar, aged about 19 years, S/o Khizar Mohammad, R/o Raghunathpur, P.S. Narsaina, District Bulandshahar. Following injuries were found at his person:

(i) Incised wound 4 cm. x 1.5 cm x 4 cm. terminating into abrasion of 7 cm long, bleeding, transverse can the left side of back on miner borders of shoulder blade 7 cm below the upper angle of shoulder blade.

(ii) Incised wound 2 cm. x 0.5 cm. x 0.5 cm, bleeding on the outer side of left index finger 2 cm. below the proximal joint.

27. Same day at about 2:15 a.m., he medically examined Khizar Mohammad, informant and following injuries were found at his person:

(i) Incised wound 2 cm. x 0.5 cm. x 1.5 cm. bleeding on the back of left upper arm 2 cm. above the elbow joint.

(ii) Incised wound 2 cm. x 0.7 cm. x 1.5 cm, bleeding, on the left side of back 2 cm. below the highest point of hip bone.

(iii) Incised wound 1.5 cm. x 0.5 cm. x 1 cm. bleeding, on the outer side of left leg 8 cm. above the ankle joint.

28. On the same day at 2:30 a.m. he examined Anwar of the same village. Following injuries were found at his person:

(i) Incised wound 1 cm. x 0.5 cm. x 1 cm. bleeding, terminating into abrasion of 4 cm. long downwards on the outer side of right shoulder 9 cm. below the joint.

29. The witness has deposed all those injuries of the injured persons could be caused with knife. They were simple in nature and fresh in duration at the time

of their medical examination. He prepared their injury reports which he had proved as Exhibit Ka-3, 4 & 5 respectively.

30. I.O. of the case has recovered blood stained and plain earth from inside the shop where the dead body was lying which he has proved by entering into witness box. The recovery memo of the aforesaid blood stained and plain earth was proved by Ahibaran Singh, S.I., who took the dictation of I.O. which has been proved as Exhibit Ka-15. The date, time and place of incident has not been seriously challenged by the prosecution. The date, time and place of the incident has rightly been found proved by the learned Trial Court. The fact that deceased Niaz Mohammad died on account of the knife injury sustained in his stomach which was caused by accused Yamin has also been fully corroborated by medical evidence as held by learned Trial Court and the aforesaid finding does not call for any interference by the Appellate Court. Likewise, all the three injured persons of this case have sustained incised wound at their person and specific role of causing knife injuries have been assigned to accused Naushad, Akhlaq and Maqsood and they have been found guilty for causing such injuries. There is nothing on record to interfere with the finding of fact recorded by the learned Trial Court.

31. None of the points urged by accused is capable of setting aside the aforesaid finding of fact recorded by the learned Trial Court. Therefore, the conviction and sentence recorded by the learned Trial Court as against the accused persons except the conviction and sentence u/s 304 Part II of I.P.C. recorded against accused Yamin needs no interference.

32. As regards, the conviction and sentence recorded against accused Yamin u/s 304 Part II of I.P.C. it is to be observed that the evidence on record concerning the motive, prearranged plan and cool calculated act of accused persons do not suggest that accused Yamin did not stab knife injury in the stomach of the deceased with the intention of causing his death. Stomach is a vital part of the body. The injury inflicted by this accused Yamin damaged the internal part of the body. The intestines were cut. The bladder was also cut. Perineum was also cut. The knife blow given by accused Yamin was so fatal which caused such bodily injury as was not only likely to cause death rather it was sufficient in the ordinary course of nature to cause death and in fact, Niaz Mohammad succumbed to his injury at spot. The single knife blow in the stomach of deceased needed no subsequent blow for causing his death. It is not a case of causing knife injury in the stomach without any intention to cause death and only with a knowledge that it is likely to cause death. Therefore, the conviction of accused Yamin u/s 304 Part II of I.P.C. is bad in law and deserves to be set aside.

33. In case of Narsingh Challan v. State of Orissa (1977) 2 Crimes 78 (ORI), the distinction between murder and culpable homicide was drawn and it was held "culpable homicide" is genus, and "murder" is the specie. All "murder" are culpable homicide but no vice-versa.

34. Section 299 I.P.C. defines "culpable homicide" as under:

299. Culpable homicide--Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

35. Section 300 I.P.C. defines "murder" which is as under:

300. Murder--Firstly, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--

Secondly--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

Thirdly--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

Fourthly--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

36. Five exceptions have been given to oust the crime of culpable homicide from the purview of murder:

Exception 1--When culpable homicide is not murder.--Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:--

First--That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly--That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly--That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation--Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2--Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he

is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3--Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4--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.

Explanation--It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5--Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

37. None of the aforesaid exceptions are attracted in the case in hand. Accused Yamin was not deprived of power of self control by grave and sudden provocation rather it was a prearranged plan for committing the murder of Niaz Mohammad. There was sufficient time gap in between the incident which occurred near the mosque where his Buggi was stucked in the mud and the actual incident of murder by the accused with a pre-arranged plan and cool-calculated prior meeting of mind of all the accused inter-se who armed with deadly weapon came from their house on the shop of Niaz Mohammad and in prosecution of their common object to commit the murder of Niaz Mohammad, on the exhortation of accused Mahfooz that Mardalo Salon Ko, accused Shahroz caught hold off Niaz Mohammad and Yamin attacked him with his knife in his stomach resulting into his death at spot. Out of six accused, accused Yamin, Nausad, Akhlaq and Maqsood were armed with knife whereas Mahfooz was armed with lathi. Although, Shahroz was empty handed but in prosecution of their common object of all, on the exhortation of accused Mahfooz, he did overt act by catching hold off Niaz Mohammad deceased which is sufficient to hold that in prosecution of their common object of all murder of Niaz Mohammad was committed and, therefore, accused Yamin is liable to be held guilty u/s 302 I.P.C. whereas accused Nausad, Akhlaq Maqsood, Shahroz and Mahfooz were liable to be held guilty u/s 302/149 I.P.C. but since accused Nausad, Maqsood and Mahfooz have died and appeal filed against them have been abated vide order dated 2.2.2012, therefore, accused Akhlaq, Shahroz deserve to be held guilty u/s 302/149 I.P.C.

38. In the result, Criminal Appeal No. 1097 of 1982 is dismissed and Government Appeal No. 1659 of 1982 is allowed accordingly.

39. Impugned judgment and order dated 5.4.1982 is modified accordingly.

40. Accused Yamin is convicted u/s 302 I.P.C. and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in default of payment of fine, he is to further undergo a sentence of one year. Accused Akhlaq and Shahroz are convicted u/s 302/149 I.P.C. and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in case of default of payment of fine, they are to further undergo a sentence of one year.

41. In addition to the aforesaid sentence, the sentences awarded to them by the learned Trial Court on different counts except u/s 304 Part II of I.P.C. awarded to accused Yamin shall also be served out by them. However, all the sentences awarded to accused persons shall run concurrently.

42. Accused Yamin, Akhlaq and Shahroz are directed to surrender themselves before the Court of learned C.J.M., Bulandshahar within a period of one month to serve out sentence awarded to them. In case, they do not surrender within a stipulated period, learned C.J.M., Bulandshahar shall commit them to jail in accordance with law to serve out the sentence. Registry is directed to send the copy of this judgment to the Court of learned C.J.M., Bulandshahar for compliance.