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REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1910 OF 2010

BALU SUDAM KHALDE AND ANOTHER ……APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA .....RESPONDENT(S)

J U D G M E N T

J.B. PARDIWALA, J.:

1. This appeal by special leave is at the instance of two convict persons and is directed against the judgment and order dated 02.03.2009 passed by the High Court of Judicature at Bombay in Criminal Appeal No. 637 of 2003 by which the High Court dismissed the criminal appeal referred to above, and thereby affirmed the order of conviction and the consequence sentence dated 12.03.2003 passed by the learned Additional Sessions Judge, Pune dated 12.03.2003 in Sessions Case No. 323 of 2001, by convicting both the appellants herein for the offence under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short, 'the IPC') and sentencing them to suffer life imprisonment and a fine of Rs. 1000/- each with the stipulation that in

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default of payment of the fine they would undergo rigorous imprisonment for further six months.

2. It may not be out of place to state at this stage that in all four persons were put to trial including the two appellants herein in the Court of the Additional Sessions Judge, Pune for the offence punishable under Sections 302 and 323 read with Section 34 of the IPC. The appellants herein are original accused Nos. 1 and 3 resply. The original accused No. 2 and 4 resply were acquitted by the Trial Court.

CASE OF THE PROSECUTION

3. The case of the prosecution as unfolded in the evidence of the prosecution witnesses and also detailed in the first information report is that on the fateful day of the incident i.e., on 01.04.2001 at about 11.15 p.m., the first informant PW 1, namely, Asgar Shaikh (Ex. 7) was chit chatting with his friend Abbas Baig (deceased). At that time, while the appellant No. 2 herein accompanied by few other individuals was passing by the side, he was accosted by the deceased Abbas. There was some verbal altercation between the two. After sometime the appellant No. 2 herein accompanied by the appellant No. 1 herein and the other two co-accused who came to be acquitted by the Trial Court reached at the spot. A fight ensued in which, the first informant PW 1 Asgar Shaikh was assaulted on his head by means of weapons like sickle and sword. This assault on the head of the first informant PW 1 is alleged to have been laid by the appellant No. 1 herein. The first informant suffered a bleeding injury on his head. Thereafter, a severe assault was laid on the deceased Abbas Baig by means of a sickle and sword. It is the case of the prosecution that the appellants herein had dangerous weapons in their hands in the form of a sword and sickle. The deceased Abbas Baig suffered serious injuries on his body and ultimately succumbed to such injuries.

4. A first information report was lodged on 2.04.2002 by the PW 1 at around 2 a.m. i.e., just within three hours from the time of the incident. The deceased Abbas Baig having suffered serious bleeding injuries was taken to the hospital in a rickshaw

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owned by the PW 3, namely, Nasir Khan. The deceased upon reaching the hospital was declared dead.

5. The FIR Exh. 8 lodged by the PW 1 *viz*. Asgar Shaikh reads thus:-

> *"I Ajgar Ibrahim Shaikh aged 22 years, Occupation Turner, residing at 54 BP/251 Lohia Nagar, slum area, Pune. I hereby lodge my complaint as under:*
>
> *I am residing at the aforementioned address with my mother, father and sister. I have been working as a turner past three years in the workshop owned by Abdul Wahab Shaikh situated at Guruwar Peth, Pune in the name of New Quality Instruments. Yesterday, i.e., on 1.4.2001, I left my house at 9.00 AM for reporting at the workshop. I worked out at the workshop for whole day and came back at 7.00 PM. I had my dinner at 11.15 PM in the night and thereafter went outside as I wanted to have paanmasala. When I reached somewhere near the shop by name Shri Sai Car Auto Consultant, I met my friend Abbas Baig (deceased) also a resident of Lohianagar, slum area, Pune. I started cheating with my friend Abbas. At that point of time, Santosh Khalde and one another boy were passing through the place where, we were talking. My friend Abbas saw Santosh and told me that "Itni Raat Ko Maa Chudane Ke Liye Kaha Ja Raha Hai? Tumhara plan kya hai". Santosh replied that he had no plan and was proceeding to answer nature's call. At around 11.45 PM, four persons, namely, Balu Khalde, Ramesh Mohite, Raju Mohite and Santosh Khalde assembled and started talking with us. At that time, Balu khale told him "Bajula Haat". Abbas Baig told Balu Khalde that "Usse kya baat kar raha hai?" talk to me. At that time, I told them "Kaiko Lafda Kar Rahe Ho?" Balu Khalde took out a weapon like Koita which he had hidden in his waist and hit me on my head. Ramesh Mohite caught hold of Abbas Baig and Balu Khalde stabbed him with a small bladed sword. We started shouting. One Firoz Babumian Shaikh residing in the neighbourhood came out of his house and told Raju Mohite "What are you fighting about?" Santosh Khalde abused Firoz Babumian. When people started assembling at the place of the occurrence, all the four assailants ran away. Abbas Baig was seriously injured and he fell down. He had suffered injuries on his left paw, wrist, right hand and right shoulder. He was bleeding profusely. I picked up Abbas in an injured condition and took him nearby chokadi. At that point of time, one Nasir a rickshaw driver known to us also living in the same slum came over there. I requested Nasir to keep a watch on Abbas Baig as he would reach and call the police. Accordingly, I alongwith Firoz Shaikh went to Lohianagar Police Station and informed about the incidence to the police. The police arrived and immediately shifted Abbas Baig to the nearby Sassoon Hospital. However, Abbas Baig was declared dead by the doctor at the hospital."*

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6. The inquest panchnama of the dead body of the deceased was drawn at the hospital itself. As a part of the investigation, the scene of offence panchnama was drawn. The clothes of the deceased stained with blood were collected and sent to the forensic science laboratory for chemical analysis. All the four accused were arrested by the police. The clothes of all the accused were collected and sent to the FSL. The dead body of the deceased was sent for post mortem. While the appellants herein were in police custody, they are said to have made statements on their own free will and volition that they would show the place where they had concealed the weapons of offence i.e. the sickle and the sword. Ultimately, the discovery panchnamas were drawn in presence of the panch witnesses. The statements of various other witnesses were recorded by the police.

7. At the end of the investigation chargesheet was filed for the offence punishable under Section 302 read with Section 34 of the IPC, in the Court of the learned Magistrate. The learned Magistrate committed the case to the Court of Sessions as the offence was exclusively triable by the Court of Sessions.

8. The Trial Court framed the following charge *vide* Exh.8. The translated version of the charges framed against the appellants are quoted below:

> *"1. That you accused Nos. 1 to 4, on 01.04.2001, at about 11.45 P.M. or thereabout, at Plot No. 54/BP, Lohiyanagar, Pune, in front of shop named as Shri Sai Car Auto Consultant, either individually or in furtherance of your common intention, did commit murder, by intentionally or knowingly causing the death of Abbas Sanaulla Beg, and thereby committed an offence punishable either under Section 302 of the Indian Penal Code simpliciter or Section 302 read with 34 of the Indian Penal Code, and within my cognizance.*
>
> ***AND***
>
> *2) That you accused Nos. 1 to 4, on the aforesaid day, date, time and place and during the course of the same transaction, either individually or in furtherance of your common intention, voluntarily caused hurt to complainant Ajgar Ibrahim Shaikh, and thereby committed an offence punishable under Section 323 of the Indian Penal Code simplicetor or Section 323 read with Section 34 of the Indian Penal Code, and within my cognizance. "*

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AND

3) That you accused Nos. 1 to 4, on the aforesaid day, date, time and place and during the course of the same transaction, either individually or in furtherance of your common intention, voluntarily caused hurt to complainant Ajgar Ibrahim Shaikh, by means of sickle and sword, which if used as a weapon of offence, would likely to cause death of said complainant, and thereby committed an offence punishable under Section 324 of the Indian Penal Code simplicetor or Section 324 read with Section 34 of the Indian Penal Code, and within my cognizance.

AND

4) That you accused Nos. 1 to 4, on the aforesaid day, date, time and place and during the course of the same transaction, either individually or in furtherance of your common intention, intentionally insulted and thereby gave protection to the complainant Ajgar Ibrahim Shaikh, intending or knowing it to be likely that such provocation will cause the said complainant to commit breach of public peace, and thereby committed an offence punishable under Section 504 of the Indian Penal Code simplicetor or Section 504 read with Section 34 of the Indian Penal Code and within my cognizance.

AND I hereby direct that you be tried by me on the aforesaid charges."

9. The prosecution adduced the following oral evidence in support of its case:

(1) PW 1	Asgar Shaikh -	Ex. 7
(2) PW 2	Firoj Shaikh-	Ex. 9
(3) PW 3	Nasir Khan -	Ex. 10
(4) PW 4	Aslam Khan-	Ex. 11
(5) PW 5	Mahesh Kumar Jain-	Ex. 14
(6) PW 6	Suhas Kalase-	Ex. 15
(7) PW 7	Dr. Shrikant Chandekar-	Ex. 18
(8) PW 8	Mubarak Baig-	Ex. 21
(9) PW 9	Mahendr Arokade-	Ex. 22

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(10) PW 10 Baba Shaikh- Ex. 38

10. The following pieces of documentary evidence were adduced by the prosecution:

(i) Inquest Panchnama

(ii) Post mortem report

(iii) Spot Panchnama (scene of offence panchnama)

(iv) Arrest and Personal search

(v) Seizure of clothes of complainant

(vi) Seizure of clothes of deceased

11. After completion of the oral as well as the documentary evidence of the prosecution, the statements of the appellants herein under Section 313 of the Code, of Criminal Procedure (for short, 'the CrPC') were recorded in which the appellants herein stated that the complaint was a false one. They further stated in their written statement under Section 313 of the CrPC that they were workers of one Hindi Ekta Mandal. On 09.03.2001, tension mounted between the Hindus and the Muslims as some people from the minority community damaged the idol of Ganesh. A report with the police was lodged in that regard. In such circumstances, the witnesses deposed falsely against them.

12. At the conclusion of the trial, the learned Trial Judge convicted the appellants herein for the offence punishable under Section 302 read with Section 34 IPC and sentenced both as stated hereinbefore. The original accused Nos. 2 and 4 were ordered to be acquitted of all the charges.

13. In such circumstances referred to above, the two appellants are here before this Court with the present appeal.

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SUBMISSIONS ON BEHALF FOF THE APPELLANTS

14. The learned counsel appearing for the appellants vehemently submitted that the High Court committed a serious error in dismissing the appeal filed by the two appellants herein against the judgment and order of conviction passed by the Trial Court. According to the learned counsel, the High Court failed to appreciate that no reliance could have been placed on the evidence of the so called eyewitnesses. According to the learned counsel, the ocular version on record does not inspire any confidence and deserves to be discarded.

15. The learned counsel further submitted that the very presence of the first informant PW 1 Asgar Shaikh is doubtful because although he claims to have suffered an injury on his head during the assault yet no medical treatment was taken by him and there is no medical certificate on record that he had suffered any injury on his head. In such circumstances, according to the learned counsel, the entire first information report, at the instance of the PW 1 is unreliable.

16. The learned counsel further submitted that the discovery of the weapons under Section 27 of the Indian Evidence Act, 1872 (for short, 'the Act 1872') could also not have been relied upon as the panch witnesses failed to support the case of the prosecution or rather failed to prove the contents of the panchnama.

17. In the last, the learned counsel appearing for the appellants vehemently submitted that even if the entire case of the prosecution is believed to be true, the case at the most would be one of culpable homicide not amounting to murder. According to the learned counsel, the case falls within the purview of Exception 4 to Section 300 of the IPC.

18. In such circumstances referred to above, the learned counsel prays that there being merit in his appeal, the same may be allowed and the appellants be acquitted of all the charges. In the alternative, he prayed that the conviction may be altered from one under Section 302 of the IPC to Section 304 Part 1 of the IPC by giving benefit of Exception 4 to the Section 300 of the IPC.

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SUBMISSIONS ON BEHALF OF THE STATE

19. Mr. Abhikalp Pratap Singh, the learned counsel appearing for the State of Maharashtra, on the other hand has vehemently opposed this appeal submitting that no error not to speak of any error of law can be said to have been committed by the High Court in dismissing the appeal thereby affirming the order of conviction and the consequence sentence passed by the Trial Court.

20. He would submit that there is no good reason to doubt the ocular version of the eyewitnesses, which has come on record. He further submitted that was no good reason for the eyewitnesses to falsely implicate the appellants herein in the alleged crime.

21. The learned counsel submitted that no case is made out to bring the case within the ambit of Exception 4 to Section 300 of the IPC. He vehemently submitted that as many as nine injuries were inflicted on the body of the deceased by dangerous weapons like sickle and sword. The appellants herein can be said to have taken undue advantage and acted in a cruel manner.

22. In the last, the learned counsel appearing for the State submitted that the discovery of the weapons points towards the conduct of the accused persons and such conduct is a relevant fact under Section 8 of the Act 1872 which taken together with the ocular version supports the case of the prosecution in toto.

23. In such circumstances referred to above, the learned counsel appearing for the State prayed that there being no merit in the present appeal, the same may be dismissed.

ANALYSIS

24. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned judgment and order.

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APPRECIATION OF ORAL EVIDENCE

25. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:

> "I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.
>
> II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.
>
> III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.
>
> IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.
>
> V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.
>
> VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

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VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness."

[See ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*** 1983 Cri LJ 1096 : (AIR 1983 SC 753) ***Leela Ram v. State of Haryana*** AIR 1995 SC 3717 and ***Tahsildar Singh v. State of UP*** (AIR 1959 SC 1012)]

26. When the evidence of an injured eye-witness is to be appreciated, the under-noted legal principles enunciated by the Courts are required to be kept in mind:

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(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.

27. In assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or put forward a positive case which is

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inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence.

28. Keeping the aforesaid principles of law in mind, we looked into the oral evidence of all the three important witnesses i.e., PW 1 Asgar Shaikh (Exh. 7), PW 2 Firoz Babumiyan Shaikh (Exh. 9) and PW 3 Nasir Khan (Exh. 10). The oral evidence of all the three eyewitnesses is consistent and there is no good reason for us to disbelieve the ocular version as narrated by the three eyewitnesses. The Trial Court as well as the High Court looked into the oral evidence of all the three eyewitnesses referred to above closely and have recorded a concurrent finding that they are reliable witnesses.

29. The High Court in its impugned judgment observed in paras 9 and 10 resply as under:

> *"9. First, it is argued on behalf of the Appellants the learned Counsel that the substantive evidence of P.W. Nos. 1 and 2, alleged eyewitnesses cannot be taken as trustworthy, in as much as they are interested and related witnesses to the deceased Abbas Baig. Secondly, it is argued that there was no immediate disclosure of the names of the accused persons when the injured Abbas was brought to Lohiyanagar Police Chowki and when said Abbas and both the injured P.W. Nos. 1 and 2 were sent to Sasoon Hospital for medical treatment no history of assault was given. Thirdly, it is argued that P.W. 1, complainant had improved on his story by mentioning that Abbas had sustained injuries on his head and it was not so mentioned by him while giving his complaint. Fourthly, it is argued that the main vital injury was in the normal course of events, sufficient to cause the death of Abbas is injury No.9 as per the Post Mortem report was attributed to only accused No.3 i.e. Appellant No.2 as it was made by use of a sword and as such it was not the injury inflicted by Appellant No.1 accused. By canvassing such last argument, it emphasized on behalf of the Appellant that the death of Abbas was caused due to the injury at serial no. 9 in the Post Mortem report and as such the Appellant accused No.1 could not be held responsible for the death of Abbas, further argued.*
>
> *10. While dealing with such arguments, on behalf of the Appellants as mentioned above, we have carefully gone through the substantive evidence of P.W.1 and 2 and also of the incidental witness, corroborating*

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the major part of the events i.e. P.W.No.3 and it must be said that immediately after reaching Lohianagar Police Chowki a complaint was lodged by P.W.1 and by that time said Abbas was also brought to the Police Chowki and was subsequently referred to Sasoon Hospital for treatment, however, declared, dead on admission. It is also in the substantive evidence of P.W.1 that he and P.W.2 attended the Sasoon Hospital along with police yadi for getting treatment, it is a factual position that there is no medical certificate brought on record by the prosecution regarding injury sustained by P.W. Nos. 1 and 2 and as such factual position prompted the Sessions Court to hold that there was no charge established for the offence punishable under Section 324 read with Section 34 of Indian Penal Code for the assault on the witness No. 1, the complainant. It is also observed that the death of Abbas was due to multiple injuries though as opined by the Medical Officer, P.W. No.7, the main injury which could have in the normal course caused death of Abbas, is injury No.9 mentioned in the Post Mortem report. In other words, it must be said that all the injuries sustained by Abbas were the cause of his resultant death and that a role was attributed to the accused Appellants using the respective weapons i.e. Article No.16 sickle and Article No. 17 a sword."

30. In the exercise of the power under Article 136 of the Constitution of India, this Court, normally would not interfere with the concurrent findings of fact, except in very special circumstances or in the case of a gross error committed by the courts below. Only where the High Court ignores or overlooks "crying circumstances" and "proven facts" or "violates and misapplies well established principles of criminal jurisprudence" or refuses to give benefit of doubt to the accused persons, etc., would this Court step in to correct the legally erroneous decisions. We are also not to interfere only for the reason that we may arrive at a different conclusion, unless, of course, there are compelling circumstances to tinker with conclusions drawn and that the accused were innocent/guilty. Undoubtedly, there are limitations in interfering with the findings of conviction, concurrent in nature.

31. In the course of hearing of this appeal, we also noticed something very important, going to the root of the matter.

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32. We noticed that in the cross-examination of the original first informant, PW 1 Asgar Shaikh (Exh.7), few suggestions were put to him by the defence counsel. We quote the relevant part of the cross-examination of the first informant:

> *"The attack on us was sudden. The first blow was hit on my head. I was assaulted severely on the head. Due to assault, I suffered a bleeding injury. It is not true that I felt giddy due to assault. Yes I however suffered pain. At that time, I did not feel that I should save my life. I did not feel that I should run away or I should try to hide myself. I went towards the side of Lohiya Nagar Police Chowkey. I did feel that I was being assaulted without any reason. Abbas was screaming while he was being assaulted. …"*

33. We are of the view from the aforesaid that the suggestions put by the defence counsel in the cross-examination of the eyewitnesses establishes the presence of PW 1 Asgar Shaikh at the scene of offence and the factum of assault could also be said to have been admitted. The reply to the suggestions answers the submission canvassed by the learned counsel for the appellants that PW1 Asgar Shaikh should not be believed or relied upon as there is nothing on record to indicate that he was an injured eyewitness. The defence could be said to have admitted the presence of PW Asgar Shaikh. When the aforesaid part of the cross-examination of PW1 Asgar Shaikh was brought to the notice of the defence counsel, he submitted that a suggestion put by defence counsel to a witness in his cross-examination has no evidentiary value and even if the same is incriminating in any manner would not bind the accused as the defence counsel has no implied authority to admit the guilt of the facts incriminating the accused.

34. According to the learned counsel such suggestions could be a part of the defence strategy to impeach the credibility of the witness. The proof of guilt required of the prosecution does not depend on the satisfaction made to a witness.

35. In ***Tarun Bora alias Alok Hazarika v. State of Assam*** reported in 2002 Cri. LJ 4076, a three Judge Bench of this Court was dealing with an appeal against the order passed by the Designated Court, Guwahati, in TADA Sessions case wherein the appellant was convicted under Section 365 of the IPC read with Section 3(1) and 3(5) of the Terrorists and Disruptive Activities (Prevention) Act, 1987.

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36. In the aforesaid case, this Court, while considering the evidence on record took note of a suggestion which was put to one of the witnesses and considering the reply given by the witness to the suggestion put by the accused, arrived at the conclusion that the presence of the accused was admitted. We quote with profit the following observations made by this Court in paragraphs 15, 16 and 17 resply as under:

> *"15. The witness further stated that during the assault, the assailant accused him of giving information to the army about the United Liberation Front of Assam (ULFA). He further stated that on the third night he was carried away blind-folded on a bicycle to a different place and when his eyes were unfolded, he could see his younger brother-Kumud Kakati (P.W.-2) and his wife Smt. Prema Kakati (P.W.-3). The place was Duliapather, which is about 6-7 kms. away from his village Sakrahi. The witness identified the appellant-Tarun Bora and stated that it is he who took him in an ambassador car from the residence of Nandeswar Bora on the date of the incident.*
>
> *16. In cross-examination the witness stated as under: "Accused-Tarun Bora did not blind my eyes nor he assaulted me."*
>
> *17. This part of cross-examination is suggestive of the presence of accused-Tarun Bora in the whole episode. This will clearly suggest the presence of the accused-Tarun Bora as admitted. The only denial is the accused did not participate in blind-folding the eyes of the witness nor assaulted him."*

37. In ***Rakesh Kumar alias Babli v. State of Haryana*** reported in (1987) 2 SCC 34, this Court was dealing with an appeal against the judgment of the High Court affirming the order of the Sessions Judge whereby the appellant and three other persons were convicted under Section 302 read with Section 34 of the IPC. While re-appreciating the evidence on record, this Court noticed that in the cross-examination of the PW 4, Sube Singh, a suggestion was made with regard to the colour of the shirt worn by one of the accused persons at the time of the incident. This Court taking into consideration the nature of the suggestion put by the defence and the reply arrived at the conclusion that the presence of the accused namely Dharam Vir was established on the spot at the time of occurrence. We quote the following observations made by this Court in paragraphs 8 and 9 resply as under:

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> *"**8.** PW 3, Bhagat Singh, stated in his examination-in-chief that he had identified the accused at the time of occurrence. But curiously enough, he was not cross-examined as to how and in what manner he could identify the accused, as pointed out by the learned Sessions Judge. No suggestion was also given to him that the place was dark and that it was not possible to identify the assailants of the deceased.*
>
> ***9.** In his cross-examination, PW 4, Sube Singh, stated that the accused Dharam Vir, was wearing a shirt of white colour. It was suggested to him on behalf of the accused that Dharam Vir was wearing a shirt of cream colour. In answer to that suggestion, PW 4 said: "It is not correct that Dharam Vir accused was wearing a shirt of cream colour and not a white colour at that time." The learned Sessions Judge has rightly observed that the above suggestion at least proves the presence of accused Dharam Vir, on the spot at the time of occurrence."*

38. Thus, from the above it is evident that the suggestion made by the defence counsel to a witness in the cross-examination if found to be incriminating in nature in any manner would definitely bind the accused and the accused cannot get away on the plea that his counsel had no implied authority to make suggestions in the nature of admissions against his client.

39. Any concession or admission of a fact by a defence counsel would definitely be binding on his client, except the concession on the point of law. As a legal proposition we cannot agree with the submission canvassed on behalf of the appellants that an answer by a witness to a suggestion made by the defence counsel in the cross-examination does not deserve any value or utility if it incriminates the accused in any manner.

40. It is a cardinal principle of criminal jurisprudence that the initial burden to establish the case against the accused beyond reasonable doubt rests on the prosecution. It is also an elementary principle of law that the prosecution has to prove its case on its own legs and cannot derive advantage or benefit from the weakness of the defence. We are not suggesting for a moment that if prosecution is unable to prove its case on its own legs then the Court can still convict an accused on the strength of the evidence in the form of reply to the suggestions made by the defence counsel to a

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witness. Take for instance, in the present case we have reached to the conclusion that the evidence of the three eyewitnesses inspires confidence and there is nothing in their evidence on the basis of which it could be said that they are unreliable witnesses. Having reached to such a conclusion, in our opinion, to fortify our view we can definitely look into the suggestions made by the defence counsel to the eyewitnesses, the reply to those establishing the presence of the accused persons as well as the eyewitnesses in the night hours. To put it in other words, suggestions by itself are not sufficient to hold the accused guilty if they are incriminating in any manner or are in the form of admission in the absence of any other reliable evidence on record. It is true that a suggestion has no evidentiary value but this proposition of law would not hold good at all times and in a given case during the course of cross-examination the defence counsel may put such a suggestion the answer to which may directly go against the accused and this is exactly what has happened in the present case.

41. The principle of law that in a criminal case, a lawyer has no implied authority to make admissions against his client during the progress of the trial would hold good only in cases where dispensation of proof by the prosecution is not permissible in law. For example, it is obligatory on the part of the prosecution to prove the post mortem report by examining the doctor. The accused cannot admit the contents of the post mortem report thereby absolving the prosecution from its duty to prove the contents of the same in accordance with law by examining the doctor. This is so because if the evidence *per se* is inadmissible in law then a defence counsel has no authority to make it admissible with his consent.

42. Therefore, we are of the opinion that suggestions made to the witness by the defence counsel and the reply to such suggestions would definitely form part of the evidence and can be relied upon by the Court along with other evidence on record to determine the guilt of the accused.

43. The main object of cross-examination is to find out the truth on record and to help the Court in knowing the truth of the case. It is a matter of common experience that many a times the defence lawyers themselves get the discrepancies clarified

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arising during the cross-examination in one paragraph and getting themselves contradicted in the other paragraph. The line of cross-examination is always on the basis of the defence which the counsel would keep in mind to defend the accused. At this stage, we may quote with profit the observations made by a Division Bench of the Madhya Pradesh High Court in the case of ***Govind s/o Soneram v. State of M.P.*** reported in 2005 Cri.LJ 1244. The Bench observed in paragraph 27 as under:

> *"**27.** The main object of cross-examination is to find out the truth and detection of falsehood in human testimony. It is designed either to destroy or weaken the force of evidence a witness has already given in person or elicit something in favour of the party which he has not stated or to discredit him by showing from his past history and present demeanour that he is unworthy of credit. It should be remembered that cross-examination is a duty, a lawyer owes to his clients and is not a matter of great personal glory and fame. It should always be remembered that justice must not be defeated by improper cross-examination. A lawyer owes a duty to himself that it is the most difficult art. However, he may fail in the result but fairness is one of the great elements of advocacy. Talents and genius are not aimed at self-glorification but it should be to establish truth, to detect falsehood, to uphold right and just and to expose wrongdoings of a dishonest witness. It is the most efficacious test to discover the truth. Cross-examination exposes bias, detects falsehood and shows mental and moral condition of the witnesses and whether a witness is actuated by proper motive or whether he is actuated by enmity towards his adversaries. Cross-examination is commonly esteemed the severest test of an advocate's skill and perhaps it demands beyond any other of his duties exercise of his ingenuity. There is a great difficulty in conducting cross-examination with creditable skill. It is undoubtedly a great intellectual effort. Sometimes cross-examination assumes unnecessary length, the Court has power to control the cross-examination in such cases. (See Wrottescey on cross-examination of witnesses). The Court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime [See State of Punjab v. Gurmit Singh, 1996 SCC (Cri) 316]."*

44. During the course of cross-examination with a view to discredit the witness or to establish the defence on preponderance of probabilities suggestions are hurled on the witness but if such suggestions, the answer to those incriminate the accused in any

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manner then the same would definitely be binding and could be taken into consideration along with other evidence on record in support of the same.

45. However, it would all depend upon the nature of the suggestions and with what idea in mind such suggestions are made to the witness. Take for instance in case of a charge of rape under Section 376 of the Indian Penal Code, the statement of the accused contained plain denial and a plea of false implication, a subsequent suggestion by the defence lawyer to the prosecutrix about consent on her part would not, by itself, amount to admission of guilt on behalf of the accused. In cases of rape, it is permissible for the accused to take more than one defence. In such type of cases a suggestion thrown by the defence counsel to a prosecution witness would not amount to an admission on the part of the accused. At the same time, if the defence in the cross examination of the prosecutrix, with a view to support their alternative case of consent procure answers to the questions in the form of suggestions implicating the accused for the offence of rape then such suggestions would definitely lend assurance to the prosecution case and the Court would be well justified in considering the same. We may give one more example of a case where the accused would plead right of a private defence. Such a defence is always available to the accused but although if such a defence is not taken specifically during the course of trial yet if the evidence on record suggests that the accused had inflicted injuries on the deceased in exercise of his right of private defence then the Court can definitely take into consideration such defence in determining the guilt of the accused. However, if a specific question is put to a witness by way of a suggestion indicative of exercise of right of private defence then the Court would well be justified in taking into consideration such suggestion and if the presence of the accused is established the same would definitely be admissible in evidence.

PRINCIPLE OF RES GESTAE

46. We have also taken notice of one another aspect of the matter emerging from the evidence on record. PW 3 Nasir Rajjak Khan in his oral testimony (Exh. 10) has

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deposed that at around 11.30 pm in the night, he saw 10-15 boys quarrelling with each other in front of a shop by name "Sai Car Auto Consultant". He has further deposed that at that time PW 1 Asgar Shaikh came and conveyed to him that he had suffered injuries on his head and hands. Asgar Shaikh also informed Nasir that he along with Firoz (PW 2) was going to the police station. Asgar further informed Nasir that Abbas Baig was seriously injured. PW 3 Nasir, on hearing the aforesaid from Asgar, reached the spot where Abbas Baig (deceased) was lying in an injured condition. It is pertinent to note that in the cross-examination of the PW 3 Nasir a suggestion was put to him that he had inquired with PW 1 Asgar Shaikh as to what had happened and Asgar Shaikh in turn narrated the incident to Nasir. This suggestion put by the defence counsel to the PW 3 Nasir was answered in the affirmative. This part of the evidence of the PW 3 Nasir is corroborated by the evidence of the PW 1 Asgar Shaikh.

47. The reason for referring to the aforesaid a piece of evidence is that the PW 3 Nasir Rajjak Khan (Exh. 10) could be termed as a *res gestae* witness. This principle of *res gestae* is embodied in Section 6 of the Act 1872:

> *"**6. Relevancy of facts forming part of same transaction.**—Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and place."*

48. In the case of ***Sukhar* v. *State of U.P.*** reported in (1999) 9 SCC 507, this Court noticed the position of law with regard to Sections 6 & 7 resply of the Act 1872 thus:—

> *"6. Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter. The aforesaid rule as it is stated in Wigmore's Evidence Act reads thus:—*
>
> *"Under the present exception [to hearsay] an utterance is by hypothesis, offered as an assertion to evidence the fact asserted (for example that a*

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car-brake was set or not set), and the only condition is that it shall have been made spontaneously, i.e. as the natural effusion of a state of excitement. Now this state of excitement may well continue to exist after the exciting fact has ended. The declaration, therefore, may be admissible even though subsequent to the occurrence, provided, it is near enough in time to allow the assumption that the exciting influence continued."

7. Sarkar on Evidence (Fifteenth Edition) summaries the law relating to applicability of Section 6 of the Act 1872 thus:—

"1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.

2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.

3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and bystanders. In conspiracy, riot, the declarations of all concerned in the common object are admissible.

4. Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated.""

49. The rule embodied in Section 6 is usually known as the rule of *res gestae*. What it means is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. To form particular statement as part of the same transaction utterances must be simultaneous with the incident or substantial contemporaneous that is made either during or immediately before or after its occurrence.

50. Sections 6 and 7 resply of the Act 1872 in the facts and circumstances of the case, in so far as, the admissibility of a statement of the PW 3 Nasir Rajjak Khan coming to know about incident, immediately from the PW 1 Asgar Shaikh that Abbas Baig had been seriously assaulted and that Asgar Shaikh had also suffered injuries and admitted by the PW 1 Asgar Shaikh in his evidence would be attracted with all its rigour.

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EXCEPTION 4 TO SECTION 300 OF THE IPC

51. We shall now deal with the submission as regards the applicability of the fourth Exception to Section 300 of the IPC. However, before we proceed to deal with the submission, it would be appropriate to look into the oral evidence of PW 7, Dr. Shrikant Suresh Chandekar, Medical Officer who carried out the post mortem of the dead body of the deceased and also prepared the post mortem report.

52. The examination-in-chief of PW 7 Dr. Shrikant, Exh. 18, reads thus:

> *"1. On 02.04.2001 I was on duty when a dead body of Abbas Sanaulla Baig was brought to mortuary by Khadak police alongwith inquest panchnama. Accordingly, I carried out the postmortem examination between 6.30 a.m. to 7.30 a.m. on the same day.*
>
> *2. On examination I noticed following external injuries: -*
>
> *1) Incised injury-left hand 3 c.m. distal to wrist transverse oblique and out into total thickness, metacarpus shows clean cut fractures;*
>
> *2) Incised injury-left wrist medically transverse oblique 4x1 c.m. underlying ulna shows clean cut fracture involving its total thickness;*
>
> *3) Linear abrasion-left wrist dorsum 2 c.m. transverse;*
>
> *4) Incised jury over fight forearm flex or aspect middle third transvers; 3.5 c.m. gaping-tailing medically skin deep;*
>
> *5) Incised injury over right hand dorsum-transverse oblique mid proximal region, 2.5 c.m. gaping skin deep;*
>
> *6) Linear abrasion right and infraclavicular region 4 c.m. oblique."*
>
> *7) Linear Abrasion-left mid scapular region vertical oblique-5c.m.*
>
> *8) Abrasion right shoulder back, 0.5 x 4 c.m. oblique.*
>
> *9) Stab injury, vertical situated adjacent and below right mid clavicle, measuring 7.5 c.m. x 0.8 to 2.5 c.m. Lower and of injury with curved margin, upper and angle clean cut, margins clean cut. Injury opening in right thoracic cavity.*
>
> *Corresponding internal injuries:- Chest muscles and pleura shows corresponding injuries. Right 2nd rib partially cut cleanly along its long 3rd right rib upper margin shown clean cut. Stab injury involving right 2nd intercostal muscles 1 to 1.5 x 3 c.m.*

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Right upper lobe of lung shows incised injuries. Vertical oblique 1.2 c.m. and 3.5 c.m.

Right middle lobe through and through injury near anterior margin, 1.5 c.m. below tissue-towards hilum, gaping.

Right pulmonary artery and superior vena cava cut partially-lumina exposed.

Right pleural cavity was full of blood with clots.

In my opinion all above injuries were antemortem and rescent.

During internal examination of head and abdomen I found no any injury, but the organs were pale. The stomach contains fluid with paste without any abnormal smell.

I preserved blood for grouping as per police requisition.

In my opinion, Abbas died due to shock and due to stab injuries.

Accordingly I have issued P.M. notes. They are in my handwriting and it bears my signature. Its contents are correct. It is marked at Exh. 19.

Injury No. 9 alongwith its corresponding internal injuries was sufficient in the ordinary course to cause death. That injury could be caused by sharp edged pointed weapons. Injury No. 9 can be caused by the sword Article No. 17 now shown to me is the same. Injury Nos. 1 and 2 were incised injuries alongwith underlined fractured bones. Injury Nos. 1 to 8 are possible by Article No. 16- sickle or Article No. 17 sword, as both are having sharp edges.

Initially, I had issued the provisional death certificate. The certificate now shown to me is the same. It bears my signatures its contes are correct. It is now marked at Exhibit 20."

53. In order to appreciate the question, it will be profitable to refer to the definition of murder as provided in Section 300 of the Indian Penal Code which is quoted below:

*"**300. Murder.**—Except in the cases hereinafter excepted, 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,—

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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.

Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

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.

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

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, in as much as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, in as much as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as witness before Z, a Magistrate, Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, in as much as the provocation was giving by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

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.

Illustration

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being

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horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

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.

Illustration

A, by instigation, voluntarily causes, Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder."

54. At this stage, it will also be profitable to refer to the following observations of this Court in the case of ***State of Andhra Pradesh v. Rayavarapu Punnayya and Another*** reported in (1976) 4 SCC 382 where this Court laid down the distinction between murder and the culpable homicide not amounting to murder in the following way:

*"**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*

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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.*

Section 299	*Section 300*
A person commits culpable homicide if the act by which the death is caused is done-	*Subject to certain exceptions culpable homicide is murder if the act by which the death caused is done -*
INTENTION	
(a) with the intention of casing death; or *(b) with the intention of causing such bodily injury as is likely to cause death; or*	*(i) with the intention of causing death; or* *(2) 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*
KNOWLEDGE	
(c) with the knowledge that the act is likely to cause death,	*(3) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such to cause death bodily injury as is likely and without any excuse for incurring the risk of causing death or such injury as is mentioned above.*

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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) 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*

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nature. Rajwant v. State of Kerala [AIR 1966 SC 1874 : 1966 Supp SCR 230 : 1966 Cri LJ 1509.] is an apt illustration of this point.

18. *In Virsa Singh v. State of Punjab [AIR 1958 SC 465 : 1958 SCR 1495 : 1958 Cri LJ 818.] 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 under Section 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."

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*

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> *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."*

55. Applying the above principles to the case before us we find that there is no dispute that the death of the deceased occurred due to culpable homicide and not due to accident or suicide. We, therefore, propose to consider whether the incident comes within any of the exceptions indicated in Section 300 of the Code.

56. In order to bring the case within fourth exception, the essential requirement as pointed out by this Court in the case of ***Parkash Chand v. State of Himachal Pradesh*** reported in (2004) 11 SCC 381 is as follows:

> *"The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of provocation not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is*

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> *no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused: (a) without premeditation; (b) in a sudden fight; (c) without the offender 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".*" o(Emphasis supplied)

57. Thus, the s*ine qua non* for the application of an Exception to Section 300 always is that it is a case of murder but the accused claims the benefit of the Exception to bring it out of that Section and to make it a case of culpable homicide not amounting to murder. We must, therefore, assume that this would be a case of murder and it is for the accused to show the applicability of the Exception. Exception 4 reads as under:-

> *"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."*

58. A perusal of the provision would reveal that four conditions must be satisfied to bring the matter within Exception 4:

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(i) it was a sudden fight;

(ii) there was no premeditation;

(iii) the act was done in the heat of passion; and; that (iv) the assailant had not taken any undue advantage or acted in a cruel manner.

59. On a plain reading of Exception 4, it appears that the help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders 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.

60. We have already noticed the extent of injuries suffered by the deceased, as it appears from the deposition of the PW 7 Dr. Shrikant who carried out the post mortem. Having regard to the nature of the injuries caused by dangerous weapons like sickle and sword which, were applied on the vital part of the body, there is no escape from the conclusion that it is a case of Section 302 of the IPC.

61. It is very difficult for us to accept the submission of the learned counsel appearing for the appellant that the case would fall within the Exception 4 to Section 300 of the IPC and such benefit be extended to the accused. Assuming for the moment that the incident had occurred in the heat of the moment and fight was also sudden, we should not overlook the fact that the appellants herein inflicted as many as nine blows with a dangerous weapon on the deceased who was unarmed and was helpless. For cases to fall within clause (3) of Section 300 of the IPC, 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. ***Rajwant Singh v. State of Kerala*** reported in AIR 1966 SC 1874 is an apt illustration of this point.

62. In the overall view of the matter, we are convinced that no case is made out by the appellants to interfere with the impugned judgment and order of the High Court.

63. In the result, this appeal fails and is hereby dismissed.

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64. The records indicate that both the appellants herein were ordered to be released on bail pending the final hearing of the present appeal. The appellant No.2 was ordered to be released on bail *vide* order dated 01.10.2010 and the appellant No. 1 herein was ordered to be released on bail *vide* order dated 04.03.2013. The bail bonds furnished by them to the satisfaction of the Additional Sessions Judge, Pune in Sessions Case No. 323 of 2001 stand cancelled. Both the appellants are ordered to surrender before the Trial Court within a period of two weeks from today.

65. Once the appellants surrender before the Trial Court, they shall be sent to judicial custody to serve out the sentence as was imposed.

66. Pending applications if any shall stand disposed of.

……..J.
(SUDHANSHU DHULIA)

……..J.
(J.B. PARDIWALA)

NEW DELHI;
MARCH 29, 2023.