

Reserved

AFR

Court No. - 45

Case :- CRIMINAL APPEAL No. - 1212 of 1983

Appellant :- Jangaliya And Others

Respondent :- State of U.P.

**Counsel for Appellant :- P.S.Raghav,Dharmendra
Singhal,S.I.Jafri,S.P.S. Raghav,Shivendra Raj Singhal**

Counsel for Respondent :- D.G.A.

Hon'ble Manoj Misra,J.

Hon'ble Shamim Ahmed,J.

(Delivered by Manoj Misra, J.)

1. This appeal is against the judgment and order dated 11.05.1983 passed by Special Judge, Bulandshahr in S.T. No.57 of 1983 whereby, the appellant no.1 (Jangaliya) has been convicted under Section 302 IPC and the appellant no.2 (Shiv Lal) has been convicted under Section 302 IPC read with Section 114 IPC and both have been sentenced to imprisonment for life.

2. The appeal of appellant no.2 (Shiv Lal) was abated vide order dated 27.11.2021 consequent to his death. This appeal therefore survives qua appellant no.1 (Jangaliya).

INTRODUCTORY FACTS

3. On a written report (Ex. Ka-1), dated 25.10.1982, scribed by Sunder Swarup (PW-2), made by Lakhpat Singh (PW-1), son of Nanua (the deceased), the first information report (FIR) was registered at P.S. Shikarpur, District Bulandshahr as Case Crime No.246 of 1982, at 19.00 hours,

on 25.10.1982. The allegation in the FIR is that informant's chak (a consolidated piece of agricultural holding) adjoins the chak of his uncle (Tau - father's elder brother) Shiv Lal (appellant no.2). Three to four months before, the informant had installed a tube-well. The channel of its flow passed through the chak of his uncle (Shiv Lal). On 25.10.1982, the informant and the deceased were working in their chak when, at about 5 pm, informant's uncle (Shiv Lal) and his son (Jangaliya) (the surviving appellant no.1) started dismantling the channel which passed through their field. When the deceased requested them not to dismantle the channel, Shiv Lal abused him and exhorted Jangaliya to beat informant's father. On this exhortation, Jangaliya administered '*Fawra*' (spade) blows hitting the head of the deceased. On witnessing this, the informant, who was at the spot, raised alarm, as a result, Gagan Singh, Kewal Singh came running to the spot and witnessed the incident. By alleging that informant's father died on the spot and Jangaliya and Shiv Lal escaped with the '*Fawra*' (spade), the FIR was lodged.

4. The inquest was conducted on 26.10.1982, by about 7.15 am, of which an inquest report (Ex. Ka-4) was prepared by Investigating Officer (Mahendra Singh-PW-3). On 26.10.1982 itself, blood stained earth and plain earth was recovered from the spot of which collection memo (Ex. Ka-11) was prepared. Autopsy was conducted by Dr. Chandra Prakash (PW-4) on 26.10.1982 at about 4.30 pm. The autopsy report (Ex. Ka-14) notices:

External Examination

Average built body. Rigor mortis present all over. No Sign of decomposition.

Ante-mortem injuries:-

(i) Incised wound 5½” x 4” into skull cavity deep extending from left parietal region to left lateral neck around left ear.

(ii) Incised wound 1” x ½” into bone deep on left frontal head 2½” above left eyebrow.

(iii) Incised wound 2” x ½” into scalp deep on posterior head in middle.

(iv) Incised wound ½” x ¼” into muscle deep on tip of right index finger on ventral aspect.

Internal Examination

Skull cavity cut underneath injury no.1. All soft tissues under injury no.1 cut through an through upto bone depth in neck. Membranes cut under injury no.1. Left lateral procuses of second to fourth cervical vertebrae cut under injury no.1.

Cause of death:- Death due to shock and haemorrhage as a result of injury no.1. The estimated time of death about one day back.

5. After investigation, the appellants were charge sheeted, vide charge sheet dated 28.11.1982 (Ex. Ka-13). On which, cognizance was taken and case was committed to the court of session. By order dated 01.02.1983, Jangaliya (the

surviving appellant no.1) was charged for the offence punishable under Section 302 IPC whereas Shiv Lal (appellant no.2) was charged for the offence of instigating Jangaliya to commit the murder of Nanua punishable under Section 302 read with Section 114 IPC.

6. During the course of trial, the prosecution examined five witnesses. After taking on record the prosecution evidence and the statement of the accused under Section 313 CrPC, the trial court convicted and sentenced the appellants, as above. Hence, this appeal.

7. Before we proceed to notice the submissions of the learned counsel for the parties, it would be useful to notice, in brief, the testimony of the prosecution witnesses.

PROSECUTION EVIDENCE

8. The prosecution examined five witnesses. Their testimony, in brief, is as follows:-

9. **PW-1- Lakhpat Singh (the informant).** PW-1 is the son of the deceased. He proved the incident as narrated in the FIR noticed above. He also stated that at the time of the incident Shiv Lal had abused the deceased and had exhorted Jangaliya by saying “**Maar Saale Ko**”. PW-1 stated that on that instigation, Jangaliya inflicted blows with Fawra (spade). The incident was witnessed by him along with Sunder and Gagan. PW-1 stated that on infliction of Fawra blows his father died on spot. PW-1 stated that he, Gagan and Sunder tried to catch the accused but they ran away with the spade. PW-1 stated that he dictated the FIR and after it was written and read out to him, he had put his

thumb impression. The report was exhibited as Ex. Ka-1.

During cross examination, PW-1 stated that his grand father (Khamani) had three sons, namely, Shiv Lal (appellant no.2), Nanua (the deceased) and Bhagwanta. All three have common holding. PW-1 stated that he never saw Bhagwanta in his lifetime. Suggestion was given to PW-1 that in the year 1967 from the informant side a suit was instituted for getting the share of Bhagwanta. In response to the suggestion, PW-1 stated that he has no knowledge of any such case and stated that, in all, in the joint khata, there were 24 bighas of land; out of which, Nanua (the deceased) had 12 bighas. PW-1 stated that tube-well was installed 3-4 months before the incident. PW-1 stated that before the incident he had ploughed 3 - 4 bighas of land. PW-1 stated that on that day Jangaliya (the appellant no.1) was working in his field. At the time of the incident, Gagan and Sunder were also present in their adjoining fields. PW-1 stated that the incident was witnessed by him, Gagan and Sunder but he was not aware whether any other person witnessed the incident. He clarified that the channel of the tube-well was not built by him but it was a government built channel (Sarkari Nali) and in that channel, his tube-well's water flowed. On further cross examination, PW-1 stated that towards west of the tube-well, he had made some constructions to derive water from the channel, these constructions fell in the field of Shiv Lal. When these constructions were raised, Shiv Lal and Jangaliya raised no dispute. PW-1 also stated that on that day, before dismantling the channel, there was no altercation or fight

between the informant side and the accused side. PW-1 stated that the channel, which was dismantled, also irrigated the fields of Jangaliya and Shiv Lal. PW-1 stated that except for dismantling the channel, there was no other reason for the incident to have occurred. In respect of his presence at the spot, PW-1 stated that when his father (the deceased) had objected to the dismantling of channel by Jangaliya, PW-1 was ploughing his field with a plough (*Hal*). PW-1 stated that on his alarm, Gagan and Sunder arrived at the spot. Thereafter, they all three went to the spot where the deceased was lying. PW-1 stated that by the time he reached the spot, Nanua was dead. PW-1 stated that when he left the spot to lodge report, he had asked Gagan to be present near the body. PW-1 stated that he brought Sunder Singh to his house and there he dictated the report to him.

PW-1 stated that he reached the police station between 7-8 pm where his report was lodged and after lodging the report, he came back to the village. The I.O. came later, by night. The body kept lying at the spot over night and the police constables also remained near the body that night. In respect of the light condition when the report was lodged, PW-1 stated that at the time when the report was dictated, it had become dark. In respect of scribing the report, PW-1 stated that the report was scribed because he believed that the police personnel might insist for a written report. PW-1 stated that prior to this, he had never gone to the police station. PW-1 admitted that agriculturists used to purchase water from his tube-well and Gagan also used to

purchase water from his tube-well but Sunder never purchased water. PW-1 stated that the spot where the deceased was killed is not the field of Sunder but is near the field of Gagan whereas Sunder was working in the field which he had taken on *Batayi* and was sowing potato. In respect of the site plan prepared by the I.O., PW-1 stated that the site plan was not prepared at his instance but it must have been prepared by the I.O. after spot inspection as he had shown the spot to the I.O. and had also shown him the field where he was working.

In respect of existence of light at the time of the incident, PW-1 stated that at the time when the incident occurred, the sun had not set. In respect of the spot, he stated that when he arrived at the spot, Nanua was lying 2-4 paces north of the channel. He denied the suggestion that at the time of the incident no one was present.

10. PW-2 Sunder Swarup. He is the scribe of the written report (Ex. Ka-1). PW-2 stated that at the time of the incident, he was in the field of Gagan. With him, Gagan was there. At that time, he heard screams of Lakhpat (PW-1), who was ploughing his own field. On hearing his screams, they saw that near the tube-well Jangaliya was assaulting Nanua with his spade and near Jangaliya his father Shiv Lal was there. By the time they could reach the spot, Jangaliya and Shiv Lal had escaped. They checked whether Nanua was alive but he was found dead. PW-2 stated that Lakhpat (PW-1) dictated the report to him which was in his handwriting.

During cross examination, he stated that he had not informed the I.O. that Aziz's field was on *Batayi* with him. PW-2 also stated that towards west of the field of Gagan, there is his tube-well. PW-2 stated that he had to go towards his tube-well near which Gagan's field fell. When he was going towards his tube-well, Gagan joined him as it was evening time. He stated that, by mistake, he said that he told Gagan to come to his house. PW-2 stated that he had informed the I.O. that when he was going towards his tube-well, through the field of Aziz, from a distance of 100 paces, he watched Jangaliya assaulting the deceased. PW-2 stated that the spot from where he noticed the incident adjoins the field of Lakhpatt (PW-1) and at that time Lakhpatt was ploughing his field. PW-2 again reiterated that by the time he could reach the tube-well/spot, the accused had escaped and he had seen them running away. PW-2 stated that by the time he had arrived at the tube-well, the accused must have ran 100 paces. PW-2 stated that he had written the report at the house of Lakhpatt (PW-1) and by the time he had written the report, it was not dark but 10-15 minutes later, it had turned dark.

In paragraph 3 of his statement, during cross examination, PW-2 stated that when he had left with Lakhpatt to lodge the report, at the spot, except Gagan, there was no body else. He denied the suggestion that he takes water from Lakhpatt for the field which is on *Batayi* with him. PW-2 stated that near that field, there is tube-well of Kanti, which is at a distance of 200-250 paces away from the field of Aziz. PW-2 also stated that he saw the

I.O. next day morning and the I.O. was seen inquiring from people around him. PW-2 stated that the I.O. had prepared the site plan in his presence and in the presence of Lakhpat. PW-2 stated that the I.O. had recorded his statement. He denied the suggestion that he was not at the spot and that on account of his relations with PW-1, he is telling lies.

11. PW-3 - Mahendra Singh - Investigating Officer. PW-3 stated that on the date of lodging the report, he was posted as Sub-Inspector at the police station concerned and with him Lalta Prasad, Head Muharrir, was posted. By recognising the signature of Lalta Prasad, he proved the chik FIR and the GD entry of the written report, which were exhibited as Ex. Ka-2 and 3 respectively. PW-3 stated that, thereafter, he proceeded to the spot and found the body of Nanua at the spot. For the safety of the body, he deputed a constable there. PW-3 stated that by the time they could reach the spot, it was dark therefore inquest was deferred to next day. PW-3 stated that next day, inquest was conducted. He proved the inquest report and the papers prepared by him for autopsy such as photo-nash, chalan-lash, letter to Chief Medical Officer, etc., which were exhibited as Ex. Ka-5 to Ka-10. He proved the sealing of the body as also lifting of blood stained and plain earth from the spot. The recovery memos were exhibited and recovered material were also produced and exhibited. PW-3 stated that he had recorded the statements of Lakhpat Singh (PW-1), Gagan Singh (not examined) and Sunder Swarup (PW-2) and had prepared the site plan at their pointing out.

The site plan was exhibited as Ex. Ka-12. PW-3 stated that he obtained photocopy of the autopsy report on 28.10.1982 and made a search for the accused. PW-3 stated that on 12.11.1982 he recorded the statement of Head Muharrir Lalta Prasad who had made GD entry of the written report and on 27.11.1982, he had recorded the statement of Shiv Lal and on 27.11.1982 itself he had recorded the statement of Jangaliya in jail. PW-3 stated that after completing the investigation, he submitted charge sheet, which was marked as Ex. Ka-13.

During cross examination, PW-3 stated that the spot from where Lakhpatt (PW-1) had witnessed the incident is shown by him in the site plan and that during site inspection he had noticed that the field had been recently ploughed. PW-3 stated that the field of Aziz would be at a distance of 150 paces from the tube-well. PW-3 stated that Sunder (PW-2) had no field of his own. PW-3 stated that he left for the spot after registration of the report at about 7.30 pm. PW-3 stated that he remained at the spot near the dead body till 9.30 pm to 10 pm and, in between, he had noticed the marks on the body and had given instructions to the constables to protect the body. PW-3 stated that he had not noticed any digging of the mud near the body. PW-3 stated that near the spot there was no tube-well of the witness Sunder Swarup (PW-2). PW-3 stated that he made spot inspection on the next day at 9.40 am and the body was handed over to the constable for autopsy at 7.15 hours. He stated that papers in connection with inquest and autopsy were prepared before 7.15 am. PW-3 stated that the

first CD parcha was prepared on 26.10.1982, which was sent to the C.O. office on 27.10.1982. PW-3 stated that there is no endorsement of the C.O. office in respect of receipt of that parcha. PW-3 stated that he had prepared the site plan with the help of the informant and the witnesses. He denied the suggestion that at the time of preparing the site plan, he received no help from the informant.

12. PW-4 - Dr. Chandra Prakash - Autopsy Surgeon. He proved the autopsy report and the injuries mentioned therein, which have already been noticed above. On his statement, the autopsy report was marked as Ex. Ka-14. PW-4 also proved the clothes, etc. of the deceased which were marked material exhibit. He accepted the possibility of the injuries found on the body of the deceased as a result of *Fawra* (spade) blows. He also accepted the possibility of death to have occurred at 5 pm on 25.10.1982.

During cross examination, PW-4 stated that he had received 10 papers from the police at the time of autopsy and those papers were received by him around 12 noon of 26.10.1982. He accepted that it may be possible that those papers were received earlier or later. He also accepted the possibility of injuries found on the body of the deceased as a consequence of heavy sharp edged weapon.

13. PW-5- Natthu Singh- the constable who carried the cadaver for autopsy. PW-5 stated that he was handed over the body for autopsy on 26.10.1982 and till the body was delivered for autopsy, the body was kept in secured custody

and was not allowed to be touched by anyone.

During his cross examination, PW-5 stated that the body was delivered to him in the morning at 7.30 am. The mortuary was 34-35 km away and they covered the distance on a '*Tonga*' and reached the mortuary by 9.30 am. PW-5 stated that he delivered the papers concerning the body at around 4 pm.

14. After the prosecution had led its evidence, the incriminating circumstances appearing in the prosecution evidence were put to the accused. The accused-appellant Jangaliya pleaded that the deceased had installed a tube-well and was drawing a channel for selling water through the field of accused in connection with which there was litigation. In the litigation, the accused had won. In connection with the dispute, earlier also, altercations had taken place. But, on the date of the incident there was no altercation.

15. We have heard Sri Dharmendra Singhal, learned Senior Counsel, assisted by Sri Shivendra Raj Singhal, for the surviving appellant no.1; Sri Pankaj Saxena, learned AGA, for the State; and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANT

16. The learned counsel for the appellant submitted that the incident occurred late evening when the sun was about to set. The incident occurred in an open field, near the tube-well which was far away from the village abadi. None was present to witness the incident and the prosecution story was developed against the accused persons on ground

of enmity, as there existed a property dispute. If Lakhpat had been present at the spot he would have made an attempt to save his father but since Lakhpat neither made any attempt to save his father nor had suffered an injury in the incident, the prosecution story does not inspire confidence. The presence of PW-2 at the spot is not natural as he did not have any field adjoining the spot and being scribe of the written report, if his presence is not disclosed in the written report, the possibility of him being present at the spot is extremely doubtful. Further, there is no recovery of the spade to corroborate the prosecution story. In the alternative, learned counsel for the appellant submitted that even if the prosecution story is accepted as correct, the dispute was in respect of carrying water channel through the field of accused for selling water to others which, by itself, was an illegal act and the accused had every right to protect their field and if in connection with exercise of that right there had been an altercation or fight and there was no exhortation to kill but only to beat, if in that fit of rage, injury with the help of spade was caused, the offence would not travel beyond the one punishable under Section 304 Part II IPC therefore, in the worst case scenario, the appellant is not liable to be convicted under Section 302 IPC.

SUBMISSIONS ON BEHALF OF THE STATE

17. **Per contra**, learned AGA submitted that this is a case where a prompt first information report has been lodged. The distance of the police station from the spot is 3 km and

the written report was lodged at 19.00 hours i.e. at 7 pm in respect of an incident that occurred at 5 pm. From the testimony of the witnesses, it has come on record that sun had not set by the time of the incident therefore, there was sufficient light to witness the incident. The presence of PW-1 was quite natural as he was ploughing his own field and his father (the deceased) was at his tube-well when the assault took place. Absence of injuries on the body of PW-1, or PW-1's attempt to save his father, is not a good ground to disbelieve his presence because by the time he could arrive at the spot, his father had been administered blows by the surviving appellant no.1 and the surviving appellant no.1 along with his own father (appellant no.2) had effected his escape. It has been submitted that the prosecution evidence appears natural and the medical report also corroborates the oral testimony. It has been submitted that there is no suggestion to the prosecution witnesses that the incident occurred at some other spot or at some other time and there is also no suggestion whatsoever to the prosecution witnesses that the first information report was ante-timed. Further, there is a suggestion to PW-2 that he takes water from the informant party to irrigate the field taken by PW-2 on *Batayee* therefore, the argument that PW-2 had no field around is not sustainable. Hence, PW-2's presence at the spot is also proved. It has thus been submitted that the eye witness account coupled with surrounding circumstances have clearly proved that the surviving appellant no.1 administered multiple spade blows on vital part of the body of the deceased and therefore he

was rightly convicted for the offence punishable under Section 302 IPC.

ANALYSIS

18. Having noticed the rival submissions and the prosecution evidence in detail, the following features stand out:-

(a) that, the deceased Nanua is the brother of accused Shiv Lal (non surviving appellant no.2) and the surviving appellant no.1 (Jangaliya) is the son of Shiv Lal which means appellant no.1 is the nephew of the deceased, whereas the informant is the son of the deceased and nephew and cousin brother, respectively, of the two accused, namely, Shiv Lal and Jangaliya; (b) that, a tube-well was established by the deceased, the water channel of which passed through the field of the accused in respect of which the accused had raised objection and, according to own statement of the accused, in the past there had been altercations in that regard; (c) that, according to the explanation of the surviving appellant no.1 under Section 313 CrPC, a suit was instituted by the deceased which was decided in favour of the accused; (d) that, from paragraph 7 of the judgment of the trial court, it appears that the said suit, which was instituted by Lakhpat (PW-1) in the revenue court, was for partition against Shiv Lal (non surviving appellant no.2) and it was dismissed. In fact, this suit, as per the observations of the trial court, was not only against non surviving appellant Shiv Lal but against Nanua (the father of PW-1) also; (e) that, the witnesses were not in

close proximity to the deceased at the time when the deceased was assaulted rather, they reached the spot after the assault had taken place and the accused were about to escape, which means that the witnesses were not in a position to intervene at the time of the assault; (f) that, according to the autopsy surgeon, the injuries found on the body of the deceased could have been a result of infliction of blows from a spade.

19. Bearing in mind the key features noticed above, what stands out is that there are no suggestions to the prosecution witnesses in respect of the incident occurring at some other time or that there were other enemies of the deceased having a strong motive to finish him. There is also no challenge to the spot and of the spot having fields of the deceased and the accused around. Thus, if the accused were in their field and the deceased and his son were managing their own field the presence of the two parties at the spot is quite natural. According to the testimony of the prosecution witnesses, the incident occurred at 5 pm on 25.10.1982 and by that time the sun had not set and there was light. The first information report was scribed and was lodged at a police station 3 km away at 7 pm. There is no suggestion that the first information report was ante-timed. Nothing has been shown to indicate that the police was in collusion with the informant and being in collusion with the informant, the first information report was ante-timed. In these circumstances, the first information report is prompt and therefore it can be taken that there was no time for the informant to contrive the

prosecution story.

20. In the aforesaid background when we notice the testimony of PW-1 (the son of the deceased), we find that according to him at the time of the incident his father had arrived at the spot upon noticing that the water channel was being dismantled by the accused. When the deceased intervened and objected to dismantling of the water channel, Shiv Lal (non surviving appellant no.2) exhorted his son (the surviving appellant no.1) to beat the deceased Nanua by stating “**Maaro Saale Ko**”. On this exhortation, spade blows were inflicted by the surviving appellant no.1. Noticing this, PW-1, who was ploughing his field at a short distance, raised an alarm and ran towards the spot. By the time he could reach, the fatal blows had been inflicted and the accused had escaped. The presence of PW-1 at the spot does not appear doubtful and is rather proved by the circumstance that the investigating officer, during the course of investigation, at the time of spot inspection, noticed that the field had been ploughed. Thus, by keeping in mind that the medical evidence has accepted the possibility of the injuries sustained by the deceased as a consequence of spade blows and had also accepted the possibility of death to have occurred at or about the time put by the eye witness account, in our view, it has been proved beyond reasonable doubt that the deceased died due to infliction of spade blows by the surviving appellant no.1 (Jangaliya). At this stage, we may notice that there is no suggestion to the prosecution witnesses that the deceased had other enemies who could have been a cause of his murder. There is also

no suggestion to the prosecution witnesses that PW-1 himself was interested in finishing off the deceased for some reason. Thus, for all the reasons mentioned above, we do not find a good ground to disbelieve the ocular account rendered by PW-1. The testimony of PW-1 is clear and is consistent throughout in respect of the time, place and the manner in which the incident occurred, which is corroborated by medical evidence as well as the material collected during investigation.

21. In so far as the PW-2 is concerned, he claims to have been there as he had the field of Aziz on '*Batayee*' from where he arrived at the spot with Gagan. Gagan has not been examined as prosecution witness and from the statement of PW-2 it appears that he arrived at the spot when the accused had already escaped and were away from the spot by quite a distance (100 paces). Most importantly, even though the written report is stated to have been scribed by PW-2 but his presence as a witness of the incident is not shown in the first information report. In these circumstances, it appears to us that PW-2 may have arrived at the spot on hearing alarms raised by PW-1 and, therefore, it would not be appropriate for us to rely on his statement as an eye witness of the incident. Nevertheless, the statement of PW-2 serves as a corroborative material to prove that PW-1 had promptly taken his help to scribe the written report to lodge the first information report in respect of the incident. Thus, the testimony of PW-2 supports the prosecution case to prove that the incident occurred on or about 5 pm and that the report was

promptly lodged.

22. As we have found the testimony of PW-1 wholly reliable and corroborated by surrounding circumstances including the material collected during the course of investigation, we affirm the findings returned by the trial court that the deceased died due to infliction of spade blows by the surviving appellant no.1 (Jangaliya).

23. Now, the question that arises for our consideration is whether the accused appellant no.1 Jangaliya is liable to be convicted for the offence punishable under Section 302 IPC or under Section 304 Part I or Section 304 Part II of the Indian Penal Code. The other question that arises for our consideration is that if we find the appellant not liable to be convicted under Section 302 IPC but under Section 304 Part I or Section 304 Part II, then what would be the appropriate sentence.

24. To appropriately address the above issue, we have to first examine as to when culpable homicide would amount to a murder. Before that we have to examine as to when a person commits the offence of culpable homicide. In that regard, Section 299 IPC provides as follows:-

“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.”

25. In the instant case, there are four external injuries

found on the body of the deceased. Injuries no.2 and 3 though are on vital part but there appears no underlying fracture to those injuries. Injury no.2 is bone deep and injury no.3 is scalp deep. Injury no.4 is on non vital part, namely, index finger and is muscle deep. The fatal injury is injury no.1. Injury no.1 is skull cavity deep extending from left parietal region to left lateral neck around left ear. Underlying the injury no.1, all soft tissues are cut through and through upto bone depth in neck. Membranes are cut, brain cut and second and fourth cervical vertebrae cut. In these circumstances, it can be said that at the time of causing that injury, the inflictor of that wound had inflicted that injury with the knowledge that he is likely by such act would cause death. Notably, there is no case of the defence that the injury no.1 was inflicted accidentally. Therefore, by all means, the appellant no.1 is liable for the offence of culpable homicide.

26. As to whether he is liable for the offence of murder, we have to examine the provisions of Section 300 IPC to find out as to when a culpable homicide is murder. Section 300 IPC, without exceptions, reads as follows:-

“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, 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.”

27. In the instant case, the argument of the learned counsel for the appellant is that the surviving appellant no.1 is a rustic villager. At the time of the incident, he was with his father (Shiv Lal-non surviving appellant no.2) in his own field and was with a spade, which is a common agricultural implement. Spade by its nature is not a weapon of assault but can be converted into one. Admittedly, according to the prosecution case, the deceased had set up a tube-well, water channel of which flowed through the field of the accused, as a consequence of which, the accused were annoyed and were raising objection and in the past also, there had been altercation. It is argued on behalf of the appellant that no one has a right to draw a water channel from another's field and therefore if the owner protects his interest and seeks to dismantle that water channel, his action is in furtherance of exercise of his right to property and that, by itself, is no offence. The intervention by the deceased in that exercise of right had evoked a strong reaction, leading a person to lose his self control and, therefore, if, as a result of which, blows were inflicted in that spur of the moment, it cannot be said that the blows

were inflicted with an intention of causing death. Hence, it would not be a case of murder. It was argued that if it is assumed, from the nature of the injuries caused, that the injuries inflicted were such that they, in all probability, would have caused death then the case of the appellant would be covered by the exceptions to Section 300 of the IPC.

28. To appropriately test the aforesaid submissions, it would be useful to extract the exceptions to Section 300 IPC. These are extracted below:-

“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.”

29. The learned counsel for the appellant submits that the case of the appellant would fall in any one or more of the following Exceptions, namely, Exception-1, Exception-2 and Exception-4.

30. **Per contra**, learned AGA submits that the case of the appellant would not fall in any of the exceptions and it would be covered by clauses secondly and thirdly of Section 300 therefore, the appellant is liable to be punished for murder.

31. Before proceeding further, we may notice that this is a case where there are multiple blows on the head of the deceased. There are three incised wounds found on the head region. No doubt, injuries no.2 and 3 were not fatal but what is important is that the accused was targeting a vital part, perhaps most vital part of the body. Therefore, it can be said with certainty that the accused had the intention of causing such bodily injury which he knew that it is likely to cause death of the person to whom the harm is caused, particularly, when we see it in the context of injury no.1 which reflects that the underlying tissues, vertebrae etc were all cut through and through. It is also important to notice here that the deceased had died on the spot. In these circumstances, in our considered view, appellant's act traveled from the genus of culpable homicide to the species of murder. Therefore, we would now have to ascertain whether the case of the appellant fell in any of

the exceptions to Section 300 IPC.

32. At the outset, we may observe that Exceptions 3 and 5 to Section 300 IPC do not apply to the facts of the case at all, therefore, we do not propose to discuss the same. Thus, we shall discuss the applicability of Exception 1, Exception 2 and Exception 4.

33. Before examining the applicability of Exceptions 1 and 4, we deem it appropriate to address the applicability of Exception 2. Exception 2 applies to a case where 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. Here there is nothing to indicate that the deceased was armed and was doing some damage to the property of the accused. It is not shown that the deceased inflicted any blows to the accused. It has also not come in the prosecution evidence that the water channel was being installed on the day of occurrence and to protect the property, the appellant exceeded his right of self defence. Rather, the tube well was there since last few months. In these circumstances, if the deceased intervened and raised objection to dismantling of an existing water channel, it did not trigger exercise of right of private defence of either property or person. Hence, in our view, we rule out the applicability of Exception 2 to Section 300 IPC.

34. In the instant case, according to the prosecution case, the accused were dismantling the water channel of the deceased. The deceased intervened. On his intervention, non surviving appellant no.2 (Shiv Lal), elder brother of the deceased, exhorted his son (surviving appellant) to beat the deceased by uttering “**Maar Saale Ko**”. It is argued by learned counsel for the appellant that in a recent decision in the case of *Litta Singh Vs. State of Rajasthan: (2015) 15 SCC 327* the Apex Court interpreted the utterances “**Maar Saale Ko**” as not “**Maar Do**”, that is, it may not mean that exhortation was with an intention that the person exhorted should kill. It is submitted that this would indicate that there was no intention to kill. In our view, this may be a mitigating circumstance qua the non surviving appellant no.2 (Shiv Lal) but would not serve as a mitigating circumstance qua the surviving appellant no.1 (Jangaliya) who inflicted three blows on the head including a fatal blow vide injury no.1 which not only cut underlying tissues through and through but also cut underlying skull, brain and vertebrae, resulting in instantaneous death. .

35. Now, we shall examine the applicability of Exception 4. The ingredients for applicability of Exception 4 are: (i) there must be a sudden fight; (ii) there was no pre-meditation; (iii) the act was committed in heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. If the said ingredients are present, the cause of quarrel would not be material as to who offered the provocation or started the fight. Although the term fight has not been defined in IPC but the consistent

view is that it implies mutual assault by use of criminal force and not mere verbal duel. In ***Bhagwan Munjaji Pawade v. State of Maharashtra, (1978) 3 SCC 330*** (Para 6), it was observed that where the accused is armed and the deceased is unarmed, Exception 2 can have no application and Exception 4 to Section 300 would not apply if there is sudden quarrel but no sudden fight between the deceased and the accused. It was held that "Fight" postulates a bilateral transaction in which blows are exchanged.

36. In the instant case, there is no disclosure about the sudden quarrel or altercation or exchange of blows. There is nothing to indicate that the deceased had any weapon such as lathi or agricultural implement in his hand which he may have raised to be used, or have used, at the time when he was assaulted by the surviving appellant no.1. In fact, the explanation of the appellant under Section 313 CrPC denies occurrence of any altercation or fight on the date of the incident. In such circumstances, in our considered view, Exception 4 to Section 300 IPC would not apply.

37. At this stage, we may notice two decisions, which were cited by the learned counsel for the appellant to bring out appellant's case within Exception 4 to Section 300 IPC. The first case cited by the learned counsel for the appellant is a decision in the case of ***Surain Singh Vs. State of Punjab: (2017) 5 SCC 796***. The other decision cited was of **Litta Singh (Supra)**.

38. In **Surain Singh's case (Supra)** the Apex Court

reiterated the law as to when Exception 4 to Section 300 IPC would apply by observing as follows:

“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. 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.”

39. In **Surain Singh’s case (supra)** the facts, which have been noticed in the judgment of the Supreme Court, are as follows:-

“At about 11:00 a.m., both the sides started quarrelling and had a heated exchange of words as Surain Singh (the appellant-accused) objected to the presence of Bhajan Singh, who was relative of Amrik Singh and not a party to the proceedings. Surain

Singh-the appellant-accused, took out his Kirpan and gave a blow to Bhajan Singh. When the complainant party tried to stop the appellant-accused, he gave a Kirpan blow to Mander Singh. He also assaulted Harbans Singh (since deceased) with Kirpan. Darshan Singh also took out his Kirpan and started giving blows to Santa Singh (since deceased). The injured were taken to Guru Gobind Singh Medical Hospital Faridkot, where Santa Singh and Harbans Singh succumbed to their injuries.”

40. On the above set of facts, the Apex Court found Exception 4 to Section 300 IPC applicable and convicted the accused under Section 304 Part 2 IPC instead of Section 302 IPC by observing as under:-

“The scuffle took place in the heat of passion and all the requirements under Section 300 Exception 4 of the IPC have been satisfied. Therefore, the benefit of Exception 4 under Section 300 IPC is attracted to the fact situations and the appellant-accused is entitled to this benefit.’

41. In the instant case, there is no evidence or even an explanation by way of statement under section 313 CrPC that there was a scuffle between the deceased and the surviving appellant no.1. There is virtually nothing to show that there was a fight between the two. Hence, in our considered view, the benefit of Exception 4 to Section 300 IPC would not be available to the appellant in light of the law noticed above.

42. In **Litta Singh’s case (supra)**, the other decision which

has been relied upon by the learned counsel for the appellant, the Supreme Court by considering the nature of the injuries and the weapons used to cause those injuries, namely, lathi, in paragraph 23, observed as follows:-

“17. Considering the nature of the injury caused to the deceased and the weapons i.e. lathi and gandasi (sickle) used by them, it cannot be ruled out that they assaulted the deceased with the knowledge that the injury may cause death of the person. Moreover, there is no evidence from the side of the prosecution that the accused persons pre-planned to cause death and with that intention they were waiting for the deceased coming from the field and then with an intention to kill the deceased they assaulted him.”

43. In the instant case, there are three injuries caused by one person and all the three injuries were on the head. Those injuries are stated have been inflicted with a ‘Fawra’ and injury no.1 is not only fatal but has been inflicted with great amount of force so much so that not only muscles were cut through and through but membranes, skull and the vertebrae were also cut as a consequence of which the deceased died on the spot. Thus, even if it is assumed that there is no premeditated intention to kill the deceased but the injury was caused with intention of causing such bodily injury as the offender knew to be likely to cause death of the person to whom the harm was caused and, in any case, that injury was sufficient, in ordinary course, to cause death and therefore, in our view, the benefit of the decision of **Litta Singh’s case (supra)** would not be available to the

surviving appellant no.1 (Jangaliya).

44. Although, the learned counsel for the appellant had not specifically argued that the case of the appellant would fall within the ambit of Exception 1 to Section 300 IPC but to explore whether the case would come under Exception 1, we proceed to examine the matter in that context.

45. To seek the benefit of Exception 1 to Section 300 IPC, following conditions are to be satisfied:- (1) there must be provocation to the accused; (2) the provocation must be grave; (3) the provocation must also be sudden; (4) the provocation must have deprived the accused of his power of self-control; (5) the offence must have been committed during loss of self-control; and (6) the person killed must have been the person giving provocation, or any other person by mistake or accident.

46. In ***K.M. Nanavati Vs. State of Maharashtra: AIR 1962 SC 605***, it was held:-

“The test of "grave and sudden" provocation under the Exception must be whether a reasonable person belonging to the same class of society as the accused, placed in a similar situation, would be so provoked as to lose his self control.”

47. In the instant case, if we go through the facts as laid out in the prosecution evidence it would appear that the water channel regarding which there appeared a dispute was there for quite sometime. The tube-well was installed 3-4 months before the incident. The prosecution evidence is that the water channel was being dismantled by the accused

when the deceased intervened. The prosecution evidence is silent with regard to the nature of the intervention; with regard to an altercation having taken place consequent to the intervention; and with regard to exchange of blows between the accused and the deceased. The prosecution evidence is to the effect that when the deceased noticed the accused dismantling the water channel, he went to the spot. There, non surviving appellant no.2 exhorted his son (the surviving appellant no.1) to assault the deceased. On that exhortation, the surviving appellant no.1 inflicted blows with the help of his '*Fawra*' (spade). The determining factor for applicability of Exception 1 in this scenario would be whether the intervention of the deceased caused grave and sudden provocation to the offender that made him lose power of self control to inflict those kind of injuries while he had no control over his emotions. For applicability of Exception 1 the provocation should not be sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person. In the instant case, the deceased intervened only when the water channel was being dismantled. If the water channel had been in existence from before and there had been a flow of water through that water channel from before and the suit for partition had been dismissed, as would be clear from paragraph 7 of the judgment of the trial court in respect of which no arguments have been raised in this appeal, there was no occasion, in our view, for the accused to be so provoked as to lose his power of self control and inflict three injuries on the head including one with so much force that it cut the

skull, damaged the brain and the vertebrae including the muscle sheets as has been noticed by the autopsy surgeon. Therefore, in our view, the surviving appellant no.1 is not entitled to the benefit of Exception 1.

48. Having discussed the arguments advanced by the learned counsel for the appellant and having noticed the nature of the injuries caused and that the prosecution has been able to successfully prove that those injuries were caused by the accused appellant, keeping in mind that those injuries were such that would fall in clause ‘Secondly’ and ‘Thirdly’ of Section 300 IPC, we are of the considered view that the appellant would be liable to be convicted for an offence of murder, as has been held by the trial court. We, therefore, affirm the judgment and order of the trial court. The appeal is, accordingly, **dismissed**. The surviving appellant no.1 (Jangaliya) is reported to be on bail. His bail bonds are cancelled. He shall be taken into custody forthwith to serve out the sentence awarded by the trial court.

49. Let a copy of this order be certified to the court below along with the record for information and compliance.

Order Date :- 31.05.2022

AKShukla/-