AFR
Court No. 48
Reserved on: 14.10.2019
Delivered on: 05.11.2019

CRIMINAL APPEAL No. 2233 of 1987

Kaptan Singh ----Appellant

Vs

State of Uttar Pradesh ----Respondent

WITH

CRIMINAL APPEAL No. 2252 of 1987

H.N. Singh ----Appellant

Vs

State of Uttar Pradesh ----Respondent

For Appellants : Sri Sangam Lal Kesharwani
Advocate

For Respondent/State : Sri J.K. Upadhaya learned, AGA

Hon'ble Pritinker Diwaker, J.
Hon'ble Raj Beer Singh, J.

Per: Raj Beer Singh,J

1. Both these appeals have been preferred against the judgment and order dated 26.08.1987 passed by IVth Additional Sessions Judge, Kanpur Nagar in Session Trial No. 199 of 1986 (State Versus Kaptan Singh and H.N. Singh) under Sections 302, 323/34 & 324/34 of I.P.C., P.S. Kalyanpur, District Kanpur Nagar, whereby accused-appellant H.N. Singh has been convicted under Section 302 and accused-appellant Kaptan Singh has been convicted under Section 302/34 and they have been sentenced to life. Both the accused-appellants have further been convicted under Section 324/34 IPC and sentenced to rigorous imprisonment for one year. Both the sentences have been directed to run concurrently.

2. Both the accused-appellants H.N. Singh and Kaptan Singh as well as the deceased Ram Niwas Rao were tenants in residential building of (PW-2) informant-Ram Singar Pandey. On 03.05.1986 at around 8.30 P.M. informant Ram Singar Pandey (landlord) came at the said premises and demanded electricity dues from accused-appellant Kaptan Singh. Accused-appellant Kaptan Singh objected the same by saying that electricity bill is exaggerated and thus he would not pay the same. Meanwhile, another tenant accused-appellant H.N.Singh also came and protested that landlord was demanding more electricity dues and they would not pay the same and he even started abusing (PW-2) Ram Singar Pandey. At the same time, another tenant Ram Niwas Rao (deceased) came and tried to intervene, but accused-appellant Kaptan Singh gave a knife blow at the chin of (PW-2) Ram Singar Pandey, while being infuriated by intervention of Ram Niwas Rao, accused-appellant H.N. Singh gave a knife blow in inguinal region of Ram Niwas Rao (deceased) by exhorting that the deceased always used to support the landlord. Hearing the noise, one Raj Kishore, Bachcha Lal, Jitendra Tewari and some other tenants of the premises reached there and intervened. Ram Niwas Rao (deceased) was taken to Hallet Hospital and was admitted there but, on the same night, he succumbed to his injuries in the hospital.

3. **(**PW-2) Ram Singar Pandey reported the matter to the police by submitting written complaint Ex. Ka-1 and on that basis, case was registered under Sections 324/304 of I.P.C. against both the accused-appellants on 04.05.1986 at 3.30 P.M. vide first information report Ex. Ka-13.

4. Deceased Ram Niwas Rao, while he was in injured condition, was medically examined on 03.05.1986 vide MLC Ex.Ka-15 and following injuries were found on the person of deceased.

> *(i) Incised wound (lt.) inguinal area 1.8 cm x 8 cm x muscle deep with fresh bleeding. Margins sharp cut*

with cut end of hair bulb seen.
(ii) He was admitted for observation and treatment as the case of stabbed wound. According to the opinion of the doctor, the injury was fresh and caused by some sharp edged object.

5. After death of deceased, (PW-3) S.S.I. Shanker Singh conducted inquest proceeding on 04.05.1986 vide inquest report Ex.Ka-2 and other related documents were prepared and the dead body of the deceased Ram Niwas Rao was sent for postmortem.

6. Postmortem on the dead body of the deceased was conducted on 04.05.1986 by (PW-4) Dr. P.S. Misra vide postmortem report Ex. Ka-12 and following injuries were found on the body of deceased.

(I) Stab wound 2 cm. x ½ cm. x 10 cm. on the left inguinal *region. Femoral artery was cut. Margin clean cut and gapping present.*

(ii) Stitched cut open wound present on right arm front. As per Autopsy Surgeon, the death had been caused on account of shock and haemorrhage as a result of injury no.1.

7. (PW-2) Ram Singar Pandey was medically examined by (PW-6) Dr. N.C. Yadav vide MLC Ex.Ka-16, and following injuries were found on his body;

(i) Traumatic swelling left side scalp 1.5 cm. x 1 cm. in red colour.

(ii) Incised wound just below left angle of mouth 1.2 cm. x .3 cm.x skin deep with fresh bleeding. M.G. examination shows cut hair bulb

(iii) Abraded contusion left thigh lower end outer aspect 1.5 cm. x 1 cm. with fresh oozing of blood is there.

complained pain in chest.

8. (PW-3) S.S.I. Shanker Singh conducted investigation and after

completion of the same, both accused-appellants were charge sheeted vide Ex. ka-11.

9. Learned Trial court framed charge under Section 302 of I.P.C. against accused-appellant H.N. Singh while accused-appellant Kaptan Singh was charged under section 302/34 of I.P.C. Both the accused-appellants were further charged under Sections 323/34 and 324/34 of I.P.C. They pleaded not guilty and claimed trial.

10. In order to bring home guilt of accused-appellants, prosecution has examined eight witnesses. After prosecution evidence, both the accused-appellants were examined under Section 313 of Cr. P.C., wherein they denied the prosecution evidence and claimed false implication, however, no evidence was adduced in defence.

11. After hearing and analyzing the evidence on record, the accused-appellant H.N. Singh was convicted under Section 302 of I.P.C., whereas accused-appellant Kaptan Singh was convicted under Section 302/34 of I.P.C. and both the accused-appellants were further convicted under Section 324/34 of I.P.C. vide impugned judgment and order dated 26.08.1987 and were sentenced as stated in paragraph no.1 of this judgment.

12. Being aggrieved, accused-appellant H.N. Singh has preferred Criminal Appeal No. 2252 of 1987 and accused-appellant Kaptan Singh has preferred Criminal Appeal No. 2233 of 1987.

13. Heard Sri Sangam Lal Kesherwani, learned Amicus on behalf of both the accused-appellants and Sri J.K. Upadhaya, learned A.G.A. for the State-respondents.

14. Learned Amicus Curiae for the appellants submits:-

(i) that (PW-1) Vimla Devi is an interested witness and similarly (PW-2) Ram Singar Pandey is also not an independent witness. No independent witness has been examined and

thus, their testimony is not reliable.

(ii) that so far as conviction of accused-appellant Kaptan Singh under Section 302/34 of I.P.C. is concerned, no specific role has been assigned to him in causing death of deceased. He has not caused any injury to the deceased. It was submitted that the incident took place suddenly and thus, there is no question of any pre-arranged plan between accused persons and thus, accused-appellant Kaptan Singh can not be convicted under section 302/34 IPC as there is nothing to show the common intention to cause murder of deceased.

(iii) that, even if the prosecution evidence is accepted as such, no case under Sections 302 or 302/34 of I.P.C. is made out. The alleged incident took place suddenly without any premeditation in the heat of passion due to dispute over electricity bill. Accused-appellant H.N. Singh has given single knife blow at the deceased, while accused-appellant Kaptan Singh has not caused any injury to him. It was submitted that, even if the prosecution evidence is accepted as such, at the most only a case under Section 304 Part II of I.P.C. is made out against the accused-appellant H.N. Singh.

(iv) that the alleged incident took place on 03.05.1986 and a period of 33 years have already elapsed and thus the purpose would be served if accused-appellants were sentenced to the period already undergone.

15. On the other hand, supporting the impugned judgment, it has been argued by the State counsel that there is clear and cogent evidence of (PW-1) Vimla Devi and (PW-2) Ram Singar Pandey, which unerringly point out the guilt of accused-appellants. As the alleged incident took place inside the premises thus, (PW-1) Vimla Devi, who is wife of

deceased, is natural witness, as she was residing with her husband Ram Niwas Rao (deceased) in the same premises. Similarly, (PW-2) Ram Singar Pandey is also a reliable and credible witness. Both these witnesses have been subjected to cross-examine but no major contradiction or inconsistency could emerge. However, it was fairly admitted by the State counsel that the alleged incident took place suddenly at spur of moment.

16. We have considered the rival submissions and gone through the entire record.

17. **(**PW-1) Vimla Devi, who is wife of deceased Ram Niwas Rao, has stated that she was residing with her husband in a rented premises belonging to (PW-2) Ram Singar Pandey. Accused-appellant Kaptan Singh and H.N. Singh were also tenants in the same premises. On the day of incident, at about 8.30 P.M. she was sitting at door of her house and was talking with her mother-in-law and husband Ram Niwas Rao (deceased). At the same time landlord (PW-2) Ram Singar Pandey was demanding electricity dues from accused-appellant Kaptan Singh and meanwhile, accused-appellant H.N. Singh also reached there. Accused appellant Kaptan Singh stated that landlord (PW-2) Ram Singar Pandey is demanding exaggerated electricity dues and both the accused-appellants Kaptan Singh and H.N. Singh started abusing (PW-2) Ram Singar Pandey. **(**PW-1) Vimla Devi further stated that her husband went there and asked accused-appellants as to why they were abusing but accused-appellant Kaptan Singh gave knife blow at (PW-2) Ram Singar Pandey, while accused-appellant H.N. Singh gave knife blow at her husband Ram Niwas Rao. Thereafter, both the accused-appellants fled away from spot. The incident was also witnessed by her mother-in-law and some other persons in the light of electricity. The deceased Ram Niwas Rao was taken to hospital but on the same night at about 01.00 P.M., deceased Ram Niwas Rao succumbed to his injuries.

18. (PW-2) Ram Singar Pandey stated that he is owner of the House

No. 116/665 situated at Rawatpur, P.S. Kalyanpur, District Kanpur Nagar and in that premises, accused-appellant H.N. Singh, Kaptan Singh as well as some other persons namely, Raj Kishore, Bachcha Lal, Jitendra Tewari and deceased Ram Niwas Rao were tenants. On the day of incident, at about 8.00 P.M. he came at his premises and demanded electricity charges Rs. 15/- from accused-appellant Kaptan Singh, but accused-appellant Kaptan Singh was ready to give only Rs. 10/-. In the meantime, another tenant H.N. Singh came there and started abusing (PW-2) Ram Singar Pandey. By that time, another tenant deceased Ram Niwas Rao also came there and objected the conduct of accused-persons but accused-appellant Kaptan Singh gave a knife blow at the lip of (PW-2) Ram Singar Pandey, while accused-appellant H.N. Singh gave a knife blow in testicles region of Ram Niwas Rao by stating that he always used to support the landlord Ram Singar Pandey. This incident was witnessed by wife of deceased Ram Niwas Rao, his mother and several other persons. After the incident, both the accused-appellants fled away from the spot. The alleged incident was seen in the light of electricity. (PW-2) Ram Singar Pandey and deceased Ram Niwas Rao were taken to Hallet hospital and were medically examined but deceased Ram Niwas Rao expired on the same night at around 1.00 P.M.

19. (PW-3) S.S.I. Shanker conducted investigation and has proved the documents including site plan of the spot. (PW-4) Dr. P.S. Mishra has conducted postmortem. (PW-5) H.C. Chandra Kumar has recorded FIR. (PW-6) Dr. N.C. Yadav has medically examined injured (PW-2) Ram Singar Pandey as well as deceased Ram Niwas Rao, while (PW-7) Constable Chandrapal Singh has assisted during investigation. (PW-8) Jitendra Tewari has not supported prosecution and was declared hostile.

20. Close scrutiny of the evidence shows that the statements of (PW-1) Vimla Devi and (PW-2) Ram Singar Pandey are clear, cogent and credible. Theyhave been subjected to cross-examination, but they remained stick to the

prosecution version and no such fact, contradiction or inconsistency could emerge, so as to create any doubt about their testimony. Keeping in view the fact that after incident, deceased as well as injured were taken to hospital and were admitted there and that on the same night deceased Ram Niwas Rao has succumbed to injuries, it is apparent that the first information report of the incident was lodged without any undue delay. Version of (PW-1) Vimla Devi finds corroboration from testimony of (PW-2) Ram Singar Pandey and is fully consistent with medical evidence. It is also to be kept in mind that (PW-2) Ram Singar Pandey has himself sustained injuries in the same incident. In **Jarnail Singh Vs. State of Punjab (2009) 9SCC 719**, the Supreme Court reiterated the special evidentiary status accorded to the testimony of an injured accused. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case, the injured witness is subjected to lengthy cross- examination and nothing can be elicited to discard his testimony, it should be relied upon. Similar view was expressed in the case of **Krishan v State of Haryana, (2006) 12 SCC 459.** Hon'ble Supreme Court in Criminal Appeal Nos. 513-514 of 2014 Baleshwar Mahto & Anr. v. State of Bihar & Anr., decided on 09.01.2017, has reiterated the law as under :

> *"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone.*
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> *"Convincing evidence is required to discredit an injured witness." [Vide Ramlagan Singh v. State of Bihar [(1973) 3 SCC 881:1973 SCC (Cri) 563:AIR 1972 SC 2593], Malkhan Singh v. State of U.P. [(1975) 3 SCC 311 : 1974 SCC (Cri) 919 : AIR 1975 SC 12], Machhi Singh v. State of Punjab [(1983) 3 SCC 470 : 1983 SCC (Cri) 681], Appabhai v. State of Gujarat [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696], Bonkya v. State of Maharashtra [(1995) 6 SCC 447 : 1995 SCC (Cri) 1113], Bhag Singh [(1997) 7 SCC 712 : 1997 SCC (Cri) 1163], Mohar v. State*

of U.P. [(2002) 7 SCC 606 : 2003 SCC (Cri) 121] (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472], Vishnu v. State of Rajasthan [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302], Annareddy Sambasiva Reddy v. State of A.P. [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630] and Balraje v. State of Maharashtra [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] 29. While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab [(2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] , where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka [1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694] this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

In State of U.P. v. Kishan Chand [(2004) 7 SCC 629 : 2004 SCC (Cri) 2021] a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana [(2006) 12 SCC 459 : (2007) 2 SCC (Cri) 214]). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein." In this very judgment, relationship between the medical evidence and ocular evidence was also discussed, based on number of earlier precedents, as under: "33. In State of Haryana v. Bhagirath [(1999) 5 SCC 96 : 1999 SCC (Cri) 658] it was held as follows: (SCC p. 101, para 15)

"15. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged

> *to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject."*

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21. When the aforesaid principles are applied in the facts of this case, we find that testimony of injured witness (PW-2) Ram Singar Pandey is quite cogent and categorical. It is correct that (PW-1) Vimla Devi is wife of deceased but as incident took near her house, thus, her presence at spot is quite natural. It is well settled position that a natural witness may not be labelled as interested witness. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of occurrence and had

witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim. Generally close relations of the victim are unlikely to falsely implicate anyone. Law reports are replete with cases, wherein it has been laid down that Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person is alleged and proved. A witness is interested only if he derives benefit from the result of the case or as hostility to the accused. (Vide State of Punjab Vs Hardam Singh, 2005, S.C.C. (Cr.) 834, Dilip Singh Vs State of Punjab, A.I.R. 1983, S.C. 364, Harbans Kaur V State of Haryana, 2005, S.C.C. (Crl.) 1213; and State of U.P. vs. Kishan Chandra and others, 2004 (7), S.C.C. 629*).* It is pretty much settled that a close relative, who is a very natural witness in the circumstances of a case, cannot be regarded as an 'interested witness.

22. In the instant case presence of (PW-1) Vimla Devi is quite natural and she deposed cogently. She has been subjected to cross-examination but no adverse fact could come out. Further, (PW-2) Ram Singar Pandey is an injured eye witness. There are absolutely no reasons to doubt his testimony, which finds ample corroboration from (PW-1)Vimla Devi as well as supported by medical evidence. Considering all aspects, testimony of (PW-1) Vimla Devi and (PW-2) Ram Singar Pandey is found credible. We find no force in argument that (PW-1) Vimla Devi and (PW-2) Ram Singar Pandey are not reliable or they are interested witnesses.

23. In view of aforesaid, it is clear that the prosecution has been able to prove the alleged incident, however, it is to be considered whether both the accused-appellants were having common intention to cause death of the deceased. Perusal of evidence shows that the alleged incident took place suddenly at the spur of moment. There is no evidence to indicate that accused persons have any pre-arranged plan to commit murder of deceased. It is settled law that the common intention to commit a criminal

act depends upon the circumstances. In the case of Hira Lal Malik v. State, 1977 CrLJ 1921, the Supreme Court observed that :

> *"38.Common intention is a state of mind of an accused which can be inferred objectively from his conduct displayed in the course of commission of crime as also prior and subsequent attendant circumstances. Mere participation in the crime with others is not sufficient to attribute common intention to one of others involved in the crime. The subjective element in common intention therefore should be proved by objective test. It is only then one accused can be made vicariously liable for the acts and deeds of the other co-accused."*

The Supreme Court in the case of ***Ramesh Singh @ Photti v. State of A.P., (2004) 11 SCC 305***, has extensively dealt with the scope of Section 34 of the IPC. It was observed that :

> *"To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Indian Penal Code. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to guilty. By introducing Section 34 in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived*

> *at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (See Noor Mohammad Yusuf Momin AIR 1971 SC 855)".*

Common intention essentially being a state of mind and can only be gathered by inference drawn from facts and circumstances established in a given case. In case Nand Kishore v. State of Madhya Pradesh, (2011) 12 SCC 120, the Apex Court discussed the ambit and scope of Section 34 Indian Penal Code as well as its applicability to a given case, as under:

> *"20. A bare reading of this section shows that the section could be dissected as follows:*
> *(a) Criminal act is done by several persons;*
> *(b) Such act is done in furtherance of the common intention of all; and*
> *Each of such persons is liable for that act in the same manner as if it were done by him alone.*

It was held that these three ingredients would guide the court in determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 Indian Penal Code must be done by several persons. The emphasis in this part of the section is on the word "done". It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must

have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity."

24. In view of the above discussion, it is manifest that to establish a case under Section 34 IPC, prosecution has to prove beyond all reasonable doubt that the appellant had the knowledge of the intention of his co-accused and they voluntarily shared the said intention. The prosecution has to establish that in furtherance of the said intention, the appellant committed certain overt act which was responsible for the murder of the deceased. It is not that any and every act done during the course of attack on the deceased would indicate that the appellant shared the common intention, and only such overt act may be relevant which indicate that the appellant also shared the intention to cause the death of the deceased.

25. In the instant case (PW-2) Ram Singar Pandey was demanding electricity dues from his tenant accused-appellant Kaptan Singh and over that issue, hot talking took place. Accused-appellant H.N. Singh, who was another tenant, also came there and protested against the demand of electricity dues. Meanwhile, deceased Ram Niwas Rao, another tenant, intervened and being outraged of the same, accused-appellant H.N. Singh gave a knife blow at inguinal region of Ram Niwas Rao (deceased). Accused-appellant Kaptan Singh has not caused any injuries to the deceased. There is no evidence of even any exhortation by accused-appellant Kaptan Singh. These facts clearly indicate that there was no pre-arranged plan or meeting of minds between two accused-persons co commit murder of deceased and it was the individual act of accused-appellant H.N. Singh, which caused death of the deceased. It is quite apparent that there was no common intention between the two accused-

persons to commit murder of deceased and that the act of causing death of deceased Ram Niwas Rao was an individual act of accused-appellant H.N. Singh. Here, it may be also stated that accused-appellant H.N. Singh was charged under Section 302 simplicitor of I.P.C., while accused-appellant Kaptan Singh was charged under Section 302/34 of I.P.C. and thus, even the prosecution has not come up with a case that both the accused-persons have caused death of deceased in pursuance of common intention, therefore, conviction of accused-appellant Kaptan Singh under Section 302/34 of I.P.C. is not in accordance with law and thus, he is liable to be acquitted under Section 302/34 of I.P.C.

26. Next question, which arises for consideration is whether the act and mischief of the accused-appellant H.N. Singh falls within the ambit of "murder" so as to make him liable for conviction under Section 302 of I.P.C. As stated above, the alleged incident took place suddenly without any premeditation over the issue of electricity dues between the landlord and tenants and when deceased Ram Niwas Rao, who was another tenant, tried to intervene, being outraged by his intervention, accused-appellant H.N. Singh gave a knife blow at the inguinal region of Ram Niwas Rao, which resulted into his death. Before proceeding further, it is relevant to refer to the provisions of Section 300 of IPC, which read as under:

> *"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.

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."..*

It is well settled that for bringing in operation Exception 4 to Section 300 of Indian Penal Code, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner. The fourth exception of Section 300 of Indian Penal Code covers acts done in a sudden fight caused: (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. In case of **Pappu V State of Madhya Pradesh (2006) 7 SCC 391** the Apex Court exhaustively dealt with the parameters of Exception IV to section 300 of IPC. The relevant paras of the judgment are reproduced as under:

> *"13...The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and(d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 Indian Penal Code is not defined in the 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 have 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 cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".*

In case of **Ramautar V State of UP 2017 (1) All JIC 237**, there was no pre-meditation or prior concert on the part of the accused persons to commit murder of deceased and the incident happened on the spur of the moment and in an uncontrollable, embittered and agitated state of enragement, thus, depriving the accused persons of their power of self control. It was observed that though during the assaults, the accused persons were understandably aware of the likely results thereof, it is difficult to perceive that they had any common object of eliminating the deceased. In view of these facts, Apex Court on a consideration of the totality of the circumstances attendant on the case, has upheld the conviction of the appellants under section 304 Part-I read with Section 147, 148, 149 IPC, as recorded by the High Court.

In the case of **Rampal Singh Vs. State of U.P. (2012) 8 Supreme Court Cases 289,** the Apex Court has considered the legal aspect as to when culpable homicide would amount to murder and when it would not amount to murder. Hon'ble the Apex Court has held in paragraph no. 22 as under:-.

> *“22. Thus, where the act committed is done with the*

> *clear intention to kill the other person, it will be a murder within the meaning of Section 300 of the Code and punishable under Section 302 of the Code but where the act is done on grave and sudden provocation which is not sought or voluntarily provoked by the offender himself, the offence would fall under the exceptions to Section 300 of the Code and is punishable under Section 304 of the Code. Another fine tool which would help in determining such matters is the extent of brutality or cruelty with which such an offence is committed.".*

In the case of **Jhaptu Ram Vs. State of Himachal Pradesh (2014) 12 SCC 410,** the facts were that an altercation took place between the appellant and his son. The accused fired at the deceased. Receiving gun shot injury, he fell down and died. In this background, the Apex Court converted the conviction of the appellant under Section 304 Part-I I.P.C and awarded sentence of ten years rigorous imprisonment and also with a fine of Rs. 5,000/-.

In case of **State of Madhya Pradesh Vs. Gangabishan @ Vishnu & Ors 2018 Law Suit (SC) 655,** the deceased suffered gunshot injury and entry wound was on back of his left thigh and the shot was fired from his backside, which was fired within the range. It was noticed that in view of the medical evidence, it would be easy to infer that if accused No.1 was having intention to commit murder of the deceased and used fire arm for that purpose, the injury could have been caused on upper limb, above waist of the deceased but the part chosen for causing injury was the back portion of left thigh. Thus, though the accused No.1 was not having intention to commit murder of the deceased but the act was to cause bodily injury which was likely to cause death. The High Court found that he would be responsible for commission of culpable homicide not amounting to murder punishable under Section 304 (Part I) of IPC. The High Court after scanning the entire evidence also held that the respondents were not having an intention to commit murder of the

deceased. In view these specific facts and evidence, the judgment of the High Court was upheld.

In case of **Gurmukh Singh V State of Haryana (2009) 15 SCC 635** after scanning all the previous decisions it was stated that where the death was caused by a single blow, the Apex Court indicated, though not exhaustively, a few factors to be taken into consideration while awarding the sentence, observed as under:

> *"23. These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:*
>
> *(a) Motive or previous enmity;*
>
> *(b) Whether the incident had taken place on the spur of the moment;*
>
> *(c) The intention/knowledge of the accused while inflicting the blow or injury;*
>
> *(d) Whether the death ensued instantaneously or the victim died after several days;*
>
> *(e) The gravity, dimension and nature of injury;*
>
> *(f) The age and general health condition of the accused;*
>
> *(g) Whether the injury was caused without premeditation in a sudden fight;*
>
> *(h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;*
>
> *(i) The criminal background and adverse history of the accused;*
>
> *(j) Whether the injury inflicted was not sufficient in the ordinary ourse of nature to cause death but the death*

was because of shock;

(k) Number of other criminal cases pending against the accused;

(l) Incident occurred within the family members or close relations;. (m) The conduct and behavior of the accused after the incident.

Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment? These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused."

It was held that the list of circumstances enumerated above is only illustrative and not exhaustive. It was observed that proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavor of the court must be to ensure that the accused receives appropriate sentence, in other words, sentence should be according to the gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused.

The Apex Court in **State of A.P. vs. Rayavarapu Punnayya and Another reported in 1976 (4) SCC 382** while drawing a distinction between Section 302 and Section 304 of IPC held as under:

"12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable

homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

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

In **Budhi Singh vs. State of Himachal Pradesh, reported in 2012, (13) SCC 663,** the Supreme Court held as under:

18. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will

always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.

19. Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is premeditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder....."

In **Kikar Singh vs. State of Rajasthan reported in 1993 (4) SCC 238,** the Apex Court held as under:

"8. The counsel attempted to bring the case within Exception 4. For its application all the conditions enumerated therein must be satisfied. The act must be committed without premeditation in a sudden fight in the heat of passion; (2) upon a sudden quarrel; (3) without the offender's having taken undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual combat or exchanging blows on each other. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood is already heated or warms up at every subsequent stroke. The voice of reason is heard on neither side in

the heat of passion. Therefore, it is difficult to apportion between them respective degrees of blame with reference to the state of things at the commencement of the fray but it must occur as a consequence of a sudden fight i.e. mutual combat and not one side track. It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first. The strike of the blow must be without any intention to kill or seriously injure the other. If two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage denying him the entitlement to Exception 4. True the number of wounds is not the criterion, but the position of the accused and the deceased with regard to their arms used, the manner of combat must be kept in mind when applying Exception 4. When the deceased was not armed but the accused was and caused injuries to the deceased with fatal results, the Exception 4 engrafted to Section 300 is excepted and the offences committed would be one of murder.

9. The occasion for sudden quarrel must not only be sudden but the party assaulted must be on an equal footing in point of defence, at least at the onset. This is specially so where the attack is made with dangerous weapons. Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted and commission must be one of murder punishable under Section 302. Equally for attracting Exception 4 it is necessary that blows should be exchanged even if they do not all find their target. Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under Exception 4...."

27. Applying the above discussed principles of law in the present case, what emerges from the evidence, is that there was no enmity between the parties and the incident occurred at spur of moment on a trivial issue of

electricity dues. There is nothing to show that there was any premeditation to commit murder of deceased Ram Niwas Rao. The alleged incident took place in a heat of passion upon sudden quarrel and accused-appellant H.N. Singh has not taken any due advantage or acted in cruel manner. Considering the entire facts and evidence, case of accused-appellant H.N. Singh would fall under Exception-4 of Section 300 of I.P.C. and thus accused-appellant H.N. Singh is liable to be convicted for committing culpable homicide not amounting to murder. Considering all the attending facts, evidence and nature of injuries caused to the deceased, we are of the view that accused-appellant H.N. Singh is liable to be convicted under Section 304, Part-II of I.P.C. and not under Section 302 of I.P.C. However, so far as, conviction of both the accused-appellants under Sections 324/34 of I.P.C. is concerned, the same is based on evidence and calls for no interference.

28. So far as question of sentence is concerned, alleged incident took place on 04.05.1986 and thus, period of 33 years has passed since then. Considering all the aspect of the matter, it appears that ends of justice would be served if accused-appellant H.N. Singh is sentenced to seven years rigorous imprisonment under Section 304 Part-II of I.P.C. Accordingly, conviction of accused-appellant H.N. Singh is altered into under Section 304 Part-II of IPC and he is sentenced to rigorous imprisonment of seven years. Conviction and sentence of accused-appellant Kaptan Singh under Section 302/34 of I.P.C. is set aside. So far as sentence under Section 324/34 of I.P.C. is concerned, injured has sustained only simple injury and considering all facts, both the accused-appellants are sentenced to the period already undergone. We order accordingly.

29. Considering entire facts and provision of Section 357 of Cr. P.C. and judgment of Hon'ble Apex Court in ***Ankush Shivaji Gaikwad Vs.***

State of Maharasthra reported in 2013 (6) SCC 770, it is directed that accused-appellant H.N. Singh shall pay compensation of Rs. 50,000/- to widow of deceased Ram Niwas Rao. He is directed to deposit the said amount before the Trial Court within six months. In the eventuality of depositing the said amount by the accused-appellant H.N. Singh before the trial court, it would be duty of the trial court to disburse the said amount in favour of wife of deceased Ram Niwas Rao. Similarly, we also direct that accused-appellant Kaptan Singh shall pay compensation of Rs. 5000/- to injured (PW-2) Ram Singar Pandey and he shall deposit the said amount before the trial court within one month. In the eventuality of depositing the said amount before the trial court, it shall be released in favour of (PW-2) Ram Singar Pandey. In case accused-appellants fail to deposit the said compensation within stipulated period, the court below shall proceed against them in the light of judgment of Hon'ble Apex Court in ***Kumaran Vs. State of Kerala and another reported in 2017 (7) SCC 471.***

30. Both the accused-appellants are stated to be on bail. Accused-appellant H.N. Singh be taken into custody forthwith to serve remaining sentence. No order is required in respect of accused-appellant Kaptan Singh.

31. Both Appeals are partly ***allowed*** in above t erms.

32. We appreciate the assistance rendered by Sri Sangam Lal Kesharwani , learned Amicus Curiae and direct that Rs. 7,000/- shall be paid to him by the State Government, as his remuneration.

33. Let a copy of this order be sent to the court concerned forthwith for information.

(Raj Beer Singh,J) (Pritinker Diwaker,J)

Dated: 05.11.2019/T.S.