

AFR

Reserved on:- 25.05.2022

Delivered on:- 31.05.2022

**Court No. - 46**

**Case :- CRIMINAL APPEAL No. - 4319 of 2012**

**Appellant :- Manoj Kumar Sharma**

**Respondent :- State of U.P.**

**Counsel for Appellant :- C.K. Bhardwaj, Amit Daga**

**Counsel for Respondent :- Govt. Advocate, Ram Jee Saxena**

**Hon'ble Mrs. Sunita Agarwal, J.**

**Hon'ble Mrs. Sadhna Rani (Thakur), J.**

**(Delivered by Justice Sunita Agarwal)**

1. Heard Sri Amit Daga learned Advocate for the appellant and Sri Patanjail Mishra learned AGA for the State respondent.

2. This appeal is directed against the judgement and order dated 24.09.2012 passed by the Additional Sessions Judge, Court No.8, Bulandshahar in S.T. No.221 of 2010, arising out of Case Crime No.348 of 2009, under Section 302 IPC, P.S. B.B. Nagar, District Bulandshahar, whereby the appellant Manoj Kumar Sharma son of Ved Prakash Sharma, resident of village Dhakoli, Police Station B.B. Nagar, has been convicted for the offence under Section 302 IPC and sentenced for life imprisonment.

3. The first information report of the incident occurred on 11.12.2009 at about 02.00 PM, was lodged by Vikas Sharma son of Ved Prakash Sharma, brother of the accused-appellant Manoj Kumar Sharma. It may also be noted herein that deceased Rajeev Kumar Sharma was brother of the first informant as also the

accused-appellant herein. It was stated in the report that on 11.12.2009 at about 02.00 PM, the informant received a call on his mobile from Smt. Savita wife of Manoj, the appellant-herein. She told that the appellant went to the tube-well for watering his field but deceased Rajeev Kumar was arguing by stating that he would first water his field and did not allow the appellant to take water from the tube-well. On the said issue, they fought and Rajeev sustained firearm injuries. Savita asked the first informant to take the injured Rajeev to the hospital.

4. On getting this information, the first informant reached at his tube-well at Kharkali Jungle and saw his brother Rajeev Kumar Sharma lying blood soaked on a cot. The injured told the first informant that Manoj Kumar Sharma (the appellant herein) shot two fires on him through his gun. One Sri Bhagwan @ Kallu and other passerby tried to save him and intercepted Manoj but he did not listen to anyone and shot the injured by his licensee gun. The injured begged him to take to the hospital. The first informant alongwith other villagers took the deceased to B.B. Nagar Community Hospital but he succumbed to his injuries on the way. While keeping the dead body at the Government Hospital, the first informant went to lodge the report.

5. The check FIR based on the written report lodged on 11.12.2009 was proved by PW-4, the Constable Clerk posted in the police station B.B. Nagar, being in his handwriting and signature as Exhibit Ka-2. The G.D. entry report No.31 at 15.45 hrs of the said report was proved by bringing the original G.D. in the Court and filing the certified carbon copy of the same, by PW-4, being in his handwriting and signature as Exhibit Ka-3.

6. In cross, PW-4 stated that he could not tell the time of

sending the special report to the senior officials. However, the special report was received on 14.12.2009 by the concerned court but the date of sending of the same from the police station was not noted. On further confrontation, he stated that no memo or information of the incident was received from the hospital.

7. The inquest of the dead body was conducted at the Community Health Center, B.B. Nagar which is evident from the inquest report proved by PW-7 as Exhibit Ka-12. The related papers to the inquest prepared for sending the dead body for the postmortem had been proved as Exhibit Ka-13 to Exhibit Ka-19. The postmortem report was proved by the doctor entered in the witness box as PW-5. He stated that he conducted the postmortem on 12.12.2009 at about 11.30 AM. The body was received in the sealed state. On external examination, the deceased appeared to be aged about 32 years, a strong built male. The rigor mortis was present over the entire body. The injury found on the person of the deceased as indicated in the postmortem report are:-

“Firearm wound of entry size 5.0 cm x 3.0 cm x chest cavity deep left side back of chest just lateral to inferior angle of left scapula. Margins inverted and black.

Firearm wound of entry size 3.0 cm x 2.5 cm x chest cavity deep on left side back of chest 3.0 cm above from injury No.1. Margins inverted and black. No tattooing present. On exploration, 4, 5 and 6 ribs of left side of back were found fractured, Left lung, pleura, heart and pericardium were lacerated. 800 ML blood was found in the left chest cavity. 2 wed pieces and 10 small metallic pellets from left lung and left side chest cavity.”

8. As noted above, on internal examination, 4th 5th 6th left ribs were found fractured. Left lung, pleura, heart and

pericardium were lacerated. 800 ML blood was found in left chest cavity. 2 wed pieces and 10 small metallic pellets from left lung and left side chest cavity. There was 200 ML fluid in the stomach. Small intestine and large intestine were filled with gases and water.

9. The cause of death had been stated as hemorrhage and shock due to antemortem injuries. PW-5 stated that the death was caused by the firearm injuries sustained by the deceased. The postmortem report was proved being in his handwriting and signature by PW-5 as Exhibit Ka-4. The proximate time of death as stated therein is 02.00 PM on 11.12.2009. It was further stated by PW-5 that two gun shot injuries sustained by the deceased were sufficient to cause his death. The wed pieces, pellets and clothes were sealed and handed over to the Constable who brought the dead body. PW-5 was cross-examined by the defence on the issue that looking to the nature of injuries, there was possibility of immediate death. The doctor, on contradiction, stated that two gun shot injuries could not occur by one bullet. A suggestion was also given to PW-5 that the deceased was shot while lying on his left side.

10. The Investigating Officer had entered in the witness box as PW-6 and stated that as soon the case was registered, he received the investigation, recorded the statement of the first informant, went to the Community Health Centre, B.B. Nagar where the body of deceased Rajeev Kumar Sharma was found lying on a cot. The inquest was conducted by PW-7 on his instruction. After completion of the inquest, he went to the spot of the incident alongwith the first informant and prepared the site plan on his pointing out, which was proved as Exhibit Ka-5 in his handwriting. PW-6 stated that he again went to the Community

Hospital to ensure that the dead body was sent for the postmortem and then went to the site of the incident wherefrom he made recoveries of two empty cartridges 12 bore and the blood soaked rope of the cot from the spot of the incident. The blood stained and plain earth were also collected and all the said recovery memos were proved as Exhibit Ka-6, Ka-7, Ka-8 and Ka-9, being in the handwriting and signature of PW-6.

11. The statement of Smt. Akhilesh, PW-3 (wife of the deceased) was recorded on 13.12.2009. On 15.12.2009, on the report of the informer, the accused was arrested at about 12.40 PM. One SBBL gun license No.47954 was recovered from the possession of appellant Manoj and the safe custody receiver receipt of the gun store was also seized. The recovery memo was prepared and signed by the accused and the witnesses, proved as Exhibit Ka-10. The statement of the accused-appellant had then been recorded. On 18.12.2009 the statement of another witness Shri Bhagwan @ Kalu (PW-2) was recorded. After recording the statement of other witnesses on 21.12.2009, the incriminating articles recovered from the spot were sent to FSL on 24.12.2009. On completion of the investigation, the charge sheet was submitted and proved as Exhibit Ka-11.

12. The Investigating Officer (PW-6) was confronted on the issue as to whether he recorded statement of Savita, wife of the appellants, on whose information, the first informant went to the spot of the incident. He was further confronted as to whether he ascertained that the deceased was in a position to speak after receiving injuries. PW-6 was further confronted with the injuries shown in the postmortem report to further assert that looking to the nature of injuries, it was not possible for the injured to speak. A suggestion was given that the FIR was based on a concocted

story to which he replied by saying that whatever was written by the first informant, it was noted by the Constable Clerk.

13. PW-6 was then confronted with the statement of the first informant recorded in the site plan wherein it was noted that blood was found below the cot wherein deceased was lying when the first informant met him. PW-6 replied that blood was found at one spot only at the site of the incident and not at any other place and denied the suggestion that the deceased was hit while lying on the cot. PW-6 was further confronted on the delay in recording the statement of the witnesses namely Akhilesh and Sri Bhagwan @ Kalu and that the copy of the first information report was not sent with the body sent for the postmortem and also that the special report was not sent by him. It is stated by PW-6 that the special report of the occurrence was sent to the CJM through proper channel and the delay in noticing the same might be because of the concerned engagement of the officer in some other work.

14. On the arrest of the accused and recovery of gun, PW-7, the officer who prepared the recovery memo was crossed who stated that the recovery memo of gun as Exhibit Ka-10 was prepared on the spot and denied the suggestion that the accused Manoj had surrendered in the police station and the gun was recovered from Choudhary Gun House, Hapur. The suggestion that no license or cartridges were recovered from the accused Manoj was also denied. PW-7 denied the suggestion that the entire recovery proceeding was forged.

15. The ballistic report Exhibit Ka-20 shows that two empty cartridges recovered from the spot were tallied with the SBBL gun seized by the police. The clothes of the deceased were found blood stained. Human blood was found on the clothes of the

deceased, pieces of rope of cot, pellet and wed pieces found from inside the dead body. The blood stains on earth were disintegrated.

16. The prosecution had produced three witnesses of fact, the first informant as PW-1, an eye witness of the occurrence namely Shri Bhagwan @ Kalu as PW-2; another eye witness Smt. Akhilesh Sharma wife of the deceased as PW-3.

17. PW-1 , the first informant, in the examination-in-chief, reiterated the version of the written report submitted by him. He then stated that his tube-well was existing in the jungle of Kharkali Gaon and when he reached at the tube-well, his brother was lying blood soaked on a cot who told him that appellant Manoj shot him from his licensee gun. The injured Rajeev was taken to the Community Hospital in a 'Jugaad' and he succumbed to his injuries on the way. The written report was scribed by him and submitted in the P.S., B.B. Nagar, proved as Exhibit Ka-1.

18. In cross, PW-1 described the distance of the place of the incident with his village as 700 meter and location of the tube-well in the field. He also described the topography of the place of the incident with the location of his agricultural field and that of his brothers, Rajeev Sharma (deceased) and Manoj (appellant). It was stated by PW-1 that there was a room wherein tube-well was installed and there were trees near the tube-well. He then stated that they were four brother and total 44 bighas of land of the joint family had been partitioned between them. The land of accused Manoj was at the east of the tube-well whereas chak of Rajeev (deceased) was at the north abetting the main road. PW-1 then described the vocation of himself and his three brothers and stated that he was a teacher in a primary institution situated at a distance

of 3 km from his village and the school timing was 10.00 AM to 04.00 PM at the time of the incident. Being a Coordinator of Nyay Panchayat, on temporary basis, alongwith teaching work he was doing inspection of the primary institutions. On the day of the incident, he left his home at about 09.30 AM and went to three primary institutions to make inspection. The suggestion that he was not in the village at the time of the incident had been repelled by him. PW-1 then described as to how he had proceeded after the incident, i.e. that he firstly went to the Hospital and then to the police station. PW-1 stated that no information of the death was sent from the Hospital and he wrote the first information report in the Hospital. The suggestion that he reached the Hospital at around 04.00 PM was categorically denied.

19. About relationship of brothers, PW-1 stated that the brothers had normal relationship and there was no enmity between deceased Rajeev and accused Manoj. No fight had occurred between them prior to the incident and all brothers used to address each other as 'Bhaiya' and they never abused each other. The suggestion that he reached at the place of the incident after about 1 hour of death of his brother Rajeev had been categorically denied by PW-1. He then categorically admitted that he did not mention anything told to him by witnesses Akhilesh and Sri Bhagwan in the first information report. A suggestion of enmity of PW-1 with accused Manoj about a compassionate appointment after death of their father was denied by PW-1. It was admitted by PW-1 that witnesses Bhagwan and Akhilesh were related to each other and he denied that the wife of the deceased Akhilesh never went to the field and she and Bhagwan were falsely projected as a witness at his instance.

20. PW-1 further stated that he went to the spot of the

incident alongwith the police after lodging of the first information report, got the site plan prepared and recovery of the empty cartridges, blood stained earth was made by the police in his presence.

21. PW-2, Sri Bhagwan @ Kalu was acquaintance of the family. He stated that while he was going to his village via Kharkali on a bicycle, when he reached at the Pakka road near the tube-well of deceased Rajeev at around 02.00 PM, he saw an oral altercation between Rajeev and Manoj. They were arguing on the issue of watering their fields. The wife of Rajeev namely Akhilesh was present. The oral altercation turned into physical and they both got entangled. He and Akhilesh tried to intervene and then Manoj shot two fires from his gun at Rajeev and fled from the spot. Rajeev was crying to take him to the Hospital but since he (PW-2) was afraid he left the place to go to his home. After two days, he came to know that Rajeev had died.

22. In cross, PW-2 stated that he left his house at around 01.00 PM and went to Dhakoli for taking tractor trolley on rent. However, he could not get it and, therefore, was going back to his village Bhasauli via Kharkali. The distance between Dhakauli and Kharkali was stated by PW-2 as 2-2-1/2 KM. He stated that the Investigating Officer recorded his statement and on confrontation with the same, PW-2 stated that wrong reason for going to Kharkali was narrated by the Investigating Officer and he did not know as to why that was written. The relationship of Smt. Akhilesh with this witness (PW-2) was admitted but he stated that Akhilesh was not her real bua (Aunt). He described as to how the incident had occurred and stated that when Manoj fired the shot, Rajeev was at a distance of 2 paces and it was so instant that he could not warn Rajeev. Both the gun shots hit at the back of the

injured.

23. On further confrontation, PW-2 stated that he went away from the place of the incident by telling Akhilesh that she should call her family members and he did not have any phone. Savita and Manoj were living in B.B. Nagar and Savita was not present on the spot. He then stated that he was so shaken by the incident that he did not intimate the police. After reaching his home, he told about the incident to his family members who went to B.B. Nagar but he did not go there.

24. The suggestion that he was not present on the spot was denied by PW-2. He admitted that he left Rajeev on the field and did not know as to who took him and PW-1, Vikas Sharma, was not at the spot, by the time he left the place.

25. PW-3 Smt. Akhilesh is the wife of the deceased. She admitted relationship of the accused with the deceased and stated that the appellant was quarrelsome (झगड़ालू) by nature and, therefore, he had separated about 11-12 years ago and was living separately. She then described as to how the incident had occurred and in her statement, it has come that the altercation between the deceased and the appellant occurred on the issue of watering their fields from the tube-well. She then stated that after the deceased was hit at the back he fell down and her brother-in-law (Vikas) namely PW-1 and other villagers took the injured to B.B. Nagar in a 'Jugaad', her husband died on the way.

26. In cross, PW-3 admitted that after the incident they all were living together i.e. the first informant, deceased and her son who was studying in the school. Deceased Rajeev was an agriculturist and used to go to his field daily and she used to carry

his food if he would go without having it. PW-3 stated that she also used to go to the field around 10.00-11.00 AM or thereafter, or sometime with the deceased depending upon the work. She did not remember that on the date of the incident whether her husband (deceased) ate his food. PW-3 then stated that only the agricultural land of Manoj (the appellant) had been separated and all other lands were in partnership and her husband Rajeev used to take care of the entire field with one help. She also used to go to the field with Rajeev to help. The topography of the place of the incident, the location of the tube-well was narrated by PW-3. PW-3, during cross, was shown certain photographs of their chak which she identified and proved as Material Exhibit Kha-2 & Kha-3.

27. She stated that PW-3 Sri Bhagwan was not his real nephew but was related to her. The suggestion that PW-2 Sri Bhagwan was not present on the spot was denied by PW-3. She stated that the police had recorded her statement and then stated that no-one came on the tube-well to save her husband rather they were crying from the distance. After PW-2, Sri Bhagwan fled away from the spot other people came in from the road and she did not know anyone. Some villagers lifted her husband, put him on the cot lying there at a distance of 2 to 4 paces from the place where Rajeev was standing and when he was put on the cot, lot of blood was oozing out from his wound. She could not tell the time when the first informant had reached at the spot and denied the suggestion that she took her husband to the B.B. Nagar Hospital with villagers named as Dharampal and Jogpal. PW-3 stated that she was shaken by the incident but she spoke and she did not know as to whether Rajeev was carrying mobile. The suggestion that she was not present on the spot and was making statement at

the instance of PW-1, the first informant was categorically denied by PW-3. She also denied the suggestion that PW-2 Shri Bhagwan was not present at the spot and was making deposition at their instance.

28. Placing the oral testimony of the prosecution witnesses and the documentary evidences on record, it is argued by Sri Amit Daga learned counsel for the appellant that both the eye witnesses of the incident are not reliable. The first informant PW-1 is not an eye witness. He though stated that telephonic information of the incident was given by Savita wife of the appellant but the prosecution had not disclosed as to how the factum of the incident came to the knowledge of Savita, who according to the own case of the prosecution witness (Investigating Officer) was not present on the spot. The statement of PW-1, the first informant, that the deceased told him that accused Manoj had killed him by opening gun shots is improbable, looking to the gravity of the injuries sustained by the deceased where heart, pericardium and lungs were found lacerated as bullet had reached straight-way into the heart cavity. The only probability which can be inferred that the deceased had died on the spot.

29. As regards PW-3, wife of the deceased, it is stated that her presence on the spot was not natural as she admitted during the course of the examination that she would not go to the agricultural field regularly. In her statement it has come that she used to go to the field only to bring food of the deceased and when questioned, she stated that she did not remember as to whether her husband ate food on that day. Looking to the status of the family of the deceased, it is improbable that PW-3, his wife would go to the field to help in the agricultural work. Even otherwise, the statement of PW-3 under Section 161 was recorded

on 13.12.2009, after two days of the incident.

30. It is argued that the prosecution had introduced one more witness projecting him as an eye witness who is PW-2, nephew of PW-3, wife of the deceased. As per own testimony of PW-2, he was crossing the road besides the field of Rajeev (deceased) by chance and at around 02.00 PM when he reached on the road near the tube-well, he heard oral altercation between Rajeev and Manoj. According to PW-2, he went on the spot, tried to intercept and the incident of firing occurred in his presence. The conduct of this witness is to be noticed to assess the truthfulness of his testimony of witnessing the incident. Admittedly, this witness did not go the house of the deceased to inform about the incident nor he took the deceased to the hospital and left his Aunt, Akhilesh (PW-3) and his injured uncle Rajeev at the place of the incident. The statement of PW-2 that he fled the scene of the occurrence because of the fear is not acceptable and shakes his presence on the spot.

31. Moreover PW-3, another eye witnesses stated, in cross, that other people who were near the place of the incident did not come to the tube-well and they were shouting to save the deceased from the place where they were standing. They only came when PW-2, Sri Bhagwan @ Kallu had fled away from the spot. For the fact that PW-2 was related to the wife of the deceased (PW-3), there is a strong possibility of introducing him as an eye witness at the instance of PW-1 & PW-3.

32. It is argued that even otherwise, PW-2 can only be kept in the category of a chance witness as his presence on the spot was not natural. In this scenario, his testimony would require corroboration from the other material circumstances of the case

and can be relied upon only if it inspires confidence of the Court on appreciation with due circumspection and adequate corroboration. The recoveries made by the Investigating Officer are also challenged on various grounds.

33. Lastly, it is argued that as per own case of the prosecution, there was no preanimosity between the accused-appellant and the deceased. It is the case of the prosecution that the incident had occurred during a sudden quarrel between two brothers over a trivial issue of watering their fields from the common tube-well. Both the alleged eye witnesses stated that the appellant and deceased were engaged in oral altercation and they were shouting at each other, which later turned into physical and while they were entangled, two fires were shot by the appellant from his single barrel licensee gun. The seat of both the injuries are at the left side back of the chest and both the injuries are at a short distance of 3 cm, which further show that there was no intention of the accused-appellant to kill the deceased. Moreover, the incident had occurred in the heat of passion when the appellant being elder brother lost his cool as his younger brother started arguing with him and then became physical. It has come in the evidence of PW-3, the alleged eye witness that when the appellant went to the field he told the deceased to allow him to water his field from the common tube-well but the deceased did not agree to that by saying that he was already watering his field and let him finish it first and that the appellant should wait.

34. The contention is that for the above sequence of events proved from the prosecution evidence, the present case does not fall beyond the scope of the offence under Section 304 Part-II; i.e. of causing injuries with the knowledge that it was likely to cause death but without any intention to cause death or to cause bodily injury as is likely to cause death. The contention is that the

conviction of the appellant under Section 302 IPC is a result of misappropriation of the evidence and misapplication of law. The appellant, at the worst, can be convicted and punished for the offence 304 Part-II, maximum sentence for which is 10 years. In the alternative, it is submitted that in any case, the offence committed by the appellant cannot travel beyond Section 304 Part-I. The appellant has already suffered incarceration for a period of 12 years as he is lodged in jail since the date of the arrest i.e. 15.12.2009. The prayer is that the Court may sustain the conviction but reduce the sentence to the period already undergone.

35. To substantiate the above submissions, reliance is placed on the decisions of the Apex Court in **Pardeshiram Vs. State of Mahdya Pradesh<sup>1</sup>**, **Khuman Singh Vs. State of Madhya Pradesh<sup>2</sup>**, **Udiya Vs. State of Madhya Pradesh<sup>3</sup>**, **Atul Thakur Vs. State of Himachal Pradesh & others<sup>4</sup>**, **Surain Singh Vs. State of Punjab<sup>5</sup>**, **Ravindra Shalik Naik & others Vs. State of Maharashtra<sup>6</sup>**, **Vineed Kumar Chauhan Vs. State of Uttar Pradesh<sup>7</sup>**, **Sridhar Bhuyan vs. State of Orissa<sup>8</sup>**, **Parkash Chand vs. State of H.P. B<sup>9</sup>**.

36. Learned AGA, on the other hand, defended the judgement of the trial court with the assertion that it is established that the appellant had committed the murder with full knowledge and intention by the single barrel licensee gun which he was carrying at the place of the incident and he had opened two fires,

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1. 2021 (3) SCC 238

2.2020 (18) SCC 763

3.2019 (15) SCC 65

4.2018 (20) SCC 496

5.2017 (5) SCC 796

6.2009 (12) SCC 257

7.2007 (14) SCC 660

8.2004 (11) SCC 395

9.2004 (11) SCC 381

one after the other. There is ample evidence against the appellant and the prosecution has succeeded in proving its case beyond reasonable doubt that the appellant is the perpetrator of the crime. In light of the oral testimony of the prosecution witnesses (PW-2 and PW-3) and the promptness of the FIR, there is no scope of interference in the judgement of conviction and sentence passed by the trial court. It was a day light murder committed by elder brother on a trivial dispute with regard to watering of his field.

37. It is argued that the injuries inflicted by the appellant were sufficient to cause death in the ordinary course of nature and in this circumstances, the appellant cannot argue that he is not guilty of murder. A person who inflicts injuries like the present case, cannot seek shelter of law by saying that the injuries were accidental or otherwise unintentional. No such inference can be drawn from the facts and circumstances of the present case. The argument of the learned counsel for the appellant that the offence committed by the appellant would fall within the meaning of Section 304 Part-A or Part II is without any substance. There is no question of reduction of sentence as the circumstances of the present case clearly proves that the appellant had committed murder of his brother with full knowledge and intention that the gun shot opened by him would cause death to his brother. The ingredients of Section 300 IPC are attracted and the punishment under Section 302 IPC for causing murder has rightly been inflicted by the trial court.

38. On merits, it is argued that both the eye witnesses are consistent about the manner of occurrence and that the deceased was killed by the appellant by opening two gun shots on a trivial issue. The first information report is a prompt report of the incident and the first informant also proved that the deceased had fixed the appellant being the only perpetrator of the crime. The

contention is that in any case, no leniency can be shown to the appellant and the appeal deserves dismissal.

39. Having heard learned counsel for the parties and perused the record, we may note that as regards the place of occurrence of the incident and the manner in which the incident had occurred, they stand proved with the statements of the prosecution witnesses and other material circumstances on record. The presence of PW-3, wife of the deceased at the spot cannot be doubted, in as much as, the incident had occurred around 02.00 PM when normally wives of agriculturists would go to the field to bring their food. PW-3, in a natural manner stated that she would normally go to the field at around 10.00-11.00 AM after finishing her household work and would bring the food of her husband, if he had not taken food at home. She also stated that she normally used to help her husband in agricultural work like cutting of the weed and spraying of manure. It has also come in the evidence that out of four brothers, the agricultural land was divided and the share of appellant Manoj was separated. Amongst the remaining three brothers, deceased Rajeev was an agriculturist whereas other two brother were engaged in their jobs. Their fields as such were being looked after by deceased Rajeev. From the statement of PW-3, it is evident that the deceased was looking after about 33 bighas of land which came in the share of three brothers as 11 bighas was separated for the appellant Manoj. Looking to the enormous nature of work being done by the deceased Rajeev, the statement of PW-3 that she was helping her husband in agricultural work cannot be discarded.

40. Even otherwise, it has been proved by the prosecution evidence that PW-1, the first informant took the deceased to the hospital with the help of other villagers through a vehicle known as 'Jugaad' and the inquest of the dead body was conducted in the

Community Health Centre, B.B. Nagar. As per the inquest report, the body was kept on a cot in the Community Health Centre. The first information report of the incident was lodged within 1 hour 45 minutes of the occurrence after the deceased had succumbed to his injuries. The Investigating Officer went to the spot and prepared the documentary evidences of the occurrence after making inspection of the site. Two empty cartridges were recovered from the spot which did tally with the SBBL gun seized from the possession of the appellant. As per the statement of the doctor, the injuries caused to the deceased were sufficient to cause his death. Nothing contrary could be culled out from the cross examination of the witnesses (PW-2 & PW-3) to demolish their presence on the spot or doubt the prosecution story in any manner. The occurrence of the incident resulting in the homicidal death of the deceased Rajeev at his field near the tube-well at around 02.00 PM stands proved.

41. It is also proved that the appellant herein namely Manoj Kumar Sharma is the perpetrator of the crime and the death was caused during an altercation between the appellant and the deceased. The suggestion given by the defence to the witness to establish that it was an accident are found without any substance. The presence of the eye witnesses on the spot cannot be doubted and could not be disputed successfully by the defence. In the said scenario, the argument raised by the learned counsel for the appellant that the crime committed by the appellant would not fall within the meaning of Section 300 IPC and can only be said to be an offence of "culpable homicide not amounting to murder" attracting punishment under Section 304 IPC, is to be examined.

42. The question is as to whether the act of the appellant in causing death of the deceased would amount to 'murder' within the meaning of Section 300 IPC or it is a case of 'culpable

homicide which will not amount to murder' attracting punishment under Section 304 IPC. Further question is as to in which part of Section 304 IPC, the offence in question would be punishable, in case, the Court reaches at the conclusion that it was a case of 'culpable homicide not amounting to murder' and not 'murder'.

43. In order to ascertain the same, we are required to go through the legal principles governing the distinction between the provisions under Sections 300 and 302 of the Code on the one hand and Section 304 Part I and Part II of the Code on the other. Section 299 of the Code which deals with the definition of culpable homicide is also to be taken note of.

44. Sections 299 and 300 of the Indian Penal Code deal with the definitions of 'culpable homicide' and 'murder'; respectively. In terms of Section 299, 'culpable homicide' is described as an act of causing death:- (i) with the intention of causing death, or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge that such an act is likely to cause death. As is clear from the reading of this provision, the first part of it emphasises on the expression 'intention' while the latter upon 'knowledge'. As has been noted in a catena of decisions, both these words denote positive mental attitudes of different degrees. The mental element in 'culpable homicide', i.e. the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an offence is caused in any of the above three stated manners, it would be 'culpable homicide'.

45. Section 300, however, deals with 'murder'. Though there is no clear definition of 'murder' in Section 300 of the Code but as has been held by the Apex Court and reiterated in Rampal Singh vs. State of Uttar Pradesh<sup>2</sup>, 'culpable homicide' is the genus and 'murder' is its species and all 'murders' are 'culpable

homicides' but all "culpable homicides' are not "murders'.

46. Another classification that emerges from the Code is "culpable homicide not amounting to murder", punishable under Section 304 of the Code. There are decisions which also deal with the fine line of distinction between the cases falling under Section 304, Part I and Part II.

47. Dealing with a matter, wherein the question for consideration was whether the offence established by the prosecution against the appellant therein was "murder" or "culpable homicide not amounting to murder", the Apex Court in **Vineet Kumar Chauhan vs. State of Uttar Pradesh**<sup>10</sup> considered its earlier decision in the State of **Andhra Pradesh Vs. Rayavarapu Punnayya and Another**<sup>11</sup>, wherein the then Justice R.S. Sarkaria brought out the points of distinction between the two offences under Sections 299 and 300 IPC, reiterating the law laid down in **Virsa Singh Vs. State of Punjab**<sup>12</sup> and **Rajwant Singh Vs. State of Kerala**<sup>13</sup>. It was held therein 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:- (i) 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; (ii) proof of such 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 IPC is reached; (iii) the third stage is to determine whether

10.2007 (14) SCC 660

11.1976 (4) SCC 382

12.1958 SC 465

13.AIR 1966 SC 1874

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 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.

48. Further, 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 IPC. It was, however, clarified therein that these were only the broad guidelines to facilitate the task of the Court and not cast iron imperative.

49. In **Aradadi Ramudu alias Aggiramudu vs. State through Inspector of Police, Yanam**<sup>14</sup>, the question was for modification of sentence from Section 302 to Section 304 Part II. While answering the same, the Apex Court had considered the above noted decisions in **Virsa Singh (supra)** as also other decisions in line namely **State of U.P. v. Indrajeet**<sup>15</sup>; **Satish Narayan Sawant vs. State of Goa**<sup>16</sup> and **Arun Raj vs. Union of India**<sup>17</sup> to note that for modification of sentence from Section 302 to Section 304 Part II, not only should there be an absence of the intention to cause death, but also an absence of intention to cause such bodily injury that in the ordinary course of things was likely to cause death. [Reference Paragraph 16]

50. Noticing the above noted decisions, in **Rampal Singh Vs. State of Uttar Pradesh**<sup>18</sup> the Apex Court had considered

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14.2012 (5) SCC 134

15.2000 (7) SCC 249

16.2009 (17) SCC 724

17.2010 (6) SCC 457

18.2012 (8) SCC 289

the distinction between the terms "murder" and "culpable homicide not amounting to murder". The observation in **State of Andhra Pradesh Vs. Rayavarapu Punnayya (supra)** was noted in paragraph '13' of **Rampal Singh (supra)** as under:-

*"13. In the case of State of A.P. v. Rayavarapu Punnayya, this Court while clarifying the distinction between these two terms and their consequences, held as under: -*

*"12. In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' its species. All 'murder' is 'culpable homicide' but not vice versa. Speaking generally, ..... '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."*

51. The guidelines laid down in its earlier decision in **Phulia Tudu vs. State of Bihar**<sup>19</sup> had been noted therein to reiterate that the safest way of approach to the interpretation and application of these provisions (Sections 299 and 300) is to keep in focus the key words used in the various clauses of these sections. In paragraph '17', it was noted that :-

*"17. Section 300 of the Code states what kind of acts, when done with the intention of causing death or bodily injury as the offender knows to be likely to cause death or causing bodily injury to any*

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19.2007 (14) SCC 588

*person, which is sufficient in the ordinary course of nature to cause death or the person causing injury knows that it is so imminently dangerous that it must in all probability cause death, would amount to "murder". It is also "murder" when such an act is committed, without any excuse for incurring the risk of causing death or such bodily injury. The Section also prescribes the exceptions to "culpable homicide amounting to murder". The Explanations spell out the elements which need to be satisfied for application of such exceptions, like an act done in the heat of passion and without pre- mediation. Where the offender whilst being deprived of the power of self- control by grave and sudden provocation causes the death of the person who has caused the provocation or causes the death of any other person by mistake or accident, provided such provocation was not at the behest of the offender himself, "culpable homicide would not amount to murder". This Exception itself has three limitations. All these are questions of facts and would have to be determined in the facts and circumstances of a given case."*

52. It was observed in paragraph '21' in **Rampal Singh (supra)** that Sections 302 and 304 of the Code are primarily the punitive provisions. An analysis of these two Sections must be done having regard to what is common to the offences and what is special to each one of them. The offence of culpable homicide is, thus, an offence which may or may not be murder. If it is murder, then it is culpable homicide amounting to murder, for which punishment is prescribed in Section 302 of the Code. Section 304 deals with cases not covered by Section 302 and it divides the offence into two distinct classes, i.e. (a) those in which the death is intentionally caused; and (b) those in which the death is caused unintentionally but knowingly. In the former case the sentence of imprisonment is compulsory and the maximum sentence admissible is imprisonment for life. In the latter case, imprisonment is only optional and the maximum sentence only

extends to imprisonment for 10 years. The first clause of Section 304 includes only those cases in which offence is really "murder", but mitigated by the presence of circumstances recognized in the Exceptions to Section 300 of the Code, the second clause deals only with the cases in which the accused has no intention of injuring anyone in particular.

53. In paragraph '22' **Rampal Singh (supra)**, it was observed that where the act 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. (emphasis added)

54. It was, thus, held therein that the distinction between two parts of Section 304 (Part I and Part II) is evident from the very language of this section. While Part I is founded on the intention of causing the act by which the death is caused, the other is attracted when the act is done without any intention but with the knowledge that the act is likely to cause death.

55. It was further observed therein that it is neither advisable nor possible to state any straight-jacket formula that would be universally applicable to all cases for such determination. Every case essentially must be decided on its own merit. The Court has to perform the very delicate function of applying the provisions of the Code to the facts of the case with the clear demarcation as to under what category of cases, the case at hand falls and accordingly, punish the accused.

56. Referring to an earlier decision in **Mohinder Pal Jolly vs. State of Punjab**<sup>20</sup>, it was noted in **Rampal Singh (supra)** that the distinction between two parts of Section 304 has been stated with some clarity therein which reads as under:-

*"24. A Bench of this Court in the case of Mohinder Pal Jolly v. State of Punjab [1979 AIR SC 577], stating this distinction with some clarity, held as under :*

*"11. A question arises whether the appellant was guilty under Part I of Section 304 or Part II. If the accused commits an act while exceeding the right of private defence by which the death is caused either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death then he would be guilty under Part I. On the other hand if before the application of any of the Exceptions of Section 300 it is found that he was guilty of murder within the meaning of clause "fourthly", then no question of such intention arises and only the knowledge is to be fastened on him that he did indulge in an act with the knowledge that it was likely to cause death but without any intention to cause it or without any intention to cause such bodily injuries as was likely to cause death. There does not seem to be any escape from the position, therefore, that the appellant could be convicted only under Part II of Section 304 and not Part I."*

57. As a guideline as to how the classification of an offence into either Part of Section 304 would be made, it was held in paragraph '25' as under:-

*"25. ....xxxxxxxxxxxxx.....This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of pre-meditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be*

20.1979 (3) SCC 30

*punished. This can also be decided from another point of view, i.e., by applying the 'principle of exclusion'. This principle could be applied while taking recourse to a two-stage process of determination. Firstly, the Court may record a preliminary finding if the accused had committed an offence punishable under the substantive provisions of Section 302 of the Code, that is, 'culpable homicide amounting to murder'. Then secondly, it may proceed to examine if the case fell in any of the exceptions detailed in Section 300 of the Code. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law.....xxxxx....."*

58. The following observations in paragraph '16' of the decision in **Aradadi Ramudu alias Aggiramudu (supra)** have been quoted in para '34' to state that while answering the question for modification of sentence from Section 302 of the Code to Part II of Section 304 of the Code, it has to be kept in mind that:-

*"not only should there be an absence of the intention to cause death, but also an absence of intention to cause such bodily injury that in the ordinary course of things is likely to cause death."*

59. Keeping in mind the above guidelines laid down by the Apex Court, in the facts of the present case, the first step in analysis, would be to examine as to whether the appellant had committed an offence punishable under the substantive provisions of Section 302 of the Code, i.e. "culpable homicide amounting to murder".

60. To return a finding on the issue, we have to determine as to whether the act by which the death has been caused would fall in any of the four Clauses detailed in Section 300 of the Code.

61. Analyzing the facts of the instant case, it is to be seen that both the accused and the deceased were real brothers. The witnesses had testified that there was no past enmity or acrimony

between the two brothers. As per the statement of PW-1, the first informant, who was also one amongst four brothers, relationship between brothers was cordial. There was no animosity between accused Manoj and deceased Rajeev. No fight had occurred between them prior to the incident. The brothers used to respect and address each other as 'Bhaiya' and they never used abusive language while talking. The partition of the agricultural property after death of their father had occurred with their consent and they all got equal shares in the total land of approximately 44 bighas. The land of appellant-Manoj was adjacent to the field of deceased Rajeev and they had common tube-well which was located in the field of Rajeev, which lie abetting the main Pakka road which runs North-South as indicated in the site plan. The crop of wheat was sown in the fields of both deceased Rajeev and accused-appellant Manoj, as per the statement of the wife of the deceased namely PW-3. She stated that appellant came to the field around afternoon and told his brother Rajeev (deceased) that he wanted to water his field. But Rajeev did not agree to that and replied that since his field was being watered, it should be completed first. On this trivial issue, oral altercation started between two brothers and they both got entangled in a physical fight.

62. It has also come in the evidence of PW-3 that appellant Manoj was hotheaded and because of him the agricultural fields were partitioned. The entire incident, thus, had occurred when the deceased (Rajeev) refused to allow his elder brother, the appellant Manoj to water his field first. It is evident that the common tube-well was situated in the field of deceased Rajeev and it appears that in this circumstance, the appellant became furious. While they were arguing and fighting with each other, the appellant who was carrying his licensee gun opened the gun shots. It is established that there was a heated exchange of words between

two brothers and they got entangled in physical altercation before the appellant opened the gun shots.

63. The evidence when examined in its entirety, establish that the appellant had committed the offence without any premeditation in a sudden fight in the state of anger and the entire incident happened within a very short span of time. The oral altercation between two brothers took an ugly turn when they got entangled in a physical altercation. Though appellant Manoj opened two gun shots at his brother but the site and distance of both the injuries show that two shots were opened one after the other without understanding the consequence of his action while he was in the heat of passion.

64. It has also come in the evidence of PW-1 that the wife of the appellant namely Savita gave telephonic information to the first informant immediately after the incident though she was not present on the spot. As per the deposition of PW-1, she stated that in a dispute relating to watering of the field, during fight between two brothers, Rajeev had sustained gun shot injuries and she also told the first informant to take deceased Rajeev to the Hospital. This information was passed on immediately after the incident as is evident from the statement of PW-1, the first informant, another brother of the deceased, and when he went on the spot, Rajiv (deceased) was alive.

65. As noted above, it has come in the testimony of eyewitness (PW-2) that the wife of the appellant namely Savita was not present in the field at the time of the incident. On a question which was posed by the learned counsel for the appellant as to who had informed Savita about the incident, the answer can be given from the circumstances which clearly show that it was the appellant himself who intimated his wife to inform his another brother Vikash Sharma, who was present in the village, to take his

injured brother to the Hospital. This fact goes to show that the appellant felt remorse and though he himself did not take the deceased to the hospital but inform his another brother immediately through his wife so that the life of his deceased brother be saved. At the cost of repetition, it is to reiterate that no eyewitness stated that Savita (wife of the appellant) was on the spot. As per the statement of PW-1, Savita even told him that the wife of Rajeev namely Smt. Akhilesh was present at the time of the fight between two brothers.

66. In the above emerging circumstances in light of the statement of PW-1 (brother of the deceased and the appellant), it is evident that the appellant had committed the offence while he was deprived of the power of self control by grave and sudden provocation for the reason that his younger brother did not accede to his request. But the death cannot be said to have been caused by mistake or accident or without the appellant being the party to the said provocation. The act of the appellant of “culpable homicide” causing the death of his brother during fight on a trivial issue, however, would not fall in any of the clauses of Section 300 of the Code as the intention of the appellant to cause death or such bodily injuries which he knew would cause death of his brother or sufficient in the ordinary course of nature to cause death, is not proved.

67. The mere fact that the appellant was carrying his licensee gun when he went on the spot to water his field cannot be taken as his intention or plan to kill his brother. The relations between the brothers being cordial, the tube-well being common, the crop of wheat having been sown in the fields of both the brothers (deceased and the appellant) and the urgency shown by the appellant to water his field vis-a-vis refusal by deceased Rajeev are the circumstances which would have to be considered

cumulatively for objective determination whether the appellant intended to kill or to inflict bodily injury to his brother.

68. As held in **Virsa Singh (supra)**, the intent required should not be linked with the seriousness of the injury. Rather the requirement is that the prosecution must establish that the injuries inflicted are sufficient to cause death in the ordinary course of nature. Once the prosecution discharged this burden, the person who inflicted injuries can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise, unintentional. Whether the injuries are serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the accused intended to inflict the injuries in question. The question whether the intention is there or not is one of fact and not of law. Whether the conclusion should be one way or the other is a matter of proof.

69. The Court, thus, reaches at the answer to the first question that the appellant had not committed an offence within the meaning of Section 300 IPC, i.e., "culpable homicide amounting to murder", which is punishable under Section 302 of the Code. The incident had occurred in a sudden fight, without any premeditation in the state of anger, the offence committed by the appellant, thus, would fall within the meaning of "culpable homicide not amounting to murder" under Section 304 of the Code.

70. A further question then would be whether the appellant is guilty under Part I or Part II of Section 304.

71. As is evident from the record, the appellant opened two fires on his brother which hit at the left side of the chest of the deceased and the situs of both the injuries was same, they are only at a distance of 3 cm from each other. When the appellant opened fires during the physical altercation upon his brother there

was no weapon in the hands of his brother, it, therefore, cannot be said that the death was caused by mistake or accident or without overt act of the appellant. The gun is a dangerous weapon and it is obvious that the appellant was aware that the use of such a weapon cause death. It is, thus, proved that there was knowledge on the part of the appellant that if gun shot was opened, the possibility of the deceased being killed could not be ruled out. But merely by the said fact, it cannot be said that the appellant had caused gun shot injuries to his brother with the aim or intention to kill him. The aforesaid fact itself is not conclusive to hold that there was an intention on the part of the appellant to kill the deceased.

72. The circumstance, however, proved that the intention probably was to merely cause bodily injury as the injuries were caused by the appellant without premeditation in a sudden fight in the heat of passion upon a sudden quarrel with his brother and as is established from the prosecution evidence, out of remorse after the incident, the appellant also made an effort to save his brother by conveying the occurrence to his another brother through his wife. The only inference which could be drawn in the peculiar facts and circumstances on record is that the intention probably was to merely cause bodily injury.

73. Having regard to the root cause of the incident and the events that sequentially unfolded thereafter, we are of the comprehension that the appellant was overpowered by an uncontrollable fit of anger so much so that he was deprived of his power of self control and being drawn in a web of action reflexes, he fired at the deceased. The fact do not commend to conclude that the appellant had intention to eliminate his brother though he had the knowledge of the likely fatal consequence thereof.

74. On overall consideration of the facts situation and also

the subsequent reaction of the appellant, we are of the considered view that the conviction of the appellant ought to be moderated to one under Section 304 Part I of the Code, "Culpable homicide not amounting to murder", punishable in the first part (Part I) of Section 304 of the Code.

75. As we found that in this case, though there may be an absence of the intention to cause death but it is not where there is also an absence of intention to cause such bodily injury as is likely to cause death which in the ordinary course of things is likely to cause death, we do not agree with the arguments of the learned counsel for the appellant that the offence committed by the appellant would fall in the Second Part (Part-II) of Section 304 IPC.

76. Having held that the appellant is guilty of offence under Section 304 Part I, we partially accept this appeal and alter the offence from that of Section 302 IPC to one under Section 304 Part I of the Indian Penal Code.

77. Further considering the facts of the case in particular, according to us, it would meet the ends of the justice if the sentence for the offence is reduced to the period already undergone, as the appellant has suffered incarceration for more than 12 years. The judgement under the appeal is modified in the above terms.

78. The appellant is in jail. He is hereby ordered to be set at liberty forthwith, if he is not required to be detained in connection with any other crime.

79. The appeal is **allowed in part**.

80. The office is directed to send back the lower court record along with a certified copy of this judgment for information and necessary compliance.

81. The compliance report be furnished to this Court

through the Registrar General, High Court, Allahabad within one month.

(Sadhna Rani (Thakur),J.)      (Sunita Agarwal, J.)

**Order Date :- 31.5.2022**

Himanshu