IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.881 of 2015

Arising Out of PS. Case No.-91 Year-2011 Thana- LODIPUR District- Bhagalpur

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1. Md. Sainul.
2. Md. Jabbar.
Both S/o Late Md. Azad R/o village - Ismailpur Garhotiya, P.S. Lodipur, District – Bhagalpur.

... ... Appellants.

Versus

The State of Bihar

... ... Respondent.

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Appearance :
For the Appellants : Mr. Bimlendu Mishra, Advocate.
Mr. Sanjay Sinha, Advocate.
For the State : Mr. Ajay Mishra , A.P.P.

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CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
and
HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 24-06-2022

By this appeal, appellant/convicted accused no.1 Md. Sainul and appellant/convicted accused no.2 Md. Jabbar are challenging the Judgment and Order dated 31.08.2015 and 04.09.2015 respectively passed by the learned 7th Additional Sessions Judge, Bhagalpur, in Sessions Trial No.866 of 2012 thereby convicting both of them of offences punishable under Sections 324 and 302 read with 34 of the Indian Penal Code. By the impugned order, they both of them were sentenced to undergo imprisonment for life apart from a direction to pay fine of Rs.5000/- by each of them and in default, to undergo simple

imprisonment for six months for the offence punishable under Section 302 read with 34 of the Indian Penal Code. They were also sentenced to undergo simple imprisonment for three years for the offence punishable under Section 324 read with 34 of the Indian Penal Code with direction that the substantive sentences shall run concurrently. For the sake of convenience, the appellants shall be referred to in their original capacity as "accused no.1 Md. Sainul" and "accused no.2 Md. Jabbar".

2. Facts in brief leading to the prosecution of the accused persons as gathered from the police report can be summarized thus:

(a). Accused no.1 Md. Sainul and accused no.2 Md. Jabbar were resident of village-Ismailpur Garhotiya falling under the jurisdiction of Police Station-Lodipur of District-Bhagalpur. Md. Azad, chargesheeted accused no.3, was their father, who died during the pendency of the trial. According to the prosecution case, all accused persons in furtherance of their common intention, caused hurt by means of dangerous weapon-Gupti (sword stick) to Md. Mintu (since deceased) and committed his murder at about 08.00 P.M. of 06.12.2011 at their village-Ismailpur Garhotiya.

(b). It is case of the prosecution that P.W.8 Md.

Shamsul is maternal uncle of Md. Mintu (since deceased) and Md. Nahid, the first Informant, is brother of the deceased. Marriage of Md. Mintu was fixed with younger daughter of P.W.8 Md. Shamsul and, therefore, on occasion of Muharram, Md. Mintu came to his native place Ismailpur Garhotiya from Hyderabad where he used to work for earning livelihood.

(c). Accused No.1 Md. Sainul had married Nadira, who is daughter of P.W.8 Md. Shamsul, about 15 years prior to the date of the incident. However, after a long drown legal battle, which lasted for ten years, the couple came to be divorced and accused no.1 Md. Sainul had to pay Mehar to his wife Nadira. Hence, according to the prosecution case, both accused persons, who are brothers, and their father i.e. deceased Md. Azad were having grudge against the prosecuting party and particularly Md. Mintu (since deceased), who was to marry younger daughter of P.W.8 Md. Shamsul.

(d). The incident allegedly took place at about 08.00 P.M. of 06.12.2011. In the evening of that day, on account of Muharram , mourners gathered at the road of the village and P.W.8 Md. Shamsul as well as Md. Mintu (since deceased) were present amongst those mourners. First Informant Md. Nahid (P.W.6) was also present there. At that time, all accused

persons came at that place. It is case of the prosecution that then Md. Azad (deceased accused) exhorted and ordered his son accused no.2 Md. Jabbar to accomplish the task. Thereafter, accused no.2 Md. Jabbar pushed Md. Mintu causing his fall. Immediately, thereafter, accused no.1 Md. Sainul, at the instance of his father Md. Azad whipped out a Gupti (sword stick) and gave a blow thereof on left side of chest of Md. Mintu. Then taking that Gupti with them, the accused persons flee from the spot by uttering that their job is over. The murderous assault, according to the prosecution case, was done by the accused persons in order to spoil the intended marriage of Md. Mintu with younger daughter of P.W.8 Md. Shamsul, ex father-in-law of accused no.1 Md. Sainul. Because of this stab wound, Md. Mintu died on the spot itself.

(e). On getting information of the incident, P.W.13 Umeshwar Jha, Police Station Officer of Police Station-Lodipur, rushed to the spot of the incident and recorded the F.I.R. (Ext.1) of P.W.6 Md. Nahid at village-Ismailpur Garhotiya itself at about 10.00 P.M. of 06.12.2011. Accordingly, Crime No.91 of 2011 came to be registered by preparing formal printed F.I.R. (Ext.3).

(f). Routine investigation followed. P.W.13 Umeshwar

Jha prepared inquest notes at about 07.00 A.M. of 07.12.2011 and the dead body of Md. Mintu came to be dispatched for post-mortem examination to J.L.N.M.C. Hospital, Bhagapur, where the post-mortem examination was conducted by P.W.12 Dr. Sandeep Lal.

(g). Statement of witness came to be recorded and on completion of investigation, the appellants/accused nos.1 and 2 along with their father Md. Azad came to be chargesheeted.

(h). The learned trial court framed and explained the charge for offences punishable under Section 324 and 302 read with 34 of the Indian Penal Code to the accused persons. They abjured their guilt and claimed trial.

(i). In support of its case, the prosecution has examined as many as 13 witnesses and has placed reliance on the documentary evidence such as inquest report and report of post-mortem examination.

(j). The defence of the accused persons as gathered from the line of cross-examination of the prosecution witnesses as well as from their statement under Section 313 of the Code of Criminal Procedure is that of total denial. The have not disputed death of Md. Mintu but according to them, on occasion of Muharram, the mourners were exhibiting and playing with

weapons and in that process, Md. Mintu sustained injury accidentally and died because of that injuries.

(k). During the pendency of the trial, the original accused no.3 Md. Azad passed away and the case against him came to be abated.

(l). Upon hearing the parties, the learned trial court was pleased to convict and to sentence the accused persons as indicated in the opening paragraphs of this Judgment.

3. We heard the learned counsel appearing for the appellants at sufficient length of time. By taking us through the entire evidence, the learned counsel appearing for the appellants argued that there is no evidence to reflect intention of the accused persons to kill Md. Mintu and, as such, no offence punishable under Section 302 of the Indian Penal Code is made out. It is further argued that evidence of P.W.6 Md. Nahid and his mother P.W.7 Bibi Rehana is not at all trustworthy and consistent. Their evidence is totally contradictory. P.W.7 Bibi Rehana is not an eye witness to the incident as her name is not reflected in the F.I.R. Evidence of P.W.6 Md. Nahid shows that he reached on the spot of the incident after happening of the incident.

4. The learned counsel for the appellants further argued

that the alleged incident took place in the evening of 06.12.2011 and the inquest notes were prepared in the morning hours of 07.12.2011. This delay in recording the inquest report makes the case of the prosecution doubtful. To buttress this argument, the learned counsel for the appellants relied on the Judgment of this Court in **Shubhendu Nath Tewary Vs. The State of Bihar, reported in 2007 (1) PLJR 90** wherein in paragraph 24, this Court had observed that it is mandate of Section 174 of the Code of Criminal Procedure to start investigation immediately after receipt of the information and to prepare inquest report with promptitude. With the aid of this paragraph, it is argued that the delay in preparing the inquest report makes the F.I.R. doubtful.

5. The learned counsel for the appellants further argued that there is inconsistency about the place of occurrence and, therefore, the case of the prosecution is doubtful. For this purpose, reliance is placed on Judgment of the Supreme Court in **Ganesh Datt vs. State of Uttarakhand, reported in (2014) 12 SCC 389.**

6. To buttress his submission that it is a case of single blow, therefore, offence if held to be proved, shall come within the purview of part-II of Section 304 of the Indian Penal Code,

the learned counsel for the appellants placed reliance on the Judgment of the Supreme Court in **Bunnilal Chaudhary Vs. State of Bihar, reported in AIR 2006 SC 2531** and **Buddhu Singh, Ledwa Singh and Another Vs. State of Bihar, reported in 2011(3) PLJR (SC) 20.**

7. As against this, the learned A.P.P. argued that case of the prosecution is established by clear, cogent and trustworthy evidence.

8. We have considered the rival submissions and we have also gone through the record and proceedings including the oral as well as documentary evidence.

9. As accused persons are charged for the offence punishable under Section 302 of the Indian Penal Code, it is incumbent upon on the prosecution to establish that Md. Mintu died homicidal death. Death of Md. Mintu occurring on 06.12.2011 is not seriously disputed by the defence. On the contrary, according to the version of the defence reflected from the cross-examination of the prosecution witnesses, it was the day of Muharram and the mourners were playing with the weapons in the procession and in that process, Md. Mintu sustained injuries accidentally and died because of those injuries.

10. To establish homicidal death of Md. Mintu, the prosecution has examined P.W.13 Umeshwar Jha, the Investigator, as well as P.W.12 Dr. Sandeep Lal, Medical Officer of J.L.N.M.C. Hospital, Bhagalpur, who conducted autopsy on the dead body of Md. Mintu. P.W.13 Umeshwar Jha has proved the inquest report prepared by him after inspecting the dead body of Md. Mintu in the morning hours of 07.12.2011. The inquest report shows that there was stab wound on the chest of the deceased Md. Mintu. As deposed by P.W.13 Umeshwar Jha, the dead body was then dispatched to the Hospital for conducting post-mortem examination.

11. It is in evidence of P.W.12 Dr. Sandeep Lal that he conducted post-mortem examination on the dead body of Md. Mintu on 07.12.2011 and has noticed the following stab wound on the dead body:

(I). 1/2" x 1/4" x cavity deep situated at left side of chest 4" below left nipple in 9th intracoastal space, penetrating the chest wall, left lung, diaphragm, stomach and liver.

The Autopsy Surgeon deposed that the abdominal and chest cavity was filled with blood and blood clot. As per his version, the injury was antemortem in nature caused by a sharp penetrating weapon. The said injury was found to be dangerous and grievous in nature by the Autopsy Surgeon. P.W.12 Dr.

Sandeep Lal has also proved the report of the post-mortem examination prepared by him on conducting the autopsy, which is at Ext.2. This contemporaneous document corroborates the version of the Autopsy Surgeon in cross-examination. This Medical Officer has stated that the injury may cause external bleeding and it was a single stab injury. Thus with this overwhelming evidence, the prosecution has established a fact that Md. Mintu had suffered homicidal death on 06.12.2011 because of stab injury on his chest.

12. Now, it will have to see whether the accused persons, in furtherance of their common intention, had caused murder of deceased Md. Mintu on 06.12.2011 at village-Ismailpur Garhotiya by stabbing him with a sharp edged weapon. Though the prosecution has examined as many as 13 witnesses, many of amongst them who are co-villagers, have turned hostile to the prosecution. Apart from official witnesses P.W.12 Dr. Sandeep Lal and P.W.13 Umeshwar Jha, the Investigating Officer, except first Informant P.W.6 Md. Nahid and P.W.7 Bibi Rehana, who happen respectively to be brother and mother of deceased Md. Mintu, rest of all prosecution witnesses have turned hostile to the prosecution.

13. We have carefully gone through the evidence of

these hostile witnesses also but there is nothing in their evidence to support the case of the prosecution.

14. The star witnesses for the prosecution are close relatives of the deceased Md. Mintu, who are brother and mother of the deceased. One may argue that being related witnesses witnesses, version of these witnesses needs to be rejected. However, it is well settled that a close relative cannot be characterized as an interested witness. Close relatives, on many occasions are natural witnesses to the incident and there is no proposition of law that relatives are untruthful witnesses. On the contrary, there is no possibility that such close relatives would save the actual culprits and falsely implicate the accused. As a rule of caution and prudence, evidence of such close relatives is required to be scrutinized carefully and if the same is found to be wholly trustworthy and reliable, then conviction can be based on testimony of such witness. {See Namdeo Vs. State of Maharashtra (2007) 14 SCC 150 and Harbans Kaur Vs. State of Haryana (2005) 9 SCC 195}.

15. Keeping in mind this principle of appreciation of evidence of related witnesses, let us examine evidence of brother and mother of deceased Md. Mintu.

16. P.W.6 Md. Nahid, the first Informant, is brother of

deceased Md. Mintu. He testified that at 08.00 P.M. of 06.12.2011, he was present near the spot. At that time, accused no.2 Md. Jabbar caught hold of deceased Md. Mintu and accused no.1 Md. Sainul gave a blow of Gupti on left side of chest of Md. Mintu. Thereupon accused no.3 Md. Azad uttered that the task has been done. This witness proved the F.I.R. lodged by him and has also identified the accused while in the dock. He was subjected to the searching cross-examination. He feigned ignorance about the divorce of accused no.1 Md. Sainul by mutual consent after long drawn litigation of 10 years with his wife Nadira-daughter of P.W.8 Md. Shamsul. P.W.6 Md. Nahid has stated that because of the blow on his chest, Mintu became serious and, therefore, he went to call the doctor and when he returned after about 7 minutes, he found Mintu died on the spot. He stated that there was blood in small quantity on the spot of the incident. From his cross-examination, it is brought on record that at that time, there was crowd of people and he saw P.W.7 Bibi Rehana, Md. Naseem, Md. Nayeem etc. in that crowd. From his cross-examination it is brought on record that on the north side of the spot of the incident, there was a field, on the south side there is shop of Imitiyaz, on the eastern side, there was house of Koki and on the western side, there was house of

one Talim. This witness denied that because of exhibition of weapon by mourners on the Muharram procession, Md. Mintu sustained injuries and he died. He denied the suggestion that the accused persons are falsely implicated in the crime in question because of divorce of accused no.1 Md. Sainul from his wife who happens to be the daughter of maternal uncle of this witness.

17. Another star witness for the prosecution is none else than the mother of the deceased. She is P.W.7 Bibi Rehana. She testified that at 08.00 P.M. of the day of the incident she was present on the spot and she saw that accused no.2 Jabbar pushed her son Mintu and then he caught hold of Mintu, whereupon accused no.1 Sainul gave a blow of Gupti to Mintu. As per her version, she took Mintu on her lap and sent her son P.W.6 Nahid for calling the doctor. She stated that the doctor did not come and Mintu died on the spot. She identified the accused persons. From her cross-examination, it is brought on record that P.W.8 Md. Shamsul is her brother and his daughter Nadira married accused no.1 Sainul but subsequently the couple sought divorced. It is also brought on record from her cross-examination that women gathered to see procession of Muharram wherein weapons are played and exhibited. She

denied false implication of the accused persons because of divorce of accused no.1 Sainul.

18. At this juncture, it is worthwhile to mention that P.W.8 Md. Shamsul, who is brother of P.W.7 Bibi Rehana and maternal uncle of P.W.6 Md. Nahid had turned hostile to the prosecution. His daughter Nadira and accused no.1 Md. Sainul dissolved their marital ties by getting divorce by mutual consent. When P.W.8 Md. Shamsul had turned hostile to the prosecution, it is not possible to hold that, as accused no.1 Md. Sainul had obtained divorce from Nadira, daughter of P.W.8 Md. Shamsul, the prosecuting party has falsely implicated accused no.1 Md. Sainul and his relatives. Moreover, the deceased was intending to marry younger daughter of P.W.8 Md. Shamsul as seen from version of P.W.7 Bibi Rehana.

19. The contention of the learned counsel for the appellants that P.W.7 Bibi Rehana was not present on the spot of the incident because she is not named in the F.I.R. as witness and P.W.6 Md. Nahid has deposed about her arrival on the spot after he had left for calling the doctor. The appellants are trying to suggest that it was after P.W.6 Md. Nahid left for bringing the doctor, P.W.7 Bibi Rehana appeared on the spot of the incident. However, there is no merit in such contention. The

F.I.R. cannot be an encyclopedia of crime and each and every fact trivial is not required to be mentioned in the F.I.R. Therefore, non mentioning of the name of P.W.7 Bibi Rehana in the F.I.R. by her son P.W.6 Md. Nahid cannot be construed to mean that she is not an eye witness to the incident. Similarly, there is nothing in the evidence of P.W.6 Md. Nahid to suggest that his mother P.W.7 Bibi Rehana came on the spot of the incident after the incident. On the contrary, in paragraph-11 of his cross-examination, this witness has stated that there were lot of people including his mother on the spot of the incident. At that time, as seen from cross-examination of P.W.6 Md. Nahid, people had gathered for mourning on the eve of Muharram. That is why, there was crowd at that place. It was suggested to her that in the procession of Muharram, her son Mintu had sustained injuries accidently. In such situation, the evidence of P.W.6 cannot be construed to mean that his mother appeared on the scene of the occurrence, after the occurrence. No such suggestion was given to her. On the contrary, she herself has stated that she has personally seen the incident and was present on the spot of the incident at the time of the incident.

20. In this view of the matter, we are unable to find out any discrepancy or inconsistency in the evidence of P.W.6

Md. Nahid and P.W.7 Bibi Rehana. Their evidence is clear, consistent, cogent and trustworthy. There is nothing to doubt their version so far as it relates to giving a blow of Gupti by accused no.1 Md. Sainul to deceased Md. Mintu. However, it is seen that both these witness, probably in order to ensure that their testimony should not be discarded by the court, have attempted to exaggerate their version by stating that accused no.2 Jabbar had caught hold of Md. Mintu when accused no.1 Md. Sainul gave a blow of Gupti. The F.I.R. lodged with promptitude by P.W.6 Md. Nahid is not to that effect and is not incorporating this fact. The first version of the incident reflected from the F.I.R. lodged within two hours from the time of the incident makes it clear that according to the prosecution case accused no.2 Md. Jabbar had given push to deceased Mintu whereby deceased Mintu suffered a fall and it was thereafter that accused no.1 Md. Sainul gave a blow of Gupti to Md. Mintu. In his evidence, P.W.6 Md. Nahid has added embellishment by stating that while accused no.2 Md. Jabbar was holding deceased Md. Mintu, accused no.1 Md. Sainul gave a blow of Gupti on the chest of Mintu. Similar is the version of P.W.7 Bibi Rehana, who has stated that accused no.2 Md. Jabbar had caught hold of Mintu and then accused no.1 Sainul gave a

blow of Gupti. The limited role attributed to accused no.2 Md. Jabbar in the crime in question as reflected from the F.I.R. lodged with promptitude is only to pushing deceased Mintu. Subsequent to that, accused no.1 Sainul gave blow of Gupti to Mintu. Thus, improvement made by P.W.6 Md. Nahid in his version on this material aspect is certainly with an intention to implicate accused no.2 Md. Jabbar in the subject crime by showing his active role and overt act for making out his common intention in the crime in question. We do not see any reason why P.W.6 Nahid should not have come out with such details about accused no.2 Jabbar holding deceased Mintu at the first possible opportunity and this is a circumstance which casts an element of doubt in the case of prosecution so far as it relates to Accused No.2 Md. Jabbar. This version of P.W.6 Nahid about Accused No.2 Md. Jabbar holding Md. Mintu at the relevant time is an improvement on the material aspect, the same needs to be ignored. Thus, what is established from the eye witness account of the incident given by P.W.6 Md. Nahid is to the effect that accused no.1 Md. Sainul gave a blow of Gupti on the left side of chest of Md. Mintu. He has not deposed before the court that Accused No.2 Jabbar gave a push to Md. Mintu causing his fall. Both the eye witnesses have not testified that

accused no.2 Md. Jabbar had given a push to deceased Md. Mintu causing his fall and the improvement made by P.W.6 Nahid in his version by stating that accused no.2 Md. Jabbar had caught hold of Md. Mintu deserves to be ignored from consideration. As P.W.6 Nahid has not spoken about Accused No.2 Jabbar holding deceased Md. Mintu, evidence of P.W.7 Bibi Rehana to that effect deserves to be kept out of consideration as a rule of prudence.

21. Now, let us examine whether a single blow given on the left side of the chest of deceased Mintu by accused no.1 Md. Sainul constitutes the offence of murder punishable under Section 302 of the Indian Penal Code. In the matter of **Bunnilal Chaudhary** (supra), accused persons including Bunnilal Chaudhary chased the victim and Bunnilal Chaudhary attacked the victim Shambhu Raut by giving a blow of knife on the left side of the chest of Shambhu Raut. The medical evidence showed that the wound was of the size of 1" x 1/2" penetrating the left lung. In that context, the Medical Officer had not opined that the injury was sufficient in the ordinary course of nature to cause death. On the backdrop of these facts, it is observed by the Supreme Court that no attempt was made by accused Bunnilal Chaudhary to cause serious injury on any vital

part of the body of the deceased and there was no motive or intention to cause murder of Shambhu Raut. With this, it was held therein that the case falls within the third part of Section 299 and the act is punishable under second part of Section 304 of the Indian Penal Code as culpable homicide not amounting to murder. In the matter of **Buddhu Singh** (supra), accused Buddhu Singh gave an axe blow which landed on the head of the deceased. On the facts of that case, it was held by the Supreme Court that there is hardly anything on record which can be said against the accused persons. It is further held in the said case that seeing his father and brother had been grappling with the deceased, accused Buddhu Singh dealt an axe blow which could not be said to be intended towards head. With this observation, conviction of the accused came to be modified from Section 302 of the Indian Penal Code to Section 304 Part-II of the Indian Penal Code. On facts, both these cases are totally different. In the case in hand, though it was a single blow by Gupti (sword stick), the blow was dealt with a great force, as seen from the medical evidence. The seat of injury was left side of chest and 4" below left nipple. The internal damage caused by the forceful blow is reflected in the post-mortem report so also from evidence of the Autopsy Surgeon P.W.12 Dr.

Sandeep Lal. The blow given by accused no.1 Md. Sainul on the left side of the chest of Mintu had penetrated chest wall, left lung, diaphragm stomach and liver of deceased Md. Mintu. Bare perusal of the nature of injury reflected in the medical evidence makes it clear that there was a deep penetration of the body of the deceased by the single but forceful blow of a sharp edged weapon. The weapon penetrated muscular membrane separating the thoracic and abdominal cavities, punctured the chest wall and lung and perforated stomach as well as liver which are vital organs causing hemorrhagic shock leading to the instantaneous death. Extensive internal damage is seen to have been caused by a single blow given by a lethal weapon on the vital part of the body of Md. Mintu causing piercing of vital organs of the deceased. Extensive bleeding from vital organs resulted in collection of blood and blood clots in abdominal and chest cavity of the deceased leading his instantaneous death on the spot of the incident, immediately.

22. At this juncture, it is apposite to quote relevant portion of Section 300 of the Indian Penal Code and the same reads thus:

> "**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."

23. Murder is a gravest form of culpable homicide, which has its peculiar characteristic required to be proved before a person is to be held guilty for committing murder as defined U/s 300 of the IPC. It requires judicial scrutiny of the prevailing facts. Merely the fact that death of human being is caused is not enough to constitute offence of murder. Unless one of the mental status mentioned in ingredient of Section 300 is present, the act causing death cannot amount to culpable

homicide amounting to murder. It must be proved that there was an intention to inflict the particular bodily injury actually found to be present. The intention of the person causing the injury has to gathered from careful examination of the facts and circumstances of each case. The intention to cause the requisite type of injury is a subjective inquiry and then there would be further inquiry whether injury was sufficient in ordinary course of nature to cause the death is of objective nature.

24. It is now well understood that in the scheme of the Indian Penal Code “Culpable homicide” is the genus and “murder” is the species and generally speaking “culpable homicide” sans “special characteristics of murder is culpable homicide not amounting to murder”. The Indian Penal Code recognizes three degrees of culpable homicide. The first degree of culpable homicide is “murder” which is defined by Section 300 and made punishable under Section 302 IPC. The second degree is culpable homicide as defined under Section 299 and made punishable under Section 304 Part I, IPC. The third degree of culpable homicide is made punishable under Section 304 Part II of the IPC. The Hon'ble Apex Court in the case of **Willie Slaney V/s State of M.P. AIR 1956 SC 116** has stated that whether the accused causing the death of another and had no

intention to kill, then the offence would be murder only if,(1) the accused knew that the injury inflicted would be likely to cause death, or (2) that it would be sufficient in the ordinary course of nature to cause death or, (3) that the accused knew that the act must in all probability could cause death and if the case cannot be placed as high as that and the act is only likely to cause death and there is no special knowledge, the offence comes under Section 304(II), I.P.C. The Apex Court in the case of **Kirkar Singh V/s State of Rajasthan (1993) 4 SCC 238** has again held that in a given case if the case does not fall in any of the exceptions, it is the duty of the prosecution to prove that the offence is of murder and the ingredients of clauses Firstly to Fourthly of Section 300 are satisfied.

25. In Virsa Singh Vs. State of Punjab reported in AIR 1958 SC 465, the Supreme Court had explained the meaning and scope of Clause-III of Section 300 of the Indian Penal Code. It was observed by the Supreme Court that for bringing a case under Section 300 clause “Thirdly” of the Indian Penal Code, the prosecution must prove the following facts- First, it must establish quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be

proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

In paragraph 16, the third ingredients of Section 300 of the Indian Penal Code has been explained in the following words:

> "16. ….. The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a

> particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion."

26. It is, thus clear from the law laid down by the Supreme Court in the matter of **Virsa Singh** (supra) that even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would be that of murder. That apart even Clause Fourthly of the Indian Penal Code as reproduces by us in the foregoing paragraphs is also relevant for determining whether the act of the accused amounts to the offence of murder punishable under Section 302 of the Indian Penal Code or not. Clasue Fourthly of Section 300 of the Indian Penal Code requires knowledge of the probability of the act causing death. The same would be applicable where the knowledge of the offender as to the probability of death of a person being caused from his dangerous act is in the realm of certainty.

27. Judgment in the matter of Virsa Singh's case is quoted with approval in the matter of **Jai Prakash Vs. State**

(Delhi Administration), reported in (1991)2 SCC 32. After considering the said Judgment as well as Judgments in other cases such as **Chahat Khan Vs. State of Haryana, reported in (1972)3 SCC 408, Chamru Bhdhwa Vs. State of M.P., reported in AIR 1954 SC 652, Willie Slaney** (supra) etc, in paragraph 15 of its Judgment, the Supreme Court has observed in the matter of Jai Prakash (supra) thus:

> "15. In all these cases the approach has been to find out whether the ingredient namely the intention to cause the particular injury was present or not and it is held that circumstances like sudden quarrel in a fight or when the deceased intervenes in such a fight, would create a doubt about the ingredient of intention as it cannot definitely be said in such circumstances that the accused aimed the blow at a particular part of the body. When an accused inflicts a blow with a deadly weapon the presumption is that he intended to inflict that injury but there may be circumstances like those, as mentioned above, which rebut such presumption and throw a doubt about the application of Clause Thirdly. Of course much depends on the facts and circumstances of each case. Now let us examine some of the cases relied upon by the learned counsel for the appellant."

28. Thus, it is clear that where the single blow causing death of a human being result in the offence punishable under Section 302 of the Indian Penal Code or not is a question of facts and circumstances of each case and no straight jacket formula can be made applicable for universal use in such type of matters.

29. The question of proof of intention to cause the death and what offence is committed by the accused in the event of inflicting a single blow by a weapon of offence has been considered by the Supreme Court in catena of cases, by examining the scope and ambit of Section 300 of the Indian Penal Code. In para 29 of its Judgment in the matter of **Pulicherla Nagaraju Vs. State of A.P. reported in (2006) 11 SCC 444,** the Hon'ble Supreme Court has observed thus:

> "*29*. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters -plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases.

There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (*i*) nature of the weapon used; (*ii*) whether the weapon was carried by the accused or was picked up from the spot; (*iii*) whether the blow is aimed at a vital part of the body; (*iv*) the amount of force employed in causing injury; (*v*) whether the act was in the course of sudden quarrel or sudden fight or free-for-all fight; (*vi*) whether the incident occurs by chance or whether there was any premeditation; (*vii*) whether there was any prior enmity or whether the deceased was a stranger; (*viii*) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (*ix*) whether it was in the heat of

passion; (*x*) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (*xi*) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may."

30. In **Singapagu Anjaiah Verus State of A.P., reported in (2010) 9 SCC 799,** in a similar set of facts and circumstances, the Supreme Court Court concluded that the accused intended to cause death of the deceased. In para 16, it was observed as under : (SCC p. 803)

"16. In our opinion, as nobody can enter into the mind of the accused, his intention has to be gathered from the weapon used, the part of the body chosen for the assault and the nature of the injuries caused. Here, the appellant had chosen a crowbar as the weapon of offence. He has further chosen a vital part of the body i.e. the head for causing the injury which had caused multiple fractures of skull. This clearly shows the force with which the appellant had used the weapon. The cumulative effect of all these factors irresistibly leads to one and the only conclusion that the appellant intended to

cause death of the deceased."

31. In **State of Rajasthan Vs. Kanhaiya Lal, reported in (2019) 5 SCC 639**, it was held by the Supreme Court in paras 7.4 and 7.5 as follows : (SCC pp. 634-44)

> "7.4. In Ashokkumar Magabhai Vankar, the death was caused by single blow on head of the deceased with a wooden pestle. It was found that the accused used pestle with such force that head of the deceased was broken into pieces. This Court considered whether the case would fall under Section 302 or Exception 4 to Section 300 IPC. It is held by this Court that the injury sustained by the deceased, not only exhibits intention of the accused in causing death of victim, but also knowledge of the accused in that regard. It is further observed by this Court that such attack could be none other than for causing death of victim. It is observed that any reasonable person, with any stretch of imagination can come to conclusion that such injury on such a vital part of the body, with such a weapon, would cause death.
>
> 7.5. A similar view is taken by this Court in the recent decision in Leela Ram and after considering a catena of decisions of this Court on the issue on hand i.e. in case of a single blow, whether a case falls under

Section 302 or Section 304 Part I or Section 304 Part II, this Court reversed the judgment [Leela Ram v. State of Rajasthan] and convicted the accused for the offence under Section 302 IPC. In the same decision, this Court also considered Exception 4 of Section 300 IPC and observed in para 19 as under : (Leela Ram case, SCC pp. 140-41)

> '19. … Under Exception 4, culpable homicide is not murder if the stipulations contained in that provision are fulfilled. They are : (*i*) that the act was committed without premeditation; (*ii*) that there was a sudden fight; (*iii*) the act must be in the heat of passion upon a sudden quarrel; and (*iv*) the offender should not have taken undue advantage or acted in a cruel or unusual manner.' "

32. Adverting to the facts of the instant case as established from the evidence of P.W.6 Nahid and P.W.7 Bibi Rehana, it is clear that accused no.1 Md. Sainul gave a forceful blow of Gupti on left side of chest of deceased Md. Mintu. We have already quoted the extensive damage caused to the vital organs of the deceased Md. Mintu by such single blow of the sword stick dealt by accused no.1 Md. Sainul in earlier paragraph of our Judgment. Suffice to quote that the said blow caused perforation of the chest wall, left lung, diaphragm,

stomach and liver of the deceased causing his death within few minutes of sustaining the said blow. Considering the nature of internal damage caused by the blow of the sword stick, one has to conclude that the said blow was certainly inflected with the intention of causing death of Md. Mintu. Cogent evidence adduced by the prosecution on this aspect shows that the weapon used was a sword stick which has a long double edged blade having lethalness to cause deep penetrating wound. Accused no.1 Md. Sainul was already carrying this double edge weapon with him at the time of the incident. There was no altercation or provocation at the time of the incident. The act was not the outcome of sudden quarrel or fight. Deceased Md. Mintu had offered no resistance while sustaining the blow which was inflicted on him all of a sudden. Thus, the blow of the sword stick was certainly aimed at the vital part of the body of Md. Mintu by accused no.1 Md. Sainul and that too by applying great force as the weapons entered deep inside the chest and reached upto the stomach and liver of deceased Md. Mintu perforating all other parts coming in between. Ultimately, intention of the accused is required to be gathered from all these circumstances borne from the record and these circumstances unerringly points out the intention to kill

harbored by accused no.1 Md. Sainul. Even if it is assumed for the sake of argument that the act was unintended, then also, the prosecution has established that the case is falling in Clause "Third" and Clause "Fourth" of Section 300 of the Indian Penal Code. The bodily injury which was intended and actually inflicted by accused no.1 Md. Sainul was certainly sufficient in the ordinary course of nature to cause death of the human being. No expert opinion is required on this aspect, in the light of the extensive damage to the human body caused by such blow, as seen from the medical evidence, made available by the prosecution, which is discussed in the foregoing paragraphs. Otherwise also, the accused no.1 Md. Sainul while inflicting the blow of the sword stick on the chest of Md. Mintu must be certainly knowing the imminently dangerous nature of that act and the probability that it would cause death of Md. Mintu, with all certainty. Without any excuse in incurring the risk of causing death or such stab injury to the chest, accused no.1 Md. Sainul had caused the same. Therefore, the prosecution has certainly established the offence under Section 300 of the Indian Penal Code, punishable under Section 302 of the Indian Penal Code as against accused no.1 Md. Sainul.

33. We only note for rejection the submission of the

learned counsel for the appellants that there was delay in recording the inquest, making the prosecution case suspect. The offence took place at 08.00 P.M. of 06.12.2011. The F.I.R. was lodged at about 10.00 P.M. of 06.12.2011 on arrival of police at the village. The incident took place in small village-Ismailpur Garhotiya. The inquest notes were taken in the morning of 07.12.2011 and, therefore, by no stretch of imagination, it cannot be said that there was delay in conducing inquest. The Judgment so cited on this aspect, as such has no application to the instant case.

34. Similarly, place of the incident is vividly described by the Investigator P.W.13 Umeshwar Jha. His version regarding the spot of the incident is also gaining corroboration from the evidence of P.W.6 Md. Nahid. Ultimately, the incident took place in open space and no overwhelming importance can be given to the minor inconsistencies or discrepancies in respect of the spot of the incident. Each witness has his own perspective regarding the scene of the occurrence. Hence, the Judgment in the matter of **Ganesh Datt** (supra) has no application to the facts in the case in hand.

35. Though with the aid of Section 34 of the Indian Penal Code, the learned trial court was pleased to convict the

appellant/accused no.2 Md. Jabbar for the offences punishable under Sections 324 and 302 of the Indian Penal Code, there is no clear, cogent and trustworthy evidence regarding harboring of common intention of accomplishing the ‘act’ by accused no.2 Md. Jabbar. In fact, if the material improvement made by P.W.6 Md. Nahid in respect of the role attributed to this accused are omitted from consideration, then virtually there is no substantive evidence against accused no.2 Md. Jabbar coming from the mouth of the first informant P.W.6 Md. Nahid. This witness has even has omitted to state that accused no.2 Md. Jabbar had pushed the deceased Md. Mintu at the time of the incident. Though P.W.7 Bibi Rehana, who happens to be mother of the deceased Md. Mintu, has ventured to state that deceased was being held by accused no.2 Md. Jabbar, in absence of corroboration to this part of her evidence by other evidence adduced by the prosecution, it would be safe to keep this portion of her evidence out of consideration. Ultimately, her son P.W.6 Md. Nahid, who was with the deceased at the time of the incident and who himself is the first informant is not corroborating his mother P.W.7 Bibi Rehana on this aspect. Therefore, evidence against the accused no.2 Md. Jabbar is doubtful as well as lacunic and, as such, he deserves to be

granted benefit of doubt.

36. In the result, we proceed to pass the following orders:

(I). The appeal is partly allowed.

(II). Conviction and resultant sentence imposed on appellant/accused no.1 Md. Sainul is confirmed.

(III). Appellant/accused no.2 Md. Jabbar is acquitted of the offences held to be proved against him. He be set at liberty if not wanted in any other case.

(A. M. Badar, J)

(Rajesh Kumar Verma, J)

P.S./-

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