

Om Prakash and ors. Vs. State

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SooperKanoon Citation : sooperkanoon.com/1139021

Court : Delhi

Decided On : May-01-2014

Judge : Kailash Gambhir

Appellant : Om Prakash and ors.

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment delivered on: May 01, 2014 + CRL.A. 673/1999 OM PRAKASH & ORS. Through: Appellants Mr. B.S. Chowdhary, Advocate Versus STATE Through: Respondent Mr. Sunil Sharma, Additional Public Prosecutor for the State CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT

KAILASH GAMBHIR, J1 By this appeal filed under section 374 of Criminal Procedure Code, 1973 (hereinafter referred to as Cr.P.C.), the appellants seek to challenge the impugned judgment and order on sentence dated 27.11.1999 and 4.12.1999 respectively whereby the Appellants were convicted for committing an offence punishable under Section 302/149, 308/149, 452/149, 148/149, 147/149 of Indian Penal Code, 1860 (hereinafter referred to as IPC). They were sentenced to undergo rigorous imprisonment for life for the offence punishable under section 302/149 IPC; rigorous imprisonment for a period of 7 years for the offence punishable under section 308/149 IPC; rigorous imprisonment for a period of 7

years for the offence punishable under section 452/149 IPC; rigorous imprisonment for a period of 3 years for the offence punishable under section 148/149 IPC; rigorous imprisonment for a period of 2 years for the offence punishable under section 147/149 IPC and it was ordered that all the sentences shall run concurrently.

2. The facts germane to the case of the prosecution are that - That on 2.6.1987 at about 11.35 p.m. Jagannath reached police station sultan puri and made statement to the police that on 2.6.1987, he was proceeding after taking water from the water tap when on the way Om Prakash resident of village Pooth alongwith another person , met him in front of his house and at that time his nephew Raj bahadur had returned from his duty, Om Prakash and his associates asked Raj Bahadur to stop but Raj Bahadur did not stop as a result , Om Prakash and his associates started giving beating to Raj Bahadur. On hearing the alarm, Shiv Murat and Ram Bahadur came there and Om Prakash and his associates started giving beatings to them as well with the dandas. As a result of which Shiv Murat, Ram Bahadur and Raj Bahadur suffered injuries and blood started coming out. The police van took Shiv Murat , Ram Bahadur and Raj Bahadur to the hospital; that Jagannath did not receive any injury and did not get him medically examined. It is further the case of the prosecution that the report was entrusted to S.I. Ranbir Singh for investigation who reached at the spot but could not find any eye witness so he alongwith constable Raj Singh reached R.M.L Hospital and obtained the M.L.Cs of the above named injured persons. But since the injured persons were under treatment, S.I. Ranbir Singh could not record their statement at that time and found from the copy of the complaint and M.L.C that a case under section 308/ 34 I.P.C is made out against the above two accused persons and sent the rukka through constable Raj Singh to the police station and got the case registered under the aforesaid sections of I.P.C. The I.O. conducted investigation of the case and recorded the statement of the witnesses wherein PW4-Ram Awadh s/o Shri Ram Narain deposed that on 02.06.1987 at about 11.00 p.m. he was sleeping in the open place in his house when he heard cries coming from the house of Shiv Murat and when he reached there , he found 7 persons including Om Prakash and Raj Singh of village Pooth Kala were giving beating to Shiv Murat, Ram Bahadur, and Raj Bahadur with dandas and lathis. Siddique was

holding a Desi Katta while Raj Singh was throwing bricks and that all of them dragged Raj Bahadur from his house to a nearby situated vacant plot where Om Prakash gave a danda blow on his head and Siddique and Neiksheikh also gave him beating as a result of which lot of blood oozed out of his head and he fell on the ground. The door of the house of Shiv Murat was also broken , as these people brought him out of the house by trespassing into his personal house. As a result Raj Bahadur died in the hospital on 03.06.1987. After completing the investigation, the police filed a challan in the court of Metropolitan Magistrate who took cognizance of the case, supplied the copies of challan and other documents and committed the case to the court of sessions . Charge sheet was framed. All the accused persons were charged for an offence punishable under section 147/148/452/308/325/302 read with section 149 IPC.

3. To prove its case the prosecution examined as many as 18 witnesses. After the completion of prosecution evidence, statement of the accused persons was recorded under Section 313 of Cr.P.C. Accused were confronted with the entire incriminating evidence produced against them and in response to various questions, the defence raised by the accused persons was of false implication.

4. On behalf of the Appellants arguments were addressed by B.S. Chowdhary, Advocate. The State was led by Mr. Sunil Sharma, Learned Additional Public Prosecutor.

5. Addressing arguments on behalf of the appellants, learned counsel at the very outset very fairly conceded to the findings of the learned trial court in convicting the accused persons for committing an offence of culpable homicide. Learned counsel further confined his arguments only to seek conversion of the offence from Section 302 IPC to Section 304 Part II IPC. To buttress his submissions on this aspect, learned counsel for the Appellants submitted that as per the case of the prosecution itself, there was no previous enmity between the accused party and the deceased which could propel the accused persons to hatch out a conspiracy for murdering the deceased - Raj Bahadur. Learned counsel for the appellants further submitted that it was a sudden quarrel that erupted between the accused - Om Prakash and Rashid with deceased Raj Bahadur, which ultimately led to a

fight between the accused persons on one hand and the complainant party on the other and at the spur of moment and in heat of passion the accused - Raj Singh and Babu Khan inflicted lathi blows on the person of the deceased which led to his unfortunate death. Learned counsel for the appellants further argued that both the parties knew each other very well and in the quarrel which had taken place between both the parties, even the accused persons had received injuries. Learned counsel for the appellants also argued that the prime witnesses of the prosecution who were alleged to be the eye witnesses of the incident, i.e., PW-2 Ram Bahadur (brother of the deceased) and PW-3 Shiv Murat (father of the deceased) also turned hostile. With these witnesses turning hostile, the entire edifice of the prosecution got collapsed. Learned counsel for the appellants further argued that PW-5 Jagan Nath in his examination-in-chief admitted the fact that prior to the said incident there was no quarrel or dispute of any kind between the parties. Learned counsel for the appellants also argued that PW-5 - Jagan Nath was not the eye witness as he had only seen the accused persons armed with lathies and sticks but the actual quarrel between the parties never took place in his presence. Based on these submissions, learned counsel for the appellants strongly urged that the case of the prosecution clearly attracts Exception 4 of Section 300 IPC and therefore, at the highest, the Appellants can be convicted for the offence punishable under Section 304 Part II IPC and not under section 302 IPC.

6. Learned counsel for the appellants also pleaded for showing mercy to these appellants who are aged about 75-80 years and who remained in Jail for a period of more than 6 years. Learned counsel for the appellants also submitted that these appellants have never committed any other crime in their lives and even after their release on bail; their conduct remained clean and unblemished.

7. Per contra, Mr. Sunil Sharma, Additional Public Prosecutor for the State vehemently contended that all the accused persons had brutally killed the deceased - Raj Bahadur after these persons had criminally trespassed into the house of PW - 3 Shiv Murat and started indiscriminately beating Shiv Murat, Ram Bahadur and Raj Bahadur (deceased) with the help of lathies, hockey sticks and one of the accused persons was also armed with desi katta. Learned APP also

submitted that initial fight of accused Om Prakash and accused Rashid, with the deceased Raj Bahadur, was to initialize a large conspiracy to carry out his murder after taking the support of five other accused persons and then criminally trespassing into the house of Shiv Murat to accomplish their criminal designs. Learned APP also submitted that these accused persons had inflicted serious blows on the head of the deceased and also caused serious injuries to the other victims. Learned APP for the State submitted that learned Trial Court has rightly convicted the appellant for committing an offence under Section 302 IPC and there exist no circumstance to scale down the offence from Section 302 IPC to Section 304 IPC Part I or II of IPC and therefore, none of the ingredients of exception 4 of Section 300 IPC can be attracted in the facts of the present case, and offence committed by the appellant does not deserve conversion. Learned APP also argued that the age factor of these accused persons and the said period of about 6 years of incarceration suffered by the Appellants will not be of any significance looking into the gravity and seriousness of the crime committed by them.

8. We have heard learned counsel for the parties at considerable length and given our thoughtful consideration to the arguments advanced by them. We have also perused the record of the learned Trial Court.

9. FIR in this case was registered based on the statement made by PW-5 Jagan Nath. As per his first statement, he met the accused - Om Prakash accompanied by another person whose name was not known to him. He further stated that after he had reached in front of his house, his nephew Raj Bahadur had just returned back from his duty. Om Prakash and his companion enquired from him as to where he was going, to which his nephew did not stop to respond. Being agitated by his conduct, Om Prakash and his friend started beating him. On hearing the noise, Shiv Murat, Ram Bahadur reached at the spot. Om Prakash and his friend started beating all of them with the lathis which were already held by them. He further stated that after seeing the incident he proceeded to lodge a report but on his way, he met the police van which ultimately took all the three injured persons to the hospital.

10. The police had also recorded the statement of PW- 2 Ram Bahadur and PW-3 Shiv Murat and as per their testimonies, after two accused persons started beating them, they fled from the scene to their house but after some time, these accused persons who were seven in number entered their house from the back door and started beating all of them. As per their deposition, accused persons were armed with sticks and lathies. Accused Raj Singh, was having a brick in his hand while accused Saddiq was having desi katta with him. This witness further stated that all the seven persons took Raj Bahadur to a nearby plot where Om Prakash had inflicted a danda blow on his head and as a result of which, blood oozed out from his head and he fell down. The statement of Shiv Murat under Section 161 Cr.P.C. is no different than that of the statement of Ram Bahadur.

11. PW-2 Ram Bahadur and PW-3 Shiv Murat turned hostile and so far as PW-5 Jagan Nath is concerned, his testimony in his examination-in-chief remained unrebutted as he was not cross examined by the defense. Although, as per the findings given by the learned trial court PW-2 and PW-3 did turn hostile but on a careful examination of their testimonies, we find that on material facts their testimonies are consistent and corroborative to the case of the prosecution. These witnesses were consistent in deposing about the presence of these accused persons on the night of 2/3.6.87. Further, accused had criminally trespassed their house by breaking open the door. They have also confirmed the fact that all these accused persons were having lathies and dandas in their hands. These witnesses further deposed that the said accused persons had dragged the deceased Raj Bahadur to a plot and was given a danda blow on his head.

12. Raj Bahadur was admitted in R.M.L. Hospital at 12.30 a.m. on 3rd June 1987 and he was brought to the hospital by none else but his father PW-3 Shiv Murat. Victim Raj Bahadur had succumbed to his injuries on 3rd June 1987 at 8.40 a.m. His body was sent for postmortem. PW-10-Dr. Bharat Singh had conducted the post mortem on the body of Raj Bahadur on 4th June 1987 at 8.00 a.m. and as per his post mortem report he found the following external injuries on his body: a. Abrasion over forehead size 1x b. One stitched wound on right mastoid area size cm long. There are abrasions at the margin of this wound. This wound was muscle deep. c. One stitched wound on the top of the skull cm long with swelling around it.

This wound was muscle deep. d. One stitched wound on the right side of the injury No.3 cm long. It was muscle deep. e. There was swelling on right hand. f. Fracture on right middle finger, proximal phalanx. g. Abrasion over both knee joints size 1 x cm on either side.

13. The cause of death as opined by PW-10, Dr. Bharat Singh was due to the injury on his skull which was found sufficient to cause death in the ordinary course of nature. He further opined that death was caused as a result of head injuries. In his examination-in-chief, the witness deposed that injury No.2 was not possible with a sharp object and injury on his skull was not possible either by fall or stricken against hard surface. PW3 Shiv Murat and PW-2 Ram Bahadur had also received injuries at the hands of accused persons and the MLC was proved on record as Ex.PW6/E and 6/G, Ex.PW-6/B and Ex.PW-6/F respectively.

14. The learned trial court has aptly dealt with the scientific evidence placed on record. The blood group as was found on the clothes of the deceased and accused persons was of group O.

15. In view of the discussion in the foregoing paras, we find ourselves in complete agreement with the findings given by the learned trial court convicting and holding the accused persons guilty for committing the offence under section 147/148/149/308 of I.P.C. and of culpable homicide on the night of 2/3.6.87. More over, during the course of arguments learned counsel to the appellant did not press this appeal on merits and prayed for alteration of sentence under section 302 to 304 I.P.C. .As such, we uphold the findings of the learned trial court.

16. Coming to the quantum of sentence and weighing whether the trial court was proper in holding the accused persons guilty for an offence punishable under section 302 IPC, To appreciate the above contention raised by learned counsel for the appellant, it would be appropriate to first jot down the relevant provisions which are as under:

Section 300:Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or- Secondly.-If it is done with the intention of causing such bodily

injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or- Thirdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or- Fourthly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. Exception 1.-When culpable homicide is not murder.- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. The above exception is subject to the following provisos:- First.-That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person. Secondly.-That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant. Thirdly.-That the provocation is not given by anything done in the lawful exercise of the right of private defence. Explanation Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. Exception 2.-Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. Exception 3.-Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused. Exception 4.-Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation It is immaterial in such cases which party offers the provocation or commits the first assault. Exception 5.-Culpable homicide is not

murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.-
-----Section 304. Punishment for culpable homicide not amounting to murder Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life]., or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. CLASSIFICATION OF OFFENCE Para I Punishment- Imprisonment for life, or imprisonment for 10 years and fine-Cognizable-Non-bailable-Triable by Court of Session-Non-compoundable. Para II Punishment- Imprisonment for 10 years, or fine, or both- Cognizable-Non-bailable-Triable by Court of Session-Noncompoundable.

17. In the scheme of The Penal Code, culpable homicide is genus and murder is its specie. All murders are culpable homicide but not vice versa. Section 299 of the Indian Penal Code recognizes three types of culpable homicides.

18. First one may be culpable homicide of the first degree. This grave form of culpable homicide is defined in Section 300 IPC as murder; the second may be termed as culpable homicide of the second degree, which is punishable under first part of Section 304 IPC; the third form of culpable homicide is of third degree, which is considered to be the lowest type of culpable homicide and is punishable under Section part II of Section 304 IPC.

19. Section 304 IPC is split into two parts. The first paragraph of this section referred to as Part I applies where the accused causes bodily injury with intention to cause death: or with intention to cause such bodily injury as is likely to cause death. Part II on the other hand comes into play when death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely

to cause death.

20. So far the present case is concerned, the moot question is whether the offence committed by the accused persons can attract exception 4 of Section 300 IPC and thus can be converted from Section 302 IPC to Section 304 Part I or Part II IPC.

21. As would be seen from a bare look of the said provision, it lays down the following four requirements, which must be satisfied for an offence to fall under the said exception. The same are as under:-

22. a. It was a sudden fight. b. There was no pre-meditation c. The act was done in a heat of passion. d. The offender not having taken undue advantage or acted in a cruel or unusual manner. For the application of exception 4 to section 300 IPC, all the aforesaid pre-requisites must be tested in all probabilities and in the absence of any of the four pre-requisites, exception 4 to section 300 IPC will have no application. It is thus not sufficient to show that there was a sudden quarrel and there was no pre-meditation but it must be further shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression undue advantage as used in the provision means unfair advantage. Dealing with the said exception 4 to section 300 IPC the Honble Apex Court in Ghapoo Yadav and ors. Vs. State of M.P., (2003) 3 SCC528 has held as under:...

The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight: (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300. Indian Penal Code is not defined in the Indian Penal Code. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4 It is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender

has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.
xxx xxx xxx ...After the injuries were inflicted the injured has fallen down, but there is no material to show that thereafter any injury was inflicted when he was in a helpless condition. The assaults were made at random. Even the previous altercations were verbal and not physical. It is not the case of the prosecution that the accused Appellants had come prepared and armed for attacking the deceased....This goes to show that in the heat of passion upon a sudden quarrel followed by a fight the accused persons had caused injuries on the deceased, but had not acted in cruel or unusual manner. That being so, Exception 4 to Section 300 Indian Penal Code is clearly applicable...

23. In the case of A. Maharaja Vs. State of Tamilnadu, 2009 Cr.L.J.

315, the Honble Apex court held:

8. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to do deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts

it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

24. In the background of the aforesaid legal position, let us now closely examine the facts of the case at hand and adjudge whether the same can be covered within the parameters of Exception 4 to Section 300 IPC. As can be seen from the deposition of PW-5 - Jagan Nath and even that of PW-2 and PW-3 that there was no previous enmity between the accused persons and claimant party. Therefore, there would not arise any reason for these persons to share any common intention to carry out any plan to murder the deceased Raj Bahadur. As per PW-5, on whose statement rukka was sent for registration of FIR, a scuffle between the deceased Raj Bahadur and the accused Om Prakash and his friend Rashid had taken place on a mere fact that the deceased did not stop or gave any response to Om Prakash when he questioned him as to where he was going. This initial scuffle between the deceased Raj Bahadur and Om Prakash alongwith Rashid then led to criminal trespass of all the seven accused persons into the house of Shiv Murat and thereafter, in the course of fight, various injuries were sustained by Ram

Bahadur, Shiv Murat and so far as deceased Raj Bahadur was concerned, he was inflicted severe danda blow on his head which proved fatal and caused his death within a short time. It was thus a clear case of sudden fight without there being any pre-meditated plan on the part of the accused persons. Although the exact provocation never surfaced in the story of the prosecution but the circumstances definitely lead to an inference that the act committed by the accused persons was in a heat of passion, as a result of which Raj Bahadur died.

25. As per the record, there is no doubt that PW-3 Shiv Murat father of the deceased and Ram Bahadur, PW-2, brother of the deceased, also suffered grievous hurt in the advent of the fight that took place between the parties, when the accused forcefully entered their house. PW-2 and PW-3 sustained injuries on their mouth, head and shoulder respectively. The altercation resulted in dislocation of the teeth of PW-3 Shiv Murti.

26. In the light of the principles which have been discussed fairly exhaustively, we have to analyse the factual position as to whether the Appellants had the intention to cause death, or whether they only had the knowledge about the injury which was likely to cause death. We have to also analyse the manner in which the injury was caused and the provocation for the same. There is no evidence in the case that there was any kind of previous enmity between the parties. The evidence on record would show that there was no premeditation on the part of the Appellants and that it was a case of sudden fight.

27. In the background of facts of the case, it is unfathomable to comprehend that there was a premeditated plan or there was a common intention on the part of the accused persons to carry out the murder of the deceased Raj Bahadur. Thus taking a cumulative view of the facts of the case and legal position discussed in the foregoing paras, we are of the considered view that the case in hand clearly attracts Exception 4 to Section 300 IPC.

28. The next question is whether the case falls under Section 304 of Part I or Part II of IPC. It will be also useful here to refer to the judgment of the Apex Court in the case of Pulicherla Nagaraju@Nagaraja Reddy v. State of Andhra Pradesh, (2006) 11 SCC444 wherein the Court has observed that:

18. ... 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 a 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 pre-meditation; (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.

29. In *Jagriti Devi v. State of Himachal Pradesh* (2009) 14 SCC771 it was held that the expressions "intention" and "knowledge" postulate the existence of a positive mental attitude. It was further held that when and if there is intent and knowledge, then the same would be a case under first part of Section 304 of IPC and if it is only a case of knowledge and not intention to cause murder by bodily injury, then

the same would be a case of second part of Section 304 IPC. To quote:

28. Section 300 Indian Penal Code further provides for the exceptions which will constitute culpable homicide not amounting to murder and punishable under Section 304. When and if there is intent and knowledge, then the same would be a case of Section 304 I and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 II. The aforesaid distinction between an act amounting to murder and an act not amounting to murder has been brought out in the numerous decisions of this Court. (m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?. These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused.

30. In State of H.P. vs. Wazir Chand and others reported in AIR 1978 SC315 dealing with the sudden fight between two groups wherein one person in such fight was vitally wounded by the appellant by knife, the Honble Apex Court took a view that this case falls in exception 4 of Section 300 and under section 304 Part 1. Relevant paras of the said judgment are as under:

Therefore, when Parshottam Lal appeared there was a sudden fight upon a sudden quarrel flowing from the earlier incident and in this both sides attacked each other. All the ingredients to attract Exception 4 to Section 300, I.P.C. are established. There is no premeditation. Parshottam Lal left the theatre and came over there. There was a fight that ensued in a sudden quarrel. The previous incident between Om Parkash alias Pashi and accused No.3 Joginder was the cause and in that heat of passion and sudden quarrel parties grappled and attacked each other and it cannot be said in the circumstances that any undue advantage was taken. It may be recalled here that Parshottam Lal was a hefty well built fellow and if accused No.1 alone was to attack him he could not have escaped with few abrasions. Therefore, all the ingredients to attract Exception 4 of Section 300, I.P.C. are fully established.

26. As injury No.1 was fatal in the ordinary course of nature and accused No.1 had wielded a dangerous weapon and caused an injury on the vital part of the body and the blows were repeated inasmuch as four injuries were caused the offence but for the application of Exception 4 would be one under Section 302, I.P.C. but as Exception 4 is attracted, it would be reduced to Section 304, Part I, I.P.C. and the conviction of accused No.1 would be modified to one under Section 304, Part I, I.P.C. maintaining the sentence as awarded by the High Court as in our opinion that is adequate.

31. In the matter of Krishna Tiwary and Anr Vs. State of Bihar, reported in AIR 2001 SC2410 where the accused had inflicted knife blows in the heat of passion without any premeditation and without any intention that he would cause that injury, the Honble Apex Court held that the case was covered by Exception 4 to Section 300 of the IPC; the accused was convicted under Section 304-I of the IPC. Relevant paragraph of the said judgment is reproduced as under:- the accused had inflicted knife blows in the heat of passion without any premeditation and without any intention that he would cause that injury, his case was covered within Exception 4 to Section 300 of the IPC; he had been convicted under Section 304-I of the IPC. 21 Applying the test laid down in this case, there is no reason as to why the appellants should also not be accorded the benefit of Explanation 4 of Section 300 of the IPC. The conviction of the appellants for the offence of murder is accordingly modified for the offence of culpable homicide not amounting to murder. They are all accordingly convicted under Section 304-I of the IPC.

32. In Babu Bandu Patil v. State of Maharashtra, (2009) 12 SCC685 it was held that where a petty quarrel culminated into a single blow being given on the head of the deceased with axe by the appellant accused, while other co-accused alleged to have assaulted him with sticks in the circumstances, appropriate conviction would be under section 304, Part I.

33. In a similar case, Baij Nath v. State of U.P. (2008) 11SCC738 it was held that where a lathi blow was given on the head of the deceased resulting in fractures of both parietal and frontal bones and doctor opined that the cause of death was due to coma as a result of the head injury, considering the nature of injury and weapon

used, the accused was rightly convicted under section 304, Part I.

34. In the present case, there was an initial scuffle between the deceased Raj Bahadur and one of the accused Om Prakash which led to criminal trespass by all the seven accused persons into the house of Shiv Murat. In the course of the fight, various injuries were sustained by PW-2 Ram Bahadur, PW-3 Shiv Murat and the deceased Raj Bahadur was given a danda blow on his head, which proved fatal. As per the post mortem report of the deceased, conducted by PW-10 Dr. Bharat Singh, there were injuries on the skull which were sufficient in the ordinary course of nature to cause death, one such wound was a one stitched wound on the top of the skull which was inch long with swelling around it. The doctor also opined that the death was due to coma resulting from head injuries. In the present case the injuries sustained by the deceased are similar to the injuries sustained by the deceased of the aforesaid case (Ref: Baij Nath v. State of U.P. (2008) 11SCC738. Therefore, the appropriate conviction under the given circumstances would be under section 304 Part I, IPC.

35. On the issue of sentence, we note that all the appellants have already undergone a sentence of more than 7 years including the period of remittance earned by them and at present these accused are aged about 70-80 years. The nominal rolls do not evidence their involvement in any other offence and do not even raise any doubt on the conduct of the appellants during their period of incarceration. It has been brought to our notice that the appellants even after grant of bail were not found involved in any criminal activities and they are leading their respective lives peacefully with their family members. Therefore, in the facts of the present case, convicting the Appellants and sentencing them for the period already undergone by them resorting to Section 304 Part I of the Indian Penal Code will meet the ends of Justice.

36. Accordingly, the impugned judgment and the order of the learned Additional Sessions Judge dated 27.11.1999 and 4.12.1999, while maintaining the sentence of the accused persons under Section 147/148/ 149/ 452/ 308 IPC, we set aside their conviction under Section 302 of IPC and convict them under Section 304 Part I IPC. The appeal filed by the appellants is partly allowed and modified from

Section 302 IPC to Section 304 Part I of IPC and accordingly a sentence imposed upon the appellants is modified from life imprisonment to sentence already undergone by them. In addition to this, each of the Appellants is directed to pay a compensation of Rs.50,000 to the legal heirs of the deceased Raj Bahadur and also, a compensation of Rs 25,000/- each, to be paid to the injured, PW-2 Ram Bahudur and PW-3, Shiv Murat. The compensation imposed shall be paid by the accused persons to the aforesaid, in the presence of the Investigating Officer/SHO of the case, within a period of two weeks from today.

37. Records reveal that appellant No.2 Raj Singh, appellant No.5 Mohd. Saddique and appellant No.7, Babu Khan have expired during the pendency of the appeal. Remaining appellants, i.e., appellant No.1, Om Prakash, appellant No.3 Abdul Rasheed, appellant No.4 Nek Sheikh and appellant No.6 Akhtar Ali are directed to comply with the said orders.

38. Appellants are on bail. Their bail bonds are cancelled and the sureties furnished by them are discharged. The case of the appellant is set at rest.

39. Copy of this judgment to be sent to the Jail Superintendent for information and further compliance 40. The appeal stands disposed of in the aforesaid terms.
KAILASH GAMBHIR, J.

SUNITA GUPTA, J.

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