Triloki Chand Vs. State

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Court : Delhi

Decided On : Nov-03-2014

Judge : S.Ravindra Bhat

Appellant : Triloki Chand

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

13. 10.2014 Pronounced on:

03. 11.2014 + CRL.A.1271/2013 AJAY KUMAR ..... Appellant Versus STATE + ... Respondent CRL.A.1272/2013, CRL.M.B.2019/2013 TRILOKI CHAND ..... Appellant Versus STATE ..... Respondent Through: Sh. R.M. Tufail with Sh. Farooq Chaudhary and Sh. Vishal Raj Sahijpal, Advocates, for the appellants in both the appeals. Sh. Varun Goswami, APP on behalf of the State with Inspector Rajbir Singh, PS S.P. Badli, in both appeals. CORAM: HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MR. JUSTICE VIPIN SANGHI MR. JUSTICE S. RAVINDRA BHAT % 1. These appeals are directed against a common judgment and order on the point of sentence of the learned ASJ Rohini in S.C. No.399/2007. The appellants (hereafter referred to by their names, i.e. Ajay and Triloki) were convicted for committing offences punishable under Sections 302/307 IPC read with Section 34 Indian Penal Code, ("IPC") and sentenced to undergo life

imprisonment for CRL.A.1271/13 & CRL.A.1272/13 Page 1 the offences punishable under Section 302 IPC and five years rigorous imprisonment under Section 307 IPC. The Trial Court directed both the sentences to run concurrently.

2. Briefly the facts are that on 10.09.2007, information was received by P.S. S.P. Badli (D.D. No.33-A produced as Ex.25/A) that someone had been grievously injured with an iron rod (saria) and that the attackers had run away after the assault. The information was sent to PW-25, SI Puran Panth through PW-5, after which that witness, (PW-25) left with PWs-5 and 16 to the place of occurrence at Sanjay Gandhi Transport Nagar. They were then told that the injured, one Gulshan had been taken to BJRM Hospital by the PCR van. PW-24, Const. Gunwant, who was patrolling the area, had reached earlier. PW-25 left the other two police personnel, PWs-5 and 16, and went to the hospital where he was told that the injured, one Sonu had been brought dead. The other injured, one Gulshan, (PW-9) was in the hospital. PW-25 collected the MLC, PW-19/A and made arrangements to shift the body of the deceased Sonu to the mortuary. FIR No.702/2007 was subsequently lodged at 02.50 AM. This was based upon the statement of the injured Gulshan, PW-9/A.

3. PW-9 stated to the police that he and the deceased Sonu worked for one Khanna Transport Company, Meenakshi Chowk, Muzaffarnagar, U.P. Sonu was the driver of the truck (registered as UP-12 T0087 and PW-9 was conductor (helper). PW-9 further stated that on 08.09.2007, he and Sonu reached Delhi in the said loaded truck, parked it in front of one Balaji Transport Company, A-11, Mandir Mohalla, Sanjay Gandhi Transport Nagar. The truck was CRL.A.1271/13 & CRL.A.1272/13 Page 2 unloaded and on 10.09.2007, it was loaded with gatta kabad (cardboard) from Bhalswa to be transported to Muzaffarnagar. After the truck was loaded it was parked in a vacant spot near the Bhagwan Pura Jhuggis, A-11, Shanta Nursing Home, Sanjay Gandhi Transport Nagar. PW-9 went on to state that he and Sonu were having food in a dhaba. The accused - who were known to Gulshan and who were employed by one Pappu Lala, as driver and helper went there and started arguing with Sonu and threatened him. This led to Sonu and Gulshan leaving the dhaba and going back to the truck. Gulshan further stated that they tried to start the truck with one Pardeeps Canter and when he was

about to get down from the truck at 11.30 PM, the accused again accosted and threatened him. Thereafter they attacked him and caused injuries to his head. Upon his crying out, Sonu got down from the truck to aid him; the accused caught hold of him, stating, tera to kaam hi tamam kar dete hai and showered blows on the head of Sonu with iron rods. The accused hit and kicked Sonu and on hearing the commotion and noise, people gathered at the spot after which the accused fled from the spot in their truck No.HR38BD7368 PW-9 also stated that the police reached the spot immediately thereafter and took him and Sonu to the hospital. Sonu was declared brought dead.

4. After the recording of the statements and lodging of the FIR, investigations were taken over by PW-18, who reached the spot. PW25 handed over the deceaseds belongings which were taken into possession by Seizure Memo, Ex.PW-5/A. PW-18 also prepared a site plan, Ex.PW-18/A at the behest of PW-9. The prosecution also alleged that the post mortem report was received by the police (Ex.PW-11/B) CRL.A.1271/13 & CRL.A.1272/13 Page 3 and that the next day, on receiving information regarding the whereabouts of HR38 BD7368from its owner, the police reached Naseerpur, Dwarka road. The accused were arrested from the truck at the behest of PW-9, who identified them. Their personal search was conducted thereafter. It was further alleged that at the behest of the accused, Triloki, an iron rod was seized and taken into possession by Seizure Memo No.Ex.PW-5/L. Likewise, another iron road which was kept underneath the drivers seat was taken into possession by seizure memo, Ex.PW-5/M. Other articles seized were the accuseds blood stained clothes, Ex.PW-5/N. The disclosure statements of the accused, PW-5/P of Triloki, and Ex.PW-5/Q of Ajay were noted.

5. On the basis of these materials, the accused were charged with offences punishable under Sections 302/307/34 IPC. They denied the charges and claimed trial. The prosecution examined 25 witnesses and relied upon several documents and materials. After considering these, the Trial Court found that the charges had been proved beyond reasonable doubt and delivered the impugned judgment and also the order on sentence.

6. Sh. R.M. Tufail, learned counsel for the appellants contends that the Trial Court fell into error in relying entirely upon the testimony of PW-9. It was submitted that this witness had contradicted himself hopelessly. Whereas on 04.10.2007, PW-9, in his deposition sought to implicate the accused persons, he had given an entirely different version on 24.04.2011, during his cross-examination. It was urged that the prosecution story could not have been accepted because there was no proof of any motive on the part of the accused persons. Stressing CRL.A.1271/13 & CRL.A.1272/13 Page 4 that in a clear case of direct evidence, motive might be irrelevant, learned counsel emphasized that in the present case, the so-called solitary eyewitness was unreliable. The other eyewitness, i.e. PW-8 was clearly introduced as an afterthought and in any event, his version could not be trusted because he did not witness the event. It was submitted that in these circumstances, the motive which allegedly impelled the accused persons to murderously assault the deceased was of vital importance. In failing to produce any material to establish such motive, on the one hand, and relying almost exclusively on the dubious testimony of PW-9, on the other, the Trial Court fell into error.

7. Learned counsel argued that even if for a moment, the testimony of PWs-8 and 9 were to be taken into account, the fact remained that their versions showed that a commotion took place. PW-9 further stated that several persons were present. In the circumstances, the failure of the police to produce other witnesses in support of the prosecutions case gravely undermined the allegations against the accused.

8. Elaborating why PW-9 could not have been believed, it was urged that besides contradicting himself inherently, even the examination-in-chief of PW-9 rendered his deposition as a whole improbable. Learned counsel highlighted the fact that according to the MLC of PW-9, written as late as at 01.50 AM in the night intervening 10.09.2007/11.09.2007, serious head injuries were recorded and the injured witness was referred to surgery, yet PW-9 claimed that he was fit enough to get back to the crime scene and record his statement. CRL.A.1271/13 & CRL.A.1272/13 Page 5 Learned counsel highlighted that PW-9 admitted that his statement was not recorded by the police at the hospital, and that after his discharge he was taken to the police station in the morning, where he was

detained and allowed to leave only the next evening. This important feature dented the prosecution which the Trial Court failed to notice.

9. It was next contended that the prosecutions attempt to somehow implicate the accused persons for the offence, also stood exposed by the fact that the materials, i.e. the Forensic Report of the articles recovered could not be connected to the accused persons. It was submitted that the prosecutions case was that the deceased Sonus blood group was A and that blood of the same group was splattered around upon the clothes of the accused persons. However, there was no material to suggest that the blood group of the deceased was indeed A. Likewise, there was no material or evidence to establish that the blood group of the accused persons was not A. Having regard to this state of evidence, it could not be said that the forensic analysis established any incriminating circumstance against the two accused. Arguing that undue reliance was placed upon the testimonies of PWs-1 and 8, learned counsel submitted that PW-1 was unreliable since he had no records to back the allegations of having employed the accused. Likewise, PW-8s identity itself was suspect because his alleged employer did not keep any formal record; what is more, he is alleged to have employed PW-8 just a few days before the incident. CRL.A.1271/13 & CRL.A.1272/13 Page 6 10. It was lastly argued that this Court should look at the overall circumstances of the case and regardless of the plea taken by the accused persons, should arrive at the proper inferences and conclusions. In this context, learned counsel emphasized that repeatedly in more than one place, the witnesses mentioned that a quarrel had broken out between the accused and the deceased as well as PW-9. It was submitted that both contemporaneous documents at the earliest point of time, i.e. the D.D. entry and MLC mentioned a quarrel. If indeed there was a quarrel, the context of a drunken brawl could not be ruled out, especially since there was evidence disclosing that the deceased and the PW-9 were under the influence of liquor. Such being the case, there was every reasonable probability of a sudden quarrel having been broken out which ultimately resulted in infliction of injuries upon the deceased and PW-9. In these circumstances, the Trial Court should not have convicted the accused persons for committing murder but could have, at the most, convicted them for committing the offences of culpable homicide not amounting to murder under Section 304 IPC and awarded appropriate sentence.

He urged that this Court should appropriately modify the conviction and sentence.

11. Counsel for the state urged that the well-reasoned order of the Trial Court should not be interfered with. It was contended that the accused have not disputed that the record clearly established their involvement in the form of the first DD entry; mention of the attack in the MLC; mention of their names in the FIR as well as their identity. If these essential facts were to be considered along with the depositions of PW-8 and PW-9 there is no room for any doubt that CRL.A.1271/13 & CRL.A.1272/13 Page 7 they, and no one else, were involved in the murderous attack upon the deceased and the other injured witness, i.e. PW-9. Emphasizing that the deposition of PW-9 in the examination-in-chief perfectly coincided with the statement recorded under Section 161, Cr PC, it was argued that the Trial Court's finding giving credence to that part of his evidence and rejecting his deposition in the cross-examination, was justified under the circumstances. Learned counsel argued that when the examination-in-chief was recorded by the Trial Court, there was no controversy and no occasion for the prosecution to declare PW-9 as hostile, on the other hand when cross-examination was conducted 6 months later, there was ample opportunity for witness tampering which appeared to have happened. In the light of this material circumstance, submitted the learned counsel for the State, the court had to consider the other circumstances. The testimony of PW-8 was material and indeed crucial because he confirmed his original statement recorded during the investigation about what he heard from Sonu just before he died. The deceased had clearly stated that he was attacked by the accused, and that they had not done any good ("Accha nahin kiya"). Being contemporaneous with the incident i.e. the attack upon Sonu and PW-9, that evidence was crucial, since it was intrinsically connected with the incident itself, and was consequently relevant by virtue of Section 6 of the Evidence Act. In this context it was argued that even if PW-8 was not a witness to the incident itself, he witnessed something which was so connected with the immediate aftermath of the attack as to its being a part of the same transaction that it was most relevant. Learned Counsel in this regard, relied upon Illustration (a) to Section 6 which states that "(a) A is accused of the CRL.A.1271/13 & CRL.A.1272/13 Page 8 murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the

transaction, is a relevant fact."

12. Learned counsel for the State disputed the assertion that the forensic evidence presented before the trial court did not establish the accused's involvement in the offense. It is argued that the blood sample and the swab recovered from the crime scene were sent to the forensic laboratory. These exhibits after examination revealed that the blood group of the deceased was A" type; the clothes worn by the accused also contained A blood group stains in terms of the report. The MLCs of the accused did not reveal any injury on their bodies. In these circumstances, they owed an explanation as to how the deceased's blood stains were discernible on their clothes. Their failure to give any explanation clearly implicated them in the crime.

13. It was submitted that far too much was made out of the so- called discrepancies in the testimony of PW-9. Learned counsel for the State here argued that the 6 month gap which elapsed between the time when examination-in-chief was conducted on the one hand and when the cross-examination was conducted on the other, appears to have been taken advantage of by the accused. However the line of cross-examination that was carried out on behalf of the accused, did not include any suggestions of the witness having deposed falsely earlier. A clever method of resiling from the previous testimony was sought to be adopted i.e. to wrongly identify both accused. Highlighting that this was done at the very outset on the date of the cross-examination, learned counsel submitted that this unambiguously CRL.A.1271/13 & CRL.A.1272/13 Page 9 pointed at the intention of the accused to paint a false picture of what transpired on the fateful day. Stressing that PW-9 did not deny his injuries and sought to give a conflicting version even in his crossexamination, counsel for the State submitted that the surrounding circumstances clearly supported the inference drawn by the Trial Court that the version given in the examination-in-chief was truthful as well as credible. Learned counsel submitted that the Trial Court had relied upon several binding decisions justifying the course adopted by it in discarding the cross-examination version of facts deposed to by PW-9 and accepting the facts deposed by him on 4.10.2007.

14. It was submitted that the attack on the testimonies of PW-1 or other prosecution witnesses, by the accused, in an attempt to discredit the prosecution version is of no consequence, because the principal reasoning of the Trial Court, upon which the conviction was recorded, was the testimony of PW-9, and the corroboration it received from the surrounding circumstances, including the testimony of PW-8 who had not turned hostile. Counsel for the state lastly submitted that there was no suggestion at any point during the trial that the death was consequent to a sudden quarrel; neither was any witness cross examined by the accused along those lines, nor was any submission made during the trial. Furthermore, the accused persons' plea was of complete denial, in their Section 313 statement. The nature of injuries - i.e. on the parietal region of the deceased, which were the cause of death within an hour of receiving them, clearly ruled out any crime other than murder. Likewise, the weapons used, i.e iron rods, compelled the same conclusion. CRL.A.1271/13 & CRL.A.1272/13 Page 10 Analysis & Findings.

15. The above discussion would reveal that there is no controversy regarding the manner in which the events unfolded. The FIR in this case records that the incident occurred on 10.09.2007, at 11.30 PM; the first DD entry is timed at 11.52 PM. The MLC of the deceased (Ex. PW-19-A) was recorded at 12.15 AM on 11.09.2007; PW-9's MLC was recorded at 1.50 AM on 11.09.2007. After his statement was recorded, the FIR (Ex. PW-3/A) was registered at 2.50 AM on 11.09.2007. Significantly, the magistrate saw the FIR at 3.05 AM- just 15 minutes later. These sequence of events rule out police complicity and manipulation; they also rule out false implication by the police. The question then is whether the allegations leveled against the accused, and the materials produced by the prosecution during the trial- including depositions of witnesses prove their guilt beyond reasonable doubt.

16. The testimony of PW-9 in this case becomes crucial. The record indicates that he was injured during the incident. His testimony - in examination-in-chief is clear about the events as to how the accused quarreled with him leading to him and the deceased leaving the dhaba and getting into the truck; how thereafter the accused went to the truck and when the witness went out, attacked him and later, the

deceased. Cross examination took place later; then, the witness virtually resiled from his earlier statement, but in a rather curious manner. His identification of the accused was inaccurate; Ajay was identified as Triloki and vice versa. He also stated that a quarrel took place and when he went to look, he received head injuries. CRL.A.1271/13 & CRL.A.1272/13 Page 11 Significantly, he did not support this version too in his re-examination, where he admitted his signatures on the statement recorded under Section 161 Cr. PC and also that: "While I was giving signal to driver Sonu for parking the truck aside. In the meanwhile, both accused persons came there and they started giving beatings to me. Both the accused persons were having iron rods in their hands at that time and they started giving iron rod's blows on my person. I raised alarm and on hearing my cries, Sonu (since deceased) came down from the truck and he tried to save me from the clutches of the accused persons. Both the accused persons also started giving beatings to Sonu with iron rods. I sustained injuries on my head and blood started oozing out of my head while Sonu also sustained injuries on his head and it started bleeding from his head. Thereafter, both the accused ran away from there in their truck. Public persons had gathered there. Someone called the police and police reached there and took me and Sonu to Babu Jagjivan Ram Memorial hospital in separate vehicles. Police met me in the hospital and recorded my statement which is Ex. PW-9/A which bears my signatures at Point A. Thereafter, I accompanied the police officials to the spot and shown the spot to the police and site plan was prepared at my instance" 17. In Vadivelu Thevar & Ors vs. The State of Madras AIR 1957 SC614 the Supreme Court classified appreciation of evidence of witnesses into three categories, namely: (1) wholly reliable; (2) wholly unreliable; and (3) Neither wholly reliable nor wholly unreliable and thereafter stated that 'it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable'. This view was based on the decision of the Privy Council, in Mohamed Sugal Esa vs. The King, AIR 1946 PC3 CRL.A.1271/13 & CRL.A.1272/13 Page 12 "In England where provision has been made for the reception of unsworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is

admissible evidence a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

18. It is a hackneyed aphorism that in a criminal trial, what is important is the quality of the evidence, and not the number of witnesses who depose to a particular fact or event. In the present case, the testimony of PW-9 - in his examination-in-chief is clear; however what complicates the appreciation by the Court is the fact that he turned hostile in cross examination and further that in re-examination he returned to the original version. What should be the approach of the court under these circumstances?. Khujji @ Surendra Tewari v State of MP AIR 1991 SC1853teaches that the entire testimony of a hostile witness need not be rejected, if the court can sift out the unreliable parts: "the evidence of a witness, declared hostile, is not wholly effaced from the record and that part of evidence which is otherwise acceptable can be acted upon. It seems to be well settled by the decisions of this Court Bhagwan Singh v. State of Haryana, [1976]. 2 SCR921 Rabinder Kumar Dey v. State of Orissa, [1976]. 4 SCC233and Syed lqbal v. State of Karnataka, [1980]. 1 SCR95that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but CRL.A.1271/13 & CRL.A.1272/13 Page 13 the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

This view was asserted in Radha Mohan Singh @ Lal Saheb and Ors. vs. State of U.P (2006) 2 SCC450 State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC2766 Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC543 Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC516 Sarvesh Naraian Shukla v. Daroga Singh & Ors., AIR 2008 SC320 and Subbu Singh v. State, (2009) 6 SCC462 Thus, the law can be summarized to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defense.

19. Undoubtedly, PW-9 is a hostile witness. However, what is interesting is that unlike the usual practice, where the witness turns hostile in the examination-in-chief when confronted with the previous statement under Section 161, Cr. PC, here, the witness deposed in favour of the prosecution entirely in the examination-in-chief. He did a volte face in cross examination, which was conducted much later. It would be idle to speculate the reason for this change; perhaps it is not even relevant, considering that in re-examination he conformed to whatever he had deposed during the examination-in-chief. The Court is of the opinion that in essential particulars, i.e. the background wherein Sonu's truck came to Delhi, was parked in Sanjay Transport Nagar, his dining with PW-9 at dhaba, a verbal altercation with the accused, the return of both back to the truck, the attempt to start the truck, the re-appearance of the accused, attack on PW-9 and later on CRL.A.1271/13 & CRL.A.1272/13 Page 14 the deceased, and his falling down, the appearance of the police and PW-9 being taken to the hospital, there is consistency in the examination-in-chief and re-examination. His testimony, to the exclusion of what he stated in the cross examination can therefore be relied on.

20. The Court has to next examine whether the portion of PW-9's testimony is credible to base a conviction on. At this stage, the evidence of PW-8 becomes crucial. His testimony is that he reached the scene immediately after the attack, and heard the deceased name the accused as his attackers. This witness had given the keys of his vehicle to PW-9 (whom he knew for the past 2-4 years) to start his (PW-9's) truck. The crucial part of his deposition, i.e that he heard Sonu name the accused as his attackers, was not challenged in cross examination. He also deposed that PW-9 told him about the incident and named the accused as the attackers, who had inflicted injuries with iron rods. The prosecution relies on Section 6 of the Evidence Act, to say that PW-8's testimony is relevant and material. Section 6 reads as follows: "6. Relevancy of facts forming part of same transaction. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places. Illustrations (a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."

CRL.A.1271/13 & CRL.A.1272/13 Page 15 Interpreting this provision, the Calcutta High Court Becharam Mukherji v. Emperor, A.I.R. 1944 Cal 224, stated that its application is purely a question of fact "depending on proximity of time and place, continuity of action and unity of purpose and design."

In Hirday Singh v. Emperor, A.I.R. 1946 Pat 40, the Patna High Court stated that "It is not the distance nor the proximity of time which is so essential in order to consider what is 'the same transaction' as the continuity of' action and purpose". In Bhairon Singh v. State of Madhya Pradesh (2009) 13 SCC80the principle underlying Section 6 and the relevance of material or evidence intrinsically connected with, and proximate to the crime was described as follows: "The rule embodied in Section 6 is usually known as the rule of res gestae. What it means is that a fact which, though not in issue, is so connected with the fact in issue as to form part of the same transaction becomes relevant by itself. To form a particular statement as part of the same transaction utterances must be simultaneous with the incident or substantially contemporaneous that is made either during or immediately before or after its occurrence.."

Gentela Vijayavardhan Rao and Anr v State of Andhra Pradesh (1996) 6 SCC241had previously stated the principle as follows: "The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or atleast immediately thereafter. But if there was an interval, however slight it may be, which was sufficient CRL.A.1271/13 & CRL.A.1272/13 Page 16 enough for fabrication then the statement is not part of res gestae."

21. PW-8's testimony acquires significance because he knew PW-9 -who besides being the sole eyewitness was also injured during the attack on the deceased (and PW-9 himself). His deposition, about previous acquaintance with PW-9 and the circumstances by which he became aware of the facts from the deceased remained unchallenged in the cross examination. There is no discrepancy

between his testimony and that of PW-9 (to the extent the cross examination is excluded) about the facts surrounding the immediate aftermath of the attack. His deposition, in the opinion of this court, is crucial and corroborative of the prosecution version about the culpability of the accused in the crime.

22. During the arguments, counsel for the appellant/accused sought to highlight that none of the truck owners, i.e. PW-1, PW-6 and PW10 were able to establish through documentary evidence the movement of their vehicles and that the prosecution version was therefore suspect. The Trial Court reasoned - and we think correctlythat the evidence led, established that these witnesses were single truck owners and small transporters, who might not maintain meticulous records about booking of their vehicles for movement of goods of various customers. Likewise, this Court notices that although PW-10 was declared hostile, he did not say anything significant to undermine the prosecution story. He admitted that the deceased was his driver and that PW-9 was a cleaner in the truck, though not employed by him. CRL.A.1271/13 & CRL.A.1272/13 Page 17 23. The prosecution had also sought to rely upon the blood stains in the clothes which the accused were wearing when they were arrested; those were seized and produced in evidence. The prosecution sought to link this recovery with the blood stained gauze seized from the spot, which was from the injuries suffered by the deceased. This blood stained gauze, i.e. Ex-9, according to PW-22 the serologist (in his report Ex. PW-22/B and his deposition) upon testing, showed the presence of blood of blood group A. Likewise, the two seized T-shirts of the accused (Parcel 6 and Parcel 7, later Ex. 6 and Ex.

7) were shown with blood (grouped A) splattered on them. These had been seized as Ex. PW-5/N and PW-5/O; they were proved by PW-9. PW-9 had also deposed, importantly that after the police took him to the crime scene and recorded his statement, he accompanied them back to Sanjay Gandhi Transport Nagar, and was able to help them trace the accused whom he identified. These materials, in the opinion of the Court, give strong corroborative support to the prosecutions version of events. By itself, the presence of blood group A cannot be determinative of the guilt of the accused. However, the recovery of the gauze stained with the deceased's blood, from the crime scene and its link with the same blood group on

the blood splattered shirt/T-shirts of the accused, adds weight to the credibility which the Court can attach to PW-9's deposition, as corroborated by PW-8.

24. Having regard to the totality of circumstances, which have been analyzed as above, this Court is of opinion that the conclusion of the Trial Court that the accused were responsible for the murderous attack on the deceased was justified. Before concluding, however, it would be necessary to deal with one submission made on behalf of the CRL.A.1271/13 & CRL.A.1272/13 Page 18 accused; i.e. that the Court should have regard to the fact that there is evidence suggestive of altercation which could have been the reason for the attack and that in these circumstances, an alteration of conviction from Section 302 to Section 304 IPC is called for. This argument in the Court's opinion is to be rejected for two reasons. One, the nature of the injuries, which resulted in Sonu's death, altogether rules out this possibility. Whilst an altercation or minor quarrel might have impelled the deceased to move away from the dhaba, the accused were best placed to state what was the reason for the quarrel, and the justification for the attack. Exception 4 to Section 300 (which clarifies when homicide is not murder) 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. The 'fight' occurring in Exception 4 to Section 300, IPC is undefined in the IPC. Heat of passion implies that there should be no time for the passions to cool down. In this case, there is no evidence as to what was the sudden reason for the quarrel which reached a flashpoint to lead the accused to attack the deceased and PW-9. 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."

(Ghapoo Yadav v CRL.A.1271/13 & CRL.A.1272/13 Page 19 State of M.P. 2003 (3) SCC528. It would be useful, in this context to recollect what was stated by the

Supreme Court in Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh (2006) 11 SCC444 The Court spelt out some relevant circumstances to determine if there was any intention by the accused to cause death. It was held that: "...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 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 pre-meditation. 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 CRL.A.1271/13 & CRL.A.1272/13 Page 20 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..."

(emphasis supplied) 25. In the present case, there is no evidence at all about any quarrel; the slender thread to the argument about a quarrel motivating the accused to attack the deceased and PW-9, is the evidence of the latter, which is that a quarrel took place at the dhaba, where the accused reached. However, the testimony of PW-9 is that after that incident- or because of it- he and the deceased left and went back to the truck. The accused pursued them, as evident from the fact that they reached later. The attack took place then. Whilst there is no hard and fast rule as to what is the proximity (of time) within which a "sudden" quarrel can be said to erupt, within the meaning of the term under Exception 4 (to Section 300), there should be some background about the quarrel itself. The threats held out by one or some persons to another, or other group of persons, or the attack by one, cannot be a "sudden" attack, in the absence of any evidence as to what impelled that behavior. The medical evidence reveals that death resulted due to ante-mortem three cerebral injuries caused by a blunt object (Post-mortem report, Ex. PW-12/A). In the cross examination, the suggestion of the accused was that injuries could have been the result of impact of stone; this was denied by PW-12 the doctor. The nature and placement of the CRL.A.1271/13 & CRL.A.1272/13 Page 21 injuries shows that the facts surrounding the attack stand corroborated; there is no material or evidence to suggest that there was a "sudden" quarrel of the kind contemplated by Exception 4, Section 300 IPC.

26. The second reason why the appellants' argument is unmerited is because when all incriminating circumstances were put to them by the learned Additional Sessions Judge, under Section 313, Cr PC, there was complete denial. If indeed it was their case that the injury was on account of a quarrel or altercation and they lost control, they ought to have used the opportunity given them during the trial to explain the conduct. The importance of this opportunity is that this is the only occasion to the accused, to explain or clarify the facts relating to the incriminating circumstances gathered during the trial. The Court which conducts the trial is obliged to draw up all the incriminating circumstances arising from the trial and ask the accused his comments and explanation. In the present case, the complete denial (of involvement in the attack upon the deceased and PW-9) rules out the possibility of a fight between the deceased and the accused. There is no objective material to support the theory of an attack. Furthermore, if indeed there was a

quarrel, the details of which were known to the accused, evidence on those facts ought to have been led by them, given the onus placed in that regard by virtue of Section 106 of the Evidence Act. The absence of any evidence compels the Court therefore, to reject the theory that a sudden quarrel erupted that culminated in an attack on the deceased and PW-9. CRL.A.1271/13 & CRL.A.1272/13 Page 22 27. For the foregoing reasons, this Court holds that the findings and conviction recorded by the Trial Court do not call for interference. The appeals are therefore, dismissed. S. RAVINDRA BHAT (JUDGE) VIPIN SANGHI (JUDGE) NOVEMBER3 2014 CRL.A.1271/13 & CRL.A.1272/13 Page 23