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Court : Guwahati

Decided On : Sep-04-1981

Judge : N.I. Singh and B.L. Hansaria, JJ.

Appellant : The State

Respondent : Abinash Dutta

Prior history : B.L. Hansaria, J. 1. The two accused-appellants are brothers - Abinash being elder to Kalidas. Both have been found guilty Under Section 302/34, IPC But Abinash has been sentenced to death mainly because of his past conduct which had led to his conviction earlier Under Sections 302 and 307, I. P. C for the offence of committing murder of his daughter and mother-in-law, in which transaction attempt was also made to murder his wife. This was in Sessions Trial No. 19 of 1970. Kalidas has, h

Judgement :

B.L. Hansaria, J.

1. The two accused-appellants are brothers - Abinash being elder to Kalidas. Both have been found guilty Under Section 302/34, IPC But Abinash has been sentenced to death mainly because of his past conduct which had led to his conviction earlier Under Sections 302 and 307, I. P. C for the offence of committing murder of his daughter and mother-in-law, in which transaction attempt was also made to murder his wife. This was in Sessions Trial No. 19 of 1970.

Kalidas has, however, been awarded sentence of imprisonment for life.

2. The place of occurrence is the house of the two brothers which had no other inmates. It is situated at Rabin-dranagar, about a mile off from Sonamura Police Station. The date of occurrence is 23-4-79. Sankar deceased with the company of Chhabi Meah P.W. 3 visited this house at about 8-30 P.M. To believe Chabi, while they were passing in front of the house, Kalidas called Sankar in saying he had some business with him. Earlier this witness had met Sankar near Srimantapur Land Custom Check Post. It is virtually an admitted position that Sankar had his first bout of drinking in a nearby B. S. F. Camp The occasion which led the two to come towards the house of Sankar was that on Sankar knowing that Chhabi, who is a driver but had no job at his hand then, it was thought that Chhabi should have a talk with Sankar's elder brother to finalise if he would like to drive the latter's vehicle. According to this star witness of the prosecution as soon as Sankar entered inside the house of Kalidas the latter demanded money from the former when Sankar replied that he would pay money on the next day. This led Chhabi to enter inside the hut to bring back Sankar. One Trishul was then seen in the hand of Kalidas As Sankar had refused to pay money, it is the case of the prosecution, that Abinash came with a dao in hand from a nearby room saying why no money was being paid. The brave man Chhabi snatched away the dao. This led Abinash to arm him with a dagger this time. Kalidae with the 'trishul' in hand pushed Sankar inside a room and Chhabi saw Abinash stabbing Sankar with dagger in the chest. Alarm was raised at this by Chhabi saying 'Sankar has been killed, has been killed'. Hearing his cries villagers did come and they saw Chhabi running away saying Sankar has been cut by Abinash and Kalidas. Thereafter Chhabi could not be found before 1-5-79 when he was examined by the I. O. and his statement Under Section 164, Cr. P. C. was also got recorded.

3. The remaining part of the story is given by the persons who had come on the scene. These include PW 1 Sukhen, P. W, 2 Swapan, P.W. 4 Maran, P.W. 5 prabir, P.W. 9 Dinesh and P.W. 13 Jagadish the last two being brothers of Sankar. According to them when they reached the house of Abinash they found Abimash almost on the gate and on being asked it was stated that his brother Kalidas had quarrelled with Sankar and after causing some injuries he had run away. Going

inside the hut they found Sankar lying somewhat covered with Chhan grass and on being asked Sankar said that Abinash and Kalidas has injured him. Sankar was then in a precarious condition and he was immediately taken to Sonamura Police Station in a rickshaw. It was Sukhen P.W. 1, who lodged the ejahar at the thana at about ill P. M., the occurrence having taken place at about 10-30 P. M. The police advised removal of Sankar to the nearby hospital and this was done. First aid was given to Sankar at Malagrarh and thereafter he was shifted to G. B. Hospital at Agartala. He was admitted to that Hospital at 2-15 A. M. of 24th and he succumbed to his injuries on the next date at 10-10 P.M. In the meantime a dying declaration had been recorded by the P.W. 24 at 5 P. M, of 2B-4-1D79.

4. The defence version as has been given out by accused Kalidas in his 313 statement is that on the day in question Chhabi and Sankar had gone to his house. After some time P.Ws. 1, 2, 4 and 6 also came. They brought meat and wine from some house with the help of Chabi. All of them took drink. Some quarrel then took place regarding payment of money. Sankar took out a dagger from his waist which caused alarm in the mind of Kalidas and he ran towards Sonamura Police station. Some time thereafter he found PWs 1, 4 and others in the Thana and he was lodged inside the lock-up. After half an hour Kalidas found that the condition of his elder brother was serious and he was taken to the hospital.

5. In support of the prosecution case as many as 26 witnesses were examined. The defence declined to adduce evidence stating that there is nobody in their house. On completion of the trial, the learned Sessions Judge was satisfied about the guilt of the accused Under Section 302 with the aid of Section 34 and on finding the two accused guilty of having committed murder of Sankar in furtherance of their common intention, awarded sentences as aforesaid.

xx xx xx xx

(After considering the medical and other evidence on record in paras 6 to 9 the Hon'ble Judge proceeds-Ed.)

10. We may first see whether Section 34 of the IPC has any application. According to P.W. 3 who has claimed to be the only eye witness to the occurrence it was

Kalidas who had called Sankar inside his house. This part of the evidence is not acceptable by us as already stated. The next overt act attributed to Kalidas is his dashing Sankar inside a room with the help of trishul indicating that Kalidas might have also assaulted Sankar with Trishul. Out of the 18 injuries found on the person of Sankar, according to autopsy surgeon P.W. 23, injury No. 1 might have been caused by a trishul and others by a dagger. In cross-examination P.W. 23 stated that injury No. 1 also might have been caused by a dagger. In the case at hand, no 'trishul' as such was seized, because what was described as 'trishul' is material object 2 which we have seen. It is a pointed iron rod only. It might have been characterised as 'trishul' because its other end is rounded and there are some iron rings in it. (See item 11 of Ext. P-3 by which large number of articles were seized). Now, none of the 18 injuries found on the person of Sankar can be said to have been inflicted by a pointed iron rod which would have caused a penetrating or lacerated wound only, whereas all the 18 wounds on Sankar were clean cut, and all but injuries Nos. 1 and 2, were muscle deep. Injury No. 1 being 6' in length and clean cut could not have been caused by an iron rod with pointed end. Though injury No. 2 was deep up to abdominal cavity, it was 1/4' x1/4 ' in size, and as such rules out infliction by a round shaped rod, which would have caused a circular wound. In this context it may be mentioned that in the F. I. R. mention was made of 'dao' also as one of the weapons of offence which could have caused clean cut injuries. In facts a dao was seized by the I.O. (P.W 25) whose wooden handle was stained with blood (See Ext, P-2) whereas M.O. 2 had no stains of blood on it. This apart we do not really see a prior meeting of minds between Abinash and Kalidas to cause death of Sankar. Even according to the prosecution it was a chance meeting of Sankar with Kalidas which had led the latter to solicit the former to come inside his house. An important feature of the case regarding with us in softening our attitude towards Kalidas is the fact of his going to the thana just about the time of the occurrence. According to the accused he had done so to inform the O.C. about the quarrel that had taken place in his house. The prosecution would, however, like us to believe that Kalidas had gone there to surrender. There is great discrepancy in the evidence of P. Ws. on this point, According to P W 25, the I. O. it was the O, C. who had arrested Kalidas on 24-4-1979. The O.C. (P.W. 18), however, stated that as far as he could remember he

saw Kalidas at the thana after he had written the ejahar and on the basis of the ejahar Kalidas was arrested, but whether this was done by the I. O. or by any of the staff of the thana he was not sure. As against this P.W. 1, the informant, stated that when he had gone to the thana he had seen Kalidas in the police lock-up. P.W. 13 also deposed that on reaching the police station he noticed Kalidas lying on a bench. These statements would suggest that Kalidas had reached earlier at the thana. If he would have gone there to surrender and in fact had done so, we would have expected some entry in the station diary but none is on record. Even the police officer could not say for definite who had arrested him. We have perused the case diary and we do not find any entry on 23rd April to show arrest of Kalidas. We have to give some benefit to this accused on this score.

11. Before, however, finally deciding this point it would be in fitness of things to see as to how Kalidas had been implicated by Sankar in his dying declarations and as to how far we can rely on the same to find him guilty. According to the prosecution Sankar had two occasions to state about the occurrence. The first was when some P. Ws. met him at the place of occurrence itself whereafter he had become unconscious. This was on the night of 23rd April. The last occasion was at the G. B. hospital and this was in the evening hours of 25th. What was stated then to P.W. 24 has already been noted. Evidence about the statement made on 23rd has come out from the mouths P. Ws. 1, 2, 4, 5, 9 and 13,

12. P, Ws, 1 and 2 were taking meals together at about 9-30 P.M. at the house of the latter who is maternal uncle of the former. Hearing shouts that 'Sankar has been killed and has been cut away' they ran towards the direction from which the shouts were coming. This was the cry raised by Chhabi. Going near the house of the accused, P.W. 1 saw (P.W. 2 is silent about it) Kalidas going away towards north in which direction lies the Sonamura P. S, Though Abinash also tried to escape, he was taken inside to see what had happened. The moment they entered, Sankar cried out hearing their voices 'Sukhen, have you come?' He also enquired whether 'Swapan da has come' and saying this he further added 'Save me, I have been killed'. On being, asked as to how he had sustained the injuries, he is said to have answered PW 1 that while he was going towards his house, accused Kalidas called him inside his house whereafter both Kalidas and Abinash

started to inflict trishul and dagger injuries. PW 2 Swapan has, however, only deposed on this score that to their query Sankar had told that accused Abinash and Kalidas-caused injuries first by trishul. On being asked as to who else was with him, it was answered that Chhabi was there who saved him. PW 1 had stated that this had been done by Chhabi by raising alarm. According to PW 4, Sankar had stated that he had been stabbed by accused Abinash and Kalidas, what instrument had been used could not be remembered by this witness though Sankar had told this. As per PW 5, Abinash and Kalidas had caused injuries on Sankar, as told by him, with dagger and iron stick, PW 9, who is elder brother of Sankar, deposed that when Sankar had been asked by Sukhen and Swapan as to what had happened, it was stated by his dying brother that Kalidas and Abinash caused him dagger and iron made trishul injuries which was seen by Chhabi. The last witness on this aspect is another brother of Sankar. A part of his statement relating to Chhabi has already been noted. As to the assault on him, Sankar's reply in weak tone was that Kalidas and Abinash assaulted him. This witness further stated that he could not exactly remember whether Sankar had said that he was assaulted by iron like trishul and dagger. In the dying declaration recorded by PW 24 what finds place is that Abinash and Kalidas had dealt blows with help of dagger and iron rod.

13. The law relating to dying declaration is well settled by now. If it it found to be true, to ascertain which close scrutiny is required, it can be acted upon without any corroboration. That has been the consistent opinion of the Supreme Court since the decision of Khushal Rao, v. State of Bombay : 1958 CriLJ106 , which was affirmed by a Bench of five Judges in Tarachand v. State of Maharashtra : [1962]2SCR775 . Thus the contrary view expressed in Ram Nath v. State of Madh Pra : AIR 1953 SC420 stands overruled, See Kusa v. State of Orissa : 1980 CriLJ408 .

14. Sri Dutta urged that it is doubtful whether Sankar could have made any statement when he was met by the PWs on 23rd night, as he was struggling for life with as many as 18 injuries on his person one of which had even caused protrusion of his intestines, as stated by PW 1. But in the face of evidence of so many witnesses, against none of whom any allegation of animus against the

accused was even suggested we do not doubt making of statement by Sankar which is amply corroborated by the mentioning of the fact in the ejahar lodged so close to the happening of the event. No doubt, injuries were many, but young Sankar (26) could stand the same, and had succumbed only after about 48 hours. It was then contended by Sri Dutta that the account of what was stated by Sankar as deposed by the PWs is not very consistent, which throws doubt as to what had exactly come out from the mouth of Sankar. In particular our attention is invited to the version given by PW 1 and to that portion where he has stated that Sankar had told them that Kalidas and Abinash had called him inside the house, about which none else has testified. We would regard it as an embellishment by PW 1. Apart from this discrepancy, the narration is consistent in its core. All the PWs whose evidence on this aspect has already been noted, have said with one voice that according to dying Sankar he had been assaulted by Kalidas and Abinash. One of the instruments specifically named was dagger with which Abinash had got himself armed as per Chhabi. The fact that Sankar did not say as to who had dealt the vital blow in the abdomen is immaterial. A dying declaration has not to contain details to merit its acceptance.

15. Reference may usefully be made in this context to Surajdeo v. State of Bihar, : 1979 CriLJ1122 . There also the victim had large number of injuries and the serious ones in abdomen. The argument that the deceased could not have been in a position to speak was ruled out by saying that none of the injuries having affected heart or brain (as in the instant, case), the deceased would not have become unconscious immediately. In the case at hand when PW 23 was asked about this, he had stated that whether such a victim would have become unconscious immediately or not depended on the constitution of the body. It may be stated that deceased Sankar was aged about 26 years at the relevant time indicating has being in rime youth. The statement made in the above case was also short and the same was regarded as ‘the guarantee of its truth’

16. The dying declaration recorded on 25th was criticised by Sri Dutta by first submitting that Dr. Ratha of the hospital who had permitted the Judicial Magistrate (PW 24) to record the same was not examined, which denied opportunity to the accused to know the exact physical and mental condition of Sankar at the relevant

time which would have enabled the Court to determine the voluntariness and real worth of the statement. But as we have an absolutely disinterested person in PW 24 to depose about it, non-examination of Dr. Ratha cannot be given much weight No doubt, the condition of Sankar was 'very serious' then, as deposed by PW 24, the question is whether he was mentally fit and alert to say what had befallen him. Though PW 24 was not asked anything in cross-examination about it, we do not take this by itself as acceptance of the full mental fitness of Sankar. What has weighed with us in this regard is the intrinsic evidence about it in the statement in question, which has ended with these words . 'I am unable to talk more.' This shows that Sankar was conscious with whom he was talking and what. When he felt that he could not speak more, he said so and stopped. The statement was recorded at about 5 P. M. and the death came after 10 P. M. As this statement is not the first to be made and is in conformity with the earlier one, suggestions of tutoring have to be rejected.

17. For these reasons, we have no hesitation to hold that Sankar did make the statements in question voluntarily and consciously. Let us now see whether we can accept the same in toto. We shall first examine it qua Kalidas.

18. Though in the declarations he has been clearly involved, but the assaults ascribed to him are by iron rod, or trishul, or iron made trishul. We have seen this instrument as exhibited by the prosecution and as already alluded, we are not satisfied if any of the injuries on Sankar can be said to have been caused by it. We would think Sankar was labouring under some misconception in this regard. Having seen Kalidas with 'trishul' in his hand he thought that he might as well have been assaulted by him. Learned Public Prosecutor submits that even if Kalidas had not caused any physical assault, his act of pushing Sankar inside the partitioned room would show his sharing of intention to kill Sankar. There are many answers to it. First this fact has been deposed to by Chhabi alone, whose words cannot be taken to be gospel truth, the type of witness as he is. Secondly, the pushing inside the room does not clearly establish the common intention of the two brothers of killing Sankar. When did it so develop? Lastly, faced as we are with the question of sending Kalidas to jail for life (as the offence is of murder whose minimum sentence is incarceration for life), our conscience must permit us

to do so only for his act of dashing Sankar inside a room where he was be laboured by Abinash. Let it be said candidly, we do not get much a clearance,

19. This is all against Kalidas. On the basis of these materials we are not fully satisfied about his guilt and by giving him the benefit of our doubt, we set aside his conviction and order for his acquittal.

20. This takes us to the case of Abinash. His presence in the house is an admitted position. According to Chhabi PW 3, Abinash had first coma after hearing the denial of Sankar to pay money, armed with a dao which was snatched away by PW 3 which led Abinash to get himself armed with a dagger. PW 3 further saw stabbing by Abinash in the chest of Sankar with' the dagger. Of the 18 injuries on the person of Sankar, one, namely injury No. 5 is on the chest though this is a small wound. After Chhabi had taken to his heels and neighbours like PWs 1, 2, 4, 5, 9 and 13 had arrived at the house of the accused, Abinash was found there. He presented himself as an innocent person and even went as far as to say that it was his brother Kalidas who had caused death of Sankar as stated by PW 1 though according to PWs 2, 4 and 5 Abinash had only said that Sankar and Kalidas had quarrelled. Thereafter on entering inside that house, Sankar was found lying in a precarious condition. The house had no other inmate except the two brothers. If Kalidas might not have been the person to assault Sankar, it really follows logically that he must have been brought to the condition in which he was found by Abinash, as Sankar was quite hale and hearty before he had entered the house.

21. The main submission of Sri Dutta who has assisted well the Court as amicus curiae as regards Abinash relates to the injuries found on his person. As aforesaid, we are inclined to concede that the injuries were received at the time of the occurrence itself, and not after-words. We have, therefore, to see what is the effect of non-explanation of the injuries by the prosecution. In this connection Sri Dutta has referred to Lakahmi Singh v. State of Bihar : 1976 CriLJ1736 wherein this factor was regarded as a very important circumstance from which the Court could draw the following inferences :-

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version:

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable:

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

22. It was afterwards stated by referring to State of Gujarat v. Bai Fatima, : 1975 CriLJ1079 , that there may be cases where the non-explanation of injuries may not affect the prosecution case and one such contingency was stated where the injuries be minor and superficial.

23. Some other and subsequent decisions may also be noted. A three-Judge Bench stated in Bhabha Nanda v. State of Assam : 1977 CriLJ1930 , that the prosecution is not liged to explain the injuries on the person of the accused in all cases and in all circumstances. This is not the law. It all depends upon the facts and circumstances of each case. A Division Bench presided over by and speaking through Fazal Ali, J., who had rendered judgment in Lakshmi Singh 1976 Cri LJ 1736 (supra), stated in Jagdish v. State of Rajasthan : 1979 CriLJ888 that before any such obligation can be placed on the prosecution two conditions must be satisfied : (1) the injuries on the person of the accused must be very serious and severe and not superficial; and (2) it must be shown that these injuries must have been caused at the time of the occurrence in question. We would take the second condition as satisfied in the present case. Let it be seen whether the injuries on the person of Abinash can be said to be 'very serious and severe' and not 'superficial'. Of the five injuries on the person of Abinash, one was an abrasion 2 cm. in diameter. This is a superficial injury. Injury No, 3 was characterised by PW 19 himself as very superficial. Fourth injury bleeding from the left ear cannot be regarded as serious without anything more, The fifth injury on the right fore-arm was lacerated, simple in nature and caused by a blunt weapon. Thus of the five injuries, the first one could be said to be a little serious in the sense that though it

was small in size (2 cm x 1 cm x 2 cm) it was on the fore-head. But it was definitely not of such a nature whose non-explanation should cause dent in the entire prosecution case. We shall of course examine at appropriate stage whether any benefit and if so, what, could be made available to Abinash because of the injuries sustained by him.

24. Let it be first seen whether he was the assailant of Sankar. That Sankar had met his end due to the injuries sustained by him on the night of 23rd April in the house of the accused is writ large on the face of the injuries which were as many as 18 in number affecting various parts of his body including abdomen. Reference to the evidence of PW 23 shows that death inter alia was due to perforation of the small intestine and injury to the liver. Sri Dutta made some grievance about the non-examination of the doctor attached to Melagharah Hospital who had first treated Sankar. It would have been better if he too would have been produced. But we cannot agree with Sri Dutta that only that doctor could have deposed about the nature of injuries sustained by the deceased and that as the injuries had been stitched before PW 23 had done the autopsy, the nature of the same got altered. Without high authority (really none was place before us) we do not think that dressing and stitching of wounds change their character. General experience does not lead to any such inference. We have therefore, to accept that the injuries as found by PW 23 had been caused to Sankar in the occurrence itself.

25. We have only to see as to who had in fact caused the injuries in question. That this was done at the house of the accused is too apparent a fact. That Abinash was present cannot be, and has not been, denied. We have dealt with the part which can be said to have been played by Kalidas, who was the only other inmate of the house. As Sankar had entered the house in a sound condition, the conclusion, on the above facts, is inescapable that it was Abinash who had reduced him almost to a lump. He has been named in the FIR which was lodged without losing any time - it was recorded at 11 p.m. whereas the occurrence was around 10.30 p.m. The injuries on the person of the deceased are such which could have been caused by a dagger. Chhab had seen Abinash arming himself with such an instrument. PWs 1, 5 and 9 have deposed that dying Sankar had said about assault on him with dagger. (PWs 4 and 13 could not remember this aspect

and PW 2 said about injuries first by trishul). In the dying declaration recorded by PW 24, there is clear mention about blows with dagger. Though we have not placed reliance on the dying version of Shanker to find Kalidas guilty, those reasons do not apply and assist Abinash, as we are satisfied that it was he who was armed with dagger and the injuries do speak of use of dagger not in causing one or two, but all. On the face of these materials on record, we cannot but hold that Abinash, and Abinash alone was the killer of Sankar,

26. The real question qua Abinash is whether exception 2 to Section 300, IPC comes to any meaningful aid of this accused. We have put the matter thus, because operation of Section 100 of the Cod'' has to be ruled out altogether inasmuch as reasonable apprehension of even grievous hurt at their hands of unarmed Sankar could not have been present in the mind of Abinash. Exception 2 broadly takes care of excess committed by persons while acting in good faith in the right of private defence. But the the protection is not available to an aggressor. It is a cardinal principle that nobody can take a life in self-defence, if he himself had invited the assault. To come near Exception 2 the accused must be free from fault in bringing about the encounter. This aspect is taken care of by the expression 'good faith' in Exception 2. On the facts of the present ease, we are not in a position to hold that Abinash was acting in self-defence; it is really the other way round, he was the aggressor. A plea of self-defence has to be established by an accused which, though not specifically urged in trial can be pleaded afterwards. But we do not find any material on record of this case to satisfy us even about the probability of the same.

27. There is another hurdle to claim protection under this exception, as to take advantage of it, the homicide caused must have been inter alia 'without any intention of doing more harm than is necessary for the purpose of such defence'. No doubt a person confronted with an attack on him cannot modulate his defence step by step, but nobody can take advantage of this right to kill with a vengeful motive where the injuries inflicted would show that they were with the intention of doing more harm; protection of Exception would not be available which takes care of unintended excess only. This is a necessary corollary of Section 99 of the Code which says that the right of private defence in no case extends to inflicting of more

harm than is necessary for the purpose of defence. Of course where the right of private defence is the only impulse any excess which in fact was not necessary, but was nonetheless committed would get the protection of tine Exception,

28. This follows from the language of the Exception. If any reinforcement is needed, we may refer to Lachmi Koeri v. State of Bihar : AIR1960 Pat62 wherein a Division Bench held that though the appellant initially had the right of private defence, but as he intended to cause much more harm than was necessary for his defence, the case did not come within Exception 2, and so his conviction Under Section 302 was upheld. This view was taken on these facts; A havildar was deputed to arrest the appellant but no order was given in writing. The Havildar was not in uniform. There was no evidence to show that the appellant knew the havildar from before the date of occurrence. The havildar managed to catch the appellant. There was a scuffle between the havildar and the appellant in the course of which the appellant's shirt was torn. The appellant then took out a chhura from his waist and gave a blow with it on the havildar's arm. The havildar fell down in a nala by the side of the road, while still holding the appellant who fell on him. The appellant then gave several blows to the havildar, got out of the nala and fled towards the south. He died very shortly afterwards,

28-A. If the minor nature of injuries on the person of Abinash is borne in mind, and it is remembered that Sankar could not have been armed with any deadly weapon, it would be difficult to say that 18 injuries on Sankar were caused by Abinash without any intention of doing more harm than was necessary for the purpose of defending him (himself). Thus as already held Abinash was the aggressor. For these twin reasons, we cannot extend the benefit of this exception to Abinash for his having purportedly acted in self defence of his person.

29. In this context, Sri Dutta wanted to build up a case of acting in defence of property right as well. The sustaining force of this submission is the statement of PWs 5 and 25 that a number of household articles were found lying scattered in the house of Abinash. Our attention is also invited to what was stated by Abinash, as deposed by PW 4, about mischief to household goods. Granting that Sankar had broken some old items like bottle, table (see items 6 and 14 of Ext. P 3 the

seizure list in question), as this mischief was not under such circumstances as could reasonably cause apprehension of death or grievous hurt, Section 103, IPC is definitely out of reach, as its clause 'fourthly' only is relevant for our purpose the mischief being not by fire. So, we have to confine our attention to Section 104 of the Code, which is subject to restrictions mentioned in Section 99, one of which is the interdict not to cause more harm than necessary for the purpose of defence. Further by virtue of Section 105 this right could continue only so long as Sankar had continued the commission of mischief. Nothing about ail these are known. Sri Dutta submitted that Sankar must have caused the mischief before he was assaulted as he could not have done so afterwards. True, but how does this bring the case within Exception 2 to Section 300, IPC or enable the accused to claim the protection of Section 104? The assaults being beyond all proportions to the small mischief supposedly caused, it would be encouraging licentiousness to grant benefit of any legal provision to the person who had inflicted 18 treacherous wounds on Sankar. We, therefore, emphatically reject this part of the contention of Sri Dutta.

30. learned Counsel's submission that the case as regards Abinash would attract mischief of Section 304 has thus no force. Even if it were to be so, it would have been definitely Part I of that Section, and not Part II as contended by Sri Dutta, inasmuch as it cannot be doubted that by inflicting the injuries in question, Abinash had intended to cause death of Sankar, and in any case the intention must have been the causing of the bodily injuries which were not only likely, but were sufficient in the ordinary course of nature, to cause death. The injuries themselves speak of it. No cloak can cover this glaring facet. The fact that the death was caused after about 48 hours of infliction of injuries does not affect this position. Law does not require instantaneous death to make culpable homicide a murder. The contention that had better treatment been given, Sankar might have survived, is also beside the point. Exception 2 of Section 299, IPC takes care of this aspect. Reference may also be made to Morcha v. State of Rajas-than : 1978 CriLJ1710 . It may be mentioned that the first part of Section 304, I. P.C. also prescribes the punishment of imprisonment for life, and the present one is definitely a fit case where the maximum sentence provided by Section 304 could be awarded. These observations have been made, by us in passing only, and it may not be

understood that we are of the view that the guilt of Abinash was Under Section 304 Part I.

31. To the question of sentence now. (Though the learned Sessions Judge has made a passing reference to Section 303, IPC let it be said that the section has no application. This is so because the present offence had not been committed by Abinash while he was 'under sentence of imprisonment for life'. It is on record that Abinash had been released from jail about a year before the present occurrence. It is also the statement of the learned public prosecutor from the bar that Abinash had served out his full sentence awarded in Sessions Trial No. 19 of 1970 by the time he was released from the jail and had committed this offence. We have, therefore, to confine our attention to the question whether sentence of death should have been really or could have been awarded Under Section 302. The learned Sessions Judge has rightly referred to Bachan Singh v. State of Punjab : 1980 CriLJ636 but has noted what was stated in para 199 only. No doubt, if a crime can be said to evince 'extreme depravity', extreme penalty can be imposed. Of course, this again is one of the reasons to be borne in mind, as the discretion in this regard cannot be imprisoned in a set formula or strait-jacket. Let it non-theless be seen whether it can be said that life of Sankar was really taken away because of depraved character of the perpetrator. As we have noted, Sankar was drawn to the house of the accused by his thirst for liquor. The injuries on the person of Abinash and the conduct of Chhabi would show that come quarrel had taken place inside the house - may be in between Sankar and Chhabi on one side and the two accused brothers on the other. Even if Abinash was the only person to cause all the injuries to Sankar, we do not think if it can be said that corrupt state of moral character or extreme wickedness was at the root of the assaults. P.W. 1 has admitted that Kalidas used to sell wine in his house. In a den of this type which has no other inmate, quarrel over petty-matters resulting in loss of lives is not an unknown phenomenon.

32. The learned public prosecutor referred to the earlier conviction of this accused Under Sections 302 and 307 for causing death of his daughter and mother-in-law, and attempted murder of his wife and submitted that such a person is a danger to the society, to protect which liquidation of a man like Abinash is called for. Sri

Dutta countered by saying that the past conduct was not put to Abinash to enable him to explain the same. This grievance has some justification. It has been stated in Muniappan v. Slate of Tamil Nadu : 1981 CriLJ726 by Chandrachud, C. J. that while discharging obligation Under Section 235(2), Cr. P. C. it is the bounden duty of the sentencing Court to cast aside the formalities of the Court, scene and approach the question of sentence from a broad sociological point of view, and for this purpose genuine efforts must be made to elicit from the accused all information which will eventually bear on the question of sentence. If use of earlier conviction was sought to be made, the accused must have been asked about it. This apart, we have noted that Under Section 54 of the Evidence Act, previous bad character is irrelevant, unless evidence of good character has been given. As per Explanation 2 to this section, a previous conviction is relevant as evidence of bad character. It may however be that this is confined to that part of the trial which is related to conviction, whereafter the questions which may be put and informations that may be solicited are 'beyond the narrow constraints of the Evidence Act', as stated in Muniappan (supra). A past conviction is a relevant factor to be borne in mind while deciding question of sentence, shutting out of the same on the ground that evidence of good character was not led, may stand in the way of doing full justice to a case.

33. Having given our considered thoughts to all the aspects of the case, we cannot persuade ourselves to hold that Abinash deserved to die for the offence 'committed by him in this case. We, therefore, reduce the sentence to imprisonment for life for his offence Under Section 302, IPC

34. The result is that the reference by the learned Sessions Judge to confirm the death sentence is rejected; Criminal Appeal No. 23 of 1980 relating to Abinash is dismissed, subject to ths above modification in sentence, and Criminal Appeal No. 24 of 1980 filed by Kalidas is allowed by ordering his acquittal. After all how could 'Abinash' be destroyed by us, and how could a 'Kalidas' be allowed in this country to rot in jail? Let us conclude with the hope that Abinash, after his release from jail this time, would prove to be 'Sadhu' as PW 1 was asked by defence, and he would definitely disprove the contention on behalf of the State that he is a menace to the society,

N.L Singh, J.

35. I agree.

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